Legal Issues of Economic Integration
Volume 41, Number 4

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Legal Issues of Economic Integration is published quartely (February, May, August and November).

Print subscription prices, including postage (2015): EUR 423/USD 565/GBP 311.

Online subscription prices (2015): EUR 392/USD 523/GBP 289.

Legal Issues of Economic Integration is indexed/abstracted in the *European Access, European Legal Journals Index, Data Juridicia.*

Printed on acid-free paper.

ISSN 1566-6573

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

Law Journal of the Europa Instituut and the Amsterdam Center
for International Law, Universiteit van Amsterdam

The *ESMA-Short Selling* Case

Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants

Miroslava Scholten & Marloes van Rijsbergen*

The delegation of powers to EU agencies has been a matter for debate for a long time since no treaty provision has even governed this issue specifically, nor has the Court applied the restrictive Meroni standard of delegating executive and not discretionary powers directly to agencies. In light of the new ESMA-short selling judgment and its implications, this article discusses the issues of the nature and scope of powers that EU agencies can be given. It argues that upon the Meroni-Romano remnants, the new judgment erects a new delegation doctrine in the EU: EU agencies can be given powers to take legally-binding decisions of general application. These powers may entail discretion, which should be limited. This article concludes by highlighting a number of questions that remain unresolved. It argues for the necessity of a (treaty-based) legal framework because empowering EU agencies is an act of conferral, rather than delegation, and discretion given to agencies may be at times of a legislative (normative) nature.

1 INTRODUCTION

Not explicitly regulated by the EU treaties, EU agencies do exist and have been growing with respect to their numbers and powers. In the last decade, the number of EU agencies has tripled.[1] Next to their information-gathering, cooperation, service and advice-providing tasks, EU agencies have been given decision-making powers as well. In 1994, the Community Plant Variety Office and the Office for Harmonization in the Internal Market were the first to receive powers to take legally-binding decisions in relation to third parties (registrations and patents). In 2010, powers to take legally-binding measures of general application have been given to the new three EU financial agencies (the European Banking Authority

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1 M. Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies*, Nijhoff Studies in European Union law, Brill, 2014 (forthcoming).

Scholten, Miroslava & van Rijsbergen, Marloes. 'The *ESMA-Short Selling* Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants'. *Legal Issues of Economic Integration* 41, no. 4 (2014): 389–406.

(EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA)).

In the light of these developments, practitioners and academics have been debating for a long time about the limits of the ongoing agencification, including whether creating and empowering EU agencies with (legally-binding) powers has been in line with the rather strict *Meroni-Romano* delegation doctrine, which has been governing the delegation limits in the EU since 1958. Among the most heated questions of the debate were the applicability of the *Meroni* ruling in case of agencies at all, since the case itself and its follow-ups[2] were not decided in relation to agencies directly, as well as whether the doctrine was followed in practice, since EU agencies have been given policy-making discretionary powers, exactly the powers that the Court prohibited the delegation thereof. Also, since 1958, a number of treaty reforms has taken place, which resulted in the question about the necessity to update the *Meroni* standard, as it no longer fit with the new practical realities.[3] Concerning the less famous[4] *Romano* judgment, the question was if the EU Legislator could give powers to take legally-binding decisions to actors other than the Commission, because in *Romano* the Court prohibited the delegation of powers 'having the force of law' to an agency. The Treaty at that time foresaw the delegation of legally-binding powers to the Commission only.

So, what is now the delegation standard in relation to EU agencies? What powers can they lawfully enjoy and what not? This article addresses these questions in light of the new judgment, the *ESMA-short selling* case (Case 270/12), which was decided explicitly in relation to an EU agency and within the realities of the new treaties. It shows that without mentioning it explicitly, the Court did formulate a new delegation doctrine in relation to EU agencies: EU agencies can be the recipients of executive discretionary powers if this discretion is limited. At the same time, a number of issues remain unresolved. These include the questions of whether empowering agencies is not better described as conferral and what kind of discretion EU agencies can have. To this end, this article concludes that empowering EU agencies is an act of conferral, rather than delegation, and suggests that discretion given to agencies may be at times of a legislative (normative) nature. Therefore, from a legitimacy point of view, it is essential that a (treaty-based) legal framework governing conferral of discretionary powers to agencies be introduced.

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2 See, e.g., Case C-301/02, *P Carmine Salvatore Tralli v. ECB*, 2005, ECR I-4071, p. 42.

3 S. Griller & A. Orator, *Meroni Revisited: Empowering European Agencies between Efficiency and Legitimacy*, Working Paper 04/D40, New Modes of Governance Project, 2006, www.eu-newgov.org/database/DELIV/D04D40_WP_Meroni_Revisited.pdf (accessed July, 2014).

4 M. Chamon, *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*, 39 European Law Review (2014), forthcoming.

The article comes further in four parts. Section II introduces briefly the origins and powers of ESMA. The analysis of the *ESMA-short selling* case is presented in section III, which is then followed by the discussion of the implications of the judgment (section IV). A conclusion finalizes this article (V).

