EU Agencies: between Meroni and Romano or the devil and the deep blue sea

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EU AGENCIES BETWEEN MERONI AND ROMANO OR THE DEVIL AND THE DEEP BLUE SEA

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1. Introduction

The so-called *agencification* of the Union administration that started in the 1990s has picked up speed ever since then,[1] leading some authors to speak of a mushrooming of agencies in the European Union's institutional landscape.[2] Most of these agencies have only limited powers, their tasks confined to gathering and disseminating information, or coordinating a network. Using the instrumental approach to classification proposed by Griller and Orator,[3] these are *ordinary agencies*. Although even the legality under the Treaties of the conferral of powers on such *ordinary agencies* could be questioned, this issue is seldom raised precisely because of the low intensity of the powers conferred. Obviously this is different for the agencies which Griller and Orator classify as *pre-decision* and *decision-making agencies*. The former provide the Commission with non-binding opinions,[4] which the Commission however usually rubber-stamps when it takes the subsequent binding decision.[5] The *decision-making agencies* take the binding decision themselves without the Commission intervening in the decision-making;[6] in some cases, as well as their decision-making powers, they also provide the Commission with

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1. Although the first two agencies were established in the 1970s, the Union legislator only started to rely more heavily on the agency instrument in the 1990s.

2. See e.g. Busuioc, "Accountability, control and independence: The case of European agencies", 15 ELJ (2009), 600; Meuwese, Schuurmans and Voermans, "Towards a European Administrative Procedure Act?", (2009) *Review of European Administrative Law*, 16; De Burca, "New modes of governance and the protection of human rights", in Alston and De Schutter (Eds.), *Monitoring Fundamental Rights in the EU* (Hart Publishing, 2005), p. 28.

3. See Griller and Orator, "Everything under control? The 'way forward' for European agencies in the footsteps of the Meroni doctrine", 35 EL Rev. (2010), 1.

4. Examples include the European Medicines Agency (EMA) and the European Food Safety Authority (EFSA), etc.

5. See Meuwese, Schuurmans and Voermans, op. cit. *supra* note 2, 19.

6. Examples include the Office of Harmonization for the Internal Market (OHIM), the Community Plant Variety Office (CPVO), the European Aviation Safety Agency (EASA), the European Chemicals Agency (ECHA), etc.

non-binding advice. Compared to the *ordinary agencies* the latter two types have more considerable powers, although they are still a long way from being true regulatory agencies. Although the Union legislature has not yet established such US-style regulatory agencies, it may still be said that the *agencification* process in the EU has gone up another gear recently, as the Union legislature has now established *decision-making agencies* in what could be termed core sectors in economic regulation: the energy and financial sectors.[7] The significance of this conferral of "intense" prerogatives on EU agencies in the regulation of highly controversial sectors should not be overlooked.

The position of agencies in the EU Treaties is in sharp contrast to their mushrooming in practice. Before the entry into force of the Lisbon Treaty, primary law was completely silent on the existence of agencies, let alone the possibility to endow them with specific tasks and powers. The Treaty of Lisbon changed this as the Article 263 TFEU now provides that the Court of Justice of the European Union can also review the legality of "acts of bodies, offices or agencies of the Union".[8] No further amendments in relation to agencies were made, meaning that primary law as it stands does not foresee the possibility of establishing an agency or conferring powers on it, but does foresee legal redress against acts of such agencies. Ever since the *agencification* of the Union administration started, the question as to the limits to a possible delegation of powers to agencies has not disappeared from the legal debate surrounding them. Virtually every author on the subject refers to the *Meroni* ruling from 1958, although the ECJ itself never applied this ruling to any EU agency.[9] This ruling was made under the ECSC Treaty and obviously did not concern an EU

7. See Regulation (EC) 713/2009 of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, O.J. 2009, L 211/1; Regulation (EU) 1093/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, O.J. 2010, L 331/12; Regulation (EU) 1094/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, O.J. 2010, L 331/48; Regulation (EU) 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, O.J. 2010, L 331/84.

8. The scope of other Articles such as 265 and 267 TFEU has also been extended to acts of "bodies, offices or agencies".

9. In a footnote in one of his Opinions, A.G. Geelhoed did postulate that the *Meroni* doctrine applies to the agencies, without however further arguing this point. See Opinion in Case C-378/00, *Commission* v. *European Parliament and Council* [2003] ECR I-937. In *FMC Chemical* v. *EFSA* the applicant invoked the *Meroni* doctrine to challenge the legality of an opinion of the EFSA, but the Court concluded that the Commission had not delegated any power to adopt binding decisions. See Case T-311/06, *FMC Chemical and Arysta Lifesciences* v. *EFSA*, [2008] ECR II-88, para 66.

agency, although it did concern a delegation of powers to a body not foreseen in the Treaty.

2. The *Meroni* devil

In the *Meroni* case,[10] the applicant company challenged the way the High Authority had organized the financial arrangements of the ferrous scrap regime. Meroni questioned *inter alia* the underlying general decision in which the High Authority delegated the powers for the financial operation of the regime to two bodies under Belgian private law, the so-called *Brussels Agencies*. Meroni essentially argued that, according to Article 8 of the ECSC Treaty, the High Authority was held "to ensure that the objectives set out in th[at] Treaty are attained in accordance with the provisions thereof", and that this did not leave any possibility for the High Authority to delegate its powers. The Court ruled somewhat differently, but to the same effect. It did not exclude the possibility of entrusting certain tasks to bodies established under private law, but after having laid down this general possibility it proceeded to substantially narrow it down. It referred to the general objectives of the Treaty as listed in Article 3 ECSC and noted that it is not certain that they could all be simultaneously pursued in all circumstances and that reconciling these objectives in individual cases requires genuine discretionary power. The Court proceeded to draw attention to the provision in Article 3 ECSC that precedes the different objectives and in which it is stated that the institutions of the Community shall aim to achieve the objectives "within the framework of their respective powers and responsibilities and in the common interest". This balance of powers was, according to the Court, characteristic of the institutional structure of the Community and was no less than a "fundamental guarantee granted by the Treaty, in particular to the undertakings and associations of undertakings to which it applies". The Court concluded that this guarantee would become ineffective if discretionary powers were to be entrusted to bodies other than those established by the Treaty.

