
THE SOCIAL PSYCHOLOGY OF FINANCIAL REGULATORY GOVERNANCE

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THE SOCIAL PSYCHOLOGY OF FINANCIAL REGULATORY GOVERNANCE

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ABSTRACT

This paper contributes to addressing a fundamental question: how do institutions, in general, and financial regulators, in particular, “think”? To this end, the analytical tools of social psychology are applied to the regulatory framework for financial services in the European Union. The paper reveals a relationship between the constitutional status of EU regulators and the dominant group dynamics typified in the literature of social psychology. Such a relationship indicates that institutional structures might favor the emergence of specific behavioral patterns and *modus operandi* within regulatory bodies. Furthermore, the identification of dominant group dynamics paves the way to a more profound understanding of conflictual dynamics within groups of decision-makers. This novel analytical map is, thus, applied to the context of the ongoing debate as to whether, following Brexit, the EU regulatory governance for financial services and markets will be characterized by a deepened divide between eurozone and non-eurozone Member States.

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I. INTRODUCTION

Financial regulators, in discharging their supervisory and regulatory functions, are key players in the financial ecosystem. Yet, in classical political economic thinking, their role tends to be explored by relying on simplified assumptions largely influenced by economic theories. Under the public choice theory, regulators are considered as rational operators routinely engaged in a process of maximization of different interests, such as acquiring more power or better reputation.¹ Neo-institutional economics, by distinguishing between “rules of the game” and “players” as key components of markets,² depicts regulators either as players or as an emanation of the structure of rules that regulate markets. In any respect, regulatory agencies are considered as units, in the form of social actors or organizations. Albeit offering a useful simplification, such understandings neglect that organizations are composed of individuals with objectives that may conflict.³ Steering away from this unitary conception, there is a flourishing literature in anthropological and sociological studies that considers organizations, such as companies or administrative agencies, as collective entities.⁴ In this paper, such an approach is applied to financial regulators to isolate the relationship between the legal rules defining the architectural framework for financial regulatory governance and behavioral dynamics driving regulatory choices and *modus operandi*.

A deeper understanding of the relationship between interpersonal dynamics and the legal framework guiding, or even shaping, the decision-making process of financial regulators leads to acquiring a more complete understanding of the role of regulators in financial markets.⁵ This is all the more important in the aftermath of the 2007–2009 Global Financial Crisis and against the backdrop of inquiries into the role of law in the financial sector that has followed. The interaction between financial entities and legal rules has been re-examined. Novel theories have focused on the idea that legal norms are constitutive elements of finance,⁶ rather than exogenous phenomena that intrude upon markets. In a similar vein,

¹ See G. Tullock, “Public Choice” in S. N. Durlauf and L. E. Blume (eds.), *The New Palgrave Dictionary of Economics*, 2nd edn. (Basingstoke: Palgrave Macmillan, 2008).

² D. C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), 3–5.

³ See generally G. M. Hodgson, “What are Institutions?,” *Journal of Econ. Issues*, 40 (2006), 1.

⁴ See, e.g., M. Douglas, *How Institutions Think* (Syracuse NY: Syracuse University Press, 1986).

⁵ See “Shedding Light on EU Financial Regulators: A Sociological and Psychological Perspective,” *Hastings International and Comparative Law Review*, 40 (2017), 69.

⁶ K. Pistor, “A Legal Theory of Finance,” *Journal of Comp. Econ.*, 41 (2013), 315.

financial markets have been approached through socio-legal lenses, highlighting, inter alia, the recursive interaction between markets, firms, and legal rules.⁷ In addition, the behavioral dynamics influencing the choices of financial consumers, professional investors, and other actors of the financial markets has been scrutinized: the postulate of rationality developed in financial economics and influencing the regulators' understanding of finance has been questioned.⁸ It is now largely understood that individual cognitive processing has limited capacity and that the brain economizes upon such processing by relying on heuristics and other shortcuts, which will save time but also generate biases and predictable errors.⁹ Regulatory actions are thus refined in order to take into account these insights that depart from the traditional rationality paradigm.¹⁰

With the intent of applying these novel and multi-disciplinary approaches to the institutional framework of financial regulation, this paper considers regulators as organizations composed of individuals whose conduct is impacted by legal design as well as by the conduct of investors, depositors, and the various financial firms populating the heterogeneous financial ecosystem. They are also impacted by legal provisions which define membership criteria, as well as organizational structures with collegial governing bodies, and the powers, responsibilities, goals or objectives of each institution. This is to say that our focus is on how the legal dimension influences the relational dynamics *within* regulators, rather than focusing on the external relationship of regulators.

Drawing on insights from social psychology, regulators appear to reach decisions shaped by social roles, cultural norms as well as legal design.¹¹ Social psychology provides a language

⁷ J. Black, "Reconceiving Financial Markets – From the Economic to the Social," *Journal of Corporate Law Studies*, 13 (2013), 401.

⁸ In the UK, see Financial Services Authority [FSA], "The Turner Review: A Regulatory Response To The Global Banking Crisis" (March 2009) Ref. No. 003289.

⁹ K. Erta et al., "Applying Behavioral Economics at the Financial Conduct Authority," (Financial Conduct Authority, Occasional Paper No. 1, April 2013), www.fca.org.uk/publication/occasional-papers/occasional-paper-1.pdf.

¹⁰ E. Avgouleas, "The Global Financial Crisis, Behavioural Finance Regulation: In Search of a New Orthodoxy," *Journal of Corporate Law Studies*, 9 (2009) 23.

¹¹ See F. H. Allport, "A Structural Conception of Behavior: Individual and Collective – Structural Theory and the Master Problem of Social Psychology," *Journal of Abnormal Psychology and Social Psychology*, 64 (1962) 3.

that enables us to capture and analyze these aspects,¹² as it focuses on the result of individual interactions within or among groups.¹³ Hence, with specific reference to the primary decision-making bodies of financial regulatory agencies, social psychology provides an analytical grid to observe group dynamics and isolate what Alan Fiske, in his seminal work, defined the “fundamental forms of sociality.”¹⁴ Fiske, bridging different studies and building upon his own ethnographic research, isolates four relational models into a unified theory of social relations. These relational models, illustrated in detail in Part III, are archetypes describing elementary forms of sociality that feature in every culture and characterize all social interactions.¹⁵ They operate in all domains of social action and cognition, such as transfer of property, standards of social justice, group decisions, social influence, organization of labor, moral judgments, response to suffering, and interpretation of human behavior. Combinations between the four models result in various forms of social interaction pursuant to general cultural rules.¹⁶ At a more fundamental level, “the relational models theory explains social life as a process of seeking, making, sustaining, repairing, adjusting, judging, construing, and sanctioning relationships.”¹⁷

Fiske’s perspective finds a natural application in the context of the European Union, as its multi-layered governance structure leads to diversified interests which converge towards different decision-making centers. Typically, the College of Commissioners and the Board of Supervisors are the primary decision-making bodies of the European Commission (the Commission) and the European Supervisory Authorities (ESAs), respectively. While they operate through very different legal structures and mandates, these organizations are

¹² A classical definition of social psychology was given by Gordon Allport: “Social psychology is the attempt to understand and explain how the thoughts, feeling, and behaviours of individuals are influenced by the actual, imagined, or implied presence of other human being”; G. W. Allport, “The Historical Background of Modern Social Psychology” in G. Lindzey (ed.), *Handbook of Social Psychology*, vol. 1 (Cambridge, MA: Addison-Wesley, 1954) 5.

