Regulatory Agencies in the EU: A Brief Overview

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Abstract: There is a clear trend towards the *progressive strengthening of the competences* of EU agencies. Initially confined to mere 'sunshine regulation' prerogatives, these bodies are increasingly vested with formal licensing powers and decision-making powers in the execution of Community law, in an evolution allowed by a more flexible reading of the so-called Meroni principle. The trend towards European *federalisation* is particularly evident in the financial sphere.

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I – Within the framework of what is known as *executive federalism*, Community law and policies are implemented, as a rule, by the State administrative apparatus (*principle of indirect administration*). The European Union's executive powers are exceptional and are justified by the need to safeguard the fundamental requirements of non-discrimination and legal certainty, the principles of the primacy of Community Law, direct applicability and direct effect, as well as uniform and effective implementation of EU Law.

Thus, when the principle of autonomy (institutional and procedural) jeopardises the effectiveness of EU Law or the principle of loyal cooperation (between member States) is insufficient to safeguard it, the possibility arises for the European legislator, in particular under Articles 290 and 291 of the TFEU (Treaty on the Functioning of the European Union), to *Europeanise competences*.

With respect for the principles of subsidiarity and proportionality, competences are transferred from member States to the European Union's institutions, bodies and agencies, in an increasingly profound trend towards the *communitarisation of national administrative rights*... and, in practice, the *erosion of the values of subsidiarity and national autonomy in the process of European integration*.

II – In terms of centralised implementation of Community Law and Policies, the Commission plays a key role, by virtue of the Treaties and, in particular, by virtue of the secondary Union law (based, above all, on Articles 290 and 291 of the TFEU), even though it is clear from (primary and secondary) Union law that there is a real *fragmentation of the European executive power*, spread across institutions such as the Commission, the Council and the European Central Bank.

Today, however, it is still possible to glimpse *a tendency to resort to the so-called (European Union) agencies*, especially in the context of the *networking of national, supranational and common administrative structures*, in an *integrated administrative action* that is increasingly relevant at Union level but omitted from the Treaties, even after the Lisbon revision.

III – In fact, we can see the *convergence of national administrative systems* - with the *communitarisation of the (organisational and procedural) structures of the member States* - and the development of a *mixed or composite system (joint administration) for the administrative execution of the Union's rules and policies*, in the genesis of a true *European administrative Union* anchored in *cooperation between various administrations and in the polarising role of the European agencies*.

In this way, and as a result of the (greater) control (of the Administrative Council) of the Union's agencies by the member States, the *comitology committees* have been losing prominence in the development of a *common or European administrative function*: the

agencies increasingly occupy the space of coeval *European governance*, as a privileged *forum* for the emergence of a genuine *co-administration*, one of the (most) striking features of current *European Administrative Law*.

IV – What's more, due to the shortcomings of the indirect implementation of EU law and policies (e.g. in the implementation of the Internal Market) and the political difficulties in directly reinforcing the Commission's mission and prerogatives, the *agencies have emerged as an unavoidable element in the current dynamic of regulation and supervision in the EU, which is institutionalised and centralised*. On the surface, this *Europeanisation of the regulatory dynamic* is indicative of the affirmation of the new bodies (the so-called agencies) at the institutional level of the Union in matters that (quite recently) have been the responsibility of informal cooperation structures between member States' administrations and between them and the European administration (e.g. electronic communications, energy, air safety and the safety of medicines). In reality, however, *the Union's agencies*, in the context of a *composite or integrated (European) administration, have basically served to strengthen the preponderance of the Commission*, as reflected in the paradigmatic reform of competition policy, apparently carried out in homage to the principle of subsidiarity and decentralisation objectives.

In a nutshell: *given the political resistance of other EU institutions and member States to strengthening its powers and competences, the Commission ended up consolidating and extending its role as European executive indirectly, through the emergence and increase of the mission and prerogatives of the EU agencies*, within the framework of certain constraints.

After all, *summo rigore*, what are European Union agencies?

V – In essence, for the sake of this speech, we are only talking about the (improperly) named regulatory agencies of the European

Union and not the *executive agencies*, which are truly part of the 'central administration' of the Union, at the service of and under the effective control of the Commission, even though they have legal personality.

In the context of the Union's regulatory agencies, we are focusing our attention on the *Community agencies* and not so much on the agencies of the so-called second and third pillars, where there are still strong intergovernmental features and a preponderance of the interests of the Council and the member States, given the extreme political sensitivity of the areas in question (Common Foreign and Security Policy and Area of Freedom, Security and Justice).

