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Approximation through agencification

Article 114 TFEU as the legal basis for the establishment
and primary tasks of the Single Resolution Board

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Abbreviations

CJEU	Court of Justice of the European Union
EBA	European Banking Authority
ECB	European Central Bank
ECSC	European Coal and Steel Community
ENISA	European Network and Information Security Agency
ESA	European Supervisory Authority
ESMA	European Securities and Markets Authority
EU	European Union
IRT	Internal Resolution Teams
MS	Member State
NCA	National Competent Authority
NRA	National Resolution Authority
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

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1. Introduction

As the European Union [EU or “the Union”] has deepened and widened in terms of its competences and members, so has the complexity of harmonising Member States’ [MS] legislation. With new regulations and directives touching upon intricate and rapidly developing markets and fields of legislation, it has become clear that the more complex the area, the bigger the risk of differences in MSs’ transposition of the Union law. This has led to a trend of proliferation of agencies/expert bodies, often referred to as *agencification*, in the attempt to facilitate the process of harmonisation for the MSs. This trend has been put under much scrutiny. This is due to, in part, the questioning of the conferral of powers on agencies on the grounds of separation of powers and, in part, the fact that the power to create agencies has never been explicit in a Union Treaty.¹ However, the Court of Justice of the European Union [CJEU or “the Court”] has found in its case law that the power to establish agencies has been implicitly conferred on the legislature by the authors of the Treaties.² This legitimised the establishment of agencies in the EU and the Court has since been the primary force in the development of agencification. Today there are Articles in the Treaty on the Functioning of the European Union [TFEU] that acknowledge the existence of agencies, but what powers can be conferred and on what legal basis, is still a question with an ever-evolving answer.

The Banking Union and the SRM

A recent example of agencification is the Single Resolution Mechanism [SRM], the second pillar of the new Banking Union, created to tackle the European financial crisis.³ The Banking Union is perhaps the most comprehensive reform of the financial sector in the history of the EU and has been called a “complete overhaul” of the EU financial system,⁴ as it is both an executive and an institutional reform.⁵

¹ Chamon, Merjin, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*. 1st ed. Oxford, Oxford University Press, 2016: 2.

² See section 3.2.

³ Baglioni, Angelo, *The European Banking Union*. 1st ed., London, Macmillan Publishers Ltd., Springer Nature, 2016: 81.

⁴ Wojcik, Karl-Philipp, "Bail-in in the Banking Union". *Common Market Law Review*, 53, 2016: 93.

⁵ Moloney, Niamh, "European Banking Union: Assessing its risks and resilience". *Common Market Law Review*, 51, 2014: 1611.

The first two pillars of the Banking Union, the Single Supervisory Mechanism [SSM] and the SRM, came into force in 2014⁶ and 2015⁷ after a turbulent economic decade in the EU. Their predecessor, the European Banking Authority [EBA] had proved insufficient to prevent the second, exclusively European, wave of the financial crisis.⁸ The EBA only had mandate to facilitate regulatory convergence, through drafting proposals to legislation to the Commission and overseeing the implementation of Union law in the MSs, acting as an aid for interpretation. Succeeding in what might be seen as the failure of the EBA, the Banking Union was to take direct action in relation to the MSs' banks.⁹ This kind of engagement in national banking supervision is unprecedented in the Union and entails the conferral of some of the most extensive executive powers ever conferred on an EU agency. The SSM was created to directly supervise the most significant banks in the Eurozone and the SRM to ensure that failing banks will be resolved efficiently while minimizing the taxpayers costs. The third pillar of the Banking Union, which is under construction, will be the European deposit insurance scheme.¹⁰

The SRM Regulation is based on Article 114 TFEU. Initially the SRM only applies to the banks in the Eurozone but non-Eurozone MSs can also participate through a so called "close cooperation".¹¹

The mechanism, the SRM, consists of an agency, the Single Resolution Board [SRB], working in collaboration with the National Resolution Authorities [NRA]. The SRB will execute the tasks set out for the SRM. The mechanism is complemented by a fund, the Single Resolution Fund [SRF]¹², to which the MSs pay contributions that can be used in case the primary SRB resolution tools prove insufficient.

⁶ Baglioni, 2016, op. cit., 31.

⁷ Baglioni, 2016, op. cit., 81.

⁸ Capiello, Stefano, "The EBA and the Banking Union". *European Business Organization Law Review*, 16, 2015: 425.

⁹ For further reading on the evolution of the supervision of the EU financial market see: Klerborg, Camilla, "Regulating the supervision of the European Financial Market – From EBA to SSM", *Term paper LLM course: EU Procedural Law*, Gothenburg University, 2017.

¹⁰ European Commission, *Factsheet: Completing the Banking Union*. Luxembourg, Publications Office of the European Union, 2015: 2.

¹¹ Regulation (EU) No 806/2014 of the European Parliament and of the Council Article 4 paragraph 1, Council Regulation (EU) No 1024/2013 of 15 October 2013 Article 7. Henceforth "SRM Regulation".

¹² SRM Regulation, op. cit., Article 1.

The agency, the SRB, is responsible for resolution matters and will apply Directive 2014/59/EU [Bank Recovery and Resolution Directive], to all credit institutions and certain investment firms in the Eurozone and in participating MSs.¹³ The purpose of establishing a common resolution mechanism was primarily to break the vicious circle between sovereigns and their banks, to ensure the financial stability of the European markets while avoiding the use of taxpayers' money.

The institutional motivations for a single mechanism lies in ensuring the least-cost solution in relation to a failing bank, while its centralized nature should generate economies of scale, reduce capture risks and considerably lessen the risk of forbearance.¹⁴ The SRM cannot recapitalize banks itself, but forms part of the EU's fiscal backstop regime together with the SRF.¹⁵

To fulfil its objectives the SRB has been given extensive powers. This has raised the question whether this is in fact not a means of harmonisation, but a replacement of a national level action with EU level action. The criticism largely stems from the choice of legal basis for the SRB; Article 114 TFEU. This is, among other things, due to the fact that this legal basis does not explicitly cover the creation of agencies.

After this short introduction to agencification and the SRB I will now go on to present the issues that are to be studied in this thesis.

1.1. Aim

This thesis aims at examining the establishment of and conferral of powers on the SRB in the context of agencification. The field of agencification is quickly developing and is therefore also under constant scrutiny pertaining to what powers can be transferred from the EU legislature to the agencies. The SRB is certainly no exception. Many authors have pointed to the use of Article 114 TFEU as a legal basis for the SRB as problematic and some that the CJEU may not accept

¹³ Kern, Alexander, "European Banking Union: A legal and institutional analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism". *European Law Journal*, 40, 2015: 176.

¹⁴ Goyal, Rishi, et al., "A Banking Union for the European Union" in *IMF Staff Discussion Notes*, Washington D.C., International Monetary Fund, 2013: 16.

¹⁵ Moloney, 2014, op. cit., 1638.

it.¹⁶ Bozina Beros has stated that it “reverses the subsidiarity assumption and it ... centralises powers at the European level of governance in the banking market”.¹⁷

Furthermore, when the SRM Regulation was drafted it was subject to heavy opposition, primarily from Germany, supported by Sweden and the Czech Republic, on the grounds that there was no legal basis in the treaty which allowed for such an extensive conferral of powers and discretion on an agency without a Treaty change.¹⁸ For this reason it is of interest to examine some of the problems arising from the SRM Regulation, establishing the SRB, on the legal basis of Article 114 TFEU.

Accordingly, this thesis aims to examine the establishment of the SRB and its two primary tasks in relation to its legal basis. The two primary tasks of the SRB are to draw up and adopt resolution plans, and to adopt resolution schemes.¹⁹ In essence the thesis aims to answer the questions:

Is Article 114 TFEU the correct basis for:

1. The establishment of the SRB,
2. the SRB’s task to draw up and adopt resolution plans and
3. the SRB’s task to adopt resolution schemes?

Having defined the objective of the thesis I will go on to describe the overarching issues and the methods applied.

¹⁶ See for instance: Tresselt, Thierry, “The Single Resolution Mechanism” in *From Fragmentation To Financial Integration In Europe*, C Enoch et al. (ed), 1st ed., Washington DC, International Monetary Fund, 2014: 242. Zavvos, George S. & Kaltsouni, Stella, “The Single Resolution Mechanism In The European Banking Union: Legal Foundation, Governance Structure and Financing” in *Research Handbook On Crisis Management In The Banking Sector*, M Haentjens & B Wessels (ed), 1st ed. Cheltenham, Edward Elgar Publishing Ltd, 2015: 11. Moloney, 2014, op. cit., 1653.

¹⁷ Bozina Beros, Marta, “Some reflections on the governance and accountability of the Single Resolution Board”, speech at European University Institute, Florence, 2016.

¹⁸ Kern, 2015, op. cit., 176-177.

¹⁹ The terms “resolution plan” and “resolution scheme” will be defined in section 5.1.

1.2. Theory and method

Being a study aiming to interpret the establishment and conferral of powers on an EU entity, it will naturally include the systemising and interpretation of EU law. The thesis will not deal with the question in relation to societal implications or critically examine the EU legal system as such. This makes the questions posed quite exclusively dogmatic, i.e. internal to the legal system. For this purpose it is suitable to apply legal dogmatics adapted to the EU context.

In the following sections I will present the study first on a theoretical level, introducing the fundamental issues of this area. Secondly, on a more concrete level, I will present my method.

On a higher level this thesis deals with questions of the separation of powers within a supranational union. As we will see, the principles governing the separation of powers in the EU is not an area of exact science.²⁰ This is largely because the EU is based on multilateral agreements, which are much more vague and broadly formulated than any national constitution. This vagueness of the Treaties is also the origin of the questions posed in the study. In this thesis I examine what the term “measures for approximation” in Article 114 TFEU entails. More specifically the thesis will examine where the “executive backstop” goes for the conferral of powers on the basis of Article 114 TFEU.

In EU-law there is a method with a certain hierarchy within the sources of law. Since the study takes its aim at Article 114 TFEU and the SRM Regulation, the legal basis is already defined. Therefore, in order of hierarchy, we need to examine the binding sources of EU law; principles of Union law, EU regulations, directives and case law of the CJEU. Furthermore, publications from *inter alia* the Commission and the SRB are used. Legal doctrine is used throughout as a complement. It should be noted that the publications and EU legal doctrine are not sources of law in the EU but can only be used as guidance and support when interpreting the primary sources.²¹

²⁰ See section 4.2.

²¹ Hettne, Jörgen & Otken Eriksson, Ida, *EU-rättslig metod - Teori och genomslag i svensk rättstillämpning*. 2nd ed., Uppsala, Nordstedts Juridik, 2011: 40.

When examining the case law of the CJEU one must be aware that it differs from national case law. EU law is dynamic and is constantly developing in line with the objectives of the Treaties.²² The CJEU typically applies a more teleological approach than national courts, considering itself not only having a right, but a duty, to weigh in political aspects in its judgements, bearing in mind the system as a whole and its process of harmonisation.²³ Furthermore the case law of the CJEU possesses a status different from that of national case law. As EU legal acts are the result of negotiations of a large number of states, they more often than not leave room for interpretation. One of the most important tasks of the CJEU is to create a foundation for a common interpretation of the Union legislation, as the case law from the CJEU guides the national courts in their interpretations.²⁴ This gives the CJEU case law a high status as a legal source.

