MERONI CIRCUMVENTED? ARTICLE 114 TFEU AND EU REGULATORY AGENCIES

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ABSTRACT

This paper conceptualizes the somewhat neglected constitutional and constitutive roles of Article 114 TFEU in the establishment and functioning of EU integrated market supervision mechanisms. Relying on a virtually unlimited interpretation of that provision by the Court of Justice, EU institutions and Member States have been able to design an institutional 'supranational operational support' narrative that allowed for the expansion of supranational agencies as extensions of national supervisory bodies operating in an EU integrated administration framework.

This paper submits that this interpretation of Article 114 TFEU incorporates a template within which a nascent ius commune *underlying the organization and operationalization of EU internal market supervision mechanisms can effectively take shape. That template allows for circumvention of some infamous agency delegation limits and grants Member States and national authorities a more direct role in a supranational system of integrated administration. In doing so however, new constitutional problems are created that have not been adequately addressed by the post-Lisbon Treaty framework. This paper identifies those problems and their impact on the emergence of integrated EU market supervision structures.*

Keywords: Article 114 TFEU; EU agencies; internal market; *Meroni*; operational support

§1. INTRODUCTION

This paper reconstructs the constitutive role Article 114 TFEU has played in the establishment of EU agencies supervising harmonized internal market rules.[1] In

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1 See A. Ottow, 'Europeanization of the Supervision of Competitive Markets', 18 *European Public Law* 1 (2012), p. 191–221.

particular it outlines and identifies to what extent this provision has allowed the Member States to directly entrust supervisory powers to supranational authorities as a matter of EU primary law. The analysis is split up into four additional sections.

The second section of this paper provides a familiar overview of the limits and opportunities of Article 114 TFEU as an instrument of internal market *regulation*. The Court of Justice has played a primary role in constructing and sanctioning a virtually unlimited substantive internal market regulation mandate through a wide variety of 'measures for the approximation' of national laws. This section illustrates that the Court considers the creation of supranational authorities and national authorities that are structured in a supranational way to fall within that category. It additionally outlines how the *Commission, Council and European Parliament* built on the momentum created by the Court's case law by establishing new regulatory agencies. The establishment of new European Supervisory Authorities (ESAs) in financial markets comprises the cornerstone of that development.

The third section conceptualizes the boundaries of powers attributed to such newly created agencies on the basis of Article 114 TFEU. Identifying a *supranational operational support* narrative in the ESA Regulations' preambles, this section argues that this narrative serves as a justificatory instrument for an Article 114 TFEU-agency template. However, the open-ended nature of the supranational operational support narrative nevertheless also raises fundamental questions about the constitutional boundaries to unfettered EU internal market agencification.

The fourth section of this paper compares the supranational operational support requirements with the post-Lisbon Treaty framework limits on the attribution and delegation of rulemaking powers to EU institutions and EU agencies. In doing so, it confronts the supranational operational support narrative with the well-known *Meroni* line of cases that consistently governed EU *agencification* debates. Submitting that the supranational operational support narrative relies on an implicit yet successful circumvention of the *Meroni* standards, it conceptualizes new constitutional boundaries to unfettered EU operational support extensions on the basis of Article 114 TFEU. The fifth section briefly concludes this paper.

§2. ARTICLE 114 TFEU AND THE ESTABLISHMENT OF SUPRANATIONAL 'INTERNAL MARKET' BODIES

This section revisits the Court of Justice's case law on the limits of Article 114 TFEU. This section focuses on the Court's generous 'internal market' *object* interpretation of Article 114 (section 2.A) as a basis for the establishment of supranational agencies under the internal market approximation banner (section 2.B). Several agencies have indeed been established in the wake of the Court's generous interpretation of Article 114 TFEU (section 2.C).

A. THE OBJECT OF ARTICLE 114 TFEU: VIRTUALLY UNLIMITED INTERNAL MARKET REGULATION

The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.[2] In addition to directly effective fundamental market freedoms, the Treaty framework allows for direct regulatory action to be taken. Article 114 TFEU serves as the principal legal basis in that regard.[3] Measures adopted on the basis of that provision need to have as their object the establishment or functioning of an area in which obstacles to the free movement are being abolished or at least contained.

The scope of Article 114 TFEU regulation in that vein is directly and exclusively related to the object of internal market integration. The *Tobacco Advertising I* judgment explicitly confirmed that position by annulling a Directive that did not comply with this 'object' philosophy. At stake in that case was the validity of a Directive that mandated a ban on the advertising and sponsorship of Tobacco products.[4] Whilst Article 114 TFEU had previously been relied on to justify a ban on certain products that did not comply with harmonized EU-wide product safety standards,[5] the introduction of such a ban in the absence of common EU-wide safety standards or approaches would go beyond the object of Article 114.[6] The Court stated 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. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition[7] liable to result therefrom were sufficient to justify the choice of [Article 114 TFEU] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it […] of ensuring that the law is observed in the interpretation and application of the Treaty.[8]

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2 Article 26(2) TFEU.

3 See S. Weatherill, 'The Limits of Legislative Harmonisation Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"', 12 *German Law Journal* 3 (2011), p. 827–864. See also Case C-350/92 *Spain v. Council* [1995] ECR I-1985, para. 35.

4 See Case C-376/98 *Germany v. Parliament and Council* [2000] ECR I-8419, para. 12–32.

5 T. Konstadinides, *Division of Powers in European Union Law. The Delimitation of Internal Competence between the EU and the Member States* (Kluwer Law International, Alphen a/d Rijn 2009), p. 190.

6 Case C-376/98, *Germany v. Parliament and Council,* para. 99–100.

7 Even though Article 114 TFEU only refers to the four freedoms rather than to the distortions of competition, see A. Somek, *Individualism. An essay on the authority of the European Union* (Oxford University Press, Oxford 2008), p. 121.

8 Case C-376/98 *Germany v. Parliament and Council*, para. 84. See also Case C-491/01 *R v. Secretary of State ex parte BAT and Imperial Tobacco* [2002] ECR I-11543, para. 60.

Despite its rhetoric in *Tobacco Advertising I* that

> to interpret [Article 114 TFEU] as meaning that the Community legislature may rely on [that provision] with a view to eliminating the smallest distortions of competition would be incompatible with the principle […] that the powers of the Community are those specifically conferred on it,[9]

the Court has not developed a more detailed 'appreciable distortions of competition warranting regulatory intervention' test.[10] In line with earlier case law,[11] it explicated that 'recourse to Article [114 TFEU] as a legal basis is always possible if the aim is to prevent the emergence of *future* obstacles to trade resulting from multifarious development of national laws'.[12] This generous interpretation led Somek to argue that 'any plausible correlation between the policies pursued and the instrumentality of harmonization to their end is sufficient for Union power to arise'.[13] As long as a conceivable relationship between an existing or future obstacle and its successful removal through supranational regulation exists, the Court seems willing to defer matters to the Council and European Parliament.[14]

The current state of the Article 114 TFEU object case law reflects the open ended nature and scope of the EU's internal market project. To the extent that the Commission, Council and Parliament adduce that a measure is necessary to address future obstacles to trade or appreciable distortions of competition, the Court will adopt a deferential position.[15] As a result of that position however, the Commission, Council and Parliament enjoy a significant margin to decide on the scope and contents of internal market Regulation. The very lenient appreciable distortions test therefore allows identification of a *virtually unlimited* internal market regulation mandate incorporated in Article 114 TFEU, as long as any reasonable appreciable distortions connection is brought into the drafting of supranational legislation.

