Navigating New Waters: The Impact of the Meroni Doctrine on AML Delegation Powers within the EU Legal Framework

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Master's Thesis

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Outline:

Research Question:

Do AMLA's current powers and mandate, as laid down in the negotiated version of its funding Regulation of 29 February 2024, comply with the *Meroni doctrine* and its subsequent developments in terms of accountability? If so, how?

List of Abbreviations:

1. **AML** - Anti-Money Laundering
2. **AML/CFT** - Anti-Money Laundering and Countering the Financing of Terrorism
3. **AMLA** - Anti-Money Laundering Authority
4. **AMLAR** - Anti-Money Laundering Authority Regulation
5. **AMLD** - Anti-Money Laundering Directive
6. **CDD** - Customer Due Diligence
7. **CLS** - Council Legal Service
8. **EBA** - European Banking Authority
9. **ECSC** - European Coal and Steel Community
10. **EIOPA** - European Insurance and Occupational Pensions Authority
11. **EPPO** - European Public Prosecutor’s Office
12. **ESAs** - European Supervisory Authorities
13. **ESMA** - European Securities and Markets Authority
14. **FATF** - Financial Action Task Force
15. **FIUs** - Financial Intelligence Units
16. **PA** - Principal-Agent
17. **SOEs** - Selected Obliged Entities
18. **SRB** - Single Resolution Board
19. **SRM** - Single Resolution Mechanism
20. **SRMR** - Single Resolution Mechanism Regulation
21. **SSM** - Single Supervisory Mechanism

1. Introduction

Over the past two decades, the institutional and administrative architecture of the European Union (EU) and its predecessors has undergone an unprecedented transformation, most notably in the increasing reliance on specialised bodies known as ‘agencies’. Although it is a more recent phenomenon than the tradition of the European national executive, the 'agency fever' at the EU level is the embodiment of a deliberate strategy to improve policy effectiveness and regulatory capacity at the European level.[1] This growing reliance on expert-level entities, known as ‘agencification’, seeks to balance the need to strengthen the EU's regulatory capacity with the reluctance of Member States to grant direct executive powers to the European Commission.[2] In this context, agencies operate as semi-autonomous entities that can offer technical specialisation and swift decision-making while remaining under the umbrella of the EU, acting as an intermediate solution between the two parties mentioned above.[3] This hierarchical relationship between the Commission and the agencies is explained by the principal-agent (PA) model, a widely accepted political science theory in which an actor (or group of actors) known as the ‘agent’ acts on behalf of its ‘principal’, who sets it up and entrusts it with certain tasks defined by the so-called ‘contract’. A design that seeks to achieve a clear definition of the tasks, responsibilities and control mechanisms of an agency by the delegator is shown to greatly reduce discrepancies between the agent's actions and the principal's expectations, thus limiting the risk of ‘agency losses’ and the possibility of ‘runway bureaucracy’.[4]

So what are agencies? Defining what an EU agency is poses a challenge because, although there is a fairly unanimous convergence in the academic literature on the structure of EU agencies as distinct entities, separated from the legislative institutions both at the national or European level, legal and political theory does not offer an all-encompassing definition of the facets of the term agency.[5] Levi-Faur defines (regulatory) agencies as ‘*non-departmental public organization, mainly involved with rulemaking, which may also be responsible for fact-finding, monitoring, adjudication and enforcement*’.[6] According to Everson agencies are usually involved in both legislative and executive

[1] Busouic, M., M. Groenleer and J. Trondal (eds.) (2012) The Agency Phenomenon in the European Union, (Manchester: Manchester University Press).
[2] Daniel Kelemen, The Politics of “Eurocratic” Structure and the New European Agencies, 25 W. EUR. POL. 93, 101 (2002).
[3] Pollitt, C., Talbot C., Caufield J. and Smullen A. (2004) Agencies: how governments do things through semi-autonomous organizations. (New York: Palgrave Macmillan).
[4] See Calvert, McCubbins and Weingast 1989; Geradin, Munoz and Petit 2005.
[5] Koen Verhoest (2017). Agencification. In: Edoardo Ongaro and Sandra van Thiel (eds.). *The Palgrave Handbook of Public Administration and Management in Europe.* Basingstoke: Palgrave Macmillan.
[6] Levi-Faur, David, ‘Regulation & Regulatory Governance’ (2010) Jerusalem Papers in Regulation & Governance1/2010 < http://regulation.huji.ac.il/papers/jp55.pdf> 15.

functions and often have a judicial role.[7] As can be seen from these definitions, there are significant differences in the range of functions performed and the degree of autonomy enjoyed by agencies within the European institutional architecture. From an organisational point of view, agencies (not only at the European level) are separate from administrative institutions or central governments. This decentralisation, which Busuioc defines as '*organisational divorce*', is a *conditio sine qua non* in order to guarantee a solid level of political independence, despite the fact that it remains difficult to measure.[8] The operational autonomy that EU agencies enjoy in practice is very high when they have to take scientific decisions or individual choices that require a high degree of expertise and specificity.[9] For this reason, there is a broad consensus in the literature that EU agencies operate in the so-called 'grey zone' between 'pure' administration and policy-making, with the aim of disburden the workload of the central administration.[10] This is carried out through the transfer (*terminus technicus* is 'delegation') of tasks and competences from the Commission, the delegator (or 'principal'), to the delegate (or 'agent'). From ensuring food safety to regulating financial markets, the range of tasks and competences for which European agencies are responsible is surprisingly broad, as is the range of their responsibilities, which vary from 'supportive assistant' to 'pivotal player' in their respective fields.[11]

The evolution of the concept of 'agency' in EU law is intertwined with the history of European integration itself. Originally conceived only as technical support units, the 36 EU agencies today can be divided into two types: executive and regulatory ones. The six executive agencies, as clarified by the European Court of Auditors' report, act as '*branches*' of the Commission, which gives them legal personality, to carry out specific tasks on its behalf for a limited period of time.[12] Their responsibilities are usually related to the management of funds from EU programmes in various fields, such as research (ERCEA, REA), health (HADEA), education (EACEA), and innovation and networks (EISMEA, CINEA).[13] In close cooperation with the relevant Commission

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[7] Everson, Michelle, 'Independent Agencies: Hierarchy Beaters?' (1995) 1 European Law Journal 180, 181.
[8] Busuioc, Madalina, 'Accountability, Control and Independence: The Case of European Agencies' (2009) 15 European Law Journal 599, 601.
[9] Ongaro, E., Barbieri, D., Bellè, N. and Fedele, P. (2015) 'EU Agencies and the European Multi-Level Administrative System'. In Ongaro, E. (ed.) Multi-Level Governance (Bingley: Emerald).
[10] Vos, E. (2000) 'Reforming the European Commission: What Role to Play for EU Agencies?' Common Market Law Review, Vol. 37, 1113–34.
[11] Weismann, Paul, 'European Agencies and Risk Governance in EU Financial Market Law' (2016) Routledge Research in EU Law 5.
[12] European Court of Auditors (2020) Special Report. Future of EU agencies – Potential for more flexibility and cooperation. < https://op.europa.eu/webpub/eca/special-reports/agencies-performance-audit-22-2020/en/index.html> accessed 28 March 2024.
[13] European Union (2024) Institutions and bodies. < https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies_en?f%5B0%5D=oe_organisation_eu_type%3Ahttp%3A//publications.europa.eu/resource/authority/corporate-body-classification/AGENCY_EXEC> accessed 25 March 2024.

DG, the Commission can decide to abolish an executive agency if it considers that it is no longer justified from the point of view of sound financial management.[14] Precisely because of these elements, it goes without saying that this group of agencies is in no way independent of its delegator. As opposed to the executive agencies, the so-called ‘European agencies’, commonly referred to as regulatory or traditional agencies, are characterised by their greater autonomy and the complex technical and administrative tasks they are called upon to perform. They play a crucial role in monitoring and regulating key sectors of the EU and have been created in response to specific needs. A significant number of agencies have been created or given increased responsibilities as a result of a crisis (e.g. EBA, EIOPA, ESMA and SRB in the financial sector; EASO and Frontex for the migration crisis and border control).[15] Thus, grouping the European agencies according to their respective tasks and responsibilities, we find a division into four groups. A first group includes those agencies that contribute to the achievement of objectives related to the internal market or to horizontal issues (such as environmental protection) through the internal market (e.g. CPVO, EFSA, ECHA, ERA, EUIPO, EFSA and EMA).[16] A second group has a mandate in the area of security and justice, providing logistical and operational support to Member States and coordinating joint activities (e.g. CEPOL, EASO, Eurojust, Europol and Frontex). A third group deals with regulation and supervision of sectors such as finance or energy, ensuring common standards across the EU (e.g. EIOPA, ESMA, EBA, ACER and ABE). Finally, a last group is mainly concerned with research, data collection and analysis, which is made available to the institutions and Member States in order to develop appropriate policies (e.g. Cedefop, EIGE and FRA).[17]

Looking at the European financial sector, over the past few years, the ‘agencification’ process has taken on a new dimension through the gradual transformation of the EU's administrative architecture and through the political will to create a new agency to respond to the need for a more unified and specialised approach to the fight against money laundering and terrorist financing from an always less intergovernmental perspective. The establishment of the new Anti-Money Laundering Authority (AMLA) aims to respond to the increasing complexity and transnational nature of financial crime by addressing the current fragmentation of Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) supervisory and regulatory authorities at both national and European level. Beyond the individual scandals that have hit the headlines in recent years, thanks to a relevant set of reliable data, we know that money laundering and related criminal

[14] In the past the Commission has periodically redistributed the responsibilities of the executive agencies, most recently in 2013. In 2017 the European Parliament rejected the Commission's proposals to merge ENISA with the new European Electronic Communications Market Authority (which later became ENISA). For further information vote n. 12.
[15] European Court of Auditors Report, see footnote n. 12.
[16] Ibid.
[17] As regards the 'common characteristics' of European agencies, see Weismann, footnote 11, 8.

offences have become a matter of concern for the majority of the Member States and for the EU itself.[18] The European Public Prosecutor's Office 2023 annual report examined a sample of 1927 investigations conducted in 2023, estimating damages of €19.2 billion, mostly caused by VAT frauds.[19] According to the report, VAT fraud accounted for €11.5 billion (59% of the total), making it the largest contributor to the estimated damages. Specifically among the crimes investigated, the most common were: expenditure fraud (both procurement and non-procurement) with 1 865 cases (or 42.57% of the total); money laundering with 226 cases (or 5.16%); corruption with 131 cases (or 2.99% of the total). The report highlights a 26% increase in prosecuted crimes compared to 2022, with almost all cases being raised by private individuals or national authorities (respectively +29% and 24% in 2022). This suggests a positive response to crime at the national/local level. However, the low number of reports from EU institutions, bodies, offices and agencies (only 108) indicates that there has been no improvement in the detection of financial crime at the European level.[20] According to a 2022 report by the European Union Agency for Criminal Justice Cooperation (Eurojust), the number of registered money laundering cases has doubled in the last six years.[21] Eurostat has also confirmed that '*there is a growing number of "new" types of crime, such as cybercrime, fraud, counterfeiting, human trafficking, money laundering and terrorism*'.[22]

As confirmed by Allegrezza, money laundering and terrorist financing are consistently identified among the most significant threats to the European economy.[23] Such illicit activities can directly result into a negative impact on the security of Member States, as these funds can be used to support terrorist, criminal endeavours and destabilising activities. The resultant risk is profound, jeopardizing political and social stability and consequently undermining the security of the European Union and its citizens. Furthermore, AML/CTF violations also pose severe risks to the sustainability and integrity of the financial system as a whole, creating systemic risks and undermining consumer and investor confidence into the Single Market of the EU. All the recent

[18] For further information see the Wirecard case in 2020 (Johnson M., McCrum D.); the Danske Bank scandal in Estonia in 2023 (Andrius Sytas and Terje Solsvik); the Rabobank scandal in the Netherlands (Toby Sterling, David Evans and Leslie Adler); or the recent actions of the authorities of Italy, Latvia and Lithuania against a Latvian financial institution (Eurojust, 27 February 2024).

[19] European Public Prosecutor's Office 2023, "Annual Report 2023: EPPO warns that serious organised crime continues to feast on EU revenue', p.4. <https://www.eppo.europa.eu/sites/default/files/2024-03/EPPO_Annual_Report_2023.pdf>.

[20] Ibid. 10.

[21] Eurojust, October 2022, "Money laundering cases registered at Agency doubled in last 6 years according to Eurojust's new report', <https://www.eurojust.europa.eu/news/money-laundering-cases-registered-agency-doubled-last-6-years-according-eurojusts-new-report> .

[22] Eurostat, 2021, Guide to statistics in European Commission development cooperation. Volume 2: Social statistics. <https://ec.europa.eu/eurostat/documents/3859598/13590455/KS-GQ-21-013-EN-N.pdf/f21ec9ed-a7e2-0dc1-3dfc-71b4849001ba?t=1635152552933> V2.1.3. Quality aspects, P. 15.

[23] Allegrezza, S, *The Proposed Anti-Money Laundering Authority, FIU Cooperation, Powers and Exchanges of Information* (PE 733.968-July 2022) EU Parliament 2022.

aforementioned financial scandals are emblematic of the fact that such phenomena can distort market competitiveness, compromising their fairness and transparency. This escalating challenge has highlighted the limitations of the fragmentation of the existing AML/CTF supervisory and regulatory frameworks, especially at the European level, while underlining at the same time the urgent need for a shift into a more robust and integrated European regulatory framework to safeguard the reliability of the EU financial system as a whole.

In order to trace the evolution of the European Union's AML architecture, it is essential to recall that the first significant steps at the European level were taken in 1991, with the adoption of the first legal instrument approaching the subject: Council Directive 91/308/EEC. Adopted on 10 June and with a rather limited scope, it addressed the ML mainly in relation to 'drug-related offences and other criminal activities'.[24] A decade later, the second AMLDirective, 2001/97EC, broadened the scope of the preceding Directive to encompass so-called 'predicate offences' and 'obliged entities'.[25] The third Anti-Money Laundering Directive (2005/60/EC) was introduced with the intention of aligning the EU legal framework with the recommendations of the Revised Financial Action Task Force (FATF). Jean-Baptiste Maillart has defined the FATF, as an inter-governmental policy-making body established during the 1989 G7 Summit in Paris, whose main aim is to develop and promote policies to protect the global financial system against money laundering, terrorist financing, and other related threats.[26] It comprises 39 members,[27] including major economies and regional organizations, and its recommendations have been widely recognized and revised multiple times, as the global standard to address evolving AML/CTF risks. These requirements called for more detail on customer identification and verification, as well as a more detailed approach to higher ML risk situations that could justify stricter measures. In 2015, the European Union implemented a series of legislative amendments in response to the recommendations of the FATF. These amendments strengthened the legal framework on the prevention of AML and extended it to CTF. This was achieved through several procedures contained in the Fourth AMLDirective 2015/849/EU.[28] However, the terrorist attacks in Europe in 2015 and financial scandals such as the

[24] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering *OJ L 166, 28.6.1991, p. 77–82*.
[25] See Recitals 8,9 and 10, Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering *OJ L 344, 28.12.2001, p. 76*.
[26] Jean-Baptiste Maillart "The Anti-Money Laundering Architecture of the FATF" in Benjamin Vogel and Jean-Baptiste Maillart (eds.), *National and International Anti-Money Laundering Law* (Intersentia 2008) p. 11.
[27] The number of participants in the FATF has gradually increased since its creation, from 16 members to 28 in 1992, to 31 in 2000 and to 39 today (including the European Commission and the Gulf Co-operation Council).
[28] For further details see Jean-Baptiste Maillart "The Anti-Money Laundering Architecture of the European Union" in Benjamin Vogel and Jean-Baptiste Maillart *National and international anti-money laundering law (*Intersentia 2008) p. 71 and 72.

Panama Papers demonstrated that these measures were still not sufficient and needed to be implemented further. Consequently, in February 2016, the European Commission published an Action Plan[29] on this matter, outlining the tools available to Member States and ensuring that the fight against ML/TF would be handled more efficiently. The Action Plan, which was based on the 2015 European Security Agenda, [30] included a series of measures that culminated in the publication of a proposal for a Directive amending the 4ALMD. This proposal was finally adopted after two years of amendments and counterproposals.[31] The 5AML (the final iteration preceding the Commission's proposal for a Regulation in 2021) did not represent a complete renewal of the pre-existing legislative framework; rather, it strengthened the existing one. Among other things, this update reinforces the Customer Due Diligence (CDD) that obliged entities have to take with regard to economic operators from third countries that are considered high-risk. Moreover, the definition of obliged entities has been expanded to include a variety of activities, such as auction houses, art dealers, digital wallet providers, and virtual currency exchange services. This significantly broadens the scope of the EU AML legislation.[32]

Nevertheless, despite the significant steps taken thus far to strengthen the EU's defences against illicit activities, the final 2021 AMLR proposal marks a deliberate shift towards an even more harmonised, supranational and specialised regulatory framework. Prior to 2021, the supervisory models for AML/CTF were still based on a purely national supervisory pattern, in stark contrast to the ECB's direct prudential supervision of credit institutions.[33] This trend was partially reversed in 2019 when the European Banking Authority (EBA) was granted the mandate to coordinate and monitor the AML/CTF efforts of all EU competent authorities and financial service providers. This was achieved through the merger of the three AML mandates of the European Supervisory Authorities (ESAs). However, as Pavlidis notes, the EBA's capacity to enforce AML/CFT standards and guidelines is severely constrained by its lack of authority to directly supervise individual financial institutions and its dearth of legal instruments to guarantee compliance.[34] The European

[29] European Commission, 'Communication from the Commission to the European Parliament and the Council on an Action Plan for Strengthening the Fight Against Terrorist Financing' COM (2016) 50 final.
[30] European Commission, 'Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions the European Agenda on Security' COM(2015)185 final. See Point 3.2 'Disrupting organised crime'.
[31] European Commission Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. OJ L 141, 5.6.2015, p. 73–117.
[32] Vogel, B., & Maillart, J. B. see footnote n. 28. P. 73 and 74.
[33] Lo Schiavo, G.L. (2022), "The single supervisory mechanism (SSM) and the EU anti-money laundering framework compared: governance, rules, challenges and opportunities", Journal of Banking Regulation, Vol. 23 No. 1, pp. 91-105.
[34] Pavlidis, G. (2023). The birth of the new anti-money laundering authority: harnessing the power of EU-wide supervision. Journal of Financial Crime, 3.

