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**Banking Resolution Under the SRM Regulation and
the Single Resolution Board:**

An assessment of the limits to the delegation of powers to EU
agencies - The Single Resolution Board and its compliance with
the *Meroni* doctrine

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Abstract

In response to the financial crisis the Single Resolution Board (SRB) has been created as a new Union agency 'with a precise structure corresponding to its tasks'. It operates under the regulation on the Single Resolution Mechanism as a resolution authority and ensures that banks, which face serious financial difficulties, are effectively resolved while minimising the impact on taxpayers and the real economy. In pursuing this objective, the SRB is equipped with decision-making powers during the resolution procedure. However, this delegation of powers to an EU agency raises the question of compliance with the *Meroni* doctrine which sets certain conditions and thereby limits the powers that can be delegated to the SRB. This thesis argues that the delegation of resolution powers to the SRB breaches the conditions set by the Court's case law, namely the *Meroni* doctrine as confirmed and relaxed by the *Short Selling* ruling, because no efficient control is exercised by the delegating authority during the resolution procedure in light of the silent endorsement mechanism and the tight deadlines.

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List of Abbreviations

CPVO	Community Plant Variety Office
EBA	European Banking Authority
ECB	European Central Bank
ECHA	European Chemicals Agency
EDIS	European Deposit Insurance Scheme
EIOPA	European Insurance and Occupational Pensions Authority
ESAs	European Supervisory Authorities
ESFS	European System for Financial Supervision
ESMA	European Securities and Market Authority
ESRB	European Systemic Risk Board
EU	European Union
NRAs	National Resolution Authorities
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TFEU	Treaty on the Functioning of the European Union
the Court	the Court of Justice of the European Union

Introduction

As a response to the economic and financial crisis, the EU introduced a regulatory reform and a complete overhaul of the financial system. Its main achievement was the establishment of the Banking Union.¹ The need to break the link between the fragile euro area banking system and the viability of euro area Member States fiscal positions as a consequence to substantial instability in the sovereign debt market constitute the origins of the Banking Union.² This new project in the field of prudential regulation, supervision and resolution of banks has since then been implemented step by step. The Banking Union is composed of three pillars. Firstly, the Single Supervisory Mechanism ('SSM')³ which brings about the centralised supervision of the euro area's credit institutions under the control of the European Central Bank ('ECB') and is concerned with banking supervision and early intervention in order to prevent bank crises. Secondly, the European Deposit Insurance Scheme ('EDIS')⁴, a Union wide deposit guarantee scheme with mutualisation of risk across Member States. Thirdly, the Single Resolution Mechanism ('SRM')⁵ is concerned with the resolution of banks.

The reason for the introduction of the European resolution mechanism is the existence of divergences between national resolution rules which create an unlevel playing field and thereby "undermine public confidence in the banking sector and obstruct the exercise of the freedom of establishment and the free provision of services within the internal market because financing costs would be lower without such differences".⁶ The SRM comprises one banking resolution authority for the Eurozone, namely the Single Resolution Board ('SRB'), a Union agency⁷ with significant powers during the various stages of the resolution process, and supported by the Single

¹ European Council Conclusions 28/29 June 2012, EUCO 76/12; European Commission, Communication from the Commission to the European Parliament and the Council: A Roadmap towards Banking Union, COM (2012) 510 final, 12 September 2012.

² Moloney N., 'European Banking Union: assessing its risks and resilience', *Common Market Law Review*, vol. 51, no. 6 (2014), p. 1610.

³ The legal framework for the SSM constitutes of two legislative instruments: 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 L 287/63 ('SSM Regulation') and Regulation 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) 1093/2010, 2013, OJ L 287/5.

⁴ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on Deposit Guarantee Schemes, 2014, OJ L 173/149.

⁵ The SRM is based on Regulation (EU) 806/2014 of 15 July 2014 of the European parliament and of the Council for the resolution of credit institutions and certain investment firms in the context of a Single Resolution Mechanism and a Single Bank Resolution Fund, 2014, OJ L 225/1 ('SRM Regulation').

⁶ Recital 3 SRM Regulation.

⁷ Article 42(1) SRM Regulation.

Resolution Fund ('SRF'). The SRB is responsible for the effective and consistent functioning of the SRM⁸ and is also responsible for drawing up resolution plans and the adoption of all resolution decisions relating to the resolution of designated entities.⁹ The powers to trigger the resolution procedure and to place an entity under resolution are the most crucial ones within the framework of the SRM.¹⁰ Therefore, lengthy negotiations took place to determine the institution or body that would be entrusted with these competences as well as the extent of its powers.¹¹ The Treaties did not confer power on a specific European Union ('EU') institution with the task of conducting the EU resolution policy; and accordingly, there was the need to establish a specialised agency given the extreme complexity of the field of resolution.¹² The European Parliament¹³ and the ECB¹⁴ supported the Commission proposal for the establishment of the SRM.¹⁵ However, some EU governments, especially Germany, raised objections concerning the legal basis for the establishment of the SRM, namely Article 114 TFEU, and the powers of the SRB.¹⁶ Concern is especially expressed with regards to the delegation of powers to the SRB whose legality may be questioned in light of the established case law.¹⁷ Especially in light of the recent occurrences in respect to the resolution of Banco Popular Español S.A. where the SRB became active and made

⁸ Article 7(1) SRM Regulation.

⁹ Article 7(2) SRM Regulation.

¹⁰ Recital 24 SRM Regulation.

¹¹ Zavvos G. and Kaltsouni S., 'The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing', in: Haentjens M. and Wessels B. (eds.), *Research Handbook on Crisis Management in the Banking Sector*. Edward Elgar Publishing Ltd., 2015, p. 127.

¹² Ibid, p. 128.

¹³ European Parliament, Position of the European Parliament adopted at first reading on 15 April 2014 with a view to the adoption of Regulation (EU) No .../2014 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 Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, 15 April 2014. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TC+P7-TC1-COD-2013-0253+0+DOC+PDF+V0//EN> ; last accessed 17 April 2017.

¹⁴ European Central Bank, Press Release – ECB publishes opinion on the Single Resolution Mechanism (SRM), 8 November 2013. Available at: <https://www.ecb.europa.eu/press/pr/date/2013/html/pr131108.en.html> ; last accessed 17 April 2017.

¹⁵ European Commission, 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, COM (2013) 520 final, 10 July 2013; Zavvos G. and Kaltsouni S. (2015), *op. cit.* n. 11, p. 118.

¹⁶ Speyer B., Deutsche Bank Research, EU Monitor, EU Banking Union – Right Idea, poor Execution, 4 September 2013, p. 16. Available at: https://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000319670/EU+Banking+Union%3A+Right+idea,+poor+execution.pdf ; last accessed 2 March 2017.

¹⁷ Schäuble W., 'The Banking Union – Another step towards a tighter-knit Europe', Federal Ministry of Finance, 23 October 2013. Available at: <http://www.bundesfinanzministerium.de/Content/DE/Interviews/2013/2013-10-23-namensartikel-the-banker.html> ; last accessed 28 April 2017. Arguing that "in order to make resolution decisions hard to challenge, the SRM should not be given more competence than necessary and can be justified under the current EU treaties. The powers granted to any central authority and the capacity of any central industry-financed resolution fund should be limited and well defined. It would be a fatal mistake to anchor the SRM on tenuous legal foundations and one that could end up toppling the entire edifice."

use of the powers conferred upon it,¹⁸ the delegation of powers to this agency becomes particularly topical.

Within this context, the issue of delegation of powers to EU agencies and its limits established by the case law of the Court of Justice of the European Union ('the Court') will be discussed. The balancing exercise of the need to delegate powers to agencies in order to free the Commission from highly technical tasks against the limits imposed to the delegation of powers to agencies and the problem of the suitability of the accountability mechanisms for EU agencies is of primary importance. This becomes even more problematic since agency powers are increasing from merely assisting the Commission to more independent, discretionary decision-making.¹⁹ In this respect the type and extent of powers delegated could become an issue of difficulty, since the delegation of powers to agencies needs to respect the limits of the delegation of powers as set by the *Meroni* doctrine.²⁰ Accordingly, the question addressed in this thesis is: *Are the powers delegated to the Single Resolution Board in conformity with the limits set by the Meroni doctrine?*

In order to elucidate and explore the problematic of the delegation of powers to EU agencies, more specifically to the SRB, this thesis first explains the rationale behind the emergence of Union agencies and the delegation of powers to agencies, as well as its limits established by the *Meroni* and *Romano* case law. Additionally, the new delegation doctrine established in *Short Selling* will be explained to illustrate the balancing exercise between the need to 'open up' or to adhere to the strict requirements laid down under the *Meroni* doctrine (Chapter 1). The next part elaborates on financial regulation in the EU before and after the financial crisis in 2008 (Chapter 2). The thesis then examines the SRB's organisational structure, its tasks and decision-making mechanism for the placement of a bank under resolution, which is entrusted to the SRB. Here, the focus will be brought to the question of compliance of the SRB with the traditional *Meroni* doctrine and the new delegation doctrine (Chapter 3). In conclusion the findings will be presented.

¹⁸ The Single Resolution Board, Press Release - The Single Resolution Board adopts resolution decision for Banco Popular, 7 June 2017. Available at: <https://srb.europa.eu/en/node/315> ; last accessed 18 July 2017.

¹⁹ Busuioac M., 'Accountability, Control and Independence: The Case of European Agencies', *European Law Journal*, vol. 15, no. 5 (2009), p. 600.

²⁰ Cases 9/56 and 10/56, *Meroni and Co., Industrie Mellurigische S.p.A. v. High Authority*, [1957–1958] ECLI:EU:C:1958:7.

Chapter 1: Emergence of EU agencies, delegation of powers and its limits

1.1. Introduction

Before the Lisbon Treaty entered into force in 2009, primary law was entirely silent on agencies. Article 263 TFEU changed this and provides that the Court can review the legality of acts of Union agencies. However, the Treaty does not foresee the possibility to set up agencies and to delegate powers to agencies.²¹ For that reason, since the agencification process has started, the question as to the limits to a possible delegation of powers to agencies existed.²² As a consequence to the *Meroni* cases, which established a limited-delegation doctrine, strict conditions were attached to the delegation of discretionary powers by EU institutions to safeguard the institutional balance.²³ The *Romano* case added a further non-delegation criterion. However, with the *Short Selling* judgment, the Court radically departed from the classic limited-delegation doctrine by creating a new delegation doctrine. The Court thereby does not exclude conferral of discretionary powers on agencies, but rather focuses on the possibility to limit the discretion of agencies.²⁴ Consequently, the scope of the powers of agencies remains uncertain, since no clear limits to the delegation of executive powers are set neither in the Treaty nor in the case law of the Court.

This section introduces the agencification process.²⁵ Firstly, the rationale and purpose of agencies will be discussed. Secondly, the question of lawfulness of the delegation of powers to Union agencies addressed in the *Meroni*²⁶ and *Romano*²⁷ judgments will be addressed. In this respect these two judgments and the limited-delegation doctrine they established will be explained. Thirdly, the new delegation doctrine established in *Short Selling* will be analysed to illustrate that the Court saw

²¹ Article 290 TFEU; Vos E., 'EU agencies on the move: challenges ahead', forthcoming *SIEPS*, 2017, p. 16.

²² Chamon M., 'EU Agencies between Meroni and Romano or the Devil and the Deep Blue Sea', *Common Market Law Review*, vol. 48, no. 4 (2011), p. 1056.

²³ Scholten M. and van Rijsbergen M., 'The Limits of Agencification in the European Union', *German Law Journal*, vol. 15, no. 07 (2016), p. 1236.

²⁴ Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, [2014] ECLI:EU:C:2014:18, paras. 45 and 50.

