

# 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

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**The Empowerment of Agencies under the *Meroni*  
Doctrine and art.114 TFEU: Comment on  
*United Kingdom v Parliament and Council (Short-  
selling)* and the Proposed Single Resolution  
Mechanism**

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# Analysis and Reflections

## 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

Merijn Chamon\*

☞ Actions for annulment; Banking regulation; Delegated powers; EU law; European Securities and Markets Authority; Financial markets; Legal basis; Short selling

### Abstract

*This article comments on recent developments related to the establishment and empowerment of EU agencies. These developments raise questions about which legal basis in the Treaties may be used for such purposes and about the limits that the EU legislator should respect when empowering an agency. In the absence of a clear provision in the Treaties, legal scholarship relied on the Meroni and Romano rulings of the Court of Justice, which predate modern agencification, to clarify these issues. In Short-selling, the Court has now scrutinised agency empowerment for the very first time, even if the Court's ruling is more of an excessive simplification exercise rather than a clarification exercise. The result of this ruling is that there seem to be few genuine limits imposed on the EU legislator when it contemplates the establishment and empowerment of an agency. The repercussions of this approach for the Single Resolution Mechanism of the Banking Union, in which the establishment of an agency is also envisaged, are also discussed.*

### Introduction

In recent times, it is hard to keep track of the process of *agencification* at EU level,<sup>1</sup> the pace of which seems to be continuously intensifying. The fourth wave of *agencification* saw the establishment of EU agencies in sensitive core economic areas such as energy, finances, and telecoms.<sup>2</sup> Following their establishment, further EU legislation has granted powers to these bodies that had, so far, been reserved

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<sup>1</sup> The EU agencies meant here are what the EU institutions call “decentralised agencies”. They are permanent bodies under EU public law, established by the institutions through secondary legislation, and endowed with their own legal personality.

<sup>2</sup> M. Chamon, “EU Agencies between ‘Meroni’ and ‘Romano’ or the Devil and the Deep Blue Sea” (2011) 48 C.M.L. Rev. 1055, 1056.

to the EU institutions proper.<sup>3</sup> In other areas, the strengthening of existing agencies and the establishment of new ones seems to be the European Union's favourite response to policy problems or crises.<sup>4</sup>

From a legal perspective, two interesting issues have recently come under the spotlight again, showing the problematic nature of the delegation to or conferral of power on these bodies. The first issue relates to the use of art. 114 TFEU as a legal basis to empower EU agencies. The second relates to the actual limits to empowering these bodies. These issues have arisen in two recent but unconnected developments. The first was the United Kingdom's challenge before the Court of Justice in the *Short-selling* case of one of the powers granted to the European Securities and Markets Authority (ESMA); the second is the proposed Board of Resolution (SRB) in the framework of the Single Resolution Mechanism (SRM) for the Banking Union.<sup>5</sup> Although the debate on the limits to empowering agencies has mainly been discussed by academics,<sup>6</sup> these developments have really brought the underlying issues to the political institutions and even (for the first time) to the Court of Justice.

In the *Short-selling* case, the Court delivered its judgment on January 22, 2014 following the Advocate General's Opinion of September 12, 2013; while the Council Legal Service (CLS) adopted legal opinions in September and October 2013 on the SRM. Both examples will be discussed in turn, in order to identify new developments in the debate on the empowerment of EU agencies.

### **Recapitulating the debate on the empowerment of EU agencies prior to the *Short-selling* case**

Following more than 40 years of *agencification*, a framework governing this process has still not been established in primary law. Although the suggestion for such a framework had been made in successive Intergovernmental Conferences,<sup>7</sup> the Treaties do not provide that the EU legislator may establish and empower EU agencies. And whereas the Commission had proposed an inter-institutional agreement establishing a framework,<sup>8</sup> this has only resulted in a non-binding Common Approach (CA).<sup>9</sup> Because of its meagre contents, the latter has been received rather sceptically by commentators.<sup>10</sup> Indeed, for the most

<sup>3</sup> See, for instance, the European Securities and Markets Authority's (ESMA's) power to impose fines under Regulation 648/2012, or its powers that were contested in *Short-selling*. See Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1 and *United Kingdom v Parliament and Council (Short-selling)* (C-270/12) January 22, 2014.

<sup>4</sup> See, for instance, the proposed establishment of the Single Resolution Mechanism ((SRM) COM(2013) 520 final) or the Commission's suggestion fundamentally to alter the European Railway Agency's mandate in its proposals for a fourth railway package. For the latter, see COM(2013) 27 final; COM(2013) 30 final and COM(2013) 31 final.

<sup>5</sup> See the Commission Proposal on the Single Resolution Mechanism, COM(2013) 520 final.

<sup>6</sup> Only a few of these contributions can be referred to here; see e.g. H. Hofmann and A. Morini, "Constitutional Aspects of the Pluralisation of the EU Executive through 'Agencification'" (2012) 37 E.L. Rev. 419; T. Zwart, "La Poursuite du Père Meroni ou pourquoi Les Agences Pourraient Jouer un Rôle plus en Vue dans l'Union Européenne" in D. de la Rochère (ed.), *L'Exécution du Droit de l'Union, entre Mécanismes Communautaires et Droits Nationaux* (Bruxelles: Bruylant, 2009), pp.159–173; S. Griller and A. Orator, "Everything under Control? The 'Way Forward' for European Agencies in the Footsteps of the Meroni Doctrine" (2010) 35 E.L. Rev. 3.

<sup>7</sup> See E. Vos, "Agencies and the European Union" in T. Zwart and L. Verhey (eds), *Agencies in European and Comparative Perspective* (Antwerpen: Intersentia, 2003), pp.128–129.

<sup>8</sup> Commission, "Interinstitutional Agreement on the operating framework for the European regulatory agencies" COM(2005) 59 final.

<sup>9</sup> See the Common Approach on Decentralised Agencies, adopted by the three institutions on July 19, 2012, [http://europa.eu/agencies/documents/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf) [Accessed April 23, 2014].

<sup>10</sup> See E. Bernard, "Accord sur les agences européennes: la montagne accouche d'une souris" (2012) 3 RDUE 440; M. Scholten, "The Newly Released 'Common Approach' on EU Agencies: Going Forward or Standing Still?" (2012), CJEUL Online, [http://www.cjel.net/online/19\\_2-scholten](http://www.cjel.net/online/19_2-scholten) [Accessed April 23, 2014]; F. Comte, "Agences décentralisées: vers un statut unifié? Approche commune du Parlement européen, du Conseil de l'Union européenne et de la Commission européenne sur les agences décentralisées" in I. Govaere and D. Hanf (eds), *Scrutinizing Internal and*

part, the CA is a codification of established practice but does not even reflect all of that practice as it has evolved up until the adoption of the CA.

### *EU agencies under Meroni and Romano*

In the absence of a clear framework, both the EU institutions and academic commentators resorted to the Court's jurisprudence in the *Meroni* and *Romano* cases, which dealt with delegations,<sup>11</sup> albeit not delegations to EU agencies. As regards *Meroni*, there is a general consensus in legal scholarship that there exists a *Meroni* doctrine. However, there is no consensus on which rules make up that doctrine, the only consistently recurring element being that discretionary powers cannot be delegated. Other elements which have been identified are that: (1) the delegating authority cannot delegate more powers than it itself possesses<sup>12</sup>; (2) the delegating authority should ensure continued scrutiny<sup>13</sup>; (3) delegations cannot be implied but must be established explicitly<sup>14</sup>; (4) continued judicial supervision should be ensured<sup>15</sup>; (5) the institutional balance should not be upset<sup>16</sup>; and (6) the delegation should indeed be necessary in order to perform the tasks concerned.<sup>17</sup>

An extra dimension to the institutions' understanding of *Meroni* is, of course, the way in which this ruling is used in the inter-institutional power struggle. The Commission, for its part, has often relied on *Meroni* (and *Romano*) to safeguard its own position as primary actor in the EU executive.<sup>18</sup> For instance, when the Parliament proposed to empower the Agency for the Cooperation of Energy Regulators (ACER) to impose fines on market operators independently from the Commission,<sup>19</sup> the latter rejected this amendment, citing *Meroni*.<sup>20</sup> Four years later, however, the Commission could not prevent the legislator from granting exactly the same power to ESMA.<sup>21</sup> The *Romano* case is cited less frequently and is often subsumed under the *Meroni* case even if the Court seemingly took an even more restrictive stance in *Romano*, prohibiting the legislature to empower a body other than the Commission "to adopt acts having the force of law".<sup>22</sup>

*External Dimensions of European Law: Les dimensions internes et externes du droit européen à l'épreuve* (Bruxelles: Peter Lang, 2013), Vol. I, pp.143–156.

<sup>11</sup> *Meroni & Co, Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* (9/56) [1958] E.C.R. 11; *Romano v Institut National d'Assurance Maladie-Invalidité (INAMI)* (98/80) [1981] E.C.R. 1241; [1983] 2 C.M.L.R. 698.

<sup>12</sup> See e.g. D. Geradin, "The Development of European Regulatory Agencies: What the EU should Learn from the American Experience" (2004) 11 C.J.E.U.L. 9.

<sup>13</sup> See e.g. M. Blanquet, "Agences de l'union et gouvernance européenne" in J. Couzinet (ed.), *Les Agences de l'Union européenne* (Toulouse: PUSST, 2002), p.64.

<sup>14</sup> See e.g. J.-V. Louis, "Le Fonds Européen de Cooperation Monétaire" (1973) 9 C.D.E. 290.

<sup>15</sup> See e.g. B. R Emmert, "Die Gründung von Einrichtungen der mittelbaren Gemeinschaftsverwaltung" (2003) 37 *Europarecht* 139.

<sup>16</sup> See e.g. J.-P. Schneider, "A Common Framework for Decentralized EU Agencies and the Meroni Doctrine" (2009) 61 *Administrative Law Review Special Issue* 35.

<sup>17</sup> See T. Tridimas, "Financial Supervision and Agency Power: Reflections on ESMA" in N. Nic Shuibhne and L. Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford: Oxford University Press, 2012), p.60.

<sup>18</sup> See e.g. Commission, "Interinstitutional Agreement on the operating framework for the European regulatory agencies" COM(2005) 59 final, p.5.

<sup>19</sup> See the Parliament's Legislative Resolution [2009] OJ C286E/149 art.12.

