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The Legitimacy of the European Systemic Risk Board in Respect of its Performance, Roles and Contributions to the Financial Regulatory System

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Abstract
The European Systemic Risk Board (ESRB) is an institutional innovation within the European System for Financial Supervision that was put in place as a direct response to the Global Financial Crisis in 2007–2008. The ESRB is responsible for the macroprudential oversight, prevention and mitigation of systemic risk in support of financial stability. This article offers a structured discussion of legitimacy-related issues that arise with respect to the ESRB's performance, role and contribution to the financial regulatory system. In all three instances, a closer examination of the characteristics of the ESRB reveals that there exist factors that are conducive to its legitimacy, but also that there are circumstances that give grounds for concern. The article suggests that legitimacy-related questions are less frequently addressed in the literature on financial regulation than those discussing the effectiveness of various regulatory tools and approaches. Since the two aspects are closely related, important considerations might go amiss if prerequisites of legitimacy in regulatory arrangements are not properly accounted for in policymaking processes. The article recommends that questions of legitimacy be more clearly inserted into regulatory deliberations to ensure robust regulatory and supervisory systems capable of contributing meaningfully to the public good.

Keywords
Legitimacy, the European Systemic Risk Board, the European System for Financial Supervision, macroprudential policy, financial stability, price stability

1. Introduction

The European Systemic Risk Board (the ESRB) is a part of the European System for Financial Supervision (the ESFS) and is responsible for the macroprudential oversight, prevention and mitigation of systemic risk in support of financial stability. Macroprudential oversight means overseeing risks that develop at the systemic level – the type of risk that, once triggered, can propagate throughout the financial system, threaten the functionality of the system as a whole and, in the worst case scenario, lead to financial crisis.

In an earlier paper, I critically analysed the governing frameworks and institutional set-up of the ESRB in order to assess how institutional and organisational issues could affect its ability to achieve its mission and objectives.[1] In that paper, acknowledging the objectives

1. Trude Myklebust, 'Form and Function of the ESRB: A Critical Analysis' in Mads Andenas and Gudula Deipenbrock (eds), *Regulating and Supervising European Financial Markets: More Risks than Achievements* (Springer International Publishing 2016) 43–66.

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that had motivated the creation of the ESRB and the importance of its mission, I identified several features that could play a role in undermining its effectiveness. Among these are that the ESRB lacks binding competencies. Furthermore, its decision-making procedures are cumbersome and long-winded. Moreover, the sheer size of the task conferred on it – ensuring financial stability at the macro level, across Europe – is massive, both in reach and in complexity.

This article raises a different question, though, and it is not so much about the ESRB's effectiveness as about its legitimacy. While these two aspects are clearly connected, a discussion of the legitimacy of the ESRB requires a broader approach and a different set of parameters by which to assess it.

In this article, there are two questions I try to answer. First, how should legitimacy be construed in the context of supranational institutions involved in the governance of financial systems? Second, how should the concept of legitimacy be applied in the case of the ESRB? In other words, what are the markers we must look for when evaluating the legitimacy of the ESRB?

To answer these questions, I proceed as follows. In section 2, I set the scene by providing some historical context to explain the ESRB's emergence and its mandate. In section 3, I situate the topic of ESRB's legitimacy in the academic landscape of financial regulation and governance, and highlight some core features of this regulatory area that are important to inform the ensuing discussion. Section 4 then addresses the first of the two main questions just presented about how legitimacy should be construed in the context of supranational institutions involved in the governance of financial systems. In section 5, I use the insights gained from the discussion of that question to discuss the legitimacy of the ESRB's performance, role and contributions to the financial regulatory system. This is a more applied exercise, taking note of the specific characteristics of the ESRB. Section 6 concludes.

2. Background and Context

The ESRB emerged from the ashes of the Global Financial Crisis in 2007–2008. This event is central to understanding how and why the ESRB came into being.[2] The propensity for bank failures to develop and, through contagion, to become systemic, has long been an acknowledged feature of the financial sector.[3] The risk of widespread financial failure manifested itself with particular force during the 1929 financial crash. This incident played an instrumental role in subverting the then dominant laissez-faire attitude with regards to financial regulation.[4]

A period of relative calm prevailed in the tightly regulated financial environment that followed. There were few failures or crises in the decades after the end of the Second World War. But with the liberalisation of the financial sector in the 1980s and 1990s, bank failures and financial crises made a solid comeback.[5] They proved to be a difficult challenge for policymakers. In 1998, the famous economist and regulatory theorist Charles Goodhart conducted a survey that found that significant bank failures or crises, most of them requiring

2. ibid 44.
3. The literature on systemic risk in the financial sector is vast. See eg Sylvain Benoit and others, 'Where the Risks Lie: A Survey on Systemic Risk' (2017) 21(1) *Review of Finance* 109 <https://doi.org/10.1093/rof/rfw026> for an extensive literature review.
4. John Armour and others, *Principles of Financial Regulation* (Oxford University Press 2016) 4.
5. Tommaso Padoa-Schioppa, *Regulating Finance: Balancing Freedom and Risk* (Oxford University Press 2004) vii.

difficult and costly government intervention, had occurred in 140 countries across the world in the years between 1980 and 1996.[6]

However, the acknowledgement among regulators that financial market activities entailed risks that could become systemic (and potentially culminate in financial crises) was not enough to avert the build-up and unleashing of the 2007–2008 Global Financial Crisis. It became apparent that systemic risk had been accruing in the financial sector without central policymakers being able to foresee or forestall it.[7] Only by expending exorbitant amounts of money and effort were they able to dampen the escalation of the crisis and restore a semblance of normality.[8] With its colossal magnitude, global reach and devastating consequences, this crisis is counted among the most severe in the history of finance.[9]

In 2008, the then Governor of the European Central Bank, Jean-Claude Trichet, remarked:

> We knew that a storm was brewing but, admittedly, we did not know exactly where. Neither did we know what would trigger it, or when it would come.[10]

This was obviously a very uncomfortable position for policymakers and regulators to find themselves in, being the ones in charge of ensuring a well-functioning and stable financial system. As a logical consequence, a long line of reports and inquiries followed the financial crisis. These publications critically examined its causes and found that a wide array of factors had contributed to the demise.[11]

One important factor highlighted in various subsequent investigations was the role played by financial policymaking and regulation. Indeed, a consensus emerged among policymakers as well as academics that the then regulatory approach to ensuring financial stability was flawed on several counts.[12] An ill-adapted understanding of the phenomenon of systemic risk was identified as pivotal. Financial regulation and supervision had been based on too narrow an understanding of systemic risk. More specifically, it had insufficiently taken into account the systemic risk that could arise at the macro-level, even if each institution seemed financially sound at the micro-level.[13] The prevailing microprudential regulatory focus on

