

La soft law en droit de l'Union européenne 24-25 juin 2013 - Rennes

Relying on soft law to circumvent the constitutional objections to *agencification*

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I. Introduction

In response to the governance crisis in which the EU found itself at the end of the 1990's, different 'new modes of governance' have been tried and tested. In this contribution, the link between two of these modes will be highlighted. First there has been the increased reliance on soft law to deliver policy and secondly the EU legislator has created numerous EU agencies which are established to secure a better and more uniform application of EU law.

These two trends of *agencification* and soft law will first briefly be situated. Taking these trends together it is revealing to note that few of the agencies' acts meet the requirement of hard law in that they are attributed legally binding force. This is unsurprising since a lot of the acts of EU agencies are adopted under 'composite procedures', which are characterised by the joined participation of different authorities belonging to different legal orders (e.g. EU agency, EU committees, Commission and Member States' authorities). Other procedures depend on the joined participation of an EU agency, committees and the Commission. Whereas the final outcome of all these procedures will often be a binding act, the agency's contribution itself generally lacks binding effect.

Following these introductory observations, the focus will be on the link between agencies and soft law. The EU legislator not only increasingly relies on EU agencies but the EU legislator has also increasingly endowed EU agencies with soft law powers, begging the question why the EU legislator has not chosen to simply grant more 'hard law' powers to EU agencies. An important part of the answer to this question relates to the uncertain constitutional position of agencies and the process of *agencification* in the EU legal order. A combined reading of the *Meroni* and *Romano* cases and the institutional balance indeed cast serious doubts on involving EU agencies in EU decision-making. Having EU agencies adopt soft instead of hard law may then circumvent (the most pressing) constitutional concerns even if such a circumvention does not fully meet the constitutional concerns at a more fundamental level.

After presenting some examples of soft law adopted by agencies, the importance of the upcoming case *UK v. Parliament and Council* will be highlighted since the EU legislator has continued to seek the limits of what is possible under primary law by granting significant powers to the most-recently established agencies. This trend is very clear in the case of the European Securities and Markets Authority (ESMA). One of the legislative acts granting such powers to ESMA is now challenged by the UK resulting in a case of fundamental importance for the future of the agency instrument in the EU. Specifically for the issue of soft law and should the Court indeed prohibit such hard law powers, this could give new incentives to the legislator to grant further soft law powers to EU agencies as an alternative to the prohibited hard law powers.

In a final section, attention will therefore be devoted to the possibilities, for the legislator, to work out a framework in which agencies could exercise these soft law powers.

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II. A new mode of governance: soft law

As noted by Senden,¹ the EU's reliance on 'new modes of governance' to better deliver EU policies gained an important impetus with the Commission's White Paper on Governance. As regards soft law, the Commission *i.a.* noted that "*The European Union will rightly continue to be judged by the impact of its regulation on the ground [...] Effective decision-making also requires the combination of different policy instruments (various forms of legislation, programmes, guidelines, use of structural funding, etc.) to meet Treaty objectives.*"² In the White Paper, the Commission also suggested the idea of ensuring a better application of EU rules through greater reliance on EU agencies.³ Senden herself also noted the rise of EU agencies as a new mode of governance together with the rise of soft law,⁴ but what is foremost interesting is that the former also relies to a considerable extent on the latter. Before exploring this issue, it is necessary to further explore the notion of soft law.

Following an evaluation of the different definitions of soft law which could be found in doctrine,⁵ Senden proposed her own rather specific definition, describing soft law as "[r]ules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects."⁶ By including the notion of 'rules of conduct' in the definition, Senden emphasised the normative effect of soft law. For the purposes of her study, this emphasis was obvious since Senden analysed soft law as an alternative to legislation. However in general, and for the purpose of the present contribution, the notion of soft law should not be reserved to normative instruments. By shortening Senden's definition to "*instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects*", its scope is actually broadened and more instruments enter the radar.

III. A new mode of governance: agencies

A second notion from the title which deserves some clarification is that of *agencification* which is a process whereby the role of EU agencies becomes increasingly important within the EU administration. As such, the process has a quantitative and a qualitative dimension.⁷ Quantitatively, a continuous growth in the number of EU agencies may be noted.⁸ Qualitatively, one may note that the EU legislator is progressively pushing the limits in empowering these EU agencies. Whereas the first agencies had advisory powers at the most, more recently established agencies may for instance adopt binding decisions vis-à-vis national authorities or impose sanctions on market operators. The evolution, since the 1990's, of

¹ Linda Senden, *Soft law in European Community law*, Oxford, Hart Publishing, 2004, p. 21.

² European Commission, 2001, 'European Governance: A White Paper', COM (2001) 428 final, p. 20.

³ *Ibid.*, 23-4.

⁴ Linda Senden, *Soft law in European Community law*, o.c., p. 21.

⁵ *Ibid.*, 111-2.

⁶ *Ibid.*, 112.

⁷ Bach and Jann make a roughly similar distinctions between structural and procedural *agencification* (at national level). In their own words: "[p]ar *agencification structurelle*, nous entendons les changements opérés dans l'organisation formelle des tâches publiques, comme la création de nouvelles agences [...] par *agencification procédurale*, nous entendons un transfert d'autorité des ministères vers les agences." See Tobias Bach and Werner Jann, 'Des animaux dans un zoo administratif: le changement organisationnel et l'autonomie des agences en Allemagne', (2010) 76 *Revue Internationale des Sciences Administratives* 3, pp. 470-1.

⁸ Using Senden's work as a reference once again, at the time of writing (2004), she noted the existence of 12 agencies. Today, there are over 30 EU agencies.

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these two dimensions has meant that *agencification* as a process today is more than the sum of its component parts. Whereas the four existing EU agencies in 1990 could at that time still be seen as a *curiosité institutionnelle* this is not the case anymore today.

Finally, because the notion of *agencification* ultimately depends on the notion of EU agency, the latter also needs to be defined. The EU agencies referred to in this contribution are what the Institutions themselves incorrectly refer to as the 'decentralised agencies'⁹ which are distinguished from the 'executive agencies'. Given the lack of official definition for a 'decentralised agency' (henceforth: EU agency), EU agencies will be defined here as permanent bodies under EU public law, established by the Institutions through secondary legislation and endowed with their own legal personality.¹⁰

IV. Soft law as circumventing the constitutional objections against agencification

After having clarified the key notions of this contribution it is possible to look into actual subject of this contribution, *i.e.* the use of soft law by agencies to ease constitutional objections against *agencification*.

This may seem odd at first sight, since the use of soft law itself has in the past been criticised on constitutional grounds. Senden for instance questioned whether "*the use of soft law entail[s] an unacceptable bypassing of the competences of other institutions in the decision-making process?*"¹¹ Observing that it is "*possible that the institutional balance can be infringed not only through the choice of instrument as such, but also through the use of soft law instruments as a means of parallel legislation.*"¹² Precisely this seems to have been an important consideration for the Court when it ruled in the case *France v. Commission* on the Commission's guidelines on regulatory cooperation with the USA. In this case, France argued the guidelines constituted a binding agreement and should therefore have been concluded in accordance with the procedure of Article 218 TFEU. The Commission on the other hand insisted that it could adopt these guidelines by itself since they were merely non-binding. Disagreeing with France, the Court found the guidelines to be non-binding but did not follow the Commission either and observed that "*the fact that a measure such as the Guidelines is not binding is [not] sufficient to confer on [the Commission] the competence to adopt it. Determining the conditions under which such a measure*

⁹ See the Common Approach on Decentralised Agencies, adopted by the three Institutions in the summer of 2012. The adjective 'decentralised' is incorrect however, since *agencification* is not a centrifugal, but rather a centripetal, process. See Colin Scott, 'Agencies for European Regulatory Governance: A Regimes Approach', in Geradin, Petit and Muñoz (eds.), *Regulation through Agencies in the EU*, Cheltenham, Edward Elgar, 2005, pp. 70-1. *I.a.* because of this reason, Sanchez Barrueco's definition is not followed either. She defines an EU agency as "*tout organisme de droit public européen, autonome du point de vue légal et financier, créé par une institution communautaire afin de décentraliser une ou plusieurs des fonctions qui lui ont été attribuées. Les éléments saillants d'une agence dans l'Union européenne seraient donc: création par le biais législatif (1), personnalité juridique (2), décentralisation des fonctions (3) et autonomie financière (4).*" See Maria Luisa Sanchez Barrueco, 'L'Agence européenne de défense, un organe intergouvernemental au service d'une institution communautaire?', (2008) *Revue du Droit de l'Union Européenne* 3, p. 513.

