**EU agencies 2.0**
– The new constitution of supranational administration beyond the EU Commission

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**Introduction**

By the mid-2000s the growing number of qualitatively ever stronger EU agencies came under increased political and legal criticism. Several member states challenged the political adequacy and constitutionality of the more than 30 increasingly powerful agencies, which led the EU Commission to announce a moratorium on the establishment of new agencies. In fact, it had become ever more difficult to square the institutional reality of the broad expansion of the EU administrative sphere beyond the Commission with the then-constitutional order. Since then – in the short time span of not even a decade – far reaching changes in the institutional setting and in the constitutional order of EU agencies have occurred. All in all the systemic changes are so profound that (in adaption of a common phrase) an analogy to the evolution of the internet into the World Wide Web 2.0 seems justified. The ongoing transformation to a new constitutional regime of agency administration will be addressed in the following chapter. Section A. lays out the institutional and constitutional status quo ante, against which the constitutional transformation will become visible. It will recall the traditional restrictive judicial doctrines on supranational agency administration, give a sketch of the institutional expansion and summarize the political and constitutional critique. Section B. illustrates the global financial of 2008 as a catalyst for a new wave of agency building aiming at re-regulation and enhanced oversight of the financial sector. Section C. turns to the key elements of transformation. Here, the focus is on the agency-related amendments of Treaty of Lisbon and subsequent constitution building through the EU judiciary. In particular, we will discuss five constitutional building blocks established by the judgment of the ECJ of January 2014 on the European Securities and Markets Authority (ESMA). We will conclude with an outlook and suggestions for a future research agenda.

**A. (Restrictive) judicial foundations, rise and constitutional crisis of EU agencies**

Although it took until the 1990s that EU agencies became a widely recognized phenomenon, their legal history goes way back to the 1950s. In the case of *Meroni v. High Authority* of 1958 the European Court of Justice had to decide upon the legality of two specific entities operating under the ECSC that had been established by the Council under Belgian private law. These entities were entitled to levy fees from European enterprises. In the absence of any specific provisions in the Treaty of the European Coal and Steel Community of 1952 it was for the court

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2 Terminologically, the “constitution” of EU agencies encompasses all rules of the highest order of EU law that govern the establishment of EU agencies in terms of legal forms, institutional designs, procedures and competences.
in *Meroni v. High Authority* in 1958 to establish a far reaching doctrine on institutional differentiation and delegation.³ Agency administration was only lawful if it did not involve “discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy”⁴ This judicial doctrine was amended in 1981 in *Romano v. INAMI*.⁵ Mr. Romano had challenged a decision of INAMI on his pension claims. At that occasion the ECJ established that „a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law“.⁶ This sentence was widely understood as a prohibition of normative legal acts of EU agencies.⁷

The judicial foundations of agency administration in Meroni and Romano had long been understood to allow for the establishment of autonomous administrative entities beyond the Commission only in exceptional circumstances. However, the 1990s and 2000s witnessed an ever intensifying process of agency-building. By way of basic regulations of Council resp. Council and European Parliament more than 30 EU agencies were established, the competences of which ranged from data collection and information exchange as in the case of the European Environmental Agency (EEA) to decision-making vis-à-vis EU citizens and enterprises and quasi-rulemaking as in the cases of the trade-mark-related Office for Harmonization of the Internal Market (OHIM), the European Medicines Agency (EMA), the European Aviation Safety Agency (EASA) and the European Chemicals Agency (EChA).⁸

In the mid-2000s the system of EU agencies slipped into a constitutional crisis. As the EU treaties even after the reforms of Amsterdam and Nizza did not mention EU agencies at all, a growing number of critics questioned the compatibility of the ongoing “agencification”⁹ with the EU constitutional order and claimed a violation of institutional balance. The most vivid critics included key member state institutions such as the German Bundestag and the British House of Commons.¹⁰ The Commission reacted with a conditioned moratorium regards the founding of new EU agencies.¹¹

### B. Global financial crisis as a catalyst of agency building

The moratorium did not hold on for long. Rather, a new wave of agency building emerged as part of the EU’s reaction to the global financial crisis that is symbolically linked to the breakdown of Lehman Brothers in 2008. As many other political institutions around the globe, the

