A Judicial Re-Thinking on the Delegation of Powers to European Agencies under EU Law? Comment on Case C-270/12 *UK v. Council and Parliament*

By Gianni Lo Schiavo[*]

Abstract

The case C-270/12 *UK v. Council and Parliament* is a much-awaited judgment addressing the problem of the delegation of powers to European agencies in the financial markets. By distancing itself from the Advocate General's conclusions, the Court of Justice upheld the legitimacy of the use of Article 114 TFEU to allow the European and Securities Market Authority to prohibit or restrict certain financial products on the market. The Court also gave greater flexibility to the *Meroni* doctrine and superseded the *Romano* doctrine. The Court's decision is welcome, especially in light of the increasingly extensive use of European agencies to regulate and supervise the internal market.

A. Introduction

Post-crisis reforms in the regulation and supervision of financial markets have led to increasing centralization of powers at the EU level. The European Market and Securities Authority (ESMA) is one of the three supervisory authorities established in 2010 in response to the financial crisis.[1] Over time ESMA has been conferred supervisory functions that make it a true European watchdog for some specific supervisory functions. In particular, ESMA has become the main supervisor for credit rating agencies, and it exercises oversight on trade repositories in the internal market. These two prerogatives demonstrate that ESMA has been vested with true regulatory and supervisory powers that go beyond the existing framework for quasi-decision-making agencies. ESMA's quasi-regulatory and supervisory powers make it a very powerful—if not even the most powerful—agency at the European level.[2] In this sense, ESMA can be regarded as an

[*] Gianni Lo Schiavo (LLM, College of Europe) is PhD Candidate at Dickson Poon School of Law, King's College, London. The author wishes to thank the editorial board for its careful reading.

[1] *See* Commission Regulation 1095/2010, European Securities and Markets Authority, 2010 O.J. (L 331/84) 1 [hereinafter Regulation 1095/2010].

[2] *See also* Regulation 806/2014, of the European Parliament and of the Council of 15 July 2014 Establishing Uniform Rules and a Uniform Procedure for the Resolution of Credit Institutions and Certain Investment Firms in the Framework of a Single Resolution Mechanism and a Single Resolution Fund and Amending Regulation 1093/2010 2014 O.J. (L 225) 1, which creates the Single Resolution Board (SRB). The SRB is the new EU agency

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institutional instrument for the further "Europeanization" of regulatory and supervisory functions.

The purpose of this contribution is to appraise the findings in the case C-270/12 *United Kingdom v. European Parliament and Council*[3] on the power of short selling as entrusted to the European Securities and Markets Authority (hereinafter *ESMA Case*). This Article begins with a brief overview of the role of the ESMA and a consideration of the background to the legislative act that established the ESMA as well as the provision in the Short Selling Regulation (SSR) under review. Then it delves into the ECJ's findings and assesses the perspectives arising from the Court's judgment by analyzing the four pleas in the case. The Article gives particular attention to three issues: (1) The new evolutionary interpretation of the *Meroni* and the *Romano* doctrine; (2) the adjudication of the reviewability of European agencies' acts; and (3) the contested use of Article 114 TFEU to confer powers to European agencies for the progressive approximation of provisions relating to the internal market.

B. Legal Background to the Case

The applicant in *United Kingdom v. European Parliament and Council* challenged the validity of Article 28 of the SSR, alleging that the ESMA should not have been given the power to prohibit or restrict the use of certain financial operators.[4] Before assessing the ECJ's findings, it is necessary to provide some background on the role of the ESMA and the power it may exercise when banning "short sales" under the SSR.

ESMA is one of the three authorities established after the findings of the de Larosière Report of 2009.[5] ESMA is the European agency charged with supervising securities in the internal market and, as part of the European System of Financial Supervisors, it is part of an "integrated network of national and Union supervisory authorities, leaving day-to-day supervision to the national level."[6]

The institutional role and the many functions of the ESMA cannot be fully presented and analyzed in this comment. A number of scholarly contributions have spoken to the strengths and weaknesses of the ESAs and the ESMA, as well as their role in the

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dealing with resolution plans and exercising the resolution of significant credit institutions in financial distress, whenever one of them fails or is likely to fail. The SRB will also be in charge of the Single Resolution Fund, a pool of financial resources available for resolution purposes.

[3] United Kingdom v. Parliament and Council, CJEU Case C-270/12 (Jan. 22, 2014), http://curia.europa.eu/.

[4] *See* Regulation 236/2012, of the European Parliament and of the Council of 14 March 2012 on Short Selling and Certain Aspects of Credit Default Swaps, 2012 O.J. (L 86) 1 [hereinafter Regulation 236/2012 or SSR].

[5] *See* THE HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU (DE LAROSIÈRE GROUP), REPORT 48 (2009).

[6] Regulation 1095/2010, recital 9.

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functioning of financial markets.[7] One of the ESMA's many functions is the power to "temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system. . . ."[8] This provision empowers the ESMA to use binding powers to prohibit or restrict financial products in the internal market under special circumstances.

Pursuant to this authority, the ESMA has been given a specific role under the SSR, which has been an important legislative reform for financial markets.[9] The SSR aims to regulate "any sale of the share or debt instrument which the seller does not own at the time of entering into the agreement to sell."[10] Among other provisions, the SSR specifically confers some powers to the ESMA in exceptional circumstances. Article 28 of Regulation 236/2012 allows direct intervention on the basis of Article 9(5) of the ESMA founding Regulation and enables the ESMA to prohibit—or to impose conditions, including notification duties on—the acquisition of net short positions by market players on certain financial instruments.[11] The adoption of a decision under Article 28 is restricted to cases where (a) the envisaged measures "address 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 and there are cross-border implications"; and (b) "no competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that do not adequately address the threat." These conditions mean that the ESMA has a role only when certain circumstances in the financial market arise and effective measures are not taken by the competent national authorities. Alternatively, if adopted, the ESMA's measures may supersede any national measure in force.

