Articles

The Limits of Agencification in the European Union

By Miroslava Scholten[*] and Marloes van Rijsbergen[**]

Abstract

Although not explicitly regulated by the EU treaties, EU agencies not only exist but also have increased in number and power. In addition, while EU agencies may exercise very similar functions to those of the Commission, Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) do not list agencies among the possible authors of non-legislative acts. The existing situation raises the questions of the extent to which the ongoing agencification in the EU is legitimate and what its limits are. This article addresses these questions in the light of the old and new Treaties and case law, including the just released *ESMA-shortselling* case. It shows that while the Lisbon Treaty made a few steps forward on the road of legitimizing EU agencies and delegating important powers to them, the scope of powers that EU agencies can have remains unclear. In this respect, the European Court of Justice's lenient approach in the *ESMA-shortselling* case is unfortunate because it neither clarifies the issue nor pushes the Union Legislator and the Member States to address it. Consequently, in the absence of clear limits, further agencification is likely to persist at the risk of increasing the democratic legitimacy deficit and remaining accountability gaps.

A. Introduction

In recent decades, two trends have been characterizing the exercise and delimitation of public power: First, the growing scope of delegation of public authority to the executive branch, and second, cutting "the executive into smaller

[*] Miroslava Scholten is an Assistant Professor EU Law at the Utrecht Centre for Shared Regulation and Enforcement in Europe (RENFORCE) and Europa Institute, Faculty of Law, Economics and Governance, Utrecht University; M.Scholten@uu.nl.

[**] Marloes van Rijsbergen is a PhD Candidate at the Utrecht Centre for Shared Regulation and Enforcement in Europe (RENFORCE) and Europa Institute, Faculty of Law, Economics and Governance, Utrecht University; M.P.M.vanRijsbergen@uu.nl.

The authors would like to thank the European Banking Authority for organizing an insightful legal workshop on regulatory tools and the EU institutional architecture for the financial sector on 17 January 2014 at the EBA's premises in London, which served as the impetus for this article.

We are grateful to Prof. Dr. Linda Senden, Mr. Rob van de Westelaken, and Mr. Merijn Chamon for their comments on the first draft of this article as well as the editorial board for their careful editing.

pieces"[1] or, in other words, dispersing the locus of the executive branch within and beyond the nation state border.

The former trend can be explained mainly by globalization and technological developments, which leave legislatures with a challenging task of regulating a number of technical and internationalized issues. The lack of time and expertise necessitate the delegation of vast powers in quantitative and qualitative terms to the executive that can act on the spot and respond to the, at times, quickly changing realities in a prompt and effective manner. The latter trend seems to have mixed origin—functional necessities and political compromises—and can be roughly brought down to the "agencification phenomenon"[2] because various sorts of agencies have become an important part of the executive branch.

Most concerns relate to the independent regulatory type of agencies because of their rather misleading label "independent," which arguably implies unaccountability.[3] In a larger perspective, concerns about both trends stem from the fact that they have occurred without being accompanied by relevant constitutional changes, which in turn raises the question of the democratic legitimacy of the increasing amount of agencies regulating a vast range of sectors, from finance to health to transport and food safety. From a formal or procedural legitimacy perspective,[4] agencies' democratic legitimacy becomes problematic when they are created without an explicit, constitution-based authorization by the people. The social acceptance of agencies may be questioned if the creation of and delegation to agencies are not justified.[5] The "legitimacy question" seems to be

[1] Luc Verhey, *Political Accountability: A Useful Concept in EU Inter-Institutional Relations?*, *in* POLITICAL ACCOUNTABILITY AND EUROPEAN INTEGRATION 55, 67 (Luc Verhey et al. eds., 2009).

[2] Agencification is used as a generic term implying the creation of agencies and delegation of powers to them.

[3] *See* Miroslava Scholten, *Independent, Hence Unaccountable? The Need for a Broader Debate on Accountability of the Executive*, 4 REV. EUR. ADMIN. L. 5, 5–44 (2011) [hereinafter Scholten, *Independent, Hence Unaccountable?*].

[4] *See* Amaryllis Verhoeven, *Democratic Life in the European Union, According to its Constitution*, *in* 49 GOOD GOVERNANCE AND THE EUROPEAN UNION: REFLECTIONS ON CONCEPTS, INSTITUTIONS AND SUBSTANCE 153, 155 (Deirdre Curtin & Ramses Wessel eds., 2005) ("We speak of formal legitimacy always when the decision making process can be formally/procedurally recognized as an expression of self-governance. A political system enjoys substantive legitimacy when it can boast wide social acceptance, i.e. the loyalty of its citizens."). In a similar way, some scholars distinguish between procedural and substantive legitimacy. *See* Giandomenico Majone, REGULATING EUROPE 291–96 (1996).

[5] This concerns, for instance, EU agencies. According to the Ramboll Evaluation of twenty-six EU agencies prepared for the Commission, EU agencies' founding acts "did not sufficiently explain why new instruments had to be implemented through an agency, rather than something else." "Alternatives to creating agencies were paid limited attention until impact assessments came into practice. The creation of agencies is now justified in a transparent way, although it is not yet fully evidence-based and still does not cover all relevant issues." RAMBOLL MANAGEMENT-EUREVAL-MATRIX, EVALUATION OF THE EU DECENTRALISED AGENCIES IN 2009, FINAL REPORT VOL. I (Dec. 2009) [hereinafter RAMBOLL EVALUATION] (evaluating twenty-six decentralized agencies).

even more delicate in relation to EU agencies. EU agencies are created without a specific treaty provision, which would allow their creation, by the EU institutions whose democratic legitimacy and accountability have been debated for a long time.[6]

What scholars call the "agencification phenomenon" seems to have become a daily practice at the EU level, especially in the last decade where the number, *de facto* influence, and *de jure* powers of EU agencies have grown enormously. Since 2000 the number of EU agencies has tripled from ten to at least thirty-five agencies. More and more scholars have pointed out that the EU agencies' impact on policy shaping and implementation is considerable, despite agencies lacking the power to make legally binding decisions.[7] While allowing EU agencies to make legally-binding decisions in individual cases has been a matter of debate since 1994,[8] the three most recently created EU financial regulators, European Banking Authority (EBA), European Securities and Markets Authority (EsSMA), and European Insurance and Occupational Pensions Authority (EIOPA), enjoy powers to issue legally binding measures and to enforce EU law by surpassing, in certain cases, relevant national authorities. A judicial challenge to these agencies' legal authority has resulted in Case C-270/12, *ESMA-shortselling*, where the Court approved the delegation of powers to issue measures of general application and laid down what could be called a new delegation doctrine for the EU. At the same time, however, the Court leaves a number of questions open. These relate to the applicability of the remnants of the old *Meroni-Romano* non-delegation doctrine and to the legitimacy and limits of agencification in the EU.

This article discusses the ongoing agencification and attempts to define its limits in light of the old and new judgments and Treaties. The article is divided into three parts: First, it outlines the ongoing trends and the *Meroni-Romano* limits of agencification in the EU (Section B). To this end, it defines EU agencies, discusses

---

[6] *See* Luc Verhey & Monica Claes, *Introduction: Political Accountability in a European Perspective*, *in* POLITICAL ACCOUNTABILITY IN EUROPE: WHICH WAY FORWARD?: A TRADITIONAL CONCEPT OF PARLIAMENTARY DEMOCRACY IN AN EU CONTEXT 3, 3 (Luc Verhey et al. eds., 2008).

[7] *See* Renaud Dehousse, *Delegation of Powers in the European Union: The Need for a Multi-Principals Model*, 31 W. EUR. POL. 789, 790, 799 (2008) ("The absence of formal authority does not necessarily mean that" EU agencies are "deprived of any influence."). *See also* Checks and Balances of Soft Rule-Making in the EU, EUR. PARL. DOC. (PE 462.433) 8 (2012); Eduoardo Chiti, *An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies*, 46 COMMON MKT. L. REV. 1395, 1405 (2009); Martin Shapiro, *The Emergence of Global Administrative Law: "Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the EU?*, 68 L. CONTEMP. PROBS. 341, 353 (2005); Ellen Vos, *Agencies and the European Union*, *in* AGENCIES IN EUROPEAN AND COMPARATIVE LAW, 113, 142 (Luc Verhey & Tom Zwart eds., 203) [hereinafter Vos, *Agencies and the European Union*].

[8] The first two EU agencies given powers to take legally binding decisions against third parties, the Community Plant Variety Office and the Office for Harmonization in the Internal Market, were created in 1994.

EU agencies' typology, historical roots, and functions, and attempts to find their coordinates on the EU institutional map (B.I.2). Section B.II.2 hones in on the *Meroni-Romano* non-delegation doctrine, which arguably used to limit the delegation of powers in the EU. Next, the article illustrates the agencification trend in the area of financial market regulation (B.III). The possibility to entrust the new EU financial regulators with vast decision-making and supervisory powers has become a test to the existing *Meroni-Romano* non-delegation doctrine resulting in the just released *ESMA-shortselling* case, analyzed in Section C. Here, in addition to the facts of the case (C.I), the questions of what the Court did and did not say (C.II) and what the Court could have said (C.III) are addressed. The discussion of the significance and implications of the new *ESMA-shortselling* case for further agencification in the EU follows in Part D.

B. The Agencification in the EU: Trends and Limits

I. EU Agencies: An Introduction

There is a genuine consensus that the proliferation of EU agencies is one of the most important institutional developments at the EU level.[9] Because they are considered to be an effective tool in implementing EU policies,[10] the number of agencies has been growing rapidly, and there are now thirty-five EU agencies.[11] The scope of delegation to EU agencies has grown not only in quantitative terms but also qualitatively, implying the growth of agencies' powers. EU agencies, no longer merely information-gathering assistants of the Commission and national authorities, may enjoy decision-making and supervisory powers. This section introduces EU agencies by defining them and discussing historical roots and reasons for creation, their types and powers, and the position within the EU institutional constellation.

