Sieps
Swedish Institute for European Policy Studies

2018:1

EU agencies on the move: challenges ahead

Ellen Vos

THE EU´S POLITICAL AND CONSTITUTIONAL SYSTEM

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– SIEPS 2018:1 –

Report No. 1
January 2018

Published by the Swedish Institute for European Policy Studies

This publication is available at www.sieps.se
The opinions expressed in the publication are those of the author.

Cover design by LuxLucid
Printed by EO Grafiska AB

Stockholm, January 2018

ISSN 1651-8942
ISBN 978-91-86107-77-2

Preface

The emergence of EU agencies is a result of the closer European integration. 25 years ago, there were only two EU agencies in the areas of working conditions and vocational training. Today, there are about 40 EU agencies established in different EU Member States that work in a wide range of areas, including police cooperation, food safety, gender equality, banking, border control, intellectual property rights and disease protection.

As part of the EU's executive powers, they fulfill a number of functions, not the least as experts in different political areas. Furthermore, their decisions have an impact on the action space of the national administrative authorities, although with variations across political areas.

The present report identifies an important challenge for the future: while the rapid development has given the agencies an important role in EU cooperation, the mechanisms of control and accountability have not kept up with this development.

The author argues that giving the agencies a stronger legal basis and a clearer place in the EU system is a key task for the future that should interest both policy makers and researchers.

Against this background, it is my hope that this report will contribute to further discussions about the EU political system and its relationship with the Member States.

Eva Sjögren
Director

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Acknowledgements

I would like to thank Anna Wetter Ryde and the anonymous reviewers for their comments. All errors are mine.

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Executive summary

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 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 recognition 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 *dédoublement fonctionnel* (the "double-hattedness") of the board members serving two masters indicates that independence is in practice a very fragile concept and

underlines the relativity of the concept of independence. This underlines the inadequacy of the current mechanisms for accountability of these agencies.

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.

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 accountability 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 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.

1 Introduction

Over the years EU agencies have become an integral part of the EU's institutional structure and are 'an established part of the way the EU operates'.[1] We can therefore safely argue that nowadays the EU cannot function without its agencies.[2] EU agencies have been assigned a mixture of tasks, varying from provision of information to decision making in various policy fields, such as food and air safety, medicines, environment, telecommunications, disease prevention, border control, trademarks and banking. They are part of a process of functional decentralisation within the EU executive, with agencies being seated all over the EU from Helsinki to Crete and from Lisbon to Vilnius. These agencies rely to a large extent on networks, both inside and outside their formal institutional structure, with national authorities, experts and/or stakeholders.[3]

The trend of public authorities resorting to agencies to assist them in carrying out executive tasks is an old phenomenon within national executives in Europe.[4] 'Agencification' refers to the creation of new entities (agencies) in the public sector, or where existing agencies are given more autonomy to carry out specific tasks.[5] The 'agency fever'[6] at the EU level is more recent. Today agencification is characteristic of the EU executive[7] within a system of integrated administrations characterised by intense cooperation between the various executive levels.[8]

In the last decades, the number and importance of so called decentralised agencies have only increased. These agencies can broadly be defined as bodies governed by European public law that are institutionally separate from the EU institutions, have their own legal personality and a certain degree of administrative and

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1 Joint statement of European Parliament, Council and Commission on decentralised agencies and a common approach of 12-7-2012, <https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf> accessed on 25-7-2017.

2 M. Everson, C. Monda and E. Vos, 'European Agencies in between Institutions and Member States', in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 3.

3 E. Vos, 'European agencies and the composite EU executive' in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 11–47.

4 M. Egeberg and J. Trondal, *Agencification of the European Union administration: Connecting the dots,* TARN working paper no 1/2016, p. 1.

5 B. Jacobsson and G. Sundström, *Governing State Agencies Transformations in the Swedish Administrative Model*, Scores rapportserie 2007:5, p. 5.

