ARTICLES

EU AGENCIES AND THE ISSUE OF DELEGATION: CONFERRAL, IMPLIED POWERS AND THE STATE OF EXCEPTION

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ABSTRACT: The delegation doctrine has evolved together with the Union's objectives and executive tasks. Yet the Court has continued to apply the principles set out at the origins of the European integration. The Treaty-makers have not intervened to offer a new legal framework as concerns the establishment and empowerment of agencies. As such, the issue of delegation has been stretched and cut on the Procrustean bed of the process of agencification, forcing a substantial reinterpretation of the concept of discretionary powers. The present *Article* will analyse the possibility of an interpretative expansion of the specific sectoral legal bases as to include the competence of delegating powers on agencies within the powers conferred to the Union. It will then move on analysing the possibility of that being an implied power of the Union. Finally, it will be suggested that the process of agencification has been primarily based on a pragmatic political need for credibility and long-term regulatory stability in order to effectively respond to what has been felt as emergency. These options represent the good, the bad and the ugly of a legal doctrine meant to apologize for an affirmed and ever-expanding practice of governance. Since the existence of agencies cannot be neglected nor their mushrooming can be acquiesced, the present analysis, beyond the apology, will attempt to shed some light over the jurisprudence of the Court, highlighting the risks arising from the lack of an agency model and, in general, from the unregulated process of agencification.

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I. INTRODUCTION

Agencies are among the most mysterious creatures of the Treaties. Even though the constitutional legislator has recognized EU agencies as part of the administrative framework of the Union and has regulated several of the logical consequences arising from their establishment and empowerment,[1] yet the *quomodo* and the *quantum delegatur* can at most be deduced from the Treaties.

The present *Article* will analyze the issues of the establishment and of delegation of powers to European agencies, researching the legal bases[2] conferred to the Union allowing for the agencification process to take place. In the first part an overview will be offered of the main functions attributed to agencies and of the fundamental principles regulating the delegation of power in the EU.

The *Article* will then tackle the legal bases for the establishment and empowerment of agencies. In particular, it will examine the practices adopted by the EU legislator who has relied on both Art. 352 TFEU and on sectoral specific legal bases, such as Art. 114 TFEU. After having analyzed the main drawbacks of the use of the flexibility clause, as well as of the use of agencification as a means of harmonization, the attention will be drawn on the findings of the Court in its rulings in *ENISA* and *Short selling.* The analysis will focus on whether the legal bases have been broadly interpreted as to make of the power to establishing and empowering agencies a conferred one, or whether this has been considered as implied.

Finally, it will be argued that none of these reconstructions properly fit as a legal justification of the process of agencification. It will then be suggested that this process has been primarily based on a pragmatic political need for credibility and long-term

[1] More specifically, agencies are mentioned in Arts 9 TEU (principle of equality before institutions); 15 TFEU (principle of transparency); 16 TFEU (right to protection of personal data); 24 TFEU (right to receive answers from institution in the same language of the applicant); 71 TFEU (internal security); 123, para. 1, TFEU (prohibition of overdraft facilities); 124 TFEU (prohibition of privileged access to credit); 127, para. 4, TFEU (submission of opinions by the ECB); 130 TFEU (independence of the ECB); 263, 265, 267 and 277 TFEU (judicial remedies); 287 TFEU (control by the Court of Auditors); 298 TFEU (EU administration); 325 TEFU (protection of the financial interests of the Union). The Charter of Fundamental Rights also makes several references to agencies as concerning the right to good administration (Art. 41), access to documents (Art. 42), recourse to the Ombudsman for cases of maladministration (Art. 43), scope of application (Art. 51) and implementation of the principles contained in the Charter (Art. 52).

[2] The present *Article* will not tackle the broader aspects connected to the political legitimization of agencies, considered as non-majoritarian, "technical" regulatory bodies. Without pretense of exhaustiveness, some considerations about the agencies' legitimacy will be made in the last section, when it will be discussed the possible emergence of a state of exception.

regulatory stability in order to effectively respond to what has been felt as emergency. Specific attention will be drawn on the consequences of a technique of governance based on the normalization of the state of exception, particularly considering the shortcomings for the agencies' legitimacy.

II. Agencification and the issue of delegation

II.1. Agencies as delegate entities: overview of the delegated functions

Delegation of powers to agencies raises concerns as the means for the delegating authority – i.e. the principal – to exercise effective control over the agent. When delegating implementing powers to the Commission, for example, Art. 291, para. 3, TFEU requires the establishment of a procedure empowering Member States to control the exercise of the implementing powers.[3] Agencies are not mentioned among the beneficiaries of the delegation under Arts 290 and 291 TFEU, nonetheless they also apparently operate in a regime of delegation of powers.[4] For that reason, means of control have been established as procedural and organizational requirements such as the representation on the Boards and the nomination of the Directors. However, the *ad hoc* way of establishing agencies leaves to the contingent political bargaining the decision concerning their

[3] Since it is necessary, for a power to be delegated, that the principal detains the competence while only the exercise of the related power is shifted to the agent, some authors have argued that the system provided for by Art. 291 TFEU does not constitute a delegation. See M. Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford: Oxford University Press, 2016, p. 237. In the frame of Art. 291 TFEU, in fact, the competence of adopting implementing measures is attributed to the Member States. Since the EU legislator does not have the competence of adopting implementing measures, the conferral to the Commission seems rather to be the creation of a power allowed in exceptional circumstances. However, since Art. 291, para. 3, TFEU prescribes that the control shall be exercised by the Member States, other authors have adopted a different reconstruction of the theory of delegation, according to which the power of the Member States may be delegated to the Commission by the intervention of a third authority – the EU legislator – hierarchically superior. See R. Barents, *The Autonomy of Community Law*, The Hague: Kluwer Law International, 2004, p. 224. As concerns this hierarchical superiority, one may argue that the EU legislator is overarching the Member States exclusively in their function of EU implementing authorities – i.e. merely intended as federal executive agents of the Union.

[4] AG Jääskinen in his Opinion in *Short selling* stressed the fact that powers are not delegated but rather conferred on agencies. See Opinion of AG Jääskinen delivered on 12 September 2013, case C-270/12, *United Kingdom v. European Parliament and Council* (*Short selling*), para. 91. However, the Court has found that the main criteria applicable to the delegation are also applicable in the case of conferral of powers to agencies. See Court of Justice, judgment of 22 January 2014, case C-270/12, *United Kingdom v. European Parliament and Council* (*Short selling*), paras 45 to 50. Given this legal framework, the subtle distinction proposed by M. Chamon, *EU Agencies: Legal and Political Limits,* cit., p. 237 between the various types of delegation and the claim that the system provided for by Art. 291 TFEU does not constitute a delegation, is not decisive for analysing the legal boundaries to the establishment and empowerment of EU agencies, see *infra,* sub-section IV.1.

internal organization, thus resulting in an extreme heterogeneity concerning the means of control the principal has over the agency.[5]

As reported by the academic literature, the comparison of the agencies' governing bodies immediately shows the difficulty of finding a common model, given that the only harmonized areas concern the budget, the access to documents and treatment of personal data.[6] That confirms the frustration of aspiring to a classification of agencies intended to explain the state of play of the phenomenon and predict its possible evolution. However, a classification of the powers attributed to agencies – through an exemplification of some measures that agencies may adopt – will try to compensate this descriptive insufficiency with the relevance of the information provided.[7]

As concerns the powers of which agencies are vested, it shall preliminarily be noted that any attempt of classification is also obstructed by the fact that agencies often express themselves through formally non-binding acts.[8] However, apart from the difficulty of classifying powers expressed in the form of comply or explain guidelines, agencies have been vested of five kinds of powers: i) regulatory powers (often referred to as quasi-regulatory powers); ii) decision-making powers affecting individuals; iii) consultative powers; iv) operational powers and v) informational and coordinating powers.[9]

Even though, formally, agencies are not vested with regulatory powers, it is undeniable that at least the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) express, *de facto*, this function. As noted by the academic literature, the European Securities and Markets Authority (ESMA) is entrusted with regulating in detail the financial markets by issuing non-binding acts. However, these acts have repercussions on the identification of the responsibility of financial markets' actors and thus present a level of compliance not dissimilar to that of a binding measure.[10] The second category of power is clearly exemplified by agencies, such as the European Union Intellectual Property Office (EUIPO) and the Community Plant Variety Office (CPVO) that are entrusted of certificatory powers in attributing patents in the fields, respectively, of trademarks and plant variety. Consultative agencies have the role of assisting the Commission in its decision-making activity by providing it with scientific and technical

[5] Cf. M. Chamon, *EU Agencies: Does the Meroni Doctrine Make Sense*, in *Maastricht Journal of European and Comparative Law*, 2010, p. 288.

[6] M. Chamon, *EU Agencies: Legal and Political Limits*, cit., p. 100.

[7] For a quantitative analysis of the variation in the reliance of legislators on EU agencies, see M. Migliorati, *Relying on Agencies in Major European Legislative Measures*, in *West European Politics*, 2020, p. 159 *et seq*.

[8] See J. Alberti, *L'utilisation d'actes de soft law par les agences de l'Union européenne*, in *Revue de l'Union européenne*, 2014, p. 162.