¹⁰ This definition is an adaptation of the one worked out by Fischer-Appelt. See Dorothee Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft: eine Studie zu Rechtsproblemen, Legitimation und Kontrolle europäischer Agenturen mit interdisziplinären und rechtsvergleichenden Bezügen*, Berlin, Duncker & Humblot, 1999, p. 38. The elements of the specific tasks entrusted to agencies and the agencies' relative independence in Fischer-Appelt's definition have been omitted from the present one since it is difficult to imagine the EU legislator would establish new bodies without entrusting them with some sort of tasks and because the independency or autonomy of the EU agencies is covered by their separate legal personality.

¹¹ Linda Senden, *Soft law in European Community law*, o.c., p. 489.

¹² *Ibid.*

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may be adopted requires that the division of powers and the institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account."¹³ This could thus be seen as the Court shutting the door for, a circumvention of hard law procedural requirements by adopting, parallel legislation in the form of soft law.

Lefevre made similar observations to those of Senden in his study of Commission communications for the implementation of EU law by national authorities.¹⁴ These communications may codify the case law of the Court on a specific issue, or they may contain the Commission's own interpretation of a piece or body of legislation. The Commission's own interpretation not being as authoritative as the Court's interpretation. As a result, "*in areas where it has no decision-making power, the Commission may nonetheless influence the behaviour of Member States inadvertently, by blurring the boundaries between the authoritative interpretation of the Courts and its own interpretation, which is not binding.*"¹⁵ If, through the adoption of soft law, the Commission were to substitute the obligations actually imposed by EU legislation on Member States with obligations preferred by the Commission, this would obviously result in an unauthorised extension of the Commission's powers.¹⁶

That this risk is not hypothetical may be illustrated by reference to two recent cases before the Court of Justice. In *Commission v. Austria* and *Commission v. Germany*, the implementation of the first Railway package by these two Member States was at issue. The Commission had argued that in these Member States the railway infrastructure manager was insufficiently independent from its overarching holding company. To clarify the independence requirements prescribed by EU legislation, the Commission had annexed some further criteria to its communication on the implementation of the first package.¹⁷ In the two cases before the Court, it had then attempted to show Germany and Austria had not properly transposed the first railway package, because their national legislation did not meet the Commission's criteria as set out in the annex. The Court however dismissed this argument by noting *i.a.* that the annex was a non-binding Commission document,¹⁸ and proceeded by scrutinising the Commission's plea against the actual wording of the relevant legislation, rather than the Commission's interpretation of that legislation.

The possibility that EU institutions will rely on soft law to acquire *de facto* competences which have not been provided *de iure* may therefore be seen as a significant risk related to the use of soft law and a matter of constitutional importance since the vertical and horizontal distribution of powers within the EU would be affected by such competence creep.

¹³ Case C-233/02, *French Republic v. Commission of the European Communities*, [2004] ECR I-2759, para. 40.

¹⁴ Obviously these types of act are only one specific category of soft law which may be adopted by the Commission. On the possibility and desirability of a Commission competence to address administrative guidelines to Member State authorities, see also Geike Adam and Gerd Winter, 'Commission guidance addressed to member state agencies', in Winter (ed.), *Sources and Categories of European Union Law*, Baden-Baden, Nomos, 1996, pp. 629-44.

¹⁵ Silvère Lefevre, 'Interpretative communications and the implementation of Community law at national level', (2004) 29 *European Law Review* 6, p. 813.

¹⁶ *Ibid.*, 812-5.

¹⁷ See European Commission, 3 May 2006, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the first railway package', COM (2006) 189 final. For the actual annex, see European Commission, 3 May 2006, 'Commission Staff Working Document annexed to the Communication on the implementation of the railway infrastructure package Directives ('First Railway Package')', SEC (2006) 530.

¹⁸ Case C-555/10, *European Commission v. Republic of Austria*, [2013] ECR nyr, para. 62; Case C-556/10, *European Commission v. Federal Republic of Germany*, [2013] ECR nyr, para. 62.

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Turning to the EU agencies, the constitutional objections which may be raised against these bodies are equally evident. Before the entry into force of the Lisbon Treaty, EU primary law was completely silent on the topic of EU agencies. Post-Lisbon, primary law does refer to EU agencies but it does not contain an explicit enabling clause giving competence to the EU legislator to establish these bodies, let alone the competence to delegate certain tasks to these bodies. Instead, Article 291 TFEU now explicitly makes clear that implementation of EU law is firstly a matter which is left to the Member States.¹⁹ At the same time, this Article has strengthened the position of the Commission in the event that implementation should be done at EU level.²⁰ The introduction of delegated acts under Article 290 TFEU further strengthened the Commission as well because it is the sole authority competent to adopt these acts and because the efficacy of the control mechanisms available to the Parliament and Council may be questioned.²¹ These Articles provide that implementation and modification of EU legislation is an affair of the Commission, Parliament, Council and Member States, but they do not foresee the involvement of EU agencies. In addition, Regulation 182/2011²² which sets out the new comitology procedures under Article 291 TFEU does not mention any role for the EU agencies either, despite the Commission's reliance on their drafts and opinions in a lot of these procedures.

The process of *agencification* noted above has thus proceeded in a constitutional vacuum. One of the most fundamental questions relates to the qualitative dimension of the process, *i.e.* how far can the EU legislator go in empowering these bodies. In doctrine, an answer to this question is usually sought in the 1958 *Meroni* ruling.²³ In this ruling which dealt with a delegation of powers from the High Authority to two bodies established under private law, the Court laid down a doctrine on the delegation of powers. The exact content of this doctrine is unclear,²⁴ but most authors agree that it applies to the EU agencies and that it prohibits the delegation of discretionary powers. Whether *Meroni* may be applied to agencies and whether the notion of delegation is an apt description of the legal relationship between an EU agency and the EU legislator may be debated however.²⁵ One of the elements explicitly mentioned by the Court in *Meroni* for instance was the prohibition for the delegating authority to delegate more powers than it itself held (*nemo plus iuris transferre potest quam ipse habet*). Since the EU legislator, when establishing EU agencies, does not transfer its own powers to these bodies, Gautier concluded that the empowerment of EU agencies could not be qualified as a delegation.²⁶ In any case, even if these matters of principle are

¹⁹ Claude Blumann, 'Le système normatif de l'Union européenne vingt ans après le traité de Maastricht', (2012) *Revue des Affaires Européennes* 2, p. 250.

²⁰ *Ibid.*, 251.

²¹ See Paul Craig, 'The Hierarchy of Norms', in Tridimas and Nebbia (eds.), *European Union law for the twenty-first century: rethinking the new legal order*, Oxford, Hart, 2004, pp. 80-4.

²² Regulation (EU) 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, O.J. 2011 L 55/13.

²³ Case 9/56, *Meroni & Co., Industrie Metallurgische S.p.A. v. High Authority*, [1957-1958] ECR 133.

²⁴ Some authors seem to claim the doctrine boils down to the single requirement prohibiting the delegation of discretionary powers. Other authors identified additional requirements, such as the *nemo plus iuris* rule, the requirement that a delegation should be explicit, the requirement that the delegating authority should continue to supervise the delegate authority, the requirement that judicial scrutiny by the Court should be maintained, the requirement that the institutional balance may not be upset or the requirement that the delegation should be necessary for the performance of the delegated tasks.