6 M. Egeberg and J. Trondal, *supra* n. 4, p. 1.

7 D. Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution* (Oxford: Oxford University Press, 2009).

8 See H.C.H. Hofmann, 'Mapping the European Administrative Space', *West European Politics* 31 (2008): 671.

financial autonomy and have clearly specified tasks.[9] These agencies have been particularly resorted to in responding to crises, such as the 'mad cow' (Bovine Spongiform Encephalopathy – BSE) crisis and the oil tanker Erika crisis. The financial crisis led to the creation of another three supervisory authorities: the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) and another agency, the Single Resolution Board (SRB). And, in relation to the current refugee crisis, the EU transformed the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) into another, more powerful agency: the European Border and Coast Guard or the new Frontex.[10] In this crisis, the role of the European Police Office (Europol) has also gained importance.

EU agencies are hence clearly 'on the move': they both are increasingly proliferating and obtaining more and more discretionary powers. Yet, both the mushrooming of EU agencies and the increasingly broad powers that are conferred upon them 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. This paper will critically analyse these issues. It will first discuss the evolution of agencies in the EU's institutional setting (section 2). Subsequently, it will examine the legal concerns that arise with increased reliance on EU agencies: their position in the constitutional framework, their legal basis and delegation of powers to them (section 3). It will then examine their independence and accountability (section 4). In conclusion, it will highlight remaining challenges that arise from resorting to EU agencies (section 5).

[9] This excludes the three agencies set up in the field of Common Foreign and Security Policy, the executive agencies and other agency-like bodies.

[10] See very critically: S. Carrera and L. den Hertog, *A European Border and Coast Guard: What's in a name*? CEPS paper, No. 88 / March 2016.

2 The proliferation of EU agencies

2.1 The rise of EU agencies

After the initial creation of the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) and the European Centre for the Development of Vocational Training (CEDEFOP) in 1975, agencification of the EU executive took off in the early 1990s with the creation of the European Environment Agency (EEA) and the European Medicines Agency (EMEA – now EMA) to coordinate and gather information on the environment (EEA)[11] and to provide the EU institutions with the 'best possible' scientific advice (EMA).[12] While agencies were still considered to be replacements of comitology structures in the 1990s, agencies in their teens and twenties demonstrate that they are not a replacement of comitology but rather of previously existing scientific committees, other advisory committees composed of (national) experts or joint committees such as the Joint Aviation Authorities in the case of European Aviation Safety Agency (EASA)[13] and the Committee for Proprietary Medicinal Products in the case of EMA.

In the aftermath of several scandals, e.g. relating to food and maritime pollution at the end of the 1990s, European agencies were seen in the 2000s as an appropriate solution for problems of lack of trust in, and credibility of, the EU and its regulation.[14] Up until that moment, the EU institutions had not taken any particular vision or strategy on the creation and design of agencies, thus leaving both functional and political interests to be determined at the

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[11] Council Regulation (EEC) 1210/90 [1990] OJ L120/1, as amended by Council Regulation (EC) 933/1999 of 29 April 1999 on the establishment of the European Environment Agency and the European environment information and observation network [1999] OJ L117/1.

[12] See the new Regulation (EC) 726/2004 of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L136/1.

[13] See A. Schout, 'Changing the EU's Institutional Landscape? The Added Value of an Agency', in M. Busuioc, M. Groenleer & J. Trondal (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making* (Manchester: Manchester University Press, 2012), 71.

