

## **Lobbying across venues in EU financial regulation<sup>1</sup>**

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### Abstract

The literature on lobbying as a general rule does not look at agency rulemaking, while the regulation literature on agencies does not delve into the effect of institutional choices for advocates. However, there is rich empirical evidence that lobbyists routinely engage with agencies and consider this venue a crucial target of advocacy efforts. This paper aims to shed light on this phenomenon by looking at the case of EU financial regulation, an ideal one given the breadth of policy powers by agencies recently established in this field. The findings from an original database of more than 4,000 consultation responses filed from around 1,100 unique actors show that the amount of resources spent on lobbying only weakly affects the number of submissions, while the nature of stakeholder comments is highly technical in nature, irrespective of advocate type.

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## 1. Introduction and motivation

The last 25 years have witnessed an impressive increase in the number of agencies, both at the European Union (EU) and at national level (OECD 2002), leading some scholars to describe the phenomenon as ‘agencification’ (Levi-Faur 2011). These agencies perform a variety of tasks, and rulemaking is chief among them: technical rules adopted by insulated bodies nowadays represent the lion share of legislative output. We already know a great deal about why these institutions are created, but not nearly as much about the process of rule adoption. While interest group scholars have long pointed to the importance for advocates of lobbying the bureaucracy and influencing rulemaking, the relationship between these venues and lobbying is not clear. Therefore, this article (and my underlying PhD research) seeks to answer the following research question: *how do agencies affect lobbying?*

Interest groups are thought to routinely engage in ‘venue shopping’ in the EU thanks to the peculiar institutional opportunity structure of this political system, but scholars usually consider only its three main institutions (European Commission (EC), European Parliament (EP) and Council of the European Union (Council)), thus leaving aside one crucial lobbying target for EU advocates, i.e. the agencies. In addition, none of the existing studies so far has been able to examine how the creation of new venues affects lobbying activities, which is a unique feature of my research design. More venues could result in more opportunities to exert influence, but they could also make success less likely due to the higher efforts needed to target more institutions. Alternatively, some venues could be ‘easier’ targets for advocates due to their inherent characteristics. Strategies could be diversified, whereby advocates might decide to forgo lobbying at the initial decision-making stage in order to focus on influencing agencies responsible for more ‘technical’ choices taken further down the policy cycle, or the opposite could happen.

Over the last decades, governments and parliaments in Western societies have increasingly delegated governance tasks to non-majoritarian institutions (of which agencies represent one category), initially because of privatisation in the fields of utilities and telecommunications (Thatcher and Stone Sweet 2002). Politicians delegate powers to independent regulatory agencies for a variety of reasons, e.g. to increase credibility, to meet the expertise requirements imposed by modern decision-making, and to resolve time-inconsistency problems (Kydlund and Prescott 1977, Thatcher 2002). In contemporary technologically complex societies, agencies offer expert knowledge, professional management and depoliticised decisions (Majone 1997). In the EU, the agencification phenomenon has been

particularly marked due its nature as a ‘regulatory state’ and to the increasing delegation of regulatory power to the EU over time (Majone 1996). Aside from a small minority, most of the (over 40) EU agencies have been established since the early 1990s, with the overarching aim of supporting the implementation of EU policies.

In spite of rightly acknowledging this major development in EU governance, most scholars initially underlined the weak powers of EU agencies, an observation backed by the fact that the oldest among these bodies (CEDEPOF and EUROFOUND) only had information-sharing tasks (Yataganas 2001, Geraldin et al 2005). EU agencies were chiefly regarded as facilitators of transnational regulatory networks or arenas for mutual learning and information exchange (Groenleer et al 2010, Egeberg et al 2014, Coen and Thatcher 2005). However, the picture is more mixed than it seems, as several EU agencies exercise considerable rulemaking powers. Not only are most agencies involved in some regulation by soft law, but a number of these are provided the power to participate in procedures leading to the adoption of binding legislative rules (Chiti 2013, Busuioc 2013). In the EU, primary legislation establishes the overarching principles on how to regulate a policy issue, while secondary (or delegated) legislation is used to fill in the details and ensure uniform conditions of implementation. However, this distinction is more formal than substantial, as there is a fine dividing line between the two and ‘turf wars’ are routinely fought between EU institutions on where to draw the boundaries (Moloney 2014). Whereas primary legislative rules are proposed by the EC and adopted by the co-legislator (EP and Council), some agencies are involved in the adoption of delegated legislation. Neglected by most political scientists, these pieces of secondary law are of rising significance (Moloney 2014, Busuioc 2013). Empirical evidence shows for example that delegated and implementing acts (art. 290 and 291 TFEU respectively) represented the bulk of EU legislation during the most recent parliamentary term (2009-2014) (Toshkov n.d.).

Among the EU agencies provided with considerable decision-making powers are the Office for Harmonisation in the Internal Market (OHIM), the Community Plant Variety Office (CPVO), and the European Chemicals Agency (ECHA). The most accomplished case, however, is that of the newly established European Supervisory Authorities (ESAs) part of the European System of Financial Supervision (ESFS), namely the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA). Created in late 2010 as a response to the global financial crisis, the three ESAs have the task to develop draft regulatory technical standards (RTS) and implementing technical standards (ITS), both forms of secondary legislation in EU financial services policy.

RTS and ITS are both instances of “Level 2” rules. Within the Lamfalussy four-level structure established in the early 2000s in the framework of the Financial Services Action Plan (FSAP)<sup>3</sup>, “Level 1” rules are primary legislative acts, while “Level 2” rules are delegated legislation. Traditionally, delegated legislation is adopted by the EC, subject to controls by the EP and the Council (typically veto powers, or sunset clauses imposing an end to the delegation) (Moloney 2014). During the Financial Services Action Plan era, Level 2 rules were adopted by the EC itself, which was (and still is) also in charge of proposing primary (Level 1) legislation. The institutional picture has now changed: the three authorities of the ESFS are responsible for drafting all Level 2 rules. This has been a considerable shift of rulemaking power away from the Commission, and therefore interesting to analyse. The Meroni legal doctrine, which limits the delegation of discretionary powers to EU agencies, requires a formal final adoption of these rules by the EC. However, evidence shows that the EC swiftly adopts agencies’ drafts in virtually all cases, and the ESAs are hence rightly seen as holding the “power of the pen” (Moloney 2014).