2 ESMA: ORIGINS AND POWERS

The 2008 financial crisis challenged the foundations of the, at that time existing, Lamfalussy system[5] and revealed the necessity to reform the system by furthering integration, including in problematic areas such as differences in enforcement laws and practices. While the cooperation between national financial supervisors existed already in the shape of the so-called level 3 committees,[6] the latter lacked the power to take legally-binding decisions, which was seen as a pressing problem for their effectiveness. In light of the 2008 financial crisis, this has led to the transformation of the 'level 3 committees' with non-binding powers into EU agencies with legally binding decision-making and supervisory powers.

ESMA is one of the three agencies within the complex institutional architecture of the new European Supervisory Structure.[7] It has been created to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses (Article 1(5) of ESMA's founding Regulation 1095/2010). ESMA is the strongest agency of the EU since it enjoys regulatory,[8]

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5 The Lamfalussy process introduced a new four-level law-making model in the area of financial services: *Level 1*: adopting framework principles in specific areas of substantive law by Directives or Regulations under the ordinary legislative procedures of Art. 294 TFEU; *Level 2*: concretising framework principles by the European Commission by means of implementing measures adopted under Comitology procedures; *Level 3*: advising the Commission on the feasibility of measures proposed at level 2 by the so-called level 3 committees - Committee of European Securities Regulators (CESR), Committee of European Banking Supervisors (CEBS), Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS); *Level 4*: envisaging timely and correct transposition of EU legislation into national law and taking action against Member States if transposition was not in compliance with European law.

6 *Ibid*.

7 The European System of Financial Supervision (ESFS) comprises the European Systemic Risk Board (ESRB), three European Supervisory Authorities (ESAs) – the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) as well as the European Insurance and Occupational Pensions Authority (EIOPA - a Steering Committee and the national supervisory authorities. The three ESAs have almost identical founding acts and powers, see further n. 9 and 10.

8 Among its regulatory powers is assisting the European Commission in formulating and adopting a single rulebook applicable to all EU financial institutions. To this end, ESMA is entitled to propose drafts of binding regulatory and implementing technical standards in specific areas (following the procedural framework as established in Arts 10 to 14 and 15) as well as to issue interpretative guidelines and recommendations (on the basis of Art. 16). Both regulatory and implementing technical standards are adopted by the European Commission by means of Regulations or Decisions. Guidelines and recommendations are not legally binding on competent authorities and financial market

decision-making,[9] and (exclusive) supervisory powers.[10] These powers are far-reaching, especially in comparison with the competences of all other EU agencies and the synergy effects that the accumulation of these different tasks may have vis-à-vis the national authorities.[11] In light of the strength of ESMA's powers and the absence of specific treaty provisions governing the scope of powers that can be delegated to agencies, it is probably not surprising that the delegation of powers to ESMA has been challenged before the Court.

3 THE *ESMA-SHORT SELLING* CASE

On 31 May 2012, the United Kingdom of Great Britain and Northern Ireland brought an action for annulment under Article 263 TFEU to the Court of Justice of the European Union (CJEU).[12] It sought the annulment of Article 28 of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps. To this end, it put forward four pleadings in law regarding the *Meroni* case, the *Romano* case, Articles 290–291 TFEU, and Article 114 TFEU. This section analyses these pleas based on the positions of the UK, the Court, AG and other relevant parties, such as the European Parliament, the Council, and the Commission, where relevant.

3.1 THE *MERONI* TEST

Under Article 28 of Regulation No 236/2012, ESMA has been given the power to take a legally binding decision targeting a specific financial market participant or specific conditions in relation to certain financial instruments. A measure adopted by ESMA under Article 28 prevails over any previous measure taken by a national supervisory authority, but it is subject to specified conditions of a substantive

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participants, but they are not merely voluntary nor without legal effect either. 8 Following a 'comply or explain' mechanism, the addressees are obliged to make every effort to comply (Art. 16(3)).

9 Breach of Union law (Art. 17), action in emergency situations (Art. 18) and settlement of disagreements between competent authorities in cross-border situations (Art. 19). In some instances, ESMA's decisions may prevail over the previous decisions of national authorities.

10 Participation in and coordination of colleges of supervisors (Art. 21), identification and management of systemic risk and the development of resolution structures, in cooperation with the ESRB (Arts 22–27), promotion of a common supervisory culture (Art. 29), peer review (Art. 30), supervisory coordination (Art. 31), market assessment (Art. 32), and information-gathering (Art. 35). Moreover, Reg. 513/2011 has delegated very important exclusive supervisory powers over credit rating agencies to ESMA.

11 M. Chamon, *The influence of 'regulatory agencies' on pluralism in European administrative law*, Review of European Administrative Law,Vol. 5, No. 2 (2012). p. 89.

