

## Articles

### **Agencification in the United States and Germany and What the EU Might Learn From It**

By Merijn Chamon\*

#### **Abstract**

*In the European Union the legislature has, in the past years, established an increasing number of agencies, granting them increasingly important powers. This phenomenon of agencification is legally problematic because it does not have a legal basis in the EU Treaties. In order to better understand the challenges posed by EU agencification, this Article looks at similar agencification processes in two other federal-type polities, the U.S. and Germany. Germany is especially relevant to understanding the vertical (federal) dimension to EU agencification, while the U.S. experience can inform us about the horizontal (separation of powers) dimension. This is done by looking at three distinct issues: The question of the initial establishment of a new body at the EU (federal) level, the extent to which powers can be entrusted to such a body, and the degree to which the decisions adopted by such bodies are judicially scrutinized. The Article concludes that EU agencification poses a greater risk than agencification in Germany or the US because control is partially less well-established (compared to Germany) and because the EU polity is much less mature (compared to the U.S.).*

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## A. Introduction

Today, the implementation of most European Union (“EU”) policies would be unimaginable without the involvement of EU agencies.<sup>1</sup> Starting in the 1990’s, the EU legislator has increasingly resorted to the agency instrument to secure the proper application of its legislation. To understand this process of *agencification*, guidance is often sought from the United States, where the ideal type of the independent agency originated.<sup>2</sup> However, the EU Treaties’ logic governing the implementation of EU legislation shares more of a resemblance with that of the German Basic Law. Juxtaposing the U.S. and German experiences with *agencification* should then help in acquiring a fuller understanding of the future challenges related to EU *agencification*. Insights from both Germany and the U.S. will therefore be combined, paying attention to (1) the possibility for the federal legislature to establish subsidiary bodies removed from the core of the executive, (2) the limits to empowering these bodies, and (3) the judicial deference granted to acts of such bodies.

## B. Understanding EU Agencification

Today, the EU legislature has established autonomous EU agencies in most policy fields to assist the EU institutions and the Member States. These EU agencies may be defined as permanent bodies under EU public law, established by the institutions under secondary law, and endowed with their own legal personality.<sup>3</sup> Following the “Common Approach on Decentralized Agencies,” the EU institutions have qualified these bodies as decentralized, even if “deconcentration” would better capture the dynamics of EU *agencification*.<sup>4</sup> *Agencification* can then be described generally as the process whereby an increasing number of agencies exercise increasingly important powers.<sup>5</sup>

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<sup>1</sup> For a general discussion of the phenomenon of *agencification* in the EU legal order, see MERIJN CHAMON, EU AGENCIES: LEGAL AND POLITICAL LIMITS TO THE TRANSFORMATION OF THE EU ADMINISTRATION (forthcoming 2016).

<sup>2</sup> See generally Tom Zwart, *Independent Regulatory Agencies in the US*, in AGENCIES IN EUROPEAN AND COMPARATIVE LAW 3 (Tom Zwart & Luc Verheij eds., 2003); Hubert Delzangles, *L’encadrement des agences américaines de régulation, un modèle pour l’Europe ?*, in LA LEGISTIQUE DANS LE SYSTEME DE L’UNION EUROPEENNE: QUELLE NOUVELLE APPROCHE 163 (Fabienne Peraldi Leneuf & Jacques Normand eds., 2012).

<sup>3</sup> See Merijn 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*, 39 EUR. L. REV. 380, 380 n.1 (2014).

<sup>4</sup> Scott earlier rejected the notion of decentralization to describe EU *agencification*. See Colin Scott, *Agencies for European Regulatory Governance: A Regimes Approach*, in REGULATION THROUGH AGENCIES IN THE EU: A NEW PARADIGM OF EUROPEAN GOVERNANCE 70–71 (Damien Geradin, Rodolphe Muñoz & Nicolas Petit eds., 2005).

<sup>5</sup> See also Tobias Bach & Werner Jann, *Des animaux dans un zoo administratif: le changement organisationnel et l’autonomie des agences en Allemagne*, 76 REVUE INTERNATIONALE DES SCIENCES ADMINISTRATIVES 469, 470–71 (2010).

EU scholars still debate the driving force behind EU *agencification*, but a consensus seems to be emerging whereby the classic “functionalist” narrative is discarded in favor of a more political rationale.<sup>6</sup> EU agencies are executive bodies that do not fit in the traditional EU administration that distinguishes between direct administration—by the Commission or, in rare instances, the Council—and indirect administration by the Member States. EU agencies are not integrated in the Commission and the internal policy organ of an EU agency is dominated by representatives of the Member States. In addition, EU agencies rarely exercise an independent executive function. Instead, they are usually involved in composite procedures, in which they play a part together with relevant national authorities and the Commission.

Still, functional reasons for *agencification* may be conceived. EU *agencification* started to gain pace following the Single European Act (SEA) and the extension of the EU’s reach to an increasing number of policy areas. This resulted in an increased demand at the EU level for expertise, begging the question of how the Commission should allocate its scarce resources. EU agencies may be a functional solution to this problem, allowing the EU to gather expertise<sup>7</sup> and freeing up the Commission to focus on its core tasks.<sup>8</sup> However, such functional needs do not fully explain *agencification* because the Treaties themselves suggest an alternative to *agencification*. Article 17 TEU provides that the Commission “shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.”<sup>9</sup> If more expertise is required at the EU level, it would seem logical under the Treaties to house it within the Commission.

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<sup>6</sup> Daniel Kelemen & Andrew Tarrant, *The Political Foundations of the Eurocracy*, 34 W. EUR. POL. 922, 923 (2011); Mark Thatcher, *The Creation of European Regulatory Agencies and its Limits: A Comparative Analysis of European Delegation*, 18 J. EUR. PUB. POL’Y 790, 791 (2011).

<sup>7</sup> See Giandomenico Majone, *The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union*, 3 EIPASCOPE 1, 1–6 (1997). See generally Jacqueline Duheil de la Rochère, *EU Regulatory Agencies: What Future do They Have?*, in VIEWS OF EUROPEAN LAW FROM THE MOUNTAIN 355 (Mielle Bulterman et al. eds., 2009).

<sup>8</sup> See Michaela Wittinger, *Europäische Satelliten: Anmerkungen zum Europäischen Agentur(un)wesen und zur Vereinbarkeit Europäischer Agenturen mit dem Gemeinschaftsrecht*, 42 EUROPARECHT 618, 618 (2008); Isabelle Muller-Quoy, *L’apparition et le développement des Agences de l’Union européenne*, in LES AGENCES DE L’UNION EUROPÉENNE: RECHERCHE SUR LES ORGANISMES COMMUNAUTAIRES DÉCENTRALISÉS 17 (Jean-François Couzinet ed., 2002); Martijn Groenleer, *The European Commission and Agencies*, in THE EUROPEAN COMMISSION 163 (David Spence ed., 2006); MICHAEL BERGER, VERTRAGLICH NICHT VORGESEHENE EINRICHTUNGEN DES GEMEINSCHAFTSRECHTS MIT EIGENER RECHTSPERSÖNLICHKEIT 89–90 (1999).

<sup>9</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C. 306) Art. 17 [hereinafter TFEU Art. 17].

Using the traditional notions, legislative integration following the SEA requires, in most areas, a level of coordination among national authorities, which cannot be properly achieved under indirect administration. The Treaties then put forward direct administration, but through *agencification* the Member States have secured a more subsidiarity-friendly alternative, escaping the rigid dichotomy of indirect and direct administration laid down in the Treaties.

*Agencification* is not a phenomenon unique to the EU and in order to better understand EU *agencification*, many authors have sought guidance from the U.S. experience.<sup>10</sup> This may prove interesting: Conceptualizing the EU as a federal-type polity allows comparisons with genuine federal states to be made. For the EU then, Germany, perhaps more than the U.S., would seem an interesting guide, because Germany's model of *Vollzugsföderalismus* (executive federalism) can be analogized to the EU's rule of indirect administration, even if the Court of Justice has refuted that such analogies could have legal consequences in the EU legal order.<sup>11</sup>

### C. Three Fundamental Issues in *Agencification*

In this Article, *agencification* in the U.S. and Germany will be looked at from a number of perspectives which are also becoming highly relevant to the EU, especially following the Court's ruling in *UK v. Parliament and Council (Short-selling)*.<sup>12</sup> The federal competence to establish agencies, the limits to empowering agencies, and the question of judicial deference to agency decisions are fundamental issues that must be addressed. While the EU legislature has currently established over thirty EU agencies, the EU does not have a clear *allgemeine Organisationskompetenz* allowing the EU institutions to establish subsidiary bodies. While the EU Treaties since the Lisbon Treaty do refer to "agencies," this language is only used in a minority of language versions of the Treaties.<sup>13</sup> Even if, for example, the reference to agencies in Article 263 TFEU were to be given legal significance, the result would be that the Treaties recognize that EU agencies may adopt legally binding acts but fail to detail when agencies should be used and what limits their power.

When it comes to these limits, legal doctrine and the EU institutions have long relied on the *Meroni* doctrine but only recently the Court of Justice confirmed this reliance in *Short-*

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<sup>10</sup> See sources cited *infra* note 48.

<sup>11</sup> Case C-359/92, Germany v. Council, 1994 E.C.R. I-3681, para. 38.

<sup>12</sup> Case C-270/12, United Kingdom v. Parliament and Council, ECLI:EU:C:2014:18 [hereinafter *Short-selling*].

<sup>13</sup> Apart from the English language version, the Bulgarian, Danish, Estonian, Greek, Gaelic, Slovenian, Slovak, Romanian, and Swedish language versions also refer to "agencies."

