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THE EUROPEAN RAILWAY AGENCY UNDER THE FOURTH RAILWAY PACKAGE: A POLITICAL AND LEGAL PERSPECTIVE

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The present symposium offers a perfect occasion to look at the European Railway Agency (ERA) from a number of different perspectives. Under the current proposals of the Commission, the ERA’s mandate would be reviewed a second time, again strengthening the ERA’s powers. Under the fourth railway package, the ERA would become a genuine decision-making agency. This is clear from the fact that a Board of Appeal would be established within the agency. Such Boards of Appeal are only being established in decision-making agencies, as litigants wishing to challenge a binding act of such agencies must first seize the internal Board of Appeal of that agency, before a procedure may be lodged at the General Court.

The new role for the ERA, as envisaged by the Commission, will be placed in the broader context of the agencification of the EU administration. From a political perspective, the fourth railway package will be seized to look at the different interests at stake when an EU agency is strengthened (or established). Further, the revision is one of the first opportunities for the institutions to apply the Common Approach on Decentralised Agencies and as a result, it should prove to be an interesting test case. From a legal perspective there is the question what the limits under the Treaties are to agencification and whether the proposed new powers for the ERA respect these limits.
I. EU AGENCEIFICATION: A POLITICAL PERSPECTIVE

The EU agencies which form the constituent elements of EU agencification may be defined as permanent EU bodies established through secondary law and having their own legal personality. (1) The phenomenon of agencification then has a twofold dimension. First, quantitatively one may observe that the number of EU agencies, their staff and their budgets continuously increase. The question why EU agencies are being established has long puzzled commentators, but in recent years a consensus seems to be emerging which goes beyond the original functional accounts of agency creation (see below). (2) A second dimension to agencification is a qualitative one: where EU agencies were initially only granted modest non-decision making powers, the more recent agencies such as the European Supervisory Authorities in the financial sector have been granted very far-reaching powers, including the power to adopt binding decisions vis-à-vis market players or national authorities. Not only do recently established agencies generally have greater powers than the earlier ones, it may also be observed that when the mandate of an existing agency is reviewed the agency is usually conferred additional new powers by the legislator. An important question under this second dimension is what the dynamics are behind subsequent delegations to EU agencies. This has received much less attention in the academic debate than the question on why agencies are originally established.

II. EXPLAINING AGENCEIFICATION

A. The initial choice to establish an agency

Despite the academic attention devoted to the phenomenon, the dynamics behind agencification do not seem fully understood yet. On the question why agencies are established in the first place, literature for a long time relied on functional accounts. (3) More recently a consensus seems to have emerged in that these functional accounts are insufficient to explain why specifically the agency instrument is chosen as a means to further administrative integration. As Thatcher noted “creating an [EU agency] is an institutional choice by policy-makers with their own interests and strategies from among competing alternatives, such as regulatory networks, regulation directly by the Commission or the traditional implementation method of implementation by national regulatory authorities monitored by the Commission and the European Court of Justice.” (4)

Thatcher then relies on ‘previous patterns of delegation’ to explain why (powerful) agencies have been established in some sectors but not in others. First, the Commission’s position is important since it will not propose to establish new agencies in those sectors where these bodies might be a threat to its own powers and if an agency is nonetheless established, the Commission will ensure its formal powers are modest. (5) In addition it will sometimes still agree to establish a powerful agency if this forms part of a trade off with greater integration within the EU context. (6) A second important actor according to Thatcher is the national agencies. If the Member States have established powerful national agencies, the latter will exert influence to ensure no strong EU agency is established, instead pleading for formalised EU networks in which they can cooperate. (7)

Thatcher’s insights on previous patterns of delegation may serve as an illustration of the importance of identifying the relevant actors in agency creation. While it seems plausible that national agencies will be wary of bureaucratic competition from an EU body, it is important to note that the national agencies are not formal actors in the decision-making process at EU level. Whether their interests will be defended thus largely depends on the positions taken by their Member States in Council.

The relevant actors then are the Commission, Parliament and Council. (8) Because the Commission does not only have a specific

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(1) In legal and political literature one often also finds a reference to the autonomous, independent, semi-autonomous, quasi-independent, etc. nature of these bodies. This element has consciously been left out of the working definition since it is very difficult to operationalise and the autonomy is in any case covered by the agencies’ separate legal personality.