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6. Charles Goodhart and others, *Financial Regulation: Why, How and Where Now?* (1st edn, Routledge 1998) 16ff.
7. Myklebust (n 1) 44.
8. See eg Armour and others (n 4) 3.
9. See eg Mads Andenas and Iris HY Chiu, *The Foundations and Future of Financial Regulation: Governance for Responsibility* (1st edn, Routledge 2013) 3 and Armour and others (n 4) 3. For comprehensive discussions and comparisons between this and previous financial crises, see among others Carmen M Reinhardt and Kenneth S Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton University Press 2009).
10. Jean-Claude Trichet, 'Undervalued Risk and Uncertainty', Speech at the Fifth ECB Central Banking Conference Frankfurt am Main, 13 November 2008.
11. See among others Norway's Finanskriseutvalg, 'NOU 2011: 1 Bedre rustet mot finanskriser' (2011) <https://www.regjeringen.no/contentassets/49ec0c14a20a40288332054176b26a1a/no/pdfs/nou201120110001000dddpdfs.pdf>; UK Financial Services Authority (FSA), 'The Turner Review: A Regulatory Response to the Global Financial Crisis' (2009) <https://webarchive.nationalarchives.gov.uk/ukgwa/20090320232241mp_/http://www.fsa.gov.uk/pubs/other/turner_review.pdf>; US Financial Crisis Inquiry Commission, 'The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States' (2011) <https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.
12. See eg Jacques de Larosière and others, 'Report by the High-Level Group on Financial Supervision in the EU' (Brussels 25 February 2009) and the Turner Review (n 11) 83. In scholarly contributions, comprehensive accounts are found in Armour and others (n 4) 3 and 409 ff and Andenas and Chiu (n 9) Part IV. See also Andrew Baker, 'The New Political Economy of the Macroprudential Ideational Shift' (2013) 18(1) *New Political Economy* 112 <https://doi.org/10.1080/13563467.2012.662952>.
13. Armour and others (n 4) 412.

the solidity and soundness of financial institutions at the individual level[14] was inadequate to prevent the build-up of risks and imbalances at the systemic level.[15]

This could be seen as a serious case of missing the forest for the trees. In the 2009 Turner Review, which was the key British report on the matter, the problem was described as follows:

> Because of these specific characteristics many of the most important challenges in banking regulation are systemic rather than idiosyncratic. One of the key deficiencies problems [sic] of the past approach, not only in the UK but in many other countries, was that it did not reflect this reality. There was inadequate focus on the analysis of systemic risk and of the sustainability of whole business models: and a failure to design regulatory tools to respond to emerging systemic risks.[16]

This misconception of the basic features of the financial systems' properties and behaviour lead to widespread recognition among policymakers that the then predominantly microprudential regulatory strategies needed to be shored up by a layer of regulation targeting the systemic level, namely, *macroprudential* regulation.[17] In Europe, the influential de Larosière report from 2009[18] laid important groundwork for the ensuing regulatory reforms.

Although a macroprudential perspective was not entirely new at that point in time,[19] it nonetheless marked a turning point in international policymaking.[20] The macroprudential turn had several consequences, among which a large number of new legislative measures aiming to strengthen financial stability at the systemic level.[21] Another consequence was rapid institutional development. New agencies were established and tasked with following up on the new macroprudential policy initiatives. The ESRB was one such agency.[22]

As this brief historical account indicates, the ESRB's area of responsibility is of utmost importance because consequences of policy failures in this field are potentially devastating, not only for actors in the financial markets, but also for ordinary citizens and the public interest more generally.[23] Taxpayers and governments are arguably the ultimate underwriters of the financial risk that amasses because of decisions taken by financial actors.[24]

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14. ibid 409.
15. See discussion in Kern Alexander, *Principles of Banking Regulation* (Cambridge University Press 2019) 396ff.
16. Turner Review (n 11) 53.
17. Emilios Avgouleas, *Governance of Financial Markets: The Law, the Economics, the Politics* (Cambridge University Press 2012) 267–68.
18. de Larosière and others (n 12).
19. See eg Claudio Borio, 'Towards a macroprudential framework for financial supervision and regulation?' (2003) BIS Working Papers No 128, February 2003.
20. Robert Hockett, 'The Macroprudential Turn: From Institutional "Safety and Soundness" to Systematic "Financial Stability" in Financial Supervision' (2015) 9 *Virginia Law & Business Review* 201.
21. Alexander (n 15) 398–99.
22. Other agencies include the G20 Financial Stability Board (FSB), the UK Financial Policy Committee (FPC) and the US Financial Stability Oversight Council (FSOC). See Armour and others (n 4) 425ff and Myklebust (n 1) 44–45.
23. Avgouleas (n 17) 6.
24. See discussion in David A Moss, *When All Else Fails: Government as the Ultimate Risk Manager* (Harvard University Press 2002) chapter 4.

3. Situating the ESRB in the Regulatory Landscape

The topic of this article belongs within the field of law commonly referred to as 'financial regulation'.[25] The core of this regulatory area is the activities taking place in the financial system, comprising the main business sectors of banking, insurance and the securities market.[26] Financial regulation is predominantly an area of public law, but includes elements of private law.[27]

Financial regulation is mainly concerned with the rules that target the functionality of the financial system[28] and aims to promote the twin overarching goals of well-functioning markets and financial stability.[29] A high level of trust and confidence in the system and its functions is an essential prerequisite to ensure both a well-functioning and stable financial system, and is therefore an important aim underpinning many sets of rules.[30]

The goal of financial stability, of central importance in the context of the ESRB, is pursued by a series of rules that aim to hinder the build-up of systemic risk. These rules seek, among others, to dampen excessive risk-taking by financial actors,[31] and to prevent the transmission of financial problems within the system through contagion.[32]

Financial regulation is arguably a particularly complex field of law, exhibiting extraordinary levels of volume and detail.[33] It is strongly influenced by a number of supranational regulatory bodies.[34] Furthermore, it is characterised by policymakers' propensity for enrolling non-public actors in standard-setting, supervision and compliance, in a context of hybrid governance.[35] As pointed out by Andenas and Chiu,[36] financial regulation can thus be characterised as a *decentred regulatory space* – or, similarly, what Black describes as *a polycentric field of regulation*.[37]

Notwithstanding the complexities just described, financial regulatory systems across the globe commonly share the same architecture, consisting of two main elements: first, the body of regulation – the laws and rules that are adopted by legislators or other rule-makers to gov-