¹³ Although there is some overlap between sociology and social psychology, there are also differences. Sociologists tend to relate social behaviours to norms, roles, social class and other structural variables. Differently, social psychologists focus on the goals, motives and cognitions of individuals operating in a social context.

¹⁴ A. P. Fiske, “The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations,” *Psychology Review*, 99 (1992), 689 (Fiske, “Four Forms of Sociality”).

¹⁵ Identified by Fiske through field study in West Africa and also uncovered at the same period in other branches of social sciences. See A. P. Fiske, *Structures of Social Life: The Four Elementary Forms of Human Relations* (New York, NY: Free Press, 1991) (Fiske, *Structures of Social Life*).

¹⁶ Fiske, “Four Forms of Sociality,” 690.

¹⁷ *Ibid.* at 689.

composed of civil servants and representatives of each Member State and are therefore considered, for our purposes, as groups of individuals whose behaviors reflect archetypical relational models.

Isolating one or more forms of sociality which characterize the decision-making bodies of different regulators has profound theoretical and practical consequences. First, it sheds new light over the relationship between the architectural framework and group dynamics, indicating whether given institutional structures and apparatuses favor specific behavioral patterns and *modus operandi*. Second, the forms of sociality allow us to understand how conflicting dynamics emerge. It similarly shows how they are resolved between individuals partaking in a collective (regulatory) enterprise when the interest of the group as a whole no longer matches the interest pursued by some of its members and the equality relationship among individuals is compromised. The infra-institutional dynamics that followed the decision of the United Kingdom to leave the EU are an example of where this can be applied. The Brexit process is now formally commenced. Nonetheless, the disentanglement of the UK from the decision-making processes and the administrative apparatuses of the EU has not occurred immediately. Meanwhile, since the vote to leave was casted, the UK, being still part of the EU, has been participating – thorough its representatives – in the decision-making bodies of EU financial regulators. Hence, a socio-psychological analysis offers a fresh perspective over the unfolding dynamics. Marginalization, or even the genesis of different subgroups, may emerge in the College of Commissioners, affecting the agenda of the Commission. In examining this transition period from a social and psychological perspective, it will emerge that the role of the ESAs is likely to change. Any future reorganization of the EU regulatory and supervisory framework that Brexit will entail stems from within the current institutions. Members of core decision-making bodies, such as the Supervisory Boards of the ESAs, are required to adjust to a novel relational setting. In observing this process of adjustment, the isolated forms of sociality help predict whether, following Brexit, the EU regulatory governance for financial services and markets could be characterized by a divide between eurozone and non-eurozone Member States.

The paper develops in four parts, including this introduction. Part II introduces the EU multi-level architectural framework for financial regulation and supervision, offering a typology of EU financial regulators. Part III illustrates the theory of relational models. It then applies this theory to isolate the dominant relational models for selected institutions that, within the EU legal order, are engaged in regulating and supervising financial markets. Part IV offers an

application of the socio-psychological framework in the context of Brexit with particular attention to its implication for the tension between eurozone and non-eurozone countries.

II. EU MULTI-LEVEL FINANCIAL REGULATION

EU institutions perform their activities and roles within the perimeters of EU law, as defined by the constitutional provisions enshrined in the Treaty of the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU).

In light of EU primary and secondary law, a typology of financial regulators is constructed around two core dimensions.¹⁸ The first dimension is represented by the institutional status of a given entity within the EU legal order. In particular, financial regulators are regrouped into two main categories: institutions that are established through EU primary law, such as the Commission and the European Central Bank (ECB), and agencies established through secondary law, such as the ESAs and the European Systemic Risk Board (ESRB). The former category represents the pantheon of EU institutions, for which mandates, competencies, and composition are enshrined in the Treaties.¹⁹ The latter category is wider and has been witnessing a constant expansion.²⁰

In the context of financial regulation, the three ESAs – i.e. the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) – deserve particular attention. They are new administrative agencies (established in 2011) and epitomize the process of progressive “agencification” of EU law which has emerged to meet the growing demand for regulatory

¹⁸ For further detail on this typology see Castellano and Helleringer, “Shedding Light on EU Financial Regulators,” 80 et seq.

¹⁹ TEU Art. 13 enlists the seven EU institutions: the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union (including the General Court and the Court of Justice), the European Central Bank, and the European Court of Auditors.

²⁰ For an analysis and a critique over the establishment of regulatory agencies in the EU see E. Chiti, “An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies,” *Common Market Law Review*, 46 (2009), 1395–1442.

interventions in the European single market.²¹ The rule-making powers of the ESAs emanate from (and are conducted under the aegis) of the Commission.²² The EU constitutional structure significantly curtails their discretion in exercising decision-making powers. Hence, supervisory tasks are discharged only in limited circumstances and occur within the limits set by the European Court of Justice in the *Meroni* doctrine.²³ Notwithstanding these narrow constitutional premises, the ESAs have swiftly become a critical component of the EU architectural framework and are located at the forefront of EU regulatory governance of the financial sector. The EBA is the custodian of the Single Rulebook and has been engaged in the definition of its key elements, i.e. the rules concerning capital requirements for credit institutions and investment firms, as well as in the new special resolution regime.²⁴ The ESMA has been involved, inter alia, in the drafting of the Markets in Financial Instruments Directive and Regulation,²⁵ whereas EIOPA has been primarily preoccupied with the implementation of the directive concerning capital and liquidity requirements for insurance companies (Solvency II).²⁶

Despite this, their current functions – following the impressive rule-making efforts recently completed – are shifting towards supervisory convergence. The ESAs are striving to accrue their institutional weights within the EU and at the international level.²⁷ Given that the ESAs are not (and cannot be) empowered with sufficient discretion to perform (outside exceptional circumstances) supervisory functions towards firms and markets, the oversight of cross-border operations and entities occurs through a network-based structure. Memoranda of understanding and secondary law provisions are established for national authorities to

²¹ On the genesis of the ESAs in comparison to other, alternative models for regulatory governance see G. G. Castellano, A. Jeunemaître and B. Lange, “Reforming European Union Financial Regulation: Thinking through Governance Models,” *European Business Law Review*, 23 (2012) 437. For an accurate critique of the legal ground sustaining the ESAs and, in particular the EBA, see E. Fahey, “Does the Emperor have Financial Crisis Clothes? On the Legal Basis of the European Banking Authority,” *The Modern Law Review*, 74 (2011), 581–595.

²² On the rule-making powers attributed to ESAs, see N. Moloney, *EU Securities and Financial Markets Regulation*, 3rd edn. (Oxford: Oxford University Press, 2014), 854 et seq.

²³ Case 9/56 *Meroni v. High Authority* [1957–1958] ECR 133. On the supervisory powers see *ibid.* 942 et seq.

²⁴ Directive 2013/36/EU [2013] OJ L176/338 and Regulation EU No. 575/2013 [2013] OJ L176/1; and Directive 2014/59/EU [2014] OJ L173/90.

²⁵ Directive 2014/65/EU [2014] OJ L173/349 and Regulation (EU) No. 600/2014 [2014] OJ L173/84.

²⁶ Directive 2009/138/EU [2009] OJ L335/1.

²⁷ On the role of the ESAs in the international regulatory arena, prior to and after Brexit, see N. Moloney, “International Financial Governance, The EU, and Brexit: The ‘Agencification’ of EU Financial Governance and The Implications,” *European Business Organization Law Review*, 17 (2016) 451.

coordinate through Colleges of Supervisors and, within the Banking Union, Joint Supervisory Teams. In this respect, the EU multilayered approach to financial regulation and supervision is composed of entities with different legal statuses and structures, as summarized in Table 1.

