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ADMINISTRATIVE REGULATION BEYOND THE NON-DELEGATION DOCTRINE

A STUDY ON EU AGENCIES

MARTA SIMONCINI

ADMINISTRATIVE REGULATION BEYOND THE NON-DELEGATION DOCTRINE

The importance of administration in the EU has been growing progressively together with the development of EU competences and tasks in the internal market. From the original model of a Community leaving enforcement with the Member States, the EU has become a complex legal order where administrative tasks are spread among different actors, including EU institutions, EU agencies and national administrations. Within this complex administrative law landscape, agencies and their powers have been essentially 'upgraded'. This volume asks whether any such 'upgrade' is compatible with EU law and its principles. Exploring both the case law of the CJEU and the regulation relating to EU agencies, the volume asks a crucial question about the legitimacy of the ever-increasing role of agencies in the enforcement of EU law.

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A Study on EU Agencies

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To the magic memory of my Grandma, Rosy, and her sparkling vitality

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Contents

Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
AG	Advocate General
AMC	acceptable means of compliance
ANAC	Autorità nazionale anticorruzione (Italy)
ANEC	European Association for the Co-ordination of Consumer Representation in Standardisation
ANS	air navigation services
ATM	air traffic management
BEREC	Body of European Regulators for Electronic Communication
BoA	Board of Appeal
CEBS	Committee of European Banking Supervisors
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CEN	Comité Européen de Normalisation
CENELEC	Comité Européen de Normalisation en Électronique et en Électrotechnique
CESR	Committee of European Securities Regulators
CJEU	Court of Justice of the European Union
CPVO	Community Plant Variety Office
CRA	credit rating agency
CRD	Comment Response Document
CS	certification specification
EAR	European Agency for Reconstruction
EASA	European Aviation Safety Agency
EBA	European Banking Authority
EBU	European Banking Union
EC	European Community
ECB	European Central Bank
ECHA	European Chemicals Agency
ECOS	European Environmental Citizens Organisation for Standardisation
ECSC	European Coal and Steel Community
EDIS	European Deposit Insurance Scheme
EDPS	European Data Protection Supervisor
EEC	European Economic Community
EFSA	European Food Safety Authority
EIOPA	European Insurance and Occupational Pensions Authority
EMA	European Medicines Agency
EMSA	European Maritime Safety Agency

ERA	European Union Agency for Railway
ERG	European Regulators Group
ESA	European Supervisory Authority
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
ETSI	European Telecommunication Standards Institute
ETUC	European Trade Union Confederation
EU	European Union
EUIPO	European Union Intellectual Property Office
FAB	functional airspace block
GM	guidance materials
GMMOs	genetically modified micro-organisms
HFT	high-frequency algorithmic trading
ICAO	International Civil Aviation Organization
JAA	Joint Aviation Authority
NPA	Notice of Proposed Amendment
OHIM	Office for Harmonisation of the Internal Market
POG	product oversight and governance
SES	Single European Sky
SME	small and/or medium-sized enterprise
SRB	Single Resolution Board
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSO	Transmission System Operator

Introduction

In the Trap of EU Agencies' Powers: Perspectives for an Analysis

INTERNAL MARKET INTEGRATION in the European Union (EU) has created cross-border interdependencies between markets and regulatory regimes, as market creation often also requires regulation. Services that depend on physical or logical networks constitutively rely on such interdependencies. The effective operation of transport, electronic communications, energy supply or financial markets has steadily assumed cross-border functional dimensions. Individual states with their limited jurisdictional reach cannot adequately govern such interdependencies and the risks that they generate. Their regulation is bound to fail where dangers do not come from the origin of the concerned activities, but rather from interlinkages on which isolated actors have no sufficient view. Where the openness of the internal market and the density of interactions therein no longer make one-level interventions sufficient, the EU subsidiary intervention may better achieve the integration objectives.[1]

EU intervention generally operates through the establishment of complex systems of governance that aim to keep under control the risks of these interdependencies and favour the correct functioning of the network. This, however, does not prevent failures and regulatory paradoxes. As Black observed, no system of regulatory governance can escape this reality, because the vulnerability of network systems based on their 'internal contradictions and tensions' generates mutable performances.[2] Complexity is therefore the justification of EU intervention and the reason for its possible regulatory failure. The most efficient governance of complexity is therefore the objective of EU regulation and the organisation of the governance is key to improving the functioning of networks and reducing their risks of failure.

