



SANT'ANNA LEGAL STUDIES

STALS RESEARCH PAPER 1/2017

Marta Simoncini

***EU Agencies in the Internal Market: A Constitutional Challenge for EU
Law***

Scuola Superiore Sant'Anna

Pisa

<http://stals.sssup.it>

ISSN: 1974-5656

This page was intentionally left blank

EU Agencies in the Internal Market: A Constitutional Challenge for EU Law

Marta Simoncini*

ABSTRACT

The EU integration process is caught between a phenomenon of supranational delegation from the Member States and autonomous constitutional developments. The comprehension of the agencification phenomenon in the EU internal market cannot be fully understood if the roles of the supranational polity and of the Member States are not distinguished in their contribution to supranational administration. This essay aims to investigate the legal legitimacy of EU agencies' powers in the complexity of the European integration. By reconnecting the development of EU agencies to the composite nature of the EU as a Union of Member States, the essay shows that the development of EU agencies' tasks responds to constitutional challenges embedded in the governance of the internal market. The analysis explains that the legitimacy process is more complex than the bottom-up approach of the supranational delegation and it relies on the development of the specific EU constitutional framework. The legitimacy questions shall therefore be addressed on broader grounds. Both the supranational delegation from the Member States and the constitutional autonomy of EU law contribute to understanding current accountability and legitimacy gaps in the functional design of EU agencies. On these grounds, only a more comprehensive public law paradigm can effectively contribute to understanding EU law and particularly the legitimacy of the exercise of administrative powers.

KEYWORDS: supranational delegation; principle of conferral; EU agencies; Meroni doctrine; accountability

EU Agencies in the Internal Market: A Constitutional Challenge for EU Law

Marta Simoncini

1. Introduction

In the European Union (EU), internal market integration has created cross-border interdependencies between markets and regulatory regimes. The need to prevent different regulatory philosophies from clashing has been addressed through coordination and harmonisation in the internal market. This regulatory process has boosted the growing importance of administration at the supranational level and it particularly involved the establishment of sector-specific EU agencies. From the original model of a Community allocating administration to the Member States, the EU has become a complex legal order where administrative tasks are increasingly allocated to institutions, agencies and bodies of the EU. In addition, the intensity of their regulatory cooperation has steadily increased. The tasks of a few EU agencies have evolved from being purely executive to including some regulatory content. In some cases, EU agencies have been allocated powers increasingly relevant to the rule-making process;¹ in other cases, they have developed the traditional recommendatory and advisory powers in models of administration through soft law standards that are increasingly able to constrain the decision-making process of both the EU institutions and the Member States.² In addition, in other specific cases, EU agencies have been allocated some powers to issue binding decisions.³

*FWO post-doctoral Fellow, University of Antwerp and King's College London. This essay is forthcoming in M Belov (ed), *Global Constitutionalism and Its Challenges to the Westphalian Constitutional Law* (Hart Publishing) and was presented at the Conference 'Global Constitutionalism and Its Challenges to the Westphalian Constitutional Law', University of St. Kliment Ohridski Sofia and the European Academy of Legal Theory, 7 April 2017. I would like to thank all the participants in this conference for their comments and remarks.

¹ See M Busuioac, 'Rule-making by the European Financial Supervisory Authorities: Walking a Tight Rope' (2013) 19 *European Law Journal* 111; E Chiti, 'European Agencies' Rulemaking: Powers, procedures and Assessment' (2013) 19 *European Law Journal* 93.

² See S Vaughan, 'Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies' (2015) 17 *Cambridge Yearbook of European Legal Studies* 66. On the effects of soft law in EU law see F Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law' (2015) 21 *European Law Journal* 68; O Stefan, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects' (2012) *The Modern Law Review* 879; O Ștefan, *Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union* (Kluwer 2013); L Senden, *Soft Law in European Community Law* (Hart Publishing 2004).

³ See S Griller and A Orator, 'Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine' (2010) 35 *European Law Review* 3; see also P Weismann, 'The European financial market supervisory authorities and their powers to issue binding decisions' (2012) 27 *Journal of International Banking Law and Regulation* 495.

This essay aims to investigate the legal legitimacy of EU agencies' powers in the context of European integration. Extensive studies have contributed to understanding the reasons for establishing EU agencies. After more than twenty years, the findings of the 1997 Special Issue of the Journal of European Public Policy on European agencies remain seminal. In the deadlock of intergovernmental politics, EU agencies responded to the integration demand by neutralising conflicts under the cover of technical expertise. By providing specialised skills, EU agencies support European integration through the development of harmonisation and coordination practices that shape Member States' enforcement policies in the light of EU objectives and rules, with no need to centralize further regulatory powers in the EU institutions. According to Dehousse, 'agencies owe their existence to a paradox. On the one hand, increased uniformity is certainly needed; on the other hand, greater centralization [in the European Commission] is politically inconceivable, and probably undesirable'.⁴ According to Shapiro, agencies were conceived as a kind of neo-functionalist experiment, aimed at integrating Europe 'indirectly' by creating 'Europe-wide epistemic communities whose technical truths transcend intergovernmental politics'.⁵ Also Kreher saw in agencies a phenomenon of administrative integration.⁶ By fostering interdependencies, administrative integration can prosaically contribute to enhancing the connections between the different Member States beyond ambitious political projects.

By keeping out politics, enforcement of EU law is believed to be less susceptible to variations.⁷ This enhances consistency in the implementation of EU law, whereas it allows EU institutions to outsource operational functions and concentrate on core tasks.⁸ As Rittberger and Wonka have pointed out, this phenomenon can be analysed from two different perspectives: the politics of the creation of EU agencies and the functionalist approach to the problem of credible commitment.⁹ On the one hand, political strategies determine the establishment of EU agencies and inter-institutional bargaining affects their powers and organisation. On the other hand, EU

⁴ R Dehousse, 'Regulation by Networks in the European Community: The Role of European Agencies' (1997) 4 Journal of European Public Policy 246, 259.

⁵ M Shapiro, 'The problems of independent agencies in the United States and the European Union' (1997) 4 Journal of European Public Policy 276, 281-282.

⁶ A Kreher, 'Agencies in the European Community - A Step towards Administrative Integration in Europe' (1997) 4 Journal of European Public Policy 225.

⁷ See B Rittberger and A Wonka, 'Introduction: agency governance in the European Union' in B Rittberger and A Wonka (eds), *Agency governance in the EU* (Routledge 2012), 2, 3.