These institutional rules put the three authorities in a very similar position to US federal agencies, which play a key role in the rulemaking process and are required by the 1946 Administrative Procedure Act (APA) to hold extensive stakeholder consultations before adopting new binding rules (Webb Yackee 2005). Empirical evidence from the United States confirms the importance for interest groups of lobbying the bureaucracy (Hula 1999, Boehmke et al 2013). Administrative rulemaking is rising in importance compared to Congress bills, and agency rules now represent an impressive 90% of federal binding legislation (Nelson and Webb Yackee 2012). Several scholars have noticed this tendency and analysed interest group involvement in agency rulemaking, consistently reporting officials’ responsiveness to lobbyists’ demands, particularly those advanced by business interests (Webb Yackee 2005, Webb Yackee and Webb Yackee 2006, Naughton et al 2009, Haeder and Webb Yackee 2015). Others have investigated the strategic choice faced by advocates when deciding whether to lobby the legislative, the agencies, or both (McKay 2011, Holyoke et al 2012). These studies confirm that lobbying the agencies is deemed crucial by most interest groups hoping to influence policymaking in Washington. The increasing prominence of delegated, secondary legislation is hence by no means an EU-specific phenomenon.

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<sup>3</sup> The Financial Services Action Plan, launched in 1999, was an effort by the European Union to achieve a single market in financial services. It comprised a series of legislative initiatives that aimed to liberalise and re-regulate the sector at the EU level.

EU legislative procedures routinely involve consultation with stakeholders before a proposal is issued by the EC, and the ‘Better Regulation’ agenda has made this a formal requirement for all legislative acts since the early 2000s. The same, online and transparent, consultation requirements are applied to the three agencies before producing the draft Level 2 (delegated) rules. The extensive powers of these authorities thus create a unique chance to directly investigate, and compare, consultation procedures at the EC and agency level. Administrative rules have an untapped potential to unveil mechanisms and effects of interest group activities. Stakeholders routinely use consultation procedures to advance their desiderata to the EC, hoping to influence the policymaking process before the final legislative proposal is forwarded to the EP and the Council, and we expect them to behave similarly in the case of agency consultations. Interest group scholars have looked widely at online consultations, both in studies of lobbying mobilisation and in studies of lobbying success (Bunea 2013, Klüver 2013, Chalmers 2015, Hermansson 2016), but an explicit emphasis on agencies is still rare in the literature.

There are several reasons why the focus on my research is on financial regulation, and not on other (or indeed more) policy areas. The first, pragmatic motivation is linked to the strong rulemaking powers of EU agencies in this field, as previously underlined. While a comparison of lobbying across venues in other policy areas is by no means impossible, agencies in charge of financial regulation are expected to be an important lobbying target, since stakeholders routinely try to influence them to ensure the details of legislation reflect their needs. Their recent creation in 2010 allows to compare lobbying across periods, testing whether their establishment has made a difference for advocates or not. Second, the recent financial crisis erupted in 2008 has demonstrated the devastating powers of poorly regulated financial markets. In addition to being researchers, we are simultaneously taxpayers liable to suffer from considerable bank bailouts, consumers purchasing financial products and citizens concerned about the stability of the financial system. Therefore, we have particular reasons to investigate lobbying in this area, and test whether financial industry interests are systematically advantaged in achieving their preferences. Third, the literature on lobbying in financial regulation has focused so far predominantly on its “input” side, i.e. mobilisation efforts. Several studies have shown participation in this area is heavily biased towards industry interests, advancing the “financial capital unity” hypothesis (Pagliari and Young 2014, Pagliari and Young 2015). Patterns of participation in financial regulation consultations are characterised by a particularly poor involvement of civil society (Chalmers 2015). The complexity and technicality of this area of regulation seems to run counter to the democratic

interest of broad societal participation, and indeed civil society advocacy efforts have emerged only in recent years, notably with the establishment of US-based Better Markets and EU-based Finance Watch. However, the jury is still out on the success of these initiatives and the ability of such NGOs to influence public policy.

The few studies on lobbying outcomes in finance have looked primarily at global financial regulation, and at how the Basel Committee of Banking Supervision is being influenced by transnational advocacy efforts (Young 2012, Young 2014). On the other hand, scholarly research on financial regulation as a policy area has adopted mostly an intergovernmental approach, and explained EU financial services policy as the result of Member State preferences (Quaglia 2010, Quaglia 2011, Quaglia 2012, Howarth and Quaglia 2013). The advocacy coalition framework has also been used as a theoretical framework, but without looking at interest groups' possible involvement in these coalitions, hence keeping the focus on Member State positions (Quaglia 2010). My research aims *inter alia* to analyse lobbying outcomes in EU financial regulation, thereby filling this gap in the literature.

Empirically, the number of agencies is growing enormously, together with the quantity of rules adopted by these non-majoritarian institutions. Developments in EU governance hence make this study particularly timely and worthwhile, if we want to understand what the effects of these institutional developments are. Theoretically, my research aims to contribute to three strands in the literature. First, it addresses regulation scholars who are interested in agencification, as it will increase their understanding of how these newly created independent bodies interact with the stakeholders they are meant to regulate. The involvement of interest groups might for instance have an impact on the accountability of regulatory agencies, or the quality of policy outcomes. Second, I aim to contribute to the interest groups literature, in that I hope to achieve a better understanding of how lobbying activities and outcomes are linked to venues. My research question directly addresses 'demand' side factors, and scholars working on these have so far considered only the EC, the EP and the Council. Adding the agencies to the equation will improve our collective understanding of advocacy efforts in the EU multi-venue political system. Third, I speak to the literature on financial regulation: my argument is that policy outcomes do not only depend on intergovernmental preferences in this area, but that analysing the stances of powerful stakeholders is necessary to gain a fuller picture of this policy field.

## 2. Literature review

While my PhD project overall aims to investigate both lobbying ‘inputs’ (mobilisation) and ‘outputs’ (success), this early stage paper is mostly limited to an analysis of lobbying participation patterns across venues (EC versus agency). In this section, I take a closer look at the literature on interest group mobilisation. Three strands of research are particularly relevant here. The first one, developed by European Studies scholars, looks at overall participation in European Union consultations, which are now routinely held before legislative proposals are issued. The second strand, firmly grounded in the IPE literature, is more closely related to financial regulation and aims to assess the patterns of mobilisation of the financial industry in this field. Finally, the third strand analyses rulemaking processes by US regulatory agencies and therein involvement by interest groups.

