INSTITUTIONAL BALANCE, EU AND NATIONAL AGENCIFICATION PROCESSES: THE NEED FOR DIALOGUE*

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RESUMEN: En las últimas décadas, la UE ha sido protagonista en el proceso de agencificación en Europa, tanto a nivel de la UE, con las agencias de la UE como una forma de gobernanza de la UE, como a nivel nacional, introduciendo reguladores nacionales independientes a través del derecho derivado. El artículo explora el papel del equilibrio institucional en el proceso de agencificación, destacando su papel decisivo a nivel de la UE y sus deficiencias a nivel nacional. Esta diferencia se ha manifestado de varias maneras. Por un lado, la debilidad de los organismos de la UE se debe a la ponderación de las preocupaciones sobre el equilibrio institucional de la UE y, por el otro, encontramos reguladores nacionales fuertes donde el equilibrio institucional nacional no era una preocupación principal. Esto ha llevado a problemas, con intrusiones en la independencia de la agencia en algunos casos y problemas de responsabilidad en otros,

ABSTRACT: In recent decades, the EU has been a protagonist in the agencification process in Europe, both at the EU level – with EU agencies as a form of EU governance – and at the national level – introducing independent national regulators through secondary law. The article explores the role of the institutional balance in the agencification process highlighting its decisive role at the EU level and its shortfalls at the national level. This difference has manifested itself in several ways. On the one hand, the weakness of EU agencies results from weighting EU institutional balance concerns and, on the other, we find strong national regulators where national institutional balance was not a primary concern. This has led to problems –with intrusions on agency independence in some cases and accountability issues in others – in accommodating independent national regulators.

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para acomodar a reguladores nacionales independientes. El artículo explora diferentes formas de interconectar a la UE y las agencias nacionales en el proceso de agencificación, particularmente a través del concepto de identidad constitucional nacional, y propone que el diálogo y la comunicación entre todos los actores de la UE y nacionales involucrados en el proceso sean más fluidos.

PALABRAS CLAVE: Agencias de la UE– Autoridades Reguladoras Nacionales– Equilibrio Institucional– Identidad Nacional Constitucional

The article explores different ways to interconnect the EU and national agencies in the agencification process, particularly through the concept of national constitutional identity, and it proposes making the dialogue and communication between all the EU and national actors involved in the process more fluid.

KEYWORDS: EU Agencies– National Regulatory Authorities– Institutional Balance– National Constitutional Identity

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I. INTRODUCTION

The agencification process in Europe presents two primary dimensions, one at the level of the European Union (EU) and the other at the national level. Over the last three decades, the EU has relied on agencies to perform the functions under its competence. EU agencies have thus increased in number and now form a decisive part of the EU administrative landscape[1]. At the same time, the EU has reinforced agencies as a form of government and administration at the national level. The EU has introduced agencies in several sectors as a means of organizing national regulators. The energy and telecommunications sectors are good examples because they show the evolution of EU legislation which first merely envisaged an agency independent of private operators that was subsequently built up into a regulatory agency that was also independent from national legislators and executives[2].

The EU has played a determinant role at both levels, especially as an agent of change. Since the 1990s, intense scholarly debate over the role of agencies in rethinking EU governance has taken place, a debate focusing on the agencies' impact on EU institutional balance, the tension between technocracy and democracy, and accountability[3]. The

1. For a map of the current EU agencies, see the official website of the EU: *https://europa.eu/european-union/about-eu/agencies_en*.
2. The first and second generations of EU legislation on energy (1996-1998 and 2003) and telecommunications (1980's-1990's and 2002) only required that regulators be separated from private actors. A full national regulatory agency, independent from national legislators and executives in addition to private actors, was adopted in the third generation of EU legislation on energy and telecommunications (2009). Section IV infra describes the evolution of this legislation in detail.
3. In the 1990s and 2000s, political scientists and lawyers developed an intense research agenda on EU agencies. The research groups of the European University Institute (EUI) and the contributions of Giandomenico Majone, were especially important in establishing the terms of the debate and subsequent scholarship has been built over their contributions. For the key role of the EUI, see A. Kreher, «Introduction», in A. Kreher (ed), *The New European Agencies. Conference Report* (European University Institute, 1996) at 1, 1-4. Section III infra refers, when appropriate, to some aspects of this debate.

debate has translated into EU institutional action through the creation of agencies whose competences are severely limited[4]. This rich discussion contrasts with the scarcity of attention devoted to the role of the EU at the national level of the agencification process. The EU has played a leading role in articulating powerful national regulatory agencies through EU law, especially in Member States unfamiliar with such forms of administration, but has not confronted the perils that have been identified at the EU level. Simply put, it seems that the accommodation of agencies in the national institutional framework is perceived as an internal affair in which the EU has little say.

Accommodating agencies within the national framework may prove difficult, however, depending on the constitutional structure of the Member States. Agencies are more or less familiar to national constitutions depending on the legal and political culture of each Member State[5]. The balance of powers between national institutions is often altered when new actors such as agencies are introduced. The relationship between national executives and parliaments changes and the role of the judiciary must be recalibrated to handle the decisions of agencies. The alteration of the balance of powers not only involves a new distribution of competences among the relevant actors, but it also raises issues of accountability and democratic process. Some national parliaments may not be equipped to scrutinize agencies; executives may be unable to coordinate them to ensure horizontal policy coherence; and the judiciary may not be up to the task of reviewing technocratic decisions of agencies and thus hesitate over the level of scrutiny/deference to be applied.

This is not a mere internal question for Member States that the EU can ignore. The effectiveness and the aims pursued by EU law are at stake. The EU seeks truly functional, independent and accountable national regulatory agencies. If a national constitutional framework is unable to hold agencies accountable –whether because either the legislator, the executive or the judiciary lacks the necessary expertise, resources or competence to carry out the task– the ultimate purpose of EU law is jeopardized.

This article is organised as follows. The discussion begins by studying the role of institutional balance in the debate over agencies at the EU level. I address the meaning and significance of this principle for the EU (II) and its relevance on the debate over EU agencies (III). Then, I explore the attitude of the EU towards the national institutional balance principle when the EU articulates independent agencies at the national level

4. The development of EU agencies –and their limits– is the result of rich interaction between scholars and the EU institutions. Section III infra shows the leading role of the scholarship in bolstering EU agencies, the cautious support of the Commission and the role of the other EU institutions, especially the limiting position of the European Court of Justice (ECJ).

5. The United States and United Kingdom public administrations have a long political and legal tradition of supporting agencies. However, most European continental administrations rely on French administrative law and are less familiar with agency oversight. In this political and legal tradition, regulatory agencies were only common in the financial sector until the 1990s –central banks and securities and exchange commissions– and antitrust. However, regulatory agencies in other economic and social sectors –such as energy and telecommunications– were rare until the 1990s and the EU initiative was decisive for their implementation. See M. Thatcher, «Regulation after delegation: independent regulatory agencies in Europe», (2002) 9:6 *Journal of European Public Policy* 954, 955-956.

(IV). Finally, the article offers some proposals to deal with the two dimensions of the agencification process more coherently and, therefore, to connect the concerns raised at the EU level to those that also exist in the national sphere (V).

II. INSTITUTIONAL BALANCE: A NATIONAL AND EU PRINCIPLE

It is difficult to list all the characteristics of contemporaneous constitutionalism. The task starts easily enough: popular sovereignty, fundamental rights, democracy as a key decision-making principle, constitutional rigidity and supremacy, judicial review of legislation, but can go on and on. It is easy, however, to obtain agreement regarding the centrality of the separation of powers doctrine. Some authors have even qualified separation of powers as perhaps the most central characteristic of constitutionalism[6].