²⁵ See Merijn Chamon, 'EU Agencies: Does the Meroni Doctrine Make Sense?', (2010) 17 *Maastricht Journal of European and Comparative Law* 3, pp. 281-305.

²⁶ Yves Gautier, *La délégation en droit communautaire*, Strasbourg, Strasbourg 3, 1995, PhD Thesis, p. 402.

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ignored for the time being, *Meroni* remains problematic since it raises the thorny issue of when a power is discretionary in nature and when it is not.²⁷

A second case before the Court seems especially relevant for the present topic. In *Romano*, the powers of the Administrative Commission for the Social Security of Migrant Workers was at issue. This Administrative Commission was provided for under Regulation 1408/71 and had *i.a.* been made competent to solve administrative or interpretative problems flowing from the Regulation. Ultimately, this raised the question whether the decisions of the Administrative Commission were binding on the national institutions implementing the rules on social security. In *Romano* the Court ruled that “*a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of Law.*”²⁸ Since the Court referred to “*actes revêtant un caractère normatif*” and “*Rechtsakte mit normativem Charakter*” in the French and German language versions of its ruling, it would seem that the Court only excluded the possibility of the Administrative Commission adopting rules of general application, leaving open the issue of individual binding decisions. However, when the Court explained the reason for disallowing such a competence, it referred to (i) the fact that the acts of the Administrative Commission could not be challenged or reviewed under the then Articles 173 and 177 EEC (current Articles 263 and 267 TFEU) and to (ii) Article 155 EEC, which *i.a.* provided that the Commission would “*exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.*” The Court thus seemed to suggest that the Council could indeed decide to empower a second body, but that this body should be the Commission, not some other body. Based on these two principle considerations, it does not make much sense to confine the consequences of *Romano* to acts of general application. Instead *Romano* would seem to prohibit the adoption of any type of binding measure by bodies such as the Administrative Commission, as was suggested by Türk.²⁹

Of course, since *Romano* primary law has evolved and Articles 263 and 267 TFEU would now allow the acts of the Administrative Commission to be reviewed. Significant changes have been made in relation to Article 155 EEC as well, but these foremost seem to have further strengthened the position of the Commission (cf. supra), rather than opening the possibility of empowering bodies other than the Commission with implementing tasks. The reference in *Romano* to Article 155 EEC therefore even seems to have gained in significance today.³⁰

Taking the view that both the *Meroni* and *Romano* rulings apply to the EU agencies, as the Commission does,³¹ undermines the prospects of *agencification* in a qualitative sense as EU agencies would not be allowed to adopt binding measures and would be not allowed to make discretionary choices. There are not that many examples one can think of in which it is worthwhile to establish a body with such limited

²⁷ See Merijn Chamon, *Maastricht Journal of European and Comparative Law*, o.c., pp. 293-5.

²⁸ Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, [1981] ECR 1241, para. 20.

²⁹ Alexander Türk, 'Case Law in the Area of the Implementation of EC Law', in Pedler and Schaefer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, Maastricht, European Institute of Public Administration, 1996, p. 186.

³⁰ For a more elaborate discussion of *Romano*, its possible repercussions today and the relation between *Meroni* and *Romano*, see Merijn Chamon, 'EU agencies between "Meroni" and "Romano" or the devil and the deep blue sea', (2011) 48 *Common Market Law Review* 4, pp. 1055-75.

³¹ European Commission, 25 February 2005, 'Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies', COM (2005) 59 final, p. 5.

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powers, let alone an EU agency which is a quite 'heavy' form of organisation given its separate legal personality and budget.

V. Soft law and EU agencies

To escape the rigid limits to *agencification* imposed by these two rulings, the EU legislator has granted soft law, rather than hard law, powers to EU agencies.³² In providing that an EU agency may adopt an opinion, report or draft, the legislator has often stopped one step short of granting the agency with a decision-making power. By providing for procedures in which the Commission and the agencies work together, whereby the latter gives advice to the former, the *Romano* ruling is then formally respected. Similarly, even if agencies in their advisory capacity have to weigh up different interests, which would require the exercise of discretionary powers, it is possible to claim that the actual discretionary choices are made by the final decision-making authority, *i.e.* the Commission.

The European Medicines Agency (EMA) and the European Food Safety Agency (EFSA) are good examples of agencies which have been granted the power to adopt opinions on individual decisions. Typically these are decisions on applications by undertakings, which are ultimately adopted by the Commission. Despite the opinions being non-binding and hence soft law, they can be characterised as authoritative since the Commission is under a special obligation to take account of the substance of the opinion. The actual purpose of the involvement of the agencies is that the Commission should not deviate from their scientific advice. This, combined with the special obligation which rests on the Commission, means that EU legislation often provides that the Commission should explain why, if so, it does not follow the agency's advice.³³

A special type of individual decision is the decision to impose a sanction. The Commission's power to impose sanctions on individual undertakings is well known and established in the field of competition policy. However, the Commission has also been granted such a power in the field of pharmaceuticals and aviation safety in the event that an economic operator after having obtained an authorisation for a medicinal or aviation product, does not respect the conditions imposed together with the authorisation. The EMA Regulation and the Regulation establishing the European Aviation Safety Agency (EASA) provide that the agencies may issue requests to the Commission to impose such sanctions on economic

³² In addition to the selection of examples provided below, see the observations made by Chiti on EU agencies involved in rulemaking, either through the adoption of binding rules or through the adoption of soft law. Edoardo Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment', (2013) 19 *European Law Journal* 1, pp. 94-100.

³³ In the regime for GMO authorisation for instance, the Commission prepares a draft decision under a comitology procedure based on the opinion of the EFSA. If its draft decision deviates from the opinion, the regulation prescribes that "*the Commission shall provide an explanation for the differences.*" See Article 7 (1) of Regulation (EC) 1829/2003 of the European Parliament and of the Council on genetically modified food and feed, O.J. 2003 L 268/1. The wording of these provisions may also vary. For instance, when one Member State disagrees with the reference Member State's assessment report of a medicinal product under the decentralised procedure, the Commission will take a decision under a comitology procedure following a scientific opinion by the EMA. The relevant directive thereby provides: "*Where, exceptionally, the draft decision is not in accordance with the opinion of the Agency, the Commission shall also annex a detailed explanation of the reasons for the differences.*" (own emphasis). See Article 33 of Directive (EC) 2001/83 of the European Parliament and of the Council on the Community code relating to medicinal products for human use, O.J. 2001 L 311/67.

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operators.³⁴ The procedure is thus initiated by the agency, leaving a discretion to the Commission whether or not to actually impose a fine or periodic penalty payment.

During the 1990's the power of opinion granted to agencies only related to individual decisions. However during the so called third wave of agency creation this changed. The European Maritime Safety Agency (EMSA) for instance is primarily tasked with an operational mission, Article 2 (2)a provides that the EMSA shall assist the Commission "*in the preparatory work for updating and developing relevant legal acts of the Union.*" However, the agencies' powers are not confined to such a supporting role in the development of new legislation. Agencies are also involved in the implementation or modification, through implementing and delegated acts, of legislation. Such involvement may be informal, but often the agency's role is also formally recognised. In the Regulation on food information to consumers for instance it is provided that "[a]ny Union measure in the field of food information law which is likely to have an effect on public health shall be adopted after consultation of the EFSA."³⁵ Sometimes, EU legislation goes even further than the mandatory consultation of an agency. The Regulation establishing the European Aviation Safety Agency for instance provides that "[i]n order to assist the Commission in the preparation of proposals for basic principles, applicability and essential requirements to be presented to the European Parliament and to the Council and the adoption of the implementing rules, the Agency shall prepare drafts thereof."³⁶ The power to draft these new rules thereby comes on top of other soft law powers of the EASA. After all, the agency also adopts 'certification specifications', 'acceptable means of compliance', and 'guidance material' as referred to under Article 19 of the EASA Regulation. In these instruments, the EASA sets out its own non-binding interpretation of the provisions of the relevant legislation, delegated acts and implementing acts. For economic operators these non-binding instruments are not without relevance since the EASA has also received the, hard law, power to decide on applications by those operators for certification. The European Railway Agency exercises a similar power to draft further regulation since Article 6 of its establishing Regulation³⁷ provides that it "*shall recommend to the Commission the common safety methods and the common safety targets*" foreseen in the Railway Safety Directive.³⁸

Perhaps the most far-reaching example of such a drafting power may be found in the mandates of the European Supervisory Authorities in the financial sector. As regards the regulatory technical standards adopted by the Commission under Article 290 TFEU, the establishing Regulations of the ESA's provide that

³⁴ See Article 84 (3) of the EMA Regulation and Article 25 of the EASA Regulation.