Parliament has expressed concern about the effectiveness of the EBA in enforcing EU AML/CFT regulations due to structural shortcomings,[35] including fragmentation, a uniform architectural design for all, and a lack of technical capacity. In response, the Parliament has proposed strengthening the cooperation between national authorities and Financial Intelligence Units (FIUs) and reallocating specific supervisory tasks to a specialised body welcoming the Commission's initiative to create the AMLA.[36] Against this background, the European Commission's 2021 proposal for the inception of an Anti-Money Laundering Authority, as part of the EU's more general trend towards 'agencification', could represent a pivotal development in the EU's strategy to combat money laundering and terrorist financing .[37]

In this context, inspired by existing supranational financial authorities such as the Single Supervisory Mechanism Board (SRB) and the ESAs, within which the Single Supervisory Mechanism (SSM) in particular, AMLA emerges as novel supervisory and regulatory model. This entity bridges the gap between these models in terms of mandate, scope and operational authority, distinguishing itself as a unique new creature. In contrast to the ESAs, whose role is primarily oriented towards the regulation and indirect supervision of the financial sector as a whole, and which act mainly through guidelines and recommendations,[38] AMLA is designed with direct and concrete powers of supervision and intervention on specific entities. The Authority will be primarily engaged in the direct supervision of so-called 'Selected Obliged Entities', which are financial institutions of significant size and other cross-border entities operating in sectors identified as high ML/TF risk. As stipulated in the initial section of Article 6 of the AMLA Regulation, the authority will be endowed with a comprehensive array of investigative and, when necessary, sanctioning powers over such entities. With regard to investigative powers, in addition to the ability to directly request information, which is essential for monitoring and assessing compliance, AMLA will have the power to directly intervene on operational practices and governance structure. [39] These powers

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[35] European Parliament Resolution of 19 September 2019 on the state of implementation of the Union's anti-money laundering legislation (2019/2820(RSP)).
[36] European Parliament resolution of 10 July 2020 on a comprehensive Union policy on preventing money laundering and terrorist financing: the Commission's Action Plan and other recent developments (2020/2686(RSP)).
[37] EUR-Lex (2021) 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010. COM/2021/421 final'. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0421>.
[38] The European Space Agency (ESA) is empowered to adopt a range of regulatory instruments, including draft *quasi-legislative acts such as regulatory technical standards* (see Article 10 ESA-Regulation) and executive acts such as *implementing technical standards* (see Article 15 ESA-Regulation). However, it is particularly noteworthy that non-legally binding acts, such as *guidelines and recommendations* (see Article 16 ESA-Regulation), are only binding in specific circumstances, for instance, in relation to national authorities or financial institutions with the objective of ensuring the consistent application of EU rules. *Binding decisions* (see Article 1 para 2 of the respective ESA-Regulation) are similarly only binding in specific instances.
[39] For further details see Article 16 and 20 of AMLA Regulation.

include the issuance of binding decisions that may impose specific corrective measures or the adoption of new internal compliance processes. In addition, AMLA Executive Board will be set-up with the power to issue and enforce its legally binding decisions, through the imposition of both administrative fines for material violations of directly applicable provisions, as well as periodic sanctions to terminate violations or to compel stakeholders to cooperate with the authority. [40]

Another distinctive feature of AMLA that differentiates it from existing financial supervisory agencies is its mandate. Typically, agencies operating in the financial sphere have a narrowly defined mandate, such as the SRB, which has a specific mandate to handle bank resolution and the power to intervene directly in distressed banks to ensure their financial stability. While the SRB can also take direct decisions, its scope is limited to resolution, not to ongoing supervision or prevention. Conversely, the SSM's mandate is focused on the prudential supervision of significant banks in the euro area, with direct supervisory powers granted to the European Central Bank (ECB). In contrast, the scope of action of the AMLA will be unique in the EU regulatory environment. It will incorporate the supervision of a wide variety of entities, not only banks, but also other financial intermediaries and non-financial entities exposed to money laundering and terrorist financing risks. This broadening of the mandate is evident in Article 12 of its founding regulation, which explicitly states that the AMLA will not be limited to the supervision of banks alone but will also be dedicated to other financial intermediaries such as casinos, real estate agents, lawyers, accountants and other professionals who may be involved in suspected money laundering activities. In 2024, in response to the evolving financial landscape and the emergence of new challenges in the area of anti-money laundering , the European Parliament and the Council engaged in negotiations to further expand the scope of the AMLA to include crypto-asset service providers. This was evidenced by an amendment to Article 12 of the AMLA's Regulation in 2024.[41]

It is therefore reasonable to claim that, while AMLA draws inspiration from existing frameworks, it indeed emerges as a 'new breed' within the EU's regulatory ecosystem. Positioned uniquely between the narrowly focused SRB, which deals primarily with bank resolution, and the broader supervisory mandate of the ESAs, AMLA's scope extends well beyond the banking sector to encompass a wide range of financial and non-financial entities. Moreover, unlike the ESAs, which predominantly utilize soft law mechanisms such as guidelines and recommendations, AMLA wields more legally compelling powers similar to those of the SRB. These include the authority to issue binding decisions and impose sanctions, thereby providing AMLA with robust tools to enforce compliance

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[40] See Article 22 para 1, AMLA Regulation.
[41] Council of the EU, 'Proposal for a Regulation Establishing the Authority for AML and CFT' ST 7204/24 INIT, 29 (February 2024).

effectively. This distinctive combination of broad mandate and strong enforcement capacity suggests that AMLA could potentially tackle the multifaceted nature of financial crime more comprehensively. However, this potential remains speculative and will need to be empirically validated once AMLA becomes fully operational and its practical effectiveness can be thoroughly assessed.

Moreover, the AMLA will have a centralised AML/CTF database (Article 11 AMLAR) now operated by the EBA, which will facilitate the collection and analysis of cross-border financial information between Member States. According to recital 14, this should result in the most important information being made available to each supervisory authority on a selective basis, thereby enabling the AMLA to intervene in cases of non-compliance with the relevant regulations. Furthermore, recital 14 states that this should allow the AMLA to act on violations of all supervised entities (even non-selected obliged entities) in a timely manner. The combination of these investigative, regulatory and sanctioning powers, together with functional and budgetary autonomy suggests that AMLA could possess a distinctive capacity to act directly and with decisive efficacy.[42] All these new elements could potentially distinguish the AMLA from other European financial authorities and ensuring an integrated and centralised approach to the fight against financial crime and terrorist financing in the European context.[43]

However, this steep evolution and empowerment of an agency such as AMLA raises critical considerations concerning the balance in the allocation of powers to both existing and new-established agencies as well as the maintenance of democratic accountability within the Union's legal and institutional architecture as defined by the European Treaties. According to Article 298(1) of the Treaty on the Functioning of the European Union (TFEU), the Union's '*institutions, bodies, offices, and agencies of the Union*' are to be bolstered by an administration that is '*open, efficient, and independent*'. Although explicit Treaty foundations for each EU agency are not detailed, the Treaties do ensure essential safeguards for judicial review of their activities.[44] Article 263 TFEU allows for the Court of Justice of the European Union (CJEU) to examine the legality of any agency actions intended to have legal effects on third parties. Additionally, under Article 277 TFEU, any entity can challenge the applicability of any general act implemented by the EU in legal proceedings, arguing on the grounds outlined in Article 263(2) for a plea of illegality. Consequently,

[42] Pavlidis, Georgios. 'The birth of the new anti-money laundering authority: harnessing the power of EU-wide supervision.' (2023) Journal of Financial Crime ahead-of-print, 322, 327.
[43] Beatriz Brunelli Zimmermann & Christopher P. Buttigieg 'A history of continuous power delegation: the establishment and further development of the European system of Financial Supervision', (2022) Law and Financial Markets Review, 145, 158.
[44] Gortsos V Christos and Lagaria Katerina, *The European Supervisory Authorities (ESAs) as "direct" supervisors in the EU financial system* (European Banking Institute Working Paper Series no 57, 2020).

the TFEU delineates strict boundaries on the delegation of regulatory authority to these agencies, compelling them to adhere closely to the limits defined by secondary legislation. This ensures that agencies cannot engage in independent policymaking, thus preserving the institutional equilibrium established by the Treaties.[45] Building upon the aforementioned legal framework, it is critical to acknowledge that the TFEU does not explicitly specify the distribution of competences to EU agencies. In response to this omission, as it will be clear in the next chapter, the *Meroni doctrine* gains particular significance for the existence and functioning of these entities, serving as legal benchmark for the delegation of powers within the EU. The primary challenge lies in ensuring that the delegation of competences to agencies does not compromise political control or result in an improper transfer of responsibilities to entities not envisaged by the Treaties, such as modern European agencies including the AMLA. This thesis, timely in its focus (AMLA will be established in 2025), aims therefore to examine whether and how the final agreement resulting from interinstitutional negotiations between Council and Parliament for the creation of AMLA, aligns with the principles set out in *Meroni*, which have been further elaborated by the CJEU after its first judgment. It will therefore be crucial, first and foremost, to analyze all available jurisprudence governing the delegation of powers from institutions to agencies in order to identify the most significant developments and recent interpretations by the Court in light of the progressive empowerment of delegated entities. Secondly, the legislative proposal of the Commission will be examined in detail together with the adopted text (Regulation (EU)2024/1620), defining the key elements of the organizational structure and governance of AMLA, followed by an analysis of its supervisory model. Thirdly, to understand the relationship between the authority and the *Meroni doctrine*, Article 21 of the AMLAR, which governs the requirements and sanctions modalities, will be analysed and compared to the same Article as amended in the legislative agreement. Finally, the last chapter will focus on the internal administrative body established within AMLA, to deal with the preliminary litigation phases, before the intervention of the Court of Justice. Any changes or differences in the original requirements for sanctions by the agency will thus be related to elements previously derived from *Meroni* jurisprudence. Through a detailed legal analysis and examination of pertinent CJEU case law, this work intends to clarify the potential and limits of regulatory power delegation to EU agencies, specifically looking at the case of the Anti-Money Laundering Authority.

To ensure methodological rigor, this research will adopt a qualitative approach, based on a review of existing literature, the study of legislative documents and agency reports, as well as an

[45] Article 13 (2) of the Treaty on European Union (TEU) states that ‘each institution shall act within the limits of the powers conferred on it in the Treaties and in conformity with the procedures, conditions and objectives set out in them’.

interpretative analysis of the CJEU rulings. Furthermore, a comparative legal approach will be employed in the final section of the thesis to identify the most salient changes in AMLAR resulting from the compatibility requirements with the jurisprudence on modern the delegation of powers. With this approach, it aims to provide a clear view of the regulatory dynamics and administrative responsibilities that characterize the current process of '*agencification*' within the European Union. In conclusion, this thesis aspires not only to fill a gap in academic research due to the novelty of the subject matter but also to offer insights for future studies and for the stakeholders involved. It aims to facilitate the development of a regulatory framework that reflects principles of efficiency, effectiveness, democratic legitimacy, and accountability, adequately framing the EU's fight against money laundering and terrorist financing.

2. From Revolution to Regression: The Surprising Evolution and Recent Reversal of the Meroni Doctrine

Through a two-tier architecture of direct and indirect supervision over financial and non-financial supervisory authorities, the Commission delegates certain exclusive powers to the European agencies in charge of the European Union's financial supervision, which, from 2025, would therefore include AMLA by extension. This would mean that the new agency would take over the Commission's authority and then act independently in sector-specific fields, where it is considered to have the necessary expertise. As such, it is crucial to analyse what is the European regulatory framework within which the Commission has the power to do so. This becomes even more crucial in the case of entities such as the Single Resolution Board (SRB) or AMLA, where the possession of such powers may imply an agency's discretionary assessment over each individual case, albeit with the co-participation of the constitutionally established European Institutions.

As argued by Maciariello E. 'from a theoretical perspective, the issue of the delegation of power to agencies has been largely dominated, by the so-called *Meroni doctrine'.*[46] The Meroni judgment, formally known as *Case 9/56, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the ECSC* is one of the earliest to be delivered by the Court of Justice of the European Coal and Steal Community (ECSC) in 1958 and is possibly the first judgment that has had a long-lasting influence on the EU's institutional architecture.[47] Following an accurate and in-depth analysis of the content of the *dossier de procédure* examining together the background and the parties' submission, the opinion of the Advocate General Roemer and the Court's final judgment, in its second section, the chapter focuses on the development of the doctrine over the last decades through a detailed thematic analysis of documents and case law relevant to the delegation of powers within the EU.

I. C-9/56 – THE *MERONI* JUDGMENT

The analysis of Meroni's case is key in the context of the creation of AMLA or more generally of the operation of all agencies within the EU. Still today, it represents the cornerstone on which the entire European jurisprudence in the context of the delegation of powers is built. This ruling, as

[46] Maciariello E., 2020, European "EU Agencies and the Issue of Delegation: Conferral, implied powers and the state of exception." 11.2, P. 728.
[47] Maria Patrin, 'Meroni Behind the Scenes: Uncovering the Actors and Context of a Landmark Judgment' (2021) 2021(1) European Papers-A Journal on Law and Integration 539, 540.

shall be seen, represents a starting point that will be repeatedly cited, reinterpreted and reconsidered in all its parts, reason why a legal analysis that aims to be detailed and holistic could hardly start from a different point.

1. Background of the Case

Meroni & Co., Industrie Metallurgiche, SpA was a company based in Italy, engaged in the metal industry. The case arose in the context of the ECSC, the precursor to the European Union, which was established to regulate the coal and steel industries across six European countries, aiming to foster economic cooperation and avoid conflicts between European nations post World War II. The High Authority of the ECSC, analogous to today's European Commission, was responsible for overseeing the ECSC's rules and policies. One of its responsibilities included the management of equalisation schemes designed to stabilize prices and production in the coal and steel sectors. In executing these tasks, the High Authority delegated certain powers to external bodies (*the Brussels agencies*), established under Belgian private law, tasked with handling administrative and financial duties under the ECSC treaty's equalisation schemes.[48] As Meroni had failed to provide the requested statistics regarding the input and output of ferrous scrap to the High Authority, the same agencies previously mentioned required the Italian company to pay contributions to the so-called *Caisse de Péréquation des Ferrailles Importées* (*Imported Ferrous Scrap Equalisation Fund*), estimated by themselves in the absence of documents. In essence, the two enforceable decisions taken by the High Authority requiring a payment of approximately 78 million Italian lire by Meroni were the consequence of assessments and calculations made at the discretion of the Brussels Agencies.[49]

Meroni sought the annulment of two decisions on the grounds of procedural violations and discrimination. First, Meroni contended that there had been a violation of procedural requirements in the failure to state the reasons for the decisions, and that there had been insufficient information on how the amounts claimed were composed and calculated. This lack of transparency, Meroni argued, violated procedural requirements essential for judicial review. Secondly, the Italian company claimed that the Brussels agencies had put in place a discriminatory system due to a

[48] The agencies involved are the *Office Commun des Consommateurs de Ferraille* (Joint Bureau of Ferrous Scrap Consumers) and the *Caisse de Péréquation des Ferrailles Importées* (Imported Ferrous Scrap Equalisation Fund). For more details see Article 1 paragraph 2 of High Authority Decisions 22/54 and 14/55 based on Article 53 paragraph 1(a) of the Treaty establishing the European Coal and Steel Community (ECSC).
[49] Decision 22/54 and 14/55 of the High Authority of the European Coal and Steel Community of 26 March 1954 and of 26 March 1956 establishing machinery for the equalization of ferrous scrap imported from third countries.

misuse of powers by the High Authority. In its defence the High Authority replied that it ‘adopts the data furnished by the Brussels agencies without being able to add anything thereto’ as any additional specific explanations would constitute an ‘unauthorized interference in another body's powers for the purpose of explaining the factors involved in the elaboration of its decisions’.[50] Furthermore, it also invoked the second paragraph of Article 47 ECSC, which mandates confidentiality on certain information, to justify its non-disclosure of specific details.[51] In conclusion, the High Authority asserted that the decision simply reiterated the information provided by the relevant Brussels agencies and that no supplementary rationale was necessary for this reproduced data. This was so because the *de facto* decision was not made by the High Authority, but rather by the agencies themselves.[52]

2. *The Opinion of the Advocate General Roemer*

In response to the first point raised by the prosecution regarding procedural violations, Advocate General Roemer acknowledged the validity of Meroni's concerns regarding the lack of adequate reasoning in the High Authority's decisions. Indeed, he emphasised that any form of legal decision taken by the High Authority, as stipulated in Article 15 ESCST, must be supported by a clear explanation of the reasons justifying the action taken, in line with the principles of transparency and the right to judicial review.[53] This requirement of transparency and detailed justification is essential to ensure that interested parties can understand the basis of decisions affecting them and, if necessary, challenge them effectively in court.

Secondly, the AG focuses on the problem of delegation of powers by outlining the two fundamental conditions that must be present in a modern state in order to have a legitimate transfer of powers from the state to private law bodies. Firstly, the delegation can only be affected by means of a law that accurately describes the content of the delegation. Secondly, sufficient judicial protection against the acts of such organisations should be guaranteed. Turning then to the specificity of the ECSC context, Roemer states that these conditions of legal delegation to private actors are also applicable by extension to the Community, in the absence of a specific rule in the treaties, which neither explicitly provide for such delegation nor prohibit it. In essence, Roemer's argument is that,

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[50] Case C-9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECLI:EU:C:1958:7, 160.
[51] Ibid., 142.
[52] Ibid., 148.
[53] Case C-9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECLI:EU:C:1958:4, Opinion of AG Roemer p. 142.

in the case of delegation, the regime of judicial protection established by the Treaty must be maintained. This can be achieved, according to Roemer, by equating the acts of the Brussels agencies with the acts of the High Authority or by allowing the High Authority itself to take the final decision, while retaining ultimate responsibility for crucial decisions.[54]

However, Roemer emphasises that this first option, namely equating the acts of the Brussels agencies with those of the High Authority, lacks a valid legal basis for its existence. In this sense, there is no justification in the Treaty for such equating, as there is no clear provision authorising such a delegation and ensuring that the required guarantees of legal protection are respected.[55] Consequently, he concludes that the absence of a clear legal basis, together withthe non-publication of the reasons for the decision taken on 26 May 1955, which aimed to establish an *ex officio* assessment procedure, render these deliberations inadequate to replace the decisions that the High Authority should have taken directly, thus completing the argument that these decisions were incomplete to fulfil the most basic requirements of transparency and accountability set forth by the Treaty itself.

3. Decision of the Court of Justice

The Court of Justice of the ECSC, in accordance with the Advocate General's advisory opinion, ruled in favour of the defence by annulling the High Authority's decision requiring Meroni & Co. to pay fees for the import of ferrous scrap. This decision was based on a series of considerations that touched on several issues concerning the relationship between European agencies and delegating authority. In particular, it emphasised the need to limit delegation to well-defined executive functions and to ensure that such practices are accompanied by adequate guarantees of control and supervision. The Court set forth an overall analysis in four points: transparency of decision-making, limits of delegation, margin of discretion, and accountability.

With regard to the first point, the Court supported the Advocate General's reasoning, emphasizing a critical lack of transparency and adequate reasoning in the decisions taken by the Brussels agencies. The judgment emphasised that the High Authority's decisions did not meet the reasoning requirements of Article 15 ECSCT, which states that 'decisions of the High Authority shall state the

[54] Ibid.
[55] Ibid. para 142.

reasons on which they are based'.[56] The insufficiency of these reasons is clear when the Court states that '*it lacks the supporting reasons indispensable for the exercise of judicial review*'.[57] A position of the High Authority that had outlined in detail 'all the individual items comprised in the claim, payment of which was made enforceable by the decision' would have been considered legally valid because it would have made judicial review by the Court possible.[58]

Regarding the specificity and limits of the delegation of powers to external bodies, the Court emphasised the need to restrict it to clearly defined and non-discretionary powers. In this context, it is necessary to determine whether the specific case of the Brussels agencies can be considered a case of 'true' delegation of powers, or whether it is otherwise a case of responsibilities and competences circumscribed to the 'drawing up of resolutions the application of which belongs to the High Authority', which assumes full responsability.[59] Upon analysis of the positions of the two parties, the Court observed that, despite the formal appearances of control and supervision by the High Authority, the agencies operated with a degree of autonomy that extended beyond administrative execution, involving a 'true delegation of powers'.[60] The ruling demonstrated that the manner in which the *Joint Bureau of Ferrous Scrap Consumers* and the *Imported Ferrous Scrap Equalisation Fund* made key operational decisions required unanimity of their respective boards of directors.[61] This requirement, which applied to both matters exclusively concerning the Joint Bureau or the Fund and those shared between the two entities, implied that each decision had to be supported by all members of the boards, reducing the possibility of discretionary interventions by individual members or minorities. However, while this might have seemed to be a mechanism that ensured greater weight and consensus, in practice, it limited the High Authority's ability to influence or modify decisions once they had been made. This is because although Article 9 of Decision No 14/55 provided that the High Authority's permanent representative could make any decision subject to the High Authority's approval, the Court notes that '*the High Authority does not take over as its own the deliberations of the Brussels agencies*'.[62] This underscores a delegation of powers that, in practice, resulted in the agencies enjoying almost complete autonomy, with decisions that, once unanimous agreement was reached, were not easily subject to review or veto by the High Authority.

[56] Case C-9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECLI:EU:C:1958:7, 142.
[57] Ibid., 142
[58] Ibid., 143.
[59] Ibid., 147.
[60] Ibid., 149.
[61] Ibid., 147; see Article 9 of Decision N. 14/55.
[62] Ibid., 149.

