



# City Research Online

## City, University of London Institutional Repository

---

**Citation:** Peers, S. and Costa, M. (2016). Reassessing the accountability of EU decentralized agencies: Mind the Independence Gap. *European Public Law*, 22(4), pp. 645-665.

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

---

**Permanent repository link:** <http://openaccess.city.ac.uk/13433/>

**Link to published version:**

**Copyright and reuse:** City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

---

City Research Online:

<http://openaccess.city.ac.uk/>

[publications@city.ac.uk](mailto:publications@city.ac.uk)

---

# Reassessing the accountability of EU decentralized agencies: Mind the Independence Gap

Professor Steve Peers\* and Dr Marios Costa\*\*

## Abstract

This article examines two recent developments to ensure accountability and independence of the EU's decentralized agencies: the 'Common Approach' adopted by the EU's political institutions, and the *ESMA* judgment on the validity of the rules delegating extensive power to an EU agency. The article argues that first of all, the Common Approach strengthens the accountability and independence of EU agencies, yet it is not being sufficiently implemented and as such it fails to mitigate the accountability and independence deficits inherent in EU agencies. Secondly, it argues that *ESMA* strengthens the independence of the EU's financial authorities at the expense of failing to address the existing accountability problem. On the whole, these developments are disappointing and fall far short of ensuring a coherent and effective system for safeguarding the agencies' accountability and independence.

**Keywords:** Agencies, accountability, independence, legitimacy, delegation, Europol, Common Approach

## 1. Introduction

The inadequacies of the EU decentralized agencies' regime have been subject to severe criticism on grounds of lack of accountability and transparency.<sup>1</sup> However, the literature has not addressed fully the clear distinction that must be made with regards to accountability and independence; the dichotomy between the two terms clarifies many of the inadequacies inherent in the agencies' governance regime. This article explains this distinction and then explores the tension between the two concepts in the context of two important recent developments on this issue, stemming from the EU's political institutions, on the one hand, and the EU judiciary, on the other.

In particular, in 2008 the Commission responded to the critics and called for a series of measures to provide 'clarity about [the agencies'] role, and about the mechanisms

---

\* Professor, Law School, University of Essex, Colchester, United Kingdom.

\*\* Lecturer, Law School, City University London, United Kingdom and former visiting scholar at the Centre for European Legal Studies (CELS), Faculty of Law, University of Cambridge.

<sup>1</sup> M. Costa, *Mind the Accountability Gap in the European Union*, (Routledge, 2016); M. Busuioc, *European Agencies Law and Practices of Accountability*, (Oxford University Press, 2013); D. Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability', in D. Gerardin, R. Muñoz & N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance*, (Elgar, 2005), 88; M. Everson, 'Independent Agencies: Hierarchy Beaters?', (1995) 1 *European Law Journal* 180-204; M. Everson, C. Monda and E. Vos, *European Agencies in between Institutions and Member States* (Kluwer Law International, 2014); SP. Riekmann, 'In Search of Lost Norms: Is Accountability the Solution to the Legitimacy Problems in the European Union?', (2007) 5 *Comparative European Politics* 121-137.

to ensure the accountability of these public bodies'.<sup>2</sup> 'Accountability' is frequently repeated (eight times) within the communication, yet 'independence' is heavily neglected and mentioned once without any further explanation. Following the communication on the governance of agencies, the Council, the Commission and the European Parliament (EP) agreed in June 2012 on a non-binding Common Approach aiming to update the governance of decentralized agencies.<sup>3</sup> Have these standard rules remedied accountability and independence deficits as regards decentralized agencies in practice? If so, to what extent? As we shall see, although the Common Approach aims to strengthen the accountability as well as the independence of decentralized agencies, discussions on the proposed new governance regime for Europol provides clear evidence that the Common Approach is not being sufficiently implemented in all cases, as regards either accountability or independence.

On the judicial front, the judgment of the Court of Justice in *ESMA*<sup>4</sup> in effect authorizes the EU political institutions to rely primarily upon the independent financial authorities in order to secure the much needed high quality financial regulation in the Eurozone, but nevertheless neglects those authorities' accountability.<sup>5</sup> As a result, *ESMA* raises broader constitutional issues concerning the powers that can be lawfully exercised by the EU's decentralized financial agencies, and arguably by analogy by all the other EU independent organs. However, with all due respect, the Court does not impose any limits on the delegation of broad discretionary tasks to decentralized bodies and in consequence it contributes little to remedy the lack of an accountability mechanism.

Taking these developments together, then, the EU institutions have not done enough to ensure accountability and independence of the agencies in recent years. These issues can only be fully understood in light of a conceptual understanding of the terms, which we provide first.

## 2. Accountability and independence

Assessing whether agencies' governance suffers from accountability deficits, along with examining alternatives on how to mitigate these deficits, presupposes a clear understanding of the meaning of accountability. The definition adopted and explained here is used throughout this paper as a tool for measuring accountability (deficits) in relation to EU decentralized agencies and highlights the reasons why more accountability is being called for in this area. There is a plethora of literature on accountability, particularly in the area of political science, but nevertheless this comprehensive body of work fails to differentiate accountability from the notion of

---

<sup>2</sup> European Commission (2008) *Communication from the Commission to the European Parliament and the Council: European agencies - the way forward*, 11 Mar. 2008, COM (2008) 135 final.

<sup>3</sup> The three institutions have agreed to use in future the adopted common approach when they decide on the governance of EU decentralized agencies. For the text see: [http://europa.eu/agencies/documents/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf)

<sup>4</sup> Case C-270/12, *United Kingdom v. Council & Parliament*, judgment of 22 Jan. 2014, ECLI:EU:C:2014:18.

<sup>5</sup> See also D. Adamski, 'The ESMA doctrine: a constitutional revolution and the economics of delegation', (2014) 39 *European Law Review* 812-834; M. Simoncini, 'The Erosion of the Meroni Doctrine: The Case of the European Aviation Safety Agency', (2015) 21 *European Public Law*, 309-342.

independence. Most commentators focus on the challenge of finding the right (fine) balance between accountability and independence.<sup>6</sup> In doing so, the existing literature considers independence as a factor or rather as a threat which may have a negative impact upon accountability.<sup>7</sup> Given the lack of a statutory definition with regards to both terms, this section explains the term ‘independence’ as well as ‘accountability’.

