

Summary of the report

EU agencies on the move: challenges ahead

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Proliferation of EU agencies

1. Today the EU cannot function without its agencies. These agencies assist in the implementation of EU law and policy, fulfil central roles in the coordination of national authorities, provide scientific advice for both legislation and implementation, collect information and provide specific services. They may adopt legally binding and non-binding acts. They increasingly operate in emergency situations and actively contribute or are even responsible for setting standards within and even outside the EU.
2. EU agencies contribute to a reinforcement of EU executive power and lead to a pluralisation of the EU executive, as political scientists conclude, although these agencies seem to lean more towards the Commission than to any other potential master. Insights from the legal literature connect EU agencies more to the composite or shared administration of the EU. The hybridity of EU agencies is expressed both institutionally, in their relation with and their dependence on the EU institutions and the Member States, and substantively, in their multiple tasks.

Legal issues

3. EU agencies are hence clearly ‘on the move’: they are increasingly proliferating and obtaining more and more discretionary powers. Both the mushrooming

of EU agencies and the increasingly broad powers that are conferred upon them, however, raise questions regarding their constitutionality, their legal basis, the powers that can be delegated to them as well as the very reason for the existence of EU agencies, their independence and accountability. These questions are addressed in this paper.

4. The portrayal of EU agencies as ‘in-betweeners’, being crucial amalgams between EU institutions, particularly the Commission and Member States, would seem appropriate as it indicates a close connection between the EU agencies and their masters: on the one hand, the institutions (especially the Commission), and on the other, the Member States. The relation with the latter should still be researched in more depth.
5. The Lisbon Treaty has acknowledged the existence of EU agencies which strengthens the position of agencies as part of the EU executive. The Treaty makes clear that agencies are also subjected to, for example, the constitutional values of judicial review, transparency, openness and participation. The Court may now review the legality of agency acts ‘intended to produce legal effects vis-à-vis third parties’ and their failure to act, while it may also interpret the legality of agency acts in preliminary rulings. Although the Treaty provision does not confer the possibility for agencies to challenge acts of EU

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institutions, the limited constitutional legitimation of agencies is welcome in ensuring more legal certainty in judicial review of agency acts.

6. In view of the criticism on agencies' transparency, *inter alia* in relation to the manner agencies deal with conflicts of interest, the recognition of constitutional values in relation to EU agencies is of high importance. Constitutionalisation will however not solve the incoherencies that exist in practice where founding regulations talk about transparency and participation in agency activities only in a very general way. Shortcomings continue to exist regarding the role of participation, consultation and transparency in relation to binding and non-binding agency decisions requiring a more general approach on these issues, for example by means of an EU administrative act.
7. At the same time, the Lisbon Treaty disregards agencies where one would have expected them most: the system of delegation laid down by the same Treaty. This system neglects to position in Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) agencies as bodies to whom powers can be delegated. It codifies the Commission's wish to partially replace comitology with the adoption of delegated acts with a direct *ex-post* control mechanism on the exercise of the Commission's powers. In the hierarchy of norms introduced by the Lisbon Treaty, no attention is paid to the fact that agencies form part of the EU executive and can be granted binding decision-making powers and adopt binding executive acts. In its case law (*ESMA*), the Court has appeared to be willing to remedy the evidently uncomfortable and unconstitutional position of agencies as bearers of executive powers that operate in the shadow of hierarchy. This seems to confirm that the Lisbon Treaty's intention to introduce an all-embracing hierarchy and categorisation of norms is also a genuine failure in relation to agency acts, in addition to its intricate division into delegated and implementing acts. EU agencies should therefore obtain a clear position in the institutional balance and need clear accountability mechanisms as explained below.
8. The lack of a clear legal basis to create EU agencies within the EU's constitutional framework has led to legal debate, arguing that agencies, as institutional creatures could only be created on the basis of the general flexibility clause, now Article 352 TFEU. Eventually, the Court confirmed that the EU legislator may create EU agencies in legislative acts adopted on the legal bases of the relevant policy areas, such as internal market, transport and environment.
9. The Court's ruling in *ESMA* can be seen as adapting the *Meroni* doctrine to the 21st century and the Lisbon amendments to the constitutional framework of the Treaties. If delegation complies with the legal guarantees set by the amended Treaties, the Court sees no objections to have delineated, discretionary powers conferred upon EU agencies. Of crucial importance hereby is that such delegation takes place in relation to agencies that are set up by the EU legislature and not bodies governed by (Belgian) private law, as was the case in *Meroni*.
10. Hence the Court in *ESMA* both protects and confines the *Meroni* doctrine to EU agencies operating beyond the modes of delegation described in Articles 290 and 291 TFEU. This new *Meroni* 2.0 doctrine is certainly to be welcomed in functional regulatory terms. Yet the Court's fresh interpretation of *Meroni* is not unproblematic and in particular disregards that the exercise of the powers delegated may entail important political, economic or social choices to be made by EU agencies. Such a recogni-

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tion of agencies as entities that may balance various interests and that only limited judicial control will be carried out in relation to their exercise of these powers, raises doubts about the adequacy of the current accountability mechanisms.

