

# ***The ESMA Case and Its Impact on the Legal Framework of the European Agencies***

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## ***Abstract***

*After the crisis, the European Union's legislative activity in connection with the regulation and supervision of the financial market was characterized with strong task- and competence centralization endeavours and is still characterized with it in secondary (but not primary) law. That is exactly why the most complicated and most significant question is that among what limitations these endeavours can prevail from legal point of view. The article analyses the notion of the measures for approximation in the European law, the applicability of Article 290 and 291 TFEU and the reinterpretation of the Meroni doctrine in the context of the current case law of the European Court of Justice.*

***Keywords:*** ESMA, European agencies, legal basis, Meroni, Article 290 and 291 TFEU.

***JEL classification:*** G18, G20, G28, K23, P48.

## **1. INTRODUCTION**

After the crisis, the European Union's legislative activity in connection with the regulation and supervision of the financial market was characterized with strong task- and competence centralization endeavours and is still characterized with it in secondary (but not primary) law. That is exactly why the most complicated and most significant question is that among what limitations these endeavours can prevail from legal point of view. What heights can centralization, or nicely expressed, integration can achieve among legal frames? What is that point after which the integration surpasses the framework of current foundation treaties?

*Centralization's (integration's) margin, borders are set by the rules of primary law on delegation of competences and by the case law of the European Court of Justice (hereinafter: ECJ). Article 5 of the Treaty on European Union (hereinafter: TEU) says that – as one of the most significant rules of the European Union common law – the limits of Union competences are governed by the *principle of conferral*. According to the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Every such competence which Treaties have not conferred to the Union, remain at member states. Hence, the*

principle expresses that Member States further remain the lords of the Treaties; they continue to be holders of national sovereignty.<sup>1</sup> It comes from the principle of conferral that every secondary legal act must have a legal basis in specific Treaty articles, or primary European law. The ECJ review the legality of legislative acts and if the legislator chose the act's legal basis wrong (*ultra vires*) the Court declare the act concerned to be void, based on Article 263 and 264 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). It is another significant question in connection with the delegation of competences that who do Member States transfer part of their competences to, hence, according to Article 17 TEU, the *Commission ensure* the application of the Treaties, and of measures adopted by the institutions pursuant to them. (...) It shall exercise coordinating, *executive and management functions*, as laid down in the Treaties. That is – as a quasi-separation of powers rule – Article 17 TEU appoints the Commission for the implementation of (primary and secondary) Union law, along determined conditions.

Simultaneously with the widening of the European Union's tasks, the level of bodies under the European institutions was formed, from which I have to highlight the diffuse system of the so called *European agencies*. As a reaction to organizational expansion, the *second level of delegation of competences* has been formed – among the principle of conferral –, which can also be understood as delegation of competences inside the organizational system of the Union. We can distinguish two cases on this level. On the one hand, we can distinguish competences delegated to the Commission by Union legislators, on the other hand, the delegation of those competences which were originally delegated to the Commission by the Treaties.<sup>2</sup> The first case is handled by Article 290 and 291 TFEU. Primary law does not rule on the conditions of the second case, its rules were formed by case laws of the ECJ (the so called *Meroni-doctrine*).

The limits of centralization (integration) endeavours are partly determined by the principle of conferral – according to which the Union can only practice such competences which were transferred to it by member states through the foundation treaties, via limiting their own sovereignty – and as its outcome, the existence of an adequate legal basis necessary for secondary legislation. On the other hand, centralization's (integration's) limits are the frames of delegation of competences among the European Union bodies written in Articles 290 and 291 TFEU, connecting to which the primary question is whether it can be regarded as a closed delegation system or not. On the third part, the court case law referring to the delegation of Commission competences also limits the deepening of integration among legal frameworks. The extent of the European financial supervisory architecture formed as the effect of the crisis was affected by all three limitations and the court's interpretation – as I am going to elaborate on it – *strongly widened the legal limits of competences' centralization in the name of integration*.

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<sup>1</sup> VÁRNAY, ERNŐ – PAPP, MÓNKA: *Az Európai Unió joga*, 2010, Complex, Budapest, 183.