This study will stay close to the rulings of the CJEU in its examination, focusing less on the theories surrounding the different agency requirements and more on how the Court has practically handled the issues. As such, it may be seen as an attempt at predicting how a future case challenging the SRB might be handled by the Court. However, the teleological and political dimensions in the Courts approach, and the fact that it is the Court that has driven the development of agencification forward, makes it difficult to predict how it will rule in future cases. It is likely that the Court will continue to develop the phenomenon of agencification. Nevertheless, one can make cautious, qualified assessments, if one emphasises the uncertainties that remain.

Having described the theory on a higher level I will now present my concrete method.

After reading Capiello's article "*The EBA and the Banking Union*"²⁵ I became interested in the emergence of the Banking Union and in particular the SRB. Having read Bergström's article concerning the reshaping of the delegation of powers through the Short Selling case²⁶, I knew

²² Hettne & Otken Eriksson, 2011, op. cit., 58.

²³ Hettne & Otken Eriksson, 2011, op. cit., 58-59 and 158.

²⁴ Hettne & Otken Eriksson, 2011, op. cit., 286.

²⁵ Capiello, Stefano, "The EBA and the Banking Union". *European Business Organization Law Review*, 16, 2015: 421-437.

²⁶ Bergström, Carl Fredrik, "Shaping the new system for delegation of powers to EU agencies: United Kingdom v. European Parliament and Council (Short selling)". *Common Market Law Review*, 52, 2015: 219-242.

that Article 114 TFEU was problematic as a legal basis for an agency. Chamon's article²⁷ on EU Agencies later introduced me to the phenomenon of agencification. This led me to find my aim for the thesis.

Having found my aim, I started looking for ways to systemise my work. Studies of literature on the area of agencification led me to find a number of relevant cases from the CJEU to examine, as well as legal principles. Building on that, I deduced that there were recurring themes to which the different cases and principles could be connected. From this I established categories into which the requirements for agencies could be divided.²⁸ This systematisation is the result of my own interpretation of how the requirements fit together thematically and best allow for a coherent discussion. As such, it can be put under scrutiny. One alternative way of examining the requirements would, for example, have been to look at the case law chronologically. However, I adduce that such a disposition would have complicated the oversight of the different requirements as well as the comparison of how the requirements were addressed in the different cases. It would also have hampered the analysis of the legal principles as they do not allow for a chronological outline in the same manner that case law does. But seeing as the chronology of the case law is important, in the sense that it can redefine or override previous case law, the cases are presented chronologically under each theme.

Having determined the requirements applicable to the establishment and conferral of powers to the SRB, I began studying the SRB in comparison to said requirements. At the time writing this thesis only one resolution scheme has been adopted by the SRB, thus not allowing for an empirical study. The investigation therefore had to take place on a theoretical level, using its founding act, the SRM Regulation as well as SRB documents. The documents released by the SRB are not legally binding but nevertheless provide valuable insight into the agency's way of working. This allowed for an evaluation of the legality of the legal basis for the agency.

1.3. Delimitations

Defining the legal limits to agencification exhaustively is near impossible, especially within the framework of a thesis. For that reason, my description of the limits will have to remain quite

²⁷ Chamon, Merjin, "EU Agencies between Meroni and Romano or the devil and the deep blue sea". *Common Market Law Review*, 48, 2011: 1055 - 1075.

²⁸ See section 1.4.

general. It aims to provide a birds eye view of the main characteristics of agencification. There are of course not only legal limits to agencification but political ones as well.²⁹ Since the study aims to review the *legality* of a conferral of powers I will not explicitly touch upon political limits.³⁰

One question that is, admittedly, relevant when examining measures of approximation under Article 114 TFEU, is that of whether a measure that only comprises the Eurozone can be seen as harmonising. This aspect is however, outside of the questions posed for this thesis.

As the thesis only focuses on examining the legal basis for the SRM Regulation, Article 114 TFEU, I will not explore the limits to agencification under any other articles that have been used to establish agencies.

Furthermore, the SRB has a number of powers outside of the two examined in this thesis, which are also of interest to compare to the limits to agencification. However, the planning and adoption of resolution plans and the adoption of resolution schemes are the primary tasks of the SRB. It is the purpose for which the SRB was created and it is also what takes up most of its time. Accordingly these were most relevant to examine.

1.4. Disposition

Chapter 2 will provide a background to the fundamental aspects of this thesis. Initially an introduction is presented to what an EU agency is, followed by a short insight into how the SRB compares to other EU agencies. Lastly is an examination of the term agencification, what it entails and what issues come with it.

Chapter 3 concerns the legal basis for the SRM Regulation – Article 114 TFEU, its purpose and its use as a legal basis for agencies.

²⁹ Craig, Paul, “Institutions, power, and institutional balance” in *The Evolution Of EU Law*. P Craig & G De Búrca (ed), 2nd ed., New York, Oxford University Press, 2011: 67.

³⁰ For a more thorough review see for instance: Chamon, Merjin, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*. 1st ed. Oxford, Oxford University Press, 2016.

In chapter 4 an account is made of the requirements for an agency relevant to the establishment and powers mentioned previously, examining their origin and significance. The chapter aims at systemising and interpreting the different requirements in relation to agencies based on Article 114 TFEU. Even though there is much written on the subject there seems to be no consensus on the issue. The requirements stem from different sources and the case law has developed and changed through decades. It is thus difficult to draw clear lines between the different requirements. For the sake of clarity I have divided them into five main themes.

The first theme concerns the supranational level of the legislation. For an agency to be rightly based on an EU level and on Article 114 TFEU it must respect the principles of subsidiarity and proportionality as well as have a harmonising objective.

The second theme concerns the agency's place in the institutional framework. The agency powers must be within the limits of conferred powers on the Union and it must not affect the Union balance of powers nor its institutional balance. There are different views on whether *institutional balance* is an EU principle and if so, whether it is a legal or a political principle. For the purpose of this thesis Chamon's definition of the term will be applied.³¹

The third theme addresses the nature of the powers conferred. An agency can only be given executive powers, excluding the possibility of exercising discretion.

The fourth theme considers the impact of the acts adopted by the agency. A differentiation is made between acts having the force of law or being of general application.

The fifth theme concerns review of the agency. The Commission must have insight into the work of the agency and there must be mechanisms for accountability in place.

Chapter 5 analyses the issues that this thesis aims at examining, by looking at the agency's structure, tasks, procedures, etc. in comparison to the limits to agencification determined in the previous chapter.

Chapter 6 concludes.

³¹ See section 4.2. of this thesis and Chamon, 2016, op. cit., 154.

2. Background

2.1. What is an agency?

The term *EU Agency* is difficult to determine and because of this there is dissonance in the estimation of the number of EU agencies.³² This is further complicated by the naming of the agencies, where the official titles include terms as “authority”, “institute” and “mechanism”. The official EU Agencies brochure define the term “EU agencies” as entailing EU decentralised agencies and Joint Undertakings and state that there are 44 EU agencies as of 2017.³³ This would mean that the number of agencies has increased at least four times since the year 2000, having led to some authors describing it as a “mushrooming of agencies”³⁴.

Agencies have become a prominent feature in the EU institutional landscape. They allow for the legislature to focus on policy formation while facilitating the use of experts, increasing the credibility of the decisions thus made.³⁵ According to Scholten and Van Rijsbergen, the scope of the delegation of powers has not only grown quantitatively, but also qualitatively, implying that the powers of the agencies has grown as well.³⁶

The powers of agencies vary greatly with regards to their purposes. They are specialized bodies outside the key Union institutions while being independent legal entities with tasks ranging from information gathering to decision making and supervision.³⁷ They cover vast areas ranging from plant variety to aviation safety and disease prevention.³⁸

Most agencies share the same organisational structure. There is a management board led by a director and officials are usually employed in a temporary or quasi-temporary position. The management board typically decides on administrative matters such as the agency’s budget, work programme, etc. Most management boards are composed of a large number of MS

³² Scholten, Miroslava & van Rijsbergen, Marloes, “The Limits of Agencification in the European Union”. *German Law Journal*, 15, 2014: 1227.

³³ European Union, *The EU Agencies - Working for you*. Luxemburg, Publications Office of the European Union, 2016, 4.

³⁴ Chamon, 2011, op. cit., 1055.

³⁵ Craig, 2011, op. cit., 66-67.

³⁶ Scholten & van Rijsbergen, 2014, op. cit., 1224.

³⁷ Scholten, Miroslava. *The Political Accountability of EU and US Independent Regulatory Agencies*. 1st ed., Leiden, Brill, 2014: 47.

³⁸ European Union, *The EU Agencies - Working for you*. Luxemburg, Publications Office of the European Union, 2016.

representatives. The Commission usually has one or two representatives as well as the European Parliament in certain cases.³⁹

Having looked at the characteristics of agencies in general we shall go on to inspect the SRB.

2.2. The SRB specifically

The SRB is a specific agency. The SRM Regulation preamble states that in order to ensure a swift and effective resolution procedure, the Board shall be a *specific* Union agency with a *specific* structure, corresponding to its *specific* tasks [*sic!*], and which departs from the model of all other Union agencies.^{40, 41}

The Board of the SRB is composed of a Chair and four full-time members.⁴² The Chair is supported by a Vice Chair without the right to vote. Each participating MS shall also appoint a member of the Board, representing their NRA, to participate in the plenary sessions. The Commission and the ECB both have permanent observers participating in the plenary and executive sessions but have no vote.⁴³ Other observers can be invited on an *ad hoc* basis. Depending on the task to be performed the Board convenes in different compositions.

The plenary session

For the plenary sessions all the members of the Board participate, as well as the Vice-Chair (as a non-voting member) and the permanent observers.⁴⁴ This means that all the MS representatives are present. In its plenary sessions the Board *inter alia* adopts its work programme for the following year and adopts and monitors its budget. In addition, it evaluates the use of resolution tools when the use of the Fund has reached a certain threshold and in exceptional cases it decides on the use of the Fund.⁴⁵

³⁹ Egeberg, Morten & Trondal, Jarle, "Agencification of the European Union administration - Connecting the dots". *TARN Working Paper Series*, 1, 2016: 3.

⁴⁰ Emphasis added.

⁴¹ SRM Regulation, op. cit., recital 31.

⁴² SRM Regulation, op. cit., Article 43 and 56.

⁴³ SRM Regulation, op. cit., Article 43 paragraph 3.

⁴⁴ Decision of the plenary session of the board of 29 April 2015 adopting the Rules of Procedure of the Single Resolution Board in its Plenary Session, SRB/PS/2015/9, 29.4.2015, Article 3.

⁴⁵ SRM Regulation, op. cit., Article 50.