<sup>20</sup> See Commission, "Commission Position on EP Amendments at First Reading", SP(2008)4439 (June 18, 2006), <http://www.europarl.europa.eu/oeil/spdoc.do?i=15160&j=0&l=en> [Accessed April 23, 2014].

<sup>21</sup> See Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1 art.65.

<sup>22</sup> See *Romano* (98/80) [1981] E.C.R. 1241 at [20].

It should be noted that when *Meroni* is applied to the current EU agencies, it is often implicitly assumed that the notion of delegation applies to the empowerment of these bodies. However, one could also argue that the powers exercised by the EU agencies are not delegated by the legislator because these powers have never been originally vested in it. The EU agencies' powers would then be conferred on, instead of delegated to, these bodies.

Whether changing the qualification from a delegation to a conferral leads to a different appraisal of the empowerment of EU agencies is a different matter still. The CLS in the 1980s, for instance, rejected the notion of delegation to describe the empowerment of the Office for the Harmonisation of the Internal Market (OHIM), an agency, because "this specific case concerns the conferring of new powers, i.e. powers which have not at the moment been vested in any Community institution ... the decisions of the Court in the *Meroni* Case do not seem to apply in this context".<sup>23</sup> It subsequently applied most of what it had identified as the *Meroni* doctrine because it found that the doctrine enshrines a number of general principles that apply in any case, regardless of whether one is faced with a delegation or a conferral. In a previous contribution, Hofmann and Morini seemed to suggest that *Meroni* only applies if the empowerment of agencies is qualified as a (sub)delegation, otherwise the "limits to the creation of agencies and their powers arise from the constitutional principles such as conferral, proportionality and subsidiarity".<sup>24</sup> Of course, the conclusion that *Meroni* only applies to (sub)delegations is greatly determined by those authors' understanding of *Meroni*, which they reduce to the two requirements that an authority can only delegate the powers it itself possesses and that delegated powers should be subject to strict review in the light of objective criteria.<sup>25</sup> By virtue of the first of these requirements, it would indeed be impossible to apply *Meroni* fully to a conferral, since the powers of EU agencies are not originally vested in the legislator.

As a result, a number of important outstanding questions before the Court's verdict in the *Short-selling* case were:

- Can the EU legislature empower bodies such as EU agencies in the absence of a clear legal basis?
- If so, are EU agencies empowered by delegations or by conferrals, and is there any practical difference between the two?
- How do *Meroni* and *Romano* relate to each other, and do they apply to the empowerment of EU agencies?
- If so, which rules do *Meroni* and *Romano* lay down, and how should they be applied to EU agencies today?
- Depending on the rules making up the *Meroni* doctrine, and the relation between *Meroni* and *Romano*, how does the institutional balance fit in? Does it underlie both rulings?

### *Article 114 TFEU as a legal basis*

Turning to art. 114 TFEU, the possibility of establishing agencies based on that provision has been discussed less intensively in the legal doctrine. For a long time, the prevailing consensus was that agency creation

<sup>23</sup> Legal Service of the Council, Opinion on the Proposal for a Council Regulation on the Community Trade Mark (5837/85) June 6, 1985, p.6.

<sup>24</sup> Hofmann and Morini, "Constitutional Aspects of the Pluralisation of the EU Executive through 'Agencification'" (2012) 37 E.L. Rev. 419, 434. It should be noted that Hofmann and Morini do not themselves make the distinction between delegation and conferral but speak of multiple delegation mechanisms, differentiating between "sub-delegation of implementing powers" and "the creation of measures necessary to ensure that policies of the Union are properly implemented".

<sup>25</sup> Hofmann and Morini, "Constitutional Aspects of the Pluralisation of the EU Executive through 'Agencification'" (2012) 37 E.L. Rev. 419, 423.

required recourse to art.352 TFEU as a legal basis,<sup>26</sup> and the institutional practice up until 2001 also confirmed this. Around that time, Vos concluded that establishing an agency as such was not possible under art.114 TFEU, but adopting harmonisation measures, together with provisions establishing an agency, was permissible under a centre of gravity test. Whether such a test would be passed would ultimately depend on the answers to the questions whether the harmonisation measures “seek to eliminate existing or future differences between national legislative provisions, and [whether] the agency [is] dependent upon such harmonization measures”.<sup>27</sup> The agency could not, therefore, be an end in itself but should facilitate or be secondary to the harmonisation measures.

Yet, under this argument, the act establishing an agency is assessed in an isolated manner. What if the EU legislature adopts a number of harmonisation measures in different instruments based on art.114 TFEU and then complements this body of legislation with an act solely establishing an EU agency, where the latter is a key measure to ensure the effectiveness of the other instruments? Could art.114 TFEU not be used here?

Vos’s argument further focuses on the powers and tasks granted to an agency, not on the institutional decision to establish an agency. This is clear in the remark that the agency,

“would no longer possess the supplementary character if proper decision-making powers were delegated to it and these powers were exercised without Commission supervision. The delegation of these powers to an agency would be of such institutional importance that it would not fall within the concept of harmonisation.”<sup>28</sup>

However, the argument that only non-decision-making agencies could be established based on art.114 TFEU seems detached from the content of that provision, which revolves around the notion of “measures for approximation”. In any event, from the third wave of agency creation onwards, the EU legislator did indeed establish decision-making agencies such as the chemicals agency (ECHA), ACER, and the European Supervisory Authorities on the sole legal basis of art.114 TFEU.

During the third wave, the use of art.114 TFEU as a legal basis for agency creation was also sanctioned by the Court in the *ENISA* case.<sup>29</sup> In that case, the Court had to deal with two issues raised by the United Kingdom: whether the EU Agency for Network and Information Security’s (ENISA) tasks (when exercised) could be qualified as “approximation measures”; and whether organisational arrangements, such as setting up a body, are possible under art.114 TFEU. To put these questions into context, A.G. Kokott referred to the conclusions of A.G. Stix-Hackl, followed by the Court, in the *European Cooperative Society* case,<sup>30</sup> who found that the creation of a new form of co-operative society in addition to national forms could not fall under the notion of the approximation of national legislation.<sup>31</sup> According to A.G. Kokott, the “approximation provisions” in the ENISA Regulation were to be found in the tasks granted to ENISA, but these were overshadowed by the provisions on the establishment and organisation of ENISA, which did “not contribute directly to the approximation of provisions of the Member States”.<sup>32</sup>

<sup>26</sup> See e.g. R. Lauwaars, “Auxiliary Organs and Agencies in the E.E.C.” (1979) 16 C.M.L. Rev. 376; M. Hilf, “Die abhängige Juristische Person des Europäischen Gemeinschaftsrechts” (1976) 36 ZaöRV 559.

<sup>27</sup> E. Vos, “Reforming the European Commission: What Role to play for EU Agencies?” (2000) 37 C.M.L. Rev. 1122.

<sup>28</sup> E. Vos, *Institutional Frameworks of Community Health and Safety Legislation: Committees, Agencies and Private Bodies* (Oxford: Hart Publishing, 1999), p.199.

<sup>29</sup> However, ENISA is an atypical agency in that it is only established for a limited period, even if the institutions keep amending its founding regulation, extending that period every time.

<sup>30</sup> *European Parliament v Council of the European Union (European Cooperative Society)* (C-436/03) [2006] E.C.R. I-3733; [2006] 3 C.M.L.R. 3 at [44].

<sup>31</sup> Opinion of A.G. Stix-Hackl in *European Cooperative Society* (C-436/03) [2006] E.C.R. I-3733 at [96]–[98].

<sup>32</sup> Opinion of A.G. Kokott in *United Kingdom v Parliament and Council* (C-217/04) [2006] E.C.R. I-3771; [2006] 3 C.M.L.R. 2 at [26].

The Advocate General might have concluded here that a Regulation containing primarily organisational provisions could not be established on the basis of art.114 TFEU, but then she observed:

“[However,] the establishment of ENISA cannot be separated from its tasks, but is a means to the end. The ENISA Regulation thus pursues only a single aim, which is to be derived above all from the provisions on the tasks of ENISA.”<sup>33</sup>

By describing the organisational arrangements as a means to the end pursued by the material rules, A.G. Kokott seemingly found those arrangements to be implied by art.114 TFEU, without entering into the question of whether the agency-instrument was indeed necessary, or indispensable, for these material rules.<sup>34</sup> Still, because the Advocate General found that ENISA’s tasks did not qualify as measures for approximation, she did not address the fundamental question of agency creation based on art.114 TFEU:

“Finally, it may be left open whether the establishment of an agency with legal personality on the basis of Article [114 TFEU]—or pursuant to other specific legal bases of the [TFEU] without recourse to Article [352 TFEU]—is precluded by obstacles of principle. Although the Court put questions to that effect at the hearing, the parties have not discussed this point in detail in the present case.”<sup>35</sup>

The Court did not really engage with that question either, since it merely remarked that:

“The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation.”<sup>36</sup>

The Court therefore spoke in very general terms of “Community bodies”, without making a distinction between permanent or temporary bodies and bodies with or without legal personality. Having dealt with the issue of establishment, it did not make a clear distinction between the material and organisational rules in the Regulation, unlike the Advocate General, but seemingly took the establishment and the tasks of the agency as a single measure. It thus remarked that:

“The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where ... the adoption of non-binding supporting and framework measures seems appropriate.”<sup>37</sup>

After having concluded that ENISA’s tasks could be situated within the broader regulatory framework of network security, it hinted at making a distinction by stating that,

“it needs to be determined ... whether the establishment of the Agency *and* the objectives and tasks which are assigned to it by the regulation may be regarded as ‘measures for approximation’ within the meaning of Article [114 TFEU].”<sup>38</sup>

However, the Court then continued by taking the establishment of ENISA as a proxy for its tasks, since it observed that the,

<sup>33</sup> Opinion of A.G. Kokott in *United Kingdom v Parliament* (C-217/04) [2006] E.C.R. I-3771 at [27].

<sup>34</sup> According to Vetter, it should be shown that the establishment of an agency, based on art.114 TFEU and the implied powers doctrine, is compellingly necessary (*zwingend erforderlich*). See R. Vetter, “Die Kompetenzen der Gemeinschaft zur Gründung von unabhängigen europäischen Agenturen” (2005) 58 DÖV 721, 729.

<sup>35</sup> Opinion of A.G. Kokott in *ENISA* (C-217/04) [2006] E.C.R. I-3771 at [46].

<sup>36</sup> *ENISA* (C-217/04) [2006] E.C.R. I-3771 at [44].

<sup>37</sup> *ENISA* (C-217/04) at [44].