Having established that the Decision under analysis is a case of true delegation of powers, the Court proceeds to assess the compatibility of this act with the requirements of the ECSCT. If the High Authority had retained direct control over the powers now delegated to the agencies in Brussels, it would have been bound by specific obligations under Decision 14/55. These include the duty to give reasons for its decisions (Article 15), the duty to publish an annual general report on its activities and administrative expenditure (Article 17), and the duty to publish data that might be useful to governments or any other interested party (Article 47).[63] However, this had not occurred because the High Authority had delegated part of its powers to the agencies without having delegated the same duties to them, effectively giving it more extensive powers than it actually possesses.[64]

In light of the aforementioned context of autonomy and the absence of direct supervision by the High Authority, the Court proceeds to assess the compatibility of the Decision under consideration with the requirements of the ECSC Treaty. To this end, the Court addresses the issue of the margin of discretion granted to the agencies. In this regard, the Court states that:

> *A delegation of the first kind (with clearly defined executive powers, the exercise of which can be subject to strict review in the light of objective criteria determined by the delegating authority) cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind (with discretionary powers, implying a wide margin of discretion which may, make possible the execution of actual economic policy.), since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility*.[65]

In the case of Decision No 14/55 '*objective criteria [...] are lacking*' and the Brussels agencies acquire, in these circumstances, a *degree of latitude* that allows them to exercise a wide margin of discretion. This is not considered compatible with the requirements of the Treaty, and therefore 'the decision of 24 October 1956 is unlawful and must be annulled'.[66]

Finally, the analysis of the issue of accountability in the *Meroni* case is inextricably linked to the issues of delegation of powers and the margin of discretion granted to agencies. The Court highlighted significant concerns regarding the effectiveness of the control exercised by the High Authority over agency decisions. In particular, the limitation of the power of the High Authority's permanent representative to intervene on decisions taken by the agencies, which is circumscribed

[63] Ibid.
[64] Ibid., 150; see also Weismann [2016], 24.
[65] Ibid., 152.
[66] Ibid. 154.

only to cases where there has not been unanimity in the decisions themselves, has been highlighted. This limitation indicates a structural weakness in the supervisory system, as the High Authority's permanent representative does not assume responsibility for the deliberations of the Brussels agencies and lacks the capacity to verify the accuracy of the data provided by the Brussels agencies.[67]

In conclusion, the delegation of discretionary powers to bodies not foreseen by the Treaties and with a low level of control by the relevant institutions may compromise the integrity of institutional functions and the transparency of administrative decisions, leading to a reduction in the balance of powers within the EU.[68]

II. RECENT JURISPRUDENTIAL DEVELOPMENTS

As demonstrated in the preceding chapter, the delegation of powers to European agencies is a complex process that has historically necessitated a delicate balance between operational autonomy and democratic control. Over seventy years after its initial formulation, it is now evident that the *Meroni doctrine* has provided a robust and dependable framework for maintaining this equilibrium, underscoring the necessity to constrain the discretion of agencies and guarantee that political decisions remain within the purview of EU institutions, the sole entities authorized by the Treaties to exercise such authority. Although initially rudimentary, this early benchmark for assessing the accountability of an agency has been, and as we will see subsequently, remains a crucial issue in order to ensure that agencies can only decide on technical and non-discretionary matters. Although originally it was envisaged that there would be an absolute prohibition on delegating powers that include '*discretionary power implying a wide margin of discretion which may, make possible the execution of actual economic policy*',[69] the evolution of the functions of European agencies along with the increasing complexity of its institutional structure may have tested these principles. In particular, the establishment of new and increasingly powerful agencies, as evidenced by the creation of SRB, ESMA, and now AMLA, has necessitated an adaptation of the concept of accountability, which has had to assume new dimensions.

The primary objective of the second section of this chapter is to present a thematic analysis of the interpretative evolution of three elements in the top-down relationship between institutions and

[67] Ibid., 149.
[68] Weismann, 25.
[69] Meroni Para. 6.

agencies. These elements are: i) the clarity and limits of agencies' mandates, ii) accountability and transparency in the delegation of powers, and iii) the importance of judicial review. This analysis will consider a selection of the most recent and pertinent sources, including the opinions of authoritative European advisory bodies and the jurisprudential developments represented by the available case law. As previously indicated, the selection of these themes is based on their pivotal role in maintaining institutional balance and legitimacy for agencies. Their interconnection ensures a comprehensive and coherent vision of the EU governance system.

1. First Pillar: Clarity of Agencies' Mandate

The clarity and scope of agencies' mandates, are crucial to prevent overreach and potential abuse of power over the will of the co-legislators. These elements have to be effectively encapsulated in the agencies' founding Regulations, which usually serve as primary legal basis for their authority and delineate their powers and limits. As previously stated, the Court of Justice of the ECSC was the first to distinguish between '*defined executive functions*' and '*discretionary powers that allow for potential political or economic choices*', which are reserved for entities established by the Treaties. This balance has been reiterated in recent jurisprudential and legal developments, particularly in the context of modern agencies like ESMA and SRB, which, unlike those at the time of *Meroni*, are now specifically established under EU law to perform public tasks within their capacity, reflecting a significant evolution in the EU's regulatory framework.

1.1. Council Legal Service's Opinion on SRB and Meroni

In this context, the Council Legal Service (CLS) has provided a similarly 'cautious' opinion on the Regulation establishing the Single Resolution Mechanism, recognising the need to delegate some powers to the agency while emphasising the importance of maintaining a precise legal framework and limiting the discretion of agencies to avoid interference with political decisions. The CLS did not oppose the delegation itself but insisted on the need for prudence and rigor in defining the limits of such delegation, in line with the principles established by the Court of Justice in the *Meroni doctrine*. In examining the opinion on its merit, the nature of the powers granted to the Resolution

Board, an EU agency with full legal personality,[70] was examined, focusing on those that allow it to take legally binding decisions and whether these powers do not transgress the limits set by the *Meroni* jurisprudence.[71] In the Commission's proposal, the Board has been entrusted with a wide range of powers, varying from recommendations of certain decisions to the Commission itself to decisions on national resolution authorities.[72] This extensive range of powers enables the Resolution Board to act at all four stages of the resolution process: the preventive phase, the resolution phase, the resolution fund management phase and finally the sanctioning phase. However, the Council identified a potential risk of interference in the European resolution policy by the Board, a body that like all the agencies, should only be granted 'technical functions ancillary to such resolution policy'.[73] In the context of the present analysis on the SRB and the Council Legal Service's point of view, it would be profitable to focus on the preventive and sanctioning phases of the resolution process. This methodological choice is based on considerations of relevance and significance to the specific objectives of this research. The two phases represent areas where the transposition of powers and modes of intervention offer the greatest scope for comparative reflection with the structures and functions of AMLA, which will be examined in detail in the chapter ahead of this thesis.

Looking at the delegation phase, the Council has encountered a multitude of critical issues. These pertain to the draft resolution plan and the simplified obligations or waivers preparation for the resolution of the entity or group.[74] The draft resolution plan, whose objective is to determine the most appropriate resolution tools to adopt in specific situations, is the result of a collaborative effort between the Commission, the Board, and the national competent authorities.[75] Although the plan is required to contain predominantly technical elements, which would entail an intrinsic limitation of the discretion of the SRB, two aspects might give rise to concerns regarding the potential expansion of such discretion.[76] Firstly, the '*direct incidence on the resolution action*',[77] and the superficiality of the criteria for exercising its powers, while, secondly, the application of simplified obligations or

[70] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (OJ L 225, 30.7.2014, p. 1-90). See Article 42.
[71] Council of the EU, 'Opinion of the Legal Service on the Proposal for a Regulation Establishing Uniform Rules and Procedure for the Resolution of Credit Institutions and Certain Investment Firms' (14547/13, 7 October 2013). Para. 17.
[72] Ibid., Art 8(9), Art 10(7) or Art 36(1) of the Proposal.
[73] By resolution policy, the Council Legal Service means a 'set of conditions and criteria under which a failing entity may be placed under resolution and the tools and financial means to be used for that resolution to take place, as well as the balancing of the different objectives and interests at stake'. Ibid., para 16.
[74] Ibid., Para 18.
[75] See SRMR, Art. 7(5).
[76] See Council Legal Service Opinion, paras 19 to 22: reference is made to the 'assessment of resolvability' (Art 7(5) points (e) and (f) of the Proposal), and the 'determination of the minimum requirement for own funds and eligible facilities, or bail-in instruments' (Art 7(5) points (o) and (p) of the Proposal).
[77] Ibid., Para 20. Direct incidence is especially found in the *'assessment of resolvability'* tool.

exemptions during the drafting of the resolution plan.[78] Nevertheless, the criteria for the application of such simplified obligations or exemptions were understood as vague and lacking in precision, which could potentially allow for an overly broad interpretation by the Board.[79] Furthermore, as opposed to Article 9 of the SRM Regulation, despite the Council's assertion that Article 11 empowers it to implement preliminary actions in anticipation of the resolution of the concerned entity or group,[80] without involving significant political choices or a broad margin of discretion, it recommends further specifications on the exercise of these powers or the involvement of a Union institution with executive competences.[81] Lastly, similarly to what will be outlined in respect to AMLA's competences, the delegation of sanctioning powers to the Board within the resolution mechanism was questioned by the CLS. In particular, it emphasised that while sanctioning powers constitute a crucial aspect to ensure compliance with the decisions of any authority,[82] their delegation '*has to be made in a precise legal framework, should be limited in its scope, and the Board should not be given the discretion to choose the adequate punitive policy to apply*'.[83] With regard to Articles 36 and 37, which confer on the Board the authority to impose fines or late payment penalties, the Council acknowledged that the circumstances that might lead to the imposition of such sanctions are clearly outlined by the legislation, highlighting a positive development of the Regulation, complying with *Meroni* requirements.[84] However, the absence of details on the calculation methods increases the risk of inconsistent interpretations and the unfair application of sanctions. This lack of precision could result in a wide range of interpretations by the Board, which would then have the ability to determine the extent of sanctions without detailed guidelines.

In conclusion, while maintaining a stance of 'cautious vigilance' regarding the delegation of powers by the Commission to a regulatory agency such as the Single Resolution Board, the Council Legal Service has repeatedly emphasized the importance of a clear mandate that delineates the boundaries within which the agency can exercise its powers. This clarity is crucial, particularly when the agency is entrusted with highly sensitive powers, such as the imposition of pecuniary sanctions. In such cases, it is imperative to establish detailed criteria to prevent it from exceeding its auxiliary

[78] These measures, designed to make the management of less risky institutions or situations, are regulated by SRMR, Art. 9.
[79] Council Legal Service Opinion, Paras 27 to 31.
[80] Actions such as requesting information, assessing the entity, contacting potential buyers, and asking the national resolution authority to draw up a preliminary resolution scheme..
[81] Ibid., Paras 32-34.
[82] Ibid., Para 68.
[83] Ibid., Para 70. See also Council opinion 14010/10 concerning the delegation of the power to impose sanctions on credit rating agencies to the European Securities and Markets Authority.
[84] Ibid., Para 71.

technical role and undertaking actions that may constitute an implementation of any form of policy, being it economic or punitive.

1.2. Evolution in the Jurisprudence

It can be reasonably assumed that the assessments of the clarity of the mandates of European agencies have not been limited to a single and isolated opinion of the Council Legal Service. Instead, they have been widely updated and shared by all institutions and bodies of the European Union. This subchapter will focus on one of these actors, outlining how the highest judicial body of the European Union, through the issuance of some fundamental rulings, has addressed the issue of the clarity of the mandate of agencies. It will demonstrate that the importance of this element being as precise and detailed as possible to ensure the legitimacy of their actions has been repeatedly and consistently reaffirmed. In the following chapter, the focus of the analysis will shift from the Court to the European Commission and the co-legislators. The aim is to ascertain whether these inputs have been followed during the preparation and negotiation of the actual legislative act. In particular, the AMLA Regulation proposal will be examined as an illustrative example. The multi-level approach adopted in this analysis aims to consider all the actors involved in the legislative and decision-making process. This method will presumably allow the reader to understand how effectively the evolution of jurisprudential inputs on the clarity of the mandate have been incorporated into the founding Regulation of the new AMLA, thereby providing a comprehensive view of the regulatory framework and its evolution in relation to European Union agencies.

The available case law on the clarity of the mandate of European agencies has developed through a series of fundamental rulings that have delineated the limits within which agencies can operate and established the criteria to ensure that such mandates comply with the principles of transparency and accountability. The so-called *ESMA-Short Selling* case represents a significant turning point in this context, as the evolution of *Meroni* in an era dominated by European agencies reached a new stage with the CJEU decision.[85] This ruling brought about what academic literature has termed as a ‘constitutional revolution’ in the field of powers delegation.[86] The Grand Chamber of the Court of Justice, in deciding on this case, addressed the issue of the discretion conferred on ESMA by

[85] *Meroni's* 1958 judgement was aimed at the so-called Brussels agencies, entities completely different from modern European agencies. These were agencies created under (Belgian) private law and not by virtue of a legislative act of a European institution, and they differed from modern agencies in terms of organisation, delegation methods and supervision. For further details see Weismann 26 and ESMA, para 43.

[86] Maciariello, Elio ‘EU Agencies and the Issue of Delegation: Conferral, Implied Powers and the State of Exception’ (2019) European Papers, Vol. 4, No 3, pp. 723-751, 737.

Regulation 236/2012. The United Kingdom, through Article 263 TFEU, had contested the legality of Article 28 of the Regulation, arguing that it conferred on ESMA a wide margin of discretion,[87] contravening the principles established in *Meroni*. This was because, according to the claimant, paragraph 2, grants ESMA 'a very large measure of discretion' given the ability to issue rules of general application based on its 'highly subjective judgment'.[88] The UK's argument was based on the aforementioned distinction in *Meroni*, between two categories of powers: (a) clearly defined executive powers and (b) powers involving discretion. The discretionary nature of ESMA's potential decisions is evidenced by the fact that Member States adopt different approaches to short selling, meaning a risk of implementation of an actual economic policy by the agency.[89] Although the delegation in question appeared to deviate from the principles established with *Meroni*, the Court confirmed in its judgment that it was in line with the doctrine, even in the case of a conferral of powers, as in this instance.[90] Despite acknowledging the discretionary nature of ESMA's authority, the Court emphasised that such powers are '*precisely delineated*' and that Article 28 of Regulation 236/2012 does not confer on the agency greater decision-making autonomy than the limits imposed by the Regulation itself, for these reasons the delegation does not conflict with *Meroni* at all.[91] Accordingly, the original differentiation established in *Meroni* between *executive powers*, which could be delegated, and *discretionary powers* which could not be delegated, has been, according to the wording a used by Scholten and Van Rijsbergen, '*devastated'* and supplanted by a novel category of delegable powers to agencies: *the executive discretionary powers*.[92] Essentially, the so called '*ESMA doctrine*' has introduced a novel standard for the delegation of powers, which per se allows the conferral of authority to make legally binding decisions, provided that they are clearly defined, based on well-outlined criteria and conditions.

[87] This norm allowed ESMA to adopt legally binding decisions aimed at regulating market practices by imposing transparency requirements and restrictions on short selling, conditional on specific substantive and procedural requirements. For further details see Regulation 236/2012, (Art 28 para 4-10). 1. *ESMA may act only if there is a threat to the orderly functioning and integrity of financial market … and no competent authority has taken measures to address the threat* … (Art 28 para 2). 2. *When taking a measure ESMA needs to consider several factors: the ability of the measure to address its goals and to prevent other possible risks and detrimental effects on the efficiency of the financial markets (Art 28 para 3)*. 3. *Before imposing (or renewing) the measure ESMA has to consult with ESRB and notify relevant national authorities.*

[88] Case C-270/12 United Kingdom v Parliament and Council [2014] ECLI:EU:C:2014:18. Para 28.

[89] Ibid. Paras. 29, 31.

[90] In ESMA, para 43 and 66, the Court seems to follow the view of Advocate General N. Jääskinen, who argues that the relevance of Meroni could be questioned on the basis of the substantial difference in the manner in which powers are delegated. While the *Meroni* doctrine regulates situations of delegation, ESMA concerns a case of '*direct conferral of power to an agency by the legislature pursuant to an Article 289(3) TFEU legislative act*'. See AG Jääskinen opinion, paras. 6 and 80.

[91] ESMA, paras. 44, 45 and 54.

[92] Scholten, M., & Van Rijsbergen, M. (2014). The ESMA-short selling case: Erecting a new delegation doctrine in the EU upon the Meroni-Romano remnants. Legal Issues of Economic Integration, 41(4) 395.

Similarly, in the recent judgment *C-551/22 P,* concerning the annulment request by the Commission of the decision taken in *Banco Popular* T-481/17, which will be discussed in more detail in the section on accountability, the Grand Chamber of the CJEU had to address concerns previously highlighted by the Council Legal Service regarding the delegation of powers to the SRB in the context of resolution procedures. The resolution of the banking crisis managed by the SRB, the executive body of the Single Resolution Mechanism, provided an opportunity for the CJEU to reiterate the significance of the clarity of an agency's mandate when certain decisions carry an inherent risk of arbitrariness. In this context, the Court emphasised that '*the consequences resulting from a delegation of powers are very different depending on whether the delegation involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority or whether it involves a "discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy*"'.[93] This confirms that the scope and depth of intervention permitted by the powers delegated by an institution established by the Treaties are accepted by the Court only if such powers are counterbalanced by a clear and detailed legal framework that defines precise limits and rigorous conditions for their exercise. In this context, the clarity of the mandate represents an essential safeguard against the risk of arbitrary use of delegated powers. This is a point that has been explicitly reaffirmed by the aforementioned June 2024 ruling , which has clarified that '*while the provisions referred to in the two preceding paragraphs confer on the SRB a wide margin of discretion ... that discretion, by virtue of Article 18(1) and (4) to (6) of the SRMR, is circumscribed by objective criteria and conditions delimiting the SRB's scope of action and relating both to the resolution tools and conditions'*.[94]

2. A Second Pillar: Accountability

A review of the legal foundations establishing European agencies has revealed the necessity for the precise definition of the limits and conditions within which such entities can operate. Nevertheless, the mere clarity of the mandate is insufficient to guarantee that agencies will act in accordance with democratic principles. This is where the concept of accountability comes into play. Accountability can be understood as the responsibility of agencies for their actions and decisions, as well as their transparency and subjection to control mechanisms. The accountability of delegated entities, in

[93] Case C-551/22 P, *European Commission v Fundación Tatiana Pérez de Guzmán el Bueno, Stiftung für Forschung und Lehre (SFL), Single Resolution Board (SRB)* [2024] ECLI:EU:C:2024:520. Para 70.
[94] Ibid. Para. 77.

particular when endowed with particularly extensive powers, implies that these entities must receive approval for their operations from the democratically established organs within the European Union. As various academic and legal sources have highlighted, accountability is a fundamental pillar for the effective and legitimate functioning of EU agencies. The objective of this subchapter is to analyse how, according to the available jurisprudence, the issue of accountability is substantiated in the context of the relationship between delegating and delegated bodies. This analysis will once again make use of the *Banco Popular* judgment and its appeal, which provide the most up-to-date and detailed framework in terms of accountability dynamics in the previously outlined context.