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³ ECJ, Case 9/56, Meroni/High Authority of ECSC, E.C.R. 1957-58, 133.
⁵ ECJ, Case 98/80, E.C.R. 1981, 1241, Romano v. INAMI; INAMI is the French acronym for the “Administrative Commission of the European Communities on Social Security for Migrant Workers”.
EU began to develop institutional reforms to promote re-regulation and enhanced oversight of financial markets. It mandated a working group chaired by former IMF-Director and Bank of France Governor Jacques de Larosière to suggest alternatives to the formerly dominant Lamfalussy-process, which emphasized soft law, coordination and cooperation-oriented tools of financial regulation. Accordingly, the “de Larosière Report” of early 2009 suggested instruments to strengthen the European supervisory arrangements to prevent the “kind of systemic and inter-connected vulnerabilities” that had proved to be disastrous in the financial crisis. As a result, Council and European Parliament agreed upon a bundle of EU regulations to establish the European System of Financial Supervision (ESFS). The ESFS encompassed three European Supervisory Agencies (ESAs) with operational tasks regarding banking, insurance and security and the European Systemic Risk Board (ESRB) that is comprised of the heads of the ESAs and further EU institutions.

With their quasi-rulemaking and supervisory competences the ESAs – European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA), European Securities and Markets Authority (ESMA) – belong to the most powerful EU agencies ever established. In the quasi-rulemaking function the ESAs develop “draft regulatory technical standards” that are subsequently submitted “to the Commission for endorsement” as the respective Art. 10 Sec. 1 of all three ESA-founding Regulation states. Thus, the Commission’s act of issuing the rule is more of a formal nature. In the supervisory function the ESAs have specific competences for inquiries and sanctions for breaches of EU Law and for action in emergency situations.

Subsequent regulations increased the ESA-competences. Of particular importance is the short selling regulation 236/2012/EU, which confers specific powers to ESMA. Art. 28 Reg.

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236/2012/EU provides for “ESMA intervention powers in exceptional circumstances”. Section 1 reads:

In accordance with [Art. 9 Sec. 5 of its founding Reg. 1095/2010/EU] ESMA shall […] either

(a) require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify a competent authority or to disclose to the public details of any such position; or

(b) prohibit or impose conditions on, the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument other than financial instruments referred to in point (c) of Article 1(1) where the effect or one of the effects of the transaction is to confer a financial advantage on such person in the event of a decrease in the price or value of another financial instrument.

Art. 28 Sec. 2 Reg. 236/2012 sets as condition for an intervention a “threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and there are cross-border implications”. Art. 28 Sec. 3 to 11 Reg. 236/2012 provide detailed material and procedural conditions for an intervention. Art. 28 Sec. 12 Reg. 236/2012 orders that an Art. 28-measure adopted by ESMA shall prevail over any previous measure of a national financial sector agency.

In the system of legal acts provided in Art. 288 TFEU – regulations, directives, decisions, recommendation and opinions – the before discussed intervention powers of ESMA could best be classified as decisions without specific addressees.\(^{23}\) The ESMA-intervention powers are however “a-typical” to the extent that they are not paralleled to the executive rulemaking and implementation competences of the Commission set out in Art. 290 resp. Art. 291 TFEU.

C. Transition to a new constitutional order

The latest wave of EU agency building in the financial sector had ambivalent effects. On the one hand, it raised the question of constitutionality with even increased urgency. On the other hand, it accelerated a transformation process that had started with the Treaty of Lisbon, but had at first received little attention. That process gained significant momentum when the legal design of the EU financial sector agencies was challenged before the ECJ.

I. Agency-related amendments of the Treaty of Lisbon

The Treaty of Lisbon contributed to agency building in the financial sector through the adoption of several new treaty provisions. Although EU agencies were not included in the circle of EU organs (Art. 13 TEU), various articles of the TFEU acknowledged their existence and their legal significance in a plurality of other article.