<sup>2</sup> LAFARGE, FRANCOIS: The legal basis and the legal constraints of EU agencies (and the transformation of the executive function in the EU), in ONGARNO, E. (ed.): *EU Agencies*, 2013, Palgrave MacMillan. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2249873](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249873) [cit. 2014-07-21].

The permissibility of the European financial supervisory system's reformation via Union law became questionable by the United Kingdom of Great Britain and Northern Ireland in front of the ECJ, in its action aiming at the annulment of ESMA competence connecting to short selling. Despite that in the action of Great Britain questioned the legal limits of centralization endeavours in connection with only one competence rule – and not in connection with the whole new supervisory system –, the ECJ's decision is a *milestone* regarding the above mentioned limits.

## 2. THE ESMA CASE'S BACKGROUND IN SHORT

Investigating short selling's legal background, we can realize that prior to the economic crisis there was no Union legislation and Member State legislations showed considerably various pictures.<sup>3</sup> In September 2008, in the height of the financial crisis – in a so called reaction panic –, more Union Member States and the USA's competent authorities accepted measures for restricting or banning short selling.<sup>4</sup>

The current fragmented approach to short selling and credit default swaps limits the effectiveness of supervision and the measures imposed and results in regulatory arbitrage. It may also create confusion in markets and costs and difficulties for market participants.<sup>5</sup>

Recognizing the further systemic risks hidden in the different regulations, Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (hereinafter: Short selling Reg.) was born on the recommendation of the Commission. The Short selling Reg. tries to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regard to the financial markets, and to ensure a high level of consumer and investor protection, it is therefore appropriate to lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional circumstances.<sup>6</sup>

According to Article 28 of Short selling Reg., in case of exceptional circumstances, ESMA can order increased *information obligation* for natural or legal persons having net short positions in relation to specific financial instrument

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<sup>3</sup> See PAYNE, JENNIFER: The Regulation of Short Selling and Its Reforms in Europe, in *European Business Organization Law Review*, Vol. 13. Issue 3. (2012), 429.

<sup>4</sup> BEBER, ALESSANDRO – PAGANO, MARCO: Short-Selling Bans Around the World: Evidence from the 2007–09 Crisis, in *The Journal of Finance*, Vol. 68. Issue 1. (2013), 343.

<sup>5</sup> See COM (2010) 482 Proposal for a regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps, 2.

<sup>6</sup> See Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (hereinafter: Short selling Reg.) preamble point 2.

or class of financial instruments, and in case of exceptional circumstances, it can *prohibit or impose conditions on*, the entry by natural or legal persons into a short sale or a transaction.

The ESMA can exclusively make these measures if a) the measures address a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and there are *cross-border implications*; and b) no competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that *do not adequately address the threat*. The competence set in Article 28 of Short selling Reg. is hierarchically superior to Member State authorities' decisions as *measures accepted* by ESMA according to this article are *prevail over any previous measure taken by a competent authorities*.

The United Kingdom (in this part furthermore referred to as Applicant) handed in an action to the ECJ on 1<sup>st</sup> June 2012, in which it requested the annulment of Article 28 of Short selling Reg. based on Article 263 TFEU. In the action, the Applicant named four pleas in law, which – according to it – give basis to annulations of ESMA's intervention powers in exceptional circumstances.

In the action the Applicant referred to that *firstly*, Article 28 of Short selling Reg. is contrary to the second principle established by the Court of Justice in the Meroni case,<sup>7</sup> because when ESMA is required to take action under Article 28 entail a large measure of discretion. *Secondly*, Article 28 purports to empower ESMA to impose measures of general application which have the force of law, contrary to the Court's decision in Case Romano.<sup>8</sup> *Thirdly*, Article 28 purports to confer on ESMA a power to adopt non-legislative acts of general application, whereas in the light of Articles 290 and 291 TFEU, the Council has no authority under the Treaties to delegate such a power to a mere agency outside of these provisions.. Finally, *fourthly*, if and to the extent that Article 28 were interpreted as empowering ESMA to take individual measures directed at natural or legal persons, it would be ultra vires Article 114 TFEU.

As *Balázs Fekete* also highlights, „the following conviction in the focus point of the Applicants was that Article 28 provides such a wide discretionary competence to ESMA, which delegation is against the law because of certain foundation treaty rules and because of the existing ECJ case law.”<sup>9</sup> Besides the validity of the concrete competence, the ECJ has to form an opinion in all above mentioned theoretically significant interpretation of law that mark the limits of centralization,

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<sup>7</sup> Judgment of the Court of 13 June 1958. *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*. Case 9/56.