This affirmation together with the conditions that a delegation of executive powers has to meet, which the Court set out further in its judgment, have come to be known as the *Meroni* doctrine, and almost every author contributing to the legal debate on agencies refers to it, as was also remarked by Chiti in a previous contribution in this journal.[11] Although most authors refer to the

10. Case 9/56, *Meroni & Co., Industrie Metallurgische S.p.A.* v. *High Authority*, [1957–1958] ECR 133.

11. Chiti, "An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies", 46 CML Rev. (2009), 1420–4.

Meroni ruling, few thoroughly analyse the judgment in relation to the EU agencies. This is in part unsurprising because simply transposing an unadapted *Meroni* doctrine to EU agencies would result in the conclusion that the current *agencification* is in breach with this doctrine, as some dissenting voices have indeed claimed.[12] Instead, many authors make two important conclusions in respect of the *Meroni* ruling. First they conclude that the *Meroni* doctrine applies to current day agencies, but subsequently none of them can convincingly argue how the functioning of current EU agencies, notably the *decision-making agencies*, can be reconciled with the prohibition to delegate discretionary powers laid down in *Meroni*.[13] Secondly, it is generally concluded that it is the principle of institutional balance as laid down in *Chernobyl*,[14] in *Meroni* still called the "balance of powers", that prevents the agencies from being endowed with discretionary powers.[15] I have argued against both these conclusions elsewhere,[16] the issues undermining both conclusions will therefore only be briefly mentioned here.

Firstly, the "balance of powers" which was invoked by the Court in *Meroni* is something very different from the current principle of "institutional balance". Between the *Meroni* ruling and the principle as it stands now, a qualitative leap has occurred. To understand the reasoning of the Court in *Meroni* it makes no sense therefore to interpret the modern construction of "institutional balance", instead one has to look at the meaning of the concept of "balance of powers" at the time of the *Meroni* ruling itself. As Jacqué points out, the principle was originally conceived as a substitute for the principle of the separation of powers of Montesquieu, the aim of which was to protect individuals against the abuse of power. According to Jacqué, this protective aspect of the principle seems gradually to have been lost as other means of protection

12. Majone, "The credibility crisis of Community Regulation", 38 JCMS (2000), 289; Hofmann and Türk, "Policy implementation", in Hofmann and Türk (Eds.), *EU Administrative Governance* (Edward Elgar, 2006), p. 89; Trondal, *An Emergent European executive order* (OUP, 2010), p. 164.

13. Van Ooik for instance argues that OHIM's functioning is in line with the *Meroni* doctrine given OHIM's strict mandate, but a strict mandate does not mean an agency cannot wield discretionary powers, as was confirmed in the *Schräder* case (cf. *infra*). See Van Ooik, "The growing importance of agencies in the EU: Shifting governance and the institutional balance", in Curtin and Wessel (Eds.), *Good governance and the European Union: Reflections on concepts, institutions and substance* (Intersentia, 2005), p. 151.

14. Case 70/88, *European Parliament* v. *Council of the European Communities*, [1990] ECR I-2041.

15. According to Vos, the Court's objections to agencies can even be reduced to this single objection: the distortion of the institutional balance. See Vos, "Agencies and the European Union", in Zwart and Verhey (Eds.), *Agencies in European and comparative perspective* (Intersentia, 2003), p. 131.

16. Chamon, "EU agencies: Does the *Meroni* Doctrine make sense?", 17 MJ (2010), 281–305.

appeared.[17] Thus, the Court did not express a concern about the effect on the inter-institutional relations by referring to the "balance of powers", but a concern regarding the Treaty's system of judicial protection. A close reading of Advocate General Roemer's conclusion to this case,[18] something few authors engage in,[19] also supports this view.

Secondly, the differences between the factual and legal contexts in which the Brussels Agencies in *Meroni* and the current day EU agencies operate are fundamental in nature. The Brussels Agencies were bodies established under private law, whereas the EU agencies are public bodies under EU law. Although it makes perfect sense to qualify the former as "outside bodies", this is not so for the latter. The Brussels Agencies had received powers from the High Authority, whereas EU agencies are established and endowed with powers by the Union legislature. Moreover, the ruling in *Meroni* was given under the ECSC Treaty, whereas the current EU agencies operate under the EU Treaties. Although the *Meroni* ruling is still being cited to this day by the Court,[20] one cannot ignore the fundamental differences between the two international organizations.

In a way this changed context has even already left its mark on the case law of the Court. The *Schräder* case is exemplary in this regard. In *Schräder*, the General Court accepted that the Community Plant Variety Office (CPVO), an agency, could exercise discretionary powers and referred to the wide margin of discretion a Union authority enjoys whenever it has to make a complex assessment in the performance of its duties. The General Court further argued this by referring to the discretionary powers the Commission wields in the Common Agricultural Policy and in its control on State aid, ignoring the fact that it was dealing with an agency and not the Commission itself.[21] In a way, the General Court was forced to legalize the CPVO's powers given the legal and political context in which the EU administration operates today. A different approach towards the issues of delegation and the allocation of tasks between the different institutions and bodies indeed seems justified in the context of the *traité cadre* of the EU, compared to the *traité loi* of the ECSC.

Although this latter issue was more extensively debated in legal doctrine,[22] the other issues have not received as much attention. It is not claimed here that

17. Jacqué, "The Principle of Institutional Balance", 41 CML Rev. (2004), 384.

18. Opinion of A.G. Roemer in *Meroni*, cited *supra* note 10, 89.

19. A notable exception being Griller and Orator who briefly refer to the A.G.'s Opinion, cf. Griller and Orator, op. cit. *supra* note 3, 17.

20. See e.g. Case C-301/02 P, *Carmine Salvatore Tralli* v. *ECB*, [2005] ECR I-4071; Joined Cases C-154 & 155/04, *The Queen, on the application of Alliance for Natural Health and Others* v. *Secretary of State for Health and National Assembly for Wales*, [2005] ECR I-6451.