2.1. Banco Popular: Siting Astride the Fence?

The *Banco Popular* case (T-481/17) serves to illustrate a significant tension between the efficacy of crisis management and the principles of accountability and democratic control of delegated entities. The analysis of the content and effects of the *Banco Popular* resolution programme, managed in 2016 by the SRB, was conducted with the objective of determining whether the act in question could be challenged and annulled under Article 263 TFEU. In this context, the General Court determined that the resolution programme had legally binding effects and was therefore valid and subject to challenge regardless of the formal approval by the Commission. The decision is based on the fact that the Commission had conferred significant decision-making powers on the Board through Article 23(1) of the Regulation, thereby making the decisions of the latter binding for national authorities regarding the resolution tools to be adopted.[95] This interpretation reaffirms that, despite the delegation of decision-making powers to the SRB, the control as well as the final approval of the Commission are still considered necessary elements to ensure compliance with the accountability principles established by the *Meroni doctrine*. Furthermore, given that the resolution process is considered a '*complex administrative procedure*' involving multiple institutions,[96] in a multi-stage procedure, only the final stage, having its own legal effects, could be challenged. This corroborates the Commission's assertion that with its final approval, it became directly responsible for the resolution, effectively 'making it its own'.[97]

[95]Case T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v. Single Resolution Board* (SRB) [2022] ECLI:EU:T:2022:311. Paras. 116 to 120.
[96] Ibid., Para 123.
[97] Para., 126.

According to the General Court, the adoption of a resolution plan by an agency can only be fully compatible with the required accountability standards when it is authorised by a designated Treaty institution. The green light needed may be used to confirm, oppose, or modify discretionary aspects of such a programme.[98] Nevertheless, this does not imply that only the Commission's decisions can produce legal effects. The latter, lacking the requisite control or ability to engage with the technical aspects or their implications, leaves the management of such decisions to the competent agency. [99] This implies that, although the approval of an institution is necessary, *de facto*, decisions of this kind are made behind the scenes by the agencies themselves.[100] For the first time this acknowledgement seems to broaden the interpretation of the *Meroni doctrine*, suggesting that an agency's action can actually have legal effects even before the delegator's final approval. In this case, the Court takes a step beyond the *ESMA doctrine*, recognizing the SRB's ability to influence bank crisis management with decisions that, although subject to review, have immediate legal relevance for national resolution authorities and for the interests of the stakeholders involved. This shift towards greater operational autonomy, as evidenced by the progressive independence of agencies like the SRB from the Commission, appears to indicate the General Court's willingness to '*definitively overstep the fence*' represented by the rigidity of the *Meroni doctrine*, understood in the same way as it was 70 years ago. Should this intention be confirmed, it would be prudent to consider the implications of greater operational autonomy for agencies and the reduction of direct control by delegating institutions, which could potentially result in a reduction in accountability towards the latter.

2.2.Commission's Appeal: Back to Meroni?

The initial decision on the resolution of *Banco Popular* by the General Court prompted a renewed sense of uncertainty regarding the interpretation of accountability of delegated bodies following the *ESMA-Short Selling* case. However, the subsequent ruling of 18 June 2024, concerning the related appeal by the Commission, firmly establishes a clear position, marking a significant evolution in the jurisprudence regarding the delegation of powers to EU agencies. The ruling provides clarity on the

[98] Ibid., Paras. 116 to 120.
[99] Ibid., Para, 132.
[100] Furthermore, a technical decision such as a resolution programme would not be automatically binding in the event of disagreement, as the Commission would not be required to approve it. Prior to its formal approval, the draft could be considered as analogous to the ECB's assessment of the risk of distress or insolvency of a financial institution (the famous '*failing or likely to fail*'), which represents a preparatory act devoid of autonomous legal effects until the implementation of concrete measures based on that assessment. In this respect See, Ibid., 133. Reference is also made to Case (C 551/19 P e C 552/19 P) ABLV Bank e a./BCE [2021] EU:C:2021:369.

role and responsibilities of the SRB and the European Commission in the context of bank resolutions. At the same time, it contrasts and complements the previous opinion of Advocate General Tamara Ćapeta.

Advocate General Ćapeta basically called for a re-evaluation of accountability in the execution of resolution schemes, critically re-examining who should be deemed legally responsible for the resolution programme. The opinion emphasized the necessity for the Commission to bear ultimate responsibility for the legitimacy and effectiveness of the resolution schemes, positing that the institutional endorsement ensures compliance with the EU fundamental principles. Ćapeta argued that the SRB, while possessing technical expertise, operates within a framework where the final discretionary aspects of any resolution scheme must be scrutinized and validated by the Commission to avoid a transfer of responsibility that would contravene *Meroni* principles.[101] Accordingly, due to its decisive role in the approval process, the action for annulment of the Banco Popular resolution should be directed at the responsible European institution rather than the delegated agency.[102] In particular, the Commission's capacity to influence the discretionary aspects of the programme gives it a level of control that is sufficiently significant to the extent that it could even (see third scenario) compel the SRB to modify the resolution programme in accordance with its directives.[103] This point marks an important convergence with the Grand Chamber's 2024 ruling, which reaffirms the necessity of institutional control to ensure compliance with EU principles and the proper application of the resolution program. In this regard, '*the resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission ... after its transmission by the Board*', highlighting how the Commission's approval is decisive for the content of the resolution program.[104] This clarification addresses the concerns raised by Advocate General Ćapeta regarding the necessity of institutional control to ensure compliance with EU principles. It is indeed confirmed that the delegation of discretionary powers to agencies must always be accompanied by adequate judicial control to avoid an '*actual transfer of responsibility*'.[105] On this basis, the ruling thus concluded that '*it is the Commission, and not the SRB, which must answer for that resolution action before the EU judicature*',[106] emphasizing that the final act to be contested as

[101] Ibid., Para 129 and 130. Furthermore to validate its doctrine, in paragraph 135 the CJEU distinguished the ECB's 'failing or likely assessment' from the resolution scheme. The former does not create legal effects, whereas the latter does.
[102] Case C-551/22 P *European Commission v Fundación Tatiana Pérez de Guzmán el Bueno, Stiftung für Forschung und Lehre (SFL), Single Resolution Board (SRB*) [2023] ECLI:EU:C:2023:846 Opinion of AG Ćapeta. Para 29.
[103] Ibid., Paras. 58 to 60.
[104] Case C-551/22 P. *European Commission v Fundación Tatiana Pérez de Guzmán el Bueno, Stiftung für Forschung und Lehre (SFL), Single Resolution Board (SRB*) [2024] ECLI:EU:C:2024:520. Para. 79.
[105] Ibid. Para. 81.
[106] Ibid. Para. 88.

binding is represented by the approval decision and not the resolution program itself, considered as a mere preparatory act that cannot be reviewed.[107]

Nevertheless, it is now evident that the CJEU in its latest judgment of June 2024,diverged from the opinion drawn by the Advocate General a year earlier, emphasising the return to the original interpretation of the *Meroni doctrine* in a more strict and traditional manner. The Court clearly delineated the scope of discretionary power that can be delegated to agencies, reiterating the distinction between '*clearly defined executive powers*' and '*powers implying a wide margin of discretion*' that would allow for the possibility of making economic policy choices.[108] The distinction between the two types of delegation is significant since '*a delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator with the choices of the delegate, brings about an "actual transfer of responsibility*"'.[109] This appears to be at odds with the approach taken by AG Ćapeta, which advocated for greater flexibility in the delegation of powers to agencies, always accompanied by adequate judicial control. Furthermore, the Court of Justice of the EU reaffirmed this stance by stating that, in the context of banking resolution, '*the final assessment of the discretionary aspects of the scheme which fall within the scope of EU policy for the resolution of credit institutions*' must be carried out by the Commission or, if applicable, by the Council.[110] This implies that the Commission must not only approve the resolution programme but also assume final responsibility for the discretionary decisions made within the framework of that programme.

3. Third Pillar: Judicial Review

In conclusion, the third pillar established in *Meroni*, the judicial review, is the final decisive element that, alongside accountability and a detailed mandate, has been outlined by the CJEU to ensure a legitimate power delegation mechanism. An examination of the most relevant pronouncements on delegation previously cited, in conjunction with the concept of judicial review, reveals that this requirement, unlike the previous two, has not undergone a significant interpretative and applicative

[107] In IBM v. Commission the General Court refused to review the initiation of a proceeding and the statement of objections because these decisions did not produce direct legal consequences. See Case T-54/99, *max.mobil Telekommunikation Service GmbH v. Comm'n*, 2002 E.C.R. 11-313, para. 48.
[108] Case C-551/22P. Para. 70.
[109] Ibid. Para 71.
[110] Ibid. Para. 81.

evolution. Conversely, it appears to have consistently retained a robust and enduring relevance and consideration by the institutions involved in the legislative and judicial phases.

After its introduction in the *Meroni* ruling, the importance of the judicial review has been repeatedly emphasized and reaffirmed on numerous occasions. Notably, in the *ESMA-Short Selling* case, the CJEU stated that the delegation of extensive discretionary powers '*must be subject to strict review in the light of objective criteria determined by the delegating authority'*.[111] More recently, the decision in *Banco Popular* further emphasised the centrality of this element even in banking resolution operations, which are considered a '*complex administrative procedure'*,[112] involving multiple institutions, that must therefore be subject to judicial review as provided by Article 86(2) of SRM Regulation. From a purely legal standpoint, the constant mention of judicial review as an indispensable criterion for delegation might be interpreted as an assertion that courts, unlike administrative appellate bodies,[113] lack the necessary expertise to delve into technical aspects and must therefore limit themselves to '*check that the procedural rules have been observed, that the facts have been accurately stated, and that there has been no manifest error of assessment or a misuse of power*'.[114] This approach is exemplified in the *Banco Popular* case, where the Court concentrated its efforts on evaluating the compliance of the procedural rules set forth in primary and secondary legislation, as well as relevant jurisprudence. The Court did not focus on understanding whether and to what extent the resolution was necessary to ensure the stability of the financial sector and the public interest, leaving these technical aspects to the competence of specialized agencies. The ruling therefore states: '*the resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the Board*'.[115] This example demonstrates how the Court limits itself to verifying the compliance with procedures, without delving into the merits of the technical assessments made by the agencies. At the same time, as highlighted by Schwarze, '*the greater administrative powers are thought to be, the more strict will be judicial review of administrative procedure*', creating a necessary balance between broad administrative powers and rigorous judicial controls.[116]

In conclusion, it can be argued that the core message of *Meroni* is centred on two key concepts, addressed respectively to the delegated bodies and the delegating institutions. Firstly, the idea of strengthened accountability emerges clearly. According to the latest ruling by the CJEU, it seems

[111] Case C-270/12 United Kingdom v Parliament and Council [2014] ECLI:EU:C:2014:18. Para 41.
[112] Ibid., Para 123.
[113] We will discuss these organs more extensively in Chapter III.
[114] Jurgen Schwarze, 'Judicial Review of European Administrative Procedure' (2004) 68 *Law and Contemporary Problems* 85, 94.
[115] Para, 79.
[116] Ibid., 105.

more challenging than before to imagine that agencies will have the possibility to decide independently in the future, without the authorisation of the institutions. Secondly, an implicit message addressed to the delegating bodies can be identified, which is centred on the concept of the conferral of powers. In *Banco Popular*, it was definitively established that the legislator is not permitted to utilise acts of secondary legislation to establish bodies or agencies that alter the institutional balance provided by the Treaties,[117] through the conferral of powers and competences that do not meet the three criteria analysed in this chapter. These criteria are as follows: a) a detailed mandate that clearly delineates the competences and in particular, the decision-making discretion of the delegating bodies must be clearly defined, especially in the case of broad powers that, if not regulated, could result in political choices. b) a strengthened level of accountability, through close information exchange and tight control between agencies and institutions; c) the possibility of judicial review must be guaranteed, which, with unlimited jurisdiction, can rule on any procedural defects or abuses in the delegation.

These considerations lead to the conclusion that the *Meroni doctrine* is not '*eroded*' or even extinct.[118] On the contrary, it has experienced a second renaissance, becoming more influential and consolidated than ever.[119]

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[117] Para, 72.
[118] See Marta Simoncini, 'The erosion of a pillar doctrine of EU law.' (2020): 1-4.
[119] For further details see, F. Annunziata, (2021). 'The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni' (2021), 48.

3. AMLA: From Proposal to Regulation 2024/1620 – A Comparative Legal Analysis:

In the first chapter, an in-depth examination of the evolution of the *Meroni doctrine* revealed the dichotomy between a new European administrative scenario, increasingly characterised by the dominance of agencies and the decentralisation of competences, and a return to the origins of the *Meroni doctrine*. In fact, the tendency towards agencification, represented in this case by the conception of the AMLA, must necessarily face up to the new (albeit old) and stricter standards for the delegation of powers resulting from the most recent CJEU pronouncement in 2024. It is precisely in the context of this recent judgment that this chapter will examine the significance of the AMLA's founding Regulation, highlighting if and how it has evolved as well as its current relationship with the most recent case law available. Given the recent publication of the judgment, which directly concerns the relationship between agencies and delegating institutions and, considering the temporal proximity between the final and official version of the AMLA Regulation (19 June 2024) and the judgment (18 June 2024), it is evident that the AMLA stands as the most recent and prominent example of how European institutions have chosen to adapt to the new/old standards of delegation. Despite the mere one-day difference between the publication of the judgment and the adoption of the Regulation, it could be argued that the final adoption of this version of the Regulation may have been influenced or incentivised by the content of the judgment. This initial question will guide our investigation, with answers potentially unfolding in the conclusion of this chapter.

Therefore, after having outlined some of the powers and responsibilities conferred on AMLA through its funding Regulation we will seek to understand how these have been influenced throughout the legislative process and whether their today's formulation makes AMLA more or less compatible with the principles outlined by the most recent standards on the delegation of powers. The results of this chapter will accordingly be drawn from a comparative legal analysis between the Commission proposal COM(2021) 421 final, the adopted Regulation (EU) 2024/1620 and the judgment C-551/22 P delivered in June 2024. This research aims to represent a practical application of the theoretical principles discussed in the first chapter, examining whether and how certain interpretative advancements in the jurisprudence on the delegation of powers have been effectively integrated into the specific legislative context of AMLA.

I. AMLA'S REGULATORY FRAMEWORK AND SUPERVISORY POWERS

As previously stated, the primary objective of Regulation (EU) 2024/1620 is the centralisation of anti-money laundering and counter-terrorism oversight to break the vicious cycle caused by the existing imbalance between a single, integrated financial market policy and a decentralised national AML supervision system.[121] It is evident from the literature that the current disparity between entities operating within the European single market and autonomous supervisory bodies scattered at the national level results in an inefficient enforcement system, thereby facilitating the exploitation of weaknesses in national legislation by money launderers. The Commission's two-tier architecture is designed to address the current deficiencies in supervisory and enforcement effectiveness and quality. It is intended to promote greater convergence towards higher European standards of supervision.[122] The European agency will assume the role of a '*supervisor of supervisors'*, overseeing the activities of the competent national authorities, which will be granted greater supervisory powers.[123] Therefore, the centralized European control is based on a new multilevel approach involving both direct and indirect supervision simultaneously. AMLA's tasks will thus be divided into five main areas: i. Direct supervision of selected obliged entities; ii. Indirect supervision of financial supervisors; iii. Indirect supervision of non-financial supervisors; iv. Coordination and support to Financial Intelligence Units (FIUs); v. The issuance of technical standards and guidelines.[124]

The initial sections of the third chapter will concentrate on the examination of the evolution of the Authority's supervisory competencies, in addition to its capacity to implement administrative measures and sanctions against supervised entities. This analysis will be conducted through a comparison of the two legislative texts (the Proposal and the Final Text), with a view to identifying both the strengths and the weaknesses of the AMLA as originally conceived. Subsequently, attention will be directed to an examination of the status of resolution of these issues following the conclusion of the legislative process, with a particular focus on the limitations and problems that have been identified. As previously indicated in the introduction to this chapter, the objective of this analysis is to conduct a detailed examination of the scope of some of the most significant powers conferred upon the AMLA. This will serve as a foundation for a subsequent evaluation of the

[121] J Kirschenbaum and N Véron, 'A Better European Union Architecture to Fight Money Laundering' (Bruegel, 2018) <https://www.bruegel.org/2018/10/a-better-european-union-architecture-to-fight-money-laundering/> accessed 7 June 2024.
[122] Allegrezza, p. 14.
[123] Ibid., p. 16.
[124] Article 5, AMLAR.

compatibility of this delegation with the *Meroni* requirements, which will be conducted in the third and final part of this chapter.

1. *Article 12 and 13: Direct Supervision of Selected Obliged Entities*

Among the various powers and tasks assigned to the agency through Article 5, direct supervision represents the most significant and innovative area of the proposal.[129] As previously stated, the role of direct supervisor is of paramount importance, as it represents the foundation of the new European anti-money laundering structure in which AMLA will exercise the greatest degree of discretion and authority in monitoring the *Selected Obliged Entities* (SOEs). The effectiveness of direct supervision is contingent upon the transparency of the criteria employed to identify entities deemed to be considered at risk. The AMLAR outlines a two-phase procedure for the establishment of SOEs. In the Proposal, the initial phase of the process involves the assessment of risk based on common standards and methodology, developed by the Authority for the classification of various risk levels.[130] This is followed by a subsequent selection based on additional criteria related to specific ML/TF risk and previous compliance violations. While this structure was retained in the final version,[131] it has been significantly amended and detailed. Furthermore, AMLAR introduces additional supervised headings,[132] while also providing more precise criteria for evaluating the intrinsic risk of SOEs.[133] The benchmarks are now based on objective risk factors pertaining to customers, products, services, transactions, distribution channels and geographic area, representing a notable advancement from the initial text, which was based on specific criteria for each of these categories.[134]

However, the proposal does not clarify which body will actually be responsible for the initial assessment once the criteria for the initial assessment have been established. In the view of Allegrezza, given the complexity and level of detail of the parameters involved, it would be '*logical*

[129] For the first time in a Commission Impact Assessment, the option of entrusting a limited number of entities considered to be at risk to the direct control of the authority is presented as the only viable option for the Union, given that it is not equipped for full direct supervision.
[130] Article 12(5) of the Legislative Proposal COM(2021) 421 final distinguishes four risk level: low, medium, substantial or high.
[131] This risk assessment methodology was retained in AMLAR, see Article 12(7)(b).
[132] See AMLAR, Article 12(4)(j), on '*crypto-asset service providers*', shows the intention to create a detailed and up-to-date categorisation of entities possibly affected by ML/TF risk.
[133] AMLAR, Article 12(5).
[134] This objectivity is evident in the data required for each risk category. To illustrate, with regard to customers, it considers *'the share of non-resident customers from [...] and the presence and share of customers identified as politically exposed persons'*; for products and services, *'significance and trading volume of products and services identified as the most vulnerable to ML/TF risks either at the level of the internal market*'; and finally with regard to geographical areas it looks at '*the annual volume of correspondent banking services and correspondent crypto-asset services [...] in third countries*'.

and coherent' for this initial assessment to be entrusted to national authorities.[135] Although they would seem to be the most suitable and competent authorities to access and evaluate all the necessary information, however, this could expose the proposal to structural vulnerabilities and national biases, leading to inaccurate or inconsistent selection results which would compromise AMLA's mandate from the outset. Conversely, a more centralized solution could undoubtedly ensure a more objective evaluation, free from discrimination due to differing approaches among national supervisors, while simultaneously imposing an unsustainable workload on the agency, particularly in the light of its limited funds and personnel. Nevertheless, in its new formulation, Article 12(1) of the final version, introduces the expression '*in collaboration with'* to clarify the national authorities' supportive role in gathering information for AMLA, which, in turn, will presumably be the reference body. This amendment eliminates ambiguity about who should actually conduct the initial risk assessment, thereby strengthening the agency's mandate. Similarly, Article 13 AMLAR, which regulates the selection process of SOEs, maintains consistency with the previous one. Indeed, in the sentence *'[t]he Authority shall commence the first selection process*',[136] although the legislator does not specify whether by 'Authority' it means AMLA or national supervisory authorities, the implicit reference to the former can be deduced *per argumentum a fortiori.* This interpretation, which would render the agency's mandate less contradictory, is plausible because the article itself, in paragraph 2 of the final version, distinctly differentiates the *Authority* from *the supervisory authorities*. The consistent and coherent use of language thus supports the idea that the legislator intended to refer to AMLA, conferring it a broader mandate than initially expected, but still with less opaque limits compared to the proposal.

