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**OVERCOMING OVERLAPPINGS IN THE
EUROPEAN UNION
(*ENTIA NON SUNT MULTIPLICANDA PRAETER
NECESSITATEM ...*)**

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ABSTRACT

The paper aims at giving a glimpse to the sector of European agencies.

It explores the possibility of avoiding duplication of powers amongst European agencies or bodies and national entities that operate in the same field, taking into account the current political and economic context that is driven by the concern for efficiency gains.

It also gives guidelines to consider the relation between the integration process and the internal market regime. So, with a complete harmonisation, the EU bodies should be fully entitled to contribute to the implementation of the integration process. In these circumstances, there should be no room for national regulators and duplications of activity should be avoided. If there is not a complete harmonisation, there could be space for national authorities.

Consequently, a possible way forward could be to further develop administrative cooperation models that will reduce inefficiencies and costs due to the overlapping responsibilities between the European and the national levels.

Keywords: *overlappings, common approach, harmonisation, European agencies, coordination.*

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1. INTRODUCTION

The establishment of a growing number of European agencies, not envisaged explicitly by the Treaties for the absence of a specific provision, is one of the most important and controversial institutional developments in the European Union ⁽¹⁾.

In the three waves of European Union's "agencification" – covering their 1975 first appearance, their end of 1990's development, and their Twenty-First Century proliferation ⁽²⁾ – agencies have been established by European law-makers as independent legal entities entrusted with a number of technical and occasionally regulatory functions.

In recent years, this process has become particularly evident, leading to the "agencification phenomenon". Agencies turned out to be an important part of the executive branch, granted not only with information-gathering powers, but also with decision-making and supervisory powers ⁽³⁾. Besides, the Lisbon Treaty, entered into force in 2009, mentions the agencies in several general provisions, together with the institutions, bodies and offices ⁽⁴⁾, awarding them with further legitimacy.

Concern has been expressed, however, in the framework of institutional debate and legal theory, about the possible lack of a solid legal basis justifying the establishment of such agencies and the powers assigned to them, as well as the lack of adequate mechanisms to ensure their democratic accountability and the monitoring of their activity ⁽⁵⁾. The issue of the democratic accountability of the so-called independent authorities is a recurrent topic also in the debate in the Member States ⁽⁶⁾.

⁽¹⁾ The literature on European agencies is extremely wide. For a glimpse on the process of establishment of new agencies and for possible lines of development, see E. CHITI, *An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies*, (2009) 46 *Common Market Law Review*, Issue 5, pp. 1395–1442; more recently, see E. VOS and M. EVERSON, *European Agencies: What About the Institutional Balance?*, *Maastricht Faculty of Law Working Paper No. 4* (July 17, 2014).

⁽²⁾ For this categorization, see M. SCHOLTEN and M. VAN RIJSBERGEN, *The Limits of Agencification in the European Union*, in *German Law Journal*, 2014, Vol. 15, No. 7, pp. 1229-1230.

⁽³⁾ M. SCHOLTEN and M. VAN RIJSBERGEN, *The Limits of Agencification in the European Union cit.*, pp. 1224-1226, especially in relation to the recently established new EU financial regulators (EBA, EIOPA, ESMA).

⁽⁴⁾ For example, in Article 9 of TEU or in Articles 15, 16, 71, 123, 124, 127, 130, 228, 263, 265, 267, 277, 282, 287, 298, 325 of TFEU.

⁽⁵⁾ M. SCHOLTEN and M. VAN RIJSBERGEN, *The Limits of Agencification in the European Union cit.*, pp. 1225 and, especially, 1255, where it is affirmed that without formal Treaty changes the "unlimited agencification" in the EU will determine that citizens "are not given the opportunity to give permission to delegate vast public authority to bodies not explicitly envisaged in the 'contracts' that they have with those who are in power". But it must be reminded that the creation of autonomous agencies has been often justified on the grounds that not all tasks must be influenced by political considerations. So, for example, an agency fully accountable to Parliaments would represent, in most cases, a suboptimal institutional design; see G. MAJONE, *Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions*. *EUI Working Papers (RSCAS 1996/57)*.

⁽⁶⁾ According to the administrative organization of Germany, for example, as noted by Prof. Georg Hermes, of University of Frankfurt, in the Convention held at Luiss, on 6 December 2014, about *Le autorità amministrative indipendenti: le esperienze italiana e tedesca a confronto*, independent authorities are subject to the democratic principle, that implies that laws are adopted by the Parliament and executed by the Government, with the competent

In order to establish a more consistent and effective framework for the functioning of decentralised agencies, the European Parliament, the Council and the European Commission adopted a Common Approach in July 2012 ⁽⁷⁾, followed in December 2012 by a Commission roadmap with the initiatives for its implementation.

Taking that into account, the aim of this paper is to focus on the sector of European agencies in order to further explore the suggestion – proposed in *SOG Working Papers #16, April 2014* ⁽⁸⁾ – of avoiding duplication of powers amongst European agencies or bodies, and national entities that operate in the same field.

The perspective of the analysis could take into account the overlappings between the European agencies and the administrative bodies of the Member States or even between the European agencies themselves and other European bodies. As shown in the 2012 roadmap, a major objective for the implementation of the Common Approach is to enhance the agencies' efficiency and accountability and one of the initiatives to be pursued in this respect is to seek synergies between agencies, such as *“that of merging agencies whose tasks are overlapping and which would be more efficient if inserted in a bigger structure”* ⁽⁹⁾.

This paper does not give a definitive answer to the question of whether it is possible or not to avoid duplications or overlappings, but it could open an opportunity for academic research to verify the common criteria that are in charge of the Regulations already adopted by the European Union as regards the agencies and to propose – if suitable – a possible new framework, taking into account the current *“political and economic context that is driven by the concern for efficiency gains”* ⁽¹⁰⁾.

There is, in fact, a common feeling that the excessive regulatory power granted to European institutions or bodies – enormously increased during the recent years of the economic crisis ⁽¹¹⁾ – is not the correct solution to the problems that affect the material domains concerned.

Minister being politically responsible towards the Parliament. In Italy, on the contrary, independent authorities are not subject to a political influence of the Government.

⁽⁷⁾ The Common Approach, further detailed in paragraph no. 3, is designed to improve the agencies' governance and efficiency, and make them a more effective tool in implementing the policies of the EU. It includes a number of improvements to the management of these agencies, including the need for an objective impact assessment before deciding to create a new agency, criteria for the choice of the seat and the introduction of sunset or review clauses foreseeing the option of merging or closing down agencies. It doesn't apply to agencies operating in the field of Foreign and Security Policy, or to executive agencies. Regulation No. 58/2003 lays down the statute of executive agencies to which the Commission, under its own control and responsibility, may entrust certain tasks relating to the management of Community programmes. They are set up for a fixed period and must be based in the same location as the Commission.