The executive session

The executive session takes two forms. In the “restricted” executive sessions only the Chair, Vice-Chair (as a non-voting member), the four full-time members and the permanent observers participate.⁴⁶ If the session will deliberate on a specific bank it does so in an “extended” executive session, where the appointed representative of the relevant national or group-level resolution authority also participates.⁴⁷ In its executive session the Board *inter alia* prepares the decisions to be adopted by the Board in its plenary session as well as prepare, assess and approve resolution plans. It also applies simplified obligations and determine the minimum requirements for own funds and eligible liabilities to be met at all times for certain entities. Most importantly it provides the Commission with a resolution scheme if an entity is failing or likely to fail.⁴⁸

2.3. The reasons for agencification, and the issues succeeding

After this insight into agencies and the SRB we shall move to the subject of agencification. Scholten and Van Rijsbergen claim that agencification can be divided into two characterizing trends: firstly, a growing scope of delegation of public authority to the executive branch and secondly “cutting the executive into smaller pieces” or in other words a transfer of the executive branch within and beyond the national border.⁴⁹ One of the reasons for this transfer of powers is the wish to solve the issue of “Community administrative deficit” by creating mechanisms that are politically acceptable for the MSs as well as the supranational institution without directly strengthening the Commission.⁵⁰ Cutting the executive into smaller pieces also allows for a geographical diffusion of it, facing the growing criticism to the centralisation of powers in Brussels, by placing agencies in different MSs.⁵¹

⁴⁶ Decision of the plenary session of the board of 29 April 2015 adopting the Rules of Procedure of the Single Resolution Board in its Executive Session, SRB/PS/2015/8, 29.4.2015, Article 3.

⁴⁷ The Single Resolution Board, *The Single Resolution Mechanism - Introduction to resolution planning*. Luxembourg, Publications Office of the European Union, 2016: p 10.

⁴⁸ SRM Regulation, op. cit., Article 54 paragraph 2.

⁴⁹ Scholten & van Rijsbergen, 2014, op. cit., 1223-1224.

⁵⁰ Chiti, Edoardo, “An important part of the EU’s institutional machinery: features, problems and perspectives of European agencies”. *Common Market Law Review*, 46, 2009: 1398.

⁵¹ Schneider, Jens-Peter, “A Common Framework for Decentralized EU Agencies and the Meroni Doctrine”. *Administrative Law Review*, 61, 2009: 32.

One source for criticism against agencification stems from Montesquieu's theory of separation of powers. The theory implies that the political, the legislative and the executive powers must be separated. The executive power should be completely detached from the legislative, exclusively executing the tasks it is given by the legislative power, allowed the freedom that the law provides but never being able to exceed it or put it out of play.⁵² A risk when conferring decision making powers on an agency, is the disruption of the separation of powers.

A couple of other issues often referred to when examining agencification are democratic legitimacy and accountability.⁵³ The question of democratic legitimacy stems from the issue of most agencies not being treaty-based.⁵⁴ The fact that these powerful agencies have been created without a constitutional change may lead to a lessened social acceptance as the boards of agencies are not democratically elected but still draft regulation for vast areas of the Union. This is especially true for the Banking Union Agencies, as they have, *inter alia*, been given the power to issue legally binding acts and to surpass relevant national authorities in certain cases.

As regards accountability this mostly concerns the independent regulatory agencies due to the labelling "independent", as it is often interpreted as meaning "unaccountable".⁵⁵ The term independence is rather to be interpreted as its independence from political and industrial interests.⁵⁶ The Commission describes the real "*raison d'être*" of the regulatory agencies to be the ability to meet specific needs on a case-by-case basis and the independence of their technical and/or scientific assessments.⁵⁷

One of the main issues with accountability is the very diverse ways in which the Council and the Parliament can get involved in the actions of the agencies.⁵⁸ This sort of diversity may cause

⁵² Liedman, Sven-Eric, *Från Platon till kriget mot terrorismen*. 14th ed., Falun, Albert Bonniers Förlag, 2008: 132.

⁵³ See for instance: Szegedi, Laszlo, "EU-level Market Surveillance and Regulation by EU Agencies in Light of the Reshaped Meroni Doctrine". *European Networks Law and Regulation Quarterly*, 2, 2014: 300, and Scholten & van Rijsbergen, 2014, op. cit., 1224.

⁵⁴ Scholten & van Rijsbergen, 2014, op. cit., 1225.

⁵⁵ Scholten & van Rijsbergen, 2014, op. cit., 1224.

⁵⁶ See further on the EU separation of powers in section 4.2.

⁵⁷ European Commission, *Draft interinstitutional agreement on the operating framework for the European regulatory agencies*. Brussels, 2005: 2 and 5.

⁵⁸ See generally: Bovens, Mark, "Analysing and assessing accountability: a conceptual framework". *European Law Journal*, 13, 2007, 447–468.

accountability deficits, as it scatters the accountability fora that are supposed to hold the agencies responsible.⁵⁹

As we have now seen, there are several issues concerning the agencification of the EU, most of them having to do with the lack of a relevant legal basis to establish an agency on. Accordingly, we shall now take a closer look on the Article that was used to establish the SRB, Article 114 TFEU.

⁵⁹ Scholten & van Rijsbergen, 2014, op. cit., 1235.

3. Article 114 TFEU measures for approximation

3.1. The purpose of Article 114 TFEU

*“Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the **measures for the approximation**⁶⁰ of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”*

– Article 114(1) TFEU

The EU internal market constitutes an area that is to be free from obstacles to the movement of goods, services, persons and capital.⁶¹ In order to achieve this, the TFEU allows for direct regulatory action.⁶² Article 114 TFEU establishes the possibility for the European Parliament and the Council to adopt measures for the approximation of laws in the MSs that have as their goal the establishment and functioning of the internal market.

The use of Article 114 TFEU as a basis for a measure is directly tied to the improvement of the internal market. In the case *Tobacco Advertising I*, the Court found that a measure adopted on the basis of Article 114 TFEU must *genuinely* have as its object the improvement of the conditions for the establishment and functioning of the internal market. The existence of disparities between the MSs that may form an abstract risk of obstructing the internal market is not sufficient.⁶³ The case concerned a directive that was stated to have been adopted with the aim to promote the establishment of the internal market, but was annulled on the suspicion that it was in fact intended to harmonise an area outside of the Union’s competence, namely public health.⁶⁴

⁶⁰ Emphasis added.

⁶¹ Consolidated version of the Treaty on the Functioning of the European Union Article 26 paragraph 2.

⁶² Van Cleynenbreugel, Pieter, “Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies”. *Maastricht Journal of European and Comparative Law*, 21, 2014: 66.

⁶³ Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* (EU:C:2000:544) paragraph 84.

⁶⁴ Maletic, Isidora, “Theory and practice of harmonisation in the European internal market” in *Theory And Practice Of Harmonisation*. M Andenas & C Baasch Andersen (ed), 1st ed., Cheltenham, Edward Elgar Publishing Limited, 2011, pp. 315.

The question of what entails a “measure” has long been thought to be limited to rules directly approximating national rules through the replacement of national diverging alternatives, but the Court has increasingly opened up for it including also institutional arrangements.⁶⁵

3.2. Article 114 TFEU as the legal basis for an agency

The following section will give an introduction to the development of the case law that led Article 114 TFEU to be accepted as a legal basis for an agency. This description will remain very short as the subject is further discussed in section 4.1.

One of the most important limitations to the use of Article 114 TFEU is that its application must be centred around the harmonisation of national laws.⁶⁶ It has been questioned whether this includes the possibility that it could act as a sole legal basis for the establishment of an EU Agency. Moloney notes that the SRM amounts to a significant extension of the traditional understanding of the term “harmonisation” and that this generates a risk of constitutional instability.⁶⁷

In the case *Smoke Flavourings*⁶⁸ the United Kingdom [UK] brought an action for annulment to the CJEU, arguing that Article 114 TFEU could not be seen as an appropriate legal basis for Regulation (EU) No 2065/2003 establishing a Union list of authorised smoke flavouring products for use in foods. The Court found that in areas where MSs have taken or are about to take divergent measures that may have an inhibitive impact on the internal market, Article 114 TFEU allows the legislature to intervene by adopting suitable measures. It further established that the authors of the Treaty had intended to confer upon the legislature a wide margin of discretion as regards what is the most appropriate technique for achieving the desired result, especially concerning areas that are characterized by complex technical features.⁶⁹ The Court

⁶⁵ Van Cleynenbreugel, 2014, op. cit., 68.

⁶⁶ de Búrca, Gráinne & de Witte, Bruno, “The Delimitation of powers between the EU and its Member States” in *Accountability And Legitimacy In The European Union*. A Arnall & D Wincott (ed), 1st ed., New York, Oxford University Press Inc., 2002: 215.

⁶⁷ Moloney, 2014, op. cit., 1654.

⁶⁸ Case C-66/04 United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (EU:C:2005:743).

⁶⁹ Case C-66/04 *Smoke Flavourings*, op. cit., paragraph 45.

also pointed out that it is especially necessary that the legislature is given a wide margin of discretion when it comes to the protection of a public interest, in this case ensuring a high level of protection of health.⁷⁰

In 2011 the three European Supervisory Authorities [ESA] were created; the EBA, the European Securities and Markets Authority [ESMA] and the European Insurance and Occupational Pensions Authority. The ESMA's legal basis was challenged by the UK in the CJEU, which found Article 114 TFEU to be a valid legal basis for it.⁷¹ As of today there are several agencies based on Article 114 TFEU, not least in the financial sector.

⁷⁰ Case C-66/04 *Smoke Flavourings*, op. cit., paragraph 46.

⁷¹ See further Chapter 4.

4. Legal limits to agencification

Having been introduced to the phenomenon of agencification, the SRB and its legal basis, we shall now continue to look at the legal limits to agencification and the requirements to be fulfilled by an agency for it to be rightly established on Article 114. As previously stated, this will be done under five themes.

4.1. Level of legislation: Subsidiarity, proportionality and harmonising objective

The first theme to be discussed is the level of legislation. For an agency to be rightly established on an EU level and on Article 114 TFEU it must respect the limits of subsidiarity and proportionality and have a truly harmonising objective.

Subsidiarity and proportionality

The use of Union competences is ruled by the principles of subsidiarity and proportionality stated in Article 5 Treaty on European Union [TEU]. The principle of subsidiarity states that the EU shall only act in areas which are not covered by its exclusive competence if the objectives of the measure cannot be sufficiently achieved on a MS level by the simultaneous enactment of identical legislation. This means that measures should be taken at the lowest level appropriate.⁷² For the purpose of agencification this means that the EU is only allowed to act if it is clear that the area in which an agency is to act comprises issues that are not sufficiently addressed on a MS level. However, the CJEU has handled this more as a political than legal principle, avoiding making the actual material examination of whether the action can be sufficiently achieved on a MS level. It has instead chosen to look at it from a procedural perspective, namely through examining whether the legislature has actually considered the implications for the principle of subsidiarity of the measure. It has however not scrutinized the reasons given by the legislature.⁷³

In the case Working Time the Court found that if there was a question of harmonisation then this “necessarily” presupposed Union-wide action. It did not, however, assess the question of

⁷² Barnard, Catherine, *The Substantive Law of the EU*. 5th ed., Oxford, Oxford University Press, 2016: 649.

