

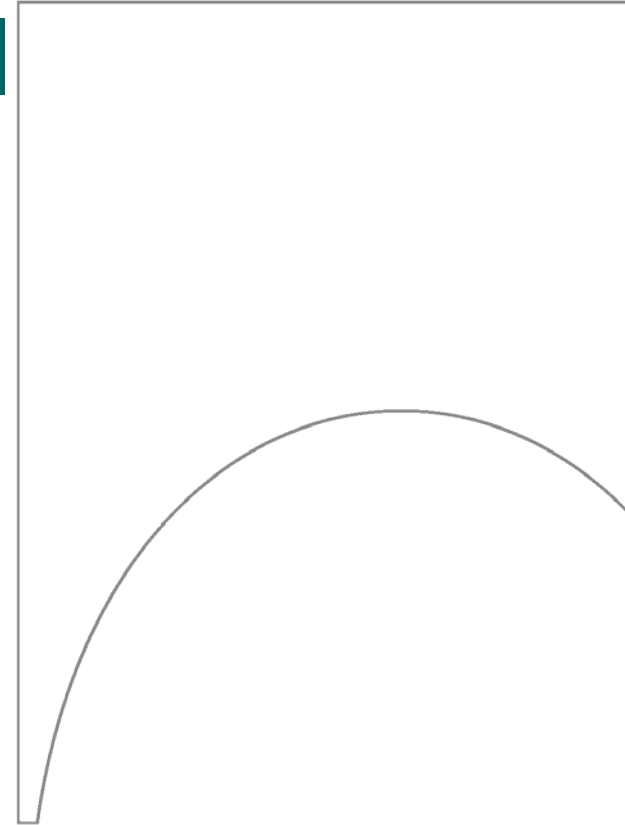
The European institutional setup on financial regulation – Meroni revisited

Stefan Griller

Faculty of Law

Salzburg Centre of European Union Studies (SCEUS)

Stefan.Griller@sbg.ac.at



Contents

- Meroni & Romano
- Meroni & Romano today
- Conclusions



content

- Meroni (1958) sets limits to the delegation of powers by and from the Commission to other bodies. The dividing line is between the permissible delegation of “clearly defined executive powers” and “discretionary power”:
- “The consequences resulting from a delegation of powers are very different depending on whether it involves **clearly defined executive powers** the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a **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**.”
- Romano (1981) deals with the transfer of powers by the ‘legislator’, i.e. the Council, not to the Commission but to an ‘agency’ established by secondary legislation.
- The ECJ held that It follows from the Treaty provisions on the implementation of EC law and on the system of judicial protection, that such a body “may not be empowered by the Council to adopt **acts having the force of law**”

rationale and topicality

- [Concentrating on delegation by the legislator (as for the ESAs)]: input oriented model of **representative democracy** (Article 10 TEU) + **institutional balance** + **judicial control**
- relevant for agencies today?
- Article 290 TFEU: The **essential elements** of an area shall be **reserved for the legislative act** and accordingly shall not be the subject of a delegation of power, AND
 - objectives, content, scope and duration of the delegation of power (**supplements and amendments**) shall be explicitly defined;
 - Conditions to be laid down explicitly
 - Revocation of delegation
 - Right of objection before entering into force
 - Untenable that the rationale should be irrelevant with regard to agencies; **wide discretionary powers** (Meroni) the pendant for essential elements?

rationale and topicality

- Articles 290 and 291 TFEU: concretion and implementation of secondary legislation is a **prerogative of the EU institutions and the Member States** (MS)
 - Agencies have to remain “the exception“ rather than the rule, and they must observe the limits for institutions; or stricter limits?
- **reviewability** (Meroni and Romano): Articles 263, 265, 267 TFEU (review; failure to act; preliminary ruling procedure); the matter is **settled**
 - BUT: this is not and never has been the only concern, see above

opinion of AG Jääskinen (Case C-270/12)

- Only the Commission can be recipient of Article 290 delegated powers
- By contrast, Article 291 implementing powers can be attributed to agencies, and they can be far-reaching
- BUT:
 - neither Article is mentioning agencies
 - The Meroni/Romano rationale is not aiming at the differentiation between delegation and implementation, but on the sufficient determination, limitation and control of agencies
 - “implementation” can be as far-reaching as delegation, as is illustrated by the example of short selling
- The test is: wide discretionary powers (including economic choices) being used in binding acts vis-à-vis third parties

M&R today I

exploring the dividing lines

- Not sufficient to use ‘Meroni-language’, e.g. Rec 22, Articles 10, 15 EBA-Reg: ‘shall not imply strategic decisions or policy choices’. Is it true, e.g. that regulatory technical standards do not include this?
- **Legally not binding activities**, even if of enormous practical importance, are not caught by Meroni
 - Opinions, guidelines, recommendations, single rulebook, supervisory handbook, etc.
 - Even if de-facto-binding like draft technical standards, as long as they have to be endorsed by the Commission in order to be binding
- Borderline: **“strong” guidelines and recommendations** (Articles 16 Founding Reg), **“with a view to establishing consistent, efficient and effective supervisory practices”**, and requiring justification for not complying

M&R today II

exploring the dividing lines

- Decisions in exceptional circumstances, e.g. Article 18(3) ESMA: Where the Council has determined the existence of an **emergency situation**, “*and* in **exceptional circumstances** where coordinated action by national authorities is necessary to respond to **adverse developments** which may **seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union**, the Authority may adopt individual decisions requiring competent authorities to take the **necessary action**” in accordance with the EU financial market directives.
- **broad discretion requiring economic policy choices (risk management, i.e. risk determination and assessment)**

M&R today III

exploring the dividing lines

- Article 28 Reg 236/2013, esp. the power to “prohibit or impose conditions on, the entry ... into a **short sale or a transaction** ... 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.”
- under the condition that the measures “address a **threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union** and there are cross-border implications”
- **broad discretion requiring economic policy choices (again risk management)**; e.g.: general prohibition covered?

- **“Meroni” establishes a blurry concept.** More than one consequence is defensible → there is a wide margin of discretion to *decide* for the ECJ, not for academia!
- Under a **strict reading**, wide discretionary powers to enact binding acts, e.g. those under exceptional circumstances, and regarding the prohibition of short sale might be illegal *per se*
- A more **flexible reading** (equally tenable and sound under the Treaty of Lisbon) would allow to contend that, *currently*, and despite their independence, the ESAs remain **sufficiently “under control”** esp. because of
 - the limited scope of these broad powers, combined with
 - accountability to the EP and the Council
 - restrictions by the EU budget
- **Additional – and advisable – control mechanisms** could include
 - Veto rights for the EP, the Council *and* the Commission
 - Callback mechanisms for the EP and the Council (with a right of recommendation for the Commission)