B. VIRTUALLY UNLIMITED INTERNAL MARKET REGULATION IN THE SEARCH FOR APPROPRIATE 'MEASURES FOR THE APPROXIMATION' OF NATIONAL LAWS

The virtually unlimited scope of substantive internal market regulation also translates into the Court's interpretation of the 'measures for the approximation of national laws'

9 Case C-376/98 *Germany v. Parliament and Council*, para. 107.
10 S. Weatherill, 12 *German Law Journal* 3 (2011), p. 839–840.
11 See T. Konstadinides, *Division of Powers in European Union Law*, p. 192.
12 Case C-376/98 *Germany v. Parliament and Council*, para. 86.
13 A. Somek, *Individualism*, p. 114.
14 Case C-210/03 *Swedish Match* [2004] ECR I-11893, para. 33; Case C-434/02 *Arnold André* [2004] ECR I-11829, para. 34.
15 Case C-301/06 *Ireland v. Parliament and Council* [2009] ECR I-593 and Case C-58/08 *Vodafone Ltd.* [2010] ECR I-4999.

that can be adopted in accordance with Article 114 TFEU. The Court confirmed that the Commission, Council and European Parliament enjoy discretion in the choice and form of such measures.[16] Whilst the measures concept has long been thought only to comprise rules directly approximating national rules and thereby replacing diverging national alternatives, the Court gradually created room for alternative institutional arrangements.

The Court held in particular that Article 114 TFEU could serve as a legal basis to institutionalize common or integrated product authorization mechanisms.[17] Although a commonly structured authorization mechanism did not directly approximate substantive national legal regimes, it included those regimes in a new institutional setting that would eventually trigger convergence and approximation across different national frameworks.[18] In addition, EU regulatory instruments could directly mandate the creation and structure of operations of national supervisory bodies without directly harmonizing existing national legislative provisions.[19]

The EU institutions in addition relied on Article 114 TFEU directly to establish supranational independent authorities. The constitutionality of that practice was questioned by the United Kingdom in the *Enisa* case. Enisa, the European Network and Information Security Agency, was established on the basis of Article 114 TFEU to function as a supplementary and informal advisory and coordinating body promoting information security across the Member States.[20] According to its founding Regulation, it is to function as a supranational agency endowed with EU legal personality.[21] The agency was set up to ensure a high and effective level of network and information security and to develop a culture of network and information security for the benefit of the citizens, consumers, enterprises and public sector organizations.[22] Its tasks also include enhancing, coordinating and structuring information exchanges without having formal action powers.[23] Although its existence was initially limited to five years, it continues to be in operation until today.[24]

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16 Case C-380/03 *Federal Republic of Germany v. European Parliament and Council of the European Union* [2006] ECR I-11573, para. 42.

17 Previously Article 352 TFEU was frequently relied upon in this respect. See however Case C-436/03 *European Parliament v. Council of the European Union (European Cooperative Society)* [2006] ECR I-3733, para. 44–45.

18 Case C-66/04 *United Kingdom v. Parliament and Council* [2005] ECR I-10553, para. 60–61.

19 Case C-518/07 *Commission v. Germany* [2010] ECR I-1885. See also A. Ottow, 18 *European Public Law* 1 (2012), p. 214. For similar discussions in the realm of European private law and the establishment of a Common European Sales Law instrument, see among others G. Low, '*Unitas via diversitas*. Can the Common European Sales Law harmonize through diversity?', 19 *Maastricht Journal of European and Comparative Law* 1 (2012), p. 132–147.

20 Regulation (EC) 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, [2004] OJ L 77/1.

21 Article 18 Regulation 460/2004.

22 Article 1(1) Regulation 460/2004.

23 Article 3 Regulation 460/2004.

24 Articles 25 and 27 Regulation 460/2004.

The creation of agencies on the basis of Article 114 TFEU was said to transgress the limits of what 'measures for the approximation of national law' amount to. Contrary to such arguments made by the United Kingdom[25] and the Advocate General,[26] the Court ruled that the establishment of agencies could indeed fall within Article 114's confines.[27]

Despite this general possibility of creating independent bodies, the Court adopted a *prima facie* strict test governing the establishment of these bodies:

> the tasks conferred on such a body must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States. Such is the case in particular where the Community body thus established provides services to national authorities and/or operators which affect the homogenous implementation of harmonising instruments and which are likely to facilitate their application.

The Court distinguished two stages in that regard.[28] It first of all posits the need for a direct relationship between the establishment of a supranational agency and a harmonized substantive law framework. The agency needs to be incorporated in a broader substantive law framework[29] and to allow for experimentation within that framework.[30] The second stage is more demanding. It requires that the objectives and tasks attributed to a supranational body must be regarded as *supporting and providing an implementing framework likely to facilitate the application of harmonized instruments*.[31]

The vague conditions thus posited by the Court create significant policy opportunities for the other institutions to establish supranational bodies that fall within those vaguely formulated boundaries. The Court indeed hardly clarified or operationalized the scope of this second step. In *Enisa*, it derived the constitutionality of the Regulation establishing the new body from it being part of an existing substantive law context, its role in addressing probable divergences in transposition and implementation,[32] and the limited time frame for its operations.[33] At the same time however, it did not *per se* exclude the adoption of binding decisions by such newly established authorities, as long as such decisions contributed to the harmonization of diverging national practices.[34] As such, the Court did not at all foreclose the development of EU agencies with binding

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25 Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union* [2006] ECR I-3771, para. 16.

26 Opinion of AG Kokott in Case C-217/04 *Enisa*, para. 38–39.

27 Case C-217/04 *Enisa*, para. 44.

28 Case C-217/04 *Enisa*, para. 47.

29 Ibid., para. 58.

30 See also for that position T. Tridimas, 'Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement', 28 *Yearbook of European Law* (2009), p. 239–240.

31 On the instrumentality requirement underlying that judgment, see G. Low, 19 *Maastricht Journal of European and Comparative Law* 1 (2012), p. 140–141.

32 Case C-217/04 *Enisa,* para. 60–62.

33 Ibid., para. 65.

34 See for a similar reading in a different context, G. Low, 19 *Maastricht Journal of European and Comparative Law* 1 (2012), p. 141.

decision-making powers on the basis of Article 114 TFEU. One could even argue that the judgment allowed the Council and the Parliament to attribute binding powers to bodies within the wide boundaries set by *Enisa*.

C. SUPRANATIONAL AGENCIES IN THE WAKE OF ENISA

Building on the *Enisa* momentum, the Commission, Council and European Parliament effectively created new bodies entrusted, to different degrees, with binding decision-making powers. The creation of all those bodies particularly complemented an ever increasing EU substantive internal market regulatory framework in each of the sectors mentioned here. The adoption of a more dense supranational substantive regulatory framework on the basis of Article 114 TFEU additionally created a need for more enhanced supranational supervision and enforcement mechanisms accompanying such regulation. The open-ended reading of Article 114 TFEU in *Enisa* similarly provided a constitutional basis for the adoption of such bodies. Four examples can be distinguished here.

Firstly, the European Chemicals Agency was entrusted with registering and organizing the evaluation of potentially hazardous chemicals in order to avoid diversified and cumbersome registration and evaluation procedures at Member States' level.[35] ECHA's registration decisions are subject to review by a Board of Appeal, which attests to the fact that they are supposed to be binding on applicants for authorization of chemicals.[36] ECHA essentially complemented a newly established uniform framework for the regulation of hazardous chemical products under EU law.[37]

Secondly, the Agency (ECHA) for the Cooperation of Energy Regulators (ACER) grew out of an informal network of national regulators (the European Regulators Group for Electricity and Gas or ERGEG), which had originally been established to accompany the EU's liberalization and re-regulation packages in the energy sector.[38] The agency is entrusted with adopting binding individual decisions addressed to national authorities[39]

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35 Article 55 Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, [2007] OJ L136/3.