Independence is an external yet a significant factor relating to accountability. The apparent consensus is that accountability cannot co-exist with independence and that independence overload leads to a non-accountable agent. Similarly, when the accountability forum is constantly steering the behavior of the agent the accountability gap is drastically diminished. Yet, the autonomy of the agent under these circumstances is non-existent and the outcome is to have an ‘accountable’ but rather a dependent agent. We therefore argue for the contrary. We consider that the person or the body under scrutiny, the actor, needs to be accountable and simultaneously independent throughout the decision-making process. As a result, the accountability relationship can be effective so long as the delegator does not directly interfere in the decentralized decision-making process. After all, accountability can be meaningful if the agent takes decisions by relying on highly complicated and technical scientific knowledge and expertise.<sup>8</sup> When the actions of the agent are directed by the delegator, the *raison d’être* of delegation defeats its purpose. In consequence, we consider that conceptually accountability and independence are interrelated terms and not mutually exclusive. Overall, the whole essence of accountability calls for independence from politics while the actor executes delegated tasks. A key role exercised by agencies is the technical and up-to-date scientific expertise that they provide for complex matters. They adopt critical decisions that will have little or no use if they are substantially influenced by their political masters.

## 2.1. Unquestionable thirst for more accountability at the EU and National level

As already explained above, accountability is a term thoroughly covered in contemporary legal and political literature. The word ‘crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic ‘governance.’<sup>9</sup> Similarly, in the context of the EU, ‘we live in the age of accountability, wherever one looks there is a discussion and debate over accountability.’<sup>10</sup> But nevertheless, there is no consensus as regards the core meaning of accountability *per se*. In fact, there seems to be as many definitions of

---

<sup>6</sup> M. Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’, (2009) 15 *European Law Journal*, 599-615.

<sup>7</sup> D. Geradin, ‘The Development of European Regulatory Agencies: Lessons from the American Experience’, in D. Geradin *et al* (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar, 2005), at 231.

<sup>8</sup> M. Busuioc, *op.cit. supra* note 1.

<sup>9</sup> R. Mulgan, ‘“Accountability”’: An Ever-Expanding Concept?’, (2000) 78 *Public Administration* 555-573, at 555

<sup>10</sup> E. Fisher, ‘The EU in the Age of Accountability’, (2004) 24 *Oxford Journal of Legal Studies*, 495-515, at 495.

accountability as there are scholars.<sup>11</sup> There is consensus, however, relating to the functioning of accountability as a ‘... mechanism that makes powerful institutions responsive to their particular publics’.<sup>12</sup> Indeed, accountability is meant to keep a democratic check upon actions of those exercising public power to ensure that the preferences of the voters are translated into policy. It also safeguards that the terms on which political power is authorised are duly observed while ensuring that decision-makers do not enjoy unlimited autonomy but have to explain and justify their decisions.<sup>13</sup> There is, therefore, ‘an unquestionable thirst for accountability that cuts across the political spectrum’.<sup>14</sup> Where public policy does not correspond to the ultimate preferences of the people or in cases of wrongdoings and maladministration accountability mechanisms come into effect. In consequence, we can describe this as the core meaning of accountability which relates in its fundamental sense to the fact that there is a strong need for the public to know how public money is spent and to receive assurances that it has been well spent. Finally, accountability’s alter ego, transparency, ensures and requires accessibility of all the relevant information by taking decisions out of the backroom.<sup>15</sup> Doing so, freedom of information and access to documents rules constitute a pre-requisite of the accountability relationship.

Additionally, it is also necessary to differentiate the notion of accountability from that of control. The latter can be understood as a ‘periodic checking and examination of the activities of public officials by external actors possessed of formal or constitutional authority to investigate, to grant *quietus* or to censure, and in some cases even to punish’.<sup>16</sup> Accountability, however, mainly has to do with wrongdoings that happened in the past as well as by preventing failures from happening again. On the contrary, ongoing control mechanisms may, on the surface, increase accountability of the actor, as already explained above, at the expense of sacrificing the agent’s independence since the choices of the actor are replaced by those of the forum. Replacing the choices of the actor is nevertheless self-defeating since the very purpose of the agent presupposes the exercise of autonomous decision-making powers that remain free from any external pressure. Constitutionally the role of the accountability forum is to constrain the actor by securing that the limits of delegation are respected at all times as well as to ensure, in any case, that the choices of the delegatee are not replaced by those of the forum.

Legal autonomy is also required by the founding measures of secondary legislation establishing agencies. Most of the regulations provide clearly that the execution of the agent’s duties must be independent from any political considerations and free from any external influence.<sup>17</sup> However, empirical research carried out during 2007

---

<sup>11</sup> G. Brandsma, ‘Accountability Deficits in European “Comitology” Decision-Making’, (2007) 11 *European Integration Online Papers*, at 2.

<sup>12</sup> R. Mulgan, *Holding Power to Account, Accountability in Modern Democracies*, (Palgrave Macmillan, 2003) at 8.

<sup>13</sup> C. Lord, *Democracy in the European Union* (UACES, 1998).

<sup>14</sup> M. Moore and M. Gates, *Inspectors-General: Junkyard Dogs or Man’s Best Friend?* (Russell Sage Foundation, 1986) at 1.

<sup>15</sup> E. Fisher, *op.cit. supra* note 10, at 503.

<sup>16</sup> C. Lord, ‘The Hidden Public Sector: The “Quangocratization” of the world’, in G. Kaufmann, G. Majone and V. Ostrom (eds), *Guidance, Control and Evaluation in the Public Sector* (de Gruyter, 1986), at 766.

<sup>17</sup> See Regulation 1095/2010, O.J. (2010) L 331/84

indicates that at least some of the EU agencies are not independent in practice. The research findings revealed that the Commission can restrict the formal autonomy granted to EU agencies by exercising on-going controls which in most of the cases relate to threatening not to fund some of the agency's proposed projects from the EU's general budget (as distinct from the agency's own budget).<sup>18</sup> Consequently, in practice and behind the scene, the accountability forum although in principle entrusted to secure the limits of delegation, pragmatically is exercising *contra legem* control powers at the cost of reducing the agent's independence.

What follows from this discussion is the threefold requirements of accountability. Firstly, accountability requires the existence of an external relationship amongst at least two different bodies, in the sense that the accountability holder can scrutinize the accountability holdee, who may then suffer the consequences where appropriate. Secondly, the overall process presupposes the existence of interaction and the exchange of information between the accountability holder and the holdee. Throughout this process, the accountability holder is entrusted with the task of questioning the accountability holdee. In consequence, we consider that the accountability mechanism can only operate when there is sufficient and accurate information available in order for the assessment exercise to take place. Thirdly, the holdee is required to explain as well as to 'undertake to put matters right if it should appear that errors have been made. In other words, [accountability] is explanatory and amendatory.'<sup>19</sup>

Overall, in its fundamental sense accountability means being answerable to some form of an authority and, if necessary, having to suffer sanctions for actions adopted not in accordance with the mandate granted by that authority. In other words, 'A is accountable to B when A is obliged to inform B about A's (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct'.<sup>20</sup> In concrete terms, this form of accountability can be said to break down into four major elements: the setting of standards, the obtaining of an account, the judging of such an account and a decision about the consequences that arise from such a judgment.<sup>21</sup> As a result, the conditions of delegation need to be set out from the beginning so that accountability does not affect the agent's independence.

