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## Summary

While decentralisation and delegation of powers is not a novel phenomenon in EU Member States, an increasing trend of creating such entities and disposing them of public authority on EC and EU level can be assessed. European agencies are increasingly resorted to as an institutional answer for demands of increased efficiency, flexibility and visibility. The paper tries to investigate the “delegation issue” by identifying and differentiating the relevance of ECJ case law (*Meroni*, *Romano*) and discuss the underlying assumptions of legitimacy.

The paper shows that general constraints to transposability of the *Meroni* doctrine do not exist and that, while it is conceivable that the courts would change their reasoning, *Meroni* remains “good law”. Following the basic assumption of our first working paper (D32a) that the more “intensive” the instruments a European agency disposes of the higher the necessity to legitimize the powers conferred to it, the authors describe and ponder more generally ways of legitimizing public authority. Following *Scharpf*'s widely accepted dichotomy of input-oriented and output-oriented legitimacy, two respective attempts to legitimize European agencies shall be presented.

The authors would like to submit that the very strict limits to the delegation of powers to agencies as established by the ECJ's jurisprudence might be loosened to a certain extent without giving up their legal fundamentals. The basis for such a development would still be input-oriented legitimacy, in other words, an effort striking the balance between on the one hand side preserving the functioning of the transmission belt securing the implementation of measures which were adopted by representatives of the people, and on the other hand flexibility in the interest of efficient administration.

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## I. Introduction

As has been shown in an earlier working paper, today's democratic polities are undergoing dramatic transformations.<sup>1</sup> When important powers are being transferred to supranational and international bodies, the focus is often on the problem-solving capacity of such entities. While the causes of such transfer of authority have been described elsewhere, this Working Paper deals primarily with its consequences at EU level. Efficiency lies also at the heart of the debate on delegating such transferred powers further, be it in the framework of the so-called comitology or committee mechanism, be it by entrusting agencies with certain tasks. Our focus is on the latter. European agencies are increasingly resorted to as an institutional answer for demands of increased efficiency, flexibility and visibility.<sup>2</sup> While decentralisation and delegation of powers is not a novel phenomenon in EU Member States, an increasing trend of creating such entities and disposing them of public authority on EC and EU level can be assessed.

The quality and quantity of this phenomenon and attempts of public actors and the scientific community to catch it by describing, classifying and assessing such European agencies have been shown in an earlier working paper.<sup>3</sup> As European agencies differ not the least with respect to the legal instruments at their hand, an “instrumental typology” has been developed which seems suitable to regroup European agencies along-line common legal problems. When considering a “simple” information-gathering agency, an agency issuing binding decisions on trademarks or a general law-making agency, questions of liability, oversight, legal remedies, composition, and more generally, democratic legitimacy, play different roles and have different impacts.<sup>4</sup>

Accordingly, this working paper tries to investigate the “delegation issue” with regards to those agency types by identifying and assessing relevant ECJ case law (*Meroni, Romano*) (II).<sup>5</sup> The underlying assumptions of legitimacy shall be discussed in turn. As has been shown in *Griller/Rumler-Korinek*, the principle of democracy plays a cardinal role in the EU.<sup>6</sup> Different conceptions of legitimacy brought forward with respect to European agencies will be then be described and pondered (III.). Finally, some institutional and procedural modifications will be presented in order to optimize the agency's legitimacy (IV.)

## II. Meroni revisited

Delegation of powers was a concept not being referred to in the three original European treaties. It was argued by some that delegation of powers was prohibited, since the principle of enumerated powers, laid down in then Art 4(1) EEC, that “[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty”, also had an exclusive effect. For each of the responsibilities the Treaty conferred, the respective institution had no right to

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<sup>1</sup> Cf Griller/Rumler-Korinek, Democracy and New Modes of Governance in Europe. Some Basic Reflections, NEWGOV D 10 (2005).

<sup>2</sup> From the vast literature of the causes of Majone, *Regulating Europe* (1996).

<sup>3</sup> Cf Griller/Orator, ‘Mapping the Jungle’: A Legal Attempt to Classify European Agencies, NEWGOV D 32a (2006).

<sup>4</sup> Cf Griller/Orator, *supra* n 3, 27.

<sup>5</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133, case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité* [1981] ECR 1241.

<sup>6</sup> Cf Griller/Rumler-Korinek, *supra* n 1, 18.

delegate it to others.<sup>7</sup> The concept of institutional balance, expressing a multitude of interests, has been put forward as a further argument for the prohibition of delegation, because any conferral of authority would disturb the balance of powers.<sup>8</sup>

The silence of the treaties does not, however, suggest the prohibition of delegation of powers. Efficient use of powers must allow any institution to structure itself accordingly. Moreover, Art 211 ECT, fourth indent, stating that “the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter”, does contain a similar mechanism.<sup>9</sup> Three different situations have been identified where such a delegation of powers takes place: First, the Council leaves “implementation” of EC rules to the Member States or the Commission;<sup>10</sup> second, the EC transfers powers to an international body; and third, the EC confers authority upon European agencies.<sup>11</sup> Only the latter kind of delegation shall be investigated further, on which the European Court of Justice (ECJ) ruled on June 13<sup>th</sup>, 1958 in *Meroni v. High Authority*.<sup>12</sup> Subsequently, the continuing validity of this very early ruling of the ECJ will be assessed. Finally, the view of the Commission on the legal constraints for delegation to agencies will come under scrutiny.

## II.1. The original Meroni cases

In the 1950s, the ferrous scrap equalization bodies played an important role on the common ferrous scrap market of the European Community of Coal and Steel (ECSC).<sup>13</sup> Founded as voluntary bodies of 22 significant steel companies, they were authorized by the High Authority under Art. 53 (1) (a) ECSCT.<sup>14</sup> Keeping ferrous scrap prices low being their main task, they were administered by the “*Office commun des Consommateurs de Ferraille*” and the “*Caisse de Péréquation des Ferrailles importées*” (“Imported Ferrous Scrap Equalization Fund”), two “*sociétés coopératives*” founded to this end under Belgian private law. Since these bodies handled their tasks insufficiently, the High Authority created a special obligatory ferrous scrap equalization system for all concerned companies,<sup>15</sup> which was to be administered by the existing Brussels agencies “under the responsibility of the High Authority”.<sup>16</sup>

Soon after its installation, this equalization system became subject to legal challenges. The Italian steel company *Meroni* sought the annulment of a decision of the High Authority re-

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<sup>7</sup> Cf Lenaerts, *Regulating the Regulatory Process: Delegation of Powers in the European Community*, 18 *European Law Review*, 23; Everling, *Zur Errichtung nachgeordneter Behörden der Kommission der Europäischen Wirtschaftsgemeinschaft*, in Hallstein/Schlochauer (eds), *Zur Integration Europas. Festschrift für Carl Friedrich Ophüls aus Anlass seines siebzigsten Geburtstages* (1965), 42.