³⁵ Article 5 of Regulation (EU) 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, O.J. 2011 L 304/18. See also Daniele Bianchi, 'La Comitologie dans le droit agro-alimentaire: une procédure complexe au service d'imperatifs de participation démocratique et de contrôle étatique', in Mahieu and Merten-Lentz (eds.), *Sécurité alimentaire: Nouveaux enjeux et perspectives*, Bruxelles, Bruylant, 2013, pp. 200-1.

³⁶ See Article 19 (1) of Regulation (EC) 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, O.J. 2008 L 79/1.

³⁷ Regulation (EC) 881/2004 of the European Parliament and of the Council establishing a European Railway Agency, O.J. 2004 L 164/1.

³⁸ Directive 2004/49 of the European Parliament and of the Council on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, O.J. 2004 L 164/44.

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The Commission should endorse those draft regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in order to give them binding legal effect. They should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily functioning of financial markets. Draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation. The Commission should not change the content of the draft regulatory technical standards prepared by the Authority without prior coordination with the Authority. To ensure a smooth and expeditious adoption process for those standards, the Commission's decision to endorse draft regulatory technical standards should be subject to a time limit.³⁹

In addition to these extra requirements, the Regulations also provide that the Commission, should it want to amend the drafts cannot do so without first referring the draft together with its comments back to the relevant ESA.

These examples of instruments adopted by EU agencies are quite diverse but they all fall under the definition of soft law. They are instruments which have not been attributed legally binding force, but they have real practical and indirect legal effects. The simple fact that the agencies house the relevant expertise at EU level, rather than the Commission, in itself *de facto* ties the hands of the latter. If the Commission would want to deviate from the line set out by the agency, it can do so but it would evidently need to argue its case by reference to alternative expertise. Depending on the case, if such expertise may be found it will usually have to be sought outside the EU framework. Incidentally, this would undermine and question the whole idea of establishing an EU agency as the EU expertise in a given field.

Apart from this practical reason, this soft law adopted by EU agencies is also hardened by the legislator by providing that the Commission cannot deal with these instruments as if they were noncommittal opinions. Instead, the Commission may have to give reasons when it deviates from the agencies' opinions, or the Commission may only alter drafts on specific grounds, or further procedural requirements have to be fulfilled before the Commission may modify such drafts.

As was already briefly referred to above, some agencies have also been endowed with the power to adopt individually binding decisions.⁴⁰ Under a strict reading of *Meroni* and *Romano*, again assuming they apply to EU agencies, this was already questionable. In doctrine such a power was reconciled with the Court's

³⁹ See recitals 23 of the preambles to the EBA and ESMA Regulations and recital 22 of the preamble to the EIOPA Regulation. Regulation (EU) 1093/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Banking Authority), O.J. 2010 L 331/12; Regulation (EU) 1094/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), O.J. 2010 L 331/48; Regulation (EU) 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority), O.J. 2010 L 331/84.

⁴⁰ These are the Office for Harmonisation in the Internal Market (OHIM), the Community Plant Variety Office (CPVO), the EASA, the Agency for Cooperation of Energy Regulators (ACER) and the ESA's. In addition, under the fourth railway package which has been recently proposed by the Commission, the ERA would also receive such a power.

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jurisprudence by reference to the limited mandate of these agencies,⁴¹ and by pointing out that administrative discretion is something else than legislative discretion.⁴² Especially the latter is interesting since it would help explain why EU agencies have been granted soft law powers when it comes to the adoption of generally applicable acts such as formal legislation, delegated acts and implementing acts.

As is apparent from the title of this paper, it could be suggested that the constitutional objections against *agencification* are being circumvented by the legislator's choice to endow agencies with soft law powers.⁴³ However, reflecting deeper on the subject reveals that this technique does not actually address the fundamental constitutional questions in play. If the Treaties accord special status to the Commission under Articles 290 and 291 TFEU and to its monopoly of legislative initiative, can the legislator hollow out the Commission's function by entrusting ever larger portions of the preparatory work for legislative, delegated and implementing acts to agencies? If policy choices are increasingly determined by the preparatory work of the agencies, can the formal decision-maker (EU legislator or Commission depending on the act) be held accountable for (negative) policy outcomes? How is the democratic quality of decision-making affected in view of the fact that the European Parliament cannot control the EU agencies as it controls the Commission? If the Treaties accord special importance to the 'Community method' how is this method affected by the increasing role of EU agencies, whose management boards are dominated by the Member States?

Having EU agencies adopt soft rather than hard law may ease the most acute constitutional objections but it does not resolve them. Instead the legislator has been kicking this constitutional can down the road and this technique actually worked quite well although it also came at a price since it has unavoidably resulted in more complex procedures.

This may be illustrated by reference to the network codes for the electricity and gas markets. Articles 6 of Regulations 714/2009 and 715/2009 set out the procedure for their adoption and provide that the Commission must first ask the ACER to work out a non-binding framework guideline which contributes to non-discrimination, effective competition and an efficiently functioning internal market. If the Commission is of the opinion that the ACER's framework guideline is not in line with these principles it can request the ACER to resubmit its framework guideline. If the ACER fails to do so, or simply fails to produce a framework guideline, the Commission may adopt one itself. Based on such a framework guideline, the ENTSO for Gas or Electricity, depending on the case, shall be asked by the Commission to develop a network code. The ENTSO will submit its draft to the ACER which may request the ENTSO to resubmit its draft, otherwise the ACER may request the Commission to adopt the network code. If the Commission decides not to do so, it must state its reasons. Should the ENTSO fail to submit a network code, the Commission may request the ACER to work out the network code or it may adopt a network code on its own initiative following consultation with the ACER and the ENTSO.

⁴¹ Ronald van Ooik, 'The growing importance of agencies in the EU: shifting governance and the institutional balance', in Deirdre and Wessel (eds.), *Good governance and the European Union: reflections on concepts, institutions and substance*, Antwerpen, Intersentia, 2005, pp. 150-2.

⁴² Jens-Peter Schneider, 'A Common Framework for decentralized EU agencies and the Meroni doctrine', (2009) 61 *Administrative Law Review Special Issue*, p. 38.

⁴³ See also in relation to *Meroni* Linda Senden and Ton van den Brink, *Checks and Balances of Soft EU Rule-Making*, Brussels, European Parliament, 2012, p. 65.

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Such complexity obviously comes at a cost and in urgent situations where authorities need to act in a swift manner, such procedures stand in the way of effective action. Perhaps this is why the EU legislator has abandoned all self-restraint in relation to the empowerment of agencies in the financial sector, when it adopted Regulation 236/2012 which regulates short selling.⁴⁴ This regulation *i.a.* provides that the ESMA, one of the ESA's, may prohibit or impose conditions on the entry by natural or legal persons into short sales. These measures would of course be generally applicable, leaving no question on whether they would fall under *Romano*. At the same time, it is beyond doubt that the decision whether or not to impose such a measure would require discretionary choices to be made, weighing off the financial stability and economic freedom of operators against each other.