21. Case T-187/06, *Schräder* v. *CPVO*, [2008] ECR II-3151.

22. Dehousse, "Misfits: EU Law and the Transformation of European Governance", (2002) *Jean Monnet Working Papers* 2, www.jeanmonnetprogram.org/papers/02/020201.html, (Last

these issues make the *Meroni* doctrine irrelevant for the EU agencies, but it should nonetheless be clear that the current debate would benefit from a more thorough analysis of the *Meroni* doctrine. This is something which was also remarked by Chiti,[23] and also by Zwart, the latter also proposing another alternative reading of the *Meroni* ruling.[24] A more thorough analysis of the ruling would clarify to what degree the doctrine still is relevant today and especially in relation to the functioning of EU agencies. Given the original meaning of the principle of "balance of powers" it seems more appropriate to stress the importance of a system of effective judicial protection when referring to the *Meroni* ruling, than it is to stress the institutional balance.[25]

3. And the *Romano* deep blue sea

The problems highlighted above related to a simple transposition of the *Meroni* doctrine to the EU agencies do not only necessitate a more thorough analysis of that judgment, but also compel us to look for other rulings in the case law of the Court. The *Romano* ruling is another interesting case concerning delegation of powers, but it is mentioned by fewer authors and analysed by none. It will be argued in the following that this ruling is more relevant to the EU agencies than *Meroni* is, and an analysis will be undertaken to attempt to clarify the implications of that ruling for the process of *agencification*.

Aside from referring to the *Meroni* doctrine, which virtually all authors do, some contributors to the legal debate on EU agencies also refer to *Romano*, a far less well known ruling by the ECJ. The reason why only a minority of authors writing on agencies deal with the implications of the *Romano* ruling is unclear, all the more since at least three fundamental aspects differentiate *Romano* from *Meroni*, bringing it closer to the factual and legal situation the EU agencies operate in today. For one, the *Romano* case was ruled on under the EEC Treaty and not, as with *Meroni*, under the ECSC Treaty. Secondly, one of the central issues in *Romano* was the delegation of powers by the legislator, *in casu* the Council, not by the Commission or High Authority. Lastly

accessed: 18/02/2011); Geradin, "The development of European Regulatory Agencies: What the EU should learn from the American Experience", 11 CJEL (2004), 1.

23. Chiti, op. cit. *supra* note 11.

24. Zwart, "La poursuite du Père Meroni ou pourquoi les agences pourraient jouer un rôle plus en vue dans l'Union Européenne", in Dutheil de la Rochère (Ed.), *L'Exécution du Droit de l'Union, entre Mécanismes Communautaires et Droits Nationaux* (Bruylant, 2009), pp. 159–73.

25. This is not to say the principle of institutional balance is irrelevant to the process of *agencification*, but that principle cannot as such be derived from the *Meroni* ruling. See also Chamon, op. cit. *supra* note 16.

the delegatee in the *Romano* case was a body established under secondary law and not a body established by private law.

The main issue in *Romano*, without going into the details of the facts of the case, brought before the ECJ under the preliminary ruling procedure, was the problem of a diminution of the value of the Italian lira *vis-à-vis* the Belgian Franc, between the time when Mr Romano was entitled to his Italian invalidity pension and the time the payment of the pension was executed. Because Mr Romano already received a provisional Belgian invalidity pension for part of the same period, the Belgian insurance institution, *L'Institut national d'assurance maladie-invalidité* (INAMI), decided that the latter pension should be adjusted proportionately upon receipt of the Italian pension. The INAMI amended the original decision granting a Belgian pension to Mr Romano and reduced the amount awarded, additionally specifying that the provisional advances it had already granted would also be recovered. However, in order to do so, the INAMI used a different exchange rate to convert the sum received by it from its Italian counterpart from the rate used to calculate the amount to be recovered, which resulted in a situation whereby it retained an amount higher than the amount of benefits actually paid over the period in question. The INAMI justified the use of different exchange rates by referring to decision No 101 of the Administrative Commission on Social Security of Migrant Workers, to which the Council had granted power to fix the conversion rates applicable under Article 107 of Regulation 574/72. The question whether the INAMI was bound by this decision ultimately gave rise, as the Advocate General noted in his opinion,[26] to a point of a constitutional nature: the question whether the Council, in Article 107 of Regulation 574/72, could confer legislative power on the Administrative Commission.[27] The Administrative Commission had been established by the Council through Article 80 of the ubiquitous Regulation 1408/71, its tasks laid down in Article 81 of the same Regulation.

Both the Advocate General and the Court concluded, without referring to the *Meroni* ruling, that such a conferral of powers was incompatible with the Treaties, in particular with the then Article 155 EEC (later Art. 211 EC, now repealed by the Treaty of Lisbon and in substance replaced by Arts. 290 and 291 TFEU), enabling the Council to confer implementing powers on the Commission and Articles 173 and 177 EEC (Arts. 263 and 267 TFEU), laying down

26. Opinion of A.G. Warner in Case 98/80, *Giuseppe Romano* v. *Institut national d'assurance maladie-invalidité*, [1981] ECR 1259.

27. Already in 1966 Maas pointed – in this journal – to the "institutional curiosity" of the Administrative Commission and answered this question in the negative since, under the Treaties, no legislative or executive powers could be conferred upon it. See Maas, "The Administrative Commission for the Social Security of Migrant Workers", 4 CML Rev. (1966), 51–63.

the judicial system created by the Treaty.[28] The Advocate General did not elaborate on the conformity of the competence conferred on the Administrative Commission with Article 155 EEC much, only briefly noting that nothing in the Treaty suggests that the Council may delegate legislative power to a body such as the Administrative Commission. With regard to the problem such a delegation poses in the light of Articles 173 and 177 TFEU his analysis was more thorough. According to the Advocate General, Articles 173 and 177 EEC gave the Court jurisdiction to rule on the validity and interpretation of acts of Community institutions, be it directly or indirectly, but the Administrative Commission, whose decision was at the heart of the case at hand, was not a Community institution mentioned in Article 4 EEC (current Art. 13 TEU) and therefore, according to the Advocate General, its acts were not subject to judicial review by the Court. The Advocate General sketched the underlying fundamental problem succinctly by stating

> "The idea that there may be set up for the Community an administrative body empowered to make binding decisions, but whose decisions are, in themselves, incapable of review by this Court seems to me incompatible with the scheme of the Treaty. Nor does it seem to me that the concept of an administrative body whose decisions are incapable of judicial review is reconcilable with constitutional principles that are accepted in all the member States and, I think, in every other civilized country."[29]

Just like Advocate General Roemer in *Meroni*, the principal concern of Advocate General Warner seemed to be the requirements of a waterproof system of judicial protection. As usual, the Court itself was very concise, simply stating:

> "[I]t follows both from Article 155 of the Treaty and the judicial system created by the Treaty, and in particular by Articles 173 and 177 thereof, that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of Law."