<sup>8</sup> Cf Jacqué, *Cours général de droit communautaire*, in *Collected Courses of the Academy of European Law*, Vol I Book I (1991), 289-292.

<sup>9</sup> Cf Lenaerts, *supra* n 7, 24.

<sup>10</sup> It has to be stated at the outset, that there is a major difference between the two: while leaving political choices to the Member States can be seen as limited harmonisation (but not delegation), this is different for entrusting the Commission with tasks that could and possibly should be settled by EC legislation.

<sup>11</sup> On the definition and types of agencies cf generally Griller/Orator, *supra* n 3.

<sup>12</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133.

<sup>13</sup> Cf Priebe, *Entscheidungsbefugnisse vertragsfremder Einrichtungen im Europäischen Gemeinschaftsrecht*, (1979), 32.

<sup>14</sup> Decision 33/53, 19.5.1953, OJ 1953, 137 and renewed by decision 43/53, 11.12.1953, OJ 1953, 200.

<sup>15</sup> Decision 22/54, 26.3.1954, OJ 1954, 286.

<sup>16</sup> Art 1 (2) Decision 22/54, later extended by Decision 14/55 per April 1<sup>st</sup>, 1956.

quiring it to pay a sum of money to the Imported Ferrous Scrap Equalization Fund.<sup>17</sup> After the regional office of the Brussels Agencies had not reached agreement with the applicant on its obligation to pay its contributions, the Equalization Fund demanded the High Authority to intervene.<sup>18</sup> Accordingly, and after Meroni had refused to supply data on their ferrous scrap consumption, the High Authority assessed the due contribution, rendered the challenged decision. The ECJ admitted the application,<sup>19</sup> held that Decision 14/55 contained a true conferral of powers on the Brussels Agencies<sup>20</sup> and proceeded to the question under what circumstances such a delegation may be lawful.<sup>21</sup>

Thus, two preliminary principles had to be respected: Firstly, in line with the general principle “*nemo plus iuris transferre potest quam ipse habet*”, a delegating authority could not confer on another body powers different from those possessed by the delegator under the Treaty.<sup>22</sup> Consequently, the receiver of authority was subject to the same restrictions as the delegator, in particular to the obligations to give reasons and to publish decisions.<sup>23</sup> Since the High Authority did not bind the Brussels Agencies accordingly, the Court held that this violation already rendered the delegation of powers impermissible.<sup>24</sup> Secondly, a conferral of powers could not be presumed, but the delegating authority had to take an express decision transferring them.<sup>25</sup>

Furthermore, the ECJ defined the conferable kinds of powers by drawing a line between the permissible delegation of “clearly defined executive powers” and the unlawfulness of conferring “discretionary power”. The Court referred to the permission of Art 53 (1) (b) ECSCT, allowing for the creation of financial bodies by the High Authority, but continued that

“[t]he consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy.

A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.”<sup>26</sup>

Finally, the ECJ relates this argument to the concept of “balance of powers”, by holding that the eight objectives contained in Article 3 ECSCT represented a “fundamental guarantee

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<sup>17</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133.

<sup>18</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133 (141).

<sup>19</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133 (139).

<sup>20</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133.

<sup>21</sup> Meroni filed two lawsuits, cases 9/56 and 10/56, which are based on similar facts and whose judgments, being rendered on the same day, June 13<sup>th</sup>, 1956, correspond to a large degree. Cf Priebe, *supra* n 13, 34.

<sup>22</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133 (149-150).

<sup>23</sup> Cf. Art 15 ECSCT and Art 47 (2) ECSCT.

<sup>24</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133.

<sup>25</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133.

<sup>26</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133 (152).

granted by the Treaty in particular to the undertakings and association of undertakings to which it applies.”<sup>27</sup> The Court held that Decision 14/55 conferred true discretionary powers on the Brussels Agencies, therefore unlawfully transferring responsibility.<sup>28</sup> Thereby, the ECJ followed the opinion of Advocate General Roemer, although concurring in parts of the reasoning.<sup>29</sup> The High Authority responded by reversing the conferral of powers;<sup>30</sup> the equalization scheme itself continued to be applied until November 30<sup>th</sup>, 1958, before being reprimanded by the Council.<sup>31</sup>

The consequences of the legal constraints to delegation voiced by the ECJ have been described, as has been shown elsewhere,<sup>32</sup> as “traumatic impact”<sup>33</sup>. In order to contain its adverse effects on delegation, several counter-arguments have been presented. It is said that the Meroni Doctrine does not apply to the *traité-cadre* of the ECT, in opposition to the “narrower” ECSCT.<sup>34</sup> Moreover, the ECJ stated its limits in the context of the conferral of powers upon legal entities under private law, and not public legal personalities, which is deemed a significant distinction, since delegations to private bodies are seen to require more legal caution than the latter.<sup>35</sup>

However, later case law in which the Court refers to the Meroni principle in the context of general community law, clearly shows that these constraints to the transposability do not exist, at least not in the ECJ’s jurisprudence.<sup>36</sup> Neither necessitates the sheer legal form of the delegate different approaches to delegation, as only the degree of supervision and control matters for the lawfulness of delegation. It can therefore be said that “[t]he *Meroni* principle has stood for approaching 50 years as a constitutional limit to delegation”<sup>37</sup>.

## II.2. The Meroni principle in the jurisprudence of Community courts

Although the ECJ has been reluctant in referring specifically to the Meroni principle afterwards, the jurisprudence of the Community courts shows that it continues to hold its fundamental principles to apply. In its opinion on the conformity of the “*Draft Agreement establishing a European laying-up fund for inland waterway vessels*” the Court held that a delegation of decisional powers to the organs of an international body, consisting of EC Member States and third countries was lawful as the proposed agreement “define[s] and limit[s] the powers which the latter grants to the organs of the fund so clearly and precisely that in this

<sup>27</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133 (152).

<sup>28</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133 (154).

<sup>29</sup> AG Roemer underlined the importance of the Treaty-based guarantee of legal protection and demanded the decisions of the Brussels agencies other than implying simple powers of preparatory or implementing nature to be equated with those of the High Authority. Cf. AG Roemer, Opinion 9/56 (*Meroni*), ECR 1958, 89.

<sup>30</sup> Art 1 (1) (a) Decision 13/58.

<sup>31</sup> Cf. High Authority, VII. General Report (1959), 107f.