VI – Playing a central role in network cooperation between national, supranational and common administrations, European Union agencies are not easy to define, given their main characteristic: *heterogeneity*.

In fact, in response to the specificity of each sector and the demands of time and place, EU agencies are *ad-hoc* solutions, which is why we prefer sectoral regulations, possibly combined with the adoption of common rules in certain areas (e.g. access to documents, data protection), to the approval of a *Framework Law*. The latter, as a cross-cutting regulation for very different organisations, is an undesirable solution, as it either imposes solutions that are unsuitable for different areas of activity, or is so minimalist that it ends up being useless. It would be better to produce a set of general guidelines to inspire the Commission in its proposals to set up the organisations under analysis.

VII – Despite the enormous diversity of European Union agencies, which makes any attempt to standardise them inadvisable and explains the *imprecise and confusing terminology and classifications that prevail*, it is possible to point out *some of the characteristics that usually characterise them*: autonomy - organic and functional - from

the Commission, the Council and the member States; creation by the Community legislator; geographical dispersion of headquarters; institutional stability (established, as a rule, without any term of validity); predominance of representatives of the member States on the Boards of Directors; legal personality in the legal systems of the member States - on the other hand, in terms of *external relations*, we must stress the limitations of international legal capacity, which is practically limited to the conclusion of *headquarters agreements* with the member States where they are to be established and mere *administrative arrangements* with administrations in third countries and international organisations, without binding the Union. Genuine international conventions by Community agencies would involve political considerations that would jeopardise the Union's institutional balance.

VIII – There is a clear trend towards the *progressive strengthening of the competences* of EU agencies. Initially confined to mere 'sunshine regulation' prerogatives, these bodies are increasingly vested with formal licensing powers and decision-making powers in the execution of Community law (e.g. ACER), in an evolution allowed by a more flexible reading of the so-called Meroni principle.

The extension of the agencies' mission and powers ultimately strengthens the Commission's role in the regulatory Europeanisation of the most diverse sectors of economic and social life. In two ways: directly, by not abandoning the (rigidity of the) Meroni doctrine; indirectly, because the *centralisation* of regulation and supervision in the Union is based on the networking of national regulators (e.g. Council of Regulators in agencies such as ACER), modelled as the Commission's technocratic armies, over which the Commission often enjoys (some) functional supremacy.

IX – The trend towards European *federalisation* is particularly evident in the financial sphere, as a reaction to the serious crisis that erupted in 2007/2008, which we believe can only be overcome in the

long term with a *Banking Union* and a *Budgetary Union* - indispensable for putting an end to the vicious circles of sovereign risk/bank risk - as well as by consolidating and strengthening a genuine *Political Union*, otherwise the Euro and the European integration project will die.

Among other measures aimed at preventing systemic risks and guaranteeing the stability of the European financial system as a whole, we highlight the *strengthening of European regulatory and supervisory schemes*, with *the emergence of an EU Financial Supervisory System*, made up of a European Systemic Risk Board - a body with no binding powers - and (three) *European Supervisory Authorities with unequivocally stronger powers than the other agencies*.

Thus, in addition to *soft law powers* which, through the mediation of general principles of law, produce (some) legal effects ('*hoft law*'), the European Financial Supervisory Authorities have (more) impressive powers: for example, *quasi-normative powers* - the Commission, which is competent to adopt delegated acts under Article 290 of the TFEU, only 'approves' the draft regulatory technical regulations drawn up by the ESA and hardly ever departs from them - and *quasi-decisional powers*, due to the *de facto* force of the draft executive technical regulations that the Commission ends up, as a rule, approving, on the basis of Article 291 of the TFEU.

X – But the ESA, among other prerogatives (e.g. in carrying out stress tests), also have (real) *decision-making powers*:

1) in *(exceptional) emergency situations*, the ESA can adopt *binding commands for national regulators* by issuing specific measures; and in the event of non-compliance by these entities, the European financial supervisory agency can address an *individual decision directly to the national financial institution*, in a framework of unprecedented centralisation and overlapping (substitution) with national supervisors;

2) in *cases of violation of EU legislation, with the ESA decisions being able to be addressed directly and compulsorily to national financial institutions*, when national regulators do not comply with the Commission's decision - based on an ESA recommendation;

3) in cases of *dispute resolution between national supervisors*, if the decisions to resolve these disputes are not complied with, the ESA can also address *individual decisions to national financial institutions in areas of legislation that are 'directly applicable' to them*.

In this context, however, we must not forget the existence of the *fiscal safeguard clause (get-out clause)*, which allows States not to comply with the ESA decision if it has a significant budgetary impact... In essence, it is a projection of the *national approach that still persists in European financial supervision*, with the supervisors of each country taking responsibility for the different financial institutions in their State and the State bearing the respective supervisory failures.