[14] The importance of establishing agencies within the institutional setting of the EU was indeed underlined in 1999 by the Committee of Independent Experts, established after the Cresson affaire, that held that it was difficult to find in the Commission persons who had 'even the slightest sense of responsibility', and recommended delegation and decentralisation of day-to-day executive tasks to such bodies. See the Committee of Independent Experts in its First Report on 'Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission' of 15 March 1999, para. 9.4.25, available at: < http://www.europarl.europa.eu/experts/pdf/reporten.pdf >, accessed on 25-7-2017.

micro-level of the founding regulations of agencies.[15] At the beginning of 2000, however, it became clear that a more general strategy on agencies was necessary. The European Commission was faced with the urgent need for a more open government, increased accountability and new forms of partnerships between the different levels of European governance in the aftermath of nepotism scandals and the various crises mentioned above.[16] It envisaged agencies as playing a role in the broader context of the exercise of the executive function and definition of the responsibilities of the institutions. It viewed agencies as being of great importance within the context of the guiding principles for administrative governance: less direct management, better control of delivery and greater cost-effectiveness.[17] The delegation of a number of tasks and powers to agencies which were non-majoritarian[18] bodies was herewith developed as a new mode of governance.[19] The 2001 White Paper on European Governance reinvigorated resorting to agencies.[20]

With this formal endorsement of agencies, we can thus observe in the 2000s a third wave of creation with at least 20 new agencies reflecting the EU's seemingly unending appetite for agencies.[21] The Commission reckoned at that moment that an overall framework was necessary to establish common provisions on the role and position of agencies in the EU's institutional structure, in accordance with the principles of good governance.[22] Such a general framework was, however, heavily debated between the Commission, Council and Parliament for almost 10 years. Finally, in 2012 the three institutions managed to agree on various

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[15] See D. Curtin and R. Dehousse, 'EU Agencies: Tipping the Balance?', in M. Busuioc, M. Groenleer & J. Trondal (eds.) *The Agency Phenomenon in the European Union. Emergence, Institutionalisation and Everyday Decision-making* (Manchester: Manchester University Press, 2012), 194.

[16] Such as the BSE crisis, see E. Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', *Journal of Consumer Policy* vol. 23, issue 3 (2000): 227–255.

[17] See Commission (EC), 'Reforming the Commission – Part I and II (Action Plan – White Paper) COM(2000) 200 final, 1 March 2000; Commission (EC), 'Shaping the new Europe' (Communication) COM(2000) 154 final, 21 March 2000; Commission (EC), 'European Governance: Better Lawmaking' (Communication) COM(2002) 275 final, 5 June 2002 and Commission (EC), 'Building our Common Future – Policy challenges and Budgetary means of the Enlarged Union 2007–2013 (Communication) COM(2004) 101 final/2, 26 February 2004, Annex 1.

[18] See G. Majone, 'The New European Agencies: Regulation by Information', *Journal of European Public Policy* 4, no. 2 (1997): 262–275. See in general G. Majone, *Regulating Europe* (London: Routledge, 1996). A. Sweet Stone and M. Tatcher define *non-majoritarian institutions*, as 'those governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials', A. Sweet Stone and M. Tatcher, *Theory and Practice of Delegation to Non-Majoritarian Institutions* (2002). Faculty Scholarship Series. Paper 74. http://digitalcommons.law.yale.edu/fss_papers/74, p. 2.

[19] See Curtin and Dehousse, *supra* n. 15, at 195.

[20] Commission (EC), 'European Governance – A White Paper (White Paper) COM (2001) 428 final, 27 July 2001, 24.

[21] See M. Egeberg, M. Martens & J. Trondal, *Building Executive Power at the European Level: Some Preliminary Findings on the Role of EU Agencies*, ARENA Working Paper No. 10, June 2009, 9.

[22] COM (2001) 428 final.

common issues of design, powers, operation and governance of EU agencies[23] and adopted a non-binding Common Approach to EU agencies.[24]

Hence, today we find a host of EU agencies in the EU's institutional structure with the total number of agencies amounting to 34.[25] The overall budget for these agencies is more than one billion Euros per year and they employ more than 5,000 staff members.[26] They 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[27] and actively contribute or are even responsible for setting standards within and even outside the EU.[28]

2.2 Rationales for EU agencies

There are various explanations on why EU agencies have become so popular.[29] Scholars first explained resorting to agencies in terms of what political scientists call 'the rational-choice approaches', or in particular the principal-agent approach.[30] Following the American model, the idea is that sectoral regulation often requires a degree of technical complexity that can and should not be dealt with by an organisation headed by politicians.[31] Agencies instead can deal with complex technical and scientific issues by providing expertise. The creation of EU agencies has thus allowed the European Commission greater room to concentrate on its core-tasks and policy priorities,[32] as more specific and technical administrative tasks were delegated to these agencies.