⁷³ Barnard, 2016, op. cit., 649-650.

whether harmonisation was indeed necessary in the area in question.⁷⁴ In the case *Ex p. BAT* the Court developed this principle stating that the purpose of the directive in question was the elimination of barriers emanating from differences in MS laws.⁷⁵ Such an objective could not, the Court stated, be sufficiently achieved by MSs individually and is hence better achieved on a Union level.⁷⁶

If, after applying the principle of subsidiarity, it becomes clear that the Union should act, the measure adopted must also be proportionate.⁷⁷ The principle of proportionality states that Union action shall not exceed what is necessary in order to achieve the Treaty objectives.⁷⁸ The Court has been quite reluctant to engage in the questions of proportionality. In reference to the principle of proportionality it stated in the case *Ex p. BAT* that:

*...the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.*⁷⁹

This means that there is a high, if not very high, threshold for the considering a measure to be disproportionate to the objectives pursued.

Harmonising objective

The purpose of Article 114 TFEU is to allow the legislature to take measures that are aimed at harmonising the internal market.⁸⁰ This means that the measure must have as its true objective

⁷⁴ Barnard, 2016, op.cit., 650 and Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (EU:C:1996:431) paragraph 47.

⁷⁵ Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*. (EU:C:2002:741) paragraph 181.

⁷⁶ Case C-491/01 *Ex p. BAT*, op. cit., paragraph 182-183.

⁷⁷ Barnard, 2016, op. cit., 649.

⁷⁸ Consolidated version of the Treaty on European Union Article 5.

⁷⁹ Case C-491/01 *Ex p. BAT*, op. cit., paragraph 123.

⁸⁰ de Búrca & de Witte, 2002, op. cit., 215.

the harmonisation of a certain area of legislation. Several cases have touched upon the subject of what can compose a harmonising measure. One of them is the Smoke Flavourings case.

In the case *Smoke Flavourings* the Court found, in regard to harmonisation under Article 114 TFEU, that the expression “measures for the approximation” intended to provide the legislature with a wide margin of discretion. Thus allowing it to decide what is the most appropriate measure for approximation on a case-by-case basis and to adapt the measure after the field in need of harmonisation and its specific features. This, the Court found, was especially true for fields characterized by complex technical features.⁸¹

After the legislature had commenced to establish agencies on the basis of Article 114 TFEU it was largely questioned if the establishment of an agency really could constitute a measure for approximation.

The European Network and Information Security Agency [ENISA] was established to contribute to the improvement of network and information security in the EU and became operational in 2005. Soon after the adoption of the ENISA Regulation⁸², establishing the ENISA, the UK questioned the use of Article 114 TFEU as the legal basis for the Regulation. The UK argued that the purpose of Article 114 TFEU was the approximation of laws and that the Regulation in fact took effect on the institutional level.⁸³

The UK requested that the Court examine whether the instrument adopted could have been carried out by the simultaneous enactment of identical legislation in each MS.⁸⁴ The UK also submitted that none of the provisions in the ENISA Regulation, even indirectly or in a minor way, approximates national legislation. Further they stated that simply because a measure may benefit the functioning of the internal market does not mean that it thereby constitutes harmonisation within the meaning of Article 114 TFEU.⁸⁵

⁸¹ Case C-66/04 *Smoke Flavourings*, op. cit., paragraph 45.

⁸² Regulation (EC) No 460/2004 of the European Parliament and of the Council.

⁸³ Chamon, 2016, op. cit., 12.

⁸⁴ Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* (EU:C:2006:279) paragraph 12.

⁸⁵ Case C-217/04 *ENISA*, op. cit., paragraph 15.

In its judgement, the Court made no distinction between the establishment of the ENISA and the tasks conferred upon it, but seemed to view them as one single measure.⁸⁶ It merely remarked that the legislator may find it necessary to establish a Community body responsible for contributing to the implementation of a process of harmonisation.⁸⁷ The Court did however indicate that a determination was desirable as to whether the Agency and its objectives and tasks may be regarded as measures for approximation.⁸⁸

The Court then performed a two-step test, firstly examining whether the tasks conferred on the body were closely linked to the subject matter of the acts harmonising the laws in the MSs.⁸⁹ After looking into the Directives concerning network and information security the Court found that to be the case.⁹⁰ It then went on to examine if the establishment of the agency together with its objectives and tasks could be considered harmonising measures within the meaning of Article 114 TFEU. This was done by examining whether those objectives and tasks may be regarded as supporting and providing a framework for the implementation of the legislation concerning network and information security.⁹¹ It was found that the ENISA Regulation did not constitute an isolated measure but was to be considered a part of a normative context directed at completing the internal market in the area of electronic communications.⁹² The Court stated that the legislature had been faced with trying to manage an area that did not only develop fast but was also very complex. The legislature had foreseen that this would lead to differences in MSs transposition of the specific Directives and found that an appropriate way to meet this challenge was through the establishment of the ENISA.⁹³

What can be derived from the ENISA-case is first and foremost that the tasks of an agency established on the basis of Article 114 TFEU must be closely linked with the legislation governing the area which it is to be active within. Secondly the agency and its tasks and objectives viewed jointly must be considered harmonising within that same area. Thirdly what

⁸⁶ Chamon, 2016, op. cit., 13.

⁸⁷ Case C-217/04 ENISA, op. cit., paragraph 44.

⁸⁸ Case C-217/04 ENISA, op. cit., paragraph 59.

⁸⁹ Case C-217/04 ENISA, op. cit., paragraph 47.

⁹⁰ Case C-217/04 ENISA, op. cit., paragraph 58.

⁹¹ Case C-217/04 ENISA, op. cit., paragraph 59.

⁹² Case C-217/04 ENISA, op. cit., paragraph 60.

⁹³ Case C-217/04 ENISA, op. cit., paragraph 61-62.

seems to have been decisive in the case is the fact that the agency was temporary and that a review of its effectiveness awaited.

Harmonisation was also touched upon in the Short Selling case. The ESMA was created as one of the ESAs with the purpose of protecting the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system for the Union economy, its citizens and businesses.⁹⁴ For this purpose it was given extensive powers and became one of the most powerful EU agencies, as it enjoys regulatory, decision-making, and exclusive-supervisory powers.⁹⁵

In 2012 the UK brought an action for annulment to the CJEU, seeking to annul Article 28 of Regulation (EU) No 236/2012, on short selling and certain aspects of credit default swaps, which allows the ESMA to intervene in exceptional circumstances.

The UK contended Article 114 TFEU as the legal basis for the delegation of powers to the ESMA to take decisions that directly affect natural or legal persons.⁹⁶ The Article did not allow the EU legislature to take individual decisions that were not of general application or to delegate to the Commission or a Union agency the power to adopt such decisions.⁹⁷ Furthermore, such decisions overriding the decisions of National Competent Authorities [NCA] could not be seen as harmonising in accordance with Article 114 TFEU.⁹⁸

The Court found that for the questioned provision in the Short Selling Regulation⁹⁹ to be within the scope of Article 114 TFEU it must satisfy two conditions. First, it must comprise a measure for the approximation of provisions laid down by law regulation or administrative action in the MSs. Second, it must have as its objective the establishment and functioning of the internal market.¹⁰⁰ With regard to the first condition the Court found that the authors of the TFEU had

⁹⁴ Regulation (EU) No 236/2012 of the European Parliament and of the Council Article 1 paragraph 5.

⁹⁵ Scholten & van Rijsbergen, 2014, op. cit., 1241.

⁹⁶ Case C-270/12 United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (EU:C:2014:18) paragraph 88.

⁹⁷ Case C-270/12 Short Selling, op. cit., paragraph 89.

⁹⁸ Case C-270/12 Short Selling, op. cit., paragraph 90.

⁹⁹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council Article 28. Henceforth “ESMA Regulation”.

¹⁰⁰ Case C-270/12 Short Selling, op. cit., paragraph 100.

intended to confer upon the legislature a discretion as regards the most appropriate method of harmonisation for achieving a desired result, and that this was especially true in areas with complex technical features.¹⁰¹ The Court then referred to the ENISA case, where it was found that the establishment of an EU body may be necessary in the pursuit of harmonisation.¹⁰² The MSs' legislation on short selling was fragmented and some MSs had taken divergent measures. Therefore, to end a fragmented situation it was necessary to address the potential risks arising from short selling and credit default swaps in a harmonised manner.¹⁰³ In respect of the second condition the Court found that the common framework laid down was intended to prevent the creation of obstacles to the proper functioning of the internal market. The purpose of the powers provided for in the contended provision was, the Court stated, in fact to improve the conditions for the establishment and functioning of the internal market in the financial field.¹⁰⁴ Article 114 TFEU was hence the appropriate legal basis for the delegation of the powers in question.

The two questions posed in the Short Selling case are arguably more open than those in the ENISA case. In Short Selling the Court did not undertake the same control of whether the tasks were closely linked to the acts regulating the area. It merely stated that the legislature has a wide margin of discretion in its choice of what is the most appropriate means of harmonisation and found that as long as that measure could be seen as harmonising, and had as its object the establishment of the internal market, then it was within the scope of Article 114 TFEU.

4.2. The agency's place in the institutional framework: the principle of conferral, separation of powers and institutional balance

The creation of an agency must respect its specific place in the institutional framework of the EU. This means that no power that was not already conferred on the Union can be conferred on an agency, nor can it affect the institutional balance of the EU.

The principle of conferral

Article 5 TEU establishes that the limits of Union competences are governed by the principle of conferral, meaning that the EU can only act within the limits of the competences explicitly

¹⁰¹ Case C-270/12 Short Selling, op. cit., paragraph 102.

¹⁰² Case C-270/12 Short Selling, op. cit., paragraph 104.

¹⁰³ Case C-270/12 Short Selling, op. cit., paragraph 110-111.

¹⁰⁴ Case C-270/12 Short Selling, op. cit., paragraph 114 & 116.

or implicitly conferred on it. Competences not conferred on the Union shall remain with the MSs.¹⁰⁵ A requirement for EU agencies is subsequently that no new power can have originated through the creation of the agency that was not originally conferred on the EU.

The separation of powers and institutional balance

Furthermore agencies based on Article 114 TFEU must not disrupt the separation of powers nor affect the institutional balance of the EU. This requirement was firstly addressed in the case *Meroni*. In the case the Court refers to the “balance of powers”.¹⁰⁶ The term as it was formulated in *Meroni* is however different from the contemporary *institutional balance*.¹⁰⁷

The term *balance of powers* was used as a substitute for the principle of *separation of powers* of Montesquieu, in the era of the European Coal and Steel Community [ECSC].¹⁰⁸ The concept was used primarily to safeguard the decision making process in the Union, as well as individuals rights.¹⁰⁹ In the *Meroni* case it is used to underline the importance of not giving an agency more power than the delegating authority, by not making it subject to the same conditions that apply to the delegating authority. It is worth mentioning here that the powers of the EU have not been functionally and institutionally separated in the same manner as in a national state. The EU has a more functional separation of powers than national states, as there is no single institution holding the legislative role.¹¹⁰

Institutional balance is not mentioned in the Treaties, but has been established through the case law of the CJEU, although it links to the Article 5 principle of conferred powers.¹¹¹ The concept of institutional balance rests on the notion that the EU legal system is closed, and within it exists a sum of powers with different aspects representing wider interests.¹¹²

¹⁰⁵ TEU, op. cit., Article 5.