Regards organization, Art. 298 TFEU established a stable textual fundament for the supranational EU administration in general and EU agencies in particular. Art. 298, Sec. 1 TFEU reads: “In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.” Art. 298, Sec.

\(^{23}\) On decisions that are not specifically addressed but more of a “generic” nature see Craig/De Búrca, EU Law, 5. ed. 2011, p. 107.
2 TFEU contains a legislative competence to lay out details and implementation: “In compliance with […] the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.”

Regards judicial review, Article 263 TFEU is equally important. Article 263, Section 1 TFEU provides that: “[The ECJ] shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.” Article 263, Section 4 TFEU extends the right to review under specified circumstances to private individuals. Article 263, Section 5 TFEU empowers the EU legislator to expand the possibilities of judicial review through regulations. In addition, Article 277 TFEU rules that “[…] any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act”.

Moreover, the Treaty of Lisbon expanded the material and procedural provisions with binding effect for EU agencies. Of particular importance are principles of a more participatory democracy and transparency (Art. 10, 11 EU-Treaty) and the EU Charter of fundamental rights – including guarantees of human dignity, democratic freedoms, business rights, transparency, data protection and the right to good administration.

II. Constitution building through the judiciary – Five constitutional building blocks

Constitution building at the EU level is historically intrinsically linked to the judiciary. The most famous narration in this regard is, of course, that of the ECJ’s judgment of Van Gend en Loos and Costa/ENEL as the birth mark of constitutionalization of the EU’s legal order. In a similar vein, the ECJ took on the task of working out the constitution of EU agency administration, when one of the newly founded agencies of the financial sector, ESMA, was challenged in front of the ECJ. The United Kingdom, home to London as one of the world’s capitals on financial market transactions and the perhaps most outspoken critic on EU financial regulation, brought an action for annulment, which demanded that the clause on short selling-regulation in Art. 28 (2) of ESMA-Regulation No. 236/2012 should be declared null and void. At the center of the argument there is the claim that ESMA enjoys too much leeway, has too much discretion to make “choices [that] have very significant economic and policy implications”. The ECJ undertook a far reaching judicial elaboration of the Treaty framework. Clearly transcending the individual case, the ESMA-judgment adds up to an institutional acknowledgment of the entire EU agency landscape.

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24 Art. 298 TFEU, it should be noted, became rather coincidentally the basic foundation for EU agency administration. It was only on grounds of a special initiative of Sweden aiming for a competence norm for EU rules on good administration, efficiency and transparency that the predecessor of today’s Art. 298 TFEU was included in the 2003 draft of the Treaty for a Constitution for Europe, Final report of Working Group V, "Complementary Competencies", CONV 375/1/02 REV 1, S. 17; s. also „working document 13“, http://european-convention.europa.eu/docs/wd5/1931.pdf (January 12, 2015).


26 Craig, EU Administrative Law, 2. ed. 2012, p. 446.


28 In this context see Morgan, Supporting the City: economic patriotism in financial markets, JEPP 19 (2012), 373, 375 ff.

29 ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 30.
1. EU agencies: Regulators with the force of law

A first important constitutional building-block of the ESMA-judgment is the acknowledgment of EU agencies as regulators with the force of law. With regard to ESMA’s competence to regulate short-selling, the court essentially reversed the above cited holding in Romano that had explicitly forbidden that administrative entities may adopt acts “having the force of law”.\(^{30}\) In ESMA, the ECJ rejected the respective challenge on the grounds of textual changes in the TFEU in favor of EU agency powers, namely that “in particular the first paragraph of Article 263 TFEU and Article 277 TFEU, expressly permits Union bodies, offices and agencies to adopt acts of general application”.\(^{31}\)

With that, the ECJ has structurally established a reversed déni de justice-argument. Because there is judicial review, there could be lawmaking EU agencies, so the argument goes. This conclusion, however, seems not compelling. To the contrary, it seems just as plausible to deny any intention of institutional legitimation in Art. 263 Sec. 1 and 277 TFEU. Rather, these articles could also be understood as expressions of the rule of law or the Rechtsstaatsprinzip or the fundamental right of effective judicial review (Art. 47 EU Charter of Fundamental Rights) – providing access to the EU courts in a specific legal formation regardless of the (il)legality of the incriminated action of the EU.