*selling*.<sup>14</sup> The Court also extensively re-interpreted the notion of “purely executive powers,” because, in the original *Meroni v. High Authority* ruling, it held that decisions adopted by the delegate authority should be “the result of mere accountancy procedures based on objective criteria laid down by the [delegating authority].”<sup>15</sup> A more flexible *Meroni* doctrine was necessary in *Short-selling* to allow a useful *agencification* to continue, and this is indeed how the Court ruled, referring to “precisely delineated powers.”<sup>16</sup>

In turn, the question of the degree of judicial deference to EU agencies’ decisions has not been seriously discussed. This may be explained by the fact that under the original *Meroni* doctrine, the question of judicial deference does not need to be addressed. Following *Short-selling*, the Court of Justice has confirmed that agencies may exercise policy discretion<sup>17</sup> subject to the agencies’ powers being “amenable to judicial review in the light of the objectives established by the delegating authority.”<sup>18</sup> This raises the question of which kind(s) of judicial review the EU Courts should apply. These questions will continue and increase following the ruling in *Short-selling*.<sup>19</sup>

#### **D. Establishing Subsidiary Executive Bodies Removed from the Core Executive**

##### *I. The United States Experience*

In the U.S., the Constitution does not explicitly address the issue of agencies. Instead, Article II, Section 1 provides that the “executive power shall be vested in a President of the United States of America,” while Article II, Section 3 provides that the President “shall take care that the laws be faithfully executed.”<sup>20</sup> Article II, Section 2 further provides that “principal officers” are nominated by the President, with the advice and consent of the Senate.<sup>21</sup> The “inferior officers,” however, may be appointed by the President alone, if

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<sup>14</sup> See *Short-selling*, *supra* note 12.

<sup>15</sup> Case 9/56, *Meroni & Co. v. High Authority*, 1957–1958 E.C.R. 133, 153.

<sup>16</sup> See *Short-selling*, *supra* note 12,, para. 53.

<sup>17</sup> Even if the Court in *Short-selling* still confirmed that EU agencies cannot exercise discretionary powers.

<sup>18</sup> See *Short-selling*, *supra* note 12, at para. 53.

<sup>19</sup> For a discussion of this case and its possible repercussions, see sources cited *infra* note 110; Chamon, *supra* note 3. See generally Rob Van Gestel, *European Regulatory Agencies Adrift?*, 21 MAASTRICHT J. EUR. & COMP. L. 188 (2014).

<sup>20</sup> U.S. CONST. art. II, §§ 1, 3.

<sup>21</sup> U.S. CONST. art. II, § 2.

Congress so provides by law.<sup>22</sup> Placing executive branch responsibility with the President, the last sentence of Article I, Section 8 of the Constitution provides that it is Congress' responsibility to design the federal government:<sup>23</sup> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

This "necessary and proper" clause has a potentially unlimited scope and permits Congress to determine how the powers vested in other federal authorities can be executed.<sup>24</sup> In *McCulloch v. Maryland*, Chief Justice Marshall noted that "[t]his provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."<sup>25</sup> Given that flexibility, independent agencies could appear necessary and proper to deliver policy in the current modern society, even if they were not foreseen by the drafters of the U.S. Constitution in 1787.

While Congress' power to design the federal government has not been contested much, the more contentious issue was where the different agencies should be situated in the federal government.<sup>26</sup> While executive and cabinet agencies fall within the executive sphere, independent agencies have been described as "a new and headless fourth branch of the Government,"<sup>27</sup> resulting in the seemingly primordial question: Who controls these bodies? This question almost equates with the single issue of who may remove an agency member from office. In the 1920's in *Myers v. United States*, the Supreme Court of the

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<sup>22</sup> See *United States v. Germaine*, 99 U.S. 508, 509–10 (1878) (confirming the distinction between inferior and principal officers). A clear definition of the constitutional notion of "inferior officers" is still lacking.

<sup>23</sup> See Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. 615, 615 (2006).

<sup>24</sup> Charles Steele & Jeffrey Bowman, *The Constitutionality of Independent Regulatory Agencies under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363, 369 (1987).

<sup>25</sup> *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

<sup>26</sup> Although there is no general consensus on exact terminology in the U.S., three basic groups of agencies are generally distinguished: Cabinet agencies (e.g. the Food and Drug Administration), executive agencies (e.g. the Environmental Protection Agency), and independent agencies (e.g. the Federal Trade Commission). See Abraham Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 ADMIN. L. REV. 415, 416 (1976); Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583 (1984). The cabinet agencies operate under a regular department, whereas the latter two do not. Yet, both the cabinet and executive agencies should be situated within the executive branch.

<sup>27</sup> PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *Report on the Administrative Management in the Government of the United States*, U.S. SEN., 29 (1937).

United States held that the President, being the head of the executive, is vested with this power.<sup>28</sup>

Later, in *Humphrey's Executor v. United States*, the Supreme Court accepted that Congress could prescribe that the President could only dismiss certain agencies' principal officers "for cause."<sup>29</sup> In *Humphrey's Executor*, the Court found that the Federal Trade Commission (FTC) exercised both "quasi-judicial and quasi-legislative" duties and that the legislature had explicitly refrained from entrusting these duties to the Bureau of Corporations—which was part of the Department of Commerce.<sup>30</sup> Congress could require removal only for cause because the precedent of *Myers* only applied to purely executive officers, and did not "include an officer who occupies no place in the executive department, and who exercises no part of the executive power vested by the Constitution in the President."<sup>31</sup> Still, both in *Humphrey's Executor* and *Myers*, the nature of the function exercised by the officer determined the President's power of removal.<sup>32</sup>

The importance of the President's power to remove executive officers was confirmed in *Bowsher v. Synar*, where Congress had reserved the power to remove the Comptroller General.<sup>33</sup> Chief Justice Burger, writing the majority opinion observed: "By placing the responsibility for execution of [this] Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function."<sup>34</sup> Interestingly, the Court found that the Comptroller General was subservient to the Congress, even if he could only be removed "for cause." The Court later acknowledged that it is impossible to speak in terms of "purely executive"

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<sup>28</sup> *Myers v. United States*, 272 U.S. 52, 163–64 (1926).

<sup>29</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). A unified "for cause" standard does not exist. The legislator may be more or less specific in its statutes as to the grounds on which an officer may be removed. See Kent Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1352 (2012).

<sup>30</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625–26 (1935).

<sup>31</sup> *Id.* at 628.

<sup>32</sup> Peter Davidson, *Chipping Away at the President's Control over His Administration: An Analysis of Morrison v. Olson and Beyond*, 6 J. L. & POL. 205, 217 (1989). As Davidson remarks, this was further confirmed in *Wiener v. United States*, 357 U.S. 349 (1958).

<sup>33</sup> However, in a concurring opinion, Justice Stevens rejected the qualification of the Comptroller General's powers as "executive" in nature. See *Bowsher v. Synar*, 478 U.S. 714, 757 (1986).

<sup>34</sup> *Bowsher*, 478 U.S. at 734. As Stack observes, the Reagan administration hoped that the Court would rule the President may remove the Comptroller General at will, possibly setting a precedent for other independent agencies. See Kevin Stack, *Obama's Equivocal Defense of Agency Independence*, 26 CONST. COMMENT. 583, 590 (2010).

tasks. Distinguishing between purely executive tasks and other tasks became so difficult that in *Morrison v. Olson*, the Court admitted: “[O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a ‘good cause’-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as ‘purely executive.’”<sup>35</sup> Instead, “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.”<sup>36</sup>

The Court further explained that it was not required that the President could remove the officers of United States Office of the Independent Counsel at will, because even a “for cause” protection allowed the Present to retain sufficient authority over the independent counsel.<sup>37</sup> As Stack observes, *Morrison v. Olson* had an ambiguous outcome for the Reagan Administration which had wanted the Court to strike down “for cause” protections as unconstitutional.<sup>38</sup> Instead, the Court upheld this protection at the same time minimizing the difference between the removal at will and removal “for cause.”<sup>39</sup>

The latest ruling in this line of cases is *Free Enterprise Fund v. PCBOA*.<sup>40</sup> The PCBOA members were appointed by the Securities and Exchange Commission (SEC), an independent agency, and could only be removed by the SEC “for cause.” In turn, the Commissioners of the SEC can only be removed by the President “for cause.” The double “for cause” removal provisions then raised the question of whether the President still retained meaningful control over the PCBOA members and the enforcement of accounting standards. In practical terms, Chief Justice Roberts wrote for the majority and explained how the second “for cause” limitation changed the nature of the President’s review and prevented him from ensuring the faithful execution of the laws.<sup>41</sup> The Court further strengthened this logic by adding a democracy argument, noting that if the President was

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<sup>35</sup> *Morrison v. Olson*, 487 U.S. 654, 689 (1988).

<sup>36</sup> *Id.* at 691.

<sup>37</sup> *Id.* at 691–92.

<sup>38</sup> See Stack, *supra* note 34, at 594.

<sup>39</sup> See *id.*

<sup>40</sup> See *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

<sup>41</sup> *Id.* at 484.



incapable of ensuring the law's execution, the people could not properly pass judgement on the President's functioning.<sup>42</sup>

Justice Breyer, writing the dissenting opinion, noted that the case concerned the intersection of two constitutional principles: The Necessary and Proper Clause and the separation of powers doctrine. Justice Breyer refers to the changes in U.S. society since the adoption of the Constitution and the exigencies of a modern regulatory state,<sup>43</sup> further noting that, in practice, the President's power "to get something done" depends on other elements than that of the power of removal.<sup>44</sup> While convincing, it might be said that the majority's argument alludes more directly to a citizen's gut feeling that executive officers who are too far removed from the President would surely try to escape his control if they are not out of his control already.<sup>45</sup>

The American experience may inform the EU's understanding of agencies in two important ways: First, the discussion in the U.S. has focused on the control of independent agencies, given that the establishment of these bodies by Congress is not contested and neither is their empowerment.<sup>46</sup> Now that the Court of Justice has sanctioned significant empowerments to EU agencies, in *Short-selling*, the question of control over the EU agencies will become a priority on the political agenda.<sup>47</sup> In *PCBOA*, the Supreme Court linked the control issue back to the democratic accountability of the U.S. President, which begs the question: Which democratic actor should secure the democratic accountability of EU agencies? Second, an important difference between the U.S. and EU systems is how federal legislation is applied and enforced. This is fundamental but often ignored in comparisons of *agencification* processes in the U.S. and EU.<sup>48</sup>

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<sup>42</sup> *Id.* at 497–498. Huq criticized the Court's opinion arguing that (1) "control" should not be reduced to the power of removal and (2) the link between Presidential control and democratic accountability is not that strong. See Aziz Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 3 (2013).