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23 See E. Vos, *supra* n. 3.

24 See *supra*, n. 1. See also COM (2008) 135.

25 The literature on European agencies is by now abundant. Publications include: M. Busuioc, *The Accountability of European Agencies. Legal Provisions and Ongoing Practices*, (Delft: Eburon, 2010); E. Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', *Common Market Law Review* 46, no. 5 (2009): 1395–1442; E. Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment', *European Law Journal* 19, no. 1 (2013): 93–110; M. Busuioc, M. Groenleer & J. Trondal (eds.), *The Agency Phenomenon in the European Union. Emergence, Institutionalisation and Everyday Decision-making* (Manchester: Manchester University Press, 2012); M. Everson, C. Monda and E. Vos (eds.), *European Agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 3; M. Chamon, *EU Agencies, Legal and Political Limits to the Transformation of the EU administration (*Oxford: OUP, 2016).

26 M. Egeberg and J. Trondal, *supra* n. 4, p. 5.

27 See e.g. ESMA and Article 28 of Regulation No 236/2012 on short selling and certain aspects of credit default swaps, OJ 2012, L86/1.

28 H.C.H. Hofmann, 'European regulatory Union? The role of agencies and standards', in P. Koutrakos and J. Snell (eds.), *Research handbook on the EU's internal market*, (Cheltenham: Edward Elgar publishing), 2017, 460–479.

29 See for a discussion Busuioc, Groenleer & Trondal, *supra* n. 25 and Busuioc, *supra* n. 25.

30 M. Egeberg and J. Trondal, *supra* n. 4, p. 4.

31 G. Majone, 'The Rise of the Regulatory State in Europe', *West European Politics* 17, no. 3 (1994): 77–101.

32 Majone (1996), *supra* n. 18.

Literature has moreover emphasised that agencies introduce more, and more flexible, administrative capacity and efficiency and facilitate, coordinate and strengthen cooperation between national authorities. The creation of agencies herewith responded to the need for more uniformity in the implementation of EU policies where the harmonisation model appeared to be less attractive while upholding the EU's system of decentralised implementation.[33]

Scholars have also pointed to what Egeberg and Trondal call 'contingent events'[34] in order to help explain institutional change and the creation of agencies. The creation of agencies, and/or the strengthening of agencies has been very appealing in responding to crises, such as the BSE crisis, oil tanker Erika crisis, financial crisis and very recently the migration or refugee crisis. The attractiveness of agencification after the occurrence of certain crises is surely also closely linked to the desire to rationalise the relevant policy area and reinforce the science-based approach to decision-making in these areas.

Moreover, the creation of agencies may also be the outcome of the interplay of strategic and political interests in a power game between the institutions and Member States.[35] Hereby Member States' desire to gain prestige for having an agency seated in their territory has indubitably played a role.[36]

Finally, agencification of EU executive governance may also be regarded as a political compromise in situations with clear functional needs for more regulatory capacity at the EU level but in which Member States were reluctant to transfer more powers to the European Commission.[37] The recent strengthening of Frontex[38] and Europol[39] and the proposal for reform of EASO[40] in the refugee or migration crisis are illustrative hereof.

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[33] R. Dehousse, 'Regulation by Networks in the European Community: The Role of European Agencies', *Journal of European Public Policy* 4, no. 2 (1997): 246–261.

[34] M. Egeberg and J. Trondal, *supra* n. 4, p. 4.