Besides, the ESMA-acknowledgment of a law-making capacity of EU agencies is of limited reach. As it stands, it seems reduced to the type of “atypical” acts generated under Art. 28 Reg. 236/2012. Perhaps most importantly, agency powers remain to be clearly distinguished from the adoption of non-legislative acts and implementation by the Commission under Article 290 and 291 TFEU.\(^{32}\)

2. European Parliament as organizational co-legislator with the Council

A second constitutional building block set by the ESMA-judgment is the empowerment of the European Parliament – the representative organ of EU citizens (Art. 11 EU-Treaty) – as organizational co-legislator with the Council, the EU organ comprised of Member State governments.

Historically, there have been two competence paths to establish EU agencies. For one, the general residual competence (today’s Art. 352 TFEU) has been deployed – a competence norm that requires a unanimous vote in the Council and the consent of the European Parliament. In an enlarged EU the veto positions granted to 28 Member State governments make the application of Art. 352 TFEU almost impossible. Political positions of the Parliament are easily turned down. Second, and increasingly, EU agencies have been based on sectoral Treaty competences, e.g. on the EU competence for environmental legislation (Art. 192 TFEU) or on the EU competence for harmonization of the internal market. Article 114, Sec. 1 TFEU reads: “[…] The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.” The reference to the “ordinary legislative procedure” (Art. 294 TFEU) implies majority voting


\(^{31}\) ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 65.

\(^{32}\) See on that issue also sub C., II., 3.
in both European Parliament and Council, thus improving the chances of political positions of the European Parliament to become law.

Against this backdrop the UK argued that the establishment of ESMA did not qualify as a “measure for approximation” under Art. 114 TFEU. Advocate General Jääskinnen concurred and pointed to 352 TFEU as the only adequate competence provision. Thus, the role of the European Parliament depends upon the narrowness or breadth of the interpretation of 114 TFEU. The ECJ rejected the view of the Advocate General. Rather, the Court emphasized the legislative discretion of European Parliament and Council: “[…] the EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought.” Thus, the ESMA-judgment brought a significant boost for the European Parliament as organizational co-legislator of the EU and did also further democratize the EU legislative process.

3. Perpetuation of the technocratic rationale

From Jean Monnet’s invention of functional integration onwards the progress of European integration was well explained by the capacity of the supranational community to fulfill certain economic or technical functions with the greatest possible efficiency. Although EU agencies began to rise only in the 1990s – that is: four decades after the ECSC-Treaty was concluded – they seem to some extent as the most perfect embodiment of the paradigm of expert-driven, technocratically legitimized European governance.

If the above mentioned moratorium of the Commission of 2008 could be seen as an indicator of doubt, the establishment of the financial sector agencies marks the return of the functional paradigm of agency legitimation. In the eye of the global financial crisis the EU went back to Monnet in betting on functionalism and institution building. The ECJ reinforced the technocratic rationale for agency building in the ESMA-judgment in two regards: First, the court took “deployment of specific technical and professional expertise” and the interconnection in an epistemic network with national financial regulation agencies as arguments to distinguish the conferral of powers to ESMA from delegation and conferral to the Commission under Art. 290 and 291 TFEU. Second, the specific technocratic character of ESMA is cited to justify the legislative discretion granted to the EP and the Council as EU organizational legislator when it comes to legislating out of the competence norm of Art. 114 TFEU.

In a holistic perspective, the reinforced technocratic rationale raises questions. In particular, the relevance for agency building beyond the internal market needs to be addressed. This is important for pressing policy questions such as the entrustment of the European Environmental

33 ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 105.
34 AG Jääskinnen, Opinion of 12 September 2013, ECLI:EU:C:2013:562, United Kingdom/ European Parliament and Council (ESMA), at 58 offers a contrasting view on the democratic implications: Compared to the majority-voting procedure of Art. 114 TFEU Art. 352 TFEU would constitute the more democratic procedure (“an important channel for enhanced democratic input”) because of the “depth of the consensus” of the unanimity of 28 EU Member States and the involvement of national parliaments according to Art. 352 Sec. 2 TFEU.
36 ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 82.
37 ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 85.
38 ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 102/105.
Agency (EEA) with competences for on-ground inspections as an answer to the implementation deficit in EU environmental law and the empowerment of the European border security agency FRONTEX and the European Asylum Support Office EASO with operational tasks in the EU migration administration. Whether the functional legitimacy discourse stabilizing the EU financial sector agencies could be extended to those areas should be discussed.