<sup>32</sup> Cf Griller/Orator, *supra* n 3.

<sup>33</sup> Ehlermann, Die Errichtung des Europäischen Fonds für Währungspolitische Zusammenarbeit, 8 *Europarecht* 3, 193-208 (198).

<sup>34</sup> Cf. Schindler, Delegation von Zuständigkeiten in der EG (1972), 102.

<sup>35</sup> Against this view cf. Priebe, *supra* n. 13, 110.

<sup>36</sup> See *infra* II.2. and II.3. Cf Hilf, Die Organisationsstruktur der Europäischen Gemeinschaften. Rechtliche Gestaltungsmöglichkeiten und Grenzen (1982) 99.

<sup>37</sup> Craig, *EU Administrative Law* (2006), 161.

case they are only executive powers”<sup>38</sup>. Thus, the ECJ was not obliged to comment directly on the Meroni question of the lawfulness of transferring “to non-Community organisms powers [...] granted by the Treaty”, but instead only confirmed indirectly the permissible case of delegation of powers dealt with in Meroni.<sup>39</sup> However, it was made clear in that case that the delegation of powers to international bodies should, according to the Court, observe similar limits as the delegation to private entities.

In *Romano*, the Court left no doubt that the institutional balance demanded that legislative powers could never be delegated on other bodies than those who were attributed those powers by the Treaty without citing Meroni.<sup>40</sup> The case concerned the “Administrative Commission of the European Communities on Social Security for Migrant Workers”, an auxiliary body of the Commission founded by one of the first regulations under the EEC treaty.<sup>41</sup> One of its tasks consists of dealing with all administrative questions and questions of interpretation arising from Community legislation on the social security schemes to employed persons moving within the EC.<sup>42</sup> Therefore, the Administrative Commission adopted a decision concerning the mode of calculation for such schemes.<sup>43</sup> The Italian plaintiff in the main Belgian action received Belgian and, subsequently, Italian pensions and the respective labour tribunal referred the question of the validity of the decision of the Administrative Commission to the Court. The ECJ held that “... it follows both from Article 155 of the Treaty and the judicial system created by the Treaty, and in particular by Articles 173 and 177 thereof, that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law.”<sup>44</sup>

Lately, however, the jurisprudence of the European courts gives clear evidence that the Meroni principle continues to be applied not only in substance, but also by directly referring to the 1958 case.<sup>45</sup> In 2005 alone, the Meroni case was referred to twice. In a preliminary ruling concerning the validity of transferral of powers from the Council to the Commission to exercise implementing powers, the ECJ referred to the unlawful delegation of discretionary powers: “[W]hen the legislature wishes to delegate its powers to amend aspects of the legislative act at issue, it must ensure that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria”<sup>46</sup>. In *Tralli*, the ECJ upheld a conferral of power of one of the organs of the ECB to another concerning rules on staff management, referring directly to the permissible kind of delegation in Meroni.<sup>47</sup> Finally, the Court

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<sup>38</sup> Opinion 1/76, *Draft Agreement establishing the European laying-up fund for inland water vessels*, [1977] ECR 741, para 16.

<sup>39</sup> Opinion 1/76, *ibid.*, para 15.

<sup>40</sup> Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité* [1981] ECR 1241. Cf also Lenaerts, *supra* n 7, 47. Cf. Calliess/Ruffert, EUV/EGV (2006), Art 7, Rz 37., Priebe, *supra* n. 13, 40.

<sup>41</sup> Regulation (EEC) 3/58, 25.9.1958, OJ, substituted by Regulation (EEC) No 572/72 of the Council to implement Reg (EEC) 1408/71, 21.3.1972. Cf Priebe, *supra* n 13, 38f., Ehlermann, *supra* n 33, 259, Lauwaars, Auxiliary Organs and Agencies in the E.E.C., 16 Common Market Law Review, 207.

<sup>42</sup> Art 81 of Regulation 1408/71.

<sup>43</sup> Decision No 101 of 29 May 1975, OJ C 44 of 26 February 1976.

<sup>44</sup> Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité* [1981] ECR 1241, para 20.

<sup>45</sup> An EUR-Lex query (7.3.2007) resulted in 37 documents (judgments, AG opinions, orders) referring directly to the Meroni cases.

<sup>46</sup> Cases C-154-155/04, *The Queen, on the application of Alliance for Natural Health and Nutri-link Ltd v Secretary of State for Health* [2005] ECR I-6541, para 90.

<sup>47</sup> Case C-301/02 P, *Tralli v ECB* [2005] ECR I-4071, paras. 42-52.

of First Instance decided in a situation comparable to the Meroni cases, i.e. the delegation of power by the Commission to a private body regarding decision-making of funding applications.<sup>48</sup> As the supervision and control of the bodies decisions were ensured by the Commission, the CFI confirmed the lawfulness of the delegation.<sup>49</sup> The Community court reiterated that “delegation of powers coupled with a freedom to make assessments implying a wide discretionary power is not permissible”<sup>50</sup>.

### II.3. The Commission’s view

The Court’s jurisprudence does not only entail legal constraints on the delegation of powers, but also seems to be referred to as a political tool to prevent further delegations. Such “political limits”<sup>51</sup> were voiced by the Commission in its statements within the debate on European Governance. *Majone* describes the debate within the Commission and identifies the Legal Service as the prime obstacle for proposing true regulatory agencies.<sup>52</sup> The “reformers” of Directorates-General like Transport would endorse the creation of full-fledged European agencies, but do “not yet feel strong enough to overcome the resistance of the traditionalists”<sup>53</sup>. In between this tension comes the Commission’s reference, reiterated during the debate on the Constitutional Treaty, to preserve “the unity and integrity of the executive function”.<sup>54</sup> It has been argued convincingly that it is this conception that explains its favour of decision-making power agencies in discrete fields like OHIM or CVPO or the establishment of information and coordination agencies, over which it has the final say.<sup>55</sup> On the other hand, in the Commission’s view the unity and integrity of the executive function would be undermined if true regulatory agencies were created.

In spite of Meroni’s generally “bad press”<sup>56</sup>, the argument that the doctrine is “outdated”<sup>57</sup> therefore seems to be difficult to be upheld.<sup>58</sup> The jurisprudence of the Community courts shows that a delegation of wide discretionary powers is clearly unlawful under present primary law and that the creation of regulatory agencies which typically would dispose of such powers, is violating the principle of institutional balance, and is therefore not permissible.<sup>59</sup> Meroni remains “good law”. It remains of course conceivable that the courts would change

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<sup>48</sup> Cases T-369/94 and 85/95, *DIR International Film Srl and others v Commission* [1998] ECR II-357, paras. 52-53.

