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# The Delegation of Executive Powers to EU Agencies and the Meroni and Romano Doctrines

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## Summary

The authors' goal with this paper is to give insight into the complex world of EU agencies and the case-law most relevant for development of their role in the EU law. As they gain an ever-increasing importance in the EU institutional landscape, and because of the scope of powers that are being given to them, they are of interest to all Member States, Croatia included. The paper first explains the background and the importance of the Meroni and Romano judgements for the subject of EU agencies, following with the overview of the newer case-law whose formulation shows evolving in understanding of each of these two judgements respectively. In their elaboration the authors will cover the issue of delegation of powers to EU agencies from the, mostly but not exclusively, perspective of the primary legislation of the EU; case-law of the Court of Justice of the European Union; and the current but differing academic legal reasoning. Moreover, the authors will pass their own judgement and give their opinion on the state of play of agencies in the EU.

*Key words: EU agency, delegation of powers, executive powers, discretionary powers, judicial overview.*

## 1. 1. INTRODUCTION

The EU is going through a process of 'agencification'<sup>1</sup> or what other authors vividly call

<sup>1</sup> "Agencification refers to the creation of semi-autonomous organizations that operate at arms' length of the government, to carry out public tasks (regulation, service delivery, policy implementation) in a relatively autonomous way i.e. there is less hierarchical and political influence on their daily operations, and they have more managerial freedoms. There is much controversy over the definition of agencies but a consensus has grown that an 'agency' in terms of agencification is an organization that (i) is structurally disaggregated from the government and (ii) operates under more business-like conditions than the government bureaucracy. Agencies can for example have a different financial system and personnel policies, although the degrees of financial, personnel, and management autonomy vary per (type of) organization. It is exactly this degree of variation between (types of) organizations that make it impossible to develop a more precise definition." See also: CH Hofmann; H. Herwig; A. Morini,

'mushrooming of EU agencies'.<sup>2</sup> They appeared for the first time in the EU's institutional landscape in 1975, went through a boom in the 1990's to finish with more than 40 of them.<sup>3</sup> With the EU institutions more or less susceptible to interests of the Member States (hereinafter: MSs) and politics, a general *raison d'être* for establishing agencies was a creation of more 'technical' bodies which could offer support from the stage of decision-making up to implementation of various Union policies.

Nevertheless, it was not until the pace of their establishment accelerated and not until they received ever-wider competences, that their foundations and lack of stronghold in the Treaties came into question. Despite the numerous inter-institutional documents which followed in dealing with this matter,<sup>4</sup> various issues surrounding EU agencies are still not completely sorted out. Since the creation of agencies may also mean a delegation of executive powers to EU agencies that are not directly accountable to EU citizens, the authors of this paper believe that it is paramount to better understand EU agencies, its establishment and the delegation of powers to them.

Moreover, the paper will examine what are the key legal *condiciones sine quibus non* of delegation of executive powers to EU agencies. In other words, the paper will give insight into the complex world of rules on delegation of powers and of the *Meroni* and *Romano* doctrines which the Court of Justice of the European Union (hereinafter: the Court) developed through the years.

## 2. THE BEGINNINGS

Since the provisions of the Treaty of Lisbon are not clear on neither the establishment nor on the empowerment of Union agencies, when analysing whether a delegation of executive powers can be made to EU agencies, EU institutions and numerous legal academics have, in their analyses, turned to Court's old rulings in the *Meroni* from 1958 and *Romano* from 1981, which dealt with institution's delegation of powers on other Union bodies.<sup>5</sup> A short overview of the cases will be presented for the sake of understanding the system of delegation of powers in the EU that will be further discussed.

In the *Meroni* case the applicant *Meroni & Co., Industrie Metallurgiche, S.P.A.* challenged the High Authority's (an institution which was counterpart to today's Commission) delegation of powers for the financial operation of the ferrous scrap regime<sup>6</sup> to two bodies

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Constitutional Aspects of the Pluralisation of the EU Executive Through "Agencification", *European Law Review*, 4/2012, 38, page 419.

<sup>2</sup> M. Busuioac, Accountability, control and independence: The case of European agencies, *European Law Journal*, 15/2009, page 600. ; A. Meuwese; Y. Schuurmans; W. Voermans, Towards a European Administrative Procedure Act?, *Review of European Administrative Law* 2009, page 16.

<sup>3</sup> For a list of EU agencies see: <[https://europa.eu/european-union/about-eu/agencies\\_en](https://europa.eu/european-union/about-eu/agencies_en)> (20. 08. 2017).

<sup>4</sup> Commission Communication; The operating framework for the European Regulatory Agencies, European agencies – The way forward; Joint Statement of the European Commission and the Parliament on decentralised agencies, <[https://europa.eu/european-union/sites/europaeu/files/docs/body/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf)> (29. 08. 2017). ; Commission Communication; Roadmap on the Follow- Up to the Common Approach on EU decentralised Agencies <[https://europa.eu/european-union/sites/europaeu/files/docs/body/2012-12-18\\_roadmap\\_on\\_the\\_follow\\_up\\_to\\_the\\_common\\_approach\\_on\\_eu\\_decentralised\\_agencies\\_en.pdf](https://europa.eu/european-union/sites/europaeu/files/docs/body/2012-12-18_roadmap_on_the_follow_up_to_the_common_approach_on_eu_decentralised_agencies_en.pdf)> (27. 08. 2017).

<sup>5</sup> M. Chamon, The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom v Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism *European Law Review*, 3/2014, page 382.

<sup>6</sup> Iron and steel scrap, also referred to as ferrous scrap, comes from end of life products (old or obsolete scrap) as well as scrap generated from the manufacturing process (new, prime or prompt scrap). Institute of Scrap Recycling Industries (definition of iron and steel scrap) <<http://www.isri.org/recycling-industry/commodities-specifications/ferrous-scrap#.WJUPu vkrLIU>> (4. 02. 2017).

founded under Belgian private law, which were called the Brussels Agencies. It claimed that according to Article 8 of the European Coal and Steel Community Treaty (hereinafter: ECSC) the High Authority has no right to delegate its powers. Though the Court ultimately ruled in favour of Meroni, it stated that the possibility to entrust certain tasks to bodies established under private law cannot be excluded.<sup>7</sup> The Court framed the permission, stating that the delegation can never be presumed, but it is always a result of the express decision of the delegator and further stressed that the delegator cannot confer powers other than those it has itself received under the Treaty.<sup>8</sup> Moreover, the Court ruled out a delegation of discretionary powers, and explicitly stated that only clearly defined executive powers can be delegated, *'the exercise of which can (...) be subject to strict review in the light of objective criteria determined by the delegating authority'*.<sup>9</sup>