4. Degrees of discretion

The limitation of the agency to a certain degree of discretion is central to the ECJ’s evaluation of ESMA’s competence profile. The ECJ goes a relatively long way to explain, why ESMA’s authority to regulate short-selling does not imply a “very large measure of discretion” and thus is constitutional.\(^{39}\) First of all, the ECJ points to the textual delineation for exercising the authority for short-selling regulation. The court holds in favor of the agency as “ESMA must examine a significant number of factors set out in Article 28(2) and (3) of Regulation No 236/2012 and the conditions imposed are cumulative”.\(^{40}\) In addition, the procedural requirement to consult ERSB before ESMA’s decision,\(^{41}\) the “temporary nature of the measures authorized” and the availability of judicial review add to the all in all sufficient limits of discretion.\(^{42}\)

The motive behind this argumentative effort is genealogic. Historically, the “no very large measure of discretion”-rule vis-à-vis EU agency powers stems from the Meroni judgment of the 1950s.\(^{43}\) Thus, the intense analysis of discretion signals that today’s constitution of EU agency administration still rests on the early judicial foundations and that Meroni – at least to some extent – is still good law. The delineation of discretion marks the perhaps last terminological connector between today’s doctrine of EU agency competences and the Meroni-foundations of the area.

However, the sustainability of the “no very large measure of discretion”-rule seems far from clear. Terminologically and in practice it may prove difficult to mark the line between an admissible “simple measure of discretion” and an inadmissible “very large measure of discretion”. Moreover, the ESMA approach to agency discretion collides with another line of jurisprudence. In particular, the EU Court of First Instance analyzed the Community Plant Variety Office (CPVO) – one of the more powerful agencies founded in the 1990s – and derived from the case law of the ECJ that “where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion” – and did not raise the slightest doubt that this leeway was perfectly legitimate.\(^{44}\) The ECJ upheld this approach by confirming that the CPVO actually has a “wide discretion” concerning annulment of a plant variety right under certain conditions.\(^{45}\)

Thus, it may turn out as the better alternative to leave the traditional understanding of limited discretion behind and instead turn to a standard similar to that of Art. 290 Sec. 1 TFEU, the central norm governing delegation of non-legislative acts to the Commission, that explicitly

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\(^{39}\) ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 54.

\(^{40}\) ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 48.

\(^{41}\) See Art. 28(4) and (5) of Reg. 236/2012/EU.

\(^{42}\) ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 50 pp.

\(^{43}\) See above A.

\(^{44}\) CFI, Case T-187/06, ECLI:EU:T:2013:522, Schräder/CPVO, at 59.

\(^{45}\) ECJ, Case C-546/12, ECLI:EU:C:2015:332, Schräder/CPVO, at 56.
demands that “essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power”.

5. Procedural safeguards

A fifth important element of the new constitutional order are procedural safeguards. This element is a conceptual complement to the normative empowerment of the agencies and the classification of degrees of discretion analyzed above. The ECJ seems to compensate for the increased substantial leeway of ESMA with particular emphasis on procedural requirements. Thus, the ECJ looks closely into the statutory design of the procedure leading to an ESMA-intervention that includes specific duties of consultation (i.e. the ESRB) and notification (of competent authorities concerned), but also into the requirements of publication and reason-giving that structure the ex post-communication of ESMA and the wider public. In addition, the ECJ evaluates the review- and sunset-clause that applies to ESMA-interventions. Last, but not least the options of judicial review are considered that have significantly improved with Art. 263 TFEU and Art. 277 TFEU. As a result, the ECJ acknowledges the actual procedural design of ESMA-regulatory action as constitutional.