Furthermore, it is crucial to acknowledge that the concept of 'risk assessment' itself can encompass subjective interpretations that could exacerbate fragmentation among Member States. Consequently, the interpretation must be as '*clear, understandable, and based on logical and reasonable arguments as possible*'.[137] The proposal stipulates that directly supervised entities must be established in a minimum of seven Member States for credit institutions and ten for financial institutions and must present a high-risk profile. The assessment is conducted in two phases. Firstly, credit institutions must present a high-risk profile in at least four Member States and have been subjected to supervisory investigation for material violations in the previous three years. Secondly, financial institutions must have a high-risk profile in at least one Member State where they operate

[135] Allegrezza, p. 28.
[136] Ibid. Article 13(4).
[137] H Koster, 'Towards Better Implementation of the European Union's Anti-Money Laundering and Countering the Financing of Terrorism Framework' (2020) 23(2) Journal of Money Laundering Control 379, 381 <DOI 10.1108/JMLC-09-2019-0073> accessed 10 June 2024.

and in at least five other Member States where they offer services through representative agents.[138] Given that, according to official estimates, only about 12 to 20 entities would be compatible with such stringent selection criteria, this limited number of supervised entities could give rise to concerns regarding compliance with the principle of subsidiarity.[139] According to this principle, EU intervention is justified only if the objectives in question cannot be sufficiently achieved by the Member States' alone, while measures taken at the EU level could provide some kind added value in achieving these goals.[140] Given the limited number of entities under AMLA's direct supervision, it could be argued that the creation of an additional layer of bureaucracy represented by a centralized authority may not be necessary. The necessity and proportionality of such an authority could be questioned, as national-level intervention might be sufficient to manage the supervision of the few entities in question. Consequently, AMLA's effectiveness and justification could be weakened if its existence is not deemed proportionate to the limited number of entities it would directly supervise.

Regulation 2024/1620 has addressed this issue by reducing the direct supervision's compatibility criteria. An amendment to Article 12(1) has reduced the minimum number of Member States in which controlled entities must operate from '*at least seven*' a '*at least six*'. Furthermore, the new text also includes activities carried out '*through establishment or under the freedom to provide services'.*[141] These changes will expand AMLA's scope, allowing it to oversee a greater number of entities than initially proposed.[142] The revision of the selection criteria, in conjunction with the introduction of an additional selection process for Member States where there are no entities with a sufficiently high-risk profile,[143] addresses the concerns previously raised regarding AMLA's compatibility with the subsidiarity principle. Indeed, a widespread direct supervision mechanism, aimed at more entities and Member States, could justify an EU level intervention in the anti-money laundering field to achieve objectives that individual Member States could not achieve alone as effectively.

In addition to these changes, Article 12 and 13 AMLAR introduce the distinction between '*inherent risk'* (already mentioned in the proposal), and '*residual risk*', which represents another enlargement

[138] See AMLAR, Article 12(1) p. 40.
[139] Allegrezza p. 24.
[140] Article 5(2) Treaty on the European Union
[141] AMLAR, Article 12(1).
[142] This expansion is further evidenced by Article 13(2) AMLAR, which indicates that, contrary to initial estimates of 12-20 directly supervised entities, '*more than 40 selected obliged entities*' could be compatible. At the same time, AMLA will be granted with the power to limit, in consultation with supervisory authorities, the number of entities under its control to a manageable number with the available resources.
[143] See AMLAR, Article 13(3). This mechanism represents a safeguard that no MSs are excluded from direct supervision, ensuring the maximum possible coverage of supervision.

of AMLA's powers spectrum.[144] Indeed, while the '*inherent risk is that which is inseparable per se from banking activity, that is, the risk intrinsic to an institution's [...] without considering the management and control systems. In turn, management and control mitigate inherent risk, leaving the residual or remaining risk*'.[145] In other words, the inclusion of residual risk allows for a more detailed and precise assessment of the vulnerabilities of obliged entities, considering not only the intrinsic risk of their activities but also the effectiveness of the already implemented risk management measures. Article 12(3) and (4) of the final Regulation, stipulate that AMLA should categorise both the intrinsic and residual risk profiles of the rated entities, utilising specific parameters and methodologies delineated in regulatory technical standards. This approach could allow the Authority to conduct a more in-depth evaluation of the vulnerabilities of SOEs, thereby improving AMLA's ability to distinguish between the risks intrinsic to the entities' operations and the risks that remain despite the implemented mitigation measures.

2. *Article 32: Direct Supervision Through Takeover of non SOEs*

When national supervisory authorities are unable to fulfil their duties effectively, the instrument provided by Article 30(4) of the proposal,[154] becomes crucial. This allows AMLA, under certain conditions, to transform the indirect supervision of financial entities that were not included in the original selection into direct supervision. In the event of a deterioration in the risk profile of entities that were not initially selected for supervision, AMLA is empowered to intervene. This enables the institution to ensure that there is a complementary and centralised control mechanism in place. In accordance with Article 30, a number of steps must be taken in order to initiate this procedure. Firstly, '*[f]inancial supervisors shall notify the Authority where the situation of any non-SOE ... deteriorates rapidly and significantly'*.[155] Subsequently, AMLA may request that the national supervisor conduct further investigations, impose sanctions, act independently, and, in any case, promptly communicate the progress of operations (within a 10-day time limit). Should the agency deem the assigned supervisor's response to be inadequate, it may request the Commission's permission to transfer supervisory competence.

[144] Ibid., Article 12(3) and (4).
[145] ESRB, 'Risk Matrix Guide: Conducting and Interpreting the Risk Matrix – Best Practices from the Spanish Macroprudential Authority' (9 December 2013) <https://www.esrb.europa.eu/mppa/cbmd/shared/pdf/Spain/2013-12-09_Risk_Matrix_Guide.pdf?6539ca699fb1c3bc01aa26f172578895> p. 3, <8 June 2024>.
[154] Now Article 32 AMLAR.
[155] AMLAR, Commission Proposal, Article 30(1).

In this context, with regard to the *Banco Popular* case, Article 30 is deficient in its selection criteria for entities to be supervised, which could leave discretionary leeway for the agency. As previously stated, in the *Banco Popular* case, the CJEU emphasised that when agencies possess particularly extensive discretionary powers that are not adequately defined in their procedural elements, the only way to comply with the *Meroni doctrine* is to involve an institution to legitimise such a decision.[156] In this case, the legislator may have anticipated that such a procedure would be susceptible to judicial appeals, given the discretionary implications it entails in the selection criteria. To this end, the supervision transition was subordinated to the Commission's approval,[157] a model that is similar to that observed in the banking resolution processes under Article 18(7) SRMR. Furthermore, the mechanism of direct and indirect supervision, in conjunction with a potential takeover, bears resemblance to the system employed by the SSM, wherein the supervision of credit institutions is exclusively entrusted to the ECB.[158] However, while the ECB is granted prudential supervisory legitimacy directly by Article 127(6) TFEU, in the case of AMLA, the supervision of non-selected obliged entities is the full responsibility of national authorities. Consequently, this responsibility cannot be transferred directly to an agency without contravening the *Meroni doctrine*. From a legal standpoint, Article 30 of the proposal, without the Commission's approval, could be perceived as a grey area susceptible to judicial appeals due to an excessive discretionary margin and possible implications of economic policy choices not permitted to agencies.[159]

Nevertheless, the proposed procedure for the takeover does present certain shortcomings that could potentially limit AMLA's authority, which in such a situation could appear to be quite extensive. Firstly, the proposal does not clarify whether the Member State of origin of the notification must necessarily be the one where the supervised entity is established.[160] The more generic expression '*where that entity operates*' used in Article 30(1) would prevent any other involved Member State from informing or alerting AMLA about potential risk. This could result in a *de facto* reduction in AMLA's intervention capacity or the number of interventions, which would be contrary to the necessary premises for its existence. Conversely, the potential for multiple alerts would enhance the efficiency of the tool, enabling AMLA to address a greater number of cases.[161] The final version,

[156] See *Banco Popular* (C-551/22 P), *Para.* 79.
[157] AMLAR, Commission Proposal, Article 30(4).
[158] See Article 4 SSMR, Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) OJ L 141, 14 May 2014, 1–50.
[159] A comparable scenario to that outlined in Article 30, as will be observed in paragraph II.2. of this chapter, could be identified in Article 21 of the Commission Proposal (22 of AMLAR) on the possibility of imposing financial penalties.
[160] ECB Opinion of the 16 February 2022 on a proposal for a Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism, (COM/2022/4), p. 11.
[161] Ibid. p. 27

while maintaining the reference to national financial supervisors, introduces a substantial improvement in operational clarity by specifying that such deterioration '*might negatively impact several Member States or the Union as a whole*'.[162] This expanded language implicitly recognises the importance of a broader perspective, which would make the provision more inclusive and would mitigate the issue of excluding other Member States, thus avoiding potential gaps in cross-border supervision. However, the formulation remains open to interpretations, leaving a potential area of uncertainty about who should act first in specific situations.

Another limitation of Article 30, as outlined in the proposal, concerns the inability of AMLA to autonomously initiate the procedure that could lead to a takeover.[163] Nevertheless, in order for the proposal to be an effective tool for combating money laundering practices, it should consider cases where AMLA receives information about the deterioration of ML/TF risk from sources other than national financial supervisors of the Member State.[164] In many instances, alternative sources, such as whistleblowers or non-financial supervisors, can provide crucial and timely information that supervisory bodies may not have or may be reluctant to report. Therefore, in order to avoid the exclusion of an internal referral mechanism by the Authority, the final version added paragraph 3, which allows AMLA to initiate requests in case of violations. This is specified in three scenarios of action: a) following notifications by financial supervisors pursuant to paragraph 1: *a) following notifications by financial supervisors pursuant to paragraph 1; b) as a result of the Authority's own collection of well-substantiated information; c) upon reception of information by Union institutions and bodies, or by any other reliable and credible information source*.[165] These additions, especially points b and c, are crucial because they expand AMLA's ability to intervene proactively through external information sources such as whistleblowers or third-party informants, significantly enhancing the clarity and effectiveness of its mandate.

II. AMLA'S ADMINISTRATIVE AND SANCTIONING POWERS

Having explained how the selection of entities to be directly supervised by the AMLA is made, this chapter aims to understand what this direct supervision entails in practice. How does the AMLA exercise its direct and indirect supervisory powers, imposing corrective measures and even fines?

[162] AMLAR, Article 32(1).
[163] According to a literal interpretation of Article 30(1) of the Proposal '*Financial Supervisors shall notify the Authority'*, only financial supervisors are entitled to initiate this process.
[164] Allegrezza, p. 27.
[165] See AMLAR, Article 30(3).

For this purpose, three main articles will be focused on: Article 21, which deals with direct supervisory powers, Article 22, which deals with monetary sanctions, and finally Article 23, which deals with periodic sanctions. Following the outline of the previous section, we will examine the changes made from the initial proposal to the final text of the Regulation and assess whether and how these changes represent a step forward for the proper and smooth functioning of the Agency.

1. *Article 21*: *Direct Supervisory Powers*

The direct supervisory powers conferred on AMLA, including the ability to impose corrective measures, limit business operations, and require changes in the governance of obliged entities, are consistent with AMLA's objectives to ensure rigorous and centralized control in monitoring high-risk entities.[175] Article 20 of the Commission proposal,[176] granted AMLA with extensive yet broadly defined supervisory powers. An illustrative example is the ability to '*require the reinforcement of the arrangements, processes, mechanisms and strategies*' and '*impose specific requirements relating to individual clients, transactions or activities that pose high risks*'.[177] In the final text, these powers have been reformulated in a manner that ensures transparency while maintaining their substance and effectiveness. The evidence of this trend is provided by the amendments in the compromise text, which allow AMLA to '*issue recommendations*' and '*order obliged entities to comply, including to implement specific corrective measures*',[178] rendering the regulatory framework for corrective actions more specific and less coercive without, substantially altering its effectiveness. Furthermore, the possibility to '*issue a public statement which identifies the natural or legal person and the nature of the breach*' could be regarded as a formal update aimed at increasing transparency and accountability,[179] without altering AMLA's ability to intervene as effectively. Nevertheless, a significant proportion of these amendments can be perceived as an alignment with the regulatory frameworks of other EU financial agencies, such as the EBA and ESMA, which adopt analogous approaches to promote financial stability and protect investors. For example, the EBA is empowered to issue guidelines and recommendations with the objective of enhancing the stability of the financial system and protecting consumers through the

[175] Ibid., Article 20(2)(b), (d), (f).
[176] Article 20 of the Commission Proposal corresponds to Article 21 of the final Regulation.
[177] See AMLAR, Commission Proposal, Article 20 (2a) and (h).
[178] See AMLAR., Article 21(2a) and (b).
[179] Ibid., Article 21(2c).

implementation of best practices.[180] In the most extreme cases, Article 18 allows the EBA to exercise direct intervention powers, such as in emergencies. However, it primarily relies on preventive and collaborative measures to avoid systemic crises. Similarly, ESMA is empowered to issue warnings, guidelines and recommendations, as well as to prohibit or restrict the distribution of certain financial products, in order to prevent risky behaviours and protecting investors.[181]

Despite these clarifications, Article 20 of the proposal, did not fully delineate the list of supervisory powers attributed to the future Authority. The initial scope of these powers was contingent upon the interpretation of Article 20(3) AMLAR, which states, '[t]*he Authority shall also have the powers and obligations which supervisory authorities have under relevant Union law*'. If the expression '*relevant Union law*' were to be interpreted as limiting powers to only directly applicable Union law provisions, Article 20(3) of the proposal would be inconsistent with Article 5(6) AMLAR. The latter states that the Authority '*shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives'*. The discrepancy becomes evident when Article 20(3), as initially formulated, could, in its more restrictive literal interpretation, result in a significant limitation of AMLA's powers.

This point is of fundamental importance, especially considering that most of the European legislation dealing with AML/TF currently consists of Directives. To date, there are six main Directives regulating this sector. Excluding AMLA from applying the national provisions transposing these secondary law provisions would constitute a significant limitation on the effectiveness and scope of its intervention. In this case, a severe regulatory gap would be created, weakening AMLA's role in harmonising AML/CTF efforts and its ability to address new challenges and adapt to future regulatory changes. Indeed, many future legislative amendments might be implemented through new Directives. Consequently, a legislative amendment is required to clarify the setup of AMLA and align it more closely with its mandate and responsibilities. This is necessary to ensure that AMLA's decisions are not constrained by ambiguity in the future.[182] The necessity for clarity has been fulfilled in the final wording of Article 21 AMLAR on *administrative measures*,[183] where the initial ambiguities concerning potential interpretations of the expression *'under relevant Union law'*, have been resolved through the complete removal of paragraph 3, in which it was

[180] See Article 16, Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), *OJ L 331, 15.12.2010, p. 12–47*.

[181] See Article 9(2), (3), Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), *OJ L 331, 15.12.2010, p. 84–119*.

[182] Allegrezza p. 28.

[183] Originally entitled '*Supervisory Powers'*, this change in Article 20 is not only semantic but also substantive. It shifts the emphasis from the generic granting of supervisory powers to a specific set of concrete administrative measures that the AMLA may take.

referenced. Indeed, the removal of this provision represents a significant step forward in terms of the agency's mandate clarity. This is because, on the one hand, it significantly reduces the risk of divergent interpretations, improving consistency with the articles that constitute the attributes and powers of the agency, and on the other hand, it provides greater specificity of its competencies.[184]

2. *Article 22: Pecuniary Sanctions*

As in the previous sections, the objective will be to understand if and how the amended version of Regulation 2024/1620, with regard to Article 22, represents a step forward in terms of clarity and specificity of the mandate, effectiveness and compliance with the doctrine regulating the delegation of powers within the EU. In particular, the analysis will focus on the replacement of the original concept of *material breach* by the new concept of *serious, repeated or systematic breaches*.

In general terms, Article 21,[185] in conjunction with Article 30 of the Commission proposal, represents a particularly relevant set of provisions when analysing the process of conferral of powers, particularly in the context of an agency such as the AMLA, immediately following a return to the 'old' *Meroni* standards. More precisely, Article 21 of the proposal, could be interpreted as a first attempt by the European Union to go beyond the mere conferral of supervisory or control powers on delegated bodies not legitimised by the Treaties, and to confer on them real financial sanctioning powers. In the field of financial regulation, in fact, none of the existing bodies - EBA, ESMA, EIOPA and SRB - has been entrusted with this responsibility. However, precisely because of its unprecedented nature, this type of power must be carefully proportioned and calibrated within the parameters set by the most recent case law on its delegation.[186]

Looking at the provision, in its original version of the Draft Regulation, it outlines the issue of administrative sanctions imposed by AMLA on SOEs in cases of '*material breach of directly applicable requirements*' of the Regulation itself, regardless of whether they were made '*intentionally or negligently'*.[187] The proposed version of Article 21 refers to Annex II of AMLAR and provides a list of violations such as customer due diligence, procedures referred, reporting obligations, internal controls etc, with reference to the affected Articles. As previously discussed, the most recent application of the *Meroni doctrine* requires an authority such as the AMLA to have extremely limited discretion and to be guided by specific and well-defined criteria in the application

[184] See AMLAR, 21 (2, a), (3).
[185] Article 21 of the Proposal corresponds to Article 22 of the final AMLAR text.
[186] These are represented by Case *Banco Popular* (C-551/22 P), (see Chapter 2. II. 2. 2.2).
[187] See AMLAR, Article 21.

of the aforementioned sanctions. These further limits the room for manoeuvre than in the past. The authority is thus authorised to apply a pre-established rule, in this case outlined by the amendments of the European institutions, in order to ensure that decisions are taken within a clear and strict legal framework. In this respect, although the Annex is quite precise in listing all the relevant infringements, '*it does not define the concept of material*'.[188] The extreme vagueness of this term certainly contravenes even the most recent and severe revision of the non-delegation doctrine, as it would allow the Agency an almost uncontrollable degree of arbitrariness. The absence of clear criteria to guide such a definition would mean that any type of action could, at the discretion of the Agency, be considered an infringement sufficient to warrant a financial penalty. This would not only pose an unacceptable risk to the AMLA's decision-making autonomy but would also complicate the supervisory work of the Court of Justice or the Agency's internal appeal body. For this reason, Simoncini argues that the only way to avoid an effective discretionary power on the part of the AMLA and to better comply with the *Meroni doctrine* is to define a concept of materiality which can follow '*precise and objective criteria'*.[189] In this way, the role of AMLA should be limited to verify and then demonstrate whether or not this requirement has actually been met, thus avoiding any discretionary decision. A suggestion to this effect is made by Allegrezza, who claims that the legislator could use Article 40 of the Sixth AML Directive as a useful reference for this improvement.[190] According to the latter, member states should '*ensure that administrative sanctions are applied to obliged entities for serious, repeated or systematic breaches*'.

Regarding the replacement of the expression *material breach* with *serious, repeated or systematic breaches* in the amended version of Article 21 AMLAR proposal, two aspects should be considered. First, it not only precisely circumscribes the situations in which the agency can intervene, but also provides clearer guidance on what actually constitutes a significant breach, thus addressing the criticisms mentioned above.[191] This specificity reduces ambiguity and provides a clearer framework for the application of sanctions, thereby improving the predictability and transparency of AMLA's decisions. Secondly, this wording could significantly strengthen the power of the AMLA. The conjunction *'or'* in this context provides greater operational flexibility, as it indicates the possibility of acting in each of these three specific scenarios without having to prove that all three conditions are met simultaneously. This could prove crucial, as otherwise the use of the conjunction *'and'*

[188] See Allegrezza p. 33.
[189] M Simoncini, 'The Delegation of Powers to EU Agencies After the Financial Crisis' (2021) 6(3) European Papers 1485, 1492.
[190] See Allegrezza, p. 33
[191] For example, a serious breach could refer to violations that cause significant damage to the financial system or to the firm's reputation; a repeated breach could be identified by the recurrence of similar infringements over time; and a systemic breach could indicate a pattern of non-compliant behaviour that permeates the organisation.

could have limited intervention to situations where all three criteria were present simultaneously. This lexical choice is therefore an indication of the legislator's intention to increase the effectiveness and adaptability of the AMLA in dealing with different types of regulatory breaches. The introduction of this new criterion, in conjunction with the existing expedients,[192] has the effect of transforming the entire sanctioning process into a predefined procedure from start to finish. This procedure is one that the agency is simply required to follow. Consequently, the difference in approach adopted by the legislature between Articles 32 and 22 AMLAR can presumably be traced to this reason. In explicit terms, where the legislature believes that a procedure may give rise to discretion and policy choices (e.g., Article 32), intervention in the approval process is necessary. Conversely, where the rule leaves no room for the agency to apply the predetermined criteria (e.g., Article 22), the agency can operate even without the green light from one or more institutions.