¹⁰⁶ Case C-9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* (EU:C:1958:7) page 152.

¹⁰⁷ See for instance: Szegedi, 2014, op. cit., 301 and Chamon, 2011, op. cit., 1058.

¹⁰⁸ Szegedi, 2014, op. cit., 301.

¹⁰⁹ Chamon, 2011, op. cit., 1058.

¹¹⁰ Chamon, 2016, op. cit., 149-150.

¹¹¹ Lenaerts, Koen & Verhoeven, Amaryllis, "Institutional Balance as a Guarantee for Democracy in EU Governance" in *Good Governance In Europe's Integrated Market*. C Joerges & R Dehousse (ed), 1st ed., New York, Oxford University Press, 2002: 44.

¹¹² Bergström, 2015, op. cit., 220.

In the case Chernobyl the Court found that the Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.¹¹³ This means, the Court stated, that each institution must exercise its powers with due regard for the powers of the other institutions and there must exist a possibility to penalize any breach of this rule.¹¹⁴

The principles of *separation of powers* and *institutional balance* can be said to operate at different levels, the first one being relevant for the evaluation of the legal architecture and political functioning of the EU, and the second one being useful to evaluate the political functioning of the EU.¹¹⁵ It has hence been proposed by several authors that institutional balance is not an obstacle to agencification, but that agencification would in fact strengthen the institutional balance.¹¹⁶

An interesting aspect of institutional balance is that it has changed its shape from a static to a dynamic rule.¹¹⁷ The rule demands that the EU institutions, positively, assume fully the political responsibility conferred on them by the Treaties and, negatively, to refrain from abusing their powers. It can hence be argued that there exists both an abstract political institutional balance and a legal institutional balance, allowing the term to be interpreted dynamically.¹¹⁸

Seeing as the principle of separation of powers and institutional balance work on different levels and can be used to evaluate different aspects, they are both relevant to the investigation of agencification.¹¹⁹

¹¹³ Case C-70/88 European Parliament v Council of the European Communities (EU:C:1990:217) paragraph 21.

¹¹⁴ Case C-70/88 Chernobyl, *op. cit.*, paragraph 22.

¹¹⁵ Chamon, 2016, *op. cit.*, 154.

¹¹⁶ *Ibid.*

¹¹⁷ Macchia, Marco, “Procedural decision-making and the Banking Union – The accountability mechanisms”. *TARN Working Paper Series*, 4, 2017: 7.

¹¹⁸ Chamon, 2016, *op. cit.*, 158.

¹¹⁹ Chamon, 2016, *op. cit.*, 154.

4.3. Nature of the powers conferred: Clearly defined executive powers leaving no room for discretion

The requirement that agency powers must be clearly defined was established first in the Meroni case.¹²⁰ The case was delivered in 1958 by the Court under the ECSC Treaty. In short, it allowed only for the delegation of executive powers. Even though the case was decided on under a treaty very different from the current version of the TFEU, it is still often cited and has been called an “institutional cornerstone” in the agencification of the EU.¹²¹

The Court established that there is a great difference in delegation of powers if they consist of:

“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.”¹²²

The second alternative would in fact amount to a real transfer of responsibility. Article 3 ECSC stated that the common objectives of the Community are binding on not only the High Authority but on all the institutions of the Community within the limits of their respective powers. This, the Court found, constituted a fundamental guarantee for institutional balance within the Community and a delegation of powers to an institution not established in the Treaty would render that guarantee ineffective.

The Meroni case is now almost sixty years old but there is no question as to whether the doctrine still has merit, it has been referred to by the Court as recently as 2015.¹²³ The case established that delegation of powers was indeed possible within the regulatory framework but it was dependant on the nature of the powers conferred. Delegation of powers of the first kind was allowed while the second kind disrupted the balance of powers guaranteed by the Treaty. Accordingly, a certain level of discretion in the decision making of an agency is acceptable, as

¹²⁰ Case C-9/56 Meroni, op. cit.

¹²¹ Szegedi, 2014, op. cit., 299.

¹²² Case C-9/56 Meroni, op. cit., page 152.

¹²³ Case C-147/13 Kingdom of Spain v Council of the European Union (EU:C:2015:299).

long as there are clear conditions circumscribing the exercise of that discretion and a wide margin of discretion is not afforded.¹²⁴

The issue was addressed anew in the case *Short selling*. In the case the UK argued that determining whether the criteria of Article 28(2) of Regulation EU (No) 236/2012 were met entailed a “very large measure of discretion” which would amount to a breach of the Meroni non-delegation doctrine. The UK claimed that this sort of discretion would lead to a “highly subjective judgement”, stating that the fact that MSs had adopted different approaches to short selling implied its complex nature and thus the margin of discretion that deciding on the matter would entail.¹²⁵ The UK further claimed that determining whether the NCA has taken appropriate measures in addressing a threat to the orderly functioning and integrity of financial markets, or to the stability of the whole or part of the financial system will require the ESMA to take potentially controversial decisions. These decisions would amount to the implementation of actual economic policy and an arbitrary weighing of public interests.¹²⁶ The UK also argued that the ESMA has a wide range of choices as to which measure to impose and as to any exceptions that may be specified, and that those choices have very significant economic and financial policy implications.¹²⁷

Addressing this plea in law the Court pointed out that the bodies in question in the Meroni case were private law enterprises whereas the ESMA was a European Union entity, created by the EU legislature.¹²⁸ It also observed that Article 28 of Regulation EU (No) 236/2012 did not confer any autonomous power beyond the bounds of the regulatory framework established by the ESMA Regulation.¹²⁹ Unlike the powers in the Meroni case, the powers of the ESMA were circumscribed by various conditions and criteria limiting the discretion of the ESMA, including *inter alia* the consultation requirement and the temporary nature of the measures authorised.¹³⁰ The Court found that the ESMA was obliged to investigate a significant number of factors

¹²⁴ Moloney, 2014, op. cit., 1660.

¹²⁵ Case C-270/12 *Short Selling*, op. cit., paragraph 28.

¹²⁶ Case C-270/12 *Short Selling*, op. cit., paragraph 29.

¹²⁷ Case C-270/12 *Short Selling*, op. cit., paragraph 30-31.

¹²⁸ Case C-270/12 *Short Selling*, op. cit., paragraph 43.

¹²⁹ Case C-270/12 *Short Selling*, op. cit., paragraph 44.

¹³⁰ Case C-270/12 *Short Selling*, op. cit., paragraph 50.

before taking a decision, and several cumulative criteria needed to be met.¹³¹ It followed, the Court found, that the powers under Article 28 of Regulation (EU) No 236/2012 did not confer on the ESMA a very large measure of discretion but were precisely delineated and open to judicial review in the light of the objectives set out by the delegating authority and hence were in conformity with the requirements of Meroni.¹³²

4.4. The impact of agency acts: Acts having the force of law vs acts of general application

The following section concerns the impact of acts adopted by agencies. Agency acts cannot have the force of law, but they can be of general application.

The requirement that agency acts cannot have the force of law was first laid down in the case Romano.¹³³ The case concerned Giuseppe Romano who was entitled to invalidity pension in two MSs, Belgium and Italy. Mr Romano was an Italian national living in Belgium where he was awarded invalidity pension and later retirement pension.¹³⁴ This led the Belgian sickness and invalidity insurance institution to take the decision that, in accordance with Belgian law, Mr Romano's Belgian pension was to be reduced by the amount of the Italian pension. In October 1976 Mr Romano brought an action that did not question the principle of adjusting the pension, but the exchange rate that had been used to calculate the size of the reduction. The Belgian institution had, *inter alia*, based their decision on a pension calculation scheme issued by the Administrative Commission.¹³⁵ In 1980 the Belgian court stayed its proceedings and referred a question to the CJEU. The question concerned whether the agency's decision, containing the pension calculation scheme, was lawful and if so how it must be interpreted.¹³⁶

The Court stated that the duties of the Administrative Commission were, *inter alia*,

“that of dealing with all administrative questions and questions of interpretation arising from the regulation and subsequent regulations, or from any agreement or arrangement concluded

¹³¹ Case C-270/12 Short Selling, op. cit., paragraph 48.

¹³² Case C-270/12 Short Selling, op. cit., paragraph 52-53.

¹³³ Case C-98/80 Giuseppe Romano v Institut national d'assurance maladie-invalidité (EU:C:1981:104).

¹³⁴ Case C-98/80 Romano, op. cit., paragraph 3.

¹³⁵ Case C-98/80 Romano, op. cit., paragraph 10.

¹³⁶ Case C-98/80 Romano, op. cit., paragraph 14.

*thereunder, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of Member States, by the regulation or by the Treaty”.*¹³⁷

The Court then arrived at the conclusion that an agency such as the Administrative Commission cannot be empowered to adopt acts having the force of law and that the Belgian court was therefore not bound by the decision.¹³⁸ The Romano case hence added another criterion to the so called non-delegation doctrine, namely that the Council could not delegate to agencies the power to adopt acts "having the force of law".

This requirement was also dealt with in the Short-selling case. In that case the UK argued for a breach of the Romano non-delegation doctrine, stating that Article 28 of Regulation (EU) No 236/2012 allows the ESMA to adopt measures of a quasi-legislative nature that are of general application.¹³⁹ Therefore it was not a question of individual decisions or a group of individual decisions, but “measures of general application having the force of law”.¹⁴⁰ With regards to this the Court noted the change in the institutional scenery since Romano and referred to Articles 263 and 277 TFEU.

The Articles acknowledge the existence of agencies and open up for judicial review of agency acts, but they do not mention the establishment of agencies. The Court stated that the first paragraph of Article 263 TFEU and Article 277 TFEU, “expressly [*sic!*] permits Union bodies, offices and agencies to adopt acts of general application”.¹⁴¹ The Court did however not find that this was in conflict with the principle established in Romano.¹⁴²

The question of what impact agency acts may have does not have a simple answer. If the Romano doctrine, according to the Court itself, is not obsoleted by the Short Selling case then we can come to the conclusion that agency acts may indeed be binding and of general

¹³⁷ Case C-98/80 Romano, op. cit., paragraph 12.

¹³⁸ Case C-98/80 Romano, op. cit., paragraph 20.

¹³⁹ Case C-270/12 Short Selling, op. cit., paragraph 56.

¹⁴⁰ Case C-270/12 Short Selling, op. cit., paragraph 57.

¹⁴¹ Case C-270/12 Short Selling, op. cit., paragraph 65.

¹⁴² Ibid.

application, but may not have the force of law. What, exactly, the difference is and where the line is drawn between the two will have to be established in future case law.

4.5. Reviewability and accountability

Lastly is the requirement that conferred powers must be reviewable, both through continuous oversight and accountability.

The importance of being able to review conferred powers was pointed out already in the *Meroni* case. There the Court found that had the powers conferred instead been exercised by the High Authority, they would have been subject to review under the Court.¹⁴³ But when conferred, the possibility to judicial review was lost. It was for this reason, in part, that the Court found the conferral to be unlawful in that case.