The so-called *'Meroni doctrine'* that has been constructed on the basis of the abovementioned ruling, confirms the ability of the EU institutions to delegate powers to EU agencies, but also constrains the delegation of such powers where the use of them would require the exercise of wide discretion.<sup>10</sup> The Court's judgment laid down three key conditions (i.e. three key criteria) of the *'Meroni doctrine'*:

1) An institution may not delegate powers that it does not itself possess;

2) A delegation of powers, which *'involves clearly defined executive powers [...] which can be subject to strict review in light of objective criteria, determined by the delegating authority'*, is permissible;

3) A delegation of powers which *'involves a discretionary power, implying a wide margin of discretion, which may [...] make possible the execution of actual economic policy'* is impermissible. This is because the power *'replaces the choices of the delegator by the choices of the delegate'* and thereby *'brings about an actual transfer of responsibility'*.<sup>11</sup>

However, the authors deem that it is important to call attention to the fact that there is a serious lack of consensus in the interpretation of the *'Meroni doctrine'*.<sup>12</sup>

In the *Romano* case<sup>13</sup>, in short, the problem was a diminution in the value of the Italian lira in comparison to the Belgian Franc, which affected the amount of the pension awarded to Mr. Romano. Belgian insurance institution, *Institut national d'assurance maladie-invalidité* (INAMI) in adjusting proportionately the original decision on the pension grant and specifying the amount to be recovered used two different exchange rates in its calculations, resulting in the request for an amount higher than the amount of benefits paid.

To justify the use of different exchange rates, the INAMI referred to decision No 101 of the Administrative Commission on Social Security of Migrant Workers, which was em-

<sup>7</sup> Case C 9/56 *Meroni* ECLI:EU:C:1958:7, para 151 subpara 2.

<sup>8</sup> Case C 9/56 *Meroni* ECLI:EU:C:1958:7, para 150 subpara 1 – 151 subpara 2.

<sup>9</sup> *Ibid.*, para 152.

<sup>10</sup> T. Ambrasas, A legal perspective of the single resolution mechanism, *Social Transformation in Contemporary Society*, 2/2014 <<https://www.noexperiencenecessarybook.com/vM6aq/a-legal-perspective-of-the-single-resolution-mechanism-social.html>> (1.03. 2017).

Regulation and Institutional Balance, The Jean Monnet Center for International and Regional Economic Law & Justice <<http://www.jeanmonnetprogram.org/archive/papers/01/010301-04.html>> (5. 03. 2017).

See more: M. Chamon, EU Agencies: Does the Meroni Doctrine make sense?, *Maastricht J.Eur & Comp. L.*, 17/2008, page 281

<<http://heinonline.org/HOL/LandingPage?handle=hein.journals/maastje17&div=27&id=&page=>> (6.03.2017).

; R. van Gestel, *European Regulatory Agencies Adrift: Case C-270/12 United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, Judgment of 22 January 2014, Not Yet Reported, *Maastricht Journal of European and Comparative Law*, 2014, pages 188-193.

<sup>11</sup> Case C 9/56 *Meroni* ECLI:EU:C:1958:7, para 152.

<sup>12</sup> Chamon, *op. cit.* (n 5).

<sup>13</sup> Case C 98/80 *Giuseppe Romano v. Institut national d'assurance maladie-invalidité (Romano)* ECLI:EU:C:1981:104.

powered by the Council of the EU (hereinafter: the Council) to fix the conversion rates applicable under Article 107 of Regulation 574/72.<sup>14</sup> The question that rose from there was whether the Council initially could confer legislative power on the Administrative Commission.

Both the Court and the Advocate General ('AG') concluded that such a conferral is not acceptable for two reasons, which became two decisive referring points when talking about the Romano doctrine. First, they claimed it is incompatible with the Article 155 of Treaty establishing the European Economic Community (EEC) (after the Treaty of Lisbon in substance replaced by Articles 290 and 291 Treaty on the Functioning of the EU (hereinafter: TFEU)<sup>15</sup> which enabled conferral of implementing powers on the Commission, stating that '*there is nothing in the Treaty to suggest that the Council may delegate legislative power to a body such as the Administrative Commission*'.<sup>16</sup> Second, they pointed that the Articles 173 and 177 EEC (now Articles 263 and 267 TFEU) that govern the system of judicial protection give the Court jurisdiction only over the acts of the Community institutions.<sup>17</sup> Therefore, it is not reconcilable with the constitutional principles of the MSs and with the Treaty principles to have '*an administrative body empowered to make binding decisions*'.<sup>18</sup> In the *ESMA* case,<sup>19</sup> a recent judgement that has also dealt with the issue of EU agencies, the Court stated that the *Romano* case is to be understood as prohibiting the conferral of legislative powers on bodies other than the EU legislature.<sup>20</sup> The lesson from those two judgements, therefore is that legislative powers cannot be delegated on the administrative bodies of the EU, but executive powers can.

<sup>14</sup> Regulation (EEC) No 574/72 on fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, 1972, OJ L 74.

The Regulation is no longer in force. In-stead: Council Regulation (EC) No 1606/98 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover special schemes for civil servants, 1998, OJ L 209.

<sup>15</sup> Consolidated version of Treaty on the Functioning of the European Union, 2012, OJ C 326.

<sup>16</sup> Case C 98/80 *Romano* ECLI:EU:C:1980:267, Opinion of AG Warner, page 1264.

<sup>17</sup> Case C 98/80 *Romano* ECLI:EU:C:1981:104, para 20.

<sup>18</sup> Case C 98/80 *Romano* ECLI:EU:C:1980:267, Opinion of AG Warner, page 1265.

<sup>19</sup> In May 2012, the United Kingdom brought an action before the Court seeking annulment of Article 28 of the Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ 2012 L 86, p. 1). The United Kingdom submitted that Article 114 TFEU is not the correct legal basis for the adoption of the rules laid down in Article 28 of the Regulation. The United Kingdom also contended, inter alia, that an EU agency, European Securities and Markets Authority (hereinafter: ESMA) has been given a very large measure of discretion of a political nature which is at odds with EU principles relating to the delegation of powers. Although AG Niilo Jääskinen proposed that Article 28 of the Regulation be annulled on the grounds that Article 114 TFEU is not a proper legal basis for its adoption, the Court took a different view. The Court took the view in favour of the EU agency, i.e. ESMA, and such a position of the Court is regarded as a controversial one in the academia.

See more on the ESMA case: Case C 270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (ESMA)* ECLI:EU:C:2014:18; Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2012] ECLI:EU:C:2013:562, Opinion AG Jääskinen. ; See also: P. Nicolaidis, N. Preziosi, Discretion and Accountability: The ESMA Judgment and the Meroni Doctrine, Bruges European Economic Research Papers 30/2014 <<http://aei.pitt.edu/57214/>> (14. 04. 2017). ; S. Gabbi, The Principle of Institutional (Un)Balance after Lisbon European Journal of Risk Regulation, 5:2/2014, page 259. ; N. Moloney, *EU Securities and Financial Markets Regulation*, OUP, 2014. ; M. Simoncini, Legal Boundaries of European Supervisory Authorities in the Financial Markets: Tensions in the Development of True Regulatory Agencies, YEL, 34/2015, page 319.