[9] See J. Alberti, *Le agenzie dell'Unione europea*, Milano: Giuffré, 2018, p. 190.

[10] *Ibid.*, pp. 192-197, who also brings the examples of the European Union Agency for Railways (ERA), European Union Aviation Safety Agency (EASA) and Agency for the Cooperation of Energy Regulators (ACER).

analysis. An example may be the role of the European Medicines Agency (EMA) in the procedure for authorizing pharmaceutical products[11] or the role of EFSA in the procedure for authorizing smoke flavorings.[12] These agencies are somehow at crossroad with those having regulatory powers. The main element of differentiation may be found in the possibility allowed to the Commission to dissent from the opinion issued by the agency, even though the academic literature has shown that statistically the Commission tends to merely ratify these opinions.[13] Operational functions consist in furnishing concrete operational support in the context of a certain activity. A clear example is the one of the European Border and Coast Guard Agency (FRONTEX), which assists the Member States in controlling the EU borders with its own means and staff members.[14]

Finally, the informational and coordinating function consists in the exchange of information and best practices with the national competent authorities and in their coordination for the optimal achievement of EU law's implementation objectives. This function is characteristic of a process of integration between the EU and national level of administration and helps foster mutual trust: it is thus mostly achieved by consensus and without the adoption of binding acts.

As the functions attributed to agencies have assumed a fundamental character in the ordinary administration of the EU, the problem has arisen as to the limits of the delegation of powers. Since the EU can only exercise the powers that have been conferred to it, the choice of the correct legal basis has a constitutional significance.[15] The corollaries of the choice of the legal basis, for what concerns the empowerment of EU agencies, are not confined only to the effects on the institutional balance but also involve an impact on the mandate of the agencies, on their collocation within the institutional framework and on the supervision of their action.

The European legislator has adopted different approaches during the different waves of agencification, moving from the use of the flexibility clause to the adoption of a specific sectoral legal basis and, then, to the adoption of Art. 114 TFEU.

[11] See Arts 9 and 10 of Regulation (EC) 726/04 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.

[12] Art. 9 of Regulation (EC) 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods.

[13] T. GEHRING, S. KRAPHOL, *Supranational regulatory agencies between independence and control: the EMEA and the authorization of pharmaceuticals in the European single market*, in *Journal of European Public Policy,* 2007, p. 208.

[14] Art. 38 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624.

[15] Court of Justice, opinion 2/00 of 6 December 2001, *Cartagena Protocol*, para. 5.

II.2. Fundamentals of the delegation of powers: *Meroni*, *Romano* and the principle of institutional balance

From a theoretical perspective, the issue of the delegation of power to agencies has been largely dominated, until the *Short selling* case, by the so-called *Meroni*[16] doctrine. Back at the times of the European Coal and Steel Community (ECSC), Art. 53 ECSC allowed the High Authority to institute a financial mechanism to attain the ECSC's objectives. When such a mechanism was established, the High Authority delegated its execution to two agencies – so-called Brussels's agencies – constituted under Belgian private law. Their powers consisted, notably, in determining the amount and collecting the contributions paid by all the undertakings using ferrous scraps and monitoring their solvency conditions. Meroni refused to pay the contributions, claiming that the decision was not motivated and that the undertakings concerned were not offered the possibility to bring their considerations before the High Authority.

The first problem the Court found in the delegation made to the agency can be summed up in the principle *nemo plus iuris ad alium tranferre potest quam ipse habet,* since the decisions of the agency were not subjected to the Treaty, as it would have been the case where the same decisions would have been adopted by the high Authority.[17] Then the Court introduced what has been seen as a prototype of the principle of institutional balance. It found that the delegation of the power to adopt purely executive acts is permitted, since these acts can be reviewed in the light of the criteria set out in the delegation while, on the opposite, the delegation of discretionary powers would render vain this guarantee, thus infringing the Treaty.[18] Even though the acts of the Agency were to be approved by the High Authority, the finding that the latter had no further function than adopting the data furnished by the Agency, led the Court to declare the delegation under scrutiny illegitimate and to annul it. The principle of institutional balance as a constraint to delegating powers to agencies, was then made more explicit in the successive *Romano*[19] ruling.

The case concerned Mr. Romano, an Italian retired worker living in Belgium who was entitled to receive his pension in both countries. The controversial issue was the definition of the exchange rate for converting the Italian pension into Belgian Francs. The exchange rate used by the Belgian authority was in fact that defined by the Decision of the Administrative Commission on Social Security of Migrant Workers,[20] to whom the Council had conferred the power to adopt such a decision that was claimed

[16] Court of Justice, judgment of 12 June 1958, case C-9/56, *Meroni v. High Authority*.

[17] *Ibid.*, p. 150.

[18] *Ibid.*, p. 152.

[19] Court of Justice, judgment of 14 May 1981, case C-98/80, *Romano*.

[20] Decision 101/1975/EEC of 29 May 1975 of the Administrative Commission of the European Communities.

to be of legislative nature. As underlined by AG Warner, even if the Treaty recognized the power of the Council to confer legislative powers to the Commission, it did not, however, allow the conferral to a body such as the Administrative Commission, which is not "a creature of the Treaty".[21] Moreover, the Administrative Commission was not mentioned in Arts 173 and 177 EEC (now Arts 263 and 267 TFEU) and, thus, their acts were not opposable before the Court. These suggestions brought the Court to finding the conferral incompatible with the Treaty and that the Decision of the Administrative Commission was not binding for the referring Labor Tribunal.

As concerns the principle of institutional balance, the Court did not, as in *Meroni*, just refer to impossibility to attack the acts of the agency, but it made express reference to Art. 155 EEC,[22] thus giving a new constitutional dimension to the principle. In fact, as it has been shown by the doctrine, the idea of institutional balance that the Court had in mind in *Meroni* was mostly conceived as a guarantee for individuals.[23] On the opposite, the evolution of the jurisprudence has offered an interpretation of the principle as regulating inter-institutional relationships.

Notably, in *Chernobyl*[24] the Court found that the lack of the European Parliament's active legitimation to bring an action of annulment before the Court undermined its role in the institutional framework of the EU. From this case, some authors have argued that the principle is to be intended as a "dynamic balance", so that it is not necessary to amend the Treaties in order to innovate the institutional frame: what only matters is that this process is "accompanied by a strengthening or rebalancing of the existing institutions and functions".[25]

The Court itself, even when finding the principle of institutional balance within the Treaties, has motivated its creative interpretation of the Treaties as being in the name of the "maintenance"[26] of the balance, thus implicitly recognizing a dynamic nature to the principle. The Court seems thus proposing a reading of the principle as meaning that what should be respected and preserved is not the allocation of powers as defined

[21] Opinion of AG Warner delivered on 20 November 1980, case C-98/80, *Romano*, p. 1264.

[22] *Romano*, cit., para. 20. Art. 155 EEC was deputed to describe the role, tasks and functions of the Commission, as it would now be Art. 17 TEU.

[23] J.-P. JACQUÉ, *The principle of the institutional balance*, in *Common Market Law Review*, 2004, p. 384.

[24] Court of Justice, judgment of 4 October 1991, case C-70/88, *European Parliament v Council* (*Chernobyl*), para. 26.

[25] E. VOS, *Agencies and the European Union*, in T. ZWART, L.F.M. VERHEY (eds), *Agencies in European and Comparative Perspectives*, Antwerp: Intersentia, 2003, p. 131. The author proposes to strengthen the Commission supervisory powers and to ensure judicial review by the Court. That view was contested by AG Van Gerven in his Opinion delivered on 30 November 1989, case C-70/88, *European Parliament v Council (Chernobyl)*, para. 6. The Court, however, did not confirm his idea – notably, that in order to change the institutional balance as defined in the Treaties it was necessary an intervention of the constituent power – and operated a *revirement* with respect to its previous jurisprudence, recognizing the active legitimation of the European Parliament to bring actions of annulment before the Court.

[26] *Chernobyl*, cit., paras 23 and 26.

by the Treaties, but rather the abstract function[27] of each institution within the EU polity, as may be deduced from the Treaties.

In this sense, the express reference to Art. 155 EEC made in *Romano,* should have made the ruling resilient to the constitutional evolution of the EU where, even though acts of agencies have been expressly made subject to judicial control, the position of the Commission has been even reinforced. It is not without surprise, then, that when the Court has been called to apply the *Romano* ruling to a case of delegation of powers to ESMA, it has stated that the latter does not add anything to *Meroni* as concerns the conditions governing the delegation of powers to agencies.[28]

III. The process of agencification and the practice of delegation: in search of the legal bases clothing the Emperor

III.1. The use of the flexibility clause as a legal basis

The first wave of agencification saw a massive establishment of agencies through the means of Art. 352 TFEU. Notably, the choice of establishing agencies on the basis of Art. 352 TFEU imposes to reach unanimity within the Council.[29] Moreover, the procedure under Art. 352 TFEU does not permit the participation of the Parliament as a co-legislator.