Unfortunately, the Court did not dwell upon this point further and simply concluded that the national court (and the national social security institution) was, as a result, simply not bound by decision of the Administrative Commission.

Because of this conciseness, there is no consensus between the different legal authors that do refer to the *Romano* judgment on the precise meaning of this ruling and how it relates to the principles laid down in the *Meroni* judg-

28. *Romano*, cited *supra* note 26, para 20.
29. Opinion in *Romano*, cited *supra* note 26, at p. 1265.

ment. According to Comte, *Romano* simply confirms *Meroni*.[30] Geradin concurs with this, but notes that the two should still be distinguished, as the Court did not explicitly rely on the principle of institutional balance in *Romano*.[31] This should be juxtaposed with Griller and Orator, who claim that it was the institutional balance already cited in *Meroni* that was central to the prohibition to delegate legislative powers on institutions other than those which were attributed by the Treaty.[32] Indeed, Griller and Orator's view carries more weight on this point as Article 155 EEC prescribed the possibility for the Council to empower the Commission to implement the rules it had itself, acting as legislator, laid down. Delegating this power to a body other than the Commission could then be seen as encroaching on the powers and prerogatives of another institution, *in casu* the Commission, which is one of the three sub-principles constituting the principle of institutional balance according to Lenaerts and Verhoeven.[33] Interestingly the latter two authors do not classify the *Romano* judgment under that sub-principle but under another one, to wit the prohibition for institutions to unconditionally assign their powers to other institutions. Doubt may be cast upon such a classification, as the Court referred to Article 155 EEC, which did not deal with the powers of the Council, which were laid down in Article 145 EEC, but with the powers of the Commission. This would suggest that it was not so much the delegation by the Council which bothered the Court, but the fact that the Council did not delegate the task to the Commission, instead choosing to attribute it to another body.

Although the institutional balance, through Article 155 EEC, was part of the Court's reasoning in *Romano*, it cannot be said with certainty to have made up the core of the Court's resistance against the delegation of powers to the Administrative Commission, as Griller and Orator seem to suggest. Such a definite conclusion on this crucial element in the *Romano* judgment seems impossible to make given the scant reasoning of the judges. The more thorough analysis by the Advocate General would even seem to point in the opposite direction, as the Advocate General insisted not so much on Article 155 EEC but on the judicial system created by the Treaties. Remmert indeed suggests that it was because of this lacuna in judicial protection that the Administrative Commission could not wield external competences.[34] Although Koenig and

30. Comte, "Agences européennes: relance d'une réflexion interinstitutionelle européenne?", (2008) *Revue du Droit de l'Union Européenne*, 495.

31. Geradin, op. cit. *supra* note 22, 10.

32. Griller and Orator, op. cit. *supra* note 3, 18.

33. Lenaerts and Verhoeven, "Institutional Balance as a Guarantee for democracy in EU Governance", in Joerges and Dehousse (Eds.), *Good Governance in Europe's Integrated Market* (OUP, 2001), pp. 44–45.

34. Remmert, "Die Gründung von Einrichtungen der mittelbaren Gemeinschaftsverwaltung", 37 EuR (2003), 140.

others assert that *Meroni* and *Romano* show a restrictive approach of the Court, they only conclude from those two judgments that comprehensive law-making powers may not be delegated.[35] Unfortunately, this in no way helps to clarify these judgments or the relation between them. The authors do not further clarify the concept of "comprehensive law-making powers" and it was not used in either of the rulings. What is precisely meant by this concept therefore remains unclear and one can imagine a plethora of acts and measures which may have important (legal) repercussions without however meeting the characteristics of acts laid down by a body exerting "comprehensive law-making powers". Lastly, according to Türk, the *Romano* ruling did not just confirm but even went beyond the *Meroni* judgment, and restricted the possibilities for delegation even further, the practical consequence being that delegating decision-making powers to outside bodies is unlawful under the Treaties.[36] Although Türk is alone in his claim that *Romano* forbids any delegation of decision-making powers, other authors have not ventured dealing with the Court's statement that a body such as the Administrative Commission could not adopt "acts having the force of Law" either. Thus, although some authors do mention *Romano* together with *Meroni*, none of them have undertaken to clarify the relation between these two judgments. Neither have they tried to explain how the *Romano* judgment can still leave room for EU agencies such as OHIM, CPVO, EASA and ECHA, that have been granted the power to take binding decisions (see *supra* note 6). Thus the question of the practical implications of this part of the judgment is still open.

Whether Türk is correct in his assertion that decision-making powers may not be delegated to outside bodies ultimately depends on how "force of Law" is construed. Türk himself seems to interpret this as the legal force making a decision or an act binding, an interpretation which is sustainable based on the English text of the judgment. However, in the French, Dutch and German language versions of the judgment, the Court refers to *actes revetant un caractère normatif*, *normatieve besluiten* and *rechtsakte mit normativem charakter*. Acts having the force of Law could then be read as legislative measures, i.e. bindings acts of general application, but excluding those that lack such general application, possibly leaving open the possibility for bodies such as the Administrative Commission or the above mentioned agencies to adopt binding acts in individual cases. The Court's second assertion in paragraph 20

35. Koenig, Loetz and Fechtner, "Do we really need a European agency for market regulation?", 43 *Intereconomics* (2008), 231.