(3) See ibid., pp. 100-102.
bureaucratic interest but also supports deeper integration in general, it may often support legislative initiatives which further integration, without promoting its own bureaucratic interests if securing both interests is politically difficult. (9)

According to Kelemen and Tarrant the same two interests may be identified for the European Parliament, although they are complemented by a third, i.e. the interest Parliament has in maximising its popularity amongst voters. According to Dehousse, the European Parliament further shares the Commission's lukewarm view to agency creation, because it could undermine its recently acquired legislative powers. Kelemen and Tarrant however note that the Parliament is attracted by the agency model because it "was granted with considerable oversight powers with respect to agencies." (10) Whether the Parliament indeed has considerable oversight powers may be doubted. Such powers may only be gauged in relation to Parliament's oversight powers vis-à-vis the alternatives to agency creation. Relatively speaking, the Parliament indeed has greater oversight powers over agencies compared to the alternatives of indirect administration and EU networks. However, compared to its powers over the Commission, its powers are far from 'considerable'. (11) As a result, Dehousse's observations seem to reflect the Parliament's position better, which is inspired both by the concern for its legislative power as well as by its control function over the EU executive.

As regards the Member States in Council, Kelemen and Tarrant echo the observations of Pollack and Franchino on the delegation of powers to the Commission, (12) in that Member States are caught between the need for credible commitment and actual delivery of the benefits of collective action and the desire for control over discretion exercised by EU actors. They also echo Thatcher's observation in that the previous patterns of delegation (to the Commission) may prevent them from delegating tasks to an EU agency, over which they would have greater control. Simply put, "[t]he advantage of an agency from the Member States' perspective is that it allows for the promotion of harmonised regulation, while entailing less loss of control than delegation directly to the Commission." (13)

To conclude, the administrative integration brought by agencies may be explained by reference to the functional needs which agencies fulfil, but the institutional choice of securing this integration through an agency seems better explained by the previous patterns of delegation noted by Thatcher and the strategic institutional behaviours described by Kelemen and Tarrant and Dehousse.

B. The subsequent choice to strengthen an existing agency

Although Thatcher offers a forceful explanation of the initial choice to establish an agency, the institutional dynamics following agency creation are a different matter. According to authors such as De Moor-van Vugt and Egeberg and Trondal agency creation is one of the phases of a broader trend in which the Commission tightens its grip on national administrations. De Moor-van Vugt explains how in a first phase, following the SEA, the EU entered into new policy fields and adopted directives of limited scope. Implementation and enforcement of these common rules was left to the Member States and the principle of national (administrative) autonomy applied. However, such decentralised enforcement quickly becomes insufficient as policies become more ambitious. The Commission will therefore promote informal coordination between the Member States, to ensure (more) uniform implementation and enforcement. Building on these experiences, the coordination is formalised, often through EU agencies. In subsequent legislation, the autonomy of national administration is further curtailed and more powers are granted to the agency (or the Commission). Egeberg and Trondal explain this trend as forming part of the creation of an executive centre at EU level. (14) According to Egeberg and Trondal, the Commission will also propose that independent national agencies be established. Once these bodies are dissociated from the traditional national administrations, the Commission can then more easily integrate them in a European administration.

The embryonic models proposed by De Moor-van Vugt and Egeberg and Trondal certainly have an intuitive appeal to them, but they

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(10) Daniel Kelemen and Andrew Tarrant, West European Politics, préc., p. 929.
(13) Daniel Kelemen and Andrew Tarrant, West European Politics, préc., p. 929.
heavily emphasise the influence of the Commission in this process giving the impression that the Commission dictates the extent and pace of agencification. In reality of course, before each phase, the Commission will have to broker an agreement with the Parliament and Council and a qualified majority of the Member States will have to agree to a further restriction of their national administrative autonomy by conferring further powers on the EU actors concerned (Commission, agency or network). In addition, the emphasis on the Commission seems at odds with the explanations of agency creation presented above, which highlight the Member States’ reticence for greater integration and their preference for agencies as a less supranational way of constructing a European Administrative Space.

Under a historical new-institutional perspective, the decisional rules in the ordinary legislative procedure are an exponent of increasing returns as they give each of the three major institutions involved the power to veto a possible abolishment of the agency. At the same time this means that each of these three institutions also has the power to veto an extension of the mandate of an agency, which is why it would be wrong to assume that the Commission determines the process of agencification.