In conclusion, the replacement of the notion of *material breach* with the more specific *serious repeated or systematic breaches*,[193] undoubtedly represents a step forward in the improvement of the AMLA, as it makes Article 22 more compatible with the current and more restrictive standards set out in the recent *Banco Popular* appeal. As previously explained, this case revived the original notions of the *Meroni* case, stating that decisions of European agencies *per se* cannot have autonomous legal effects. It is therefore, of the outmost importance that AMLA operates within a clear and well-defined regulatory framework, such as the one provided by the new wording of Article 22, in order to ensure that such decisions are justified and legitimate. The Court of Justice has continued to emphasise the importance of a clear and specific mandate, understood as the only instrument guaranteeing the legitimacy of the discretionary actions of a delegated body. In this context, it can be argued that the procedure for imposing economic penalties had a fair level of detail already at an early stage, as certain aspects of the quantification of the fine having been sufficiently defined. However, this may not have been sufficient because although the number of penalties is calculated objectively, there was still a procedural gap in understanding to whom such penalties could be imposed. In this regard, the new concept of *serious, repeated or systematic breaches* precisely fulfils this requirement, thereby aligning the sanctioning purposes of AMLA with the principles established by the most recent case-law. As it currently stands, Article 22 (as well as Article 32) AMLAR, has been considerably strengthened, as all aspects that might have left doubts about a true delegation of powers have been smoothed out and refined. The entire system of

[192] Two additional criteria in the proposal serve to restrict AMLA's discretion in setting the amounts of fines: a) limitation of the minimum and maximum amounts of fines, Art. 21 (3a) to (3d); b) further adjustment of these amounts within stakes included in Annex I through the application of *'aggravating or mitigating factors*,' as set out in Article 21(4).

[193] Also Article 32 of the final version of the AMLAR makes repeated usage of the same expression, as if to confirm the convergence of the two provisions when it comes to the new *Meroni* guidelines in the field of conferral of powers.

sanctions will be adopted almost automatically by the agency, which will have no discretion or responsibility in the face of any probable future litigation.

3. *Article 23: Periodic Penalty Payments*

Ultimately, Article 23 of Regulation 2024/1620,[194] represents a logical progression from the provisions on administrative measures set forth in Article 21. The objective of the legislator is to establish an enforcement instrument that, through a novel sanctioning system, aims to guarantee that SOEs comply with the measures imposed or suggested by the Authority through Article 21, which lacks such an instrument. The shift from the imperative 'shall' in the legislative proposal to the permissive 'may' in the final text suggests an increase in the discretionary authority granted to AMLA.[195] This change in language would enable the Executive Board to evaluate the imposition of periodic payments on a case-by-case basis, rather than being required to do so in all circumstances, thereby allowing for greater flexibility. While this may enhance the AMLA's operational adaptability in addressing unique and intricate circumstances, from a purely legal standpoint, it would necessitate meticulous attention to guarantee that such decisions are made in a transparent and accountable manner, in accordance with the *Meroni doctrine*. As previously suggested with regard to monetary sanctions, an extension of sanctioning powers could result in an increase in complaints by sanctioned entities concerning the conduct of an *actual economic policy* by the AMLA, which is repeatedly prohibited by *Meroni*.[196] This would undoubtedly be the case, particularly in situations where sanctions do not align with the criteria of objectivity, transparency, and accountability as set forth in case law. The activation of this instrument was conditionally linked to non-compliance with the rules laid down in Article 21, which could be seen as a *de facto* guarantee of respect for the principles of transparency and accountability. Indeed, a literal interpretation of the provision indicates that the '*[t]he Executive Board may adopt ... a periodic penalty payment in order to compel a SOE to put an end to a breach, where it fails to comply with an administrative measure*'.[197] This double-edged conditionality means that Article 23 is only triggered when there is a proven breach of the administrative measures already approved in Article 21. This requires the AMLA to operate within the confines of a regulatory framework that is more

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[194] Article 23 of the final AMLAR text corresponds to Article 22 of the Commission Proposal.
[195] See AMLAR, Article 23(1).
[196] See Chapter 2.I.3, footnote n. 65 p. 21
[197] Ibid., Article 23(1), (1a).

transparent and *accountable*.[198] Therefore, when considering a potential challenge to the imposition of a periodic penalty, the focus should not be solely on Article 23, which would be triggered with little discretion,[199] but rather on the legitimacy of the underlying administrative measures and, most importantly, on whether they have been transgressed.

Secondly, the search for greater objectivity in these penalties, as well as their level of proportionality,[200] can be traced back to paragraph 3, which explicitly states that the amount of the periodic payment '*shall not exceed, in the case of legal persons, 3% of the average daily turnover ... or, in the case of natural persons, 2%*'. These criteria establish a framework for calculating penalties, ensuring that they are objective and proportionate to both the punitive and deterrent intent of the rule, in accordance with the *ne bis in idem* principle.[201] The objective nature of the calculation is guaranteed by the fact that AMLA will not have the power to intervene on its own initiative. With regard to the principle of effectiveness, however, the legislative process resulted in an extension of the duration of payments, which, in the proposed text, was designed for a maximum period of six months.[202] In this regard, although the final text retained the aforementioned limit, it additionally provided that, '*Where, upon the expiry of that period, the SOE has not yet complied with the administrative measure, the Authority may impose periodic penalty payments for an additional period of no more than six months.*'.[203] This extension of the maximum period of imposition of payments appears to be designed to enhance the efficacy of sanctions, thereby providing an increasing incentive for SOEs to comply. Presumably for the same purpose, the final text of Regulation 2024/1620 also introduces the possibility of adopting a decision '*with retroactive effect up to the date of application of the administrative measure*'.[204] This clause, absent from the preliminary proposal, enhances the AMLA's flexibility in imposing penalties and guarantees that obliged entities cannot evade sanctions by postponing compliance.

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[198] These two terms are the same as those used in chapter 3.II.1, to summarise the distinctive features of the final Article 21, as amended by the legislative process. For further details, please refer to the footnote n. 38.
[199] With regard to the degree of automaticity in the issuance of periodic penalty payments, it would be fruitful to examine the implications of modifying the imperative 'shall' to the permissive 'may'. Would this result in greater discretion for the AMLA? Or would it not play such a significant role in the fine assessment process?
[200] According to Article 23(2) AMLAR, the periodic penalty '*shall be effective and proportionate*'. Effectiveness will be discussed further on.
[201] See AMLAR, Recital 31, p. 8.
[202] See Article 22(4), Commission proposal.
[203] See AMLAR, Article 23(4).
[204] Ibid., Article 23(5).

III. AMLA'S COMPLIANCE WITH REVIVED MERONI'S STANDARDS

The compliance of the delegation of powers with the *Meroni doctrine* and recent case law can be assessed by examining the limits and conditions imposed on the exercise of the delegated powers and the level of balance between the agency's autonomy and institutional control. Therefore, this concluding chapter examines how the relevant norms of the final version of the AMLAR respond to these two key requirements. The *Meroni doctrine*, as established in the ESMA-Short Selling case onwards, requires that the delegation of powers to an EU agency must be clearly defined, limited to specific tasks that can't in any way give rise to political decisions, and subject to judicial review.[207] The objective of this analysis is to examine each of the aforementioned elements through the lens of Regulation 2024/1620 which establishes AMLA. This will enable an evaluation of whether the legislative process has brought AMLA closer to these standards than was the case at the time of its initial drafting.

One of the defining characteristics of the legislative process is the desire to provide as much clarity as possible regarding the responsibilities, limits and instruments available to the agency in question. This tendency was observed to be consistently adhered to throughout the entire sample of articles taken as a model.[208] The most striking illustration of this approach can be observed in the evolution of the direct supervision of (SOEs) by the AMLA. As was previously observed in subsection 3.I.1, the initial wording of Articles 12 and 13 exhibited evident deficiencies in terms of the level of detail and clarity, which, in certain instances, could potentially give rise to ambiguity and uncertainty with regard to their interpretation. However, these limitations were addressed and presumably resolved through targeted amendments. A notable illustration of this is the incorporation of more exacting criteria and particular benchmarks for risk assessment, a process that, in the absence of adequate regulation, is susceptible to ambiguity and misinterpretation. This may be identified by the addition of the concept of residual risk to the existing concept of inherent risk. The objective of this amendment is to obtain a specific and transparent mandate, thereby facilitating a more detailed and precise assessment. The same approach was subsequently applied in the context of direct supervision through the acquisition of non-SOEs, where the risk of politicisation and contestation was significantly higher than that associated with normal direct supervision. In this instance, in

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[207] The judicial review, as well as the administrative review, will be deepened in the next Chapter: 'Accountability through Judicial and Administrative Review in AMLA's Operations'.

[208] Due to space constraints, this thesis was constrained from undertaking a comprehensive analysis of all Articles of the AMLA Regulation. Nevertheless, it was deemed appropriate to select those provisions identified as being most suitable to assess AMLA's compliance with the *Meroni* standards.

addition to the enhanced clarity achieved, for instance, in paragraph 1 of Article 32 AMLAR, the procedure itself was also reinforced through the intervention of the Commission, precisely mirroring the events that transpired in the *Banco Popular* case. This mechanism, which has already been tested and approved by the General Court in resolution procedures initiated by the SRB,[209] could prove to be the key factor in ensuring that AMLA's operations are conducted within clearly defined and well-delineated parameters. This would serve to minimise the risk of discretionary or politically motivated decisions and ensure the uniform and predictable application of the rules. With regard to administrative and sanctioning measures, the replacement of the term *material breach* with the expression *serious, repeated, or systematic breaches,* which is widely used in other articles besides Article 22, is arguably the most innovative and distinctive element of the entire amendment process. While, as previously noted, it considerably narrows the agency's scope for issuing a sanction, it also affects its efficacy because it encompasses as many as three potential fields of application.

Therefore, it could be reasonable to conclude that, generally speaking, the balance between the autonomy of the agency and institutional control is recognised as essential to ensure that any agency can operate effectively without overstepping the limits of its powers. Most of the articles of Regulation 2024/1620 are designed to ensure this balance. All the analysed mechanisms ensure that the AMLA operates within a strict and controlled regulatory framework, maintaining a balance between autonomy and institutional supervision, in line with the principles of the *Meroni doctrine* and recent case law. In light of the aforementioned conclusions, it can be stated that the legislative process has, to some extent, brought AMLA's powers closer to the concept of delegation that emerged from case C-551/22. This leads to the final question of the chapter, which remains to be answered.[210] Given the temporal proximity between the issuance of the judgment and the official publication of the Regulation, and especially considering the final result of the amendments, which, whether intentionally or coincidentally, have brought the future AMLA closer to the idea set forth in the Banco Popular case, can a direct relationship between the two be argued? Although it is challenging to ascertain whether the entirety of the amendment process was influenced by a potential (and arguably unlikely at the time) anticipation of a return to the *Meroni* principles, it may not be implausible to suggest that, at the very least, the ratification of these amendments in the final version of the legislation could be interpreted as an effort to comply with the principles established in the preceding day's ruling, while still maintaining a high level of agency effectiveness. Nevertheless, it must be acknowledged that a definitive answer to this question is not possible to

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[209] See Case T-481/17, Paras. 128, 137, 224 and 435.
[210] See Chapter 3. p. 35.

provide. However, this topic could form the basis of future research, potentially incorporating the consideration of future AMLA litigations and the CJEU's response to specific disputes concerning the analysed articles. In conclusion, uncertainty persists. However, it is not implausible to suggest that there is a direct connection between case law and legislative developments. While this link is not overtly evident, it could be reasonably inferred that both domains are mutually influencing each other in the ongoing process of European integration.

4. Accountability through Judicial and Administrative Review in AMLA's Operations: The Role of the ABoR

In the previous chapter, the analysis demonstrated how the legislative process of AMLA has progressively contributed to increasing the agency's compatibility with the most recent interpretations of the *Meroni doctrine*. In particular, the evolution of the Authority's characteristic powers was presented through three key criteria: the clarity and specificity of the mandate, the effectiveness of supervisory powers, and compliance with the delegation of powers doctrine. These are the essential elements that will ensure that AMLA can operate within a clear and defined regulatory framework in the future, maintaining a balance between the agency's autonomy and institutional control. However, in order to complete this analytical journey, it is necessary to go beyond the powers and criteria previously outlined. The final indispensable element, common to all analyses, rulings, and debates on the *Meroni doctrine*, has remained unchanged from the years of the first ruling (1956) to the present day. This concerns the obligation to guarantee that subjects affected by the legally binding decisions of agencies have the possibility to challenge certain acts and contest them.[240] This principle serves as the fundamental safeguard of the rule of law within the EU, particularly in regard to the accountability of decentralised bodies with binding powers, which are commonly referred to as agencies. Indeed, the incremental establishment and empowerment of agencies has contributed to the academic and legal literature debate on the most appropriate and legally sustainable method for controlling the proper exercise of these powers.[241] The debate in the literature has been gaining momentum with a number of significant publications addressing the issue of agencies' accountability. In this context, it is particularly noteworthy to consider the question of whether they are, by their very nature, independent and therefore unaccountable.[242] Despite the existence of a plethora of vertical and horizontal instruments within the domain of EU administrative law, which are designed to ensure the accountability of decentralised agencies,[243] new internal audit tools have emerged and gained traction in recent years. The Boards of Appeal have been identified as the '*most elaborate technique used by the legislator*' in the context of

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[240] In this regard, In *Les Verts v. Parliament*, the European Court of Justice emphasized that the European Community is a community based on the rule of law, therefore a judicial review of the actions of the institutions, and by extension of the European agencies, can't be avoided. For further details see Case 294/83, *Les Verts v. Parliament*, [1986] ECLI:EU:C:1986:166, para. 23.

[241] The debate among scholars has intensified in recent years, with a number of important publications addressing the issue of accountability of agencies in the context of the classic question of whether they are, by their very nature, independent and therefore unaccountable This debate has also encompassed the role of judicial controls in this area.

[242] Merijn Scholten, 'Independent, hence unaccountable? The need for a broader debate on accountability of the executive' (2011) 4(1) *Review of European Administrative Law*, 5.

[243] Maat, Eva Pander, and Miroslava Scholten. 'Historical development of boards of appeal of EU agencies' (2021) SSRN 4139150, 5.

judicial scrutiny of agency acts.[244] While the establishment of internal appellate bodies does not preclude parties from pursuing subsequent action before the General Court and the CJEU, these bodies play a pivotal role in the filtering of cases involving unfounded appeals.[245] Moreover, in the absence of a functional accountability system that permits effective and transparent review of decisions, these entities would be unable to operate legitimately within the EU.

It is precisely the direct link between the concept of accountability and the requirements imposed by *Meroni* that makes the analysis of AMLA's Administrative Board of Review (ABoR) fundamental. The ABoR not only represents an internal administrative review tool useful to '*reduce the burden on the Court*', but it is also a guarantee of transparency and impartiality, allowing '*natural and legal persons with the possibility to request a review of decisions taken under the powers related to direct supervision ... and addressed to them, or which are of direct and individual concern to them'*.[246] Therefore, with the aim of providing a complete and organic conclusive answer to the '*accountability*' element highlighted in the *Research Question* of this work, this chapter will focus on the in-depth analysis of the ABoR. The methodology to be employed is identical to that employed in the previous chapter. The legislative proposal will serve as the point of departure for an examination of the structure and functioning of this body. This examination will encompass an analysis of the composition, appointment criteria, and competences of the body in question, with a view to identifying both its strengths and weaknesses. Once the opinion provided by the European Central Bank has been discussed in order to identify possible improvements to be introduced in the compromise text, the latter will be evaluated in order to ascertain whether any amendments to the Regulation have increased or reduced the level of accountability and similarity to the administrative review systems of the already existing European Supervisory Authorities.

I. THE ROLE OF THE ADMINISTRATIVE BOARD OF REVIEW

At the time of writing, 11 out of the 38 EU agencies have established, in their founding Regulation, a Board of Appeal. This was also the case in the domain of financial surveillance, where all the ESAs a dedicated BoA. Consequently, the establishment of an Administrative Board of Review constituted a pivotal element of the Commission's proposal even in the context of AMLA

[244] Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016) 106, 338.
[245] Damien Geradin, 'The Development of European Regulatory Agencies: What the EU Should Learn from American Experience' (2005) 11 Columbia Journal of European Law 1, 33.
[246] See AMLAR, Commission proposal Recital 47, p. 13.