This EU regulatory effort has been accompanied by the establishment of 'buffer' supranational agencies facilitating the cross-border, sector-specific cooperation between national regulatory authorities and the EU institutions, as well as amongst those national administrations in the framework of EU integration policies. Being placed in the intersection of different regulatory regimes, EU agencies face the

[1] See M Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 *European Law Journal* 503.

[2] J Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75 *Modern Law Review* 1037, 1038.

concrete issues of integration, its spill-overs and setbacks. However, they often do this from a backward position. Internal market integration in network services passes through EU agencies, but their powers are generally limited. Legally speaking, they are not more than advisory and monitoring expert bodies working for the Commission and in close cooperation with national competent authorities. In practice, however, their advice cannot be ignored and has the factual strength to contribute to shaping integration.

Especially in the last decade, EU agencies have been acquiring sounder voice in the integration process. Even if their range of powers is not uniform and their regulatory regimes are quite differentiated, some common trends can be identified. In some cases, they have been allocated powers increasingly relevant to the executive rule-making and may also bring significant input to the legislative process. In addition, most of them have developed the traditional recommendatory and advisory powers into standardisation practices, which are increasingly able to constrain the decision-making process of both the EU institutions and the Member States. In other specific cases, EU agencies have also been allocated a few formal regulatory powers. Especially in the financial sector, the wider reach of powers conferred on the European Supervisory Authorities (ESAs) has generated a hybrid organisational model, which shares many characteristics of agencies, yet moves towards an embryonic independence in the structure of organisation.[3] The logical incoherence between the growing relevance of agencies in the integration process and their difficult emergence as a centre of regulation has been the distinctive mark of EU agencies' governance. The result is that EU agencies' responsibilities and tasks are generally limited, but legally uncertain. The main evidence of EU agencies' governance by uncertainty has been the steady development of non-binding powers aimed at generating regulatory effects.

This gap between law and reality is troublesome. The framework strategy for a European Energy Union has considered the necessity to enhance the Agency for the Cooperation of Energy Regulators' (ACER) powers, 'in order to enable it to effectively oversee the development of the internal energy market and the related market rules as well as to deal with all cross-border issues necessary to create a seamless internal market'.[4] This intention has become part of the winter package on a clean energy economy that is aimed to facilitate the transition to a low carbon economy by 2050.[5] The European Commission proposed to confer

[3] See E Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment' (2013) 19 *European Law Journal* 93, 94; C Franchini, 'Le fasi e i caratteri del processo evolutivo dell'organizzazione amministrativa europea' (2017) 27 *Rivista Italiana di Diritto Pubblico Comunitario* 375, 383.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *Energy Union Package: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, COM(2015)80 final (25 February 2015), 9.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *Clean Energy for All Europeans*, COM(2016)080 (30 November 2016).

wider functions on ACER and to partially reform its organisation in light of the enhanced competence.[6] The Commission recognised that while ACER has thus far played a key role in the coordination, advising and monitoring of energy markets, the fragmentation of regulatory oversight and the management of cross-border issues concerning grid operation and electricity trading require these powers to be strengthened so as to make the pursuit of the regulatory goals more effective. Under the Commission's proposal, ACER particularly acquires more powers in the draft of a network code to be adopted by the Commission, may decide the regional relevance of some issues and may adopt individual decisions concerning technical and regulatory issues which require regional coordination.[7] Although the negotiation process is still long, this proposal shows that there is increasing awareness about the key role that EU agencies may play in internal market integration. Hancher and Winters, however, remarked that the reinforcement of powers still 'shies away from centralising regulatory powers in the hands of ACER'.[8] Indeed, these powers are not sufficient to create an independent regulator, but they may nonetheless change the legal position of the Agency in the Energy Union. This change will not come without legal challenges.