<sup>8</sup> Judgment of the Court (First Chamber) of 14 May 1981. *Giuseppe Romano v Institut national d'assurance maladie-invalidité*. Reference for a preliminary ruling: Tribunal du travail de Bruxelles – Belgium. Social security – Applicable exchange rate. Case 98/80.

<sup>9</sup> FEKETE, BALÁZS: *Az Európai Értékpapír-piaci Hatóság rendkívüli válsághelyzetben alkalmazható beavatkozási hatásköre nem ellentétes az uniós jogrend követelményeivel*, Lendület HPOPs Kutatócsoport, 2014. Available at: <http://hpops.tk.mta.hu/blog/2014/02/europai-ertekpapir-piaci-hatosag> [cit. 2014-07-21].

the ESMA case's *systemic importance* originates from this.<sup>10</sup> These theoretically significant questions are going to be investigated via following the study's logical order, not according to the order of the Judgement.<sup>11</sup>

### 3. IN THE NAME OF THE INTEGRATION

#### ***3.1. The question of legal basis and the notion of the measures for approximation***

Hence, the first theoretically significant question referred to the interpretation of the notion of the measures for approximation and Article 114 TFEU determined as the legal basis of the competence included in Article 28 of Short selling Reg. Based on Article 114 TFEU – which Article is also the legal basis of the formation of the ESFS and the SRM –, *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 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.*

According to the Applicant, Article 28 of Short selling Reg. is not intended to authorise ESMA to take individual measures directed at natural or legal persons. On the contrary, measures that may be adopted under that provision are of general application. Furthermore, the Applicant considers that, if, however, Article 28 of Short selling Reg. is to be regarded as authorising ESMA to direct decisions at natural or legal persons, that provision is *ultra vires* Article 114 TFEU. That provision does not empower the EU legislature to take individual decisions that are not of general application or to delegate to the Commission or a Union agency the power to adopt such decisions. Hence, the theoretically significant question can be asked in a way that whether those decisions addressed to financial institutions which have prevail over any previous measure taken by a competent authorities can be regarded as measures for approximation according to Article 114 TFEU or not. The theoretical significance of the question is showed by that the advocate general (*Niilo Jääskinen*) acting in the case and the court has different theoretical standpoints.

In the Advocate General's opinion,<sup>12</sup> referring to judgement made in the

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<sup>10</sup> MARJOSOLA, HEIKKI: Case C-270/12 (UK v Parliament and Council) – Stress Testing Constitutional resilience of the Powers of EU Financial Supervisory Authorities – A Critical Assessment of the Advocate General's Opinion, in *EUI Working Paper Law* 2014/02, 4.

<sup>11</sup> Judgment of the Court (Grand Chamber) of 22 January 2014. *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*. C-270/12. (hereinafter: Judgement)

<sup>12</sup> Opinion of Advocate General, 12 September 2013. *United Kingdom of Great Britain and*

ENISA case,<sup>13</sup> he ascertained upon the court case law that the EU legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation ‘in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate’. Furthermore, it is important that in the ENISA case the ECJ ruled that nothing in the wording of Article 114 TFEU implies that the addressees of the measures adopted by the EU legislature on the basis of that provision can only be Member States. Hence, Article 114 TFEU provides legal basis for that addressees of acts accepted upon this can even be natural or legal persons. The Advocate General determined *that the decision making powers of ESMA under Article 28 of Short selling Reg. bear little resemblance to the measures described by the Court in these important passages of the ENISA ruling*. First of all, *measures based on Article 28 of Short selling Reg. are legally binding*, while the Court investigated non-legally binding measures in the ENISA case. While this is not objectionable in and of itself, it is difficult to envisage how the exercise of a power under Article 28 of Short selling Reg. could contribute to harmonisation of the kind described by the Court in *ENISA*. Rather *its function is to lift implementation powers contained in Article 18, 20 and 22 of Short selling Reg. from the national level to the EU level* when there is disagreement between ESMA and the competent national authority or between national authorities.<sup>14</sup> Hence, the Advocate laid down that *the outcome of the activation of ESMA’s powers under Article 28 of Short selling Reg. is not harmonisation, or the adoption of uniform practice at the level of the Member States*, but the replacement of national decision making with EU level decision making.<sup>15</sup>

The ECJ, deviating from the Advocate General's opinion investigated whether the two conditions in Article 114 TFEU prevail with relation to Article 28 of Short selling Reg. So the ECJ analysed that, on the one hand, whether the measures according to Article 28 of Short selling Reg. *comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States* and, on the other hand, *have as its object the establishment and functioning of the internal market*.