²⁵ Agencification refers to the creation of new entities, agencies, in the public sector, or where existing agencies are given more autonomy, to carry out specific tasks. See Vos E. (2017), *op. cit.* n. 21, p. 2.

²⁶ *Meroni* Cases, see *supra* n. 20.

²⁷ Case 98/80, *Guisepppe Romano v. Institut national d'assurance maladie-invalidité*, [1981] ECLI:EU:C:1981:104.

the need to ‘open up’ and to allow the delegation of discretionary powers to Union agencies.

1.2. EU agencies

As a result to the increasing market integration, a transfer of powers from national to EU level took place; and thus, more and more responsibilities were delegated to the Commission.²⁸ This growing importance of EU activities has been received with great scepticism. Concerns of legitimacy and accountability of the Commission as well as a ‘democratic deficit’ of the EU were raised. These problems were tried to be remedied through parliamentary involvement in the EU’s decision-making process. However, this seems to be insufficient in light of the increasing functions the Commission carries out; and hence, additional means of administrative legitimacy were necessary. Moreover, crises situations, such as the BSE crisis or the tanker Erika crisis, made the shortcomings in the Commission’s regulatory capacity even more apparent.²⁹ This shows that the Commission was not ready to perform the newly acquired functions since it simply lacked the respective resources and the required expertise.³⁰

As a response to this problem new modes of governance gained importance. In particular the creation of agencies was envisaged. As sectorial regulation often requires technical complexity, agencies are considered to provide the needed scientific and technical expertise and help to relieve the Commission of specific administrative tasks. Additionally, agencies would remove the resolution of technical tasks from political pressure thereby enhancing transparency, accountability and credibility through the clarification of competences.³¹ With its 2000 White Paper on Reforming the Commission, the Commission introduced the “externalisation policy”,³² indicating a decentralisation of executive and regulatory tasks to independent EU agencies. In 2001, the Commission advocated the resort to EU agencies in its White Paper in

²⁸ Mathieu E., *Regulatory Delegation in the European Union: Networks, Committees and Agencies*. Palgrave Macmillan, 2016, p. 1; Vos E., ‘Reforming the European Commission: What Role to Play for EU Agencies?’, *Common Market Law Review*, vol. 37, no. 5 (2000), p. 1114.

²⁹ Vos E. (2017), *op. cit.* n. 21, p. 2.

³⁰ Mathieu E. (2016), *op. cit.* n. 28, p. 47.

³¹ Majone G., ‘Delegation of Regulatory Powers in a Mixed Polity’, *European Law Journal*, vol. 8, no. 3 (2002), p. 329; Geradin D. and Petit N., ‘The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform’, *Jean Monnet Working Paper 01/04*, 2004, p. 36.

³² European Commission, White Paper on Reforming the Commission, COM (2000) 200 final, 5 March 2000.

European Governance.³³ During the last decades the number and the importance of EU agencies steadily increased which resulted in the trend of “mushrooming” of EU agencies.³⁴ Even though the Commission advocates the role of independent agencies, the delegation of powers to agencies does not stay without concern and criticism, which will be further discussed in the next sections.

After many years of institutional practice there is still a lack of an official definition for an agency.³⁵ In order to identify EU agencies the Commission defined in its 2002 Communication an agency as an EU level public authority with a legal personality and a certain degree of organisational and financial autonomy, created to perform clearly defined tasks.³⁶ Agencies were then classified by the Commission into different categories in its 2008 Communication on European Agencies - the Way Forward.³⁷ It distinguished between two main categories of agencies: executive agencies and decentralised³⁸ agencies. On the one hand, executive agencies governed by a single legal base³⁹ are set up by the Commission for a limited period of time and have the task of helping to manage specific tasks related to EU programmes. On the other hand, decentralised agencies are spread across the EU and are “actively involved in the executive function by enacting instruments, which help to regulate a specific sector”.⁴⁰ However, the Commission’s definition and typology were not taken over in legal doctrine.⁴¹ M. Chamon⁴² defines EU agencies as “permanent bodies under EU public law established by the institutions through secondary legislation and endowed with their own legal personality”. Just like there is no official definition of EU agencies, there is no official typology or classification of agencies. Different authors proposed their own dimensions to classify agencies which may be temporal, structural, functional or instrumental. Many authors employ a functional approach according to which the defining characteristic of an agency is dependant on the function it exercises.⁴³

³³ European Commission, White Paper on European Governance, COM (2001) 428 final, 25 July 2001, p. 24.

³⁴ Dehousse R., ‘Misfits: EU Law and the Transformation of European Governance’, *Jean Monnet Working Paper 2/02*, 2002, p. 8.

³⁵ Chamon M., *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*. Oxford University Press, 2016, p. 5.

³⁶ European Commission, Communication from the Commission on the operating framework for the European Regulatory Agencies, COM (2002) 718 final, 11 December 2002, p. 3.

³⁷ European Commission, Communication from the Commission to the European Parliament and the Council on European agencies – the way forward, COM (2008) 135, 11 March 2008, pp. 2-3.

³⁸ They are also called regulatory agencies or traditional agencies.

³⁹ Council Regulation No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, 2003, OJ L 11.

⁴⁰ See *supra* n. 36, p. 4.

⁴¹ Chamon M. (2016), *op. cit.* n. 35, p. 7.

⁴² *Ibid*, pp. 10-15.

⁴³ Several authors classify agencies by different types: See Chiti E., ‘The Emergence of a Community

In the aftermath of the financial crisis several agencies have been set up *inter alia* the SRB, which is central to this thesis. According to the Commission's typology, this agency can be classified under the category of decentralised agencies, because the SRB is involved in the regulation of the financial sector being responsible for the resolution of failing banks. This thesis therefore focuses on decentralised agencies rather than on executive agencies.

1.3. The limited delegation doctrine

1.3.1. The *Meroni* doctrine

The *Meroni* case concerned a legal challenge against the delegation of powers by the High Authority to two private law bodies (the 'Brussels agencies') to administer financial arrangements introduced to stabilise Community prices, since the Treaty did not explicitly provide for such delegation.⁴⁴ The Court held that the delegation of power at issue was unlawful.⁴⁵

This shows that the delegation of powers to private bodies has been constrained by the Court's ruling in *Meroni*. The Court distinguished between two categories of powers: 'clearly defined executive powers' the exercise of which is subject to strict review by the Commission could be delegated, while discretionary power implying a wide margin of discretion could not be delegated.⁴⁶ The Court drew attention to Article 3 ECSC that laid down the different objectives and which stated that the institutions shall aim to achieve its objectives "within the framework of their respective powers and responsibilities and in the common interest". According to the Court, the balance of powers is "characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies".⁴⁷ In *Meroni* the Court invalidated a delegation of

Administration: The Case of European Agencies', *Common Market Law Review*, vol. 37, no. 2 (2000), pp. 315-317; Geradin D. and Petit N. (2004), *op. cit.* n. 31, p. 47; Van Ooik R., 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance', in: Curtin D. and Wessel R. (eds.), *Good governance and the European Union: reflections on concepts, institutions and substance*. Intersentia, 2005, pp. 139-144; Dehousse R. (2002), *op. cit.* n. 34, p. 9; Vos E., 'Agencies and the European Union', in: L. Verhey and T. Zwart (eds.), *Agencies in European and Comparative Law*. Intersentia, 2003, p. 119.

⁴⁴ *Meroni* Cases, see *supra* n. 20, para. 151.

⁴⁵ *Ibid.*, para. 154.

⁴⁶ *Ibid.*, para. 152.

⁴⁷ *Ibid.*

discretionary powers to bodies other than those established by the Treaty since this would distort the institutional balance and thereby this guarantee would be rendered ineffective.⁴⁸ The *Meroni* judgments set the following criteria that a delegation of executive powers has to meet:⁴⁹

- The delegation of powers cannot be ultra vires i.e. the delegating authority cannot confer powers to another body different from those which the delegating authority itself received under the Treaty and agencies must exercise their powers under the same rules as if they would have been directly exercised by the delegating authority;
- Only clearly defined executive powers may be delegated while discretionary power may not be delegated;
- The powers conferred are subject to conditions set by the delegating authority and subject to its supervision.

Albeit this case law dates back to the 1950s and hence was made under the European Coal and Steel Community Treaty, in more recent judgments the Court confirmed their applicability to the EU Treaties.⁵⁰

1.3.2. The *Romano* non-delegation criterion

The *Romano* judgment established an additional non-delegation criterion: the Council could not delegate the power to adopt acts having the force of law.⁵¹ Mr Romano was entitled to pensions in Italy and in Belgium so that the issue arose in relation to the amount of the pensions he would receive in both Member States. The Belgian insurance institution decided that his Belgian pension would be adjusted basing its decision on a pension calculation scheme issued by the Administrative Commission. Thus, the question whether the Belgian institution was bound by the decision gave rise to the question whether the Council could confer legislative power on the Administrative Commission.⁵² The Court concluded that the delegation of powers at

⁴⁸ Ibid; Vos E. (2017), *op. cit.* n. 21, p. 17; Chamon M. (2011), *op. cit.* n. 22, p. 1057.

⁴⁹ *Meroni* Cases, see *supra* n. 20, paras. 149-152; Scholten M. and van Rijsbergen M. (2016), *op. cit.* n. 23, p. 1237.

⁵⁰ Case C-301/02 P, *Carmine Salvatore Tralli v ECB*, [2005] ECLI:EU:C:2005:306, para. 4; Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others*, [2005] ECLI:EU:C:2005:449, para. 90.

⁵¹ Case 98/80, *Guisepppe Romano v. Institut national d'assurance maladie-invalidité*, [1981] ECLI:EU:C:1981:104, para. 20.

⁵² Chamon M. (2011), *op. cit.* n. 22, p. 1061.

stake was illegal because under the Treaty agencies were not listed among the authors of legally binding decisions and no judicial review of agency decisions was possible.⁵³

In literature, it is claimed that the limited delegation doctrine should be relaxed and allow for the delegation of a greater variety of powers to agencies provided that the institutional balance is safeguarded.⁵⁴ In practice, a trend towards delegating broader powers to agencies by their founding regulations can be observed. This however, may exceed the limits set by the Court in *Meroni*. Consequently, in order to respect the institutional balance of powers, a more lenient interpretation of delegation of powers to agencies would require a rebalancing of the powers of the institutions provided that constitutional guarantees for decision-making are safeguarded.⁵⁵

1.4. The new delegation doctrine - *Meroni 2.0*⁵⁶

In 2012, the UK brought an action for annulment before the Court questioning the empowerment of the European Securities and Market Authority ('ESMA') in light of the Court's jurisprudence on the delegation of powers to agencies. The Regulation, adopted pursuant to Article 114 TFEU, equipped ESMA with far-reaching intervention powers to regulate shorting on the financial markets.⁵⁷ The UK raised four arguments: firstly, the UK argued that in the exercise of supervisory powers on the short selling market ESMA was granted broad discretionary powers having a political nature and hence would violate the *Meroni* doctrine; secondly, the UK argued that such powers are contrary to the *Romano* judgment concerning the prohibition on executive bodies to adopt measures of general application with the force of law; the third plea concerned the infringement of Articles 290 and 291 TFEU; and finally, the UK contested Article 114 TFEU as being the correct legal basis for ESMA powers.⁵⁸ The Court, however, rejected all claims in their entirety.

⁵³ Case 98/80, *Guissepe Romano v. Institut national d'assurance maladie-invalidité*, [1981] ECLI:EU:C:1981:104, para. 20.

⁵⁴ Everson M., 'European Agencies: Barely Legal?', in: Everson M., Monda C. and Vos E., *European Agencies in Between Institutions and Member States*. Kluwer Law International, 2014, p. 49.

⁵⁵ Vos E., 'EU agencies and Independence', in: Rittleng D. (ed.), *Independence and legitimacy in the institutional system of the EU*. Oxford University Press, 2016, p. 223.

