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Marta Simoncini

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Editors

Paolo Carrozza (+)
Giuseppe Martinico
Giacomo Delledonne
Filippo Fontanelli

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Abstract

Since 1958, the Court of Justice has established the key criteria governing the legitimate delegation of powers to EU agencies. Nevertheless, the principle of delegation remains a subject of debate and has been revisited by the Court in recent years. This article examines the current state of the so-called non-delegation doctrine, arguing that the original doctrine has been progressively “eroded” over time not only *de facto*, through the pragmatic involvement of EU agencies in the regulatory process, but also *de iure*, through the gradual and sometimes strained evolution of the EU courts’ case law.

Key words

EU agencies; delegation of powers; discretion; soft law; accountability

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Marta Simoncini*

SUMMARY: 1. Introduction. – 2. The tenets of the Meroni doctrine. – 3. The *de facto* erosion of the Meroni doctrine. – 4. From the *de iure* erosion of the Meroni doctrine in the *ESMA short-selling* case... - 5. ...to the chronic erosion in the Banco Popular Español cases. – 6. Shall we get rid of *Meroni*?

1. Introduction

On 6 June 2017, the ECB announced that Banco Popular Español, the sixth largest Spanish banking group, was “failing or likely to fail”, because of a liquidity crisis, mainly due to the significant outflow of deposits. On the following day, the Single Resolution Board (SRB) adopted a resolution decision, transferring all shares and capital instruments of Banco Popular to Banco Santander for one euro. Less than one hour later, the European Commission approved the SRB’s decision and Banco Popular was sold.

This was the first case that the single resolution mechanism under the European Banking Union was applied to a credit institution in Europe.¹ All account holders were spared, but the resolution cost over 3 million euros to shareholders and creditors. The bail-in procedure created a centralised and independent decision-making process on bank resolution, based on the close cooperation between an EU agency (the SRB) and an EU institution (the Commission).

Is the SRB the hidden decision-maker under the single resolution mechanism? This is the question behind the shareholders and creditors’ action, as they contended the legitimacy of the procedure before the General Court. They particularly questioned the proactive role of the SRB, claiming that it has very broad decision-making powers, whereas the Commission is simply rubber-stamping the SRB’s decision. If the responsibility of the SRB covers policy choices, the mechanism would be in contrast with the so-called Meroni doctrine setting the limits and the criteria for the delegation of powers to EU agencies.

¹ Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.

This is only the last case where the issue of the range of powers that EU agencies can exercise has emerged. The original severity of the non-delegation doctrine in fact does not square with the current system of European governance where EU agencies are key actors of internal market integration. My claim is that the Meroni doctrine has been eroded overtime. Such “erosion”² occurred not only *de facto* by pragmatically involving EU agencies in the regulatory process, but in the last decade also *de iure* through the straining evolution of the case law of EU courts. The effects of such erosion on the reach and the limits of EU agencies’ powers still need to be understood and organised coherently by the courts, the agencies, the competent authorities, and the markets. The result is that the more EU agencies are involved in internal market policies, the more their action can be subjected to strategic litigation under the Meroni doctrine.

This article examines the current state of power delegation to EU agencies, considering both *de facto* and *de iure* developments. After reconstructing the key aspects of the Meroni doctrine as established by the Court of Justice in its early case law (Section 2), the article analyses its gradual erosion in practice (Section 3) and in subsequent case law, including the *ESMA short-selling* case (Section 4) and the *Banco Popular* cases (Section 5). Section 6 concludes by addressing the key challenges of the non-delegation doctrine in defining the boundaries of EU agencies’ authority.

2. The tenets of the Meroni doctrine

Under the non-delegation doctrine, the institutions established in the Treaties cannot delegate their powers to other bodies and abdicate their public functions. The so-called Meroni doctrine represents a specific application of the non-delegation principle to agencies’ tasks and responsibilities. It concerns whether EU institutions can delegate powers to agencies and, if so, to what extent such delegation is feasible.

The doctrine has been developed in distinct rulings of the CJEU: *Meroni v High Authority*³ and *Romano*.⁴ Although held in very different stages of growth of the EU legal order, these judgments have elaborated the constitutional rule about the delegation of powers to agencies, which still represent a strong legacy. Through the limitation of agencies’ powers, the CJEU ensured that the structure of powers as set in the Treaties was kept unchanged. In the absence of the guiding principle

² M. Simoncini, ‘The Erosion of the Meroni Doctrine: The Case of the European Aviation Safety Agency’, in *European Public Law*, 21, 2, 2005, 309–342.