⁸ See R Dehousse, 'Regulation by Networks in the European Community: The Role of European Agencies' (n 4), 254-255; G Majone, 'The New European Agencies: Regulation by Information' (1997) 4 Journal of European Public Policy 262, 272. See also Communication from the Commission to the European Parliament and the Council COM (2002) 718 of 11 December 2002, The operating framework for the European Regulatory Agencies; Communication from the Commission to the European Parliament and the Council COM (2008) 135 of 11 March 2008 European Agencies – The way forward [2008] OJ C135.

⁹ B Rittberger and A Wonka, 'Introduction: agency governance in the European Union' (n 7), 4.

agencies' design can rationally respond to functional needs. These approaches are not mutually exclusive and contribute to explaining different aspects of European agencification: the political momentum for their establishment and the regulatory objectives that their establishment pursues.

When analysing the legal legitimacy of EU agencies, the essay considers the EU legal order as a complex integration process caught between a regulatory phenomenon of supranational delegation from the Member States and an autonomous constitutional development. This essay aims to show that the development of EU agencies' tasks responds to constitutional challenges embedded in the governance of the internal market.

As the Court of Justice (CJEU)'s case law points out, legally speaking the evolution of administrative powers at the EU level cannot be explained only through the pure lens of the supranational delegation from the Member States. The regulatory relationship that this administrative kind of delegation embodies presupposes the development of an autonomous supranational order that constitutionally frames EU agencies' powers. Only the existence of a constitutional principle at the EU level concerning the conditions for the delegation of powers conferred upon the EU institutions to EU agencies explains if and how EU agencies may legitimately retain regulatory powers. This principle generally known as the Meroni doctrine was developed and recently updated in the CJEU's case law. When dealing with the conditions for the allocation of powers to EU agencies, this doctrine shows the autonomous foundation, in the domain of EU law, of the responsibilities and tasks of EU agencies at the supranational level.

At the same time, the powers of EU agencies shall be framed within the composite nature of the EU polity as a Union of Member States. The guarantees for the exercise of their powers can only be explained within this original nature of the EU legal order. The comprehension of the agencification phenomenon cannot be fully understood if the roles of the supranational polity and of the Member States are not distinguished in their contribution to supranational administration. Accountability and legitimacy issues of EU agencies need to be addressed not only in the supranational framework of EU powers, but also within the multilevel structure of the EU. This means that not only the Meroni doctrine, but also the regulatory approach to EU integration may contribute to re-connecting the EU administrative developments to the legitimate functioning of the EU legal order.

The essay is structured as follows. Firstly, EU agencies' action is framed within the double-edged nature of the EU legal order as caught in between its derived legitimacy from the Member States and the legal autonomy of its constitutional developments (sec. 2). Subsequently, the

essay presents the constitutional foundations of EU agencies' powers in the EU legal framework as developed in the case law under the Meroni doctrine (sec. 3). On these grounds, the essay emphasises that the conferral of powers on EU agencies raises constitutional challenges that need to be framed in the double-edged nature of the EU legal order (sec. 4). This particularly means that accountability issues shall be addressed with due regard to both the EU and the Member States. The final remarks consider the need for a comprehensive public law approach to EU law that takes into account this double nature of the EU and in this light, justifies the exercise of administrative powers to supranational administrative bodies.

2. EU agencies in the complex nature of the EU integration process

A clear distinction shall be marked between the supranational delegation of powers from the Member States to the EU and the subsequent allocation of powers which may autonomously take place at the EU level. Supranational delegation is a concept describing a political phenomenon of diffusion of specialised normative powers which does not question the political centrality of nation states. The conferral of administrative powers to EU agencies is, instead, a phenomenon of pluralisation and specialisation of EU powers that is legally autonomous from supranational delegation and that legally speaking, takes place only in the autonomous framework of EU public law. From different standpoints, both aspects contribute to explaining the EU integration process.

The reading of EU integration as supranational delegation conceives the idea that EU institutions retain regulatory powers conferred by the Member States with the aim of satisfying functional demands, but upon the condition of overseeing the exercise of the conferred powers. This approach was first developed by political science scholarship, which emphasised that the technocratic power of the EU was a means for Member States to insulate themselves from political pressures and commit to implementing EU policies.¹⁰ Subsequently, legal scholarship has also further explored the regulatory approach to EU governance and considered the EU as a form of deliberative supranationalism, distinct from a constitutional experience.

Lindseth has particularly described EU integration as an administrative phenomenon, as it regards the conferral of specialised regulatory powers not on the basis of the expression of a general democratic will, but on the grounds of a delegation of powers from nation state

¹⁰ See G Majone (ed), *Deregulation or Re-Regulation? Regulatory Reform in Europe and the United States* (Pinter 1990); G Majone, 'The European Community. An "Independent Fourth Branch of Government"?', in G Brüggemeier (ed), *Verfassungen für ein ziviles Europa* (Nomos 1994), 23; G Majone, *The European Community as a Regulatory State* (Nijhoff 1995); G Majone, *Regulating Europe* (Routledge 1996).

institutions.¹¹ As legitimacy derives from the national constitutional systems, this approach shares the theories that base the legitimacy of the EU on the national democratic circuits.¹² Lindseth considers the political-cultural nature of such an administrative integration and he presupposes and implies the absence of autonomy of the EU as a constitutional legal order. According to Lindseth, the EU benefits from a ‘mediated form of legitimacy’ that stems from its Member States and their citizens. Member States are thus understood as the principals overseeing the EU agent.

This approach can explain EU governance historically and politically. Legally speaking, it is expressed by the principle of conferral set in article 5 TEU. When transferring competences from sovereign Member States to the EU, this principle holds that:

- “1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”

Within the domain of the devolved competences, however, the EU is only committed to the implementation of the Treaties and the exercise of its powers is only limited by the principles of subsidiarity and proportionality as set in EU law. The oversight of Member States is therefore constrained by the rule of the Treaties which thus founded the constitutional legitimacy of the EU legal order and its institutions.¹³

If the oversight of Member States is mediated by the Treaties and their institutions, the linearity of the supranational delegation paradigm is not able by itself to explain the autonomous developments of the EU public law framework. As Weiler has observed, the EU appears to be a ‘specified interstate governmental structure defined by a constitutional charter and constitutional

¹¹ P Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State* (Oxford University Press 2010); P Lindseth, Equilibrium, ‘Democracy and Delegation in the Crisis of European Integration’ (2014) 10 German Law Journal 529; P Lindseth, ‘The Perils of ‘As If’ European Constitutionalism’ (2016) 22 European Law Journal 696.