Separation of powers doctrine is relevant from at least two different perspectives. On the one hand, it provides a tool for limiting government power through the allocation of functions between institutions and the controls implemented for mutual supervision among the branches of government. From the other perspective, separation of powers doctrine seeks to optimize decision-making processes by assigning functions and powers according to the capabilities and institutional advantages of each institution. The first perspective emphasises the limiting character of constitutionalism whereas the second focuses on enhancing governance. Without minimizing the importance of the latter dimension of the doctrine, the limiting powers perspective of the doctrine has been predominant from the legal standpoint. The doctrine was born of a desire to avoid potential abuses of government power and its limiting function has been central ever since[7].

Although the essence of the separation of powers doctrine is common to most constitutions, its specific articulation varies across legal systems. The specific institutional design of the polis –whether following presidential, parliamentarianism, or hybrid models– conditions the operation in practice of the doctrine, but, even more importantly, legal thought is crucial for understanding how the separation of powers doctrine works in a specific constitutional framework[8].

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6. See R. Bellamy, «The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy», in R. Bellamy and D. Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Blackwell, 1996) at 24, 24; D.S. Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006) 111.
7. Following the earlier formulations of Sydney and Locke, Montesquieu and Hamilton/Madison established the basis of the separation of powers doctrine as a limiting powers clause. For Montesquieu, because the «constant experience» shows that «every man invested with powers is apt to abuse it», the «power should be a check to power». See C. Montesquieu (translated by T. Nugent in 1752), *The Spirit of Laws* (Batoche Books, 2001) 172. For Hamilton/Madison, because «men are not angels', it is necessary to develop a system of checks and balances. See A. Hamilton or J. Madison (Publius), «The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments», (1788) *Federalist Papers* n.º 51.
8. I refer to the notion of «Legal Thought or Consciousness» of Duncan Kennedy: «the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment. The main particularity of this consciousness is that contains a vast of number of legal

Legal formalism[9], now less prevalent in the world yet nonetheless relevant ever since French revolutionary constitutionalism, particularly in continental Europe, has understandably led to a formalistic understanding of the separation of powers doctrine[10]. Under this conception, the three branches exercise powers that are different in nature and so must be separated, meaning the interconnections between the branches should be all but inexistent. Legal formalism puts special emphasis on the distinction between the legislative function –to be left in the hands of legislators and executives in the political branches– and the judicial function, which in theory responds only to the principles and criteria of legal science, not politics. Because of the sharp distinction drawn between these functions, the formalist separation of powers tends to result in a static doctrine that is incapable of evolving and, therefore, impedes the interchange or transfer of competences between institutions[11].

Contrariwise, legal antiformalism, promoted especially within the United States legal intelligentsia, leads to a dynamic conception of separation of powers[12]. Legal antiformalism recognizes the difficulties of separating law from politics, blurs the distinction

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rules, arguments, and theories, a great deal of information about the institutional workings of the legal process, and the constellation of ideals and goals current in the profession at a given moment». See D. Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 2006) 27.

9. See D. Kennedy, «Legal Formalism», in N. Smelser and P. Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences*, vol. 13 (Elsevier, 2001) 8634-8637. Legal formalism understands law as a complete and closed social science, separated from other disciplines, especially politics, and therefore is autonomous and self-sufficient.

10. For an analysis of the formalistic version of the separation of powers doctrine, see M.C. Packard, *The Separation of Powers Doctrine: Rationales, Applications and Bibliography* (Nova Science, 2002) 50-60; K.J. Harriger, «The Separation of Powers in the Modern Context», in K.J. Harriguer (ed), *Separation of Powers. Documents and Commentary (Understanding Constitutional Principles)* (CQ Press, 2003) at 15, 15-26. For an explanation of the specific developments of the formalistic understanding of the separation of powers under French revolutionary constitutionalism, see M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Clarendon, 2 ed., 1998) 193-233.

11. See as an example the debate about the existence and scope of the non-delegation doctrine in the United Sates. The formalists' support of the doctrine defends either that legislative powers cannot be delegated or the delegation is possible only if it is not too broad or entails too much discretion. See T.W. Merrill, «Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation», (2004) 104 *Columbia Law Review* 2097, 2102-2120. The doctrine was used to preserve the distinction between the legislative and the executive branch only in 1935, when the United States Supreme Court struck down two statutes because of the broadness of the delegation of legislative powers in favour of the executive. See *Panama Refining Co. v Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp v United States*, 295 U.S. (1935). Nowadays the doctrine is deactivated in practice due to the predominance of the dynamic and antiformalism understanding of the separation of powers doctrine. See S.G. Breyer, R.B. Stewart, C.R. Sunstein, A. Vermeule, *Administrative Law and Regulatory Policy. Problems, Text, and Cases, Sixth Edition* (Aspen, 2006) 38.

12. Legal antiformalism is a heterogeneous response in the United States to the completeness and autonomy of the law as a basis of legal formalism. The progressive school (1890s-1920s), legal realism and the New Deal (1920s-1930s) and finally post-legal realism after the Second World War (with different legal movements such as the Legal Process School, Law and Economics or Critical Legal Studies) link law with other social sciences such as politics, economy or behavioural sciences.

between the legislative and judicial functions and pays special attention to the mutual control of the branches and the equilibrium and balance between them[13]. The strict enumeration of separate powers is secondary as the three branches can share and delegate competences. This version of the doctrine is also dynamic, in that the powers of the three branches are seen to evolve over time depending on the historical circumstances[14]. The key function of separation of powers from this perspective is maintaining the proper balance between all the branches to avoid the concentration and abuse of power. For this reason, the use of the expression «checks and balances» is more common than «separation of powers» among those who adopt an antiformalist approach because «checks and balances» better captures the idea of balance and mutual control.

Formalistic/nonformalistic approaches aside, the principle of separation of powers is well rooted in contemporaneous national constitutional law. It is also a characteristic feature of the EU constitutional framework[15]. It is not explicitly recognized in the treaties, but the overall design and operation in practice of the EU reflects concern for this principle[16]. Undoubtedly, the supranational nature of the EU makes differences with the national arrangement of the principle inevitable, especially with regards the design of EU institutions. National institutions are separate organs that perform different functions,

13. From the very beginning, United States constitutional law has adopted a version of the separation of powers principle based on the notion of balance and equilibrium, leaving aside the mere separation of functions between the three branches of government. See J. Madison (Publius), «These Departments Should Not Be So Far Separated As to Have no Constitutional Control Over Each Other», (1788) *Federalist Papers* n.º 48 (1788). In this regard, United States constitutionalism connected with the first formulations of Locke and Montesquieu, also emphasizing the notion of mutual control and balance, and moved away from the distortions of French revolutionary constitutionalism which brought to continental Europe the formalistic understanding of the separation of powers principle.

    The developments of legal antiformalism in the United States, especially the emergence of legal realism in the New Deal, reinforced the already existing dynamic version of the separation of powers in the United States. During the New Deal, the new understanding of the law, connected with other social sciences and opened to new methods, reshaped the classical relationship between the three branches and a new institutional balance emerged. See M.J. Horowitz, *The Transformation of American Law, 1870-1960. The Crisis of Legal Orthodoxy* (Oxford University Press, 1992) 213-246.

14. The New Deal is an example of the reformulation of the functions and competences of all the branches in the United States. The strengthening of the executive power –with the explosion of agencies and the regulatory state– and the setback of the judicial and legislative branches in the economic affairs shows how works the evolutionary and dynamic checks and balances doctrine in the United States. See C.R. Sunstein, *After the Rights Revolution* (Harvard University Press, 1990) 18-24.

15. K. Lenaerts and A. Verhoeven, «Institutional Balance as a Guarantee for Democracy in EU governance», in C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002) 35-36.