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*Northern Ireland v European Parliament and Council of the European Union*. C-270/12. (hereinafter: Opinion).

<sup>13</sup> Judgment of the Court (Grand Chamber) of 2 May 2006. *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*. Case C-217/04.

<sup>14</sup> Opinion point 50.

<sup>15</sup> The Advocate General marked that the Article 352 TFEU could be an adequate legal basis for the competences delegated to the ESMA with the Article 28 of Short selling Reg. With this legal basis the problem is that the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament to adopt the appropriate measures.

The ECJ first determined that by the expression ‘measures for the approximation’, the authors of the TFEU intended to confer on the Union legislature, depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features.<sup>16</sup> Regarding this, the ECJ has held in that regard that such discretion may be used *in particular to choose the most appropriate method of harmonisation* where the proposed approximation requires highly technical and specialist analyses to be made and developments in a specific field to be taken into account.<sup>17</sup> Continuing the Court's argumentation, accordingly, the EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, *may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought. That is the case in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately.*<sup>18</sup>

The ECJ makes clear that the aim of the orderly functioning and integrity of the financial markets or the stability of the financial system in the EU includes the establishment of an appropriate mechanism which would *enable measures to be adopted throughout the EU which may take the form, where necessary, of decisions directed at certain participants in those markets.*<sup>19</sup> The EU legislature therefore considered it appropriate to lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional circumstances. Therefore, the harmonisation of the rules governing such transactions is intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States.<sup>20</sup> Taking all these into account, in the ECJ interpretation, competence set in Article 28 of Short selling Reg. corresponds to criterion written in Article 114 TFEU.

The significance of the decision in connection with the centralization's borders can be traced in that according to the ECJ's interpretation Union bodies' practice of their competences is based on such general, Union interests which in nature and in quality differ from the individual Member State interests and cannot

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<sup>16</sup> Judgement point 102.

<sup>17</sup> Judgement point 103.

<sup>18</sup> Judgement point 105.

<sup>19</sup> RAPASSI, RENÉ: Assessment of the Judgement of the European Court of Justice in Case 270/12, United Kingdom v Council and European Parliament. Impact of this judgement on the proposal of the SRM regulation. Available at: <http://www.sven-giegold.de/wp-content/uploads/2014/01/Assessment-ECJ-Case-C-270-12-and-relevance-for-the-SRM1.pdf> [cit. 2014-07-21].

<sup>20</sup> Judgement point 114.

be realized exclusively with the cooperation of Member State authorities.<sup>21</sup> Therefore, competences ensuring direct Union intervention (supervision) are compatible with Article 114 TFEU in connection with the significantly integrated European financial markets, and – in opposition with the Advocate General's opinion which tried to set up limits for the application of the notion of „measures for approximation” –, unanimous decision making set in Article 352 TFEU is not necessary for them. Such interpretation of Article 114 TFEU gives way (not only) to the further integration of financial market's European supervisory system. Besides, such wide interpretation creates the risk that the scope of „measures for approximation” could be expanded almost indefinitely, depriving of Article 114 TFEU inherent limits and thus the principle of legality can be violated.<sup>22</sup>

### **3.2. The interpretation of Articles 290 and 291 TFEU**

According to the argumentation of the United Kingdom, because of that Articles 290 TFEU and 291 TFEU circumscribe the circumstances in which certain powers may be given to the Commission, the Council has no authority under the Treaties to delegate powers such as those provided for in Article 28 of Short selling Reg. to an EU agency. Therefore, the ECJ had to take a side in that whether legal framework entering into the place of so called comitology with the Treaty of Lisbon mean a closed system or not. Whether creators of TFEU wished to create such an only legal framework in Articles 290 and 291 TFEU which only makes the delegation of certain competences exclusively – in special cases for the Council – for the Commission possible, or the Union legislator have other systems of delegation such competences to Union organizations or authorities.