Regulation 2024/11620. This is evident from the *Explanatory Memorandum*, which in the section dedicated to the organization and governance of AMLA, clarifies that '*there will be an Administrative Board of Review to deal with appeals against binding decisions ... addressed to obliged entities under its direct supervision'*. This emphasizes the need for an internal review mechanism in the setup of AMLA. The utility of creating the ABoR is confirmed for multiple reasons. Firstly, the decision-making process would be improved through the direct and immediate review of the legality of acts, thereby enhancing the agency's legitimacy and credibility. Internal review allows for the identification and correction of potential errors or abuses of discretion in decisions, contributing to the guarantee of '*procedural and substantive conformity with this Regulation of such decision*'.[247] Secondly, the purpose of the ABoR, similar to what happens with the Appeal Panel in the SRB, is to provide interested parties with the opportunity to obtain feedback from expert bodies quickly and more accessible than the lengthy bureaucratic procedures required for feedback from the Court.[248] This possibility is made even more credible for appellants thanks to the specific sectoral expertise of ABoR members.[249] These characteristics explain why Boards of Appeal are nowadays frequently considered in the judicial phase as support bodies to the Court. As stated by U.S. Supreme Court Justice Stephen Breyer, it is necessary to counter the idea that the focus should solely be on judicial review since it is often difficult to fully understand and evaluate agency actions without detailed knowledge of the regulatory policies guiding them.[250]

Nevertheless, while the establishment of an administrative review body may be beneficial, it is also crucial to acknowledge and assess the inherent limitations of such bodies. Firstly, it is important to note that in the available literature on EU law, the concept of *administrative review* does not find a clear and universally recognised definition, unlike that of *judicial review*.[251] A significant and readily apparent distinction between the two review procedures pertains to the potential for further appeals. The judicial review process, defined as the power of a court to examine the actions of public sector entities to ensure that they are legitimate, measured, and procedurally correct, serves

[247] See M. Chamon, D. Fromage, Between Added Value and Untapped Potential: the Boards of Appeal in the Field of EU Financial Regulation, in: M. Chamon/A. Volpato/ M. Eliantonio (eds.), Boards of Appeal of EU Agencies, 2022, p. 19.
[248] Rosa M. Lastra, Marco Bodellini, 'The Financial Appeal Bodies of the European Union: Nature and Future of the Appeal Panel of the Single Resolution Board' (2020) 17(2) European Company and Financial Law Review 335, 943.
[249] See AMLAR, Article 60(2) on the composition of the ABoR. It '*shall be composed of five individuals of high repute, having a proven record of relevant knowledge and professional experience, including supervisory experience in the area of anti-money laundering and countering the financing of terrorism*'.
[250] Lincoln Caplan, 'A Workable Democracy: The optimistic project of Justice Stephen Breyer' (March-April 2017) Features. <https://www.harvardmagazine.com/2017/02/a-workable-democracy> accessed 1 July 2024.
[251] Ibid.

as a critical check on the exercise of public power.[252] In contrast to internal administrative decisions, the decisions derived from the courts are of 'last resort'. This means that they are always binding, generally definitive, and, with the exception of instances where respect for human rights is concerned, unappealable. Such decisions are the result of a rigorous legal control process that not only evaluates the legitimacy of certain decisions but also their logical foundations and compliance with the principles of proportionality and necessity. In contrast, administrative decisions are designed to represent a preliminary step within a broader process aimed at evaluating purely technical compliance elements. They provide an initial review opportunity that can identify and correct errors before decisions are subjected to legal scrutiny. Consequently, administrative decisions of internal agency bodies are not definitive; they must necessarily represent only an intermediate step. In order to ensure a reliable and legitimate system of checks and balances, they must coexist with a further level of judicial appeal, which may be exercised as a last resort.[253]

This intrinsic and substantial limitation thus leads to the view that administrative review bodies are bodies with characteristics halfway between administrative commissions and courts of justice, in a single expression '*quasi-judicial*' bodies.[254] Reflecting on their nature, Sabino Cassese offers a fitting and, in my opinion, apt definition: '*If they are neither advisory bodies nor courts, they can only be considered to be administrative tribunals'*.[255] This functional hybrid highlights the complexity and specificity of these bodies, whose roles and competences must be clearly defined in order to avoid overlaps and inefficiencies in the European financial supervisory system. As Lastra and Bodellini explain, the creation of a banking union has led to a revolution in the competences of the various regulatory bodies involved in the supervision and regulation of the financial sector, which have gradually become decentralised and sometimes overlap.[256] The presence of different agencies and their review bodies, with similar or complementary mandates, has led to a duality of legal regimes and a multi-level system of appeals and disputes, resulting in inefficiencies and compromising the predictability of decisions.[257] The introduction of the AMLA, and in particular the ABoR, could further exacerbate these problems. Although the mandate of the ABoR is not directly aimed at the supervision of the banking sector, many credit institutions supervised by the European Banking Authority or the Single Resolution Board could also fall under the direct or

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[252] Mark Elliott, Administrative Law: Text and Materials (5th edn, Oxford University Press 2017) 72. For further information see also Aileen Kavanagh, Constitutional Review under the UK Human Rights Act (Cambridge University Press 2009) 35; Paul Craig, Administrative Law (8th edn, Sweet & Maxwell 2016) 456.
[253] Ramos-Muñoz, D., & Lamandini, M. (2020). Law and practice of financial appeal bodies (ESAs' Board of Appeal, SRB Appeal Panel): A view from the inside. Common Market Law Review, 57(1), 122.
[254] Ibid. p. 150.
[255] See S. Cassese, "A European Administrative Justice", Quaderni di Ricerca Giuridica 810 (2018), 9, 16.
[256] Rosa M. Lastra, Marco Bodellini, p. 939.
[257] Ibid.

indirect supervision of the AMLA with regard to their AML/CFT risk. Although these authorities are involved in different areas of financial regulation, in some very specific cases, an overlap of these competences could lead to potential conflicts between supervisors and even divergent positions of the appellate bodies on the same issue.[258] Therefore, in order to '*ensure the right to an effective* remedy',[259]as well as to avoid the risk of making the European coordination inefficient, '*the existing palette of differences should be avoided to […] enhance clarity, legal certainty and legitimacy.*'.[260]

The lack of convergence from this perspective creates a context in which the functions and limitations of bodies such as the ABoR or the Appeal Panel are better analysed on a case-by-case basis. Beyond the conceptual limitations related to definitions, the hybrid nature of the appeal bodies established in the financial sector was very evident even before the AMLA was established. In the context of the Single Resolution Board, for example, the Appeals Panel has demonstrated significant influence through binding decisions, but these powers are limited to specific areas of activity.[261] On the one hand, this allows it to intervene by directly modifying the content of the Board's decisions, but on the other hand, it leaves the regulation of entire areas of bank resolution entirely in the hands of the agency, creating a relatively large gap in the allocation of powers. With the AMLA's ABoR, this trend towards diversification seems to have been reinforced, as it appears with a slightly different configuration. From a procedural point of view, the ABoR, unlike the Appeal Panel, will not have the power to confirm the AMLA's decision or to remit the case to the authority for reconsideration in the traditional sense.[262] Indeed its role will be limited to '*express an opinion'* on the contested decision and '*remit the case for preparation of a new draft decision to the Executive Board, [which] shall take [it] into account and promptly adopt a new decision. [It] shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision*'.[263] This wording, closely mirroring that found in Article 24(7) of Regulation No 1024/2013 regarding the ECB's powers in the prudential supervision of credit institutions, suggests that the ABoR's authority is primarily advisory. This advisory capacity positions the ABoR similarly to the model used by the Single Supervisory Mechanism, in that it can only conduct an internal review resulting in a non-binding evaluation. Consequently, the ABoR can issue reasoned opinions

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[258] I am grateful to R. Torresan from the SRB Legal Service, for providing valuable insights and stimulating reflections on the potential overlap of supervisory competences, which constitute a significant contribution to the final outcome of this chapter.
[259] See Case T-755/17 Germany v ECHA [2019] ECLI:EU:T:2019:647, para 56.
[260] Maat, Pander and Scholten, p. 17.
[261] Specifically: a) the determination of minimum own funds and eligible liabilities (MREL) and b) access to documents.
[262] Rosa M. Lastra, Marco Bodellini, p. 943.
[263] AMLAR, Article 62(3).

on the contested decisions, which the Executive Board of AMLA is required to consider. However, having taken that opinion into account, the ultimate power to adopt a new, reasoned decision lies solely with the AMLA Executive Board.[264] In contrast, the Appeal Panel of the SRB and the Joint Board of Appeal of the European Supervisory Authorities issue binding decisions that must be exhausted before a complaint can be filed with the EU Court.[266]

This means that while the ABoR may be able to intervene in a wider range of cases, it may not have the same powers as the SRB Appeal Panel to intervene directly on the merits of the agency's decisions, therefore not performing its natural role of agency's counterweight. In this context, there appears to be a difference between the appeal bodies, which could lead to an imbalance of powers between *'stronger'* and more legitimate agencies than others. The coexistence of bodies capable of issuing binding decisions and others capable only of issuing non-binding opinions creates an obvious imbalance between agencies that should be on an equal footing.[267] This situation is even more emphasized in a context such as the banking or the financial one, where '*EU Courts (especially the General Court), [observe] the traditional "limited review" standard'* under which '*the judge must not substitute its own assessments for that of the administrative body, but focusing on whether the contested decision is vitiated by a manifest error, a misuse of powers, or a clear excess in the bounds of discretion*'.[268] If this imbalance persists, the result will be an uneven playing field between agencies with '*less power*', or which can exercise their powers with much more limitations due to their administrative review bodies (ESAs and SRB), and agencies such as the AMLA with much more influence, mandate legitimacy and powers. At this point, the question that naturally arises in this multilateral relationship between semi-autonomous agencies is: what would happen if one or more agencies with powers limited by their appeal bodies expressed an opposing view on the same situation or measure taken by the AMLA? Understandably, a premise is needed here. A scenario in which two agencies with different supervisory powers and scope express their views on the same situation is difficult to achieve in practice. However, in the area of financial regulation, such a scenario could be more likely, for example in the supervision of banks or credit institutions. As hypothesised earlier, this specific sector could realistically represent the most likely intersection of the supervisory activities of agencies such as the AMLA, the EBA and the SRB, as it may in some cases be subject to supervision by all three. Consider the hypothesis that the AMLA

[264] Ibid. Article 62(5), see also Allegrezza S., p. 33.
[266] Rosa M. Lastra, Marco Bodellini, p. 942, 943.
[267] Maat, Pander and Sholten have defined this distinction of powers as *'functional independence'*. While some BoAs possess *weak functional independence* (ECB) due to their non-binding decisions, those with binding decisions show *moderate functional independence* (ESAs and SRBs). Finally, those with binding, subjective decisions demonstrate *strong functional independence* (EUIPO, CPVO and ECHA). Please refer to page 9 for further details.
[268] Massimo Condinanzi, 'The "judicial" control of discretionary measures in banking and financial fields: the role of EU Courts (and Boards of Appeal)' (2023) *European Company and Financial Law Review 978, 982*.

adopts a very strict attitude towards a bank under its direct supervision that is deemed to be highly involved in money laundering activities, to the extent of imposing administrative or financial sanctions on the institution. If, as a hypothetical scenario, the same banking institution were simultaneously supervised by the SRB, which, in the context of a bank resolution, decided that such measures could endanger the financial stability of the institution and that a more lenient approach was therefore necessary, this would create a situation of regulatory misalignment. In this case, in addition to creating uncertainty, inefficiency and a lack of credibility towards the EU, the divergence of assessments between the two agencies would put the AMLA in a clear '*advantage*' position vis-à-vis the SRB.[269] This is because the ABoR would not have the concrete power to oppose its decisions, unlike the SRB, whose Appeal Panel could issue binding decisions. This scenario could lead to fragmented supervision, where firms simultaneously supervised by several authorities could not only receive conflicting guidance, but also have to deal with appeal bodies with very different levels of scrutiny, efficiency and consistency. Finally, even though all this would be a preliminary stage, pending the opinion of the CJEU, which has '*unlimited jurisdiction*' in its functions,[270] there are good reasons to state that, due to its intrinsic political nature, there is a '*limited (yet meticulous) scrutiny towards discretionary measures in the field of Banking Union and EU financial architecture*'.[271]

A balanced solution might include strengthening the internal review mechanisms available to the ABoR, while maintaining a strong external judicial review system to ensure the legitimacy and accountability of decisions. This issue is explored in more detail in the next section, where the ECB's opinion on the ABoR and its implications for financial supervision in the EU are analysed in detail, alongside more radical proposals for European intervention. A detailed perspective on the feasibility and potential impact of these proposals will be provided, examining how these developments could improve the coherence of financial supervision.

[269] I would like to acknowledge R. Torresan from the SRB Legal Service, for kindly providing insight for this hypothetical scenario, which serves as an illustrative example. From a legal point of view, this misalignment could raise questions regarding the consistency and effectiveness of EU legislation with reference to Article 114 TFEU. It aims at the approximation of legislative provisions to ensure the functioning of the internal market, calling for greater harmonisation of the powers of financial supervisory agencies.

[270] See Article 28 AMLAR. Also, D'Ambrosio, R., 2021, The legal review of SSM administrative sanctions, in Zilioli, C. (ed,) *Judicial Review in the European Banking Union*, (Edward Elgar Publishing 2021) p. 316.

[271] Massimo Condinanzi, p. 984.

1. *Balancing Power: Strengthening AMLA's Accountability*

In this respect, the literature is critical of the direction taken by the legislator and suggests that this imbalance needs to be addressed. In the academic debate, two possible countermeasures have emerged to limit the disparity between the internal appeal bodies of the agencies, which will be further expanded with the imminent creation of the ABoR of the AMLA. One possible solution to this imbalance could be the creation of a more coherent system for dealing with monetary and financial disputes, combining the advantages of technical expertise with legitimacy, accountability and effective legal protection. This proposal, although currently abstract and not on the negotiating table due to the significant institutional commitment it would require, envisages the creation of a system that includes a de facto administrative tribunal or a specialised court, or a combination of both options.[272]

In the specific context of European financial regulation, the establishment of an *ad hoc* tribunal, could mean the creation of a judicial body in support, or replacing the internal appeal bodies of the agencies, dedicated exclusively to resolving financial disputes. This hypothetical setup has been identified in today literature with the creation of specialized chambers within the CJEU.[273] They should be given specific and technical competences in all areas of financial regulation covered by the EU agencies, from banking supervision to bank resolution, financial market regulation and anti-money laundering. Composed of judges experienced in financial matters, it could operate within the institutional framework of the EU, but with sufficient autonomy and competence to ensure impartial decisions based on in-depth technical knowledge of the sector.[274] A similar approach has been adopted both within the EU,[275] and internationally by some countries with the creation of specialised chambers within their higher Courts.[276] The realisation of such a system in financial matters would require a structural change in the way European supervision is understood, both from a judicial and an administrative perspective. Several steps would be necessary, but not necessarily legislative reforms at EU level. The creation of a specialised financial court or chambers within the

[272] Ibid.
[273] Massimo Condinanzi, p.990.
[274] Jochen von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt' (2018) 9-25.
[275] Proposal to create a specialised intellectual property court, the Unified Patent Court (UPC), established under the Enhanced Cooperation Agreement between 25 EU Member States. The UPC centralises jurisdiction over European patent disputes, providing an example of how a specialised legal system can work effectively at the European level (Regulation (EU) No 1257/2012 and the UPC Agreement, 2013). The structure of the UPC, with a Court of First Instance, a Court of Appeal and supporting local and regional divisions, could be a replicable model for a financial court operating on a similar basis, ensuring a level of specialisation and consistency in financial regulatory decisions. See Official Journal of the European Union, Agreement on a Unified Patent Court, OJ C 175/01, 20.6.2013. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:42013A0620(01)> accessed 30 June 2024.
[276] See Jochen von Bernstorf.

CJEU could be facilitated by Article 257 TFEU, which states that '*the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas*'. Furthermore, the same Article specifies that '*[d]ecisions given by specialised courts may be subject to a right of appeal ... only or, when provided for in the regulation establishing the specialised court'.* Such a reform could represent a step forward from the limitations and inefficiencies of the current internal appeal bodies outlined above. On the one hand, it would achieve greater consistency and uniformity in dispute resolution by reducing the disparity of powers between appeal bodies and providing a more integrated and formalised structure. On the other hand, the possibility of appeal would not be automatic, but would have to be explicitly provided for in the legislation establishing the tribunal. Despite the potential positive outcomes of such a reform, as Lastra pointed out, '*the complexity of financial regulation requires a judicial body that can both understand and manage the intricate details involved*',[277] this structural change could face significant obstacles. In particular, the predictable complexity and slowness of the European legislative process, together with the need for broad consensus among Member States, could make it difficult to implement such an ambitious reform in the short term.

In view of these difficulties, Codinanzi, while recognising in the specialized Chambers a useful tool, proposes an alternative and widely supported approach: *enhancing the role of BoAs*.[278] This would mean creating a common model more similar to that of the EBA, ESMA, EIOPA and SRM, in which all the appeal bodies in the financial domain, have the power to issue decisions that are binding on the bodies responsible for the final decision.[279] This approach is also supported by the ECB, which states in its opinion on the creation of the AMLA that '*The ABoR ... has been designed ... similarly to the Administrative Board of Review under SSMR.*[280] *Beside this model, there are also other possible approaches, such as the model used within the EBA, ESMA, EIOPA and the Single Resolution Board where the appeal bodies, inter alia, adopt decisions that are binding for the respective bodies that subsequently adopt the final reviewed decisions. The design of the solution most appropriate for AMLA could therefore benefit from comparing the experiences gathered from the functioning of all the models*.'.[281]

277 Rosa M. Lastra, International Financial and Monetary Law (2nd edn, Oxford University Press 2015) 394.
278 Massimo Condinanzi explains that this would entail 'making [the BoAs] jurisdiction always mandatory and extending their powers' p.990. For further details of the step to take please refer to p. 987.
279 Ibid.
280 See Art. 24 Regulation (EU) No 1024/2013.
281 Opinion of the European Central Bank of 21 June 2024 on a proposal for a regulation of the European Parliament and of the Council as regards certain reporting requirements in the fields of financial services and investment support (CON/2024/21).

This suggests that strengthening the AMLA's appeals model would have a greater impact on the Agency's decision-making power, while at the same time further reducing the weight that its decisions can have. This is due to the fact that within the EU, the BoAs are designed to serve as *legal accountability mechanisms*,[282] which Chiti and Chiarulli identified as a '*counterweight*' against the power of agencies.[283] By increasing the power of an oversight body like the ABoR, the decisions made by the AMLA would be subject to more stringent scrutiny and potentially more frequent reversals or modifications. This can lead to a situation where the agency's authority and autonomy are undermined, as its decisions are continuously challenged and second-guessed. This change could thus be interpreted as a further '*lightening*' of the European Authority, which is precisely in line with recent developments in the *Meroni doctrine*, which seek to depoliticise the Agencies, also making them less autonomous and accountable for their actions, even recognising the importance of their technical expertise. However, if it is true that this new proposed format for the ABoR could create a stronger and more independent internal review structure, it is equally important to consider how this will affect the AMLA's interaction with the latest form of the *Meroni doctrine*. Compatibility with *Meroni* can be argued in a number of ways. First, the binding power of the ABoR would be limited to reviewing decisions already taken by the AMLA, which, as we have seen in the analysis of its legal basis (Regulation 2021/0240 (COD)), will operate in accordance with the case law on delegation of powers in most of its functions. The role of the ABoR would therefore be limited to ensuring that these decisions are taken in full compliance with the regulatory and procedural framework established in the amended AMLAR. This would not constitute a delegation of primary discretionary powers, but rather a technical control that evaluates the agency's decisions in terms of their compliance with the norms established by the legislator. Secondly, the existence of a final judicial control, represented by the possibility of an appeal to the CJEU, which has '*unlimited jurisdiction*' according to Article 28 AMLR, would ensure that the decisions of the ABoR would continue to be subject to a thorough external review. This external judicial control would be maintained to respect the pre-existing institutional balance and prevent abuses of power, in accordance with the requirements of the *Meroni doctrine*. Thirdly, the widespread interpretation of the case law offered by the General Court in the *ESMA-Short Selling* case, but especially by the Grand Chamber of the CJEU in the more recent appeal to the *Banco Popular* ruling, confirms that EU agencies can exercise discretionary powers only within clearly defined limits set by the legislator, so as to have objective criteria on which to measure and judge the actual exercise of such

[282] Paul Craig, *EU Administrative Law* (Oxford University Press 2012), 157; Madalina Busuioc, *The accountability of European agencies: legal provisions and ongoing practices* (diss. Utrecht University 2010), 167-172.
[283] Edoardo Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' (2009) 46 *Common Market Law Review* 5, 1395-1442, 1406; Paola Chirulli, 'The Boards of Appeal of European agencies: an overview' (2015) *Amicus Curiae* 103, 2.

powers during the review phase.[284] If, therefore, the legislator were to foresee a strengthening of the ABoR through an amendment to the AMLA Regulation, this procedure would meet the requirement of a mandate with clearly defined limits, ensuring that the administrative review decisions remain within a well-defined regulatory and procedural framework. This amendment could specify in detail the competences and limits within which the ABoR can intervene, recalling what was done with the SRB's Appeal Panel, ensuring that it cannot operate arbitrarily. Moreover, proof that such an administrative review body is fully compatible with European jurisprudence is provided by the mere existence of similar models for the above-mentioned bodies, which already operate with appeal bodies that have the power to issue binding decisions on their respective authorities.

In conclusion, strengthening the AMLA's ABoR would not only be compatible with the *Meroni doctrine*, but also desirable for a number of interrelated reasons. First, it would improve the internal consistency of European financial regulation and supervision. As we have shown, most EU financial regulatory agencies already operate with appeal bodies that have the power to issue binding decisions. Providing the ABoR of the AMLA with similar powers would promote a level playing field for all authorities, facilitate their cooperation and ensure that all can operate with the same level playing field. In addition, a strengthened ABoR would avoid the excessive '*dominance*' of the AMLA, which, without such powers, would be able to operate without adequate challenge until a decision is taken by the Court. Indeed, the possibility of resolving disputes internally would almost certainly lead to a reduction in the time and costs associated with constant recourse to judicial review, while maintaining a high level of expertise and, above all, credibility. In fact, in addition to speeding up decisions, a key consequence would be to strengthen the confidence of stakeholders and market operators in the AMLA review system, which would emerge strengthened in terms of legitimacy and trust. This is because the presence of a review body with binding powers would act as an internal counterbalance, ensuring that the Agency's decisions are constantly subject to rigorous and impartial review, creating an essential check and balance mechanism to prevent abuses of power and maintain institutional balance, ensuring transparency and accountability.[285]

2. *Towards Effective Governance: Ehnancing AMLA's Oversight Framework*

Concluding the previous chapter with a reflection on the importance of strengthening the ABoR of AMLA, in line with the principles of the Meroni *doctrine*, the focus now shifts to the detailed

[284] See case *Banco Popular*, Para. 70.
[285] Edoardo Chiti, 395, 1406; Maat and Scholten, p. 6.

analysis of the normative proposals and the final result achieved in Section V of Chapter III of the compromise text regarding the ABoR. This analysis is crucial to understanding how legislative choices can influence the effectiveness and transparency of AMLA, as well as its compliance with the principles of accountability and clarity of mandate required by the European regulatory framework. Starting from the already proven recognition that a strengthened ABoR, with binding decision-making powers, would promote an operational level playing field among various EU financial supervisory authorities and contribute to a more coherent and effective regulatory system, it is essential to examine whether and how these ideas have been incorporated into the proposed legislative text. With this premise, in this final subchapter, any amendments to the Commission's initial proposal will be examined in detail.