⁽⁸⁾ See R. FERRARI ZUMBINI, *Overcoming overlappings (in alter parole... oltre 'questa' Europa)*, in *SOG Working Papers #16*, April 2014.

⁽⁹⁾ Roadmap on the follow-up to the Common Approach on EU decentralised agencies.

⁽¹⁰⁾ Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies of 19 July 2012.

⁽¹¹⁾ See, G. STOLFI, *“Tempi (post-)moderni: la Banking Union alla prova delle sovrapposizioni”*, forthcoming in the *SOG Working Papers Series*.

The redundant regulation, in other words, doesn't seem a solution, but, on the contrary, it brings to legislative "bulimia". In addition, the excesses in the creation of these bodies – whose functions could easily fall within the mandate of the European Commission itself – have determined a possible detachment from a model that requires efficiency and smoothness of functioning to be socially accepted by citizens. In other words, agencies *non sunt multiplicanda praeter necessitatem*.

In the next paragraphs, we will go through the current political debate on the agencies and the first attempt to give an institutional framework, constituted by the so called "Common Approach". We will then explore how the harmonisation process may offer an interpretative key for suggesting operational solutions to the question of the overlappings. Three branches of agencies will be then analyzed: the banking and financial sector ones, the authorities on competition rules and the European Public Prosecutor's Office. So, the economic side of the European Union will be associated with its role in protecting the interests of the citizens from the organised crime. Then, we will try to draw some conclusions.

2. THE CURRENT POLITICAL DEBATE ON THE AGENCIES

A debate about the role and functions of the agencies is going on at the European level. So, the topic of this paper is worthy of a consideration on the position expressed by the European affairs Committees of national parliaments, being the theme of EU agencies debated at the LII COSAC, held in Rome on 1-2 December 2014 ⁽¹²⁾, with specific reference to "*The democratic control on the EU agencies*".

The views expressed by the EU affairs Committees with regard to the establishment of agencies, the powers delegated to them, and the effectiveness of their work and of the existing accountability mechanisms by means of which EU institutions monitor their activity, are contained

⁽¹²⁾ COSAC is the acronym of the *Conference of Parliamentary Committees for Union Affairs*, a European body foreseen in Article 1 of protocol No. 1. Under this Article, COSAC may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. Contributions from the conference shall not bind national Parliaments and shall not prejudice their positions.

The LII Meeting was held at the Senate in Rome, according to the general practice of organizing it in the Parliament of the Member State holding the rotating presidency of the Council of the European Union.

in the COSAC *Twenty-second Bi-annual Report: Developments in European Union. Procedures and Practices* ⁽¹³⁾.

Almost a third of the Parliaments/Chambers represented in COSAC highlighted the important role of the EU agencies in implementing effectively and timely European policies in various fields, thus helping all the institutions to concentrate on core policy-making tasks.

Over a quarter of them expressed, however, criticism, mainly in relation to the lack of transparency, cost-effectiveness, good governance and accountability of EU agencies, but also in relation to their proliferation and duplication of activities.

As regards the effectiveness of agencies as a tool to support European policies, their importance has been highlighted in their capacity: to implement effectively and timely the European policies in the various fields; to ensure consistency, notably due to their technical expertise and know-how; to conduct independent surveys and provide evidence-based assistance and expertise to EU institutions and Member States; to help all the institutions to concentrate on core policy-making tasks; and to contribute to enhance the cooperation between Member States and the EU in important policy areas.

Considering the most critical remarks, a theme that came into question – and that is related to this paper – has been the proliferation of EU agencies and the duplication of their activities (Dutch *Eerste Kamer*, French *Sénat*, German *Bundesrat*) and the dubious necessity, usefulness or cost-effectiveness of agencies which raise questions of good governance and accountability and are “*part of member states’ appetite for a “juste retour” on their contributions to the EU budget*” (Finnish *Eduskunta*).

In particular, the establishment of new agencies has been deemed acceptable only after an evaluation of the need for a new agency and on appraisal of “*possible alternatives in the light of deregulation, subsidiarity, proportionality and concentration*” (German *Bundesrat*), also in relation to the current economic and budgetary restraints (United Kingdom *House of Commons*). Besides, it has been proposed by the Constitutional Affairs Committee of the European Parliament to introduce a review clause foreseeing the option of merging or closing down agencies.

The French *Sénat* came straight to one of the points of this paper, calling for a “*horizontal*” assessment of regulatory agencies undertaken by the European Commission, in order to include a systematic review of the added-value of their operation in comparison with the action of Member States, under the principle of subsidiarity. This review should also address possible

⁽¹³⁾ The XXX COSAC decided that the COSAC Secretariat should produce factual Bi-annual Reports, to give an overview of the developments in procedures and practices in the European Union that are relevant to parliamentary scrutiny. All Bi-annual Reports are available on the COSAC website at www.cosac.eu.

overlappings of competences between agencies, with a view to approximating or merging some of them.

The final Contribution of LII COSAC, taken into account these positions, made also some critical remarks on the theme. According to paragraph 4.2, approved on 2 December, “*COSAC notes that some Parliaments/Chambers expressed concerns in relation to the role and the functioning of some EU agencies, especially with reference to the lack of adequate oversight, governance and accountability, the risk of agency capture by sectoral interests, the usefulness or cost-effectiveness of agencies, their proliferation and a possible duplication of their activities and urge that these matters be given greater and the most detailed and transparent consideration before further agencies are proposed or established*”.

So, the argument of the duplication of activities and, more in general, of overlapping functions is under discussion in the political debate at the EU level and a more general debate is taking place even within the European Institutions.

As noted by the European Commission ⁽¹⁴⁾, agencies have been established on a case by case basis, and the process had not been accompanied with an overall strategic vision of their role and place in the Union. The endorsement, in July 2012, of a Common Approach on decentralised agencies, notably with a view to addressing a series of governance issues surrounding the growing number of agencies, at a time when streamlining of activities and improved performance are expected to contribute to efficiency gains, clearly shows the attention paid to the topic.

The issue of costs is also related to the establishment of new agencies. To ensure that needs are addressed in time of budget constraints, the European Commission ⁽¹⁵⁾ has grouped the agencies in three categories depending on the degree of maturity and expected evolution of tasks of each agency until 2020: – “cruising speed” agencies are well-established agencies with stable tasks ⁽¹⁶⁾; – “new tasks” agencies have a “cruising speed” part, for which tasks do not change from previous years, but which also have additional or modified tasks as explicitly foreseen by an amendment of their founding Regulation, or in case of additional tasks already foreseen in the

⁽¹⁴⁾ In the Commission Communication *Programming of human and financial resources for decentralised agencies 2014-2020*, COM(2013) 519, of 10 July 2013.