Table 1: The legal status of EU financial regulators

<i>Status</i>	<i>Institution</i>	<i>Scope</i>
<i>Treaty-based</i>	European Commission	EU
	European Central Bank (ECB)	Eurozone/Banking Union
<i>Secondary law-based</i>	European Supervisory Authorities (ESAs)	EU
	European Systemic Risk Board (ESRB)	EU
<i>Networks of national authorities</i>	Colleges of Supervisors (CoS)	EU
	Joint Supervisory Teams (JST)	Eurozone/Banking Union

The second dimension in our typology represents the relation that selected EU institutions have, according to the Treaties, towards the *common interest* of the Union. EU regulators perform three key functions vis-à-vis this general interest, which are: advancing and protecting its existence, defining its content and ensuring its operation throughout the Union. The existence of a common interest represents a prerequisite to establishing a legal community that binds together different social actors – e.g. sovereign States, public

administrations, citizens, and businesses.²⁸ This means that the EU is an entity that is autonomous and transcends the interests of its members when individually considered. Thus, EU institutions are established to pursue the interest of the community.²⁹ Although the common interest of the Union stemmed from the establishment of a single market, the concept – given its blurred contours – appears to be, in essence, the preservation and the prosperity of the Union.³⁰

A closer examination reveals that, in promoting the advancement of these overarching objectives, EU institutions have different prerogatives. In this regard, as illustrated in Table 1, within the EU financial regulatory framework, institutions and agencies perform different functions vis-à-vis the realization of the common interest. To the Commission, the Treaty expressly attributes the role of promoting the general interest of the Union.³¹ The ECB, within the European System of Central Banks (ESCB), advances the primary interest of the monetary union of maintaining price stability.³² The discretionary powers attributed to both institutions, e.g. in setting the policy agenda, initiating the legislative process, or in determining the appropriate monetary policy tools to safeguard the single currency, equip them with the ability to determine the contents of the general interest. This process benefits from the expertise of specialized agencies, such as the ESAs or the ESRB, which in turn contributes to defining– under the Commission’s aegis – the general objectives of the Union. Leaving aside specific considerations concerning monetary policy activities, the interest of the Union is pursued through the EU legal order and by the voluminous corpus of rules and administrative provisions enacted to regulate financial firms and markets. Specific institutional arrangements to ensure supervisory convergence and coordination are thus required to ensure the correct and harmonized application of these rules. Without a change in the Treaty, this function is mandated to network-based mechanisms involving the authorities of EU Member States.

²⁸ The idea of the EU as a legal community operating under a common interest – that transcends the interests of individual members – emerges decisively from early case law; see, in particular, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 ECR, 2–15.

²⁹ TEU Art. 13(1) states: “The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.”

³⁰ See Castellano and Helleringer, “Shedding Light on EU Financial Regulators.”

³¹ TEU, Art. 17(1).

³² TFEU, Art. 127(1)

Table 2: The ‘common interest’ of the Union and financial regulators

<i>Relation with the ‘common interest’</i>	<i>Example</i>	<i>Institution</i>	<i>Scope</i>
<i>Advancement and protection</i>	TEU Art 17(1) “The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.”	Commission	EU
	TFEU Art 127(1) and Art 129(1) Price stability and general support to the Union’s economic policy.	ECB (European System of Central Banks)	Eurozone
<i>Definition of contents</i>	TEU Art 17(2) Right of legislative initiative, power to set policy agenda (in pursuit of the general interests of the Union).	Commission	EU
	TFEU Art 127(2) and Art 129(1) Monetary policy tools (to achieve price stability).	ECB (European System of Central Banks)	Eurozone
	TFEU 114 Legal harmonization	Commission + ESAs	EU
<i>Operation and application</i>	TEU Art 17(1) Application of the Treaties and of EU law.	Commission	EU

TFEU Art 127(4) and Art 128			
Possibility to issue opinion and recommendations.	Printing banknotes and minting coins.	ECB	Eurozone
TFEU 127(6)	Prudential supervision (Banking Union).		
TFEU 114	Supervisory convergence	ESAs	
	Cross-border coordination and supervision	CoS JST	EU Eurozone/ Banking Union

The complexity of the resulting framework, with different constitutional statuses, structures, and prerogatives, generate critical legal and political issues. First, the ECB discharges its newly acquired – yet enshrined in the Treaty – supervisory duties in line with its function of protecting the general interest of the monetary union. In giving operational value to such a common interest, the ECB will apply technical standards that have been de facto drafted by an institution that is not established by the Treaty, i.e. the EBA. Second, the risk of the three ESAs to be politicized – as noted also by the International Monetary Fund – may ultimately undermine the effectiveness of the regulatory governance apparatus established, within and outside the Banking Union.³³ The overlaps of different national and supranational interests within an institutional framework that cannot sufficiently curb the risk of politicization and which is grounded on unstable constitutional premises, is likely to harbor conflicts between those Member States that have adopted the euro as a single currency and those that have not.

³³ International Monetary Fund Country Report, European Union: Publication of Financial Sector Assessment Program Documentation—Technical Note on European Banking Authority, 7–87 Report No. 13/74 (2013).

The first group of Member States considers the ESAs and, in particular the EBA, as a forum where undue pressures may be directed towards Treaty-based institutions. The second group of states perceives the new supervisory role of the ECB as an expansion of the institutional perimeters of the eurozone, which thus reduces the weight of the ESAs.³⁴ Ultimately, this indicates that Member States within and outside the Banking Union (and the eurozone) have different priorities.³⁵ In this respect, it appears that, as part of being engaged in a supervisory convergence across the EU, non-Treaty based agencies will be naturally called to offer a bridge between the two groups of Member States within the single market. This paper approaches these issues as phenomena related to the relational dynamics among the individuals participating in the decision-making process of the relevant EU institutions.

III. ELEMENTARY FORMS OF SOCIALITY IN FINANCIAL REGULATORY GOVERNANCE: THE CASE OF THE EUROPEAN UNION

a. The Four Elementary Forms of Sociality

The theory of social relations identifies four relational models that characterize any social interaction in every culture³⁶: Market Pricing (MP), Equality Matching (EM), Communal Sharing (CS), and Authority Ranking (AR). Combinations of these four models build various social forms in accordance with the contingent cultural framework. Through these lenses the social dimension of interactions among individuals is understood as a process that involves “seeking, making, sustaining, repairing, adjusting, judging, construing, and sanctioning relationships.”³⁷ The four relational models operate in all domains of social action and cognition. For example, transfer of property, definition of standards of conduct, group decisions, or organization of labor. The core characteristics for each of these relational

³⁴ House of Lords, European Banking Union: Key Issues and Challenges, 2012, HL Paper 88, at 28.

³⁵ The point was also noted by A. Enria, “Challenges for the Future of EU Banking” (Speech, 3rd Financial Meeting, Madrid, January 2015).

³⁶ Fiske, “Four Forms of Sociality,” 689.

³⁷ *Ibid.* at 690.

models are briefly presented here, drawing primarily from Fiske's unified view of the theory of social relations.

MP is the epitomic form of sociality in Western cultures.³⁸ Within this model, relationships among individuals are based on cost-and-benefit considerations to sustain self-interested exchanges. Market prices, exchange rates, or other forms of measurements are devices to facilitate such relational structure. Individuals interact and enter into consensual agreements with the intent of maximizing their return according to utilitarian and individualistic logics. From a socio-psychological perspective, rationality is not a necessary element for MP to occur, as irrational choices may still underpin self-interested exchanges. In general terms, MP arises whenever a coordinated action among individuals is necessary to attain an agreed general goal, provided the goal is pursued through voluntary interaction sustained by a calculative attitude. Relational dynamics based on MP require defined parameters and established criteria which individuals can consider to measure demands and assess whether their objectives are met. Explicit rules, often formally stated, are prerequisites for groups operating (primarily) under this form of sociality. Although MP is widely diffused, it is not the only mode of relating to others in Western cultures.