⁵⁶ Vos E. (2017), *op. cit.* n. 21, p. 20.

⁵⁷ Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, [2014] ECLI:EU:C:2014:18.

⁵⁸ Bergström C., 'Shaping the new system for delegation of powers to EU agencies: United Kingdom v European Parliament and Council (Short Selling)', *Common Market Law Review*, vol. 52, no. 1 (2015), p. 229-234.

The first plea is of most importance to this thesis since it concerns the *Meroni* doctrine. In addressing this plea the Court had three options to its availability: a rejection of *Meroni*'s relevance, a reinterpretation of the doctrine, or a strict application of *Meroni*.⁵⁹ The Court was divided between the need to confirm the strict limited-delegation doctrine and the awareness that ESMA needs to carry out the tasks conferred upon it.⁶⁰ After having observed that contrary to the type of body examined in *Meroni*, ESMA is an EU entity created by EU law, the Court focused its assessment on the limits to the powers available to ESMA under the contested delegation clause. It was concluded that the Union legislature may, in an area which requires the deployment of specific technical and professional expertise, confer discretionary implementing powers upon a Union agency if these powers are “precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority” and do not imply that the agency is vested with a “very large measure of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy” that is incompatible with the Treaty.⁶¹ In order to come to the conclusion that ESMA's powers fall within these limits, the findings that the contested delegation clause does not confer any autonomous powers which go beyond “the bounds of the regulatory framework” established for ESMA and that the exercise of powers is circumscribed by “criteria and conditions” which restrict ESMA's discretion, were of particular importance.⁶² In summary, the Court has set several requirements for the delegation of powers to Union agencies:

- The conferred powers have to be precisely delineated by the empowering act with respect to substantive and procedural requirements;
- The conferred powers have to be amenable to legal review (judicial accountability);
- The conferred powers have to be effectively controlled by the delegating authority (political accountability).

⁵⁹ Chamon M. (2016), *op. cit.* n. 35, p. 243.

⁶⁰ Vos E. (2017), *op. cit.* n. 21, p. 18.

⁶¹ Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, [2014] ECLI:EU:C:2014:18, paras. 41-42.

⁶² Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, [2014] ECLI:EU:C:2014:18, paras. 44-52.

Therefore, it can be said that the Court is ‘mellowing’ *Meroni*⁶³ in *Short Selling* by relaxing the strict *Meroni* requirements⁶⁴ and consequently sets up a new delegation doctrine.⁶⁵ However, the Court does not take the opportunity to revise the *Meroni* doctrine in light of the agencification process of EU governance since the *Meroni* judgment and the recent constitutional developments under the Lisbon Treaty. Whilst the Court discusses the nature of the powers that are delegated, it ignores that the exercise of the powers delegated may require ESMA to take substantial decisions of political, economic or social nature.⁶⁶

Such a transfer of broad discretionary powers to independent bodies seems already to be accepted by the General Court in several cases.⁶⁷ In *Schröder*, a case dealing with a decision of the Community Plant Variety Office (‘CPVO’), the Court indicated that where an EU authority is required “to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to limited judicial review”.⁶⁸ This limited review over agency decisions was confirmed and even extended in *Rütgers*, which dealt with a decision of the European Chemicals Agency (‘ECHA’) in accordance with the procedure laid down in Article 59 of Regulation 1907/2006⁶⁹ identifying anthracene oil as substance meeting the conditions set out in Article 57 of that same Regulation. According to Article 59 in conjunction with Article 57 of the REACH Regulation, ECHA has the power to decide that a substance will be added to a ‘candidate list for eventual inclusion in the authorisation procedure’ if the criteria referred to in Article 57 are met and hence be classified as ‘substance of very high concern’. The applicants claimed that ECHA is not competent to amend the proposal made by the Member States to include a substance in the list.⁷⁰ In this respect the General Court concluded that it cannot be argued that ECHA exceeds its powers as provided for in Article 59 when it identifies a substance not solely on the basis of the grounds proposed in the dossier by the Member State, but also on the basis on

⁶³ Pelkmans J. and Simoncini M., ‘Mellowing Meroni: How ESMA can help build the single market’, *CEPS Commentary*, 2014.

⁶⁴ Everson M. and Vos E., ‘European Agencies: What about Institutional Balance’, *Maastricht Faculty of Law Working Paper No. 4*, 2014, p. 12.

⁶⁵ Scholten M. and van Rijsbergen M. (2016), *op. cit.* n. 23, p. 1249.

⁶⁶ Vos E. (2017), *op. cit.* n. 21, p. 21.

⁶⁷ Vos E. (2017), *op. cit.* n. 21, p. 22.

⁶⁸ Case T-187/06, *Schröder v. CPVO*, [2008] ECLI:EU:T:2008:511, para. 59.

⁶⁹ Regulation (EC) No 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) No 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, 2006, OJ L 396.

⁷⁰ Case T-96/10, *Rütgers Germany GmbH v. ECHA*, [2013], ECLI:EU:T:2013:109, para. 81.

grounds not mentioned in the file.⁷¹ Additionally, the identification procedure does not confer any power on ECHA in respect to the choice of the substance to be identified. ECHA at the request of the Commission must proceed to identify that substance subject to the conditions set out in Article 59.⁷² The General Court also pointed out that when EU authorities have broad discretion review by the judiciary is limited to “verifying whether there has been a manifest error of assessment or misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion”.⁷³ In this respect it was held that “it must be acknowledged that the ECHA has a broad discretion in a sphere which entails *political, economic and social choices* on its part, and in which it is called upon to undertake complex assessments”.⁷⁴

It seems the Court goes beyond what it held to be legal under *Short Selling* in the *Rütgers* ruling. This casts doubt about whether ESMA’s powers are “amenable to judicial review” if ESMA would exercise powers entailing a political, economic or social choice.⁷⁵

1.5. Conclusion

The main aim of the first Chapter was to give an overview of the emergence of agencies and the problems surrounding the exercise of a delegation of powers to Union agencies. The Court dealt with this issue in *Meroni* and *Romano* resulting in the non-delegation doctrine, which is still good law today. However, this doctrine was broadened in the *Short Selling* case as a consequence to the need to delegate more discretionary powers to independent bodies.

The scope of powers of agencies remains uncertain since no clear limits to the delegation of powers are set neither in the Treaty nor in the case law of the Court. As agencies gain more and more powers, adequate mechanism and controlling measures

⁷¹ Ibid, para. 85.

⁷² Ibid, para. 94.

⁷³ Ibid, para. 99.

⁷⁴ Ibid, para. 134.

⁷⁵ Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, [2014] ECLI:EU:C:2014:18, para. 53; Chamon M., ‘The empowerment of agencies under the Meroni doctrine and article 114 TFEU: comment on United Kingdom v European Parliament and Council (Short Selling) and the proposed Single Resolution Mechanism’, *European Law Review*, vol. 39, no. 3 2014, p. 396-397.

need to be set up. E. Chiti⁷⁶ states in this respect that control instruments depend on the powers delegated. However, before illustrating the scope of powers delegated to the SRB, the next section addresses the financial regulation in the EU before and after the crisis in 2008.

⁷⁶ Chiti E., 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', *Common Market Law Review*, vol. 46, no. 5 (2009), pp. 1416-1420. See particularly p. 1419: "All in all, European agencies are kept under control through several instruments, whose actual combination varies from case to case according to the type of powers granted to the agency. This observation means one should not be too pessimistic about the capacity of the European legal order to check European agencies. Several instruments are in place to guarantee that this component of the EU administration is under control. Their combination is a matter of pragmatism and adaptation to the functional needs of the various agencies."

Chapter 2: Financial regulation in the EU

2.1. Introduction

After having discussed the general background on the emergence of Union agencies and the problems surrounding the delegation of powers to independent bodies, this section will provide an overview of the financial regulation in the EU, before and after the financial crisis of 2008.

During the past few years, strong legislative activity in the field of EU financial market law took place as a reaction to the financial and banking crisis in 2008 revealing a number of shortcomings in financial regulation and supervision in the EU and its Member States.⁷⁷ These reforms not only impact the substantive financial regulation but also the related institutional framework.⁷⁸

2.2. Outbreak of the crisis

In 2005, the Financial Services Action Plan, the EU's agenda for regulating and liberalizing the EU's financial markets had been completed.⁷⁹ At the same time, the Lamfalussy structures for law-making and supervisory co-ordination were adopted. The Lamfalussy reforms laid the foundations for a European network for the supervision of the EU financial system as a whole taking the form of EU committees composed of national regulatory authorities (namely the Committee of European Securities Regulators, Committee of European Banking Supervisors, and Committee of European Insurance and Occupational Pensions Supervisors). This shows that institutional reform is not new to the EU financial system of governance, but the construction of structures supporting delegated rule-making were facilitated through wider treaty-based reforms to the legislative process.⁸⁰ The Commission then called for a "regulatory pause" for market actors and the EU institutions.⁸¹

⁷⁷ Binder J-H. and Gortsos C., *The European Banking Union A Compendium*. Nomos, 2016, p. 2.

⁷⁸ Weismann P., 'The ECB under the Single Supervisory Mechanism', *TARN Working Paper 1/2017*, 2017, p. 1.

⁷⁹ Moloney N., 'EU Financial Market Regulation after the Global Financial Crisis: „More Europe“ or More Risks?', *Common Market Law Review*, vol. 47, no. 5 (2010), p. 1317.

⁸⁰ Moloney N. (2014), *op. cit.* n. 2, p. 1612.

⁸¹ European Commission, White Paper on Financial Services Policy 2005–2010, COM (2005) 629, 1 December 2005.

And then the crisis broke out in 2008. At the core of the EU crisis was a destructive imbalance in the regulatory and supervisory architecture of EU financial regulation. The regulatory structure facilitated the cross-border activities of the large EU groups that had supported integration of the banking market, but it did not adequately address cross-border supervision, coordination, crisis resolution, and deposit protection.⁸² The Commission mandated in November 2008 the de Larosière Group (DLG) to examine the EU financial crisis.⁸³ Besides highlighting a range of regulatory gaps and weaknesses, it also pointed to poor supervisory structures, coordination, cooperation, and information-sharing proving unable to evolve with the increasingly internationalised market.⁸⁴ Consequently, it suggested the creation of an integrated European system of financial supervision.

2.3. The EU's regulatory response to the crisis

As a consequence to the crisis, the regulatory reform has been mainly concerned with prudential regulation, crisis management, and market efficiency.⁸⁵ Therefore, numerous new agencies were set up with the aim to develop an understanding of risks to the EU banking system through the European Systemic Risk Board ('ESRB'); manage harmonisation and ensure convergence in the banking market through the European Banking Authority ('EBA'); and ensure sustainability and stability of the banks by creating the Banking Union.

The first step in addressing this crisis was the establishment of the European System for Financial Supervision ('ESFS') on 1 January 2011. The ESFS consists of the ESRB and three new European Supervisory Authorities ('ESAs'): the EBA, the ESMA and the European Insurance and Occupational Pensions Authority ('EIOPA').⁸⁶ Through the establishment of the ESAs the recent movement to establish ever more independent and autonomous agencies and structures takes a further step forward.

⁸² Ferrarini G. and Chiodini F., 'Regulating Multinational Banks in Europe: An Assessment of the New Supervisory Framework', *ECGI Law Working Paper 158/2010*, 2010, pp. 6-7.

⁸³ Report by the High-Level Group on Financial Supervision in the EU (de Larosière Report), 25 February 2009.

⁸⁴ Ottow A., 'The New European Supervisory Architecture of the Financial Markets', in: Everson M., Monda C. and Vos E. (eds.), *European Agencies in between Institutions and Member States*. Kluwer Law International, 2014, p. 126; Moloney N. (2010), *op. cit.* n. 79, p. 1319.