¹² See A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998); J H H Weiler, ‘The Community System: The Dual Character of Supranationalism’ (1982) 1 Yearbook of European Law 267; J H H Weiler, ‘The Transformation of Europe’ (1991) 100 Yale Law Journal 2403; K Nicolaïdis, ‘The New Constitution as European ‘Democracy?’’ (2004) 7 Critical Review of International Social and Political Philosophy 76; K Nicolaïdis, ‘Sustainable Integration: Towards EU 2.0?’ (2010) 48 Journal of Common Market Studies 21.

¹³ On the commitment to the rule of law as a condition for any theory of global constitutionalism see J-B Auby, ‘Global Constitutionalism and Normative Hierarchies’, paper presented at the Conference ‘Global Constitutionalism and Its Challenges to the Westphalian Constitutional Law’, University of St. Kliment Ohridski Sofia and the European Academy of Legal Theory, 7 April 2017.

principles'.¹⁴ Legally speaking, EU case law clearly affirms the constitutional nature of the EU as an autonomous community based on the rule of law and the protection of fundamental rights.¹⁵ It also shows that when applying the principles of proportionality and subsidiarity, as well as when recognising the competences falling within the EU domain, the Court of Justice of the EU has adopted a standard of review which favours the autonomous evolution of EU action and responsibilities.¹⁶ Without taking into account this legal autonomy of the EU from its Member States, based on this peculiar constitutional nature of the Treaties, the further development of EU powers beyond the supranational delegation from the Member States cannot be legally explained.

When understanding EU law, the idea of a supranational administrative governance shall be complemented by and adjusted to the existence of an autonomous dimension of the EU legal order which cannot be explained only as a delegation of regulatory powers from the Member States, but needs to be understood within the own categories of EU law. These are the two faces of the same coin: if you look from the perspective of the Member States, you must admit that they politically accepted to confer part of their powers upon supranational institutions and you can accept that these powers are regulatory in nature. If you look from the perspective of EU institutions, however, you see an autonomous supranational legal order fully committed only to the goals set in the Treaties, which binds Member States and shapes their individual legal orders according to the framework of the Treaties. When doing this, unforeseen legal instruments and new regulatory solutions can be autonomously developed under the framework of EU law.

The allocation of competence to EU agencies is a clear example of this double nature of EU integration. If supranational delegation may be considered a preliminary condition for the allocation of powers to EU agencies, it cannot explain either if or how such allocation may be legally justified. The legal substance of supranational delegation is shaped by the autonomous evolution of the EU legal framework. Due to this autonomous dimension of EU public law, the principle of conferral has embedded new regulatory instruments into the domain of EU law.

¹⁴ See J Weiler, 'The Transformation of Europe' (n 12) 2407.

¹⁵ See particularly 294/83, *Les Verts v Parliament* [1986] ECR 1339, para 23; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union* [2008] ECR I-06351, paras 281-285.

¹⁶ See P Craig, *EU Administrative Law* (Oxford University Press 2012), chapters 14, 19-20; S Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal* 827; T-I Harbo, 'The Function of the Proportionality Principle' (2010) 16 *European Law Journal* 158; R Schütze, *From Dual to Cooperative Federalism: the Changing Structure of European Law* (Oxford University Press 2009), 250; T Tridimas, *General Principles of EU Law* (Oxford University Press 2006), chapters 3-4; M Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 *European Law Journal* 503; A Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press 2002); G de Búrca, 'Reappraising Subsidiarity Significance After Amsterdam', Harvard Jean Monnet Working Paper, 7/1999.

The growth of EU agencies' powers in the internal market is the consequence of the need for specialisation and technical expertise.¹⁷ However, this functional development of EU law has been legally constrained by the principle of conferral, as set in the Treaties and interpreted in the Court of Justice's case law. The principle of conferral shaping the (political) delegation of competences to EU institutions has the supranational effect of designing a system of division of powers at the EU level that cannot be arbitrarily changed by EU institutions.

The limits to the growth of EU agencies' powers have been legally defined by the non-delegation doctrine, which generally goes under the label of the Meroni doctrine.¹⁸ The issue in this doctrine is the protection of the balance of powers as set in the Treaties, meaning that responsibilities cannot shift from EU institutions which legitimately retain competences, to other bodies outside the relation of supranational delegation from the Member States as set in the principle of conferral. If this is the substantive issue, however, the evolution of EU case law on EU agencies' powers demonstrates that the balance of EU powers depends on the autonomous legal developments of the EU legal order. The connection with the Member States through the principle of conferral does not prevent EU law from implementing autonomous instruments of governance in the internal market.

The real issue about the delegation of powers to EU agencies concerns their constitutional status, on the one hand, and the nature and the guarantees to the exercise of their powers, on the other hand. As soon as some constitutional changes intervened in these regards the limits to the conferral of tasks on EU agencies also changed in the interpretation of the Court of Justice. The judicial interpretation of the Meroni doctrine evolved in almost sixty years of integration with the aim of pointing out that the development of administrative powers in the EU has its legal foundations in the legal setting of the Treaties and their interpretation, and not in the supranational delegation from the Member States. When designing the institutional profile and the functioning of EU agencies, however, the issue of the 'mediated legitimacy' from the Member States cannot be ignored, as it remains a foundational aspect of this supranational constitutionalism.

3. The constitutional value of the Meroni doctrine

¹⁷ See H C H Hofmann and A Morini, 'Constitutional aspects of the pluralisation of the EU executive through "agencification"' (2012) 37 *European Law Review* 419, 421-423; but see also M L P Groenleer, *The Autonomy of European Union Agencies. A Comparative Study of Institutional Development* (Eburon 2009), 100-108 (who considers the functional needs and the political motives); P Magette, 'The Politics of Regulation in the European Union', in D Gerardin, R Muñoz and N Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Elgar Publishing 2005) 3, 7-10 (who reads the need for agencies in the light of the Principal-Agent approach).

¹⁸ 9/56 and 10/56, *Meroni & Co, Industrie Metallurgiche s.p.a. v High Authority* [1957-1958] ECR 133.