Online consultations are of course only one of several instruments for policymakers to listen to the voices of organised interests, and for the latter to express their preferences. Other lobbying strategies involve traditional ‘inside’ tactics such as face-to-face meetings with politicians and officials or sitting on advisory committees and stakeholder fora as well as ‘outside’ tactics like organising public campaigns or publishing press releases (Broscheid and Coen 2003). Hence, submitting a response to an online consultation is but one of the various tools that advocates can choose from, and the group of actors participating in consultations might not represent a representative sample of organised interests. However, one of the advantages of responding to a consultation is that this activity has relatively low costs (especially if compared to civic engagement campaigns) and does not require prior invitation (aka a strong ‘insider’ status) as online consultations are open to anybody wishing to participate, citizens included (Rasmussen and Carroll 2014).

In their study of interest group participation in EU consultations, Rasmussen and Carroll analyse mobilisation patterns across a sample of over 200 consultations held over a decade (2001-2010) in various policy areas. First, they compare participation patterns to the population of active EU interest groups as reflected in the Transparency Register, and find an overall higher degree of business bias in the consultations than in the overall population of registered advocates. When looking at the number and diversity of actors submitting a consultation response, they find a link between the degree of bias in specific consultations and the characteristics of policies, notably a broader and more diverse set of actors mobilising on expenditure policies when compared to regulatory policies (Rasmussen and Carroll 2014). In a similar paper and moving from explicit normative concerns about whether interest groups

can positively contribute to representative democracy, the same scholars argue that advocates potentially provide a ‘transmission belt’ mechanism for public opinion. While they do not in fact investigate interest group preferences as compared to citizen preferences, they back their theoretical argument by the empirical finding that salient policy areas attract higher mobilisation, as measured via participation in a sample of EC consultations (Rasmussen, Carroll and Lowery 2014). Another recent study specifically analyses participation in financial regulation consultations, looking at the European Securities and Markets Authority (ESMA) and its predecessor Committee of European Securities Regulators (CESR). The author’s argument, tested with a database of online consultations held over a decade (2002-2013) on which around 2,400 unique actors were active, is that mobilisation patterns (number and diversity) are affected by both institutional opportunity – defined as openness and accessibility of regulatory policy-making – and by demonstration effects – defined as the combination of exogenous shocks (crises) and issue salience in the media. While the study presents a statistical model to assess the independent effect of these two factors on the two independent variables (number of submissions and diversity, measured with the Herfindahl-Hirschmann index), it does not delve into the overall bias inherent in these consultations, i.e. the type of actors filing a comment (Chalmers 2015).

A second series of studies has investigated the assumption that interest group pluralism is particularly limited in the financial sector realm as opposed to other policy areas. Scholars have indeed found causes for concern in the very limited mobilisation of voices outside the business community on financial regulation, thus lending support to the ‘unified dominance model’ of financial regulatory politics (Pagliari and Young 2015). By looking at an extensive database covering 250 consultations at the European, US and global level, authors confirm the dominance of the private industry and the underwhelming representation of civil society among respondents. Moreover, the same authors analyse an impressive range of consultations at both the domestic (US, UK, Germany) and international (EU, Basel Committee, IOSCO) levels and show that business actors outside the finance sector (hence nor directly targeted by the proposed regulation) often tie their interests with financial firms and express closely aligned preferences. While a plurality of private sector groups inside and outside the financial industry mobilises to influence regulation, this does not result in a plurality of views expressed but rather in cohesive business coalitions, hence giving support to the ‘finance capital unity’ hypothesis (Pagliari and Young 2014, Young and Pagliari 2015).



Meanwhile, scholars in the United States have long emphasised how administrative venues are considered crucial lobbying targets by interest groups. Several studies by Webb Yackee and co-authors have consistently demonstrated that advocates' comments influence rulemaking by US federal agencies (Webb Yackee 2005). The finding that agencies are particularly targeted by - and responsive to - private sector interests stems from the analysis of a large sample of (mostly low salience) rules in the areas of labour and transport regulation, which should be generalizable to all agency rules (Webb Yackee and Webb Yackee 2006). Following a process of open consultations (called in the US context 'notice and comment'), agencies consistently change the content of rules in favour of the side which dominates the consultations, while there is very limited evidence of 'countervailing lobbying' and strategic responses (McKay and Webb Yackee 2007).

To summarise, actors mobilising on online consultations mostly represent industry interests, especially in the financial regulation field, and this involvement has been proven to be particularly effective for business interest groups in the case of US agency rulemaking. Additionally, advocates tend to expand their lobbying efforts into multiple branches of government – the legislative *and* the administrative – when highly conflictual issues are involved: McKay studies the conditions under which interest groups lobby the bureaucracy rather than or in addition to the legislature in the US and finds that agency targeting increases when lobbyists represent business interests (McKay 2011). No comparable study seems to exist as to under which conditions interest groups in the EU lobby agencies as compared to the legislative institutions (EC, EP and Council), with only one similar article seeking to establish how domestic advocates from a sample of Member States (France, Belgium, the Netherlands and Germany) derive their 'multilevel venue shopping' strategies, i.e. choose to target national and/or European policymakers (Beyers and Kerremans 2011). However, while both the European Commission and Parliament figure among the possible lobbying venues, these authors do not consider EU agencies as a potential target for advocates.

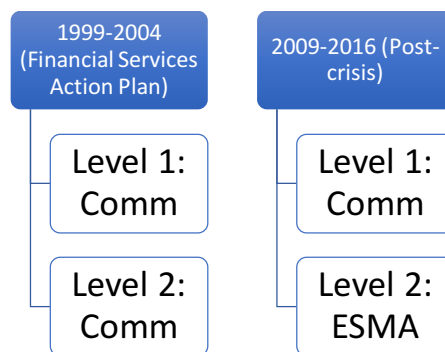
### 3. Research design

My research adopts a mixed methods strategy. The main reason behind this choice is my wish to test my hypotheses in a large-N fashion and then, once these are established, investigate in depth the mechanisms behind the significant correlations and the reasons guiding advocates' strategic lobbying choices. In the quantitative section I analyse 20 policies in EU financial services regulation, each of them both at Level 1 and at Level 2 of legislation (primary and secondary rules). The qualitative section will aim at unveiling the pathways to influence and testing the relevant assumptions built in my model, mainly through policymakers' and interest group representatives' interviews.