<sup>38</sup> *ENISA* (C-217/04) at [59] (emphasis added).



“legislature considered that the establishment of a Community body such as the Agency was an appropriate means of preventing the emergence of disparities likely to create obstacles to the smooth functioning of the internal market in the area.”<sup>39</sup>

At face value, this observation seems questionable, since the establishment of a new EU body cannot itself be a means to prevent disparities from emerging; and it stands in contrast with the Opinion of the Advocate General who, rightly, believed that the establishment and organisation of ENISA is simply an instrument to allow ENISA’s tasks to be carried out. Because it remained uncertain whether ENISA would actually contribute to or facilitate harmonisation (the Advocate General thought it would not), the Court concluded by emphasising that ENISA was established only for five years and that the Commission would be obliged to assess ENISA’s contribution to the implementation of the relevant directives. According to Bouveresse, this element was decisive in order for the Court to come to its conclusion.<sup>40</sup>

As regards art.114 TFEU, the following questions may thus be raised:

- May the EU legislature establish (permanent) agencies without recourse to art.352 TFEU?
- If Treaty provisions speak of “measures” to be taken, does this cover both material rules and “organisational measures”?
- May art.114 TFEU be used to establish an EU agency? Is the organisational act setting up an agency a harmonisation measure in itself or is this subsumed under the material rules (which do harmonise) contained in that act?
- Should the act establishing an EU agency be assessed on its own merits for the purposes of art.114 TFEU, or may an assessment depend on the legislative context in which that act should be situated?

In what follows, the issues identified in this section will be commented upon in relation to the two topical examples of the *Short-selling* case and the SRM proposal.

### ***United Kingdom v Council and Parliament—the Short-selling case***

In *Short-selling*, the United Kingdom challenged ESMA’s powers to prohibit (or impose conditions on) short-selling under art.28 of Regulation 236/2012.<sup>41</sup> The United Kingdom invoked both the *Meroni* and *Romano* jurisprudence. In addition, it argued that since the measures adopted by ESMA would be non-legislative acts of general application, they would be contrary to arts 290 and 291 TFEU, which reserve the power to adopt delegated or implementing acts to the Commission. Lastly, if ESMA were to use its power to adopt individual decisions, the United Kingdom claimed that the Regulation could not be based on art.114 TFEU.<sup>42</sup>

It goes without saying that the issues raised in relation to ESMA are also highly relevant for other EU agencies since the silence in primary law on the limits to *agencification* has placed a special responsibility on the Court. As Hofmann and Morini predicted:

<sup>39</sup> *ENISA* (C-217/04) [2006] E.C.R. I-3771 at [62].

<sup>40</sup> A. Bouveresse, “Bases juridiques autorisant la création d’organismes dotés d’une personnalité juridique propre” (2006) 203 *Europe* 10.

<sup>41</sup> Regulation 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps [2012] OJ L86/1.

<sup>42</sup> *Short-selling* (C-270/12) January 22, 2014 at [89].

“The European Courts will have to face and explicitly begin to address the questions of the nature of delegation and the position of EU agencies in implementing EU policies in the absence of a clear constitutional mandate.”<sup>43</sup>

Here, the Court had different options at its disposal. If it had followed the letter of its previous jurisprudence, it could only have concluded that the empowerment of ESMA by Regulation 236/2012 is illegal.<sup>44</sup> The alternative for the Court was to rule that *Meroni* and *Romano* do not apply any longer in the post-Lisbon EU legal order, or to reinterpret these rulings so that ESMA’s powers might be upheld.<sup>45</sup> The Court could, for instance, have done so by ruling that *Romano* prohibits the delegation of formal legislative powers and that *Meroni* prohibits the delegation of the power to decide on the essential elements of (material) legislation.<sup>46</sup> Because A.G. Jääskinen<sup>47</sup> proposed to solve the case solely on the fourth plea, the latter option will be looked at first.

### *Article 114 TFEU as a legal basis*

In his Opinion on the case, A.G. Jääskinen proposed that the Court could ignore the first three pleas by solving the case on the argument related to art. 114 TFEU, albeit not for the reason advanced by the United Kingdom. The United Kingdom had raised its fourth plea only in the event that ESMA could use its power under art. 28 of Regulation 236/2012 to address individual decisions to market operators.<sup>48</sup> A.G. Jääskinen analysed the power under art. 28 in the light of the *ENISA* case. The Advocate General noted that,

“it is difficult to envisage how the exercise of a power under Article 28 of Regulation 236/2012 could contribute to harmonisation of the kind described by the Court in *ENISA*. Rather its function is to lift implementation powers ... from the national level to the EU level when there is disagreement between ESMA and the competent national authority or between national authorities.”<sup>49</sup>

As a result, A.G. Jääskinen concluded that art. 114 TFEU only allows for harmonisation of national (decision-making) procedures and not the replacement of such national procedures with decision-making at EU level.<sup>50</sup> He then proposed art. 352 TFEU as the proper legal basis to confer the contested power on ESMA.<sup>51</sup>

The Advocate General’s solution would indeed have helped to avoid the even more contentious issues that the other pleas of the United Kingdom raised, but his approach was also rather restrictive. After all, as noted, the Court had found the agency in *ENISA* to be the organisational form incidental to the *ENISA*

<sup>43</sup> Hofmann and Morini, “Constitutional Aspects of the Pluralisation of the EU Executive through ‘Agencification’” (2012) 37 E.L. Rev. 419, 443. In *Short-selling*, however, the Court did not address these two questions.

<sup>44</sup> See also A. Orator, “Die unionsrechtliche Zulässigkeit von Eingriffsbefugnissen der ESMA im Bereich von Leerverkäufen” (2013) 24 EuZW 852, 855.

<sup>45</sup> For a more elaborate discussion of these options, see M. Chamon, “Le recours à la soft law comme moyen d’éluder les obstacles constitutionnels au développement des agences de l’UE” (2014) 576 RUE 152, 157–158.

<sup>46</sup> This would then result in aligning the Court’s *Köster* (see *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co* (25/70) [1970] E.C.R. 1161) jurisprudence with its *Meroni* jurisprudence.

<sup>47</sup> For a discussion of the Advocate General’s Opinion, see Orator, “Die unionsrechtliche Zulässigkeit von Eingriffsbefugnissen der ESMA im Bereich von Leerverkäufen” (2013) 24 EuZW 852.

<sup>48</sup> *Short-selling* (C-270/12) January 22, 2014 at [88]–[89].

<sup>49</sup> *Short-selling* (C-270/12) at [50].

<sup>50</sup> *Short-selling* (C-270/12) at [52].

<sup>51</sup> Orator, “Die unionsrechtliche Zulässigkeit von Eingriffsbefugnissen der ESMA im Bereich von Leerverkäufen” (2013) 24 EuZW 852, rejects A.G. Jääskinen’s claim at [58] of the Opinion that art. 352 TFEU would enhance democratic input. Even if only for the reduced role of the European Parliament, on which Orator does not rely, the Advocate General’s claim would indeed appear doubtful.

Regulation's material rules,<sup>52</sup> stressing the importance of the relation between ENISA's tasks and the existing body of EU legislation in the field of network security.<sup>53</sup> In *Smoke Flavourings*, the Court had validated a centralised procedure at EU level for the authorisation of certain (food) products. The Court found that this authorisation could amount to a harmonisation measure under art. 114 TFEU if its essential elements were contained in the basic legislative act and if the procedure to reach a centralised decision is designed in such a way that it results in harmonisation.<sup>54</sup>

As noted above, in the *European Cooperative Society* case, on the other hand, the Court rejected the use of art. 114 TFEU to establish a new legal form for a co-operative society that would exist alongside the existing national legal forms. As it left the latter unchanged, the Court found that there was no "approximation".<sup>55</sup>

In *General Product Safety*, the Court sanctioned the adoption of individual measures based on art. 114 TFEU, noting that,

"the concept of 'measures for the approximation' of legislation must be interpreted as encompassing the Council's power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products."<sup>56</sup>

Furthermore, the Commission and Council in *General Product Safety* emphasised that the individual measures at issue were addressed to the Member States and did not have direct effect with respect to individuals.<sup>57</sup> The competence to issue such individual measures was triggered by the existence or risk of divergent national measures, following which the Commission could require the Member States to take certain temporary measures to address such obstacles to the internal market.

In the light of these cases, art. 114 TFEU might therefore allow for a centralised procedure such as that provided for in art. 28 of Regulation 236/2012, covering both the adoption of general and individual measures as "harmonisation measures" that do not co-exist alongside national measures. The questions remaining would then be whether the essential elements of the harmonisation measure are already contained in the basic act, as prescribed by *Smoke Flavourings*, and whether the individual measures may also be addressed to private parties, in contrast to what had been at issue in *General Product Safety*. Probably because it had already ruled in relation to the first plea that ESMA had not been accorded discretionary powers (as discussed further below), the Court did not dwell on the first of these questions. As to the second question, the Court referred to *General Product Safety* and to *ENISA*, in which it had noted that nothing in the wording of art. 114 TFEU "implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States".<sup>58</sup>

The Court then dismissed the United Kingdom's plea by testing the contested power in light of the express Treaty provision, noting that,

"a legislative act adopted on that legal basis must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as its object the establishment and functioning of the internal market."<sup>59</sup>

<sup>52</sup> *ENISA* (C-217/04) [2006] E.C.R. I-3771 at [62].

<sup>53</sup> *ENISA* (C-217/04) at [47].

<sup>54</sup> *United Kingdom v European Parliament (Smoke Flavourings)* (C-66/04) [2005] E.C.R. I-10553; [2006] 3 C.M.L.R. 1 at [47]–[48].

<sup>55</sup> *European Cooperative Society* (C-436/03) [2006] E.C.R. I-3733 at [44].

<sup>56</sup> *Germany v Council (General Product Safety)* (C-359/92) [1994] E.C.R. I-3681; [1995] 1 C.M.L.R. 413 at [37].

<sup>57</sup> See *General Product Safety* (C-359/92) [1994] E.C.R. I-3681 at [16].

<sup>58</sup> *ENISA* (C-217/04) at [44].

<sup>59</sup> *Short-selling* (C-270/12) January 22, 2014 at [100].

On the first of these requirements, the Court stressed the large margin of discretion left to the legislator to choose the most appropriate method of approximation and found that the legislator “may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought”.<sup>60</sup> With this first issue out of the way, the result of the test was already determined since there was no doubt that the measure *in casu* had as its object the proper functioning of the internal market, given the plethora of incongruent national measures which had been adopted in this field during the financial crisis.