Unlike EU institutions, only recently have EU agencies been recognised as institutional actors under the Treaties. Before the Lisbon Treaty, agencies were not included in the Treaties and therefore they fell outside the principle of conferral.¹⁹ Legally speaking, the evolution of their powers is a story connected to the development of the EU case law.

To preserve the allocation of competences as set in the Treaties and not to alter such legal framework, the CJEU developed in the *Meroni* doctrine the rules for reconciling the need to keep the structure of the supranational legal order unchanged with the need to delegate technical tasks to expert supranational bodies. This case law is based on the principle of the balance of powers which is the other-face of the principle of conferral. The principle of conferral pinpointed the principle of the institutional balance of powers within the European legal order. The balance of EU powers as set in the Treaties on the grounds of the principle of conferral could not be altered by further delegation of tasks implying the exercise of political discretion to bodies not included in the Treaties. By making the institutions able to act only in accordance with the powers they have been conferred by the Treaties, this principle further specifies the more general principle of division of powers within the framework of the European legal order.²⁰ Under the ECSC Treaty, *Meroni* questioned the delegation of power from the High Authority to two bodies under the Belgian private law – the so-called Brussels agencies – for dealing with financial arrangements of the ferrous scrap regime. In doing this, the *Meroni* case set the necessary principles and conditions under which any delegation of powers from institutions could be feasible.²¹

The case held that delegation should find its structural limit in the impossibility of delegating those powers whose exercise requires a discretionary evaluation, since this would have involved a shift of responsibility not expected by the Treaty. In the *Meroni* case, the concept of wide discretion referred to a quasi-legislative power ‘which may, according to the use which is made of it, make possible the execution of actual economic policy’.²² Moreover, the delegation of powers should be explicit and in line with the principle of conferred competences: if necessary for the accomplishment of its tasks,²³ the delegating authority can provide an agency with

¹⁹ See K Lenaerts, ‘Regulating the regulatory process: “delegation of powers” in the European Community’ (1993) 19 *European Law Review* 23.

²⁰ See J-P Jacqué, ‘The principle of institutional balance’ (2004) 41 *Common Market Law Review* 383, 383-384.

²¹ In this regard see T Tridimas, ‘Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement’, in P Eeckhout and T Tridimas (eds), *28 Yearbook of European Law 2009* (Oxford University Press 2010) 216, 241-243; T Tridimas, ‘Financial Supervision and Agency Power: reflection on ESMA’, in N Nic Shuibhne and L W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (Oxford University Press 2012) 55, 60-62.

²² 9/56 and 10/56, *Meroni & Co.*, 173.

²³ 9/56, *Meroni*, 151; 10/56, *Meroni*, 172.

powers only explicitly²⁴ and within the limits of the powers it retains. Tridimas has identified in the necessity requirement the further condition of proportionality for lawful delegation.²⁵ These tasks should then be performed by the agencies under the same conditions as the delegating authority would have performed them. This means that the execution of the delegated tasks should be subject to the same procedural guarantees to be applied by the delegating authority as a necessary condition for its legitimacy.

Subsequently, the non-delegation doctrine has been further developed in the *Romano* case. Under the EEC Treaty, *Romano* questioned the delegation of regulatory powers from the Council to a body established under EC secondary law, the Administrative Commission on Social security of Migrant Workers. In a preliminary ruling, the CJEU held that agencies cannot impose methods, interpretative rules or obligations on national administrations, but they can only help such national administrations by providing not-binding decisions,²⁶ so as to specify that agencies cannot exercise any rule-making power, but they can only have recommendatory powers.

As a result, only executive powers could be delegated from Treaty-based institutions to agencies and their use must be entirely subject to the supervision of the delegating institution. This has been interpreted as holding that no regulatory power can be delegated to agencies without prejudicing the design of powers as set in the Treaties. Administrative rule-making power has therefore been frozen with the aim of keeping the institutional structure unchanged and compliant with the principle of conferral. In this line, the non-delegation doctrine has become a constitutional principle of the EU legal order concerning the possible allocation of public powers.

Nonetheless, in so far as internal market development and its proper functioning require those administrative functions to be performed by supranational administrations, an increasing number of agencies have been performing functions which almost substantially touch upon a regulatory content. Even if formally these agencies have limited decision-making powers and issue opinions or draft technical standards to EU institutions or recommendations to Member States, they often retain powers that stretch the *Meroni* doctrine. European Aviation Safety Agency

²⁴ In this regard see also C-154-155/04, *Alliance for Natural Health* [2005] ECR I-6541, para 90; C-301/02 P, *Tralli v ECB* [2005] ECR I-4071, paras 42-52; T-311/06, *FMC Chemical SPRL v European Food Safety Agency (EFSA)* [2008] ECR II-88, para 66, where the General Court rejected the argument that the Commission had delegated to EFSA its powers to adopt decisions having binding effects on third parties on the grounds that 'powers cannot be presumed to have been delegated and that, even when empowered to delegate its powers, the delegating authority must take an express decision to that effect'. It is interesting that in this latter case, the Court does not deal with the legal feasibility of such delegation of powers, so that it does not manage to question the validity of the *Meroni* doctrine.

²⁵ T Tridimas, 'Financial Supervision and agency power: reflections on ESMA' (n 21), 55, 60.

²⁶ 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité* [1981] ECR 1259, para 20.

(EASA), for instance, issues standards which effectively commit Member States to the implementation of EU regulation in the aviation sector.²⁷ More recently, the European Supervisory Authorities in the financial markets (ESAs) have been bestowed with more intense powers of supervision and regulation which were reviewed by the Court of Justice according to the Meroni doctrine.²⁸ In addition, the powers of the Agency for the Cooperation of Energy Regulators (ACER) to determine the electricity capacity calculation regions have proven to be controversial in nature, as they involve ‘a certain *margin of appreciation* of methodological nature to precise the concrete requirements to be met to assess that there is a situation of structural congestion’.²⁹

The recent *ESMA - short selling* case has somehow opened the door to further EU administrative integration through the development of EU agencies’ regulatory powers.³⁰ The case concerned the ESMA’s power to prohibit or impose conditions on the entry by natural or legal persons into transactions in the short selling market or require such persons to notify or publicise their positions, if and when there is a threat to the orderly functioning and the stability of financial markets with cross-border implications; and no competent authority has already taken measures to address such threat.³¹

When reviewing the compatibility of European Securities and Markets Agency (ESMA)’s powers with the Meroni doctrine, the CJEU updated the Meroni doctrine to the changed constitutional framework of the Lisbon Treaty. First of all, the Treaty on the Functioning of the European Union (TFEU) has recognised agencies as legal actors within the EU legal order.³² According to the Italian administrative law scholarship, this shall be considered as the end of the

²⁷ See M Simoncini, ‘The erosion of the Meroni doctrine. The case of the European Aviation Safety Agency (EASA)’ (2015) 21 *European Public Law* 309.