The legal explanation of the existing dichotomy between law and practice, in fact, lies in the constitutional position of EU agencies in the EU legal order. As the 1972 Vedel Report emphasised, 'once the Community institutions began to function, practice quite naturally gave birth to bodies for which no provision was made initially'.[9] Although the Report referred to the new establishment of committees and intergovernmental organs, the same issue concerns EU agencies. Their insecure constitutional seat in the structure of the Treaties as interpreted by the Court of Justice of the European Union (CJEU) as at the origin of the conundrum that affects their powers. In a nutshell, the judicial doctrine of non-delegation as developed in the 1958 leading case *Meroni*[10] has prevented the delegation of regulatory competences involving discretionary powers to independent bodies other than the EU institutions. This prohibition aims to protect the democratic accountability of the EU legal order and to prevent the allocation of EU responsibilities to bodies other than the legitimate EU institutions. The constitutional engineering reason is that agencies would unlawfully interfere with the powers conferred upon the institutions by the Treaties and would alter the institutional balance of public powers as set out in the Treaties.

[6] Proposal for a Regulation of the European Parliament and of the Council of 23 February 2017 establishing a European Union Agency for the Cooperation of Energy Regulators (recast), COM(2016)863 final, 7–8.

[7] Proposal of Regulation annexed to COM(2016)863 final/2, COM(2016)863 final/2, 22, recitals 13, 14 and arts 4–6.

[8] L Hancher and BM Winters, *The EU Winter Package: Briefing Paper* (Allen & Overy LLP, February 2017) 11.

[9] 'Report of the Working Party Examining the Problem of the Extension of the Powers of the European Parliament of 25 March 1972' [1972] 4 *Bulletin of the European Economic Community* 7, 27.

[10] 9/56 and 10/56 *Meroni & Co., Industrie Metallurgiche, SAS v High Authority of the European Coal and Steel Community* [1958] ECR 53.

As regards targeting the discretionary content that is at the core of administrative powers, in practice this doctrine has kept EU administrative integration through EU agencies in this conundrum for almost 60 years and still prevents the transformation of ACER into a sort of independent regulator enforcing the Energy Union. Recently the CJEU has revisited the *Meroni* doctrine. In the *ESMA Short Selling* case concerning the allocation of specific regulatory competences to the European Securities and Markets Authority (ESMA) in the trade of securities, futures and other derivative contracts,[11] the CJEU better circumscribed the application of this doctrine and contributed to mitigating the gap between law and practice. However, the validity of the non-delegation principle as the constitutional rule governing the establishment and the functioning of EU agencies has been confirmed. No institutional innovation in the competence of EU agencies can take place without meeting the *Meroni* requirements, even in their updated version. This represents the constitutional foundation of EU agencies' responsibilities and tasks.

The *Meroni*-based legality of delegation is only part of a wider issue related to the distribution of powers in the EU.[12] It is the formal institutional evidence of substantive regulatory dilemmas. Internal market integration in services clearly moves national interests as well as EU institutions' preferences. The establishment of supranational independent regulators governing the structure of a market comes with the acceptance of the reduction of national powers, as well as with the de-politicisation of market integration. Magnette significantly explained that even though every decision depends on a specific political context, both national governments and EU institutions are reluctant to renounce (part of) their powers in favour of independent regulators. On the one hand, governments 'will generally prefer to keep a given field under their control rather than delegate it to an independent agency', but if necessary, they would rather accept 'a weakly independent agency to a true regulatory body' and a national independent regulator to a supranational one. Supranational agencies are therefore the institutional evidence that Member States 'fear the consequences of non-coordination'. On the other hand, 'EU institutions will only support an independent and supranational regulator if they think this widens EU competences and the new regulator will not undermine their own existing and potential powers'.[13]