⁸⁵ Wymeersch E., 'The Institutional Reforms to the European Financial Supervisory System', *European Company and Financial Law Review*, vol. 7, no. 2 (2010), p. 240.

⁸⁶ Ottow A. (2014), *op. cit.* n. 84, pp. 129-130; Moloney N. (2010), *op. cit.* n. 79, p. 1332; Weismann P. (2017), *op. cit.* n. 78, p. 1.

The comitology structure framing the Lamfalussy apparatus has been largely replaced by an agency-based structure, formed by the three ESAs. Even though the term 'authority' is used it seems clear that the ESAs are agencies.⁸⁷ Nevertheless, the ESAs have to be distinguished from other agency structure in two points. Firstly, they enjoy considerable decision-making powers over national supervisory authorities and individual market actors. ESMA, for example, coordinates national competent authorities and thereby has the ability to influence local supervisors.⁸⁸ So far only a small number of agencies enjoy decision-making powers over third parties (including OHIM and EASA); however, the scale of ESAs decision-making powers over individual actors is likely to raise the accountability, legitimacy, independence, and constitutional challenges to a completely different level.⁸⁹ Secondly, while the ESAs do not enjoy direct powers to adopt rules of general application, their activities are likely to lead to a significant intensification of delegated rule making.⁹⁰

In a second phase, the Banking Union was introduced in 2012. As already mentioned in the introduction, the Banking Union consists of three pillars: the SSM, the SRM and the EDIS. As this thesis reflects upon the SRB the following focuses on the second pillar (the SRM). The SRM constitutes a centralised uniform resolution mechanism under which bank resolution is managed by the SRB.⁹¹ Resolution of a bank occurs when the authorities determine that a bank is failing or likely to fail i.e. that there is no other private sector intervention that can restore the entity back to viability within a short timeframe. This represents a standard insolvency situation. To prevent the possible consequences of liquidation under normal solvency procedures, namely the jeopardising of financial stability, the interruption of the provision of financial services and affecting the protection of depositors,⁹² the primary aim of bank resolution is to rapidly respond to a bank in financial distress and to maintain the stability of the financial system as well as to minimise losses for society, in particular in relation to

⁸⁷ Griller S. and Orator A., 'Everything in Control? The way forward for European Agencies in the Footsteps of the Meroni Doctrine', *European Law Review*, vol. 35, no. 1 (2010), pp. 3 and 7–9; Chiti E. (2009), *op. cit.* n. 76, pp. 1395 and 1427–1428.

⁸⁸ Di Noia C. and Gargantini M., 'Unleashing the European Securities and Market Authority: Governance and Accountability after the ECJ Decision on the Short Selling Regulation (Case C-270/12)', *European Business Organization Review*, vol. 15, no. 1 (2014), p. 24.

⁸⁹ Griller S. and Orator A. (2010), *op. cit.* n. 87; Curtin D., 'Holding (Quasi-) Autonomous EU Administrative Actors to Public Account', *European Law Journal*, vol. 13, no. 4 (2007), p. 523; Geradin and Petit (2004), *op. cit.* n. 31; Busuioc M. (2009), *op. cit.* n. 19, p. 599.

⁹⁰ Moloney N. (2010), *op. cit.* n. 79, pp. 1344-1345.

⁹¹ Recital 11 SRM Regulation.

⁹² Recital 58 SRM Regulation.

taxpayers.⁹³

The regulatory reforms in the regulation of the financial sector show that agencies, particularly the ESAs and the SRB, are used as a favoured instrument to deepen financial integration. When however establishing European regulatory authorities and assigning tasks and powers to such bodies an important element to be considered are the limits set by the case law, namely the *Meroni* doctrine. The legislator has been mindful not to transfer regulatory powers to the ESAs. Instead, the ESAs can only propose draft rules to the Commission, which will then decide whether to endorse them.⁹⁴ Additionally, only the Council, and not the agencies, is authorised to take a decision on an emergency situation, since the right to take an individual decision in respect to an individual financial institution may conflict with the ruling in the *Meroni* case, as this could constitute the exercise of discretionary powers.⁹⁵ This shows that not all powers delegated to Union agencies are problematic in respect to the established doctrine. Therefore, the powers that agencies enjoy must be divided into two categories: those that are problematic in light of the *Meroni* doctrine and those that are unproblematic in terms of the established case law. Therefore, the next section will analyse the SRB in more detail and elaborate on the powers of this specific Union agency in order to find out which powers comply or do not comply with the established doctrine for the delegation of powers to Union agencies.

2.4. Conclusion

During the financial crisis, financial regulation has been found to be confronted with a challenge of cross-border supervision, co-ordination, crisis resolution, and deposit protection. However, the then existing legislation was unable to meet the demands that came with an increasingly internationalised financial market. The result was the financial crisis in 2008. Financial regulation post-crisis is expected to remedy these shortcomings by offering a uniform, centralised system operating under an agency structure. As the agencies created in the field of financial regulation enjoy a great deal

⁹³ Recital 73 SRM Regulation.

⁹⁴ Articles 5, 10 and 13 Regulation (EU) 1093/2010 of the European Parliament and of the Council of 24 November, establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, 2010, OJ L 331/12.

⁹⁵ Ottow A. (2014), *op. cit.* n. 84, pp. 137-138.

of power, particularly the SRB, the next section will focus on the SRB and its role within the framework of the SRM Regulation as well as its compliance with the limits set by the *Meroni* doctrine.

Chapter 3: The Single Resolution Board and the *Meroni* doctrine

“The SRB has been created to respond to the Euro area crisis and establishes one of the pillars of the Banking Union. By avoiding bail-outs and worst-case scenarios, the SRB will put the banking sector on a sounder footing – only then can we achieve economic growth and financial stability” (E. König, Chair of the SRB)⁹⁶

3.1. Introduction

As part of the reforms following the financial and economic crisis, the SRB is the new European Banking Union's resolution authority and can therefore be considered as key element of the Banking Union and its SRM. The SRB is an EU agency that became fully operational from 1 January 2016.⁹⁷ It pursues the mission to ensure the resolution of failing banks, with as little impact as possible on the real economy and public finances of the participating EU countries and taxpayers.⁹⁸ The SRB will be able to act swiftly, effectively and proportionately to establish recovery and resolution arrangements for Eurozone banks.

This Chapter first examines the organisational structure of the SRB. Then, the tasks that this agency pursues will be set out. Finally, the decision-making process under the SRM will be analysed in order to find out whether or not the powers delegated to the SRB comply with the traditional *Meroni* doctrine as well as the new *Meroni* doctrine.

⁹⁶ The Single Resolution Board, Press Release – Financial Stability – new EU Agency "Single Resolution Board" holds its first Plenary Meeting in Brussels officially establishing second pillar of European Banking Union, 25 March 2015. Available at: https://srb.europa.eu/sites/srbsite/files/20150325-press-release_en.pdf ; last accessed 18 July 2017.

⁹⁷ Binder J-H. and Gortsos C. (2016), *op. cit.* n. 77, p. 45.

⁹⁸ Article 14(2) SRM Regulation.

3.2. Organisational structure of the SRB

Before analysing the organisation structure it has to be determined whether the SRB is an agency. In order to do so the characteristics of SRB have to be considered and whether these are in conformity with an EU agency. The definition which is composed of four elements of an agency by M. Chamon⁹⁹ has already been mentioned above (section 1.1.): (i) permanent bodies (ii) under EU public law (iii) established by the institutions through secondary legislation and (iv) endowed with their own legal personality. The SRB meets the four requirements and thus qualifies as an EU agency.¹⁰⁰ This is made explicit in the SRM Regulation which states that the SRB is conceived as a new kind of agency in the financial sector since in order to ensure a swift and effective decision-making process “the Board should be a specific Union agency with a specific structure, corresponding to its specific tasks, and which departs from the model of all other agencies of the Union”¹⁰¹ and it has legal personality.¹⁰² These novel features allow the SRB to fulfil its main objectives of ensuring a swift adoption of effective resolution decisions for failing banks as a contribution to systemic stability in Europe’s banking market.¹⁰³ The insistence on the word ‘specific’ derives from the singular organisation features of the SRB that let the Board depart from the traditional model of EU agencies within the financial sector as for example the ESAs. When comparing the SRB to the ESAs, the SRB deviates from a typical agency in terms of the kind of organs it has. The three ESAs have highly similar governance and operational arrangements. These structures include the Board of Supervisors, the Managements Boards, the Chairpersons and the Executive Directors.¹⁰⁴ Each Chairperson has the task to represent the organisation while the Executive Director is responsible for the management of the ESA.¹⁰⁵ The operational decisions however, are taken by the respective Board of Supervisors,¹⁰⁶ which is composed of the ESA chairperson, the heads of the National Competent Authorities of each Member State

⁹⁹ Chamon M. (2016), *op. cit.* n. 35, pp. 10-15.

¹⁰⁰ *Ibid.*, p. 17.

¹⁰¹ Recital 31 SRM Regulation.

¹⁰² Article 42 SRM Regulation.

¹⁰³ Recital 24 SRM Regulation.

¹⁰⁴ Demarigny F., McMahon J. and Robert N., Review of the New European System of Financial Supervision (ESFS) – Part 1: The Work of the European Supervisory Authorities (EBA, EIOPA and ESMA), October 2013, pp. 27 and 31-57. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/507446/IPOL-ECON_ET\(2013\)507446_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/507446/IPOL-ECON_ET(2013)507446_EN.pdf); last accessed 19 July 2017.

¹⁰⁵ Articles 48-53 ESA Regulations. The EBA Regulation (EU) 1093/2010; the EIOPA Regulation (EU) 1094/2010; and the ESMA Regulation (EU) 1095/2010 are together referred to as the ‘ESA Regulations’.

¹⁰⁶ Articles 40-44 ESA Regulations.

and observers. The Management Boards ¹⁰⁷ are composed of the respective chairpersons and six further members that are elected by the Board of Supervisors and ensure that the ESAs properly perform the assigned tasks.

Given the need to combine speedy, centralised decision-making and the political imperative to involve national representatives in light of the fiscal consequences, depending on the type of tasks executed the SRB operates in two sessions: the executive and plenary sessions.¹⁰⁸ The composition is not fixed, but varies in terms of the sessions it operates in. Therefore, the permanent members should ensure proportionality and coherence in the decision-making procedure.¹⁰⁹

	Executive session	Plenary session
Members with voting rights	<ul style="list-style-type: none"> • Chairperson • 4 full-time members • NRAs from non-participating Member States in which the troubled bank and its branches or subsidiaries are located 	<ul style="list-style-type: none"> • Chairperson • 4 full-time members • Representatives from NRAs (1 from each Member State participating in the Banking Union)
Observers	<ul style="list-style-type: none"> • Permanent: 1 ECB representative + 1 Commission representative • ad hoc invited observers 	<ul style="list-style-type: none"> • Permanent: 1 ECB representative + 1 Commission representative • ad hoc invited observers

¹⁰⁷ Articles 45-47 ESA Regulations.

¹⁰⁸ Recital 32 SRM Regulation, Binder J-H. and Gortsos C. (2016), *op. cit.* n. 77, p. 49.

¹⁰⁹ Recital 34 SRM Regulation.