<sup>43</sup> See *Free Enterprise Fund*, 561 U.S. at 520.

<sup>44</sup> *Id.*

<sup>45</sup> Chief Justice Roberts further contemplated the idea of a multiple, rather than a double-layered protection, using the metaphor of a matryoshka doll. See *Free Enterprise Fund*, 561 U.S. at 496.

<sup>46</sup> See *infra* Part E.I.

<sup>47</sup> See *infra* Part E.II.

<sup>48</sup> See generally Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn from the American Experience*, 11 COLUM. J. EUR. L. 1 (2004); François van der Mensbrugge, *The Danger of Excessive Delegations to Independent Administrative Agencies: The Example of the U.S.A.*, in EUROPEAN REGULATORY AGENCIES 113 (Giacinto Della Cananea ed., 2005); Christian Stoffaës, *Network Regulation on a Federal Scale: Lessons for Europe from the American Perspective*, in EUROPEAN REGULATORY AGENCIES 137 (Giacinto Della Cananea

In the Supreme Court's jurisprudence, there are strands of cases related to the separation of powers and related to federalism. Both strands may at times come together in a single case or at other times be debated under which single strand a case should be situated.<sup>49</sup> Generally, the question of delegation of powers to agencies firmly forms part of the separation of powers jurisprudence. Simply put, in the U.S., a decision by Congress to grant powers to an independent agency is an exclusively federal affair. Such a decision may be contested for not being "necessary and proper," or because it "impedes the President's ability to perform his constitutional duty," or because it is an unlawful delegation of legislative powers.<sup>50</sup> Such challenges do not have a vertical dimension linking the federal to the state level, because the federal level in the U.S. has its own administration. The EU, however, is characterized by a *Vollzugsföderalismus* which means that empowering a new federal administrative body is intrinsically linked to the vertical order of competences. As a result, the question of how to control EU agencies, unlike in the U.S., will not be an exclusive "federal" affair, but should also involve the Member States.

## II. The German Experience

The EU and Germany share the logic of *Vollzugsföderalismus*. Therefore, the question of implementation of federal legislation raises issues of *Länder* competence. At the same time, unlike in the EU, hybrid forms of administration between direct and indirect administration are not tolerated by the German Basic Law (*Grundgesetz* (GG)), because it "precludes, apart from limited exceptions, a so-called mixed administration."<sup>51</sup>

The German *Grundgesetz* (GG),<sup>52</sup> unlike the U.S. or EU constitutional charters, contains an elaborate section on "The Execution of Federal Laws and the Federal Administration."<sup>53</sup> The German distinction between direct and indirect administration is not analogous to that which exists in the EU. In Germany, direct administration (*unmittelbare Verwaltung*) means

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ed., 2005); MIROSLAVA SCHOLTEN, THE POLITICAL ACCOUNTABILITY OF EU AGENCIES: LEARNING FROM THE US EXPERIENCE (2014). Shapiro does take note of this issue. See Martin Shapiro, *A Comparison of US and European Independent Agencies*, in *COMPARATIVE ADMINISTRATIVE LAW* 300 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

<sup>49</sup> See, e.g., Calabresi, *infra* note 94; *Printz v. United States*, 521 U.S. 898, 922–23 (1997).

<sup>50</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 689 (1988); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

<sup>51</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 20, 2007, *Hartz IV-Arbeitsgemeinschaften*, 119 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVerfGE] 331, 365.

<sup>52</sup> The German Parliament provides an English translation of the *Grundgesetz*. See GRUNDGESETZ [GG] [BASIC LAW], translation at [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0060](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0060).

<sup>53</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. VIII.

that a body incorporated in the executive is responsible for administration, whereas under indirect administration (*mittelbare Verwaltung*) the administration is entrusted to legally independent bodies.<sup>54</sup> This would require a search for the EU agencies' counterparts among the bodies of indirect administration.<sup>55</sup> Yet, Fischer notes that the "Federal Authorities [*selbständige Bundesoberbehörden*] are the closest thing to Quangos [that] the German system of direct administration can offer [although] the Federal Authorities cannot generally be described as independent administrative agencies with rule-making power."<sup>56</sup>

Indeed, the federal authorities will often represent Germany in EU agencies if they are not represented by a ministry (regular department).<sup>57</sup> The identification of these bodies is straightforward precisely because of the elaborate section on the execution of federal legislation in the Basic Law.

As Ziller points out, that elaborate GG section contrasts with the single Article found in the EU Treaties—Article 291 TFEU.<sup>58</sup> With regard to the possible scope of *Bundesverwaltung*, the German Federal Constitutional Court has made clear that, under the structure of the Basic Law, the *Bund's* legislative competence is, at the same time, the ultimate limit to its administrative competence.<sup>59</sup> As to the implementation itself, Article 83 GG lays down the

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<sup>54</sup> HOWARD FISHER, *THE GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE: A GENERAL SURVEY TOGETHER WITH NOTES AND GERMAN VOCABULARY* 5–6, 11 (4th ed. 2002).

<sup>55</sup> See, e.g., Joachim Wentzel, *Agenturen im deutschen Verwaltungskontext: Nachzügler oder Vorreiter?*, 63 *DIE ÖFFENTLICHE VERWALTUNG* 768 (2010).

<sup>56</sup> A Quango is a quasi-autonomous non-governmental organization in the U.K. See Kristian Fischer, *Quangos—An Unknown Species in German Public Law? German Report on the Rulemaking Power of Independent Administrative Agencies*, in *RECENT TRENDS IN GERMAN AND EUROPEAN CONSTITUTIONAL LAW* 153, 195–60 (Eibe Riedel & Rudiger Wolfrum eds., 2006). Bach also stresses that the bodies of indirect administration are typically not involved in core public-sector functions. See Tobias Bach, *Germany*, in *GOVERNMENT AGENCIES: PRACTICES AND LESSONS FROM 30 COUNTRIES* 166, 167–69 (Koen Verhoest et al. eds., 2012).

<sup>57</sup> The following are some of the bodies other than ministries, representing Germany in EU agencies: Bundesanstalt für Finanzdienstleistungsaufsicht [BaFin] [Federal Financial Supervisory Authority] which is an *Anstalt*; and Bundesinstitut für Arzneimittel und Medizinprodukte [BfArM] [Federal Institute for Drugs and Medical Devices], Eisenbahn-Bundesamt [EBA] [Federal Railway Authority], Bundesnetzagentur [BNetzA] [Federal Network Agency], and Bundesamt für Sicherheit in der Informationstechnik [BSI] [Federal Office for Information Security] which are *selbständige Bundesoberbehörde*.

<sup>58</sup> Jacques Ziller, *Multilevel Governance and Executive Federalism: Comparing Germany and the European Union*, in *THE EUROPEAN UNION LEGAL ORDER AFTER LISBON* 265 (Patrick Birkinshaw & Mike Varney eds., 2010).

<sup>59</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 28, 1961, 1. Rundfunkentscheidung, 12 BVerfGE 205, 229.

general rule similar to Article 291 (1) TFEU.<sup>60</sup> Article 84 GG provides for the execution of federal legislation by the *Länder* “in their own right.”<sup>61</sup> Article 85 GG details the execution “on federal commission,” which is limited to those material fields expressly mentioned in the Basic Law.<sup>62</sup> These Articles will not be further discussed because the provisions immediately relevant here are those dealing with the implementation of federal legislation by the federation itself.<sup>63</sup>

The two bodies, *selbständige Bundesoberbehörde* and *Anstalt*, identified above are mentioned in the first sentence of Article 87 (3) of the GG:

In addition, autonomous federal higher authorities as well as new federal corporations and institutions under public law may be established by a federal law for matters on which the Federation has legislative power. When the Federation is confronted with new responsibilities with respect to matters on which it has legislative power, federal authorities at intermediate and lower levels may be established, with the consent of the *Bundesrat* and of a majority of the Members of the *Bundestag*, in cases of urgent need.<sup>64</sup>

Because the provisions of paragraph three are applicable *in addition* to the rules laid down in the two preceding paragraphs, it deals with the so-called optional federal administration, either through the federal higher authorities, or through the federal corporations and institutions under public law.

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<sup>60</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. VIII, art. 83.

<sup>61</sup> This is the so called *Ausführung als eigene Angelegenheit*.

<sup>62</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. VIII, art. 85. For a more elaborate discussion of these two types of *Bundesverwaltung*, see Ziller, *supra* note 58, at 268–74.

<sup>63</sup> The *Bundeseigene Verwaltung* therefore is one possible form of *Bundesverwaltung*, next to the options under Article 84 GG and Article 85 GG.

<sup>64</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. VIII, art. 87 (3).

Because the first sentence of Article 87 (3) of the GG contains an optional course of action within the exceptional category of federal administration, this provision has been studied from a federalist perspective. Indeed, one of the first controversies regarding the provision was whether it contained both a *Kompetenz* and *Organisationsnorm* or only the latter—in other words, whether the provision only gives competence to the federation to establish some of its own authorities or whether it also includes the competence to entrust such authorities with implied tasks for which the Basic Law does not explicitly provide. In the *Kreditwesen* case,<sup>65</sup> the Constitutional Court, following the dominant opinion in legal doctrine, confirmed that the first sentence of Article 87 (3) of the GG also qualifies as a *Kompetenznorm*.<sup>66</sup> It is difficult to overestimate the importance of this qualification. As Kalkbrenner noted, the areas in which the federation holds legislative competence are vast, and as a *Kompetenznorm*, the federal level can establish its own administration in these fields as it sees fit.<sup>67</sup> Kalkbrenner predicted that the logic of Article 83 GG could be reversed,<sup>68</sup> because a reliance on Article 87 (3) precludes the competence of the *Länder*.<sup>69</sup> As the Constitutional Court explained in *Moratorium Gorleben*, “[t]he federation may, by establishing this federal higher authority to which it grants certain tasks, claim the power of administration and at the same time end the competence of the *Länder* under Article 83 GG.”<sup>70</sup>

Because of the alleged lack of real constraints on the use of the first sentence of Article 87 (3), Papier describes the provision as a Trojan horse.<sup>71</sup> First, because it speaks of “matters on which the federation has legislative power,” a federal authority may be established for matters on which the federation has exclusive, concurring, or even implied legislative

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<sup>65</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 24, 1962, *Kreditwesen*, 14 BVerfGE 197, 202 [hereinafter *Kreditwesen*].