For this reason, the *ESA's supervisory and sanctioning powers are practically non-existent*, although we must remember, for example, the important supervisory functions entrusted to ESMA in relation to credit rating agencies.

In a nutshell: *the ESA are not a genuine revolution at EU institutional level* and are still a long way from the status of the American regulatory agencies that are inspiring the agencification process in Europe. However, it is important to emphasise the *different qualitative nature of the financial supervisory authorities from the other European Union agencies*, even when they have decision-making powers, since these are mainly administrative in nature and are granted within a well-defined regulatory framework (e.g. EASA).

XI – With more or fewer powers, the trend is inevitably towards the *growing prominence of agencies in the Union's institutional complex*, because these organisations are seen as interesting ways of combining

the (functional) logic of efficiency with the demands of democratic and constitutional theory.

But *the 'proliferation' of EU agencies is fundamentally due to the synthesis of interests that they embody*: the interest of the member States - in controlling the Boards of Directors (greater than in the comitology committees or in relation to any Commission service); the interest of European institutions such as the Council and the European Parliament - disinclined to (excessively) strengthen the powers of the Commission; and the interest of the Commission itself, due to the possibility of concentrating on political tasks and the convenience of dispersing administrative execution to other bodies, insofar as these have restricted powers and remain under its authority and supervision.

XII – In this line of thought, on the one hand, *the Commission's (political) interest is served well by the rigid reading of the principle of institutional balance set out in the Meroni judgement*: the delegating authority cannot transfer to the agency powers other than those it itself possesses - the *nemo plus iuris* principle - which implies that the delegated entity fulfils the same requirements imposed on the delegator; even when there is authorisation for the delegation of powers, this must be express, it cannot be presumed; the scope of the delegation is restricted to powers of mere execution, strictly controllable by the delegator, and it is not possible to delegate competences that involve broad discretion.

However, just as in the United States of America, where the '*non delegation doctrine*' has been made more flexible with great pragmatism - namely through the increase in accountability mechanisms - we believe that a more elastic interpretation of the delegation of powers in the Union is desirable, in the interests of the *principle of realism*, administrative efficiency and the practicability of European governance.

A realism of (more) flexibility in the jurisprudential interpretation of the Meroni principle that is not only (more) appropriate to the Union's institutional *status quo* - the growing prominence of agencies with significant powers - but also (more) compatible with the fundamental dimension of the principle of institutional balance: the guarantee of judicial protection against abuses of power.

In fact, at the time the Meroni ruling was handed down, by limiting the possibility of delegating mere executive powers in Community institutional life, the Court aimed to guarantee the position of the metallurgical companies concerned in court; nowadays, the acts of the agencies are (expressly) subject to review, so there is no justification for crystallising a solution handed down several decades ago, in such a different and distant context (ECSC Treaty, delegation to private individuals and not to public bodies such as agencies) ...

XIII – On the other hand, *the Commission's (political) interest in using agencies (albeit with limited missions and prerogatives and under strict supervision) fits in well with the preference for using specific legal bases for the policies to be implemented (and for Article 114 of the TFEU) over Article 352 of the TFEU*: it makes it easier to set up these bodies, but gives them more limited mandates.

XIV – We realise that the European agencies are a relevant combination of different (institutional and State) interests, but we believe that they do nothing to end the EU's democratic deficit: *the overvaluation of technical expertise even carries serious risks of transferring decision-making power from politics to science and of democratic control of public decision-making*.

It is fundamental, in the current risk society, that political decisions are based on solid and duly substantiated technical studies, however, we cannot replace democratically legitimised governments with governments of competent and independent technocrats, guided by a supposed (and arrogant?) scientific neutrality...

XV – In the European Union, we recognise some advantages in the logic of networking and in a consensual vision of regulatory activity, especially in terms of due respect for the sovereignty of the nation State. However, agencies legitimised essentially on the basis of participation (and transparency) run the serious risk of the common good being captured by highly organised socio-economic interests: (European) governance based on the ideal of participatory democracy can only complement (and not replace) the traditional mechanisms of (representative) democracy, otherwise lobbies will triumph over popular will...

XVI – On this basis, we conclude that it is important to strengthen (certain) accountability mechanisms for European Union agencies, especially of *political control* - by member States and institutions such as the Council or the European Parliament - and, within a framework of prudent self-restraint by the courts, of *judicial control* - with, for example, the admission of direct appeal against (*de facto*) binding opinions (of the agencies), without prejudice to the questionability of the final administrative act (of the Commission).