“The practice of delegated competences and the taking of adequate executive measures are indispensable tools of the enforcement of Union law, which suppose the unified interpretation of the TFEU’s new regulations”.<sup>23</sup> Based on Article 290 TFEU a legislative act may delegate to *the Commission* the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. Article 291 para. 1 TFEU lies down that Member States shall adopt all measures of national law necessary to implement legally binding Union acts. Para. 2 says that where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council. By Article 290 the Commission can only be authorized to accept acts with general application, while according to Article 291 the Commission (in certain cases the Council) can also apply individual measures and acts with general application for the sake of unified implementation of the legally binding Union

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<sup>21</sup> FEKETE: *op. cit.*

<sup>22</sup> BABIS, VALIA: The Power to Ban Short-Selling: The Beginning of a New Era for EU Agencies? in *Legal Studies Research Paper Series*, No. 27/2014. 2.

<sup>23</sup> OSZTOVITS, ANDRÁS (ed.): *Az Európai Unióról és az Európai Unió Működéséről szóló Szerződések magyarázata* 3. 2011, Complex, Budapest, 3099.

acts.<sup>24</sup> The main constitutional concern relating to Article 290 TFEU delegated acts appertains to democratic accountability. In contrast, the main constitutional focus in relation to Article 291 TFEU implementing acts relates to respect for the primary competence of the Member States with respect to implementation of EU law, and the institutional balance between the Council and the Commission when they assume implementing roles.<sup>25</sup>

Continuing the train of thoughts, it is important to highlight that regarding Article 291 a European authority cannot be the addressee of an executive competence *expressis verbis*. The opinion of the Advocate General also took it into consideration, as it says that Article 291 TFEU, like Article 290 TFEU, does not refer to agencies as subjects on whom implementing powers can be conferred at the EU level. However, given that implementing powers do not extend to amending or supplementing legislative acts with new elements, fundamental constitutional principles do not in my opinion prevent the legislator from conferring such powers on agencies as a midway solution between vesting implementing authority in either the Commission or the Council, on the one hand, or leaving it to the Member States, on the other.<sup>26</sup> This argumentation was taken over by the ECJ as well. In the Judgement the ECJ noted in that regard that, while the treaties do not contain any provision – hence, neither do Articles 290 and 291 TFEU – to the effect that powers may be conferred on a Union body, office or agency, a number of provisions in the TFEU none the less presuppose that such a possibility exists.<sup>27</sup> Under Article 263 TFEU, the Union bodies whose acts may be subject to judicial review by the Court include the ‘bodies, offices’ and ‘agencies’ of the Union. The rules governing actions for failure to act are applicable to those bodies pursuant to Article 265 TFEU. Article 267 TFEU provides that the courts and tribunals of the Member States may refer questions concerning the validity and interpretation of the acts of such bodies to the Court. Such acts may also be the subject of a plea of illegality pursuant to Article 277 TFEU.<sup>28</sup>

The ECJ noted that Article 28 Short selling Reg. vests ESMA with certain decision-making powers in an area which requires the deployment of specific technical and professional expertise. However, that conferral of powers does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU, but cannot be considered in isolation. On the contrary, that provision must be perceived as forming part of a series of rules designed to endow the competent national authorities and ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence. The ECJ deduced that from this rough argumentation that Article 28 of Short selling Reg. read in conjunction with the other regulatory instruments adopted in that field identified above, cannot be regarded as undermining the rules

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<sup>24</sup> OSZTOVITS: *op. cit.* 3105-3106.

<sup>25</sup> Opinion point 83.

<sup>26</sup> Opinion point 86.

<sup>27</sup> Judgement point 79.