In order to appreciate the problem of accountability in the field of delegation of tasks to non-majoritarian agencies we need to consider no more than the core meaning of accountability. As already explained above, accountability requires that the powers of rule-making organizations are connected with a democratically elected parliament as 'appointed bodies enjoying a degree of independence from elected politicians are viewed as democratically suspicious at best and, at worst, democratically illegitimate'.<sup>22</sup> Yet, the development of effective accountability mechanisms that

---

<sup>18</sup> M. Busuioc, *op.cit. supra* note 6.

<sup>19</sup> D. Oliver, *Government in the United Kingdom: The search for Accountability, Effectiveness, and Citizenship*, (Oxford University Press, 1991), at 24.

<sup>20</sup> A. Schedler, 'Conceptualizing Accountability', in A. Schedler, *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers, 1997), at 17.

<sup>21</sup> A. Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press, 2001).

<sup>22</sup> M. Flinders, 'Distributed public governance in the European Union', (2004) 11 *Journal of European Public Policy* 520-544, at 534; See Everson *et al*, *op.cit. supra* note 1.

restrain the unlimited exercise of broad discretionary tasks should mitigate, in principle, legal objections against the proliferation of agencies.

### 3. Mushrooming of EU agencies

EU decentralized agencies<sup>23</sup> are defined as 'independent bodies, entrusted by the European [Union] institutions with one or several tasks which they undertake under their own responsibility'.<sup>24</sup> The Community (as it was then) established the first generation of agencies in the mid-1970s. Most agencies were, however, created in the early 1990s, and their number almost doubled in the early 2000s.<sup>25</sup> Agencies' functions vary from the collection of information and delivery of opinions and recommendations, to the carrying out of inspections and investigations. More importantly, in some cases agencies are granted decision-making powers. Agencies possessing this latter function have the power to adopt binding decisions which may have adverse effects on individuals, regulators and Member States.<sup>26</sup> These agencies are usually referred to, mostly by the Commission, as decentralized agencies and are considered to be highly specialized, autonomous and independent.<sup>27</sup> It would be misleading to argue that the technique of delegating tasks to agencies is something entirely new.<sup>28</sup> What is new, however, is their massive expansion.

The main EU institutions from their inception, in particular the Commission and the Council, have extensively used the opportunity of delegation to external committees in order to carry out specific tasks, usually requiring highly specialised knowledge and/or scientific expertise.<sup>29</sup> From the very beginning (1960), the Council, the only legislator at the time, lacked extensive, detailed knowledge and the technical and scientific expertise required for the implementation of highly complicated legislative measures. It was also not possible for the Council to agree quickly and efficiently on all the technical requirements needed for every single piece of legislation due to

---

<sup>23</sup> See section below about the content of the Common Approach.

<sup>24</sup> Rambøll Management, Euréval, and Matrix (2009) 'Evaluation of the EU decentralized agencies in 2009 Final Report'; Volume I; Volume II; Volume III; Volume IV, at 1.

<sup>25</sup> For an updated list of the agencies established and active at the EU level see:

<http://europa.eu/about-eu/agencies/>

<sup>26</sup> The EU financial agencies, the Office of Harmonisation in the Internal Market (OHIM) and the European Aviation Safety Agency (EASA), among other agencies, have the powers to adopt legally binding decisions. See also D. Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (Oxford University Press, 2009).

<sup>27</sup> R. Van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance', in D. Curtin *et al*, *Good Governance and the European Union. Reflections on Concepts, Institutions and Substance*, (Intersentia, 2005); G. Majone, 'Functional Interests: European Agencies', in Peterson *et al.*, *The Institutions of the European Union*, (Oxford University Press, 2002); M. Everson *et al*, 'The Role of Specialized Agencies in Decentralizing EU Governance', Report to the Commission (1999).

<sup>28</sup> P. Craig, *EU Administrative Law* (Oxford University Press, 2012).

<sup>29</sup> X. Yataganas, 'Delegation of regulatory authority in the European Union: The relevance of the American model of independent agencies', Jean Monnet Working Paper 3/01, available at <https://infoeuropa.eu/rocid.pt/files/database/000036001-000037000/000036463.pdf> (last accessed on 17 Nov. 2015). For a more recent discussion about the accountability for delegated and implementing acts post Lisbon see S. Peers and M. Costa 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon', (2012) 18 *European Law Journal* 427-460.

workload limitations.<sup>30</sup> Delegation of the non-essential elements of legislation to the Commission was seen as a solution to mitigate these problems. However, delegation by the principal (in this case, the Council) to the agent (in this case, the Commission) can only be said to be desirable as long as the principal retains control powers to monitor how the agent is carrying out its delegated tasks. Loss of power by the Council is a sufficient reason to consider delegation as undesirable.<sup>31</sup> The leading cases on this point are the old *Meroni* case, and now (since January 2014) the *ESMA* judgment.<sup>32</sup>

The Council (by definition an intergovernmental institution) feared that delegation would see the supranational Commission acting contrary to the interests of the Member States when exercising its implementing powers. The Council therefore wished to exercise effective control over the Commission to limit, as far as possible, the Commission's discretionary powers and to ensure that the implementing measures reflected the opinions of the Member States.<sup>33</sup> It was the consideration of the Member States' interests that led to the birth of the pre Lisbon comitology committees.

Equally, agencies' development aimed to reduce some of the Council's and the Commission's administrative tasks, allowing them to concentrate on their major strategic policies. With more than thirty decentralized agencies established at the time of writing, it is clear that '[t]he creation of European agencies is one of the most remarkable institutional developments at the EU level in recent years'.<sup>34</sup> For a long time, there was no explicit mention in the EC/EU Treaties of decentralized agencies in general. The lack of a constitutional legal basis, which would have subjected agencies to a number of guarantees, increased the criticism about agencies' accountability,<sup>35</sup> but did not prevent their mushrooming. Article 308 EC Treaty,<sup>36</sup> post-Lisbon Article 352 TFEU, was initially frequently used as a basis for the establishment of agencies. However, the recent tendency is to use a more specific provision.<sup>37</sup>

---

<sup>30</sup> F. Bergström, *Delegation of Powers in the European Union and the Committee System* (Oxford University Press, 2005).