Another interesting power which has recently been granted to the ESMA is the power to fine economic operators. Annex I to Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories lists a number of infringements while Article 65 (1) of that regulation provides that where the “ESMA finds that a trade repository has, intentionally or negligently, committed one of the infringements listed in Annex I, it shall adopt a decision imposing a fine.”⁴⁵ As regards sanctioning, the ESMA has thus been made the sole authority responsible, unlike in the pharmaceuticals and aviation sector where the EMA and EASA merely submit a proposal to the Commission to impose a fine. Even if the Regulation is quite detailed, narrowing the discretion left to ESMA, this power remains questionable in the light of the Court's jurisprudence. In fact, when the European Parliament proposed, during the legislative process, to grant the ACER the very same sanctioning powers, the Commission refused to take over this amendment in its adapted proposal. According to the Commission, at that time, the *Meroni* ruling prevented the legislator from granting such powers to an agency.⁴⁶

VI. Challenging agencification: UK v. Parliament and Council

By granting these new powers to the ESMA, the EU legislator clearly overstepped a limit and it did not take long before this was challenged before the Court. Unsurprisingly the applicant challenging ESMA's powers under Regulation 236/2012 is the United Kingdom which has taken a critical stance towards *agencification* in financial regulation at EU level.⁴⁷ In *UK v. Parliament and Council*, the UK is

⁴⁴ Regulation (EU) 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps, O.J. 2012 L 86/1.

⁴⁵ Regulation (EU) 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, O.J. 2012 L 201/1.

⁴⁶ See European Commission, 18 June 2008, 'Commission Position on EP Amendments at first reading', SP(2008)4439 <http://www.europarl.europa.eu/oeil/spdoc.do?i=15160&j=0&l=en>.

⁴⁷ On 7 December 2011, two days before the European Council Summit of 9 December 2011 UK Prime Minister Cameron declared the following in the House of Commons: “*I think we should celebrate the fact that [the financial services sector] is a world-class industry, not just for Britain but for Europe—but it is absolutely vital for us to safeguard it. We are currently seeing it under continued regulatory attack from Brussels. I think that there will be an opportunity, particularly if there is a treaty at 27, to ensure that there are some safeguards—not just for the industry, but to give us greater power and control in terms of regulation here in the House of Commons. I think that that is in the interests of the entire country, and it is something that I will be fighting for on Friday.*” See the Hansard of 7 December 2011, column 294. In return for agreeing on a Treaty amendment which was proposed by Germany to tackle the euro-crisis, the UK delegation demanded safeguards alluded to in the quote above. The UK thus *i.a.* demanded that the unanimity rule would be reintroduced for financial sector legislation and it also demanded that the ESA's executive powers would be clearly set out, the exercise of discretion being reserved to the Member States authorities. Should the latter demand have been granted it would have meant a codification of *Meroni* in primary

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challenging the ESMA's powers on four grounds: (i) since these are discretionary powers they are contrary to the *Meroni* doctrine; (ii) since they give rise to generally applicable measures they are contrary to *Romano*; (iii) since they give rise to non-legislative acts of general application they are contrary to Articles 290 and 291 TFEU which reserve the power to adopt delegated acts to the Commission; lastly (iv) if these powers are used to adopt individual decisions directed at natural or legal persons the Regulation could not be based on Article 114 TFEU.⁴⁸

This case, which is still pending, is almost destined to be a landmark case in EU administrative law since it is the first time the Court is invited to scrutinise the powers of an EU agency under its *Meroni* and *Romano* jurisprudence.⁴⁹ So far, these two rulings have only been used in legal doctrine to set out a framework for *agencification*. The consequences of the Court's decision in this case will most likely not be confined to the ESMA or ESA's but will be relevant to all the EU agencies.

Incidentally, the outcome of the case may also have repercussions for the topic of this conference. This becomes clear if one maps out some of the options which are open to the Court, focussing on the first three arguments by the UK.

As regards its previous jurisprudence one can envisage the Court has four main options. A first is the most radical, where the Court would conclude that *Meroni* and/or *Romano* are not relevant anymore under current EU law. Especially for *Meroni*, but also for *Romano* the reasons for such a move have been explored in doctrine.⁵⁰ Such a move would be inspired by practical reasons which were already put forward in the 1960's⁵¹ and which only have gained weight since then. From the Court's legal perspective, the qualitative change from the ECSC Treaty (*Meroni*) and the EEC Treaty (*Romano*) to the EU Treaties under Lisbon could be used to argue that *Meroni* and *Romano* should not be upheld anymore. Although this would be easier to argue for *Meroni* than for *Romano*, the Court in both cases could argue that the

law, at least for the agencies in the financial sector. In the end, the UK did not succeed since the plan to amend the Treaties was dropped and the Fiscal Compact was adopted as a separate treaty outside the EU framework.

⁴⁸ See Case C-270/12: Action brought on 1 June 2012 — United Kingdom of Great Britain and Northern Ireland v Council of the European Union, European Parliament, OJ 2012 C 273/3.

⁴⁹ Only Advocate General Geelhoed observed once, hidden away in a footnote, that *Meroni* applies to EU agencies. See Opinion of Advocate General Geelhoed in Case C-378/00, *Commission v. European Parliament and Council* [2003] ECR I-937, para. 59 and footnote 22. According to Mok and Van Damme, the Court also applied *Meroni* to the EFSA in *Alliance for Natural Health*. However, other authors simply interpret this ruling as a validation of *Meroni* in the EU context, since the Court actually applied *Meroni* to a delegation from the legislator to the Commission. See Thomas Van Damme, 'Joined Cases C-154/04 and C-155/04, The Queen, on the application of Alliance for Natural Health and Others v. Secretary of State for Health and National Assembly for Wales', (2006) 33 *Legal Issues of Economic Integration* 3, p. 314. The note by Van Damme is an English translation of that of Mok (or vice-versa) who therefore makes the same observation, see Robert Mok, 'Gevoegde zaken C-154/04 en C-155/04, The Queen, on the application of Alliance for Natural Health and Others v. Secretary of State for Health and National Assembly for Wales', (2006) 54 *Tijdschrift voor Europees en economisch recht* 3, p. 124.

⁵⁰ See for instance Renaud Dehousse, 'Misfits: EU Law and the Transformation of European Governance', in Joerges and Dehousse (eds.), *Good Governance in Europe's Integrated Market*, Oxford, Oxford University Press, 2002, p. 221; Damien Geradin, 'The Development of European Regulatory Agencies: What the EU should learn from the American Experience', (2004) 11 *Columbia Journal of European Law* 1, p. 10; Tom Zwart, 'La Poursuite du Père Meroni ou pourquoi Les Agences Pourraient Jouer un Rôle plus en Vue dans l'Union Européenne', in Dutheil de la Rochère (ed.), *L'Exécution du Droit de l'Union, entre Mécanismes Communautaires et Droits Nationaux*, Bruxelles, Bruylant, 2009, p. 166.

⁵¹ See for instance Ulrich Everling, 'Zur Errichtung nachgeordneter Behörden der Kommission der Europäischen Wirtschaftsgemeinschaft', in Hallstein and Schlochauer (eds.), *Zur Integration Europas*, Karlsruhe, Müller, 1965, p. 41.