⁽¹⁵⁾ COM(2013) 519.

⁽¹⁶⁾ European Foundation for the Improvement of Living and Working Conditions (EUROFOUND), European Agency for Safety and Health at Work (EU-OSHA), European Centre for the Development of Vocational Training (CEDEFOP), European Fisheries Control Agency (EFCA), European Centre for Disease Prevention and Control (ECDC), European Food Safety Authority (EFSA), European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), European Union Agency for Fundamental Rights (FRA), European Institute for Gender Equality (EIGE), European Training Foundation (ETF), Translation Centre for the bodies of the European Union, Office for Harmonisation in the Internal Market (OHIM), Community Plant Variety Office (CPVO).

initial Regulation that are planned to enter into force at a later date ⁽¹⁷⁾; and – “start-up phase” agencies, which have been created recently and which have not yet reached a stable status ⁽¹⁸⁾.

At the end of the Communication, some conclusions are drawn: the continuous development of EU policies might impose that existing agencies are required to contribute with additional expertise. Possible legislative proposals modifying the scope of existing agencies will comply with the financial and human resources programming provided, while any new legislative proposal, which require additional human resources for existing individual agencies, will simultaneously require a corresponding reduction in the establishment plans of other agencies, and/or of the Commission if tasks are delegated from the Commission to agencies.

The problems raised by EU agencies, consequently, are firmly on the table. As it has been said, “*the absence of explicit treaty authorization for agency creation, the lack of clear reasons why agencies are necessary, and, at times, missing accountability obligations put the legitimacy of EU agencies’ under pressure*” ⁽¹⁹⁾. At the same time, the political and technical solutions offered by the EU agencies should not be underestimated.

3. THE “COMMON APPROACH”

The questions linked with the proliferation of EU agencies have led to the adoption, on July 2012, by the European Parliament, the Council and the European Commission of the Common Approach on decentralised agencies.

The non-binding character of the Common Approach does not hinder the strength of its principles, that have to be taken into account by the EU Institutions and by the Member States when dealing with agencies’ issues ⁽²⁰⁾.

⁽¹⁷⁾ European GNSS Agency (GSA), European Aviation Safety Agency (EASA), European Maritime Safety Agency (EMSA), European Railway Agency (ERA), European Network and Information Security Agency (ENISA), Agency for the Cooperation of Energy Regulators (ACER), European Environment Agency (EEA), European Medicines Agency (EMA), European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), European Police Office (EUROPOL), European Police College (CEPOL), European Union’s Judicial Cooperation Unit (EUROJUST), Body of European Regulators for Electronic Communications – Office (BEREC – Office).

⁽¹⁸⁾ European Banking Authority (EBA), European Insurance and Pensions Authority (EIOPA), European Securities and Markets Authority (ESMA), European Chemicals Agency (ECHA), European Asylum Support Office (EASO), Agency for the operational management of IT systems (eu.LISA).

⁽¹⁹⁾ M. SCHOLTEN and M. VAN RIJSBERGEN, *The Limits of Agencification in the European Union cit.*, p. 1236.

⁽²⁰⁾ For a critical analysis of the Common Approach, showing that while progress has been made on a number of issues, it is still eclipsed by several serious factors, especially the non-binding character of the document, see M. SCHOLTEN, *The Newly Released ‘Common Approach’ on EU Agencies: Going Forward or Standing Still?*, in *Columbia Journal of European Law*, Vol. 19, No. 1, F.1. 2012.

Some of its principles are relevant for the arguments raised in this paper about overlapping functions of the agencies and it's worth to recall them.

Point No. 4 of the Common Approach relates to the sunset or review clause, that should be inserted in the founding acts of the agencies, accompanied by the concomitant provisions for disbanding the agency, addressing in particular issues related to staff contracts and budget arrangements. Point No. 60 repeats this suggestion, adding that sunset or review clause should be considered in the second evaluation of the activity of the agency, to be conducted after ten years from its establishment.

Point No. 5 considers the possibility of closing an agency, when dealing with underperforming situations, or merging different agencies in cases where their respective tasks are overlapping, where synergies can be contemplated or when agencies would be more efficient if inserted in a bigger structure.

Point No. 10 concerns the composition of the Management Board of the agencies, which, in order to improve their performance while guaranteeing the full participation of the Member States and of the Commission, should comprehend "*one representative from each Member State*", two representatives from the Commission and other relevant members. Even if this principle seems not in line with a simplified governance, its presence in the Common Approach testifies the need for the Member States to be present in the decision making process of the agencies.

Point No. 22, taking into account their contributions to the work of agencies' internal bodies, considers advisable that Member States regularly review the adequacy of the resources they assign for this purpose. And it is important that they ensure information flows between the different authorities concerned at national level in relation to the agencies' activities, *inter alia* by appointing contact points in their national administrations for relations with a given agency. This contact point should be in principle the representative of the Member State sitting in the Management Board.

Point No. 23 concerns the administrative support that agencies need to operate in the most efficient manner and proposes three options: improving or extending the services provided by the Commission; merging smaller agencies to achieve economies of scale based on an impact assessment; sharing services between agencies, either by proximity of locations or by policy area.

Point No. 65 foresees that agencies should exercise their functions in coordination with different actors charged with the definition and implementation of the given policy, and that they should also clarify the sharing of roles between them and their national counterparts.

All these principles should consequently be considered when evaluating the agencies' activities, since – apart from their legal enforceability – they give the European Commission and

the Member States a solid guidance for improving the efficiency and the cost-effectiveness of European agencies, especially when dealing with overlappings of functions between them at the EU level and with national authorities.

But, given the integrated system between the European Union and Member States, these principles express a tendency that must be taken into account also at the national level in considering the performance of national authorities and their connection with the corresponding European ones, in order to avoid overlappings and duplication of functions. In other words, if EU level seeks efficiency for EU agencies, also the national level must do the same. The problem is how these aspects are dealt with, in order to find practical solutions.

4. THE HARMONISATION PROCESS AND THE SUBSIDIARITY PRINCIPLE, AND THEIR CONNECTION WITH THE INTERNAL MARKET

Given the results of this overview on the positions of European Chambers and Institutions, a possible attempt to offer guidance on the overlappings between EU agencies and corresponding national authorities could start from the concept of harmonisation, the cornerstone of the European integration process with reference to the internal market regime.

In the framework of 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 (Article 114 of TFEU), a central role is played by the latitude in the use of the harmonisation competence by the EU legislature, in order to reach the objective of having an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured ⁽²¹⁾.