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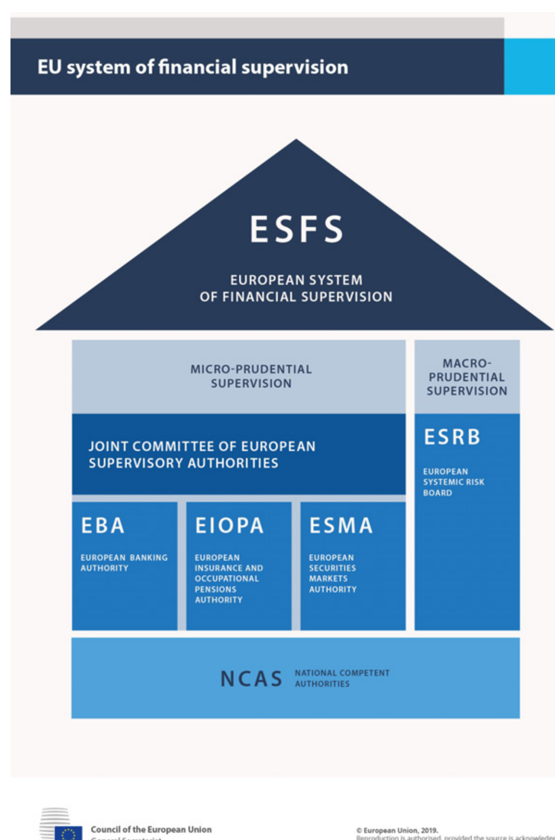
25. Niamh Moloney, Eilís Ferran and Jennifer Payne, 'Introduction' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press 2015) 2.
26. This classification is also reflected in the literature, see for instance Moloney and others (n 25) which follows this main outline.
27. Rüdiger Veil (ed), *European Capital Markets Law* (Rebecca Schweiger tr, 2nd edn, Hart Publishing 2017) 90.
28. Armour and others (n 4) 51. See also Andenas and Chiu (n 9) 5.
29. For a comprehensive discussion of the goals and aims of financial regulation including how they translate into more specific legal objectives, see Armour and others (n 4) chapter 3. See also Trude Myklebust, *Innføring i Finansmarkedsrett* (Fagbokforlaget 2011) chapter 3.1 for a version in Norwegian.
30. See eg Frank Partnoy, 'Financial Systems, Crises, and Regulation' in Moloney and others (n 25) 69.
31. See eg Kern Alexander, Rahul Dhumale and John Eatwell, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (Oxford University Press 2005) 24.
32. Systemic risk in financial systems arises from several context-specific characteristics pertaining to the financial system and its actors. This includes the incentive structures in the financial markets. Faulty incentive structures can drive the level of total risk in the system higher than is desirable from a societal point of view. In combination with amplification mechanisms and a propensity for contagion between financial institutions through various transmission channels, these inherent traits can lead to the development of financial crisis. See eg Benoit and others (n 3).
33. Both the complexity and the volume of regulation have steadily grown over the years, driven by increased levels of activity and the increased complexity of the activities taking place in the financial system. Several commentators are critical of these developments. See as examples Andrew Haldane, 'The Dog and the Frisbee', Speech at the Federal Reserve Bank of Kansas City's 36th Economic Policy Symposium, 'The Changing Policy Landscape', Jackson Hole Wyoming, 31 August 2012, and Dan Awrey and Kathryn Judge, 'Why Financial Regulation Keeps Falling Short' (European Corporate Governance Institute 2020) ECGI Law Working Paper 494/2020.
34. Christoffer Brummer, 'How International Financial Law Works (and How it Doesn't)' (2011) 99 *The Georgetown Law Journal* 71.
35. Andenas and Chiu (n 9) 73.
36. Andenas and Chiu (n 9) 73.
37. Julia Black, 'Mapping the Contours of Contemporary Financial Services Regulation' (2002) 2 *Journal of Corporate Law Studies* 253.

ern the institutions and activities of the financial sector; and second, a system of financial supervision, which is a set of structures and institutions put in place to provide regulated subjects with guidance and ensure that the rules in the regulatory framework are obeyed.[38] Supervisors monitor performance, enforce compliance with the rules, and sanction breaches.

There is no sharp divide between the territories of regulation and supervision. Supervisors often have powers to issue supplementary rules or provide binding interpretations of rules. As has been pointed out, regulation and supervision are complementary in their contribution to the final objective[39] of maintaining a sound financial system, which means a financial system that functions as intended and in which financial stability is preserved.[40]

Within the overarching categorisation just described, the ESRB belongs within the realm of financial supervision, as such forming a part of The European System of Financial Supervision (the ESFS). The figure below shows a stylised figure of the architecture of the ESFS, instituted in accordance with Article 114 of the Treaty on the Functioning of the European Union.



Council of the European Union, General Secretariat (2019). Infographic – EU system of financial supervision.

38. On these two components, see eg Veil (n 27) 42. See also Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, Oxford University Press 2014) 446.

39. Marc Quintyn and Donato Masciandaro, 'The Evolution of Financial Supervision: The Continuing Search for the Holy Grail' in Morten Balling and Ernest Gnan (eds), *50 Years of Money and Finance: Lessons and Challenges* (Larcier 2013) 263.

40. There is no universally agreed definition of financial stability. The European Central Bank has adopted the following definition: 'Financial stability can be defined as a condition in which the financial system – which comprises financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances.' This definition is functionally oriented as it proceeds to state: 'This mitigates the prospect of disruptions in the financial intermediation process that are severe enough to adversely affect real economic activity'. See <https://www.ecb.europa.eu/ecb/tasks/stability/html/index.en.html>.

This figure illustrates the organisational divide between microprudential and macroprudential supervision touched upon earlier. Again, microprudential supervision focuses on the soundness of the individual institutions and actors in the financial system. For the microprudential side of this structure, the responsibilities of the three operative agencies – EBA, EIOPA and ESMA (or jointly 'the ESAs') – are allocated in accordance with the traditional divide in financial regulation between the business areas of banking, securities markets and insurance services.[41]

Responsibility for macroprudential supervision is, as we can see, conferred on the ESRB, at the right-hand side of the figure.[42] The ESRB covers all the business sectors under the ESA's responsibility. The actors in the ESFS are subject to detailed regulation as regards their governance, activities and powers.[43] For the ESRB, the central legal act regulating its organisation and activities is the ESRB Regulation.[44]

The last thing to note here is the layer beneath the level of the European supervisory authorities, which consists of each state's National Competent Authorities. These national supervisory authorities cooperate with the European level through various mechanisms.[45]

4. The Concept of Legitimacy

4.1 Introduction

Colloquially, the term legitimacy is often used in written or spoken language without clarifying exactly what we mean by it. We presuppose that we have a shared understanding of its meaning that is sufficiently clear for it to be useful as a common point of reference in our everyday discussions. To be useful to an academic inquiry, however, the concept of legitimacy must be clarified and interpreted. Accordingly, this section addresses how the concept of legitimacy should be understood in this instance.

In what follows, I show that 'legitimacy' is a concept that has multiple meanings and interpretations depending on the context and the theoretical field. Building on scholarly contributions from different fields of literature, I highlight a set of criteria that seem most pertinent to a discussion of the legitimacy of the ESRB.