³ 9/56 and 10/56 *Meroni & Co., Industrie Metallurgiche, sas v High Authority of the European Coal and Steel Community* [1958] ECR 53 [hereafter: *Meroni*].

⁴ C-98/80 *Romano v Institut national d’assurance maladie-invalidité* [1981] ECR 1241 [hereafter: *Romano*].

of separation of powers as it exists in individual Member States, the principle of institutional balance under EU law safeguarded the institutional design of powers as conferred by the Treaties.⁵

In the *Meroni* case, the CJEU set the conditions for the lawful delegation of powers and about twenty years later in *Romano* explicitly secured that agencies cannot be delegated regulatory powers. To ensure the institutional balance of powers, *Meroni* allowed agencies to exercise only “clearly defined executive powers”⁶ amenable to judicial review and entirely subject to the supervision of the delegating institution. It thus forbade the delegation of “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”,⁷ meaning wide discretionary powers which may unlawfully shift the competence conferred by Treaty establishing the European Coal and Steel Community (ECSC).

In the *Romano* case, the CJEU further developed the principles of the non-delegation doctrine by preventing an administrative commission with no legal basis in the then Treaty establishing the European Communities (CEE) from the adoption of “acts having the force of law”.⁸ The CJEU made clear that agencies could only adopt non-binding decisions.

While this case law had been adopted to respond to the lack of strong legitimization of agencies under those legal orders, the emerging principles have permanently constrained the establishment, the remit, and the instruments at disposal of EU agencies and hence their capability to contribute to the implementation of the internal market’s goals. Yet, constitutional concerns behind this timid approach to EU agencies’ powers has not stopped the expansion of their powers in the implementation of the internal market.

3. The *de facto* erosion of the *Meroni* doctrine

As internal market integration asked for the centralisation of (some) administrative powers at the EU level and their allocation to specialised supranational expert bodies, the *Meroni* doctrine remained at odds with the compelling need to develop agencies’ tasks for the better implementation of the internal market. The participation of EU agencies in sector-specific regulation thus occurred through instruments different from autonomously adopted, legally binding acts. The formal compliance with

⁵ On the principle of separation of powers in the EU see M. Simoncini, ‘The separation of powers and the administrative branch in the European Union’, in *International Journal of Constitutional Law*, 23, 3, 2025, forthcoming.

⁶ 9/56 *Meroni*, p. 152; 10/56 *Meroni*, p. 173.

⁷ *Ibid.*

⁸ C-98/80 *Romano*, para 20.

the Meroni doctrine required the development of sophisticated and complex systems of governance, which pragmatically rely on EU agencies' expertise.

For instance, EU agencies participate in the Commission's rule-making process. The participation of the European Supervisory Authorities in the financial markets (ESAs) the setting of delegated technical standards under art. 290 TFEU and implementing technical standards under art. 291 TFEU is a special case.⁹ The ESAs do not merely infuse technical expertise in the non-legislative rulemaking by the Commission, but they initiate the procedure, draft the acts and structure the general technical framework for regulation. The byzantine procedure stretches the procedure under art. 290 and 291 TFEU by strongly limiting the Commission in the exercise of its delegated powers and as Busuioc observed, it creates "a gap between the treaty text and legal realities".¹⁰

In addition, EU agencies autonomously issue guidelines and recommendations that aim to shape supervisory practices and to ensure the consistent application of EU law. Although not legally binding, such soft law acts have become difficult to avoid or ignore for the recipient competent authorities and market operators. As Craig noticed with regard to the EASA's certification specifications, the rules of conduct concerning product requirements are "codes (...) that are in effect complex, highly detailed regulatory provisions regarded as binding by the industry, even though they do not have the force of law".¹¹

Soft law in fact creates a method of informal governance, which shapes market regulation through formally rebuttable instruments of enforcement. Firstly, the technical content of the rules of conduct contributes to sidelining deviations. In addition, the introduction of procedural burdens strengthens the reputation of compliant actors. For instance, the duty to justify deviations as well as the publication of non-compliant entities are legal requirements that feed naming-or-shaming mechanisms so to favour compliance. Diversity has a price, so that what is not legally binding may become necessary in the practice. Based on the pragmatic need to ensure the effectiveness of governance, the use of non-traditional coercive techniques has become a key instrument to promote the enforcement of regulation beyond the legal constraints set in *Meroni* and *Romano*.