How has the *Short-selling* case clarified the questions on art.114 TFEU raised above? Perhaps unsurprisingly, the general question of agency creation and empowerment without recourse to art.352 TFEU has still not been addressed. After all, unlike in the *ENISA* case where the United Kingdom had argued that the contested regulation could only have been adopted based on art.352 TFEU, such an argument had not been advanced by the United Kingdom in *Short-selling*. Whereas commentators had deplored the fact that the Court did not address this issue in *ENISA*,<sup>61</sup> one cannot reproach the Court for not venturing *ultra petita* in the present case.

A similar observation may be made on the second question, but on the third question the Court did further develop its reasoning in *ENISA*.<sup>62</sup> While the Court was not asked to rule on the decision to establish the agency as such, it recalled the legislator’s discretion on the most appropriate form of approximation (as noted above) and referred to its judgment in *ENISA* where it found that this also allows the legislator to establish EU bodies, if necessary in a process of harmonisation. This was then also taken as the standard to determine whether powers of implementation could be delegated to an EU body. The Court’s ruling confirms that the legislator has a very large margin of discretion to take any measures necessary for harmonisation, regardless of their nature, be they organisational or material.<sup>63</sup> The present ruling of the Court could thus be criticised on the same grounds as its ruling in the *ENISA* case.<sup>64</sup> This criticism could be addressed by insisting that the legislator first show that a certain implementation power is necessary for contributing to the process of harmonisation and then demonstrate why an organisational form such as an EU agency is necessary to exercise that power.<sup>65</sup> In any event, the Court’s ruling in *Short-selling* has also sanctioned the delegation of powers to other agencies that have been empowered pursuant to art. 114 TFEU, such as the ACER and ECHA.

<sup>60</sup> *Short-selling* (C-270/12) January 22, 2014 at [105].

<sup>61</sup> See e.g. K. Gutman, “Case C-66/04, Smoke Flavorings: Case C-436/03, SCE; & Case C-217/04, ENISA” (2006) 13 Colum. J. Eur. L. 147, 176–177; V. Randazzo, “Case C-217/04, United Kingdom v. European Parliament and Council of the European Union” (2007) 44 C.M.L. Rev. 155, 168–169.

<sup>62</sup> Regarding the fourth question, it should be noted that this case did not concern the decision to establish ESMA but only to (further) empower it. In any event, in dismissing the United Kingdom’s fourth plea, the Court only relied on considerations related to Regulation 236/2012 itself without needing to refer to the broader regulatory framework.

<sup>63</sup> In e.g. the French, German, and Dutch language versions of the Court’s ruling, this is clearer. In the English version, the Court found that the legislator could establish an agency if it found it necessary for the purposes of harmonisation and *accordingly* could delegate powers to that agency. In the three other versions, the Court does not link these two considerations, using “conformément”, “dementsprechend” or “dienovereenkomstig” instead of using “partant”, “demzufolge” and “bijgevolg”, implying causality more clearly than (simple) accordance.

<sup>64</sup> See e.g. C. Ohler, “Rechtmäßige Errichtung der Gemeinschaftsagentur ENISA” (2006) 17 EuZW 369, 373–374; Vetter, “Die Kompetenzen der Gemeinschaft zur Gründung von unabhängigen europäischen Agenturen” (2005) 58 DÖV 721, 729.

<sup>65</sup> The outcome in this case probably would not be different, since the Court referred to both the fragmentation of the internal market if national authorities would adopt incongruent measures and to the specific professional and technical expertise of ESMA. The approach suggested could, however, alleviate concerns that the Court defers all too eagerly to the legislator.

*ESMA's power under Meroni, Romano, and arts 290 and 291 TFEU*

Again, because of the different approach taken by the Advocate General and the Court, the Opinion will first be discussed, followed by a discussion of the Court's ruling.

## A.G. Jääskinen's analysis

In the event that the Court would not follow his suggestion to decide the case solely on the art.114 TFEU point, the Advocate General worked out an analysis on the pleas related to *Meroni* and *Romano*, noting that,

“the evolution in the EU constitutional law that occurred under the Lisbon Treaty has indeed accommodated the pivotal concerns with which the Court had to deal in *Meroni* and *Romano*; namely the absence of treaty based criteria for the conferral and delegation of powers so as to ensure respect for institutional balance, and the vacuum in terms of judicial review of legally binding acts of agencies.”<sup>66</sup>

The Treaty of Lisbon has indeed elaborated the European Union's system of judicial review, accommodating the EU agencies, but there is still no explicit *Delegationsnorm* allowing for delegations to agencies.<sup>67</sup> The Advocate General therefore presented an interesting analysis, differentiating delegated acts under art.290 TFEU from implementing acts under art.291 TFEU. According to the Advocate General, agencies cannot be empowered to adopt delegated acts because the latter may alter the normative content of legislative acts. This requires a democratic accountability that only the Commission, as the body accountable before the European Parliament, actually has.<sup>68</sup> As regards implementing acts, however, the Advocate General noted that these do not amend or supplement legislative acts and therefore the same restriction would not apply.<sup>69</sup> A.G. Jääskinen correctly observed that the fact that the distinction between implementing and delegated acts is not always clear<sup>70</sup> cannot be a reason for rejecting such fundamental consequences of the distinction.<sup>71</sup>

The problem remains, however, that just like art.290 TFEU, art.291 TFEU does not make any reference to agencies; and even the Comitology Regulation adopted under the latter provision does not mention agencies one single time.<sup>72</sup> The Advocate General's willingness to grant implementing powers to EU agencies thus rested on two elements. First, such powers do not require a great level of democratic legitimacy. Secondly, the Advocate General referred to the system of judicial protection, notably arts 263 and 277 TFEU, to which the EU agencies have now also been subjected, which would be pointless if they could not adopt binding acts.<sup>73</sup>

<sup>66</sup> Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) September 12, 2013 at [72].

<sup>67</sup> In the work of Barbey, the *Delegationsnorm* is the rule that sets out the conditions under which a lower rule (the *delegierende Norm*) may deviate from the *Regelnorm* (which the *Delegationsnorm* should at least match in rank). See G. Barbey, *Rechtsübertragung und Delegation: eine Auseinandersetzung mit der Delegationslehre Heinrich TRIEPELS* (Münster: Max Kramer, 1962), pp.76–77.

<sup>68</sup> See Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) at [85].

<sup>69</sup> Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) at [86].

<sup>70</sup> On this point, see *Commission v European Parliament and Council* (C-427/12) March 18, 2014 where the question regarding the dividing line between implementing acts under art.291 TFEU and delegated acts under art.290 TFEU was put to the Court for the first time.

<sup>71</sup> See Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) at [78] n.103.

<sup>72</sup> Regulation 182/2011 [2011] OJ L55/13.

<sup>73</sup> Orator has questioned this deduction; see Orator, “Die unionsrechtliche Zulässigkeit von Eingriffsbefugnissen der ESMA im Bereich von Leerverkäufen” (2013) 24 EuZW 852, 855.

While the second argument may seem sensible, accepting the existence of an implicit *Delegationsnorm*, inferred from the system of judicial protection, is still quite a fundamental step to take.<sup>74</sup> As regards the first argument, while it is evident that a sufficient degree of democratic legitimacy is in order when (formal or material) legislation is adopted, democratic concerns are not absent from implementing acts either. Article 11 of the Comitology Regulation, for instance, provides for a right of scrutiny for the European Parliament, precisely because the (democratic) legislature has an evident interest in scrutinising the way in which its legislation is implemented. However, such a right of scrutiny is not in place when EU agencies take decisions. It is not entirely clear, therefore, why the lack of democratic legitimacy of EU agencies would only be problematic for delegated acts but not for implementing acts.

In addition, the distinction on democratic grounds between the two types of acts is not of a fundamental nature. After all, one could take the Parliament's democratic scrutiny powers vis-à-vis the Commission and mirror them in the acts laying down the statutes of EU agencies. EU agencies would then find themselves in the same position as the Commission, except for the fact that the Parliament's scrutiny powers over the agencies would only be laid down in secondary law. Even then, if the *Delegationsnorm* may be implicitly presumed under the Treaties, the scrutiny powers of the Parliament may surely be presumed to be all-encompassing and derived from primary law as well, bar explicit *leges specialis*. As a result, if the right mechanisms were instituted to allow the Parliament to exercise the same, or even greater, control over EU agencies as it exercises over the Commission, there would be no reason any longer to deny EU agencies the power to adopt delegated acts, under the reasoning of the Advocate General.

The distinction based on a pure democracy argument further ignores the separation of powers or institutional balance dimension of the problem, even if the Advocate General also stressed the importance of the institutional balance in this case.<sup>75</sup> Ultimately this goes to the question of how the executive power in the European Union is conceived. In the EU legal order, there is clearly a multilevel executive, authorities at both Member State and EU level being competent.<sup>76</sup> Focusing on the European Union, the questions that arise are whether the Commission is the primary EU executive actor and whether, ultimately, the notion of a unitary (EU) executive should be established at EU level. It is therefore the definition of the Commission's role that should largely solve how EU agencies could fit in the EU executive. This issue is exemplified in the Advocate General's concluding remarks, in which he noted that:

“*Meroni* remains relevant in that (i) powers cannot be delegated to an agency that are different from the implementing powers the EU legislature has conferred on the delegating authority, be it the Commission or the Council ... The delegating authority ‘must take an express decision transferring them and the delegation can relate only to clearly defined executive powers’.”<sup>77</sup>

Although the Advocate General later came back to this point (discussed further below), it suggests that the Commission is the authority delegating powers to the agencies. In reality, however, it is the legislature that grants powers to the EU agencies, powers which the Treaties say should be granted to the Commission. Since *Meroni* was determined under the ECSC Treaty, its logic assumes that the Commission is the European Union's unitary executive (as the High Authority was in the ECSC). If that is the case, the Commission's role should be greatly enhanced when it comes to delegating powers to the EU agencies, a point picked up again below.

A.G. Jääskinen thus concluded that delegating implementing powers under art.291 TFEU is permissible within the confines of the *Meroni* doctrine. He then observed that ESMA's powers were conferred rather

<sup>74</sup> In this sense, see also C. Ohler, “Rechtsetzungsbefugnisse der Europäischen Wertpapier- und Marktaufsichtsbehörde (ESMA)” (2014) 69 JZ 244, 250.