In the history of political thought, the concept of legitimacy has long been an important focal point for famous thinkers. As divine authority and natural law gave way as the per-

41. As described above in this section.
42. The perspective of the ESRB ties in with that of other agencies established after the Global Financial Crisis to strengthen the oversight of risks that, on an aggregate basis, could become systemic and threaten the stability of the financial system. See n 22 above.
43. The operations of the three ESAs are regulated by separate legal acts: Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) [2010] OJ L 331/12; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) [2010] OJ L 331/48; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L 331/84.
44. Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L331/1 (ESRB Regulation) amended by Regulation (EU) 2019/2176 of The European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L334/146. A closer description of the content of the regulation is found in Myklebust (n 1).
45. For a description of the relationship between the National Competent Authorities and the European Supervisory Authorities, see Brigitte Haar, 'Organizing Regional Systems: The EU Example' in Moloney and others (n 25) chapter IV.

ceived sources of legal authority and legitimacy, ideas about voluntary consent emerged as replacements. The Enlightenment era philosopher John Locke's interpretation of legitimacy was based on the idea of voluntary consent, while other philosophers – David Hume and Jeremy Bentham, for example – suggested that authority could be justified by the shared beneficial consequences that arose from a political regime.[46]

Skipping forward a couple of centuries, the sociologist Max Weber stated that the legitimacy of a political regime depended on its participants holding certain beliefs or faith towards it – called 'Legitimitätsglaube' – which gave the regime authority and prestige and instilled in the participants a willingness to obey.[47] While Weber's interpretation was descriptive, others, including John Rawls, have viewed legitimacy from a normative perspective, asking, for instance, how a state's coercive powers are justified.[48] Even this brief historical overture shows that legitimacy is closely tied up with concepts of power, trust, perceptions and beliefs, fairness, effectiveness and consent – though these concepts too are elusive and their meaning hard to pin down with precision.

For legal scholars it is important to note, as pointed out by Nicolas de Chamfort, that there is no one-to-one relationship between what is legal and what is legitimate.[49] Legitimacy is not a necessary prerequisite to govern, as governing capacity can be obtained by other means (for example, military force or coercion). Neither does the lack of a legal basis bar a governing arrangement from being legitimate. This means that the answer to what is legitimate cannot be found through an examination of black letter law or a doctrinal legal enquiry alone (although such enquiry can certainly play an important role).

4.2 Legitimacy – an 'essentially contested concept' in a multidisciplinary field of study

Legitimacy is debated in a number of disciplines other than law, and none of them seems able to provide a universally accepted definition. Writers within political science have labelled legitimacy as 'an essentially contested concept',[50] whereas Jeremy Waldron points out that '"Legitimacy" has a rather loose meaning in political philosophy'.[51] He goes on to state that '…its meaning can veer between the normative and the empirical, and between the basis of a state's right to govern and the sentiment among its subjects that they have an obligation to obey'.[52] Other scholars have referred to the concept as 'mercurial' and, in the

46. For a brief account of influential early philosophers' view on legitimacy, see Fabienne Peters, 'Political Legitimacy' (2017) *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/legitimacy/#DesNorConLeg>.
47. Max Weber, 'Economy and Society' [1921–1922], ed. G Roth and C Wittich (University of California Press 2013). See also Pedro T Magalhães, 'Charisma and Democracy: Max Weber on the Riddle of Political Change in Modern Societies' (2022) 41 *Topoi* 69, 71 <https://doi.org/10.1007/s11245-021-09761-2>.
48. For a comprehensive discussion of Rawls views, see Silje A Langvatn, 'Legitimate, but unjust; just, but illegitimate: Rawls on political legitimacy' (2016) 42 *Philosophy and Social Criticism* 132 <https://doi.org/10.1177/0191453715615386>.
49. Nicolas de Chamfort (1795): 'It is easier to make certain things legal than to make them legitimate'. Cited in Christopher A Thomas 'The Uses and Abuses of Legitimacy in International Law' (2014) 34(4) *Oxford Journal of Legal Studies* 729, 729 <https://doi.org/10.1093/ojls/gqu008>.
50. Achim Hurrelmann, Steffen Schneider, Jens Steffek, 'Conclusion: Legitimacy — Making Sense of an Essentially Contested Concept' in Achim Hurrelmann, Steffen Schneider, Jens Steffek (eds), *Legitimacy in an Age of Global Politics (Transformations of the State)* (Palgrave Macmillan 2007) 229. See also Christoforos Ioannidis, 'Legitimacy: An Essentially Contested Concept', doctoral thesis (2019) <https://kclpure.kcl.ac.uk/portal/files/134009100/2020_Ioannidis_Christoforos_0752187_ethesis.pdf>.
51. Jeremy Waldron, 'The Conditions of Legitimacy: A Response to James Weinstein' (2017) *Constitutional Commentary* 697, 698 <https://scholarship.law.umn.edu/concomm/483>.
52. ibid.

context of international law and international institutions, have lamented that the concept has remained under-scrutinised, leading to confusion and misuse.[53]

These fleeting conceptions of legitimacy, and the strong connection to people's beliefs and perceptions, show us that what is legitimate cannot be determined once and for all. As Julia Black has pointed out, 'legitimacy can differ significantly across time and space, and between actors, systems and contexts'.[54] She stresses: 'Legitimacy thus lies as much in the values, interests, expectations, and cognitive frames of those who are perceiving or accepting the regime as they do in the regime itself'.[55]

The variability here emphasised by Black is underlined by the connection she makes between perception and acceptance. This perspective is also present in several of the much-cited definitions of legitimacy within political science, as for instance is Lipset's. In his view, legitimacy involves 'the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society'.[56]

If we look at legitimacy through this lens – as the capacity of a system, which depends on the beliefs of those observing it, to engender acceptance and a willingness to submit to its powers – we can surmise that legitimacy is not necessarily an enduring quality. If the expectations of a constituency are disappointed, or the results promised by an authority do not materialise, legitimacy can arguably be lost far more quickly than the time it took to build it. Indeed, the political scientist Robert A Dahl has likened legitimacy to a water reservoir.[57] As long as the water is at a given level, political stability is maintained; if it falls below a certain level, political legitimacy is endangered. This would suggest that legitimacy might remain resilient against transgressions and disappointments, as long as it stays above a certain threshold level. However, it also implies that the gradual erosion of qualities of importance for how an authority is perceived can surreptitiously bring the level dangerously close to the threshold, perhaps resulting in a swift change in sentiment as the last – but perhaps not the most important – factor is added to the heap of previous disappointments. In sum, legitimacy, particularly in the empirical sense, relates not just to the constituting factors of a certain regime or arrangement, but also to its ability to maintain a relationship with the legitimacy community on which it depends, through its ongoing performance, actions and communication.[58]

4.3 Assessing the legitimacy in financial regulatory regimes

Scratching the surface of a huge legitimacy-related literature with traditions reaching back hundreds of years, the discussion has so far considered the concept of legitimacy from several angles, focusing on establishing some core characteristics from an overarching per-