C. Facts of the Case

The SSR entered into force on 25 March 2012. Shortly after its adoption, the United Kingdom promoted an action for the annulment of Article 28 of the SSR under Article 263

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[7] On the institutional and constitutional issues arising from the establishment of ESMA see, among others, Edoardo Chiti, *An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies*, 46 COMMON MKT. L. REV. 1395, 1427 (2009); Takis Tridimas, *Financial Supervision and Agency Power: Reflections on ESMA*, *in* FROM SINGLE MARKET TO ECONOMIC UNION 55–89 (Niamh Nic Shuibhne & Laurence W. Gormley eds., 2012); and recently, Carmine Di Noia & Matteo Gargantini, *Unleashing the European Securities and Markets Authority: Governance and Accountability after the ECJ Decision on the Short Selling Regulation*, 15 EUR. BUS. ORG. L. REV. 1 (2014).

[8] Regulation 1095/2010, art. 9, para. 5.

[9] *See* Regulation 236/2012, recital 2.

[10] *Id.* at art. 2(b).

[11] *See* Oskari Juurikkala, *Credit Default Swaps and the EU Short Selling Regulation: A Critical Analysis*, 9 EUR. COMPANY & FIN. L. REV. 307, 322 (2012).

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TFEU.[12] The UK framed its case on four grounds of annulment. First, it alleged that the provisions envisaged under Article 28 of the SSR exceed the limits set out by the Court in the *Meroni* judgment on the delegation of powers to EU agencies.[13] Second, it contended that Article 28 aims to empower the ESMA to adopt measures of general application having the force of law in conflict with the ECJ's ruling in *Romano*.[14] Third, it argued that Article 28 empowers the ESMA to adopt non-legislative acts that are in breach of Articles 290 and 291 TFEU. Finally, the UK claimed that the power to adopt individual decisions that are legally binding on third parties is not correctly based on Article 114 TFEU, which is the legal basis for the harmonization of the internal market and not for regulatory measures by an EU agency directed at individuals in Member States.

D. Opinion of the Advocate General

The Advocate General (AG) Jääskinen delivered his opinion on the case on 12 September 2013.[15] After describing the role of European agencies, the AG drew a distinction between the ESAs from other agencies. He concluded that the ESMA can "make legally binding decisions directed at individual legal entities *in substitution* for either a decision, or the inaction, of a competent national authority."[16] After having advocated for the importance of judicial scrutiny on the use of Article 114 TFEU, the AG assessed the existing ECJ case law on recourse to Article 114 TFEU to establish agencies. His analysis then moved to the role of Article 114 TFEU for the establishment of the special power under Article 28 of the SSR.

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[12] Under article 263, paragraphs 1 and 2 of the TFEU,

> The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

Consolidated Version of the Treaty on the Functioning of the European Union, art. 263, May 9, 2008 O.J. (C 115). This provision allowed the UK to bring an action for annulment of Article 28 of the SSR.

[13] *See* Meroni v. High Authority, CJEU Case C-9/56, 1958 E.C.R. 133.

[14] *See* Giuseppe Romano v. Institut national d'assurance maladie-invalidité, CJEU Case C-98/80, 1981 E.C.R. 1241.

[15] *See* Opinion of Advocate General Jääskinen, United Kingdom v. Council and Parliament, CJEU Case C-270/12 (Sept. 12, 2013), http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-09/cp130101en.pdf.

[16] *Id.* at para. 24.

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The AG's main concern was whether the ESMA's special power to ban activities, or to impose a restriction on activities, constituted an *ultra vires* use of Article 114 TFEU.

The AG's skepticism towards the use of Article 114 as the basis for the power to enact Article 28 is justified as this power allows the ESMA to intervene in the market in a way that affects the conditions of competition in a particular financial market.[17] Hence, the ESMA acts in a way that does not necessarily fit within the permissible object, namely "the improvement of the conditions for the establishment and functioning of the internal market."[18] If allowed to exercise this power, the ESMA might avoid judicial review of its compliance with a proper legal basis.[19] By contesting the qualified majority voting under the ESMA procedure, and by contrasting the objective of Article 28, the AG concluded that Article 114 TFEU was not the correct legal basis for the enactment of Article 28.[20] Rather, the AG indicated that the correct legal basis for Article 28 was Article 352 TFEU (the flexibility clause).

The remaining part of the AG's opinion assessed the three other pleas of the applicant on the basis of the *Meroni* and *Romano* cases in light of Article 290 and 291 TFEU. Preliminarily, the AG clarified that the other three grounds are to be assessed only in the event that the Court considers Article 114 TFEU the correct legal basis for the adoption of Article 28.[21] In particular, the AG addressed the issue of the lack of judicial review for the decisions taken by agencies and considered that the Lisbon Treaty has filled the gap with the introduction of Articles 290 and 291 TFEU.[22] The AG excluded from this general frame the possibility that agencies may be conferred powers under Article 290 TFEU.[23] This means that the *Meroni* case law remains relevant "in that (i) powers cannot be delegated to an agency that are different from the implementing powers the EU legislature has conferred on the delegating authority . . . , and (ii) the powers delegated must be sufficiently well defined so as to preclude arbitrary exercise of power."[24] The AG concluded that the challenged ESMA powers do not infringe the *Meroni* and *Romano* case law. The AG offered two justifications for this conclusion. First, the ESMA's decisions under Article 28 do not infringe the *Meroni* doctrine because "the essential value judgments

[17] *See id.* at para. 45.

[18] *Id.* at para. 46.

[19] *See id.*

[20] *See id.* at para. 53.

[21] *See id.* at para. 60.

[22] *See id.* at para. 70.

[23] *See id.* at para. 85.

[24] *Id.* at para. 88.

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underpinning Article 28 of the Regulation have been made by the EU legislature and have not been left to ESMA."[25] Second, "ESMA has no discretion as to whether or not to act."[26]

E. The ECJ Judgment

The ECJ delivered its judgment on 22 January 2014. Most importantly, the ECJ did not follow the AG's opinion regarding the legitimacy of the use of Article 114 TFEU.