16. For two reconstructions of the EU as a checks and balances system in which legitimacy derives from Madison theories, see A. Héritier, «Elements of Democratic Legitimation in Europe: An Alternative Perspective», (1999) 6:2 *Journal of European Public Policy* 269; and A. Moravcsik, «In Defence of the "Democracy Deficit": Reassessing Legitimacy in the European Union», (2002) 40:4 *Journal of Common Market Studies* 603.

yet all derive from a single polity, whereas the supranational character of the EU involves a pluralistic polity. EU institutions much represent several different communities and interests. A few examples of the allocation of such representation are the delegates of Member States who sit on the Council, the representatives elected by popular vote who sit in the Parliament or appointment to serve the supranational interest in the Commission or the ECJ. Even federal or regional States composed of very diverse states, regions, provinces or departments are not comparable to the EU in this respect[17]. Some authors have argued that the nature and idiosyncrasy of the EU should be considered in terms of a «mixed government» structure rather than a «separate powers» one[18].

The differences between national and EU levels end, however, with the composition and design of EU institutions. Once the various interests are accommodated and accounted for, the practical operation of EU institutions follows national separation of powers doctrine. First, the treaties allocate the functions and competences of each EU institution, spreading the EU's public power among several bodies. The language used by EU primary law makes an explicit connection to national constitutional experiences by establishing that the EU Parliament and the Council exercise the «legislative» function, the Commission ensures the «application» of EU law and the ECJ its «interpretation and application»[19]. Second, several mechanisms such as shared competences, the allocation of the initiative to act and the obligation to consult or the judicial review allow for the mutual control of the institutions[20]. They are connected and have tools to act and counteract to the decisions of their counterparts.

This brief description of the separation of powers principle at the EU level shows how a non-formalistic understanding of the doctrine is at work. EU institutions share functions, they are not isolated or strictly separated, and they have evolved over time. The resulting institutional map is thus dynamic rather than static[21] and the ECJ has always emphasized that the balance of powers between EU institutions should be respected[22]. The expression «institutional balance» used in EU language signifies something

17. For a deep analysis about the relationship between federalism and the EU, see M. Burgess, *Federalism and European Union: The building of Europe, 1950-2000* (Routledge, 2000).
18. G. Majone, «Delegation of Regulatory Powers in a Mixed Polity», (2002) 8:3 *European Law Journal* 319, 326-328.
19. Articles 14(1), 16(1), 17(1) and 19(1) TEU.
20. The Parliament and the Council share the legislative function, whereas the executive function –implementation of EU law – is shared by the Commission and Member States through comitology and the Commission and Member States' administrative apparatus; the Commission is empowered to initiate the legislative procedure; in some matters the Council is exclusively competent, in others the Parliament should be consulted; and EU secondary law and national law implementing EU primary and secondary law are subject to review by the ECJ.
21. J.P. Jacqué, «The Principle of Institutional Balance», (2004) 41:2 *Common Market Law Review* 383, 387-391.
22. Beyond the debate about EU agencies that will be addressed in section III infra in which the ECJ has relied on the principle of institutional balance, the definition of the principle in the *Chernobyl* case in relation to the prerogative of the Parliament to file an annulment action against the Commission or Council acts deserves special attention: «the Treaties set up a system for distributing powers among the different Community institutions, assigning to each

very similar to the «checks and balances» formulation in the United States tradition. The principle of balance or equilibrium between EU institutions, established at each historical moment by EU primary law, should thus guide the day-by-day operation of the EU institutions. This principle is particularly relevant when institutional innovation occurs through EU secondary law. Indeed, the institutional balance principle has attracted a great deal of attention in the debate over the creation and development of EU agencies.

III. THE RELEVANCE OF EU INSTITUTIONAL BALANCE IN THE DEBATE OVER EU AGENCIES

Scholars and EU institutions alike have shaped their arguments and policymaking preferences using the principle of institutional balance. Overemphasis on institutional balance may even be a crucial factor behind the weakness of the EU agencies.

Leading scholars in the debate on EU agencies have argued that the institutional balance principle must be considered when creating and empowering EU agencies[23]. In practice, however, the dynamic and non-formalistic approach to the principle allows the transfer of powers to the EU agencies only if they remain accountable to all the existing EU institutions in order to preserve «institutional balance»[24]. Once again, the principle has been understood as requiring a balance of powers of the EU institutions and, therefore, only when EU agencies do not alter the existing balance can they be developed[25]. In response, the scholarly debate has shifted from the legitimacy of the agencies' creation in the EU institutional framework to the accountability measures that hold EU agencies accountable to their principals – EU institutions[26]. EU agencies can negatively affect the

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institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community» (Case 70/88 *European Parliament v Council*, ECLI:EU:C:1990:217, para. 21). The ECJ also said: «Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur» (ibid. at para. 22). For a description of the ECJ's case-law on the origins and construction of the principle of institutional balance, see Jacqué, n 21 supra, at 384-386.

23. See, in particularly, the Report *The Role of Specialised Agencies in Decentralising EU Governance* (Chapter III) sent to the Commission in 1999. This Report was coauthored by G. Majone, M. Everson, L. Metcalfe and A. Schout.
24. X.A. Yatanagas, «Delegation of regulatory authority in the European Union. The relevance of the American model of independent agencies», (2001) 3/01 *Jean Monnet Working Paper* 1, 38-39.
25. D. Curtin, «Holding Quasi-Autonomous EU Administrative Actors to Public Account», (2007) 13:4 *European Law Journal* 523, 540-541.
26. Behind the label framed by Majone «no one controls and independent agency, yet the agency is "under control"» and its approach based on a «combination of control mechanisms» (see G. Majone, «The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union», (1997) 3 *EIPASCOPE* 1, 4-6), scholars have studied a plethora of accountability mechanisms which keep accountable EU agencies. *Inter alia*, (a) the definition of specific legal mandates and objectives or clarity in the delegation (D. Coen and M. Thatcher, «The New Governance of Markets and Non-Majoritarian Regulators», (2005) 18:3 *Governance: An International Journal of Policy Administration and Institutions* 329, 340; M. Busuioc, «Accountability, Control and Independence: The Case of European Agencies», (2009) 15:5 *European Law Journal*

institutional balance of EU institutions, and for this reason new accountability measures should be deployed[27] or, to the contrary, agencies can also help to maintain the existing balance by, *inter alia*, reducing the workload of the Commission so it may focus on its core functions[28]. Somehow, the scholarly debate takes institutional balance seriously as a relevant factor to be weighed and the necessary consequences extracted to preserve the principle in terms of accountability.

This academic debate mirrors the way EU institutions treat the principle of institutional balance, especially the attitude of the ECJ. The *Meroni/Romano/Short Selling* doctrine, established by the ECJ since 1958 and still considered good law, is the legal framework that the forces driving towards the development of EU agencies face[29]. Put briefly, the doctrine allows for the creation of EU agencies but under several conditions aimed at preserving the balance of powers of EU institutions; for example, the express, concise and non-discretionary delegation of powers belonging to the sphere of the principal who can control its exercise[30]. Without doubt, what is meant by non-discretionary powers is ambiguous, but in *Romano* the ECJ read it as excluding the delegation of normative powers to EU agencies[31].In so doing, the ECJ has apparently circumscribed the powers of EU agencies to the realm of consultation and, at the most, adjudicative