Still, the Commission will play a primordial role. As De Moor van Vugt explains, further agencification rests on the deficiencies in policy implementation. As a policy entrepreneur therefore, the Commission will plead for further administrative integration. To put this concretely for the case which will be elaborated below: the Commission will sell the idea of further administrative integration by highlighting that the objective of a common railway market, to which the Member States have committed themselves, will remain dead letter unless further action is undertaken to secure proper implementation. In theory, this action could take on any number of forms, including a complete overhaul of existing institutions and structures. However, given that a sector-specific agency already exists, the functional pressures for greater administrative integration will meet fewest resistance if they are channelled through this existing institutional arrangement.

Here, different logics play at the same time. For the Commission, a ‘calculus approach’, (15) will result in the conclusion that its resources are best invested by elaborating existing arrangements instead of trying to recast them, even if the agency instrument itself remains a second best alternative. The same applies to the Parliament which may have principled issues with the agency instrument and agencification, but its resources are best invested in the pragmatism of influencing the provisions on the functioning of agencies instead of challenging the agency instrument as such. After all, under a ‘cultural approach’, (16) a logic of appropriateness has grown following two decades of agencification, in which the agency instrument is now seen as legitimate. As a result, if implementation deficiencies arise in a sector in which no agency so far exists, a proposal to establish an agency will have a head start against other possible alternatives. Similarly, if implementation problems persist and an agency is already established, granting further powers to the agency will not be fundamentally contested. While this make the Commission’s policy solution (extending the powers of an agency) acceptable, the Commission will further have to overcome resistance amongst the Member States (and the Parliament) by showing them that a political problem (insufficient implementation) exists, in casu showing how the objective of an integrated railway sector is being undermined.

This way, political backing is created and the three streams of problems, policies and politics are coupled under the entrepreneurship by the Commission. (17) For instance, in its communication on the fourth railway package, of which a strengthened ERA forms part, the Commission subtly reminds the Member States of their own commitment: “At the European Council on 28-29 June 2012, the Heads of State or Government adopted the Compact for Growth and Jobs, which seeks to deepen the single market by removing barriers in order to promote growth and jobs in network industries. The Commission consequently identified the Fourth Railway Package as a key initiative to generate growth in the EU.” (18) The Commission also pressurised the Member States by commencing eleven infringement proceedings in 2010, (19) so that the judgments would be passed around

(16) Ibid.
C. The Common Approach on Decentralised Agencies

In the absence of a framework, the process of agencification has resulted in a great variety of agencies. In order to work out a more uniform model for future EU agencies the Commission proposed an inter-institutional agreement in 2005. However, by 2008 it had become clear that the institutions would not be able to agree on a binding framework and ultimately they settled on the non-binding Common Approach on Decentralised Agencies in 2012. Apart from being non-binding, the Common Approach is also less far-reaching than the Commission's draft inter-institutional agreement. Still the Common Approach does contain some guidelines which the legislator is called upon to respect, also when an existing agency's establishing regulation is being reviewed. To implement the Common Approach, the Commission adopted a Roadmap in December 2012. As a result, the revision of the ERA regulation is one of the first opportunities, together with the proposed merger of Europol and CEPOL, for the Commission and the legislator to show that they are serious about rationalising agencification.

D. EU agencification: a legal perspective

From a legal perspective it has been said that EU agencification rests "on shaky legal grounds" because the Treaties do not seem to leave much room for powerful independent administrative bodies within the EU (apart from the Commission). This is so because there is no clear legal basis to set up and empower agencies and because the power to adopt delegated and implementing acts is entrusted to the Commission. In addition, there is a broad consensus in legal doctrine that the Court's jurisprudence in the Meroni and Romano cases also apply to EU agencies. Strictly applying these rulings to current EU agencies would mean however that they cannot adopt binding acts and cannot exercise discretionary powers, limits which today are clearly transgressed.

Since these issues have already been extensively debated elsewhere, they will not be commented upon further. In any case this debate may be decided in the near future by the Court of Justice itself. In UK v. Council & Parliament it has been asked, for the very first time, to assess the legality of an agency's powers under Meroni, Romano as well as under Articles 290 and 291 TFEU. In UK v. Council & Parliament, the UK is challenging the ESMA's powers to prohibit (or impose conditions on) shorting under Regulation 236/2012. In the light of Meroni, this power is indeed questionable since it is generally accepted that that ruling prohibits the delegation of discretionary powers. However, the decision whether or not to prohibit shorting requires a balancing between different interests, notably that of financial stability and economic freedom and this balancing implies that the ESMA would have to make discretionary choices. Similarly, the decision to (temporarily) ban shorting would take the form of a generally binding act, while the Court in Romano prohibited a delegation of the power "to adopt acts having the force of law." Apart from challenging the Regulation on these two grounds, the UK also invokes two other grounds. Since the measures adopted by the ESMA under this power would be non-legislative acts of general application they would be contrary to Articles 290 and 291 TFEU which reserve the power to adopt delegated or implementing acts to the Commission. Fourthly if the ESMA would use this power to adopt individual decisions, the UK claims that the Regulation could not be based on Article 114 TFEU.