EU financial regulation during the last 25 years can be roughly divided in three periods: 1999-2004, 2005-2009, and 2009-today (Moloney 2014). The Financial Services Action Plan era (1999-2004) was a period of intense legislative activity, aimed at liberalising financial markets and creating a single market in financial services. Almost forty measures (Directives, Regulations and Commission Recommendations) were adopted during this period. The period that followed (2005-2009) was marked by the publication of the "White Paper in Financial Services 2005-2010", which inaugurated a period of legislative pause. In the Commission's intentions, the key priorities for that period would have been a focus on enforcement and implementation, ex post evaluation, and supervisory convergence. The effort was part of the 'Better Regulation' agenda, launching the regular use of online consultations and rigorous impact assessments. Thereafter came the financial crisis, which was followed by a period of intense legislative activity. The regulatory backlash which ensued in 2009-2014 (with some of the secondary measures still in the process of being adopted) aimed at regulating financial markets in a more thorough manner, and at bringing under legislators' control some previously unregulated entities.

I focus on financial markets rules, which are under the remit of ESMA, and hence leave both EBA and EIOPA outside of the analysis. I have made this choice since banking rules, the competence of EBA, are set globally by the Basel Committee and only implemented at EU level with minor changes. They hence do not represent an entirely EU-specific enterprise and the existing literature, as previously recalled, has appropriately analysed transnational lobbying on the Basel Committee on Banking Supervision. Excluding insurance-related rules (the remit of EIOPA) is then required for consistency purposes. This results in a comparison between the Commission and ESMA as the main focus of my research.

The time scope of my analysis is 1999-2016. Since the three EFSF authorities were established in late 2010, this choice makes it possible to compare lobbying activities before and after their creation. Since the 2005-2009 period was one of legislative pause, this results in a comparison of the FSAP period (1999-2004) with the post-crisis period (2009-2016). This setting allows for a double comparison, across venues (Commission and ESMA) and across levels of legislation (Level 1 vs Level 2). The following figure summarises the responsibilities for drafting each level of legislation in the two periods under analysis.



I plan to analyse all financial services rules adopted in 2009-2016: since consultations have been routinely carried out on both Level 1 and Level 2, there are abundant sources for me to carry out this analysis. However, online consultations were not systematic before the ‘Better Regulation’ agenda was implemented in the early 2000s. During the FSAP period, a range of consultation methods was used by the EC, including meetings with forum groups or national regulators, hearings with selected industry representatives, consultations with Member State experts in Council working groups. This means that for this period I can unfortunately only analyse five policies, for which the Commission organised a public consultation.

Below is a table with the list of policy issues together with the related consultation submissions. Since consultation responses for older legislative acts – those adopted during the FSAP era – are not available on the Commission website anymore, I have contacted DG FISMA officials to receive them. The database comprises so far a total of over 4,000 interest groups consultation submissions across 17 different consultations (in several instances more than one consultation is carried out for every policy). The numbers below are provisional, given that some Level 2 consultations are still being carried out by ESMA (but will be finalised shortly) and that I am waiting for the Commission to supply the consultation documents for FSAP Level 1 acts.

Table 1. Policies under analysis

	Level 1 submissions	Level 2 submissions
1. <i>Financial Conglomerates (Supervision) (2002)</i>	Waiting for documents	NA
2. <i>Distance Marketing of Financial Services (2002)</i>	Waiting for documents	NA
3. <i>Savings Directive (2003)</i>	Waiting for documents	NA
4. <i>MIFID I (Markets in Financial Instruments) (2004)</i>	Waiting for documents	442
5. <i>Transparency I (2004)</i>	Waiting for documents	187
6. AIFMD (Alternative Investment Fund Managers) (2011)	96	231
7. EMIR (European Market Infrastructure) (2012)	295	488
8. CRAs (Credit Rating Agencies) (2009-13)	167	145
9. Short Selling/CDS (Credit Default Swaps) (2012)	109	74
10. Transparency II (2013)	20	NA
11. EuVECA/EuSEF (European Venture Capital and Social Entrepreneurship Funds) (2013)	112	15
12. MIFID II/MIFIR (Market in Financial Instruments) (2014)	328	612
13. MAD/MAR (Market Abuse) (2014)	89	169
14. CSD Reg (Central Securities Depositories) (2014)	101	17
15. PRIIPs (Retail Investor Information) (2014)	137	150
16. UCITS V (Units in Collective Investment Funds) (2014)	93	40
17. ELTIFs (European Long Term Investment Funds) (2015)	93	21
18. Shadow Banking (2015)	126	69
19. Benchmarks (2016)	71	115
Total	<b>1837</b>	<b>2932</b>

The quantitative analysis of these consultations has two main components, the overview of participation patterns and an analysis of lobbying success, grounded in the application of a scaling algorithm to retrieve actors' preferences from their submissions. This paper presents results on the first of these pillars, while the main steps for future research on lobbying outcomes are laid out in the concluding section. In order to establish the tendencies in consultation participation, I categorized and matched all consultation responses to the advocates and collected actor-level variables from the EU Transparency Register, as already pre-compiled on the website LobbyFacts.EU. At a second stage, I started the automated analysis of these texts with R's package *quanteda*, developed by Ken Benoit and colleagues, notably focusing on text readability, to gain a first picture of the content and technicality of advocates submissions.

#### 4. Hypotheses on lobbying mobilisation

In this section, I present some first tentative hypotheses on how I expect venues to affect lobbying, focusing primarily on participation. While dozens of studies have pointed to several variables affecting several aspects of lobbying - among which advocate characteristics and contextual factors have been subject to particularly thorough investigation - my research focuses on institutional variables. Differently from most of the cited studies, which consider only the EC, the EP and the Council, I am interested in the comparison between the EC and one authority, ESMA. This comparison is particularly promising since agencies are a relatively new phenomenon in EU governance and potentially represent an important lobbying target for advocates, but we know very little about how stakeholders approach them and with what effects. Under certain respects, the two institutions are similar in that they are both bureaucracies: while the Commission is an executive-type bureaucracy, ESMA is an agency-type bureaucracy. In spite of the resulting similarities, the two institutions are different in many aspects, starting from staff size (DG FISMA, the Directorate-General in charge of financial services, has alone 380 staff, while ESMA has less than 200) to formal and informal powers, independence and reputation.