<sup>31</sup> A. Türk, 'Transparency and Comitology', in C. Demmke and C. Engel, *Continuity and Change in the European Integration Process* (European Institute of Public Administration, 2003), 175.

<sup>32</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v. High Authority* [1958] ECR 133; *United Kingdom v. Council & Parliament*, cited *supra* note 4.

<sup>33</sup> C. Harlow, *Accountability in the European Union* (Oxford University Press, 2002).

<sup>34</sup> M. Busuioc, 'Accountability, Control and Independence: The Case of European Agencies', (2009) 15 *European Law Journal* 599-615, at 600.

<sup>35</sup> Curtin, *op.cit. supra* note 26.

<sup>36</sup> Agencies established under Article 308 EC Treaty: CEDEFOP, EUROFOUND, OHIM, CPVO, EMEA, EU-OSHA, EMCDDA, EFT, CdT, EAR, GSA, FRA.

<sup>37</sup> See case C-217/04, *United Kingdom v. European Parliament and Council*, [2006] ECR I-3771 with the UK government arguing that only Art 308 was an appropriate legal basis for the creation of ENISA. The Court, however, ruled that ex Article 95 was the appropriate legal basis for the establishment of ENISA because the main objective of the agency was the completion of the internal market as an area without any internal frontiers in the field of information technology. Even where agencies were initially founded on the basis of Art 352 TFEU (as it now is), more specific legal bases were often used for later amendments to the legislation constituting those bodies.



The Treaty of Lisbon remedied this deficit by integrating agencies into the Treaties and replaced references to ‘institutions (and/or bodies)’ with references to ‘institutions, bodies, offices or agencies’. Notably, Article 15 TFEU on the right of access to documents and Article 228 TFEU on the right to file complaints to the European Ombudsman explicitly apply to EU agencies. Pursuant to Articles 263 and 267 TFEU and to Article 51 of the Charter of Fundamental rights the Court of Justice has jurisdiction to review the legality of acts adopted by agencies.

The extent to which agencies are empowered to adopt binding decisions raises significant questions regarding agencies’ compliance with the fundamental principle of subsidiarity,<sup>38</sup> particularly whether the same level of optimal regulation through the adoption of national standards could be better achieved at the domestic level. If so, regulation at the supranational level is not justified. In the case of the EU’s recently created financial agencies, in light of the current financial crisis it is very hard to imagine a scenario with cross-border implications threatening the stability of the whole or part of the euro system which could be better resolved through the adoption of national standards. This means that, again, the necessity of having these agencies cannot be neglected: agencies may lead to better efficiency; they carry out highly complicated tasks requiring knowledge and scientific expertise all of which results to better allocation of resources.<sup>39</sup> In any case, the delegation of powers should not distort the accountability framework as defined by the Court in the *Meroni*<sup>40</sup> and *ESMA*<sup>41</sup> judgments. The CJEU ruled that delegation to autonomous bodies of wide discretionary powers presupposes the exercise of public power and cannot be accepted. Agencies’ decision-making process should be limited to the drafting of technical standards and not relate to the balancing of broad discretionary tasks or relate to the exercise of a wide margin of appreciation which can disturb the institutional balance provided by the Treaty framework. If that happens then delegation ‘...replaces the choices of the delegator by the choices of the delegate, [and] brings about an actual transfer of responsibility’.<sup>42</sup>

#### 4. Assessment of Accountability and Independence

In the context of the EU, the need for accountability and independence in the field of agencies is augmented by the ‘democratic deficit’ which some have argued exists within the EU at various levels.<sup>43</sup> Members of the EU institutions, offices, bodies and agencies - with the notable exception of the EP - are not elected directly by the people and can be removed from their positions only in the most extreme circumstances. While accountability within the EU context is often characterised as a principle for an era of innovative governance, a common statement by many commentators is that, not only is the EU not accountable enough but that

---

<sup>38</sup> Craig, *op.cit. supra* note 28.

<sup>39</sup> G. Majone, ‘The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union’, (1997) 3 *EIPASCOPE*, 1-6.

<sup>40</sup> *Meroni*, cited *supra* note 32.

<sup>41</sup> *United Kingdom v. Council & Parliament*, cited *supra* note 4.

<sup>42</sup> *Meroni*, cited *supra* note 32, para. 152.

<sup>43</sup> G. Brandsma, *op.cit. supra* note 11; C. Neuhold, ‘Taming the “Trojan Horse” of Comitology? Accountability issues of Comitology and the Role of the European Parliament’, (2008) 12 *European Integration Online Papers*; G. Brandsma, D. Curtin and A. Meijer, ‘How Transparent are EU “Comitology” Committees in Practice?’, (2008) 14 *European Law Journal* 819-838.

accountability deficits are even growing, compromising the legitimacy of the EU.<sup>44</sup> The proliferation of EU agencies in diverse fields raised, unsurprisingly, significant questions about the overall accountability of the EU. The apparent concerns highlighted the pressing need for the development of mechanisms to secure agencies' accountability in the sense that 'no one controls [agencies], yet [they are] under control'.<sup>45</sup> Nevertheless, agencies have been heavily criticized in the literature as 'uncontrollable centres of arbitrary power'.<sup>46</sup>

From a legal point of view, agencies are separate entities distinct from the EU institutions, with their own legal personalities. As already explained above, agencies' independence requires carrying out related tasks efficiently while simultaneously remaining autonomous.<sup>47</sup> In consequence, the EU institutions need to exercise sufficient control over agencies but '...cannot give instructions to agencies or oblige them to withdraw certain decisions. Quite the contrary, they are given considerable legal, budgetary and operational autonomy. Precisely because of this autonomy, agencies must be held responsible directly for their actions...'.<sup>48</sup> Agencies are therefore expected to perform their tasks independently from their political masters, something which safeguards their policies and grants them a degree of immunity against external pressure.<sup>49</sup> In the words of the Commission, '[t]he main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations'.<sup>50</sup>

Giandomenico Majone, a strong supporter of EU agencies, argued that delegation to independent bodies is democratically justified only in the sphere of efficiency issues where reliance on expertise is clearly more important than direct political accountability.<sup>51</sup> Majone also argues that the Commission only needs to identify the relevant areas in which further regulation is needed and leave the details on how technical decentralized issues are implemented to agencies.<sup>52</sup> Notably, these findings fit uneasily with the *Meroni* and also the recent *ESMA* line of reasoning. The conferment of extensive discretionary power reconciling competing public interests cannot, in any case, be justified on the basis of scientific expertise. In the wording of

---

<sup>44</sup> M. Bovens, D. Curtin and P. Hart, *The Real World of EU Accountability, What Deficit?* (Oxford University Press, 2010); A. Arnall, 'Introduction: The EU's Accountability and Legitimacy Deficit', in A. Arnall and D. Wincott, *Accountability and Legitimacy in the EU* (Oxford University Press, 2002).