36. Türk, "Case Law in the Area of the Implementation of EC Law", in Pedler and Schaefer (Eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (European Institute of Public Administration, 1996), p. 186.

of the *Romano* judgment, stating the Administrative Commission may only provide aid, but cannot issue binding interpretations or instructions, should then be understood as a clarification of the first part of paragraph 20 and not as a novel requirement also excluding binding action even if it did not constitute a legislative measure.[37] Although the current state of *agencification* would still be compatible with such a reading of the Court's ruling, such a literal interpretation of the Court's affirmation would also run counter to the original premise in both the Court's and the Advocate General's reasoning. Whether a decision is of a general or individual scope does not appear to be relevant in the light of the Treaty Articles invoked by the Court and Advocate General. Thus, if one stays true to the underlying reasoning apparent in the *Romano* judgment, the scope of the prohibition contained in that judgment should indeed be broadened to any binding decision whether of general or individual application, as Türk suggested.

Assuming such a construction of the Court's ruling holds true, this in itself does not yet clarify how current EU agencies may operate in the institutional architecture and, more specifically, which powers may be conferred to them. Since the *Romano* judgment, the Treaties have been amended five times through major Treaty revisions. Not only were the scope and pervasiveness of EU law altered, but precisely those articles the Court cited as an obstacle to delegating powers to the Administrative Commission were amended as well. Therefore, to have a proper understanding of the relevance of the *Romano* judgment for the EU agencies today, the following issues need to be explored. Firstly, whether the Treaty revisions enacted since the *Romano* judgment have accommodated the concerns raised in that judgment. And secondly, whether the legal and political context the agencies operate in today, and which is different from the legal and political context the Administrative Commission operated in, could provide us with possible reservations on applying the principle laid down in *Romano* to the agencies.

37. In a subsequent ruling, the Court referred back to *Romano* and the prohibition laid down therein, but used the term "legislative measures" instead of "acts having the force of law" which was the phrase actually used in *Romano*; see Case C-102/91, *Doris Knoch* v. *Bundesanstalt für Arbeit*, [1992] ECR I-4341, para 52. This seems to confirm that the prohibition laid down in *Romano* did concern "legislative measures". Later case law, however, did not use the term legislative measures in relation to the prohibition in *Romano* any more. See Case 21/87, *Felix Borowitz* v. *Bundesversicherungsanstalt für Angestellte*, [1988] ECR 3715; Case C-202/97, *Fitzwilliam Executive Search Ltd* v. *Bestuur van het Landelijk instituut sociale verzekeringen*, [2000] ECR I-883.

4. Assessment of the Treaty revisions

4.1. *The implementing powers of the Commission: Article 155 EEC*

Already under the Rome Treaties, the Commission's competence to adopt implementing measures was foreseen in Article 155, fourth indent, EEC. Although this competence of the Commission had existed since 1957, it was strengthened by the entry into force of the Single European Act (SEA), more specifically the amendments introduced by it to then Article 145 EEC. Article 10 of the SEA added a third indent to Article 145 EEC, laying down the basis for the comitology system in primary law, and charging the institutions with the task of establishing a framework for the delegation of these implementing powers and for the committees assisting the Commission.[38] Labouz rightly noted that it would have been much more logical to amend the existing article,[39] instead of inserting this provision in another article, which gave the impression of redundancy, as Blumann remarked.[40] The Commission had indeed proposed to the Intergovernmental Conference leading to the SEA to amend the existing Article 155 EEC to this end,[41] but ultimately the Member States opted to insert a new provision in the Treaty. According to Ehlerman this was because the Member States feared the solution proposed by the Commission would have left it with a general and autonomous executive power.[42] Still the power of the Commission was strengthened through the SEA, since the amendment to Article 145 EEC created an obligation for the Council to confer implementing powers to the Commission,[43] whereas conferring these powers to the Commission under Article 155 EEC was merely optional.[44] After the renumbering following the entry into force of the Amsterdam Treaty, the Articles 145 and 155 EEC became Articles 202 and 211 EC. Both latter articles were

38. Usher, "The Institutions of the European Communities after the Single European Act", 19 *Bracton Law Journal* (1987), 68.

39. Labouz, "L'Acte unique européen", (1986) *Revue Quebecoise de Droit International*, 139.

40. Blumann, "Le pouvoir exécutif de la commission à la lumière de l'Acte unique européen", 24 RTDE (1988), 1.

41. Glaesner, "The Single European Act: Attempt at an appraisal", (1987) *Fordham International Law Journal*, 469; Lonbay, "Reforming the European Community", (1987) *Holdsworth Law Review*, 105.

42. Ehlermann, "Compétences d'exécution conférées à la commission: la nouvelle décision-cadre du Conseil", 31 RMC (1988), 233.

43. Glaesner, op. cit. *supra* note 41, 469. For an elaborate analysis of the obligation on the part of the Council to confer powers on the Commission see Blumann, op. cit. *supra* note 40, 30–32.

44. Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co*, [1970] ECR 1161, para 9.

repealed by the Lisbon Treaty, and the respective indents dealing with the implementation powers of the Commission were in substance reproduced in Articles 290 and 291 TFEU, thereby removing the illogicality noted by Labouz (see *supra*) from the Treaties. Thus, since the *Romano* judgment, the rules concerning the delegation of implementing powers by the Council to the Commission, originally provided for in Article 155 EEC, have profoundly changed. The key question here is not so much how the relationship between the Commission and the legislature (the Council, since Maastricht ever more together with the Parliament) has changed, but whether these changes have had repercussions for the concern expressed by the Court in *Romano*. As Lenaerts notes, the Court intended to preserve the Commission's role of executive lawmaker by referring to Article 155 EEC and this concern was only made stronger through the amendments brought by Article 10 of the SEA.[45] Although there is some debate over whether the new Articles 290 and 291 TFEU have strengthened the position of the Commission or not,[46] what can easily be ascertained is that only delegation to the Commission is foreseen. This is clear in Article 290, introducing delegated acts which replace the comitology decisions adopted under the *regulatory procedure with scrutiny* (*PRAC*), giving the legislator the possibility to delegate the power to adopt non-legislative acts of general application,[47] only to the Commission. Although Parliament and Council have a large margin of discretion to decide the conditions of this delegation, the list in Article 290(2) TFEU not being exhaustive,[48] only delegation to the Commission is provided for. Article 291 TFEU lays down the principle of national implementation of EU law in paragraph 1. If however implementation at EU level is deemed necessary for the uniform implementation of EU law, powers may be conferred on the Commission and in exceptional cases on the Council. There would seem to be no room left for the legislator to delegate powers through legislative acts to institutions other than the Commission (and in exceptional cases the Council). If the reference by the Court in *Romano* to Article 155 EEC should be understood as clarifying to the legislator (*in casu* the Council, but now predominantly Council and Parliament) that it is at liberty

45. Lenaerts, "Regulating the regulatory process: 'Delegation of powers' in the European Community", 18 EL Rev. (1993), 47.