<sup>20</sup> Case C 270/12 *ESMA* ECLI:EU:C:2014:18, para 60.

In the two judgments, the Court and the AGs stayed relatively concise in delivering their argumentation,<sup>21</sup> the details of which will be discussed later, which had consequences for the rulings' clarity and academic consensus on both their legal elements and 'precedential' importance.<sup>22</sup> The first one to say that the conditions from the *Meroni* apply to the transfer of (implementing) powers to agencies was AG Geelhoed in the case *Commission v Parliament and Council* in the year 2000, but he did not go further than mentioning it in a footnote.<sup>23</sup> Five years later, the Court applied the '*Meroni doctrine*' (i.e. the three *Meroni* criteria) in the case *Tralli*<sup>24</sup> to a situation of an internal delegation of powers within the ECB, and at about the same time, in *Alliance for Natural Health*<sup>25</sup> on the delegation of powers from the Community legislator to the European Commission (hereinafter: the Commission). From then on, the *Meroni* doctrine was a constant litmus test when considering legality of delegation of powers within the Union, but its interpretation, as it will be seen, was changing over the time. On the other side, *Romano* was less referred to,<sup>26</sup> even though some authors claim that *Romano* judgment bears more resemblance to the problem of empowerment of contemporary agencies than the *Meroni* judgment does.<sup>27</sup>

There are four main objections to the uncritical reliance on the three *Meroni* conditions (i.e. criteria). The first is the difference between the bodies in question, because in *Meroni* the Brussels Agencies were founded under private law, whereas Union agencies are public bodies established by secondary law.<sup>28</sup> The second one, the delegator in the *Meroni* was the High Authority (today's parallel would be the Commission) in contrast to the EU agencies which are established and empowered by the Union legislature.<sup>29</sup> The third, the reasoning behind the *Meroni* was based on the ECSC Treaty, distinct from the EU Treaties currently in force.<sup>30</sup> And lastly, somewhat derived from the last difference, one of the most pivotal concerns of the *Meroni* (and *Romano* even more) was the lack of judicial supervision over the acts of the non-institution bodies, whereas today articles 263 and 267 TFEU explicitly subject agencies to Court's jurisdiction.<sup>31</sup>

Nevertheless, since even after the Treaty of Lisbon the agencies are too scarcely mentioned in the Treaties to offer solid legal framework for their establishment and functioning, and the Court in the aforementioned *ESMA* case considered *Meroni* and *Romano* judgments in reaching its decision, the EU legislator is bound to have in mind the constraints of both of them in its future legislative acts concerning agencies and agency-like structures. Being so, the authors hold that only the analysis of the initial, then the evolving and finally current understanding of the two rulings can provide the understanding of the *Meroni* and *Romano* doctrines.

<sup>21</sup> Case C 98/80 *Romano*, ECLI:EU:C:1980:267, Opinion of AG Warner; Case C 9/56 *Meroni*, ECLI:EU:C:1958:4, Opinion of AG Roemer.

<sup>22</sup> Chamon, *op. cit.* (n 10), page 289.

<sup>23</sup> Case C-378/00 *Commission of the European Communities v European Parliament and Council of the European Union* ECLI:EU:C:2002:561, Opinion of AG Geelhoed, para 59.

<sup>24</sup> Case C 301/02 *Carmine Salvatore Tralli v European Central Bank* ECLI:EU:C:2005:306.

<sup>25</sup> Case 154/05 *Alliance for Natural Health* ECLI:EU:C:2005:449.

<sup>26</sup> Score being 11:7 for AGs vs. The Court in regard of how many times they have mentioned *Romano*.

<sup>27</sup> Chamon points to three reasons, namely a) it was ruled under the EEC Treaty and not under the ECSC Treaty; b) the delegator was a legislator, and not an executive branch; and c) the delegate was a body established under secondary law. See more: M. Chamon, *EU Agencies Between Meroni and Romano or the Devil and Deep Blue Sea*, *Common Market Law Review*, 48/2011, page 1060.

<sup>28</sup> Case C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen, para 69.

<sup>29</sup> Chamon, *op. cit.* (n 25) page 1059.

<sup>30</sup> Case C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen, para 69.

<sup>31</sup> *Ibid.*, para 72.

The part, which the authors of this paper named the ‘*initial understanding*’ of the ruling can be seen as the academic analysis of the *Meroni* and *Romano* judgments itself and in themselves, independent of the further development of the case-law of the Court on the subject. ‘*The evolving understanding*’ necessarily turns more to the Court’s point of view, while ‘*the current understanding*’ is initiated by the recent Court’s judgments and then followed by conflicting opinions of the academics. In the following section, each stage will be discussed. In the end, it is also important to mention the *Les Verts* judgment,<sup>32</sup> which influenced the amendments of the Treaty of Lisbon that changed the articles, specifically Articles 263, 265, 267 and 277 TFEU, that refer to the system of judicial review, now explicitly stating that ‘[t]he Court of Justice of the European Union shall (...) review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.’<sup>33</sup>

The *Les Verts* case allowed a possibility to interpret the existence of the Court’s jurisdiction to review acts of agencies even without the express jurisdiction being given to the Court (as in the Treaty of Lisbon today). Reasoning from the *Les Verts* case, advocating for the judicial review of the agencies’ acts, was also one of the arguments that influenced the debate about the appropriateness of delegation of powers to EU agencies.

### 3. MERONI V. HIGH AUTHORITY

From the previous subchapter, as far as the *Meroni* case is concerned, two points can be noted. First, from the short layout of the facts and the Court’s arguments it can be seen that the ruling contains several elements which make up what we today refer to as ‘*The Meroni doctrine*’.<sup>34</sup> Second, the lack of academic consensus and (op.a. one could think of adding Court’s) consistency on the interpretation of the legal elements of the *Meroni* judgment has been indicated.<sup>35</sup>

According to Chamon, there is only one obvious reiterative element in the analyses of various authors, the one prohibiting a delegation of discretionary powers.<sup>36</sup> She continues to identify six other elements which occur with more or less frequency:<sup>37</sup>

- (a) the delegating authority can delegate only the powers it itself has received under the Treaty (general principle that *nemo plus iuris ad alium transferre potest quam ipse habet*);<sup>38</sup>
- (b) the delegator must retain the right of supervision;<sup>39</sup>
- (c) delegated powers must be transferred with an express decision;<sup>40</sup>

<sup>32</sup> Case C 294/83 *Parti écologiste «Les Verts» v European Parliament* ECLI:EU:C:1986:166, para 23; Case T 411/06 *Società generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)* ECLI:EU:T:2008:419.