In EM, a form of sociality exchange is also a core feature.³⁹ However, in comparison to MP, EM presents a distinctive focus on ensuring an even balance within the group, rather than an individual maximization of value or resources. The principles of equality and reciprocity are cardinal features and individuals are willing to reduce personal gains in order to avoid imbalances or unfairness in the group.⁴⁰ A balanced distribution of resources is incentivized, echoing the economic concept of Pareto efficiency, whereby a given allocation of resources among individuals is considered optimal when it is impossible to make any one individual better off without making someone worse off.⁴¹ In this form of sociality, individuals relate among themselves as equals and differences are taken into account to reach an optimal point. This is represented by an even balance.

³⁸ Ibid., 706.

³⁹ Ibid., 702. As also noted by M. S. Clark and J. Mills, "Interpersonal Attraction in Exchange and Communal Relationships," *J. Personality & Soc. Psychol.*, 37 (1979), 12; and J. Mills and M. S. Clark, "Exchange and Communal Relationships," in *Rev. of Personality & Soc. Psychol.*, 3 (1982).

⁴⁰ Rawls' "veil of ignorance" is epitomic of the ethical dynamics underlying EM; see, John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 2009).

⁴¹ See V. Pareto, "The New Theories of Economics," *Journal of Political Economy*, 5 (1897) 485.

In relationships governed by CS, the equality principle is taken further and members of a group consider each other as part of the same family, sharing a common identity and, possibly, a common history.⁴² A sense of responsibility for the well-being and preservation of the group as a whole is a core feature in the communal relationship. Unlike MP and EM, where resources are distributed according to merit or as part of exchanges, in CS resources are distributed (primarily) in response to the needs of individuals.⁴³ In modern societies, CS mostly characterizes familial and friendship relationships, but it is also common when the cooperative attitude towards a common objective is fueled by an *organizational identity*.⁴⁴ In such a circumstance, members of an organization, e.g. a company or an administrative authority, share an understanding of what characterizes their organization as unique. Within this framework, members of a group identify themselves under a common denominator – be it an ideology, a shared identity, a cultural element, a mission, or a common interest – and tend to change their behaviors to conform to the behaviors of the others in order to maintain their membership.⁴⁵ An idealized social norm, often accompanied by rituals and traditions, provides the core social bond. The ordering principles of consensus, unity, and conformity lead individuals to act in order to preserve the group and its existence. In its extreme manifestation, CS leads to *groupthink*, which is a psychological phenomenon that occurs when members of a group or a community impede critical thinking in order to avoid conflicts.⁴⁶ When conflicts among individuals are openly managed and not discouraged, CS still operates.

Finally, AR relationships reflect a hierarchical ordering among members of a group.⁴⁷ By adopting a linear structure, each individual is either above or below another member. Higher ranked individuals enjoy various benefits and are in command. Military ranks are epitomic of this relational model. In contrast to CS and EM, AR demands that resources are allocated

⁴² Fiske, “Four Forms of Sociality,” 693.

⁴³ The idea is advanced by Clark and Mills, “Interpersonal Attraction,” and “Exchange and Communal Relationships.”

⁴⁴ The concept is well established in the organizational literature, see S. A. and D. A. Whetten, “Organizational Identity,” *Res. Org. Behav.* 7 (1985), 263.

⁴⁵ See M. D. and H. B. Gerard, “A Study of Normative and Informational Social Influences upon Individual Judgement,” *J. Abnor. & Soc. Psychol.*, 51 (1955) 629.

⁴⁶ See I. L. Janis, “Groupthink,” in *Psychological Studies of Policy Decisions and Fiascoes* (Boston, MA: Houghton Mifflin, 1982).

⁴⁷ Fiske, “Four Forms of Sociality,” 700.

depending on the ranking of individuals instead of being traded, equally distributed, or pooled. A hierarchical structure may be imposed or may develop spontaneously, for instance when individuals emulate or defer their decisions to someone considered superior.⁴⁸

The four models often coexist, and a group that operates according only to one model is a rare phenomenon. Within the same group, different forms of sociality may be adopted depending on the activity the group has to perform.⁴⁹ Empirical investigation has shown that individuals recognize which form of interaction should be used in any given circumstance and (more or less consciously) opt for one of the forms of sociality.⁵⁰ This indicates that, depending on circumstances, there are cultural and contextual rules that drive individuals to adopt one of the four relational models of interaction. Drawing from these observations, the fundamental forms of sociality are applied to identify the relational dynamics that characterize selected EU institutions tasked with financial regulatory and supervisory functions.

b. Forms of Sociality in the EU Regulatory Framework

To apply the theory of relational models to the EU regulatory framework, three points of methodology should be clarified. First, the decision-making bodies of EU institutions and agencies are approached as *groups of individuals* that organize themselves in *collective structures*. Here the achievement of one's activity may only occur if other individuals perform their assigned task or activity.⁵¹ This implies that our findings and considerations concern primarily the body observed and do not necessarily reflect the general culture of the entity in which such a decision-making body operates. Second, basic contextual rules against which the scrutinized decision-making bodies organize themselves should be identified. To this end, the organizational structure and the powers of a given institution or agency define the context in which its decision-making body has been established. Third and related, a

⁴⁸ See Charles Horton Cooley, *Human Nature and the Social Order* (Place: Transaction Publishers, 1992); and Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley, CA: University of California Press, 2003).

⁴⁹ Fiske, "Four Forms of Sociality," 701.

⁵⁰ See R. A. LeVine, "Properties of Culture: An Ethnographic View," in R. A. Shweder and R. A. LeVine (eds.), *Culture Theory: Essays on Mind, Emotion, and the Self*, (Cambridge University Press, 1984) and Fiske, "Four Forms of Sociality."

⁵¹ This idea draws from F. H. Allport, "A Structural Conception," 3. The idea that institutions are groups of individuals has been also advanced by Douglas, *Institutions Think*.

fundamental group norm bonding together individuals should be identified. The composition of the various decision-making bodies of Treaty-based institutions and non-Treaty-based agencies, as well as their functions vis-à-vis the pursuit of a common interest, are powerful proxies indicating whether there is an organizational identity. For instance, bodies which are composed of national representatives operate under a given group norm. This is different from the group norm which drives the decisions of a body composed of civil servants and where individuals are mandated to advance the interests of the body itself or the institution it governs. Ultimately, whether EU institutions and agencies organize themselves in a collective enterprise which is governed (primarily) by communal, bargain, equalitarian, or hierarchal relational models depends on a number of factors, largely engendered in the legal framework.

Through this prism, the application of the forms of sociality in relation to EU regulators is directly linked to the fundamental grammar of the EU legal order. Hence, the typology presented in Seoffers a map that allows for comparison of different institutions and agencies in relation to both their proximity to the general group norm, i.e. the pursuit of the common interest of the Union, and their constitutional status. This means that where a given decision-making body within an institution performs more than one function, more than one model of sociality is observed. In advancing this approach, we hope to stimulate a new strand of empirical studies that connects with greater accuracy the legal (and constitutional) dimension of administrative agencies and political institutions with forms of sociality. Publicly available official documents, scholarly inquiry, and legal documents provide for an abundance of data on the modus operandi that characterizes the EU bodies under scrutiny.⁵² Consequently, for each body examined it is possible to isolate a dominant relational model, as summarized by Table 3 and as further illustrated in the remainder of this paper.