A first observation is that they differ widely in their level of insulation: while the Commission enjoys (relatively) extensive media coverage both in EU specialised press and in national media (although to a lesser extent), what ESMA does rarely raises to public attention. Thus one might expect that interest groups that are devoting comparably less time to media monitoring would not be aware of the consultation opportunities at the agency level. An obvious consequence of this difference in terms of participation patterns would be the expectation that the number of interest groups targeting the agency is considerably lower than those targeting the Commission:

Hypothesis 1a. *The overall number of consultation submissions to ESMA is lower than the number of submissions to Commission consultations.*

If monitoring consultations opportunities at the agency level is indeed more resource-intensive than keeping track of the outreach efforts by the Commission, then alongside the number also the type of interest groups making use of this advocacy opportunity would be affected, and we would see a potential ‘crowding out’ effect of less resourceful advocates. Agency consultations would then present a response pattern which is particularly biased

towards business groups and other private sector interests, whereby we expect citizen and consumer groups to be relatively less represented in comparison with Commission consultations.

Hypothesis 1b: *Commission consultations should display a higher proportion of responses by civil society interests than ESMA consultations.*

Scholars have long investigated the effect of actor-related factors on lobbying. Among those, the type of interest group has been perhaps the most scrutinised. While some scholars find a certain advantage for business groups in lobbying success (Dür and De Bièvre 2007, Mahoney 2008, Bunea 2013, Binderkrantz and Rasmussen 2015) and others claim that a similar benefit exists for civil society groups (Bernhagen et al 2015, Dür et al 2015), another strand argues that no general pattern links interest group type and their success (Mahoney 2007, Baumgartner et al 2009). These studies use interest group type as a proxy for resource endowment, and share the assumption that the (potential) advantage of business interests is linked to their superior financial resources. While we do not look at lobbying outcomes in this paper, the hypothesis that resources are crucial to allow for effective lobbying mobilisation will be tested here:

Hypothesis 2: *Advocates with higher lobbying expenditures respond more frequently to online consultations than those with inferior financial resources.*

This hypothesis is grounded in the assumption that, while relatively less costly than other advocacy strategies, responding to a policymaker's consultation still requires some time (hence paid staff and resources), especially when technical rules are involved. Thus the amount of resources spent on lobbying should have an effect on the overall number of consultation submissions per advocate. Similarly and employing a more crude measure, we expect advocates representing business interests (firms and trade associations) to submit a higher number of responses in comparison with non-business interests, in line with the existing literature.

The third and last hypothesis is derived from what is perhaps still the most resilient of theoretical frameworks on lobbying, namely Bouwen's theory of resource dependence, which conceptualises lobbying as an exchange of access for information (Bouwen 2002, 2004). In his theory, advocates offer a range of informational goods (of either a political or technical nature)

to policymakers in exchange for being granted access to the policy process, and potentially influence. While influence is notoriously difficult to measure and demonstrate, one obvious metric of access to policymakers is the number of meetings held with public officials. Granting more information to policymakers by consistently responding to online consultations should be linked to a higher number of meetings, and the opposite should be the case too in a demand-supply model like Bouwen's. Consequently, an advocate's submissions should be correlated with her insider status measured as number of meetings held with Commission officials:

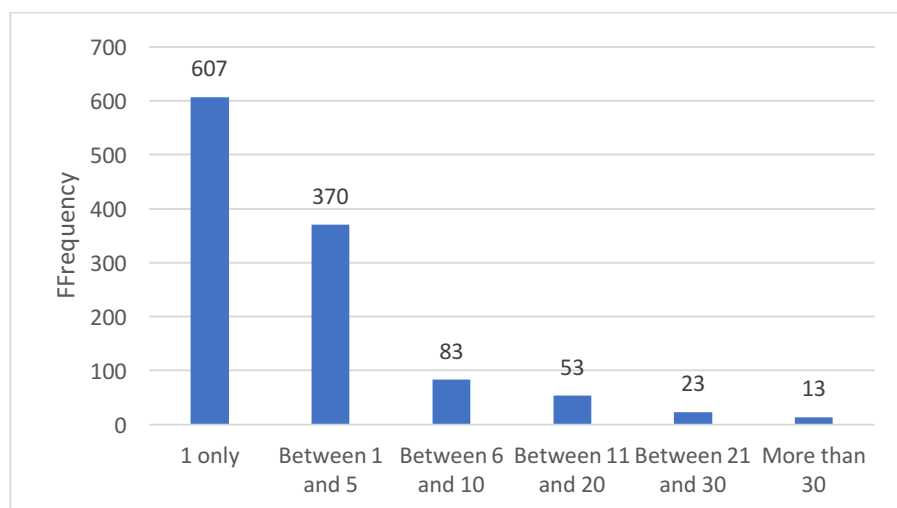
Hypothesis 3: *Advocates who meet EU officials more frequently respond more often to online consultations.*

## 5. Early stage findings

Since the construction of the database is still ongoing, in this section I will briefly provide some first findings in relation to the consultations held during the post-crisis period (2009-2016), which I have already gathered.

The database so far comprises a total of 4,140 consultation responses, across 70 consultations organised around 14 policies, and 1158 unique actors. While the overwhelming majority of interest groups submitted one single response and hence appears only once in the dataset (see figure below), almost 100 actors submitted more than 10 comments overall, thereby displaying a remarkably stable presence among stakeholder responses, suggesting they seem to regard this strategy as a valuable one. As for those that submitted more than 30 responses, they typically represent financial industry interests and are either trade associations (both at the national level – German and French – as well as European and global) or individual firms; particularly active in this respect are the French asset manager Amundi (a subsidiary of the banking groups Crédit Agricole and Société Générale), Deutsche Bank and the London Stock Exchange Group.