<sup>33</sup> Before the Treaty of Lisbon, the so called ‘*Les Verts doctrine*’ from the 1986 was referred to in attempt to fill in *lacuna* in the system of judicial protection. It claimed that since the EEC is a community based on the rule of law, neither the MS or any of Community’s institutions can avoid review of measures adopted by them, regardless if they are explicitly mentioned in the Treaties or not. This was later backed in the *Sogelma* case as well, discarding the claim that such reasoning applies only to the institutions but excludes bodies established by secondary law, Case C 294/83 *Parti écologiste «Les Verts» v European Parliament* ECLI:EU:C:1986:166, para 23; Case T 411/06 *Società generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)* ECLI:EU:T:2008:419.

<sup>34</sup> Chamon, *op. cit.* (n 5).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Case C 9/56 *Meroni* ECLI:EU:C:1958:7, para 150 subpara 1; *Nemo plus iuris ad alium transferre potest quam ipse habet* is a Latin phrase meaning ‘no one can transfer a greater right than he himself has’.

<sup>39</sup> Case C 9/56 *Meroni* ECLI:EU:C:1958:7, para 152 subpara 3, 5.

<sup>40</sup> *Ibid.*, para 151 subpara 2.

- (d) judicial review of the acts of the delegate must be ensured;<sup>41</sup>
- (e) the institutional balance should be observed;<sup>42</sup> and
- (f) the delegation is legitimate only if necessary to perform the tasks concerned.<sup>43</sup>

The authors think that the above-described elements can be found in the judgment, and since they are backed by Chamon's text, they do not consider them disputable. What the authors find interesting is the possibility of '*reading into*' the same text done by various authors, resulting in different emphasis given to one or another element and different understanding of certain arguments of the Court.

For Example, Rob van Gestel detects '*a twofold ratio*' behind the *Meroni* (and *Romano* as well).<sup>44</sup> Namely, an institutional balance of powers and a lack of judicial supervision by the Court.<sup>45</sup> For the first, he asserts that a broad discretionary power delegated to a body which is '*not directly democratically accountable*' could upset the Treaty based institutional balance of powers between the legislative, executive and judiciary branch.<sup>46</sup> His second concern was straightened out, as was already mentioned, with the changes made by the Treaty of Lisbon and with the change in Article 263 TFEU. Articles 265, 267 and 277 TFEU also subject acts of the bodies, offices or agencies to the Court's jurisdiction.<sup>47</sup>

Professor Ellen Vos focuses on the first concern, and according to her, the problem of agencies disturbing the principle of institutional balance is not just pivotal, but rather a single concern of the *Meroni* judgment.<sup>48</sup>

On the other side, Chamon continuously argues in her articles on this subject that one has to interpret the ruling within context of its time.<sup>49</sup> Therefore, its reasoning cannot be automatically transferred on contemporary concepts, *et vice versa*, one cannot '*read*' today's understanding of certain concepts into older judgments. Hence, she claims that the *Meroni*'s concern is '*balance of powers*' in the sense of Court's jurisdiction over the acts of the institutions, and the distortion of that balance if '*outside*' bodies are empowered to take binding decisions without the possibility to review them.<sup>50</sup> Consequently, the '*institutional balance*' is qualitatively different concept which did not yet exist in today's form at the time of the *Meroni* judgment.<sup>51</sup>

Therefore, as the '*balance of powers in the sense of Court's jurisdiction over the acts of agencies*' is the main concern, the authors would expect Chamon to conclude more openly that the changes brought in Article 263 from the Lisbon Treaty have solved all the problems. However, Chamon believes that uncritical reliance on the *Meroni* is misleading and calls on '*more thorough analysis of the ruling*' in order to '*clarify to what degree the doctrine is still relevant today*'.<sup>52</sup>

<sup>41</sup> *Ibid.*, para152 subpara 2.

<sup>42</sup> *Ibid.*, para 152 subpara 8.

<sup>43</sup> *Ibid.*, para 151 subpara 12, 13.

<sup>44</sup> Same wording in case C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen para 64.

<sup>45</sup> Gestel, *op. cit.* (n 10).

<sup>46</sup> *Ibid.*

<sup>47</sup> Article 265 TFEU ensures judicial review in the case of failure to act, article 267 TFEU states that the Court can give preliminary rulings concerning validity and interpretation of their acts, and article 277 TFEU deals with the acts of general application.

<sup>48</sup> See more: E. Vos, Agencies and the European Union', in Luc Verhey and Tom Zwart (eds) *Agencies in European and Comparative Perspective* (Intersentia Antwerp 2003).

<sup>49</sup> Chamon, *op. cit.* (n 10); Chamon, *op. cit.* (n 25), page 1058.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Chamon, *op. cit.* (n 25).

Similarly, Dehousse questions the mere application of the *Meroni* doctrine on today's agencies vested with executive powers due to the changed context and different institutional setting created by changes of the Treaties.<sup>53</sup> Unlike in the ECSC where the High Authority had centralized regulatory powers,<sup>54</sup> under the Treaties in force after the decision is taken by the European institutions, MSs and their administrative apparatus are primarily charged with the implementation.<sup>55</sup> Therefore, Dehousse notices that '[a]ssuming implementation powers are to be given to some administrative agency, those powers would rarely be taken away from a Community institution; they would instead be removed from national administrations.'<sup>56</sup> On the other hand, the *Meroni* doctrine is concerned with the delegation of powers 'which the delegating authority itself received under the Treaty'.<sup>57</sup> Hence, he thinks the term 'Europeanization' rather than 'delegation' better describes the process where 'the powers are transferred vertically (from the national to the EU level)'.<sup>58</sup> Surprisingly, not a lot of authors give attention to this issue.