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legislator should be able to grant significant powers to EU agencies,⁵² given the expanded reach of EU law since the Single European Act and given the *effet utile* principle. Today, EU law cannot acquire its useful effect anymore at the implementing stage without a more intensive involvement of national authorities at EU level, within agencies. To deny this option to the legislator would result in the insufficiently uniform application of EU law. Of course to be somewhat convincing such an argument would need to be elaborated since establishing an agency is not the only way one can come to better implementation of EU law. One could then argue that the agency instrument strikes a good balance between the principle of *effet utile* and the principle of subsidiarity, compared to giving implementing powers to the Commission. The latter option would also secure a uniform application of EU law, but it would cut off national authorities from the implementing process.⁵³

A second option which would have about the same effects (*in casu*) would be for the Court to rule that *Meroni* and *Romano* do not apply to the 'delegations' to EU agencies, without the Court having to depart from or renounce its earlier jurisprudence. Such a ruling would be perfectly possible because already in its existing jurisprudence it is impossible to identify one single legal regime which applies to all the different forms of delegation which have been elaborated under primary and secondary EU law.⁵⁴ The delegations to the Commission under the old Article 155 EEC were organised along the lines first set out in *Köster* and then *Germany v. Commission*.⁵⁵ The rules laid down in that jurisprudence are different from the rules governing delegations to private bodies such as *Meroni*, taken over in *DRI Film International*.⁵⁶ The rules on delegations or conferrals to bodies under international public law are still different.⁵⁷ Lastly, with the entry into force of the Lisbon Treaty, primary law for the first time mentions the notion of 'delegation' in Article 290 TFEU which established yet another legal regime. Given this existing multiplicity, it would not be too far-fetched to suggest that the Court could rule that the legal regime governing the empowerment of agencies is again different from the existing regimes. Of course, the Court will be cautious here since this matter should actually have been dealt with by the Treaty Authors themselves. The question of delegating powers to EU agencies has indeed been raised at the occasion of several inter-governmental conferences but had not been settled. Should this option materialise the Court would not develop a fully fledged framework but would only lay down the bare minimum of such a framework to allow the case before it to be solved.

⁵² At national level as well, constitutional courts have interpreted their constitutional charters 'flexibly' to allow for agencification, cf. *infra*.

⁵³ Of course national authorities would not be cut off completely, since the Commission would probably exercise these competences under a comitology procedure. But the national authorities' role would still be more limited than the role they can play in procedures involving (both) agencies (and comitology).

⁵⁴ See also Yves Gautier, *La délégation en droit communautaire*, Strasbourg, Strasbourg 3, 1995, PhD Thesis, p. 461.

⁵⁵ See Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster and Berodt & Co*, [1970] ECR 1161; Case C-240/90, *Federal Republic of Germany v. Commission of the European Communities*, [1992] ECR I-5383.

⁵⁶ See Joined Cases T-369/94 & T-85/95, *DIR International Film and Others v. Commission*, [1998] ECR II-357.

⁵⁷ The Court has accepted that the EU may become party to the constituent instruments of international organisations, conferring powers on these organisations, and that the EU may subsequently be bound by rules established by such organisations. The Court does not so much emphasise the control over these organisations, which would be illusory in multilateral forums, instead it emphasises that the nature of the powers of the EU must be retained and the EU's autonomy safeguarded. See Opinion 1/92 re, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, [1992] ECR I-2821, para. 41; Opinion 1/00 re, *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, [2002] ECR I-3493, paras 11-4.

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A third option would be that the Court confirms that *Meroni* and/or *Romano* govern the empowerment of EU agencies (possibly constituting a single legal regime) while applying a 'light' interpretation of those rulings. As was noted above, the concepts used in these two cases are not immune from discussion. By adopting a narrow definition of 'discretionary' (or an expansive definition of 'executive') and a narrow definition of 'acts having the force of law', the Court could allow for the present and further (qualitative) agencification. For instance, acts having the force of law could be interpreted as being formal legislation, which would even exclude the delegated acts from its scope. Discretionary powers could be interpreted as the competence to make final discretionary choices. As a result, the only thing which would count is which authority adopts the final decision, the preliminary steps to such a final decision being irrelevant. Elaborating the notion of 'choice' the Court could also rule that the fundamental discretionary choices in the application of Regulation 236/2012 are already contained in the Regulation itself and as long as the ESMA acts within its mandate as set out in the Regulation, it cannot affect the discretionary choices made therein. This would be similar to Schneider's distinction between legislative discretion in setting out the legal framework and administrative discretion in applying the legal rules to concrete cases or situations (cf. supra). Of course, pushing this option to its extremes, the end result would be the same as under the second option since the Court would only formally start from *Meroni* and/or *Romano* to end up with a legal regime which would significantly differ from the regimes originally set out in those rulings. It cannot be ruled out either that the Court applies a *Meroni*- and or *Romano*-light in this case and still concludes that the empowerment of ESMA under Regulation 236/2012 is incompatible with the Treaties.

A last option is the simplest. The Court would confirm that *Meroni* and/or *Romano* apply to the empowerment of agencies and it could further confirm that these two rulings set out a single legal regime governing the same type of 'delegation'. Without an adaptation of these rulings to the current legal, political and administrative context (*i.e.* creating a *Meroni*- or *Romano*-light) the Court would be bound to find the empowerment of the ESMA under Regulation 236/2012 illegal. This because the ESMA has to make discretionary choices when it decided to prohibit or impose conditions on short selling and because its prohibition or its measure imposing condition would be an act having the force of law.

The options open to the Court on the UK's third argument are a different matter. Whereas the Court itself left a sufficient margin in its rulings in *Meroni* and *Romano* to allow for a more flexible interpretation of those judgments in the light of the current context, the Articles 290 and 291 TFEU seem to leave less room for manoeuvre. As was noted above, these Articles seem to have reinforced the Commission's position and the only actors they mention are the Parliament, the Council, the Commission and the Member States. How could the Court interpret these Articles in such a way as to give a meaningful role to the agencies in the procedures for adopting implementing and delegated acts? The UK argues that the measures which the ESMA would adopt would be delegated acts only but in name. Meeting all the characteristics of the delegated act as described in Article 290 TFEU, they should therefore also be recognised as such, meaning the ESMA cannot be empowered as this competence is exclusive to the Commission. Here the Court could in theory rule that the Treaties are not exhaustive on this point, meaning there may be generally applicable measures which do not belong to the categories of delegated acts or formal legislation. Since these measures would be different from delegated acts, despite meeting all the characteristics of delegated acts, they would not necessarily need to be adopted by the Commission. With some imagination, Article 290 TFEU could be read in this light since it provides that "[a] legislative act may delegate to the Commission" (own emphasis) the power to adopt delegated acts.

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The possibility reflected in the verb ‘may’ would then not only relate to the possibility for the legislator to provide for such a power to the Commission, but also to a possibility for the legislator to pick the delegated authority of its choice. However, such an argument could only be upheld based on a purely textual interpretation of the provisions in Article 290 TFEU. Put into its context, Article 290 TFEU employs ‘may’ rather than ‘shall’ since otherwise the legislator would not be allowed to deal with the non-essential elements of legislation itself. Should the legislator want to, it should obviously have the possibility to deal with all the elements of legislation, essential as well as non-essential.⁵⁸ Similarly it would seem rather far-fetched to argue that the Treaty authors provided for the delegated act of Article 290 TFEU as only one possible non-legislative act of general application, leaving it to the legislator to devise other alternative categories of such acts.

Should Articles 290 and 291 TFEU indeed be interpreted as such, *i.e.* attaching no special constitutional importance to the Commission’s role as provided in those Articles and allowing the legislator to empower other actors to adopt implementing and delegated acts or acts meeting the characteristics of these acts in all but their name, this would fundamentally alter the EU’s institutional balance. The Commission’s role in the decision-making process in the post-legislation phase would be at the whims of the Parliament and Council rather than it being defined in primary law.

Of course, one could imagine a number of scenarios in between the two extremes of the Commission being the sole responsible authority under Articles 290 and 291 TFEU and that of the Commission’s position being completely undermined by the empowerment of other bodies. However, the problem again here is that it is not really the task of the Court to define those ‘exceptional situations’ in which delegated acts could perhaps be adopted by bodies other than the Commission.

At the same time, nothing in the provisions of Articles 290 and 291 TFEU would prevent the legislator from prescribing the Commission should request and take account of the advice of other bodies, such as EU agencies, before it adopts delegated or implementing acts. This would mean there is ample room for the involvement of such bodies in these procedures, as long as the ultimate authority in these procedures is the Commission.