36 Article 89 Regulation 1907/2006. See M. Pawlik, *Das REACH-System und die Meroni-Doktrin Ein imperfekter Quantensprung im Europäischen Verwaltungsverbund* (Nomos, Baden Baden 2013), p. 115–117.

37 J. Scott, 'REACH: Combining Harmonisation with Dynamism in the Regulation of Chemicals', in J.Scott (ed.), *Environmental Protection: European Law and Governance* (Oxford University Press, Oxford 2009), p. 56.

38 For background, see M. Zinzani, *Market integration through 'Network Governance'* (Intersentia, Antwerp 2012), p. 133–134.

39 Article 2(1) Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, [2009] OJ L211/1.

and individual market participants.[40] ACER's decision-making body is composed of representatives of national authorities, which are mandated to adopt supranational decisions as a matter of EU law.[41]

Thirdly, a Body of European Regulators in Electronic Communications (BEREC) has been created as a more formal network of national electronic communications regulators. This network serves to ensure the consistent implementation of increasingly supranationally regulated rules on liberalized electronic communications.[42] The Body is supported by an Office that has been granted EU legal personality.[43] At the same time however, BEREC essentially supports the tasks of national regulatory authorities in implementing and applying extensively harmonized EU electronic communications law.

Fourthly, Article 114 served as a basis to establish three new European Supervisory Authorities (ESAs) in the realm of financial markets: the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA).[44] In the wake of crisis, and given the already extensive scope of EU financial market regulation, the *De Larosière* report proposed the development of supranational supervisory authorities over financial markets.[45] The authorities replaced former informal networks of national supervisors and were entrusted with supplementary binding individual decision-making powers.[46] The authorities can indeed adopt *individual decisions* addressed to national supervisory authorities and/or individual financial institutions in cases of breach of directly applicable substantive EU financial law (Article 17 ESA Regulations) and of 'emergency situations' (Article 18 ESA Regulations) as well as towards the settlement of disagreements between competent national authorities in cross-border situations (Article 19 ESA Regulations).

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40 Articles 7–9 Regulation 713/2009.

41 Article 14 ACER Regulation 713/2009.

42 See P. Nihoul and P. Rodford, *EU Electronic Communications Law. Competition and Regulation in the European Telecommunications Market* (2nd Edition, Oxford University Press, Oxford 2011), p. 15–20.

43 Article 6 Regulation 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1.

44 Regulation 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/78/EC, [2010] OJ L 331/12; Regulation 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/79/EC, [2010] OJ L 331/48; Regulation 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC, [2010] OJ L 331/84. All regulations follow the same structure and numbering of Articles. I will refer to all regulations collectively as the ESA Regulations.

45 The High Level Group on Financial Supervision in the EU. Report, http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf, p. 85.

46 D. Fischer-Appelt, 'The European Securities and Markets Authority: the beginnings of a powerful European Securities Authority?', *Law and Financial Markets Review* (2011), p. 21–32.

The ESAs can also issue prohibitions or restrictions on practices that affect consumer protection.[47] At the same time, the ESAs are competent to adopt general guidelines and recommendations to establish consistent, efficient and effective supervisory practices and to ensure a common, uniform and consistent application of Union law. Although guidelines and recommendations are not binding, competent national authorities and financial institutions can be obliged to report in a clear and detailed way on their compliance (Article 16 ESA Regulations). In addition to addressing direct decisions to national authorities and individual market participants, the ESAs play essential indirect roles in the drafting of regulatory and implementing technical standards. These standards – essentially delegated or implementing legislation referred to in Articles 290–291 TFEU – are drafted by the ESAs, but are formally adopted by the European Commission. The ESA decision-making procedures nevertheless leave the Commission little leeway in amending proposed standards.[48]

§3. RECONSTRUCTING AN ARTICLE 114 TFEU AGENCIFICATION TEMPLATE

Newly created supranational bodies accompany ever increasing EU substantive regulation adopted on the basis of Article 114 TFEU. More intensified supranational regulation serves as a trigger for the development of supranational bodies supporting the implementation, application and enforcement of such regulation at the supranational level, and across Member States. Although Article 114 TFEU is relied upon to justify more intensified regulation and supranational bodies accompanying such regulation, a different test is relied upon for the establishment of such agencies. This section uses the ESA Regulations as a test case to identify how Article 114 TFEU has been interpreted in relation to supranational bodies (section 3.A) and extracts a more general 'operational support' template seemingly underlying the creation of different Article 114 TFEU agencies in the wake of the *Enisa* judgment (section 3.B). The section subsequently argues that without additional judicial guidance, this template nevertheless allows for a potentially unlimited extension of EU agency powers, as manifested in ESA practice (section 3.C).

A. CONCEPTUALIZING 'OPERATIONAL SUPPORT' AS A TEMPLATE UNDERLYING ESA GOVERNANCE

Contrary to previously established Article 114 agencies such as ECHA or ACER, the ESA Regulations' preambles explicitly refer to the *Enisa* judgment. The Regulations

47 See Article 9 ESA Regulations.
48 See Article 10–15 ESA Regulations.

describe the *purpose* and the *tasks* of the new authorities as assisting competent national supervisory authorities in *the consistent interpretation and application of Union rules and contributing to financial stability necessary for financial integration*. According to the preambles, these aims are closely linked to the objectives of the Union *acquis* building the internal market for financial services, and therefore justify the legal basis of Article 114 TFEU.[49] The preamble recitals referring to *Enisa* do not however indicate the extent to which the ESAs' powers differ from *Enisa's*, nor mention in what ways the ESAs merely support or coordinate the implementation or application of EU financial markets regulation. The preambles rather presume that limited binding powers still fall within the ambit of the *Enisa* judgment.

Underneath the single recital referring to *Enisa*, more elaborate justifications for the ESA Regulations and the introduction of binding agency powers on the basis of Article 114 TFEU can indeed be found. The two stages highlighted by the Court in *Enisa* can be found throughout the ESA Regulations' preambles.

The first stage of the *Enisa* test – incorporation in a substantive law framework – hardly constitutes a problem. The ESAs did not develop a European financial regulation framework from scratch. Prior to the crisis, the Union had already established a significant substantive law framework.[50] Reform proposals mainly aimed to bring 'more Europe' into the supervisory and enforcement dimension of that framework in order to put it on a par with the already extensively harmonized substantive law framework.[51] In addition, the ESAs have been incorporated in a wider supranational institutional framework with the newly created European Systemic Risk Board (ESRB) and an informal, European Network of national supervisory authorities (European System of Financial Supervisors – ESFS).[52]

The second stage – supporting and providing a framework for implementation – also seeps through in the ESA Regulations. Four implicit justifying elements could be read into the ESA Regulations' preambles in that regard.

Firstly, the Regulations emphasize *the need for a balance between supplementary supranational intervention powers and continuous day-to-day supervision powers at the national level*.[53] That balance particularly reflects a *subsumption* of EU intervention powers to national supervisory autonomy. EU bodies would not entirely replace, but merely supplement national supervision and enforcement structures. The composition of ESA Boards of Supervisors – with only representatives from national authorities having voting rights – confirms that position.[54] The more substantive law approximation has

49 Recitals 17 Regulations 1093/2010 and 1095/2010; Recital 16 Regulation 1094/2010.

50 See Article 1(2) ESA Regulations.

51 N. Moloney, 'EU financial market regulation after the global crisis: "more Europe" or "more risks"?', 47 *Common Market Law Review* (2010), p. 1317–1383.