On the other hand, the authors of this paper hold that the problem briefly addressed by Dehousse and more broadly by Hofmann and Morini,<sup>59</sup> that is, the difference between delegation and conferral of powers could in the future be used as the 'safe way out' by the Court, would other Union agencies' powers be challenged in front of it. In various unconnected situations, some Union bodies have shown they are aware of the difference as well. Council's legal service, when discussing powers of the Office for the Harmonization of the Internal Market (OHIM), stated that 'this specific case concerns the conferring of new powers, i.e. powers which have not at the moment been vested in any Community institution (...) so the decisions of the Court in the *Meroni* case do not seem to apply in this context'.<sup>60</sup>

The evolving understanding of the issue has been under the influence of the Court's approach to the problem. In both recent cases *Kingdom of Spain v. Council of the European Union* and *Kingdom of Spain v. European Parliament and the Council of the European Union* concerned with the empowerment of the European Patent Office (hereinafter: EPO), the Court ruled that since the Council in the first case and the Union legislator in the second have not delegated powers that are exclusively theirs under EU law, the principles of the *Meroni* doctrine do not apply.<sup>61</sup> Lastly, AG Jääskinen in his Opinion in the *ESMA* made the distinction as well, claiming that 'EU legislature is not acting as a 'delegating authority' in the sense of the *Meroni* judgment when it confers implementing powers (...) but a constitutional actor exercising its own legislative competence' and therefore it can 'confer on institutions or bodies [executive powers which] are qualitatively different from its

<sup>53</sup> R. Dehousse, *Misfits: EU Law and the Transformation of European Governance*, Jean Monnet Working Paper 2:12/2022 <<http://www.jeanmonnetprogram.org/archive/papers/02/020201.html>> (15. 02. 2017).

<sup>54</sup> *Ibid.*

<sup>55</sup> Art 291 TFEU.

<sup>56</sup> Dehousse, *op. cit.* (n 51).

<sup>57</sup> Such a statement corresponds to the AG Jääskinen's reasoning in the *ESMA* case on the validity of article 114 TFEU as a legal basis for empowering ESMA.

<sup>58</sup> Case C 9/56 *Meroni* ECLI:EU:C:1958:7, para 150.

<sup>59</sup> Dehousse, *op. cit.* (n 51); Case C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen.

<sup>60</sup> Hofmann, Morini, *op. cit.* (n 1); Chamon discusses the difference as well. See more: M. Chamon, *op. cit.* (n 5), page 397.

<sup>61</sup> Council of the European Union, Opinion of the Legal Service, Opinion on the Proposal for a Council Regulation on the Community Trade Mark (5837/85) 6 June 1985, 6.

<sup>62</sup> Case C 146/13 *Kingdom of Spain v. European Parliament and the Council of the European Union* ECLI:EU:C:2015:298, para 87; Case C 147/13 *Kingdom of Spain v. Council of the European Union* ECLI:EU:C:2015:299, para 63.



own powers.<sup>62</sup> Unfortunately, the Court in the *ESMA* case made no remarks on this AG's reasoning, but rather it used the terms interchangeably, leaving this question unresolved.<sup>63</sup>

Though it seems that the problem of distinction between the notion of delegation and conferral of powers on agencies appears regularly, it looks like avoiding to give a clear answer and adopting a consistent approach occurs with the same frequency.

Certain steps have been taken by the Court itself in what Pelkmans and Simoncini call a 'very gradual process of the EU coming to terms with the appropriate and justified degree of delegation to EU agencies (...) for the completion and proper functioning of the single market', or shorter, 'Mellowing Meroni'.<sup>64</sup>

In the case *Schröder*, dealing with the Community Plant Variety Office (hereinafter: CPVO), a Union agency, General Court stated that 'where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to limited judicial review'.<sup>65</sup> Therefore, delegation of clearly defined executive powers subject to the strict review, as a request from the *Meroni* judgment does not exclude any possibility for an agency to exercise some degree of discretionary powers.<sup>66</sup> Moreover, in the *Rütgers* case concerned with the decision of the European Chemicals Agency (ECHA), General Court seemed to validate the reality of agencies' functioning, observing that 'it must be acknowledged that the ECHA has a broad discretion in a sphere which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments'.<sup>67</sup>

Here, the authors would like to point to the discrepancy with the Commission's Draft Interinstitutional agreement on the operating framework for the European regulatory agencies (that was abandoned at the end), where it is stated that agencies cannot 'have decision-making powers conferred on them in areas in which they would be required to arbitrate in conflicts between public interests or exercise political discretion'.<sup>68</sup> Even if one could argue that political, economic and social choices do not always amount to a wide public interest, it is hard to imagine how the EU legislator would in some future agency-creation-and-empowerment-situation be able to clearly separate those moments in order to arrange decision-making of the agency.

Nowadays, what the authors referred to as the 'current understanding of the *Meroni* doctrine' is mostly marked by the *ESMA* judgment. Since the arguments from the *ESMA* regarding plea in law alleging breach of the principles governing delegation of powers laid down in *Meroni* differ between the AG and the Court, each will be analysed separately.

AG Jääskinen holds that the two main concerns behind the *Meroni* were the absence of a Treaty based criteria for delegation of powers, which in turn could upset the institutional balance, and the lack of judicial review.<sup>69</sup> Then he points to the changes brought by the Treaty of Lisbon in Articles 263, 265, 267 and 277 TFEU which ensure Court's supervision of the acts of the agencies.<sup>70</sup> With that, he concludes that 'it is evident that agencies can

<sup>62</sup> C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen, para 91.

<sup>63</sup> Chamon, *op. cit.* (n 57).

<sup>64</sup> J. Pelkmans, M. Simoncini, *Mellowing Meroni: How ESMA can help build the single market*, CEPS Commentary, 2014.

<sup>65</sup> Case T 187/06 *Ralf Schröder v Community Plant Variety Office (CPVO)* ECLI:EU:T:2008:51, para 59.

<sup>66</sup> Chamon, *op. cit.* (n 10).

<sup>67</sup> Case T 96/10 *Rütgers Germany GmbH and Others v European Chemicals Agency (ECHA)* ECLI:EU:T:2013:109, para 134.

<sup>68</sup> Commission, *Draft Interinstitutional agreement on the operating framework for the European regulatory agencies*, 59/2005, page 12.

<sup>69</sup> Case C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen para 72.

<sup>70</sup> *Ibid.*, para 73.

be vested with powers to take legally binding decisions', because '[o]therwise these Treaty amendments would be meaningless'.<sup>71</sup> With the analysis of Articles 290 and 291 TFEU, which are actually 'Romano' articles so they will be given a fair share of attention later in this paper, he asserts that '[a]gencies necessarily have to be precluded from Article 290 delegations of power because the exercise of such powers changes the normative content of legislative acts',<sup>72</sup> but gives clearance for the delegation of article 291 TFEU implementing powers.<sup>73</sup> Within that conclusion, *Meroni* stays relevant with two requests:

- a) powers cannot be delegated to an agency that are different from the implementing powers the EU legislature has conferred on the delegating authority, be it the Commission or the Council, and
- b) the powers delegated must be sufficiently well defined so as to preclude arbitrary exercise of power.<sup>74</sup>

Aside from that, as already mentioned, AG makes a difference between conferral and delegation of powers, with the consequence that the *Meroni* applies only to the latter.