<sup>75</sup> See Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) at [72].

<sup>76</sup> P. Craig, *EU Administrative Law*, 2nd edn (Oxford: Oxford University Press, 2012), pp.27–33.

<sup>77</sup> See Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) at [88].

than delegated by the legislature, since the legislature does not possess implementing powers itself. However, similarly to the CLS's opinion on OHIM noted above, the Advocate General also noted that this did not mean that *Meroni* does not apply.<sup>78</sup> He continued by reinterpreting *Meroni* so that the doctrine reserves policy choices, which should be sufficiently spelled out, to the legislature. Because the Advocate General precluded agencies from adopting delegated acts, he did not go as far as aligning *Meroni* with *Köster*.<sup>79</sup> After all, delegated acts may still contain policy choices but cannot touch on the essential elements of legislation, which is the demarcation line originally set in *Köster*.

The Advocate General further found that the complex factual assessments that ESMA would have to make do not mean that it is in breach of *Meroni*.<sup>80</sup> That agencies may make such assessments has indeed already been accepted by the Courts.<sup>81</sup> In addition, the Advocate General noted that the discretion of ESMA is further restricted by the delegated acts that the Commission adopts, concluding that the conferral of powers to ESMA by art.28 of Regulation 236/2012 was permissible under *Meroni*.<sup>82</sup>

### The Court's ruling

Where the Advocate General's Opinion read as a delicate attempt to reconcile the requirements of rigorous analytical reasoning with the concern of allowing the European Union to fulfil its objectives, which today requires the involvement of EU agencies, the Court's ruling appears much more like a simplification exercise.

### *Romano does not add anything to Meroni*

Just like the Advocate General, the Court found *Meroni* and *Romano* to be applicable to EU agencies. Yet, where the Advocate General noted that the Lisbon Treaty had addressed the issues underlying both *Meroni* and *Romano*, he dealt with these two rulings separately. The Court, however, entirely subsumed *Romano* under *Meroni* by noting that "it cannot be inferred from *Romano* that the delegation of powers to a body such as ESMA is governed by conditions other than those set out in *Meroni v High Authority*".<sup>83</sup> The Court's decision on this issue is a first major simplification, although debatable in itself (a point developed further below).

### *Reducing Meroni to a single criterion*

The Court's second major simplification may be found in its recapitulation of *Meroni*. Above, it was noted that many different elements could be identified as constituting the *Meroni* doctrine. The Court noted, however, that in *Meroni* it,

"stated, *in essence*, that the consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a 'discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy'".<sup>84</sup>

<sup>78</sup> Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) at [91]. On this point, see also Orator, "Die unionsrechtliche Zulässigkeit von Eingriffsbefugnissen der ESMA im Bereich von Leerverkäufen" (2013) 24 EuZW 852, 854.

<sup>79</sup> See fn.46.

<sup>80</sup> Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) at [94].

<sup>81</sup> See fnn.101 and 102.

<sup>82</sup> Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) at [101].

<sup>83</sup> *Short-selling* (C-270/12) January 22, 2014 at [66].

<sup>84</sup> *Short-selling* (C-270/12) January 22, 2014 at [41] (emphasis added).

Although the Court, in its previous jurisprudence, had recalled a more complete *Meroni* doctrine,<sup>85</sup> and even if the Advocate General had presented a *Meroni* doctrine that was more faithful to the original,<sup>86</sup> the Court reduced *Meroni* to its supposed essence, i.e. the single prohibition of delegating discretionary powers. Here the Court also took a first step in introducing a *Meroni*-light doctrine, by dismissing other possible elements. A second step was then taken by reinterpreting the single requirement still retained by the Court.

Before doing so, the Court, in a preliminary observation, remarked that the power *in casu* did not go “beyond the bounds of the regulatory framework established by the ESMA Regulation”,<sup>87</sup> notably its art.9(5). That paragraph provides *inter alia* that ESMA,

“may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2).”

The latter paragraph in turn referred to the relevant legislation in force at the time of the adoption of the ESMA Regulation and any future relevant legislation (such as Regulation 236/2012). Still, it is not entirely clear what drove the Court in making this observation. Surely it could not have meant that any potential irregularity in Regulation 236/2012 could be covered by a previous piece of secondary legislation. And if an assessment of the context within which a power is exercised is essential properly to qualify that power, as the Court further suggested, the United Kingdom could surely not have been required to request the annulment of art.9(5) of the ESMA Regulation in the absence of any further measures concretising that provision.

As already noted, in order to ascertain whether the power *in casu* was not discretionary, the Court rightly emphasised the context in which ESMA would exercise that power. To this end, it recalled four elements in the regulatory framework that circumscribed the margin left to ESMA. First, ESMA can only exercise this power in case of a systemic risk and when no national authority has acted adequately. Interestingly, however, the Court did not seem to take issue with the fact that, under the logic of art.28, it is up to ESMA itself to decide whether these conditions are met. Secondly, when these conditions are met, ESMA has to take into account the criteria of para.3 of art.28. These are threefold: ESMA’s action (i) should address the threat concerned or improve the national authorities’ ability to handle the threat; (ii) should not create a risk of regulatory arbitrage; and (iii) should not have a negative impact on the financial market’s efficiency in a manner which is disproportionate to its beneficial impact. Thirdly, before taking any action, ESMA is required to consult the European Systemic Risk Board (ESRB). Lastly, the Court referred to the power of the Commission to elaborate this framework further by adopting delegated acts, which the Commission had done through Delegated Regulation 918/2012.<sup>88</sup> The Court then concluded that ESMA’s powers “are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority.”<sup>89</sup>

### *Articles 290 and 291 TFEU do not form an exhaustive system*

A third major element in the Court’s ruling was a rather simple solution to the United Kingdom’s third plea but by no means a real simplification. The Court found that,

<sup>85</sup> *Tralli v European Central Bank* (C-301/02 P) [2005] E.C.R. I-4071 at [43].

<sup>86</sup> See Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) at [62].

<sup>87</sup> *Short-selling* (C-270/12) at [44].

<sup>88</sup> Commission Delegated Regulation 918/2012 [2012] OJ L274/1.

<sup>89</sup> *Short-selling* (C-270/12) at [53].



“for the purpose of addressing the third plea in law, the Court is called upon to adjudicate on whether the authors of the FEU Treaty intended to establish, in Articles 290 TFEU and 291 TFEU, a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union bodies, offices or agencies may be contemplated by the Union legislature.”<sup>90</sup>

The Court then confirmed the second possibility by first noting that primary law, since the entry into force of the Lisbon Treaty, explicitly provides for legal remedies against agencies’ acts. In addition, it found that the power foreseen in the contested art.28 does not correspond to any of the situations defined in arts 290 and 291 TFEU. As a result, the EU legislator, by inscribing art.28 in Regulation 236/2012, did not undermine the system as set up under arts 290 and 291 TFEU.

### Assessing the Court’s ruling

At this point, it is interesting to verify the extent to which the Court’s ruling has answered the questions raised in the first part. The Court answered the question of whether the EU legislature may empower EU agencies in the absence of a clear legal basis affirmatively. In this regard, the Court referred twice to the possibility of challenging agencies’ general acts under arts 263 and 277 TFEU.<sup>91</sup> As was also noted by Griller and Orator in a previous issue of the *Review*,<sup>92</sup> that possibility, introduced by the Lisbon Treaty, would then be meaningless if the agencies could not be empowered in the first place.<sup>93</sup> The Court further made it perfectly clear that *Meroni* and *Romano* apply to EU agencies, and it addressed how these rulings interrelate, by subsuming *Romano* under *Meroni* and by reducing the latter to the single requirement of prohibiting the delegation of discretionary powers.

### A *Meroni*-light

As to how this new *Meroni* doctrine should be applied to EU agencies, there is less clarity. The Court stressed the context in which a power is exercised in order to determine its (non-)discretionary nature, but it is difficult to induce some abstract rule from this approach. Unless the Court were to clarify further or elaborate on this point,<sup>94</sup> determining the nature of a delegated power would depend on a case-by-case analysis. That the Court opted for *Meroni*-light is clear, on the other hand. In the beginning of its analysis, the Court subtly tried to distinguish the situation in *Meroni* from that *in casu*:

“Unlike the case of the powers delegated to the bodies concerned in *Meroni v High Authority*, the exercise of the powers under Article 28 of Regulation No 236/2012 is circumscribed by various conditions and criteria which limit ESMA’s discretion.”<sup>95</sup>

Whether the Court was right in making this preliminary observation is, however, debatable. After all, Decision 22/54, through which the High Authority had delegated its powers and which was at issue in *Meroni*, provided that the delegated powers would be exercised under the responsibility of the High

<sup>90</sup> *Short-selling* (C-270/12) at [78].

<sup>91</sup> *Short-selling* (C-270/12) at [65] and [80]. See also Orator’s critique on this: Orator, “Die unionsrechtliche Zulässigkeit von Eingriffsbefugnissen der ESMA im Bereich von Leerverkäufen” (2013) 24 *EuZW* 852, 855.

<sup>92</sup> See Griller and Orator, “Everything under Control?” (2010) 35 *E.L. Rev.* 3, 27.

<sup>93</sup> This was also remarked by the Advocate General; see his Opinion in *Short-selling* (C-270/12) at [74].

<sup>94</sup> The pending cases C-507/13, and C-146 and 147/13 may provide an opportunity for this. The latter two cases concern a challenge by Spain of an empowerment of the European Patent Office in the framework of the European Unitary Patent. The former concerns a challenge by the United Kingdom of a power granted to the European Banking Authority in the framework of the bankers’ bonus cap.

<sup>95</sup> *Short-selling* (C-270/12) at [45].

Authority.<sup>96</sup> To this end, a representative of the High Authority attended all of the meetings of the boards of the two Offices to which powers had been delegated. That representative could reserve every decision of those boards to the High Authority. In addition, the Council and the High Authority had also laid down a number of criteria that the Offices needed to take into account. In *Meroni*, however, the Court had found that these criteria still left too much leeway to the Offices as their decisions “cannot be the result of *mere accountancy procedures* based on objective criteria laid down by the High Authority”.<sup>97</sup> However, the criteria laid down by the legislator in para.3 of the contested art.28 are, for obvious reasons, similarly vague. In addition, the criteria laid down by the Commission in its delegated regulation referred to above are also, necessarily, generally worded. For instance, they provide that a systemic threat under the contested art.28 should be understood as,

“any threat of serious financial, monetary or budgetary instability concerning a Member State or the financial system within a Member State when this may seriously threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.”