12 Case C-270/12, *The United Kingdom of Great Britain and Northern Ireland v. European Parliament and the Council of the European Union* (further referred as: *ESMA-short selling*).

(when the agency may act and what it should consider when acting) and procedural (whom it shall consult and/or notify) nature.[13]

The UK argued that ESMA received 'a very large measure of discretion' since it could issue rules of general application upon its 'highly subjective judgment' when applying the criteria set in Article 28(2) of Regulation No 236/2012. The fact that the Member States have adopted different approaches to short selling demonstrated, according to the UK, the discretionary nature of the choices that might be made.[14] Taking such decisions would involve ESMA in the implementation of actual economic policy and require it to arbitrate between conflicting public interests, make value judgments and carry out complex economic assessments.[15] The UK's argument was based on the *Meroni* case where the Court distinguished two categories of powers: clearly defined executive powers and powers that involve discretion. More specifically, the Court stated in *Meroni* the following:

> 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. A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.[16]

The delegation of discretionary powers was prohibited also as it would hinder the balance of powers, which was regarded as the guarantee that the treaty preserves.[17] So: (1) does this particular delegation of tasks to ESMA stay within the *Meroni* limits and (2) what kind of powers can EU agencies receive in general?

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[13] To be more specific: 1. ESMA *may act only* if there is a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and no competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that do not adequately address the threat (para. 2 of Art. 28). 2. *When taking a measure* ESMA needs to take into account several factors: the ability of the measure to address its goals and to prevent other possible risks and detrimental effects on the efficiency of the financial markets (para. 3 of Art. 28). 3. *Before imposing (or renewing) the measure* ESMA has to consult with ESRB and notify relevant national authorities. ESMA's decision expires after three months if not renewed. A reasoned notification about prospective measure and the decision itself need to be published on the website of ESMA (paras. 4–10 of Art. 28).

[14] *ESMA-short selling,* para 28.

[15] *ESMA-short selling,* paras 29, 31.

[16] Case 9-56, *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*. p. 152.

[17] 'To delegate a discretionary power, by entrusting it to bodies other than those which the treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective' (*Ibid.*).

Concerning the first question, while the Court in reality seems to have departed from the *Meroni* doctrine, it still maintained that the delegation at issue was in line with that doctrine. First, it noted the difference with the *Meroni* case as to the entities to which delegation took place. It stated that unlike in *Meroni*, ESMA was a European Union entity, created by the EU legislature, and not a body governed by private law.[18] Second, the Court did not really apply the *Meroni* categorization of powers (executive vs. discretionary).[19] In fact, the Court avoided labelling the powers that ESMA has received. For instance, it stated that Article 28 of Regulation No 236/2012 did not confer any autonomous power on ESMA that would go beyond the bounds of the regulatory framework established by the ESMA Regulation.[20] Moreover, the Court admitted that ESMA received powers involving discretion by saying that unlike the powers delegated to the bodies concerned in *Meroni*, the exercise of the powers under Article 28 of Regulation No 236/2012 was circumscribed by various conditions and criteria, which limited ESMA's *discretion*.[21] It is interesting to note that the Court seemed to use deliberately the words of the plaintiff on a number of occasions concerning the fact that ESMA was not vested with a 'very large measure of discretion',[22] as if it was saying that not a 'very large' amount of discretion (simply 'large'?) would pass the delegation test.

With respect to the second question, the classification of powers that EU agencies can be given in general remains unclear. Following the Court's language, delegation of *discretionary* powers can be allowed as long as the discretion is limited. The Court seems to have agreed with the European Parliament's arguments that the powers conferred on ESMA under Article 28 of Regulation No 236/2012 were subject to very specific criteria and limitations. Moreover, those powers were implemented in the context of a highly developed professional supervisory methodology and culture as well as a legislative and regulatory framework, which '*cannot be compared with that in the Meroni case*'.[23] The judgment was, however, not further elaborated concerning the classification of powers that can and cannot be given to EU agencies. The typology of agencies' powers, including the relevance of that of *Meroni*, is therefore likely to remain a debatable issue, also because the EU main institutions use different labels: the Commission defines ESMA's powers as *executive decision-making*, the Council talks about the *power to adopt executive*

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18 *ESMA-short selling,* para 43.

19 According to AG Jääskinen's opinion, the relevance of *Meroni* could also be questioned on the basis of the fact that the EU legislator confers powers to agencies rather than delegates powers; the *Meroni* case governs the situation of delegation. This issues is discussed in the next section.

20 *ESMA-short selling,* para. 44.

21 *ESMA-short selling,* para.45.

22 *ESMA-short selling,* para. 54.