<sup>45</sup> T. Moe, 'Interests, Institutions and Positive Theory: The Politics of NLBM', (1987) 2 *Studies in American Development* 236-299, at 291.

<sup>46</sup> M. Everson, op. cit. *supra* note 1, at 190.

<sup>47</sup> European Commission, 'Communication from the Commission. The Operating Framework for European Decentralized Agencies', COM (2002) 718 final.

<sup>48</sup> M. Szapiro, 'The Framework for European Regulatory Agencies: A Balance between Accountability and Autonomy', 3rd ECPR Conference, Budapest 8-11 September 2005.

<sup>49</sup> D. Gerardin and N. Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform', New York University School of Law, New York, Jean Monnet Working Paper 1/04, (2004), 36-37 (last accessed on 17 Nov. 2015, <http://www.jeanmonnetprogram.org/papers/04/040101.pdf>); Van Ooik, op. cit. *supra* note 27; Majone, op. cit. *supra* note 27.

<sup>50</sup> European Commission, op. cit. *supra* note 47.

<sup>51</sup> G. Majone, 'The new European Agencies: regulation by information', (1997) 4 *Journal of European Public Policy* 262-275.

<sup>52</sup> Majone, op. cit. *supra* note 51.

the judiciary '[s]cientific legitimacy is not a sufficient basis for the exercise of public authority'.<sup>53</sup> Delegation of tasks to agencies presupposes the existence of appropriate control mechanisms circumscribing agencies' actions to a number of procedural and substantive constraints.

#### 4.1. Assessment of the new governance regime

In 2005, the Commission proposed an inter-institutional agreement on the governance of decentralized agencies.<sup>54</sup> The negotiations between the Commission, the Council and the EP on this proposal did not come to fruition and in 2008 the Commission withdrew it. However, after three years of negotiations, these three institutions eventually agreed upon the adoption of a 'Common Approach' on EU agencies, attached to a Joint Statement of the Commission, the EP and the Council adopted in July 2012.<sup>55</sup> This Common Approach does not apply to CFSP agencies or to Commission agencies with no decision-making powers.

The Joint Statement acknowledges that the Common Approach is not binding, but states that the institutions 'will take the Common Approach into account' as regards all future discussions on decentralized agencies, 'following a case-by-case analysis'. In order to implement the Common Approach, the Commission was asked to present a roadmap by the end of 2012, and inform the EP and the Council regularly on the implementation of this roadmap, first of all at the end of 2013. This follow-up process is discussed further below.

##### 4.1.1. Content of the Common Approach

The Common Approach sets out 66 points in five sections, addressing in turn: the role and position of agencies in the institutional landscape (section I, points 1 to 9); the structure and governance of agencies (section II, points 10 to 22); the operation of agencies (section III, points 23 to 26); the programming of activities and resources (section IV, points 27 to 44); and agencies' accountability, control and transparency (section V, points 45 to 66). The following summary focusses on the issues which are the most relevant for the topics of this paper.

First, as for the structure and governance of agencies (section II of the common approach), the Common Approach provides for a standard composition for agencies' Management Boards (point 10), which are a significant means of ensuring the agencies' accountability. They should have one representative from each Member State, two representatives from the Commission, one representative from the EP and a 'fairly limited' number of representatives from stakeholders. But the provisions on representatives from the EP and Commission are 'without prejudice' to existing rules, and the provisions on the EP and stakeholders apply 'where appropriate'. Board members should be appointed for renewable periods of four years, and all parties should try to limit their turnover, in order to enhance agencies' efficiency.

---

<sup>53</sup> Case T-13/99 *Pfizer Animal Health SA v. Council of the European Union* [2002] ECR II-3305.

<sup>54</sup> Draft Interinstitutional Agreement, COM (2005) 59 final.

<sup>55</sup>[http://europa.eu/agencies/documents/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf)<[http://europa.eu/agencies/documents/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf)> (last visited 17. Nov. 2015).

Appointments should be made in light of the board members' knowledge of agencies' core business, taking into account their management, administrative and budgetary skills. Where their efficiency would be enhanced, agencies should have a two-tier management structure, with the Management Board limited to providing 'general orientations' for the agency's activities and a 'small-sized Executive Board', with a Commission representative present, more closely involved in supervising the agency's activities.

The Directors of agencies should be responsible for administrative management and implementation of the agencies' duties, 'in particular' as regards implementation of work programmes and budget and staffing decisions (point 14). They are accountable 'first and foremost' to Management Boards, to whom they submit annual reports, as well as to the EP and Council via the annual discharge procedure. Each Director should be appointed by the Management Board on the basis of a shortlist drawn up by the Commission (point 16). The shortlist should be drawn up following a 'transparent selection procedure that guarantees a rigorous evaluation of candidates and a high level of independence', but there can be exceptions to this procedure 'if justified in specific cases'. There should be a procedure, mirroring the appointment procedure, for dismissal of a Director 'in the event of misconduct, unsatisfactory performance or recurring/serious irregularities' (point 19). The Common Approach does not establish standard terms of office for Directors, but rather refers to the acts founding the agencies on this point. A Director's term may be extended once, if the Director has performed well (point 17).

Agencies' scientific committees should improve their functioning (point 20), in particular as regards the independence of experts and the selection criteria for them. The same applies to the selection of Boards of Appeal, and there should be 'great care' appointing an agency's staff to such boards (point 21).

As for the accountability of the agencies' activities, the provisions on the programming of activities and resources (section IV) require that agencies draw up annual work programmes (point 27) and multi-annual programmes (point 28).<sup>56</sup> The Commission should be consulted and issue advice on both documents, while the EP should be consulted on the multi-annual programmes, provided that its opinion is not binding; the practice of agency Directors presenting the annual programme to the EP should continue (point 29).

Finally, the points on agencies' accountability, control and transparency (section V) start with rules on reporting. Reporting requirements should be streamlined, with only one annual report in principle (point 46). Each annual report should describe the implementation of the work programme, along with detailed information on staff and budget issues (point 47). Moreover, to aid comparison, the annual reports from the agencies should have a common structure, based on a template to be drawn up by the Commission (point 48). There should also be common rules on the process of drawing these reports up (point 49). The Common Approach then sets out detailed rules on auditing and discharge of the budget (points 50-58).