<sup>28</sup> Judgement point 80.

governing the delegation of powers laid down in Articles 290 TFEU and 291 TFEU.<sup>29</sup>

Defects of the ECJ's argumentation probably come from that in spite that it agreed with the Advocate General's argumentation, it did not wish to make it as part of the Judgement. According to the Advocate General's argumentation, Article 28 of Short selling Reg. does not violate Articles 290 and 291 TFEU because it delegated the intervention competence to ESMA directly with the legislative act of the Union's legislator – *choosing the solution outside Articles 290 and 291 TFEU*. The EU legislature is not acting as a 'delegating authority' when it confers implementing powers on institutions, agents, or other bodies of the Union, but *a constitutional actor exercising its own legislative competence*, as conferred on it by the higher constitutional charter, i.e. the Lisbon Treaty.<sup>30</sup>

According to Articles 290 and 291 TFEU the addressee of transfer may only be the Commission – in some cases based on Article 291 the Council –, however, we can deduct it from the argumentation of the judgement that according to the ECJ's interpretation, the legal framework formed in Articles 290 and 291 TFEU cannot be regarded as the only system with which competences can be delegate to any European body. With this argumentation, the ECJ stated not less than *that European agencies actually mean the alternative of the implementation of Union law besides Member States and implementation by the European institutions*, even if *expressis verbis does not come from the text of founding treaties*. Among the framework of the Meroni-doctrine, which I am going to elaborate on in the next point, in areas requiring special competencies, the Union legislator can delegate regulative and executive competencies to European agencies having special competency. Based on these, the ECJ distinguish the delegation of powers to EU agencies that is only indirectly recognised in the Treaties, from the explicit delegation of powers to the European Commission under Article 290 and 291 TFEU.<sup>31</sup>

### **3.3. The reinterpretation of the Meroni-doctrine**

The essence of the Meroni judgement<sup>32</sup> is that the Court differentiated between clearly defined executive powers and discretionary powers having wide margin of discretion. The previous ones can be conferred, while the latter ones were qualified as non-conferrable.

In the Meroni-case the Court set those criteria with which fulfilment delegation of competences is allowed. Based on these, the delegator can only delegate competences to administrative agencies if: *(1) a delegating authority cannot confer upon the authority receiving the delegation powers different from*

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<sup>29</sup> Judgement point 80.

<sup>30</sup> Opinion point 91.

<sup>31</sup> PELKMANS, JACQUES – SIMONCINI, MARTA: Mellowing Meroni: How ESMA can help build the single market, in *CEPS Commentary*, 3. Available at: <http://www.ceps.eu/book/mellowing-meroni-how-esma-can-help-build-single-market> [cit. 2014-07-21].

<sup>32</sup> See KOEN, LENAERTS: Regulating the regulatory process: Delegation of powers in the European Community, in *European Law Review*, Vol. 18. No. 1. (1993), 30.

*those which it has itself received under the treaty (general principle); (2) such a delegation of powers can only involve clearly defined executive powers, the use of which must be entirely subject to the supervision of the delegator; (3) a delegation of powers cannot be presumed, even when empowered to delegate its powers the delegating authority must take an express decision transferring them; (4) the transfer must not disturb the institutional balance between European institutions.*

The judgment of the Meroni-case was further supplemented by several later judgements, which together form the so called Meroni-doctrine.<sup>33</sup> The framework of the delegation of competences became complete with the Romano case, as the ECJ, within the framework of the EEC Treaty in connection with a Union organization set the general prohibition of legislative competences' further delegation, the prohibition of the delegation of powers having wide margin of discretion, and it determined the necessary system of criterion regarding every other cases of delegation of powers.

The strict system of conditions set up in the Meroni-case and the prohibition of the delegation of powers having wide margin of discretion has stood for fifty years as constitutional limits to delegation,<sup>34</sup> which prohibition continuously became flexible in the court' case law<sup>35</sup> since the formation of the new type of European authorities. The ESMA case allowed the ECJ to summarize and reinterpret the Meroni-doctrine's strict rules in the context of the introduced Treaty of Lisbon.<sup>36</sup>

As the first step, the ECJ noticed that the bodies in question in *Meroni* case were entities governed by private law, whereas ESMA is a European Union entity, created by the EU legislature.<sup>37</sup> As the second step the court stated that unlike the case of the powers delegated to the bodies concerned in *Meroni* case, the exercise of the powers under Article 28 of Short selling Reg. is circumscribed by various conditions and criteria which limit ESMA's discretion.<sup>38</sup> Finally the ESJ noted that contrary to the applicant's claims, those powers do not, therefore, imply that ESMA is vested with a 'very large measure of discretion' that is incompatible with the

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<sup>33</sup> See for more details KÁLMÁN, JÁNOS: A tilalomtól a rugalmas értelmezésig, avagy a hatáskör-átruházás az Európai Unió Bíróságának joggyakorlatában, in KECSKÉS, GÁBOR (ed.): *Doktori műhelytanulmányok 2014*, Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola, Győr, 2014 (forthcoming).