The ECJ followed the first pleas put forward by the applicant and started with an assessment of the delegation of powers as laid down in the *Meroni* case. The ECJ recalled the distinction between the delegation of clearly defined executive powers and the delegation of a discretionary power.[27] The ECJ then specified that the delegation of powers in the *Meroni* case was made to entities governed by private law.[28] The ESMA delegation of powers under Article 28 of Regulation 236/2012, on the other hand, "is circumscribed by various conditions and criteria which limit ESMA's discretion."[29] With respect to the first plea, the ECJ concluded that "the powers available to ESMA under Article 28 of Regulation No 236/2012 are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority."[30]

The ECJ then moved on to the second plea. The Court held that under Article 28, the ESMA may adopt measures of general application under specific conditions. But the Court referred to Articles 263 and 277 TFEU as the basis for legitimizing the adoption of acts of general application by Union bodies, offices, and agencies. This allowed the ECJ to conclude that "it cannot be inferred from *Romano* that the delegation of powers to a body such as ESMA is governed by conditions other than those set out in *Meroni v High Authority*."[31]

The third plea alleged that the delegation of powers involved in the case was incompatible with Articles 290 and 291 TFEU. The ECJ disagreed, holding that the delegation of powers in the Treaty framework is expressly granted to the Commission while "a number of provisions in the FEU Treaty none the less presuppose that such possibility exists" for

[25] *Id.* at para. 97.

[26] *Id.* at para. 98.

[27] *See United Kingdom*, CJEU Case C-270/12 at paras. 41–42.

[28] *See id.* at para. 43.

[29] *Id.* at para. 45.

[30] *Id.* at para. 53.

[31] *Id.* at para. 66.

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Union bodies, offices, or agencies.[32] By referring to the provisions allowing judicial review of the acts adopted by Union bodies, offices, and agencies, the ECJ maintained that the ESMA is conferred powers that "[do] not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU."[33] This means that the powers conferred to the ESMA cannot be considered a logical application of Articles 290 and 291 TFEU. Instead, they must be seen as another form of the delegation of power to adopt acts that have the force of law and that are amenable to judicial review.

Finally, the ECJ analyzed the plea regarding the breach of Article 114 TFEU. By recalling its case law, the Court asserted that the expression "measures for the approximation" can include the potential to delegate the implementation of the harmonization sought under Article 114 TFEU to a Union body, office, or agency.[34] This is particularly the case, the Court concluded, for measures that require "specific professional and technical expertise and the ability of such a body to respond quickly and appropriately."[35] By referring to the object of Article 28, the Court affirmed that the provision under scrutiny improves the conditions for the establishment and functioning of the internal market. This is because it lays down "a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency among Member States where measures have to be taken in exceptional circumstances."[36] For these reasons, the ECJ dismissed the plea on the illegality of the adoption of Article 28 of the SSR under Article 114 TFEU.

F. Commentary

The *ESMA Case* presents a number of interesting issues that require analysis. This proves especially true in the aftermath of the financial crisis. This commentary will follow the assessment of the four pleas presented to and resolved by the ECJ. First, it will evaluate the case in light of the *Meroni* doctrine. Second, it will analyze the role of ESMA powers under the *Romano* doctrine. Third, it will examine the basis for judicial review of agencies' actions as endorsed by the ECJ. Finally, it will assess the extent to which Article 28 of the SSR aligns with the legal basis provided by Article 114 TFEU.

[32] *Id.* at para. 79.

[33] *Id.* at para. 83.

[34] *Id.* at para. 105.

[35] *Id.*

[36] *Id.* at para. 114.

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I. Delegation of Powers to the ESMA and the Meroni Doctrine: What Does it Entail After the ESMA Case?

The ECJ analyzed the issue of the delegation of powers to EU agencies under the *Meroni* doctrine. *Meroni* is the (in-)famous judgment that prohibited the delegation of discretionary powers to agencies under European law. European agencies have been shaped in different periods of the European integration process,[37] yet the *Meroni* doctrine has been considered the main obstacle to the creation of fully fledged decision-making agencies under EU law. The main challenge has been to "balance the functional benefits and independence of agencies against the possibility of them becoming 'uncontrollable centers of arbitrary powers.'"[38]

Shortly after the creation of the European Communities, the European Court decided the *Meroni* case in 1958.[39] The Court held that the delegation of powers to some private law Brussels agencies in the contested High Authority decision contained a true conferral of powers to the "Brussels Agencies" and that this delegation was unlawful. The Court contemplated the circumstances in which such a delegation could be lawful. In its core paragraph, the ECJ held that "the consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers . . . , or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy."[40] The Court suggested that a delegation of the first kind—clearly defined executive powers—does not appreciably alter the consequences involved in the exercise of the powers concerned. But a delegation of the second kind—discretionary power—would produce an actual transfer of responsibility. The Court ruled that the contested decision contained significant discretionary powers conferred on private entities and was therefore incompatible with the Treaty.

Recent case law demonstrates that the Court is willing to consider *Meroni* as a legal limitation on the delegation of general rule-making powers. For instance, *Meroni* was cited in the *Alliance for Natural Health* case.[41] The Court has pursued a restrictive reading of

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[37] *See, e.g.*, Damien Geradin & Nicolas Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform* 37 (The Jean Monet Program, Working Paper No. 01/04, 2004); Xénophon A. Yataganas, *Delegation of Regulatory Authority in the European Union—The relevance of the American Model of Independent Agencies* 23 (The Jean Monet Program, Working Paper No. 03/01, 2001).

[38] Opinion of Advocate General Jääskinen, *supra* note 15, at para. 19.

[39] *See Meroni*, CJEU Case C-9/56.