<sup>66</sup> *Id.* at 210.

<sup>67</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. VIII, art. 73, 74.

<sup>68</sup> Helmut Kalkbrenner, *Zur Errichtung von Bundesoberbehörden nach Art. 87 III GG*, 7 JURISTENZEITUNG [JZ] 211 (1963).

<sup>69</sup> DIETER HÖMIG, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 515 (2010).

<sup>70</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 5, 2001, *Moratorium Gorleben*, 104 BVerfGE 238, 247 (own translation).

<sup>71</sup> Hans-Jürgen Papier, *Die Regionalisierung der gesetzlichen Rentenversicherung aus verfassungsrechtlicher Sicht*, 4 NEUE ZEITSCHRIFT FÜR SOZIALRECHT 6, 242 (1995).

competence.<sup>72</sup> Second, while the bodies have to be established by law, this law does not require the consent of the *Bundesrat* and may be adopted by the *Bundestag* alone—contrary to the bodies provided for in the second sentence of Article 87 (3).<sup>73</sup> As a result, the *Länder* lack control when new federal authorities are established and empowered. For this reason, ten of the sixteen *Länder* proposed, albeit unsuccessfully, in the 1990s to amend the provision so that the *Bundesrat's* consent would be required to establish these bodies.<sup>74</sup> In parallel with the exercise by the federation of its concurrent competences, which is subject to the *Erforderlichkeitsklausel*,<sup>75</sup> it has been argued that the establishment of a new federal body should be subject to the condition that it is necessary because existing federal and *Länder* authorities cannot adequately fulfill the tasks concerned.<sup>76</sup> However, the Constitutional Court rejected this and observed that clause gives an exclusive competence to the *Bund*, that it does not differentiate between such bodies in fields of exclusive or shared competence, and—under an *a contrario* reasoning—that only the second sentence of Article 87 (3) refers to “cases of urgent need.”<sup>77</sup> Lastly, while the first sentence of Article 87 (3) prescribes that the agencies be established through law, their further empowerments do not require legislative action and may be done by executive rulemaking.<sup>78</sup>

Only two limits to the exercise of the competence in the first sentence of Article 87 (3). The first is the principle of federal loyalty, an unwritten principle of German constitutional law

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<sup>72</sup> Martin Ibler, *Artikel 87 GG*, in GRUNDGESETZ: KOMMENTAR, MÜNCHEN, BECK, ERGÄNZUNGLIEFERUNG 64, 205 (Theodor Maunz & Günter Dürig eds., 2012). In case the matter falls with a concurring competence, the conditions for using such a competence should of course also be met. Focusing on the *Erforderlichkeitsklausel*, see GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. VIII, art. 72 (2).

<sup>73</sup> See Ibler, *supra* note 72, at 209.

<sup>74</sup> It should be noted that the original draft of the Basic Law prescribed the consent of the *Bundesrat* for laws establishing *Bundesoberbehörden*. In the end, this provision did not make it to the final version. Further on this and on the proposed amendment in the 1990's, see *id.* at 198–201.

<sup>75</sup> *Id.* at 205.

<sup>76</sup> Ibler, *supra* note 72, at 210–11.

<sup>77</sup> *Kreditwesen* at 213–14.

<sup>78</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. VIII, art. 80 (1). The Bundesverwaltungsgericht [Federal Administrative Court] has confirmed that an *Anstalt* may be empowered either through (1) its establishing law, (2) a subsequent law, or (3) a *Rechtsverordnung*. See Bundesverwaltungsgericht, [1996] 102 BVerwGE 119, 126. Appel and Eding conclude that *Bundesoberbehörden* may also be empowered through *Rechtsverordnungen*. See generally Markus Appel & Annegret Eding, *Verfassungsrechtliche Fragen der Verordnungsermächtigung des § 2 II NABEG*, 6 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 344 (2012).

that resembles the principle of loyal cooperation in EU law.<sup>79</sup> In practice, it would appear difficult to rely on this principle to curtail the *Bund*.<sup>80</sup> The Constitutional Court read the second limit into Article 87 (3) and this limit prescribes that a federal authority or institution may only be established to entrust it with tasks which out of their nature may be practically executed at federal level for the entire territory of the *Bund* without needing to rely on further subordinate authorities or *Länder* authorities.<sup>81</sup> One may question whether this is really a meaningful limit. Which task lends itself to be undertaken in a centralized manner is also affected by technological advances broadening the scope of government tasks that may practically be exercised at the federal level. Reicherzer further notes that because the federation is free to devote as many resources to a federal authority as it chooses, any task may be effectively centralized if the resources are unlimited.<sup>82</sup>

Because of this, Reicherzer has argued for a revision of the Constitutional Court's rejection in *Kreditwesen* of an *Erforderlichkeitskriterium* for the first sentence of Article 87 (3) GG.<sup>83</sup> By working out a test resembling a subsidiarity and proportionality test in EU law, Reicherzer concludes that in at least one specific case, the powers entrusted to the federal office for the environment in the carbon emissions trading system is in violation of the Basic Law.<sup>84</sup>

The German experience shows how, in a system of *Vollzugsföderalismus*, the establishment of new federal bodies is relevant to the states. But in the EU federation, the states are in a much stronger position than the *Länder*. Originally, EU agencies were established under Article 352 TFEU, requiring unanimity in the Council. Today, EU agencies are established using the legal bases of the specific policy fields or Article 114 TFEU, which

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<sup>79</sup> See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Besoldungsgesetz von Nordrhein-Westfalen, Dec. 1, 1954, 4 BVERFGE 115, 140; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Volksbefragung Hessen, July 30, 1958, 8 BVERFGE 122, 138–39.

<sup>80</sup> See Ibler, *supra* note 72, at pp. 211–12.

<sup>81</sup> See Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Zollkriminalamt, Mar. 3, 2004, 110 BVERFGE 33, 49; *Kreditwesen* at 211.

<sup>82</sup> See Max Reicherzer, *Bundesoberbehörden: Trojanische Pferde für den Föderalismus? Zur Verfassungsmäßigkeit der Zuständigkeitsbestimmungen im TEHG*, 8 NVwZ 877 (2005).

<sup>83</sup> Reicherzer specifically takes issue with the Court's "blunt" *a contrario* reasoning. To Reicherzer, it follows from the exceptional character of Article 87 (3) first sentence that the *pouvoir constituant* would have intended the provision to be used only when a clear need can be shown, albeit that the threshold required should not be as high as that of Article 87 (3) GG in the second sentence. See Reicherzer, *supra* note 82.

<sup>84</sup> See *id.* at 877–80.

most of the time, post-Lisbon, results in the ordinary legislative procedure. While Member States have lost their individual veto rights, collectively they are still a veto player, unlike the German *Länder*. In addition, the qualified majority being a super majority itself maintains a high threshold requirement. The Member States' strong hold over the establishment of EU agencies ensures that the original rationale of *agencification* remains respected. It may also explain why the European Parliament, and not the Member States, has stressed questions of control over individual agencies

## E. Empowering Subsidiary Executive Bodies Removed from the Core Executive

### I. The United States Experience

The fixation on the control over independent agencies makes an observer believe that the question as to which powers Congress may delegate to agencies is uncontested. This is not true, but it does appear that this matter has largely been settled. An important preliminary observation here is that the Supreme Court of the United States does not distinguish between congressional delegations to the President and delegations to agencies.

For instance, *Atlas Roofing*<sup>85</sup> confirmed that agencies may perform adjudicative functions through the administrative law judges which they house and *Humphrey's Executor*<sup>86</sup> confirmed that agencies may combine such quasi-judicial powers with quasi-legislative powers.<sup>87</sup> In *Union Bridge Co. v. United States*<sup>88</sup> and *Buttfield v. Stranahan*,<sup>89</sup> the Court provided further guidance and held that Congress could delegate some legislative power to the Treasury as long as that delegation contained a fixed primary standard, in which case "the Treasury [held] the *mere executive* duty to effectuate the legislative policy declared in the statute."<sup>90</sup> In *United States v. Chicago*, the Court further applied this jurisprudence to the Interstate Commerce Commission—the very first independent agency—and noted that "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."<sup>91</sup> From an EU perspective, the similarity between *Union Bridge* and the CJEU's ruling in *Meroni* is evident as both cases focus on "mere executive" duties or

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<sup>85</sup> *Atlas Roofing Co., Inc. v. Occupational Safety Comm'n*, 430 U.S. 442, 455 (1977).

<sup>86</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625–26 (1935).

<sup>87</sup> *INS v. Chadha*, 462 U.S. 919, 984–86 (1983) (White, J., dissenting).

<sup>88</sup> *Union Bridge Co. v. United States*, 204 U.S. 364, 385 (1907).

<sup>89</sup> *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904).

<sup>90</sup> *Union Bridge Co. v. United States*, 204 U.S. 364, 385 (1907) (emphasis added).

<sup>91</sup> *United States v. Chicago*, 282 U.S. 311, 324 (1931).



powers. It is then interesting how the U.S. Supreme Court's subsequent jurisprudence has come to embrace the agencies' far-reaching powers.

In *Hampton & Co. v. United States*, the Court held that "[i]f Congress shall lay down by legislative act an intelligible principle to which the [delegate authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."<sup>92</sup> The delegation of legislative power thus became permissible, as long as it conformed to Congress' "intelligible principle," begging the question how precise the principle needs to be. In later cases, the Court confirmed that vague notions, such as the requirement to act "in the public interest" or "as public convenience, interest or necessity requires," were sufficiently precise.<sup>93</sup>

Still, on two occasions the Court struck down Congressional delegations as being unconstitutional.<sup>94</sup> In *Panama Refining Co. v. Ryan*, the Court assessed the U.S. President's power to prohibit the transportation of petroleum in excess of the amounts permitted by the states, under the National Industrial Recovery Act (NIRA). According to the Court, the relevant section of the Act

establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress . . . thus declares no policy as to the transportation of the excess production . . . it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.<sup>95</sup>

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<sup>92</sup> *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>93</sup> *N.Y. Central S. Corp. v. United States*, 287 U.S. 12, 25 (1932); *Federal Radio Comm'n v. Nelson Bros. B. & M. Co.*, 289 U.S. 266, 285 (1933).