<sup>49</sup> Cf Craig, *supra* n 37, 162.

<sup>50</sup> Cases T-369/94 and 85/95, *DIR International Film Srl and others v Commission* [1998] ECR II-357, para. 52.

<sup>51</sup> Craig, *supra* n 37, 162.

<sup>52</sup> Majone, Delegation of Regulatory Powers in a Mixed Polity, 8 *European Law Journal* 3, 319-339 (328).

<sup>53</sup> Majone, *supra* n 52, 329.

<sup>54</sup> Cf., COM(2002) 718 final, 11.12.2002, 1.

<sup>55</sup> Craig, *supra* n 37, 174.

<sup>56</sup> Craig, *supra* n 49, 183.

<sup>57</sup> Majone, Ideas, Interests and Institutional Change: The European Commission Debates the Delegation Problem, (2001) *Cahiers Européens de Sciences Po* 4, 2.

<sup>58</sup> In favour of relativizing the Meroni doctrine cf Everson, Independent Agencies: Hierarchy Beaters?, 1 *European Law Journal* 180, Majone, *supra* n 52, 329, Vos, Reforming the European Commission: What Role to Play for EU Agencies?, 37 *Common Market Law Review*, 1113.

<sup>59</sup> For the question whether an amendment of primary law empowering the treaty organs to delegate such powers posed fundamental constitutional problems, see *infra* at IV.

their reasoning. However, such a step does not appear imminent. Whether it would be advisable shall be addressed below.

### III. Legitimizing European Agencies

#### III.1. Differentiating the “Delegation Debate”

Following the basic assumption of *Griller/Orator* that the more “intensive” the instruments a European agency disposes of the higher the necessity to legitimize the powers conferred to it, this section deals more generally with ways of legitimizing public authority. The general point of reference will be the model of representative democracy as presented in *Griller/Rumler-Korinek*.<sup>60</sup> Following *Scharpf*'s widely accepted dichotomy of input-oriented and output-oriented legitimacy, two respective attempts to legitimize European agencies shall be presented.<sup>61</sup> Several additional considerations shall follow. However, at the beginning we would like to submit a differentiation which we feel could at the same time serve as a basis for differentiated solutions to the problem.

In *Meroni*, the Court dealt with the delegation of powers from the High Authority to the two Brussels agencies, and it found that the High Authority had not retained sufficient powers, and that consequently the delegation of powers included a degree of latitude which implied a wide margin of discretion that could not be considered as compatible with the Treaty.<sup>62</sup> Here, the issue is primarily the delegation of powers, which themselves had been delegated to the Commission before. The presumption is that this previous delegation to the Commission itself is not at stake. This is the issue of the so-called “executive agencies”.

In other cases, however, especially in *Romano* and in *Alliance for Natural Health*, the situation was different: here the delegator was not the Commission, but the “legislator”, namely the Council and the Council and the European Parliament respectively, entrusting not the Commission, but instead an agency with implementing the enacted measures.<sup>63</sup> In these cases, there is an additional and to some extent different scenario: firstly, the limits to the delegation of legislative powers (from the Council and the European Parliament) as such, especially including discretionary powers to take policy choices. Secondly, the “exclusivity issue”, that is to say the limits to entrusting other bodies than those foreseen in the Treaty with the task of implementing legislation, more particularly others than the Commission which the Treaty explicitly mentions in this respect (Article 210 [ex Article 155] ECT).

Differentiating between the two constellations might justify that *Meroni* was in fact not quoted in *Romano*. Arguably, there may be further consequences flowing from these differences. It might be useful to keep this in mind when now turning to the general debate on legitimising the delegation of powers to agencies.

#### III.2. Agency Output as a Form of Legitimacy

“Output legitimacy” refers to the functional principle of utility, echoing in the corresponding expression of “government for the people”. This strand assumes that the legitimacy of delega-

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<sup>60</sup> Cf *Griller/Orator*, *supra* n 3, and *Griller/Rumler-Korinek*, *supra* n 1.

<sup>61</sup> *Scharpf*, *Regieren in Europa: effektiv und demokratisch?* (1999), 16-28.

<sup>62</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133 (154).

<sup>63</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133, case 98/80 *Giuseppe Romano v Institut national d'assurance maladie-invalidité* [1981] ECR 1241.

tion depends on the capacity of the delegate to achieve the citizen's goals and solve their problems.

It is often argued that the problem-solving capacity of independent regulatory agencies would be in a better position than elected governors to satisfy the new regulatory demands of the electorate.<sup>64</sup> *Giandomenico Majone* is known to be one of the strongest supporters of this model of a regulatory state, what in the United States has been called the “fourth branch of government”<sup>65</sup>, i.e., independent regulatory agencies and commissions, freed from political bias and concerned exclusively with issues of technical complexity. *Majone* makes the case for non-majoritarian, efficiency-oriented, expertise-based institutions, which allegedly do not produce redistributive effects: “[T]he delegation of important policy-making powers to independent institutions is democratically justified only in the sphere of efficiency issues, where reliance on expertise and on a problem-solving style of decision-making is more important than reliance on direct political accountability”<sup>66</sup>. Under this premise of output-oriented legitimacy, the delegation of tasks to autonomous agencies seems to be advantageous for several reasons:<sup>67</sup> It reduces political transaction costs; it improves the efficiency and quality of policy-making; it enhances credibility of decisions taken by independent experts; it facilitates the provision of impartial and highly specialized expertise, pooled in a European agency, to a general institution like the Commission; it reinforces transparency and visibility of EU decision-making.

These motives are reflected in the texts of the founding regulations of European agencies. The European Food Safety Authority EFSA was set up to “be an independent scientific source of advice, information, and risk communication in order to improve consumer confidence”<sup>68</sup>. The Network and Information Security Agency ENISA operates “as a point of reference and [establishes] confidence by virtue of its independence, the quality of the advice it delivers and the information it disseminates”<sup>69</sup>. To ensure the “confidence of the Community institutions, the general public, and interested parties”, the founding statute of the Centre for Disease Control ECDC deems it “vital to ensure its independence, high scientific quality, transparency and efficiency”<sup>70</sup>.

However, *Majone's* model also faces some critique. The distinction between regulatory and redistributive issues has been called static and problematic, since also within regulatory issues redistributive effects have been shown,<sup>71</sup> and it remains, moreover, doubtful whether a useful definition of technical as opposed to political issues can be developed, and how “efficiency

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<sup>64</sup> Majone, *supra* n 2, 299.

<sup>65</sup> Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch of Government* (1984) *Columbia Law Review*, 574.