Against this background, the discretionary power of the European Legislature in using a harmonisation technique or the other allows to categorize different methods of harmonisation: maximum, partial or minimum.

⁽²¹⁾ For the concept of harmonisation, see L. WOODS – P. WATSON, *Steiner and Woods EU Law*, Oxford University Press, 2014, pp. 341 ff.

With the maximum harmonisation, the application of the European rules determines the attraction at the supranational level of the regulation of the subject matter, without any margin left to the national legislators.

With the partial harmonisation, in the same subject matter, both European and national provisions can be applied, considering that the European level does not cover every aspect.

With the minimum harmonisation, Member States are obliged to respect the principles of the rules fixed at the European level, but they maintain a certain degree of flexibility in implementing them.

Article 114 of TFEU – and consequently its reference to the concept of harmonisation – has been used also for legitimizing the establishment of bodies or agencies in the European Union, entrusted with technical and occasionally regulatory functions.

Full institutional legitimacy of this approach has been granted by the Court of Justice, with its Judgment of the Grand Chamber on the European Network and Information Security Agency (ENISA), of 2 May 2006 (case C-217/04).

The Court ruled that using the expression *measures for the approximation* in Article 95 of the Treaty on European Community (now Article 114 of TFEU) the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the most appropriate method of approximation for achieving the desired result, in particular in fields with complex technical features. But nothing in the wording of Article 95 of TEC (now Article 114 of TFEU) implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States.

The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate ⁽²²⁾.

The same concept has been expressed, in 2014, in a Judgment of the Court of Justice on the *ESMA-shortselling* case, stating that “*the EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought. That is the case in particular where the measures*

⁽²²⁾ Court of Justice, Judgment of 2 May 2006, Case C-217/04, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*.

to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately” (23).

It has to be underlined that the European Parliament, during the procedure before the Court, stated that the EU has the power to establish agencies and give them a role in the application of that provision (Article 114), provided that such agencies form part of a normative context requiring the approximation of provisions relating to the internal market. On the contrary, the opinion of the Advocate General opted for the legal basis of Article 352, also for the provided enhanced democratic input due to the involvement of national Parliaments (24).

In this framework, the role of the principle of subsidiarity is obviously crucial. According to Article 5, paragraph 3, of TEU, the constitutive elements of the principle of subsidiarity are: a) areas which do not fall within the exclusive competence of the Union (25); b) the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level (transnational nature of the problem – necessity test); c) the objectives of the proposed action can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (added value – effectiveness test) (26).

Given that for granted, it is possible to adopt an approach concerning the issue of the overlappings that can be based on the different types of harmonisation and so to try to give a clue on the possible solutions to the problems laid down in this paper.

Consequently, if there’s a full harmonisation, the EU bodies are entitled – and so responsible – “for contributing to the implementation of a process of harmonisation ... in order to facilitate the uniform implementation and application of acts based on that provision” (27). In these circumstances, there should be no room for national regulators, and duplications of activity should be avoided, in full respect of the dynamic, supranational, dimension of the principle of subsidiarity. The topics that have a cross-border, “federal”, dimension should fall within the

(23) Court of Justice, Judgement of 22 January 2014, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, related to the powers granted to European agencies and their compliance with the requirements of the Meroni doctrine. In fact, the United Kingdom challenged before the Court of Justice the conferral of power to ESMA (the Agency in charge of the financial markets) as being too wide according to the Meroni doctrine itself.

The “Meroni doctrine”, according to the Court of Justice, Judgment of 13 June 1958, Case C-9 e 10/56, *Meroni v. High Authority*, prohibits the delegation of powers by an EU institution where that delegation 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”; in principle, the same doctrine admits the delegation of clearly defined executive powers, whose exercise can be subject to a strict review in the light of objective criteria determined by the delegating authority. See also, Court of Justice, Judgment of 14 May 1981, Case C-98/80, *Romano*, which prevented an Administrative body to be empowered by the Council to adopt acts having the force of law.

(24) The opinion of Advocate General Jääskinen was delivered on 12 September 2013.

(25) These areas relate mainly to the shared competences of the European Union, amongst which the internal market is the first in the order. According to Article 4, paragraph 2, let. a), of TFEU, “Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; ...”.

(26) For these concepts, see D.A. CAPUANO, *The role of national Parliaments in the legislative process of the EU. A view from the Italian Parliament*, in *Democracy and Subsidiarity in the EU*, II Mulino, Bologna, 2013, pp. 241 ff.

(27) Court of Justice, Judgement of 2 May 2006, Case C-217/04.

competence of the EU level, whilst a limited competence of the national level could possibly be granted by the same EU legislation, but not by national legislation.

If there is not a complete harmonisation (minimum or partial or other minor types), there could be more space for national authorities, in full respect of the static, national, dimension of the principle of subsidiarity.

This approach found a political support in the European Parliament that, in a recent resolution, called for the introduction of a legal basis in order to establish Union agencies which may carry out specific executive and implementing functions conferred upon them by the European Parliament and the Council in accordance with the ordinary legislative procedure⁽²⁸⁾. The ordinary legislative procedure recalls the procedure foreseen for the internal market legislation, so confirming the possibility of making Article 114 of TFEU the core legal basis of the EU agencies. Also the LII COSAC supported this view⁽²⁹⁾.

And the Court of Justice, in the *ESMA-shortselling* case, stated that “*with regard to the scope of Article 114 TFEU, it should be recalled that a legislative act adopted on that legal basis must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as its object the establishment and functioning of the internal market*”⁽³⁰⁾.

In the next paragraphs, a special attention will be paid to some important European agencies in order to describe their main functions and tasks and to suggest the lines of a possible academic research. The description can give guidance to verify the assumption of this paper, namely that the harmonisation principle, in relation to the internal market regime, may justify the complete attraction to the European level of the powers related to the sector involved⁽³¹⁾.

⁽²⁸⁾ European Parliament Resolution of 12 December 2013 on Constitutional problems of a multitier governance in the EU, P7_TA(2013)0598.

⁽²⁹⁾ According to point No. 4.3. of the Contribution, “*COSAC supports the European Parliament’s call for the introduction of a legal basis to the establishment of agencies which may carry out the specific executive and implementing tasks conferred upon them by the European Parliament and the Council in accordance with the ordinary legislative procedure*”.

⁽³⁰⁾ Court of Justice, Judgement of 22 January 2014, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union* (paragraph 100).