Table 3: The form of sociality in respect to the legal status of selected EU bodies and their relationship with the common interest of the Union.

<i>Institution</i>	<i>Legal status</i>	<i>Relation with the 'common interest'</i>	<i>the Form of sociality</i>
<i>Commission</i>	Treaty-based	Advancement	and CS

⁵² For a more complete treatise over the methodological approach and the source of data, see Castellano and Helleringer, "Shedding Light on EU Financial Regulators."

		protection	
		Definition of the content	EM
<i>ECB</i>	Treaty-based	Advancement and protection	CS
		Definition of the content	EM
<i>ESAs</i>	Secondary law-based	Definition of the content	EM
		Operation and application	MP
<i>CoS/JTS</i>	Network	Operation and application	MP

A pattern emerges from this data. CS is the dominant mode for institutions engaged in the advancement and protection of the common interest. EM and MP are the dominant modes for institutions involved in defining the content of the common interest (under the principles of mutual recognition). They are also the dominant modes for institutions operating the common interest, where regulatory and supervisory convergence occur through a balancing of the interests of the community, with national and industry's interests. By contrast, due to the very nature of the EU legal framework, AR does not appear to be a dominant mode in any of the three categories elicited. This is not to say that hierarchical arrangements are alien to EU institutions and agencies; rather it signals that linear ordering, albeit present to an extent and in specific instances, is not a dominant form of sociality induced by the legal framework governing the decision-making bodies under scrutiny. Moreover, as expected for any group of individuals, more than one form of sociality is observed. More precisely, the coexistence of multiple forms of sociality appears to reflect the various functions that the observed entities, and their decision-making bodies, are mandated to perform vis-à-vis the common interest. EU Treaty-based institutions appear to be engaging with the logics of two primary forms of sociality: CS and EM. With regards to the ESAs, their ambivalent – and recently acquired – roles lead to EM and MP appearing as their primary forms of sociality.

Treaty-based Institutions and Communal Sharing and Equality Matching Forms of Sociality

In general terms, CS relational dynamics permeate the EU constitutional framework. CS is a direct emanation of the idealized notion of “common interest.” Hence, the advancement of such an interest is the *raison d’être* of Treaty-based institutions that are called on to represent such a community as a whole. In particular, the ECB and the Commission pursue the common interest, however intended, precisely through the realization of specified objectives that shape their regulatory and supervisory action. The Commission acts as a guardian of and represents the community’s interest, to the point that it defines itself as the institutional embodiment of the community.⁵³ The ECB preserves the stability of the eurozone, in the general interest of its members. These institutions’ supranational status, with extensive autonomy and independence, separates them from individual members and entitles them to manage resources that are pooled in the pursuit of a collective interest. Within these institutions, the pursuit of a common interest – no matter how vaguely defined – bonds together individuals who, in turn, operate knowing that their actions are directed towards a collective enterprise.⁵⁴ The principles characterizing a decision-making structure based on CS, i.e. consensus, unity and conformity,⁵⁵ emerge from the status of their civil servants whose activities and roles are above national politics under the principles of *fonction publique européenne* (European civil service). This determines a sense of the group and an organizational identity which is established to manage the (pooled) resources of the community in view of its general interest.

A closer look at the organizational structures and decision-making processes of the Commission and the ECB reveals that EM also characterizes the relational dynamics within their respective decision-making organs. These organs are governed under the principle that distinct but equal individuals acknowledge their differences to reach an even balance.⁵⁶ Other than being the guardian of the common interest, the Commission is also the engine of the Union, with its executive, policy-setting, and quasi-legislative powers. The College of

⁵³ European Commission, *The European Commission: 1995–2000*, 7.

⁵⁴ Allport, “A Structural Conception,” 13–15.

⁵⁵ Fiske, “Four Forms of Sociality,” 697.

⁵⁶ *Ibid.*, 705.

Commissioner is the primary decision-making body of the Commission and it is composed of one Commissioner for each Member State,⁵⁷ (now twenty-eight Commissioners⁵⁸) with one President proposed by the European Council and elected by the Parliament.⁵⁹ The debate over the politicization of the College of Commissioners has led commentators to note that, in practice, there is little collegial discussion.⁶⁰ A socio-psychological perspective indicates that the lack of collegiality could be explained also as a manifestation of a specific form of sociality.

The College of Commissioners observes the “one-person-one-vote” principle. This indicates that the EM is likely to govern interpersonal relationships. A mechanism for social influence is thus created. Individuals receiving a favor feel obliged to reciprocate in order to ensure balance and equality among group members.⁶¹ For example, debating the decisions proposed by one or more Commissioners is likely to delay the decision-making process and compromise the Commissioners’ ability to attain their objectives. In order to maintain an overall balance of interpersonal relationships – and avoid the institutional paralysis of such a large decision-making body – the principles of reciprocity and equality encourage a bargaining process.

The EM relational mode can also be found in the ECB governing organs. Within the ECB there are three decision-making organs, namely:

- i. The Governing Council, which formulates monetary policy for the eurozone, defines guidelines for national central banks operating under the ECBS, and under the Single Supervisory Mechanism (SSM) of the Banking Union, sets the general supervisory framework with the possibility to object the decisions proposed by the Supervisory Board.
- ii. The Executive Board, which implements the guidelines established by the Governing Council and coordinates national central banks.

⁵⁷ TEU art. 17(4).

⁵⁸ As illustrated below, until the UK formally leaves the EU, i.e. two years after the notification to the European Council of the decision to withdraw from the Union, the EU is still composed of twenty-eight Member States.

⁵⁹ TEU art. 17(5) and TFEU art. 244, which stipulates that “Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission” TFEU art. 244(a).

⁶⁰ See, e.g., F. Franchino, “Delegating Powers in the European Community,” *B. J. Pol. S.*, 34 (2004) 269; and S. K. Schmidt, “The European Commission’s Powers in Shaping Policies,” in D. G. Dimitrakopoulos (ed.), *The Changing European Commission* (Manchester: Manchester University Press, 2004), 105

⁶¹ K. S. Cook, C. Cheshire, E R. Rice, and S. Nakagawa, “Social Exchange Theory,” in J. DeLamater and A. Ward (eds.), *Handbook of Social Psychology* (Dordrecht: Springer, 2013), 61

- iii. The newly established Supervisory Board which coordinates the supervisory activities under the SSM.

The Governing Council is the primary decision-making body and is composed of the governors of the national central banks that are a part of the eurozone, plus the members of the Executive Board (President, Vice-President and four other independent individuals).⁶² Governors shall not represent the interests of their country and are members in their capacity as independent experts. In order to avoid coalitions among Member States, the Executive Board sets the agenda and, since Lithuania's accession to the eurozone as of 2015, the voting follows a rotating system capped at twenty-one voters. Governors are allocated to different groups based on the size of their country's economy and financial sector. As long as the eurozone has between eighteen and twenty-one participating countries, there are two groups. The five largest countries constitute the first group, sharing a total of four voting rights that rotate monthly.⁶³ Thus, every month one of the governors of the five largest countries cannot vote, but may participate in the discussion. The remaining governors share a total of eleven voting rights, which also rotate on a monthly basis. The six members of the Executive Board are permanent voters. This creates a system based on a collective decision-making process where one person is equal to one vote. The mechanism creates a "veil of ignorance" proper of the EM form of sociality.⁶⁴ In fact, members of the Governing Council are in the position to predict when they will not vote – but cannot predict the decisions on which they will be asked to vote.