---

<sup>56</sup> For more on multi-annual programmes, see points 30 to 32 of the Common Approach.

According to point 59 of the Common Approach, there should be an ‘alert/warning system’, which the Commission can use if it has ‘serious reasons for concern that an agency’s Management Board is about to take decisions which may not comply with the mandate of the agency, may violate EU law or be in manifest contradiction with EU policy objectives’. In that case, the Commission may request the Management Board of that agency not to take the relevant decision. If the board does not suspend the decision, the Commission will inform the EP and the Council with the intention of reacting quickly. The Common Approach does not spell out what form this reaction would take, or refer to judicial review in this context. These provisions obviously aim to strike a delicate balance between accountability and independence, providing for control by one of the EU’s political institutions in highly limited cases.

To ensure long-term accountability, overall evaluations of agencies should take place five years after they begin operations, and every five years thereafter. The sunset/review clause should apply on the occasion of every other overall evaluation, and the idea of a common template for evaluations should be explored (point 60). There should be evaluations in advance of major agency programmes and activities, and ex-post evaluations of all such programmes and activities (point 61). To implement the conclusions of these evaluations, each agency should prepare a roadmap with an action plan, and report bi-annually on its implementation to the Commission (point 62).

On the issue of transparency, the Common Approach states simply that agencies’ websites should be as multilingual as possible (point 63). Relations with stakeholders should be clarified, and stakeholders should have a role either on the agency’s Management Board, or in the agency’s internal bodies or advisory/working groups (point 64).

To follow up the Common Approach, the Commission first of all produced a ‘road map’ at the end of 2012, which mainly reiterated the main content of the institutions’ agreement.<sup>57</sup> The Commission committed itself to propose amendments to the legislation establishing agencies which reflected the agreement – but only in the event that it was proposing a broader set of amendments to that legislation.

Subsequently, the Commission reported on the implementation of the Common Approach at the end of 2013.<sup>58</sup> The report indicated (*inter alia*) that: there would soon be common rules on consolidated reporting on budgets and work programmes; the ‘alert-warning’ system had not yet been used; and the Commission had proposed amendments to seven agencies’ founding legislation, taking account of the Common Approach.<sup>59</sup>

---

<sup>57</sup> [http://europa.eu/agencies/documents/2012-12-18\\_roadmap\\_on\\_the\\_follow\\_up\\_to\\_the\\_common\\_approach\\_on\\_eu\\_decentralised\\_agencies\\_en.pdf](http://europa.eu/agencies/documents/2012-12-18_roadmap_on_the_follow_up_to_the_common_approach_on_eu_decentralised_agencies_en.pdf) (last visited 14 Nov. 2015).

<sup>58</sup> [http://europa.eu/agencies/documents/2013-12-10\\_progress\\_report\\_on\\_the\\_implementation\\_of\\_the\\_common\\_approach\\_en.pdf](http://europa.eu/agencies/documents/2013-12-10_progress_report_on_the_implementation_of_the_common_approach_en.pdf) (last visited 15 Nov. 2015).

<sup>59</sup> The agencies concerned were: CEPOL, EASA, ERA, EUROJUST, EUROPOL, GSA and OHIM.

However, the Council's and EP's positions on those amendments do not necessarily reflect the Common Approach. A good example of this is the negotiation of new legislation governing Europol, the EU's police intelligence agency.<sup>60</sup> Many of the proposed amendments reflect agreements in the Common Approach, but one or both of the Council and the EP reject them nevertheless. For instance, as regards Europol's management board, the Commission proposed (in accordance with the Common Approach) that it have two representatives, alongside one from each Member State. However, both the EP and Council want to cut this back to one representative (as at present). Moreover, the EP (based on the Common Approach) proposes to let an observer from its Joint Parliamentary Scrutiny Group (see below) attend meetings of the Management Board. Both the EP and the Council want to drop the proposed clause (based on the Common Approach) which would require Member States to limit turnover in the Board, even though this provision obviously aims to guarantee the independence of the agency.

Next, the Council and Commission agree that (in accordance with the Common Approach) members of the Management Board should have standard terms of four years. However, the EP wants their term of office to be set by each Member State, again possibly limiting their independence.

Furthermore, the Council wants the chair of the Management Board to come (as at present) from one of the three Member States which is jointly holding the Council Presidency, whereas the Commission and the EP reject this. The link to the Council would give the impression that independence could be compromised. Finally, to increase accountability, the EP wants all members of the Management Board to sign a declaration of interests, for such declarations to be published, and for the Commission to have the power to object to draft Management Board decisions on fundamental legal or policy grounds. These proposals are based on the Common Approach.

Also, the Council wants to retain its current powers to appoint Europol's Executive Director and the Deputy Executive Directors, instead of shifting this power to the Management Board as the Commission proposes, to ensure their independence in accordance with the Common Approach on agencies (the EP agrees with the Commission). But the Council does not want to share this power with the EP.

As for parliamentary accountability, currently, the EP can receive reports on Europol, plays a role as regards the budget, is consulted upon implementing measures and can hold hearings with the Director. Due to concerns about ensuring more effective parliamentary accountability for Europol's actions, the Commission proposed a number of reforms, in particular sending the EP and national parliaments more reports, and involving the EP more in the process of choosing the (Executive) Director.

In response, the Council insists upon separate references to the EP and national parliaments. It would also delete many of the proposed powers for the EP, in

---

<sup>60</sup> COM (2013) 173, 27 Mar. 2013. See also the blog post on the 'EU Law Analysis' blog, 18 Jun. 2014, 'The Reform of Europol: Modern EU agency or intergovernmental dinosaur?'.

particular dropping the proposed obligation for the Executive Director to report to the EP and the obligation for the candidate to be Executive Director to make a statement before the EP.

Conversely, the EP would enhance the parliamentary role in the Regulation, in particular by creating a Joint Parliamentary Scrutiny Group, which would comprise members of both the EP and national parliaments. In its view, references to the EP in the proposal should be replaced by references to this group. There would also be greater powers for the Joint Parliamentary Scrutiny Group as regards the process of appointing the Executive Director.

Overall, in some respects the Council position seeks to go backwards, by eliminating any role for the EP questioning the Executive Director. This flies in the face of the specific reference to parliamentary accountability in the Treaties as regards Europol (see Article 88 TFEU), given the obvious importance that parliamentary questioning of an agency director can play in ensuring that body's accountability.