52 Article 2 ESA Regulations for the ESFS.

53 See reflections of this kind in Recitals 9 EBA and ESMA Regulations, Recital 8 EIOPA Regulation. See also Recitals 23 EBA and ESMA Regulations and Recital 22 EIOPA Regulation.

54 Article 40 ESA Regulations.

taken place, the more need for supporting structures would emerge.[55] This understanding would not however allow for a general attribution of supervisory powers to the EU level, hence the role of national authorities in the supranational agency decision-making processes.

Secondly, the powers attributed to the ESAs are framed as 'guiding devices' for national supervisory authorities.[56] The regulations emphasize the need for cooperation through colleges of national supervisors, the essential arbitrating role of the EU authorities and the ESAs' responsibility to provide a forum for interaction with global or third country national supervisory structures.[57] The *guidance* justification confirms the extent to which EU authorities play a predominantly advisory role.

Thirdly, the Regulations seek to *frame the Union enforcement mechanisms within the reality of national enforcement structures*.[58] This enforcement justification recognizes the need for supranational enforcement in a supranational regulatory environment. According to the ESA Regulations, the financial crisis showed that at least some binding powers are required to remedy shortcomings effectively in a multi-layered framework of regulation and enforcement.[59] Binding secondary intervention powers therefore protect the *cooperative* aims of regulatory integration and seek to maintain high standards in national enforcement structures.

Fourthly, the Regulations emphasize the need to safeguard Member States' prerogatives.[60] Even in instances where supranational bodies have been able to adopt supranational decisions, particular options and rights exist for Member States to contest and remedy the adoption of such measures. The ESA Regulations contain a specific safeguard clause[61] and additionally provide for a specific administrative review system through the Board of Appeal.[62] In doing so, they seek to *safeguard* the prerogatives of Member States and national supervisory authorities granted by EU law.

The four justificatory 'supporting' elements confirm a reading of *Enisa* in which Article 114 TFEU grants supranational regulatory competences to support the day-to-day application, implementation and enforcement of harmonized standards at the national levels. The Regulations' preambles seek to justify the ESAs' extended decision-making roles on a *supranational operational support* rationale, which transcends the narrow conditions outlined in *Enisa*, but nevertheless reflects the spirit of that judgment. Building upon that spirit, the ESA Regulations assume that Article 114 TFEU would allow for only supplementary supranational decision making powers, that additionally need

55 See for a similar argument E. Ferran and K. Alexander, 'Can soft law bodies be effective? The special case of the European Systemic Risk Board', 35 *European Law Review* (2010), p. 769.
56 Recitals 40–45 EBA and ESMA Regulations; Recitals 39–44 EIOPA Regulation.
57 Article 30–35 ESA Regulations.
58 Recitals 51 and 58 ESA Regulations.
59 Article 60–61 ESA Regulations.
60 Recitals 50 ESA Regulations.
61 Article 38 ESA Regulations.
62 Article 60 ESA Regulations.

to be fit in the subsumption, guidance, cooperation and safeguard conditions reflected in the ESAs' operations. Binding supranational intervention powers are therefore embedded in a market supervision framework where Member States essentially retain basic supervisory powers.[63]

B. A SUPRANATIONAL OPERATIONAL SUPPORT TEMPLATE UNDERLYING ARTICLE 114 TFEU AGENCIES

According to the ESA Regulations' preambles, Article 114 TFEU is to be read as justifying binding emergency or subsidiary intervention powers entrusted to EU regulatory agencies that are firmly incorporated in a *dense supranational substantive regulatory framework*, have only *supplementary* binding market intervention powers, yet leave *the bulk of day-to-day supervision to national authorities*. Supranational authorities enjoy regulatory powers that allow them to intervene in instances where national authorities insufficiently coordinate their supranational mandates and endanger the effective implementation and enforcement of EU law. Supranational authorities' intervention in that instance merely presents a subsidiary and supplementary modus of intervention. Day-to-day market supervision remains at the national level, structured in accordance with the principle of national institutional autonomy.[64] Article 114 TFEU 'Operational support' under that understanding implies that national implementation powers can only be complemented by additional and supplementary supranational intervention possibilities as a matter of EU law.

Whilst not explicitly relied on in other agency frameworks, the founding ACER and ECHA Regulations are equally premised on a similar supranational operational support understanding. Firstly, ACER can indeed adopt binding decisions, but mostly in relation to national regulatory authorities. Binding individual decisions are supplementary in this respect.[65] ACER shall decide only if the competent national authorities have not been able to reach an agreement within a period of six months from the date the case

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63 A small caveat needs to be placed here in relation to the Single Supervisory Mechanism established in relation to credit institutions in the Eurozone. In that instance, the Member States decided to entrust supervisory powers to the European Central Bank on the basis of Article 127(6) TFEU, without however ignoring the frameworks in place on the basis of Article 114 TFEU. See Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013] OJ L287/63 and Regulation (EU) 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, [2013] OJ L287/5.

64 On day-to-day supervision, see P. Schammo, 'EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision?', 32 *Oxford Journal of Legal Studies* 4 (2012), p. 771–797.

65 Article 7 Regulation 713/2009.

was referred to them and to the extent that they jointly requested ACER intervention.[66] ACER decision-making is thus subsumed to national supervisory decisions and is predominantly structured to protect cooperative values and to guarantee the effective enforcement of EU law in national legal orders.

A similar argument can be made in relation to the European Chemicals Agency (ECHA). In that case, the ECHA does not formally authorize potentially hazardous chemicals. The Commission remains responsible for doing so. ECHA's responsibilities mainly lie in the administrative monitoring of the completeness of applications for registration and authorization, as well as on whether a substance should be registered at all.[67] The agency can adopt judicially reviewable binding individual decisions in relation to those roles.[68] At the same time however, ECHA also facilitates the Commission's task as an authorization body and the national enforcement authorities' supervision responsibilities.[69] National bodies retain responsibility for the actual implementation of evaluation tests in relation to potentially hazardous chemicals.

The following table connects the three operational support requirements with the regulatory frameworks in which the agencies discussed here have been established:

Operational support	**ESAs**	**ACER**	**ECHA**
Incorporation in harmonized legal framework	Art. 1(2) ESA Regulations	Art. 1(2) Regulation 713/2009	Recital 15 Regulation 1907/2006
National day-to-day supervision	Art. 9 ESA Regulations	Art. 7 Regulation 713/2009	Art. 76 Regulation 1907/2006
Supplementary supranational market intervention	Art. 17–19 ESA Regulations	Art. 8–9 Regulation 713/2009	e.g. Art. 27(7) and 30(5) Regulation 1907/2006

C. UNFETTERED EXTENSION AT THE EXPENSE OF CONSTITUTIONAL INTEGRITY?

Despite its potential attractiveness as a justificatory framework underlying the organization of Article 114-structured market supervision, the operational support narrative and the three essential requirements underlying it are problematic in their own right. The *scope* and *exercise* of supranational operational support powers remain highly uncertain in that regard.