Secondary Law-based Agencies and Market Pricing Form of Sociality

The ESAs and the ESRB have been established under Article 114 TFEU which allows Treaty-based institutions to delegate specific task to ad hoc created authorities, as long as they are devices to serve the community's interest of protecting the single market through the harmonization of EU law. It follows that the ESAs and the ESRB are, from a constitutional perspective, means to achieve the general interest and, following the categorization offered in Part II, they operate the common interest by ensuring regulatory and supervisory convergence.

⁶² TFEU art. 283(1).

⁶³ The countries in this group are France, Germany, Italy, the Netherlands and Spain.

⁶⁴ Fiske, "Four Forms of Sociality," 705.

With primary reference to ESMA, we argue that the decision-making bodies of the ESAs are primarily characterized by MP form of sociality. ESMA drafts technical standards, advances proposals, and issues “comply or explain” notices, which harden its non-binding guidelines and recommendations.⁶⁵ ESMA’s primary decision-making body is the Board of Supervisors, which is composed of the heads of Member States’ supervisors, themselves defined as National Competent Authorities (NCAs). The Chairperson of ESMA sits on the Board and chairs the meeting, but has no voting right. The Board also includes representatives (also with no voting rights) of the Commission (as for any EU agency), the ESRB, EBA, and EIOPA. With such a configuration, the Board combines scientific expertise functions with political oversight, two functions that are usually separated. The Board gives guidance to the work of ESMA, and adopts opinions, recommendations, decisions and advice. The Board operates under a simple majority vote; each Board member has one voting right and Board members have a duty *not* to advance the interest of their own Member State⁶⁶ (but see below). Alongside the Board of Supervisors, there is the Management Board, which is composed of the Chairperson and six members of the Board of Supervisors. The members of the Management Board are elected by the voting members of the Board of Supervisors.⁶⁷ Also in this case, the Commission and the Executive Director participate in meetings, but have no voting rights.⁶⁸ The Management Board operates on a simple majority rule basis. The Management Board has to propose, for adoption by the Board of Supervisors, an annual and multi-annual work program. In addition, to facilitate consultation with stakeholders, ESMA has established a consultative Securities and Markets Stakeholder Group (SMSG).⁶⁹ This Group is consulted by ESMA on various matters, including technical aspects of market practices. Decisions within ESMA – especially those driving supervisory convergence across the EU – are technical in nature and abide to established criteria set by its remit and internal procedures.⁷⁰

⁶⁵ Council Regulation 1095/2010, Nov. 24, 2010, art. 16 O.J. (L 331) (EU), establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (ESMA Regulation).

⁶⁶ ESMA Regulation art. 44(1).

⁶⁷ ESMA Regulation art. 45(1).

⁶⁸ ESMA Regulation art. 45(2); according to art. 45(3) of the same regulation, the representative of the Commission, however, has voting rights on matters related to the ESMA’s budget.

⁶⁹ ESMA Regulation art. 37.

⁷⁰ See, e.g. European Securities and Markets Authority Annual Report 9, (2011).

Notwithstanding the Board of Supervisors' supranational character,⁷¹ representatives of NCAs within the Board are naturally incentivized to promote national interests. For instance, in deciding how to allocate the limited resources of ESMA – and, in general, of the three ESAs – NCAs are not bound to a common (European) organizational identity. The 2013 Mazars ESA Review also highlighted that decisions are mostly taken through a process of negotiation that engages the members of the Board, and emphasized the preponderance of national interests over those of the EU.⁷² Through the prism of the fundamental forms of sociality, these elements indicate that the group operates primarily through a MP form of sociality, where the individual interests are more prominent.

IV. REGULATORS IN DISARRAY

The relational models provide a useful analytical tool to examine the actual or potential conflicts within and among EU institutions. Divergences among individuals partaking in a collective enterprise are also managed following the behavioral patterns ascribed to each dominant form of sociality. Social sanctioning when individuals do not follow the appropriate group norm are commonly adopted to maintain group cohesion. In this respect, the Brexit debate – preceding and following the result of the referendum of June 23, 2016, when the UK voted to leave the EU – offers a perfect case study to examine how different, and often antithetic, positions advanced by EU Member States influence the group dynamics operating within different EU institutions and bodies.⁷³ The UK has signaled that it no longer shares the common interest upon which the Union has been constructed. As further elaborated below, this emerges from the result of the June referendum and is evidenced in the official talks preceding the public vote. Even after the formal notification of withdrawal, as per Article 50 TEU, the UK would remain a member of the Union. Pursuant to Article 50 TEU, there is a window of two years – set to terminate in March 2019 – to define the UK–EU relationships,

⁷¹ According ESMA Regulation art. 42 para 1, ESAs should act independently and autonomously “in the sole interest of the Union as a whole” without seeking instructions from other European institutions or from Member States.

⁷² Mazars, *The European Supervisory Agency, Review of the New European System of Financial Supervision*, (October 2013); see in particular Pt. 1.

⁷³ For a first assessment of the possible implications of Brexit see N. Moloney, “Financial Services, The EU, and Brexit: An Uncertain Future For The City?” *German Law Journal*, 17 (2016) 75. For a complete analysis of the legal implications of Brexit for financial services see K. Alexander, et al., *Brexit and Financial Services: Law and Policy* (London: Bloomsbury Publishing, 2018).

after which the UK will be effectively out of the Union. This exit will occur with or without a deal between the UK and the EU.⁷⁴ Hence, at least until the moment of exit, the UK has participated in most of the official meetings of the European Council, and its representatives have still held positions in EU institutions, such as the Commission and the ESAs. In this context, while the Union still performs its tasks and functions relying on an institutional setting designed for twenty-eight countries, the position of the representatives of the UK in the various decision-making bodies of EU institutions is peculiar. A social and psychological perspective over the group dynamics within institutions provides a much deeper understanding of an unfolding debate that will have ripple effects in the years to come.

a. The Emergence of a Divide

A significant source of tension in EU institutions derives from the emergence and the consolidation of two separate groups of countries, notably eurozone countries and non-eurozone countries. The inclusion of financial stability within the perimeters of the common interests is particularly pronounced for Member States that are taking part in the SSM. The link between the banking regulation and supervision, sovereign debts restructuring, and monetary policy in the eurozone, imposes crisis response solutions tailored to the needs of the monetary union and demanding further integration. Breaking the vicious circle between the banking sector and sovereign debt, whereby the use of public funds to rescue troubled banks increases national debts and weakens the single currency, has been a priority animating the establishment of the Banking Union. However, the greater involvement of the ECB preoccupied many Member States, chiefly the UK, which feared a reduced role of the EBA.⁷⁵ In general terms, it is possible to note that, within the EU, there is material misalignment in the understanding of what constitutes the common interest. Drawing from the literature on the forms of sociality, it is possible to examine how this divide within the Union affects the decision-making process and, more generally, the relational dynamics within institutions.

⁷⁴ In particular, TEU art. 50 para 3 states: “The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification [...], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.” For an analysis over the mechanism put forward by TEU art. 50, see European Parliament, *Brief: Article 50 TEU: Withdrawal of A Member State From The EU*, European Parliamentary Research Service (Feb. 2016, PE 577.971)

⁷⁵ See *supra* House of Lords (n. 34).