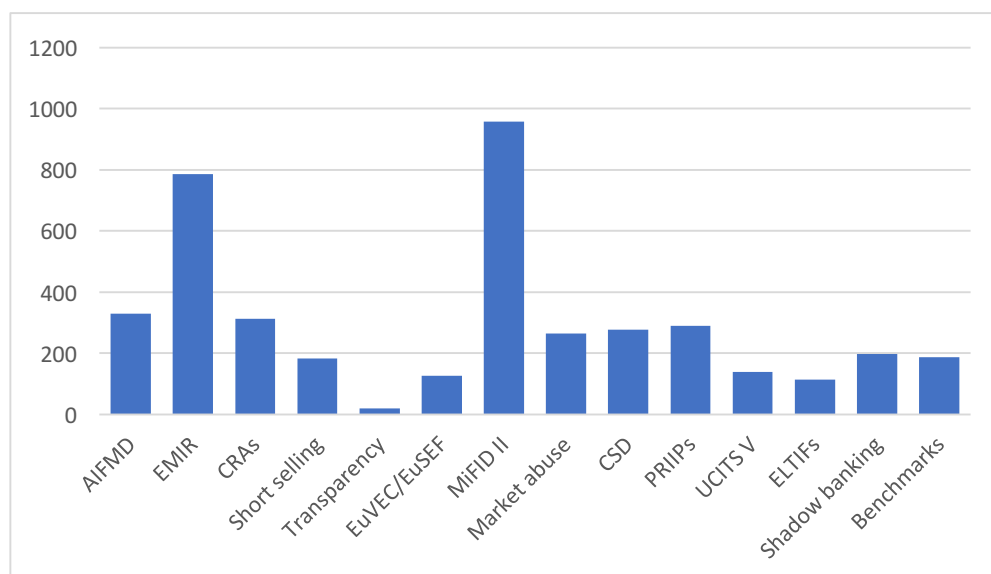
Figure 1. Number of consultation submissions per advocate



Source: European Commission, European Securities and Markets Authority

As the figure below shows, some policies are more salient than others and attracted a considerably higher number of comments from stakeholders. Notably, this is the case for MiFID II (the Markets in Financial Instruments Directive II, which represents the cornerstone reform of securities regulation in the EU) and for EMIR (European Market Infrastructure Regulation), which has a narrower focus as it regulates over-the-counter derivatives, a category of financial instruments that rose to public attention during the recent financial crisis.

Figure 2. Number of submissions according to policy

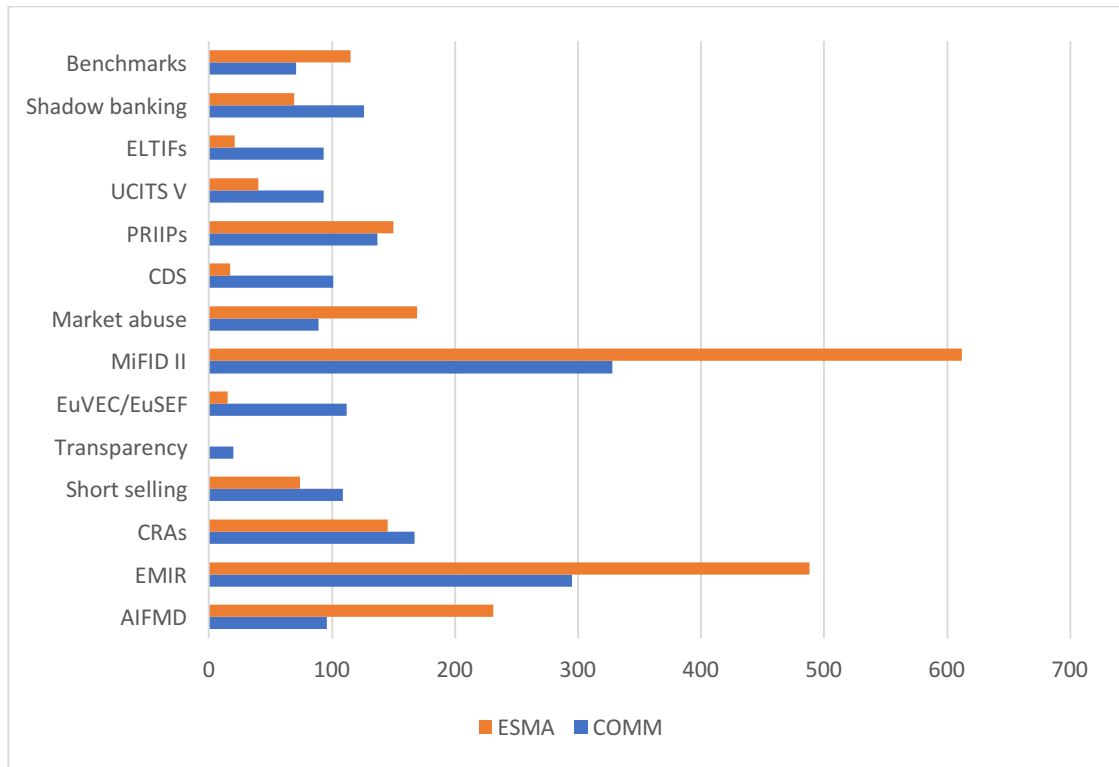


Source: European Commission, European Securities and Markets Authority



When we look at the difference across venues, another interesting observation is that the number of consultation responses to ESMA was in the period under analysis actually higher than the overall number of comments submitted to the Commission: while 2303 comments were filed to the agency, the corresponding EC responses were ‘only’ 1837. Thus, the evidence so far does not lend support to hypothesis 1a.