23 *ESMA-short selling,* para. 35.

decisions in a specific factual context,[24] while the European Parliament makes a distinction between *policy considerations* and *complex professional considerations,* the latter being the measures taken upon a high level of technical and economic expertise and information.[25]

All in all, the new judgment has devastated *Meroni's* distinction between *executive* powers, which were allowed to be delegated, and *discretionary* powers, which were not allowed to be delegated, because the Court has accepted the delegation of *executive discretionary* powers subject to certain limits. Such limits include issues, such as when the agency can act, what factors it should consider when making its decisions and whom it should consult and notify. While the agency can act only when a *threat* to the functioning of the financial market arises and when competent authorities could not *adequately* address the threat, ESMA retains the discretion to determine what a 'threat' or 'adequate' is. Furthermore, it is questionable in how far the prescribed substantive standards, such as *taking into account* whether the measure of ESMA can attain the desired goals without producing other possible risks and detrimental effects on the efficiency of the financial markets, actually *limit* ESMA's discretion. It is unclear how seriously, in the sense of details, the agency needs to consider those factors and show that and in how far this 'taking into account' could be checked *ex post* (by the Court). The same applies to procedural hurdles, such as notifying respective authorities and consulting the ESRB, which do not legally restrict ESMA to issue the measure irrespective of the outcome of the consultation. Thus, while discretion is conditioned, it is questionable whether it is actually limited.

3.2 THE *ROMANO* TEST

Similar to the first plea, the second argument of the UK concerned the nature of powers that can be given to EU agencies, but this time it was based on the *Romano* restriction and the issue of the 'legally-bindingness' of the decisions of general application.[26] In *Romano*, the Court established that the Council could not delegate the power to adopt acts 'having the force of law' to agencies. In light of the treaty at that time, the delegation was concluded to be unlawful because no agencies were envisaged among the possible authors of legally-binding decisions and no judicial review of agencies' decisions was possible. Since a prohibition on short sales affects the entire class of persons engaging in transactions in that instrument or category of instruments, the UK argued that ESMA's action would

[24] *ESMA-short selling,* para. 38.
[25] *ESMA-short selling,* para. 35.
[26] Case 98-80, *Giuseppe Romano v. Institut national d'assurance maladie-invalidité* [1981] ECR 1241.

be a prohibited 'measure of general application having the force of law'.[27] Addressing this issue was not that difficult for the Court, since the Lisbon Treaty, in particular the first paragraph of Article 263 TFEU and Article 277 TFEU, 'expressly permits Union bodies, offices and agencies to adopt acts of general application'[28] and allows for the judicial review of agencies' measures. The Court thus overturned the UK's objection.

The relevance of the *Romano* judgment in the future depends, however, on how one interprets 'acts having the force of law'. If it is understood in a narrow sense, i.e., legally-binding decisions of general application, then the *Romano* judgment loses its relevance in the realities of the new treaty. The current treaties provide for the judicial review of agencies' decisions of general application.

However, one can interpret the Romano principle also in a broader sense. AG Jääskinen opined that 'acts having the force of law' were to be read in light of other language versions;[29] the French, Dutch, German, and Spanish language versions of the *Romano* judgment show that its scope was limited to a prohibition on the adoption by agencies of *normative measures*. This brings us to the debate about the possibility of delegating legislative or, as it has become fashionable to say, quasi-legislative powers to agencies. In this light, *Romano*'s restriction remains in force, though it is not to say that it makes it clear upon what substantive criteria legislative (normative) acts differ from legally-binding decisions of general application.

Such a debate mirrors in fact a similar discussion in the US. It concerns the difficulty of drawing a clear distinction between legislative and 'other' powers, which have legislative-like effects in practice, but are adopted by agencies and other executive actors not in accordance with a constitutionally-prescribed law-making procedure. In a way, we talk here about the separation of procedures, rather than powers. This is problematic from a democratic point of view since:

> The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.[30]

Do regulatory agencies not make laws? In the US, this remains the issue for debate in the literature[31] as well as among the Supreme Court Justices. Concerning the

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27 *ESMA-short selling,* para. 57.
28 *ESMA-short selling,* para. 65.
29 *Opinion AG Jääskinen,* para. 67.
30 Locke J. Second Treatise of Civil Government, Ch. IX, Of the Extent of Legislative Power, s. 141, 1690.
31 For arguments from both sides of the debate, see, for example, K.C. Davis, *A New Approach to Delegation*, University of Chicago Law Review 36, no. 713 (1969): 729–73, and R.B. Stewart, *The Reformation of American Administrative Law*, Harvard Law Review 88, no. 8 (1975): 1669 – 1813.

latter, *Whitman*[32] is an interesting case to consider. In this case, the US Congress agreed that the Environmental Protection Agency (EPA), a federal executive agency, is empowered on the basis of Section 109(b)(1) of the Clean Air Act to promulgate and revise air quality standards from time to time, more specifically 'to establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air'.[33] This implied that the agency received the power to determine what level of pollution is requisite and what level is not requisite to protect public health. Since it is the agency that has to determine the requisite level (not Congress), no constitutionally-prescribed procedure for adopting such a level is necessary. US agencies exercise their powers with the help of rule-making and adjudication procedures prescribed by the Administrative Procedure Act and in accordance with their founding acts.