It is clear that the repercussions of this case may stretch far beyond the financial regulation in the Internal Market by the ESMA: how far can the legislator go in empowering agencies; which regime applies to the delegation of powers to agencies; may the empowerment of an agency be described at all as a delegation; what role can agencies play in the procedures under Articles 290 and 291 TFEU; etc. Whether these questions will be answered will depend on how the Court proceeds in

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(22) Merijn Chamon, CMLRev, prec., p. 1075.

(23) Sce ibid.; Stefan Geiler and Andreas Ortmol, 'Everything under control? The 'way forward' for European agencies in the footsteps of the Meroni doctrine', (2016) 33 ELRev 1.


(25) See Case C-270/12: Action brought on 1 June 2012 — UK v. Council, Parliament, OJ 2012 C 274/3. The case has been ruled in the meantime. For a discussion, see Merijn Chamon, 'The empowerment of agencies under the Meroni doctrine and article 114 TFEU: connect on United Kingdom v. Parliament and Council (short-selling) and the proposed single resolution mechanism', (2014) 39 ELRev 3.
resolving the issues brought before it. In any event, there is the possibility that the ERA’s new proposed powers will need to be re-evaluated in the aftermath of *UK v. Council and Parliament* (cf. infra).

III. – THE REVISION OF THE ERA’S MANDATE AS A CASE OF AGENCIFICATION

A. – The ERA’s establishment and the first revision of its mandate

The ERA was established in 2004 through Regulation 881/2004, which was part of the second railway package, to secure the objective of an integrated railway sector by reinforcing safety and interoperability, *i.e.* helping to avoid that safety issues would be abused to continue market fragmentation. (26) To this end the ERA mainly had a pre-decision-making function, comparable to other agencies such as the European Food Safety Agency (EFSA) and the European Medicines Agency (EMA), whereby it provides the Commission with input for further legislation or implementing measures, the Commission remaining the competent authority to adopt the final act or legislative proposal. (27)

In 2008, following the third railway package, the mandate of the ERA was revised for a first time and the amending regulation gave further pre-decision making powers to the agency. (28) More precisely, the regulation contained 7 new provisions allowing the Commission to request recommendations, reports or opinions from the ERA. It further contained 20 new provisions which directly instructed the ERA to propose draft measures, reports, opinions or recommendations to the Commission (without needing a request from the latter), including one general provision on support by the ERA to the Commission in its implementation function. The regulation further contained one provision allowing the Commission to request the ERA to monitor a national body and one provision allowing national bodies to file requests for technical opinions. Lastly the ERA was also instructed to fulfil a number of operational tasks such as setting up and keeping registers.


(27) Ibid., 323; Martijn Groeneweg, Michael Karding and Esther Vermeulen, ‘Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation’, (2010) 17 JEPP, 8.


B. – The fourth railway package and the second revision of its mandate

Although the extended mandate further agencified regulation in the railway sector it did not fundamentally alter the powers of the ERA as its existing powers were ‘merely’ extended to new fields. As such, the ERA remained a ‘pre-decision-making agency’. This would be different under the fourth railway package. In its proposal the Commission also wants the ERA to exercise decision-making powers. The Commission clarified this was its preferred option out of the following alternatives:

Option 1: Baseline scenario (do nothing), continuing on the path that is currently set out for the sector.

Option 2: Greater coordination role for the Agency in ensuring a consistent approach to certification of railway undertakings and vehicle authorisation.

Option 3: ERA as a one-stop-shop, where the final decision on certification and authorisation remains with the NSAs but ERA performs entry and exit checks of applications and of the decisions.

Option 4: ERA and NSAs share competencies, where the final decision on certification and authorisation is taken by the Agency.

Option 5: ERA takes over activities of NSAs in relation to certification of railway undertakings and vehicle authorisation. (29)

The Commission thus proposed option 4 as being the most cost-efficient which will see the ERA become responsible for safety certification and authorisation of vehicles and trackside control-command and signalling sub-systems. Under the third railway package and the safety and inter-operability directives these certificates and authorisations are granted by the national authorities, even if the substantial rules on which the certificates and authorisations are based are subject to harmonisation by the Commission through a comitology procedure, based on drafts prepared by the ERA.