599, 607; M. Groenleer, *The autonomy of European Agencies. A Comparative Study of Institutional Development* (Eburon, 2009) 130-133); (b) the influence of the principal, in particular the Commission, through the power of nomination, budget approval or surveillance committees (M.A. Pollack, «Delegation, Agency and Agenda Setting in the European Community», (1997) 51:1 *International Organization* 99, 110-121; S. Andoura and P. Timmerman, «Governance of the EU: The Reform of Debate of European Agencies Reignited», (2008) 19 *European Policy Institute Network, Working Paper* 1, 18-19); (c) procedural requirements for decision-making and transparency (G. Majone, «The Regulatory State and its legitimacy problems», (1999) 22:1 *West European Politics* 1, 9-11; E. Chiti, «The Emergence of a Community Administration: The Case of European Agencies», (2000) 37:2 *Common Market Law Review* 309, 331-341; P. Magnette, «The politics of Regulation in the European Union», in D. Geradin, R. Muñoz and N. Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Edward Elgar, 2005) at 3, 10-15); (d) participation in professional networks (G. Majone, «The Credibility Crisis of Community Regulation», (2000) 38:2 *Journal of Common Market Studies* 273, 295-298; C. Harlow and R. Rawlings, «Promoting Accountability on Multi-Level Governance: A Network Approach», (2007) 13:4 *European Law Journal* 542); (e) judicial review of agencies' actions (S. Kraphol, «Credible Commitment in Non-Independent Regulatory Agencies: A Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs», (2004) 10:5 *European Law Journal* 518, 525-527; T. Gehring and S. Kraphol, «Supranational regulatory agencies between independence and control: the EMEA and the authorization of pharmaceuticals in the European Single Market», (2007) 14:2 *Journal of European Public Policy* 208, 218-220).

27. E. Vos, «Reforming the European Commission: What Role to Play for EU Agencies?» (2000) 37:5 *Common Market Law Review* 1113, 1123-1124.
28. Majone, n 18 supra, at 335-338.
29. See Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7; Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, ECLI:EU:C:1981:104; Case 270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, ECLI:EU:C:2014:18.
30. *Meroni* Case 9/56, at 150-152.
31. *Romano* Case 98/80, para. 20.

powers, excluding the rule-making powers that have become a key tool, if not function, of modern regulatory agencies. Leading scholars, especially political scientists, have criticized the position of the ECJ, which they consider old-fashioned[32].

Despite the criticism, the Commission has continued to respect the limits established by *Meroni*. Undoubtedly, the Commission has taken a pro-agency stance for the last three decades[33], but its support has always targeted the creation of agencies in highly technical areas where they would lack any political discretion and only possess adjudicative powers (non-normative powers)[34]. The Commission took in the wave of scholarly support for agency creation in the 1990s and 2000s, perceiving in them a good tool for improved governance, but at the same time the Commission disappointed agency enthusiasts by effectively rendering agencies powerless following *Meroni*[35]. The Commission apparently saw agencies as a constructive tool but also as a potential threat to its institutional position that could appropriate away some of its own competence[36]. Institutional balance as framed in the *Meroni* doctrine was meant to safeguard the position of the

32. R. Dehousse, «Misfits: EU law and the Transformation of European Governance», (2002) 2/02 *Jean Monnet Working Paper* 1, 12-14; D. Geradin, «The Development of European Regulatory Agencies: Lessons from the American Experience», in D. Geradin, R. Muñoz and N. Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Edward Elgar, 2005) at 215, 221-222; G. Majone, «Institutional Balance Versus Institutional Innovation», in G. Majone (ed), *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2006) at 84, 88-89; J.P. Schneider, «A Common Framework for Decentralized EU agencies and the *Meroni* Doctrine», (2011) 61 *Administrative Law Review* 29, 30-31; M. Chamon, «EU agencies between *Meroni* and *Romano* or the Devil and the Deep Blue See», (2011) 48:4 *Common Market Law Review* 1055, 1072-1074.

33. There are several reasons for this pro-agency stand of the Commission. Scholars have pointed to the institutional deficit of the EU resulting from the enhancement of its competences and the necessity to reform the EU executive branch (see A. Kreher, «Agencies in the European Community – a step towards administrative integration in Europe», (1997) 4:2 *Journal of European Public Policy* 225, 227-229; G. Majone, «The European Commission: The Limits of Centralization and the Perils of Parliamentarization», (2002) 15:3 *Governance: An international Journal of Policy, Administration, and Institutions* 375, 391; M. Groenleer, M. Kaeding and E. Versluis, «Regulatory governance through agencies of the European Union? The role of European agencies for maritime and aviation safety in the implementation of European transport legislation», (2010) 17:8 *Journal of European Public Policy* 1212, 1214), as well as the corruption scandals faced by the Commission in the 90s (see Vos, n supra 27, at 1114-1115).

34. European Commission, *European Governance. A White Paper*, Brussels, 25 July 2001 COM (2001)428 final 23-24; Communication from the Commission COM(2002)718 final, of 11 December 2002, on the operating framework for the European regulatory agencies 11-12; Draft Interinstitutional Agreement presented by the Commission COM(2005)59 final, of 22 February 2005, the operating framework for the European regulatory agencies 11; Communication from the Commission COM(2008)135 final, of 11 March 2008, on European agencies – the way forward 5.

35. The legal Department of the Commission pushed for considering the *Meroni* doctrine and limiting the powers of EU agencies. See M. Flinders, «Distributed public governance in the European Union», (2004) 11:3 *Journal of European Public Policy* 520, 527.

36. The Commission has stated that powers directly conferred by the treaties to the Commission cannot be vested on agencies and the «unity and integrity» of the executive function in charge of the Commission must always be respected. See COM(2001)428 final, at 24; COM(2002)718 final, at 6; COM(2005)59 final, at 10; COM(2008)135 final, at 5.

Commission against future attempts of the Council and the Parliament to deprive it of its competences through the creation of agencies.

The Parliament was very cautious, at the beginning, to embrace the creation of EU agencies[37]. Unlike the Commission's first reaction, the Parliament first emphasized the principle of democratic process in EU governance arguing that agencies were therefore to be circumscribed to areas of technical expertise where the decentralization of powers was deemed necessary[38]. However, the Parliament also vindicated its role, especially as an accountability mechanism for agencies, and reclaimed its ultimate political responsibility over both the Commission and EU agencies[39]. Subsequently, the democratic demand was diluted, the Parliament accepted agencies as a good tool for EU governance, and it focused on its own position vis-à-vis the other institutions that would control them[40]. In other words, similarly to the Commission, the Parliament has pursued to maintain its powers in the new era of EU agencies. Only recently has the Parliament gone back to its initial democratic claim against EU agencies, arguing for the development of stronger accountability mechanisms to ensure the control of agencies[41]. Once again, the Parliament has cited respect of the institutional balance principle to vindicate its role as a controlling principal.

Finally, the Council has neither been particularly pro-agency nor resistant to them on democratic grounds as the Commission or the Parliament have been. In its public declarations about EU agencies, the Council has only been preoccupied by the amount of its influence in the process of creation of agencies and role as a decisive principal once they are created. The Council accepted agencies as a Commission proposal for enhancing EU governance[42], but the Draft Interinstitutional Agreement presented by the Commission failed in 2005 because the Council disagreed on the normative tool to regulate a common framework for EU agencies: the Council refused the interinstitutional agreement mechanism and sought the application of ex-article 308, in which the role of the Parliament was only consultative[43]. When the Commission reignited the debate over the necessity of a common framework for EU agencies in 2008, the Council agreed on the

37. The position of the Parliament has been called paradoxical. On the one hand, it has raised democratic concerns over agencies but, on the other, it has created them through the EU legislation when called on for that purpose. See C. Lord, «The European Parliament and the legitimation of agencification», (2011) 18:6 *Journal of European Public Policy* 909, 915.
38. European Parliament Resolution, of 29 November 2001, on the Commission White Paper on European governance, paras. 10 a) and 17.
39. ibid. at para. 18.
40. European Parliament Resolution, of 13 January 2004, on the Communication of the Commission on the operating framework for the European regulatory agencies, paras. N and 18-23; European Parliament Resolution, of 1 December 2005, on the Draft Interinstitutional Agreement presented by the Commission on the operating framework for the European regulatory agencies, para. 4.
41. European Parliament Resolution, of 3 April 2014, on discharge in respect of the implementation of the budget of the European Union agencies for the financial year 2012: performance, financial management and control, paras. 15-26.
42. Conclusions of the Council of the European Union, of 28 June 2004, on the Communication of the Commission on the operating framework for the European regulatory agencies, paras. 1-7.
43. Note 16247/06 of the Presidency of the Council to Member States Delegations, of 4 December 2006, on the Draft Interinstitutional Agreement presented by the Commission on the operating framework for the European regulatory agencies.

entire Draft Joint Declaration of the Parliament, the Council and the Commission on Decentralized Agencies except for the part on the nomination of the boards and directors of agencies[44]. The Council negotiated a reduction in the powers of the Parliament and, subsequently, the Joint Declaration assumed a diluted parliamentarian role[45]. Reflecting the movement of the Parliament towards more self-institutional arguments, the Council also displayed concern for its role as a principal of EU agencies and its institutional influence vis-à-vis the other EU institutions.

