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BOOK REVIEW

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Marta SIMONCINI, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Oxford, Hart, 2018, pp, 214

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The legal basis and limits of the powers of the EU decentralised administrations have long been the subject of discussion in the field of European law. The question is primarily one of positive law: based on the current constitutional framework, what powers can the European legislator confer to European agencies and other satellite bodies to implement Union laws and policies? The issue is significant for multiple reasons. It is not simply a matter of providing the European legislator with specific operational criteria. On a more general level, the identification of powers that can be exercised on the basis of current law by the EU decentralised administration would allow to focus on strengthening European administration in comparison to national administrations, which nonetheless represent an essential component of the European administrative system. It would then allow the reinterpretation of the EU constitutional framework in order to reconcile its founding principles with consolidated and expansive European administrative law.

Scientific reflection on the problem and its implications, fuelled by developments in case law of the Court of Justice, has thus far not led to a shared interpretation (amongst texts that exemplify the most widespread positions, see S. Griller and A. Orator, *Everything Under Control? The* '*Way Forward*' *for European Agencies in the Footsteps of the Meroni Doctrine*, in *European Law Review*, 2010, p. 3 et seq.; M. Chamon, *EU Agencies Between Meroni and Romano or the Devil and the Deep Blue Sea*, in *Common Market Law Review*, 2011, p. 1055 et seq.; and E. Chiti, *An Important Part of the EU Institutional Machinery: Features, Problems and Perspectives of European Agencies*, in *Common Market Law Review*, 2009, p. 1395 et seq.).

Marta Simoncini's book now enters into the discussion. The stated objective is to move the institutional discourse to European agencies, which represent the most important example of EU decentralised administrations, out of the shallows in which it has been trapped by the so-called *Meroni* Doctrine. The constitutional framework in which European agencies are positioned is certainly articulated, but, as repeatedly affirmed over time, the principle established by the Court of Justice in the late 1950s in the *Meroni* judgement represents a fundamental issue, as it drives the discussion on the powers of European agencies into a dead end. However, the author warns, it is possible to leave the

cul de sac by taking a new perspective on European case law. This will reduce the distance between the traditional interpretation of the *Meroni* Doctrine and actual administrative activities carried out by the European agencies.

The book is divided into four chapters and ends with one conclusion. The first proposes a re-reading of the constitutional principle of non-delegation established by the Court of Justice, according to which the delegation of powers from the institutions to bodies – not provided for by the treaty – is only possible on the condition that it does not alter the institutional and procedural framework established by the treaty itself. The Meroni Doctrine represents a specific application of the principle and is traditionally understood as a ruling that only allows the delegation of "clearly circumscribed powers of enforcement". The author notes that it has undoubtedly contributed to limiting the development of the powers of agencies, as well as administrative regulation in the European legal system. This is more due to the restrictive interpretation that has been given by the political institutions of the European Union and European law, than the constraints imposed by European case law itself. Upon closer inspection, the *Meroni* Doctrine did not intend to limit the delegation to mere powers of implementation, but rather to subordinate the delegation of administrative powers to the provision of adequate guarantee mechanisms. This perspective is confirmed by the ESMA Short Selling judgement, which offers the most recent reformulation of the *Meroni* Doctrine in view of the relevance attributed to European agencies by the Lisbon Treaty. The chapter closes with a reconstruction of parameters, in light of which the compatibility of the powers of the European agencies with the jurisprudence of the Court of Justice, must be assessed. This respectively regards the administrative nature of powers, the exercise of which is always subordinate to European legislation, and the development of accountability mechanisms.

The second chapter discusses the relevance of the powers of European agencies in sector-specific regulation. The analysis aims to bring out the true importance of their administrative action, beyond the reductive readings of European law. In particular, the cases of the European Aviation Safety Agency and the European Supervisory Authorities, instituted following the 2008 financial crisis, are used as examples of European agencies called upon to exercise "quasi-regulatory" powers. The powers of these agencies are examined one after the other: from those that materialise in the adoption of individual

acts and those of administrative rule-making that lead to binding general acts, to powers that produce general acts of soft law. These activities are called "quasi-regulatory" because European agencies correct the regulatory conduct of the Member States and behaviour of private entities. However, due to the limits imposed by the restrictive interpretation of the *Meroni* case, they do so through tools that are weaker than those typical of state regulations. In short, European agencies are at the heart of the regulatory process but operate within a legal framework that in many ways remains uncertain and incomplete.

The third chapter is dedicated to the nature of administrative powers that can be allocated to European agencies. First and foremost, it should be noted that the quasi-regulatory powers conferred on European agencies can be qualified as discretionary powers. European agencies require a certain margin of discretion both in their adjudication and rule-making activities, as implicitly recognised by the founding regulations and expanded *de facto* by agency practices. This is despite the reluctance of legal scholarship and European institutions to admit the importance of discretion in the operation of the European administrative system. Attempts are made to reconcile the exercise of discretionary powers with the non-delegation doctrine on the basis of this assumption, as demonstrated through examples from various agencies. These include the European Plant Variety Office and the Agency for the Cooperation between National Energy Regulators. The author argues that this is possible by overcoming the conflict between political powers and technical attributions as well as recognising the autonomous relevance of administrative discretion (alongside merely executive powers) and those to express political diplomacy. This discretionary power, which is distinct from a strictly political one, is not, in principle, incompatible with the non-delegation doctrine. The latter does not exclude administrative discretion, but rather conditions it to a series of legal and institutional constraints.