<sup>66</sup> Majone, *supra* n 2, 296

<sup>67</sup> Cf already Griller/Orator, *supra* n 3, 4 and, e.g., Majone, *supra* n 2, 41, Geradin/Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, Jean Monnet Working Paper 01/2004, 36.

<sup>68</sup> EFSA Regulation 35th recital.

<sup>69</sup> ENISA Regulation 11th recital.

<sup>70</sup> ECDC Regulation 14th recital.

<sup>71</sup> Cf Scharpf, *Föderalismus und Demokratie in der transnationalen Ordnung*, in Beyme/Offe, *Politische Theorien in der Ära der Transformation* (1996) 211-235 (220).

issues” could at the same time include “important policy-making powers” without transgressing the border.<sup>72</sup>

This model of legitimizing European agencies would be even more problematic if the legal constraints of the Meroni doctrine were to be overcome or ignored by the establishment of truly regulatory agencies. There is, as Craig argues convincingly, “no special claim to expertise when it comes to balancing broad, competing public interests”<sup>73</sup> as would be the case with such regulatory agencies. Output-oriented legitimacy would, not the least in the view of the Community courts, then appear as a flawed basis for the delegation of powers: “Scientific legitimacy is not a sufficient basis for the exercise of public authority”<sup>74</sup>.

Arguably, this fundamental objection can only be rejected on the basis of an approach aiming at overcoming mechanisms of representative democracy.<sup>75</sup> On these grounds, output-legitimacy can be seen as an alternative to representative democracy. This is not the view adopted in this paper. Under these premises, “traditional” input-oriented legitimacy deserves some considerations.

### III.3. Agency Input as a Form of Legitimacy

Input-oriented legitimacy refers to the normative principle of consent of the governed, which is echoed in the classic expression of “government by the people”.<sup>76</sup> In representative democracies, elections are the central mechanism of authorisation to exercise public authority. In a democratic polity the lawmaking and the executive function can be legitimized in different ways, parliamentary and presidential systems being the two ideal-types.<sup>77</sup>

It is argued that the standard of democracy derived from the nation-states is not suitable for the European level.<sup>78</sup> However, the conferral of powers to independent bodies is a well-known phenomenon in EU Member States and many Western democracies, which invites to at least take account of the “yardsticks” developed at national level. Justification of the power exercised by the executive represents the aim of democratic legitimacy of the administration. It seeks to ensure that all decisions of the executive can be eventually attributed to the will of

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<sup>72</sup> For examples cf Shapiro, *The problems of independent agencies in the United States and the European Union*, 4 *Journal of European Public Policy* 2, 276-91 (285f.). Cf., however, the differentiated results in Majone, *Dilemmas of European Integration. The Ambiguities & Pitfalls of Integration by Stealth* (2005).

<sup>73</sup> Craig, *supra* n 37, 184.

<sup>74</sup> Case T-13/99, *Pfizer Animal Health SA v Council* [2002] ECR-II 3303, para. 201. The Commission’s exercise of such powers, however, would be legitimated democratically: “Whilst the Commission’s exercise of public authority is rendered legitimate, pursuant to Article 155 of the EC Treaty (now Article 211 EC), by the European Parliament’s political control...” This judgment underlines the importance of democratic legitimacy the Community courts attribute to the delegation issue.

<sup>75</sup> Cf Dehousse, *Beyond representative democracy: constitutionalism in a polycentric polity*, in: Weiler/Wind, *European Constitutionalism Beyond the State* (2003), 135.

<sup>76</sup> Scharpf, *Governing in Europe: Effective and Democratic?* (1999) 6.

<sup>77</sup> Cf Griller/Rumler-Korinek, *supra* n 1, Hix, *The Political System of the European Union* (2005) 175 ff; for a detailed comparison between these systems cf Sartori, *Comparative Constitutional Engineering* (1994), 83 ff.

<sup>78</sup> E.g. Held, *Democracy, the nation-state and the global system*, in Held (ed), *Political Theory Today* (1991): “[P]olicy problems are not congruent with decisional problem-making powers”.

the people and that administrative decisions have the special quality to be the expression of a common will beyond particular interests.<sup>79</sup> Several levels can be distinguished.

On a first level, legitimacy is procured by means of elections and voting. Classic democratic polities mediate legitimacy by the parliaments, which is then conveyed on the executive. On the European scale, democratic legitimacy is twofold and stems from both the European Parliament, as a direct source of legitimacy, and the Council, as an indirect source since Member States representatives, belonging to the executive of their respective countries, are held responsible by their national parliaments. Both strands form the democratic basis of EC authority.<sup>80</sup> On a second level, democratic legitimacy of the administration is secured via several mechanisms. The European Commission, for instance, depends on both personal and substantive modes of legitimacy. Its personal legitimacy stems from their appointment by the governments of the Member States and the approval of the European Parliament. The personal dimension of democratic legitimacy requires an uninterrupted “chain of legitimacy”<sup>81</sup> to the individual office-holder. Its substantive legitimacy is based on legislative steering, the binding of all acts of the Commission to the will of the Council and European Parliament, comprising both preventive elements, i.e. the democratic dimension of the principle of legality, and ex post controls, like the budgetary procedure (Art 274 EC). It is complemented by powers of supervision and control.<sup>82</sup>

The delegation of powers to European agencies, on a third level, has to be complemented by the same two modes of democratic legitimacy. Therefore, the question of the exact composition, appointment and responsibility of agency boards and directors becomes crucial. EC agencies consist of two main organs, the management board<sup>83</sup> and the executive director, and are sometimes supported by an advisory forum or scientific committees.<sup>84</sup>

The management board plays an important role in appointing the agency’s director, adopts the annual work programme and annual report and may also influence the agency’s general strategy. More generally, the management board supervises the day-to-day execution of the agency’s tasks by its director. Its members are appointed for an office term of three to five years, which can be generally renewed. Most agencies’ boards are composed of one or two representatives per Member State, and one to six from the Commission.<sup>85</sup> Some include additionally corporative or other stakeholder representation.<sup>86</sup> Under the premise that the democratic principle also entails the duty to protect itself from particular interests,<sup>87</sup> the board of EU-OSHA (Office for Safety and Health at Work), which is substantially filled with national employers’ and employees’ representatives, suggests a rather weak personal component of

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<sup>79</sup> Cf Schmidt-Aßmann, Verwaltungslegitimation als Rechtsbegriff, 116 Archiv des öffentlichen Rechts, 329-390.

<sup>80</sup> Cf BVerfGE 89, 155 (185f.)

<sup>81</sup> Böckenförde, Demokratie als Verfassungsprinzip, in Isensee/Kirchhof (ed), Handbuch des Staatsrechts der Bundesrepublik Deutschland (2003), § 22, Rz 15.