53. Christopher A Thomas, 'The Concept of Legitimacy and International Law' (2013) *LSE Law, Society and Economy Working Papers* 12/2013 1 <WPS 12-2013 The Concept of Legitimacy and International Law by Thomas (lse.ac.uk)>.
54. Julia Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes', (2008) 2 *Regulation & Governance* 137, 144 <https://onlinelibrary.wiley.com/doi/10.1111/j.1748-5991.2008.00034.x>.
55. ibid 145.
56. Seymour Martin Lipset, 'Social Conflict, Legitimacy, and Democracy' in Jean Blondel (ed), *Comparative Government* (Palgrave 1969) chapter 7 <https://doi.org/10.1007/978-1-349-15318-3_7>. Cf Koop and Reh, stating: 'We use the term "legitimacy" in its broadest, empirical meaning: "acceptance", understood as the latent or manifest support that citizens grant a political order and the power it exerts.' Christel Koop and Christine Reh, 'Europe's bank and Europe's citizens: Accountability, transparency – legitimacy?'(2019) 26 *Maastricht Journal of European and Comparative Law* 63, 65 <https://doi.org/10.1177/1023263X19827906>.
57. Robert A Dahl, *Polyarchy: Participation and Opposition* (Yale University Press 1971) 124ff.
58. For a discussion based on a distinction between the strategies for gaining, maintaining and repairing legitimacy, see Mark S Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) *The Academy of Management Review* 571.

spective. However, to discuss the legitimacy of the ESRB's performance, role and regulatory contributions more specifically, we will need a set of assessment criteria that permit more targeted discussion based on the context and main characteristics of its institutional features, purpose and mandate.

Much of the legitimacy-related scholarly contributions discuss issues within their specific fields, ranging from the judicial system to systems for taxation, from international humanitarian law to marriage law – and a wide range of subjects in between. We have already established that legitimacy is a contextual phenomenon, hence, the markers of legitimacy will differ depending on whether the task is to analyse a regime of criminal law or a means of economic governance.

As previously explained, the ESRB is situated in the decentred space of financial regulation. This means that regulatory powers are distributed between national and supranational public entities and non-public actors who partake in governance through self-governance, standard-setting bodies etc.[59] Unelected powers, with various degrees of detachment from democratic control, play an important role in the overall governing structure of finance.[60] One particularly vivid example is central banks, which are commonly granted a high degree of autonomy in modern economies.[61] But other governing institutions, too, may have been given various degrees of independence in their charters. This is true of the ESRB. According to the ESRB regulation, the members of its General Board and Steering Committee must perform their duties impartially and solely in the interest of the Union as a whole.[62] They are not to seek or take instructions from any government, the Union institutions, or any other public or private body.[63]

As pointed out by Eriksen, unelected institutions wield political power, while their connections to parliaments, legislatures and elected executives are unclear.[64] It is possible, then, that their claim to legitimacy may be grounded in factors other than those that are important for institutions where democratic control and accountability are more apparent. Scholarly contributions within governance literature and political science, for example, suggest that the legitimacy of such institutions may depend on their credibility in terms of expertise, due process and the ability to produce desirable outcomes.[65] Willke and Willke posit that this type of 'out-put' oriented legitimacy changes the quality of democracy from formal equality stemming from participation, representation and equality of impact, to results-oriented evaluation of outcomes.[66] From this it can be inferred that legitimacy in such contexts may hinge on the extent to which there exists a perceived congruence between the mission and the capacity of the institution to fulfil that mission.

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59. As discussed above in section 3.
60. Andenas and Chiu (n 9) 73.
61. For a comprehensive discussion on this topic, see Paul Tucker, *Unelected Powers: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2019).
62. ESRB Regulation Article 7(1).
63. ibid.
64. Erik O Eriksen, 'Introduction. Making the unelected safe for democracy' in Erik O Eriksen (ed), *The Accountability of Expertise: Making the Un-Elected Safe for Democracy* (Routledge 2021) 5 with further references.
65. For instance, Julia Black explains how functional or performance-based legitimacy depends on outcomes and consequences of the organisation (for example efficiency, expertise or effectiveness), and the extent to which it operates in conformance with professional or scientific norms: see Black (n 54) 146. See also Anat Keller, stressing the role of 'input legitimacy' and 'throughput legitimacy' in macroprudential authorities, encompassing institutional and governance structures, and the quality of governance processes: Anat Keller, *Legal Foundations of Macroprudential Policy: An Interdisciplinary Approach* (Cambridge University Press 2020) 191.
66. Helmut Willke and Gerhard Willke, *Political Governance of Capitalism: A Reassessment Beyond the Global Crises* (Edward Elgar 2012) 130.

However, some fields of governance are so complex and complicated that it seems impossible for outsiders to have much insight into desired results and so to evaluate the various policies and decisions. In such cases, de facto or perceived legitimacy will arguably depend on a more generalised sense of trust. That is, people need to *feel* that the entity is pursuing desirable goals, has the necessary expertise, follows due process and is accountable to sufficient control mechanisms.[67] In such instances, how the institution communicates with its constituency to instil trust and legitimacy becomes particularly important.[68] Black has shown that legitimacy must be constructed and claimed, and that various authorities and entities in a governing structure may compete with each other for what she describes as 'regulatory share'.[69] Such claims can be pursued in a variety of ways, for instance by professional communication strategies or reputational management. These efforts may enhance – or at least maintain – legitimacy, even if the institution's output is less than impressive.[70]

5. The Legitimacy of the ESRB – Discussion

Drawing on the discussion so far, I now turn to the final part of the article, where I discuss the legitimacy of the role, performance and regulatory contributions of the ESRB more specifically.

5.1 The role of the ESRB

Black has explained that legitimacy is closely associated with the role that is being performed.[71] An organisation can, for instance, have role legitimacy in taking on certain tasks, while that legitimacy is absent with regard to other tasks. As an example, she mentions that an NGO can be legitimate in the role of lobbyist, and yet not legitimate as a regulator.[72]

Another side of role legitimacy pertains to the organisational set-up of an institution and the structure in which it is embedded. Drawing on the discussion in the previous section, this can be understood as a question about whether there is congruence between the role and responsibilities that are conferred on an organisation, and the resources, tools and measures that are available to it. One should also consider whether the organisation has sufficient independence such that its integrity and the effective execution of its mission are not hampered by conflicts of interest. Furthermore, one should assess whether appropriate mechanisms for accountability and measurement of performance exist.[73] Finally, as the perception of these issues matters for the question of legitimacy, one should also consider whether the organisational and procedural arrangements are transparent and open to inspection by others.[74]

67. See eg Suchman (n 58) 578–79 (explaining how generalised perceptions of organisational legitimacy may arise from the constituents' positive (although sociologically naïve) evaluation of the acts of an organisation as ones that '"have our best interests at heart," that "share our values," or that are "honest," "trustworthy," "decent," and "wise."').
68. ibid 586.
69. Julia Black, 'Legitimacy and the Competition for Regulatory Share' (2009) *LSE Law, Society and Economy Working Papers* 14/2009 <http://eprints.lse.ac.uk/24559/>.
70. See eg Suchman (n 58) 596 (describing how organisations may 'stockpile' goodwill and support (such as trust and esteem) among the population as a form of capital reserve that can protect against a depletion of legitimacy in cases of deviation from social norms).
71. Julia Black (n 54) 145, with further references.
72. ibid.
73. ibid 150. For a discussion of accountability and transparency in relation to the legitimacy of the European Central Bank, see Koop and Reh (n 56).
74. See among others Martin Lodge 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in Jacint Jordana and David Levi-Faur (eds), *Politics of Regulation* (Edward Elgar 2004) ch 6.