Furthermore, it should be noted that the Commission’s delegated acts are themselves drafted by ESMA,<sup>98</sup> and that the Commission is not free to deviate from ESMA’s drafts.<sup>99</sup> The Court did not take issue with this, but the extent to which the Commission really “restricts” ESMA here may be questioned. Whether ESMA’s future decisions, based on art.28 of Regulation 236/2012, would then be the result of a “mere accountancy procedure” based on this “objective criterion” laid down by the Commission (and drafted by ESMA itself) or of the criteria laid down in Regulation 236/2012 is questionable. Instead, both in the present case and in *Meroni*, certain general criteria had been laid down but it appears that the Court was less strict in its approach in the *Short-selling* case than it was in *Meroni*.<sup>100</sup>

### *Extent of judicial review*

This new *Meroni*-light also appears problematic in the light of the General Court’s jurisprudence on agencies. In *Schröder*, which dealt with a decision of the Community Plant Variety Office, the Court noted that “where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to limited judicial review”.<sup>101</sup> In *Rütgers*, a case dealing with a decision of ECHA, it went even further and observed that “it must be acknowledged that the ECHA has a broad discretion in a sphere which entails *political, economic and social choices* on its part, and in which it is called upon to undertake complex assessments”.<sup>102</sup> Neither the Advocate General nor the Court referred to these cases in *Short-selling* and, as a result, it is unclear whether *Rütgers* already goes beyond what the Court of Justice held to be permissible in *Short-selling*. In any event, the General Court’s jurisprudence stresses the marginal judicial review exercised by the

<sup>96</sup> See art.1(2) of *Décision 22/54 instituant un mécanisme financier permettant la péréquation de la ferraille importée des pays tiers*, JO 4 du 30 mars 1954, p.286.

<sup>97</sup> *Meroni* (9/56) [1958] E.C.R. 11 at 153 (emphasis added).

<sup>98</sup> For the draft *in casu*, see ESMA, *Technical Advice on possible Delegated Acts concerning the regulation on short selling and certain aspects of credit defaults swaps*, ESMA/2012/263, pp.65–67.

<sup>99</sup> See fn.104.

<sup>100</sup> It should further be recalled that the Court in *Meroni* also noted that the High Authority had to intervene twice to make a decision because of a disagreement among the board members. The Court thus seemed to suggest that the existence of such a disagreement must have meant that the criteria laid down by the High Authority were insufficiently clear. See *Meroni* (9/56) [1958] E.C.R. 11 at 154. In the case of ESMA, it need only be recalled that its competence may be unlocked by virtue of a disagreement among national regulators.

<sup>101</sup> *Schröder v CPVO* (T-187/06) [2008] E.C.R. II-3151 at [59].

<sup>102</sup> *Rütgers Germany GmbH v ECHA* (T-96/10) [2013] 3 C.M.L.R. 3 at [134] (emphasis added).

European Courts when they scrutinise (certain) agencies' decisions. This, of course, casts some doubt on the Court of Justice's conclusion in *Short-selling* that the exercise of powers by ESMA is "amenable to judicial review in the light of the legislator's objectives".<sup>103</sup> Is this really the case if, in a future hypothetical action, an ESMA decision is challenged and the General Court observes that ESMA enjoys a broad discretion allowing it to make political, economic and even social choices?

### *Romano and implementing or delegated acts*

When it comes to the adoption of implementing or delegated acts by the Commission, it should be recalled that agencies such as ESMA have been assigned, under their founding measures, to assist the Commission in working out drafts of such acts and that these acts further restrict the Commission's possibility to alter such drafts because the experts are found at ESMA and not at the Commission.<sup>104</sup> This characteristic potentially undermines the ratio of *Meroni*,<sup>105</sup> but, as noted above, it was not taken up by the Court in its analysis in *Short-selling*. To have done so would indeed also have raised the question of institutional balance, which the Court carefully avoided, as will be seen in the next paragraphs.

Whether *Romano* added nothing to *Meroni*, as the Court ruled, is questionable as well. That neither the Court nor A.G. Warner in *Romano* referred to *Meroni* is remarkable in itself, but even more so if *Romano* could indeed be completely subsumed under *Meroni*. In reality, the Court's objection to the delegation in *Romano* rested on two elements. First, under primary law at that time, the Court did not have jurisdiction to review the acts of the Administrative Commission to which powers had been delegated by the Council. Secondly, the Court referred to art.155(4) EEC, which provided that the Council could delegate powers to the Commission. Following the Treaty of Lisbon, the first of these objections has been addressed, but art.155(4) EEC has been replaced by arts 290 and 291 TFEU.<sup>106</sup> Under those provisions, the position of the Commission has been further strengthened. Under art.155 EEC, the Council was free to decide whether or not to delegate, but *Romano* clarified that if the Council decided to delegate, it should delegate to the Commission. Article 291 TFEU has now objectivised the first decision, taking it out of the hands of the legislator: if uniform conditions for implementation are required, powers should be vested in the Commission or, exceptionally, the Council.

The United Kingdom's second plea on *Romano* in *Short-selling* was thus inextricably linked to its third plea on arts 290 and 291 TFEU. This brings us to the question raised above on how the institutional balance fits in with *Meroni* and *Romano*, and whether it indeed underlies both rulings. After all, if the plain wording of arts 290 and 291 TFEU reserves certain executive powers to the Commission, it cannot be denied that granting such (similar) powers to agencies affects the Commission's institutional position and thus the institutional balance. As was noted above, while A.G. Jääskinen referred to the institutional balance, he did not develop his reasoning based on that principle. The Court has taken an even bolder step by not even referring one single time to the institutional balance. In a sense, this is completely in line with the Court's previous jurisprudence. Whereas it has qualified the institutional balance as a principle of EU law,<sup>107</sup> it

<sup>103</sup> See *Short-selling* (C-270/12) January 22, 2014 at [53].

<sup>104</sup> See fn.98; and Chamon, "EU Agencies between 'Meroni' and 'Romano' or the Devil and the Deep Blue Sea" (2011) 48 C.M.L. Rev. 1055, 1068–1070.

<sup>105</sup> See D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford: Oxford University Press, 2009), pp.173–174.

<sup>106</sup> See Chamon, "EU Agencies between 'Meroni' and 'Romano' or the Devil and the Deep Blue Sea" (2011) 48 C.M.L. Rev. 1055, 1066–1068.

<sup>107</sup> *European Parliament v Council of the European Union (Minimum Common Lists)* (C-133/06) [2008] E.C.R. I-3189; [2008] 2 C.M.L.R. 54 at [56]–[57].

has never actually solved a case based on that principle when invoked by a party before it.<sup>108</sup> The Court has been criticised for being too unreceptive to institutional balance arguments brought before it,<sup>109</sup> and the present case is a perfect illustration of this. The Court again confirmed that the principle of institutional balance is in fact not an actionable principle of EU law.<sup>110</sup> Just as the *Romano* case was hollowed out by the Court to the brink of being irrelevant, so the Court has again confirmed the irrelevance of the institutional balance.

### *Delegations or conferrals?*

The last of the questions raised above dealt with the possible differences that arise from qualifying agency empowerments as either delegations or conferrals. Whereas, again, the Advocate General made this distinction, the Court did not. This was of course, in itself, a consequence of the Court's reinterpretation of *Meroni*, reducing it to the single prohibition of delegating discretionary powers. As noted above, another element of the original *Meroni* ruling was the rule that a delegating authority could not delegate more powers than it itself possesses. If this rule had been retained by the Court, it would have stumbled upon the problem of ESMA's powers not being originally vested in the EU legislator, as the Advocate General had. The Court avoided this issue and thereby left the question open, even if it may now be assumed that discretionary powers cannot be the object of either delegations or conferrals.

### *Issues following the Short-selling case*

Apart from the open issues related to the main questions dealt with in the preceding section, the *Short-selling* case raises further new issues or puts old ones in the spotlight (again). A first point is the Court's refutation of arts 290 and 291 TFEU as constituting an exhaustive system of delegated and implementing acts.<sup>111</sup> Here, the Court sanctioned a longstanding practice, as, since the 1990s, the legislator has established agencies that adopt atypical executive acts. For instance, OHIM's decisions on granting trade marks meet the definition of implementing acts under art.291 TFEU, since the very purpose of an EU-wide trade mark is to ensure uniformity in protection on the entire EU market. Yet, trade marks are not granted by the Commission but by OHIM. While not revolutionary in itself, it should be noted that the Court has now clearly sanctioned this practice without indicating clear limits for the legislator: in which situations may the legislator opt for a different system from that laid down in arts 290 and 291 TFEU, of delegated or implementing instruments? Does the legislator have complete freedom here? The only kind of vague limit that the Court seems to suggest is the fact that agencies have a "high degree of professional expertise".<sup>112</sup> On this point, Ohler rightly remarks that, following *Short-selling*, it appears to be easier for the legislator to delegate powers to an agency than to delegate powers to the Commission.<sup>113</sup> As noted elsewhere, the

<sup>108</sup> In those cases where the principle played a decisive role, it was invoked by the Court of its own motion; see *European Parliament v Council of Ministers of the European Communities (Chernobyl)* (C-70/88) [1990] E.C.R. I-2041; [1992] 1 C.M.L.R. 91; and *France v Commission* (C-233/02) [2004] E.C.R. I-2759.

<sup>109</sup> D. Chalmers, "Justifying Institutional Accommodation" (2008) 33 E.L. Rev. 455, 456.

<sup>110</sup> In her Opinion in *Audiolux*, however, A.G. Trstenjak observed that "the Court established, as early as 1958 on the basis of its judgment in *Meroni* and subsequently in consistent case-law, the notion of 'institutional balance' from a combination of the organisational principles and powers to act under the Treaties ... and accorded it the role of a normative, actionable formal principle". See Opinion of A.G. Trstenjak in *Audiolux SA v Groupe Bruxelles Lambert SA (GBL)* (C-101/08) [2009] E.C.R. I-9823; [2010] 1 C.M.L.R. 39 at [105] (emphasis added).

<sup>111</sup> Already during the second wave of agency creation, Triantafyllou pointed to the pertinence of this question. See D. Triantafyllou, *Les compétences d'attribution au domaine de la loi: étude sur les fondements juridiques de l'action administrative en droit communautaire* (Bruxelles: Bruylant, 1997), p.306.

<sup>112</sup> *Short-selling* (C-270/12) January 22, 2014 at [85].