<sup>82</sup> Schmidt-Aßmann, Das allgemeine Verwaltungsrecht als Ordnungsidee. Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung (2004), 400.

<sup>83</sup> This dual structure is a feature common to all EC agencies. The boards are denominated “management board”, “governing board”, “administrative board” or „administrative council“, the directors “executive director”, “director” or “president”.

<sup>84</sup> Cf. Groß, Das Kollegialprinzip in den Verwaltungsorganen (1998).

<sup>85</sup> This is the case for ETF, OHIM, CPVO, EAR, EASA, GNSSA, Frontex, CFRA.

<sup>86</sup> Cedefop, Eurofound, EMEA, EU-OSHA, EFSA, ENISA, EMSA, ERA, FRA, ECHA

<sup>87</sup> Cf, the “Distanzschutz” in German constitutional law, Schmidt-Aßmann, *supra* n 79, 329-390 (349, 378)

democratic legitimacy.<sup>88</sup> However, to a certain extent the “blindness” of the democratic principle towards private interests, has to be weighed against the principles of participation and openness, which demand for the involvement of interested parties.<sup>89</sup> Consequently, some agency’s boards include to a certain degree stakeholders’ representation, but they deny these representatives voting rights on the board.<sup>90</sup>

The case of EU-OSHA is, moreover, a fine example for the Commission’s efforts to dominate the agency’s boards,<sup>91</sup> which also mirrors in its draft for an Interinstitutional Agreement of an operating framework for the European regulatory agencies: Although “no single formula” for the composition of agency boards could be found, the “parity of executives” demands, the Commission argues, for equal representation of the Commission and the Member States.<sup>92</sup> In the past, however, the Commission has, with the exception of EU-OSHA, never been able to realize its conception.<sup>93</sup> It is the Member States (directly or via the Council) who dominate the management boards of agencies.<sup>94</sup>

The executive director, responsible for the drafting and implementation of the agency’s work programme, its day-to-day work, the budget and personnel, is appointed by the management board after a proposal from the Commission or vice versa. However, the founding regulations of some of the agencies with decision-making or de-facto decision-making powers, e.g. the trademark office OHIM, the CPVO (plant variety), the Chemicals Agency ECHA and the Medicines Agency EMEA, provide for the appointment by the Council itself. The duration of his mandate varies between three and five years and, with the notable exception of the director of the Fundamental Rights Agency FRA, is renewable.<sup>95</sup>

The increasing awareness of the importance of the personal dimension of democratic legitimacy of European agencies is reflected in a clear trend to concretize the requirements to composition and proceduralize the appointment. The “complete independence” and qualification of the executive director is sought to be ensured by a public expression of interest and open competition, followed by the Commission’s preparation of a shortlist, selection by the management board and subsequent hearing before the European Parliament. Only then the board, “taking into account” the Parliament’s observations, appoints the director.<sup>96</sup>

Nevertheless, the diversity of actors represented on the board or involved in its appointment should not belie the fact that democratic accountability becomes diffuse. The chain of legiti-

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<sup>88</sup> Given EU-OSHA’s very limited powers, compared to its US counterpart, this legitimacy deficiency could be easily balanced with an adequate level of material, functional and institutional legitimacy. Cf also the „adequate level of legitimacy“ *infra* at p 14.

<sup>89</sup> Cf. e.g. draft Interinstitutional Agreement for a framework for European regulatory agencies, COM 2005(59) final at 9.1.

<sup>90</sup> E.g. ENISA, EMSA

<sup>91</sup> With the aid of „coordinators“ who are to bundle the employers’, the employees’ and the Member States groups respectively, and who alone are attributed a voting right on the board, the Commission aims at limiting the influence of the Member States, disposing of three representatives for herself. Cf Craig, *supra* n 37, 171.

<sup>92</sup> Draft IIA p 7

<sup>93</sup> Cf. the Commission’s proposals and the final Council regulations for the most recent agencies (ECHA, EGI, FRA).

<sup>94</sup> Board decisions normally require a simple or two-thirds majority. Cf. e.g. ECHA two-thirds, FRA simple majority.

<sup>95</sup> Cf OHIM, CPVO, ECHA, EMEA.

<sup>96</sup> Cf., e.g. ECHA procedure Art 76ff. REACH Regulation.

macy thins out in view of 27 different national members appointed by their national executive on the one hand, some members representing the Commission or the European Parliament on the other hand.<sup>97</sup>

The second basic element of democratic legitimacy, the material dimension, will depend, to a large degree, on the exact steering exercised by the legislator in framing the founding regulation including the delegation of powers. Budgetary procedures and means of supervision at the disposal of the legislator(s) are other important factors to ensure material democratic legitimacy of European agencies.

The Agency statute itself serves as the main steering instrument to ensure substantially the democratic empowerment of agencies. Depending on the respective legal base, the Council and/or the European Parliament will more or less be able to convey their (direct or indirect) democratic legitimacy.<sup>98</sup> Depending on the subject matter, detailed proceduralization may compensate for a lower degree of determination and binding of executive agency acts, as is the case for, e.g., EMEA.<sup>99</sup> The legislator may, however, not delegate important or “essential” choices to the agency.<sup>100</sup> Another strand of the material mode of democratic legitimacy is secured through the budgetary controls of the legislator. Budgetary controls become even more important instruments to ensure democratic legitimacy where (legislative) statutory determination is weaker. Following the adoption of the new framework Financial Regulation, the Commission enacted a Financial Regulation which catches European agencies.<sup>101</sup>

Besides the personal and material dimension of democratic legitimacy, which are to a certain degree complementary, input-oriented legitimacy also comprises a somewhat weaker institutional and functional mode of legitimacy. To a certain degree, legitimacy is conveyed by the constitution or primary law respectively. A body depends not the least on the exact function and position it is attributed to by the constitutional legislator. Therefore, treaty-based bodies (e.g. the ECB) enjoy a slightly, yet limited degree of democratic legitimacy since they are attributed specific functions directly. Although European agencies lack this mode of legitimacy, its role should not be overestimated.

European agencies dispose (or in the future will dispose) of different legal instruments ranging from general-law making powers, individual-decision making powers, inspection and other coercive powers, and finally other “simple” public powers which demand each for different “levels of legitimacy”.<sup>102</sup> All different modes of input-oriented legitimacy, from the more important personal and material modes to the somewhat less significant institutional and functional modes, will finally have to be weighed in two steps. Their weight will be assessed individually before being pondered collectively according to the demanded level of legiti-

<sup>97</sup> On the composition and appointment procedures for 2nd and 3rd pillar agencies, cf Craig, *supra* n 37, 172f.