AG Jääskinen argued that this procedure anyway fosters the democratic legitimacy of agencies, since under Art. 352, para. 2, TFEU, the Commission is asked to draw national Parliaments' attention on the proposal, in order for them to make an assessment of subsidiarity.[30] This argument does not count among the most persuasive. In fact, on one side, all legislative proposals are subjected to the procedure of the Protocol on the application of the principles of subsidiarity and proportionality and, on the other, there is a substantial difference between the control of subsidiarity made by national Parliaments and the participation of the European Parliament as a co-legislator. The control of national Parliaments, in fact, is limited to the control of the respect of the principle of

[27] For a complete reconstruction of the principle see, *ex multis*, K. Lenaerts, A. Verhoeven, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in C. Joerges, R. Dehousse, *Good Governance in Europe's Integrated Market*, New York: Oxford University Press, 2002, p. 35. A different reading of the principle has been offered by G. Majone, *Delegation of Regulatory Powers in Mixed Polity*, in *European Law Journal,* 2002, p. 330. The author argues that if the delegation of competences to agencies is read in the context of the politicization of the Commission, as means of reliving the latter of technical tasks, then the agencification process strengthens the institutional balance, intended as a principle related to the cooperation between institutions in the law-making process more than a strict circumscription of the powers attributed to each of them.

[28] *Short selling*, cit., para. 65.

[29] As highlighted by C. Tovo, *Le agenzie decentrate dell'Unione europea*, Napoli: Editoriale Scientifica, 2016, p.137, the political process that leads the research of consensus has an impact on the quality and on the quantity of functions that are delegated to agencies.

[30] Opinion of AG Jääskinen, *Short selling*, cit., para. 58.

subsidiarity and does not have binding effects unless the reasoned opinion issued represents at least one third of all the votes allocated to national Parliaments.[31]

Since the use of the flexibility clause is restricted to the sole cases where the action of the Union should prove necessary, some authors have found a further problem in its adoption as the legal basis for establishing agencies that can be endorsed. Notably, it has been argued that, under this provision, it becomes hard to distinguish between the necessity of establishing the agency for the attainment of an objective of the EU, and the necessity of empowering the agency: thus, agencies provided with modest powers may be at odds with the requirement of necessity set in Art. 352 TFEU.[32] Moreover, it has been highlighted that a distinction should be drawn between the creation of an agency and the process of agencification. The dimension of the issue, in fact, is liable to be read as a Treaty amendment – expressly prohibited through the means of Art. 352 TFEU in the Court's Opinion 2/94[33] – in the measure that it constitutes a process of reform of the EU's administration method.[34]

Moreover, it shall be noted that in its Opinion 2/94,[35] the Court has expressly prohibited the use of the flexibility clause in all cases where the Union has been conferred a power, even if it is implied. That could make the use of the flexibility clause illegal since the power to establish agencies may be considered as an implied power.[36]

At any rate, from the third wave of agencification onwards, Art. 352 TFEU has been only used as a legal basis for the establishment of the Fundamental Rights Agency (FRA) and of the Global Satellite Agency (GSA).[37] Moreover, until the Parliament will not receive a full co-decision power under Art. 352 TFEU, it is improbable that the praxis will step back relying on the flexibility clause, since the full participation of the European Parliament in the legislative procedure leading to the establishment of a new agency provides it with a stronger legitimization and, thus, a more effective capacity of performing the tasks of which it is entrusted. In accordance with this trend, the Commission, on occasion of the draft interinstitutional agreement of 2005,[38] sought to extent to

[31] Art. 7, para. 2, Protocol (No. 2) on the Application of the Principles of Subsidiarity and proportionality.

[32] See M. Chamon, *EU Agencies: Legal and Political Limits*, cit., p. 137.

[33] Court of Justice, opinion 2/94 of 28 March 1996, para. 30.

[34] Cf. M. Chamon, *EU Agencies: Legal and Political Limits*, cit., p. 139.

[35] Opinion 2/94, cit., para. 29.

[36] See *infra*, sub-section III.4.

[37] Cf. C. Tovo, *Le agenzie decentrate*, cit., p.133. The author highlights how the establishment of these two agencies shall be seen as a confirmation of the new trend, rather than as an exception. The use of Art. 352 TFEU, in fact, has been required by the fact that the competences attributed to the two agencies do not find any correspondent among the sectoral specific policies attributed to the Union.

[38] Commission Draft Interinstitutional Agreement of 25 February 2005 on the operating framework for the European regulatory agencies, COM(2005) 59 final.

EU agencies the jurisprudence of the Court concerning the application of Art. 352 TFEU,[39] confining the latter provision to a merely residual application.

III.2. The specific sectoral legal bases: Art. 114 TFEU and the approximation through agencification

Since the third wave of agencification,[40] agencies have been mostly established on the basis of the specific sectoral legal bases attributing a material competence to the EU. At first glance, recourse to the specific sectoral legal bases may be seen as an improvement in the practice of agencification, it permits the measures to be adopted following the ordinary legislative procedure, thus granting a greater participation of the European Parliament.

The main problem, however, is that these provisions do not make any reference to the fact that the legislator may have a competence to adopt organizational arrangements in order to exercise the attributed competence. For that reason, concerns have been raised by the academic literature sustaining that the creation of a body having autonomous legal personality is more likely to appear as an institutional decision than the exercise of a material competence.[41]

Among the specific sectoral legal bases used by the legislator, Art. 114 TFEU has contributed the most to the blossoming of EU agencies,[42] even though it has not always been peacefully accepted. In occasion of the establishment of European Medicines Agency (EMA), in fact, the Council Legal Service (CLS) found illegitimate the proposal made by the Commission of establishing the agency on the basis of Art. 100A of the EEC Treaty (now Art. 114 TFEU). The CLS had made a clear distinction between the creation of an agency and the conferral of powers to it. In particular, the CLS had sustained that the concept of *rapprochement* could not be extended to national measures that do not exist and that, for their specificities, cannot be adopted by Member States individually.[43]

Ten years later, however, in occasion of the establishment of European Food Safety Authority (EFSA), the CLS declared that Art. 352 TFEU should have been used for the establishment of agencies only whether there would have been no other legal basis in the Treaty, since the creation of an agency, *per se*, does not require to recur to the flexibility

[39] Court of Justice, judgment of 26 March 1987, case C-45/86, *Commission v. Council,* para. 13.

[40] Cf. S. Griller, A. Orator, *Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine*, in *European Law Review,* 2010, p. 6. The first agency to be established without recourse to Art. 352 TFEU was the European Environment Agency (EEA).

[41] R. Adam, A. Tizzano, *Manuale di diritto dell'Unione europea*, Torino: Giappichelli, 2014, p. 109.

[42] As reported by C. Tovo, *Le agenzie decentrate*, cit., p.133, eight agencies have been founded on the basis of Art. 114 TFEU.

[43] See M. Chamon, *EU Agencies: Legal and Political Limits*, cit., p. 143, who refers to the document of the Legal Service of the Council of the European Communities of 19 November 1991, 9525/91, para 14. See also J. Alberti, *Le agenzie dell'Unione europea*, cit., p. 132.

clause.[44] It then considered that Art. 114 TFEU could be used for the adoption of measures that, even if not directly constituting measures of harmonization, contributed to the intent of harmonizing the internal market, notably by reducing recourse to Art. 36 TFEU by Member States and, thus, preventing the emergence of barriers to the free movement of goods.[45] The CLS, motivating the difference with its previous opinion concerning the EMA, stated that the EFSA was not entrusted of replacing national laws through the establishment of a central authority responsible for authorizing the products considered to be legal, but had a genuine purpose of harmonization. It, however, did not take position concerning the fact that the measure could have not been taken by Member States individually.

This juridical tension between the exercise of a material competence and the arguably implied competence of establishing an institutional body for its exercise, has found its first settlement in occasion of the *ENISA* judgement.

III.3. The *ENISA* ruling: a broader interpretation of art. 114 TFEU as to include the power of establishing and empowering agencies?

The *ENISA* ruling[46] can be seen as the judgment that marked the legitimacy of the use of Art. 114 TFEU for the establishment – and empowerment – of agencies. The case was promoted by the United Kingdom which sought the annulment of the measure establishing the agency, claiming that Art. 114 TFEU was not the appropriate legal basis. The claimant argued that the establishment of an agency could not be achieved at national level by the simultaneous enactment of identical individual measures and, thus, could not be considered as a harmonization measure.[47]

The Court rejected the claim, finding that Art. 114 TFEU not only confers discretion to the legislator as regards the choice of the most appropriate technique of approximation[48] – including the choice of attributing the power to the agency to enact individual measures[49] – but it also attributes the power of taking measures having an institutional character, as establishing an agency.

Implicitly following the suggestion of the AG Kokott,[50] the Court considered that the establishment of the agency cannot be separated from its empowerment. Acting as a

[44] Opinion of the Legal Service of the Council of 18 May 2001, n. 8891/01, para. 3.

[45] *Ibid.*, para. 9.

[46] Court of Justice, judgment of 2 May 2006, case C-217/04, *United Kingdom v European Parliament and Council* (*ENISA*).

[47] *Ibid.*, para. 12.

[48] Cf. Court of Justice, judgment of 6 December 2005, case C-66/04, *United Kingdom v European Parliament and Council* (*Smoke flavourings*), para. 45.