The Council's attempts to defend the status quo can also be seen in its approach to the appointment of the (Executive) Director and the composition and chairing of the Management Board. The more modern approach of the EP as regards declarations of interests and scrutiny by the Commission should be preferred. Furthermore, accountability surely demands a single parliamentary observer on the Management Board, given that 28 Member States will each have a voting member to advocate their interests.

It is striking that three years after agreeing standard rules on EU agencies, in a bid to forestall future conflicts and difficult negotiations, all three political institutions have taken a 'pick and mix' approach to the Common Approach, each selecting certain points that they like from these common principles and rejecting those which they dislike.

## 5. The judicial dimension: accountability of the EU's financial agencies

Has the latest contribution of the Court of Justice as regards the accountability of EU agencies been more successful than the political institutions' initiative at enhancing that accountability?

In 2010 we witnessed the establishment of three European Supervisory Authorities (ESAs): the European Banking Authority; the European Insurance and Occupational Pensions Authority; and the European Securities and Markets Authority (ESMA). They were set up by the Union to exercise highly independent but purely technocratic decision-making powers. In particular, the ESAs were established to increase and centralize financial supervision at the EU level. The CJEU was asked to rule on the validity of more recent legislation empowering ESMA to adopt legally binding measures upon financial institutions of the Member States in the event of a threat to the proper functioning of the financial market or to the stability of the

financial system of the EU.<sup>61</sup> More precisely, the UK requested the annulment of Article 28 of Regulation 236/2012, which confers power upon ESMA power to ban 'short selling', a practice which permits the sale of shares not owned by the vendor at the time of sale with the view of benefiting from a fall in the share price.

ESMA can draft highly detailed technical and implementing standards which are later on adopted by the Commission under Article 290 and 291 TFEU (which concern, respectively, the adoption of delegated and implementing acts). In relation to Article 290 TFEU, the Commission sets out the conditions and specifies the criteria under which the agency can adopt further decentralized measures of a technical nature, but the drafting of the technical measure always comes from the agency. A very important issue here, from the accountability perspective, is whether the Commission has the sources, technical knowledge and scientific expertise required to control the appropriateness of the measures drafted by the agency. Regulation 1095/2010 established the ESMA to rectify the significant shortcomings as regards financial regulation exposed by the financial crisis. In particular, pursuant to Article 10 and 15 of Regulation 1095/2012, if the Commission decides not to adopt the measures drafted by ESMA then it is required to send them back to the Agency and explain why it has decided not to endorse them. Interestingly enough and in order to secure the independence of the financial authorities there are extreme limitations imposed upon the Commission in this context: the preamble to Regulation 1095/2010 provides that the Commission can depart from the draft measures prepared by the agency only if they are incompatible with EU law, violate the principle of proportionality or contradict the EU's financial services legislation. This can be compared with the subsequent Common Approach, where these principles govern the Commission's control of the agency; here they effectively govern the *agency's* control of the *Commission*, imposing the technical expertise of the former in place of the political discretion of the latter as the normal rule creating a significant accountability gap with long-lasting constitutional consequences. Overall, the depressing reality of the accountability mechanism set in place in relation to the ESAs is that it fails to address the challenge of identifying (any) balance between independence and accountability. But nevertheless, at least the current framework secures (rightly), in accordance with our proposed theorized framework as set out in section 2, a significant number of independent powers for agencies.

The legislation being challenged by the UK was adopted on the basis of Article 114 TFEU which allows for the enactment of harmonization measures necessary for the establishment and the functioning of the internal market. The rationale for the adoption of the Regulation and in particular Article 28 is for the ESMA to interfere and issue binding measures against the financial institutions of the Member States to prohibit short selling in the event of a threat to the proper functioning and integrity of financial markets or to the stability of the whole or part of the EU's financial system. The ESMA has wide discretionary power to issue such bans, and it is the only adjudicator of whether such a threat exists.

---

<sup>61</sup> *United Kingdom v. Council & Parliament*, cited *supra* note 4. See also 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* 219-242.



The UK raised four arguments. First of all, it argued that ESMA is given political powers which entail policy choices to adopt legally binding measures *vis-a-vis* the financial institutions of the Member States. These powers do not fit well with the old *Meroni* line of case law which states that delegation to autonomous bodies is considered to be acceptable as long as Commission retains control powers to monitor how the agency is carrying out its tasks. According to the *Meroni* line of reasoning, the conferment of broad discretionary power, reconciling competing public interests, to an EU agency cannot be justified on the basis of scientific expertise. However, in the ESMA judgment, the Court of Justice ruled that the parent EU legislation, and the delegated and implementing acts adopted pursuant to that legislation by the Commission, sufficiently circumscribed ESMA's powers.

Secondly, the UK argued that the power for ESMA to ban short-selling breached the principle in *Romano*<sup>62</sup> that the EU legislature could not delegate the power to adopt 'quasi-legislative measures of general application'. However, the Court ruled that *Romano* did not add anything to *Meroni*, noting in particular that the Treaty provides for agencies to adopt measures of general application.

Thirdly, the UK argued that Articles 290 and 291 TFEU were in effect exclusive, ruling out *a contrario* the delegation of powers like the short-selling ban to EU agencies and fourthly that Article 114 TFEU is not the correct legal basis. In the Court's view, the Treaty (in particular, the rules on judicial review) presupposed that agencies could adopt binding acts, and the provision allowing ESMA to ban short selling had to be seen in its overall legal context.

What is the impact of the ruling on accountability? The Court's ruling gives significant emphasis to judicial accountability, for instance, the fact that the measures adopted by the EU financial agencies are subject to judicial review under Article 263 (4) TFEU. However, decentralized and implementing technical standards drafted by the EU financial agencies are subject to the Commission's endorsement and although they constitute the basis for the adoption of the final act by the Commission they are technically and legally preparatory documents and as such they are excluded, in principle, from judicial scrutiny. Additionally, non-privileged applicants, such as financial institutions negatively affected by any ban adopted by ESMA, would not be in a position to satisfy the EU's *locus standi* requirements.<sup>63</sup> They may be excluded from direct actions under Article 263 (4) TFEU on the basis that the ban adopted still entails separate implementing measures within the meaning of the *Telefonica* judgment.<sup>64</sup> With great respect to the judgment, since the founding Regulation of the ESMA limits the power of the Commission to proceed with the drafting of technical standards or to amend them,<sup>65</sup> the ruling secures independent technocratic powers and in effect unilaterally empowers EU financial agencies with wide political decisions which entail policy choices. More importantly, the absence of sufficient follow-up to the Common Approach means that the Agency's actions to this end are not subject to sufficient *political* accountability either. The wider implications of the

---

<sup>62</sup> Case 98/80, *Romano v. Institut National d' Assurance Maladie-Invalidité* [1981] ECR 1241.