1. Defining EU Agencies

Defining an "EU agency" is a challenging task due to the absence of an official definition and the existing variety of bodies that could be put under the umbrella of EU agencies. The term "agency" is used as an omnibus term substituted by such

[9] Nearly every academic and policy document recognizes this development, calling it at times an "agency fever." Tom Christensen & Per Lægreid, *Rebalancing the State: Reregulation and the Reassertion of the Centre*, *in* AUTONOMY AND REGULATION: COPING WITH AGENCIES IN THE MODERN STATE, 359, 366 (Tom Christensen & Per Lægreid eds., 2006).

[10] *See* EUR. PARLIAMENT, COUNCIL OF THE EU & EUR. COMM'N, JOINT STATEMENT ON DECENTRALISED AGENCIES 1 (2012), http://ec.europa.eu/commission_2010-2014/sefcovic/documents/120719_agencies_joint_statement_en.pdf.

[11] *See* MIROSLAVA SCHOLTEN, THE POLITICAL ACCOUNTABILITY OF EU AND US INDEPENDENT REGULATORY AGENCIES 53–54 (Fabian Amtenbrink & Ramses A. Wessel eds., 2014) [hereinafter SCHOLTEN, POLITICAL ACCOUNTABILITY].

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

terms as "institute," "center," "office," or "authority" in the existing EU agencies' official titles.[12] Because of the difficulty of defining EU agencies, there is little consensus on how many EU agencies there actually are.[13]

The official web-page of EU agencies describes them as follows:

> A number of specialised [sic] and decentralised [sic] EU agencies have been established to support the EU Member States and their citizens. These agencies are an answer to a desire for geographical devolution and the need to cope with new tasks of a legal, technical and/or scientific nature. They are bodies governed by European public law; they are distinct from the EU Institutions (Council, Parliament, Commission, etc.) and have their own legal personality.[14]

Furthermore, scholars have included additional characteristics of EU agencies, including the following: Agencies are created by secondary legislation, they enjoy a new organizational mode[15] and financial autonomy, and they are created on the basis of the provision(s) of the EU or EC Treaties.[16]

---

[12] The recently issued "Common Approach" on EU agencies proposes harmonization of agencies' titles in the future using a standard term "European Union agency for . . . ." EUR. PARLIAMENT, *supra* note 10.

[13] Reports on the number of EU agencies vary greatly: Various studies, evaluations, and EU official documents refer to different numbers of EU agencies. For instance, while the Commission's brochure, EU AGENCIES, WHATEVER YOU DO, WE WORK FOR YOU (2007), http://cdt.europa.eu/CDT%20Publication%20Book/Agencies/agenciesFeb08_EN_low.pdf, offered an overview of twenty-nine EU agencies, the Meta-Study for the Commission (2008) evaluated twenty-six decentralized agencies. The COUNCIL OF THE EU, EVALUATION OF EUROPEAN UNION AGENCIES (2012), http://www.statewatch.org/news/2012/mar/eu-council-agencies-agreement-7727-12.pdf, summarizing the results of the institutional working group on agencies referred to thirty-one agencies. The official web-page of EU agencies lists thirty-five decentralized agencies, *Agencies and Other EU Bodies*, EUR. UNION, http://europa.eu/about-eu/agencies/index_en.htm (last visited Nov. 25, 2014).

[14] SCHOLTEN, POLITICAL ACCOUNTABILITY, *supra* note 11, at 48.

[15] Agencies share a similar organizational structure: a management board, executive director, and additional scientific committees reflecting their functional needs; exact names of such organs may differ. Some agencies that issue individual decisions also have boards of appeals.

[16] *See* Chiti, *supra* note 7, at 1396; Stefan Griller & Andreas Orator, *Everything Under Control? The "Way Forward" for European Agencies in the Footsteps of the* Meroni *Doctrine*, 35 EUR. L. REV. 3, 7–10 (2010); Mark Thatcher & David Coen, *Reshaping European Regulatory Space: An Evolutionary Analysis*, 31 W. EUR. POL. 806, 814 (2008); Vos, *Agencies and the European Union*, *supra* note 7, at 118; Ellen Vos, *Independence, Accountability and Transparency of European Regulatory Agencies*, *in* REGULATION THROUGH AGENCIES IN THE EU: A NEW PARADIGM OF EUROPEAN GOVERNANCE 120, 122 (Damien Geradin et al. eds, 2005) [hereinafter Vos, *Independence, Accountability, and Transparency*].

Independence or autonomy[17] is the most distinctive feature of EU agencies, which implies that they have "to be free of both political and industry interests. In the Community context this also refers to national interests."[18] The importance of making agencies independent is explained by the Commission as follows:

> It is particularly important that [agencies] should have genuine autonomy in their internal organisation [sic] and functioning if their contribution is to be effective and credible. The independence of their technical and/or scientific assessments is, in fact, their real raison d'être. The main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations.[19]

It needs to be noted, however, that while all EU agencies generally can be considered autonomous bodies, each individual agency may enjoy more or less autonomy by design and in reality.[20]

The so-called independent EU agencies can also be characterized by the label "regulatory" understood in a broad sense:

---

[17] Groenleer chooses to use the term "autonomous" instead of "independent" with regard to EU agencies because "an autonomous actor is granted a level of autonomy by other actors or will attempt to ascertain a degree of control over his or her own affairs, but this does not mean that he or she is completely free, without restrictions, independent." Martijin Groenleer, THE AUTONOMY OF EUROPEAN UNION AGENCIES: A COMPARATIVE STUDY OF INSTITUTIONAL DEVELOPMENT 29 (2009). *See also*, Scholten, *Independent, Hence Unaccountable?*, *supra* note 3 (arguing that the term "independent" is misleading).

[18] Vos, *Independence, Accountability, and Transparency*, *supra* note 16, at 123; *see also* Resolution of 21 Oct. 2008 on a Strategy for the Future Settlement of the Institutional Aspects of Regulatory Agencies, EUR. PARL. DOC. (INI 2008/2103) para. 28 (2008); RAMBOLL EVALUATION, *supra* note 5, at 11.

[19] According to the Commission, independence is to be ensured in the following way:

> [G]ranting of legal personality, budgetary autonomy, collective responsibility and own powers of the administrative board, the independence of the director, of the members of the scientific committees and of the boards of appeal, etc." and "the director, the members of the scientific committees and of the boards of appeal shall also undertake to act independently of any external influence. To this end, they shall make a written declaration of commitment and a written declaration of interests every year.

Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, EUR. PARL. DOC. (COM 59) 5–6 (2005).

[20] *See* Groenleer, *supra* note 17.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

> Regulatory activities do not necessary involve the adoption of legal acts. They may also involve measures of a more incentive nature, such as co-regulation, self-regulation, recommendations, referral to the scientific authority, networking and pooling good practice, evaluating the application and implementation of rules, etc. It therefore follows that a European "regulatory" agency does not necessarily have the power to enact binding legal norms.[21]

This distinguishes regulatory EU agencies from the executive type of agencies established by Council Regulation (EC) No 58/2003. These are the so-to-speak "assistant" agencies of the Commission, created by the Commission on a temporary basis wherever necessary to implement and manage certain programs. For instance, the Education, Audiovisual and Culture Executive Agency was created to control management aspects, such as drawing up calls for proposals, selecting projects, and signing project agreements of fifteen Community funded programs and actions in the fields of education and training, active citizenship, youth, audiovisual and culture.[22] The Commission supervises these agencies and may dissolve them. As of this writing, six executive agencies exist.[23]

2. EU Agencies' Historical Roots and Reasons for Creation

EU agencies have become a tool to address various challenges of the integration process and technological change: "[T]o a large extent, the creation of European agencies must be seen as a response to . . . functional needs,"[24] which seem to have come, roughly speaking, in three waves starting in the 1970s.[25]

---

[21] Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, *supra* note 19, at 4.

[22] *See Education, Audiovisual and Culture Executive Agency*, EUR. UNION, http://europa.eu/about-eu/agencies/executive_agencies/eacea/index_en.htm (last visited Nov. 25, 2014).

[23] These are: Education, Audiovisual and Culture Executive Agency (EACEA); European Research Council Executive Agency (ERC Executive Agency); Executive Agency for Competitiveness and Innovation (EACI); Executive Agency for Health and Consumers (EAHC); Research Executive Agency (REA); and Trans-European Transport Network Executive Agency (TEN-T EA). *Agencies and Other EU Bodies*, EUR. UNION, http://europa.eu/about-eu/agencies/index_en.htm (last visited Nov. 25, 2014).

[24] Renaud Dehousse, *Regulation by Networks in the European Community: The Role of European Agencies*, 4 J. EUR. PUB. POL'Y 246, 255 (1997).

[25] *See* Vos, *Agencies and the European Union*, *supra* note 7, at 114–15.

The first wave of EU agencies came in 1975 when the first two agencies, namely the European Centre for the Development of Vocational Training (Cedefop) and the European Foundation for the Improvement of Living and Working Conditions (Eurofound), were created "to establish, *inter alia*, action programmes [sic] on social and environmental policy."[26] With EU regulations expanding in number and in technical detail after the EU faced another round of integration—after the Single European Act and the Maastricht Treaty—it became necessary to create bodies that could provide technical expertise and support policy- and decision-making tasks of the Commission. "Delegating technical work to independent agencies would expand the EU's regulatory capacity while allowing the Commission to concentrate on its core competences, namely policy-making and long-term strategic planning."[27] Thus, by the end of the 1990s, during the so-to-speak second wave, eleven new agencies appeared.[28] Finally, the Twenty-First Century witnessed further agency proliferation during the third wave, which seems to be partly a response to the so-called transparency deficit that fell upon the comitology system. EU agencies were thought to enhance the transparency of EU decision-making directly by "bringing the Union closer to its citizen," [29] and indirectly by placing agencies all over the Union and, for example, inviting various interest groups to participate in agencies' decision-making. As of this writing, at least thirty-five EU agencies exist.[30]

---

[26] Richard H. Lauwaars, *Auxiliary Organs and Agencies in the E.E.C.*, 16 COMMON MKT. L. REV. 365, 368 (1979).

[27] Daniel Kelemen, *The Politics of "Eurocratic" Structure and the New European Agencies*, 25 W. EUR. POL. 93, 101 (2002).