[40] *Id.*

[41] *See* The Queen v. Sec'y of State for Health & Nat'l Assembly for Wales, Joined CJEU Cases C-154/04 and C-155/04, 2005 E.C.R. I-6451, para. 90. *See also* Carmine Salvatore Tralli v. Eur. Cent. Bank, CJEU Case C-301/02 P, 2005 E.C.R. I-4071, paras. 41–44; DIR Int'l Film Srl v. Comm'n, Case C-164/98 P, 2000 E.C.R. I-00447, para. 6.

what can be delegated to other institutions or entities. The main argument put forward for limiting delegation remains institutional balance.[42] According to Ellen Vos, the risk of a distortion of the institutional balance is the true limit set out in the *Meroni* judgment. A delegation of discretionary powers to agencies would upset this balance.[43]

The consequences of the *Meroni* ruling have been immense. The *Meroni* principle enshrined in the judgment "has stood for . . . 50 years as a constitutional limit to delegation."[44] The case law has taken a restrictive approach to the delegation of power. But many counterarguments have been put forward to moderate or even annul the *Meroni* doctrine. Giandomenico Majone maintains that agencies constitute the essence of a regulatory estate that should be added to other estates in the EU.[45] Edoardo Chiti argues that the institutional balance to which the Court referred in *Meroni* is a fluid concept that should be reinterpreted over time by the Court.[46] Accordingly, he asserts that it is now time to give discretionary powers to agencies and move beyond a strictly legal reading of *Meroni*.[47] Stefan Griller and Andreas Orator argue for a flexible interpretation of the *Meroni* doctrine.[48] Merijn Chamon suggests that the *Meroni* case is a product of an ECSC framework that is incomparable to the current state of EU integration.[49] Still, these arguments have not been successful in limiting the predominance of a "*Meroni*-consistent" approach to the delegation of powers in European case law and legislation.

Against this background, the *ESMA Case* is a welcome development because it updates the content of the *Meroni* doctrine and applies a more flexible standard for assessing the delegation of powers to European agencies.

Preliminarily, the ECJ emphasized that the *Meroni* case concerned the delegation to a private law entity, and not to a public entity, under the EU administrative law framework.

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[42] *See* 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, 18 (2010).

[43] *See* Ellen Vos, *Agencies and the European Union*, *in* AGENCIES IN EUROPEAN AND COMPARATIVE PERSPECTIVE 131 (Luc Verhey & Tom Zwart eds., 2003).

[44] PAUL CRAIG, EU ADMINISTRATIVE LAW 155 (2011).

[45] *See* Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77, 95 (1994).

[46] Edoardo Chiti, *supra* note 7, at 1423.

[47] *Id.* at 1424.

[48] Stefan Griller & Andreas Orator, *supra* note 42, at 34–35.

[49] *See* Merijn Chamon, *EU Agencies Between* Meroni *and* Romano *or the Devil and the Deep Blue Sea*, COMMON MKT L. REV. 1055, 1059 (2011) (citing Schräder v. CPVO, CJEU Case T-187/06, 2008 E.C.R. II-3151, as an example where the General Court took into account the EU system and discretionary powers to the Community Plant Variety Office (CPVO)).

This means that the application of the *Meroni* doctrine can be maintained while keeping in mind that the *Meroni* situation is different than the delegation to agencies in the current process of European integration.

Second, the AG opinion seemed to follow the logic of the constitutional balance and the role of *Meroni* doctrine—even after the Lisbon Treaty. But the ECJ adopted an evolutionary approach to *Meroni*. The ECJ views the *Meroni* doctrine in a renewed interpretation that leaves behind the structural difficulties of delegating powers to agencies. The delegation of powers is allowed under EU law so long as control mechanisms are in place to avoid the exercise of a pure discretionary power by the delegated agency. This means that the Court's main concern was to verify the presence of limitations on delegated powers and of control mechanisms that ensure that the agencies respect their attributed powers. In that sense, the Court pointed to two arguments to affirm the legitimacy of the powers conferred under Article 28 of the SSR. First, the Court held that ESMA is not conferred any autonomous power that "goes beyond the bounds of the regulatory framework established by the ESMA Regulation." In other words, the possibility of granting the ESMA the power to ban financial products had already been framed in the ESMA's founding regulation. Second, the presence of conditions and criteria relating to the exercise of this power limit the ESMA's discretion. In other words, there are clear limits and control mechanisms on the ESMA's exercise of delegated powers. The ECJ's reasoning made clear that the *Meroni* doctrine cannot be considered an absolute limit on the delegation of powers to an agency. On the contrary, the Court suggested that the delegation of powers to agencies is compatible with *Meroni* so long as it involves non-discretionary powers and control mechanisms to assess delegation. This signifies that the *Meroni* doctrine still exists, but now with flexible contours.

A critical reading of the Court's reasoning might note that the Court did not offer deeper theoretical justifications for evading *Meroni's* underlying logic. The *ESMA Case* does not provide a broad picture regarding what constitutes a *Meroni*-compliant delegation to European agencies. Rather, after a quote from the *Meroni* case, the ECJ moved to its assessment of the specific case of ESMA power under Article 28 without grappling with the theoretical foundations of *Meroni* and the extent to which they still hold force. What are the general grounds for considering a delegation compliant or non-compliant with *Meroni*? Is the presence of control mechanisms for agencies sufficient to satisfy *Meroni*? Are there other conditions that limit the possibility to delegate under the *Meroni* doctrine? Is institutional balance a real concern under the *Meroni* framework? The ECJ did not answer these questions, but simply assesses the ESMA's limitations and control mechanisms under the ESMA framework regulation and the SSR. Perhaps, this is because the Court was reluctant to exercise extensive judicial review as an ex post sanction of the European legislators in a politically sensitive case.

Despite these inadequacies, the *ESMA Case* can still be seen as an innovation of the *Meroni* doctrine. First, the ruling recognizes the private law nature of the agencies in *Meroni* and

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distinguishes the findings of *Meroni* from the delegation involved in the *ESMA Case* on that basis. This allows distancing delegation to European agencies from the *Meroni* case where delegation to private entities took place. Second, and more importantly, the ECJ held that limitations on discretionary powers and control mechanisms are sufficient to make the delegation of powers to European agencies compliant with the *Meroni* doctrine. The Court was able to "restyle" the *Meroni* doctrine and move beyond the doctrine's straitjacket—so long as a purely discretionary power is not delegated to a European agency and so long as some institutional safeguards are guaranteed. The result of this is that the *Meroni* doctrine is more flexible than it had been in the past, as now it allows delegation of powers to EU agencies. A welcome step in future case law would be to overrule *Meroni* and allow the delegation of full powers to European agencies, provided that such a delegation is warranted with safeguarding measures (i.e. a clear delineation of its conditions and the power to revoke it under certain circumstances). Regrettably, the *ESMA Case* does not—yet—overrule the basic limitation of *Meroni*. In fact, the Court implies that a " 'very large measure of discretion' " is incompatible with the TFEU.[50] The Court should elaborate a delegation doctrine to EU agencies, bodies, or offices that is more consistent with the changing European constitutional and institutional post-financial crisis environment by allowing the delegation of discretionary powers so long as such a delegation is legally safeguarded. Sidestepping the *Meroni* doctrine would be a positive judicial development in light of the political difficulties to amend primary EU law at present.