The institutional balance principle –as defined by the *Meroni* docrine– and the interinstitutional struggle between the Commission, the Parliament and the Council to maintain their authority have resulted in powerless EU agencies. Scholars have tried to classify the heterogeneous galaxy of EU agencies using different criteria, but a definitive classification, including the attempt of the Commission in 2002, has never been consolidated[46]. However, what is easily agreed is that most of EU agencies do not exercise public powers –they are only consultative in nature– and only some possess public powers that entail adjudication in particular cases or quasi–normative power; that is, the normative power remains in the hands of the Commission but the agency is somehow needed to perform the function[47]. The ideal of a truly regulatory agency as exemplified in the United States remains far from being accomplished[48].

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44. The Draft Joint Declaration was presented by the Commission on 29 February 2012. The Draft established that four members of the board of EU agencies were appointed by the Commission and the Parliament (para. 10.1). The Draft also envisaged a public hearing before the Parliament for the appointment of the directors of EU agencies (para. 14.2). The Council did not accept these prerogatives of the Commission and the Parliament (see Note 7727/12 of the Presidency of the Council to Member States Delegations, of 16 March 2012, second part, regarding the evaluation of EU agencies).
45. The final Joint Declaration was agreed on 19 July 2012. The final text maintains the power of nomination of two members of the board by the Commission, but only one in the case of the Parliament which also is not guaranteed (final para. 10.1). The public hearing of the directors of EU agencies before the Parliament has been eliminated (final paras. 14-19).
46. See the Communication of the Commission COM(2002)718 final, of 11 December 2002, on the operating framework of European regulatory agencies 2-4. The type of functions or prerogatives –consultative, adjudicative or normative powers– is the main criterion used by scholars for classifying EU agencies, but the results differ. Geradin classified EU agencies in three types: executive agencies, decision-making agencies and regulatory agencies (see Geradin, n 32 supra, at. 228). Griller and Orator identified ordinary agencies, pre-decision agencies and decision-making agencies (see S. Griller and A. Orator, «Everything under control? The "way forward" for European agencies in the footsteps of the *Meroni* doctrine», (2010) 35:1 *European Law Review* 3, 3-6). Finally, Busuioc found five types of agencies according to their prerogatives: information providing agencies, management agencies, operational-cooperation agencies, decision-making agencies and quasi-regulatory agencies (M. Busuioc, *European Agencies. Law and Practices of Accountability* (Oxford University Press, 2013) 37-42).
47. There are many examples of these agencies. Consultative agencies include, *inter alia*, the European Environment Agency (EEA) or the European Agency for Safety and Health at Work (EU-OSHA), adjudicative agencies are the Community Plant Variety Office (CPVO) or the European Medicines Agency (EMA), whereas an example of an agency with quasi-normative powers is the European Aviation Safety Agency (EASA).
48. Geradin, n 32 supra, at 228.

In this regard, during the 1990s and 2000s, scholars pushed for mirroring the United States by implementing independent agencies at the EU level[49]. The Commission was responsive to the scholarly debate, but was also aware of the limits imposed by the institutional balance principle expressed in *Meroni*. Its own position within the EU institutional framework was in play as well. The ECJ has had several opportunities to relax the *Meroni* doctrine, but has considered it good law in recent cases such as *Short Selling*. The Parliament and the Council, especially the latter, have been vigilant over their influence on EU agencies and their attributes as agency principals. The victims of this vigilance have been the EU agencies themselves, which as a result cannot be truly considered regulatory agencies. The principle of EU institutional balance has shown great vitality and has played a key role in the debate over EU agencies.

IV. NATIONAL INDEPENDENT REGULATORS AND NATIONAL INSTITUTIONAL BALANCE: A MATTER FOR THE EU?

At the national level, however, a different strategy has unfolded. The national institutional balance principle became irrelevant for the EU when national regulatory bodies in several sectors were articulated through secondary law. The EU has not hesitated to design strong national regulatory bodies in certain sectors, regardless their impact on national constitutional frameworks. The energy and telecommunications sectors are two clear examples of this strategy, but there are others[50]. Some Member States had experience using independent agencies in the financial sector and competition bodies, but the articulation of sectoral independent regulatory bodies was new development in the 1990s and 2000s[51]. The energy and telecommunications sectors are the clearest examples of this development with the decisive influence of the EU.

In the energy sector, the path towards national regulatory agencies has been slow but solid. The first wave of EU legislation on energy (1996 and 1998) did not envisage any national regulatory agency, the door was only opened to the Member States should they desire to adopt this kind of administration[52]. The second wave (2003) used the

49. See, *inter alia*, G. Majone, «Regulation and its modes», in G. Majone (ed), *Regulating Europe* (Routledge, 1996) at 9, 9-11 and 15-16; M. Shapiro, *Independent Agencies: US and EU* (Robert Schuman Centre-European University Institute, 1996) 1-31; Yatanagas, n 24 supra, at 1-70; R.D. Kelemen, «The Politics of "Eurocratic" Structure and the New European Agencies», (2002) 25:4 *West European Politics* 93, 94 (2002); Dehousse, n 32 supra, at 4-5; M. Thatcher and A.S. Sweet, «Theory and Practice of Delegation to Non-Majoritarian Institutions», (2002) 25:1 *West European Politics* 1, 3; Geradin, n 32 supra, at 215-246; Groenleer, n 26 supra, at 36-38.

50. Other examples are the railway sector (Arts. 55-57, Dir 2012/34), audiovisual media services (Art. 30, Dir 2010/13), the aircraft services (Art. 11, Dir 2009/12) or national competition authorities (Art. 35 Council Reg 1/2003, but a more robust independence framework will be in place if enters into force the Proposal of the Commission Com(2017)142 Final). In the realm of protection of fundamental rights –not to be considered regulatory bodies– the developments in the field of personal data protection with the articulation of strong independent bodies as supervisors should be highlighted (see Art. 28, Dir 95/46, and after May 2018, Arts. 51-58, Reg 2016/679).

51. M. Thatcher, «Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation», (2002) 25:1 *West European Politics* 125, 126-129.

52. Recital 11 and Art. 3(1), Dir 96/92 and Recital 9 and Art. 3(1), Dir 98/30.

expression «regulatory authorities» for the first time and expressed the necessity of separating the regulator from the private and public operators in the sector[53]. Finally, in 2009, the EU established a strong national regulatory agency through legislation that separated it from the other public powers of the Member States, especially national executives[54]. The EU adopted institutional measures –*inter alia*, own legal personality, secure mandate of the directives or sufficient resources–[55] and defined a long list of functions and powers to safeguard the agency from competences seizures by other public powers[56]. The recent developments –which adopt the form of a Proposal of the Commission for a new EU regulatory framework– follow the line of the 2009 legislation and does not entail a departure from the ideal of a strong independent national regulator[57].