[49] Court of Justice, judgment of 9 August 1994, case C-359/92, *Germany v. Council*, para. 37.

[50] Opinion of AG Kokott delivered on 22 September 2005, case C-217/04, *United Kingdom v European Parliament and Council* (*ENISA*), para. 27.

means to the end, in fact, it seems that it is not possible to conceive the creation of an agency as an objective in itself.[51]The Court then found that since the tasks conferred on *ENISA* were "closely linked to the subject matter of the acts approximating the laws, regulations and administrative provisions of the Member States"[52] and since the complexity of the area with which the legislature was confronted may have led to differences in the transposition in the Member States, the establishment of the agency was rightly based on Art. 114 TFEU.

What the Court did not examine is whether the decision to adopt an extraordinary organizational measure as the establishment of an agency was proportionate – *rectius* necessary, suitable and *stricto sensu* proportionate – to perform the given set of tasks[53] or there were at hand lighter organizational alternatives. In other words, even though it is the function sought for an agency that gives it an appreciable substance, the test of proportionality shall not be circumscribed to the tasks conferred to the agency but shall be extended also to the establishment of the agency as a proper means to perform those tasks in light of all possible alternatives.[54]

At any rate, the Court concluded that Art. 114 TFEU granted the power of establishing a "Community body responsible for contributing to the implementation of a process of harmonization".[55] This finding of the Court seemed to offer the possibility of abroad reading of Art. 114 TFEU – and by analogy any other specific sectoral legal basis – as including the power of establishing and empowering EU agencies. Moreover, the wide margin of discretion that the Court attributes to the legislator in choosing the most appropriate measure for the approximation *ex* Art. 114 TFEU seems to exclude the possibility of exercising an implied power, the latter being strictly circumscribed by the requirement of indispensability. Notwithstanding, in its subsequent ruling in *Short selling*, the Court did not directly use Art. 114 TFEU as a provision to the effect of which powers may be conferred on European Securities and Markets Authority (ESMA), thus nourishing the uncertainty concerning the legal basis allowing for its establishment.

[51] This statement is generally agreeable, since it must be recognized that the establishment of an agency is necessarily, conceptually bound to the powers that are meant to be conferred on it. Notwithstanding, the distinction between the two acts makes sense in the context of the actual state of play of EU law where, even though there exist the legal bases for exercising powers such as those conferred to agencies, nothing is said as concerns their establishment. Similarly, cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 152.

[52] *ENISA,* cit., para. 45.

[53] For a similar position see M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 168.

[54] A possible problem of this solution may be that it takes the legislative measure empowering the agency as the parameter of the proportionality test, while Art. 5, para. 4, TUE prescribes that "the content and form of a Union act shall not exceed what is necessary to achieve the objectives of the Treaties". Hence, the legislative measure would be elevated to primary law, as explicating the objectives of the Treaties.

[55] *ENISA*, cit., para. 44.

III.4. *Short selling* and the shadow of the implied powers

More precisely, in its *Short selling* ruling, the Court stated that "while the Treaties do not contain any provision to the effect of which powers may be conferred on a Union body, office or agency, a number of provisions in the FEU Treaty nonetheless presuppose that such possibility exists".[56] If the possibility of framing the empowerment – and thus also the establishment, since the Court treats the two measures as a *unicum* – of EU agencies as an implied power was to be excluded, the Court could have stated, *sic et simpliciter*, that the norm allowing for the conferral of powers on ESMA was precisely Art. 114 TFEU.

This path of reasoning relying on other provisions of the Treaties, added to the fact that treating the establishment of an agency as a conferred power under Art. 114 TFEU does not resolve the theoretical problem of drawing institutional consequences from norms establishing material competences, have cast the shadow that the establishment of agencies may be considered as an implied power.[57] The doctrine of implied powers has its roots in the judgment of the Court *Germany and others v. Commission*, where it was found that: "where an Art. of the EEC Treaty — in this case Art. 118 — confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task".[58]

In the context of the *ENISA* case, the European Parliament had claimed that, whether the Court should have not found in Art. 114 TFEU the correct legal basis for establishing ENISA, it could have nonetheless been considered as the exercise of an implied power conferred on the Union legislature by that very provision.[59] However, the power to establish an agency shall be kept distinct from the powers at issue in the case *Germany and others v. Commission*. There was at stake the possibility for the Commission to ask for a notification by the MS whether Art. 118 of the EEC Treaty entrusted it of arranging consultations. The Court then found that the task conferred on the Commission to arrange consultations would have stayed a dead letter if the consultations were not to be started somehow.[60]

[56] *Short selling*, cit., para. 79.

[57] See J. Alberti, *Le agenzie dell'Unione europea*, cit., p. 129; A. von Bogdandy, J. Bast, *The Federal Order of Competences*, in A. von Bogdandy, J. Bast (eds), *Principles of European Constitutional Law,* München: Hart, 2010, p. 282.

[58] Court of Justice, judgment of 9 July 1987, joined cases 281/85, 283/85, 284/85, 285/85 and 287/85, *Germany and others v Commission*, para. 28.

[59] *ENISA*, cit., para. 28, where the Parliament stated that the creation of the agency could have been seen "as indispensable to the achievement of the objectives pursued by the specific directive". It shall be noted that in its *Germany v. Council* ruling, the Court clearly affirmed that the implied power should be implied by an Art. of the Treaties. It does not seem that the directive to which the Parliament refers may have the necessary status of primary law in order to provide the Union legislature for any implied power. Reasoning *a contrario*, the European legislator would have an unlimited power to extend its competences by issuing secondary legislation whose objectives require the exercise of non-conferred powers in order to be achieved.

[60] *Germany and others v. Commission*, cit., para. 29.

On the contrary, the establishment of an agency appears as the exercise of a power that, even though related to the exercise of the conferred material competence, goes far beyond what is strictly indispensable to carry out the tasks assigned by the material competence. Moreover, in the judgment *Germany and others v. Commission,* the Court expressly stated that the provision conferring the task on the Commission would have been wholly ineffective without the exercise of the implicit competence contested. It does not seem to be the same in regard to EU agencies: would the harmonizing competence *ex* Art. 114 TFEU be completely ineffective if the power to establish agencies EU was not recognized to the EU? It seems that agencification is nothing more than a political choice, among many others, as the means to achieve and perform a conferred task or objective. It is not strictly indispensable, even though it may be considered as the most efficient means: that would not justify the adoption of the theory of implied powers, since the principle of conferral shall be deemed as prevailing over opportunity or efficiency issues.

However, it should be kept in mind that with the Lisbon Treaty agencies have gained mentions within the primary law. One might argue that, if the competence to establish agencies was not recognized, all the mentions made within the Treaties to their acts and, in general, to their existence, would stay a dead letter. Even though tempting, this reconstruction would result in a completely new doctrine of implied powers. The test of indispensability characterizing the doctrine of implied powers, in fact, would not apply in the sense of considering the establishment of the agency as indispensable for the exercise of the material competence conferred to the Union, but rather in the sense that it is indispensable for the norms referring to agencies not to stay dead letter with regard to the acts of agencies mentioned there.

This understanding would have the effect of breaking any causal link between the legal basis adopted for exercising the implied power and the conferred power giving rise to the implied one. Which is to say that it would not matter whether the establishment of an agency is indispensable for attaining the objective, for example, of harmonizing national measures under Art. 114 TFEU: since it is indispensable not to render vain some parts of the Treaty, the power of establishing agencies can be discretionary exercised by the EU legislator in any field of competence. Moreover, if such powers were to be considered implied from the provisions of the Treaties referring to agencies, these legal bases should have been adopted by the legislature, in combination with others, in the funding acts of agencies. This phenomenon, however, cannot be observed.

Such broad conception of the doctrine of implied powers does not seem to be coherent with a European polity where implied powers shall be collocated within the boundaries set by the principle of conferral.[61] Furthermore, as already mentioned, if the power of establishing EU agencies were to be considered as implied, the jurisprudence

[61] See A. VON BOGDANDY, J. BAST, *Principles*, cit., p. 282. The authors notice how, on the opposite, under international law implied powers are simply considered to be at odds with the concept of conferred powers.

of the Court concerning the flexibility clause would prohibit the use of Art. 352 TFEU[62] for exercising such power.

In this regard, AG Jääskinen in his Opinion adopted a different position. He claimed that the legal basis for establishing an EU agency may well be Art. 114 TFEU[63] but, given the particular case at hand, the powers conferred to ESMA did not correspond to the requirements of the approximating measures as defined by that provision.[64] Thus, he proposed the use of Art. 352 TFEU as the most appropriate legal basis. While, as will be shown, the AG considered as implied the power to sub-delegate or to confer implementing powers to agencies on the basis of Art. 291 TFEU,[65] he did not apply the same rationale to the conferral of powers on the basis of Art. 114 TFEU. He rather seemed to interpret the ENISA ruling as offering a broad lecture of Art. 114 TFEU as to include the power of establishing and conferring tasks to agencies. Nonetheless, the doubt may still arise that such a broad interpretation allowing for the exercise of measures having an institutional character shall anyway be considered as the recognition of an implied power. It is in fact unclear what shall be deemed differentiating the latter interpretation from the one, eventually *contra legem*, widening the exhaustive list of beneficiaries of the delegation provided for by Art. 291 TFEU.