Figure 1: Organisational structure – executive and plenary session

The resolution of banks occurs during the executive session.¹¹⁰ The executive session of the SRB is responsible for drawing up resolution plans and adopting all resolution decisions for cross border banking groups and banks directly supervised by the ECB.¹¹¹ In its executive session, the SRB is composed of a Chair, four further independent permanent members, permanent observers appointed by the Commission and by the ECB, and the relevant national resolution authorities ('NRAs'). Each member, including the Chair, has one vote; however, the representatives of the Commission and the ECB have no voting rights, they only have an observer status.¹¹² During the plenary session, which has the widest representation of relevant interests, the Board is composed of the same members as during the executive session, as well as all members appointed by the participating Member States representing the NRAs and ad hoc observers.¹¹³ This session takes decisions of a more general nature e.g. decisions on the rules of procedure, the annual budget of the SRB, or on investment and staff matters, but it is particularly competent to decide in specific resolution cases whether the support of the Fund is required once the resolution action exceeds the threshold of €5 billion.¹¹⁴ The SRB decides by majority of its member and in the event of a tie, the Chair's vote is decisive.¹¹⁵

3.3. Tasks of the SRB

The SRB is responsible for the effective and consistent functioning of the SRM and hence the Board exercises an array of important powers. These include *inter alia* the responsibility for the resolution of banks directly supervised by the ECB,¹¹⁶ oversight powers over NRAs,¹¹⁷ issuing of general and specific instructions and

¹¹⁰ Article 54 SRM Regulation.

¹¹¹ Article 7 SRM Regulation.

¹¹² Recital 32 and Articles 43 and 53 SRM Regulation.

¹¹³ Articles 43 and 49 SRM Regulation.

¹¹⁴ Recital 33 and Article 50 SRM Regulation.

¹¹⁵ Articles 52 and 55 SRM Regulation.

¹¹⁶ Article 7 SRM Regulation.

¹¹⁷ Article 31 SRM Regulation

guidelines,¹¹⁸ and sanctioning powers.¹¹⁹ In particular, where necessary to ensure the consistent application of high resolution standards under this Regulation, it may issue warnings to the NRA where it considers that a draft decision does not comply with the SRM Regulation or with the SRB's general instructions and at any time, after consulting the NRA or on its request, exercise all resolution powers.¹²⁰

More generally, the SRB's tasks mainly focus on the establishment of standard rules and procedures for the resolution of entities; the establishment of credible and feasible arrangements for resolution;¹²¹ the removal of obstacles to resolution in order to make the banking system in Europe safer;¹²² to minimise resolution costs and avoid destruction of value unless necessary to achieve the resolution objectives;¹²³ to provide benefits for taxpayers, banks and depositors;¹²⁴ and to promote financial and economic stability.¹²⁵

3.4. The decision-making process under the SRM

Having examined the organisational structure and the tasks of the SRB, now the interplay in the decision-making process between the SRB, the Commission and the Council tailored to the limits set by the *Meroni* cases will be analysed. This section addresses the questions when and under which circumstances the SRB is able to adopt independent decisions and whether its decision-making powers are compatible with the conditions established in the *Meroni* judgments. In order to answer these questions this section will elaborate on the different phases of the resolution procedure and thereby focus on the SRB's decision-making powers within the various stages of this process.

The most important reason for the establishing of the SRM was to facilitate independent European decision-making for EU banks. Therefore, the SRB is an agency of the EU. However, according to the *Meroni* doctrine, it is not possible to

¹¹⁸ Article 28-31 SRM Regulation.

¹¹⁹ Articles 34-36 and 38-39 SRM Regulation.

¹²⁰ Article 7(4) SRM Regulation.

¹²¹ Article 10(3) and (4) SRM Regulation.

¹²² Recital 21 SRM Regulation.

¹²³ Article 14(2) SRM Regulation.

¹²⁴ Recitals 73 and 81 SRM Regulation.

¹²⁵ Recital 10 SRM Regulation.

delegate tasks to an agency which limit the discretionary powers of EU institutions. Agencies can only take decisions when their powers are explicitly defined. Consequently, two options could have been considered in the author’s opinion:

- The Commission decides while the SRB prepares the decisions.
- To limit the discretion of the SRB by means of very detailed legislation.

The Commission explained that the limits set by the Court in its case law are the reason why the ultimate decision-making whether to place an entity under resolution rests with the Commission and the Council.¹²⁶ In 2013, the Council Legal Services gave its legal opinion on the delegation of power to the SRB.¹²⁷ It concluded that the powers of the SRB concerning resolvability assessments, implementation tools such as bail-in and the use of the SRF need to be further detailed in order to properly frame the powers of the SRB to exclude that a wide margin of discretion is entrusted to the SRB or these functions should be performed by an EU institution.¹²⁸ Therefore, the first option was opted for with the result that a complicated and complex decision-making procedure was necessary. Article 18 of the SRM Regulation sets out the decision-making process governing the resolution of banks under which two scenarios are possible:

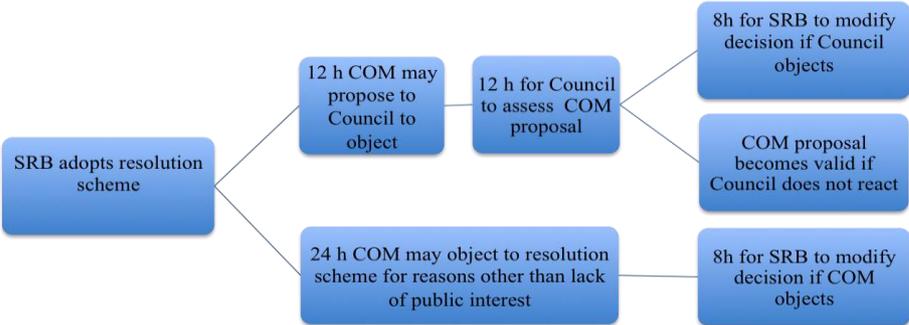


Figure 2: Article 18(7) of the SRM Regulation

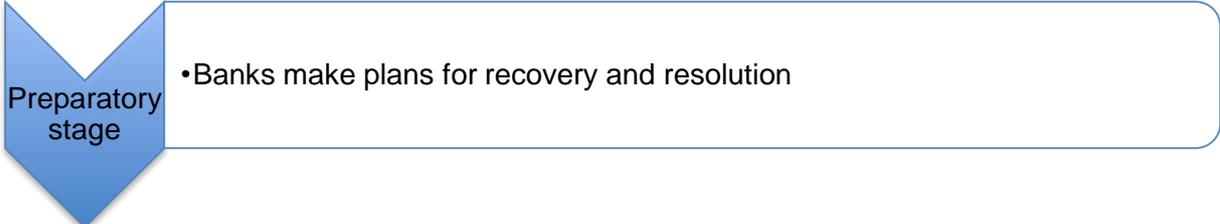
¹²⁶ Alexander K., ‘European Banking Union: a legal and institutional analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism’, *European Law Review*, vol. 40, no. 2 (2015), p. 180.
¹²⁷ Council of the European Union, Opinion of the Legal Service on the delegation of powers to the Board, 2013/0253 (COD), 14547/13, EF 89 ECOFIN 867.
¹²⁸ *Ibid*, pp. 14, 17, 23 and 25.

The first scenario involves in addition to the SRB both the Commission and the Council. Under the second scenario besides the SRB, the Commission is involved. As the adoption of a resolution scheme, which is in the hands of the SRB, inevitably involves a margin of discretion and limits are imposed on the delegation of discretionary powers, as outlined above, it is of major importance that powers of such significance should be properly controlled in order to justify the large discretion. In the context of resolution of failing entities such considerations need to be balanced against the need for the authority in charge to be able to act speedily, independently and decisively.¹²⁹ Thus, both scenarios ensure the involvement of EU institutions (Commission and/or Council) in the decision-making and still allow for a swift adoption process.

The arrangement adopted under Article 18 of the SRM Regulation entails that the assessment of discretionary aspects is within the Commission’s responsibility because of the endorsement mechanism. But is it the Commission that exercises the discretionary powers and are the SRB’s powers sufficiently controlled by the Commission in light of the short time limit of 24 hours?

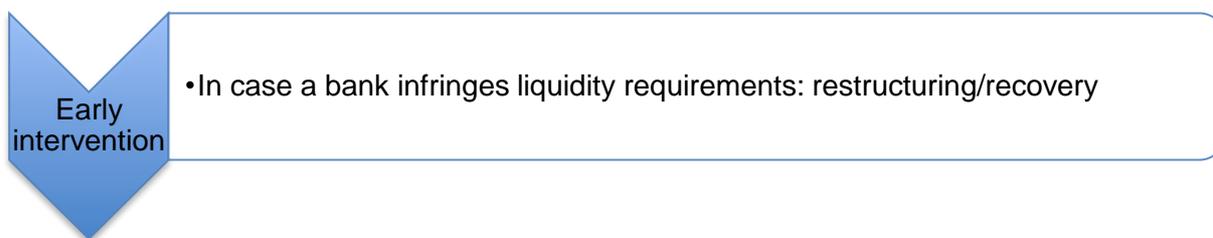
3.4.1. The resolution procedure

The SRM Regulation creates a uniform procedure for determining the resolution of an entity by the SRB. The scheme below gives an overview of the resolution procedure. This decision-making process consists of different phases (preparatory stage, early intervention and resolution), which will be discussed in turn below. In order to provide guidance to follow the different steps of the resolution phase an illustration is included.



¹²⁹ Ferran E., ‘European Banking Union: Imperfect, But It Can Work’, *University of Cambridge Faculty of Law Legal Studies Research Paper Series No. 30/2014*, 2014, p. 14; Wojcik K-P., ‘Bail-In in the Banking Union’, *Common Market Law Review*, vol. 53, no. 1 (2016), p. 102.

The preliminary phase for a significant bank is the drawing up of resolution plans for all banks under the responsibility of the SRB. This resolution plan must set out the options for applying the resolution tools and exercising resolution powers.¹³⁰ If the SRB, after consultation with the ECB and the relevant NRAs, determines that there are substantive impediments to the resolvability of that entity or group, the Board must prepare a report and send it to the entity concerned.¹³¹ The entity must propose possible measures to address or remove the substantive impediments within four months.¹³² The SRB assesses the proposal and can decide that the proposal does not effectively reduce or remove the impediments and in this decision instruct the NRA to require the entity to take any of the measures mentioned in Article 10(11).¹³³



The recovery process can also be triggered by certain supervisory measures. Article 13 of the SRM Regulation summarises measures that the SRB must be informed about by the ECB or the national authority. Based on this information the SRB is authorised to prepare for the resolution of the entity involved. In this case the SRB must have the power to require the entity to contact potential purchasers in order to prepare for the resolution of the entity.¹³⁴ These measures are called "early intervention".

In the following the resolution phase will be addressed. Because of the complex nature of this process, this illustration should guide the reader through the various steps.

¹³⁰ Article 8(5) SRM Regulation.

¹³¹ Article 10(7) SRM Regulation.

¹³² Article 10(9) SRM Regulation.

¹³³ Article 10(10) SRM Regulation.

¹³⁴ Article 13(3) SRM Regulation.



BANK IS FAILING
OR LIKELY TO FAIL

Determined by ECB/SRB
executive session



SRB decision:

- 1) Is a private sector solution possible?
- 2) If not, is resolution in public interest?

Resolution not
public interest,
bank wound up

Resolution in
public interest:
resolution scheme



Adoption of
RESOLUTION SCHEME

→ Commission

Option 3
objection of
public interest/
use of SRF

Council

- public interest
objection adopted: bank
wound up

- objection refused →

- use of SRF objection

↓
Resolution scheme
modified + approved
by SRB

Option 2
objections to
discretionary
elements

Option 1
Endorsement

Scheme
enters
into force

Figure 3: Decision-making process

Resolution
stage 1

- Determination of failing or likely to fail by ECB or SRB

In order to trigger the resolution of a bank three conditions must be fulfilled. First, this entails the determination of whether an entity is “failing or likely to fail”. The ECB makes this determination.¹³⁵ If the ECB, after consultation with the SRB, concludes that this criterion is met, the ECB will notify the SRB and the European Commission and thereby trigger the resolution process. However, the SRB is authorized to inform the ECB about its own intention to make this determination. If the ECB does not make such notification within three days after the SRB notice, the SRB retains the power to trigger the resolution process.¹³⁶ The decision to trigger the resolution procedure may have a

¹³⁵ Article 18(1) SRM Regulation.