[28] The European Environment Agency (1990); The European Training Foundation (1990); The European Agency for the Evaluation of Medicinal Products (1993; today The European Medicines Agency); The European Monitoring Centre for Drugs and Drug Addiction (1993); The Community Plant Variety Office (1994); The Office for Harmonization of the Internal Market (1994); The European Agency for Safety and Health at Work (1994); The Translation Centre for the Bodies of the European Union (1995); The European Police Office (1995); The European Monitoring Centre on Racism and Xenophobia (1997, today The European Union Agency for Fundamental Rights); and The European Police College (2000).

[29] Jens-Peter Schneider, *A Common Framework for Decentralized EU Agencies and the* Meroni *Doctrine*, 61 ADMIN. L. REV. 29, 33 (2009) ("The spread of agencies beyond Brussels and Luxembourg adds to the visibility of the Union and of course - although not mentioned by the Commission - to options for political bargaining.").

[30] *See* SCHOLTEN, POLITICAL ACCOUNTABILITY, *supra* note 11, at 53–54. These include: Agency for the Cooperation of Energy Regulators (ACER); Body of European Regulators for Electronic Communications (BEREC); Community Plant Variety Office (CPVO); European Agency for Safety and Health at Work (EU-OSHA); European Agency for the Management of Operational Cooperation at the External Borders (Frontex); European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (IT Agency); European Asylum Support Office (EASO); European Aviation Safety Agency (EASA); European Banking Authority (EBA); European Centre for Disease Prevention and Control (ECDC); European Centre for the Development of Vocational Training (Cedefop); European Chemicals Agency (ECHA); European Environment Agency (EEA); European Fisheries Control Agency (EFCA); European Food Safety Authority (EFSA); European Foundation for the Improvement of Living and Working Conditions (Eurofound); European GNSS Agency (GSA); European Institute for Gender Equality (EIGE); European Insurance and Occupational Pensions

At the same time, Kelemen and Tarrant suggest that "while there may be functional benefits to be gained from creating EU-level regulatory bodies,"[31] their creation and designs are not determined only "by functional imperatives—indeed, sometimes such bodies may be designed to be ineffective. Rather than functional necessities, political considerations drive" the agencification process and "the fundamental choice of whether to create a centralized [sic], EU-level body or instead to establish a looser network of national regulatory authorities."[32] According to them, "since the beginning of the 1990s, it has become clear that Member State governments are unwilling to countenance any significant expansion of the Commission and instead prefer delegating new regulatory tasks to bodies outside the Commission hierarchy."[33] In this light, agencies represent an attempt "to solve the traditional Community administrative deficit through instruments that may be politically acceptable both to the national governments and the supranational institution . . . without implying a direct reinforcement of the Commission."[34]

Thus, a mixture of functional necessity with acceptability for relevant veto players involved in the creation of agencies offers a more nuanced explanation of the proliferation of EU agencies.

3. EU Agencies' Powers

Various classifications exist in relation to EU agencies' functions. Chiti distinguishes between agencies with production and dissemination of information functions, advisory functions, and assistant and administrative decision-making functions.[35] Lavrijssen and Ottow view EU agencies as "European supervisory authorities" because they are "involved in supervising and regulating markets or market parties, especially if they advise on the adoption of new European legislation and policies

Authority (EIOPA); European Maritime Safety Agency (EMSA); European Medicines Agency (EMA); European Monitoring Centre for Drugs and Drug Addiction (EMCDDA); European Network and Information Security Agency (ENISA); European Police College (Cepol); European Police Office (Europol); European Railway Agency (ERA); European Securities and Markets Authority (ESMA); European Training Foundation (ETF); European Union Agency for Fundamental Rights (FRA); Office for Harmonization in the Internal Market (OHIM); European Union's Judicial Cooperation Unit (Eurojust); Translation Centre for the Bodies of the European Union (CdT); European Defence Agency (EDA); European Union Institute for Security Studies (EUISS); and European Union Satellite Centre (EUSC).

[31] Daniel Kelemen & Andrew D. Tarrant, *The Political Foundations of the Eurocracy*, 34 W. EUR. POL. 922, 923 (2011).

[32] *Id*.

[33] *Id.* at 929.

[34] Chiti, *supra* note 7, at 1398.

[35] *See* Chiti, *supra* note 7, at 1395.

and monitor uniform application of EU law."[36] All in all, "EU agencies can be created to gather information, enhance cooperation, provide service, advise, take decisions which affect third parties, and supervise the implementation of EU law."[37]

Some suggest that EU agencies do not seem "powerful enough" in the sense that most do not formally enjoy policy-making discretion,[38] yet "influence does not equal formal powers."[39] An increasing number of scholars, however, point to the fact that *de facto* impact of EU agencies may not necessarily correspond to agencies' *de jure* powers.[40]

Whose tasks do agencies exercise? In its various documents, "the Commission has presented itself as the principal that must evaluate the possibility of delegating a share of its powers to autonomous bodies, which will assist in completing its tasks and operating the internal market."[41] From this viewpoint, EU agencies are merely auxiliaries of the Commission.[42] At the same time, EU agencies have been assigned tasks that have been previously exercised by national authorities, the Council, or its "fragmentary and opaque structures."[43] Thus, nearly every EU agency has an institutional or procedural forerunner.[44] Furthermore, some

---

[36] Saskia Lavrijssen & Annetje Ottow, *Independent Supervisory Authorities: A Fragile Concept*, 39 LEGAL ISSUES ECON. INTEGRATION 419, 423 (2012).

[37] SCHOLTEN, POLITICAL ACCOUNTABILITY, *supra* note 11, at 58.

[38] *See, e.g.*, Ronald van Ooik, *The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance*, *in* GOOD GOVERNANCE AND THE EUROPEAN UNION: REFLECTIONS ON CONCEPTS, INSTITUTIONS AND SUBSTANCE 25, 152 (Deirdre Curtin & Ramses Wessel eds., 2005) (concluding that the importance of EU agencies should not be exaggerated at the moment, at least before they have been delegated "more intense responsibilities").

[39] Thomas Christiansen, *Out of the Shadows: The General Secretariat of the Council of Ministers*, 8 J. LEGIS. STUD. 80, 80 (2002).

[40] *See* SCHOLTEN, POLITICAL ACCOUNTABILITY, *supra* note 11, at 3–4.

[41] DEIRDRE CURTIN, EXECUTIVE POWER OF THE EUROPEAN UNION: LAW, PRACTICES, AND THE LIVING CONSTITUTION 145 (2009).

[42] *See* Dehousse, *supra* note 7, at 792.

[43] CURTIN, *supra* note 41, at 164.

[44] For example, Technical Assistance Units preceded the European Training Foundation, the comitology system of two scientific committees preceded the EMEA, procedural mechanisms within the EP and within the Commission preceded the European Monitoring Centre for Drugs and Drug Addiction, and the Community programs of the CORINE program preceded the EEA as well as activities which were undertaken at an intergovernmental level. *See, e.g.*, Alexander Kreher, *Agencies in the European Community: A Step Towards Administrative Integration in Europe*, 4 J. EUR. PUB. POL'Y 225, 233 (1997) (describing how, in two cases, the emergence of an agency took place alongside the decision to establish a new Community regime—Community plant variety protection and the Community trademark); Ellen Vos, *Reforming the European Commission: What Role to Play for the EU Agencies?*" 37 COMMON MKT. L. REV. 1113, 1113 (2000) [hereinafter Vos, *Reforming the European Commission*] (showing that

agencies, such as the recently created Agency for the Cooperation of Energy Regulators (2009), constitute "an institutionalisation [sic] of the previously existing informal regulatory networks."[45] Considering different levels where EU agencies' functions originate, "a partial 'fusion' between the two orders of authorities," national and European, has taken place.[46] In the case of ESMA's exclusive supervisory and enforcement powers in relation to registration, supervision, and sanctioning of credit rating agencies, one can speak of a transfer of almost all respective powers from the national to the EU level.

4. EU Agencies Within the EU Institutional Constellation

The silence on EU agencies in the EU Treaties has raised the question of where these agencies' coordinates lie on the EU institutional map, which is in turn important with respect to the questions of institutional balance and these agencies' democratic legitimacy and accountability.

The situation regarding EU executive agencies is clear. The Commission may create and abolish them and it is also the Commission that can be held responsible for them before the European Parliament—and hence before the people.[47] The so-called EU *independent regulatory* agency is not directly under the Commission's supervision. Because most of the existing agencies' founding acts have been passed by the Council with the increasing involvement of the European Parliament[48] and because these institutions may enjoy supervisory functions over EU agencies (see the founding acts of individual agencies), a direct line between the EU representative institutions and EU agencies could be established. This would in turn position agencies beneath the EU institutions. From the perspective of the origins of agency functions, EU agencies seem to be subordinate to the Commission and the Member States, whose powers may have been given to

agencies have been created to replace various committees of the Commission and arguing that the visibility of agencies facilitates holding the EU structures to account).

[45] MARCO ZINZANI, MARKET INTEGRATION THROUGH 'NETWORK GOVERNANCE:' THE ROLE OF EUROPEAN AGENCIES AND NETWORKS OF REGULATORS 156 (2012); *see generally* David Levi-Faur, *Regulatory Networks and Regulatory Agencification: Towards a Single European Regulatory Space*, 18 J. EUR. PUB. POL'Y 810 (2011) (discussing how agencies replace networks).

[46] Eduoardo Chiti, *The Emergence of A Community Administration: The Case of European Agencies*, 37 COMMON MKT. L. REV. 309, 342 (2000).

[47] *See* Council Regulation (EC) No 58/2003 of 19 December 2002, 2003 O.J. (L 11) (laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programs).

[48] *See* SCHOLTEN, POLITICAL ACCOUNTABILITY, *supra* note 11, at 394–463 (describing how, of the existing thirty-five EU independent regulatory agencies, seventeen agencies have been created with the European Parliament as co-legislator; these are mostly the agencies created in the third wave since 2000. The European Parliament gave its opinion to the Council in fifteen cases and did not participate in the creation of three agencies of the former second pillar).

agencies while gaining some measure of control over such agencies via, for example, agency management boards. Thus, as EU agencies "operate outside the Commission and Council"[49] and are "a matter of secondary Community law,"[50] EU agencies can be placed below the EU institutions and Member States.