So, was it legislative power that was given to the EPA? In the words of US Supreme Court Justice Stevens,[34] if the national ambient air quality standards promulgated by the EPA had been prescribed by Congress, 'everyone would agree that those rules would be the product of an exercise of' democratically legitimate 'legislative power'.[35] In other words, this agency has power, which is legislative in its effect. This is because determining a standard that requires 'to establish environmental standards requisite to protect public health' differs little (if at all) from a standard 'establishing what the requisite level of pollution to protect public health is' in terms of making 'hard choices'[36] between different affected groups (e.g., polluting industries vs. population in industrial areas) and different policy objectives (e.g., environmental protection vs. promoting employment in industrial areas). It is true that the legislator sets up the course of action for the agency, i.e., to determine the requisite level of pollution, but does the agency not outline the direction for the public, i.e., what the requisite level is?[37] In this light, should we distinguish standards based on the identity of the person exercising that power or on the nature of the power?[38]

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32 Whitman v. American Trucking Associations 531 US 457 (2001).

33 *Whitman* at 473.

34 Concurring in part and in judgment in *Whitman*.

35 *Whitman* at 489.

36 Using the words of Schoenbrod who criticizes the non-delegation doctrine in the US for being vague and allowing Congress to pass general laws by which it shifts the blame and making hard choices to agencies (D. Schoenbrod, *Power Without Responsibility*, Yale University Press, 1993).

37 M. Scholten. 'The Democratic Legitimacy of IRAs: assessing against a proper level', Paper presented at the ECPR Conference on Regulatory Governance, Barcelona, 25–27 Jun. 2014. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403797.

38 Justice Stevens in *Whitman v. American Trucking Associations* 531 U.S. 457, 488, 121 S.Ct. 903, 913 (US 2001).

Does ESMA have quasi-legislative powers? In its contribution to the *ESMA-short selling* case, the European Parliament proposed a 'test' of three features, which underline the executive nature of ESMA's decisions. These elements included: (1) the technical nature of the measures, (2) the intention to respond, by the measure in question, to a specific situation, and (3) the temporary nature of the measure.[39] These criteria can, however, apply easily to legislative acts, too. The legislator may be as specific as he wants; consider such a highly technical act as the REACH Regulation, which contains 278 pages. The legislator does normally respond to specific situations in his laws; think about all the financial regulations, including ESMA's founding act, passed in response to the financial crisis. Finally, the laws may be made temporary with the help of sunset clauses, i.e., an expiry date inserted into the act; consider, for instance, the founding Regulation No 460/2004 of the European Network and Information Security Agency, which was initially created for five years. Thus, the question of what exactly makes the measure of ESMA non-legislative from a substantive perspective remains an issue.

3.3 ESMA'S POWERS IN LIGHT OF THE ARTICLES 290 AND 291 TFEU REGIME

The UK submitted that the delegation of powers to an EU agency, such as those provided for in Article 28, was incompatible with the treaties, since Articles 290 and 291 TFEU only circumscribe the conditions in which certain powers could be given to the Commission (and in some cases to the Member States). According to the UK, any prohibition on short sales under Article 28(1) is intended to bind legally the entire class of persons engaging in transactions in that instrument or category of instruments. Following in part the *Romano* logic,[40] the UK argued that the treaties provide two provisions as to when (and to whom) the power to adopt a measure of general application can be delegated; agencies are not listed there.

In addressing the third plea, the Court considered the question of whether Articles 290 and 291 TFEU established a closed legal framework under which certain delegated and implementing powers may be attributed solely to the Commission, or whether other systems for the delegation of such powers to Union bodies, offices or agencies could have been contemplated. According to the Court, the fact that the Treaty mentioned agencies in twenty-eight provisions[41]

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[39] *ESMA-short selling,* para. 59.

[40] In *Romano*, one of the arguments of the Court was that the Treaty allowed delegation of power to adopt binding decisions to the Commission only.

[41] To be more specific, the Lisbon Treaty mentions EU agencies in such provisions as Art. 15 TFEU: 'In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.' Similar references to agencies can be found in Arts 9 (on democratic equality), 42 and 45 (on European Defence Agency) TEU and Arts 15 (mentioned before), 16 (on data protection), 24 (on right to

implied an open regime of Article 290 and 291 TFEU, meaning that the regimes under the mentioned articles were not exhaustive. Moreover, in the Court's view, ESMA's decision-making powers in an area, which requires the deployment of specific technical and professional expertise, did not correspond to any of the situations defined in Articles 290 and 291 TFEU. Having said that, the Court did not mention, unfortunately, how exactly the powers of EU agencies differ from those of the Commission exercised under the mentioned articles. Moreover, the existence of such a difference can be questioned. As some experts in the field note, 'binding legal acts on the registration or refusal of a European Trade Mark adopted by the OHIM are clearly an act of executive nature and comparable with Commission decisions on the approval or refusal of an EU-wide approval of a novel food'.[42]