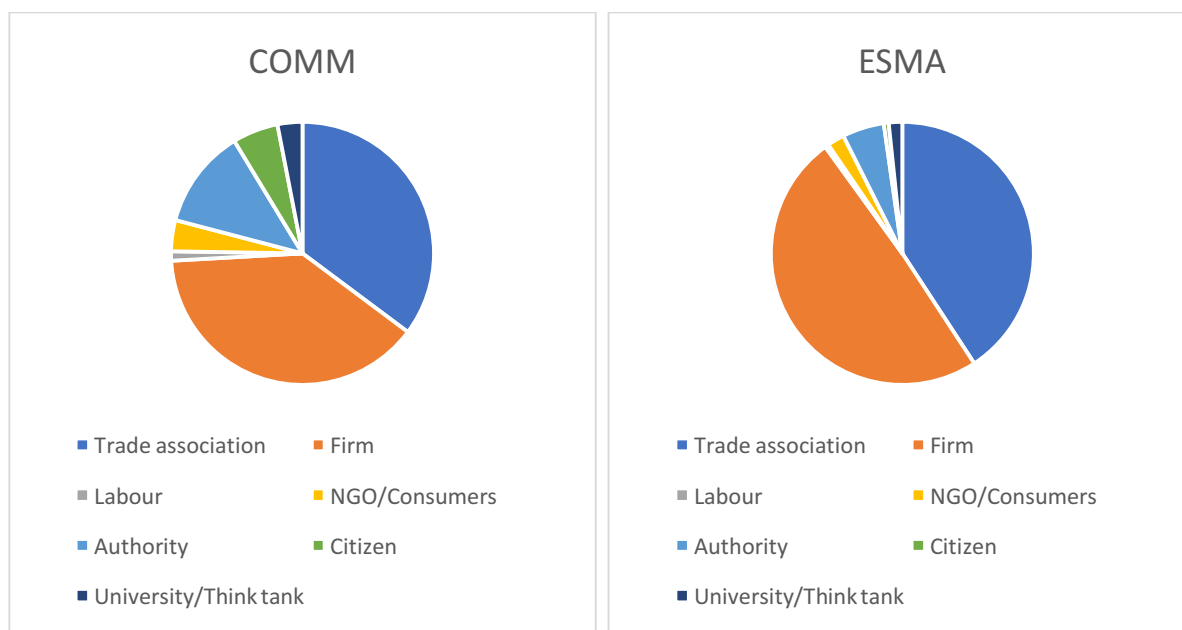
Figure 3. Comparison of Commission and ESMA



Source: European Commission, European Securities and Markets Authority

Remarkably, the relative distribution of responses across the two venues varies by policy, as shown in the figure above. For around half of the examined policies, the number of stakeholder submissions was higher to the Commission, whereas agency consultations attracted more responses in the case of benchmarks regulation, market abuse, PRIIPs, MiFID, EMIR and AIFMD (alternative investment fund managers). Disaggregation by policy thus reveals that the picture is less crystal-clear than it seems at a first glance, and that some policy-level factors might be at play which lead advocates’ choices as to which venue(s) to target, calling for further theoretical investigation.

Figure 4. Distribution of advocates by venue

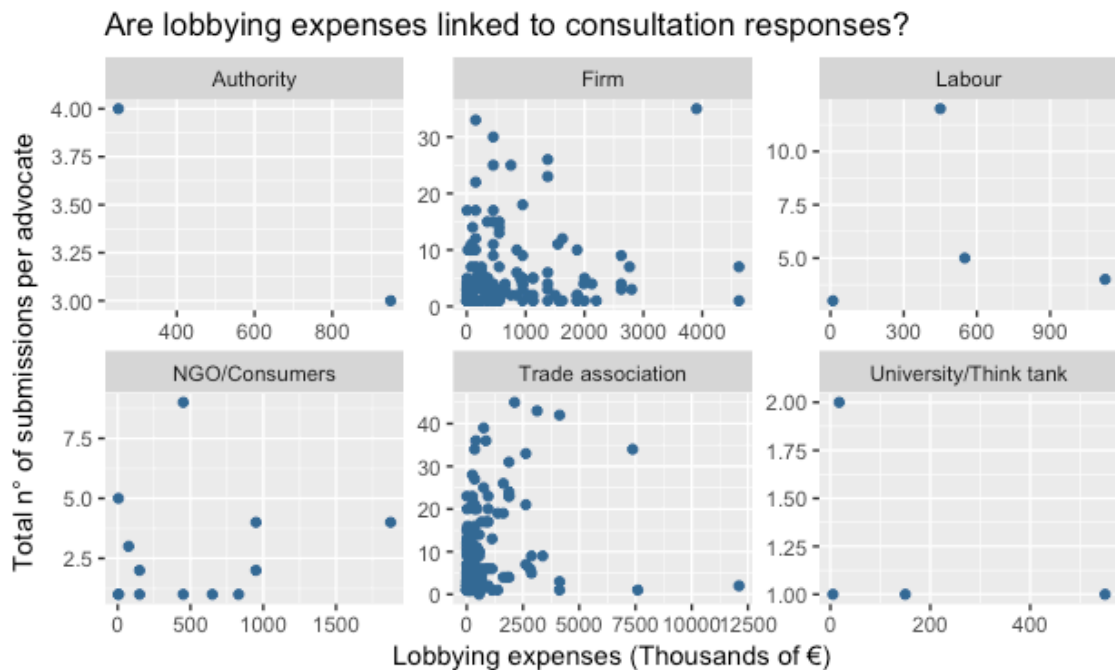


Source: European Commission, European Securities and Markets Authority

An explicit comparison of stakeholder participation patterns across venues is particularly insightful. While the first clear finding that business interests are the best represented category in consultations is well established in the literature, it is interesting to notice that the two advocate types of trade associations (in blue) and individual firms (in orange) together make up 90% of submissions at the agency level. On the other hand, the corresponding percentage in Commission consultations, in spite of also being high, is somewhat lower (70%), hence suggesting a potential ‘crowding out’ effect of citizen and consumer interests from agency consultations, in line with hypothesis 1b. Public authorities, although being relatively less represented in ESMA consultations than EC ones, seem to make consistent use of this lobbying opportunity, suggesting that public sector interests (which in the dataset typically take the form of central banks, ministries and financial sector regulators) find it worthwhile to engage in this kind of dialogue with the EU institutions. The reasons for this different pattern of responses remain unexplored, and enlightening the motivations behind venue choice would represent one of the primary objectives of the qualitative part of my research.

Before turning to the results of some simple OLS regressions, the following plot visualises the investigated relation between lobbying expenses and consultation participation, conditional on advocate type. As we can see, there is no clear positive correlation between the

two measures, except for a few of the categories, so we expect the results of the regression models to provide at best only weak support to hypothesis 2.