¹³⁶ Ibid.

significant impact on assets of the banks, the shareholders, the depositors and possibly the entire financial system which is the reason why the power of the SRB should be subject to certain conditions limiting its discretion.¹³⁷

Resolution stage 2

- The executive session determines whether a private sector alternative is possible and whether the resolution is necessary in the public interest
- If the conditions are met: SRB adopts resolution scheme and transmits it to the Commission

Secondly, it must be determined whether or not there are prospects for alternative private sector solutions. This determination is made by the SRB, in close cooperation with the ECB.¹³⁸ Thirdly, if the SRB concludes that resolution action is necessary in the public interest, it adopts in consultation with the relevant NRAs a resolution scheme placing the bank under resolution and including relevant resolution tools and identifying whether the SRF is to be used.¹³⁹ If the resolution is not in the public interest the bank is wound up in accordance with national law.

Immediately after adoption of the resolution scheme, the SRB transmits the resolution scheme to the European Commission.¹⁴⁰

Resolution stage 3

- Within 24 h: Commission must either endorse or object the scheme
- Within 12 h: Commission may propose to the Council to object or to object/approve to the resolution scheme

Although multiple actors are involved, which reflects the difficult negotiations and Treaty constraints, strict time limits apply. The purpose of these very tight deadlines is to ensure that highly sensitive resolution decisions are taken in a speedy way and to

¹³⁷ Ferrarini G. and Chiodini F. (2010), *op. cit.* n. 82, pp. 56-57.

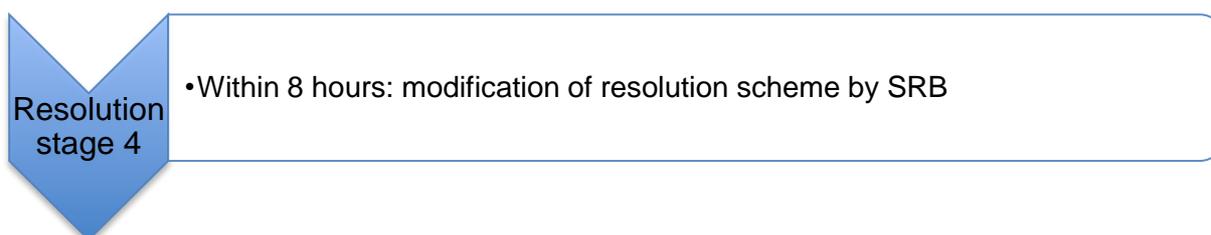
¹³⁸ Article 18(1) SRM Regulation.

¹³⁹ Article 18(6) SRM Regulation.

¹⁴⁰ Article 18(7) SRM Regulation.

allow that an entity is to be resolved over the weekend while financial markets are closed.¹⁴¹

Reflecting the *Meroni* doctrine, within 24 hours after transmission by the SRB, the European Commission must either endorse the resolution scheme, or make a reasoned objection. In the same phase, within a 12-hour time limit from transmission of the resolution scheme by the SRB, the European Commission may propose to the Council to object to the scheme on the grounds that the resolution through the SRM is not in the public interest, or approve or object to a material modification of the amount of the recourse to the Fund provided for in the resolution scheme.¹⁴² The Council must provide reasons for the exercise of its power of objection. In case of objection the bank is orderly wound up in accordance with the applicable national law.¹⁴³



This stage is only entered after objections by the Commission to discretionary elements of the scheme and/or the approval by the Council of material modifications of the amount of Fund that should be provided in the resolution scheme. In this stage the SRB must, within 8 hours, modify the resolution scheme in accordance with the reasons expressed by the Commission or the Council.¹⁴⁴ The SRB has the authority to amend and update the resolution scheme after it enters into force if this is appropriate in light of the circumstances of the case.¹⁴⁵

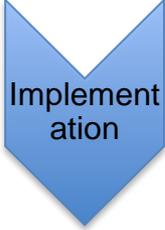
¹⁴¹ Moloney N. (2014), *op. cit.* n. 2, pp. 1639-1640.

¹⁴² Article 18(7) SRM Regulation.

¹⁴³ Article 18(8) SRM Regulation.

¹⁴⁴ Article 18(7) SRM Regulation.

¹⁴⁵ Articles 23 and 28(3) SRM Regulation.



Implementation

- Resolution scheme enters into force
- NRA implements resolution scheme

Accordingly, where objections are raised, the procedure will be completed in 32 hours or where none are raised the process may be completed in 24 hours through the adoption of the resolution scheme.

The resolution scheme is addressed to the NRAs and instructs these authorities to take all necessary national measures to implement it using their resolution powers in line with national company and insolvency law.¹⁴⁶

¹⁴⁶ Articles 18(9) and 29 SRM Regulation.

3.5. The SRB's compliance with the *Meroni* doctrine: an analysis

This section particularly addresses whether the allocation of responsibilities to the SRB discussed under the resolution procedure is within the limits of the permitted delegation of powers to an EU agency according to the *Meroni* doctrine. As will be established and also follows from the SRM Regulation, the adoption of a resolution scheme involves a margin of discretion¹⁴⁷ and therefore it is necessary to involve the Commission and the Council in the procedure relating to the adoption of the resolution scheme. Recital 26 of the SRM Regulation states that this procedure “strengthens the necessary operational independence of the Board while respecting the principle of delegation of powers to agencies as interpreted by the Court of Justice of the European Union”. Whether the conditions set by the *Meroni* doctrine are respected, particularly the scope of powers granted to the SRB and the control of the delegating authority, will be analysed. Beforehand, it will be determined whether a delegation of powers to the SRB can be established on the basis of three pertinent factors: the nature of powers delegated, the control by the delegating authority and the actual exercise of these powers.

3.5.1. Delegation of powers to the SRB

As European agencies assist the EU institutions in implementing Union policies, they generally have been delegated powers. Therefore, it is important to first determine whether there is a delegation of powers to the SRB and if so what powers are delegated to the agency. Delegation of powers can be defined as “the transfer of powers from one organ or institution to another, which the latter exercises under its responsibility”.¹⁴⁸ In order to establish whether a real delegation is at hand three factors are crucial: (1) the nature of powers delegated (clearly circumscribed executive powers or wide discretionary powers); (2) the amount of control the delegating authority can exercise over the agency; (3) the actual exercise of the powers by both agency and delegating authority.¹⁴⁹ In the *Meroni* ruling, the Court distinguished between real delegation of powers and a situation where the delegating authority transfers powers, but the performance of these powers remains subject to oversight

¹⁴⁷ Recital 24 SRM Regulation.

¹⁴⁸ Ott A., Vos E. and Coman-Kund F., ‘EU agencies and their international mandate: A new category of global actors?’, *CLEER Working Papers 2013/7*, 2013, p. 19.

¹⁴⁹ Hartley T., *The Foundations of European Union Law*. Oxford University Press, 2014, pp. 127-129.

by the delegating authority, which assumes full responsibility for the decision of the delegate. In the latter case no real delegation takes place.¹⁵⁰

To determine whether there is a delegation of powers from the Commission to the SRB these three factors will be analysed respectively in the following.

(a) The nature of powers delegated

This part assesses what powers are delegated and how the SRB exercises these powers in order to find out whether the agency is granted a wide discretion or whether the exercise of the power is made subject to rules laid down by the delegating authority being that extensive that the agency's role is only executive. Powers of resolution are allocated to both the Commission and the SRB. A wide range of resolution powers is delegated to the SRB particularly in the preparatory phase, the resolution phase, in respect to the SRF and sanctioning powers.

In the preparatory phase, the SRB has the task to draft resolution plans for entities referred to in Article 7(2).¹⁵¹ Within this context, the SRB shall determine the minimum requirement for own funds and eligible liabilities in accordance with Article 12. The elements contained in the resolution plan are of factual or technical nature and their assessment does not entail the exercise of a wide margin of discretion.¹⁵² However, the resolvability assessment¹⁵³ already produces its own legal effects in the preparatory phase. According to Article 10, the SRB should conduct an assessment of resolvability when drafting resolution plans where the SRB will autonomously decide which elements of a bank's balance sheet it will monitor and investigate. While conducting the assessment has a technical nature, it has a direct incidence on the resolution action¹⁵⁴ and therefore the SRB should not be left with a wide margin of discretion.¹⁵⁵ In respect to early intervention,¹⁵⁶ the actions of the SRB are only of a preparatory and purely technical nature and hence do not entail a wide margin of discretion. The SRB is able to require information, carry out a valuation, require the

¹⁵⁰ *Meroni* Cases, see *supra* n. 20, paras. 147-149.

¹⁵¹ Article 8 SRM Regulation.

¹⁵² The key elements of the plan are to be found in Article 8(9). Subparagraphs (a) and (b) are of pure factual nature while subparagraphs (c) (d) (g) (h) (i) (j)(k) (l) (m) (n) (q) (r) are of purely technical nature setting out different procedures, options or assessments.

¹⁵³ Article 8(9)(e) and (f) SRM Regulation.

¹⁵⁴ The assessment of resolvability constitutes a central element of resolution planning which is an essential component of the effective resolution according to recital 46.

¹⁵⁵ Council of the European Union, Opinion of the Legal Service on the delegation of powers to the Board, 2013/0253 (COD), 14547/13, EF 89 ECOFIN 867, p. 9.

¹⁵⁶ Article 13 SRM Regulation.

institution to contact potential purchasers, or require the relevant national resolution authority to draft a preliminary resolution scheme.

In the resolution phase, the SRB is allocated a large number of powers. The resolution of banks can and typically does involve discretionary decisions. Most importantly the agency's role in triggering the resolution of a failing entity will inevitably require the exercise of discretion in practice.¹⁵⁷ Despite the cooperation with NRAs for the execution of the scheme, the criteria followed by the SRB fall within a large range and with no specific prioritisation. Hence, SRB's decision to order a bank to reorganise itself does not have to be based on specific criteria and thereby affords a very wide margin of discretion in adopting decisions with major economic effects. Consequently, the nature and scope of the powers delegated to the SRB in the resolution phase does not encompass purely circumscribed executive powers, but rather discretionary powers, which must be limited in order to uphold the *Meroni 2.0* doctrine.

The powers of the SRB in relation to the Fund relate to the constitution, the administration and the use of the SRF. The SRB is responsible to decide on several matters: the individual contributions of entities, the extension of the period for reaching the target funding level; the borrowing or the alternative funding means, the investments and the use of the Fund in the resolution procedure.¹⁵⁸

The sanctioning powers of the SRB are set out in Article 38 and 39 of the SRM Regulation. It may impose a fine,¹⁵⁹ may recommend national resolution authorities to take enforcement action, and impose periodic penalty payments.¹⁶⁰ The situations giving rise to fines or periodic penalty payments are well defined and the calculation of the sanctions is also indicated in these provisions thus the sanctioning powers of the SRB are properly framed.

(b) Control by the delegating authority

This part addresses the question of whether the Commission can exercise effective control over the agency. It may be provided, for example, that the decision of the agency will not come into force until the delegating authority has confirmed it.¹⁶¹ Such

¹⁵⁷ Recital 24 SRM Regulation.

¹⁵⁸ Recital 20 and Articles 75-76 SRM Regulation.

¹⁵⁹ Article 38(2) SRM Regulation.

¹⁶⁰ Article 39 SRM Regulation.