II. Delegation of Powers to ESMA and Romano: Downsizing an Obsolete Doctrine?

The second issue from the Court's judgment that merits assessment is the relationship between the power granted under Article 28 of the SSR and the *Romano* doctrine. The *ESMA Case* established that the *Romano* doctrine does not have an impact on the establishment of European agencies. Does this mean that the *Romano* case is no longer applicable when establishing or conferring powers to European agencies?

To answer this question, one must recall the main findings of the *Romano* case. Together with the *Meroni* case, the *Romano* case established constitutional limitations on delegation.[51] The essential question before the Court was whether the Council could confer powers to adopt "acts having the force of law" on EU agencies. Without referring to the *Meroni* ruling, the Advocate General and the Court concluded that such a conferral of powers was incompatible with the Treaties. This was necessary with regard to former Article 155 EEC (later Article 211 EC, now repealed by the Treaty of Lisbon and in substance replaced by Articles 290 and 291 TFEU), which authorized the Council to confer implementing powers on the Commission and Articles 173 and 177 EEC (now Articles 263 and 267 TFEU). The outcome of the case played against the conferral of powers to EU

[50] *ESMA*, CJEU Case C-270/12 at para. 54.

[51] Giuseppe Romano v. Institut National d'Assurance Maladie-Invalidité, CJEU Case 98/80, 1981 E.C.R. 01241.

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agencies. While the limitations on delegation seemed similar to those outlined in *Meroni*, the Court in *Romano* was concerned with European agencies adoption of acts "having the force of law."[52] These findings are different from the *Meroni* case, which was concerned with the delegation of powers to agencies *tout court*. The *Romano* doctrine refers to the adoption of legally-binding measures, that is, measures having the force of law.

The AG could only muster a cautious suggestion that the *Romano* doctrine be superseded in the *ESMA Case*. Rather, he stressed that "the *Romano* prohibition on agencies . . . remains good law."[53] The Court appears to have been bolder. It has substantially superseded the *Romano* doctrine by stating that the powers of the ESMA are not governed by conditions other than those set out in *Meroni*.[54] By referring to *Meroni*, the Court allows the European legislators to delegate powers to European agencies when the delegation involves clearly defined executive powers.[55] This reasoning seems to follow the position of the Council, which maintained that under *Romano* there is only a prohibition against the adoption of legislative acts by entities other than the European legislators.[56] From the *ESMA Case*, it seems that European agencies cannot be empowered to adopt legislative acts following one of the legislative processes indicated in the Treaty. Under the Lisbon Treaty framework, the ECJ specified that agencies, offices, and bodies may adopt acts of general application to be applied to the widest category of entities and market operators. In particular, the ESMA under Article 28 is not empowered to adopt *legislative* acts—those that are adopted with the legislative procedures under the Treaty.[57] But the ESMA may adopt acts having general application. In this way, the ECJ appears to supersede the *Romano* doctrine as it confirmed that European agencies may adopt acts "having the force of law" so long as a clear definition of the powers is identified.

In sum, the Court superseded the limitations established in the *Romano* case. European agencies can adopt "acts having the force of law." This development is justified by the increased role that European agencies have in the post-Lisbon constitutional framework. While there is good reason to believe that the *Meroni* doctrine still exists, it seems that European regulatory agencies are no longer subject to the *Romano* doctrine after the *ESMA Case*.

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

[53] Opinion of Advocate General Jääskinen, *supra* note 15, at para. 84.

[54] *ESMA*, CJEU Case C-270/12 at para. 66.

[55] *Id.* at para. 67.

[56] *Id.* at paras. 60–61.

[57] *See* Jürgen Bast, *New Categories of Acts After the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, 49 COMMON MKT. L. REV. 885, 887–888 (2012) (discussing the notion of legislative act in EU law).

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III. Delegation of Powers and Judicial Review in EU Law: Can European Agencies Adopt Judicially Reviewable Acts?

The third plea relates to the delegation of power and the grounds of judicial review for acts adopted by bodies, offices, and agencies.

It is important to begin the assessment of these issues with a reference to the Treaty framework on the delegation of powers and the adoption of delegated and implementing act under Articles 290 and 291 TFEU. As established in the Lisbon Treaty, there are two new categories of acts that may be adopted in EU law. First, Article 290 TFEU defines "delegated acts" as acts which are delegated to the Commission by the European Parliament or the Council. Delegated acts are "non-legislative acts of general application [which] supplement or amend certain non-essential elements of the legislative act."[58] Second, Article 291 TFUE provides for implementing acts that are "implementing non-legislative acts" that can be adopted by the Commission or, in some specific cases, by the Council. Neither of these provisions authorizes the delegation of power to European agencies to adopt such delegated and/or implementing acts.

The *ESMA Case* clarified the authority of European agencies to adopt delegated or implementing acts. The ECJ did not assess in detail the role and functions of Articles 290 and 291 TFEU. While this is an important element for discussion, the Court chose not to address the issue and instead focused on agency delegation and judicial review. Nevertheless, it implicitly constitutionalized, beyond the express Treaty provision, a "third" type of delegation in the form of the delegation of powers to European agencies. This can be inferred from paragraph 83 where the Court indicated that the power provided under Article 28 does not involve "any of the situations defined in Articles 290 and 291 TFEU." In sum, the Lisbon Treaty provides for an alternative implicit form of delegation that is evident in the Treaty's reference to the judicial review of agencies.