The three pleas assessed together

Looking at these pleas together makes clear that even if the Court would adopt a very generous interpretation of *Meroni* and/or *Romano* allowing for further (qualitative) *agencification*, the prospects of such *agencification* would be hampered by the textual provisions and context of Articles 290 and 291 TFEU, which do not seem to allow any other authority than the Commission to adopt delegated and implementing acts.⁵⁹ One way of circumventing the Commission’s (quasi) monopoly over delegated and implementing acts is the option which has been relied upon extensively in the past already, *i.e. de facto* narrowing down the Commission’s discretion by providing for the (mandatory) involvement in decision-

⁵⁸ Under Article 291 TFEU the situation is completely clear since that Article provides that legally binding acts “shall confer implementing powers on the Commission or in duly justified specific cases [...] on the Council” (own emphasis). Implementing acts can therefore only be adopted by the Commission or the Council. In addition these implementing powers shall be provided for “where uniform conditions for implementing legally binding Union acts are needed.” It would thus seem impossible to grant *sui generis* implementing powers to agencies outside Article 291 TFEU once it is established that these powers relate to the need for uniform conditions to apply to the implementation of (formal and material) legislation.

⁵⁹ Again, apart from the Council which may also, in exceptional cases, adopt implementing acts.

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making procedures of the EU agencies without touching upon the Commission's final authority to adopt these acts.

The second is to take the point of view that the Treaties have not dealt with the catalogue of EU legal instruments in an exhaustive way and that, as a result, the legislator may establish new bodies and empower them to adopt new types of acts. In itself, the first part of this reasoning cannot be contested since the EU institutions have been adopting such acts, unforeseen by the official catalogue of Article 288 TFEU, since the beginning of the integration process. However, these atypical acts were based on Treaty Articles other than Article 288 TFEU, or they were adopted by the Institutions themselves in the course of institutional practice.⁶⁰ In his thesis, Lefevre makes a distinction between the atypical acts for which the EU assumes (political) responsibility and those for which it does not. However, in both cases those acts are adopted by actors whose intervention is foreseen by the Treaties.⁶¹ Obviously, the problem for the EU agencies is that their intervention is not foreseen by the Treaties. Whereas one can argue a case allowing for the Treaty Institutions to adopt acts other than those explicitly foreseen by the Treaties, this is different for the agencies. Allowing these, unforeseen and thus atypical, bodies to adopt, unforeseen and thus atypical, acts would risk both undermining the legality principle and opening a Pandora's box.

As a result, in the absence of any provision in the Treaties, it would be difficult and dangerous for the Court to allow the existence of (binding) atypical acts, which resemble but are distinct from delegated and implementing acts and which subsequently and as a result thereof may be adopted by EU agencies rather than by the Commission.

VII. Agencification following Case C-270/12

Of course it is difficult to predict how the Court will rule in this case, which is why some of the more extreme solutions have been presented above, making it convenient to conclude now that the Court's actual solution will probably find a middle ground. It is clear that the Court will not give a complete *carte blanche* to the EU legislator to continue (qualitative) *agencification*. At the same time, the importance of the agency instrument today in delivering EU policies will equally deter the Court from placing a ban on that instrument. The interesting question then is whether the Court will provide a constitutional basis for *agencification* by possibly carving out a separate legal regime for *agencification* which would come with its own rules and limits to agency-empowerments.

For this, there are two ways for the Court to proceed. First, the Court could address the issue as if it were acting as the Treaty authors itself, taking into account fundamental considerations such as the Commission's role and function in (administrative) decision-making and how it is affected by EU agencies, the EU agencies' administrative and democratic legitimacy, the nature of the EU itself and whether it has *Kompetenz-Kompetenz* on, or how far such a competence could go in relation to, its institutional organisation and its internal distribution of competences.

Here a parallel may be drawn with the national debates on *agencification*, since the phenomenon of establishing independent authorities is not unknown in the national legal orders either. In most national states for instance, the national constitutional charter allocates the different powers to different branches

⁶⁰ Silvère Lefevre, *Les actes communautaires atypiques*, Bruxelles, Bruylant, 2006, p. 14.

⁶¹ See *ibid.*, 43.

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and as regards the executive branch the idea of a 'unitary executive' may often be identified,⁶² barring, at first sight, *agencification*. In France, Article 21 of the Constitution entrusts the tasks of executing laws and the *pouvoir réglementaire* to the prime minister, and provides he can delegate some of his powers to his ministers.⁶³ A literal reading of the latter provision would have the reader conclude that the powers of the prime minister may therefore only be delegated to the ministers, which seems analogous to the effects of a literal reading of Articles 290 and 291 TFEU (cf. supra). The French Conseil Constitutionnel ruled differently however and has allowed the legislator to entrust the task of executing legislation to an independent agency subject to the condition that the agency's measures only have a limited scope as regards both their field of application and their content.⁶⁴ The Conseil further ruled, in the same case, that under the principle of separation of powers it is permissible for an (independent) administrative authority to impose sanctions.⁶⁵ Interestingly, the Conseil did struck down part of the law in question since it provided that the government could further regulate the sector of undertakings for collective investment in transferable securities by decree, since this touched upon the elements of legislation which Article 34 of the French Constitution reserves to the legislative branch.⁶⁶

Even though the French fifth republic and the EU were both established in 1958, the former may be regarded as a more mature polity. The EU has seen several profound amendments to its constitutional charter since 1958 and, evidently, it is not a state. Whether the Court of Justice could take the same progressive approach (away from the actual text of the constitutional charter) like the Conseil Constitutionnel, seems doubtful therefore.

Instead, the second way for the Court to solve the issue would seem the safer and it would have it focus on more formal considerations such as the legal effects of acts adopted by EU agencies and the question of the formal authority adopting a (binding) act, leaving it to the *pouvoir constituant* to definitively settle the issue of *agencification* under EU primary law. In order to continue further (qualitative) *agencification*, the EU legislator would then have to grant further soft law powers to EU agencies. Incidentally, this has also

⁶² For Belgium, Article 37 of the Constitution offers ground for a unitary executive. For the USA it may be found in Article 2, Section 1 of the Constitution. In German public law, the notion of the '*Einheit der Verwaltung*' is not absent either but it is debated. See Merijn Chamon, 'Verzelfstandiging in de nationale en Europese rechtsordes: nieuwe uitdaging van een meergelaagde administratie', (2013) *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2-3, p. 117.

⁶³ Article 21 *i.a.* provides: *Le Premier ministre [...] assure l'exécution des lois. [Il] exerce le pouvoir réglementaire [...] Il peut déléguer certains de ses pouvoirs aux ministres.*

⁶⁴ "Considérant que si [les dispositions de l'Article 21 de la Constitution] ne font pas obstacle à ce que le législateur confie à une autorité publique autre que le Premier ministre le soin de fixer des normes permettant de mettre en œuvre une loi, c'est à la condition que cette habilitation ne concerne que des mesures de portée limitée tant par leur champ d'application que par leur contenu." See Décision n° 89-260 DC du 28 juillet 1989, para. 30. See also, Décision n° 86-217 DC du 18 septembre 1986, para. 58; Décision n° 88-248 DC du 17 janvier 1989, para. 15. Interestingly, the Court of Justice may have been entertained by similar considerations when it ruled in *Meroni* that the delegate authority could only adopt executive measures.

⁶⁵ "Considérant que le principe de la séparation des pouvoirs, non plus qu'aucun principe ou règle de valeur constitutionnelle ne fait obstacle à ce qu'une autorité administrative, agissant dans le cadre de prérogatives de puissance publique, puisse exercer un pouvoir de sanction dès lors, d'une part, que la sanction susceptible d'être infligée est exclusive de toute privation de liberté et, d'autre part, que l'exercice du pouvoir de sanction est assorti par la loi de mesures destinées à sauvegarder les droits et libertés constitutionnellement garantis." See Décision n° 89-260 DC du 28 juillet 1989, para. 6.

⁶⁶ See Décision n° 89-260 DC du 28 juillet 1989, paras 35-7. This in turn resembles the Court of Justice's 'essential elements' reasoning in *Köster* even despite the fact that the Treaties lack a provision such as Article 34 of the French Constitution.