Having said that, even though the Court has recognized the legitimacy of establishing EU agencies, it is still not clear how exactly this power may be reconciled with the principle of conferral. In fact, while on one side reliance on the doctrine of implied powers does not seem suitable for justifying the process of agencification, on the other the Court has been reticent in affirming that this power can be directly based on specific sectoral legal bases.

IV. The nudity of the Emperor: *Short selling* and the proclamation of the state of exception

IV.1. *Short selling*: the unbearable lightness of being delegated powers

With its ruling in *Short selling* the Court has brought what the academic literature has defined as a "constitutional revolution" in the doctrine of delegation of powers.[66] The case was brought by the United Kingdom which claimed that: *i*) the discretionary powers granted to ESMA violate the *Meroni* doctrine;[67] *ii*) Art. 28 of Regulation 236/2012[68]

[62] In its Opinion 2/94, cit., para. 29 the Court has found that the flexibility clause, being a subsidiary means, cannot be used whether the Treaty confers to the Union an express or implied power to act.

[63] Opinion of AG Jääskinen, *Short selling*, cit., para. 34.

[64] *Ibid.*, para. 53.

[65] *Ibid.*, paras 87 and 90.

[66] D. Adamski, *The ESMA doctrine: a constitutional revolution and the economics of delegation*, in *European Law Review*, 2014, p. 812 *et seq*.

[67] *Short selling*, cit., paras 28 to 34.

also violates the *Romano* doctrine, since the decisions that ESMA is empowered to take are generally applicable;[69] *iii*) the delegation also violates Arts 290 and 291 TFEU since agencies are not included among the beneficiaries of the delegation of supplementing and implementing powers;[70] *iv*) Art. 114 TFEU cannot be considered as an appropriate legal basis for the adoption of Regulation 236/2012 since it has no harmonizing effects.[71] For the purpose of the present exposure, the analysis will proceed backwards, starting from the last of the pleas.

Supporting the applicant's plea, in his Opinion AG Jääskinen stressed the fact that Art. 28 of Regulation 236/2012, more than having any harmonizing outcome,[72] had the effect of replacing national decision-making with EU-level decision-making through the creation of an emergency mechanism,[73] thus being incompatible with Art. 114 TFEU. Nonetheless, since ESMA's powers were considered to be necessary in order to achieve the aims of the internal market, the AG proposed to use Art. 352 TFEU as a legal basis.[74] The Court, on the contrary, recalling its previous ruling in *ENISA*, found that the purpose of the powers provided for in Art. 28 of Regulation 236/2012 satisfied the requirements laid down in Art. 114 TFEU.[75]

As concerns the claim that the delegation of powers to ESMA is in breach of Arts 290 and 291 TFEU, it shall be recalled that these Arts do not contain any reference to agencies.[76] After acknowledging this lack of reference, notwithstanding AG Jääskinen found "particularly appropriate" the delegation of implementing powers on agencies, especially when complex technical assessments are required, considering that if Art. 291 TFEU was not to be given such an extensive interpretation, the other provisions of the Treaties referring to the acts and decisions of agencies would have been deprived of any content.[77] It seems that the AG interpreted the possibility of conferring powers to agencies as an implied power of the Union and then proposed an analogical interpretation of Art. 291 TFEU, suggesting that the conferral of implementing powers to agencies

[68] Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps Text with EEA relevance.

[69] *Short selling*, cit., paras 56 and 57.

[70] *Ibid.*, paras 69 and 70.

[71] *Ibid.*, para. 90.

[72] Opinion of AG Jääskinen, *Short selling*, cit., para. 52.

[73] *Ibid.*, para. 51.

[74] *Ibid.*, para. 55.

[75] *Short selling*, paras 116 and 117.

[76] The absence of EU agencies in Arts 290 and 291 TFEU has been defined as a "neglection" of agencies by Treaty reformers. See E. Vos, *EU agencies on the move: challenges ahead*, in *Swedish Institute for European Policy Studies*, 2018, p. 23.

[77] Opinion of AG Jääskinen, *Short selling*, cit., para. 87.

could have been considered as a "midway solution" between the exceptional delegation to the Commission or the Council and the ordinary entrustment of MS.[78]

Moreover, AG Jääskinen considered that the powers vested in ESMA had not been conferred by an implementing act but rather by a legislative one and, thus, distinguished between the sub-delegation of implementing powers to agencies made by either the Commission or the Council from the conferral[79] of implementing powers to agencies made by the legislature.[80] From this analysis, it seems to arise a further distinction between, on one side, the sub-delegation and the conferral of implementing powers – that constitute the exercise of an implied power and an analogical application of Art. 291 TFEU to the case of agencies – and, on the other, the conferral of powers on the basis of Art. 114 TFEU, which lies instead on a broader interpretation of the legal basis.

The Court, however, avoided this distinction and, interestingly, held that the delegation of competences to ESMA shall be understood comprehensively, as an enchainment of subsequent delegations in the frame of a unique legislative will.[81] It found that for the purpose of Arts 290 and 291 TFEU, the power conferred through Art. 28 of Regulation 236/2012 shall not be considered in itself, but in the context of all the powers already conferred on ESMA to entrust the agency of effective powers to safeguard the financial markets in some defined sectors of competences. By adopting that perspective, the conferral of powers to the agency cannot be regarded as undermining the rules governing delegation established in Arts 290 and 291 TFEU. ESMA is an agency of the Union created by the European legislator and to which its creator confers powers, do not delegate them. The fact that it is the comprehensiveness of the delegations to bring the Court to this conclusion, suggests that the element of differentiation between a situation of delegation of powers – subject to the discipline of Arts 290 and 291 TFEU – and the rather atypical situation of conferral of powers, consists in the evidence of a project of the legislator to build, through separate legal acts, a unique regulatory, supervisory and sanctioning asset of powers of which the agency is entrusted. More precisely, it consists in the *effet utile* of the powers vested in ESMA in order to preserve the functioning and integrity of the financial system of the Union.

[78] *Ibid.*, para. 86.

[79] *Ibid.*, para. 91. In order to sustain the existence – in EU law – of such a conferral of powers by the EU legislature, the AG made a parallelism with Art. 257 TFUE. He found that the power of instituting a special body with jurisdictional competences is a clear demonstration that the EU legislators can delegate powers that they could not exercise by themselves. Thus, in order not to be at odds with the principle of *nemo plus iuris ad alium transferre potest quam ipse habet*, this kind of empowerment must be a conferral of power and not a delegation. It may be noted that, unlike Art. 257 TFEU, there is no provision in the Treaties conferring to the EU legislature the same powers as concerns agencies.

[80] *Ibid.*, para. 90.

[81] *Short selling*, cit., paras 84 to 86.

As concerns the applicability of *Romano,* the Court stated that it could not be considered as adding anything to the requirements already set in *Meroni*.[82] The Court was not called to judge upon a possible infringement of the institutional balance, but merely on the nature of the measures that ESMA was allowed to enact. On that point the Court found that the *Romano* ruling was not to be read as prohibiting agencies from adopting measures of general application – since this possibility can now be found in the Treaties at Arts 263 and 277 TFEU – but as merely prescribing that the discretion accorded to them shall be clearly circumscribed by the legislator.[83]

Examining the legality of the delegation of powers to ESMA, the Court was called to apply the criteria set out by the *Meroni* doctrine. In his Opinion, AG Jääskinen first stated that some of the principles set out in *Meroni* had been overruled by the Lisbon Treaty. Notably, the fact that the acts of the agencies are now attackable before the Court and that agencies can now be vested with the power of taking binding decisions.[84] Subsequently, the AG noted that the *Meroni* doctrine, as concerns the *nemo plus iuris* principle and the necessity to sufficiently define the delegated powers in order to avoid their arbitrary exercise, was still applicable to the sub-delegation of implementing powers to agencies.[85] He then found that the one at issue was not a sub-delegation, but rather a direct conferral of implementing powers by the legislature subtracted from the restriction set out in *Meroni*.[86] This notwithstanding, he finally concluded – not without a sort of astonishment – that the principles expressed in the *Meroni* ruling were to be considered as being still applicable to evaluate the legality of the conferral.[87]

Interestingly, even the Court, while finding that the "conferral of powers" to ESMA was not regulated by Arts 290 and 291 TFEU,[88] it nonetheless applied the criteria of *Meroni* to test the legality of the powers vested in ESMA by Art. 28 of Regulation 236/12. The Court started its reasoning by highlighting the substantial difference between the bodies of private law at issue in the *Meroni* ruling and ESMA, a European Union entity, created by the EU legislature.[89] Notwithstanding this prelude, that could have also

[82] *Ibid.*, paras 65 and 66.