The results from the OLS regressions of the number of submissions from Table 2 indeed validate this intuition. While the coefficient on the ‘Lobbying expenses’ variable is positive, its significance is debatable at best, hence not lending much support to the claim that resources are a crucial factor influencing the choice of advocates to participate in online consultations. The evidence seems to be pointing rather in the direction of this being a ‘cheap’ lobbying strategy, or one that at best has very little relation with the amount of money directly spent on lobbying. Hypothesis 3 does not find empirical support in this data either, as shown by the negative sign of the coefficient on the ‘Meetings’ variable. The two advocacy strategies are hence not connected to each other in a positive manner, as it would follow from the lobbying exchange theory, but they would rather appear to be complementary, perhaps weighted out against each other by advocates when deciding how to allocate priorities in a lobbying budget. While the sequencing and strategy behind such a choice cannot be explored with this database, it would be worth investigating in structured interviews conducted with advocates.

Table 2. Ordinary least squares regression of number of submissions per advocate

	Total (1)	Total (2)	Total (3)	Total (4)	Total (5)	COMM (6)	ESMA (7)
Lobbying expenses	0.002*** (0.004)		0.002*** (0.004)	0.002*** (0.005)	0.002*** (0.005)	0.001*** (0.0002)	0.001*** (0.0003)
Business		1.832*** (0.408)	3.455** (1.751)	3.166* (1.819)	3.229* (1.837)	0.608 (0.658)	2.620** (1.309)
Meetings				-0.063* (0.037)	-0.064* (0.037)	-0.009 (0.013)	-0.055** (0.026)
EP passes				0.085 (0.164)	0.076 (0.168)	0.050 (0.060)	0.026 (0.120)
Brussels office					0.406 (1.190)	-0.080 (0.427)	0.486 (0.848)
Constant	5.564*** (0.495)	2.189*** (0.361)	2.350 (1.702)	2.775 (1.805)	2.644 (1.844)	1.538** (0.661)	1.106 (1.314)
Observations	364	1,144	364	364	362	362	362
R2	0.050	0.017	0.060	0.068	0.069	0.068	0.064
Adjusted R2	0.047	0.016	0.055	0.058	0.056	0.055	0.051
F Statistic	18.896*** (df=1; 362)	20.170*** (df=1; 1,142)	11.471*** (df=2; 361)	6.546*** (df=4; 359)	5.282*** (df=5; 356)	5.180*** (df=5; 356)	4.888*** (df=5; 356)

Note: \*p<0.1; \*\*p<0.05; \*\*\*p<0.01

The last - and not particularly surprising - finding from these models is the fact the business interests are considerably more likely to submit a higher number of responses, thus potentially reinforcing the bias created by their overrepresentation in the sample of active advocates. On the other hand, neither having a head office in Brussels nor the number of EP passes do appear to have any effect on our dependent variable.

A closer analysis of the content of the texts submitted to these consultations was undertaken in order to calculate the Flesh-Kincaid readability index. The index, developed during the 1970s and nowadays a standard for reading ease tests, has higher scores for text that is easier to read. As an example, a Flesch-Kincaid index of 90-100 corresponds to a text suitable for a 5<sup>th</sup> grade student, while scores ranging between 0 and 30 are 'college graduate' material, signalling documents best understood by university graduates. The texts gathered in the database under analysis have a mean Flesch-Kincaid index of 11-12, which is not surprising given the technicality and complexity of some of the issues involved (for example setting rules on reporting derivatives transactions). The readability score does not vary by advocate type, showing that even consumer and citizen interests, when participating in consultations, are

perfectly able to master the rules of this technical game and do not seem to submit ‘easier’, perhaps less informative responses. Another interesting fact here is that responses submitted to ESMA consultations, which are often pointed out as being more ‘technical’ in nature than primary consultations (and rules), have a readability score which is only 1.4 points lower on average, hardly a significant difference on a 1-100 scale. Thus, the responses supplied by advocates on both levels, Commission and agency, are of a very similar nature. While the nature of advocate contributions itself does not say much about the nature of the legislative rules produced at the end of the consultation process, it is safe to assume that the difference between EU primary and secondary legislation could be smaller than often believed, contrary to some claims that secondary rules are arcane and obscure, and hence best left to specialists.

## 6. Conclusion and research agenda

This paper aimed at shedding light on the relationship between lobbying and venues by looking at how advocates interact with agencies, which are rising in importance among policymaking institutions in all Western political systems, and particularly the EU. The analysis of an original database of EU online consultations at both Commission and agency level in financial services policy shows that citizen and consumer interests are less represented in agency consultations than EC ones, while all kinds of interests supply responses of a very similar, highly technical nature. Moreover, spending more resources on lobbying only has a minimal positive effect on this advocacy strategy, suggesting that participating in a consultation is not a resource-intensive activity. Finally, there seems to be a trade off between holding closed-doors meetings with Commission officials and responding to online consultations.

While this paper focused on participation in consultations, the next steps in my research entail looking at lobbying success, i.e. the outcomes of lobbying activities and whether advocates’ preferences are reflected in proposed legislation (Dür 2008). In order to do so, I will use quantitative text analysis of the stakeholder responses and particularly scaling, which allows to extract authors’ positions on a given dimension and has already been successfully applied in studies of lobbying (Slapin and Proksch 2008, Klüver 2009, 2013). More specifically, in a study of EU lobbying spanning across 56 random policy issues, Klüver used interest groups’ submissions to Commission consultations in order to gauge the degree of

success in both the policy formulation and the decision making stage. In a similar vein, I will use automated text analysis to extract policy preferences from consultation submissions, and adopt a measure of lobbying success drawn from spatial theories of politics before investigating how institutional and actor-level variables affect it (Bernhagen et al 2014). This second part of the analysis should complete the picture of my research on agency lobbying, by providing a second pillar on lobbying ‘outputs’ to be coupled with this first investigation of lobbying ‘inputs’.

By undertaking this research, I hope to contribute to the regulation literature and show the effects that agencification can have for advocates, an aspect of delegation of powers to independent authorities that is rarely considered *ex ante* when designing institutions. Secondly, I will show how stakeholders try to influence legislation and whether they are successful in seeing their preferences reflected in the finally policy outcomes, something that is often neglected in the scholarly literature on financial regulation, in spite of rich anecdotal evidence pointing to the power of the financial lobby. Thirdly and lastly, my research should contribute to the wider literature on lobbying, by bringing into the picture a usually overlooked venue – agencies – and producing some original findings on mobilisation strategies and venue choice.

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