The issue was dealt with again in the *Romano* case. One of the primary reasons for the Court disapproving of the delegation was the fact that the decisions of agencies were not available for review under the CJEU. The EEC Treaty established that the power to issue legally binding decisions belongs only to the Commission and provided for judicial review of only the Commission and Council's decisions.¹⁴⁴ Since no agencies had been foreseen in the Treaty as possible authors of legally binding decisions and hence not been made subject to judicial review, the delegation was unlawful.

In the *ENISA* case a decisive factor was that the Agency was temporary and that an evaluation was scheduled to take place to decide on the fate of the Agency after having studied its effectiveness and its contribution to the implementation of the Directives concerning network and information security.¹⁴⁵

In the *Short Selling* case the Court found the establishment of, and delegation of powers on, the ESMA to be lawful. This depended, as previously stated, in part on the fact that Article 263 and 267 TFEU acknowledged the existence of agencies and opened up for review of their acts by the CJEU.

¹⁴³ Case C-9/56 *Meroni*, op. cit., page 149.

¹⁴⁴ Scholten & van Rijsbergen, 2014, op. cit., 1239.

¹⁴⁵ Case C-217/04 *ENISA*, op. cit., paragraph 65-66.

It is clear that the possibility to review the acts of an agency as well as its functioning and efficiency is a decisive factor in determining the legality of the establishment and the conferral of powers on it.

4.6. The legal limits to agencification

Summing up the legal limits to agencification we find that for an agency to be rightly established on Article 114 it must firstly have an objective that is harmonising and better achieved on a Union level. The creation of an agency must also be proportionate to the objective to be achieved. Secondly, the establishment of an agency cannot implicate the creation of a new power for the Union nor alter the balance of powers within the EU. Thirdly, the powers conferred on the agency must be clearly defined and leave no room for discretion. Fourth, the acts adopted by the agency can be of general application but cannot have the force of law. Fifth, there must be ways of reviewing the agency. Both through oversight and through accountability.

5. The SRB in relation to the agency requirements

5.1. Establishment of the SRB and its primary tasks

Having determined the requirements for an agency to be rightly established on Article 114 TFEU, we now turn the spotlight on the SRB. The following sections will look closer at the two primary tasks of the Agency.

The planning of a bank resolution is made *ex ante* and is hence what makes up most of the SRB's day-to-day work when banks are not failing. This is to allow the SRB to be prepared and have a resolution plan ready in the event that an intervention becomes necessary. When the SRB finds that it is time for a resolution, the resolution plan is adopted by the Board in its extended session and becomes a resolution scheme.

5.1.1. Drawing up and adopting resolution plans

The SRB's primary task is to draft and adopt resolution plans and schemes for credit institutions.¹⁴⁶ The objective is to allow for banks that are failing to do so in an orderly manner without greater disruptions to the stability of the market on a larger scale.¹⁴⁷ The resolution planning is done in so called Internal Resolution Teams [IRT] consisting of staff from the SRB and from the relevant NRAs and are headed by coordinators appointed from the SRB's senior staff.¹⁴⁸ In the resolution plan the banks critical functions are determined and any obstacles to a possible future resolution are identified and addressed. The resolution plan lays out a resolution strategy, including which resolution tools to apply.¹⁴⁹

There are four resolution tools. The *sale of business tool* allows for total or partial disposal of the entity's business. The *bridge institution tool* entails a transfer of the entity as a whole or in part to a temporary entity which is totally or partially publicly owned. The *asset separation tool* involves the transfer of assets, rights or liabilities to an asset management vehicle which is

¹⁴⁶ SRM Regulation, op. cit., Article 8 paragraph 1.

¹⁴⁷ Bozina Beros, Marta, "Some reflections on the governance and accountability of the Single Resolution Board". *TARN Working Paper Series*, 3, 2017: 3.

¹⁴⁸ The Single Resolution Board, 2016, op. cit., 11.

¹⁴⁹ The Single Resolution Board, 2016, op. cit., 11.

totally or partially publicly owned. The *bail-in tool* is used to write down or convert equity and debt, placing the burden on creditors and shareholders rather than taxpayers.¹⁵⁰

If an entity has subsidiaries or significant branches in non-participating MSs a Resolution College is established. A Resolution College brings together the SRB with the NRA or NRAs of the relevant non-participating MS/s. For entities without significant branches in non-participating MSs no Resolution College is needed. The IRT draws up a resolution plan which then enters into the formal adoption process.¹⁵¹

After a resolution plan has been drafted it is communicated to the European Central Bank [ECB] or the NCA for consultation. It is then submitted to the Board in its extended executive session for approval after which it is communicated to the relevant bank. If there is a Resolution College involved then it must be consulted before the approval of the plan.

5.1.2. Adoption of resolution schemes

If the SRB in its extended executive session has found that a bank meets the conditions for resolution, it will adopt a resolution scheme. For a resolution scheme to be adopted three conditions must be met.¹⁵² Firstly, the ECB must have found in their assessment that the entity is failing or likely to fail. The SRB can itself make such an assessment if the ECB has been alerted that it intends to do so and the ECB has not made the assessment within three days of receiving that message. Secondly, there can be no reasonable prospect that any alternative private sector measures would prevent the failure in respect of the timing and other relevant circumstances. This is decided on by the SRB in its executive session. Thirdly, a resolution action must be in the public interest.

A resolution is in the public interest if it is necessary to achieve, and is proportionate to, one or more of the resolution objectives.¹⁵³ The resolution objectives include the ensuring of critical functions, avoiding significant adverse effects on financial stability, protecting certain

¹⁵⁰ SRM Regulation, op. cit., Article 22 paragraph 2 and The Single Resolution Board, 2016, op. cit., 12.

¹⁵¹ SRM Regulation, op. cit., Article 8 paragraph 2 and The Single Resolution Board, 2016, op. cit., 15 and 17.

¹⁵² SRM Regulation, op. cit., Article 18 paragraph 1.

¹⁵³ SRM Regulation, op. cit., Article 18 paragraph 5.

depositors¹⁵⁴ and investors¹⁵⁵ as well as public funds and client funds and assets.¹⁵⁶ Once the SRB has found that the conditions are met it consults with the NRA and adopts the scheme. The ECB shall during this process provide all necessary information to the SRB to help inform the assessment process but the SRB is ultimately responsible to determine whether there is no alternative action available and a resolution action is necessary.

The scheme shall place the entity under resolution, determine what resolution tools shall be utilized and whether the SRF is to be used.¹⁵⁷ Immediately after the resolution scheme has been adopted it must be sent to the Commission. The Commission then has 24 hours to either endorse or object to the resolution scheme with regard to the discretionary aspects of it.¹⁵⁸ Within the first 12 hours the Commission may object to the scheme before the Council if it considers that the condition for public interest is not fulfilled, or suggest a modification of the amount to be used from the SRF. If no objection has been expressed by either the Commission or the Council after the 24 hour period has expired, the resolution scheme may enter into force.

After this walk-through of the SRB primary tasks we shall now proceed to examine this procedure in the light of the requirements established in Chapter 4.

5.2. The proper level of legislation for the SRB

The first theme to be examined is the proper level for the legislation. For the legislation to be rightly established on a Union level and on Article 114 TFEU it must respect the limits of subsidiarity, proportionality and have a harmonising objective.

Subsidiarity and proportionality

The principle of subsidiarity gives that the EU shall only act in areas which are not covered by its exclusive competence if the objectives of the measure proposed cannot be sufficiently achieved on a MS level, by the simultaneous enactment of identical legislation.¹⁵⁹ The establishment of an agency with the power to draw up and adopt resolution schemes could

¹⁵⁴ Depositors covered by Directive 2014/49/EU.

¹⁵⁵ Investors covered by Directive 97/9/EC.

¹⁵⁶ SRM Regulation, op. cit., Article 14 paragraph 2.

¹⁵⁷ SRM Regulation, op. cit., Article 18 paragraph 6.

¹⁵⁸ SRM Regulation, op. cit., Article 18 paragraph 7.

¹⁵⁹ TEU, op. cit., Article 5.

arguably not have been achieved in said manner. Although as mentioned previously, the Court, when confronted with this issue, has mainly looked at whether or not the legislature has given thought to the aspect of subsidiarity.

The SRM Regulation states that ensuring an effective resolution procedure on a Union level is essential for the completion of the internal market in financial services and that as long as resolution rules and practices remain at national level, the internal market will continue to be fragmented.¹⁶⁰ The Regulation hence addresses that the area is disintegrated and in need of harmonisation. This may seem to be a vague motivation for showing that the principle for subsidiarity is fulfilled. Nonetheless, in accordance with previous case law, as long as it has been shown that there exists obstacles to the establishment of the internal market then this should be satisfactory for the legislature to have proven that a Union level measure is necessary.

Having found that the measure is better achieved on a Union level we move to the requirement for proportionality. As was demonstrated in section 4.1., the threshold for considering a measure disproportionate is very high. Similar to the situation in the case *Ex p. BAT* the SRB is active in an area that demands political, economic and social choices on its part, building on complex assessments. For the establishment of the SRB to be illegal on the grounds of it being disproportionate, it must thus be “manifestly inappropriate” in relation to the objective pursued. Seeing as it is established that agencies can in fact be an acceptable response to obstacles in the internal market¹⁶¹, it is highly unlikely that the SRB would be deemed illegal on the basis of not being proportionate.

Harmonising objective

Furthermore cases *ENISA* and *Short Selling* have shown that an agency can indeed be within the scope of the legislature’s margin of discretion, as long as the establishment and the powers of the agency have as their object the establishment and functioning of the internal market and can be seen as harmonising.

In the *Short Selling* case the Court stated two conditions to be satisfied: First, the measure must comprise a measure for the approximation of provisions laid down by law, regulation or

¹⁶⁰ SRM Regulation, *op. cit.*, recital 9 and 12.

¹⁶¹ See section 3.2.

administrative action in the MSs. Second, it must have as its objective the establishment and functioning of the internal market.¹⁶²

The Court found in that case that the authors of the Treaties intended to grant the legislature with a wide margin of discretion as to what is the most appropriate method for harmonisation where the area is characterized by complex and technical features. The power contended in the Short Selling case was the ESMA's power to intervene directly in exceptional circumstances. This is similar to the situation with the SRB, which will also intervene directly, but on a larger scale.

The preamble of the SRM Regulation discusses the subject of harmonisation, and how a centralised resolution procedure will promote the functioning of the internal market, at length. It is stated *inter alia* that the financial crisis has shown that the functioning of the internal market is under threat.¹⁶³ There is an increasing risk of financial fragmentation, and as long as the resolution rules and practices stay national, the internal market will remain fragmented.¹⁶⁴ Furthermore, divergences between the national resolution rules and the lack of a unified decision making process for resolution in the Union contributes to instability and lack of confidence in the market as they do not ensure predictability as to the possible outcome of a bank failure.¹⁶⁵ Divergences in national rules may also lead banks and customers to have higher borrowing costs, simply because of their place of establishment.¹⁶⁶

The preamble remarks that the Bank Recovery and Resolution Directive, establishing a common framework for the MSs resolution procedures, admittedly is a step along the way, but that it still leaves discretion to the national authorities in the application of the tools and in the use of national financing arrangements.

The preamble goes on to state that the SRM is not to be judged on its own, but is an interwoven part of a system harmonising the prudential supervision of the internal market, together with

¹⁶² Case C-270/12 Short Selling, *op. cit.*, paragraph 100.