⁽³¹⁾ A different question is related to the democratic accountability of the agencies. Shifting competences and regulations to the European level must be supported with a consistent level of parliamentary control. In this perspective, a central role must be assigned to the European Parliament, mainly in the activity of monitoring and controlling the technical rules that these bodies often adopt with the technique of the delegated acts (Article 290 of TFEU). For all these problems, see COSAC 22nd Bi-annual Report, on www.cosac.eu, debated at LII COSAC meeting, held in Rome, on 1-2 December 2014.

5. THE BANKING AND FINANCIAL SECTOR

The first group of agencies that can be evoked are those of the European banking system at the European level, the so called “Banking Union” ⁽³²⁾.

In the academic debate on the “strength” of the reform, it has been noted that “*the wishful fulfillment of the Banking Union is becoming a gradually developing case, still unfinished and uncertain in its final definition, of which only sometimes one can see the borders*” ⁽³³⁾.

A good description of the setting of the European regulatory mechanisms is the one that represents them as concentric circles ⁽³⁴⁾. Another way of looking at the system could be to see it as arranged in distinct regulatory “layers”, with a differentiated application.

The first “layer” would be the one (pre-existing, albeit slightly, the Banking Union) that applies to all EU Member States and which contains the rules of the ESFS (European System of Financial Supervision). This area is part of the complex architecture centered on the authority of macro-prudential supervision (ESRB) and the three sectoral authorities (EBA, EIOPA, ESMA), appointed to dictate uniform rules ⁽³⁵⁾ whose application and integration is devoted to national authorities, as in Italy the Bank of Italy and CONSOB ⁽³⁶⁾.

The second “layer” would be the one which, unlike the previous, concerns only Euro Area Member States (and those who wants to join it voluntarily), for which the only supervising authority (the exclusive one for the “significant” banks) will be the European Central Bank, thus giving birth to the so-called “SSM”, the Single Supervisory Mechanism ⁽³⁷⁾.

It has been said that these “layers” partially overlap because the Euro Zone Member States will at the same time remain part of the ESFS: in other words, the (secondary) rules should continue to be dictated by the existing authorities (ESRB - EBA, ESMA, EIOPA). The conditional clause is necessary because, to be honest, the European Central Bank (ECB) has already taken – according to the regulation establishing the SSM – its own “Manual”, which is nothing different from a set of secondary rules for the supervisory activities.

⁽³²⁾ See, also, G. STOLFI, “*Tempi (post-)moderni: la Banking Union alla prova delle sovrapposizioni*”, to be published in *SOG Working Papers*.

⁽³³⁾ See M. MANCINI, *Dalla vigilanza nazionale armonizzata alla Banking Union*, *Bank of Italy Legal Research Papers*, 73/2013, p. 10.

⁽³⁴⁾ M. MANCINI, *Dalla vigilanza nazionale armonizzata alla Banking Union cit.*, 2013, p. 5.

⁽³⁵⁾ In direct application of the criteria laid down in the *de Larosière* Report, of 25 February 2009, paragraph 208, sect. III), which recommended that “*a legal mechanism should be put in place so as to ensure that, once an Authority has decided on a given interpretation (through guidance, recommendations, etc.), this interpretation becomes legally valid throughout the EU*”.

⁽³⁶⁾ The Italian financial supervisory Authority.

⁽³⁷⁾ Council Regulation (EU) No. 1024/2013 of 15 October 2013, conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

How, specifically, will the division of regulatory powers between the EBA and the ECB be arranged? And how much of the regulation will remain in the hands of the national banking authorities?

Further complication can be seen from another point of view: regulations, in fact, are of immediate application, but the directives are addressed to the Member States. Consequently, the ECB could face a situation in which, potentially, it would have to apply, to the States to which it exerts its own supervision, their own national transposition measures ⁽³⁸⁾.

Moreover, it must be remembered that a new uniform system for the resolution of banking crises, the Single Resolution Mechanism or SRM, has been adopted ⁽³⁹⁾. This system is composed of a regulation and a directive; it also provides for the establishment of a “*Single Resolution Board*”, that is a new body with expertise in the field, which will have to coordinate with the other EU and national authorities. This task will not be simple.

This perspective clearly shows that a real unification in the banking sector is proceeding rapidly ⁽⁴⁰⁾.

The financial sector is a bit behind, but the integration proceeds very quickly and the establishment of the three agencies in charge of its supervision and regulation is an index of the results achieved.

Obviously, a problem of overlappings may arise, but the harmonisation process and the legal basis given by Article 114 of TFEU offer a wide umbrella. When there is a full harmonisation, by regulation or directive, the power of European bodies or agencies should be considered as essential. A limited competence of the national level could possibly be granted by the same EU legislation, as it is for the non “significant” banks under the SSM. When, on the contrary, the harmonisation process is not full, the competence of national authorities cannot be avoided.

In this sense, the Judgment of the Court of Justice in the *ESMA-shortselling* case may also pave the way to a different interpretation of the *Meroni-Romano* doctrine on delegation of powers

⁽³⁸⁾ Article 4, paragraph 3, of Regulation (EU) No. 1024/2013, states that for the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, “*the national legislation transposing those Directives*”.

⁽³⁹⁾ Regulation (EU) No. 806/2014 of the European Parliament and of the Council, of 15 July 2014, 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; Directive 2014/59/EU of the European Parliament and of the Council, of 15 May 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms.

⁽⁴⁰⁾ A further step, through the establishment of a truly federal system and the enlargement of its scope of application to the entire Union, has been suggested, pending the consideration of the Commission proposals on the Banking Union, by J. CARMASSI, C. DI NOIA, S. MICOSSI, *Banking Union: A Federal Model for the European Union with Prompt Corrective Action*, (2012), CEPS Policy Brief, No. 282, 18 September 2012.

at EU level ⁽⁴¹⁾. The Judgment legitimises the conferral to the three financial authorities of regulatory and exclusive supervisory powers, which seems in contrast both to the *Romano* Judgment, for the respect of the decisions of the EU agencies by the national authorities and for their judicial review ⁽⁴²⁾, and to the *Meroni* Judgment, for the involvement of discretionary powers.

Taking the decision of the Court of Justice to its consequences, Article 114 of TFEU seems to be a solid legal basis to permit the overruling of the doctrine on delegation of powers to EU agencies and open the debate for a new approach.

The Court of Justice gave also guidance on which articles of the TFEU would constitute a legal framework of possible powers vested to agencies. While the Treaties do not contain any provision to the effect that powers may be conferred on a Union body, office or agency, a number of provisions in the FEU Treaty none the less presuppose that such a possibility exists (under Articles 263, 265, 267 and 277) ⁽⁴³⁾.

6. COMPETITION RULES

Another phenomenon of potential overlappings concerns the “authorities” in charge of the competition rules, which are identified in the European Commission and in the Member States’ competition authorities.