Having clarified that the delegation of decision-making powers to European agencies is possible under the Lisbon Treaty framework, the ECJ rather concerned itself with the issue of whether acts of agencies are subject to an acceptable degree of judicial review. While the ECJ acknowledged that the new Treaty framework does not include a provision for the delegation of powers to European agencies, it indicated that some provisions "presuppose that such possibility exists."[59] Before the adoption of the Lisbon Treaty, no explicit review of legality was provided for acts adopted by bodies other than the EU institutions. This meant that any substantial transfer of power would deprive the persons concerned the standing to sue regarding delegated acts.[60] The ECJ correctly clarified that EU law provides

[58] Article 290 TFEU at para. 1.

[59] *ESMA*, CJEU Case C-270/12 at para. 79.

[60] *See* Di Noia & Gargantini, *supra* note 7, at 32.

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for a full system of judicial review, also regarding European agencies after the entry into force of the Lisbon Treaty.

Judicial review should be intended as a system of administrative law in which the legality of the decisions and actions taken by Union institutions may be judicially reviewable.[61] The text of the new Articles 263 and 267 TFEU now also cover acts of bodies, offices, and agencies of the Union, and the rationale for ensuring legal protection for natural and legal persons against agencies does not appear as problematic as before the Lisbon Treaty. The four main systems for judicial review in EU law—actions of annulment (Article 263 TFEU), actions for failure to act (Article 265 TFEU), preliminary rulings (Article 267 TFEU), and pleas for illegality (Article 277 TFEU)—may be used against Union bodies, offices, and agencies. The explicit reference to agencies in the Treaty framework allows institutions and individuals to take legal action against the agencies' acts. Hence, there was the need to have a clear judicial pronouncement on the matter. This is precisely what the Court did in the *ESMA Case*. Accordingly, the judgment acknowledged that any act adopted by European entities and having legal effect is subject to judicial scrutiny by the European judicature. With that said, it remains unclear from which entity the delegation of powers to European agencies might come. From the judgment, it cannot be inferred that the delegation of powers to agencies comes directly from EU institutions, but it only appears to be an alternative form of delegation enshrined in the Treaty provisions on judicial review.

Furthermore, the judgment clarified that judicial review may be exercised only against agencies' acts having legal effects *vis-à-vis* third parties. In other words, the act must be legally binding on natural or legal persons. This group of entities also includes the ESMA, as it has been vested with decision-making powers in an area that requires technical and professional expertise and that can lead to legally binding acts.[62]

In sum, the possibility to adopt a judicially reviewable act by Union agencies does not jeopardize Articles 290 and 291 TFEU. European legislators may establish new agencies, delegate powers to them—in compliance with the "restyled" *Meroni* doctrine—and allow agencies to adopt acts having effects on third parties that are—ultimately subject to judicially review.

IV. European Agencies and the Role of Article 114 TFEU: Going Beyond the Harmonization Paradigm?

The fourth and most intricate issue raised by the *ESMA Case* relates to the reliance on Article 114 TFEU as the legal basis for adopting Article 28 of the SSR. The Court's

[61] DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW. TEXT AND MATERIALS, 177 (3rd ed. 2014).

[62] *ESMA*, CJEU Case C-270/12 at para. 82.

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assessment of this issue revealed the most pronounced friction between the AG and the ECJ.

Before addressing the Court's interpretation of Article 114 TFEU in the *ESMA Case*, it is necessary to briefly recall the Court's existing jurisprudence on the use of Article 114 TFEU. Article 114 TFEU is the internal market provision that aims to adopt measures for the harmonization or approximation of national rules in order to contribute to the establishment and functioning of the internal market.[63] This has generated extensive case law. The most famous case is the *Tobacco Advertising* judgment in which the ECJ held that an Article 114 TFEU measure "must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market."[64] The Court credited the appellant's plea in that case and annulled—for the first time—the harmonizing measure at issue. That outcome was seen as the seminal expression of the constitutional limits on the use of Article 114 TFEU.

The boundaries of the legal basis provided by Article 114 TFEU were blurred in subsequent case law.[65] In the *British American Tobacco* case,[66] the Court upheld the labeling rules contained in Directive 2001/37/EC on the manufacture, presentation, and sale of tobacco products. In that case, the Court held that, in the absence of the harmonizing directive, Member States would be likely to adopt national rules that could constitute obstacles to the free movement of goods. In *Swedish Match*,[67] the Court upheld an outright ban on the marketing of tobacco for oral use. Here, again, the Court stated that the ban on marketing was correctly established under Article 114 TFEU. This case was criticized for being excessively formal. Overall, the Court's appraisal has not been clear-cut in the subsequent case law.[68] The Court has shown that the threshold to adopting harmonizing measures in

[63] *See* Jukka Snell, *The Internal Market and the Philosophies of Market Integration*, *in* EUROPEAN UNION LAW 300, 315 (Catherine Barnard & Steve Peers eds., 2014).

[64] Germany v. European Parliament and Council (Tobacco I), CJEU Case C-376/98, 2000 E.C.R. I-08419, para. 84.

[65] For case law on harmonization and Article 114 TFEU, *see* Stephen Weatherill, *The Limits of Legislative Harmonization Ten Years After Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide,"* 12 GERMAN L.J. 827.

[66] R v. Secretary of State for Health ex Parte British American Tobacco (Investments) Ltd And Imperial Tobacco Ltd, CJEU Case 491/01 2002, E.C.R. I-11453.

[67] The Queen, on the Application of: Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health, CJEU Case C-210/03, 2004 E.C.R. I-11893.

[68] *See* Alliance for Natural Health v. Secretary of State for Health, Joined Cases C-154/04 & C-155/04, 2005 E.C.R. I-6451; *see also*, Vodafone, O2 et al. v. Secretary of State, CJEU Case C-58/08, 2010 E.C.R. I-04999.

the internal market is low,[69] but it has not clearly demonstrated what the threshold for such use is. Some loopholes in the judicial interpretation of Article 14 TFEU remain.

Article 114 TFEU has also been offered as the legal basis for the creation of new agencies. Case law has arisen on this use. Two cases are of particular interest: *UK v. Parliament (Smoke Flavourings)* and *Germany UK v. Parliament (ENISA).* In the *Smoke Flavourings* case, the Court held that the grant of certain powers to the European Food Safety Authority (EFSA) and to the Commission did not run counter to Article 114 TFEU as a legal basis.[70] The test used by the Court was very low. It seemed satisfied that the power was legitimate so long as it was used to resolve differences between laws of Member States. More recently, in the *ENISA* case,[71] the establishment of the European Network and Information Security Agency (ENISA) was upheld. This case showed that the Court did not restrict the use of Article 114 TFEU to the establishment of European agencies. The Court adopted a more extensive approach on the establishment of ENISA, which did not –strictly adhere to the Court's reasoning in the *Tobacco Advertising* case.