<sup>63</sup> S. Peers and M. Costa, 'Judicial review of EU Acts after the Treaty of Lisbon', (2012) 8 *European Constitutional Law Review* 82-104.

<sup>64</sup> Case C-274/12P, *Telefónica v. Commission*, judgment of 19 Dec. 2013, ECLI:EU:C:2013:852.

<sup>65</sup> Regulation 1095/2010, O.J. (2010) L 331/84 Articles 10(1) and 15 (1).

judgment and also of the current framework establishing the agencies seem to suggest what has already pointed out in the literature that ‘in any event, it is clear that EU independent agencies are independent in the sense of being relatively free of control by any other organs of the [Union]’.<sup>66</sup> Independent powers exercised by the authorities are important, but nevertheless there is a pressing need to establish an accountability mechanism which will secure that the independent technocratic powers are executed in a way which secures accountability.

Another accountability question: will the Commission or the agency be held responsible in cases where adverse consequences occur if the assessment by the agency proves to be wrong and has further financial repercussions?<sup>67</sup> The EU citizens are now experiencing the austerity measures along with the consequences of the financial distress upon the Union’s economy and the unprecedented level of the unemployment rate. There is at least some correlation that the decline of the economic activity comes from the ESAs’ financial regulation. Similarly, according to the *ESMA* judgment additional powers could be conferred upon agencies to adopt acts of general application outside the scope of Articles 290 and 291 TFEU, which provide for the accountability of the Commission’s adoption of delegated or implementing acts to the other EU institutions or the Member States respectively. The delegated and implementing acts of the Commission which detailed ESMA’s powers to adopt the short-selling bans were themselves *drafted* by ESMA. Therefore, the constraints on ESMA’s powers were in practice drafted by it and endorsed by the Commission. This raises long-lasting questions in relation to accountability of ESMA which the Court seemed, with all due respect, to ignore.

Judicial accountability demands that EU measures are subject to judicial review as well as that the review is directed to the actual body that made the underlying substantive decision. In the wording of the judiciary: ‘as a general rule, actions must be directed against the body which enacted the contested measure, in other words, the [Union] institution, or body from which the decision emanated’.<sup>68</sup> However, this approach is highly formalist: there are agencies such as the EMEA (the EU pharmaceuticals regulation agency) and the EU’s financial agencies where the final decision is taken by the Commission but the actual decision is *de facto* taken by the agency. Similarly, the founding regulations of the agencies are based on the assumption that the Commission will have to adopt the drafts prepared by either the EMEA or the financial agencies. The GC has already identified this accountability problem and ruled that in these circumstances for judicial review to be meaningful it will essentially need to cover the opinion of the agencies since it influences greatly and it is closely related to the final measure adopted by the Commission.<sup>69</sup> This welcome judicial approach does mitigate the accountability problem in the short-term. In the long-run; however there must be a legislative solution that will

---

<sup>66</sup> M. Shapiro, ‘The Problems of Independent Agencies in the United States and the European Union’, (1997) 4 *Journal of European Public Policy* 279-291, at 289.

<sup>67</sup> On this point see M. Scholten and M. 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*, 389–405.

<sup>68</sup> Case T-411/06, *Sogelma - Società generale lavori manutenzioni appalti Srl v. European Agency for Reconstruction (AER)*, [2008] ECR II-2771, para. 49.

correspond to the political reality of the highly influential decision-making exercised by the agencies.

The Court's ruling in *ESMA* is important given that it is the first case which deals with the powers of the newly created financial supervisory authorities. The judgment secures the independence of the authorities and empowers them with unprecedented autonomous powers in order to rectify the exposed shortcomings of the EU's financial regulation. Further, the Court imposes no limitations whatsoever, on the wide discretionary powers granted upon the financial authorities by the legislature in order to be able to foresee and secure financial stability in the EU. Therefore, there are certain constitutional questions that need to be answered: who are these highly independent autonomous bodies answerable to? Independent scientific legitimacy and complex decision-making in the area of EU's financial regulation can lead to short-term solutions but raises greatest constitutional concerns over their appropriateness and legitimacy of those rulings to the EU's constitutional setting. Independent technocratic decision-making cannot be a legitimate justification for increasing the powers of the EU's financial agencies, something which can only be accepted if there are control powers vested in the main EU institutions for securing the accountability of these EU agencies. In this regard, it was already emphasized that 'European law is a victim of the crisis' since the mushrooming of various independent bodies and the way the Court corresponded to this provide strong evidence that technocratic decision-making is the latest judicial justification as regards to the expansion of powers to bodies not mentioned in the Treaties.<sup>70</sup> On the whole, with all due respect, the Court's judgment contributes little to remedy the lack of accountability of EU agencies.

## 6. Conclusion

Independent decentralized agencies have increasingly contributed to the EU regulatory area by playing a central role in the whole integration process. In doing so, they provided the internal market with appropriate credibility, supervision and scientific expertise. . At the same time, scientific legitimacy cannot constitute a basis for the exercise of public authority. Delegation of tasks entailing the exercise of wide discretionary powers would indeed breach the institutional balance provided by the Treaties. The Treaty of Lisbon attempted to rectify some of the accountability inadequacies by formally acknowledging agencies at the Treaty level. The latest contribution of the Court cannot be underestimated either. It has provided us with a contemporary reading of *Meroni* and clarified further the tasks that can be delegated to the new generation agencies. The Court has confirmed that the EP and the Council are empowered to control the acts drafted by agencies. Nevertheless, with all due respect, the Court seems to ignore that ESMA's control powers were in fact drafted by ESMA itself, and therefore it overlooked the need to demand more intensive control to secure accountability in the field.

Finally, we have identified that agencies' regime needs to be revised with the aim to balance political neutrality (independence) with the requirements of accountability. There is a pressing constitutional requirement to secure that independent actors are

---

<sup>70</sup> M. Everson, 'An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht', (2015) 21 *European Law Journal*, 474-499.

being held accountable by their political masters. It is however very early at this stage to say with certainty that the development of the Common Approach will secure accountability in this area. The Common Approach has the potential to enhance the accountability mechanisms by requiring all the decentralized agencies function under the same rules, ensuring a consistently high standard of accountability and independence. But nevertheless, the initial indication is that the institutions lack the political will to ensure that agencies are actually reformed in accordance with the same standard rules.