<sup>94</sup> Sometimes it may be debated whether a delegation problem is at issue or not. For instance, in *Clinton v. City of New York*, the U.S. Supreme Court held part of the Line Item Veto Act of 1996 unconstitutional because it created a new procedure to pass legislation. Calabresi argued that this case was not about legislative procedure but about a delegation of powers from Congress to the President. See Steven Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of Clinton v. City of New York*, 99 *Nw. U. L. Rev.* 77, 85–86 (2004). Justice Scalia, writing for the minority indeed argued as such. See *Clinton v. City of New York*, 524 U.S. 417, 465 (1988).

<sup>95</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935).

According to the Court, this empowerment was impermissible because it blurred the difference “between the delegation of power to make the law . . . and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.”<sup>96</sup>

In *Schechter Poultry Corporation v. United States*, the Court struck down the President’s power to promulgate binding “codes of fair competition” finding that “the discretion of the President in approving or prescribing codes . . . is virtually unfettered.”<sup>97</sup>

The fact that the last two cases involved delegations to the President rather than to independent agencies is not relevant, because the material factor in the Court’s analysis is whether Congress in its legislation laid down a sufficiently clear standard, guiding the delegate authority in its exercise of the delegated powers. Again, U.S. constitutional law, unlike EU law, does not make a distinction between delegations to the President and delegations to other executive actors.<sup>98</sup>

Justice White in *Immigration and Naturalization Service v. Chadha* concluded that despite the early cases such as *United States v. Chicago*,<sup>99</sup> “restrictions on the scope of the power that could be delegated diminished and all but disappeared.”<sup>100</sup> After the exceptional 1935 cases, the Court reaffirmed its lax scrutiny of delegations as long as Congress provided some limiting standard guiding the delegate authority. In *Sunshine Anthracite Coal Co. v. Adkins*, the Court stressed the necessity of delegation to ensure the effectiveness of legislative and administrative process.<sup>101</sup> In *Yukas v. United States*, the Court further emphasized that Congress is not under an obligation to choose the least amount of delegation necessary.<sup>102</sup>

In addition, judicial review now intervenes at the stage when a delegated power is exercised, scrutinizing the delegated act in light of the Constitution and the delegating

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<sup>96</sup> *Id.* at 426.

<sup>97</sup> A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935). Justice Cardozo, who dissented in *Panama Refining Co. v. Ryan*, wrote a concurring opinion, setting out why he thought the two delegations were different and why the *Schechter* delegation did not conform to the limits he set out in *Panama*. *See id.* at 551–55.

<sup>98</sup> *See also* Robert Schütze, “Delegated” Legislation in the (New) European Union: A Constitutional Analysis, 74 *Mod. L. Rev.* 5, 664 (2011).

<sup>99</sup> *See United States v. Chicago*, 282 U.S. 311, 324 (1931).

<sup>100</sup> *See INS v. Chadha*, 462 U.S. 985 (1983).

<sup>101</sup> *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398–99 (1940).

<sup>102</sup> *Yukas v. United States*, 321 U.S. 414, 425–26 (1944).

statute,<sup>103</sup> rather than scrutinizing the delegating statute itself.<sup>104</sup> As a result, the Supreme Court in the *Benzene* case applied its general rule of constitutional avoidance,<sup>105</sup> reinterpreting an unclear Congressional delegation so that it would not run afoul of the non-delegation doctrine,<sup>106</sup> even if the reinterpretation itself was a rather questionable departure from the literal reading of the statute.<sup>107</sup>

Unlike in the U.S., the EU legal order distinguishes between empowering the core executive—the Commission—and subsidiary executive bodies. The former is subject to the rule originally laid down in *Köster*,<sup>108</sup> which bars the Commission from touching on the essential elements of legislation and imposes a duty on the legislature to deal with these elements itself. Post-Lisbon, the provisions of Articles 290 and 291 TFEU govern the Commission’s executive rule-making power. *Meroni*, as confirmed in *Short-selling*, governs empowerments of EU agencies.<sup>109</sup> While the original *Meroni* ruling was much less permissive than the rule laid down for delegations to the Commission in *Köster*, *Short-selling’s* reinterpretation of *Meroni* gives the opposite result. As Ohler and Skowron noted,<sup>110</sup> after *Short-selling*, it has become easier for the EU legislature to empower EU agencies—unforeseen under the Treaties—than it is to empower the Commission, given the framework and requirements laid down in Articles 290 and 291 TFEU.

## II. The German Experience

As noted above, the question of establishing and empowering agencies has mostly received attention from a federalism perspective. The detail of the German Basic Law

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<sup>103</sup> See *van der Mensbrugge*, *supra* note 48, at 118.

<sup>104</sup> See, for example *Brown & Williamson*, where the Supreme Court held that the FDA was not competent to regulate tobacco products: given tobacco’s cultural and economic importance it could not be assumed that Congress had implicitly granted jurisdiction to the FDA. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

<sup>105</sup> *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408–09 (1909).

<sup>106</sup> *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980).

<sup>107</sup> Brigham Cluff, *American Trucking and the Nondelegation Doctrine: A New Twist on an Old Doctrine*, 40 *JURIMETRICS* 485, 491–93 (2000).

<sup>108</sup> Case 25/70, *Köster*, 1970 E.C.R. 1161.

<sup>109</sup> See *Short-selling*, *supra* note 12, paras 41–53.

<sup>110</sup> Christoph Ohler, *Rechtsetzungsbefugnisse der Europäischen Wertpapier- und Marktaufsichtsbehörde (ESMA)*, 69 *JZ* 5, 251 (2014); Magdalena Skowron, *Kapitalmarktrecht: Rechtmäßigkeit der Eingriffsbefugnisse der ESMA nach Art. 28 Leerverkaufsverordnung*, 25 *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EUZW]* 349, 353 (2014).

should also be viewed from a separation of powers perspective. Article 80 (1) GG explicitly provides that the legislature may authorize the government to adopt “statutory instruments” provided that the legislature also specifies the content, purpose, and scope of the power conferred. This is very similar to Article 290 TFEU; but unlike in the EU, the Grundgesetz further allows the sub-delegation of this power. This possibility exists under the GG because the federal authorities, despite being “independent,” and the public institutions, despite their separate legal personality, are still subject to the supervision of the highest federal authorities, the ministries, who may also still issue directives.<sup>111</sup> Because of this, many reject any analogy with the American federal agencies discussed above, beyond than their mutual qualification as “regulatory authority.”<sup>112</sup> Despite ministry supervision, Ludwigs notes two recent trends which have strengthened the independence of federal authorities: (1) Pressures from EU legislation requiring the Member States to establish increasingly independent regulatory authorities,<sup>113</sup> and (2) a more progressive interpretation of this new legislation by the German administrative courts, which may strengthen the independence of federal authorities.<sup>114</sup> From this, Ludwigs sees an evolution towards the model of the American regulatory authority.<sup>115</sup>

Under German public law, the strengthened independence of regulatory authorities, imposed by EU law, conflicts with the principle of democracy.<sup>116</sup> This was also apparent in *Commission v. Germany*, which dealt with the EU requirement that national data supervisors act “with complete independence.”<sup>117</sup> The German *Länder* had implemented the EU Directive in such a way that a supervisor was still subject to scrutiny by its *Land* government. While Advocate General Mazák suggested a dismissal of the case,<sup>118</sup> the Court

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<sup>111</sup> Ibler, *supra* note 72, at 218–20.

<sup>112</sup> See Matthias Ruffert, *Regulierung im System des Verwaltungsrechts - Grundstrukturen des Privatisierungsfolgerechts der Post und Telekommunikation*, 124 ARCHIV DES ÖFFENTLICHEN RECHTS 237, 277 n.176 (1999).

<sup>113</sup> Halberstam also notes that the birth of the *Bundesnetzagentur* was not the result of an indigenous development but followed from EU law requirements. See Daniel Halberstam, *The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies*, in EDWARD ELGAR, *COMPARATIVE ADMINISTRATIVE LAW* 197 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

<sup>114</sup> Markus Ludwigs, *Die Bundesnetzagentur auf dem Weg zur Independent Agency? Europarechtliche Anstöße und verfassungsrechtliche Grenzen*, 44 DIE VERWALTUNG 1, 41 (2011).

<sup>115</sup> *Id.* at 42.

<sup>116</sup> This is of course relevant to all EU Member States.

<sup>117</sup> Case C-518/07, *Commission v. Germany*, 2010 E.C.R. I-1885, para. 1.

<sup>118</sup> AG Mazák further noted that the problem in this case also related to the conflict between the traditional concept of administration and the (more modern) concept based on decentralization. See Opinion of Advocate General Mazák, Case C-518/07, *Commission v. Germany*, 2010 E.C.R. I-1885, para. 8; sources cited *supra* note 6.

held the action to be well founded. In its pleadings, Germany had *inter alia* invoked the *Demokratieprinzip*, but the Court followed an EU, rather than a national interpretation of this principle and the EU principle “does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government.”<sup>119</sup> The Court also emphasized that the independence in question only related to the supervisor’s relationship with the executive and not with the legislature even if one year earlier the Court had also sanctioned a limitation on the national legislature’s discretion in predefining an NRA’s policy.<sup>120</sup>

The traditional German conception of the *Demokratieprinzip* is based on Article 20 (2) GG from which the German Constitutional Court elaborated an important doctrine:<sup>121</sup> The exercise of public power is only legitimate—in other words, democratic—if there is an uninterrupted chain of legitimacy (*ununterbrochene Legitimationskette*) from the people to the wielders of public power. In *Mitbestimmungsgesetz Schleswig-Holstein*, the Court clarified this by reference to the personal democratic legitimacy of public officials and the substantive legitimacy scrutinized by the people or parliament:

The exercise of public power is only then democratically legitimate when the appointment of its wielders, affording them personal legitimacy, may be traced back to the people and when their actions themselves are equally legitimate, namely when the wielders of public power act under the authority of the government and in line with its directives, allowing the government to take on responsibility before the people and parliament.<sup>122</sup>

In this case, the Court ruled that the arbitrary powers of the joint civil servants’ committee were in violation of the *Demokratieprinzip* because its members were not personally legitimized and because the committee could not receive instructions from the ministry, which could, in turn, not be held accountable by the parliament.