<sup>98</sup> On the choice of legal base cf Griller/Orator, *supra* n 3.

<sup>99</sup> Cf. the “differentiertes Legalitätsprinzip” in, e.g., Öhlinger, *Verfassungsrecht* (2005), 255f.

<sup>100</sup> Cf the *Köster* case *infra* at IV. Compare with the doctrine of legislative reservation of the German Bundesverfassungsgericht („Wesentlichkeitstheorie“), according to which essential questions of a particular matter must be regulated by an act of Parliament. Cf Ladeur, *Sources and Categories of Legal Acts – Germany*, in Winter, *Sources and Categories of European Union Law* (1996), 241.

<sup>101</sup> Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities OJ L 357, 31.12.2002, p. 72–90. Cf *infra* at IV. for other components.

<sup>102</sup> “Legitimationsniveau”, BVerfGE 83, 60ff (72).

macy stemming from the quality and quantity of powers delegated.<sup>103</sup> Obviously, operationalizing these principles in concrete measures and defining the adequate level of legitimacy will be a highly demanding and difficult endeavour.

The last chapter will try to elaborate a bit further on one possibly somewhat underrepresented aspect of the debate.

#### **IV. Empowering European Agencies Democratically – Lessons From the Comitology-Debate?**

Let us come back to the differentiation between the *Meroni* and the *Romano* constellation, i.e. between the delegation of powers to agencies on the one hand with regard to Commission powers by the Commission itself, and on the other hand by the Council and the European Parliament.<sup>104</sup>

The first alternative is, in the meantime, addressed by the Council regulation on executive agencies.<sup>105</sup> On the basis of this regulation, the Commission established several agencies, amongst others the Executive Agency for the Public Health Programme,<sup>106</sup> the Education, Audiovisual and Culture Executive Agency,<sup>107</sup> the Intelligent Energy Executive Agency,<sup>108</sup> and the Trans-European Transport Network Executive Agency,<sup>109</sup>

The mentioned regulation empowers the Commission to set-up and wind-up executive agencies, by observing a committee procedure. The regulation explicitly specifies that the Commission may entrust the agency with any tasks required to implement a Community programme, “with the exception of tasks requiring discretionary powers in translating policy choices into action”.<sup>110</sup>

Consequently, the regulation appears to establish a two-tier-test: first, it would not be allowed to authorise an agency to take policy choices; second, and very clearly stressing the desire to limit the powers of such agencies as far as possible, also discretionary powers in *translating* policy choices into action, choices which were already taken by someone else, cannot be delegated to executive agencies. This is fully in line with the limits set in *Meroni*.

The second alternative relates to agencies being set up by the Council or jointly the Council and the European Parliament. As mentioned, agencies of that type, especially those with decision-making capacity or regulatory functions, arguably should meet two standards: first the limits for delegating powers from the EC legislative level to the executive level, and second, the possible limits resulting from “exclusivity”, meaning the fact that agencies do not, in the text of the EC Treaty, figure among Community institutions or bodies which can be entrusted with implementing tasks, while the Commission explicitly is one of the institutions which,

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<sup>103</sup> Cf Trute, § 6 Die demokratische Legitimation der Verwaltung, in Hoffmann-Riem/Schmidt-Aßmann/Vosskuhle (eds), Grundlagen des Verwaltungsrechts Vol I (2006), 316-317.

<sup>104</sup> Case 9/56, *Meroni & Co, Industrie Metallurgische SpA v High Authority* [1958] ECR 133, case 98/80, *Giuseppe Romano v Institut national d’assurance maladie-invalidité* [1981] ECR 1241.

<sup>105</sup> Council regulation (EC) No 58/2003 laying down the steps to it for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003/L 11/1.

<sup>106</sup> OJ 2004/L 369/73.

<sup>107</sup> OJ 2005/L 24/35.

<sup>108</sup> OJ 2004/L 5/85.

<sup>109</sup> Commission decision 2007/60/EC.

<sup>110</sup> Article 6 paragraph 1 Council regulation (EC) No 58/2003.

according to Article 7 EC Treaty, shall carry out the tasks entrusted to the Community, and is at the same time responsible to implement Community legislation (Article 202 third indent, and Article 211 ECT).

The standards of delegating powers from the legislative to the executive are dealt with in the jurisprudence on empowering the Commission. It shall be submitted that the respective case law and the related comitology or committee procedure deserves closer attention also with a view to the transfer of powers to agencies.

The ECJ is quite generous regarding the delegation of powers from the Council to the Commission. Especially with regard to the Common Agricultural Policy the conclusion is that “it cannot ... be a requirement that all the details of the regulations concerning the common agricultural policy be drawn up by the Council ... It is sufficient ... that the *basic elements* of the matter to be dealt with” have been adopted in accordance with the legislative procedure laid down by the Treaty.<sup>111</sup> In another case, the Court specified that only those provisions which “are intended to give concrete shape to the fundamental guidelines of Community policy”<sup>112</sup> could be qualified as “essential”<sup>113</sup> and as such necessarily be reserved to the Council's power. And more recently, the Court held that it was perfectly legal to confer to the Commission “wide powers of discretion and action ...”, and that “the limits of those powers must be determined in the light of the essential general aims of the market organisation”.<sup>114</sup>

Correspondingly, judicial review is limited. According to settled case-law, “Community institutions have a wide measure of discretion in relation to the common agricultural policy ... Given that discretion, the Community judicature must limit itself to examining whether or not the exercise of that discretion is vitiated by any manifest error or misuse of powers and whether or not the authority concerned has manifestly exceeded the limits of its power of assessment.”<sup>115</sup> It appears that these limits to the Community judicature, according to the ECJ, also have to be observed vis-à-vis the Commission as the delegated institution as soon as it enjoys such a transfer of a wide margin of discretion.

The so-called *Comitology* decision of the Council<sup>116</sup> draws on and corresponds to this jurisprudence and states, among others, that implementing measures not reserved to the Council shall be conferred to the Commission and should be designed according to the five types laid down in the decision: advisory, management, regulatory, regulatory with scrutiny, and safeguard procedure. In each of the procedures, the Commission is assisted by a committee of the representatives of the Member States, chaired by the Commission. The strongest position for the Member States or the Council respectively is established within the regulatory procedures, where, in the event of a disagreement with the Commission, the Council may stop the procedure or adopt a different measure from that proposed. As from 2006, also the European Parliament may, in the regulatory with scrutiny procedure, stop the process by indicating that the

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<sup>111</sup> Case 25/70, *Köster*, [1970] ECR 1161, para 6 (emphasis added).