3.4 On the legal basis

As a final argument, the UK questioned the legal basis, i.e., Article 114 TFEU, for Article 28 of Regulation No 236/2012, which authorizes ESMA to take decisions affecting natural or legal persons directly.[43] According to the UK, Article 114 TFEU did not empower the EU legislature to take individual decisions that were of general application or to delegate to the Commission or a Union agency the power to adopt such decisions. Furthermore, decisions directed at financial institutions overriding those made by competent national authorities could not be regarded as Article 114 TFEU harmonization measures. The Court disagreed and 'explicitly held that the conferral of general and discretionary decision-making powers on ESMA in the realm of short selling fell within the scope of Article 114 TFEU'.[44] It used here the following test: 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,

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communication, indirectly referring to any 'body'), 71 (on internal security), 85, 86 and 88 (mentioning Eurojust and Europol) 123, 124, 127 and 130 (on monetary union), 228 (concerning the procedures of Ombudsman), 263, 265, 267 and 277 (on judicial review), 282 (on ECB), 287 (on the discharge by the Court of Auditors), 298 (on 'open, efficient and independent' European administration) and 325 (on anti-fraud) TFEU, and Protocols 3 (on the Court of Justice), 4 (on the ECB), 6 (on the location of the seats of institutions and agencies), 10 (concerning the European Defence Agency), and 36 (on transitional provisions).

42 E. Vos, *European Agencies and the Composite EU Executive*, In: European Agencies in between Institutions and Member States, edited by M. Everson, C. Monda and E. Vos, 11-48. (Alphen aan de Rijn: Wolters Kluwer 2014) p. 44.

43 For the discussion of the appropriateness of Art. 114 TFEU as legal basis for delegation to ESMA, see also: M. Chamon (2014) *supra* n. 5 and P. van Cleynenbreugel, *Meroni circumvented? Art. 114 TFEU and EU Regulatory Agencies*, Maastricht Journal of European and Comparative Law, 21, no. 1 64 (2014).

44 van Cleynenbreugel (2014) p. 78 *supra* n. 43.

second, have as its object the establishment and functioning of the internal market. In the view of the Court, Article 28 satisfied both requirements.

As regards the first condition, the Court stressed the large margin of discretion left to the legislator to choose the most appropriate method of approximation, including thus the creation of an EU body, and referred to its *ENISA*[45] judgment, in which it upheld the creation of an agency upon the predecessor of Article 114 TFEU, i.e., Article 95 TEC. Note, however, that the European Network and Information Security Agency (ENISA) differs considerably from the new financial supervisors, i.e., EBA, EIOPA, and ESMA. ENISA may gather information and at a maximum give technical advice if requested, but has no powers to adopt legally-binding decisions. In addition, its founding act included a sunset clause, i.e., the agency was initially established for five years, the point which was stressed by the Court in its judgment.[46] Concerning the second condition, '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'.[47]

What the Court has done in the *ESMA-short selling* case is that it has extended the scope of Article 114 TFEU (and hence its *ENISA* ruling) to include the possibility to create EU agencies with the power to take legally-binding decisions. Such a broad reading by the Court is however alarming, because the Court allows the creation of agencies based on Article 114 TFEU 'as long as those agencies remotely contribute to harmonization or the adoption of uniform practices at the different national levels'.[48] As a result, the link between the language of the provision and the creation of an EU body and the scope of the latter's powers is quite weak. In addition, such a large margin of discretion given to the Union legislator by the Court is not backed up by the fullest democratic input possible; Article 114 TFEU does not require unanimity in the Council. Article 352 TFEU (the flexibility clause) seems to be a more appropriate legal basis, including the stronger democratic legitimacy link thanks to the unanimity in the Council, for legislating on the issues that have not been envisaged in the Treaty directly. In fact, Advocate General Jääskinen advised the Court this, too; he recommended that the Court overturn the challenged provision on the ground of the inappropriateness of the legal basis. The Court overturned rather the advice.

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45 Case C-217/04, *The United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, 2006 (*ENISA*) ECR I-3771.

46 Ibid., para. 65.

47 Chamon (2014) p. 389 *supra* n. 5.

48 van Cleynenbreugeln (2014) p. 78 *supra* n. 43.

4 IMPLICATIONS OF THE *ESMA-SHORT SELLING* JUDGMENT

The Court's assessment in the *ESMA-short selling* case is quite brief, yet it has great significance. This is because the judgment lays down a new delegation doctrine in the EU. At the same time, at least two issues remain unresolved.