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<sup>119</sup> Case C-518/07 at para. 42.

<sup>120</sup> See Case C-424/07, *Commission v. Germany*, 2009 E.C.R. I-11431.

<sup>121</sup> A number of German authors have therefore criticized *Short-selling* for its lack of attention to the repercussions on the *Demokratieprinzip*. See Ohler, *supra* note 110, at 250–52.

<sup>122</sup> See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], *Lippeverband*, Dec. 5, 2002, 107 BVERFG 59, 87-88 [hereinafter *Lippeverband*]; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], *Mitbestimmungsgesetz Schleswig-Holstein*, May 24, 1995, 93 BVERFG 37, 67.

As Wiedemann points out, the Court's insistence in *Mitbestimmungsgesetz Schleswig-Holstein* on the ultimate responsibility of the relevant government minister was heavily criticized and may have led it to taking a more progressive approach in *Lippeverband*.<sup>123</sup> In the latter case, the Court noted the following:

In consequence of its quality as a principle, Article 20 (2) GG is also open to change. The state authority being 'derived from the people' should both be noticeable and practically realizable for both the people and the state authorities. When the circumstances change, adaptations may become necessary.<sup>124</sup>

Even if *Lippeverband* dealt with a problem of personal and not substantive legitimacy, the Court held that Article 20 (2) of the Basic Law in its entirety was open to change and this flexibility could therefore help to reconcile national *agencification* with the *Demokratieprinzip*. After all, as Ludwigs notes, the requirement that the exercise of public power be substantively legitimate becomes problematic if independent, in the American sense, regulatory authorities are vested with powers.<sup>125</sup>

To justify a deficit in substantive legitimacy, Ludwigs proposes a strengthening of the personal legitimacy and a strengthening of the oversight powers of the Parliament.<sup>126</sup> The latter is also proposed by Wiedemann as an alternative to the control exercised through the issuance of directives by a government minister.<sup>127</sup>

Because of this, it may be assumed that the issue of control, so central in the discussion on the U.S. federal agencies, over *Bundesoberbehörden* or *Anstalten* will be the subject of a new debate in Germany, where it had lain dormant for many years because of the well-established hierarchical supervision by the ministries. The latter model is ultimately

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<sup>123</sup> Richard Wiedemann, *Unabhängige Verwaltungsbehörden und die Rechtsprechung des BVerfG*, in UNABHÄNGIGE REGULIERUNGSBEHÖRDEN: ORGANISATIONSRECHTLICHE HERAUSFORDERUNGEN IN FRANKREICH UND DEUTSCHLAND 46–47 (Johannes Masing & Gérard Marcou eds., 2010).

<sup>124</sup> *Lippeverband*, at 122.

<sup>125</sup> Ludwigs, *supra* note 114, at 47.

<sup>126</sup> According to Ludwigs, if independence is absolutely necessary (*zwingend erforderlich*) for an authority to achieve its policy objectives, this could also justify a *Demokratiedefizit*. *Id.* at 48.

<sup>127</sup> See Wiedemann, *supra* note 123, at 48. On the power to issue directives, see Georg Hermes, *Abhängige und unabhängige Verwaltungsbehörden - ein Überblick über die Bundesverwaltung*, in UNABHÄNGIGE REGULIERUNGSBEHÖRDEN: ORGANISATIONSRECHTLICHE HERAUSFORDERUNGEN IN FRANKREICH UND DEUTSCHLAND 68 (Johannes Masing & Gérard Marcou eds., 2010).

incompatible with the model promoted by the EU legislature, which emphasizes genuine independence, or a more U.S.-style independence as Ludwigs would say, for regulatory authorities.

What then does the German experience bring to the EU table? The seemingly deep-rooted and dogmatic concern, even despite *Lippeverband*, for the *Demokratieprinzip* has thus far inhibited American-style *agencification* in Germany. The United States Supreme Court has made a link between the democratic accountability of the President and his control over independent agencies. The German case is then a strong expression of the fundamental issue of the democratic legitimacy of agencies. The repercussions for the EU are still vague because the democratic finality of the EU has not been settled yet. Without entering into the debate of whether a democratic deficit exists in the EU and how serious it is if there is one, it is fair to say that the democratic character of the EU is still in flux. Were the EU to evolve towards a parliamentary system, it is clear that the position of the European Parliament would need to be strengthened. In any event, it would seem difficult to claim that the Member States' involvement in *agencification*—in the Council and in the individual agencies' Boards—results in a sufficient indirect democratic legitimacy.

## F. Judicial Deference to Subsidiary Executive Bodies' Decisions

### I. The United States Experience

Because the focus shifted to the legality of federal U.S. agencies' actions under their own mandate, the question of interpretation of those mandates has also gained importance. The answer to the question of who is competent to interpret the statutory mandate of an agency would seem obvious in light of the U.S. Supreme Court's observation that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>128</sup> Yet, it was soon recognized that agencies themselves hold useful experience to solve questions of interpretation. In questions of application of the law,<sup>129</sup> the agencies' expertise holds some weight.<sup>130</sup> In *Skidmore v. Swift & Company*, the question at issue was whether firefighters' "waiting time" could be qualified as "working time."<sup>131</sup> Although the Court emphasized that the Administrator's interpretation of the Fair Labor Standards Act

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<sup>128</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>129</sup> In addition, when Congress explicitly delegated the power to interpret or refine the law to an agency, courts deferred under an arbitrary and capricious test of the Administrative Procedure Act. See 5 U.S.C. § 706 (2012).

<sup>130</sup> Linda Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHICAGO. L.J. 141, 160–61 (2012).

<sup>131</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 136–37 (1944).

could not be binding on courts, it did acknowledge that the Administrator had greater expertise and experience in the matter than an ordinary judge and should therefore be considered.<sup>132</sup> The weight of the Administrator's interpretation would be determined by the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."<sup>133</sup> This came to be known as *Skidmore* deference; because while the agency opinion is not controlling, the agency could persuade the courts, which differed from the Supreme Court's previously implied preference for judicial review of agencies' interpretations.<sup>134</sup>

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>135</sup> however, the Court introduced a new test for deference to agencies' statutory interpretations, and in doing so abolished the importance of the distinction between pure questions of law and the application of law.<sup>136</sup> The Court's reasoning rested on—perhaps questionable assumptions of—agency expertise, the greater accountability of (executive) agencies compared to politically unaccountable judges,<sup>137</sup> and the idea that Congress chose to delegate significant power by drafting ambiguous statutes.<sup>138</sup>

In *Chevron*, the issue arose from the Environmental Protection Agency interpretation of "stationary source" in the Clean Air Act.<sup>139</sup> The EPA defined "stationary source" as encompassing all pollution emitting devices of an industrial plant as if they were contained in one "bubble."<sup>140</sup> This conception was challenged for conserving rather than ameliorating pollution's effect on air quality. Justice Stevens, writing for the majority, introduced the now famous two-step *Chevron* test:

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<sup>132</sup> *Id.* at 139–40.

<sup>133</sup> *Id.* at 140.

<sup>134</sup> See Matthew Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1239 (2007).

<sup>135</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>136</sup> See Jellum, *supra* note 130, at 165.

<sup>137</sup> See Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 466 (1989).

<sup>138</sup> David Gosset, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 688–90 (1997).

<sup>139</sup> *Chevron*, 467 U.S. 837 at 840.

<sup>140</sup> *Id.* at 840 n.2.



When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>141</sup>

After *Chevron*, if Congress does not clearly settle an issue or define a term, courts should defer to the agencies' interpretation as long as it is reasonable. This new test strengthened the administrative state and was described as a counter-*Marbury*,<sup>142</sup> relegating courts to the marginal role of enforcing only unambiguous provisions.<sup>143</sup>

However, in its jurisprudence following *Chevron*, the U.S. Supreme Court introduced what has been called the "*Chevron* Step Zero,"<sup>144</sup> preceding the two original steps. In this Step Zero, a court will ascertain whether the agency interpretation at issue actually merits *Chevron* deference. After all, *Chevron* itself dealt with an interpretation having the force of law,<sup>145</sup> adopted after following a notice-and-comment procedure by an executive agency.<sup>146</sup>

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<sup>141</sup> *Id.* at 842–43.

<sup>142</sup> Cass Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990).

<sup>143</sup> Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969–70 (1992). But Merrill himself rejects the idea of *Chevron* as a counter-*Marbury*. Later, the U.S. Supreme Court also ruled that *Chevron* deference trumps stare decisis when an agency interprets ambiguous text previously interpreted by a court. See *National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.*, 545 U.S. 967, 982–83 (2005).

<sup>144</sup> Thomas Merrill & Kristin Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 873 (2001).

<sup>145</sup> It is not clear what is to be understood by the force of law and in *Christensen*, but especially in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court further complicated the issue. See also Linda Jellum, *United States Court of Appeals for Veterans Claims: Has It Mastered Chevron's Step Zero*, 3 VETERANS L. REV. 1, 87–97 (2011).