Additional procedural safeguards are currently subject to discussion in EU administrative law scholarship. To improve accountability and procedural justice of agency administration suggestions include increased duties of reason-giving for agencification, an extension of impact assessments for EU non-legislative rulemaking and an increased role for the European Parliament is suggested. In the latter regard one might consider granting the European Parliament seats in agency boards or the empowerment of the European Parliament into a veto-player over agency decisions – a constellation with parallels to the legislative veto power of the U.S. Congress vis-à-vis executive rules rejected by the U.S. Supreme Court or to veto rights of the German federal parliament over executive rulemaking in the environmental sector.

Moreover, procedural safeguards are also the aspect at which Art. 298 Sec. 2 TFEU comes in. This competence norm enables the EU organizational legislator to enact an EU administrative

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46 Similarly, but with a different reasoning Chamon, The empowerment of agencies under the Meroni doctrine and article 114 TFEU: comment on United Kingdom v Parliament and Council (Short-selling) and the proposed Single Resolution Mechanism, European Law Review 39 (2014), p. 380, 387.
47 ECJ, Case C-270/12, ECLI:EU:C:2014:18, United Kingdom/European Parliament and Council (ESMA), at 50. 48 Art. 28, Sec. 10 Reg. 236/2012 reads: “ESMA shall review the measures referred to in paragraph 1 at appropriate intervals and at least every 3 months. If the measure is not renewed by the end of such a 3-month period it shall automatically expire. Paragraphs 2 to 9 shall apply to a renewal of measures.”
49 See above at C., I. and II.
52 For an account on various practical experiences Curtin, Executive Power of the European Union, 2009, p. 151-152.
procedure statute. The European Parliament has recently renewed its long standing support\(^{56}\) of the idea of a codification\(^{57}\) and officially requested the Commission to submit a proposal for a regulation on a “European Law of Administrative Procedure” on the basis of Art. 298 TFEU.\(^{58}\) The codification goal of the European Parliament meets we a widely discussed transnational academic initiative that presented a draft for an EU Administrative Procedure Act only recently.\(^{59}\)

### D. Conclusion and outlook

The global financial crisis of 2008 motivated the establishment of three particularly powerful EU agencies to promote re-regulation and enhanced oversight of financial markets. ESMA, EIOPA and EBA joined the phalanx of more than 30 EU agencies that had come into existence in the 1990s and early 2000s. With the new agencies in the financial sector, it became almost impossible to address the constitutionality through the prism of the traditional principles originating in the Meroni- and the Romano-judgment of the ECJ. Thus, the founding of the financial sector agencies accelerated a transformation process that was already visible in the Treaty of Lisbon: Through the agency-related treaty amendments of Lisbon and subsequent constitution building through the judiciary a new constitutional regime of agency administration began to emerge. The central contribution of the ECJ is the judgment of January 22, 2014, which rejected the action of annulment of the UK against the powers of ESMA to intervene in short selling activities.

Main elements of the new constitutional regime include the acknowledgement of EU agencies as (potential) regulators with the force of law, the exposition of the European Parliament as organizational co-legislator with the Council and the importance of functional legitimacy of agency administration. Moreover, EU agencies could be granted regulatory leeway as far as there are textual delineations for the exercise of power and compensation requirements through procedural safeguards. However, it deserves emphasis that the transformation to the new constitutional regime of the EU agency sector is still underway. So far, several key aspects keep underdeveloped. This holds true for the specifications and limits of the rule-making capacity of EU agencies, but also for the distinction from delegated rulemaking and implementation by the Commission under Art. 290 and 291 TFEU. Another follow-up problem to the groundwork of the ECJ is the transferability of the results to EU agencies with tasks beyond market regulation. For EEA, EASO or FRONTEX the question is whether the functional legitimacy attributed to ESMA extends to their competence profiles as well. Finally, the “no large margin of discretion”-approach of the ECJ in ESMA and the competing judgments observed above deserve closer analysis. It may well be that this last terminological connector to the Meroni-doctrine may not hold up for all times. All these are aspects a future research agenda on supranational administration should include.


\(^{58}\) Resolution of the European Parliament with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)).