For the ESRB, its responsibilities are listed in the ESRB Regulation. According to Article 3(1) of the Regulation, the ESRB is responsible for macroprudential oversight of the financial system within the European Union, in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system. The Regulation defines systemic risk as 'a risk of disruption in the financial system with the potential to have serious negative consequences for the real economy of the Union or of one or more of its Member States and for the functioning of the internal market' (Article 2(c)). The goal of the ESRB's activities is stated as avoiding periods of widespread financial distress (Article 3(1)). The ESRB must promote the smooth functioning of the internal market and so ensure that the financial sector is able to contribute to furthering economic growth (Article 3(1)).

It should be obvious from the outset that this is a task of extraordinary size and complexity. The concept of systemic risk, and uncertainties as to how it emerges and develops, is under constant discussion in academic circles.[75] Even if a legal definition of systemic risk is provided in the ESRB Regulation, this is by no means a guarantee that it will be easy to identify or possible to say beforehand when a disruption will be triggered. The perimeter of the area of responsibility is wide in that it encompasses all types of financial intermediaries, markets and infrastructures (see Article 2(c) ESRB Regulation) and even includes monitoring macroeconomic developments (Article 3(1) ESRB Regulation). In assessing the congruence between the ESRB's responsibilities and organisational role and the ESRB's capacities, it is clear that the ESRB's mandate places very high demands on the organisation's expertise, capacity and timeliness.

Turning to organisational matters, the ESRB is established as an independent organisation without legal personality.[76] Its governing structure consists of the General Board, a Steering Committee, an Advisory Scientific Committee and an Advisory Technical Committee (Article 4(1) ESRB Regulation). The President of the European Central Bank (ECB) chairs the General Board (Article 5(1) ESRB Regulation). The General Board counts a large number of members, divided into voting and non-voting members (Article 6). The voting members are the President and the Vice-President of the ECB; the Governors of the national central banks; a member of the Commission; the chairperson of each of the ESAs, and high-level representatives from the advisory committees (Article 6(1)). The non-voting members comprise one high-level representative per Member State of the competent national supervisory authorities and the President of the Economic and Financial Committee (EFC) (Article 6(2)).

The ESRB's Secretariat is staffed by the ECB, in accordance with a separate regulation.[77] The Secretariat's role is to provide analytical, statistical, logistical and administrative support to the ESRB.[78]

The ESRB's areas of responsibility combined with its organisational set-up and applicable measures invite certain comments from a role legitimacy perspective. First, being an institution that operates as an independent expert organ, it scores well on access to expertise because leading officials from all member countries are represented in its governing body. Simultaneously, this ensures representativeness and participation by the member states, so strengthening the legitimacy of the ESRB from their perspective.

75. See above in section 3.
76. For an in-depth account of the organisation and structure of the ESRB, see Myklebust (n 1) section 5.
77. Council Regulation (EU) No 1096/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board [2010] OJ L 331/162. Hereinafter the 'Council Regulation'.
78. Article 2 Council Regulation.

However, the size of the General Board, in combination with its high-level members, suggests that it is not the most nimble and agile of decision-making bodies. This could hamper the efficiency of the ESRB's performance, and thereby its legitimacy.[79]

It is also worth highlighting the close proximity between the ESRB and the ECB. Indeed, there is an affinity between the ESRB and the sphere of the central banks in general, given that the ECB Chair doubles as the Chair of the ESRB, and that the voting members of the General Board are, for the most part, national central bank governors. In addition, the secretariat is supplied by the ECB. This feature could pose a challenge in terms of the independence of the ESRB, and is far more than a cosmetic problem.[80]

Even though the ECB's mandate includes financial stability, a core objective is to maintain price stability. Ensuring price stability involves measures that, under some circumstances, can be counterproductive in terms of safeguarding systemic risk. For example, keeping interest rates very low over time or continued quantitative easing may eventually lead to a rise in debt and asset prices and thus raise concerns from a systemic risk perspective.

One striking example of the challenges central banks may be confronted with when pursing their various objectives materialised in the UK in the autumn of 2022. After market turmoil erupted as result of the British government tabling economic plans involving large unfunded tax cuts, the Bank of England had to set in motion a swift market intervention, purchasing British government bonds (gilt) to halt the ongoing rapid price depreciation with ensuing risks to financial stability.[81] This emergency operation contrasted with the Bank of England's already adopted program of selling gilt previously acquired under quantitative easing mechanisms put in place after the Global Financial Crisis.[82] The prime minister resigned soon after and the proposed tax cuts were abandoned. In a letter to Parliament, the Bank of England states that the gilt purchase operations were carried out under its statutory financial stability objective, and as such, they should not shift the underlying monetary trends in the economy and were not monetary policy operations.[83]

One observation to be made is that even though the Bank of England stressed that the financial-stability-induced operations should not be seen as monetary policy operations, in this case, they were enacted through the bond market, which is also a channel for executing monetary policy. This shows that the same type of instrument may be employed based on different motivations – financial stability and monetary policy – that may be difficult to disentangle for the public. Under given circumstances, the same might be the case for the ECB. The intermingling of objectives and instruments used to obtain them could potentially have detrimental effects on perceptions of transparency and accountability, and through that, on the legitimacy of a central bank. The close association between the ECB and the ESRB could challenge the legitimacy of the latter insofar as doubts are cast on its ability to enact its financial-stability-related mandate independently of monetary policy considerations.

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79. This aspect has been pointed out by several writers. See among others Myklebust (n1) with further references, and Brigitte Haar (n 45) 177–78.
80. Avgouleas (n 17) 320; Willem Buiter, Written evidence included as annex to The Committee's Opinion on proposals for European financial supervision, House of Commons Treasury Committee (Sixteenth Report of session 2008–09); Myklebust (n 1) 56 and 65.
81. Tommy Stubbington, 'Bank of England says £65bn gilt intervention staved off UK financial "spiral"', *Financial Times* (London, 6 October 2022) <https://www.ft.com/content/09c43669-18a9-4476-9a95-044a2448d400> accessed 16 December 2022.
82. See letter 5 October 2022 from the Deputy Governor of the Bank of England, Jon Cunliffe, to the Chair of the Treasury Committee of the House of Commons, Mel Stride 10. <https://committees.parliament.uk/publications/30136/documents/174584/default/>.
83. ibid.