A similar tale can be explained in the telecommunications sector. In the first wave of EU legislation (end of the 1980's, beginning of the 1990's), the concept of «national regulatory authority» was introduced, but only separation from the private and public operators of the sector was required[58]. The second wave (2002) did not introduce any significant development regarding the institutional design of the regulatory authorities[59]. However, the third wave in 2009 brought a strong independent national regulatory authority, with similar institutional safeguards and a set of functions and powers as robust as those of its counterpart in the energy sector[60]. Again, recent developments –the Proposal of the Commission– have reinforced the independent status of the national regulator and a minimum core of functions[61].

In this context, the institutional innovation –a strong regulatory agency with independent status plus adjudicative and normative powers– was introduced in the Member States. It did not occur, however, in a vacuum. National constitutional frameworks were already in place and had to accommodate the new institutional design. Some of them were more familiar with this type of regulatory administration, but most only in the financial and anti-trust fields[62]. The sudden appearance in the 1990s and 2000s of a new actor on the national sphere brought concerns about its impact on the national institutional balance. In launching strong national regulatory agencies in the national arena, the EU neglected to address the perils of agencies at the national level. In the energy and telecommunications sectors, the EU legislation clearly set up a regulatory body independent from other national public bodies –legislatures and executives– that possessed real power, not merely consultative functions. This new actor had to find its place in the existing national institutional framework.

53. Art. 23, Dir 2003/54 and Art. 25, Dir 2003/55.
54. Recital 34 and Art. 35(4)(b)(ii), Dir 2009/72 and Recital 30 and Art. 39(4)(b)(ii), Dir 2009/73.
55. Art. 35, Dir 2009/72 and Art. 39, Dir 2009/73.
56. Arts. 26-27, Dir 2009/72 and Arts. 40-41, Dir 2009/73.
57. Arts. 57-64, Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast) COM(2016)864final/2, of 23 February 2017.
58. Art. 2(2), Council Dir 92/44.
59. Art. 3, Dir 2002/21.
60. Art. 3 bis and Arts. 6-12, Dir 2002/21, introduced by Dir 2009/140.
61. Arts. 5-11 Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (recast) COM(2016)590final/2, of 12 October 2016.
62. Thatcher, n 51 supra, at 126-129.

As the debate over EU agencies has shown, independent agencies are capable of altering institutional balance. At the national level, legislators and executives must share competences with independent regulators in sectors such as energy and telecommunications[63]. The latter acquire a piece of «turf» that used to be controlled by the legislature or executive. Besides this redistribution of power, national parliaments and executives must also deal with a new creature that aspires to independence but at the same time remains accountable to them. Both legislatures and executives must be prepared to develop new accountability tools for independent regulators. Legislators face a different kind of administration quite unlike the traditional political and hierarchical administrative offices that respond to the executive. More pertinently, independent regulators not only aspire to independence, but also claim expertise, and national parliaments must be prepared to ensure proper expertise[64]. As for the executive, in the United States experience, problems of coordination and policy coherence arose when the executive shared competences with independent regulators, leading the executive to develop new tools to ensure the integrity of the executive function[65].

The role of the national judiciary vis-à-vis independent regulators deserves special mention. Robust national legal scholarship and theory are crucial to determine the appropriate stance of the judicial branch regarding independent regulators. Formalistic legal thought that embraces a static notion of institutional balance might reject the accommodation of independent regulators and even if such regulators are accepted as a matter of principle, formalistic legal thought can lead to a counterproductive understanding of

63. Independent regulators are now in charge of most of the adjudicative functions in their sectors –such as the authorization schemes or registers for operators, the day-to-day application of the requirements of the public service, competition supervision, the tariffs and costs of connection, the resolution of controversies between operators, etc.– and normative functions – establishing standards and technical requirements. Most of these functions were in the hands of national executives that exercised them in the normative framework established by the legislature.

64. The necessity of ensuring expertise in highly technical sectors was one of the reasons for adopting independent agencies in the Progressive Era and the New Deal in the United States. See Ch. McCarthy, *The Wisconsin Idea* (Macmillan, 1912) 178; S.O. Dunn, «Regulation by Commission», (1914) 199 *North American Review* 205, 205-206; R.E. Cushman, *The problem of the independent regulatory commissions* (U.S. Government Printing Office, 1937) 10-11; M. Fainsod, «Some reflections on the nature of the regulatory process», (1940) 1 *Public Policy* 297, 313. In the 1990's and 2000's, in Europe the scholarly literature emphasized other reasons such as the credibility of the regulation by isolating independent regulators from politics. See, et al., G. Majone, «Nonmajoritarian Institutions and the Limits of Democratic Governance: a Political Transaction-Cost Approach», (2001) 157:1 *Journal of Institutional and Theoretical Economics* 57, 65-67. Also in the EU scholarship of that time, however, expertise was cited as a key reason for articulating independent regulators. See Ch. Pollit, K. Bathgate, J. Caulfield, A. Smulen and C. Talbot, «Agency fever? Analysis of an International Policy Fashion», (2001) 3:3 *Journal of Comparative Policy Analysis: Research and Practice* 271, 276-279; Magnette, n 26 supra, at 3-23; Andoura and Timmerman, n 26 supra, at 6; Groenleer, n 26 supra, at 17-18; M. Busuioc, *The Accountability of European Agencies. Legal Provisions and Ongoing Practices* (Eburon, 2010) 3 and 15.

65. See P.L. Strauss, «The place of agencies in government: separation of powers and the fourth branch», (1984) 84:3 *Columbia Law Review* 573; L. Lessig and C.R. Sunstein, «The President and the Administration», (1994) 94 *Columbia Law Review* 1; E. Kagan, «Presidential Administration», (2001) 114 *Harvard Law Review* 2245.

the judiciary's competence to review the actions of independent regulators[66]. On the contrary, again, as has been seen in the United States experience, an antiformalist legal approach involving a dynamic understanding of the institutional balance principle facilitates the accommodation of independent regulators and, more importantly, allows the development of new judicial tools that leave room for regulators to operate independently without abdicating the judicial responsibility to review agency actions[67].

Ultimately, the degree to which independent regulators are successfully accommodated may depend on the specific national constitutional framework, the institutional capabilities of national institutions and the legal and political culture of the Member State. Spain provides an illustrative example of the difficulties that can be encountered in the process of national accommodation. The Spanish energy and telecommunications regulators were created and developed under the leadership of the EU[68]. Only after 2009 and the decisive decision of the EU favouring strong independent regulators in the energy and telecommunications sectors, especially in the energy sector, did the Spanish regulators become fully independent regulatory authorities with strong powers according to EU law[69]. However, in 2013 the creation of the new super regulator dealt a huge setback to the slow but progressive development of Spanish regulators[70]. On the one hand, the regulator independence was curtailed, not only through the dismissal of some of the former members of the sectoral regulators following the merger of sectoral regulators into a sole entity and the decision by the ECJ that those dismissals ran counter to EU law, but also through the removal of certain safeguards of regulator independence[71]. At the same time, several functions that had been in the hands of the longstanding energy and telecommunications sectoral regulators were returned to the executive[72]. The entire process was met with concern by the Commission, which began an epistolary correspondence with the Spanish government[73]. Likewise, the Spanish judiciary,