46. According to Barents, the new provisions have weakened the position of the Commission. See Barents, *Het Verdrag van Lissabon, Achtergronden en commentaar* (Kluwer, 2008), pp. 461–2. But Craig sees a reinforcement of the Commission, see Craig, "The Hierarchy of Norms", in Tridimas and Nebbia (Eds.), *European Union law for the twenty-first century: rethinking the new legal order* (Hart, 2004), pp. 80–84.

47. Notwithstanding Art. 290 TFEU describes the delegated acts as non-legislative acts, they are legislation in a substantive sense. See also Driessen, "Delegated legislation after the Treaty of Lisbon: An analysis of Article 290 TFEU", 35 EL Rev. (2010) 837, 838.

48. Barents, op. cit. *supra* note 46, p. 461.

to decide whether or not to delegate certain tasks,[49] but that once a decision to delegate is made, the delegatee may only be the Commission, it is clear that the successive treaty revisions have not detracted from this at all.

4.1.1. *A brief digression on Articles 290 and 291 TFEU and the regulatory powers of the newly established agencies in the financial sector*

The recent establishment of the three European Supervisory Authorities (ESAs) in the financial sector has, as was already briefly mentioned above, marked a new step in the process of agencification. Their establishment has further highlighted the problem agencification poses under the current Treaty Articles 290 and 291 TFEU. The Commission's declaration, following the Council's approval of the draft regulations for the establishment of the ESAs, on the compatibility of those regulations with Articles 290 and 291 TFEU,[50] provides a good example in this regard.

As explained, under Article 290 TEU only the Commission has the power to adopt delegated acts, which allow the EU executive to flesh out a policy within the framework laid down by the Union legislator. Giving the Commission a *carte blanche*, subject to the legislator's scrutiny under Article 290(2) TFEU, to further regulate the financial sector through delegated acts, obviously was too ambitious a step for the Member States. This is why an important role in the adoption of delegated acts was foreseen for the ESAs, which, just like any agency, are a halfway house between regulatory policy at the national level and regulatory policy by the Commission.[51] The regulations establishing the ESAs foresee that they can propose draft regulatory technical standards to the Commission, who will then endorse them by means of delegated acts. This technique in itself is not new, as agencies such as the EASA (*European Aviation Safety Agency)* can also propose new regulations to the Commission. What is new and what bothers the Commission is that the relevant regulations foresee that the draft regulatory technical standards submitted by an Authority "should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and

49. An obligation on the part of the legislator to delegate implementing powers to the Commission (or Council) does exist under Art. 291(2) TFEU, once it is established that uniform conditions for the implementation of EU law are needed, since that paragraph provides, *inter alia*, "Where uniform conditions ... are needed, those acts *shall* confer…"

50. The Commission declaration was an addendum to the Council document, Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority, 15649/10, ADD 1, 10 Nov. 2010. The Commission made identical statements for the other two authorities (in docs 15647/10 ADD1 and 15648/10 ADD1). The adopted regulations are cited in note 7 *supra*.

51. See also Chamon, op. cit. *supra* note 16, 286–287.

knowing best the daily functioning of financial markets."[52] It is clear this substantially limits the Commission's discretion and is hard to justify based on the wording of Article 290 TFEU, the latter only foreseeing a role for the Commission and the Union legislator in the adoption of delegated acts. As Driessen points out, the main difference between the delegated act and a decision adopted under the *PRAC*, which the former replaces, is that any opinion the Commission receives from national experts, which of course is still possible under Article 290 TFEU,[53] is now without any legal effect.[54] However, in the new regulations on financial supervision, the legislator has made clear that the draft regulatory technical standards adopted by the ESAs would have legal effect. Effectively, the Commission is bound to these drafts in a similar way as it is already bound to the opinions of *pre-decision-making agencies* which are *de iure* non-binding. Yet the legal fiction of the Commission retaining all decisional power has now also been partly abandoned. Thus, this competence of the ESAs does not only impinge upon the prerogatives of the Commission; it also implies that the ESAs wield quasi-legislative powers, subject to the limited scrutiny of the Commission, who also still formally adopts the delegated acts.

As regards the adoption of implementing technical standards by means of implementing acts under Article 291 TFEU, the regulations also foresee an important role for the ESAs. A general rule, subject to exceptions, is introduced, according to which the Commission can only adopt an implementing act if the relevant ESA has submitted a draft to it. This again limits the power of the Commission, as the three new ESAs replace the three financial services Committees who under the old regime also participated in policy making by giving their opinion on draft measures proposed by the Commission under the comitology procedures. Now these Committees have been upgraded into Authorities and they themselves propose draft measures to the Commission. Again this is hard to justify based on the wording of Article 291 TFEU.

Although an important part of the policy making has been delegated to the ESAs, the Commission still formally adopts the delegated and implementing acts. Moloney argues this was a pragmatic constitutional fix, aimed at resolving

52. The preambles of the various regulations further provide for the following restricted and extraordinary circumstances: "Draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation."

53. See also Declaration No 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, in which the Conference took note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area.