[83] This flattening of *Romano* on *Meroni* operated by the Court does not take account of the fact that in the *Romano* ruling, the precedent of *Meroni* was not even recalled. Moreover, as already mentioned, the principle of the institutional balance was of fundamental importance in the *Romano* ruling and was framed in different terms than *Meroni.* Thus, the statement of the Court that *Romano* cannot impose further conditions to the delegation as those set out in *Meroni* can be seen as a rushed conclusion, merely confined to the kind of measures that can be delegated and not excluding the review of the impact that the power conferred may have on the EU inter-institutional relationships.

[84] Opinion of AG Jääskinen, *Short selling*, cit., paras 73 and 74.

[85] *Ibid.*, para. 88.

[86] *Ibid.*, paras 90 and 91.

[87] *Ibid.*, para. 92.

[88] *Short selling*, cit., para. 83.

[89] *Ibid.*, para. 43.

brought to the declaration of inapplicability of the doctrine *tout court*, the Court proceeded by applying the *Meroni* test to the powers conferred to ESMA.

Notably, after recalling the fundamental condition set out by its *Meroni* ruling, viz the fact that the delegation of clearly defined executive powers is permitted since they are amenable of "strict judicial review" provided that their exercise can be evaluated "in the light of the objective criteria determined by the delegating authority",[90] the Court found that the discretion attributed to ESMA was to be considered as sufficiently circumscribed by the legislator for three reasons. First, because ESMA's powers could have only been exercised in well-defined circumstances and to specifically address, "a threat to the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union".[91] Secondly, because ESMA had the duty to balance the benefits of its action with the possible negative effects.[92] Lastly, because ESMA was required to consult other competent authorities and to periodically review its measure, thus been limited in the exercise of its discretion.[93]

It should be noted that the consultation requirement does not provide the consulted entities with any veto power and that the temporary nature of the measure does not affect its discretionary nature. Furthermore, if one also looks at the broadness of the criterion of the threat to the orderly functioning of the financial markets and to the fact that the balance made by ESMA is also extremely technical and based on scientific evidence, it becomes clear that the Court has substantially allowed the delegation of discretionary powers to agencies, or at least it has reinterpreted the concept of discretionary measures as defined in *Meroni*. Moreover, the Court did not take account of the fact that the powers conferred on agencies necessarily embrace political issues[94] and that the General Court had expressly affirmed in its previous case law that where an EU authority is required to make a "complex assessment, it enjoys a wide measure of discretion, the exercise of which is subject to limited review".[95]

It would have been an interesting logical exercise to reconcile the requirement expressed by the Court that powers delegated to agencies must be clearly delineated with the finding of the General Court that agencies have "a broad discretion in a sphere which entails *political, economic and social choices*".[96] At any rate, it seems that, even

[90] *Ibid.*, para. 41.

[91] *Ibid.*, para. 46.

[92] *Ibid.*, para. 47.

[93] *Ibid.*, para. 50.

[94] To the extent that some authors have affirmed that "the traditional depoliticized agency model seems thus in the EU to convert into a model of politicised depoliticization". M. EVERSON, C. MONDA, E. VOS, *What is the Future of European Agencies?*, in M. EVERSON, C. MONDA, E. VOS (eds), *European Agencies in Between Institutions and Member States*, Alphen aan den Rijn: Wolters Kluwer, 2014, p. 236.

[95] Court of First Instance, judgment of 19 November 2008, case T-187/06, *Schräder v. CPVO,* para. 59.

[96] General Court, judgment of 7 March 2013, case T-96/10, *Rütgers Germany and others v. ECHA*, para. 134 (emphasis added).

though the empowerment of EU agencies lies in a constitutional grey area between the conferral and the delegation of powers, nonetheless the criteria defining the boundaries to the exercise of discretionary powers set out in *Meroni* – even though reinterpreted – remain good law.[97]

IV.2. The creation of agencies as an exceptional measure dictated by a state of necessity

Among scholars, some doubted about the relevance of *Meroni* for EU agencies, since agencification was not a process of delegation, but rather one of Europeanisation of administrative powers.[98] Even though one may undoubtedly agree from a political perspective, it is still necessary to wear the lens of the jurist in order to see under what legal conditions, such process of Europeanisation has taken place. A doctrine of the living constitution would allow for constitutional praxis – even *praeter legem* – as mirroring the development of the society over the static letter of the constitutional text. However, the idea of an institutional practice *contra* or *praeter legem* has been clearly rejected by the Court in the judgments *Refugee status*[99] and *Beef labelling*.[100] These practices, defined by the Court as "derived legal basis", were considered as an illegal means for the adoption of measures, since their use would have had the effect of altering the decision-making procedure provided by the Treaties. Hence, the process of agencification cannot formally rely on such a safe harbor.

Yet a way must be found to reconnect the application of the *Meroni* doctrine to the conferral of powers, the discretion of the legislator with the exercise of an implied power, the exercise of a material competence with a decision that has an institutional character. As Italians refrain from believing in the possibility of bridging Sicily with the mainland, but still the fascination of such an unthinkable infrastructure bewilders even the most skeptical, so the building of an intellectual bridge may here be proposed between all these antipodes.

Along the beams of emergency, this bridge may be built. Some authors have proposed that the delegation of powers may be possible even in the absence of an explicit

[97] Cf. M. Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Oxford: Hart, 2018, pp. 33-40. M. Chamon, *EU Agencies: Legal and Political Limits,* cit.*,* p. 248 has defined this *Meroni* doctrine – as results after the *Short selling* ruling – as the "EU *Meroni* doctrine", juxtaposed to the "ECSC *Meroni* doctrine".

[98] R. Dehousse, *Misfits: EU Law and the Transformation of European Governance*, in C. Joerges, R. Dehousse (eds), *Good Governance in Europe's Integrated Market,* Oxford: Oxford University Press, 2001, p. 221.

[99] Court of Justice, judgment of 6 May 2008, case C-133/06, *European Parliament v. Council (Refugee status)*, paras 56-57.

[100] Court of Justice, judgment 13 December 2001, case C-93/00, *European Parliament v. Council (Beef labelling),* para. 42.

provision for doing so "under the pressures of practical necessity".[101] This merely expresses the ancient principle of law – dated back to the *Decretum Gratiani* – "*si propter necessitate aliquid fit, illud licite fit: quia quod non est licitum in legem, necessitas facit licitum. Item necessitas legem non habet*".[102] The state of exception cannot be shaped in juridical terms: it is at the border line between politics and law,[103] it presents itself as the legal shape of what cannot be legally shaped.

The fact that the rulings in *Meroni* and *Romano* are dated far back in the history of the European integration does not only give to the analysis the fascination of a historical reconstruction. Since then, the Union has changed profoundly: its competences have probably widened above the most flourishing neo-functionalist expectations. Together with competences, it has grown the regulatory apparatus of the EU as well and its governance framework.

In its *Romano* ruling the Court prohibited the delegation of the power to adopt acts having the force of law.[104] What was unpredictable back at the time was that the Union would have faced a time when the adoption of acts of general application would have become indispensable to carry out the tasks conferred to the Union itself. As noted by the academic literature, institutional experimentation is needed for the Union to evolve and find its optimum structures of government.[105]

Hence, regulatory policies, through the design of non-legal, indirect and informal means, have found their way out of the legal constraints imposed by the Court.[106] When the *Short selling* case was submitted to the judges of Luxemburg, some authors legitimately fearing about the improbability of an extensive interpretation of Arts 290 and 291 TFEU as to legitimize the delegation of decision-making powers to ESMA, stated that the case may have resulted in a "foolish judicial disregard for the vital need to ensure continuing financial stability within Europe".[107] The Court was sensible to these fears and, in its *Short selling* ruling, expressly affirmed that: "by the expression 'measures of

[101] Cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 236.

[102] As reported by G. AGAMBEN, *Stato di eccezione*, Torino: Bollati Boringhieri, 2003, p. 35.

[103] *Ibid.*, p. 10. The author defines the state of exception as a "land of nobody between the juridical order and the political fact". On the contrary, Santi Romano considered necessity as the primary source of all the law and of the State itself: "[i]f necessity has no law, it makes itself the law: it is an authentic source of law. It is the primordial source of the whole law". S. ROMANO, *Sui decreti-legge e lo stato di assedio in occasione del terremoto di Messina e Reggio-Calabria*, in *Rivista di diritto costituzionale e amministrativo*, 1909, p. 260.

[104] *Romano*, cit., para. 20.

[105] T. TRIDIMAS, *Financial Supervision and Agency Power: Reflections on ESMA*, in N.N. SHUIBHNE, L.W. GORMLEY (eds), *From Single Market to Economic Union*, Oxford: Oxford University Press, 2012, p. 66.

[106] On the use of *soft law* by agencies as means to get around the limits set out by the jurisprudence of the Court concerning the adoption of measures having the force of law, see M. CHAMON, *Le recours à la* soft law *comme moyen d'éluder les obstacles constitutionnels au développement des agences de l'UE*, in *Revue de l'Union européenne*, 2014, p. 152.