Firstly, the conditions identified in the ESA Regulations' preambles have not yet been the subject of formal judicial confirmation. As long as the Court does not clarify the

66 Article 8(1) Regulation 713/2009.
67 Article 20(2) Regulation 1907/2006.
68 Article 27(7) and Article 30(5) Regulation 1907/2006.
69 Article 55 Regulation 1907/2006.

scope of Article 114 and the limits of the *Enisa* test in case binding decisions are adopted, the operational support mantra will remain clouded in constitutional uncertainty and potentially provide for unchecked EU expansionism. An example may clarify this point. Following on from the ESA Regulations, the EU legislature developed and designed more stringent regulation of credit rating agencies.[70] An important part of such regulation lies in the entrustment to the European Securities and Markets Authority with direct enforcement powers over credit rating agencies registered in the European Union. On the one hand, ESMA is responsible for the authorization of such agencies to operate in one or more Member States.[71] The authorization of activities has traditionally been left to national administrations or with the European Commission, but has not generally been entrusted to a European supranational agency, especially not on the basis of Article 114 TFEU. On the other hand, ESMA has been granted direct powers of inspection and enforcement. It can impose fines and periodic penalty payments on credit rating agencies that do not comply with the new regulatory framework.[72] ESMA thus acts as a full-fledged supervisor in its own right, with national authorities supporting its operations. The supranational level in that image no longer provides operational support to national supervisory authorities. Whilst Credit Rating Agencies could be argued as comprising a particular sector of financial market regulation that has been under more intense scrutiny in the wake of crisis, the lack of clear constitutional boundaries would not impede the expansion of ESA powers beyond operational support into other sectors as well.

Secondly, the subsuming, supporting, guaranteeing and safeguarding categories do not determine the *exercise* of supplementary supranational market intervention powers. In the realm of Credit Rating Agency supervision, ESMA has been entrusted with a significant margin of appreciation to determine whether and to what extent a credit rating agency transgressed the EU regulatory framework. It retains a similar amount of appreciation in determining whether a fine should be imposed and what amount it should bear.[73] In both instances, ESMA is no longer specifically and directly supporting the operations of the Commission and national enforcement bodies. It is rather called upon to make policy and appreciate facts in its own right. A similar example can be found in a Regulation prohibiting short selling in financial markets.[74] According to that Regulation, national authorities may restrict or prohibit persons from engaging in short selling practices.[75] In case of non-compliance, ESMA can intervene subsidiarily.

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70 Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, [2009] OJ L302/1.

71 Article 15 Regulation 1060/2009.

72 Article 36a-b Regulation Regulation 1060/2009.

73 See Article 36a Regulation 1060/2009.

74 Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, [2012] OJ L86/1.

75 Article 23(1) and (2) Regulation 236/2012.

According to Article 28 of the Short Selling Regulation, ESMA may in particular circumstances prohibit or *impose conditions* on, the entry by natural or legal persons into a short sale transaction.[76] ESMA would thereby be at liberty to determine the scope of such conditions. It would consequently be able to adopt binding and generally applicable decisions restricting short selling in particular financial instruments.[77]

The operational support narrative would thus enable agency *discretionary* and *generally applicable* decisions to be adopted. Although not intended as such in the original ESA Regulations, the latter have created the operational support basis upon which these new powers can apparently be based. In its judgment of 22 January 2014 on the scope of ESMA powers in relation to short selling, the Court of Justice confirmed that discretionary powers could indeed be attributed to a supranational authority in the name of operational support.[78] Contrary to the Advocate General,[79] the Court explicitly held that the conferral of general and discretionary decision-making powers on ESMA in the realm of short selling fell within the scope of Article 114 TFEU. As ESMA powers only serve to coordinate measures taken by competent authorities or to take the necessary measures itself in the absence of appropriate action by those competent authorities, those powers enable the approximation of diversified national enforcement systems and therefore fall within the 'measures for the approximation' category.[80] Article 114 TFEU could therefore comfortably be relied upon in establishing a short selling enforcement mechanism such as the one available in Article 28 of the Regulation.

§4. IDENTIFYING BOUNDARIES TO UNFETTERED EXPANSION OF OPERATIONAL SUPPORT STRUCTURES

In light of the Court's short selling judgment, it would now appear that the scope and powers of Article 114 TFEU agencies can theoretically be extended infinitely as long as those agencies remotely contribute to harmonization or the adoption of uniform practices at the different national levels. In ruling so, the Court refrained from identifying meaningful constitutional boundaries on the establishment of 'operational support' mechanisms.

Traditionally, constitutional boundaries on EU agency powers have been found within the framework of delegation of EU powers to supranational agencies as

76 Article 28(1) Regulation 236/2012.

77 Article 28(3) Regulation 236/2012.

78 Case C-270/12 *United Kingdom v. Council and European Parliament*, Judgment of 22 January 2014, not yet reported.

79 Opinion of Advocate General Jääskinen of 12 September 2013 in Case C-270/12 *United Kingdom v. Council and European Parliament*, not yet reported, para. 52. See for a similar argument in relation to the Common European Sales Law instrument, G. Low, 19 *Maastricht Journal of European and Comparative Law* 1 (2012), p. 145–146.

80 Case C-270/12 *United Kingdom v. Council and European Parliament*, para. 112 and 116.

circumscribed by the Court's *Meroni* judgment.[81] That delegation would necessarily be restrained by the institutional balance and horizontal division of powers reflected in the Treaty framework.[82] Delegation debates nevertheless generally ignore the prior and more fundamental constitutional problem of the conferral of powers to the EU level resulting from the vertical division of competences underlying the Treaties.[83] Although the vertical division of competences gains ground in EU legal scholarship,[84] scholars generally presume the establishment of agencies to be a *delegation* from Member States to EU agencies, rather than a particular *interpretation* of the *competence conferral principles* underlying the EU Treaty framework. As a result, they remain loyal to a pure delegation approach of agency creation and all the problems such a position entails.

This section ventures to question the usefulness of traditional delegation debates for providing meaningful limits on supranational operational support mechanisms in the wake of the Court's short selling judgment. Building upon the Court's *prima facie* relevant precedents in *Meroni* and *Romano* (section 4.A), it argues that both precedents have in fact very limited relevance in Article 114 TFEU operational support debates (section 4.B). At the same time however, the concerns underlying both judgments and the principles reflected therein have over time come to be included in the Treaty framework. This section therefore identifies similar principles in the Treaty framework and outlines to what extent they could serve as boundaries of what Article 114 TFEU operational support structures can do and how operational support mechanisms should be structured (section 4.C). In doing so, this section seeks to identify to what extent post-Lisbon constitutional principles structure and limit the framework within which the operational support template can further take shape and continue to be inspired by genuine *Meroni* concerns.

A. THE *MERONI* AND *ROMANO* PRECEDENTS

In its 1958 *Meroni* judgment, the Court invalidated a *delegation* of *discretionary* regulatory competences by the European Commission to a private body.[85] *Meroni* limited the delegation of regulatory powers to private bodies in two ways. First, it limited the *delegation* of powers. Delegation of rulemaking powers was to be expressly provided for in a legal instrument; only powers retained by a delegating body could be delegated; the exercise of these powers was subject to the same limits and procedures as they would

81 Case 9/56 *Meroni v. High Authority*, [1958] ECR 133. See for recent examples M. Chamon, 'EU Agencies: Does the Meroni Doctrine make sense?', 17 *Maastricht Journal of European and Comparative Law* 4 (2010), p. 281–317.

82 On the notion of institutional balance in general, see S. Prechal, 'Institutional Balance: A Fragile Principle with Uncertain Contents', in T. Heukels, N. Blokker and M. Brus (eds.), *The European Union after Amsterdam. A Legal Analysis* (Kluwer Law International, The Hague 1998), p. 282–283.

83 See Article 5(2) TEU.

84 H. Hofmann and A. Morini, 'Constitutional aspects of the pluralisation of the EU executive through "agencification"', 37 *European Law Review* 4 (2012), p. 419–443.