Under the fourth railway package the ERA would thus acquire the competence to issue safety certificates for railway undertakings and authorisations for vehicles and vehicle types as well as authorisations for trackside control-command and signalling sub-systems.

How then does the Commission propose to ‘share’ these certification and authorisation competences between the ERA and national authorities? This would be spelled out in the recast safety and interoperability directives. Article 10 of the former directive would then provide the ERA grants the single safety certificate and it would be assisted by the national authorities which would fulfil a role in verifying whether the undertakings continues to meet the requirements of the single safety certificate, notifying the ERA if they have doubts thereupon. (30)

The technical specifications for inter-operability underlying the authorisations under the inter-operability directive were already adopted by the Commission following a draft by the ERA, but the ERA would now acquire competence to authorise trackside control-command and signalling subsystems (authorising other fixed subsystems would remain a national competence). Further, the vehicle and vehicle types would also be authorised by the ERA, whereby the national authorities would cooperate with the ERA to disseminate the relevant guidance documents to applicants. (31)

A further interesting provision in the new safety directive is the change proposed to Article (16) 1 on the national safety authorities. Under the third railway package it is provided these bodies should be independent from market players but that they may form part of the ‘Ministry responsible for transport matters’, however the Commission now proposes to scrap this clarification.

IV. - THE ERA'S PROPOSED NEW POWERS: DYNAMICS OF FURTHER AGENCIFICATION

How do these changes fit with the frameworks set out above? At first sight they seem a confirmation of the propositions made by De Moor-van Vugt and Egeberg and Trondal since further powers are shifted from national authorities to the EU level. For the certification and authorisation processes it is interesting to note that the Commission sees a ‘sharing’ of tasks between the ERA and national authorities whereas for those certification and authorisation

powers granted by the ERA, the national authorities actually simply work in support of the ERA, providing information to undertakings or keeping the ERA up to date on the situation ‘on the ground’. However, unlike what the embryonic models set out above claim, the Commission is not strengthened under these proposals, although it should be noted that the new powers of ERA do not come at the expense of the Commission either and the Commission stays fully responsible for the rule making procedure, where the ERA retains its pre-decision-making role.

On the other hand, the proposed amendment to the safety directive whereby the possibility of national safety authorities being housed inside the Ministries of Transport would be omitted, may also be read as an attempt by the Commission to further dissociate these bodies from the traditional national administrations. If these bodies could no longer be housed within the traditional ministries, this would indeed facilitate a further linkage between these national bodies and the EU agencies, as Egeberg and Trondal have suggested.

Applying Thatcher’s previous patterns of delegation to the strengthening of an agency rather than the initial choice of establishing an agency one may note that, in line with Thatcher’s model, (32) the new powers of the ERA would not come at the detriment of the Commission. However, the ERA would take over powers of national bodies begging the question how this relates to the powers of the national authorities. Thatcher noted that “few Member States had an [independent authority] for chemicals, railways or air safety when [European agencies] were created (or even today). As a result, [European Agencies] in these domains could be set up without integrating or posing a threat to [national authorities].” (33) Indeed, looking at the (often recently established) national bodies in the railway sector, one could not say these are strong organisations which could prevent the transfer of part of their powers to the ERA.

As regards the Member States’ positions in Council, the question would seem to be whether the Commission can effectively convince them that a further shift of competences form the national level to the ERA is necessary to achieve an integrated European railway area, an objective which they have in principle subscribed to. In its Impact Assessment the Commission noted that not all national

(33) Ibid., pp. 24-25.
bodies (Safety Authorities and Notifying Bodies) work efficiently resulting, together with a patchwork of national regimes, in long and costly procedures and access barriers. (34) However, options 2 & 3 do not significantly affect national autonomy and the Commission itself admits that the beneficial effects of option 3 come very close to that of its preferred option 4. (35)

There is less reason to suspect that the European Parliament will hesitate to support the centripetal aspects of the Commission's proposals. As Lord discussed, even if the European Parliament is not an ardent supporter of the process of agencification as such, it has often supported a further strengthening of agencies' power in its capacity of co-legislator. (36) As a matter of fact, during the negotiations on the first revision of the ERA mandate, the Parliament suggested, unsuccessfully, to give an even greater role to the ERA. Further to the amendments of the Parliament, the ERA would have i.a. been able to issue technical opinions at the request of applicants who had received a negative decision from national safety authorities and from 2015 onwards the ERA would have been competent to authorise the placing in service of vehicles. (37) The Commission has now picked up the latter suggestion in its current proposals under the fourth railway package.