4.1 THE NEW DELEGATION DOCTRINE

The Court concludes that the reviewability of agencies' decisions (Article 263 and 277 TFEU) implies the possibility to create EU agencies with powers to issue acts of general application. The new delegation standard is therefore: *the delegation of powers to issue legally-binding measures, which are: (1) precisely delineated, (2) subject to sufficiently delineating conditions and criteria limiting discretion, which may include a notification requirement and the temporary character of a measure, and (3) amenable to judicial review in the light of the objectives established by the delegating authority, is allowed*. The *ESMA-short selling* case sets up a new delegation doctrine in the EU in this way, because this case is based on the Treaty provisions recognizing the existence of EU agencies (at least indirectly) and it overturns at least in part the *Meroni-Romano* non-delegation standard. The *Romano*'s ban on delegating powers with 'the effect of law' is in part overturned because the Lisbon Treaty establishes the judicial review of agencies' acts explicitly. Furthermore, while conditioned, the powers that the Union legislator can give to agencies can be *discretionary*, powers transferring a part of responsibility from the legislator to the agency, since the agency is given a choice to determine, for instance, whether national authorities have *adequately* dealt with certain issues themselves. Thus, even though the Court states that the delegation to ESMA is within the limits of *Meroni*, the latter's continuing relevance in the future is unclear, also because of the following issues that remain unclear.

4.2 THE ISSUES UNRESOLVED

The *ESMA-short selling* case has left at least two issues unresolved, which are discussed here.

First, it concerns possible differences between delegation and conferral of powers, which in turn relate to the question of relevance of the *Meroni delegation* doctrine for the case of *conferral* of discretionary powers on agencies. Is the empowering of EU agencies now an act of delegation or of conferral?

According to *Meroni*, enjoying certain tasks implies the possibility to delegate such tasks to an assistant body upon the condition that the assistant will be subject to the same limits and obligations as the delegating authority. Under delegation, the nature of powers that are allowed to be delegated as well as the responsibility

for the exercise of the delegated powers are clear. Those powers that the delegating authority enjoys itself can be delegated. Also, it is the conditions that the delegating authority is subject to itself in exercising its powers that have to accompany the transfer of tasks; think, for instance, about reporting requirements that the delegator has to impose upon the recipient of the delegated powers. In addition, it is the delegating authority who is to be held responsible for the recipient of the delegated powers.

If the legislator delegates tasks, however, it means that it can delegate legislative power while subjecting agencies to the same obligations and conditions that it has to respect. Subjecting agencies to elections is clearly not a feasible option. Nor is the delegation of legislative powers possible, at least from Locke's perspective, as mentioned before. Moreover, the tasks that the EU legislator has been giving to EU agencies are not the tasks that it has had itself. EU agencies have been usually assigned tasks that have been previously exercised by national authorities, the Commission or the Council or the latter's 'fragmentary and opaque structures'.[49] Conferral of powers seems, therefore, to describe better the process of giving powers to EU agencies by the EU legislator.

The conferral of powers, however, raises the questions of what powers (and how much discretion) can be conferred upon an entity, when and how the conferral takes place (within what procedural and substantive limits) and who holds the recipients of the conferred powers to account and how. This is especially the case when a constitution or a treaty is silent on these matters. In contrast to delegation, the conferral of powers requires a legal framework to be in place in order to realize the conferral. It cannot be an implied power as is the case with delegation, since the issues of the nature of powers that can be given away and the locus of responsibility for the exercise of that power do not derive from and are not necessarily directly interrelated with the conferral authority. In relation to EU agencies, no treaty or legal framework governing the creation and operation of agencies exists. In fact, this has resulted in the ad hoc creation of thirty-five EU

[49] D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*. Oxford: Oxford University Press, 2009. p. 164. Nearly every EU agency has an institutional or procedural forerunner, such as: Technical Assistance Units (in the case of the European Training Foundation), the comitology system (two scientific committees in the case of the EMEA), procedural mechanisms within the EP and within the Commission (in the case of the European Monitoring Centre for Drugs and Drug Addiction), or Community programmes (the CORINE programme in the case of the EEA <…>) or activities which were undertaken at an intergovernmental level. In two cases, the emergence of an agency took place alongside the decision to establish a new Community regime (Community plant variety protection and the Community trademark), see: A. Kreher, *Agencies in the European Community – a step towards administrative integration in Europe,* J. of Eur. Public Policy 4, no. 2 (1997): 225-245.

agencies without necessarily good reasons[50] and different sorts of powers, discretion and accountability obligations or the absence of the latter. The current situation entails not only having accountability gaps but also it questions the legitimacy of EU agencies and hence hinders the legitimacy of the EU structures and processes, which are too diverse and complicated to understand and hence accept.[51] Therefore, if empowering EU agencies implies conferral, and it does look like it, a relevant legal framework must be established to govern the scope, conditions and limits of it.

