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Reported by Peter Sand-Hendriksen in the context of the TARN Conference on *Constitutionality, Powers and Legitimacy of EU Agencies or Agency-Like Bodies,* held in Florence

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EU agencies in the EU's institutional landscape

The conference opened with the presentation by Michelle Everson and Ellen Vos on *Unfinished Constitualisation: The politicised agency administration and its consequences*. The paper focused on four key points: (1) Politicised administration, (2) Constitutional neglect, (3) Meroni 2.0 and (4) Particular politicization pitfalls.

With regard to politicisation of administration, here the growing body of agencies operating at the EU level should be viewed in the light of a bigger phenomenon governing the process: politicisation, which may be understood and explained as a movement and development towards using law, and different types of legal measures, for political objectives following social and economic agendas. In this regard, agencification refers to a more general process of functional and decentralized creation of agencies, separate from the EU institutions, having their own legal personality, a certain degree of administrative and financial autonomy, legislatively specified tasks, an increasingly broad range of powers. Agencification is therefore heightening the political and constitutional legitimacy concerns. Concerns of to whom are EU agencies accountable to, given their hybrid nature as intergovernmental, transnational and supranational, accountable for what purposes and in what cases?

With regard to (2) constitutional neglect, the Lisbon Treaty does not provide for a separate legal basis for the creation of agencies within the Union, also for the recognition of possibility to delegate powers to agencies and for these agencies to adopt binding acts in the hierarchy of norms system. Despite there having been a “fever” of agency creation, it is not problematic and, actually, the limited constitutional legitimation of agencies is welcomed, where it ensures greater legal certainty in the judicial review of agency acts, having in mind that the agencies are subject to the “usual” constitutional values of transparency, openness and participation. Though, what is missing, is an EU administrative act similar to the US administrative Procedures Act.

With regard to (3) Meroni 2.0, especially the relationship between the Meroni cases[1] and the ESMA case[2], it relates to the problem of delegation of powers to EU agencies. The Meroni doctrine allows for the delegation of very limited powers to subordinate authorities outside the EU institutions, essentially boiled down to a requirement that the institutional balance must not be distorted, which would be the case, if discretionary powers were delegated to bodies other than those established by the Treaty. The ESMA case confirms that Meroni is still good law, but mellows it in the sense that it does not rule out entirely the possibility to delegate discretionary powers. First of all, the Court refers to the fact that in Meroni, the delegation powers were conferred to bodies governed by private law, where in ESMA powers are delegated to a body created by EU legislature, an EU entity. Second, the powers delegated to ESMA by the legislature were circumscribed by conditions which limit ESMA’s conditions and means that ESMA was not vested with any large measure of discretion. Under such circumstances, the Court found that the delegation of intervention power (binding measures such as prohibition or imposition of sanctions) in relation to short selling against financial institutions was in line with *Meroni*.

The ESMA judgment seemed a little controversial, in particular CJEU’s conclusion on the possibility to delegate intervention powers to ESMA in exceptional circumstances not corresponding to any of the situations defined in Art. 290 and 291 TFEU, which was also pled by the UK in the case and emphasised in case law from the General Court. On the other hand, CJEU bridged the gap between normative provisions in the treaties and the functional reality and need for delegating to agencies, for instance to ESMA under conditions of crisis. Under this view, the CJEU establishes Meroni 2.0 as an updated version of the older Meroni doctrine.

With regard to (4) particular politicization pitfalls, three were observed: (a) the CJEU limitation of agency powers and formal insistence on clearly delineated powers in ESMA is contradicting the case law of General Court; (b) balancing various interests combined with limited judicial control create doubts about the adequacy of accountability mechanisms, e.g. to what degree law can claim any power to review beyond the sphere of the protection of

[1] Cases 9/56 and 10/56 *Meroni v. High Authority* [1957–1958] ECLI:EU:C:1958:7.
[2] Case C-270/12, United Kingdom v Parliament and Council

individual rights; (c) in this context balance between independence and accountability becomes more pressing.

The politicisation pitfalls were also placed within a frame of a more general (global) tendency, here with key points from Giandomenico Majone (2014): There is a tendency to disguise political projects as technical exercises, to focus on integration by means of total harmonisation and emphasing process rather than results. Similar the presentation highlighted with implicit recognition from the audience that we are facing a development moving from a traditional model of depoliticised agency operation to a politicised depoliticisation and of EU agencies as they turn into political creatures.

If there were any solution to the problem, then it seemed as if there should be a constitutional recognition and appropriate mechanisms of independence and accountability. But, as a conclusion on this presentation, and as many paradoxes and general concerns were discussed at the conference, this presentation ended with a good self-reflection on the European political rationale searching for the common good, and which somehow embraced many of the concerns:

“Pluralist and deliberative models of decision-making both prescribe the same observable procedures. All concerned parties are to have a seat at the table. A maximum exposition of relevant data and the most scientifically valid analysis of that data should be achieved. All relevant questions should be asked and answered … does it result in good deliberation presumably leading to a converging and reordering of particular interests that ultimately achieve the public interest?” (?)

The presentation by M. Mihaylova on: “Governance of EU Agencies – The Common approach and beyond” followed four leads: (1) Agencies are not referred to by the Treaties as part of the Union's institutional set up. They are institutionally legitimised pursuant to the supervision exerted on them by the institutions that set them up. (2) The role of diverse institutions (European Commission, Council, EP, Court of Auditors) and other bodies (EEAS, Ombudsman) in the makeup and work of decentralised agencies. (3) The institutional control of agencies as reflected in the Common Approach on Decentralised Agencies and which is further developed in secondary legislation establishing individual agencies required by the policy area concerned or introduced by the legislators for other purposes. (4) supervisory mechanisms that best legitimise agencies' existence and which ensure an institutional balance of powers.