The Court opted for, what is in literature already called 'Meroni-light' interpretation. Among all the mentioned elements comprised in the original *Meroni* judgment, in the *ESMA* ruling the Court considered the prohibition to delegate discretionary powers as the single one important.<sup>75</sup> By concentrating on the specific context of the Short Selling Regulation that was in question,<sup>76</sup> the Court stressed the importance of powers to be 'precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority'.<sup>77</sup> Unfortunately, due to line of argumentation that relied heavily on the text of the Regulation *in casu*, as Niamh Moloney observed, 'the extent to which discretion has been confined in a particular case remains the touchstone for the legality of agencies' operational powers'.<sup>78</sup> Some authors draw attention to the fact that even though *ESMA* was reported later, neither the Court nor the AG in their call for limiting discretionary powers mentioned *Rütgers* case which allowed for 'a broad discretion in a sphere which entails political, economic and social choices' while undertaking complex assessments.<sup>79</sup> Also, Chamon and Moloney both note that the only additional requirement the Court has retained in regard to delegating powers to agencies is a 'high degree of professional expertise'<sup>80</sup> that the agency should have in order to justify the delegation.<sup>81</sup> As mentioned earlier as well, the Court did not follow the AG's differentiation between the delegated and conferred powers.

From the analysis of different interpretations of the *Meroni* judgment, as well as from the analysis of a notion of dissent over the recent *Meroni*-related developments, the aut-

<sup>71</sup> *Ibid.*, para 74.

<sup>72</sup> *Ibid.*, para 85.

<sup>73</sup> *Ibid.*, para 86.

<sup>74</sup> *Ibid.*, para 88.

<sup>75</sup> Case C 270/12 *ESMA* ECLI:EU:C:2014:18, para 41.

<sup>76</sup> Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps. Text with EEA relevance (2012) OJ L 86.

<sup>77</sup> Case C 270/12 *ESMA* ECLI:EU:C:2014:18, para 53.

<sup>78</sup> N. Moloney, European Banking Union: Assessing Its Risks and Resilience, Common Market Law Review, 51/2014, page 1661.

<sup>79</sup> Case T 96/10 *Rütgers Germany GmbH and Others v European Chemicals Agency* (ECHA) ECLI:EU:T:2013:109, para 134; Chamon poses interesting question regarding Court's claim that ESMA's powers are amenable to judicial review, anticipating circular answer: 'Is this really the case if, in a future hypothetical action, an ESMA decision is challenged and the General Court observes that ESMA enjoys a broad discretion allowing it to make political, economic and even social choices?' See more: Chamon, *op. cit.* (n 5).

<sup>80</sup> Case C 270/12 *ESMA* ECLI:EU:C:2014:18, para 85.

<sup>81</sup> Moloney, *op. cit.* (n 76); Chamon, *op. cit.* (n 57).

hors reached a few conclusions. First, the concept of ‘a *rigid Meroni*’ is clearly unfit for today’s reality in which agencies are not just needed on the EU level, but already execute tasks that in the 1950s would be in breach of the *Meroni* judgment.<sup>82</sup> Therefore, evolving interpretation of the judgment goes hand in hand with the changed context. Second, for deciding on the legality of delegation of powers on the (existing or) future agencies, the key will be case-by-case scrutiny of how precisely are those powers delineated to be amenable to judicial review in the light of the delegator’s objectives. Finally, to improve the functioning of the single market, the Court ‘has to’ allow for effective functioning of the Union agencies. Having that in mind, it is fair to admit that the *ESMA* judgment is in that attempt just short of touching the constitutional boundaries, but nevertheless serves as an encouraging signal.<sup>83</sup>

To summarize in the words of Pelkmans and Morini, the time has come to stop using *Meroni* as a convenient excuse to stall the growing role of the EU agencies in the integrated market.<sup>84</sup>

#### 4. GIUSEPPE ROMANO V. INSTITUT NATIONAL D’ASSURANCE MALADIE-INVAVLIDITÉ

The *Romano* judgment is less dwelled upon,<sup>85</sup> but it is an equally important ruling when it comes to the delegation of powers on EU bodies. As aforementioned, the Court did not present a lot of arguments but simply stated that:

*‘It follows both from Article 155 of the Treaty and the judicial system created by the Treaty, and in particular by Articles 173 and 177 thereof, that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law.’*<sup>86</sup>

In a sole sentence, two main issues of the judgment are visible. First, since the Article 155 EEC (after the Treaty of Lisbon in substance replaced with Articles 290 and 291 TFEU) explicitly mentions only the possibility for the Council to confer implementing powers on the Commission, AG Warner and the Court concluded that ‘*nothing in the Treaty suggests that the Council may delegate legislative power to a body such as the Administrative Commission.*’<sup>87</sup> Second, again both of them agreed that the system of judicial protection under Articles 173 and 174 EEC (now 263 and 267 TFEU) subjects to judicial review only acts of Community institutions, thus precluding empowerment of other bodies to take binding decisions.<sup>88</sup>

At the beginning of the analysis of the evolution of the interpretation of the *Romano* judgment, it is interesting to notice that all these conclusions were reached without a single referral to the *Meroni* case which dealt with the similar matter, neither from the Court or the AG Warner.<sup>89</sup> This observation was brought up after the Court in the *ESMA* case completely subsumed *Romano* under the *Meroni* judgment, stating that ‘*it cannot be*

<sup>82</sup> E. Ferran, *European Banking Union: Imperfect, But It Can Work*, in: Busch, Ferrarini (eds), *European Banking Union*, Oxford University Press, 2015, page 83.

<sup>83</sup> *Ibid.*

<sup>84</sup> Pelkmans, Simoncini, *op. cit.* (n 62).

<sup>85</sup> In a bit overexaggerated words of Chamon, another interesting case that is ‘mentioned by fewer authors and analysed by none’. See more: Chamon, *op. cit.* (n 25).

<sup>86</sup> Case C 98/80 *Romano* ECLI:EU:C:1981:104, para 20.

<sup>87</sup> Case C 98/80 *Romano* ECLI:EU:C:1981:104, para 20; Case C 98/80 *Romano* ECLI:EU:C:1980:267, Opinion of AG Warner, p.1264.

<sup>88</sup> *Ibid.*, page 1265.

<sup>89</sup> Chamon, *op. cit.* (n 25), page 1061.

inferred from *Romano* that the delegation of powers to a body such as ESMA is governed by conditions other than those set out in *Meroni v High Authority*.<sup>90</sup> The authors hold that such Court's move is a straightforward example of the depth of the Court's interpretative role in the system of EU law, often used to 'adjust' the existing provisions of the Treaty and the case-law to the ever-evolving scope of the Union law.