<sup>34</sup> CRAIG, PAUL: *EU Administrative Law*, 2012, Oxford University Press, Oxford, 155.

<sup>35</sup> About the process see for more details KÁLMÁN (2014): *op. cit.*

<sup>36</sup> Under Article 263 TFEU, the Union bodies whose acts may be subject to judicial review by the Court include the 'bodies, offices' and 'agencies' of the Union. The rules governing actions for failure to act are applicable to those bodies pursuant to Article 265 TFEU. Article 267 TFEU provides that the courts and tribunals of the Member States may refer questions concerning the validity and interpretation of the acts of such bodies to the Court. Such acts may also be the subject of a plea of illegality pursuant to Article 277 TFEU. *So the judicial control over the European agencies become full, which was completely lacking at the time of the Meroni judgement.*

<sup>37</sup> Judgement point 43.

<sup>38</sup> Judgement point 45.

TFEU for the purpose of that judgment.<sup>39</sup>

The new Meroni-doctrine referring to the delegation of competences can be built up from the judgement's reasoning – with regards to what has been included in the Advocate General's opinion. Based on this, *competences having wide margin of discretion can be delegated to other Union organization than the Commission if (1) this organization is a European Union entity, created by the EU legislature (point 43), (2) the exercise of the powers are circumscribed by various conditions and criteria which limit the discretion (point 45), and (3) the exercise of the delegated powers are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority (point 53.)*. It is important to highlight that competences delegated via this way include individual decisions and measures with general application, too.

Hence, it can be seen that the ECJ strongly reinterpreted the framework of delegation of competences, taking the wide formation of the ECJ review into account, which – together with literature opinions<sup>40</sup> – makes the maintenance of strict conditions laid down by the Meroni-doctrine useless. At the same time, the Court discarded the difference between clearly defined executive powers and discretionary powers having wide margin of discretion, with that it resolved the prohibition of the delegation of powers having wide margin of discretion. Several representative of the literature welcomed the reinterpretation of the Meroni-doctrine, as the new framework suits the Union's current improvement more.<sup>41</sup>

#### 4. CONCLUSIONS

The ESFS was formed as the first step of the European Union's reform process, "compelled" by the economic crisis. However, the banking system's bailout packages raised government debt to such levels which led to sovereign credit crisis and the deflection of the Euro. Hence, reform processes continued to move towards the more and deeper integration, putting the question: what kind of Europe do we want? Do we want the United States of Europe with federal organization or the Europe of Nations with strengthened Member State position, without political integration? We can list several reasons pro and contra all future plans, however, with the analysis of institutional changes it becomes clear that the formation of the Banking Union is not followed by the weakening of Union competencies but by its drastic strengthening. The introduction of the Banking Union, and primarily the SRM, its second pillar cannot reach its aim without adequate financial background, hence, the further deepening of integration is needed with the approach of fiscal policy, which is direct consequence and wish is the remedy of the lack of democratic legitimacy, which shows into the direction of political union. We can quarrel on the European Union's future, but decision makers have already voted

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<sup>39</sup> Judgement point 54.

<sup>40</sup> VOS, ELLEN: Reforming the European Commission: What role to play for EU agencies? in *Common Market Law Review*, Vol. 37. No. 5. (2000), 1123-1124.

<sup>41</sup> See BABIS: *op. cit.* 2.; PELKMANS – SIMONCINI: *op. cit.* 6.

for one way with the introduction of reform processes. In the deepening of integration the ECJ does a good job, and as it elaborated on it in its study, they widened the founding treaties' regulations to the widest in order to maintain the reform processes. We cannot solve every question with the integration-friendly interpretation but the principle of legality has to be blocked against the unlimited widening of founding treaties' regulations mainly Article 114 of TFEU which is the seed of reforms. The European Union is further based on the principle of conferral, as it cannot be regarded as a sovereign state, hence, for the sake of ensuring the new institutional reforms' stability – before further reforms – their treaty base must be laid down.

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