⁹ Art. 10 e art. 15, Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

¹⁰ M. Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope', in *European Law Journal*, 19, 1, 2013, 111-125, 117.

¹¹ P. Craig, *EU administrative law*, 3 edn., Oxford University Press, 2018, 164.

This method however burdens the legal certainty of rights and obligations, as it complicates the identification of the source of authority and the legal effects of acts. To avoid any shift of responsibility and the conferral of undue, hidden powers to EU agencies, adequate instruments of protection need to be ensured beyond the distinction between binding and non-binding acts.

On the one hand, the gap in the legal remedies against soft law has been partially filled by the public participation in the decision-making process of EU agencies. However, the power of EU agencies to decide *who*, *when* and *how* can participate in the proceedings -within the limits of the general principles set in the establishing regulations- do affect the selection of the relevant interests and the content of their decisions.

On the other hand, judicial remedies have been progressively expanded by the CJEU so to enhance protection against the non-binding acts adopted by EU agencies. In the recent *FBF* case,¹² the CJEU ensured the judicial review of the validity and the interpretation of the guidelines adopted by the European Banking Authority (EBA) on governance and product control mechanisms through the preliminary reference procedure (art. 267 TFEU). Although the Court confirmed the annulability of only legally binding acts and the acts intended to produce legal effects under art. 263 TFEU, it did ensure some justiciability to the EBA's guidelines.

4. From the *de iure* erosion of the Meroni doctrine in the *ESMA short-selling* case...

In the last decade, the EU case law on the interpretation and application of the Meroni doctrine has also evolved. In the 2014 *ESMA short-selling* case,¹³ the CJEU revisited for the first time the Meroni doctrine and reshaped the reach and the limits of EU agencies' powers. Although the legacy of the Meroni doctrine is still undeniable, the CJEU "mellowed" *Meroni*¹⁴ and recognised some space for the regulatory intervention by the European Security and Markets Authority (ESMA) in the short selling markets. The CJEU held that as long as objective criteria and circumscribed conditions leading the exercise of the powers are amenable to judicial review, delegation could involve some "margin of discretion"¹⁵ when a "high degree of professional expertise"¹⁶ is required to pursue the objective of financial stability. According to the CJEU, two sets of reasons justify the possibility to confer such

¹² C-911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* ECLI:EU:C:2021:599.

¹³ C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (ESMA short-selling)* ECLI:EU:C:2014:18 [hereafter: *ESMA short-selling*].

¹⁴ J. Pelkmans and M. Simoncini, 'Mellowing Meroni: How ESMA can help build the single market', *CEPS Commentaries*, 18 February 2014.

¹⁵ C-270/12 *ESMA short-selling*, para 50.

¹⁶ C-270/12 *ESMA short-selling*, paras 82-85.

powers on an EU agency: the changed framework of the Treaties, where EU agencies' acts, including acts of general application, can be challenged in courts; and the legislative context, which conferred the powers in question on ESMA. To be legitimate, agencies' powers shall be exercised according to the conditions fixed in the enabling EU legislative acts, and effective guarantees of institutional supervision and judicial review should be in place.

In addition, the Court dismissed the applicability of *Romano*, because in the changed framework of the Treaties EU agencies are “expressly” allowed to adopt acts of general application.¹⁷ The CJEU thus raised the key issue of the legal status of the entity who has been delegated the power and recognised the changed status of EU agencies under the Treaties. Unfortunately, this part of the judgment remains underdeveloped in the reasoning of the Court and did not secure clear legal consequences.

As I argued elsewhere,¹⁸ the *ESMA short-selling* case shows that insofar EU agencies exercise regulatory tasks within the priorities set and the policy choices made by EU legislative acts, no significant transfer of responsibilities occurs. However, instead of introducing the distinction between legislative and administrative powers known in national contexts, the CJEU perpetuated the *Meroni*'s dichotomy between political and technical tasks. This makes the identification and the justification of non-political, discretionary powers still uncertain, while EU agencies' competence firmly rests on technical expertise.