The establishment of the Body of European Regulators for Electronic Communication (BEREC) remarkably reflects this fierce political negotiation behind the structure and the powers of EU agencies. To address the fragmentation and

[11] C-270/12 *United Kingdom v Council of European Union and European Parliament* ECLI:EU:C:2014:18.

[12] See E Chiti, 'An Important Part of the EU Institutional Machinery: Features, Problems and Perspectives of European Agencies' (2009) 46 *Common Market Law Review* 1395, 1405.

[13] P Magnette, 'The Politics of Regulation in the European Union' in D Geradin, R Muñoz and N Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Elgar Publishing, 2005) 3, 10.

the inconsistent regulation of the electronic communication market, the Commission proposed to establish a European authority 'working in close cooperation with the national regulatory authorities (NRAs) and the Commission' in substitution of the informally operating network of national regulators established in the European Regulators Group (ERG).[14] Although few hard powers were allocated to the proposed EU agency, negotiations could only bring about a weird body, not even an agency, but more like a common substation of national regulators. As such, BEREC has no legal personality,[15] but it has an Office with legal personality, which assists and supports the Body of Regulators.[16] BEREC has the responsibility of assisting national regulators for ensuring the consistent application of the EU regulatory framework.[17] As it has been emphasised, it culminated in being an enhanced version of the ERG self-regulation forum.[18]

The political shipwreck of an EU agency shows the harshness of the interests behind their establishment and hints at the political challenges behind the apparent regulatory inconsistencies and paradoxes. The legal discourse therefore cannot ignore consideration of the political reasons concerning the opportunity of delegation. The two levels of analysis, however, can be distinguished and functionally separated for the clarity of the investigation. Clearing out the political issues, this study focuses on the legal aspects of the complex phenomenon of *agencification*. The elucidation of the legal debate may produce positive spillovers on political arguments, making the relevant stakeholders more aware of the potential and the limits of EU agencies as administrative entities. The objective is to investigate the constitutional position of EU agencies' administrative powers in the EU legal order. I aim to question the unavoidability of the legal conundrum that restrains EU agencies' powers and to engage in a reasoned discussion of the *Meroni* non-delegation doctrine in the current framework of the Treaties and the administrative practice. The question is to what extent EU agencies as a model of administration in expansion can contribute to the administrative exercise of regulatory functions.

Legal scholarship has widely debated the *Meroni* doctrine and studies on EU agencies have been flourishing in recent decades. Yet, EU administrative law has not effectively addressed the gap between law and practice and has not clearly responded to the questions concerning the legitimacy and the scope of EU administrative action. In 2000, Vos recognised that the growth of administration

[14] Proposal for a Regulation of the European Parliament and of the Council of 13 November 2007 establishing the European Electronic Communications Market Authority, COM(2007)699 final, 2.

[15] Regulation 1211/2009/EC of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, recital 6.

[16] Ibid art. 6.

[17] Ibid art. 1(3).

[18] See M Mester, 'Independent NRAs in European Electronic Communications Policy-making and Regulation: The Road to BEREC and Beyond' (2010) 147 *Studia Iuridica Auctoritate Universitatis Pecs Publicata* 113, 124 and 129.

questions the strict application of the *Meroni* doctrine and requires 'searching for additional means to enhance administrative legitimacy'.[19] Dehousse also advocated the inapplicability of the *Meroni* case law in the context of the European Community (EC), as it concerned the powers of the High Authority in the *traité loi* of the European Coal and Steel Community (ECSC) and cannot effectively control the new *traité cadre* of the EC embedding a different system of governance.[20] In 2005, Geradin reached the conclusion that:

> the restrictive interpretation of Meroni followed by the EU institutions fails to resist serious legal analysis. Its main implication, which is to prevent the delegation of regulatory powers to European agencies, fails in turn to satisfy the needs of a modern administrative state.[21]

More recently, scholars have engaged in the search for the compatibility of the *Meroni* doctrine with the changed framework of the Lisbon Treaty. Griller and Orator particularly aimed to reconcile this doctrine with administrative practice and supported its 'cautious reassessment', where the prerogatives of the legislature, the Commission and accountability are secured.[22] Chiti argued that the principle of institutional balance should not preclude 'the inventiveness of a Community authority' where the assessment of the individual case suggests that no undue interference with other EU institutions' powers occurred.[23] Chamon discussed the sustainability of EU agencies' powers in the context of the Lisbon Treaty and concluded that the process of agencification is still based 'on shaky legal grounds'.[24] Maybe more pragmatically, some Italian scholarship recognised that the reference in the Lisbon Treaty to agencies, offices and bodies matches up the recognition of the autonomous existence of such administrative entities under the Treaties and the end of the delegation relationship on which the *Meroni* doctrine is based.[25] Nonetheless, the *Meroni* doctrine is still governing the broad phenomenon of agencification and the *ESMA Short Selling* case confirms that this remains the current legal justification for the legitimate allocation of powers to EU administrative entities.

[19] E Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?' (2000) 37 *Common Market Law Review* 1113, 1123.

[20] R Dehousse, 'Misfits: EU Law and the Transformation of European Governance' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002) 207, 221.

[21] D Geradin, 'The Development of European Regulatory Agencies: Lessons from the American Experience' in D Geradin, R Muñoz and N Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Elgar Publishing, 2005) 215, 222.

[22] S Griller and A Orator, 'Everything Under Control? The "Way Forward" for European Agencies in the Footsteps of the *Meroni* Doctrine' (2010) 35 *European Law Review* 3, 31.

[23] Chiti, 'An Important Part of the EU Institutional Machinery' (n 12) 1424.

[24] M Chamon, 'EU Agencies Between *Meroni* and *Romano* or the Devil and the Deep Blue Sea' (2011) 48 *Common Market Law Review* 1055, 1075.

[25] D Sorace, 'Una nuova base costituzionale europea per la pubblica amministrazione' in MP Chiti and A Natalini (eds), *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (Il Mulino, 2012) 45, 56.

The problematic fit between law and practice prevents legal scholarship from definitely closing the discussion on the *Meroni* doctrine and dooms it to reassess the compatibility of EU agencies' powers any time new powers involving some regulatory content are conferred upon them. The poor wording of the Treaties and the ambiguity of the case law do not favour the substantive advancement of the legal discourse. The evidence is that the legal analysis on the compatibility of EU agencies' powers has slightly changed from the issues that Lauwaars examined in his 1979 comment on the powers of the European Monetary Cooperation Fund, which lately flowed into the European Central Bank and indirectly acquired the status of an EU institution.[26] He recognised that where 'delegation to third parties is necessary for the attainment of one of the objectives of the Community', an exception to the execution of such tasks and responsibilities by EU institutions will be made; but such delegation must comply with the Treaties and be limited to executive powers.[27] By building institutional innovation on the necessity requirement, Lauwaars correctly pointed to the proportionality test in the establishment of agencies. What Lauwaars could not resolve, and is still unsolved in the application of the *Meroni* doctrine, is the discretionary content of EU agencies' powers. He conceived the exercise of some discretion by the European Monetary Cooperation Fund 'with a view to the special nature' of its tasks and 'albeit only by way of a provisional measure which, ultimately at the time of the definitive arrangement of the European Monetary System, has to be object of Treaty revision'.[28] He could do nothing but admit an exception to the rigidity of the *Meroni* doctrine.