In the *ENISA* case, the Court outlined the broad limits on the use of Article 114 TFEU. First, the necessity of the harmonizing act shall be "closely linked to the subject matter of the acts approximating the laws, regulations and administrative provisions of the Member States."[72] Second, the harmonizing act should constitute an appropriate means of preventing the emergence of disparities likely to create obstacles to the smooth functioning of the internal market in the area.[73] Third, in line with the principles applied by European courts, harmonization shall be proportionate.

These judgments have laid the basis for the use of Article 114 TFEU for the creation of EU agencies. As recently stated, the use of Article 114 TFEU is "attractive because it allows for flexible structures and far-reaching conferral of powers."[74] This is precisely what happened in the creation and shaping of the ESAs. It is uncontested that the founding acts of the ESAs have relied on Article 114 TFEU. But some commentators have argued that ESAs have been established on a rather precarious legal basis considering the radical institutional reform

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[69] Elaine Fahey, *Does the Emperor Have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority*, (2011), 74 MOD. L. REV. 581, 591 (2010).

[70] United Kingdom v. European Parliament and Council (Smoke Flavourings), CJEU Case C-66/04, 2005 E.C.R. I-10553.

[71] United Kingdom v. Council and European Parliament (ENISA case), CJEU Case C-217/04, 2006 E.C.R I-03771.

[72] *Id.* at paras. 45, 47.

[73] *Id.* at paras. 62–63.

[74] Herwig Hofmann and Alessandro Morini, *The Pluralisation of EU Executive—Constitutional Aspects of "Agencification,"* 4 EUR. L. REV. 419, 438 (2012).

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they represent.[75] Notwithstanding these concerns, it is argued that, in the context of financial supervision and regulation, Article 114 TFEU has acquired a role that was not anticipated before the outbreak of the financial crisis. Nevertheless, the boundaries of its use are still controversial and require clarification.

The Court took an innovative but cautious approach to the use of Article 114 TFEU to confer powers to European agencies in the *ESMA Case*. The Court considered whether the provision of Article 28 of the SSR could be adopted using Article 114 TFEU as its legal basis. Basically, this analysis took place as part of a discussion on the two main elements of the provision under Article 114 TFEU: The nature of the expression of "measures for the approximation" and the content of the measure that shall have as an object the establishment and functioning of the internal market.

The Court's analysis of Article 114 TFEU issue first turned to the phrase "measures for the approximation." In doing so, the Court pursued an open-ended interpretation of the measures for the approximation. The Court concluded that the EU legislators have a wide degree of discretion in adopting approximation measures, including delegation to European agencies of the power to adopt measures of approximation that require those agencies' special professional and technical expertise. In doing so, the ECJ followed the *ENISA* case law and allowed European agencies to adopt measures for the approximation of the internal market. But the Court did not answer the question of whether, and to what extent, approximation measures must contain some limitations that ensure respect for the principle of legality.

The Court was conscious that approximation measures must be loose enough to allow European agencies to adopt acts of general application. It has been recently held that the case law on Article 114 TFEU is permissive, not only of a greater integration of the market, but also of a "more centralized paradigm of market harmonization."[76] But the ECJ did not indicate what the more general limitations for "the measures for the approximation" are. Rather, it described the provision of Article 28 of the SSR without setting a more general framework for the interpretation of "measures for the approximation." The ECJ's approach shows that the Court is deferential to the actions of the EU legislators and that the Court prefers to exercise limited judicial review.[77] This does not mean that the Court will not provide some explanations on the interpretation of the phrase "measures for the approximation." The approach taken by the Court is regrettable because it could have

[75] *See* Eilis Ferran, *Understanding the New Institutional Architecture of EU Financial Market Supervision*, *in* FINANCIAL REGULATION AND SUPERVISION. A POST-CRISIS ANALYSIS, 111, 157 (Guido Ferrarini, Klaus J. Hopt & Eddy. Wymeersch eds., 2012).

[76] ISIDORA MALETIC, THE LAW AND POLICY OF HARMONIZATION IN EUROPE'S INTERNAL MARKET 38 (2013).

[77] *See, e.g.*, Afton Chemical Limited v. Secretary of State for Transport, CJEU Case C-343/09, 2010 O.J. (C 234).

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clarified the boundaries of this expression for the purposes of adopting new measures in financial markets under Article 114 TFEU. The AG opinion was more careful in addressing the boundaries of the harmonization provision. Still, the AG failed to consider that Article 28 of the SSR might have the harmonizing effect of removing obstacles to the internal market by effectively substituting national measures with ESMA measures.[78] This passage in the AG's conclusions remains obscure and allowed the AG to suggest that the ECJ should have struck down Article 28 pointing instead to Article 352 TFEU as the correct legal basis.[79] Counter to the AG's findings, the ECJ concluded that European measures that substitute national measures can be considered harmonization measures.

The Court then turned its attention to the phrase "object the establishment and functioning of the internal market" as the second part of its Article 114 TFEU analysis. The Court referred to case law specifying that measures under Article 114 TFEU must improve the conditions for "the establishment and functioning of the internal market." The Court demonstrated judicial deference to the EU legislator. Again, the Court's assessment lacked an in-depth appraisal of the nature and object of the phrase "the establishment and functioning of the internal market." The Court merely quoted its established case law and the content of the ESMA Regulation under review. Thus, the Court confirmed that the measures of approximation may also have the goal of reducing obstacles in the internal market.