5. ...to the chronic erosion in the Banco Popular Español cases

The five rulings of the General Court¹⁹ in the case of the resolution of Banco Popular and the following appeal before the Court of justice contributed to relentless revision of the *Meroni* doctrine. In the attempt to apply *Meroni* to the complex technical assessments by EU agencies, the General ended up by adding new elements to the doctrine and further extending EU agencies' powers. This created some contradictions in the interpretation of three key aspects: 1) the identification of the decision-making authority; 2) the understanding of the notion of discretion; and 3) the access to judicial protection.

¹⁷ C-270/12 *ESMA short-selling*, paras 65-66.

¹⁸ M. Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Hart Publishing, 2018, 31.

¹⁹ T-481/17 *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB* ECLI:EU:T:2022:311; T-510/17 *Antonio Del Valle Ruiz and Others v Commission and SRB* ECLI:EU:T:2022:312; T-523/17 *Eleveité Invest Group and Others v Commission and SRB*, ECLI:EU:T:2022:313; T-570/17 *Algebris (UK) and Anchorage Capital Group v Commission* ECLI:EU:T:2022:314; T-628/17 *Aeris Invest v Commission and SRB*, ECLI:EU:T:2022:315.

To stick to the *Meroni* condition that no shift of responsibility should occur, the General Court distinguished the competence of the SRB and the Commission on the basis of the technical nature of the SRB's powers and the discretionary competence of the Commission in the procedure. The informal participation of the Commission in the SRB's resolution decision was a sufficient procedural element to ensure that it could make an informed assessment of the discretionary aspects of the final decision and could be the effective decision-making authority.

As Chamon underlined,²⁰ even the High Authority in the *Meroni* case had the status of observer with veto power in the Board of agencies responsible for the functioning of the financial mechanism for the supply of scrap, but this condition had not saved the architecture of the equalisation mechanism under the ECSC. In the General Court's interpretation, instead, participation integrates a new condition capable of smoothing out the rigidity of the *Meroni* doctrine.²¹

In addition, such informed participation by the Commission seems to exclude the need to define conditions for the exercise of its powers as per under the *ESMA short-selling* case. The General Court considers participation as sufficient evidence that the SRB does not exercise any autonomous power involving any margin of discretion in the resolution procedure. The assumption of responsibility by the Commission is therefore an alternative to definition of the criteria and the conditions for the exercise of the power.

Evidence of the Commission's responsibility however passes through a relaxed duty to give reasons of its decision. Because of the limited time available and the need not to repeat elements already pointed out by the SRB, the General Court held the reference to the SRB's motivations sufficient for the legitimate endorsement of the resolution scheme.²² Yet, as Brito Bastos explained,²³ this seems in contrast with the *Meroni* doctrine because this does not allow to understand whether the Commission has effectively exercised its discretionary powers or has merely validated the decision of the SRB. Conversely, the duty to give reasons could have been an effective instrument to demonstrate that no shift of responsibility has occurred.

The General Court also stressed the division of competence between the SRB and the Commission, so that the latter cannot change the (technical) resolution scheme adopted by the Agency, but the production of legal effects follows from (the approval of) the identification of the public interest in

²⁰ M. Chamon, 'The non-delegation doctrine in the Banco Popular cases', in *REALaw.blog*, 28 October 2022, available at <https://wp.me/pcQ0x2-s6>.

²¹ T-510/17 *Antonio Del Valle Ruiz and Others v Commission and SRB*, paras 230-232.

²² T-510/17 *Antonio Del Valle Ruiz and Others v Commission and SRB*, para 553.

²³ F Brito Bastos, 'Referential reasons-giving and the limits of Union Agencies' power', in *REALaw.blog*, 7 October 2022, available at <https://wp.me/pcQ0x2-tx>.

the resolution by the Commission.²⁴ However, the General Court also finds out that the SRB's decision is not a preparatory act and produces autonomous legal effects after the endorsement by the Commission. It can thus be challenged in courts with no need to challenge the Commission's decision, and its annulment would roll over to the Commission's decision. This expands judicial protection but creates contradictions. The recognition of the competence of the SRB shows that it does exercise powers autonomously, including an assessment of the public interest in the resolution; however, the General Court does not refer to the *ESMA short-selling* case, but to the general principles of legal certainty and effective judicial protection.