66. J. Solanes Mullor, *Administraciones independientes y Estado regulador. El impacto de la Unión Europea en el Derecho Público español* (Congreso de los Diputados, 2016) 305-310.
67. ibid. at 56-73.
68. ibid. at 179-213.
69. ibid. at 193-196 and 200-204.
70. The super regulator (called Comisión Nacional de los Mercados y la Competencia, CNMC) integrated the competition supervision and regulatory powers of several sectors in Spain, including the energy and the telecommunications sectors. The CNMC was created by Law 3/2013, of 4 June.
71. Regarding the dismissal of members of the former specific regulators in the transition period to a super regulator, see Case 424/15 *Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros v Administración del Estado,* ECLI:EU:C:2016:780. The new articulation of the CNMC reduced the financial autonomy of the regulator –the own fees were eliminated as a source of self-financing– and the autonomy for selecting its own staff also was limited (Arts. 31 and 33 of Law 3/2013).
72. In the energy sector, the same Law 3/2013 which created the CNMC reduced the functions of the new super regulator in the energy sector (see the eighth additional provision). Afterwards, Royal Decree 9/2013, of 12 July and Law 24/2013, of 26 December, consolidated this path returning some functions to the executive. In the telecommunications sector, the pressures of the EU stopped the ideas of curtailing functions when the Law 3/2013 was passed (see n infra 73). However, Law 9/2014, of 9 May, followed the path of weakening the independent regulator.
73. See the joint letter of the General Directorates of Competence, Energy, Telecommunications, Economy and Finance of the European Commission to the Spanish Government of 29 November 2012, as well as the letter of Neelie Kroes, Vice-president of the Commission at that time,

tied to formalistic notions of administrative law, has been incapable of adapting traditional oversight of the administration to the new challenges that independent regulators cause, and has displayed a rather undisciplined deference to the regulator's actions that jeopardize their control[74]. In addition to the Spanish example, the Hungarian case[75], also shows how specific national circumstances can undermine the proper operation of independent regulators and, therefore, the objectives of EU law.

The ECJ has not only been called on to safeguard the independence of the regulators in Spain and Hungary, it has also intervened in Germany[76]. In this case, the legislature limited the power of the telecommunications national regulatory authority to assess and supervise the so-called «new markets». The ECJ understood that limitation contrary to EU law and affirmed the powers of the German independent regulator[77]. Paradoxically, the ECJ has adopted a cautious approach towards EU agencies by carefully considering EU institutional balance, but has not hesitated to reinforce and protect the independence of national regulators protected by EU law.

These are only some examples in which national regulators have encountered difficulties during their accommodation. For the sake of national institutional balance, especially the reactions of national legislators and executives, intrusions into the independence status of the regulator or the functions and powers entrusted on them have occurred. Beyond these examples in the energy and telecommunications sectors, there are other experiences that also reveal the struggles that national regulators have faced in their national institutional frameworks. The ECJ's intervention to protect the independence of German and Austrian data protection supervisory authorities should be noted[78]. More recently, although it involves an EU regulator, the German Federal Constitutional Court has for the first time expressed doubts about the status of the independence and accountability, especially in relation to national institutions, of the European Central Bank[79]. All these cases represent a small fraction of the discomfort regarding the perils that independent regulators face at the national level.

V. LINKING THE EU AND NATIONAL AGENCIFICATION PROCESSES: PATHS FOR DIALOGUE

The EU shows inconsistency when, at the EU level, it relies on the principle of institutional balance in a way that limits EU agencies because of the effect on the relationship between EU institutions, and then, on the contrary, fails to consider that these same concerns are often problematic at the national level. The EU cannot be blind to these

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to José Manuel Soria, Spanish Minister of Industry, Energy and Tourism at that time, of 11 February 2013.

74. Solanes Mullor, n 66 supra, at 283-310.
75. Case 288/12 *Commission v Hungary*, ECLI:EU:C:2014:237.
76. Case 424/07 *Commission v Germany*, ECLI:EU:C:2009:749.
77. ibid. at paras. 91-94.
78. Case 518/07 *Commission v Germany*, ECLI:EU:C:2010:125; Case 614/10 *Commission v Austria*, ECLI:EU:C:2012:631.
79. BVerfG, Judgment of the Second Senate of 21 June 2016 – 2 BvR 2728/13, paras. 187-189.

concerns because, in the end, the effectiveness of EU law is at stake. Faulty accommodation of a national regulator into a national institutional framework is liable to jeopardize the objectives of EU law. To resolve this inconsistency, the EU should incorporate national concerns into the EU debate through two mechanisms. On the one hand, the principle of institutional and procedural autonomy is a longstanding mechanism which does not seem to have much of a place in this debate. On the other hand, the national constitutional identity clause (Article 4(2) TEU) could be potentially brought in to give it some.

The institutional and procedural autonomy principle is not explicitly established in primary EU law[80]. For that reason, it can be understood as case law developed by the ECJ[81]. However, the ECJ has circumscribed the scope of application of the principle in case the EU decides not to adopt institutional and procedural measures in a realm of its competences[82]. In other words, the EU, in exercising its competences, can leave the institutional and procedural measures to Member States and, therefore, it refrains from making implementation decisions – institutional and procedural. Nevertheless, if the EU decides to intervene, the institutional and procedural autonomy of Member States is negated. The principle of institutional and procedural autonomy is not a parameter for the validity of EU secondary law, a limit to the exercise of the competences of the EU or a counter-limit which modulates the primacy of EU law[83].

This construction of the principle is well reflected in the action of EU in the energy and telecommunications sectors. First, prior to 2009, the EU referred to the institutional and procedural autonomy principle to leave room for Member States in the articulation of national regulators[84]. The EU only required the separation between the regulator and the operators in the sectors and established some procedural safeguards, but it refrained from giving directives about the relationship between the national regulator and other national public bodies[85]. In 2009, the principle disappeared from the language of the

80. To the contrary, Schwarze has argued that the principle can be derived from Art. 291.1 TFEU, using its wording after the Treaty of Lisbon. See J. Schwarze, «El Derecho Administrativo Europeo a la luz del Tratado de Lisboa: observaciones preliminares», in M. Fuertes (ed), *Un procedimiento administrativo para Europa* (Aranzadi, 2012) at 25, 48.
81. X. Arzoz, «La autonomía institucional y procedimental de los Estados Miembros en la Unión Europea: Mito y realidad», (2013) 191 *Revista de Administración Pública* 159, 163-165.
82. C.N. Kakouris, «Do the Member States possess judicial procedural "autonomy"?», (1997) 34:6 *Common Market Law Review* 1389, 1408; J.S. Delicostopoulos, «Towards European Procedural Primacy in National Legal Systems», (2003) 9:5 *European Law Journal* 599, 599-600; Arzoz, n 81 supra, at 170-174; M. Bobek, «Why There is No Principle of «Procedural Autonomy» of the Member States», in B. de Witte and H.W. Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012) at 305, 319-322.
83. For a more positive approach to the ECJ case law on the procedural and autonomy principle, especially in favour of coherence and predictability and, therefore, the usefulness of the principle, see D.U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer, 2010) 121-123.
84. Arts. 3(1), Dir 2003/54 and Dir 2003/55/EC in the energy sector, and Recital 11, Dir 2002/21 in the telecommunications sector.
85. Art. 23, Dir 2003/54 and Art. 25, Dir 2003/55 in the energy sector, and Art. 3, Dir 2002/21 in the telecommunications sector.

new legislation and truly independent agencies were imposed to Member States. The EU decided to limit the margin of institutional autonomy of Member States and took decisions to implement truly independent national regulators through secondary law. The only references were to respect «supervision in accordance with national constitutional law» of Member States or that the autonomy of the national regulator not preclude either «judicial review [or] parliamentary supervision in accordance with the constitutional laws of the Member States»[86]. It seems that these references are related to national accountability measures of national regulators, which depend on Member States, but the decision to introduce an independent agency with strong powers and separated from national legislators and executives was made through EU secondary law irrespectively of national institutional balances and the capacities –even from the accountability perspective– of national institutions. In sum, the autonomy and procedural principle was used, then abandoned and, because of its weak textual basis and the limitation of the ECJ case law, seems ill-suited for incorporating the national concerns at the core of EU law.