54. Driessen, op. cit. *supra* note 47, 848.

the difficulties the *Meroni* doctrine creates.[55] The doctrine's shadow is indeed apparent in the regulations, as it is also expressly provided that the "regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and [that] their content shall be delimited by the legislative acts on which they are based."[56] In reality, however, such an assumed clear distinction between technical issues and policy choices does not exist, as is already well recognized in legal literature on agencies.[57] It can furthermore be doubted whether reserving the formal power to adopt these measures for the Commission, whereas the real decisions are made by the ESAs, is truly in line with the *Meroni* doctrine. This latter issue is of course also relevant in the light of *Romano*.[58] Thus the Commission in its declaration was right to express its doubts whether the restrictions on its role are in line with Articles 290 and 291 TFEU. It should equally be pointed out, however, that the powers conferred on previously established agencies already undermine the Commission's role under the current Articles 290 and 291 TFEU. The new powers conferred on the ESAs can therefore be seen as a continuation of an already ongoing evolution.

4.2. *The system of judicial protection under the Treaties: Articles 173 and 177 EEC*

The second cornerstone of the Court's critique in *Romano* on the delegation of powers to the Administrative Commission was its insistence on the judicial system as laid down in Articles 173 and 177 EEC (now 263 and 267 TFEU). Just as the system governing the delegation of implementing powers to the Commission has undergone several changes through the successive treaty revisions since the *Romano* judgment, so has the system of judicial protection. Although these changes were many and fundamental in nature, and their introduction was the result of the constitutional evolution of the Community (now Union), only the most notable changes for the problem at hand will be dealt with. These relevant amendments to the Union's system of judicial protection

55. Moloney, "EU financial market regulation after the global financial crisis: 'More Europe' or More Risks?", 47 CML Rev., 1347.

56. Art. 10(1) of Regulations 1093/2010, 1094/2010 and 1095/2010, cited *supra* note 7. This provision is of course also relevant in the light of Art. 290(1) TFEU, which clarifies that the essential elements should be laid down by the legislator and cannot be amended by the Commission through delegated acts.

57. See e.g. Griller and Orator, op. cit. *supra* note 3, 22; Wittinger, "Europäische Satelliten: Anmerkungen zum Europäischen Agentur(un)wesen und zur Vereinbarkeit Europäischer Agenturen mit dem Gemeinschaftsrecht", 42 EuR (2008), 619.

58. However, when proposing drafts to the Commission, the ESAs act as *pre-decision-making agencies*, whereas *Romano* is especially relevant as regards the *decision-making agencies*.

were only introduced through the latest revision by the Treaty of Lisbon. The current Article 263 TFEU now allows actions for annulment of "acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties." Likewise, Article 267 TFEU gives the Court of Justice jurisdiction to rule on the validity and interpretation of "acts of the institutions, bodies, offices and agencies of the Union." Whether this extension of the jurisdiction of the Court actually strengthens the system of judicial protection under the Treaties is another matter. In relation to acts of agencies specifically, the jurisdiction of the Court had already been extended through the establishing regulations of those agencies, albeit in an unsatisfactory and ultimately illegal way, as the Court's powers of review may only be laid down in the Treaties themselves and cannot be extended through secondary law.[59] More generally, many authors have referred to the *Les Verts* case law, where the Court ruled that in a Community based on the rule of law, no measure adopted by one of its institutions may be exempt from judicial review by the Court.[60] Lenaerts, for instance, concluded that based on this case law the Court could accept jurisdiction to review the acts of bodies established through secondary law regardless of whether that legislation provides for this possibility or not.[61] Remmert on the other hand noted that the problem the Court faced in *Les Verts* was not quite comparable to such situations, as in *Les Verts* it was faced with a lacuna in the system of legal remedies and procedures concerning the functioning of an institution established by the Treaties themselves and not by a body established through secondary legislation.[62] Nevertheless, the General Court decided in *Sogelma*[63] that such situations are indeed identical to the situation in *Les Verts* when it rejected a plea of inadmissibility raised by the European Agency for Reconstruction (EAR) in an action for annulment against a decision of that agency. The EAR had claimed the General Court had no jurisdiction since the EAR was not mentioned in the former Article 230 EC as one of the institutions whose acts could be reviewed by the Court. In its decision, the Court probably felt strengthened by the fact that the Treaty of Lisbon was soon to be ratified. Riedel indeed rightly notes that the Court anticipated the new rules under the TFEU in its interpretation of the rules under the EC Treaty.[64] Thus, interesting

59. Court of Auditors, *Opinion No 8/2001 on a proposal for a Council Regulation laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes*, O.J. 2001, C 345/1, para 22.

60. Case 294/83, *Parti écologiste «Les Verts»* v. *European Parliament*, [1986] ECR 1339, para 23.

61. Lenaerts, op. cit. *supra* note 45, 45–6.

62. Remmert, op. cit. *supra* note 34, 140.

63. Case T-411/06, *Societá generale lavori manutenzioni appalti Srl* v. *European Agency for Reconstruction*, [2008] ECR II-2771.

64. Riedel, "Rechtsschutz gegen Akte Europäischer Agenturen", 20 EuZW (2009), 568.

as the discussion might have been, it has been relegated to the realm of legal history by the Treaty of Lisbon, which has extended the Court's jurisdiction in the proper legal way, i.e. by amendment of the Treaty itself. In the same way, the objection of Advocate General Warner in the *Romano* case against an empowerment of a body to make binding decisions and his qualification of such an empowerment as incompatible with the scheme of the Treaty can now be swept aside, as the former Articles 173 and 177 EEC have been amended giving jurisdiction to the Court to review such decisions.

Thus we are left feeling a bit abandoned. We know from the *Romano* ruling that Articles 155, 173 and 177 EEC stood in the way of a delegation of decision-making powers by the legislature to a body other than the Commission. But only one part of this two-pronged objection had been elaborated, and even then only by the Advocate General. As the Treaty of Lisbon has done away with this first part of the Court's objection, the relevance of *Romano* for the current agencies comes down to the requirements of the former Article 155 EEC (in substance replaced by Arts. 290 and 291 TFEU). As the Court did not clarify its reasoning in its judgment, discovering these precise requirements comes down to conjecture, given the possibility that these requirements might have been altered through the successive treaty revisions. Assuming the fourth indent of the former Article 155 EEC can indeed be identified as the stumbling block leading the Court to rule as it did in *Romano*, and that the Court implied that implementing powers should either be exercised by the Council or the Commission, it is clear that the second part of the Court's objection is still valid. The Treaties as they currently stand, do not provide for the power to implement EU law other than by the Council, Commission or the Member States, excluding the possibility for another EU body or institution to wield executive powers.