The rules on competition and on State aid are of exclusive competence of the Union whenever they are necessary for the functioning of the internal market (Article 3, paragraph 1, of TFEU).

For Article 2, paragraph 1, of TFEU, when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

⁽⁴¹⁾ See footnote No. 23.

⁽⁴²⁾ M. SCHOLTEN and M. VAN RIJSBERGEN, *The Limits of Agencification in the European Union cit.*, p. 1250.

⁽⁴³⁾ Court of Justice, Judgement of 22 January 2014, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*. And, in this sense, “that conferral of powers does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU” (paragraph 83).

Consequently, the administrative powers related to this matter are normally exercised “directly” by the European Commission (which could be considered as the main “Agency” of the European Union) ⁽⁴⁴⁾, but there is a substantial set of activities that involve national authorities.

In fact, as affirmed in the Commission Communication *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* ⁽⁴⁵⁾, Regulation (EC) No. 1/2003 ⁽⁴⁶⁾ empowered Member States’ competition authorities (“NCAs”) and national courts to apply all aspects of the EU competition rules, in addition to the European Commission ⁽⁴⁷⁾. It also introduced new, close forms of cooperation between the Commission and NCAs, notably in the framework of the European Competition Network (“ECN”).

The Communication found that the new system has positively contributed to the stronger enforcement of the EU competition rules, but that some aspects deserved further evaluation, such as the differences in procedures and fining powers.

The new enforcement system largely relies on market players assessing the compatibility of their conduct with the EU competition rules and on targeted *ex post* enforcement action by competition authorities. In support of this, the Commission has given extensive general guidance to assist undertakings and national enforcers.

So, Regulation (EC) No. 1/2003 has considerably enhanced the enforcement of the EU competition rules by NCAs and national courts, establishing multiple enforcers of the EU competition rules, which have led to their much wider application. It also introduced cooperation tools and obligations to ensure efficient work sharing and effective cooperation in the handling of cases.

NCAs, consequently, have become a key pillar of the application of the EU competition rules. This has meant that the work carried out in the ECN has become increasingly important to ensure coherent enforcement and to allow stakeholders to benefit from a more leveled playing field.

But a problem of overlappings did indeed arise and it is the same EU legislation, being the competition policy of exclusive competence of the European Union, that tries to solve it.

⁽⁴⁴⁾ There is a parallel with the Constitutional jurisprudence on Article 118 of the Italian Constitution and on the attraction at the State level of the administrative powers whenever necessary in accordance with the principle of subsidiarity, so determining the attraction also of the related legislative powers.

⁽⁴⁵⁾ COM (2014) 453 final, of 9 July 2014.

⁽⁴⁶⁾ Council Regulation (EC) No. 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁽⁴⁷⁾ See S. BRAMMER, *Concurrent jurisdiction under Regulation 1/2003 and the issue of case allocation*, (2005) 42, *Common Market Law Review*, Issue 5, pp. 1383–1424. For the spillovers of this Regulation on the private antitrust enforcement, see W. WURMNEST, *A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition*, in *German Law Journal*, 2005, Vol. 6, No. 8, pp. 1173-1190.

Article 12, paragraph 6, of Regulation (EC) No. 1/2003, in fact, states that the initiation by the Commission of proceedings for the adoption of a decision of infringement of the competition rules shall relieve the competition authorities of the Member States of their competence to apply Articles 105-106 of TFEU. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

The Italian system may also give guidance and seems consistent with the pragmatic approach proposed in this paper.

Article 1 of Law 10 October 1990, n. 287 (*Rules for the Protection of Competition and the Market*), states that the scope of the Law relates to all agreements between undertakings which may affect trade between Member States and to all abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it and to all concentrations between undertakings which are not subject to Articles 105-106 of the TFEU.

It will be the national authority on competition ⁽⁴⁸⁾, if it considers that a question does not fall into the domain of its jurisdiction according to Law n. 287, to inform the European Commission, transmitting all information available.

According to Law n. 287 of 1990, the relation between European and national legal systems is defined by the dimension of the breach of the competition rules. If the breach is relevant within the European internal market, the European Commission will be in charge of its detection and will ensure the compliance to the rules of the Treaty. The breach which is relevant only on the national market will be investigated by the national authority ⁽⁴⁹⁾.

In this perspective, the competition sector is dealt with at the European level whenever it is necessary in reason of the reference market. The principle of subsidiarity in its dynamic dimension is, therefore, crucial to justify the operational role of the power at a supranational level. And the Court of Justice construes the concept of effects on the trade between Member States very broadly, so leaving little room for the applying of different standards at national level ⁽⁵⁰⁾.

Therefore, it seems confirmed that the internal market regime - recalled by Articles 101 and 102 of TFEU, on competition policy - may attract to the European level the regulatory discipline of any administrative body, prospecting a shading role for the national authorities in charge of the same sector, being them competent to regulate breaches of the competition rules

⁽⁴⁸⁾ Autorità garante della concorrenza e del mercato.

⁽⁴⁹⁾ Italian Council of State, Sect. VI, decision No. 1192/2012.

⁽⁵⁰⁾ W. WURMNEST, *A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition cit.*, p. 1176.

only when they are related to the national level, and with their power granted by the EU legislation itself.

7. THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Other bodies that are not operating in a regime of formal harmonisation may be conducted to the Union level competence as a consequence of their mission to protect specific interests of the Union, as it should be for the European Public Prosecutor.

Organised crime uses the European integration process, adapting its trafficking at the European level, and conversely makes use of the procedural mechanisms of individual Member States to hamper the investigation of crimes and their prosecution. In this perspective, the EU funds and the internal market offer new possibilities of committing crimes that affect the financial interest of the Union and therefore the Lisbon Treaty provides for a new tool, the European Public Prosecutor's Office (EPPO), which shall exercise the functions of prosecutor in the competent courts of the Member States in relation to the crimes affecting the financial interests of the Union (Article 86, paragraph 2, TFEU).

Under Article 86 of the TFEU, a legislative proposal to establish a European Public Prosecutor's Office from Eurojust was submitted by the European Commission on 17 July 2013⁽⁵¹⁾.

The negotiations in the Council took the Ministers to a provisional text (doc. 15862/1/14) as a basis for future work. The Ministers confirmed, as the basis for further discussion, the principles of a collegial organisation of the EPPO. They also confirmed the principle that the EPPO has a priority competence to investigate and prosecute offences affecting the Union's financial interests.