When Communal Sharing (CS) operates, members are not ranked or organized under a hierarchical structure. Decisions made for the group, and conflicting interests, are resolved under the overarching objective of preserving the collective enterprise. A powerful illustration of this behavioral structure is offered by the position of the UK in the debate concerning the establishment of the Banking Union, which happened only a few years before the Brexit decision. Here, the UK, while opting out from the project and advancing some concerns, formally supported the creation of a Banking Union among eurozone countries, having in view the common objective of preserving the integrity of the single market.⁷⁶

More generally, prolonged dissent may engender a disagreement around the group norm upon which the collective structure is established. This makes participation in the group less rewarding and ultimately may lead to one or more individuals withdrawing from the group.⁷⁷ Hence, lacking a sense of belonging to a collective project, the relational equivalence among members is undermined.⁷⁸ It follows that prolonged divergences damage not only groups characterized by CS, but also groups operating under the equality paradigm of an EM relational model. In the EU institutional framework, this implies that if the existence of the common interest is compromised, decision-making bodies entrusted with the powers to define the contents of such a common interest are also compromised.

The problem emerges clearly from the impact that the UK vote to leave the EU had immediately on the College of Commissioners. The Commissioner for the UK, Lord Hill, held the crucial role of advancing the financial regulatory agenda of the Union, being Commissioner for Financial Stability, Financial Services and Capital Markets Union. After the results of the referendum, Lord Hill, a key promoter of the Capital Markets Union, resigned and Mr. Dombrovskis (Latvia), Vice-President of the Commission and Commissioner for the Euro and Social Dialogue, took over his position.⁷⁹ Given that the UK is still part of the EU, a new UK Commissioner for the Security Union has since been

⁷⁶ On the different positions see D. Howarth and L. Quaglia, “The Steep Road to European Banking Union: Constructing the Single Resolution Mechanism,” *J. Common Mkt. L. Rev.*, 52 (2014) 125 and A. Spendzharova, “Is More ‘Brussels’ the Solution? New European Union Member States’ Preferences About the European Financial Architecture,” *J. Common Mkt. L. Rev.*, 50 (2012) 315.

⁷⁷ Allport, “A Structural Conception of Behavior,” 11.

⁷⁸ Fiske, “Four Forms of Sociality,” 697.

⁷⁹ Jim Brunsten, “UK’s EU Commissioner Lord Hill Quits as British Departures Begin,” *Financial Times*, June 25, 2016; and Jim Brunsten, “Brexit Gives Valdis Dombrovskis Big Sway Over Banks,” *Financial Times*, June 30, 2016.

appointed, Sir Julian King.⁸⁰ However, from the “Mission Letter” issued by the President of the Commission, it emerges that the new Commissioner will be mostly in charge of implementing “concrete operational measures,”⁸¹ rather than focusing on policymaking. Moreover, Sir Julian will not represent the Commission in the European Parliament and at meetings of national ministers; a crucial role maintained by the previous Commissioner.⁸² Hence, one member of a key decision-making body within a Treaty-based institution is not mandated to advance and protect the common interest of the Union; instead, differently from other members, he has been allocated operational functions that are proper of non-Treaty-based institutions (see [Table 3](#)). As a consequence, the representative for the UK in the College of Commissioners is no longer treated as formally equal to the other Commissioners. Ultimately, his role has been curtailed, thus weakening the equality paradigm that characterizes a group dominated by a form of sociality that responds to the Equality Matching relational dynamics.

b. Insiders v. Outsiders

The existence of Member States that partake in only some features of the Union is not new in the history of the EU, and is often referred to as a phenomenon of *differentiated integration*. Accordingly, Member States may opt for different levels of integration that entail different levels of abdication of state prerogatives, on specific matters, towards the supranational institutional apparatus.⁸³ Differentiation characterizes the genesis of the EU that from a small group of founding members progressively enlarged and conflated various communities into a supranational union. During this process, opt-out clauses, notably to the Schengen Agreement and to the monetary union, have been conceded to some Member States and, more generally, new members are not expected to adopt the single currency at the same pace. Nonetheless, the division between countries that have adopted the euro and countries that have not, either

⁸⁰ M. Khan, “Juncker To Appoint New UK Commissioner As ‘Security’ Chief,” *Financial Times*, Aug. 2, 2016.

⁸¹ Mission Letter from Jean-Claude Juncker, President, European Commission, to Julian King, Member of the European Commission, 4 (Brussels, Aug. 2, 2016).

⁸² *Ibid.* at 5.

⁸³ See B. Leruth and C. Lord, “Differentiated Integration in the European Union: A Concept a Process or a Theory?,” *J. Eur. Pub. Pol.*, 22 (2015) 754; F. Schimmelfennig, et al., “The European Union as a System of Differentiated Integration, Politicization and Differentiation,” *J. Eur. Pub. Pol.*, 22 (2015) 764; J. Jamet, “The Optimal Assignment of Prerogatives to Different Levels of Government in the EU,” *J. Common Mrkt. Stud.*, 49 (2011) 563.

because they opted out or because they are waiting to meet the conditions for joining the monetary union, is becoming more pronounced. Following the recent crises and the establishment of the Banking Union, the risk of a two-speed Europe has been particularly strong. There is even a risk that differentiation could evolve into fragmentation, as already witnessed in the discontent that animated the movement causing the UK to leave the Union. With the Brexit vote, fragmentation is now becoming a tangible risk that the EU has to tackle. Aside from any speculation over the possible future of the UK and the EU, the unified theory of social relations applied to EU financial regulators helps to identify an increasingly sharp division within groups of individuals entrusted with decision-making powers. Such a division implies that outsiders, i.e. countries not participating in a given project, harden their positions, while insiders, i.e. countries partaking in the new project, expect the former to join.⁸⁴ Beyond this, a socio-psychological standpoint indicates that the differentiation between outsiders and insiders may induce insiders to concentrate around a new shared interest that defines a new bond, or even a new common identity. In turn, this is further legitimized by the existence of outsiders who do not share in such a bond and whose common interest may harden as well towards a new shared objective.⁸⁵ The unfolding events concerning Brexit offer a powerful illustration of such a group dynamic.

A progressive crystallization of different positions around new or reinforced shared objectives has emerged from the declarations of European politicians during the talks that preceded the formal commencement of EU–UK negotiations. In particular, reports over the alleged stance of EU negotiators to use French, rather than English, as the official language of the negotiation process regarding the EU–UK relationships signals, beyond a possible pre-negotiation tactic, the search for a new group identity for EU Member States.⁸⁶ Likewise, the polarization of a group around a hardened common interest, towards which individual interests converge and are superseded, is apparent if one considers that negotiations will be conducted between the EU – a block of twenty-seven countries that is expected to act, by virtue of the legal obligations established in the Treaties, as a unitary entity protecting its existence – and the UK, a single sovereign state. This polarization is exemplified by the fact

⁸⁴ T. Chopin and C. Lequesne, “Differentiation as a Double-Edged Sword: Member States’ Practices and Brexit,” *Int’l Aff.*, 92 (2016) 531.

⁸⁵ Fiske notes that CS, in its extreme form, may imply “a contrast between the subjective ‘we’ and the objectified ‘they.’” Fiske, “Four Forms of Sociality,” 699.