¹⁶¹ Hartley T. (2014), *op. cit.* n. 149, p. 129.

a mechanism is enshrined in Article 18(7) of the SRM Regulation, which provides that the Commission should either endorse or object to the proposed resolution scheme, only then it can enter into force. However, whether the Commission thereby exercises effective control over the agency can be disputed, because the SRB is under the control of the Commission and the Council only to the extent of a silent endorsement mechanism and a very limited, both temporally and substantively, power to object. Therefore, it will be assessed in the following whether the Commission effectively exercises its power to control the discretionary elements of the SRB proposal in order to comply with the *Meroni* doctrine.

(c) The actual exercise of these powers

Lastly, it will be assessed whether the powers granted to the SRB are actually exercised by the agency itself or whether the real decision is taken elsewhere. The wording, legal construction under Article 18, indicates that the SRB takes the decision; thus, it might be a delegation, but since the Commission nonetheless wants to retain its power an endorsement mechanism has been integrated. Consequently no formal, but a *de facto* delegation of powers takes place since the formal decision is taken by the delegating authority, the Commission, and the role of the agency only amounts to making proposals, but the Commission never questions these proposals and merely rubber-stamps them. Similarly, the powers of control are not exercised in practice because of the Commission's practice to tacitly endorse the resolution scheme.

3.5.2. Is the *de facto* delegation of powers in compliance with the *Meroni* doctrine?

As can be concluded from the previous section that a *de facto* delegation of powers takes place it need to be assessed whether this delegation is in compliance with the *Meroni* doctrine. In order to answer this question, the foregoing will be put into context and arguments in favour of and against compliance with the *Meroni* doctrine will be given. As the limitations established by the Court in *Meroni* related to both the scope of the powers delegated as well as the need for control by the delegating authority, the arguments will be given along this distinction.

(a) Scope of the powers

As long as the conditions under which the discretion is exercised are clearly defined and a wide margin of discretion is not afforded the powers conferred comply with the

Meroni doctrine. Therefore, the powers set out above will be analysed to its compatibility with the *Meroni* case law.

A comparison between ESMA and SRB should be drawn in order to find out whether ESMA and SRB are similar in terms of the powers accorded to the agency and whether the *Short Selling* ruling can therefore justify the compliance of the SRB with the *Meroni* doctrine. The powers delegated to ESMA are related to both regulation and supervision.¹⁶² Regulation concerns the drafting of rules while supervision refers to the application of those rules encompassing administrative monitoring and enforcement.¹⁶³ The Court rejected the UK's challenge that ESMA's powers are to be considered as discretionary powers, which did not comply with *Meroni* and held that the degree of conditionality imposed on the powers entailed that the *Meroni* requirements were fulfilled. In this regard, the Court justifies its ruling by stating that Article 28 of Regulation 236/2012¹⁶⁴ "does not confer any autonomous power on that entity [ESMA] that goes beyond the bounds of the regulatory framework established by the ESMA Regulation".¹⁶⁵ Additionally, ESMA must examine a significant number of conditions before taking any decision. Firstly, according to Article 28(2) of Regulation 236/2012, ESMA can only adopt measures in two cases namely if they 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 EU and there are cross-border implications". Secondly, ESMA is only allowed to take measures if either no measures have yet been taken by the competent national authority or if the measures taken by those authorities have proven not to address the threat appropriately. Thirdly, Article 28(3) of Regulation 236/2012 sets out that when taking measures, ESMA must consider three conditions: the extent to which the measure significantly addresses the two situations, as set out above, under which ESMA is allowed to adopt measures or improves the capability of the competent national authorities to oversee the threat at issue; the measure does not create a risk of regulatory arbitrage; and the measure does not have a adverse effect on the effectiveness of financial markets, which is

¹⁶² See for the evolution of the powers delegated to ESMA: Spendzharova A., 'Becoming a powerful regulator – The European Securities and Markets Authority (ESMA) in European financial sector governance', *TARN Working Paper 8/2017*, 2017.

¹⁶³ Di Noia C. and Gargantini M. (2014), *op. cit.* n. 88, pp. 14-31.

¹⁶⁴ Regulation (EU) 236/2012 of 14 March 2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps, 2012, OJ L 86/1.

¹⁶⁵ Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, [2014] ECLI:EU:C:2014:18, para. 44.

disproportionate to the advantages of the measure.¹⁶⁶ Moreover, the margin of discretion is circumscribed by the requirement to consult the European Systemic Risk Board and the temporary nature of the measures authorised through the requirement to review at appropriate intervals the measure.¹⁶⁷ Additionally, ESMA's powers of intervention are restricted to exceptional circumstances.¹⁶⁸ The Court concluded that "the powers available to ESMA under Article 28 of Regulation 236/2012 are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority".¹⁶⁹ "Those powers do not, therefore, imply that ESMA is vested with a 'very large measure of discretion' " ¹⁷⁰ and accordingly, those powers comply with the requirements laid down in *Meroni*.

It can be argued that the design of the SRB reflects the constraints of the agency structure, because the SRB cannot adopt rules and its operational powers are delineated. When it comes to the requirement that the powers delegated should not be discretionary in nature, the main discretionary powers are still in the hands of the Commission. With regard to Article 18 of the SRM Regulation, this can especially be deduced from the fact that the ultimate decision to take a bank into resolution rests with the Commission. Moreover, the SRB enjoys discretionary powers at the preparatory stages of drafting the resolution scheme or recommending the use of resolution tools. In that regard, it needs to be recalled that *Short-Selling* paved the way for a legal transfer of some discretionary powers, as long as the exercise of discretion is circumscribed by clear conditions. This conditionality is clearly present in the resolution procedure, as can be witnessed from Article 18(1) and (4) of the SRM Regulation. The SRB triggers the resolution procedure if three conditions are fulfilled: the bank is failing or likely to fail; there is no reasonable prospect for a private sector alternative; and the resolution is necessary in the public interest. The most important of those conditions is the one requiring that the bank is failing or likely to fail. This assessment can either be done by the ECB, after consulting the SRB or by the SRB itself, however only after it has informed the ECB of its intention to do so and the ECB within three days of the receipt of that information does not make an assessment itself.¹⁷¹ In this respect one sees that the SRB cannot decide on its own whether a

¹⁶⁶ Ibid, paras. 46 and 47.

¹⁶⁷ Ibid, para. 50.

¹⁶⁸ Ibid, para. 52.

¹⁶⁹ Ibid, para. 53.

¹⁷⁰ Ibid, para. 54.

¹⁷¹ Article 18(1) SRM Regulation.

bank is failing or likely to fail. Moreover, Article 18(4) explicitly lays down when an entity shall be deemed to be failing or likely to fail, thereby also limiting the discretion of the SRB.

On the contrary, given the SRB's power to place an institution under resolution, its power to construct a resolution scheme and its operational powers,¹⁷² one could equally argue that the powers delegated provide the SRB with a wide margin of discretion and hence breach the traditional *Meroni* doctrine. Due to the scope of powers and the stringent deadlines, the SRB's independent decision-making contributes to the discussion of the agencification process in the European financial sector, since compared to the ESAs, which already stretch the boundaries of the *Meroni* doctrine to its maximum,¹⁷³ the SRB even increases agency powers more. However, since *Short Selling* relaxed the strict *Meroni* conditions by allowing the transfer of some discretionary powers, as long as the exercise of discretion is circumscribed by clear conditions namely Article 18(1) and 18(4) of the SRM Regulation, it seems that the scope of powers afforded to the SRB is likely to be compliant with *Meroni 2.0*.

(b) Control by the Commission

This section addresses the question whether the delegating authority exercises control over the agency and if so what kind of control. Additionally, the control mechanism will be analysed to its effectiveness.

On the one hand, in order to justify compliance with the *Meroni* doctrine it can be argued that already in the activation of the resolution procedure and the adoption of the resolution scheme, by the Commission's power to object or endorse the resolution scheme, the SRB is under the control of the Commission and the Council.¹⁷⁴ Additionally, a form of ex ante accountability is secured through the observer status of the Commission and ECB representative in the executive sessions. On the other hand, it is argued that "the silent Commission endorsement process and the tight time limits

¹⁷² Zavvos G.S. and Kaltsouni S. (2015), *op. cit.* n. 11 pp. 137-138.

¹⁷³ Busuioc M., 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope', *European Law Journal*, vol. 19, no. 1 (2013), p. 114.

¹⁷⁴ See statement by Moloney N. (2014), *op. cit.* n. 2, pp. 1642 and 1661: "these powers must be regarded as *de facto* powers given the power of the Commission and Council to intervene and the *Meroni* constraint; nonetheless the SRB's powers remain considerable" and "*Short Selling* suggests that within this framework the SRB is likely to be *Meroni* compliant."

within which the Commission and Council must act, significantly weaken the *Meroni* controls in practice”.¹⁷⁵

Considering that the control over the SRB only extends to a tacit endorsement, the Commission and the Council have a very limited power to object.¹⁷⁶ The SRB functions in a context where swift decision-making is crucial¹⁷⁷ and speedy action is of critical importance for the success of a resolution and to prevent disruptions of the economy; and thus, the process is designed to ensure that a resolution scheme is adopted over a weekend while markets are closed.¹⁷⁸ However, despite the need of swift and speedy decision-making, adequate safeguards and control mechanism should be in place in order to comply with the set limits to the delegation of powers. It is therefore questionable whether the practice of the Commission to remain silent and thereby to tacitly endorse the SRB’s proposal constitutes efficient control by the Commission over the SRB. Moreover, the Commission representative only has a status of permanent observer and has no vote at the SRB executive sessions.¹⁷⁹ Therefore, when considering Article 18(7) of the SRM Regulation,¹⁸⁰ the Commission’s role mainly consists in an ex post control of the discretionary aspects of the decision of the SRB on the resolution scheme. In other words, if either the Commission or the Council within the prescribed time limit of 24 hours expresses no objection or remains silent, the proposed resolution scheme is deemed adopted and enters into force.¹⁸¹

Besides the formal supervision exercised by the delegating authority, the Commission, which is a condition for the delegation of powers to agencies as discussed above, the accountability of agencies is secured in other different ways. Other accountability arrangements for the SRB exist in the SRM Regulation and additionally an agreement¹⁸² between the SRB and European Parliament has been concluded representing a highly detailed accountability mechanism. The SRM

¹⁷⁵ Ferran E. (2014), *op. cit.* n. 129.

¹⁷⁶ *Ibid.*, p. 23.

¹⁷⁷ Moloney N. (2014), *op. cit.* n. 2, pp. 1639-1640.

¹⁷⁸ Ferran E. (2014), *op. cit.* n. 129, p. 17; Moloney N. (2014), *op. cit.* n. 2, pp. 1639-1640.

¹⁷⁹ Article 43(3) SRM Regulation.

¹⁸⁰ “The resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within 24 hours after its transmission by the Board”.

¹⁸¹ Article 18(7) SRM Regulation.

¹⁸² Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism. Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015Q1224\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015Q1224(01)&from=EN) ; last accessed 23 June 2016.

Regulation provides for two types of accountability:¹⁸³ political accountability vis-à-vis the EU institutions (European Parliament, Commission, Council)¹⁸⁴ and the national parliaments¹⁸⁵ as well as for judicial accountability either for actions pursuant to Article 263 TFEU before the Court¹⁸⁶ or prior to litigating SRB's decisions before the Court, the Appeal Panel reviews the contested issue.¹⁸⁷ However, according to the case law on the delegation of powers to EU agencies, supervision of the delegating authority is the decisive criterion to justify that the delegation of powers falls within the limits.