As concerns the overlappings with national authorities, the text under discussion proposes a model whereby:

a) the European Public Prosecutor's Office and national prosecution authorities will both be competent to investigate and prosecute offences affecting the financial interests of the Union;

⁽⁵¹⁾ On the proposal, see T. ALESCI, *La Procura europea per i reati lesivi di interessi finanziari: la proposta di regolamento tra luci ed ombre*, in *Archivio Penale*, LXVI, 1, 2014, pp. 149-167; see also, LEENDERT H. ERKELENS et al. (eds.), *The European Public Prosecutor's Office. An extended arm or a Two-Headed dragon?*, Asser Press, 2015.

b) the European Public Prosecutor's Office will have a priority right, as expressed in Article 19 of the draft regulation, to investigate and prosecute the offences, and also have a right of evocation of investigations already started by national prosecution authorities. If the European Public Prosecutor's Office decides to exercise its competence, the national authorities shall not exercise their own competence in respect of the same offence. If the national authorities have already started a criminal investigation, the Office may take over the investigation by exercising its right of evocation.

If the European Public Prosecutor's Office is informed or becomes otherwise aware of the fact that an investigation in respect of the same case is already undertaken by the authorities of a Member State, the European Public Prosecutor's Office shall consult with these authorities and shall thereafter decide whether to open its own investigation and request the respective Member State's authorities to transfer the case to the European Public Prosecutor's Office in accordance with the right of evocation. Where the European Public Prosecutor's Office exercises its competence, the competent authorities of the Member States shall forthwith transfer the case to the Office and refrain from carrying out further acts of investigation in respect of the same offence. The European Prosecutor's Office may exercise the right of evocation at any time during the investigation;

c) minor cases, as defined in the Regulation, will in principle be handled by national prosecution authorities.

Furthermore, the set-up of the future European Public Prosecutor's Office should imply the sharing of administrative and support resources with Eurojust – which plays a role in its creation under TFEU Article 86 – as well as the redeployment of Olaf staff for the implementation of the European Public Prosecutor's Office operational functions ⁽⁵²⁾.

The case of the EPPO – that must be completed – shows that the connection with the financial interests of the Union (Article 86 of TFEU) and the relation of these interests with the general interest of the EU, as it is for the internal market, allows its functioning and its scope to be associated to those of a federal body, in charge of a specific sector that cannot be dealt with efficiently at national level. Whoever operates with the EU funds, as well as whoever operates inside the internal market, needs to feel safe and secure, and to that end a European Public Prosecutor's Office is welcome.

The functions of the EPPO relate consequently to “European” crimes that involve the European level; and the responsibility of the EPPO is determined in bringing to judgement the

⁽⁵²⁾ COM(2013) 519.

authors of these crimes before national courts. But with a “European” body and with a European legislation.

The draft regulation has not completed its consideration before the European legislators. However, a first conclusion can be drawn. The crimes that affect the financial interests of the Union should be investigated, prosecuted and brought to judgment by a supranational body, without any overlapping with the national authorities or, in this case, prosecutors, being possible to grant power to them only via the EU legislation itself. In this sense, when the European Public Prosecutor’s Office exercises its competence, the competent authorities of the Member States shall not exercise their own, with respect of the same offence (Article 19).

If this will be an efficient solution, in helping to better define the roles between national and European authorities – and without overlappings – is a question that will have to be verified in the final text to be adopted and in the (future) judicial practice.

8. THE DIFFERENT MODELS OF ADMINISTRATION AT THE EUROPEAN LEVEL

In connection with the practical solutions to the problem of overlappings that may be proposed, the evolution of the different models of administration at the European level must be taken into consideration. Their changes give, in fact, the rationale of what could be a model in which the European administration take the lead, beyond concurrence with national administrations, and may conduct, for the harmonised sectors, to a single European level of administrative bodies, or – in a more pragmatic approach – to a Euro-National model of administration, in which the two levels mutually cooperate ⁽⁵³⁾.

Historically, the first period of the European integration did not assume an important role for the Community administration. The objective was to have an extremely reduced apparatus in order to put a limited emphasis on the European bodies and concentrate the administration in the hands of the Member States. This is the period of indirect administration ⁽⁵⁴⁾.

⁽⁵³⁾ It’s possible again to make a parallel with the Constitutional jurisprudence on Article 118 of Italian Constitution and on the attraction at the State (Union) level of the administrative powers related to a harmonised sector, whenever necessary, in accordance with the principle of subsidiarity.

⁽⁵⁴⁾ See M.P. CHITI, *Forms of European administrative action*, in *Law and Contemporary Problems*, 2004, available at <http://www.law.duke.edu/journals/lcp>; see, also, E. CHITI, *La costruzione del sistema amministrativo europeo*, in *Diritto amministrativo europeo*, Giuffrè, Milano, 2013, pp. 78 ff.

The Community administration, consequently, had no hierarchical power on national administrations nor did it have power to mandate and control the exercise of power at the national level. Only when there was a breach of Community Law, the Commission, via the infringement procedures, acted against the States, but not against the single administrations.

The second period of the European integration process produced a sort of co-administration model, that related both to the side of the organization (with the rise of comitology) and to the side of the activity (with the composite administrative procedures).

As for what relates to the side of the organization, the Committees are bodies where the interests of the Member States and of the European Union are integrated, forming a composite administrative structure granted with administrative powers. Their composition relies on the European Commission and on the administrative structures of the Member States, which designate one member to participate to the meetings of the Committees.

The attraction of administrative powers to the supranational level has been enhanced by these bodies, which represent a compromise solution between the necessity to devolve to the European level the regulation and control of certain domains of activities and the reluctance of Member States to lose their traditional administrative powers. Therefore, something similar to a partnership, at the administrative level, has been created to satisfy both sides.

As for what relates to the side of the activity, in certain occasions it happens that a joint exercise of administrative powers concerning a European interest occurs. It is possible to talk of a composite European administrative procedure that leads to a sort of co-administration model, where the function is devolved to both the European and the national levels, jointly. The sense is to allow to both levels the monitoring and controlling of the activity concerned, in a model of administrative partnership, without either part losing the control of it.

The third period of the European integration process saw the rise of an interesting phenomenon, which is the one dealt with in this paper: the agencies. Their proliferation has to be put in connection with the increasing integration between the European administration and national administrations in dealing with technical functions and tasks.

The agencies appear to be more structured than the Committees of the second period, since in this new model representatives of the Commission and of the Member States usually sit and decide together within the Board of Management ⁽⁵⁵⁾.

The next evolution must take into account the entry into force of the Lisbon Treaty, that contains a specific provision related to the “*European administration*”. In fact, Article 298 of TFEU specifies that “*in carrying out their missions, the institutions, bodies, offices and agencies*

⁽⁵⁵⁾ As already seen in paragraph No. 3 with reference to point No. 10 of the Common Approach.

of the Union shall have the support of an open, efficient and independent European administration”. This provision – which marks an important step in the integration process – unifies in a single notion different administrative organisations, amongst which agencies are included.