In this regard, the ESRB's organisational connection with the ECB might suggest inherent biases and possible conflicts of interest embedded in the relationship leading to compromised credibility among observers.[84] The fact that the General Board members from the national supervisory authorities do not have voting rights could also weaken the legitimacy of the ESRB from their perspective, particularly given that these agencies do not pursue price stability as part of their mandates and therefore do not suffer from the same potential conflict of interest as the voting members from the central bank sphere.

The next point to examine is the impact of the ESRB's role legitimacy given the tools and measures at its disposal.[85] The tools and measures available to the ESRB fall into the following main categories:[86] the gathering and exchange of information,[87] identifying and prioritising systemic risk, and issuing warnings and recommendations as necessary.[88] Warnings or recommendations issued by the ESRB may be general or specific in nature and are addressed in particular to the Union, to Member States, to the ESAs, or to national supervisory authorities.[89]

The ESRB is only mandated to issue warnings and recommendations when significant risks to financial stability are identified[90] – in other words, in serious cases.[91] Warnings and recommendations are confidential.[92] However, the ESRB can decide to make a warning or recommendation public on strict conditions.[93] In emergency situations, the ESRB may issue a confidential warning to the Council.[94] However, the ESRB has no legally binding powers.[95] The follow-up procedures in place concerning the warnings and recommendations are based on an act-or-explain approach.[96]

Arguably, role legitimacy will be dependent on there being a reasonable degree of correspondence between an agency's mission and the tools at its disposal. Several scholars have argued that the lack of binding powers may diminish the credibility of the ESRB.[97] Willke and others reiterate a view that the ESRB has 'no teeth' and consequently limited ability to pursue its mandate.[98] On the other hand, as Avgouleas points out, the 'close ties of co-opera-

84. Avgouleas (n 17) 320.
85. For more comprehensive accounts of the tools and measures, see Myklebust (n 1) section 6. See also Avgouleas (n 17) 304 ff.
86. Article 3(2) ESRB Regulation.
87. Article 15 ESRB Regulation. On data collection, see particularly Anat Keller, 'Collecting Data: How will the ESRB Overcome the First Hurdle towards Effective Macro-prudential Supervision?' (2013) 24 *European Business Law Review* 487.
88. Article 16 ESRB Regulation.
89. Article 16(2) ESRB Regulation.
90. Article 16(1) ESRB Regulation.
91. A *General Warning* was published 22 September 2022, warning against severe risks to financial stability due to geopolitical developments, the situation in the energy markets, higher than expected inflation and rising mortgage rates, among others. The identification of the heightened risks is accompanied by several recommendations to private sector institutions, market participants and relevant authorities. ESRB, 'Warning of the European Systemic Risk Board of 22 September 2022 on vulnerabilities in the Union financial system (ESRB/2022/7) <https://www.esrb.europa.eu/pub/pdf/warnings/esrb.warning220929_on_vulnerabilities_union_financial_system~6ae5572939.en.pdf>.
92. Article 16(2) ESRB Regulation.
93. Article 18 ESRB Regulation. See discussion of the conditions for such decisions in Myklebust (n 1) 60. The General Warning mentioned in fn 89 above was made public.
94. Article 3(2)(e) ESRB Regulation.
95. Eilish Ferran and Kern Alexander, 'Can soft law bodies be effective? The special case of the European systemic risk board' (2010) 35(6) *European Law Review* 751; Myklebust (n 1) 59.
96. Recital 20 ESRB Regulation.
97. Comprehensively discussed in Ferran and Alexander (n 95).
98. Helmut Willke, Eva Becker and Carla Rostásy, *Systemic Risk: The Myth of Rational Finance and the Crises of Democracy* (2013 Campus Verlag) 204.

tion with the ESAs, the EU Commission and the Council, the national central banks and national supervisors, give a distinct hard law edge to its warnings and recommendations.'[99] In any case, should a situation arise where a warning or recommendation is not followed up – for instance because the member state concerned disagrees or does not wish to comply – this could certainly undermine the role legitimacy of the ESRB. Speculations among stakeholders that non-compliance with ESRB decisions might be a plausible outcome because of the lack of binding powers, could in and by themselves undermine the credibility of the ESRB.

The last point to touch on here is the relationship between the ESRB's role and its leeway for communication.[100] As is the case with many organisations in the financial sector, both private and public, the ESRB and its personnel are bound by strict rules on professional secrecy.[101] Furthermore, as mentioned, warnings and recommendations are not made public without a prior decision under strict conditions. This is to be expected, since communication about systemic risk could be very sensitive. If the ESRB voices concern, this may be met by market reactions in anticipation of stricter operating conditions. In certain stages of the financial cycle, this can be perceived as undesirable from the perspective of policymakers because swift adjustments in market actors' behaviour can, in and by themselves, contribute to instability.[102] The cautious communication strategy required of the ESRB may make it difficult for the Board to showcase its work or portfolio of cases to demonstrate its expertise and thereby build credibility in a claim for legitimacy.

5.2 Performance and contributions to the financial regulatory system

Turning to the legitimacy of the ESRB in terms of its performance, an initial question is how this should be assessed? Should the assessment be based on the Board's actual output in the form of for instance the warnings or reports it produces, or, by looking at its contribution towards its end-goals – that is, the existence or absence of a financial crises at any given time?

I start by looking at the actual output of the ESRB so far. The ESRB publishes much information on its website[103] relating to its different tasks. There is a plethora of documents and contributions reflecting its work in the areas of information-gathering and the prioritising of systemic risk; ESRB policies; and policies regarding the individual member states. The warnings and recommendations that have been made public are also published there.[104]

The format of this article does not allow an in-depth assessment of the numerous publications that make up the tangible and observable output of the ESRB's work. However, drawing on the previous discussions of how legitimacy might be assessed with respect to unelected governing bodies, I would argue that the published material as a whole supports the ESRB's claim to legitimacy. The documents overall seem to be of high technical quality, demonstrating the apt use of the expertise that is available to the ESRB. The content of the documents is congruent with the ESRB's mission, reflecting the tasks it has been given in its mandate. As such, they are comprehensible, not in the sense that they are easy to under-

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99. Avgouleas (n 17) 305.
100. The importance of communication as a means to garner and maintain legitimacy is discussed above in section 4.3.
101. Article 8 ESRB Regulation.
102. For instance, in emergency cases where the ESRB has decided to inform the Council in accordance with Article 3(2)(e) ESRB Regulation, Recital 22 of the same regulation stresses that 'during that process, due protection of confidentiality is of outmost importance.'
103. <https://www.esrb.europa.eu/home/html/index.en.html>.
104. These are assembled under the heading of ESRB Policy: <https://www.esrb.europa.eu/mppa/html/index.en.html>.

stand, but in the sense that the choice of focal areas seems logical and appropriate given the Board's role and mission. This contributes to the perception that due process is being followed, strengthening its legitimacy. Conversely, it would suggest that the Board's remit is not subject to 'mission creep', which might otherwise diminish its legitimacy.