85 Case 9/56 *Meroni v. High Authority* [1958] ECR 133, p. 152.

have been within the delegating body; and such delegation needed to be necessary for the effective functioning of the delegating institution.[86] Second, the judgment limited the *scope of powers* delegated. It maintained that the powers delegated could only include *clearly defined executive powers* that were capable of being objectively reviewed by the delegating body.[87] A delegation of powers by the High Authority to a private body outside the realm of supranational law would not fit that image.

The 1981 *Romano* judgment was said to have confirmed that position in relation to the Council.[88] The judgment did not however expressly refer to such limits. It mainly stated that a body, such as an independent administrative commission set out by secondary Union law to support national social security administrations, may only provide an aid to social security institutions applying EU law in that field.[89] An administrative commission 'is not of such a nature as to require [national social security] institutions to use certain methods or adopt certain interpretations when they come to apply the Community rules'.[90] The Council could not therefore delegate away powers of decision-making attributed to the Commission and the Court. The judgment did not however claim that any delegation of supervisory powers that did not remain with the European Commission or the Court was *per se* impossible.

Meroni and *Romano* predominantly provided tools to confirm a political unwillingness to establish independent EU agencies.[91] *Meroni* on the one hand consistently limited EU policy making. The 2001 White Paper on European Governance[92] and its preparatory documents[93] continued to reflect the *Meroni* limits. The political discourse emphasizing *Meroni* has impeded the creation of truly self-standing European regulators capable of promulgating binding regulatory standards.[94] Recent studies on both judgments

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86 Case 9/56 *Meroni*, p. 150–151. See for a schematic overview, T. Tridimas, 'Financial Supervision and Agency Power' in N. Nic Shuibhne and L. Gormley (eds.), *From Single Market to Economic Union. Essays in Memory of John A Usher* (Oxford University Press, Oxford 2012), p. 61–62.

87 Case 9/56 *Meroni*, para. 152.

88 Case 98/80 *Giuseppe Romano v. Rijksinstituut voor Ziekte- en Invaliditeitsverzekering* [1981] ECR 1241, para. 20 on the prohibition to take binding decisions by an administrative commission.

89 Ibid., para. 20.

90 Ibid.

91 See in that regard, the 2008 Moratorium the Commission placed on the creation of new agencies, paying more attention to their proliferation than to their actual competences, European Agencies – The Way Forward. Communication from the Commission to the European Parliament and Council, COM 2008 (135), 11 March 2008, p. 6.

92 See White Paper on European Governance, COM 2001(428), http://ec.europa.eu/governance/white_paper/index_en.htm, p. 24.

93 M. Everson, G. Majone, L. Metcalfe and A. Schout, *The Role of Specialised Agencies in Decentralising EU Governance,* Report Presented to the Commission 1999, http://ec.europa.eu/governance/areas/group6/contribution_en.pdf, p. 54.

94 See N. Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making', 12 *European Business Organisation Law Review* (2011), p. 73; P. Schammo, 32 *Oxford Journal of Legal Studies* 4 (2012), p. 783; T. Tridimas, in N. Nic Shuibhne and L. Gormley, *From Single Market to Economic Union,* p. 60.

nevertheless hint at a more nuanced approach. They argue that *Meroni* limited delegation to *private* bodies but did not as such envisage the creation of EU-wide agencies. *Romano* on the other hand only limited delegation to *public* bodies by the Council to the extent that these bodies would impinge on powers attributed to the European Commission and the Court. The judgment merely confirmed the Commission's role as a gatekeeper of EU law and as a policeman of Member States' implementation and application.[95] Beyond these limited circumstances, the precedential value of both judgments would nevertheless appear highly questionable.

B. SUPRANATIONAL OPERATIONAL SUPPORT AND THE CONSTITUTIONAL CIRCUMVENTION OF *MERONI* AND *ROMANO*

The *Meroni* limits have become a favourite approach to question the constitutionality of the newest Article 114 agencies, most notably the ESAs.[96] In questioning the compatibility of these agencies with *Meroni*, scholars nevertheless have generally neglected the point that the latter judgment dealt with a delegation of implementing decision-making powers from the Commission to a private body.[97] The establishment of EU agencies rather concerns the delegation of Member States' implementing powers under EU law to an independent supranational authority by the Council and the European Parliament in accordance with an acknowledged Treaty legislative procedure. From the vantage point of Article 114 TFEU, the traditional *Meroni* objections voiced do not present obstacles at all. Article 114 TFEU would rather appear as a constitutionally valid technique to circumvent the *delegation* and *discretion* limits underlying that judgment.

Firstly, an operational support reading allows for circumvention of the limits on delegation as outlined in *Meroni*. The latter case dealt with the *top-down* delegation of powers presumably held by the ECSC High Authority to a private body *outside* the institutional realm of the Treaty framework. The establishment of ESAs does not involve such a delegation 'downwards' from the Commission towards a specialized agency. It rather reflects a constitutional delegation *upwards* from the Member States to an intermediate supranational body that operates firmly *within* the legal space established by the EU Treaties.[98] The Commission has never been – and was never constitutionally considered to be – the primary EU financial market supervision authority. On the

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95 See Opinion of Advocate General Jääskinen in Case C-270/12 *United Kingdom v. Council and European Parliament*, delivered on 12 September 2013, not yet reported, para. 68.

96 N. Moloney, 12 *European Business Organisation Law Review* (2011), p. 73; P. Schammo, 32 *Oxford Journal of Legal Studies* 4 (2012), p. 783; T. Tridimas, in N. Nic Shuibhne and L. Gormley, *From Single Market to Economic Union,* p. 60; see also M. Chamon, 'EU agencies between Meroni and Romano or the Devil and the Deep Blue Sea', 48 *Common Market Law Review* (2011), p. 1069.

97 As the Court explicitly held in Case C-270/12 *United Kingdom v. Council and European Parliament*, para. 43.

98 On delegation upwards, see P. Schammo, 32 *Oxford Journal of Legal Studies* 4 (2012), p. 779.

contrary, the Treaty only allows the Commission to supervise the Member States in their capacities as enforcers of EU law in the national legal orders.[99] Member States and their national authorities retained responsibility for the day-to-day implementation, application and enforcement of internal market law within national legal orders. The establishment of supranational operational support agencies are a delegation from the Member States to a supranational body that seeks to provide more efficient cross-border coordination in the enforcement of financial regulation. As a result, the *Meroni* limits on the scope of delegated powers would also not apply here. The Member States rather delegate powers they have been attributed by EU law to a formal and network-like structure established at the EU level which complements and *includes* national supervisory authorities.

Secondly, the limits on delegating discretionary powers do not in themselves limit the scope of ESA powers that can be exercised from a supranational operational support point of view. *Meroni* maintained that the powers delegated should be *clearly defined* and *subject to review in accordance with objective criteria by the delegating authority*.[100] To the extent that one accepts that the delegating institution comprises the Member States in this image, that condition would be fulfilled, even in the presence of powers attributing a wide margin of discretion to the ESAs. The Member States do indeed rely on the elaborate Treaty decision-making procedures, and adopt a legislative decision subject to review under the EU Treaties' terms. In addition, Member States retain a role in the day-to-day operations of the authorities to which they delegated powers[101] The establishment of operational support would justify the conferral of discretionary competences to the ESAs by national legal orders if and to the extent that these competences are limited and included as EU law standards within an EU law framework.