The tools that frame and legitimise the exercise of discretionary powers by European agencies are discussed in the fourth and final chapter. These are tools relating to the organisation of European agencies, the administrative procedures through which they operate, and the judicial protection guaranteed with respect to their activities. As for the organisation, it is observed how the formula of autonomy organisers can operate in the function of the accountability of European agencies. On the other hand, procedural

institutes include the rights attributable to proper administration (now provided for by the Charter of Fundamental Rights of the European Union), and rules aimed at guaranteeing the impartiality and correctness of administrative action. On top of these organisational and procedural tools, there are legal remedies, which must be developed in such a way as to ensure their effectiveness against an administrative activity that uses both binding acts and soft law measures. It is the set of these complementary mechanisms that render the exercise of discretionary powers by European agencies "sustainable" in the context of the current constitutional framework of the Union.

Marta Simoncini's book has various merits. The first one is that it offers a realistic representation of the activities carried out by European agencies, and their role in the administrative implementation processes of EU standards and policies. The author avoids two opposing simplifications: that of minimising the relevance of European agencies, relegating them to mere coordinating administrations, and that of those who overestimate their importance, making them one of the hinges of the Union's institutional architecture itself. In taking a route in between, the analysis conducted in the book realistically shows how European agencies have gradually consolidated. In fact, since the early 1990s, they have become administrations capable of facilitating the operation of important sectors of economic and social regulation through the exercise of quasi-regulatory powers earned in the field.

The study offers a very reasonable solution to the problem of the limits of European agencies. The volume traces the series of interpretations through which both the political institutions of the Union and European law have narrowly reconstructed the constraints imposed by the case law of the Court of Justice as regards the delegation of powers by the European institutions to bodies not included in the Treaty. It then shows how these interpretations end up betraying the meaning of case law itself, which also suffers from a lack of clarity that the Court of Justice has not resolved in its most recent judgements. The argument of the author is absolutely reasonable: it highlights how the principle set by the European court subordinates delegation to a series of constraints and guarantees, rather than limiting it to merely executive powers. It reveals the fundamentally political character of the Commission's interpretation of the *Meroni* Doctrine and traces the cultural limits of European scholarship, which is more than reluctant to admit that decentralised European administrations can exercise discretionary powers.

A third merit of the text is that it does not merely discuss the theoretical aspects of the problem, but it offers operational solutions. In this sense, recipients of the survey are not only scholars of European administrative law, but also the Court of Justice, and above all, the political institutions that participate in the legislative process of the Union. The function of the book is to both advance knowledge and resolve a legal issue that has thus far slowed down the development of the European administrative system, to allow its resumption or full take-off. As such, the approach chosen seems to be that of "practical" European administrative law, aimed at making the exercise of administrative functions as effective and sustainable as possible. It is an approach promoted without the rhetorical overstatements of the openly normative perspectives of the grand theories of the European integration process. It is capable of contributing to the improvement of European administrations and their rights with common sense and legal and institutional realism.

The view offered by the study, however, suggests that the rationalised and constructive reading of the *Meroni* Doctrine raises certain problems. There are two main, related issues. The first one concerns accountability tools. The volume duly identifies in the evolution of control and guarantee mechanisms the legal condition for the development of discretionary administrative powers. The invitation does not seem intended to be ignored. The European legislator has made efforts regarding the matter over the past two decades. In recent years, numerous studies have shown the growing attention of European law to the accountability regimes of European administrations (see, most recently, the writings of Giuseppe Sciascia, Mario Filice and Marco Pacini, in the *Rivista italiana di diritto pubblico comunitario*, 2018, p. 969 et seq.). Nevertheless, the path remains largely to be created: accountability is not a unitary regime that is definable once and for all, but rather a set of different regimes built on a case by case basis, starting from the characteristics of the various administrative functions.

The second issue concerns the role that discretion is intended to play in the administrative actions of the Union. Once the path has been cleared of the apparently insurmountable obstacle of the *Meroni* Doctrine, the problem arises as to how to rebuild the administrative system in such a way as to allow the beneficial and effective use of administrative discretion in the implementation of European regulations and policies. There is no easy solution to this problem. On the one hand, it is the same regulatory function that revolves around single-mission authorities, regardless of the weight of

various public and private interests, as known for some time by the Italian administrative legal system. On the other hand, the European administrative system is also divided into a series of sectoral administrations that operate in parallel with each other, and are subject to very weak coordination by the European Commission. In this context, the recognition of the importance of administrative discretion is the first step, which can only be followed by the reassessment of the structure and operating methods of the European administrative system. This is not intended to put discretion at the centre of the system, but to use it as one of the techniques of action that modern administrations must be able to use in relation to various functional needs. The publication of *EU Executive Discretion and the Limits of Law*, edited by Joana Mendes (Oxford, Oxford University Press, 2019), shows how European legal scholarship has started this type of reflection, which is unavoidable for the development of the European administrative system.

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