Widely discussed by academics,[51] yet never addressed by the Court, is the question of whether EU agencies upset the institutional balance. The interrelations between the different EU institutions and their respect of each other's boundaries have become known as the principle of institutional balance. This is defined by the Court of Justice of the European Union in the *Chernobyl* case as "a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community."[52] While the principle of institutional balance does not explicitly derive from the Treaty, the Court did link it to Article 7 TEC,[53] which is a part of Article 13 TEU[54] today by stating that each institution shall act within the limits of the powers conferred on it in the Treaties.

The creation of and delegation of power to EU agencies affects the EU institutional balance in at least two ways. First, the delegation of decision-making to agencies changes how the main institutions participate in making certain decisions. For example, in the past, when the Council could create an agency without the European Parliament's legislative involvement, it could shield away the exercise of certain powers from the European Parliament. In turn, Parliament could have had more influence if the Commission—and not the agency—was the recipient of those powers. Second, the creation of agencies raises the question of who holds EU agencies to account and how. In the absence of a relevant Treaty provision and any general framework for agencies' operation and accountability, the balance of controlling powers between the main institutions is not based on a treaty. The involvement of, for instance, the Council and the European Parliament differs

[49] Paul Craig, *The Community Political Order*, 10 IND. J. GLOBAL LEGAL STUD. 79, 116 (2003).

[50] Van Ooik, *supra* note 38, at 128.

[51] *See generally,* Jean-Paul Jacqué, *The Principle of Institutional Balance*, 41 COMMON MKT. L. REV. 383 (2004); Vos, *Reforming the European Commission*, *supra* note 44.

[52] European Parliament v. Council, CJEU Case C-70/88, 1990 E.C.R. I-2041, I-2072, para. 21.

[53] Consolidated Version of the Treaty Establishing the European Community art. 7, Dec. 29, 2006, 2006 O.J. (C 321) 1, 12 [hereinafter TEC].

[54] Consolidated Version of the Treaty on European Union art. 13, Mar. 30, 2010, 2010 O.J. (C 83) 1, 53 [hereinafter TEU].

considerably from agency to agency.[55] In fact, excessive diversity dominates the political accountability of EU agencies.[56]

Excessive diversity is harmful to the political accountability and legitimacy of agencies and to the Union at large in several respects. From the accountability perspective, too much diversity disperses those institutions who hold agencies to account ("accountability forum")[57] and their responsibilities. This increases the chances of creating accountability deficits, shadows the existing shortages and excesses, and causes other accountability problems.[58] For example, while an obligation to submit an annual report to the EU representative institution seems to be the general practice, the Community Plant Variety Office (CPVO) has no such obligation.[59] The President of CPVO claims to not have any relationship with the European Parliament even though the agency is formally overseen by the Committee on Agriculture and Rural Development.[60] Excessive diversity also hinders EU legitimacy because it does not justify why the differences should exist.[61] This leads further to questions. For example, in accordance with which Treaty provision does the European Parliament have the power to question officials of entities other than those that are specifically provided for in the Treaty?[62] Or, given that only directors of some agencies are subject to the hearings' obligations,[63] why

[55] SCHOLTEN, POLITICAL ACCOUNTABILITY, *supra* note 11, at 391–463 (describing all individual agencies).

[56] *See, e.g., id.* at 172–73. For instance, EU agencies' directors can be appointed by twelve different procedures and can be removed in five different ways. Similar procedures may receive different legal labels in agencies' founding acts, such as evaluation and review clauses. Moreover, founding acts may simply lack evaluation, review, and removal clauses. Also, reporting obligations vary greatly with respect to the institutions-recipients of agencies' reports and specificity of such obligations. Furthermore, whereas EU agencies' founding acts can prescribe three types of hearings obligations before the European Parliament and/or the Council, they are not generally applied. Only eighteen (out of thirty-five) founding acts prescribe appointment hearings for candidates to head EU agencies, sixteen (out of thirty-five) agencies' directors may be invited to report on the performance of the agency, and in six (out of thirty-five) cases the founding acts provide a possibility to question an agency's director before the extension of the term of office. *Id.*

[57] *See generally* Mark Bovens, *Analysing and Assessing Public Accountability: A Conceptual Framework*, 13 EUR. L.J. 447 (2007).

[58] *Id.*

[59] *Id.*

[60] *Id. See also Rules of Procedure of the European Parliament,* EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=ANN-07 (last visited Nov. 25, 2014)

[61] *Id.*

[62] *See, e.g.*, Consolidated Version of the Treaty on the Functioning of the European Union art. 47, May 9, 2008, 2008 O.J. (C 115) 1, 57 [hereinafter TFEU] (relating to the Commission and the Council).

[63] SCHOLTEN, POLITICAL ACCOUNTABILITY, *supra* note 11, at 74.

are all officials of the same rank or level—agency directors for example—not obligated to be subject to hearings before the European Parliament in the same way? Not only do the agencies' founding regulations do not explain the existing diverse accountability obligations, but a number of agencies have also been created without good reason.[64] The absence of explicit Treaty authorization for agency creation, the lack of clear reasons why agencies are necessary, and, at times, missing accountability obligations puts the legitimacy of EU agencies' under pressure.

II. The Meroni-Romano *Non-Delegation Doctrine and the Former Limits of Delegation*

Is the delegation of powers to EU agencies lawful? So far this question has been addressed in light of the *Meroni*[65] and *Romano*[66] judgments.[67] This section briefly analyzes these judgments and the non-delegation doctrine that they established.

1. The Meroni *Non-Delegation Standard*

The *Meroni* non-delegation standard was established in 1958 within the framework of the European Coal and Steal Community (ECSC). In short, it allowed only for the delegation of executive powers. Such powers could not include policymaking discretion and had to correspond to the responsibilities that the delegating authority could exercise itself, including obligations like reporting that the delegating institutions might have been subject to by the Treaties.[68]

The *Meroni* case concerned the Italian steel company, Meroni, which refused to pay a sum of money to the Imported Ferrous Scrap Equalization Fund, a private company under Belgian law operating under the responsibility of the High Authority, the predecessor of the European Commission.[69] The Fund's task was to administer a special obligatory ferrous scrap equalization system created by the High Authority with a further goal of keeping ferrous scrap prices low.[70] The steel company

---

[64] *See* RAMBOLL EVALUATION, *supra* note 5, at i–ii.

[65] Meroni & Co., Industrie Metallurgische S.p.A. v. High Authority of the Eur. Coal & Steel Cmty, CJEU Case C-9/56, 1958 E.C.R. 135.

[66] Giuseppe Romano v. Institut National D'assurance Maladie-Invalidité, CJEU Case C-98/80, 1981 E.C.R. 1241.

[67] *But see* Merijn Chamon, *EU Agencies: Does the* Meroni *Doctrine Make Sense?* 17 MAASTRICHT J. 281 (2010) (questioning the relevance of the *Meroni* judgment to the agencies).

[68] *See Meroni & Co.*, CJEU Case C-9/56 at 152.

[69] *See id.* at 135.

[70] *See* Griller & Orator, *supra* note 16, at 15–16.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

challenged the legality of the bill it received and questioned the possibility for the High Authority to delegate powers, because the Treaty did not explicitly provide for such delegation.[71]

While the Court concluded that the delegation at stake was illegal, it addressed the possibility of delegation at the EU level, because the Treaty did not provide explicitly for that.[72] Regarding Article 53 of the ECSC Treaty, the Court stated that the delegation was not excluded, and that the institutions might use assistant bodies having a distinct legal personality.[73] In *Meroni*, the power of the High Authority "to authorize or itself make the financial arrangement mentioned in Article 53 of the Treaty" gave it the right "to entrust certain powers to such bodies subject to conditions to be determined by it and subject to its supervision."[74] However, such delegation was allowed only if it was "necessary for the performance of the tasks set out in" respective articles and "compatible with" the Treaty.[75] Furthermore, the Court ruled that the delegating authority "could not confer upon the Authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty."[76] In *Meroni*, the Court found that if the delegating authority would have exercised the delegated powers itself, when issuing decisions, it would have been bound by certain principles established by the Treaty, such as the principles to state reasons and to publish an annual report.[77] But as the agencies at stake received those powers arguably without any further guidance on how they should implement the delegated tasks, they were not bound by relevant Treaty obligations, and hence received more extensive powers than the delegating authority enjoyed itself, which violated the Treaty.[78]

While *Meroni* showed that delegation was possible in principle, the Court made it clear that not all kinds of powers were delegable.[79] The consequences of delegation differ depending on the nature of powers that are delegated.[80] Here, two categories of powers were distinguished: "[C]learly defined *executive powers* the exercise of

[71] *See Meroni & Co.*, CJEU Case C-9/56 at 151.

[72] *See id.* at 151–52.

[73] *See id.* at 151.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 150.

[77] *See id.* at 149.

[78] *See id.* at 150.

[79] *See id.* at 152.

[80] *See id.*

which can . . . be subject to strict review in the light of objective criteria determined by the delegating authority," and powers that involve discretion, which can "make possible the execution of actual . . . policy."[81] The Court accepted the delegation of the first kind of powers.[82] The Court concluded that the second kind hindered the balance of powers guaranteed by the Treaty.[83]

Although the *Meroni* ruling dates to the beginning of EU integration in the 1950s, in more recent judgments the Court of Justice of the European Union confirmed its relevance for delegation: "[T]he powers conferred on an institution include the right to delegate,"[84] and that "when the Community legislature wishes to delegate its power to amend aspects of the legislative act at issue, it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria."[85]

2. The Romano *Non-Delegation Standard*

The *Romano* judgment is the other important judgment concerning delegation.[86] The European Court of Justice established an additional non-delegation criterion: The Council could not delegate to agencies the power to adopt acts "having the force of law."[87] The agency at issue was the Administrative Commission, which was created by a Council Regulation to assist the Commission by, among other things, dealing "with all administrative questions and questions of interpretation arising from" its founding Regulation and subsequent Regulations in the area of application of social security schemes to employed persons and their families moving within the Community.[88]

---

[81] *See id.* (emphasis added).

[82] *Id.* ("A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.").

[83] *Id.* at 151 ("[T]o delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective.").

[84] P Carmine Salvatore Tralli v Eur. Cent. Bank, CJEU Case C-301/02, 2005 E.C.R. I-4071, at para. 41.