The constitutional identity clause (Article 4(2) TEU) might have better chances of success[87]. It could potentially redirect the debate over agencies in order to introduce national interests into it. Undoubtedly, the meaning of the clause is still uncertain. Some scholars do not believe the clause has in the teeth, particularly in terms of its power to modulate the primacy of EU law[88]. Others understand the clause in a robust sense, i.e. that the clause should be understood as a limit on the EU when exercises its competences and may provide a channel for expressing the red lines of the European integration process that have been suggested by some high courts of the Member States[89]. Weak or strong understanding aside, taking Article 4(2) TEU as space for dialogue and cooperation in a pluralistic polity as the EU is an interesting proposition, for the Article's wording allows, on the one hand, Member States to raise concerns at the EU level, and,

86. In the telecommunications sector, see Art. 3(a), Dir 2002/21, introduced by Dir 2009/140. In the energy sector, see Recital 34, Dir 2009/72 and Recital 30, Dir 2009/73.
87. The national identity clause was introduced in Article F(1) of the Treaty of Maastricht, but Art. 4(2) TEU has redefined the clause by linking national identity to constitutional identity. Art. 4(2) TEU establishes: «The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.»
88. M. Claes, «National Identity: Trump Card or Up for Negotiation?», in A. Saiz Arnaiz and C. Alcoberro Llivina (eds) *National Constitutional Identity and European Integration* (Intersentia, 2013) at 109, 121-124.
89. A.V. Bogdandy and S. Schill, «Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty», (2011) 48:5 *Common Market Law Review* 1417, 1417-1421. In the same line, but in relation to the unborn Treaty establishing a Constitution for Europe, see M. Kumm and V. Ferreres Comella, «The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union», (2005) 2:3 *International Journal of Constitutional Law (I-CON)* 473, 478-480.

on the other, the EU to weigh in from the perspective of balancing national interests and the effectiveness and primacy of EU law[90].

Mirroring the lack of scholarly consensus debate, the treatment of the meaning and scope of the constitutional identity clause in the case law of the ECJ in the wake of the Treaty of Lisbon is also unclear[91]. Some ECJ case law leans towards a strong interpretation of the clause, interpreting it as a limit on the EU or, at least, as a provision allowing some restrictions or modulations of relevant principles such as freedom of movement. The ECJ has stated, for example, that respect of national constitutional identity includes respect for the republican form of the Member State, the equality principle and the protection of the official language of a Member State[92]. Yet the ECJ has also interpreted the regulation by EU law of the employment status of judges –equating judges with labourers– as not affecting judicial independence and, therefore, as not impinging on the constitutional identity of Member States[93]. Ultimately, the ECJ must determine, under the principles of EU law, which actions of the EU amount violations of the constitutional identity of Member States, who, at the same time, must bring attention to and bring a case for the alleged violation. The constitutional identity clause is not a tool Member States can use to trump EU law, for the ECJ has the last word in analysing the Member States' concerns in light of the high principles of EU law –especially effectiveness and primacy– but it could provide the best channel for Member States to express their concerns and build their cases[94].

This is also the clause's potential relevance to the debate on the agencification process in the EU. It links the two parallel debates in this process. On the one hand, the debate over EU agencies, well developed in the scholarship and at the EU institutional level, which has clearly played a role in creating weak agencies in which EU institutional balance is a key and limiting– principle. On the other hand, the debate over independent national regulators, also bolstered at the national level by the EU in several sectors, albeit without addressing the same concerns that both seem to count most at the EU level and could be reproduced at the national level. National constitutional identity differs from Member State to Member State so the accommodation of independent regulators depends on each national institutional framework. For some Member States the accommodation may be as simple as adjusting administrative structures, without further implications or, surely, constitutional impact. However, for other Member States, the accommodation can significantly alter their institutional frameworks, limiting the executive or the legislative,

90. R. Toniatti, «Sovereignty Lost, Constitutional Identity Regained», in A. Saiz Arnaiz and C. Alcoberro Llivina (eds) *National Constitutional Identity and European Integration* (Intersentia, 2013) at 49, 68-73.

91. B. Guastaferro, «Beyond the exceptionalism of constitutional conflicts: the ordinary functions of the identity clause», (2012) 31:1 *Yearbook of European Union Law* 263.

92. Case 208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, ECLI:EU:C:2010:806, paras. 92-93; Case 391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, ECLI:EU:C:2011:291, paras. 86-87.

93. Case 393/10 *Dermod Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs*, ECLI:EU:C:2012:110, para. 49.

94. Claes, n 88 supra, at 138-139.

especially the balance between them, in a way that constitutional identity is affected. Or, more simply, the national institutional framework –legislators, executives and the judiciary– are ill-equipped to hold independent regulators accountable.

In this debate, national legal thought is crucial for the success of accommodation. Member States dominated by formalistic legal thought may encounter more difficulty integrating independent regulators than Member States with an antiformalist attitude towards the law: the internal institutional balance is more hierarchical and the accountability measures to be developed to face new actors take much longer to be implemented and are often incorrectly understood. The process of accommodation in such cases should be considered at the EU level to prevent undesirable consequences like the rejection of independent regulators at the national level, the lack of real independence of national regulators or accountability problems.

Voices in the field of fundamental rights are calling for better integrating national interests at the EU level. They beseech the EU to consider, *inter alia*, the national level of protection of fundamental rights in the EU legislative process[95], giving more room to constitutional national claims in the use of comparative law by the ECJ[96], and taking a proactive role aiding domestic courts in defining the red lines of European integration or the constitutional identity core of their Member States[97], in order to better connect EU and national interests in a pluralistic polity. The agencification process in Europe could benefit from this link. On the one hand, the rich debate over EU agencies could be useful in national debates over independent regulators and, vice versa, legitimate national concerns could be introduced into the EU's discussions. Both dimensions of the agencification process in Europe share common concerns and experiences in their pursuit to improve the role, powers and control of agencies in Europe, both at the EU and national levels.

VI. CONCLUSIONS

The debate over the agencification process in Europe has suffered from poor communication. On the one hand, the debate has been framed in terms of agencies' role in the EU institutional framework, highlighting the institutional struggle between EU institutions –the principals of EU agencies– and accountability issues, especially in scholarly debates. On the other hand, when the EU has sought to introduce agencies at the national level, how those agencies were to be accommodated within the national systems was pushed into the background as an internal affair of Member States. At most, national constitutional and institutional framework were presumed malleable and adaptable. In other words, the debate at the two levels has, at best, ignored the other or, even worse,

95. B. de Witte, «Article 53», in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing, 2013) 1523.
96. A. Torres Pérez, *Conflicts of rights in the European Union. A theory of supranational adjudication* (Oxford University Press, 2009) 153-155.
97. ibid. at 179-184.

has been phrased in contrasting terms. Whereas EU institutional balance has been given primacy, national institutional balance has been ignored. The agencification process is an example of disconnected debates at the EU and national levels. This disconnection has led to problems of national accommodation of agencies, which jeopardizes the objectives of EU law regarding the capacities and accountability of national regulators.

Mechanisms exist for enhancing the dialogue between the two faces of the agencification process in Europe. Article 4(2) TEU is one possible means for linking the two levels and incorporating national concerns over agencies into the EU debate, particularly in the EU legislative process or adjudication phase of EU law overseen by the CJEU. Article 4(2) TEU is a tool for singularizing the idiosyncrasies of each Member State, for some of them may be more familiar to independent national regulators while others present institutional resistance to them – depending on their political culture, legal tradition, or institutional deficits involving accountability mechanisms. A fluid dialogue between the two faces of the agencification process in Europe needs to be established, one that enhances communication in order to face shared challenges.

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