5. A changed context

Although the facts of the case and the legal context of *Romano* resemble the situation in which the current agencies operate much better than the *Meroni* ruling, important differences remain. Notwithstanding that this in itself would not overrule the *Romano* judgment, it can give extra weight to a plea for revising the existing case law of the Court, to accommodate for the existence of EU agencies and their participation in EU policy implementation.[65]

65. A plea already made by some authors specifically for the *Meroni* doctrine. See e.g. Geradin, op. cit. *supra* note 22, 16.

Undoubtedly the core of such an argument would relate to what Majone has coined "the rise of the regulatory State in Europe".[66] Although the regulatory State paradigm cannot be dealt with *in extenso* here, the repercussions of this evolution on the central issue at hand should be pointed out. As Majone explains, the rise of the regulatory State in Europe is not just a national but also a supranational phenomenon. According to Majone regulatory growth in the EU started in the 1970s and has been exponential, both quantitatively and qualitatively. Not only has the amount of legislation enacted at European level increased dramatically since the 1970s, the scope and pervasiveness of EU regulation has too.[67] The importance of the SEA, which attributed new competences to the then EEC, is obvious in this regard. Although there was a clear evolution in expanding the competences of the Community, a similar evolution in its institutional architecture, to match the newly gained competences did not materialize. According to Everson and Majone, this created an institutional deficit.[68] To remedy this institutional deficit, auxiliary bodies could be set up to support the Treaty institutions and especially the Commission in their (new) tasks, thus making the case for EU agencies. The analogy of the establishment of numerous regulatory agencies in the United States following the New Deal program in the 1930s seems evident and is therefore also often made.[69]

Returning to the *Romano* ruling, it should be recalled that this judgment was delivered in 1981 at the start of the regulatory growth at the European level and well before the SEA and the subsequent Treaty revisions that broadened the scope of EU law immensely. The institutional deficit indicated by Majone had not yet materialized, and an acute organizational need to delegate certain tasks to bodies not mentioned in the Treaties did not yet exist. Hence the outcome of the *Romano* ruling was quite logical in 1981 given the state of European law at that time: the Council could have easily taken the necessary binding decisions itself instead of the Administrative Commission or it could have delegated this task to the Commission, not yet overburdened at that time. In both cases, judicial review of such decisions would have been available, given that the authors of the acts would have been either the Council or Commission. Since the broadening of the then Article 173 EEC by the Court in its *Les Verts* ruling only dates from 1986, this could not be presumed to be the

66. Majone, "The rise of the regulatory State in Europe", (1994) *West European Politics*, 77.

67. Majone, "The rise of statutory regulation in Europe", in Majone (Ed.), *Regulating Europe* (Routledge, 1996), pp. 56–9.

68. Everson and Majone, "Réforme institutionelle: agences indépendantes, surveillance, coordination et contrôle procédural", in De Schutter, Lebesis and Paterson (Eds.), *La Gouvernance dans l'Union Européenne (*Office des publications officielles des Communautés européennes, 2001), pp. 144–50.

69. See e.g. van Ooik, op. cit. *supra* note 13, 125.

case for a body such as the Administrative Commission. In short in 1981, there was no good reason to delegate powers to a body such as the Administrative Commission and this delegation would even have created problems concerning the system of judicial protection under the Treaty.[70] However, at the beginning of the 21st century, the EU markedly differs from the EEC in 1981 and no one questions the need to delegate certain implementing tasks to bodies other than the Commission and the Council. Unfortunately, as Hofmann remarks, although the framers of the Treaty of Lisbon provided for a new system of delegated and implementing acts under Articles 290 and 291 TFEU, they essentially ignored the agencies in this regard,[71] yet agencies take an ever increasing role, both quantitatively and qualitatively, in EU policy implementation.

Although these observations could help the Court review its case law should it be confronted with a similar question to the one raised in *Romano* and *Meroni*, this time concerning powers conferred on an agency, and they have probably already led the Court to take a relaxed stance towards agencies (see for instance *Schräder, supra*), it is not clear how the Court could rule such a case without applying a *contra legem*, or at the very least a *praeter legem*, interpretation of the Treaty articles on implementation. The Treaty of Lisbon did indeed provide an excellent opportunity to close the "institutional deficit", but the delegation of implementing powers at EU level is still explicitly reserved to the Commission or, in exceptional cases, the Council.[72]

6. Conclusion

In the legal debate on EU agencies, the *Meroni* doctrine of 1958 is often applied to the establishment and functioning of these bodies. In this contribution a number of fundamental differences between the Brussels Agencies at issue in *Meroni* and the EU agencies of today were highlighted. It was argued that these differences need to be further analysed in order to understand the true implications of the *Meroni* ruling for EU agencies. At the same time, attention was drawn to a less well-known ruling by the Court, the *Romano* case of 1981. This ruling seems more relevant for the study of EU agencies, but at the same time even more restrictive than *Meroni* as regards the possibility to attribute implementing powers to auxiliary bodies. This ruling was further analysed and its implications for the EU agencies looked into. Although the Treaty revisions

70. Why the Administrative Commission was initially established is explained by Maas, cf. op. cit. *supra* note 27.

71. Hofmann, "Seven challenges for EU administrative law", 2 *Review of European Administrative Law* (2009), 46–7.

72. Ibid.

since 1981 have done away with the first of the two objections raised by the Court in *Romano*, the Court's second objection, the fact that the Treaty only provides for the Commission or the Council to implement policy at EU level, is still as pertinent today as it was in 1981. The role granted to the newly established agencies in the financial sector in the implementation of EU legislation through delegated and implementing acts has therefore been found questionable in this regard. Thus, although the framers of the Lisbon Treaty have updated the Treaty's system of judicial protection, they have failed to close the institutional deficit remarked by Everson and Majone, as the Treaty still does not provide for a role by EU agencies in the implementation of EU policies, leaving the process of *agencification* of the EU administration on shaky legal grounds.