[85] Alliance for Natural Health v. Sec'y of State for Health, CJEU Joined Cases C-154/04 & C-155/04, 2005 E.C.R. I-6451, para. 90.

[86] *Giuseppe Romano*, CJEU Case C-98/80.

[87] *Id.* at para. 20.

[88] Regulation (EEC) 1408/71, art. 81, 1971 O.J. 1, 444.

Mr. Romano was entitled to pensions in two Member States: Belgium and Italy.[89] The question arose in relation to the amount of pensions he would receive in the two countries.[90] The Belgian relevant institution decided to give him a reduced pension basing its decision on—among other things—a pension calculation scheme issued by the Administrative Commission.[91] The Court held that the decision of the agency could have provided guidance but was not of such a nature as to bind national authorities to use certain methods of calculation.[92] The Court's decision was based on Articles 155, 173, and 177 of the EEC Treaty, which established that the power to issue legally binding decisions belongs only to the Commission and provided for judicial review of only the Commission and Council's decisions.[93] The delegation at question was unlawful because, under the EEC Treaty, no agencies were envisaged among the possible authors of legally binding decisions and no judicial review of agency decisions was possible.[94]

All in all, the *Meroni-Romano* doctrine seems to be best characterized by the word non-delegation. It imposes a rather strict limitation on the nature of delegated powers within the EU: The delegation of executive powers involving no discretion is allowed, but agencies cannot issue acts with the force of law. While the *Meroni* doctrine "has stood for approaching 50 years as a constitutional limit to delegation,"[95] in practice, EU agencies have become the recipients of discretionary powers along with the power to issue legally binding decisions.[96] The most far-reaching delegation happened in the aftermath of the 2008 financial crisis resulting in the creation of the three EU financial authorities with regulatory and—exclusive—supervisory powers.[97] This delegation stands contrary to *Romano*, because its decisions would have to be respected by competent national authorities and

[89] *See Giuseppe Romano*, CJEU Case C-98/80 at para. 3.

[90] *See id.* at para. 1, 14.

[91] *See id.* at para. 5, 7, 10.

[92] *See id.* at para. 20.

[93] *See id.*

[94] *See id.* It has to be noted however that there is no consensus among scholars on the interpretation of the *Romano* judgment. Chamon gave an overview of the relevant scholarship. *See* Merijn Chamon, *EU Agencies: between* Meroni *and* Romano *or the Devil and the Deep Blue Sea*. 48 C. M. L. REV. 1055 (2011).

[95] Andreas Orator, *Empowering European Agencies: Perspectives and Limits of European Democratic Legitimacy, in* PERSPECTIVES AND LIMITS OF DEMOCRACY 23, 34 (Harald Eberhard, Konrad Lachmayer, Gregor Ribarov & Gerhard Thallinger eds., 2007).

[96] *See* SCHOLTEN, POLITICAL ACCOUNTABILITY, *supra* note 11, 3–4 n.14.

[97] *See* Miroslava Scholten & Annetje Ottow, *Institutional Design of Enforcement in the EU: the Case of Financial Markets*, UTRECHT L. REV. (forthcoming Dec. 2014).

contrary to *Meroni* because it involves discretionary power. The following section focuses, therefore, explicitly on the origins and powers of one of the new European financial authorities, the European Securities and Market Authority. This delegation resulted in the *ESMA-shortselling* judgment analyzed in subsequent sections.

III. Agencification in the Case of the EU Financial Markets: The Origins and Powers of ESMA

The current architecture of financial market regulation has its origins in the so-called Lamfalussy process chaired by Baron Alexandre Lamfalussy, which resulted in the Final Report of the Committee of Wise Men on the Regulation of European Securities Markets.[98] One of the major conclusions of the report was that the existing regulatory system at that time was too slow, too rigid, and too ambiguous.[99] Therefore, "a higher degree of convergence and greater Community presence in the field of enforcement" was thought to be necessary.[100] To this end, the Lamfalussy process introduced a new four-level law-making model in the area of financial services: (1) Adopt framework principles in specific areas of substantive law by Directives or Regulations under the ordinary legislative procedures of Article 294 TFEU;[101] (2) solidify framework principles by the European Commission by means of implementing measures adopted under Comitology procedures;[102] (3) advise the Commission on the feasibility of measures proposed at level (2) by the level 3 committees—the Committee of European Securities Regulators (CESR), the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance, and the Occupational Pensions Supervisors (CEIOPS);[103] and (4) envisage timely and correct transposition of EU legislation into national law and taking action against Member States if transposition was not in compliance with European law.[104]

While the Lamfalussy system has enhanced cooperation between EU Member States, the 2008 financial crisis challenged its foundations and revealed the necessity for reform of the system by furthering integration. The *de Larosière* report,

---

[98] *See* COMM. OF WISE MEN, FINAL REPORT ON THE REGULATION OF EUROPEAN SECURITIES MARKETS (2001), http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf.

[99] *See* Takis Tridimas, *EU Financial Regulation: Federalization, Crisis Management, and Law Reform*, *in* THE EVOLUTION OF EU LAW, 786 (Paul Craig & Gráinne de Búrca eds., 2011).

[100] *Id.* at 783.

[101] *See* COMM. OF WISE MEN, *supra* note 98, at 22–27.

[102] *See id*. at 28–36.

[103] *See id.* at 37–39.

[104] *See id.* at 40–41.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

issued by a group of experts mandated by the Commission under the chairmanship of Jacques de Larosière, demonstrated the weaknesses of the Lamfalussy architecture, including a lack of convergence and differences in enforcement laws and practices.[105]

The lack of binding regulatory powers of the level 3 committees was seen as a pressing problem in this regard, since stronger powers were considered to be necessary to address the inconsistencies and enforcement deficits at the national level.[106] This in turn led to the transformation of the level 3 committees with non-binding powers into EU agencies with legally binding decision-making and supervisory powers.[107]

The new European Supervisory Structure comprises the European Systemic Risk Board (ESRB) and the European System of Financial Supervision (ESFS). The ESRB is a new independent body for macro-prudential supervision without legal personality and legally binding powers.[108] However, it does enjoy soft law power through its warnings and recommendations.[109] The ESFS consists of the three European Supervisory Authorities (ESAs): The European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) as well as the European Insurance and Occupational Pensions Authority (EIOPA), a Steering Committee, and the national supervisory authorities.[110]

With respect to the ESMA, whose powers have been challenged in the to-be-discussed *ESMA-shortselling* case, it was created with the purpose "to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses."[111] The ESMA is one of the strongest agencies in the EU because it enjoys regulatory, decision-making, and—exclusive—supervisory powers.

---

[105] *See* DE LAROSIÈRE GROUP, THE HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU, (2009), http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

[106] *See* Annetje Ottow, *Europeanization of the Supervision of Competitive Markets*, 18 EUR. PUB. L. 191 (2012).

[107] *See* DE LAROSIÈRE GROUP, *supra* note 105, at 49.

[108] *See Communication from the Commission, European Financial Supervision,* at 5, COM (2009) 252 final (May 27, 2009).

[109] *See* Niamh Moloney, *Reform or Revolution? The Financial crisis, EU Financial Markets law and the European Securities and Markets Authority,* 60 INT'L & COMP. L. Q. 529 (2011).

[110] Donato Masciandaro, Maria J. Nieto & Marc Quintyn*, Will They Sing the Same Tune? Measuring Convergence in the New European System of Financial Supervisors* (IMF Working Paper No. 09/142, 2009).

[111] Regulation 1095/2010 of the European Parliament and of the Council of 24 November 2010 Establishing a European Supervisory Authority (European Securities and Markets Authority), Amending

The ESMA's regulatory powers include assisting the European Commission in formulating and adopting a single rulebook applicable to all EU financial institutions.[112] To this end, ESMA is entitled to propose drafts of binding and implementing technical standards in specific areas.[113] It may also issue interpretative guidelines and recommendations.[114] Both regulatory and implementing technical standards are adopted by the European Commission by means of Regulations or Decisions.[115] Guidelines and recommendations are not legally binding on competent authorities and financial market participants, but they are not merely voluntary nor without legal effect.[116] Following a *comply or explain* mechanism, the addressees are obliged to make every effort to comply.[117]

Furthermore, the ESMA's founding Regulation provides for the procedural framework for a set of binding decision-making powers either vis-à-vis national authorities or directly vis-à-vis financial institutions.[118] ESMA has the right to issue binding decisions in three fields of action which concern the breach of Union law,[119] action in emergency situations,[120] and settlement of disagreements between competent authorities in cross-border situations.[121] The real empowerments to take such binding decisions can only be found in other legislation that refers to the ESMA Regulation. These powers allow ESMA to intervene in the relationship between national competent authorities, or in the relationship between competent

---

Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC, art. 1(5), 2010 O.J. (L. 331/12).

[112] *See* NIAMH MOLONEY, THE EUROPEAN SECURITIES AND MARKETS AUTHORITY: A PERSPECTIVE FROM ONE YEAR ON 10 (2013).

[113] These drafts and standards follow the procedural framework as established in Articles 10 to 14 and 15 of Regulation No 1095/2010.

[114] *See* Regulation No 1095/2010 art. 16.

[115] *See id.* arts. 10(4), 15(4).

[116] *See* Eddy Wymeersch, *The European Financial Supervisory Authorities or ESAs*, *in* FINANCIAL REGULATION AND SUPERVISION. A POST-CRISIS ANALYSIS 276 (Eddy Wymeersch, Klaus J. Hopt & Guido Ferrarini eds., 2012).

[117] *See* Regulation No 1095/2010 art. 16(3).

[118] *See id.* arts. 17–19.

[119] *See id.* art. 17.

[120] *Id.* art. 18.

[121] *See id.* art. 19.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

authorities and market actors.[122] In some instances, ESMA's decisions may prevail over the previous decisions of national authorities.