²⁸ See M Simoncini, ‘Legal boundaries of European Supervisory Authorities (ESAs) in the financial markets. Tensions in the development of true regulatory agencies’ (2015) 34 *Yearbook of European Law* 319.

²⁹ Decision of the Board of Appeal of the Agency for the Cooperation of Energy Regulators (ACER BoA) of 17 March 2017, para 108. See also H Kühnert, P Böehler and S Polster, ‘A Tale of Delegation and Power: ACER and the Dichotomy of the Non-Delegation Doctrine and the Creation of a Genuine Internal Market in Electricity’ (2017) 1 *European Competition and Regulatory Law Review* 47.

³⁰ C-270/12, *United Kingdom of Great Britain and Northern Ireland v Council of European Union and European Parliament* ECLI:EU:C:2014:18. On this case in the literature see D Adamski, ‘The ESMA doctrine: A constitutional revolution and the economics of delegation’ (2014) 39 *European Law Review* 812; M Chamon, ‘The empowerment of agencies under the Meroni doctrine and article 114 TFEU: comment on *United Kingdom v Parliament and Council (Short-selling)* and the proposed Single Resolution Mechanism’ (2014) 39 *European Law Review* 380; H Marjosola, ‘Bridging the constitutional gap in EU executive rule-making: The Court of Justice approves legislative conferral of intervention powers to European Securities and Markets Authority’ (2014) 10 *European Constitutional Law Review* 500; M Scholten and M van Rijsbergen, ‘The ESMA-Short Selling Case. Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants’ (2014) 41 *Legal Issues of Economic Integration* 389; R Van Gestel, ‘European Regulatory Agencies Adrift?’ (2014) 21 *Maastricht Journal of European and Comparative Law* 188; C F Bergström, ‘Shaping the new system for delegation of powers to EU agencies: *United Kingdom v. European Parliament and Council (Short selling)*’ (2015) 52 *Common Market Law Review* 219.

³¹ See art. 28 of Regulation 236/2012

³² Art. 298 TFEU.

precondition on which the Meroni doctrine was based; that is, the absence of any constitutional foundation for agencies' powers.³³ Furthermore, the TFEU holds that legal remedies apply also to EU agencies' acts when 'intended to produce' legal effects on third parties and this makes explicit the principle of judicial review already present to the EU judiciary.³⁴ Against this changed constitutional backdrop, the CJEU confirmed the validity of the logic of non-delegation of discretionary powers, but it 'mellowed' *Meroni*,³⁵ whereas it probably set aside *Romano*.

The CJEU recognised that the EU legislative power may legitimately confer administrative powers to EU agencies under defined conditions. The CJEU upheld the rules about delegation of powers defined in the *Meroni* case, but noticed that the allocation of direct supervision powers potentially involving a regulatory impact was grounded on well-restricted conditions which make the discretionary power of intervention subject to strict exercise and effective judicial review. Against the changed backdrop of the Treaties, the Court delineates a form of administrative discretion which is situated between the mere executive powers (exercised in completely bound administrative activities) and the 'wide margin of discretion', political in nature, at stake in the *Meroni* case.³⁶

The CJEU held that it is in the full power of the EU legislator -as composed of the EU Parliament and the Council through the ordinary legislative procedure ex article 289 TFEU- to confer administrative powers on EU agencies. This is an expression of the constitutional autonomy of the EU legal order, as the EU legislator is able to confer powers of administrative nature not specifically allocated to EU institutions by the Treaties, on third bodies legally included in the Treaties. Even if the Council is composed of its Member States, nonetheless this is a different framework from the one of supranational delegation, because of both the nature of the EU legislator and the nature of the powers in question. In fact, the EU legislator is a different institutional actor, whose acts are the result of a deliberative procedure of two EU institutions, the European Parliament and the Council. Moreover, the powers conferred on EU agencies express administrative competences that are directly exercised at the supranational level and aimed at the internal market integration. However, in order to keep the conferral of these powers

³³ D Sorace, 'Una nuova base costituzionale europea per la pubblica amministrazione', in M P Chiti and A Natalini (eds), *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (Il Mulino 2012) 45, 56,

³⁴ Art. 263 TFEU. In the case law see T-411/06, *Solgema* [2008] ECR II-2771, paras 36-37. This represents a further development in the sector of EU agencies and bodies of the more general principle of judicial review as the other side of the rule of law as held *Les Verts* case.

³⁵ See J Pelkmans and M Simoncini, 'Mellowing Meroni: How ESMA can help build the single market', CEPS Commentary, 18 February 2014, available at <http://www.ceps.eu/system/files/Mellowing%20Meroni.pdf>.

³⁶ C-270/12, *UK v Council and European Parliament*, paras 41-42.

in line with the principle of institutional balance, guarantees about their nature and their exercise shall apply. Only because of these guarantees has the Meroni case law been mellowed.

The exercise of administrative discretion shall be subject to a series of criteria and conditions set in legislative acts which limit and guide the exercise of administrative powers. This is clear from the *ESMA - short selling* case: the powers conferred on ESMA are subject to the principle of legality. They should be exercised according to the relevant regulations conferring the direct supervision powers and more specifically 1) only if a concrete risk to the financial stability is at stake and no competent national authority has intervened; 2) by taking into account a number of factors delineated in the short-selling regulation, so that ESMA's intervention does not create further risks in the financial markets (e.g., the risk of regulatory arbitrage, or the risk of reduction of liquidity or the creation of further uncertainty on the market); 3) by limiting the power of intervention to temporary and precise measures as outlined in the founding regulation; and 4) by notifying the competent national authorities.