¹⁶³ SRM Regulation, *op. cit.*, recital 1.

¹⁶⁴ SRM Regulation, *op. cit.*, recital 1 and 9.

¹⁶⁵ SRM Regulation, *op. cit.*, recital 2.

¹⁶⁶ SRM Regulation, *op. cit.*, recital 4.

inter alia the establishment of the EBA, the SSM and the directives and regulations covering the area.¹⁶⁷

Moreover, common and effective resolution rules is in the interest of the MSs from a banking perspective, but also in general, as it will promote a level competitive playing field and improve the functioning of the internal market.¹⁶⁸ Considering the interconnectedness of the financial market, the MSs participating in the SSM would have a stronger negative systemic impact on the non-participating MSs in the absence of the SRM. The SRM, the preamble states, will limit the spill-over effects of failing banks in the non-participating MSs and thus promote the functioning of the internal market as a whole.¹⁶⁹

The SRM Regulation hence more than justifies that the SRB has been established in the name of harmonisation.

It would seem that the establishment of the SRB likely satisfies the requirements of subsidiarity, proportionality and of having a harmonising objective. At least in reference to how the requirements have hitherto been handled by the Court. Accordingly, we shall now examine how it is tailored to fit into the institutional framework of the EU.

5.3. The SRB's place in the institutional framework

The second theme to be observed is that of the SRBs place in the structure of the EU. For the SRB to be acceptable in the EU institutional organisation it must respect the limits of conferred powers, separation of powers and institutional balance.

The principle of conferred powers

As stated previously, principle of conferred powers states that the EU can only act within the limits of the powers that the MSs have conferred upon them. No new power can have been generated for the Union with the creation of the agency. However, the powers laid down in EU Treaty legislation is often vaguely and broadly worded, being the result of multilateral negotiations, giving room for ample interpretation.

¹⁶⁷ SRM Regulation, op. cit., recital 11.

¹⁶⁸ SRM Regulation, op. cit., recital 12.

¹⁶⁹ SRM Regulation, op. cit., recital 12.

Chamon states that the question of whether the power vested in an agency is originally conferred on the EU, is typically not very contentious. Agency powers are usually dependent on an earlier exercise of competence by the EU, that is, the EU legislator adopting new legislation which is then implemented.¹⁷⁰ This is the case also regarding resolution. The common resolution framework for the Union as a whole, is laid down in the Bank Recovery and Resolution Directive. Since the framework takes the form of a Directive it allows for the MSs to implement it into their own legal systems in the way that best suits that state. But for the Eurozone, it is the SRB that applies the Directive. Seeing as the powers were already established in a Directive, it is not very precarious to conclude that the conferral of tasks to the SRB is within the principle of conferred powers.

Balance/separation of powers

In the Meroni case we could see that the objective of the principle of balance/separation of powers was to safeguard the decision making process of the Union and individuals rights.

As regards individuals rights the SRB can, when applying the bail-in resolution tool, write down or convert depositor funds not covered by the deposit guarantee in Directive 2014/49/EU.¹⁷¹ This may amount to a breach of the right to property established in Article 17(1) of the Charter of Fundamental Rights of the European Union and Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in the recent case Ledra Advertising, which concerned the bail-in of uninsured deposits, the Court opened up for the possibility that restrictions may be imposed on the exercise of the right to property.¹⁷² This is, nevertheless, dependent on that the restrictions genuinely meet the objectives of public interest, are proportionate and do not impair the very substance of the right guaranteed.¹⁷³

Firstly, the adoption of a resolution scheme is reliant on the fact that a resolution is in the public interest. This is also a ground for the Commission to object to the scheme. If the SRB has found

¹⁷⁰ Chamon, 2016, op. cit., 4.

¹⁷¹ SRM Regulation, op. cit., Article 27.

¹⁷² Joined Cases C-8/15 P to C-10/15 P Ledra Advertising v Commission and ECB (EU:C:2016:701) paragraph 70.

¹⁷³ Joined Cases C-8/15 P to C-10/15 P Ledra, op. cit., paragraph 70.

that a resolution applying the bail-in tool is in the public interest and the Commission has not objected to this, then one can presume that it would be accepted as in being in the public interest by the Court as well.

Secondly, the SRM Regulation states that “interference with property rights should not be disproportionate”. Consequently, shareholders and creditors shall, through a resolution, not suffer greater losses than they would have done should the entity have been wound up under at the time that the resolution decision is taken.¹⁷⁴ As the Court has tended to, in respect to proportionality, only examine whether the principle has been taken into consideration, this should satisfy the requirement for the measure to be proportionate. It should also guarantee that the very substance of the right is not impaired seeing as the shareholders and creditors will not be worse off than had the bank been wound up. However, the Court did not address the question of *who* can impose restrictions to the right to property, it is hence uncertain whether the Court would accept that it be made by an EU Agency.

Institutional balance

Concerning whether the SRB disrupts the institutional balance of the EU, Lenaerts and Verhoeven state that three principles can be derived from the case law of the CJEU for the evaluation of institutional balance:

1. Each institution shall enjoy a sufficient independence in order to exercise its powers.
2. Institutions should not unconditionally assign their powers to other institutions.
3. Institutions may not, in the exercise of their powers, encroach on the powers and prerogatives of other institutions.¹⁷⁵

The SRB has been provided with some quite extensive powers. Its place in the institutional framework allows it to exercise those powers to a certain extent. As an expert body the SRB is given a considerable amount of trust in its assessments and conclusions. But in the end it must always look for endorsement from, or at least give chance for objection to, the Commission and the Council.¹⁷⁶ This proves that the SRB is indeed independent in its use of powers, but at the

¹⁷⁴ SRM Regulation, op. cit., recital 62.

¹⁷⁵ Lenaerts & Verhoeven, 2002, op. cit., 44-45.

¹⁷⁶ See further section 5.6.

same time, that the legislature has not assigned it those powers unconditionally. The Commission acknowledged the need for an expert body, faced with an area of extreme complexity, but on the other hand, retained the power itself to have the final say when adopting resolution schemes.¹⁷⁷ As stated previously, this can be seen as a strengthening of the institutional balance, as opposed to a disruption. Allowing experts to make assessments and propose actions, but leaving the final decisive powers with the Commission and the Council.

Summing up, it can be expected that the powers of the SRB will be seen as being within the principle of conferral and that institutional balance would likely not compose an issue to the its establishment. There is however a risk that the Court would oppose the restricting of the right to property invoked by an agency.

5.4. Nature of the powers conferred on the SRB

This leads us to the third theme of the study, namely, examining the nature of the powers conferred on the SRB. Whether they are clearly defined and executive, or if they leave room for discretion.

The requirement that conferred powers must be executive and clearly defined was, as we have seen, first dealt with in *Meroni* and last in the *Short Selling* case. The *Short Selling* case confirmed the principle established in *Meroni*, that powers must be executive and not entail discretion.¹⁷⁸ But it gave it a new shape, laying down a new delegation doctrine for the EU.¹⁷⁹

In *Short Selling* the Court found, first of all, that the ESMA's action under the contended Article could only be exercised under certain specific circumstances. Those are, to address a threat to the orderly functioning and integrity of the internal market or to the stability of the whole or part of the financial system of the Union, and there are cross border implications. This is also limited to situations where the MS has failed to act or the actions have failed to address the threat adequately.¹⁸⁰

¹⁷⁷ Zavvos & Kaltsouni, 2015, op. cit., 20.

¹⁷⁸ Bergström, 2015, op. cit., 240.

¹⁷⁹ Scholten & van Rijsbergen, 2014, op. cit., 1225.

¹⁸⁰ Case C-270/12 *Short Selling*, op. cit., paragraph 46.

The adoption of a resolution scheme is surrounded by numerous conditions to be met. First of all the ECB (or in certain cases the SRB itself) must have found that a bank is failing or likely to fail. Secondly, there can be no prospect that any other private sector measure could prevent the failure and thirdly it must be in the public interest.

As we have seen, a resolution is in the public interest if it is necessary to achieve one or more of the resolution objectives.¹⁸¹ The resolution objectives include ensuring the continuity of critical functions, avoiding significant adverse effects on financial stability and protecting *inter alia* public and depositor funds. These objectives all describe a hazard to the financial market of some sort, implying that the SRB does indeed respond to a threat to the stability of, at least part of, the financial system in the EU when adopting a resolution scheme.

The Court also found in Short Selling that the ESMA, when adopting measures, is bound to consider the extent to which the measure addresses the threat.¹⁸²

When applying resolution tools the SRB must take a number of things into consideration. It is however not obliged to assess the level to which the measure addresses the threat. This is supposedly because the threat to the financial stability to be handled is the failing bank. When placing a bank under resolution the threat of it failing is effectively eliminated. Thus not giving much reason for the SRB to consider the level to which the threat is addressed.

The Court further found in the Short Selling case that the ESMA's margin of discretion was circumscribed both by the consultation requirement and the temporary nature of the measures. The ESMA is required to consult both with the European Systemic Risk Board and, if necessary, other relevant bodies. It must also notify the competent national authorities concerned of the measure it proposes to take. Moreover, the ESMA must review the measure at least every three months.¹⁸³

When resolution plans are drawn up the relevant NRA is not only consulted, but is a part of the process of drafting the plan. The Commission and the ECB are also present as observers. It is

¹⁸¹ SRM Regulation, op. cit., Article 18 paragraph 5.

¹⁸² Case C-270/12 Short Selling, op. cit., paragraph 46.

¹⁸³ Case C-270/12 Short Selling, op. cit., paragraph 50.

further communicated to the ECB for consultation before being approved in the extended executive session of the Board. The measures adopted by the SRB are, however, in no way temporary. On the contrary, they are final. When a bank is placed under resolution there is no possibility of restoring it to its former shape. This might be seen as problematic for the SRB. However, there are two aspects to be considered. First of all, before the ESMA could take a decision under the contended Article it did indeed have to consult the European Systemic Risk Board. But it did not, as the SRB must, have to await endorsement or objection from the Commission and the Council. This makes the democratic legitimacy stronger for the SRB measures than it was for the ESMA decisions. Secondly, when the SRB has adopted a resolution plan (that is, before the bank is failing or likely to fail), that plan is communicated to the relevant bank. This means that the bank has a possibility to challenge the decisions made in the plan long before it is adopted as a resolution scheme. This is however not the case for creditors and depositors.

It is interesting to note that the SRM Regulation states that the Bank Recovery and Resolution Directive leaves discretion to the national authorities in the application of the resolution tools and in the use of national financing arrangements, but still does not consider the SRB to have been given a wide margin of discretion.¹⁸⁴ However, this can be explained by the fact that the Directive only provides minimum harmonisation, and thus in fact leaves a considerable amount of discretion to the MSs.¹⁸⁵ The SRM Regulation does indeed circumscribe much more detailed how the tools are to be applied and how the SRF is to be handled.

In conclusion, it would seem that the legislature has gone to great lengths to make the powers of the SRB Meroni-tailored¹⁸⁶, by circumscribing them with various conditions specifying under what circumstances and in what manner they are to be used.