[107] M. EVERSON, *European Agencies: Barely Legal?*, in M. EVERSON, C. MONDA, E. VOS (eds), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn: Kluwer Law International, 2014, p. 50.

approximation' the authors of the FEU Treaty intended to confer on the Union legislature, depending on the general context and the specific circumstances of the matter to be harmonized, discretion as regards the most appropriate method of harmonization for achieving the desired result, especially in fields with complex technical features".[108]

This statement went beyond merely recalling the spread view that regulating the markets needs a powerful and efficient regulatory framework. The range of that statement is better understood in the light of the fact, found by the Court, that Art. 28 of Regulation 236/2012 does not fall within the field of application of Arts 290 and 291 TFEU. It rather shall be considered as "forming part of a series of rules designed to endow the competent national authorities and ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence".[109]

What is most surprising is that the Court itself qualifies this set of rules empowering national authorities as "emergency rules".[110] Even more explicitly, AG Jääskinen stated that the powers conferred on ESMA had the effect of creating an "EU level emergency decision-making mechanism".[111] He argued that it is the need for complex technical assessments to implement EU measures that justifies – and has always allowed for – "derogating from general principles on implementation in the Treaty".[112] All these elements have brought some authors to conclude that "this is nothing less than an emergency doctrine".[113]

The emergency realm of the rules conferring powers on ESMA is even more blatant when considered that the agency has the power of substituting itself to national authorities in cases of inaction. If the decision-making power attributed to ESMA was, as declared by the Court, merely a consequence of its expertise and technical authority, then it would have not needed authoritative powers.[114] What justifies the attribution of such powers is the time constraint in intervening regulating the financial markets in situations where any hour may be fundamental to avoid losses and to safeguard the integrity and stability of the financial markets. In other words, it seems here fitting the Latin formula *e facto oritur ius*: in the state of exception the fact is converted into law and, at the same time, also the law is suspended and obliterated in facts.[115]

[108] *Short selling*, cit., para. 102.

[109] *Ibid*., para. 85.

[110] *Ibid.*, para. 109.

[111] Opinion of AG Jääskinen, *Short selling*, cit., para. 51.

[112] *Ibid.*, para. 87.

[113] C. JOERGES, *Integration Through Law and the Crisis of Law*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The End of the Eurocrats' Dream*, Cambridge: Cambridge University Press, 2016, p. 311.

[114] *Ibid.*

[115] G. AGAMBEN, *Stato di eccezione*, cit., p. 40.

Once the lens through which reading the agencification process are set, the technique of an emergency legislation becomes more and more evident. As the academic literature highlighted,

> "agencies have been particularly resorted to in responding to crises, such as the 'mad cow' (Bovine Spongiform Encephalopathy – BSE) crisis and the oil tanker Erika crisis. The financial crisis led to the creation of another three supervisory authorities: the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) and another agency, the Single Resolution Board (SRB). And, in relation to the current refugee crisis, the EU transformed the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) into another, more powerful agency: the European Border and Coast Guard or the new Frontex. In this crisis, the role of the European Police Office (Europol) has also gained importance".[116]

Even ENISA, as recognized by the Court in the homonymous case, was established as an answer to the fact that "the Community legislature was confronted with an area in which technology is being implemented which is not only complex but also developing rapidly. [...] it was foreseeable that the transposition and application of the Framework Directive and the specific directives would lead to differences as between the Member States".[117]

Since the need for administrative experimentation is indeed necessary, it would be irrational for the legal order to renounce its own survival in the name of the respect of the pre-established law. That would be the case if, considering the institutional frame of the EU as fixed and unchangeable, an institutional deficit would be let arising as a consequence of the expansion of the tasks assigned to the EU not accompanied by a proportionate remodeling of its institutional capacities.[118] This appears to be in line with the *Short selling* doctrine with which the Court has allowed the delegation – or at least substantially amended the definition – of discretionary powers. The need of having a body able to effectively intervene, in fact, would be irremediably undermined if that entity could not exercise a certain latitude of discretion, thus putting into discussion the foundation itself of the delegation.

The ability of a legal order to create solutions – beyond the codified law – necessary to its survival is an unwritten law that does not need to be explicitly codified. The prob-

[116] E. Vos, *EU agencies on the move*, cit., p. 13. Cf. also M. Simoncini, *Administrative Regulation*, cit., p. 51, according to whom crises have acted as a driving force for the establishment of EU agencies.

[117] *ENISA*, cit., para. 61.

[118] Cf. M. Everson, G. Majone, *Réforme institutionnelle: agences indépendantes, surveillance, coordination et contrôle procédural,* in O. De Schutter, N. Lebessis, J. Paterson (eds), *Gouvernance dans l'Union européenne*, Luxemburg: Office des publications officielles de la Communauté européenne, 2001, p. 153. Similarly, see also E. Noël, J. Amphoux, *Les Commissions*, in W.J. Ganshof van der Meersch, M. Waelbroeck, L. Plouvier, G. Vandersleben (eds), *Droit des Communautés européennes*, Brussels: Larcier, 1969, p. 186.

lem is the normalization of a state of necessity that is at odds, by definition, with the necessity justifying the exceptional measures. The inability of the EU to codify the praxis of agencies' establishment cannot be regarded as a justification. Not to have a legally binding standardized model for establishing and empowering EU agencies[119] corresponds to the political will of the EU institutions. Political philosophers maintain that the creation of permanent states of exception has become an essential practice of modern democratic states.[120] The state of exception is in fact a means through which the law includes in itself the "living".[121] Since it became the rule, it shifts from an exceptional measure into a technique of government.[122]

So far as agencies are concerned, it seems that it is the necessity – *rectius* the emergency – of granting an effective governance of the Union policies that has constituted the legal basis for their establishment. Necessity, in fact, is a subjective concept related to the objective sought: it is for that reason that it cannot be considered as a source of law *per se*, but rather as conversion of a political fact into law.[123]

IV.3. Normalizing the state of exception: drawbacks of the lack of regulation

In the mid-1930s Carl Schmitt prophesied the irreversible crisis of parliamentary democracy.[124] Already after the First World War, he noted a general trend among the major industrialized countries characterized by the progressive suppression of the distinction between the legislative and the executive powers. This trend was justified in view of simplifying the legislative process and keeping legislation in harmony with the constant changes of the society. The constitutional evolution after the Second World War has been characterized by the perpetual attempt of reconciling delegation and parliamentary democracy. This trend has resulted in a new conception of democratic legitimization, not rooted anymore in direct representation, but rather in a system of indirect control over the administrative sphere by the executives who are in turn responsible before Parliaments, com-

[119] It shall be noted that the 2012 Common Approach on Decentralised Agencies merely constitutes a non-binding instrument. For an analysis of the Common Approach's tenuous contribution to the agency model see M. Chamon, *EU Agencies: Legal and Political Limits*, cit., p. 97.

[120] G. Agamben, *Stato di eccezione*, cit., p. 11.

[121] *Ibid.*, p. 12.

[122] *Ibid.*, p. 16.

[123] *Ibid.*, p. 41. For an interesting reconstruction of the establishment of the EMU as an emergency measure see C. Joerges, *Integration Through Law*, cit., pp. 317-322.

[124] C. Schmitt, *Une étude de droit constitutionnel comparé. L'évolution récente du problème des délégations législatives*, in *Introduction à l'étude du droit comparé. Recueil d'études en l'honneur d'Edouard Lambert,* translated by P. Roubier and H. Mankiewiez, Paris: Sirey, 1938, p. 200.

plemented by forms of direct participation and control by independent courts.[125] One of the main features of the state of exception, in fact, is the abolition of the separation of powers which becomes an ordinary way of government.[126]

It appears that regulatory powers, in order to meet the constant changes of society, must be depoliticized, subtracted to the political bargaining, viz subtracted from the discussion around the most fundamental issues concerning their exercise. It would be in fact misleading to understand this process of depoliticization as the creation of a reign of technocracy where the political dimension is absent. As already noted, the sharp distinction between political decision-making and technocratic activities is merely artificial,[127] to the extent that some authors have identified an agency model of "politicized depoliticization".[128] The meaning of such a depoliticization is rather the substitution of political discourse with technical and scientific information: in other words, agencified and depoliticized regulatory powers are not apolitical, but rather undemocratic.[129] What is absent is not the conflictual dimension of the political decision but rather the entrustment of its resolution to the majoritarian opinion forming the public will. As it has been noted, in the post-crisis economic governance, "democracy has been marginalized by a rhetoric of emergency, existential threats and economic necessities, even when the issues involve deep distributional conflicts".[130] What can be observed, thus, is a trend of depoliticization of democracy, by subtracting the decision-making from the direct influence of elected entities, subjected to the ever-changing will of the people.

This process is sustained by a felt need for credibility and long-term stability that binds the political actors through rules and relegates the control of the technical measures to independent Courts. While judicial control is circumscribed to the respect of the procedure and the manifest error of reasoning,[131] thus not being conceivable as an

[125] P. LINDSETH, *Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity*, in C. JOERGES, R. DEHOUSSE (eds), *Good Governance in Europe's Integrated Market*, Oxford: Oxford University Press, 2001, p. 145.

[126] G. AGAMBEN, *Stato di eccezione*, cit., p. 16.

[127] Cf. M. EVERSON, C. JOERGES, *Re-conceptualising Europeanisation as a public law of collisions: comitology, agencies and an interactive public adjudication*, in H.C.H. HOFMANN, A.H. TÜRK (eds), *EU Administrative Governance*, Cheltenham: Edward Elgar Publishing, 2006, p. 530.