Finally, while national supervisors remain predominantly responsible for day-to-day supervision of individual entities, ESMA has a range of supervisory coordination powers.[123] These powers include the participation in and coordination of colleges of supervisors,[124] the identification and management of systemic risk and the development of resolution structures, in cooperation with the ESRB,[125] the promotion of a common supervisory culture,[126] peer review,[127] supervisory coordination,[128] market assessment,[129] and information-gathering.[130] Moreover, Regulation 1060/2009[131] has delegated very important exclusive supervisory powers over credit rating agencies to ESMA.[132] These include the powers to examine and take copies of any relevant records and material, ask for oral explanation, summon and hear persons, require telephone and data traffic records, and interview persons.[133] These powers are not available even to the European Parliament in its investigatory capacity.

All in all, the regulatory, decision-making, and supervisory powers of ESMA are far-reaching, especially in comparison with the competences of all other EU agencies. The accumulation of its different tasks results in synergy effects that greatly

---

[122] *See* Pierre Schammo, *The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers*, 48 C. M. L. REV. 1885 (2011).

[123] *See Communication from the Commission: European Financial Supervision,* at 12, COM (2009) 252 final (May 27, 2009).

[124] *See* Regulation No 1095/2010 art. 21.

[125] *See id.* arts. 22–27.

[126] *See id.* art. 29.

[127] *See id.* art. 30.

[128] *See id.* art. 31.

[129] *See id.* art. 32.

[130] *See id.* art. 35.

[131] *See* Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on Credit Rating Agencies 2009 O.J. (L 302/1).

[132] *See id.*

[133] Article 23c of Regulation (EC) 1060/2009 was introduced by Regulation 513/2011 of the European Parliament and of the Council of 11 May 2011 Amending Regulation (EC) No 1060/2009 on Credit Rating Agencies 2011 O.J. (L 145/30).

strengthen the role of this EU agency vis-à-vis the national authorities.[134] In light of the discussed *Meroni-Romano* non-delegation doctrine, it is in fact ESMA's strong intervention powers in the case of short-selling that have led the UK to bring an action for annulment before the CJEU. This action has resulted in the judgment in case C-270/12 and arguably in a new delegation doctrine to be discussed below.

C. The *ESMA-Shortselling* Case

I. Facts

On May 13, 2012, the United Kingdom of Great Britain and Northern Ireland brought an action for annulment under Article 263 TFEU to the Court of Justice of the European Union. It sought the annulment of Article 28 of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps. This article vests ESMA with certain powers to intervene under certain conditions—through legally binding acts—in Member State financial markets if there is a "threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union." The ESMA is empowered by Article 28(1) of Regulation No 236/2012 to impose notification and disclosure requirements on natural and legal persons and to prohibit the entry into certain transactions or to subject such transactions to conditions. A measure adopted by ESMA under Article 28 prevails over any previous measure taken by a national supervisory authority. In its pleadings, the UK put forward four arguments regarding the *Meroni* and *Romano* restrictions, Articles 290-291 and 114 TFEU respectively.[135]

First, the UK argued a breach of the principles relating to the delegation of powers laid down in *Meroni*. It claimed that the ESMA's determination as to whether the criteria set out in Article 28(2) are met entails "a very large measure of discretion."[136] According to the UK, under Article 28(1), ESMA has a wide range of choices as to which measure or measures to impose and as to any exceptions that may be specified. Those choices have very significant economic and financial policy implications.[137] Besides, the UK stated that ESMA has extremely wide-

---

[134] Merijn Chamon, *The Influence of "Regulatory Agencies" on Pluralism in European Administrative Law*, 5 REV. OF EUR. ADMIN. L. 61, 89 (2012).

[135] Note that the UK did not call into question the establishment of ESMA, and hence its founding regulation, which in light of Article 263 TFEU can be challenged within two months of the publication of the regulation. This is not surprising, however, because the possibility of creating an agency on the basis of Article 95 TEC (114 TFEU) was challenged by the UK and was upheld by the Court in the ENISA judgment, United Kingdom v. Parliament and Council, CJEU Case C-217/04, 2006 E.C.R. I-03771.

[136] U.K. and N. Ir. v. European Parliament and the Council of the European Union, CJEU Case C-270/12, para. 28 (Jan. 22, 2014), http://curia.europa.eu/ [[hereinafter *ESMA-shortselling*].

[137] *Id.* at para. 30.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

ranging discretion when deciding how to take account of the factors set out in Article 28(3), which include *inter alia* the impact on liquidity and the level of uncertainty for market participants and are "highly subjective."[138]

Second, the UK pleaded a breach of the principle established in *Romano*. It argued that Article 28 authorizes ESMA to adopt quasi-legislative measures of general application,[139] because a prohibition on short sales affects the entire class of persons engaging in transactions in that instrument or category of instruments. It observed that at issue, therefore, was not an individual decision or a bundle of individual decisions—even if confined to a very limited range of stocks—but a "measure of general application having the force of law."[140]

Third, the UK submitted that the delegation of powers to an EU agency as those provided for in Article 28 was incompatible with the Treaties, because Articles 290 and 291 TFEU circumscribed the circumstances in which certain powers could be given to the Commission.[141] According to the UK, any prohibition on short sales under Article 28(1) was intended to bind the entire class of persons engaging in transactions in that instrument or category of instruments. It was therefore a measure of general application and could not be entrusted to an agency.[142]

Fourth, the UK questioned the legal basis (e.g., Article 114 TFEU) for Article 28 of Regulation No 236/2012 which authorizes ESMA to take decisions affecting natural or legal persons directly. According to the UK, Article 114 TFEU did not empower the EU legislature to take individual decisions that were not of general application or to delegate to the Commission or a Union agency the power to adopt such decisions.[143] Furthermore, decisions directed at financial institutions overriding those made by competent national authorities could not be regarded as Article 114 TFEU harmonization measures.[144]

---

[138] *Id.* at para. 32.

[139] *Id.* at para. 56.

[140] *Id.* at para. 57.

[141] *Id.* at para. 69.

[142] *Id.* at para. 70.

[143] *Id.* at para. 89.

[144] *Id.* at para. 90.

II. What the CJEU Did and Did Not Say

Advocate-General Jääskinen upheld only the last point of the UK in his opinion before the Court, noting that Article 352 TFEU (requiring unanimity in the Council and not qualified majority as in Article 114 TFEU) would be the correct legal basis of Article 28 of Regulation No 236/2012, and that it would have opened up an important channel for enhanced democratic input. However, the Grand Chamber of the Court dismissed all four arguments of the plaintiff.

Regarding the first plea—concerning the alleged violation of the *Meroni* non-delegation criteria—the Court held that Article 28 of Regulation No 236/2012 did not confer any autonomous power on ESMA that went beyond the bounds of the regulatory framework established by ESMA's founding Regulation. The exercise of the powers under Article 28 was—unlike the powers delegated to the bodies concerned in the *Meroni* case—circumscribed by various conditions and criteria that limit ESMA's discretion. According to the Court, the powers available to ESMA under Article 28 were precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority. Furthermore, ESMA's margin of discretion was circumscribed by both the consultation requirement and the temporary nature of the measures authorized. Those powers thus complied with the requirements laid down in *Meroni* and did not, therefore, imply that ESMA was vested with a "very large measure of discretion" incompatible with the EU Treaty. The Court did not say, however, how far *Meroni*'s classification of powers would be applicable in the future if discretionary powers subject to certain restrictions were now allowed to be delegated.

With respect to the second plea, the violation of the *Romano* restriction to entrust agencies with a power to adopt acts "having the force of law," the Court noted the change of the institutional framework established by the EEC and TFEU treaties, which seemed to imply that the *Romano* restriction became irrelevant. The Court inferred certain implied powers from Article 263 and 277 TFEU, which establish the judicial review of the agencies' acts, to create agencies and delegate them powers to adopt measures of general application. While, in *Romano*, the Court referred to Article 155 EEC Treaty as one of the three Treaty provisions for overturning the legally-binding effect of the agency's decision, it did not seem to follow a similar logic in the new case. Instead, the Court distinguished the powers of agencies from those of the Commission performed under Articles 290 and 291 TFEU.[145]

In addressing the third plea, the Court considered whether Articles 290 and 291 TFEU established a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission, or whether other systems for the delegation of such powers to Union bodies, offices or agencies could have been contemplated. For the Court, the fact that the Treaty mentioned

[145] *Id.* at paras. 77–78.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

agencies in twenty-five provisions[146] implied the open regime of Article 290 and 291 TFEU. In the Court's view, ESMA's decision-making powers in an area which required the deployment of specific technical and professional expertise did not correspond to any of the situations defined in Articles 290 and 291 TFEU. The Court did not say, however, how the powers of EU agencies differ from those of the Commission exercised under the mentioned articles. "For example, binding legal acts on the registration or refusal of a European Trade Mark adopted by the OHIM are clearly an act of executive nature and comparable with Commission decisions on the approval or refusal of an EU-wide approval of a novel food."[147] In this light, the distinction between these decisions is made on the basis of the identity of the institution exercising relevant power, rather than on the basis of the nature of the power. The question is whether this should be the case.

The fourth plea concerned the appropriateness of the legal basis (Article 114 TFEU) for entrusting ESMA with decision-making powers of general application given to it by Article 28 Regulation No 236/2012.[148] The Court used the following test: A legislative act adopted on that legal basis must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as its object the establishment and functioning of the internal market.[149] In the Court's view, Article 28 of satisfied both requirements. At the same time, the Court ignored completely the argument brought up by AG Jääskinen about the appropriateness of choosing the legal basis from the democratic input perspective, to be discussed in the following section.

---

[146] To be more specific, the Lisbon Treaty mentions EU agencies in a number of general provisions, such as Article 15 TFEU: "In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible." Similar references to agencies can be found in Articles 9 (on democratic equality), 42 and 45 (on European Defense Agency) TEU and Articles 15 (mentioned before), 16 (on data protection), 24 (on right to communication, indirectly referring to any 'body'), 71 (on internal security), 123, 124, 127 and 130 (on monetary union), 228 (concerning the procedures of Ombudsman), 263, 265, 267 and 277 (on judicial review), 282 (on ECB), 287 (on the discharge by the Court of Auditors), 298 (on 'open, efficient and independent' European administration) and 325 (on anti-fraud) TFEU, and Protocols 3 (on the Court of Justice), 4 (on the ECB), 6 (on the location of the seats of institutions and agencies), 10 (concerning the European Defense Agency), and 36 (on transitional provisions).