The European Commission's proposal for the establishment of the ABoR outlined an initial framework for the review of AMLA decisions, assigning the ABoR the task of expressing opinions on contested decisions and referring cases to the Executive Board for further action. However, the lack of an amendment to transform these opinions into new binding decision-making powers for the ABoR represented the only truly inadequate and significantly limiting element to the proper balance of European financial agencies. This disparity between BoAs and ABoRs within the same sector, as previously argued, could reduce the effectiveness of the review process, providing diverse and unbalanced depths of judgment. However, it is currently difficult to predict the concrete consequences of such a choice on the operations and potential appeals of AMLA decisions, especially considering that AMLA will be fully operational only from 2025. In this regard, it might be useful to compare it with the ABoR of the ECB. As previously mentioned, it was also designed with the power to issue non-binding decisions and given the overlapping texts of the two Regulations (No 1024/2013, Article 24(7) for the ECB and No 2021/0240, Article 62(3) for AMLA), it can easily be argued that the ECB's ABoR was the inspirational model for AMLA. Despite this apparent similarity, it is more than necessary to consider a distinction in the comparison between the two regulatory contexts. The ECB's ABoR, in fact, operating within an EU institution with decision-making bodies established by the Treaties, is in a different position compared to an agency like AMLA. For this reason, the non-binding nature of the ECB's ABoR opinions is justified by the need to respect primary law, which establishes that the Governing Council and the Executive Board are the only decision-making bodies of the ECB, granting it a level of autonomy and independence that an agency like AMLA does not possess.[286] Moreover, despite this apparent limitation, the ABoR of the ECB has proved to be a significant influence, sometimes influencing the

[286] Brescia Morra C, Smits R and Magliari A, ‘The Administrative Board of Review of the European Central Bank: Experience After 2 Years’ (2017) 18 *European Business Organization Law Review* 567, 573.

decisions of the Supervisory Board and contributing to the resolution of disputes without the need to resort to justice. For example, the General Court has recognised the importance of the ABoR's opinion in assessing the legality of ECB decisions, as in *Landeskreditbank Baden-Württemberg Förderbank v ECB*, where the ABoR's opinion was considered an integral part of the ECB's decision-making process and as such '*may, therefore, be taken into account for the purpose of determining whether that decision contained a sufficient statement of reasons* ...'.[287] Conversely, the ABoR of the AMLA, without binding powers, could easily fail to achieve the same level of influence and authority, leading to an increase in appeals to the General Court, as parties dissatisfied with the decisions of the AMLA may not find sufficient redress in the ABoR. Paradoxically, this could undermine the main objective behind the creation of the ABoR, which is to reduce the workload of the Court and provide a quick and effective review of contested decisions. The lack of binding powers could also undermine stakeholders' confidence in the AMLA's internal review process, limiting its effectiveness and authority. Indeed, '*the success of all these bodies depends on whether they gain the confidence of those affected by supervisory decisions*, [through] *the independence of the review which is essential for its credibility. Without independence, it simply becomes an extra and potentially expensive step on the way to the courts'.*[288] One possible solution to this problem could be to introduce mechanisms to strengthen the independence and authority of the ABoR, as some academics have suggested. For example, the possibility of entrusting the appointment of ABoR members to the European Commission and providing for some form of direct accountability to the European Parliament, as suggested Lamandini.[289] This could enhance the credibility, legitimacy and effectiveness of the ABoR, while ensuring that the decisions of the AMLA are subject to rigorous and impartial scrutiny.

However, when considering this proposal, some critical considerations arise. On the one hand, increasing the legitimacy of the ABoR could solve the current problem of imbalance due to its lack of authority compared to other financial supervisors. On the other hand, it risks creating a new imbalance of the opposite kind. An overly legitimised ABoR, directly accountable to the European institutions, could create another form of imbalance compared to the appeal bodies of other financial supervisory and resolution authorities, which would not enjoy the same level of legitimacy. This could lead to fragmentation in European regulatory harmonisation, undermining the objective of a single and coherent financial supervision. In addition, such an arrangement could

[287] See Case T-122/15 *Landeskreditbank Baden-Württemberg — Förderbank/BCE* [2017] ECLI:EU:T:2017:337, Para. 125.
[288] Sir William Blair, 'The ABoR and the Role of Independent Panels of Administrative Review: An Introduction' *in Building Bridges: Central Banking Law in an Interconnected World ECB Legal Conference 2019* 331, 334.
[289] Ibid., p. 334.

create tensions between the technical independence of the ABoR and the political influence of the European institutions, with the risk of politicising technical decisions and undermining the objectivity and impartiality of assessments. On the other hand, the current version of the *Meroni doctrine*, as interpreted in the recent *Banco Popular* judgment, could positively welcome greater accountability of an administrative review body, which falls into the category of delegated bodies. This approach aligns with the broader principle that bodies delegated by the European institutions should themselves be accountable to those institutions.. This would be all the more true if we are talking about bodies with the power to take discretionary and legally binding decisions, as is hoped for the future of the ABoR. An alignment with the *Meroni* principles suggests that a model of greater accountability could not only be compatible with existing case law but could also be a model to follow for future ABoRs or appeal panels of the EU. In conclusion, the choice to maintain AMLA's ABoR with non-binding powers reflects legislative caution which, although understandable, could have significant implications for the effectiveness and legitimacy of AMLA's internal review process. At the same time, the problems may not be confined to the agency. On the contrary, such an approach could exacerbate the disadvantages arising from a possible imbalance between supervisors in the same sector, i.e. the financial sector, which have to deal with appellate bodies with very different powers and levels of scrutiny. This could only exacerbate the difficulties of a highly fragmented and sectoralised financial supervision system in specific areas of competence (resolutions, banking supervision, anti-money laundering, etc.), where all these areas are destined to eventually intersect at convergence points. At that point, the balance between the capacity for control and the principle of legal certainty would be crucial. However, the current direction taken by the legislator seems to go in exactly the opposite direction to these hopes, indicating a limitation of the binding nature of the AMLA's administrative review. As we have noted, a possible solution could be the introduction of mechanisms that strengthen the accountability and authority of the ABoR, in order to balance autonomy and control by European institutions with more incisive powers in legal terms. However, the debate on this point remains open, as such a change could create new imbalances by introducing an excessively legitimised review body compared to other financial supervisors. Therefore, a more moderate approach may be preferable, providing for stronger control and transparency mechanisms without introducing a level of legitimacy that could lead to new forms of imbalance. Ultimately, the current state of affairs suggests that the legislator's direction points towards a continuous evolution towards greater integration and accountability of European financial supervisors, but at the current expense of the intervention capacity of their administrative review bodies.

5. Conclusion

As can be deduced from the structure of this thesis, the evolution of the European regulatory framework, increasingly characterised by the creation of new agencies to manage specific areas of the European single market has significantly addressed the challenges of money laundering and financial crime through the proposal to establish the new European Anti-Money Laundering Authority. The centralisation of supervision, with a new authority playing the role of 'supervisor of supervisors', aims to create a more coherent and integrated system. In this context, the aim of the present work was to analyse how the AMLA, and in particular the powers directly conferred on it by the institutions through the legal basis of a regulation, fits into the broader and more debated doctrine governing such types of delegation, known as the *Meroni doctrine.*

To address this question, the research structure had to follow two parallel and seemingly distinct paths, which, however, aimed to provide a comprehensive overview of the subject, fundamental in my opinion to answer the Research Question:: '*Do AMLA's current powers and mandate, as laid down in the negotiated version of its funding Regulation of 29 February 2024, comply with the Meroni doctrine and its subsequent developments in terms of accountability? If so, how?*'. The first chapter outlined a comprehensive analysis of the evolution of the *Meroni doctrine*. Starting from its origin in 1956, it traced the entire evolution of its jurisprudential foundations up to its most recent and modern application, through a thematic reading key that focused on the most determining aspects around which the delegation of EU powers revolves: a) clarity of agencies' mandate; b) accountability; and c) judicial review. This jurisprudential analysis has revealed a very particular and ambiguous path that the Court of Justice of the European Union has followed over the decades. Indeed, in the *ESMA-Short Sellin*g and *Banco Popular* judgments, there was an initial attempt to distance itself from the first and stricter version of the doctrine, seeking a more '*progressive*' interpretation in line with the times characterised by the relentless agencification of the EU. However, this trend was abruptly interrupted and reversed by the decision of the Grand Chamber of the Court of first instance of 18 June 2024, which returned to the old delegation standards established with *Meroni* and established an '*old-new*' doctrine. The *old* aspect consists in reaffirming that agencies are bodies which are not authorised to take discretionary binding decisions or decisions which may have political consequences of any kind, unless this is authorised by the European institutions provided for by the Treaties, which are then legally responsible for the act adopted. The *new* aspect of this case, however, lies solely in the completely different legal context in which the decision was taken. The origin of *Meroni* stems from an administrative context in which agencies, as we understand them today, did not exist, but were bodies to which the High Authority delegated its powers, governed by national law and not by secondary law provisions. Today, the context is completely different, as these agencies are created with a solid legal basis provided by a European law (usually a Regulation) approved by the co-legislators in accordance with the Ordinary Legislative Procedure, which defines each and every one of their competences and the way in which they are to be exercised in a very detailed manner. Rarely is there any discretion left to these bodies, which is in any case increasing as a result of the ongoing process of European integration, which each year adds new areas of the internal market to be managed at European level, which the EU cannot regulate in detail. Within the process of EU agencification in the financial sector, an evolutionary trend has clearly emerged, from initial intergovernmentalism to growing supranationalism. This phenomenon is particularly evident when looking at the creation and evolution of key European institutions and agencies in the aftermath of the global financial crisis. First, the European Central Bank, a key institution in financial supervision, is a paradigmatic example of intergovernmentalism. Through its Supervisory Board, the ECB exercises both microprudential and macroprudential supervision of credit institutions. The Supervisory Board is composed of representatives of the Member States, as provided for in Article 26(1) of Regulation (EU) No 1024/2013, which establishes the legal framework for the Single Supervisory Mechanism. This institutional set-up reflects a clear intergovernmental influence, as supervisory decisions are taken with the direct involvement of Member States, ensuring that supervisory policies are aligned with national interests. The Single Resolution Board, created exactly ten years before the AMLA, represents an intermediate stage between intergovernmentalism and supranationalism. Although it acts as an independent agency that takes decisions related to the resolution of troubled banks, the decision-making process is not completely autonomous. As examined in the Banco Popular resolution, in resolution situations the Board may need to obtain the approval of the Council, the body that essentially represents the interests of the Member States. This is clearly set out in Article 18(7) of Regulation (EU) No 806/2014, which gives the Council the power to approve or block resolutions proposed by the SRB. Therefore, the SRB embodies a hybrid model in which elements of supranationalism are balanced by intergovernmental control, ensuring that resolution decisions reflect a compromise between European autonomy and national sovereignty.[290] AMLA represents the ultimate and apex point of this trend towards supranationalism. The European Anti-Money Laundering Authority adopts a decision-making model strongly inspired by the SRB but takes this approach to a higher level. AMLA's structure provides for a two-tier supervision (direct and

[290] This insight is attributed to D. Segoin, Senior Legal Counsel at the European Central Bank, from his presentation entitled ‘AMLA Relationship and Comparison with SSM’ at the Intensive Summer Course on ‘AMLA and EU Financial Agencies’ organised by the Department of European Studies at the University of Salzburg.

indirect), where decisions can be made internally without the direct involvement of Member States. This is particularly evident in the articles of the Regulation concerning administrative and pecuniary sanctions, where AMLA has the power to issue decisions directly, albeit based on predefined standards and criteria set by the European Commission. In these cases, Member States' intervention is minimized, significantly reducing or eliminating their ability to oppose the agency's decisions, except in judicial review. Moreover, in procedures requiring institutional intervention for the transition from indirect to direct supervision, as provided by Article 30 of the Regulation, the role of the Council is replaced by the European Commission. This change eliminates another level of intergovernmental control, reinforcing AMLA's supranational nature. The Commission, as the sole European institution involved, represents the common interests of the Union rather than those of individual Member States, making AMLA's decision-making process more centralized and autonomous. This supranational characteristic of AMLA implies that, unlike other agencies, continuous support from the Commission is not always necessary for its daily operations. Member States will not have the power to directly oppose AMLA's decisions except through judicial means, which means that any opposition must be based on procedural or formal defects rather than political or national considerations. This approach significantly reduces the risk of political interference in the agency's decision-making process, ensuring greater consistency and uniformity in the application of anti-money laundering rules across the European Union.

Once it was clarified how the new *Meroni doctrine* established a clear context within which the new AMLA must operate, the research then analysed the second aspect, namely the text of the actual legislative proposal of the Commission, comparing it with the compromise text approved by the European Parliament and the Council. This second path is necessary to relate the notions previously obtained regarding the three criteria to be respected during the exercise of delegation (namely a mandate that provides clear limits to discretionary powers, accountability of agencies towards delegating institutions, and judicial review of every decision) with the powers conferred on AMLA. The goal, in fact, is to evaluate whether and how the powers conferred on AMLA align with these criteria of the *Meroni doctrine*. Having analysed some of the key provisions of the new AMLA's operational power (e.g., Articles 12 and 13, Article 30, Article 20), we can affirm with certainty that most of the procedural and compliance issues in the legislative proposal have been considered and effectively resolved in the compromise text. However, despite the significant progress made in the final version, some small but significant areas of uncertainty remain, which may require further attention in the future and likely need to be tested for their correct functioning. For example, while the compromise text has clarified many aspects related to the selection and direct supervision of obligated entities, there remains some ambiguity regarding AMLA's ability to intervene effectively without incurring excessive discretion. This is particularly relevant for articles regulating indirect supervision and especially the assumption of supervisory competences in case of risk profile deterioration, such as Article 30. Here, although more specific criteria have been introduced, there is still a risk that AMLA may find itself operating in a not entirely clear regulatory context, increasing the potential for legal disputes and operational inefficiencies. For this reason, given the uncertainty surrounding the fact that this procedure may imply a discretionary margin for the agency, it was necessary to intervene along the lines of what happens in the resolution procedures drawn up by the SRB. In that case, as per Article 30(4), it is the Commission that must intervene to give the agency the go-ahead, taking all legal responsibility for the case and remaining the institution to be cited in case of litigation. This necessity is mainly due to the fact that, evidently according to the legislator, the mandate of the Article in question has not reached a sufficiently high level of detail to make the margin of autonomy of the agency's actions equal to or very close to zero, foreseeing that many litigations would arise due to concerns related to compliance with the old-new interpretation of Meroni, it was preferred to dispel any doubt through the responsibility shifted to the Commission, a fully legitimized body. Proof of this is given by Article 21 AMLAR, which could have even more intrusive implications for SOEs, as it allows for the imposition of pecuniary sanctions. In this case, the procedure has been so detailed (see change from *material* to *serious, repeated or systematic*) that AMLA will have no power to autonomously decide when to impose such a sanction or the amount of such a sanction. Since everything will happen almost automatically, the legislator did not deem it necessary to intervene to support such decisions. The moral is that if the agency's mandate is precise and well defined, it will be very difficult for questions of compatibility with the *Meroni doctrine* to arise, even in the most anti-delegation version.

Finally, the last criterion analysed in relation to the founding regulation of the AMLA concerns judicial and administrative control. Since it is essential, in terms of accountability, that the decisions of the AMLA are subject to effective and thorough judicial review, Article 28 of the AMLA establishes that the CJEU has '*absolute jurisdiction*' over any decision taken by the Authority. The Court has a fundamental role to play in this context, but it is necessary to ensure that its workload does not jeopardise the timeliness and effectiveness of judicial review. Strengthening internal review mechanisms, such as administrative review mechanisms, could help to reduce the number of appeals to the General Court while improving the quality of initial decisions. In this regard, the analysis of the role of the Administrative Board of Review, the AMLA's internal body for administrative review of its decisions, highlighted the crucial importance of this body in ensuring accountability and transparency. However, the limitation of the ABoR's powers, which currently only allow it to issue non-binding opinions, is the main weakness identified by several academics and experts. Strengthening the ABoR with binding decision-making powers, as suggested by the literature and supported by the experience of other European agencies, would increase stakeholders' confidence in the internal review process and improve the overall effectiveness of anti-money laundering oversight. However, this improvement was not made in the final compromise text, and it seems fair to say that this is the point in the Regulation where the legislative process has most misunderstood the right direction to take for the proper functioning of the AMLA. Despite the obviousness of this important oversight, it is not yet possible to assess the impact that this choice will have on the AMLA's activities and on the European financial regulatory system as a whole, understood as a network of interconnected parts in which several agencies, institutions and actors, including at the national level, cooperate.

The issue of the effectiveness of an ABoR with these prerogatives will undoubtedly be one of the topics to be further explored in future academic literature in the years to come, once the AMLA has become operational and the first foreseeable appeals against its decisions have been lodged. This aspect could be further enriched by comparisons with bodies with similar characteristics (e.g. the ABoR of the ECB) or diametrically opposed characteristics (e.g. the Appeal Panel of the SRB or the Joint Board of Appeal of the ESAs) in order to delineate a unique and effective path to be followed at the European level. Moreover, the potential overburdening of the Court of Justice of the European Union caused by an increase in appeals due to the perceived inadequacy of internal administrative review deserves in-depth reflection, as it would undermine the very raison d'être of an internal review body.

Taken together, these aspects and issues clearly indicate that the practical implementation of the AMLA and its interaction with the existing legal framework will need to be closely monitored in the future. This could serve as an extremely interesting barometer to measure the direction in which European financial regulation has decided to go after the return to the old delegation standards. In conclusion, therefore, the answer to the research question can be considered positive. This thesis has demonstrated that, from the point of view of compatibility with the *Meroni doctrine*, the legislator has largely succeeded in improving those small but significant procedural and formal deficiencies that would certainly have slowed down or blocked the proper functioning of the AMLA. Furthermore, the inclusion of a more robust internal review mechanism, as suggested in various academic papers, could significantly enhance the operational efficiency and stakeholder confidence in the Union’s financial market regulation. However, despite the significant progress made with the compromise text of the Regulation, there remain equally important challenges and areas for improvement that will require further attention once the Agency becomes operational. As the AMLA moves forward, continuous monitoring and adjustments based on empirical evidence and practical experiences will be essential to address emerging challenges and ensure compliance with the evolving jurisprudential landscape. Moreover, it underscores the necessity for future regulatory developments to consider a balanced approach, taking into account both the independence and accountability of agencies to foster a more robust European financial regulatory framework. Compliance with the criteria of the *Meroni doctrine*, the need to strengthen administrative review mechanisms, interaction with other financial supervisors, and adaptation to new challenges in the global financial landscape are issues that will require ongoing analysis and in-depth study. Future research will need to focus on these aspects to examine whether the AMLA can operate effectively, transparently and responsibly, contributing to a safer and more resilient European financial system. Strengthening the interplay between internal administrative reviews and judicial oversight will be crucial for maintaining the integrity and effectiveness of AMLA's regulatory functions.

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