V. — The Commission's proposal in the light of the Common Approach

In its proposal, the Commission indicated that some of the proposed changes were drafted following the Common Approach, i.a. allowing for more flexibility in its staff recruitment. The most important elements from this perspective are those concerning the (multi-)annual work programmes, the ERAs' international relations and its headquarters agreement.

Because the Common Approach emphasised the (multi-)annual work programme as a key instrument for assessing an agency’s functioning, a separate Article in the proposal is dedicated to it. The Article itself however only brings together the already existing provisions and contains nothing new apart from the multi-annual work programme which the ERA is now also obliged to prepare and adopt. The Common Approach also suggested that the agencies' international relations should be streamlined and governed by working agreements with their parent DG's, further making clear that agencies could never represent the EU's position externally or enter into binding commitments on behalf of the EU. The proposal now makes clear that the ERA is allowed to develop contacts and enter into administrative agreements with international partners, without prejudice to the competences of the EU's institutions, the European External Action Service and the Member States. The proposal further explicates that the agency cannot create legal obligations in respect of the Union or the Member States and that the ERA should detail its international strategy in its work programmes. In short, the proposal makes clear that ERAs' international activities may never prejudice the institutions' and Member States' prerogatives, but it does not really clarify the nature of ERAs' international relations.

In line with the Common Approach, the proposal contains a provision instructing the agency and (especially) the host state to conclude a headquarters agreement by 2015. In addition it instructs the "host Member State [to] provide the best possible conditions to ensure the proper functioning of the Agency, including multilingual, European-oriented schooling and appropriate transport connections." This may seem self-evident but has been rather problematic for the ERA in the past. (38)

Overall, for a number of reasons the impact of the Common Approach on the Commission's proposal does not seem that great. Firstly, the impact which the Common Approach could have had would always have been greater for new agencies rather than for agencies whose mandate is reviewed. Secondly, the impact is difficult to assess in any case since the Common Approach itself is merely a codification of already existing practices rather than a brand new approach. (39) As a result, some of the proposed changes which seem inspired by the Common Approach would have been suggested by the...
Commission even in absence of the Common Approach. Thirdly, the impact of the Common Approach depends on the implementation of the Commission's road map but the road map itself had only been adopted one month prior to the proposals for a fourth railway package and has not been completely implemented yet.

VI. - THE ERA'S NEW POWERS FROM A LEGAL PERSPECTIVE

From a legal perspective, ERAs' new powers as proposed by the Commission are significant, since it is the first time that an agency which had not been originally established as a decision-making agency is granted decision-making powers. Still, they are not revolutionary, since they do not go beyond the powers granted to the already existing decision-making agencies. Seen from this perspective one would be inclined to say that these new powers are evolutionary, since they do not go beyond the powers granted to the existing agencies. After all, the system of a decision-making agency together with a wrong legal basis, the European Aviation Safety Agency, etc. have always been questionable in the light of Romano and Meroni but no party has ever raised this issue before the Court. In UK v. Council & Parliament however, the Court follows the suggestion by Advocate General Jaăskinen and solves the case by overturning the UK's fourth plea on Article 114 TFEU as a wrong legal basis, (40) it will address these constitutional issues. Depending on how the Court will proceed in solving these legal questions brought before it, the repercussions of the case could also affect the revision of ERAs' powers under the fourth railway package.

VII. - UK v. COUNCIL AND PARLIAMENT

The Court has a number of options and as regards its own case law one can envisage roughly four. A first is the most radical, where the Court would conclude that Meroni and/or Romano are not relevant anymore under current EU law. Especially for Meroni, but also for Romano the reasons for such a move have been explored in doctrine. (41) Such a move would be inspired by practical reasons which were already put forward in the 1960's (42) and which only have gained weight since then. From the Court's legal perspective, the qualitative change from the ECSC Treaty (Meroni) and the EEC Treaty (Romano) to the EU Treaties under Lisbon could be used to argue that Meroni and Romano should not be upheld anymore. Although this would be easier to argue for Meroni than for Romano, the Court in both cases could argue that the legislator should be able to grant significant powers to EU agencies, given the expanded reach of EU law since the Single European Act and given the effet utile principle. As to the choice for an EU agency rather than another alternative, one could argue that the agency instrument strikes a good balance between the principle of effet utile and the principle of subsidiarity, compared to conferring implementing powers on the Commission. The latter option would also secure a uniform application of EU law, but it would cut off national authorities from the implementing process. (43)