<sup>113</sup> Ohler, "Rechtsetzungsbefugnisse der Europäischen Wertpapier- und Marktaufsichtsbehörde (ESMA)" (2014) 69 JZ 244, 251.

issue here is not so much that the Court has sanctioned the use of atypical acts, since the institutions have resorted to such acts already for a long time, but that the Court has now ruled that it is perfectly possible for atypical EU bodies, rather than the institutions, to adopt equally atypical acts.<sup>114</sup> This is a potential Pandora's box at a time when the coherence of the EU legal order is already under pressure.<sup>115</sup>

The Court's ruling, sanctioning a significant shift of powers to the advantage of EU agencies, has further highlighted the stark contrast between the agencies' importance in the European Union's functioning and their constitutional anchoring in the EU legal order. A result of this is that (democratic) control over these bodies is underdeveloped, as was also implicitly noted by the Advocate General in his Opinion. Here, two effects of the empowerment of EU agencies should be noted. First, there is a (theoretical) horizontal shift in powers, since the legislator grants powers to an EU agency rather than to the authority indicated by the Treaties (i.e. the Commission). Secondly, there is (usually) a vertical shift in powers, since an EU agency will be competent whereas, beforehand, (only) national authorities had competence.

The result is that the European Parliament loses influence, since its scrutiny over agencies is not as comprehensive as that which it exercises over the Commission. Secondly, national parliaments lose influence since they only scrutinise national authorities, not EU agencies. In addition, it should be noted that the EU legislator not only increasingly relies on EU agencies, but also increasingly instructs Member States to create independent agencies in their national legal orders.<sup>116</sup> Independent national regulators in energy, finances, and telecoms are then brought together in an independent EU agency to implement and set out the European Union's policies, but who then controls this *agencified* multilevel administration?

A number of solutions are imaginable here. As Griller and Orator suggested, and as was noted above, the European Parliament's powers vis-à-vis EU agencies could be strengthened.<sup>117</sup> The authors have also suggested strengthening the Commission's control over these agencies.<sup>118</sup> This would indeed address two problems: that of the agencies' accountability and that of securing the Commission's prerogatives under the institutional balance. To this end, Griller and Orator suggested giving the Commission veto rights over agencies' decisions. Whether this would be workable is another question, as the information asymmetry between the Commission and agencies would probably relegate a veto option to a mere theoretical possibility.<sup>119</sup> Enhancing the Commission's position through, inter alia, its representation on the Board is another possibility. During the third wave of agency creation, the Commission had indeed proposed to establish agencies' boards with parity between Commission and Council representatives, which the Council consistently rejected. The Commission had also proposed this in its draft inter-institutional agreement,<sup>120</sup> but the (non-binding) Common Approach has now firmly buried this idea, without addressing the issue. However, the *Short-selling* case clearly requires the legislator to take up this issue again.

<sup>114</sup> See Chamon, "Le recours à la soft law comme moyen d'éviter les obstacles constitutionnels au développement des agences de l'UE" (2014) 576 RUE 152, 159.

<sup>115</sup> On the European Union's response to the euro crisis, Dawson and De Witte even speak of a "rejection of the treaties' normative structure"; see M. Dawson and F. de Witte, "Constitutional Balance in the EU after the Euro-Crisis" (2013) 76 *Modern Law Review* 817, 818.

<sup>116</sup> On this point, see M. Ludwigs, "Die Bundesnetzagentur auf dem Weg zur Independent Agency? Europarechtliche Anstöße und verfassungsrechtliche Grenzen" (2011) 44 *Die Verwaltung* 41, 44–46 specifically.

<sup>117</sup> Griller and Orator, "Everything under Control?" (2010) 35 E.L. Rev. 3, 29. It may be noted that during the Convention on the Future of Europe, the Parliament proposed to allow EU agencies to adopt implementing acts, with a scrutiny mechanism allowing the two arms of the legislature and the Commission to repeal such acts, see point 17 of Resolution of the European Parliament on the typology of acts and the hierarchy of legislation in the European Union [2002] OJ C31E/126.

<sup>118</sup> Griller and Orator, "Everything under Control?" (2010) 35 E.L. Rev. 3, 29.

<sup>119</sup> See also M. Chamon, "EU Agencies: Does the Meroni Doctrine Make Sense?" (2010) 17 *Maastricht J. Eur. Comp. Law* 381, 292.

<sup>120</sup> Commission, "Interinstitutional Agreement on the operating framework for the European regulatory agencies" COM(2005) 59 final, p.7.

## The establishment and empowerment of the Single Resolution Board

In a final, shorter, section, the two opinions prepared by the CLS will be looked at in the light of the Court's ruling in *Short-selling*. As Commissioner Barnier has observed, the single supervisory mechanism (SSM) involving the European Central Bank (ECB) is a cornerstone of the new Banking Union for the euro zone, the single resolution mechanism (SRM) being its indispensable complement.<sup>121</sup> An SRM is indeed necessary to deal with banks that do fail, despite the (improved) supervision provided through the SSM. To this end, the Commission proposed the SRM in July 2013.<sup>122</sup> The Commission proposes that in participating Member States (in the Banking Union), the rules laid down in the Bank Recovery and Resolution Directive (addressed to all EU Member States) should be applied by the Single Resolution Board (SRB), a new EU agency, as well as by the national resolution authorities and the Commission.

Just like ESMA, the SRB would be established on the basis of art.114 TFEU and would be granted considerable powers. One of the Council working parties therefore referred two questions to the CLS querying the suitability of art.114 TFEU as a legal basis for the SRM and about the compatibility of the SRB's powers with the *Meroni* doctrine. In September and October 2013, the CLS delivered its opinions, which were quickly leaked and found their way to the *Financial Times* website.<sup>123</sup>

### *The Commission's proposal*

Under the Commission's proposal, the SRB would participate in a resolution as follows. In a first phase, before a resolution is even at issue, the national authorities would send all relevant information to the SRB, which would work out a resolution plan for the entities covered by the regulation.<sup>124</sup> The plans would spell out the options available when an entity would be put into resolution, but the SRB could ask the national authorities to draft these plans for it.<sup>125</sup> The regulation would also, inter alia, list a number of criteria that the SRB must take into account to determine the relevant minimum requirement for own funds, which the entities covered should maintain.<sup>126</sup>

In the intervention phase, the relevant supervisory authorities (national authorities or the ECB) will keep the SRB informed so that the latter may, based on that information, prepare the resolution of an entity.<sup>127</sup> As to the actual resolution, the regulation would list general resolution objectives and principles that the SRB and the Commission should pursue and respect.<sup>128</sup> It would be up to the SRB to assess, following the criteria defined by the regulation, whether a resolution is indeed required.<sup>129</sup> If it comes to a positive assessment, the SRB would recommend to the Commission that the entity should be placed under resolution.<sup>130</sup> The Commission would then take a decision and decide on the framework for the resolution at the same time.<sup>131</sup> Within the limits set by the framework, the SRB would decide on a resolution

<sup>121</sup> M. Barnier, "L'union bancaire européenne: condition de la stabilité financière durable et prélude à une nouvelle étape de l'intégration européenne" (2013) 571 RUE 462.

<sup>122</sup> See "Proposal for a Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms" COM(2013) 520 final.

<sup>123</sup> See A. Barker, "Blow to German Banking Union Plan", *Financial Times*, September 12, 2013; A. Barker, "Setback for Brussels as Lawyers warn on Banking Union Plans", *Financial Times*, October 8, 2013.

<sup>124</sup> See Proposal, COM(2013) 520 art.7(1).

<sup>125</sup> See Proposal, COM(2013) 520 art.7(8).

<sup>126</sup> See Proposal, COM(2013) 520 art.10.

<sup>127</sup> See Proposal, COM(2013) 520 art.11(2).

<sup>128</sup> See Proposal, COM(2013) 520 arts 12 and 13.

<sup>129</sup> See Proposal, COM(2013) 520 art.16(2).

<sup>130</sup> See Proposal, COM(2013) 520 art.16(5).

<sup>131</sup> See Proposal, COM(2013) 520 art.16(6).

scheme, addressed to the national resolution authorities, which would, in turn, be instructed to take the necessary measures to implement the scheme.<sup>132</sup>

In the scheme, the SRB would also set out the amounts that would be used from the Fund.<sup>133</sup> The resources of the Fund used in a resolution would be made up of contributions by the entities covered by the regulation themselves.<sup>134</sup> The SRB would own and manage the Fund, and it would be responsible for monitoring the execution of the scheme, relying in this task on the national authorities.<sup>135</sup> Lastly, in order for the SRB to be able to fulfil its role in the different phases, it would be granted significant information and investigative powers, and would also be able to fine entities that do not co-operate.<sup>136</sup>

### *Article 114 TFEU as a legal basis*

In the light of the powers of ESMA under Regulation 236/2012, it is important to note that the SRB would receive more intrusive powers. Some of the decisions of the SRB in the first phase, for instance, the determination of the minimum requirement for own funds, would even have significant effects on all of the entities concerned, not just those that might (later) be placed under resolution. Under its information and investigation powers, it would be able to give (binding) instructions to national authorities. The SRB would also have the power to grant waivers to entities concerned allowing them to be exempt from the requirement of a resolution plan.<sup>137</sup> The SRB would decide on the resolution scheme (within the framework set by the Commission) and decide on the resolution tools to be used throughout the resolution. Just like ESMA, the SRB would be able to step in during a resolution when a national resolution authority is not adequately enforcing the SRB's scheme and the SRB would do so by directly addressing decisions to the entity concerned.<sup>138</sup> Since the Fund would be managed by the SRB, the latter would decide on the contributions payable, possible borrowing by the Fund, and the use of the Fund's resources in a resolution.

If the same approach as that developed by A.G. Jääskinen were taken, the conclusion should be that art.114 TFEU cannot be the proper legal basis for empowering the SRB since it would take decisions under the SRM in substitution of national authorities.<sup>139</sup> However, the CLS found no problem with the use of art.114 TFEU in its opinion, because,

“the centralised decision procedure described in the proposal cannot be regarded as an isolated regulatory measure with autonomous purposes, but is conceived as an element contributing to an on-going harmonisation process in the field of financial services, without which its establishment would have no sense.”<sup>140</sup>

Drawing an analogy with *Smoke Flavourings*, the CLS noted that the resolution decisions by the Board (and Commission) would result in the harmonisation effect aimed at by the resolution rules, which are also laid down in the proposed directive, just like the single list of authorised products resulted in harmonisation in *Smoke Flavourings*.<sup>141</sup>

The CLS further observed that the proposal is part of a whole body of regulation harmonising the internal market and that the essential elements of the harmonisation measure, as prescribed by *Smoke*

<sup>132</sup> See Proposal, COM(2013) 520 art.16(8).