[147] Ellen Vos, *European Agencies and the Composite EU Executive in* EUROPEAN AGENCIES IN BETWEEN INSTITUTIONS AND MEMBER STATES 44 (Michelle Everson et al. eds., 2014).

[148] The debate and the case law on Article 114 TFEU are outside the scope of the article, except for the argument on democratic input, to be discussed in Part IV. For the discussion of the appropriateness of Art. 114 TFEU as legal basis for delegation to ESMA, see also Merijn Chamon, *The Empowerment of Agencies under the* Meroni *Doctrine and Art. 114 TFEU: Comment on United Kingdom v. Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism*, 39 EUR. L. REV. 380, (2014) and Pieter van Cleynenbreugel, Meroni *Circumvented? Art. 114 TFEU and EU Regulatory Agencies*, 21 MAASTRICHT J. EUR. & COMP. L. 64 (2014).

[149] *U.K. and N. Ir.*, CJEU Case C-270/12 at para. 100.

III. What the CJEU Could Have Said

So far this part has discussed the *ESMA-short selling* judgment, the UK's arguments, the Court's holding, and the latter's controversies. It has shown that the Court has been quite lenient in its interpretation of the existing Treaty provisions—perhaps too lenient—because it seems to lean more towards the legislature's regulatory preferences, rather than balancing the legislative choices with one of the major core values governing EU integration, for example, democratic input.

The Court does not consider Article 28 "in isolation" but regards it within the framework of a chain of regulatory responses of the EU legislator to the 2008 financial crisis and upholds it. While the procedure that Article 28 sets up may be indeed a necessary component of the general financial regulatory reform, the Court could also consider the general Treaty framework, which does not explicitly allow the creation of agencies and does not list them among the possible recipients of implementing powers. Here, a more "balanced" (in the sense of balancing between legislator's regulatory references and higher values) answer of the Court could have been to follow AG Jääskinen's opinion concerning the importance of the choice of legal basis for enhancing the legitimacy of agencies and of their decisions, for example, to make Article 352 TFEU the legal basis for creating agencies. This Article requires unanimity in the Council and requires the Commission to bring all related legislative proposals to the attention of national parliaments. The Treaties are not explicit as to when independent regulatory agencies can be created. Yet, agencies impact society by participating in the policy-shaping and implementation processes or adopting legally binding decisions affecting the citizens generally or individually. The authorization of an agency and its powers by all Member States would enhance the agency's legitimacy, because the Union's democratic legitimacy derives, to a great extent, from the Member States. For the sake of agencies' legitimacy, such a decision would give two choices to the Member States: Either modify the Treaty by establishing a clear legal basis for creating agencies pursuant to a specified legislative procedure or be obliged to create and delegate to agencies only upon the agreement by all Member States together with the Parliament.

The Court deduces from Article 263 and 277 TFEU an implied power to empower agencies with powers to issue measures of general application. However, reviewability does not address the question of how much discretion such powers may entail. In this regard, the Court could have at least acknowledged the "hidden ways"[150] in which the Treaty addresses the question of agencies' creation and the scope of powers and discretion allowed to be delegated to them and could have stressed the necessity to address such issues. Such an approach could provide an

[150] Herwig C.H. Hofmann & Alessandro Morini, *Constitutional Aspects of the Pluralisation of the EU Executive Through "Agencification"* 34 (Univ. of Lux. L., Working Paper No. 2012–01, 2012). The hidden ways imply no explicit authorization of creating agencies and delegating to them specific powers, but mention agencies here and there in some general provisions.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

incentive for the EU political institutions and Member States to address the question of the nature and scope of delegable powers and discretion, encouraging the democratic deliberation and perhaps even decision-making process in relation to establishing of an appropriate creation and operation framework for agencies to take place.

When entrusting the Court with the task to ensure that, in the interpretation and application of the Treaties, the law be observed (Article 19 TEU), the Treaties require the Court to consider legal provisions challenged within the framework of relevant secondary and policy-specific legislation and in light of the higher norms and principles—such as democratic input and control—governing the EU integration. In *ESMA-shortselling*, the Court seems to have done the former, but not the latter.

D. The New Treaties, Case-law Regime, and Agencification

The Court's assessment in the *ESMA-shortselling* case is quite short, yet it has great significance. This is because the *ESMA-shortselling* case seems to lay down a new delegation doctrine in the EU. Furthermore, in light of the new Treaty and case law regime, there are at least two important implications for further agencification which need to be noted. These implications concern the issues of democratic legitimacy and accountability of EU agencies and the Union at large.

I. The New Delegation Doctrine in the EU

The *Meroni-Romano* non-delegation doctrine has arguably found its successor. So far, the applicability of the *Meroni* ruling to EU agencies has been questioned on the basis of the age of the case itself, a different type of agency at stake (private instead of public bodies), and a different treaty regime dating back to 1956.[151] In *ESMA-shortselling*, the Court does indeed note the difference between the type of agencies[152] and relies on the Lisbon Treaty, the first EU Treaty to mention agencies although it is not explicit regarding the possibility to create agencies and delegate specific powers to them. The Court concludes that the reviewability of agencies' decisions (Article 263 and 277 TFEU) implies the possibility to create agencies with powers to issue acts of general application. It lays down the following delegation standard: The delegation of powers to issue legally binding measures, which are (1) precisely delineated, (2) subject to sufficiently (delineating) conditions and criteria limiting discretion, which may include a notification requirement and the temporary character of a measure; and (3) amenable to judicial review in the light of the objectives established by the delegating authority, is allowed.

[151] *See, e.g.*, Chamon, *supra* note 67.

[152] *U.K. and N. Ir*, CJEU Case C-270/12 at para. 43.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

The *ESMA-shortselling* case sets up a *new* delegation doctrine in the EU because this case is based on the Treaty provisions recognizing agencies' existence and it overturns at least in part the *Meroni-Romano* non-delegation standard. *Romano*'s ban on delegating powers with "the effect of law" because the judicial review was precluded, no longer seems relevant because the Lisbon Treaty establishes the judicial review of agencies' acts explicitly. Furthermore, even though the Court states that the delegation to ESMA is within the limits of *Meroni*, the latter's continuing relevance in the future is unclear with respect to the three pillars of the *Meroni* doctrine.

To begin, the *Meroni*'s non-delegation criteria included the requirement of delegating powers which the delegating authority enjoyed itself. In *Meroni*, it was the High Authority (the Commission) who delegated the power to agencies, not the legislator. Clearly, the Union Legislator does not enjoy all the powers which it delegates to EU agencies.[153] Therefore, the term "conferral" seems more suitable to describe empowering agencies with public power. The *Meroni* doctrine can be, strictly speaking, characterized as applicable to the delegation of powers. In fact, the Court does use the term "delegation" when it discusses the *Meroni* judgement and the term "conferral" when it talks about ESMA's powers, without further explanation on the implications of the difference. This leaves the reader with uncertainty on whether and if so how conferral and delegation differ and what implications the possible difference may have for the applicability of the *Meroni* restrictions in relation to EU agencies.

If there is indeed a distinction between delegation and conferral of powers, then this also has an implication for the other pillar of the *Meroni* doctrine, for example, the question of review. In *Meroni*, it was found that if the delegating authority would have exercised the delegated powers itself when issuing decisions, it would have been bound by certain principles established by the Treaty, such as the requirement to publish an annual report.[154] Hence, the recipient of the delegated powers was not only the recipient of delegated powers but also of obligations that the delegating authority may be subject to. The question of what and how many obligations the agency should be subject to—including the question of who should hold it to account—remains unclear when the conferral of powers occurs. This is because the legislator has given somewhat "new" powers to agencies. These powers are not subject to certain reporting and other obligations under the Treaty, especially if agencies' powers are nowhere defined in the Treaty and—according to the Court itself—are different from the powers exercised by the Commission under Articles 290 and 291 TFEU.[155] The Treaty establishes only the possibility of judicial

[153] *See supra* Part II. 1 (discussing the origins of agencies' functions).

[154] *Meroni*, CJEU Case 9/56 at 149.

[155] It is, in fact, difficult to place the Court's ruling within the new Treaty-based distinction of legislative implementation and delegation of powers, as well as different democratic controls which different powers entail.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

review; the Treaty and the Court are, however, silent concerning other reviews, such as those of political accountability.

Finally, the *Meroni* non-delegation standard was based on the distinction between two types of powers: "Delegable" executive and "non-delegable" discretionary powers. In *ESMA-shortselling*, the Court allowed the Union Legislator to entrust agencies with powers of general application whose discretion is limited by various conditions. Purposely using the UK's words on several occasions, the Court seemed to hint that a "*very large* measure of discretion" cannot be delegated.[156] The Court, in essence, says that a measure of discretion is allowed to be given to an agency as long as it is not "very large" and is subject to the criteria mentioned above. Following this line of reasoning, *Meroni*'s classification of executive and discretionary powers becomes less relevant, if it is still relevant at all.

II. Implications of the New Treaty and Case-Law Regime for Further Agencification in the EU

In light of the new Treaty and case-law regime there are at least two important implications for agencification in the EU. These concern the issues of democratic legitimacy and accountability of EU agencies and the Union at large. The (democratic) legitimacy of agencification in the EU has been a debatable issue, especially in the recent decade. The concerns have been the following.

First, the EU Treaties have never explicitly authorized the creation of EU agencies. Consequently, no Treaty regulates the nature and scope of possible delegation of powers to them. Nevertheless, EU agencies' numbers and *de jure* powers have been growing and the creation of agencies has, at times, lacked good reason.[157]

Second, even if one were to agree that the creation of agencies was an implied power of the Union Legislator, two concerns remain. On the one hand, the democratic credentials of the EU institutions and the EU in general are questionable, which is not helped by the fact that these institutions prolong the delegation chain further away from the people without the EU's explicit authorization. On the other hand, the nature and scope of delegable powers are unclear. The *Meroni* restriction on delegating executive powers involving no discretion was argued not to be respected in practice.[158]

Third, the importance of the legal basis for creating agencies in light of democratic legitimacy has been debated. Similar to AG Jääskinen's opinion in the *ESMA-shortselling* case, there exists the difference of opinion in relation to the necessity of

[156] *U.K. and N. Ir*, CJEU Case C-270/12 at para. 54 (emphasis added).