A second option which would produce about the same effects would be to hold that Meroni and Romano do not apply to the 'delegations' to EU agencies, without the Court having to depart from or renounce its earlier jurisprudence. Such a ruling would be perfectly possible because already in its existing jurisprudence it is impossible to identify one single legal regime which applies to all the different forms of delegation which have been elaborated under primary and secondary EU law. (44) The delegations to the Commission under the old Article 155 EEC were organised along the lines first set out in


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

(44) See also Yves GAUDE, La délégation en droit communautaire, Strasbourg, Université Strasbourg 3, 1995, thèse multigraphiée, p. 401.
Köster and then Germany v. Commission. (45) The rules laid down in that jurisprudence are different from the rules governing delegations to private bodies such as Meroni, taken over in DIR Film International. (46) The rules on delegations or conferrals to bodies under international public law are still different. (47) Lastly, with the entry into force of the Lisbon Treaty, Article 290 TFEU established yet another legal regime. Given this existing multiplicity, it would not be too far-fetched to suggest that the Court could rule that the legal regime governing the empowerment of agencies is again different from the existing regimes.

A third option would be that the Court confirms that Meroni and/or Romano govern the empowerment of EU agencies (possibly constituting a single legal regime) while applying a ‘light’ interpretation of those rulings. The concepts used in these two cases are not immune from discussion. By adopting a narrow definition of ‘discretionary’ (or an expansive definition of ‘executive’) and a narrow definition of ‘acts having the force of law’, the Court could allow for the present and further (qualitative) agencification. For instance, ‘acts having the force of law’ could be interpreted as being formal legislation. Discretionary powers could be interpreted as the competence to make final discretionary choices. Pushing this option to its extremes, the end result could be the same as under the second option since the Court would only formally start from Meroni and/or Romano to end up with a legal regime which would significantly differ from the regimes originally set out in those rulings. However, it cannot be ruled out that the Court picks this option and still concludes that the empowerment of the EMSA under Regulation 236/2012 is incompatible with the Treaties.

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

The options open to the Court on the UK’s third plea on Articles 290 and 291 TFEU are a different matter. Whereas the Court itself left a sufficient margin in its rulings in Meroni and Romano to allow for a more flexible interpretation of those judgments in the light of the current context, the Articles 290 and 291 TFEU seem to leave less room for manoeuvre. These Articles seem to have reinforced the Commission’s position and the only actors they mention are the Parliament, the Council, the Commission and the Member States. The UK argues that the measures which the ESMA would adopt would be delegated or implementing acts only and that they should therefore be recognised as such. This would mean that this competence cannot be granted to the ESMA since it is exclusive to the Commission.

The Court could rule that the Treaties are not exhaustive on this point, meaning there may be generally applicable measures which do not belong to the categories of delegated and implementing acts or formal legislation and since such measures would not fit the existing categories, they would not necessarily need to be adopted by the Commission. With some imagination, Article 290 TFEU could even be read in this light since it provides that “[a] legislative act may delegate to the Commission” (own emphasis) the power to adopt delegated acts.

The possibility reflected in ‘may’ would not only relate to the legislator’s freedom to empower the Commission, but also to its freedom to select the delegated authority of its choice. Yet, such an argument could only be upheld based on a purely textual interpretation and, put into its context, Article 290 TFEU employs ‘may’ rather than ‘shall’ since otherwise the legislator would not be allowed to deal with the non-essential elements of legislation itself. Obviously, should the legislator want to, it should have the possibility to deal with all the elements of legislation, essential as well as non-essential. (48)

(47) The Court has accepted that the EU may be party to the constituent instruments of international organisations, conferring powers on those organisations, and that the EU may subsequently be bound by rules established by such organisations. The Court does not so much emphasise the control over these organisations, which would be illusory in multilateral forums, instead it emphasises that the nature of the powers of the EU must be retained and the EU’s autonomy safeguarded. See Opinion 1/92 re. Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, (1992) ECR I-2821, para. 4; Opinion 100 re. Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area, (2002) ECR I-3403, paras 11-4.

(48) Under art. 291 TFEU the situation is completely clear since that art. provides that legally binding acts “shall confer implementing powers on the Commission or in duly justified specific cases [...] on the Council” (own emphasis). Implementing acts can therefore only be adopted
Similarly it would seem rather far-fetched to argue that the Treaty authors provided for the delegated act of Article 290 TFEU as only one possible non-legislative act of general application, leaving it to the legislator to devise other alternative categories of such acts.