As long as the Court recognises that the TFEU 'expressly permits Union bodies, offices and agencies to adopt acts of general application', the generally valid *Romano* principle cannot apply anymore to the specific case of EU agencies.³⁷ When setting the guarantees of judicial review, the TFEU only indirectly recognises the capability of EU agencies to adopt acts of general application. Firstly, when addressing the plea of illegality by guaranteeing the inapplicability of acts of general application to specific proceedings, article 277 TFEU implicitly recognises that agencies can issue acts of general applications. Article 267 b) TFEU on the preliminary ruling addresses the interpretation of the acts of agencies and bodies as well as those of the institutions; furthermore, according to article 265 TFEU, the failure to act can be contested to agencies as well, under the same conditions that apply to EU institutions. Nonetheless, these provisions admit that acts of general application are now in the domain of EU agencies.

What the *ESMA - short selling* case actually did was to recognise the different constitutional status that EU agencies achieved within EU law: as far as the Treaties laid down guarantees about the exercise of their powers, the CJEU could mellow the severity of the Meroni doctrine without dismissing its general structure.

This judicial development shows that the evolution of the constitutional framework of the EU Treaties can give rise to administrative organisations of powers which are supranational in character and cannot be reconnected to the will of the Member States to delegate competences to the EU. It is the EU legislator in its functional autonomy that may create and allocate

³⁷ C-270/12, *UK v Council and European Parliament*, para 65.

administrative competences at the EU level (within the scope of the Treaties). Such a judicial development of EU administrative law shows the autopoiesis of the EU legal order as an autonomous constitutional subject. However, the double-edged nature of the EU requires that a coherent discourse on EU agencies cannot disregard the theory of the original delegation of powers from the Member States to the EU. This shall assist in structuring the accountability and strengthening the legitimacy of EU agencies' powers.

4. The constitutional challenges to EU agencies

The judicial evolution of the Meroni doctrine shows that from a supranational perspective, the EU is a legal order autonomous from its constituent Member States. The tasks of EU agencies evolved because of the legitimate conferral by the EU legislator on the grounds of political choices made at the EU level.

This autonomous development of EU administrative law may have great potential for supranational integration in the internal market, as well as side effects for the democratic accountability of the EU. The EU administrative framework can have a strong impact on effective harmonisation in the internal market, but it is also clearly disconnected from the national democracies adhering to the EU. As political science scholarship has underlined, this mismatch may raise significant trade-off issues between efficiency and legitimacy in the implementation of EU agencies' tasks.³⁸ By focusing on the connections between the Member States and the supranational level, the theory of supranational delegation from the Member States can contribute to covering the democratic issues embedded in the autonomous development of the supranational legal framework.

Administrative law can help to fill the accountability gap that such disconnection generates. The implementation of administrative law guarantees beyond the state can help to circumscribe the growth of powers at the EU level and contain the distance of these bodies from national democracies. However, this process has not clearly developed at the EU level and the effectiveness of the mechanisms to control EU agencies' action can be questioned. EU administrative law has not yet recognised the relevance and the role of administrative discretion and, consequently, has not developed a coherent accountability system that consistently frames supranational administrative action.³⁹ As Chiti has observed, when dealing with administrative power, EU administrative law has focused on how to functionalise it to the implementation of

³⁸ See M Egan, 'Regulatory strategies, delegation and European market integration' (1998) 5 *Journal of European Public Policy* 485, 499-501.

³⁹ E Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?' (2016) 22 *European Law Journal* 576, 587-591.

EU law, but it has not been concerned with the establishment of a conceptual framework aimed at understanding the exercise of administrative powers in conformity with the rule of law and democracy. The reason for this failure lies in the disconnection of the development of EU administrative law from its political roots and in its reduction to a functional means of integration.⁴⁰

The double-edged nature of the EU is a reminder of these political roots and can help to structure a coherent accountability framework for EU agencies' powers. When looking at EU agencies' powers from the EU level, the existence of legal remedies to their action and their political accountability to the EU legislator shall shape the exercise of their powers. When looking at the same issue from the perspective of the Member States, procedural rules can limit and guide the exercise of agencies' powers⁴¹ as well as the existence of organisational arrangements which allow a representation of Member States' interests in the agency's boards. In the current framework of EU agencies, these variables are articulated in different ways and not all are fully developed and in place. In the following sub-sections, I will point out the criticalities of the current legal arrangements and the challenges that they pose for European supranational constitutionalism.

4.1. The political accountability issues

The EU legislator supervises the delegation of regulatory tasks to EU agencies through the enforcement of accountability mechanisms that aim to check that the exercise of the conferred administrative powers is in line with the mandate. Both *ex ante* and *ex post* mechanisms shall operate and ensure that EU agencies exercise only administrative powers within the scope of their remit. According to the (even revised) Meroni doctrine, any *in blanc* delegation of powers that implies a full shift of responsibilities cannot be legitimate, as far as delegation shall not involve a loss of responsibility for EU institutions, but only a further refinement of their tasks.

Besides the definition of clear conditions for the exercise of powers, however, the *ex ante* control of the EU legislator is not remarkable in the current framework of EU agencies' powers. On the contrary, agencies intervene autonomously and the counterparts of their action are directly the Member States' agencies and private parties operating in the sector of reference. In this regard, the presence of representatives of the Member States on the management boards of EU agencies may be a further link to tailor EU agencies' measures and this could help to find

⁴⁰ Ibid

⁴¹ On the role of administrative procedure as a means available to the Principal to ensure the accountability of the Agent see M A Pollack, 'Delegation, agency, and agenda setting in the European Community' (1997) 51 *International Organization* 99, 108.

more sustainable regulatory solutions which take into account the diversification of national contexts. Empirical research has not provided conclusive findings on the *de jure* or *de facto* effects of vertical accountability mechanisms connecting members of the management boards and the correspondent national institutions. Findings express some variance; but these mechanisms are not able to effectively re-connect EU agencies to the national political legitimacy.⁴²

However, the presence of national representatives on the management boards can also hamper EU agencies' autonomy and delay the exercise of agencies' powers in favour of more concerted measures which may not have the same effectiveness. In the case of the ESAs, for instance, adjudication powers aimed at requiring the competent national authorities to take the necessary action in accordance with EU law and if necessary, at substituting the competent national authorities' decisions and making decisions directly applicable to financial institutions,⁴³ have never been exercised in the five years since their foundation. One reason for the failure to fully use supervisory powers shall be sought in the structure of the governance of the ESAs. As their board of supervisors is composed of representatives of the national competent authorities, before the adoption of restrictive measures addressed to the same national authorities, they preferred to pursue the supervisory convergence goal by using non-binding mediation, persuasion and reputational instruments which are less burdensome on the addressed national competent authorities.⁴⁴

Ex post accountability mechanisms operate with the EU legislator and mainly consist of the submission of an annual report to the European Parliament and the Council which shall give an account of the activities carried out.⁴⁵ If the annual report is the common method ensuring the accountability of independent agencies in the Member States, the highly technical nature of reports does not allow a substantive control of the EU legislator on the performance. For instance, a concise version of the report in layman terms could be usefully submitted, so as to

⁴² See M Buess, 'European Union agencies and their management boards: an assessment of accountability and democratic legitimacy' (2015) 22 *Journal of European Public Policy* 94, 101-107. As *de jure* accountability is concerned, Buess notes that the more independent and powerful EU agencies are (like the EMA, EASA, and the OHIM), the less accountable to national institutions they are.