[157] RAMBOLL EVALUATION, *supra* note 5.

[158] *See, e.g.*, Chiti, *supra* note 7, at 1406.

involving all EU Member States in passing agencies' founding Regulations to legitimize them. The agencies' legitimacy is clearly enhanced if all Member States agree to their creation. Alternatively, another argument supported basing the founding act on the provision regulating the policy area at stake,[159] rather than limiting the legal basis to the legislative procedure. Finally, Davies suggested that creating agencies by international conventions—as was the case with Europol—was the most democratically legitimate means of creation because conventions would require ratification by the national legislatures.[160]

To what extent do the Lisbon Treaty and the *ESMA-shortselling* case address existing legitimacy concerns? It seems that only the question of agencies' *formal* legitimacy is addressed, and even it is addressed shallowly. Some now argue that EU agencies are legitimate because the Lisbon Treaty mentions them in twenty-five provisions. In addition, the delegation of powers involving not "a *very* large measure of discretion" to agencies now seems legitimate based on the *ESMA-short selling*'s interpretation of Articles 263 and 277 TFEU. At the same time, concern about extending the delegation line to agencies created by the Union institutions with questionable democratic credentials remains. The legitimacy of EU agencies is further impaired by the fact that the Union Legislator can cherry-pick legal bases for creating agencies,[161] which includes the possibility of creating agencies without the agreement of all EU Member States. Moreover, the Court in *ESMA-shortselling* in no way pushes the Union Legislator and the Member States to clarify these issues or promote the democratic legitimacy of EU agencies. In the *ESMA-shortselling* case, the Court's lenient approach allows the Member States to avoid "the thorny

---

[159] Giandomenico Majone & Daniel Keleman, *Managing Europeanization: The European Agencies*, *in* THE INSTITUTIONS OF THE EUROPEAN UNION 197, 219–40 (John Peterson & Michael Shackleton eds., 2006) ("The legal basis for establishing an agency [is proposed to] be the same as that authorizing the corresponding policy rather than the general Article 308 EC. The logic of the proposal is clear—the agency is simply an instrument of policy implementation").

[160] Bleddyn Davies, *Delegation and Accountability of Criminal Agencies after Lisbon: An Examination of Europol, in* THE TREATY OF LISBON AND THE FUTURE OF EUROPEAN LAW AND POLICY 325, 331–33 (Martin Trybus & Luca Rubini eds., 2012).

[161] Different legal bases imply the necessity of different legislative procedures to be used to pass relevant acts. This in turn implies the involvement of different EU institutions, which can be used and abused for various political purposes. For instance:

> [I]n two cases (the EMEA and the Community Plant Variety Office), the Council changed the legal principle on which the Commission had originally based the proposal. Using Article 100A, EC Treaty, as proposed by the Commission for the EMEA, would have required the co-operation procedure and thus more EP influence, and, additionally, qualified majority voting in the Council.

Kreher, *supra* note 44, at 232.

https://doi.org/10.1017/S2071832200019350 Published online by Cambridge University Press

question of whether this actually necessitates Treaty change,"[162] which seems necessary, at least because Articles 290 and 291 TFEU "forget" to list agencies among the legitimate authors of non-legislative acts. Additionally, this is necessary because the balance of controlling powers among the EU main institutions is affected by the creation of agencies but not reflected in the Treaty.

Another implication of the *ESMA-shortselling* case which this article notes concerns the issue of accountability of the EU executive. Alexander Hamilton noted over two centuries ago that:

> [O]ne of the weightiest objections to a plurality in the Executive . . . is that it tends to conceal faults and destroy responsibility . . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall.[163]

The EU seems to run this risk because the locus of the executive power is highly dispersed. There is not only division between the EU and national executive institutions, but also at the EU level itself, where next to the Commission and in part the Council, approximately thirty-five independent regulatory agencies are additionally involved in the policy-shaping and implementing process.

Furthermore, there are no clear accountability roles of the EU main institutions in relation to agencies, nor is there any Treaty or case law obligation to clarify such roles. In this respect, what seems to have been neglected by the Court when it viewed EU agencies as simply instruments of policy implementation is that the creation of agencies raises institutional questions, such as the already mentioned balance of controlling powers. This balance is not addressed in the Treaty because the Treaty does not explicitly provide for the creation of agencies, yet the balance of controlling powers is still affected by the creation of agencies. As shown above, approximately thirty-five EU agencies operate in their own individualized accountability regimes, where the EU main institutions have very different controlling powers in relation to individual EU agencies, if having such powers at all. The differences exist without necessarily having good reasons for them. Not only does the existing situation shadow accountability gaps,[164] but it also hinders the clarity and comprehensibility of the system, if the word "system" is appropriate here at all. The absence of an obligation to justify why some agencies escape accountability obligations to which other similar agencies are subject, and why

---

[162] Alex Barker, *European Court Rejects UK challenge Against EU Short-Selling Ban*, FINANCIAL TIMES (Jan. 22, 2014), www.ft.com/cms/s/0/68cbcb64-834c-11e3-aa65-00144feab7de.html#axzz2sRtvtjln.

[163] THE FEDERALIST NO. 70 (Alexander Hamilton).

[164] SCHOLTEN, POLITICAL ACCOUNTABILITY, *supra* note 11, at 177-178, 186.

some EU agencies have been created in the first place,[165] affect agencies' and the EU's legitimacy."[I]t is doubtful that the exercise of public authority may be perceived as legitimate if it is not understood."[166] Given the treaty gap on the issues of agencies' creation, delegation and accountability, the Court could have been more demanding in this respect and introduce a more restrictive delegation standard in order to promote democratic legitimacy of the agencies and the EU.

E. Conclusion

This article has discussed the ongoing agencification trend in the EU in light of the old and new treaties and case law, including the just-released *ESMA-shortselling* judgment. While it suggested that the new ruling arguably establishes a new delegation doctrine, it also noted that the old concerns regarding the democratic legitimacy and accountability of EU agencies and the Union remain.

It is true that the Lisbon Treaty mentions EU agencies in twenty-five general provisions, yet it leaves three crucial questions open: (1) Upon what conditions can an EU agency be created and on what legal basis?; (2) what kind of powers and how much discretion can be delegated to agencies?; and (3) who holds agencies accountable and how? The Court's rather lenient behavior in the *ESMA-shortselling* case leaves no reason for the Union Legislator and the EU Member States to address these quite fundamental questions. The current approach of delegating more and more public authority (in quantitative and qualitative terms) to agencies without justifying these decisions and without establishing a proper accountability framework to withstand judicial scrutiny will negatively affect the EU's ability to gain democratic legitimacy because the current approach is haphazard with respect to the necessity of agencification and its limits. Acceptance of governing authority rests, however, on understanding of the authority's actions.

If agencification seemed limited prior to the Lisbon Treaty under the *Meroni-Romano* restrictions, its limits have been diminished now.[167] This is due to both the "hidden ways" in which the Lisbon Treaty regulates agencies and the vagueness of the Court in interpreting the existing Treaties' gaps, such as the scope of powers and discretion that can be given to EU agencies. Given the absence of clear limits, further agencification is likely to persist at the risk of increasing the democratic

[165] *Id.* at 70.

[166] Peter Dyrberg, *Accountability and Legitimacy: What is the Contribution of Transparency?, in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 81, 83 (Anthony Arnull & Daniel Wincott eds., 2002).

[167] For the argument of the evolution of the "delegation debate" from the issue of "what kind of powers can be delegated to EU agencies" to the question of "what kind of discretion can be conferred on EU agencies," see Miroslava Scholten & Marloes van Rijsbergen, *The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU Upon the Meroni-Romano Remnants*, 41 LEGAL ISSUES ECON. INTEGRATION 389, 389–406 (2014).

legitimacy deficit and accountability gaps, because these issues are not regulated explicitly by the Treaty or any other legally binding act.[168]

Is this arguably unlimited agencification in the EU a good or bad thing? It depends. From the regulatory legitimacy perspective, powerful regulators are thought to be necessary to attain policy goals effectively because they can respond to relevant changes and threats in a prompt and intelligible manner. Here, it is argued that agencies can gain the so-called regulatory legitimacy by their good deeds and achievements. Note, however, that after forty years of impact assessment in the United States and the subsequent development of the European regulatory state in existence for more than two decades, there is still no clear-cut evidence concerning the results of regulatory reforms and regulatory agencies' performance. The few studies examining agencies' performance, while helpful for building detailed country-specific knowledge, have led to mixed and inconclusive results.[169] In other words, the underlying hypothesis of the theory of regulatory legitimacy must still be proven.

From the democratic legitimacy perspective, the unlimited agencification is clearly problematic because the Union Legislator does not, and thanks to the Court of Justice of the EU, it need not, give proper account as to the reasons for agencification and its limits. Without relevant treaty changes, "the ultimate principals, the citizens"[170] are not given the opportunity to give permission to delegate vast public authority to bodies not explicitly envisaged in the 'contracts' that they have with those who are in power. The proliferation of agencies results in a democratic legitimacy deficit, which has a special detrimental effect in the EU. This is because the democratic legitimacy and accountability of the EU agencies' creators (the Council and the European Parliament) are the troublesome issues on their own due to the low turnouts on the elections to the European Parliament representing the EU citizen that does not arguably exist and the absence of any collective accountability of the Council. To be on the safe side in such circumstances, it is essential to restrict the EU Legislator's ability to place decisive powers with questionable accountability even further from the people.

---

[168] The recently issued "Common Approach" on EU agencies is a non-legally binding document which implies that future political negotiations remain the determinant factor when creating agencies, delegating powers to them, and organizing their accountability. The future negotiations will test the political will required to implement the intentions laid down in the "Common Approach" consistently. On the critical analysis of the Common Approach on EU agencies, see Miroslava Scholten, *The Newly Released "Common Approach" on EU Agencies: Going Forward or Standing Still?,* 19 COLUM. J. EUR. L. 1 (2012).

[169] Martino Maggetti, *Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review*, 2 LIVING REVIEWS IN DEMOCRACY (2010).

[170] Katrin Auel, *Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs,* 13 EURO. L. J. 487, 504 (2007).