<sup>133</sup> See Proposal, COM(2013) 520 arts 16(6) and 71(1).

<sup>134</sup> See Proposal, COM(2013) 520 arts 66 and 67.

<sup>135</sup> See Proposal, COM(2013) 520 art.26.

<sup>136</sup> See Proposal, COM(2013) 520 art.36.

<sup>137</sup> See Proposal, COM(2013) 520 art.9.

<sup>138</sup> See Proposal, COM(2013) 520 art.26(2).

<sup>139</sup> Compare Opinion of A.G. Jääskinen in *Short-selling (C-270/12)* September 12, 2013 at [56].

<sup>140</sup> Legal Service of the Council, *Examination of the proposed legal basis* (September 11, 2013), 13524/13, p.10.

<sup>141</sup> Legal Service of the Council, *Examination of the proposed legal basis* (September 11, 2013), 13524/13, p.11.

*Flavourings*, were provided in the uniform rules on resolution which “are the necessary material substratum that serves the proposal’s aim to achieve the highest degree of uniform application, so that disparities in the internal market are eliminated”.<sup>142</sup> The CLS thus emphasised the importance of the SRM in the harmonisation process related to the resolution of banks, and the importance of the latter in the harmonisation process related to the Banking Union, to conclude that art.114 TFEU was the appropriate legal basis for the proposed regulation. The CLS then found that the SRB’s proposed powers would just be another centralised procedure, as already validated in *Smoke Flavourings*, without finding it problematic, unlike A.G. Jääskinen, that an agency would replace national authorities.

The CLS’s opinion thus seems to be very much in line with the Court’s subsequent ruling in the *Short-selling* case, where it stresses the contribution to a *process* of harmonisation. Under the Court’s reasoning in *Short-selling*, where it emphasised the two conditions for unlocking art.114 TFEU, it seems clear that the SRM may be qualified as an approximation measure and that its object is the establishment and functioning of the internal market (in financial services). The real question is, then, whether the legislator would not overstep its margin of discretion, also emphasised by the Court in *Short-selling*, when it finds that the establishment and empowerment of the SRB are necessary for the purpose of establishing an SRM in the context of the Banking Union. As noted above, the European Union’s legislative decision-making would benefit from a serious and detailed scrutiny (and motivation) of the real necessity of empowering (and establishing) agencies to achieve the envisaged processes of harmonisation.

### *The SRB and Meroni*

In its opinion on the “Delegation of powers to the Board”, the CLS was less convinced of the soundness of the SRM proposal. Since the core of the SRB’s powers has been set out above they do not need to be repeated here. In its opinion, the CLS seems to have drawn inspiration from A.G. Jääskinen’s Opinion in *Short-selling*, which was delivered one month earlier. For instance, the CLS also rules out the possibility of an agency supplementing the EU legislative framework, while allowing agencies to adopt implementing measures subject to the *Meroni* doctrine. When addressing the scope of the notion “discretionary choices”, the CLS, just like the Advocate General but unlike the Court, narrows this down, focusing on “policy choices” reserved to the legislator.<sup>143</sup> Conceptually, however, unlike the Advocate General but just like the Court, the CLS has not made the distinction between the delegation and conferral of powers, unlike in its opinion on OHIM, noted earlier, and instead using these notions interchangeably.

While not taking issue with the SRB’s proposed powers as such, the CLS has noted that the proposal is, in certain respects, insufficiently precise as to how the SRB ought to exercise its powers, and would hence grant it the possibility to set out the European Union’s resolution policy itself rather than that policy being defined for the SRB. As regards the drafting of the resolution plan, as well as the implementation of the resolution tools and decisions, the CLS suggests that the Commission could be empowered to set out further criteria by delegated acts. For other powers exercised by the SRB, the CLS suggests that the regulation itself could include further specifications or that an EU institution proper (i.e. the Commission or, exceptionally, the Council) should be involved in the exercise of those powers.

That any analysis of the nature of a power may appear rather subjective can be illustrated by reference to the CLS’s discussion of the SRB’s powers in the prevention phase of a resolution. According to the CLS, the criteria imposed on the SRB in art.8(2) of the proposal “are of a rather general nature founded

<sup>142</sup> Legal Service of the Council, *Examination of the proposed legal basis* (September 11, 2013), 13524/13, p.12.

<sup>143</sup> Opinion of A.G. Jääskinen in *Short-selling* (C-270/12) September 12, 2013 at [93]; and Legal Service of the Council, *Delegation of powers to the Board* (October 7, 2013), 14547/13, p.5.



on undetermined legal concepts that would leave in the hands of the Board the capacity to determine when the companies are resolvable”.<sup>144</sup> To be sure, art.8(2) provides:

“An entity shall be deemed resolvable if it is feasible and credible for the resolution authority to either liquidate it under normal insolvency proceedings or to resolve it by applying to it the different resolution tools and powers without giving rise to significant adverse consequences for financial systems, including circumstances of broader financial instability or system wide events, of the Member State in which the entity is situated, or other Member States, or the Union and with a view to ensuring the continuity of critical functions carried out by the entity.”

It is difficult to see, however, how this criterion is significantly more general or vague than the criteria sanctioned by the Court in the *Short-selling* case. Since the Court did not really set a clear rule in that case, it is also difficult to assess the proposed powers of the SRB and any analysis necessarily remains on a case-by-case basis.

In any event, the approach of the CLS would suggest that few powers are discretionary per se (and thus non-delegable under *Meroni*) but that everything depends on the context whereby the definition of the policy should be made by the EU institutions proper. Here, the opinion joins perfectly with the reasoning of the Court in *Short-selling*. To the CLS, agencies would thus be allowed to exercise discretion as long as it is not related to policy. However, just as was noted in relation to the Court’s ruling, the CLS, too, seems to overlook the General Court’s jurisprudence endorsing the exercise of policy-discretion by agencies.<sup>145</sup>

It should further be noted that the relativity of the restrictions of the *Meroni* doctrine is also apparent from the CLS’s opinion when it (rightly) notes that “[w]ere the [SRB] simply to address recommendations to the Commission, the eventual policy choice would rest with the Commission and there could be incompatibility with the *Meroni* case-law”.<sup>146</sup> According to the CLS, agencies are thus allowed to take discretionary choices, as long as the final decision is taken by the Commission, regardless of whether the Commission de facto has any margin left to alter the agencies’ drafts. Here, again, a parallel may be drawn with the Court’s ruling in *Short-selling*, since the Court identified the delegated acts adopted by the Commission as effectively restricting ESMA’s margin of discretion, despite the fact that these acts are drafted by ESMA itself. If *Meroni* was about securing real accountability, the formal restrictions derived from that ruling by the Court and the CLS would seem to fail in doing so,<sup>147</sup> requiring the institutions to think again about controlling and/or securing accountability of EU agencies.

## Conclusion

The Court in *Short-selling* has delivered an important ruling, sanctioning *agencification* but without, however, setting limits to the further development of this process. Unlike the Advocate General, the Court found art.114 TFEU to be a suitable legal basis to empower ESMA, thereby confirming the legality of the empowerments of a number of other agencies as well. The Advocate General’s solution, using art.352 TFEU rather than art.114 TFEU, would have put a serious brake on future *agencification*, since every Member State would have (re)gained a veto power. For the SRB, for instance, it would have been doubtful whether art.114 TFEU could have been used. In addition, it would also have diminished the role of the

<sup>144</sup> Legal Service of the Council, *Delegation of powers to the Board* (October 7, 2013), 14547/13, p.10.

<sup>145</sup> See cases cited in fnn.101 and 102.

<sup>146</sup> Legal Service of the Council, *Delegation of Powers to the Board* (October 7, 2013), 14547/13, p.7. However, in early writings, this technique was deemed to be in contravention of *Meroni*; see e.g. G. Olmi, “L’Agriculture” in G. van der Meersch, M. Waelbroeck and L. Plouvier (eds), *Droit des Communautés européennes* (Bruxelles: Larcier, 1969), pp.703–704.

<sup>147</sup> See also Curtin, *Executive Power of the European Union* (2009), pp.173–174.

European Parliament in the legislative process of setting up and empowering agencies. The Court's ruling should therefore be supported on this point, even if the European Union's legitimacy would benefit from reducing the emphasis on the legislator's large discretion and emphasising, instead, the legislator's duty to elaborate on why powers should, exceptionally, be vested in agencies.

The Advocate General, the Court and the CLS all referred to *Romano*, but did not deduce further requirements from that case in addition to those which flow from *Meroni*. The Court's reinterpretation of the latter case, resulting in a *Meroni*-light doctrine, also allows the process of *agencification* to develop further. The CLS found the SRB proposal to be in breach of *Meroni*, but whether this is the case under the Court's new *Meroni*-light variant of the doctrine is questionable. Still, since the Court did not take over the Advocate General's (and the CLS's) suggestion to reserve policy decisions to the legislator and the Commission, and because it emphasised the context in which a power is exercised, any determination should necessarily be done on a case-by-case basis. The Court's finding that the exercise by ESMA of its powers is amenable to judicial review then stands in contrast with the General Court's emphasis on the agencies' far-reaching discretion, raising the question as to whether the Court's review is indeed an effective limit.

While the *Short-selling* case should also be welcomed because it finally confirms the applicability of *Meroni* and *Romano* to EU agencies, the rejection of *Romano*'s relevance beyond that of *Meroni* should be deplored. The logical result of this was that the institutional balance was denied any meaningful role in the Court's reasoning. In turn, this has meant that the Commission's prerogatives under the Treaties have seemingly been ignored. Following *Short-selling*, the Commission is no longer the default executive actor in the EU executive, since the legislator is free further to develop the system of executive acts (partially) worked out in arts 290 and 291 TFEU.

EU agencies can now be vested with very significant powers, but this only highlights the fact that the framework governing their functioning is underdeveloped. The proposed inter-institutional agreement could have addressed some of the problems flowing from this, but the Common Approach is grossly insufficient in this regard. However, *Short-selling* should be a reminder to the institutions (or even the Treaty authors) that their understanding of the EU executive should be updated, taking into account the European Union's need to rely on agencies as well as the primary role which the Commission should play in this sphere.