EU agencies' independence and accountability

11. The characterisation of EU agencies as 'in-betweeners' indicates their complex relationship with the notion of independence. Analysis of the formal, *de iure* independence of EU agencies in relation to their institutional design, staffing, finances and functions discloses a diffused picture: agencies' independence very much depends on the specific context in which they operate and legal requirements placed on agencies. Fundamentally, Member States present on agency boards is in line with the conceptual understanding of the EU executive as an integrated administration and is an expression of the composite or shared character of the EU executive.
 12. The independence of EU agencies is however a relative concept. In terms of institutional design, finances and operational activities, agencies have been intricately connected to their principals. EU agencies are often not merely operating at 'arm's-length' from the Commission, Parliament or the Member States but the latter are frequently involved in the institutional design and operation of agencies.
 13. Agencies as in-betweeners, therefore, highlights that agency independence from political and national influence is an extremely sensitive and problematic issue. This issue has been particularly pertinent in relation to the supervisory agencies in the financial sector. In particular, the *dédoulement fonctionnel* (the "double-hattedness") of the board members serving two masters indicates that independence is in practice a very fragile concept and underlines the
14. An issue which is less controversial but no less difficult to achieve is the issue of agency independence from commercially driven interests. Crucial hereby is the problem of the 'revolving doors' where board, committee and/or staff members of agencies leave their position for a job in industry. Clearly, independence from market interests requires elaborate rules on conflicts of interest for all people who work with and for EU agencies.
 15. Unlike their more independent American counterparts, EU agencies have been expressly designed as dependent on various institutions, mainly the European Commission, and to act as part of networks relying heavily on their national counterparts, which contributes to the complexity of their accountability mechanisms. This shows the delicate nature of determining how to balance between independence and accountability and control of agencies. This question has become more pressing now that following the *ESMA* ruling, agencies will be able to carry out more discretionary powers.
 16. The design of EU agencies includes an intriguing mix of control and accountability. *Ex-ante* control is determined by the legal boundaries set in the founding regulations of agencies, such as the scope of action, powers, finances and the determination and position of the agencies' principals as well as the general principles that apply to or are declared applicable to agencies. Most prominently involved in the *ex-ante* control are therefore the European Parliament and the Council as legislators. Ongoing control refers to the direct control by the principals in order to steer or influence the actions of the agencies.

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17. *Ex-post* control equals accountability that carries out a retrospective process of information, discussion and evaluation of agencies' actions. It expressly precludes direct intervention and herewith ongoing control. We observe five types of accountability: managerial accountability whereby in particular the supervisory roles that management boards play is key; political accountability that refers to the role of the European Parliament and the Council; administrative accountability, whereby the European ombudsman plays an important role in supervising general rules on transparency and access to documents; financial accountability which concerns the role of the Commission's financial controller, the Council and the European Parliament as budgetary authorities, the latter of which is also responsible for the annual budgetary discharge and the Court of Auditors; and judicial accountability, that regards the possibility at last foreseen in Article 263 TFEU to challenge agency acts that have legal effect vis-à-vis third parties before the General Court.
18. Although most agencies have powers of an advisory nature, it may be clear that the scientific opinions given, for example, by the European Medicines Agency (EMA) or the European Food Safety Authority (EFSA) carry significant weight in Commission decision making. Installing proper accountability mechanisms in relation to these agencies therefore becomes of key importance.
19. The 'borrowing' of EU agencies by Member States to implement EU law, as permitted by EU law, seems not to be problematic, but is adding to the complexity of their accountability.
20. The intricate relationship between independence and control and accountability of agencies is exemplary of the many existing legal arrangements. Shortcomings relate to the unfolding of account-

ability mechanisms in practice as well as the tensions between the Parliament, the Commission, the Council, and Member States and the existence of manifold control and accountability mechanisms, referred to in the literature as the problem of 'accountability overload'. This necessitates rethinking the current mechanisms.

Challenges ahead

21. EU agencies as 'in-betweeners' amidst EU institutions and Member States are part and parcel of the EU executive and strengthen the executive's composite character. This position of EU agencies is inevitably also a cause for critical concern, in particular in relation to their constitutional position and legitimacy; their increasing role at the global level and their hierarchical knowledge production; their functional operation and effectiveness in furthering European integration. This worry is intensified by the novel *Meroni* 2.0 as developed by the Court that allows agencies to further develop their own regulatory roles.
22. The notable absence of their position in the system of Articles 290-291 TFEU raises further concerns in relation to the nature of the EU executive and the possible conflicting roles of the Commission and the agencies and the accountability and control measures for these agencies. This constitutional neglect shows the unconstitutional position of agencies as actors operating in the shadow of hierarchy that can adopt binding executive acts that would ultimately be at odds with the principle of conferral.
23. The proliferation of agencies and the diversification of their tasks have made it increasingly difficult to reconcile agency operation in practice with the traditional agency model based on depoliticised operation. The traditional depoliticised agency

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model seems indeed to be growing into a model of 'politicised depoliticisation'. Highly problematic hereby is the situation where agencies may be used to move European policy and integration strategies beyond and circumvent current institutional impasses and political conflicts within the Commission, amongst the Member States, or between Union institutions.

24. The possible evolvement of EU agencies into political creatures therefore demands profound scholarly

attention. It crucially requires a thorough rethinking of the position of EU agencies in the EU executive, necessitating *inter alia* a careful reconsideration of current independence and accountability mechanisms for agencies while acknowledging that agencies are part of the composite executive power at the EU level. Ultimately, this calls for further, fully-fledged constitutionalisation of agency operation, ensuring that EU agencies obtain a clear position within the EU's institutional balance and be part of the EU executive.