⁴³ Artt. 17, 18, 19 of the ESAs' Founding regulations.

⁴⁴ See Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), COM (2014) 509 fin., 7.

⁴⁵ See art. 57, Regulation 216/2008 of the European Parliament and of the Council, of 20 February 2008, on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC; see also art 50, art. 16 (4) and 17 (8), ESAs' Founding reg., which also require ESAs to clarify future plans and include any information requested by the European Parliament on an ad hoc basis.

enhance the understanding of EU agencies' activities and allow politicians to effectively know the methods and see the results of EU agencies' performances.

This accountability framework shows that the EU legislator substantially confers powers on EU agencies, but it is not equipped with effective control powers. In this light, it is not by chance that the 2012 Common Approach has introduced an 'alert/warning system' to be activated by the Commission if it has 'serious reasons for concern' that an EU agency may act beyond its mandate, may violate EU law or may be 'in manifest contradiction with EU policy objectives'.⁴⁶ If the EU agency does not accommodate the Commission's request, the latter informs the European Parliament and the Council with the aim of settling the institutional conflict. Vos has suggested that this provision might be susceptible to the introduction of a form of 'ministerial responsibility for agencies' acts' in relation to EU commissioners.⁴⁷ The search for complementary accountability instruments that beyond their specific goals can set up a wider political accountability framework is key to reconnect EU agencies to the composite nature of the EU and to consolidate their legitimacy.

4.2 The legal accountability issues

Alongside the political accountability framework, legal accountability can also play a significant role and limit possible illegitimate use of administrative powers. As seen, the existence of effective judicial protection is a necessary pre-condition for the allocation of powers to EU agencies. The nature of the judicial scrutiny on administrative acts is the issue at stake.⁴⁸ The question is what level of deference the judiciary takes towards EU agencies' acts when complex technical assessments are submitted to the judicial review.⁴⁹

The preliminary issue, however, is the fact that EU administrative law has not theorised the notion of administrative discretion and it has strongly reduced EU agencies' powers to technical tasks.⁵⁰ Only recently, in the *ESMA - short selling* case, has the CJEU started to recognise the

⁴⁶ Common Approach Annex to the Joint Statement of the European Parliament, the Council of the EU and the European Commission of 19 July 2012 on decentralised agencies, para 59.

⁴⁷ See E Vos, 'European Agencies and the Composite EU Executive' in M Everson, C Monda and E Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer 2014) 11, 32-33.

⁴⁸ See A H Türk, 'Oversight of Administrative Rulemaking: Judicial Review' (2013) 19 *European Law Journal* 126.

⁴⁹ From this point of view, the American experience is paradigmatic, since in a few years the Supreme Court passed from the deep review of administrative decisions – the so-called hard look doctrine developed in the '70s (see *Citizen to Preserve Overton Park v Volpe* (1971) 401 US 402; *Vermont Yankee Nuclear Power Corp. v National Resources Defense Council* (1978) 435 US 519; *Motor Vehicle MFRS. ASSN v State Farm* (1983) 463 US 29) - to a much more deferential approach in the case *Chevron Usa v Council* (1984) 467 US 837.

⁵⁰ See J Mendes, 'Law and administrative discretion in the EU: value of comparative perspective' paper presented at the Comparative Administrative Conference, Yale, April 2016, <https://www.law.yale.edu/system/files/area/conference/compadmin/compadmin16_mendes_law.pdf> accessed 23 May 2017, 3. See also J Mendes, 'Bounded Discretion in EU law: A Limited Judicial Paradigm in a Changing EU' (2017) 88 *The Modern Law Review* 443, 444-448.

existence of an area of discretion that cannot be easily assimilated to the exercise of the political discretion prohibited under *Meroni*. The dichotomy between technical assessments by EU agencies and political discretion by EU institutions has blocked the development of effective procedural guarantees that can ensure the legitimate exercise of administrative powers by EU agencies.⁵¹ To avoid blending discretionary choices of EU agencies, the recognition of the existence of a specific administrative decision-making space in the EU is needed. The increasing growth of EU agencies' competences makes the legal identification of this space unavoidable. EU agencies' action needs to be confronted with a firmer conception of legality that goes beyond the dichotomy between political and technical tasks. Only on these grounds can a coherent system of legal accountability be developed.

Clearly, the scrutiny of facts, the compliance with the criteria of delegation and the enforcement of procedural rights when taking administrative measures and acts are essential elements for making the judicial review effective. In the EU courts' case law, when complex technical assessments are at stake, courts cannot substitute their particular appraisal of the case with the one of the competent institution and judicial review shall focus on how the discretionary powers have been applied.

Since the leading case *Technische Universität München*, the criteria for such a control have been consolidated and judicial review has consisted of how the competent authorities have performed 'the duty (...) to examine carefully and impartially all the relevant aspects of the individual case'.⁵² Judicial review therefore consists of the evaluation of the law and the facts which grounded the decision in question, as well as of procedural review. When applying this standard to EU institutions, the EU courts applied the manifest error standard: so long as EU institutions have not exceeded the bounds of their discretion, only manifest distortions in the exercise of the conferred powers are illegitimate.⁵³ Even if EU agencies have different status from EU institutions, it is reasonable that EU courts apply the same standard of review, but within the different boundaries of (technical) discretion. This means also checking the delegation criteria.

⁵¹ See J-P Schneider, 'A common framework for decentralized EU agencies and the *Meroni* doctrine' (2009) 61 *Administrative Law Review* 29, 38.