According to that understanding, both delegation and discretion limits are directly addressed throughout the operational support reading of Article 114 TFEU. As such, they no longer serve as *institutional balance* limits on the delegation of powers to agencies. They rather serve as enabling devices to ensure an operational support conferral of powers upwards. The operational support conditions underlying Article 114 TFEU rather than the *Meroni* criteria would under that understanding determine the limits on supranational agency powers established on the basis of Article 114 TFEU. *Meroni* and *Romano* do not constitute helpful precedents in that regard and seem to be of limited analytical and explanatory constitutional value in determining constitutional boundaries of EU integration through Article 114 agencies.

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99 On the basis of Article 258–260 TFEU.

100 Case 9/56 *Meroni*, p. 152.

101 Article 40 ESA Regulations. See also Case C-270/12 *United Kingdom v. Council and European Parliament*, para. 53.

C. IN SEARCH OF MEANINGFUL NEW CONSTITUTIONAL BOUNDARIES

The Article 114 TFEU operational support narrative operates against the backdrop of, and is necessarily limited by, different provisions outlining the role and function of other EU institutions and ensuring that particular fundamental features of European integration are always complied with. In that constellation, the role of agencies remains inherently limited and has to be reconciled with more general implementing and decision-making powers attributed to other institutions, most notably the Commission.[102] Five boundary-setting constitutional provisions can consequently be determined. Those provisions serve – or could serve – to re-create boundaries the *Meroni* judgment traditionally sought to impose on the institutions.

Firstly, the regulatory and policy making roles fulfilled by the Commission cannot be frustrated by an implicit mandate from the Member States to the Council and European Parliament to create agencies under Article 114 TFEU. The ESA case study effectively makes this clear. ESAs cannot adopt generally applicable financial market rules or play a general supervisory role to the extent that the Commission would be able to in accordance with Article 17 TEU and specific Treaty provisions. ESAs would also not be able to police the implementation of EU law in a general way, as Article 258 TFEU explicitly entrusts this to the Commission.[103]

Secondly, a combined reading of Articles 263, 289 and 290 TFEU serves to limit the role of EU regulatory agencies. Article 289(3) TFEU explicates that legal acts adopted by legislative procedure shall constitute legislative acts. That provision defines legislative procedure as either ordinary or special. Ordinary legislative procedures refer to the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. Special legislative procedures refer to instances where the Treaties identify the adoption of legal acts by the Council with the participation of the European Parliament or by the latter with the participation of the Council. The notion of participation is deemed to refer to active involvement through consultation of the institution concerned. A mere notification of that institution would not suffice to bring about a legislative procedure.[104] Whilst the classification of legislative acts is far from clear, the Treaty indicates that such acts should always involve

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102 See on the tension between agency powers and the role of the Commission and the extent to which the *Meroni* standards continue to play an inspiring role in that regard, the Council Legal Service Opinion 14547/13 on the Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council – Delegation of powers to the Board, available at http://register.consilium.europa.eu.

103 See also Opinion of Advocate General Jääskinen of 12 September 2013 in Case C-270/12 *United Kingdom v. Council and European Parliament*, para. 21 on the difference between agencies and the Commission.

104 See Article 289(2) TFEU.

the Council and Parliament. Regulatory agencies cannot as such adopt legislative acts. Additional provisions enabling the adoption of EU legal acts – without the participation of either the Parliament or the Council – are not deemed legislative, but rather *sui generis* regulatory decision-making powers in the Treaty.[105] There appears to be no exclusion of the Treaty directly – or indirectly through the medium of Article 114 TFEU – delegating such powers to supranational regulatory agencies.

Article 263 TFEU confirms that point. That provision distinguishes between legislative and regulatory acts for the purposes of standing before the Court of Justice. Standing requirements have indeed been alleviated for regulatory acts that are of direct concern to individuals and do not require further implementing measures.[106] As agencies cannot be involved in the legislative process, Article 263 could nevertheless be read as an implicit acknowledgement that these agencies can adopt regulatory acts.[107] According to the latter provision, acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. The references in that provision to 'acts' that produce 'legal effects' would seem to indicate that agencies can adopt acts that produce legal effects beyond mere individually addressed decisions. Those acts could not however be classified as legislative acts, as that would require direct Council and Parliamentary intervention.[108] Read in combination with Article 263, Article 289 could thus be understood as enabling the establishment of agencies with regulatory decision-making powers. The ESMA's short selling powers would therefore not directly contradict the institutional and procedural principles of legislative decision-making underlying Article 289.

Other Treaty provisions, nevertheless, do limit those general decision-making powers entrusted to ESMA. Article 290 TFEU grants the Commission the final and exclusive authority to adopt delegated legislation in accordance with delegation mandates reflected in particular instruments of secondary legislation. Confirming the *Meroni* judgment, Article 290 TFEU holds that non-essential rule-setting powers can only be delegated to the Commission in circumstances clearly specified and revocable by the Council and Parliament. The Commission in that image remains responsible for discretionary rule-making within the scope of delegation. It cannot delegate those powers away to regulatory agencies, nor can it delegate powers that it does not already possess.[109] As

105 D. Chalmers, G. Monti and G. Davies, *European Union Law: Cases and Materials* (Cambridge University Press, Cambridge 2011), p. 415. See e.g. Article 106(3) TFEU in the realm of competition law.

106 See Case C-583/11 P *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, Judgment of 3 October 2013, not yet reported, para. 58–61.

107 The Court even held that such provision *permitted* agencies to adopt acts of general application, see Case C-270/12 *United Kingdom v. Council and European Parliament*, para. 63. One cannot however directly infer such constitutional permission from the wording of Article 263 TFEU.

108 See Article 289(1) and (2) TFEU.

109 Opinion of Advocate General Jääskinen of 12 September 2013 in Case C-270/12 *United Kingdom v. Council and European Parliament*, para. 76.

a result, Article 290 TFEU would additionally impede EU regulatory agencies directly adopting rules that have general applicability as part of a delegation mandate in secondary legislation in conformity with that provision. The preparatory role played by the ESAs in the adoption of technical standards reflects this limit and serves to confine the powers of supranational operational support bodies.[110]

Thirdly, Article 291 TFEU most directly calls the generally presumed institutional balance underlying *Meroni* into question.[111] That provision now explicitly states that *Member States* shall adopt all measures of national law necessary to implement legally binding Union acts. Only where uniform conditions are needed will such implementation be entrusted to the Commission or the Council. The Treaty does not define the notion of 'uniform conditions', and leaves it to the Member States – participating as Council members – to determine whether or not such uniform conditions are indeed present.

Article 291 TFEU implementing powers could either constitute powers to develop and refine EU rules into more detailed implementing uniform 'legislation' or powers related to the coherent supervision, application and implementation of EU law in the national legal orders. The explicit conferral of implementing competences on the Member States rather than to the Council therefore allows for an enlarged implementing role for supranational regulatory bodies. Supranational bodies would in that light provide for an intermediate implementation instrument that maintains Member States' involvement in the implementation process through participation and representation in the agency's Board of Supervisors. In addition, nothing in Article 291 appears to prevent the creation of supranational regulatory agencies as an alternative to direct Commission intervention.[112] The conferral of *discretionary powers* on supranational regulatory bodies in that image flows from the Member States' constitutional role in implementing EU law in a particular fashion: through the creation of a joint network taking the format of a supranational agency. Member States are called upon to make implementing choices in accordance with that provision and they may decide that an EU-wide agency encapsulating national regulatory authorities better serves the interests of implementing EU law than entrusting the Commission with particular supervisory responsibilities would.[113] As a result, the establishment of EU-wide authorities would contribute to coordinated *Member State* implementation within a supranational constitutional framework. Both Member States and supranational authorities would be called upon sincerely to cooperate in the attainment of coordinated and effective EU law

110 H. Hofmann and A. Morini, 37 *European Law Review* 4 (2012), p. 430.

111 See for that argument also L. De Lucia, 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris)', 5 *Review of European Administrative Law* 1 (2012), p. 43.