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been noted at national level: whereas agencies under French constitutional law may be granted with a '*pouvoir réglementaire*', such a power still remains contentious. Senator Gélard therefore noted that even in the absence of such a power, an agency might *de facto* exercise this power if, by virtue of the agency's authority, relevant parties would accept its observations or guidelines as binding, "*comme si elles étaient dotées d'une potée normative.*"⁶⁷

VIII. Establishing a framework for agencies' soft law powers

Although an increased reliance on EU agencies adopting soft law rather than hard law instruments, following the outcome of *UK v. Parliament and Council*, would address the immediate concerns related to the institutional balance,⁶⁸ it would also emphasise the problematic nature of soft law in general and specifically that of soft law adopted by agencies. In their report on soft law following the Treaty of Lisbon for the European Parliament, Senden and van den Brinck dedicated special attention to this subject. Although both authors, incorrectly (cf. supra), assume that the agencies' powers find their constitutional basis in the *Meroni* ruling,⁶⁹ they are correct in pointing to the lack of a clear framework which applies to the agencies' exercise of powers. However, such a framework seems necessary to govern the agencies' soft powers and to provide greater legitimacy to such acts and to the agencies themselves. And where horizontal rules do apply, such as the regime of judicial review laid down in the Treaties which now also includes the agencies, Senden and van den Brinck identify further scope for improvement of the agency's legitimacy by establishing a more generous system of judicial review vis-à-vis agencies' acts.⁷⁰

To develop such a framework, Senden and van den Brinck identify a role for the inter-institutional agreement on EU agencies which the Commission had proposed in 2005.⁷¹ However, by 2008 it was already clear that the inter-institutional agreement would never materialise.⁷² In July 2012, a few months after Senden and van den Brinck submitted their report, the three institutions reached an agreement on a Common Approach on the decentralised agencies, the alternative to the inter-institutional agreement. The Common Approach, in any event a non-binding document, has largely codified the existing legislative practice of agency creation which has matured over the years.⁷³ Further, although the Common Approach deals with a lot of issues, it does not provide any guidance on the subject of decision-making by agencies in procedures resulting in the adoption of soft law instruments.⁷⁴

Some attention to this issue would have been no luxury however, as may be concluded from Chiti's analysis of the rulemaking procedures of EU agencies. Whereas he identifies a procedural pattern common to the agencies when they adopt binding implementing rules, "*there is no evidence of an overall tendency*

⁶⁷ Rapport de l'office parlementaire d'évaluation de la législation n° 404 (2005-2006), 15 juin 2006, Sénateur M. Patrice Gélard, Rapport sur les autorités administratives indépendantes, Tome II, p. 120.

⁶⁸ The institutional balance would therefore be formally respected, but the values which it seeks to protect could still be hollowed out because the agencies' would *de facto* play a much greater role than one would *de iure* expect.

⁶⁹ Linda Senden and Ton van den Brink, *Checks and Balances of Soft EU Rule-Making*, o.c., p. 23.

⁷⁰ *Ibid.*, 42-9.

⁷¹ European Commission, 'Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies', COM (2005) 59 final.

⁷² See European Commission, 2008, 'European Agencies - The way forward', COM (2008) 135 final.

⁷³ Merijn Chamon, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, o.c., p. 120.

⁷⁴ In addition, just like the inter-institutional agreement, it could not address the constitutional issues related to *agencification* in any case, since an amendment of the Treaties (or a ruling by the Court of Justice) would be needed for that.

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*to formalise the procedures through which soft law measures are adopted.*⁷⁵ Chiti notes that the informality characterising these procedures is not problematic per se, but that proceduralisation strengthens administrative legitimacy. Chiti seems to agree that in any case, it is important to ascertain the purpose of the soft law instrument to conclude whether it should be subjected to more formalised procedures. A fundamental consideration in this is whether the soft law is adopted for organisational purposes, structuring the internal functioning of the agency or its working relations with national administrations or whether the soft law is of concrete relevance to private parties. Allowing the latter to get involved in the agencies' procedures would strengthen transparency and would allow the agencies to have access to and take account of all relevant information. As a result, the lack of formalised procedures to this end is seen as "*a genuine lacuna of European agencies' rulemaking*" by Chiti.⁷⁶ In her critical analysis of the Common Approach, Bernard does not specifically deal with this question, but she did comment on the advisory powers which the agencies exercise vis-à-vis the Commission, noting that "*[l]'approche commune occultant l'existence de telles prérogatives au bénéfice des agences, la question des limites aux délégations qui leur sont consenties n'est pas abordée.*"⁷⁷ Logically, if not even the limits to agencies' powers are dealt with in the Common Approach, it is evident that any contemplation on (a framework for) the agencies' soft law powers is lacking as well.

The institutions' lack of attention to this issue will evidently become even more problematic should the Court's ruling in *UK v. Parliament and Council*, depending on the solution adopted, indeed result in more soft law powers for the agencies.

This eventuality would then be a good occasion for the Commission to make use of one of the new powers which the EU acquired under the Treaty of Lisbon. Article 298 (2) TFEU now allows the EU legislator to adopt a law on administrative procedure, whereas pre-Lisbon "*there were doubts as to whether the EU had competence to enact such a measure.*"⁷⁸ Senden and van den Brinck have also identified this Treaty Article as a legal base to establish "*procedural modalities of the use of soft rule-making.*"⁷⁹ So far, the Commission has not adopted a proposal yet and when the Parliament adopted an own-initiative report invited the Commission to do so,⁸⁰ the latter did not react very enthusiastically. In any event, the Parliament's report remained rather general as it did not contain special recommendations for rules applicable to either agencies or soft law, let alone soft law adopted by EU agencies. Still, Article 298 TFEU refers to regulations (plural) to be adopted by the legislator, which means a specific regulation devoted to soft law procedures could also be envisaged.⁸¹

⁷⁵ Edoardo Chiti, *European Law Journal*, o.c., p. 104.

⁷⁶ *Ibid.*, 106.

⁷⁷ Elsa Bernard, 'Accord sur les agences européennes: la montagne accouche d'une souris', (2012) *Revue du Droit de l'Union Européenne* 3, p. 440. For another, but shorter, analysis of the Common Approach, see Miroslava Scholten, 'The Newly Released 'Common Approach' on EU Agencies: Going Forward or Standing Still?', (2012) *Columbia Journal of European Law Online*, http://www.cjel.net/online/19_2-scholten, Last Accessed: 17 April 2013.

⁷⁸ Paul Craig, *EU Administrative Law*, Oxford, Oxford University press, 2012, p. 323.

⁷⁹ Linda Senden and Ton van den Brink, *Checks and Balances of Soft EU Rule-Making*, o.c., p. 84.

⁸⁰ See European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union.

⁸¹ However, Ziller has put forward some strong arguments why a single legal instrument, covering all types of procedures, should be preferred. See Jacques Ziller, *Note on Alternatives in Drafting an EU Administrative Law*, Brussels, European Parliament, 2011, pp. 13-4.

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IX. Conclusion

'To be continued...' would be a fitting (preliminary) conclusion to the above sections.

Undoubtedly, the Court's ruling in *UK v. Parliament and Council* will be of fundamental importance for the process of *agencification* and depending on the actual solution adopted, it could also have important consequences for the use of soft law by agencies.

Should the Court choose to adopt a more formalistic approach, *e.g.* prohibiting agencies from adopting binding (generally applicable) acts, in solving the case it could leave ample scope to the legislator to continue qualitative *agencification* by granting soft law powers to EU agencies.

Still, the political institutions' have not only failed to come to shared understanding of the role and place of the agencies in the EU's institutional order, leaving the Court of Justice in a difficult situation concerning the limits to agencies' powers. In their Common Approach on EU agencies, the political institutions have also failed to address the issue of administrative rule-making, through soft law, by EU agencies. An even greater reliance on soft law by EU agencies would therefore be questionable from this perspective.

The possibility opened by the Lisbon Treaty, under Article 298 TFEU, to adopt regulations shaping an open, efficient and independent European administration offers a repêchage for the institutions to remedy at least this deficiency in the Common Approach even if it seems doubtful that this opportunity will actually be seized in the short term.