Similar to different opinions surrounding the *Meroni* judgment, various authors have put an emphasis on distinct parts of the *Romano* ruling. For example, Griller and Orator focus on the institutional balance (analysed earlier in the *Meroni* discussion), arguing that since the Article 155 EEC mentioned only the Commission as a possible delegate, vesting implementing powers on some other body would infringe Commission's prerogatives, and thus institutional balance as well.<sup>91</sup> Others disagree, claiming that since AG Warner argued significantly broader on the problem of Articles 173 and 174 EEC, the central issue of the *Romano* case, i.e. why agencies and similar bodies were barred from adopting decisions of general application, was actually a *lacuna* in the system of judicial protection of individual rights under the EEC Treaty.<sup>92</sup> Türk, on the other hand, gives a lot of meaning to the Court's phrase stating that the Administrative Commission cannot be empowered to adopt 'acts having the force of law',<sup>93</sup> therefore asserting that the *Romano* goes even further than the *Meroni* and prohibits all delegations of decision-making powers on bodies other than institutions mentioned in the Treaty.<sup>94</sup> Chamon directly counterargued,<sup>95</sup> while the AG Jääskinen in his Opinion in the *ESMA* judgment had the same reasoning as she did, pointing to the German, French, Spanish and Dutch language versions of the ruling, which refer to the 'prohibition on the adoption by agencies of normative measures'<sup>96</sup> as opposed to English 'acts having the force of law' which could be understood as all acts binding on the third parties. This was one of the arguments that has led AG Jääskinen to state that agencies can be subject to a delegation of Article 291 TFEU implementing acts.<sup>97</sup>

As far as the current understanding of the *Romano*, one point at which all authors concur, is that after the changes brought by the Treaty of Lisbon, Articles 263, 265, 267 and 277 TFEU subject acts of the agencies to the judicial review of the Court, with that dismissing the whole second issue of the *Romano* judgment. As it was already multiple times pointed out, in the *ESMA* case AG Jääskinen took that as an 'indirect', and the Court as an 'express' sign that Union bodies, offices and agencies are allowed to adopt acts of general application.<sup>98</sup>

On the other hand, the authors question how can a possibility to bring an EU agency under judicial review lead to the conclusion that this agency can adopt acts of general application. The authors believe that a reverse logic would be more appropriate – if it is

<sup>90</sup> Case C 270/12 *ESMA* ECLI:EU:C:2014:18, para 66.

<sup>91</sup> S. Griller, A. Orator, Everything Under Control? The „Way Forward” for European Agencies in the Footsteps of the *Meroni* Doctrine, *European Law Review*, 35/2010.

<sup>92</sup> M. Everson, E. Vos, European Agencies: What about the Institutional Balance?, Maastricht Faculty of Law Working Paper, 4/2014, page 13; Chamon, *op. cit.* (n 25), page 1062.

<sup>93</sup> Case C 98/80 *Romano* ECLI:EU:C:1981:104, para 20.

<sup>94</sup> A. Türk, Case Law in the Area of the Implementation of EC Law, in: Pedler, Schaefer (eds), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, European Institute of Public Administration, 1996, page 186.

<sup>95</sup> Recalling also the fact that numerous agencies such as OHIM, CPVO and ECHA are already allowed to take binding decisions. See more: Chamon, *op. cit.* (n 25), page 1065.

<sup>96</sup> Case C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen, para 67.

<sup>97</sup> *Ibid.*, para 83 – 86.

<sup>98</sup> Case C 270/12 *ESMA* ECLI:EU:C:2014:18, para 65; Case C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen para 74.

concluded that an EU agency can adopt legally binding acts, then (both, individual and general) legally binding acts are subject to a judicial review.

As regards the first issue, the problem of delegation of powers from Articles 290 and 291 TFEU, AG Jääskinen and the Court parted in their reasoning. AG differed, in essence, between the aim of Article 290 TFEU delegated acts which give [exclusively] ‘*the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act*’,<sup>99</sup> and the delegation of Article 291 TFEU implementing acts which enable ‘*the promulgation of the normative content of the act that is being implemented, in a more detailed manner, in order to facilitate its application*’.<sup>100</sup> Since Article 290 TFEU delegated acts can change the content of the legislative act, they, according to the AG, require a higher degree of democratic accountability for their bearer and thus can be delegated from the Union legislator solely to the Commission under strict conditions.<sup>101</sup> Article 291 TFEU implementing acts already envisages, in duly necessary cases, for the implementation of the legislative acts on the EU level by the Commission or the Council rather than on the primary MSs level. Even though agencies as the potential delegates are not explicitly mentioned in that article either, due to the referral to them in Article 263 TFEU, the AG sees their executive role as a ‘*midway solution*’ between the institutions and the MSs,<sup>102</sup> especially when ‘*complex technical assessments are required in order to implement an EU measure*’.<sup>103</sup>

The Court on the other hand concluded that Articles 290 and 291 TFEU do not represent ‘*a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission*’.<sup>104</sup> Moreover, such a delegation of powers to agencies cannot be considered in isolation as a measure *per se*, but observed as an ‘*integral part of a detailed legal framework*’<sup>105</sup> which is actually always conducted in cooperation on national and supranational level.<sup>106</sup>

Nevertheless, the fact that there is no mention of agencies as possible delegates in either of the articles, not even after the Treaty of Lisbon, cannot be avoided, and was labelled in academic discussions as a ‘*[c]onstitutional neglect of the position of agencies in the institutional balance*’.<sup>107</sup> Discrepancy between the ever-growing role of the agencies in the Union’s functioning and their ‘*constitutional anchoring in the EU legal order*’<sup>108</sup> is visible as ever, and the authors are positive that reality-legislature gap will be continuously challenged by the MSs if the latter is not going to be solidified.

The authors deem that here, as regard the *Romano* issue of Articles 290 and 291 TFEU in relation to the delegation of powers, as well as with the *Meroni* judgment, one has to take utmost regard of the context in which the ruling was brought, as well as to be aware of the changed context of today’s debate.

In 1981, when the *Romano* judgment was delivered, the scope of the Union’s law and the amount of its tasks was significantly smaller than it is today, so either the Council or the Commission in the role of the delegate could have taken all binding decisions by

<sup>99</sup> Art 290(1) TFEU.

<sup>100</sup> Case C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen, para 77.

<sup>101</sup> *Ibid.*, para 76; Chamon doubts such reasoning. See more: Chamon, *op. cit.* (n 5), page 391.

<sup>102</sup> *Ibid.*, para 86.

<sup>103</sup> *Ibid.*, para 87.

<sup>104</sup> Case C 270/12 *ESMA* ECLI:EU:C:2014:18, para 78.

<sup>105</sup> Ferran, *op. cit.* (n 81), page 82; Case C 270/12 *ESMA* ECLI:EU:C:2014:18, para 85.

<sup>106</sup> Ferran, *op. cit.* (n 81).

<sup>107</sup> Everson, Vos, *op. cit.* (n 91).