One particular aspect of the ESRB's activities that deserves attention pertains to the legitimacy of its contributions to regulatory development. The ESRB contributes to regulatory development in various ways. In terms of the macroprudential legal framework, it contributes by interpreting and giving guidance on the implementation of the various rules through its practice.[105] Furthermore, it is active as an expert body participating in law-making procedures, for instance by answering consultations and assisting in working groups that develop new legislation.[106] Lastly, it plays a role in the development of the regulatory field within its area of responsibility by developing measures and tools that further the understanding of the concept of systemic risk.[107] Even though there now exists a legal definition of systemic risk, our fragile understanding of the phenomenon and how it should be tackled by regulation leaves plenty of room for further investigation.[108]

The legitimacy-related questions that may arise with regards to the ESRB's contribution to regulatory development are first and foremost associated with its role as an unelected body and its consequent lack of democratic accountability.[109] That means that legitimacy must be drawn from other characteristics of the ESRB, where its expertise and understanding play a more significant role. Its expertise makes it a useful participant in regulatory processes. However, there is a danger that it might be too focused on its own mandate, preventing it from taking a broader perspective. Although preventing systemic risk is arguably a very important aim of financial regulation, the focus must be balanced against other relevant concerns – consumer protection, for instance.[110] When involving the ESRB in regulatory developments, it is therefore important that those responsible for the process make sure that its contributions be sufficiently calibrated against the interests of other stakeholders to maintain the legitimacy of the regulatory process as a whole.

The final test of the ESRB's performance would be to determine whether it succeeds in its ultimate goal of avoiding widespread financial distress. However, it would be notoriously difficult to assess the ESRB's contribution to whether or not financial distress erupts.[111] Research on systemic risk and financial crises shows that such events can be caused by a wide range of different factors.[112] Moreover, these factors interact with each other, making

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105. See as example Atanos Pekanov and Frank Dierick, 'Implementation of the countercyclical capital buffer regime in the European Union,' ESRB Macro-prudential Commentaries, Issue No 8, December 2016 <https://www.esrb.europa.eu/pub/pdf/commentaries/ESRB_commentary_1612.en.pdf?4b9a070a60468fc95e34fd85ec80d62b>.
106. See eg ESRB, 'Macro-prudential Aspects of the Reform of Benchmark Indices, in response to a consultation by the European Commission on a possible framework for the regulation of the production and use of indices serving as benchmarks in financial and other contracts' (14 November 2012).
107. Important here is ESRB, Recommendation of the European Systemic Risk Board of 4 April 2013 on intermediate objectives and instruments of macro-prudential policy (ESRB/2013/1) [2013] OJ L 170/1. Another important development is the Risk Dashboard, which is a set of quantitative and qualitative indicators of systemic risk in the EU financial system that is published quarterly: <https://www.esrb.europa.eu/pub/rd/html/index.en.html>.
108. As discussed above in 3.
109. Andenas and Chiu point out that even though the ESRB is accountable to the EU Parliament and the Council and is required to present its annual report to both institutions, its accountability channel is confined to the EU level and must seem remote to the public: Andenas and Chiu (n 9) 450.
110. Inherent goal conflicts in financial regulation have been pointed out by several writers: see eg Armour and others (n 4) chapter 3 for a comprehensive discussion.
111. See Keller (n 65) 191.
112. As demonstrated among others in the investigative reports mentioned in n 11 above.

it incredibly difficult to assign probabilities because the uncertainty cannot be quantified.[113] We can draw an analogy here to public health authorities whose responsibilities include pandemic preparedness. If a pandemic does not occur in a specific year, that does not necessarily imply that the health authorities have done a particularly good job. Conversely, if a pandemic does occur in a specific year, that does not automatically imply that the authorities have done a particularly bad job. A pandemic can be caused by events that are beyond the authority's control. For instance, a pandemic might originate in a geographic area that is outside of the authority's remit or might emerge from a hitherto unknown pathogen. However, as discussed in section 4.3 above, in complex areas of governance, the perception of legitimacy might be influenced by negative events, even if an institution's actual ability to impact on the outcomes were limited.

This reasoning gives rise to two observations. The first is that if one is within a policy area that deals with high-impact events, where uncertainty makes it difficult to assess the probability of the event, one should operate with a margin of error that reflects the uncertainty associated with the efficacy of an intervention.[114] The second observation has to do with the consequences of financial turbulence, in spite of the ESRB's efforts. For stakeholders that rely on the ESRB to ensure that financial distress is kept at bay, seeing the Board fail to fulfil this mission may lead them to lose faith in the organisation as such, whether or not the Board actually 'failed' in any real sense.[115] In turn, this could negatively impact the legitimacy of the ESRB. Given the need for trust and confidence in financial policymaking to ensure financial stability,[116] such a scenario could have ramifications that extend beyond the Board itself, questioning the legitimacy of the financial governing systems more broadly.

6. Conclusions

Financial crises have the potential to cause severe and long-lasting damage to the economy and society at large. It is therefore of utmost importance that the governing system and institutions set up in support of financial stability succeed in their mission. The ESRB forms an important element of this system in the European context.

The success of governing institutions depends on many factors. Questions of legitimacy play a crucial role in this regard. This is especially the case in the financial sector, where maintaining trust and confidence is one of the core objectives of financial regulation.

This article has discussed the legitimacy of the ESRB in respect of its role, its performance and its contribution to regulatory development. In all three instances, a closer examination of the characteristics of the ESRB has revealed that there exist factors that are conducive to its legitimacy, but also that there are circumstances giving grounds for concern.

The research questions of this article demanded a targeted discussion of the legitimacy of the ESRB. In the literature on financial regulation, legitimacy-related questions are less frequently addressed than those discussing the effectiveness of various regulatory tools and approaches. However, as the findings in this article show, the two aspects are closely

113. See eg Willke and others (n 98) 9.
114. This would be in line with the theoretical framework on 'normal accidents' developed by the renowned sociologist Charles Perrow. Charles Perrow, *Normal Accidents: Living with High Risk Technologies* (Princeton University Press 1999).
115. See related argument in Avgouleas (n 17) 320 noting that flawed actions by implementers of its warnings and recommendations could lead to the ESRB losing its credibility.
116. See eg Partnoy (n 30) 69.

related, and important considerations might go amiss if prerequisites of legitimacy in regulatory arrangements are not properly accounted for in policymaking processes. These findings might also be of broader interest in assessing financial regulation and supervision at large. Are such systems furthering the overarching objective of ensuring well-functioning and stable financial systems, and so contributing meaningfully to the public good? Inserting questions of legitimacy more clearly into regulatory deliberations might provide important insights into how such a question should be answered.