5.5. The impact of acts adopted by the SRB

Next we shall examine the requirement regarding the impact of agency acts. The Romano case gave that acts adopted by an agency cannot have the force of law. However, the Short Selling

¹⁸⁴ See section 5.2.

¹⁸⁵ Wojcik, 2016, op. cit., 100-101.

¹⁸⁶ Bozina Beros, 2017, op. cit., 5.

case established that acts of general application are within the scope of acceptable agency power.

Resolution schemes can have a substantial effect on not only the financial stability in a MS and on the Union as such, but also on the fiscal sovereignty of a MS.¹⁸⁷ Through resolution schemes the SRB can decide on institutional changes, sale of assets and liabilities, write-downs of assets and liabilities of legal as well as natural persons. It is thus clear that the impact of an adoption of a resolution scheme can be monumental. Nevertheless, a resolution scheme only affects one single entity and will not set a precedent for any future resolutions. It is therefore difficult to argue for the view that resolution schemes can be seen as having the force of law, nor even be of general application.

However, in *Short Selling* the Court did not primarily give weight to the consequences of an act. What was decisive rather seemed to be that the instances in which the ESMA was required to adopt decisions of general application, the acts were circumscribed by several criteria that the ESMA had to take into account.¹⁸⁸ This seems to lead us back to the question of whether the decision making of the agency includes discretion. As we have seen in the previous section the SRB, like the ESMA, has a number of conditions to consider before adopting a resolution scheme. As such it can be stated to, similarly to the ESMA, “be required, in strictly circumscribed circumstances, to adopt measures of general application”.¹⁸⁹

In conclusion it would seem that even though SRB resolution schemes may have a grand impact on the several actors, there is room to argue that they fit within the limits of *Romano* and *Short Selling*. However, since the principle established from the cases is indeed very vague, it is likely that the Court will elaborate on it in future case law.

5.6. Reviewability and accountability of the SRB

The CJEU case law has shown that for an agency to be rightly established on Article 114 TFEU there must be adequate ways to review its functioning and efficiency and hold it accountable.

¹⁸⁷ Macchia, 2017, op. cit., 6.

¹⁸⁸ Case C-270/12 *Short Selling*, op. cit., paragraph 64.

¹⁸⁹ Case C-270/12 *Short Selling*, op. cit., paragraph 64.

Reviewability

In the ENISA case a decisive factor in the legality of the establishment of the agency was the fact that it had a process for evaluation ready for the Commission.¹⁹⁰ This evaluation tool exists also in relation to the ESMA but was never addressed by the Court in Short Selling.¹⁹¹ In that case the Court merely referred to the possibility of judicial review that is available under Articles 263 and 267 TFEU.¹⁹²

The Commission has multiple ways in which it reviews the work of the SRB. Even though the Court did not touch upon the subject of a Commission review in the Short Selling case, the SRM Regulation sets out a comprehensive procedure for review to take place every three years, starting 2018. The Commission will publish a report evaluating a large number of factors. *Inter alia* the functioning of the SRM, its cost efficiency and the impact of its resolution activities on the interests of the Union as a whole. It shall also cover the possible impact on the structures of national banking systems within the Union in comparison to other banking systems. Furthermore it shall evaluate the effectiveness of the cooperation within the SRM and the Banking Union and between the SRM and the NRAs of both participating and non-participating MSs as well as the appropriateness of the cooperation between the BU, the European Supervisory Authorities and the European Systemic Risk Board. It shall also assess if there is in fact a need for an independent agency to exercise the powers conferred through the Regulation and, if so, whether any changes to the Regulation need to be made or to Treaty level legislation. It shall further assess whether the link between sovereign debt and banking risk has been broken and the effectiveness of the independence and accountability arrangements.¹⁹³

Apart from the three year evaluation, the Commission also oversees the continuous work of the SRB in a number of ways. Most importantly the Commission and the ECB have permanent observers taking part in all Board sessions, regardless of in which constellation it convenes. This allows the Commission to have insight and stay informed of the day-to-day work of the SRB, and be prepared for any resolution decision that may be approaching. To completely ensure that the Commission is in the loop, the SRM Regulation also lays down an obligation

¹⁹⁰ Case C-217/04 ENISA, op. cit., paragraph 66.

¹⁹¹ ESMA Regulation op. cit., Article 81.

¹⁹² Case C-270/12 Short Selling, op. cit., paragraph 80.

¹⁹³ SRM Regulation, op. cit., Article 94.

for the Board to inform the Commission of any action it takes to prepare for resolution.¹⁹⁴ This is followed by an obligation of close cooperation between the Board, the Council and the Commission, in particular in relation to resolution planning and resolution action.¹⁹⁵

Another form of review is the 24 hour period in which the Commission and the Council can endorse, object to or change a resolution scheme. This short timeframe for the adoption of a resolution scheme is motivated by the need to minimise disruption of the financial market and of the economy.¹⁹⁶ It can be questioned whether this period of time is sufficient for the Commission to actually be able to make an informed decision on the matter. However, one must take into consideration the fact that the Commission has a permanent observer present at all Board sessions and that the Board is obliged to communicate to the Commission any action in preparation for resolution. As such, neither the fact that a resolution scheme has been adopted, nor the setup of it, should come as a surprise to the Commission, this allowing it to take a well-informed decision.

Accountability

There are two ways to hold the SRB accountable. The first being the way of judicial review. Article 263 TFEU states that the CJEU shall review the legality of, *inter alia*, bodies, offices or agencies of the Union intended to produce a legal effect *vis-à-vis* third parties.¹⁹⁷ As an agency the SRB is covered by this judicial review, meaning that any act it adopts that has a legal effect towards natural or legal person can be challenged before the Court if the act is addressed to them or if it is of direct concern to them.

Before the matter is litigated before the Court the contested issue is reviewed by the SRB's Appeal Panel.¹⁹⁸ The Appeal Panel consists of five individuals of high repute, with a proven record of expertise and relevant experience, that are not currently members of the Board.¹⁹⁹

¹⁹⁴ SRM Regulation, op. cit., Article 30 paragraph 1.

¹⁹⁵ SRM Regulation, op. cit., Article 30 paragraph 2.

¹⁹⁶ SRM Regulation rec 56.

¹⁹⁷ TFEU, op. cit., Article 263.

¹⁹⁸ Bozina Beros, 2017, op. cit., 8.

¹⁹⁹ SRM Regulation Article 85 paragraph 2.

The second way of holding the SRB accountable is through political accountability, holding the Board responsible to the EU executive branch, the Commission and the Council, as well as the legislative branch, the European Parliament.²⁰⁰ This requires the SRB to submit an annual report on the performance of the tasks conferred on it by the SRM Regulation.²⁰¹ The European Parliament also has the option to request a hearing with the Chair of the Board on an *ad-hoc* basis and ask questions to which the Board shall reply orally or in writing.²⁰² There also exists a possibility for the European Parliament to conduct confidential oral discussions behind closed doors with the Chair of the Board.²⁰³ The Chair may also be heard by the Council, at any time, on the performance of the resolution tasks by the Board.²⁰⁴

As can be seen the SRM Regulation gives opportunity to have insight into the work of the SRB before it takes a decision, to endorse or object to the decision once it has been taken, to hold it accountable for any wrongdoing afterwards and to review its function as such in the three year review. It is hence clear that the legislature has put great effort into ensuring there are comprehensive ways of holding the SRB accountable, following the case law from both ENISA and Short Selling.

5.7. Summary

As can be gathered from the previous sections in the chapter, the legislature has gone to great lengths to ensure that the governance and accountability structures of the SRB are in line with the case law governing the area of agencification. Even though there remains some issues that need to be clarified in future case law, most uncertainties have been considered in one way or another when drafting the SRM Regulation. The establishment of the SRB and its primary tasks can be argued to fulfil all requirements listed in this study, even if there is also grounds for critique in nearly every area.

²⁰⁰ Bozina Beros, 2017, *op. cit.*, 7.

²⁰¹ SRM Regulation Article 45 paragraph 2.

²⁰² SRM Regulation, *op. cit.*, Article 45 paragraphs 4 and 6.

²⁰³ SRM Regulation, *op. cit.*, Article 45 paragraph 7.

²⁰⁴ SRM Regulation, *op. cit.*, Article 45 paragraph 5.

6. Conclusion

The aim of this thesis has been to examine if the Article 114 TFEU conferral of powers on the SRB is legal by looking at its establishment and two of its core powers; the drawing up and adoption of resolution plans and the adoption of resolution schemes.

What seems clear is that the establishment of an agency on the basis of Article 114 TFEU is now quite straightforward. The Court took a clear stand in the Short Selling case, confirming that the establishment of an agency is within the scope of “measures for approximation” as stated in the Article. In this case, the establishment of the SRB can be seen as a complement to an existing, inadequate, harmonisation measure; the Bank Recovery and Resolution Directive, as it only provides for minimum harmonisation.²⁰⁵

Even though the powers conferred on the SRB are unprecedented in their extensiveness, they have been crafted to fit within the legal limits to agencification. By building a governance web that allows for almost every part of the process to include the affected parties, to be reviewed in multiple ways and to hold the agency accountable, the legislature has managed to tightly fit the SRB into the legal limits of agencification.

Some aspects can of course, as we have seen, be criticised. But most of these obstacles to legitimacy have been taken into consideration when drafting the SRM Regulation. E.g. the short time frame in which the Commission and the Council has to evaluate a resolution scheme can be argued to be weighed up by the fact that the Commission has a permanent observer allowed at all Board sessions, regardless of the constellation in which the Board convenes. This allows the decisions to be more democratically legitimate.

Another possible issue for the establishment of the SRB on Article 114 TFEU is the final nature of its adopted measures. When a resolution scheme has been implemented, it is very difficult to undo the measures implemented. This may be problematic in relation to the accountability aspects as it would mean that even if one can hold the SRB accountable for an incorrect decision, the error cannot be rectified.

²⁰⁵ Zavvos & Kaltsouni, 2015, op. cit., 12.

Despite these grounds for critique, it appears that even extensive powers can be made to fit within the limits of conferral as long as the framework respects the limits to EU governance and accountability. As others have noted, this seems to open up for an almost unlimited extension of EU agency powers, as long as they serve the purpose of the establishment and functioning of the internal market.²⁰⁶ It has even been claimed that to the extent that the Commission, Council and Parliament find a certain measure necessary to limit obstacles to trade or distortions of competition, the Court will adopt a deferential position.²⁰⁷

The introduction chapter of this thesis brought up the question of where the executive backstop for Article 114 TFEU goes. The answer to that question is, quite frankly, where the Court decides to draw the line. The EU legislature creates agencies, and the Court develops the rules of agencification accordingly, allowing the legislature to create even more powerful agencies, and so, the circle is complete. The fact that the institutions of the EU confirm each other may be problematic in the age of Brexit (and other possible MS exits) when the importance of democratic legitimacy is monumental. For this reason it needs to be established, either by the Court or by the legislature, clear limits to agencification, as continued uncertainty and unpredictable development of agencification may risk that the EU undermines its democratic legitimacy.

²⁰⁶ Van Cleynenbreugel, 2014, op. cit., 72.

²⁰⁷ Van Cleynenbreugel, 2014, op. cit., 67.

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