<sup>112</sup> Case C-240/90, *Germany/Commission (Sheep meat)*, [1992] ECR, I-5383, para 37. The (original) German version is even more generous: “Wesentlich sind nämlich nur solche Bestimmungen, durch die die grundsätzlichen Ausrichtungen der Gemeinschaftspolitik umgesetzt werden.”

<sup>113</sup> Compare also the “essential elements” language in Article I-36 paragraph 1 of the Draft Treaty establishing the Constitution for Europe. Arguably the idea of this provision is to continue with the limits set by the ECJ.

<sup>114</sup> Case C-14/01, *Molkerei Wagenfeld Karl Niemann*, [2003] ECR, I-2279, para. 38.

<sup>115</sup> Case C-14/01, *Molkerei Wagenfeld Karl Niemann*, [2003] ECR I-2279, para 39.

<sup>116</sup> Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, O.J. 1999, L 184/23, as amended by Council Decision 2006/512/EC, O.J. 2006/L 200/11.

draft measures exceed the implementing powers provided for in the basic instrument or are not compatible with the aim or the content of the basic instrument or do not respect the principles of subsidiarity or proportionality.

What can we learn from this for the debate on agencies? We would like to submit the following:

As has been shown, it is not that the ECT would be extremely restrictive regarding the delegation of powers from the legislative to the executive level. While the jurisprudence on the delegation of powers to the Commission and the Comitology decision can be based on the Treaty provisions explicitly establishing the Commission as Community institution which is primarily responsible for implementing secondary legislation, such a basis is lacking for agencies.

However, if establishing agencies nevertheless is not entirely prohibited (on the grounds that the Commission would have an *exclusive* right to implement legislation), of primary concern has to be safeguarding the prerogatives of the legislative as well as those of the Commission, and preserving legal and political responsibility comparable to that available for measures of the Commission – mainly legal scrutiny of enacted measures and political accountability.

Firstly, securing the *prerogatives of the legislative* would require to either take political choices and decisions making use of large discretion at the legislative level (the Council and the Council and the European Parliament respectively) or to establish mechanisms similar to those available under the comitology procedures (callback mechanisms, joint decisions) in order to maintain the legislative's influence.<sup>117</sup> However, it would not be forbidden at the outset entrusting agencies with discretionary powers, as long as such mechanisms would exist.

Secondly, safeguarding the *Commission's prerogatives* in implementing Community legislation is a requirement flowing from the principle of separation of powers, or balancing of powers. It means that the Council or the Council together with the Parliament must not encroach upon the Commission's prerogative as the institution mainly responsible for implementing EC law. This role must not be undermined. Consequently, administration by agencies has to remain the exception rather than become the rule, and it must be justified against the equality principle. It goes without saying that it would not be easy to draw the borderline. But again, this would be very much different from a general prohibition with very limited exceptions to entrust organs other than the Commission with implementing tasks.

Thirdly, regarding *legal scrutiny*, the solution seems to be that it must always be possible to review (at least binding) measures taken by agencies, and meeting the respective standards which are valid for the Commission. When the Medicines Agency EMEA was set up, judicial review was permitted by designing the decision-making process in a way that EMEA and its scientific committees were not allowed to issue binding authorizations, but to prepare the decision, finally to be taken by the Commission. EMEA's scientific opinion had, however, a legal effect insofar as any departure from it had to be reasoned by the Commission.<sup>118</sup> However, effective review necessitates looking behind the formal Commission decision. In *Artegodan GmbH v Commission*, the Court of First Instance was confronted with such a two-tier decision-making process:

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<sup>117</sup> Compare also, in this respect, Article I-36 of the Draft Treaty establishing the Constitution for Europe. However, the conditions mentioned there would only apply with regard to delegations to the Commission, not for agencies. Moreover, the relation to implementing acts according to Article I-37, whereby obviously comitology mechanisms should be upheld, is unclear.

<sup>118</sup> Cf Griller/Orator, *supra* n 3, 23.

“Although [EMEA]’s opinion does not bind the Commission, it is none the less extremely important so that any unlawfulness of that opinion must be regarded as a breach of essential procedural requirements rendering the Commission’s decision unlawful. ... Against that background, for the purposes of assessing the lawfulness of a Commission decision ... the Community judicature may be called upon to review, first, the formal legality of the [EMEA]’s scientific opinion and, second, the Commission’s exercise of its discretion.”<sup>119</sup>

Fourthly, regarding *political accountability*, the possible step forward could be twofold: making agencies answerable to the European Parliament – modelled after the (specific) example of the ECB –, and enhancing the surveillance mechanisms of the European Parliament, the Council, and the Commission vis-a-vis agencies. The latter would in turn allow activating the Commission's accountability with regard to agency activities. Such mechanisms would include enforcing the budgetary discipline (on the grounds of the Community budget), but also organisational measures like influencing the appointment of the director and senior officials. This could in parts be done jointly with representatives of the Member States, as is frequently the case in the management boards.

In essence, this means that we would like to submit that the very strict limits to the delegation of powers to agencies as established by the ECJ’s jurisprudence might be loosened to a certain extent without giving up their legal fundamentals. The basis for such a development would still be input-oriented legitimacy, in other words, an effort striking the balance between on the one hand side preserving the functioning of the transmission belt securing the implementation of measures which were adopted by representatives of the people, and on the other hand flexibility in the interest of efficient administration.<sup>120</sup>

It is to be conceded, though, that especially strengthening the influence of the Community institutions and the Member States respectively over agencies would at the same time compromise their independence. This would result – at least to a certain extent – in transforming the agencies from independent expert bodies to administrative expert bodies. However, it might be that efficiency and output-legitimacy could at the same time be enhanced or preserved, which would probably be preferable if compared to the available alternatives. This would meet with the observation that input- and output-legitimacy are closely intertwined, and that democracy cannot be based solely on one or the other. They reinforce and complement each other; “input-oriented authenticity, and output-oriented efficiency are equally essential elements of democratic self-determination”<sup>121</sup>.

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<sup>119</sup> Cases T-74, 76, 83-85, 132, 137 and 141/00, *Artegodan GmbH v Commission*, [2002] ECR II-4945, para 197 and 199.

<sup>120</sup> Wessels, *The Modern West European State and the European Union: Democratic Erosion or a New Kind of Polity?*, in Andersen/Eliassen (eds), *The European Union: How Democratic is it?* (1996), 58, speaks of a “general trade-off” between efficiency and effectiveness versus democratic participation and control. The effort in the above text is to reduce this trade-off.

<sup>121</sup> Scharpf, *Economic Integration, Democracy and the Welfare State*, MPIfG Working Paper 96/2, 1f.

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