As the SRB's powers are controlled through the intervention of the Commission and the Council provided for by the mechanism laid down in Article 18(7) of the SRM Regulation, the legality of the endorsement mechanism in the context of ESMA's powers to prepare binding technical standards should be discussed in order to draw a parallel.¹⁸⁸ ESMA may be entrusted to elaborate two kinds of technical standards to be submitted to the Commission for endorsement: regulatory technical standards or implementing technical standards.¹⁸⁹ The Commission however retains the power to adopt the regulatory measure, but in case it does not endorse the draft standards or if it proposes amendments the Commission also has to provide reasons.¹⁹⁰ Moreover, the European Parliament and the Council are constantly involved in these procedures, as they receive the draft standards from the Commission as soon as ESMA submits them for endorsement. In literature¹⁹¹ it is proposed to base this system on a tacit approval rather than express endorsement to make it more efficient. However, this proposition would clearly come close to the boundaries of the *Meroni* requirements since it might marginalise the role of the Commission and thereby widen the powers of ESMA. It is claimed that no problem would arise if one adopts the position that *Meroni* can be relaxed in view of the constitutional context, because the Court can review acts adopted by agencies or since the protection of the institutional balance should be interpreted more flexible.¹⁹² However, as has been emphasised in *Short Selling*,

¹⁸³ See for an overview of different types of accountability Busuioc M., *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*. Eburon, 2010.

¹⁸⁴ Article 45 SRM Regulation.

¹⁸⁵ Article 46 SRM Regulation.

¹⁸⁶ Article 86 SRM Regulation.

¹⁸⁷ Article 85 SRM Regulation.

¹⁸⁸ Moloney N., 'The European Securities and Market Authority and Institutional Design for the EU Financial Market – A Tale of Two Competence: Part (1) Rule-Making', *European Business Organization Law Review*, vol. 12, no. 1 (2011), pp. 66 and 74-78.

¹⁸⁹ Articles 10 and 15 Regulation 1095/2010.

¹⁹⁰ Article 10(1) Regulation 1095/2010.

¹⁹¹ Di Noia C. and Gargantini M. (2014), *op. cit.* n. 88, p. 38.

¹⁹² *Ibid.*, p. 40.

Meroni is still good law and while allowing direct attribution of powers by the legislature to agencies, the need to preserve the institutional balance is not removed. Nonetheless, in the new institutional context some concerns addressed in *Meroni* are now lessened. But it can be argued that the simple non-opposition of the Commission could take the delegation of powers to agencies too far and would thus deprive the Commission of the powers conferred by the Treaties since “the tacit endorsement does not seem sufficient to lead to the act to be adopted by the Commission”.¹⁹³

Considering that the control over the SRB by the Commission only extends to a silent endorsement mechanism and is subject to the extremely tight timeframe of 24 hours,¹⁹⁴ the Commission and Council have a very limited power to exercise effective control over the SRB. Whether the control is sufficient is open to debate, but the supervision exercised over the SRB during the resolution procedure is less than what is prescribed for ESMA. When comparing the control mechanism of express endorsement of the Commission for draft technical standards proposed by ESMA to the draft resolution scheme proposed by the SRB which is subject to a tacit endorsement by the Commission, it becomes clear that the Commission carries out greater control over ESMA’s powers, since it even has to provide reasons if it does not endorse them. Consequently, the delegation of powers to the SRB does not seem to respect the limits set by the Court, since it does not fulfil the requirement of sufficient supervision by the delegating authority, namely the Commission, requiring that the exercise of delegated discretionary powers to the SRB remains subject to a strict review as established in *Meroni* and confirmed in *Short Selling*.¹⁹⁵

3.6. Conclusion

This Chapter examined the organisational structure, the tasks of the SRB, as well as the decision-making procedure with the focus on the agency’s compliance with the

¹⁹³ Neergard A., ‘European Supervisory Authorities. A New Model for the Exercise of Power in the European Union?’, *European Banking and Financial Law Journal (EUREDIA)*, vol. 11, no. 4 (2009), p. 627.

¹⁹⁴ The Council itself describes the timeframe provided for in Article 18(7) as “extremely tight deadline”. See Council of the European Union, “1/A” item note on the Single Resolution Mechanism Procedure, 2013/0253 (COD), 10507/15, EF 134 ECOFIN 575, p. 3; Council of the European Union, Decision (EU) 2016/228 of 14 July 2015 on the resolution procedure.

¹⁹⁵ Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, [2014] ECLI:EU:C:2014:18, para. 41.

Meroni doctrine. The SRB enjoys a special status since it is designed as a specific agency in terms of its organisational structure in order to fulfil the objectives pursued by the resolution of a failing entity. In this respect the SRB deviates from the traditional model of EU agencies.

Most importantly, however, the interplay in the decision-making process between the SRB, the Commission and the Council was analysed. First of all it was concluded after having considered three criteria for the existence of a delegation of powers that no formal, but a *de facto* delegation of powers takes place. On this basis it has been analysed whether this delegation of powers complies with the two decisive conditions set by the *Meroni* doctrine: the scope/nature of powers delegated to the agency and the control by the delegating authority. With regard to the first condition, the SRB enjoys operational, discretionary and fiscally significant powers which are in breach of the traditional *Meroni* doctrine since discretionary powers are transferred to the agency, however as *Short Selling* relaxed this condition by allowing the delegation of discretionary powers if they are precisely delineated, amenable to judicial review and no very large measure of discretion is afforded, the discretionary powers delegated to the SRB seem to be in compliance with the *Meroni 2.0* doctrine. In respect to the second condition, Article 18 entails a complex decision-making process and structure; thus, it might be questioned whether enough control is exercised through the Commission and the Council. Based on the foregoing comparison with ESMA, it is the author's opinion that the decision-making procedure laid down in Article 18 of the SRM Regulation and more specifically the practice of the silent endorsement of the Commission breaches the *Meroni* doctrine considering that there is no exercise of effective control through the EU institutions, namely the Commission and the Council. Based on these findings it can be concluded that the delegation of resolution powers to the SRB breaches the requirements of both the traditional *Meroni* doctrine as well as the *Meroni 2.0* doctrine, because discretionary powers are delegated that are not effectively controlled by the delegating authority.

Conclusion

The specific circumstances of the banking crisis underlie the necessity for the establishment of the SRB since the creation of an agency cannot be considered out of its relevant context. On the contrary, there is a need to take into account the legal, political and economic environment surrounding the setting up of the agency. During the financial crisis, financial regulation has been found to be confronted with a challenge of cross-border supervision, co-ordination, crisis resolution, and deposit protection. However, the then existing legislation was unable to meet the demands that came with an increasingly internationalised financial market. The result was the financial crisis in 2008. Financial regulation post-crisis is expected to remedy these shortcomings by offering a uniform and centralised system operating under an agency structure. The SRB serves as resolution authority in the framework of the SRM in order to create a uniform and harmonised resolution procedure and substantive rules. As the agencies created in the field of financial regulation, and particularly the SRB, enjoy a great deal of power; the limits to the delegation of powers to agencies must be respected.

The Court dealt with this issue in *Meroni* and *Romano* resulting in the non-delegation doctrine, which is still good law today. However, this doctrine was relaxed in the *Short Selling* case as a consequence to the need to delegate more discretionary powers to independent bodies. Nonetheless, the scope of powers of agencies remains uncertain since no clear limits to the delegation of powers are set neither in the Treaty nor in the case law of the Court. As agencies gain more and more powers, adequate mechanism and controlling measures need to be set up. The main concern that drove the judges at the time the *Meroni* ruling was rendered was the need to ensure that no substantial exercise of power could escape the judicial review by the Court. Before the Lisbon Treaty was adopted, no review was explicitly provided for acts by agencies and hence, the legal framework for the delegation of powers to agencies has been mainly set through the case law of the Court. However, the new Articles 263 and 267 TFEU now also cover acts of agencies and the rationale to ensure legal protection appears to be less of a concern. Therefore, the relevance of *Meroni* today mainly depends on the fact that it reflects the perspective that agencies are executive or regulatory bodies detached from the Commission. Already in *Short Selling* the Court's awareness of the need for entrusting the agency with certain, though delineated, discretionary powers in

order to ensure speedy decision-making became apparent. The establishment of the SRB thus might be interpreted as indicating towards the greater awareness of what current economic and political difficulties require. If one considers that the *Meroni* doctrine can be relaxed nowadays because judicial review is ensured for acts adopted by agencies no problem arises in respect to the limitations to the delegation of powers. Advocate General Jääskinen stated in its opinion for the *Short Selling* case that the *Meroni* principle should be interpreted in light of the new EU constitutional framework of the Lisbon Treaty. The Lisbon Treaty introduced with Article 263 and 267 TFEU important safeguards that allow the EU co-legislator to lawfully delegate regulatory powers to EU agencies. Therefore, if the delegation complied with the legal guarantees set by the current context of Treaties no unlawful shift of responsibility would occur. However, *Meroni* is still good law and thus the distinction between clearly defined powers and discretionary powers as well as the need for sufficient safeguards (control and supervisory mechanisms) represents a guiding criterion to assess the tasks of EU agencies.

Not all powers delegated to the SRB breach the *Meroni* ruling, but in particular the powers delegated to the SRB for the resolution procedure definitely push against the boundaries of the conditions set under the *Meroni* doctrine. Therefore, this thesis addressed the question whether the delegation of powers to the SRB is in conformity with the limits set by the *Meroni* doctrine. In light of the foregoing analysis, it can be concluded that the SRB enjoys discretionary powers in the resolution procedure, which is not in line with the requirement that only clearly defined executive powers can be delegated to EU agencies. Therefore, the delegation of powers for the resolution procedure breaches the traditional *Meroni* doctrine. In 2012, with the *Short Selling* judgment, the Court relaxed the strict *Meroni* doctrine by allowing a delegation of discretionary powers as long as they do not entail a very large room of manoeuvre for the agency. However, control from the delegating authority is still required. When considering the control of the Commission under the resolution procedure, particularly the practice of tacitly endorsing the resolution scheme proposed by the SRB and the strict time limit of 24 hours, it can be concluded that the SRB is not sufficiently supervised by the Commission. Consequently, in the author's opinion, the mere non-opposition by the Commission takes the delegation of powers too far as it deprives the Commission of the powers conferred by the Treaties. Therefore, the delegation of

powers to the SRB in the resolution procedure breaches the requirements of both the traditional *Meroni* doctrine as well as the *Meroni 2.0* doctrine.

At the time of the *Meroni* judgments, the Court only considered the supervision of the delegating authority as a condition to the delegation of powers to agencies, but no other accountability arrangements an agency is subject to. The SRB is governed, besides the supervision by the delegating authority, by different other accountability mechanisms. These include provisions in the SRM Regulation on political accountability and judicial review of all decisions taken by the SRB as well as a very detailed and extensive accountability agreement between the European Parliament and the SRB. Therefore, as the necessity to create the SRB was driven by the concern to create certainty, uniformity and effectiveness in the rules and procedure on the resolution of banks, it may be questioned whether the *Meroni* doctrine is inappropriate to resolution policy. Accordingly, it may be questioned whether greater accountability of EU agencies can resolve the problem of fulfilling the strict criteria of control by the delegating authority. This issue is however not central to this thesis, however should be further explored in subsequent research. As the independence of agencies needs to be matched with the need for accountability, new provisions that guarantee control are included in the arrangements governing agencies; however, not all are equally extensive. The SRM Regulation contains substantial accountability arrangements as elaborated above. Such procedures on accountability were not available when the Court took the *Meroni* judgment. Consequently, the establishment of the new EU agencies cannot be compared with the situation in the *Meroni* case because now, and especially in the case of the SRB, sufficient safeguards are in place to control the independent body. The author is of the opinion that within the new architecture of the EU financial sector and given the need to delegate certain tasks to independent and specialised EU bodies, the condition requiring control of the delegating authority should be relaxed by also considering other accountability arrangements that are in place to justify that the delegation of powers to the SRB falls within the limits of the *Meroni* doctrine. As a result, the *Meroni* doctrine should further been broadened in respect to the requirement of supervision by the delegating authority by taking into account all accountability mechanisms in place to control the agency.

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