<sup>146</sup> The deference in *Chevron* was not only based on the agency's expertise, but also on its political accountability, coming under the authority of the President. Evidently this second element applies much less to the independent agencies but the U.S. Supreme Court has still afforded *Chevron* deference to independent agencies. For a

To illustrate this significance: In *Christensen v. Harris County*,<sup>147</sup> the Supreme Court found that an opinion letter from the Department of Labor could not receive *Chevron* deference because it lacked the force of law and was not arrived at by a formal adjudication or a notice-and-comment procedure. Instead, the letter was entitled to a lesser *Skidmore* deference in so far as it had the “power to persuade.”<sup>148</sup> In *United States v. Mead Corporation*,<sup>149</sup> the Supreme Court further clarified that *Chevron* had not introduced a new single rule on deference.<sup>150</sup> Even in absence of an express delegation by Congress to an agency of authoritative interpretation, there could be an implied delegation apparent in the agency’s “generally conferred authority and other statutory circumstances” in which case courts should also defer to the agency’s interpretation.<sup>151</sup> In *Chevron*, the implied delegation was deduced from the authorization to engage in rulemaking. The Court in *Mead* confirmed that the notice-and-comment procedure was not a *conditio sine qua non* for *Chevron* deference but held that nothing suggested that Congress had meant the “classification rulings” at issue in *Mead* to deserve *Chevron*-type deference.<sup>152</sup> To conclude with an understatement, the Court in *Mead* did not really clarify the scope of the *Chevron* deference. Justice Scalia in his dissent noted:

[T]he one test for *Chevron* deference that the Court enunciates is wonderfully imprecise: whether “Congress delegated authority to the agency generally to make rules carrying the force of law, . . . as by . . . adjudication[,] notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent.” . . . In the present case, it tells us, the absence of notice-and-comment rulemaking (and [“who knows?”] of some other procedure indicating comparable congressional intent”) is not

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discussion, see Randolph May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 429–53 (2006).

<sup>147</sup> See *Christensen v. Harris County*, 529 U.S. 576 (2000).

<sup>148</sup> *Id.* at 587. In his concurring opinion, Justice Scalia dismissed *Skidmore* as an anachronism, arguing that *Chevron* deference should be applied in this case as well. Justice Scalia still concurred, because he found the interpretation of the Department of Labor unreasonable in any case. *Id.* at 589–91.

<sup>149</sup> See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>150</sup> *Id.* at 229–31.

<sup>151</sup> *Id.* at 229.

<sup>152</sup> *Id.* at 229–31.

enough to decide the question of Chevron deference, “for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded.”<sup>153</sup>

As Justice Scalia noted, *Mead* cancelled *Chevron*'s presumption that statutory ambiguity implies agency authority, by demanding that Congress' implicit intent to delegate is shown. But how this intent could be demonstrated was left unclear. Whereas in *Christensen*, *Chevron* Step Zero seemed to depend on the force of law of an agency interpretation, the Court in *Mead* suggested that a complex assessment should be undertaken in *Chevron* Step Zero.<sup>154</sup> This lack of clarity was repeated in *Barnhart v. Walton*, where a regulation of the Social Security Administration was entitled to *Chevron* deference, despite it lacking the force of law and without the agency having followed formal procedures.<sup>155</sup> In cases such as *MCI* and *Brown & Williamson*,<sup>156</sup> the Court seemed to have added a non-delegation dimension to its *Chevron* Step Zero, whereby Congress' implicit intent to delegate “minor questions” could be presumed, all the while reserving major questions for the legislature.<sup>157</sup>

*Chevron* and its “domain”<sup>158</sup> remain a contentious topic in legal academic doctrine.<sup>159</sup> The fact that the Supreme Court mitigated part of its *Chevron* ruling in its later cases should not obfuscate the remarkably strong position which agencies hold in the U.S. federal system and the rather large gap which exists between how the “administrative state” in the U.S. functions today and how one would expect it to function if one were guided solely by the provisions of the U.S. Constitution.

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<sup>153</sup> *Id.* at 245.

<sup>154</sup> Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 216 (2005).

<sup>155</sup> See *Barnhart v. Walton*, 535 U.S. 212 (2002).

<sup>156</sup> In *MCI*, the U.S. Supreme Court ruled that where an agency has the authority to “modify” certain requirements in a section of the basic statute this cannot be understood as granting the power to fundamentally alter that section, because “modifying” is commonly understood as (only) “changing slightly or incrementally.” See *MCI Telecomm. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 225–26 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

<sup>157</sup> Sunstein proposes to include these questions in *Chevron* step One, because this would otherwise mean that courts become competent to solve major questions for which they have no superior claim than the executive branch. See Sunstein, *supra* note 154, at 243.

<sup>158</sup> See Merrill and Hickman, *supra* note 144.

<sup>159</sup> A search in the HeinOnline database for the query “Chevron deference” results in hundreds of academic contributions discussing (and generally criticizing) *Chevron* and the cases which followed it.

Because the question of judicial deference vis-à-vis agency decisions only comes into play after it is established that agencies may be empowered to take binding decisions, that question has, so far, not been so much debated in relation to EU agencies. As was noted, the Court in *Short-selling* emphasized that EU agencies' powers should be "amenable to judicial review in the light of the objectives established by the delegating authority."<sup>160</sup> The reference to the agencies' powers being scrutinized suggests that the Court will focus on the legislature's act delegating powers to the agency. But the U.S. experience shows that this focus may shift to scrutinizing specific agency acts in the light of the (legislative) mandate and the Treaties. In this regard, practice so far shows that the General Court applies the same standard of deference to agency decisions as it does to those of the Commission;<sup>161</sup> this practice incidentally shows how EU agencies have for a long time fallen afoul of the Court's *Meroni* doctrine which prohibits them from exercising discretionary powers.<sup>162</sup> More precisely, when an authority within the EU administration must make complex or technical assessments, the Court only exercises a marginal review. This is still in line with *Short-selling*, because by all standards the Court's marginal review still qualifies as "judicial review" but it should be clear that the agency will have an appreciable margin to decide how to pursue the legislator's objectives.

One way of addressing this risk is by expanding the system of the Boards of Appeal.<sup>163</sup> These Boards are a typical feature in certain EU agencies, which have been given a significant decision-making function and allow for a more thorough review of technical agency decisions when compared to the review offered by an ordinary judge. If these Boards fulfill their role properly, the legal protection offered to private parties may be significantly enhanced.

## II. The German Experience

The framework to assess the executive's discretion in Germany is much more complicated than it is in the U.S. or in other EU Member States. In Germany, an initial distinction is made between *Tatbestand* and *Rechtsfolge*, or discretion on whether the facts in a specific case meet the conditions set out in the norm and discretion on the legal effects. The

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<sup>160</sup> See *Short-selling*, *supra* note 12, para. 53.

<sup>161</sup> See Case T-187/06, *Schröder v. CPVO*, 2008 E.C.R. II-3151, para. 59; Case T-96/10, *Rütgers Germany GmbH e.a. v. ECHA*, ECLI:EU:T:2013:109, para. 134.

<sup>162</sup> See Merijn Chamon, *EU Agencies: Does the Meroni Doctrine Make Sense?*, 17 MAASTRICHT J. EUR. & COMP. L. 281, 294 (2010).

<sup>163</sup> For a discussion, see generally Merijn Chamon, *EU Risk Regulators and EU Procedural Law*, 5 EUR. J. RISK REG. 3 (2014).

former defines legal concepts which have not been sufficiently defined by the legislature. Here the courts exercise a full review of the executive's decision with a goal of uniformity by operating under the "ideal of the single correct decision."<sup>164</sup> In rare cases, the executive has a *Beurteilungsspielraum*, or a margin of appreciation, which is the first type of possible executive discretion. The other two traditional types of discretion fall under the *Rechtsfolge*, the second distinction, and include general administrative discretion and planning discretion.

At the same time, German administrative law, just like that of the other Member States, has not been immune from the influence of EU legislation even if national autonomy is the rule and EU intervention remains the exception in the administrative sphere. Under increasing pressures of EU internal market law, the Federal Administrative Court has created a new type of discretion<sup>165</sup>—regulatory discretion—in which the distinction between *Tatbestand* and *Rechtsfolge* is ignored and courts will defer to the federal network agency's interpretation ambiguous legislative provisions.<sup>166</sup>

*Arcor* is an importance case in which the administrative court of Cologne had to rule on a decision of the federal network agency which fixed certain rates that Deutsche Telekom could charge to Arcor for access to its infrastructure. One of the questions that the administrative court referred to the Court of Justice was whether the federal network agency was "entitled, when assessing cost-orientation in the context of its authority under [the relevant EU legislation], to a 'margin of discretion' [subject] only to limited judicial control?"<sup>167</sup> In its answer, the Court confirmed that national regulatory authorities have been granted broad discretion under EU telecoms legislation.<sup>168</sup> At the same time, it confirmed its traditional approach on national procedural law noting: "[I]t is a matter solely for the Member States, within the context of their procedural autonomy, to determine, in accordance with the principles of equivalence and effectiveness of judicial

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<sup>164</sup> For a discussion, see Heinrich Amadeus Wolff, *Nachprüfung von Ermessensentscheidungen*, in VERWALTUNGSGERICHTSORDNUNG: VWGO 2395 (Helge Sodan & Jan Ziekow eds., 2014).

<sup>165</sup> However, Ludwigs notes that EU legislation does not require national judges to be deferential to regulatory authorities, as is also apparent from the discussion of *Arcor*, since it only deals with the NRA's relationship with the legislator. See Ludwigs, *supra* note 114, at 68–69.

<sup>166</sup> See Joachim Wieland, *Regulierungsermessen im Spannungsverhältnis zwischen deutschem und Unionsrecht*, 64 Die Öffentliche Verwaltung 705, 706 (2011).

<sup>167</sup> Case C-55/06, *Arcor AG & Co. KG*, 2008 E.C.R. I-2931, para. 39.