⁵² See C-269/90, *Technische Universität München* [1991] ECR I-5469, para 14; see also T-13/99, *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-03305, para 171.

⁵³ See CJEU, C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-04023, para 9; T-13/99, para 166. See also P Craig, *EU Administrative Law* (Oxford University Press 2012), 408-409 and 441-445. In the literature, see also A H Türk, 'Oversight of Administrative Rulemaking: Judicial Review' (n 48) 141, who considers the introduction of general provisions about the public participation in EU administrative rule-making as a means 'to enhance the legitimacy of the process' and as a method 'to ensure that the Union courts have an adequate administrative record for substantive review'.

According to *Technische Universität München*, if the fundamental guarantees of fairness – particularly the careful and impartial examination which is closely linked to the right to be heard and the duty to give reasons –⁵⁴ are not correctly enforced, the legitimacy of the administrative measures shall be successfully challenged. If EU agencies were called to follow a common EU administrative procedure, judicial review could be favoured and the exercise of discretion could be more controlled.

Even if EU agencies adopt their own rules of procedure on the basis of general principles set in the founding regulations and in the case law, this cannot have the same legal value of a general law about the EU administrative procedure in terms of protection of procedural rights and controls over the exercise of administrative powers. In fact, the choice of procedural rules is not neutral to the final decision. The way the procedure is articulated allows the taking into account of some interests rather than others and this affects both fact-findings and decision-making.⁵⁵ When leaving the definition of the procedure to EU agencies, the prioritisation of interests itself is left to agencies.

The autonomy with which EU agencies can organise their own administrative procedure seems to be at odds with the allocation of administrative powers of supervision and regulation to actors who are not legitimated through the democratic circuit and are also far from the national *demos*. The implementation of procedural guarantees through primary law would positively affect the compliance with the constraints of the (even mellowed) Meroni doctrine. The democratic principles embedded in the Meroni doctrine would benefit from the existence of an administrative procedure law which ensures procedural legitimacy in the exercise of EU agencies' powers. The introduction of an EU administrative procedure law would make the exercise of (regulatory) powers more visible to the Member States, as well as to European citizens and sector-operators.

5. Final remarks

By analysing the evolution of EU agencies' powers, this essay aimed to point out the complexity of the EU identity. The autonomy of the EU legal order and its derived legitimacy from the constituent Member States emerged as faces of the same legal reality. The powers and the limits of the EU legal order exceed the classification as an experiment of administrative governance,

⁵⁴ C-269/90, *Technische Universität München*, paras 25-26.

⁵⁵ See G della Cananea, 'The European Union's mixed administrative proceedings' (2004) 68 *Law and Contemporary Problems* 197, 207, who emphasises that the shape of administrative proceedings depends on the interests at stake.

but at the same time, the legal autonomy of the EU cannot disregard its national roots when framing its constitutional status.

The case of EU agencies is a good example of how autonomy and interdependency are strictly connected in the development of administrative powers to be exercised at the EU level. The evolution of the Meroni doctrine in the EU case law has shown such complexity. When setting the constitutional principle of the limits to delegation of EU institutions' powers to other entities, the Meroni doctrine demonstrated its sensitivity towards the mutation of the constitutional framework of the Treaties. Only when EU agencies acquired a constitutional status in the Treaties and their powers have been clearly subject to defined conditions of exercise and explicitly recognised as amenable to judicial review, have they become legitimate actors able to exercise administrative powers with a regulatory impact.

When considering the 'mediated legitimacy' of the EU as a phenomenon of supranational delegation, the development of EU agencies' powers can be interpreted as further fragmentation of national normative powers which involves a relaxation of Member States' oversight aimed at the development of the (supranational) internal market. The autonomy of EU law legally justifies this development on the grounds of the constitutional status of the EU. To understand these two faces of the same phenomenon, a broader paradigm that compromises these competing approaches is needed. The constitutional autonomy of EU law needs to be grounded on the supranational delegation from the Member States and EU agencies' powers should be assessed within this composite framework.

Under a public law paradigm, EU law can accommodate its independent developments without disregarding its derived legitimacy from the Member States' constituencies. The legitimate powers of EU agencies shall be compatible with the principle of conferral as set in the Treaties and thus with the balance of powers within the EU. Benchmarks of the compatibility of EU agencies' powers can be identified through administrative law instruments which can re-connect the supranational administration to EU institutions, as well as to the Member States.

The balance of powers in the EU can be implemented by strengthening the political accountability framework and by settling possible illegitimate alterations through judicial review. From the perspective of the Member States, organisational arrangements and procedural restrictions to the exercise of EU agencies' powers can help to administratively protect against any unwanted extension of EU regulatory tasks. Procedural arrangements also protect individuals against arbitrary decisions of EU administrative bodies. Administrative law can thus provide the instruments for containing an unnecessary proliferation of administrative agencies.

As seen, not all these arrangements are in place and their effectiveness may be strengthened so as to implement the benchmarks of the Meroni doctrine. If more regulatory powers are conferred upon EU agencies, the implementation of these arrangements is a preliminary condition that allows the maintenance in equilibrium of the different powers composing the EU legal order.

EU law as a specific experience of public law presents an original character where the derived legitimacy from the Member States is embedded in the constitutional structure of the Treaties and both these aspects contribute to explaining and nourishing the EU integration process. The supranational delegation approach particularly shows the gap between the legal dimension of the EU and its political nature and it recalls the need to safeguard democratic instance in the expansion of EU powers. The constitutional status of the EU is not structured as in the Member States according to the traditional state doctrine, but nonetheless it is legally enforceable and it also frames the supranational administrative governance.

A public law paradigm for EU integration contains and respects these different components in a broader framework. Cassese has shown the openness of public law and its capability to create new frameworks for law by combining different levels of regulation and meaningful interactions that generate institutional changes.⁵⁶ If we reflect in the more general terms of public law, we can better understand the goals and the limits of the EU. If we accept that a single category of law cannot explain the complexity of the EU, then we can engage different legal disciplines in a dialogue aimed at understanding the nature of the EU in the polymorphous domain of public law. The key is to go beyond the boundaries between the single areas and to approach the EU as a specific public law experience, which can be analysed but cannot be captured through the specific categories of the single legal disciplines.

⁵⁶ S Cassese, 'An International Society of Public Law' (2015) ICON S Working Paper Series - Conference Proceedings Series 1 No 1/2015.