[128] M. EVERSON, C. MONDA, E. VOS, *European Agencies*, cit., p. 236.

[129] Even though sceptical as the most appropriate meaning to assign to the word "democratic", cf. M. EVERSON, C. JOERGES, *Re-conceptualising*, cit., p. 531.

[130] J.P. OLSEN, *Democratic accountability and the changing European political order*, in *European Law Journal*, 2018, p. 90.

[131] In the *Artegodan* ruling, for example, it was clearly stated that: "the Court cannot substitute its own assessment for that of the [agency]. It is only the proper functioning of the [agency], the internal consistency of the opinion and the statement of reasons contained therein which are subject to judicial review". See the Court of first instance, judgement of 26 November 2002, joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan GmbH and Others v Commission of the European Communities*, para. 200.

alternative to a control on the merit of the agencies' action,[132] the legitimacy of the technical decision is granted as far as it satisfies the regulatory demands of the electorate.[133] In this process, the core of legitimacy has in fact shifted from popular elections to the efficiency of the action undertaken, thus turning entities with functional expertise into a milestone of the legitimate institutional architecture.[134] Moreover, as noted by the academic literature, it is not clear at all how democratic accountability may ever be granted, "when governance is embedded in networks across levels of government, institutional spheres, and public-private realms and based on informal partnership and dialogue rather than hierarchical command and formal control relationships".[135]

In this context, a mistake by the agency or a softening of the emergency narrative are sufficient for agencies not to be perceived anymore as legitimate regulatory actors. On the contrary, a clear regulatory framework would both make their action more transparent and bolster their legitimacy.

Furthermore, the unregulated process of agencification based on the normalization of the state of exception as a technique of governance, has also the effect of altering the institutional balance. Delegation of powers to EU agencies, in fact, has a strong impact on the distribution of powers between the EU centralized level of administration and the decentralized national one. In that sense, it is emblematic that some authors have defined agencies as "Trojan horses"[136] in order to describe the process of gradual concentration of executive powers through agencification. In other words, this gradual concentration of executive powers has the effect of altering what has been defined as the EU executive federalism, where Member States should be entrusted of the enforcement of EU law.[137] From a different perspective, it has been argued that the process of agencification makes the principle of subsidiarity obsolete since Member States, by participating in the organs of the agencies, realize a joint enforcement of EU law that scatters any juxtaposition between the Union and the Member States as legitimized executive entities.[138] This incertitude with regard to the role of agencies with respect to the principle of subsidiarity, bolstered by an unregulated process of agencification that does not allow to collocate agencies in the institutional framework of the Union, contributes hindering the legitimacy of agencies as a model of governance.

[132] For an analysis of the different means of *ex ante, ex post* and ongoing control, see E. Vos, *EU agencies on the move*, cit., p. 42.

[133] G. Majone, *Regulating Europe,* London: Routledge, 1996, p. 299.

[134] Cf. J. P. Olsen, *Democratic accountability*, cit., p. 91.

[135] *Ibid.*, p. 91.

[136] M. Chamon, *EU Agencies: Legal and Political Limits*, cit., p. 115.

[137] N. Petersen, *Democracy Concept of the European Union: Coherent Constitutional Principle or Prosaic Declaration of Intent*, in *German Law Journal*, 2005, p. 1520.

[138] See J. Alberti, *Le agenzie dell'Unione europea*, cit., p. 141.

Moreover, the absence of a standardized, binding regulatory framework for the establishment and empowerment of agencies undermines the equal representation of both the EU institutions and the Member States. Since the structure and concrete functioning of each agency is decided following an *ad hoc* procedure, it becomes the product of the contingent political bargaining, and the result of conflicting political interests that impede the creation of a transparent agency model.[139] In particular, the representation of the Member States will be assured in order to foster the process of integration between the national and the EU level of administration and the development of mutual trust between national competent authorities and between the latter and the centralized level. On the contrary, an adequate representation of the EU institutions would be beneficial both to bolster the democratic and political accountability of agencies and render effective the supervision by the principal(s) over the exercise of the delegated powers by the agent. A standardized agency model would in fact allow to provide adequate information to the delegating authorities that would enable them to effectively monitor the activities of the agencies and concretely have the possibility of exercising their role of setting the political address that should guide the technical activity of the agencies.

To sum up, the lack of a regulatory framework for agencies ultimately hinders their legitimacy, confining them in a constitutional grey area, a land of nobody between a general legislative competence and the principle of conferral.

V. Conclusions

As emerged by this analysis of the process of agencification, many uncertainties still surround the establishment and empowerment of agencies. The legal bases upon which powers have been vested in agencies are made of an invisible fabric, resembling the notorious clothes of the Emperor that only the foolish cannot see. While the procession of agencification goes on, the legislator parades exhibiting the legal bases clothing its action, before a plethora of observers going along with the pretence. Yet an innocent cry echoes from the depth of the analysis: The Emperor is not wearing anything at all. The procession, however, must go on.

Metaphors aside, uncertainties arise from the fact that a doctrine of implied powers does not seem to be applicable to justify a process of reform of the institutional framework of the Union and, even if it were applicable, that would be at odds with the use of Art. 352 TFEU as a legal basis. This notwithstanding the Court has not been clear in stating whether the specific sectoral legal bases can be broadly interpreted as to include the powers of establishing and empowering agencies. Moreover, it is still not even clear how a legal basis empowering the Union to exercise a material competence could be

[139] Cf. M. Chamon, *EU Agencies: Legal and Political Limits*, cit., p. 52.

interpreted as including the power of adopting measures having an institutional character, without considering such power as implied.

As concerns the actual legislative practice, the use of the flexibility clause as a legal basis for the establishment of agencies is only limited by the self-restraint of the institutions. It is exemplary the fact that as soon as it was envisaged the establishment of agencies whose powers did not find a corresponding legal basis in the Treaties, Art. 352 TFEU has been readily dusted off.[140] As it has been shown, recourse to the flexibility clause is not only at odds with the application of the doctrine of implied powers to the establishment of agencies, but it also exacerbates the legitimacy deficiencies of agencies by reducing the role of the European Parliament.

Even though the *Short selling* ruling has ultimately legitimated the delegation of discretionary powers to agencies, the alleged declaration of a state of emergency justifying the taking of exceptional measures cannot overcome the lack of a specific provision within the Treaties and shall be considered – in conformity with its emergency character – as a merely transitory solution.[141] This permanent transitory and experimental position, in which lies EU agencies, undermines the transparency of their acts and hinders their legitimacy as well as the perceived democratic legitimacy of the whole Union.[142]

A clear regulatory framework, set by primary law, providing for a legal basis for the establishment and empowerment of agencies, as well as the fundamental general principles concerning their functioning and the delegation of powers, would indeed be needed.[143] This could define the exceptional character of the decision of establishing an agency by requiring, for example, a duty of motivation on grounds of necessity, specifically considering why it is not possible to achieve the same objectives by delegating powers to the Commission or to the Council. Recourse to the ordinary legislative procedure may be rendered mandatory as well as consultation of national authorities: this would both guarantee the involvement of the European Parliament and foster the integration of national executive bodies through the process of agencification. Agencies' accountability could be bolstered by an express duty of periodical information to the European Parliament, while the latter's power of control would be strengthened if accompanied by the possibility to propose the withdrawal or the redefinition of the powers conferred.

Such a regulation would not only have the effect of assigning a legal land – within the institutional design of the EU – to agencies, but it would also and foremost enhance their

[140] Notably FRA and GSA, see *supra*, III.1.

[141] European Parliamentary Research Service, *EU Agencies, Common Approach and Parliamentary Scrutiny*, 2018, p. 70, available *online*.

[142] Cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 52.

[143] The political debate has known several attempts of introducing a specific legal basis for agencies. None of them, however, ever succeeded in reaching the necessary political consensus. See M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., pp. 372-381. The author offers a complete review of the proposals of reform that have been advanced by both politicians and academics.

accountability and legitimacy. Within the frame of a regulation, in fact, the possibility for economic and political interests to be disguised as scientific truths would be rendered more difficult.[144] A legislative guidance would, furthermore, tear the veil of mystery surrounding agencies and elevate them to a status of legitimate creatures of the Treaties.

On the contrary, at the present stage, it is only possible to apologize for the process of agencification either by trying to make it fit within the conferred powers, by broadly interpreting the legal bases offered by the Treaties, either by relying on an extended version of the doctrine of implied powers or, as a last instance, by relying on a doctrine of emergency where the facts are converted into law. While awaiting for the next Treaty reform, the juridical hermeneutics, powerless before the profound mutation of the modern democratic societies, cannot do but unveiling the inconsistencies of the legislative practices and of the jurisprudence, with the hope of inspiring the future trends and the wish that, meanwhile, the "perfection-seeking" dynamics of European law[145] may permeate the process of agencification.[146]

[144] Cf. R. DEHOUSSE, *Misfits*, cit., p. 223.

[145] J. BOMHOFF, *Perfectionism in European Law*, in *Cambridge Yearbook of European Legal Studies*, 2012, p. 75.

[146] Cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 61.