This is the very vulnerable issue in the application of such a doctrine. It portrays the delegation of purely executive tasks as in the Weberian 'transmission-belt' administration, which does not fit with the complex reality of integration. Vos significantly characterised 'the functioning of EU agencies in the "grey zone" between "pure" administration and politics'.[29] In my view, this is the key issue in which the consolidated discussion on the *Meroni* doctrine needs to be originally engaged. This study aims to discuss the very nature of EU agencies' powers with the aim of getting out of the loop in which the strict interpretation of the *Meroni* doctrine has trapped the discourse on EU agencies and has stretched law and practice apart. The novelty of my study is that the dead-end to which the interpretation of the *Meroni* doctrine has confined the EU agencies' competence is not inescapable and the concerns on delegation addressed in this doctrine need to be considered from another perspective, which does not reject the very nature of administrative powers.

The centrality of the *Meroni* doctrine in the assessment of the constitutional legitimacy of EU agencies' powers has consolidated even though the delegation

[26] RH Lauwaars, 'Auxiliary Organs and Agencies in the E.E.C.' (1979) *Common Market Law Review* 365.

[27] Ibid 372.

[28] Ibid 386–87.

[29] Vos, 'Reforming the European Commission' (n 19) 1130.

of the High Authority's powers under *Meroni* does not completely match the conferral of powers by the legislature to EEC agencies under *Romano*. The subsequent case law has not significantly distinguished these cases, probably because the *Meroni* ruling set a series of requirements for lawful delegation that may also apply in the case of conferral. Conceptually the distinction is relevant, because administrative delegation and legislative conferral necessarily rest on different legitimacy premises. The scope of the allocation of powers is therefore necessarily different. Apart from the preservation of the institutional balance, the legislative conferral enjoys more opportunities than administrative delegation, as the legal source of power has higher (democratic) legitimacy. This is the way public administration is considered democratically compatible in national legal orders: the principle of legality guides and limits administrative powers. Where administration delegates its own competence to another administration, clearly it cannot delegate more powers than those it retains, and some further limitations may apply according to the public interests that the legal order aims to protect. The *Meroni* ruling was seriously concerned with the protection of the ECSC institutions' prerogatives and accordingly limited the possibility of administrative delegation. Nonetheless, *Meroni* is still considered good law that also applies to the cases of conferral. My study recognises this judicial approach, but holds this legitimate as long as *Meroni* points to the substantive issues in the allocation of administrative powers; that is, the administrative nature of the power and its justiciability, which can be extensively considered as the set of legal guarantees that will direct its exercise.

My study therefore identifies in these substantive issues the key questions for the assessment of the tenability of EU agencies' powers. My reading, however, refreshes the substance of the constitutional rule embedded in the *Meroni* doctrine, but dismisses its formalistic interpretation. With regard to the nature of the power, I contend that the *Meroni* doctrine's approach has trapped EU agencies in an unreal dichotomy between technical powers of pure execution and political powers embedding wide discretion. Although the principles of legality and institutional balance play essential roles in the functioning of EU administrative law, the rule of law has no legitimising function. Legitimacy tends to derive from the output of the enforced policies; that is, from the technical effectiveness of their impact. This functional approach of EU administrative law has created some false myths, such as the supposed purely technical nature of EU administrative action and the existence of neutral instruments for EU policies' implementation. Although recognising a circumscribed margin of discretion that is not political in nature, the *ESMA Short Selling* case has not unequivocally wiped out such a myth and it is still difficult to predict how EU courts will review such discretion.

I demonstrate that EU agencies' enforcement powers have a necessary content of discretion that under specific conditions may reconcile with the non-delegation principle. This brings me to identify administrative discretion as a particular category of discretion based on the legislative establishment of objectives, priorities and hierarchy of interests, which may be acceptable in a democratic legal order under a specific conception of the rule of law. The innovative character of this