⁸⁶ F. Guarascio, “Parlez-vous Brexit? EU Negotiator Wants Brits to Talk French,” *Reuters*, Oct 21, 2016.

that the first meetings of the European Council after Brexit – on June 29, 2016 (Brussels) and on September 16, 2016 (Bratislava) – were held informally, without the participation of the UK. They led to what has been labeled the Bratislava Declaration and Roadmap, that deals with the new institutional setting of the Union.⁸⁷ In particular, the Bratislava Declaration opened with a reaffirmation of the common interest, enshrined in the following statement:

Although *one country* has decided to leave, the EU remains indispensable for *the rest of us*. In the aftermath of the *wars and deep divisions* on our continent, the EU secured peace, democracy and enabled our countries to prosper. ... We are determined to make a success of the EU with 27 Member States, building on this *joint history*.⁸⁸

This statement appears to be more than a mere rhetorical device. First, the locution “one country” contraposed to “the rest of us” (as well as “our continent”) constructs a hiatus between a generically denominated outsider – i.e. the runaway country – and the subjective insiders.⁸⁹ Second, reference to “wars and deep divisions” (as well as to the “joint history”) echoes the Schuman declaration of 1950, which represents the first time the idea of a common interest was presented as a necessary premise for an enduring peace.⁹⁰ The separation between those members of the club partaking a common interests is manifested also in the subsequent Brexit talks, which have been separated from the agenda concerning “the future of the EU with twenty-seven member countries.”⁹¹

While the result of referendum held in the UK enlarged a fracture in the common interest, the phenomenon has deeper roots. Already during the run-up to the referendum, and as a condition for the UK to remain in the EU, the then-UK Prime Minister negotiated concessions and exceptions that were gathered in an agreement reached during the European Council (February, 18 and 19, 2016): this already signaled a misalignment of interests between the EU, the monetary union and ultimately the UK.⁹² Such an agreement reflects a separation that goes beyond the process of differential integration that allowed the UK to opt

⁸⁷ European Council, Bratislava Declaration, 1 (informal meeting, Sept. 16, 2016).

⁸⁸ Emphasis added. *Ibid.* at 1.

⁸⁹ On this aspect see *supra* n. 85.

⁹⁰ See R. Schuman, “A United States of Europe,” speech recorded in *Selection of Texts Concerning Institutional Matters of The Community From 1950 to 1982*, 47, European Parliament Committee on Institutional Affairs (1982).

⁹¹ See, e.g., President Donald Tusk, Remarks of The President of The European Parliament Following The European Council Meeting (Oct. 20–21, 2016).

⁹² European Council, *Conclusions*, Brussels (Feb. 19, 2016).

out from the single currency; it entailed a general and more profound opt-out for the UK on an ever-closer Union.⁹³ In this respect, it was expressly stated that reference to an ever-closer Union contained in the Treaties does not constitute a legal basis for expanding the scope, the competencies, or the powers of the EU and of its institutions.⁹⁴

Among the various items of the agreement, of particular interest (for the purposes of this analysis) are those defining the perimeters of the Banking Union and the relationships between eurozone and non-eurozone countries. The agreement advocated for a stronger protection for eurozone Member States and, hence, a sharper separation between the eurozone and non-eurozone countries. From a legal perspective, the agreement, albeit recognizing the necessity to deepen the monetary union in support of a robust Banking Union, reaffirmed two already established principles of EU law. First, it reinstated the principle of non-discrimination towards non-eurozone Member States, thus indicating that regulation and supervision of banking institutions in the EU should have followed two separate paths. Second, the agreement reaffirmed a principle already encountered in the *OLAF* decision and according to which the EU institutions involved in the governance of the eurozone should be subjected to EU law at large, and their decisions should be taken with the participation of non-eurozone Member States when affected.⁹⁵ Given that the agreement would have had a limited impact on the existing EU legal framework, the requests therein advanced may signal a departure from the idea of common interest, that is, a fracture in the group norm.

Against this backdrop, different scenarios may develop. Members may be separated under the pressure of a centrifugal force that dissolves the group norm and, thus, the group. The widening gap between eurozone and non-eurozone countries may result in a weakened equivalence relationship in the EU architectural framework for financial regulation. Alternatively, a centripetal force could lead to a convergence around a new or a reinforced group norm. Even if damage to the Union is one of the most probable consequences of Brexit, a socio-psychological perspective indicates that the self-preservation of the group may

⁹³ The agreement commences the section titled “Sovereignty” with the following statement: “It is recognised that the United Kingdom ... is not committed to further political integration into the European Union. The substance of this will be incorporated into the Treaties at the time of their next revision ... so as to make it clear that the references to ever closer union do not apply to the United Kingdom.” *Ibid.* at Annex 1, p. 16.

⁹⁴ *Ibid.*

⁹⁵ C-11/00 *Commission v. European Central Bank*, 1999/726, [1991] ECR (EC).

tighten the group of the “remaining.” This dynamic can be observed in the decision, following a large bid, to relocate the EBA from London to Paris. It can also be seen in the Commission stance (backed by several Member States and by the ECB) to deploy a new system to regulate non-EU clearing houses that currently handle a large portion of euro-denominated transactions.⁹⁶ In fact, the completion of the Brexit process calls into question the applicability of the protections against discrimination based on location and currency for the UK financial services industry.

In general terms, the theory of social relations helps explaining why, after Brexit, the polarization around two group norms – one for eurozone and one for non-eurozone Member States – may ultimately fade. Under the Maastricht Treaty, any country joining the EU is obliged to adopt the single currency, provided that they fulfill the convergence criteria, which include price stability, soundness and sustainability of public finances, durability of convergence, and exchange rate stability.⁹⁷ Denmark and the UK negotiated an opt-out from this obligation. Hence, after Brexit becomes effective, only Denmark is formally exempted from joining the eurozone. Nonetheless, rather than clustering around the choice of the UK, and thus widening the gap between eurozone and non-eurozone countries, Denmark is currently debating joining the Banking Union, with the intent of becoming a stronger financial center. The future is obviously uncertain, and any forecast tends toward speculation; however, the dominant form of sociality characterizing the behavioral patterns of the decision-making bodies will directly affect the ultimate outcome. In this respect, the expanding process of financial integration presupposes that members are partaking in an “enhanced group norm.” According to this norm the common interest is achieved by pairing regulatory and supervisory convergence with monetary integration. In other words, the shock sent by Brexit tilted the equilibrium between the two coexisting sub-groups that had different understandings of what constituted the common interest. This triggered a centripetal force within institutions governed by Communal Sharing or Equality Matching forms of sociality.

⁹⁶ See European Commission, “Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories” (Brussels, 4 May 2017 COM(2017)208).

⁹⁷ Albeit the Global Financial Crisis slowed the expansion of the eurozone, Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania and Sweden will join the eurozone eventually. For a review of the different levels economic integration and the legal framework of these countries, see European Central Bank, *Convergence Report 2014* (Frankfurt, Jun. 4, 2014).

V. CONCLUSION

Studies in the field of social psychology and anthropology highlight four fundamental relational models, or forms of sociality. Such relational structures characterize relationships within every group and call for specific decision-making processes within such groups: the way they think is influenced by the prominence given to shared objectives that can be more or less distinct from individual members' interests.

In the general context of financial regulation, and with respect to EU institutions specifically, this is evidenced by the fact that institutions perform different functions (including advancing and defining the contents of the common interests) and display specific relational – and decision-making – models. Capturing this mosaic opens up the complexity of the multi-layer governance model of the EU. It also clarifies the dynamics at play and therefore provides a deeper understanding of behavior within the multi-layer governance model. This new map helps elucidate why, after Brexit, the eurozone Member State vs. non-eurozone Member State dichotomy may become less pronounced. When institutions must respond and adapt to different political and economic contingencies, the dominant form of sociality characterizing the behavioral patterns of their decision-making bodies has direct consequences on the ultimate outcome. Brexit has revealed how much the understanding of what constitutes the common interest may differ – and triggered centripetal tensions within financial regulators governed by Communal Sharing or Equality Matching forms of sociality.