In sum, the Court concluded that the second element of Article 114 TFEU means that the objective of a harmonization measure must be the improvement to the internal market. This may also take place by reducing the obstacles that exist in the internal market. This is the correct interpretation. But the Court did not reach this result following a substantive and thorough discussion of what the objective of the establishment and functioning of the internal market is. The Court confirmed its previous case law and did not add anything significant on the goals of harmonization. In particular, the Court limited itself to affirming that the prohibition or the imposition of conditions on the entry by natural or legal persons into a short sale or a transaction at ESMA level prevents "the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States."[80] This is the only expression that suggests what the second condition entails for the interpretation of Article 114 TFEU. What would the threshold be for a measure that would not constitute an obstacle and, hence, be subject to annulment because it exceeds the Article 114 TFEU legal basis? What are the grounds for concluding that a measure aims to remove an obstacle to the proper functioning of the internal market? These questions remain unanswered and again show that the Court prefers not to

[78] Opinion of Advocate General Jääskinen, *supra* note 15**Error! Bookmark not defined.**, at para. 52.

[79] *Id.* at para. 54.

[80] *ESMA*, CJEU Case C-270/12 at para. 114.

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engage in detailed assessment of the breadth of the legal basis under Article 114 TFEU. On the one hand, this judicial deference is positive as it allows the Court to endorse the EU legislators. By quoting the provisions in the SSR, the ECJ suggests that powers to EU agencies can be conferred under Article 114 TFEU especially if they are meant to solve threats to the functioning and integrity of the (financial) internal market. On the other hand, this deference does not provide the EU legislators with greater legal certainty in adopting measures, the object of which is the establishment and functioning of the internal market. As such, the ECJ leaves the EU legislators free to adopt measures, albeit without an effective assessment of the measures that would go beyond the legal sphere of Article 114 TFEU. This remains problematic, as it is not clear when a *Tobacco Advertising* situation may arise in future case law.

To conclude, the ECJ interpretation of Article 114 TFEU is satisfactory, especially when compared with the AG's opinion. Remarkably, the AG did not consider that Article 114 TFEU was the correct legal basis for Article 28 of the SSR. After the ECJ judgment, it seems that Article 114 TFEU may be used to confer upon agencies the power to adopt acts having the force of law that aim to reduce obstacles to the functioning of the internal market, in particular those that may cause "serious threats to the orderly functioning and integrity of the financial markets or the stability of the financial system in the EU".[81] Nonetheless, the Court did not provide more legal certainty on the use—and possible abuse—of Article 114 TFEU.

G. Conclusion

The ESMA judgment is the second important ECJ ruling legitimizing crisis-related measures after *Pringle*.[82] In the *ESMA Case*, the Court took a positive stance towards the adoption of legally binding rules by European agencies for the regulation and supervision of financial markets at the European level. The ECJ distanced itself from the AG's conclusions and confirmed the validity of Article 28 of SSR. This is a welcome development, especially in light of other recent financial reforms such as the launching of the Capital Markets Union[83] or the creation of the European Banking Union.[84]

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[81] *Id.* at para. 108.

[82] Thomas Pringle v. Government of Ireland, Ireland and The Attorney General, CJEU Case C-370/12, 2012. This case decided the compatibility of the European Stability Mechanism with EU law. *See also*, Gianni Lo Schiavo, *The Judicial "Bail Out" of the European Stability Mechanism: Comment on the Pringle Judgment,* 2 ITALIAN J. PUB. L. 107 (2013).

[83] On the Capitals Market Union, *see* European Commission, GREEN PAPER *Building a Capital Markets Union* COM/2015/063 final.

[84] On the Banking Union project, *see* http://ec.europa.eu/internal_market/finances/banking-union/index_en.htm.

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Three important conclusions arise from the ECJ's judgment. First, the *Meroni* doctrine is still good law, but it is given a more flexible interpretation in an evolutionary perspective when compared with past case law. It may be inferred that in future case law the Court may downsize further—if not even overrule—the *Meroni* doctrine constraints. Second, the Court clarified that European agencies may be empowered to adopt non-legislative general acts that nevertheless have the force of law. Third, the Court supported the use of Article 114 TFEU as the principal legal basis for conferring powers to European agencies especially when they are empowered to reduce obstacles in the internal market. Some questions have been left unanswered. But overall, the result is positive, especially given the politically sensitive nature of the case.

In light of the ESMA judgment it may be said that the pending case brought by the UK against the powers of the European Banking Authority (EBA) regarding variable remuneration of certain employees of financial institutions is not likely to succeed.[85] This would be true for the grounds on the use of an inadequate Treaty legal basis as well as on the *ultra vires* delegation of powers to the EBA.[86] The recent AG's conclusions are not so convincing. While the AG suggests that the legal basis for the establishment of the EBA—Article 114 TFEU—is not to be contested,[87] he adopts a formal reading of the *Meroni* doctrine and stresses the fact that EBA's acts need to be formally adopted by the Commission.[88] This interpretation sits uneasily with the possible development of extensive delegation of powers to EU agencies. It is hoped that the ECJ will follow its evolutionary ESMA jurisprudence by holding that EBA is empowered to adopt the contested provision so long as delegated powers are 'precisely delineated' by the EU legislator and are amenable to judicial review.

De jure condendo, the ESMA judgment allows extensive delegation of powers to ESAs, and more generally to EU agencies. As regards the ESAs, this may be possible, especially once a future review of the ESFS will take place.[89] Policy makers should not be biased against extending the ESAs' powers so long as the 'restyled' *Meroni* doctrine is not blatantly infringed. The reinforcement of ESA's powers would allow a new vigor to the debate on deepening "agencification" in Europe.

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[85] United Kingdom of Great Britain and Northern Ireland v. European Parliament, Council of the European Union, CJEU Case C-507/13, 2013 O.J. (C 359).

[86] *Id.*

[87] Opinion of Advocate General Jääskinen, *supra* note 15, at para. 63.

[88] *Id.* at para. 64.

[89] *See* European Commission, *REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision* (ESFS), COM(2014) 509 final, 13 where it is envisaged the possibility to confer further tasks to the ESAs.

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It remains to be seen what the future reforms on the role and functions of European agencies, and the ESAs in particular, will be. In this sense, the *ESMA Case* is a welcome judgment that provides for a flexible reading of the limitations of delegation to entities other than EU institutions and that fosters the use of Article 114 TFEU to confer non-legislative general powers to European agencies.

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