Furthermore, the matter of discretion puts a question mark on the applicability of *Meroni*'s distinction in the future, too. While the Court holds that pursuant to *Meroni* ESMA has been given 'clearly defined executive powers', it also admits that ESMA enjoys discretion. In *Meroni*, however, discretionary powers were not allowed to be delegated. In *ESMA-short selling*, the observation of the Court is realistic, since discretion accompanies any delegation or conferral per definition. Since legislators seek to delegate tasks 'that frequently cannot be precisely specified in advance',[52] especially when they delegate regulatory tasks, 'principals can realise the benefits of delegation only by granting discretion to the agent'.[53] In light of the new delegation/conferral doctrine, which allows entrusting EU agencies with limited, yet discretionary powers, the question becomes what kind of discretion can be given to ESMA and other EU agencies for that matter.

From the hierarchy of norms perspective, since ESMA can issue measures of general application pursuant to the existing regulations passed by the Union legislator, its discretion could be classified as executive. The fact that ESMA acts pursuant to the law which leaves it a choice in the means to achieve legislative goals makes the agency's measure non-legislative. Following this logic, the term 'legislative' can be attributed only to the powers and actions of a 'legislator'.

From a substantive point of view, even though its decisions may be called non-legislative, ESMA's decisions of general application may include more than

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[50] Agencies' founding acts 'did not sufficiently explain why new instruments had to be implemented through an agency, rather than something else. <…> Alternatives to creating agencies were paid limited attention until impact assessments came into practice. The creation of agencies is now justified in a transparent way, although it is not yet fully evidence-based and still does not cover all relevant issues' (The Ramboll Management-Eureval-Matrix evaluation of twenty-six decentralized agencies. Vol. I. P. i–ii).

[51] Scholten (2014) p. 6, 172, 315–317 *supra* n. 2.

[52] B. Smith, *Accountability and Independence in the Contract State*, in: B. Smith and D. Hague (eds.), The Dilemma of Accountability in Modern Government: Independence versus Control (Macmillan, London 1971), p. 33.

[53] M. Thatcher and A. Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, in M. Thatcher and A. Stone Sweet (eds.), The Politics of Delegation (Frank Cass, London 2003), p. 4.

merely technical considerations as they also make 'hard choices'[54] between competing interests and policy objectives (see section III point 2). In this sense, its decisions can be considered having the same effect in regulating the society as those of the legislator; its decisions and discretion would be thus of a legislative (in the sense of normative) nature. The latter sends clearly more alarming signals about the agencification trend and its problematic legitimacy within the current constitutional set up in the EU. Yet, in any case, the lack of clarity on these issues requires the EU legislator and the Member States to address them via a treaty amendment (the ways, means and limits of conferral to agencies) and secondary legislation (principles and mechanisms governing the operation and accountability of agencies).

Such a treaty change could also clarify the limits of the EU Legislator in relation to shaping, including the dispersion of, the Union's executive. The introduction of Articles 290 and 291 TFEU is clearly a move towards a unitary executive model in organizing the executive branch of the EU in order to enhance the clarity and hence legitimacy of the EU. These provisions set up a framework for procedures and types of acts that the main executive institution, i.e., the Commission, though under exceptional conditions also the Council, can receive. The Court's opinion that Articles 290 and 291 TFEU are not exhaustive concerning the executive branch institutions and their decisions leads to uncertainty and a situation in which the Union legislator may be more inclined to confer powers on agencies, rather than give those powers to the Commission, because it may be easier, i.e., not subject to the restrictions of Articles 290 and 291 TFEU.[55] Such an (anticipated) effect is unlikely to promote clarity, which has been presumably the idea behind introducing Articles 290 and 291 TFEU, and hence legitimacy of the EU structures, processes, and decisions.

5 CONCLUSION

So, what is now the delegation standard in relation to EU agencies? What powers can they lawfully enjoy and what not? The Court stated clearly that since the treaties foresee EU agencies' existence and the judicial review of their decisions of general application, EU agencies could enjoy the power to take legally-binding decisions of general application. The *ESMA-short selling* judgment does not, however, end the debate concerning the scope and nature of powers that can or should be given to EU agencies, rather it adds a little twist to it. Since the

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[54] Schoenbrod (1993) *supra* n. 36.

[55] C. Ohler, Rechtsetzungsbefugnisse der Europäischen Wertpapier- und Marktaufsichtsbehörde (ESMA), 69 JZ 244 (2014), 251.

judgment 'merged' the *Meroni*-based powers (executive vs. discretionary) into executive discretionary powers, where discretion is limited (at least in the sense of conditioned), among the key questions for the upcoming discussion become: what kind of discretion can, do and should EU agencies enjoy (executive or legislative/normative in nature) and is this discretion to be considered as delegated to or conferred on EU agencies?

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Legal Issues of Economic Integration publishes thought-provoking articles, case-notes and book reviews on European and international economic integration. The journal includes contributions from regarded practitioners, academics, and legal representatives of international economic organizations, and aims to provide a discussion of the legal choices that are raised by the process of economic liberalization. It compares European and other regional systems, and draws the developments into the larger framework of the World Trade Organisation and other international bodies.

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Manuscripts should be submitted to the Managing Editor, James Mathis.
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