112 For a different opinion, see M. Chamon, 48 *Common Market Law Review* (2011), note 96, p. 1069.

113 See also R. Schütze, 'From Rome to Lisbon: "Executive federalism" in the (New) European Union', 47 *Common Market Law Review* (2010), p. 1398. See also H. Hofmann and A. Morini, 37 *European Law Review* 4 (2012), p. 431.

enforcement across the national legal orders.[114] Cooperative structures established at the supranational level could contribute to such attainment.

In his Opinion in the *Short Selling* case, Advocate General Jääskinen argued that Article 291 could thus be relied on to allow an EU agency to *implement* the prohibition on short selling and to attach particular conditions to market behaviour.[115] In his view however, such implementing powers constituted a *delegation* from the EU legislator to the ESAs rather than an attribution of such powers from the Member States to ESMA and on the basis of Article 114 TFEU *and in compliance with the limits incorporated in Article 291 TFEU*. The result of his analysis would not however differ in that regard. As the EU legislator was not competent to adopt such a discretionary prohibition requirement on the basis of Article 114 TFEU, however, the procedural conditions of Article 291 TFEU were of limited relevance for the case at hand. His analysis nevertheless also makes clear that whilst the creation of supranational support structures could conform with Article 291 TFEU, the entrustment of discretionary decision-making powers to those structures cannot ignore a clear-cut requirement of 'implementing' measures delegated or attributed in accordance with that provision. The concept of implementing measures would thus impose limits on the powers exercised by supranational support structures.[116] The Treaty does not however provide sufficiently detailed limits in that respect and the case law is not entirely clear at this stage either.[117] As a result, Article 291 TFEU at present does not impose any meaningful limits in this regard.[118]

Fourthly, Article 19 TEU and Article 47 of the Charter entrust the Court with ensuring that the law is observed and that effective judicial protection is provided for against all EU decisions affecting the legal positions of natural and legal persons or Member States. Delegating such powers to outside bodies would frustrate the judicial protection mindset underlying the Treaty framework.[119] The inclusion of regulatory agencies in the EU's system of judicial review attests to concerns that agency decision-making should not operate in the shadows of EU law. The operational support narrative identified in Article 114 TFEU confirms that position, as it foresees supranational courts' involvement in the review of supranational decisions. Building on Article 47 of the Charter, national courts' involvement in the operational support system has equally been envisioned in instances where national supervisory authorities adopt

114 Article 4(3) TEU.

115 Opinion of Advocate General Jääskinen of 12 September 2013 in Case C-270/12 *United Kingdom v. Council and European Parliament*, para. 99.

116 Ibid., para. 96.

117 See Case C-355/10 *European Parliament v. Council*, Judgment of 5 September 2012, not yet reported, para. 67, where the Court considered itself competent to determine the extent of essential elements and non-essential elements in the realm of delegated acts. Nothing would appear to impede the Court from taking the same position in interpreting the concept of implementing acts.

118 This view was confirmed in Case C-270/12 *United Kingdom v. Council and European Parliament*, para. 79.

119 Case 9/56 *Meroni*, p. 151.

decisions under EU law. At the same time, judicial involvement serves to impose limits on unfettered expansions of operational support readings. It will be for the Court of Justice to determine to what extent operational support justifications can transform the European Supervisory Authorities into full-fledged market supervisors in discrete sectors of financial market regulation (such as Credit Rating Agencies or Short Selling rules), and how curbed national institutional autonomy should be allowed to remain in place. In that understanding, judicial review serves as a keystone to limit unfettered operational support extension. In doing so, it complies with *Meroni*'s proclamation that supranational judges need to be called upon to interpret and safeguard the boundaries of the EU constitutional framework.[120]

Fifthly, Article 197 TFEU states that effective implementation of Union law by the Member States is essential for the proper functioning of the Union and shall be regarded as a matter of common interest.[121] Coupled with the Treaty principle of sincere cooperation stated in Article 4(3) TEU, the idea of coordinated administrative implementation serves as a basis for a converging set of European administrative process principles and supranational institutional structures facilitating such principles to take shape.[122] Article 197(2) TFEU particularly states the Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The Treaty additionally enables the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, to establish the necessary measures to this end, *excluding any harmonization of the laws and regulations of the Member States*. Whilst that provision excludes harmonization initiatives in relation to administrative implementation, it does not however limit the emergence of harmonizing structures supporting the administrative implementation of internal market law. In that instance, the Court made clear in *BAT* that

> [i]f examination of a [Union] act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component.[123]

To the extent that the functioning and maintenance of the internal market proves to be the main component of a regulation creating an operational support framework

120 Ibid., p. 152.

121 On that provision, see P. Nicolaides and M. Geilmann, 'What is effective implementation of EU law?', 19 *Maastricht Journal of European and Comparative Law* 3 (2012), p. 383–399.

122 R. Schütze, 47 *Common Market Law Review* (2010), p. 1426.

123 Case C-491/01 *BAT*, para. 94 and case law references included therein. At times however, reliance on two legal bases is unavoidable, see also Case C-166/07 *European Parliament v. Council* [2009] ECR I-7135, para. 69.

– as the ESA Regulations (but not the CRA and Short Selling Regulations) appear to have done –, Article 114 TFEU could comfortably be relied on to create operational support mechanisms. Outside the realm of internal market regulation, another specific Treaty basis would have to be found in order for operational support mechanisms to be established as a matter of EU law. As such however, Article 197 TFEU does not impose a meaningful limit on the establishment of operational support mechanisms. Quite the contrary – the explicit recognition that coordinated administrative implementation is of EU constitutional importance, might entice the development of such coordinated or harmonized implementation mechanisms in areas where the Treaty provides a specific basis for the development of those mechanisms.

The following table summarizes the limits the post-Lisbon Treaty framework imposes on EU operational support agencies:

Treaty provision	Art. 17 TEU	Art. 289–290 / Art. 263 TFEU	Art. 291 TFEU	Art. 19 TEU / Art. 47 CFR	Art. 197 TFEU
Agency functioning boundaries	no general EU law oversight powers	no delegated rulemaking powers	potential 'implementing measures' limits?	obligatory judicial control	only internal market support

§5. CONCLUSION

This paper reconstructed the scope of Article 114 TFEU in the establishment and extension of EU market supervision mechanisms at the supranational level. It claimed that Article 114 TFEU presented an open-ended mandate for the design and development of extensive harmonized legislation and accompanying supranational authorities in the service of the internal market. To that extent, it conceptualized a supranational operational support narrative underlying recently established Article 114 TFEU agencies. That narrative serves to justify and limit the scope and role of such agencies.

At the same time however, the operational support narrative promotes an EU constitutional taste for supranational expansionism. This paper therefore additionally sought to identify constitutional provisions potentially restraining such unfettered expansionism. It was submitted that Article 114 TFEU constitutes an inherent part of the EU's constitutional framework and should be read in light of other provisions, such as the limits on the adoption of regulatory standards and the scope of EU legislative intervention, the need for judicial review and the Commission's role as ultimate guardian of the Union's general interest. Whilst the *Meroni* standards remain inspiring in that regard, they are to be developed further in a more developed and constitutionally flexible EU internal market integration framework.