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

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

VIII. THE ERA’S POWERS UNDER THE FOURTH RAILWAY PACKAGE REVISITED

What could all this mean for the ERA’s new powers under the fourth railway package? It should be clear that the ERA would exercise discretionary powers and that it would adopt binding acts. As a result, should the Court rule that Meroni and Romano apply to the ESMA (and hence to other EU agencies), it would need to (re-)define the notions of ‘discretionary choices’ and ‘acts having the force of law’ narrowly in order for the ERA to be vested with its new powers. As noted above, as regards the Meroni and Romano jurisprudence there is a rather easy escape route but the UK’s plea relating to the Articles 290 and 291 TFEU is a different matter.

Looking for instance at the vehicle authorisations which the ERA would issue, one would be inclined to say that this power is taken from the national authorities and given to the EU authority to ensure that uniform conditions in the implementation of EU rules apply. As it happens this is the very raison d’etre, described by Article 291 TFEU, why implementing powers are vested in the Commission (or exceptionally the Council). Furthermore, Article 291 TFEU is very clear as it prescribes that the acts requiring implementation “shall confer implementing powers on the Commission.” How then could the legislator, under the fourth railway package, grant such powers to the ERA, bypassing the Commission? (49) Although the UK’s third plea ultimately begs this question, the Court could probably decide the case UK v. Council and Parliament without having to touch upon the issue thereby leaving it undisturbed. Otherwise a significant part of the powers already exercised by EU agencies would be undermined, since from a simple reading of the Treaties it would appear that only procedures whereby agencies draft decisions and the Commission adopts them, such as those involving the EMA and the EFSA, are permissible.

However, because UK v. Council and Parliament does not immediately concern the ERA and because the powers which would be granted to the ERA are different from the ESMA’s powers questioned by the UK, it is doubtful that the institutions will take much account of the possible consequences of this case for the fourth railway package, even if is advisable they would. In the end, more than twenty years of institutional practice involving a legally questionable agencification has already made it virtually impossible for the Court to uphold its previous jurisprudence without reinterpreting it, even if institutional practice could not be invoked before the Court to deviate from express Treaty provisions. (50)

CONCLUSION

Under the fourth railway package, the Commission proposes to strengthen the ERA, granting it new powers which are taken away from the national authorities. In line with Thatcher it seems doubtful these authorities could prevent such a transfer of power, given that in most Member States they are not powerful and well established

(49) AG Jääskinen however believes this should be possible. See Opinion of AG Jääskinen in Case C-270/12, UK v. Council & Parliament, ECLI:EU:C:2013:562 paras 86-87.

players. In addition, in the EU legislative process they are not veto players either. Whether and to which extent the ERA will be strengthened will therefore depend on an accord between the Commission, Council and the Parliament. Since the latter in the past has been more keen than the Member States to transfer powers to the ERA, the Commission will foremost have to convince the Member States that a strengthened ERA (and therefore a transfer of powers from the national to the EU level) is necessary to achieve the objective of a single integrated railway market to which the Member States have (in principle) subscribed.

The process by which the regulation of the railway sector is being Europeanised indeed much resembles the models worked out by De Moor-van Vugt and Egeberg and Trondal, even if in this specific case it is not so much the Commission but the ERA which is strengthened, to the detriment of the national authorities. The Commission's attempt to detach the latter from their ministries fits very well with the 'executive centre formation' proposed by Egeberg and Trondal, whereby the Commission is forging direct links with the experts in independent national authorities, bypassing the traditional national ministries under the control of national governments. As regards the Common Approach, the Commission's proposals do not succeed in silencing its critical reception. Even if a number of mitigating circumstances may be invoked, the effects of the Common Approach appear limited so far.

From a legal perspective it is interesting to see that the ERA would be 'upgraded' to a genuine decision-making agency, even if it would not become as powerful as agencies such as the EASA or the European Supervisory Authorities in the financial sector. If it had not been for the pending case UK v. Council and Parliament, the ERAs new proposed power would hardly be contestable since they are no different from the powers which half a dozen of other agencies are already exercising. In the currently pending case, the relationship between the EU agencies and Articles 290 and 291 TFEU as well as the Mero­ni and Rom­ano jurisprudence is put to the Court for the very first time. However, even if it is almost certain that this case will have some repercussions for the process of agencification, and hence for the ERA, it is not to be expected that the EU institutions will put the discussions on the fourth railway package on a hold in anticipation of the Court's ruling.