And the important thing to underline is not only the reference to the concept of “independence” of the administration, but the reference to the word “European” associated with the word administration in a Treaty Article, that gives the idea of a perspective development of the public administration theories applied also to the European level with a new, solid, legal basis ⁽⁵⁶⁾.

9. CONCLUSIONS

Trying to draw some conclusions, it has to be underlined that EU Member States have allowed a progressive increase in the number and the functions of the European agencies – linked with the growth of their autonomy and flexibility in administrative action – only on condition that within the European structures elements of nationality were included. The intent has been to maintain a sort of substantial power of interference on the action of European administrations ⁽⁵⁷⁾.

And so, often – in the analysis of the governance of agencies – it is possible to find colleges, councils, committees, boards, which are also composed by representatives of the Member States. The composition of the internal bodies of the agencies balances the needs of the supranational administration with the needs of national administrations to participate, as some kind of watchdogs on the safeguards of national prerogatives. And the Common Approach of 2012

⁽⁵⁶⁾ On the role of European bodies, that are reshaping the role of national institutions and directing the system towards the formation of complex public powers, see R. FERRARI ZUMBINI, *L'Europa del diritto al crocevia: un reticolo di quesiti*, in *justice.luiss.it(2014)*, 18 March 2014.

On the possibility of using of Article 298 TFEU for a codification of general rules and principles of administrative procedures of the EU, see *ReNEUAL Model Rules on EU Administrative Procedure, Book I – General Provisions*, 14 ff., available at <http://www.reneual.eu/>; see, also, E. CHITI, *Adelante, con juicio: la prospettiva di una codificazione del procedimento europeo*, in *Giornale di diritto amministrativo*, n. 7/2014, 677 f.; C. NAPOLITANO, *EU Administrative procedures. Presenting and discussing the ReNEUAL draft model rules (Resoconto del Convegno ReNEUAL - Bruxelles)*, in *Rivista Italiana di Diritto Pubblico Comunitario*, No. 3-4/2014, 879 ff.; J. ZILLER, *Alternatives in Drafting an EU Administrative Procedure Law, European Parliament - Directorate General for Internal Policies - Policy Department C: Citizens' Rights and Constitutional Affairs*, November 2011.

⁽⁵⁷⁾ See N. BASSI, *Agenzie nazionali ed europee*, in *Enc. dir., Annali II, Tomo 2*, Giuffrè, Milano, 2008, 69. See, also, R.D. KELEMEN and A.D. TARRANT, *The Political Foundations of the Eurocracy*, in *West European Politics*, Volume 34, Number 5, 1st September 2011, pp. 922-947, where the authors affirm that the EU has established an extensive “Eurocracy” outside of the Commission hierarchy, including over 30 European agencies and a number of networks of national regulatory authorities. But, in doing this, the design of EU regulatory institutions – “the Eurocracy” – was driven not by functional imperatives but by political considerations related to distributional conflict and the influence of supranational actors.

reflects, in point No. 10, this aspect, by requesting that the Board of Management of the agencies should include “*one representative from each Member State*”.

In this direction, the establishment of agencies sometimes took place along with a parallel enlargement of national administrations, in order to facilitate their participation in the exercise of the new “shared” function.

A second conclusion that can be drawn relates to the need to give an accurate response to the issues determined by the institutional pluralism and therefore to the need to find a unifying element that can be functional to the public actions concerning a certain subject matter.

It is obvious that the progressive centralization at the supranational level of competences previously exercised by the Member States through their administrative bodies generated overlappings and duplications, to a certain extent inevitable considering the European integration process.

The solutions to the problem of overlappings must in any case take into account the assessment of the factual situation, in which the attraction of power to the European level is never neutral for the EU Member States.

Without advocating solutions that could “endanger” entire sectors of national administrations, which are now, at least partly, doubled in functions and roles by the establishment of corresponding bodies/agencies of the European Union, a possible way forward lies in the possibility of developing models of administrative cooperation (or coordination) that will reduce to the minimum inefficiencies and costs deriving from the proliferation of overlapping responsibilities and tasks between the European center and the national peripheries.

It is especially the model of administrative networks that has increased its role in the wake of the surge of the European agencies phenomenon⁽⁵⁸⁾. The aim, obviously, is that of advancing in the integration process by means of administrative integration built upon loyal cooperation between European and national administrations. The most prominent example of this common European administrative system is ESFS (European System of Financial Supervision), centered on the authority of macro-prudential supervision (ESRB) and on the three sectoral authorities (EBA, EIOPA, ESMA)⁽⁵⁹⁾.

But, taking this approach into account and prospecting an even more “federalist” solution, it can be assumed and proposed that the presence of the Member States in the process – even if politically desirable – should not be considered as necessary in fully harmonised sectors; unless, it is the EU legislation itself that confers power to them.

⁽⁵⁸⁾ N. BASSI, *Agenzie nazionali ed europee cit.*, p. 56.

⁽⁵⁹⁾ E. CHITI, *La costruzione del sistema amministrativo europeo*, in *Diritto amministrativo europeo cit.*, pp. 81-82.

In this perspective, the principle of subsidiarity – which is one of the key principles in the adoption of a large part of European legislation that has as legal basis Article 114 of TFEU, on measures for the approximation of the provisions which have as their object the establishment and functioning of the internal market – would enhance the European dimension, in which the knowledge of the issues is more structured and complete than at the national level. It would also legitimize the allocation at the European level of a stable European administration which will be entrusted with regulatory and administrative tasks ⁽⁶⁰⁾.

The proper functioning of the internal market is the legitimating factor of the European Union, that consequently justifies the attractions to the European level of national disciplines and administrative tasks. A significant number of European agencies operate in a context of harmonisation of laws, regulations and administrative provisions of the Member States.

In this context, according to the well known principle “*entia non sunt multiplicanda praeter necessitatem*”, duplication of structures and activities should be avoided, even if this clashes with the national interest of some Member States, and even if this could lead to an evaluation about the effective utility of some national agencies.

Therefore, if the primacy of EU law is a cornerstone principle of the Union law, and if the European Court of Justice has a prevailing position on domestic jurisdiction in governing EU law, the same criteria must apply also to the administrative function related to fully harmonised sectors, being the principle of subsidiarity an adequate factor to attract to the supranational level the administrative tasks and activities of the Member States relating to “federal” matters of the European Union.

In the end, according to the two pillars of the principle of subsidiarity, it is the mission of the European Union to act whenever it is necessary (necessity test) and to deliver to the citizens an added value through its policies (effectiveness test).

⁽⁶⁰⁾ N. BASSI, *Agenzie nazionali ed europee cit.*, p. 69.

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