<sup>168</sup> *Id.* at para. 159.

protection . . . the detailed rules of judicial review with respect to decisions of the NRAs.”<sup>169</sup>

In its main proceedings, the Cologne administrative court used the Court’s answer to specifically emphasize the NRAs’ “only limitedly scrutinizable margin of discretion.”<sup>170</sup> The federal administrative court on appeal, noted that the federal network agency had a *Beurteilungsspielraum*, which closely resembled the regulatory discretion. As a result, it could only determine whether the contested decision was “reasonably and completely argued in view of the criteria explicitly or implicitly laid down in the legislative norm.”<sup>171</sup> The latter two requirements could indeed come close to the Supreme Court standard laid out in *Chevron*.<sup>172</sup>

The resulting complexity and the need to ensure the compatibility of Germany’s administrative law to the EU and the other Member States prompts Ludwigs to propose a single regime of executive discretion that merges the existing types.<sup>173</sup> This would not mean that German courts would defer just as readily as U.S. courts to agency decisions. Wimmer notes that German legal tradition is rather suspicious of the possibility for the administration to adopt acts that are not fully reviewable by the courts.<sup>174</sup> This stems from Article 19 (4) GG which textually does not rule out the possibility for courts to be highly deferential to decisions of the executive, but which has been interpreted as doing so by the Constitutional Court.<sup>175</sup> As expressed in *Behördliches Beschwerderecht*:

The importance of this constitutional protection mainly lies in the nullification of the executive acting on its self-interest in its relationship with the citizen. Its objective is not just limited to submitting every act of

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<sup>169</sup> *Id.* at para. 170.

<sup>170</sup> Verwaltungsgericht Köln [Cologne Administrative Court], Aug. 27, 2009, 1 K 3427/01, para. 121. *See also* Ludwigs, *supra* note 114, at 66.

<sup>171</sup> Bundesverwaltungsgericht [BverwG] [Federal Administrative Court] Nov. 23, 2011, 6 C 13.10, para. 38.

<sup>172</sup> *See* Thorsten Attendorf, *Das “Regulierungsermessen” Ein deutscher „Sonderweg” bei der gerichtlichen Kontrolle tk-rechtlicher Regulierungsentscheidungen?*, 12 MULTIMEDIA UND RECHT 238, 239 (2009).

<sup>173</sup> Markus Ludwigs, *Das Regulierungsermessen als Herausforderung für die letztentscheidungsdogmatik im Verwaltungsrecht*, 64 JZ 6, 292–94 (2009); *see also* Matthias Jestaedt, *Maßstäbe des Verwaltungshandelns*, in ALLGEMEINES VERWALTUNGSRECHT 351 (Hans-Uwe Erichsen ed., 2010).

<sup>174</sup> Norbert Wimmer, *Kontrolldichte - Beobachtungen zum richterlichen Umgang mit Entscheidungsprärogativen*, 65 JZ 433, 433 (2010).

<sup>175</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. VIII. Art. 19(4).

the executive restricting citizens' rights to a full, namely both factually and legally, legal review . . . .<sup>176</sup>

From this jurisprudence it follows that the recourse to courts laid out in Article 19 (4) GG is traditionally understood as granting full jurisdiction to the courts both on matters of law and fact with marginal review being the exception. While the tension between EU law and this traditional jurisprudence is not exclusive to the question of national agencies' discretion,<sup>177</sup> it is clear that the regulatory discretion granted to the federal network agency also sits uncomfortably with that jurisprudence.<sup>178</sup> Here, Wimmer questioned whether the legislature should not write down a list of objectives and prioritize among them, insisting that the legislature deal with the strategic questions and continue to insist on a judicial scrutiny of how legislation is implemented.<sup>179</sup> However, it was exactly that course of action that the Court of Justice ruled out in *Commission v. Germany*.<sup>180</sup> Germany had limited the discretion of the NRA in the telecoms sector by setting out which regulatory objectives should be prioritized. The Court agreed with the Commission who argued that this was not a proper implementation of the relevant directives and that the German NRA should have been accorded greater powers.<sup>181</sup> In a very critical comment on this case, Gärditz noted that "this European ideal could hardly be in more contrast with the passed down pattern of argumentation in German constitutional law."<sup>182</sup> In contrast, Ludwigs referred back to the actual wording of Article 19 (4), which, on its face, would allow for an EU obligation prescribing a limited judicial review.<sup>183</sup>

It is apparent that the German experience with judicial deference to administrative discretion cannot be understood without reference to the European context. Ultimately this question is linked to that of EU *agencification*. This is because the EU will often not only impose an obligation on the Member States to establish NRA's, but it will also

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<sup>176</sup> See Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] 1973, 119 BverfGE 263, 274.

<sup>177</sup> See Opinion of Advocate General Jacobs in Case C-269/90, *Technische Universität München*, 1991 E.C.R. I-5469, para. 11. Note the *Bundesfinanzhof's* problem with the well-established limited review standard of the Court of Justice in *Technische Universität München*.

<sup>178</sup> Wimmer, *supra* note 174, at 435.

<sup>179</sup> See *id.* at 438; see also Attendorn, *supra* note 172, at 241.

<sup>180</sup> Case C-424/07, *Commission v. Germany*, 2009 E.C.R. I-11431.

<sup>181</sup> *Id.* at paras 53–100.

<sup>182</sup> Klaus Ferdinand Gärditz, *Anmerkung zur Rechtssache C-424/07*, 65 JZ 198, 200 (2010).

<sup>183</sup> Ludwigs, *supra* note 114, at 68.

establish an EU agency as the EU counterpart to the NRA's, making these actors collectively responsible for the implementation of EU law in a given field. The question is not so much what the EU can learn from the limited German experience, but whether we will see a convergence of national administrative law in those fields subject to strong legislative EU harmonization when regulators are established at both EU and national levels. Because these regulators engage in composite procedures, it would make sense to evolve towards a more uniform standard for reviewing administrative discretion.

### G. Concluding Remarks

The state of *agencification* in the U.S. and Germany is very different but both provide lessons for the EU. These two excursions have highlighted a number of issues: First, in the federal system with an uncontested federal administration, the practice of establishing and empowering independent agencies has foremost been debated in the light of the separation of powers. Second, in the federal system in which federal administration is an exception to the rule, federal agencies have predominantly been scrutinized under a federalist perspective, with the agencies identified as possible threats to the autonomy of the federal entities. This is not to say that the notion of control is absent in the second type of federal system. As was observed, the mechanism to control such agencies was actually firmly established and has only been recently contested under pressures from European integration. Third, the notion of control, which is of fundamental importance in both types of federal polity, is always linked to the notion of democracy. Because Congress should lay down a sufficiently clear standard for the agency to enforce, or because the President, in order to be accountable to the people, should have sufficient control over an agency, or because the *Legitimationskette* ultimately goes back to the people. Here, it should be noted that in the EU, the democratic question still is in flux, which has repercussions for the question of who, and to which degree, should control EU agencies.

Following *Short-selling*, these issues will become more prominent for EU agencies as well. The traditional tribute paid by institutions to *Meroni* resulted in a certain restraint in empowering EU agencies. Now that the Court has reinterpreted *Meroni* rather liberally, this restraint may gradually flounder. The above-mentioned issues will surface and the EU institutions will have to address the issues of control and democratic accountability. Evidently, these issues partially surpass the competences of the institutions and should be tackled in primary law. Yet, even within their competences, the institutions have failed to tackle these issues as the Common Approach on Decentralized Agencies illustrates.

Looking at the polity with the greatest experience in *agencification*, the Supreme Court's jurisprudence in the United States appears inspired by a large deal of pragmatism. It is this pragmatic view on the modern administrative state that explains the far-reaching powers



delegated to agencies.<sup>184</sup> Yet, in itself, this pragmatism is insufficient to ensure effective governance. Here the U.S.' system of checks and balances comes into play. Despite the wording of the U.S. Constitution not permitting *agencification* at first sight, the U.S. federal system and its institutions have acquired the necessary maturity allowing for the creation and empowerment of independent agencies without risking the subversion of the balance among the three branches established in the Constitution. As Geradin notes, "even if there is a large consensus that powers can and should be delegated to agencies, Congress, the President, and the courts will compete to influence their policies."<sup>185</sup> Indeed, this appears to be where the maturity of the U.S. federal system seems to prove itself, as potential shocks caused by the delegation of powers to agencies and the exercise of such powers are absorbed. The traditional three branches having acquired the necessary (political) strength and authority.

Specifically for the Presidency, considered to be the weaker of the two political branches (thus not including the courts) at the time of the framing of the Constitution,<sup>186</sup> it is noteworthy that *agencification* has chronologically followed the rise in presidential power, which the ambiguous text of the Constitution allows "to grow with the developing nation."<sup>187</sup> Even if proponents of the unitary executive theory—for example, in the past, the Reagan administration—would argue that independent agencies undermine the President's position as head of the executive, no one would argue today that Congress, by establishing independent agencies, is nullifying the importance of the presidential office. Instead, strong independent agencies have even been presented as part of the checks and balances against an increasingly strong president.

In so far as necessary, it may be noted that the EU differs considerably from the U.S. on this point. The EU is hardly a mature polity. The status of its constitutional charter is in no way comparable to that of the U.S. Constitution. Rather, it is the subject of an almost permanent diplomatic conference and, as a result, the positions of the EU's main institutions are not settled and the *agencification* experiment entails more risks.

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<sup>184</sup> See for example the Court's observation in *Mistretta*: "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power." See *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

<sup>185</sup> Geradin, *supra* note 48, at 13.

<sup>186</sup> See William Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507–09 (2008).

<sup>187</sup> See *id.* at 509.

While the Court of Justice in *Short-selling* has not completely opened the door to U.S.-style *agencification*, it has paved the way to more significant powers being exercised by EU agencies.<sup>188</sup> It would be commendable for the EU to contemplate its democratic and institutional finality before embarking on further significant *agencification*. Ultimately, this is what the Commission proposed to do in its 2001 White Paper on Governance, suggesting the adoption of a binding framework governing *agencification*.<sup>189</sup> Because of a lack of agreement between the institutions, this process merely resulted in the adoption of the Common Approach, which is not the product of a genuinely common understanding on agencies and *agencification*. These fundamental issues related to *agencification* will now resurface with greater intensity.

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<sup>188</sup> On the new—more permissive—delegation doctrine resulting from *Short-selling*, see Miroslava Scholten & Marloes Van Rijsbergen, *The Limits of Agencification in the European Union*, 15 GERMAN L.J. 1223, 1249 (2014).

<sup>189</sup> European Commission, *European Governance - A White Paper*, at 24, COM (2001) 428 final (Mar. 29, 2016).