<sup>108</sup> Chamon, *op. cit.* (n 5), page 398.

themselves.<sup>109</sup> Since their acts as the acts of the Treaty institutions would have been supervised by the Court, there was no reason to allow the delegation of powers on the Administrative Agency as the Union agency which escaped the Court's judicial review.<sup>110</sup> In essence, a) there was no practical need for agencies at the time, and b) assuming that the system of judicial review was the main concern, there was no practical need to enter into that problem since the institutions were fit for the job.

Then, the circumstances have changed, the EU grew in size and so did its legislative reach. Consequently, the institutions became overburdened and the process of 'agencification' started, so the Court took a more flexible stance towards powers of the Union agencies in the abovementioned *Schröder* and *Rütgers* cases of the beginning of the 2000s. In the recent *ESMA* case the AG (referring to the written observations of the European Parliament) concluded that the conferral of certain implementing powers on agencies has already been happening for such a long time, that an 'express reference in the Treaty of Lisbon to its abolition would have been required to change this.'<sup>111</sup>

With the system of judicial review of agencies' acts affirmed in the Treaties, the Court had a significant problem sorted out. As the Court 'opened' the system of Articles 290 and 291 TFEU, and subsumed the delegation of powers under the *Meroni* conditions in the recent *ESMA* case, accompanied by stressing the advantage of the agencies as the bodies with the specific technical and professional expertise, one has no reason to doubt that the Court is ready to advocate for the Union agencies.

## 5. CONCLUSION – STATE OF PLAY OF THE AGENCY EMPOWERMENT IN THE EU

After undertaking the analysis, the authors would summarize the problem of vesting EU agencies with executive (*i.e.* implementing) powers into a single phrase: *where there is a will, there is a way*. The subsequent catch is, there are two ways which the EU could take.

In the situation where there was no mention of agencies in the Treaties, the system of judicial protection was not adjusted for the bodies outside the Treaty institutions and when agencies were not indispensable for the everyday functioning of the EU, the strictness of the *Meroni* and *Romano* ruling seems understandable. There was more logic in the precautionary narrowing of the scope of permitted delegation of powers on agencies than in venturing into rickety legal spheres. Nevertheless, as aforementioned, the amendments of the Treaty of Lisbon changed the articles, specifically Articles: 263, 265, 267 and 277 TFEU, concerned with the system of judicial review, now explicitly stating that '[t]he Court of Justice of the European Union shall (...) review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.'<sup>112</sup> As previously discussed, if the lack of judicial supervision was the main impediment for allowing the transfer of executive powers on agencies, should not that problem now be considered *ad acta*?

On the other hand, one must admit that the Treaty of Lisbon did not add the notion of bodies, offices or agencies into what was once article 155 EEC, but formed the system of delegated and implementing acts in Articles 290 and 291 TFEU, referring only to the Commission for the former article and to the MSs, Commission and the Council for the latter article. It seems as if the EU, by vesting executive powers in its agencies, has gone

<sup>109</sup> Chamon, *op. cit.* (n 25), page 1073.

<sup>110</sup> *Ibid.*

<sup>111</sup> Case C 270/12 *ESMA* ECLI:EU:C:2013:562, Opinion of AG Jääskinen, para 87.

<sup>112</sup> Art 263 TFEU.

by the logic that everything that is not prohibited is permitted.

Regardless, the *ESMA* judgment clearly followed that line of reasoning for the issue of Articles 290 and 291 TFEU, upholding it with abovementioned ‘*judicial review articles*’ which ‘*presuppose that such a possibility exists*’.<sup>113</sup>

The practice of the Union legislator has showed through the process of ‘*agencification*’ that once the concerns of the Commission and the Council over their share of powers are observed,<sup>114</sup> they find no objection to the establishment and empowering of the Union agencies. On the contrary, in the enlarged Union cooperating on the supranational level in many more areas, agencies with their technical expertise have become an unavoidable partner in the executive branch.

Therefore, in the changed legal and practical context, there is no need to mystify the old landmark cases. The authors are not advocating for the rejection of the *Romano* and *Meroni* judgments, but for a more pragmatic approach in the sphere of EU law. When the prospect of the change of Treaties is unlikely, and the way for agencies to function within Treaties current boundaries can be found, insisting on the case-law created in a different moment in time seems to come only from the defiance and from the lack of political will to cooperate.

Of course, it is reasonable to consider the ‘*second path*’ (which the authors mentioned at the beginning of this section) that the EU could take. That is, to defer future creation or conferral of powers on agencies, this time for real,<sup>115</sup> until it finds a way to clearly determine a basis for their establishment and empowerment.

An imbalance between factual agencies’ positions in the executive and a lack of solid Treaty base for their functioning can always develop into a problem for the Union legislator. Deciding to proceed with the situation as such leaves the EU vulnerable to hampered negotiations with MSs over future legislation, as well as to possible challenges in front of the Court. It is up to EU to put all arguments on the scale and decide if this vagueness brings it more good or harm in the long run.

<sup>113</sup> Case C 270/12 *ESMA* ECLI:EU:C:2014:18, para 79.

<sup>114</sup> *E.g.*, Opinion of the Council Legal service from 2013 concludes that almost all of the EU agency ‘Single Resolution Board’s powers have to be ‘further detailed in order to exclude that a wide margin of discretion is entrusted’ unless the EU legislator decides to involve ‘an institution of the Union vested with executive powers’ in the process. See: Council of the European Union, Opinion of the Legal Service, CLS Banking Union, 14547:13/ 2013.

<sup>115</sup> Commission Communication to the European Parliament and the Council, European agencies – The way forward, 135/2008.

## **Delegacija izvršnih ovlasti agencijama Europske unije te Meroni i Romano doktrine**

### **Sažetak**

Cilj autora jest pružiti uvid u kompleksan svijet agencija Europske unije te sudske prakse koja je bila odlučujuća za razvitak njihove uloge unutar prava EU. Uzimajući u obzir njihovu rastuću važnost u cjelokupnom institucionalnom sistemu EU te obujam prava koja im se povjeravaju, agencije su važne svim državama članicama, uključujući i Hrvatsku. Članak prvo objašnjava važnost Meroni i Romano presuda za agencije EU, nastavljajući s pregledom novije sudske prakse čija formulacija dokazuje promjenu i razvoj u tumačenju prve dvije presude. U svom istraživanju, autori će pristupiti problemu delegacije ovlasti europskim agencijama, između ostalog, iz perspektive primarnog zakonodavstva EU; sudske prakse Suda Europske unije; te iz recentne ali nesuglasne akademske pravne perspektive. Također, autori će dati svoje mišljenje i sud o trenutačnoj poziciji agencija unutar EU.

*Ključne riječi: agencije EU, delegacija ovlasti, izvršne ovlasti, diskrecijska ocjena, sudski nadzor.*