On appeal the CJEU overruled this interpretation by holding that:

“the discretionary aspects of a resolution scheme, which relate both to the establishment of the resolution conditions and to the determination of the resolution tools, are inextricably linked to the more technical aspects of resolution. Contrary to what the General Court held in paragraph 137 of the judgment under appeal, a distinction, therefore, cannot be drawn between those discretionary aspects and those technical aspects, for the purposes of determining the act against which an action may be brought in the context of a resolution scheme endorsed in its entirety by the Commission.”²⁵

As a result, this revised approach has set back the SRB's decision to the condition of preparatory act, which cannot be directly and autonomously challenged in courts.²⁶ While the justiciability of the SRB's decision has been reduced, this shift has also redefined the accountability framework for complex technical assessments. It suggests a significant limitation on the Agency's capacity to make autonomous decisions involving some margin of discretion. This occurs even though the Court further aligns and clarified the scope of the delegation criteria set in the *ESMA short-selling* case. In fact, the Court recognises that SRB's powers are expressly “circumscribed by objective criteria and conditions”.²⁷ At the same time, the CJEU has significantly clarified that broad discretionary powers pertain to “the fundamental issues of the policy area concerned,” which require a wide margin of discretion to balance multiple, and sometimes conflicting, objectives.²⁸ Nonetheless, compared to the *ESMA short-selling* case, two different accountability models emerge. On the one hand, the *ESMA short-selling* model suggests that EU agencies can act autonomously under specific conditions set in the relevant regulation. On the other, the *Commission v SRB* case shows that EU agencies cannot adopt autonomous decisions, and their evaluations need to be shared and accountable to the Commission. How should these distinct accountability frameworks apply to EU agencies' action?

²⁴ T-481/17 *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB*, para 132.

²⁵ C 551/22 P *European Commission v Single Resolution Board (SRB)* ECLI:EU:C:2024:520, para 87.

²⁶ C 551/22 P *European Commission v Single Resolution Board (SRB)*, paras 88-89.

²⁷ C 551/22 P *European Commission v Single Resolution Board (SRB)*, para 77.

²⁸ C 551/22 P *European Commission v Single Resolution Board (SRB)*, para 72.

Under what circumstances should one prevail? The choice should depend on the level of discretion at stake, and clearly this would set the discussion back to the nature and the tolerability of EU agencies' discretion.

6. Shall we get rid of *Meroni*?

EU agencies' powers are designed to respond to the failures of individual States' regulations and to the need to apply rules in a uniform manner throughout Europe. Beyond EU agencies' informal governance and although interpretation of the CJEU has unblocked the legal recognition of some discretionary powers for EU agencies, yet tensions remain between the functional need to strengthen the agencies' role and the doubts about their compatibility with the EU legal order. The issue is that constitutional checks-and-balances for the operation of specialised agencies in the internal market are not completely unraveled. This can be attributed to the *Meroni* doctrine, which probably has never been fit for setting limits to the delegation of powers to agencies and conversely contributed to the complication of the governance. When rethinking such doctrine, the latest case law has expanded EU agencies' powers without fixing the relevant theoretical issues beyond the *Meroni* restrictions.

To get rid of the uncertainties generated by and because of the *Meroni* doctrine, the Court of justice should address two critical aspects. Firstly, the notion of discretion needs to be further elaborated and the existence of administrative discretion as a power circumscribed by the law needs to be refined. The Court should consider discretion acceptable insofar as priorities and policy choices have already been made by the legislative power and it should abandon the dichotomic distinction between political and technical powers as a ground for EU agencies' action. Complex technical assessments require technical expertise, but they are not neutral and may require some value judgments.

Secondly, if some discretion is acceptable, the exercise of the tolerable discretionary powers needs to be entrenched in the legal system. The unclear setting of EU agencies' powers under the Treaties affects such entrenchment and the development of an adequate accountability framework for EU agencies' action. Treaties unchanged, it should be up to the legislation to clarify how responsibilities are shared between EU agencies and EU institutions in the single proceedings and to identify instruments that make the exercise of such administrative powers accountable.