[35] See e.g. R. Dehousse, 'Delegation of Powers in the European Union: The Need for a Multi-principals Model', *West European Politics* 4 (2008): 789–805; M. Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development* (Delft: Eburon, 2009).

[36] Exemplary of this is the fight for the seat of the European Food Safety Authority. See the quote in footnote 35 of E. Vos, *supra* n. 3.

[37] D. R. Keleman, 'The Politics of 'Eurocratic' Structure and the New European Agencies', *West European Politics*, 25, no. 4 (2002): 93–118, p. 95.

[38] Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, (2016) OJ L251/1.

[39] Regulation (EU) 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, (2016) OJ L 135/53.

[40] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM (2016) 271 final.

2.3 Conceptualisation of EU agencies

Egeberg and Trondal have encapsulated the existing literature on the agencification of EU executive governance into three broad conceptual images: an intergovernmental, transnational and supranational image. The intergovernmental image regards EU agencies as set up to implement or monitor the implementation of policies agreed upon by Member States. The transnational image presupposes that EU agencies are 'loosely coupled' to national and EU institutions and view agencies as regulator networks. A supranational image sees EU agencies as integral elements of the EU administration, more specifically the Commission. According to Egeberg and Trondal, these images highlight 'overlapping, supplementary, co-existing and enduring governance dynamics within and among EU agencies' and these three images are likely to co-exist and the various elements may change over time and per agency. As a matter of fact, they state that studies on EU agencies reflect all three images.[41]

What is clear from this analysis is that agencies have induced a shift from a model of indirect administration, where EU policies were implemented by Member States and not by EU bodies to a more direct administration, whereby implementation is carried out at the EU level, by *inter alia* EU agencies.[42] They find more elements indicating an ongoing trend towards supranationalisation of executive power in the EU.[43] EU agencies may be argued to have contributed to the centralisation of EU administration, but not at the expense of the Commission's executive power, as they largely perform functions that the Commission cannot perform itself because of the lack of expertise. Importantly, as Keleman argues, tasks have been assumed at the EU level by means of agencies, which otherwise would not have been possible at the EU level because of the political resistance against the Commission.[44] Busuioc and Groenleer argue that agencies have been established within the Union because it was deemed to not be politically appropriate to entrust certain tasks to the European Commission as the latter would be too bureaucratic, too politicised and composed of only generalists.[45] A lack of political faith in the Commission which arises by virtue of its own politicised, generalist or bureaucratic nature, and its vulnerability to Member State interests in the context of comitology, have greatly facilitated the

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[41] M. Egeberg and J. Trondal, *supra* n. 4, p. 2–3.

[42] M. Egeberg and J. Trondal, *supra* n. 4, p. 8; M. Keading and E. Versluis, 'EU Agencies as a Solution to Pan-European Implementation Problems', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 73–86.

[43] M. Egeberg and J. Trondal, *supra* n. 4, p. 9.

[44] D. R. Keleman, *supra* n. 37, p. 112.

[45] M. Busuioc and M. Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 179.

rise of agencies within the EU structure.[46] The conferral of powers upon ESMA to intervene in emergency situations in the national financial markets seems indicative of this.

The trend towards direct administration and supranationalisation is confirmed by findings of EU agencies operating on the basis of networks. EFSA, for example, has been designed to operate with national counterparts and/or stakeholders and manoeuvre as a kind of *primus inter pares* with the national authorities, instead of being hierarchically placed above the national authorities. This agency has therefore been conceptualised as the apex of an interdependent network with various national authorities and other actors in a 'multi-level procedural labyrinth'[47] or even a 'super-agency'.[48]

The fact that EU agencies contribute to a reinforcement of EU executive power and lead to a pluralisation of the EU executive[49] is, however, not in itself conclusive in determining the precise location of agencies in the political-administrative setting and the characterisation of agencies. As Egeberg and Trondal have stated: 'the jury is still partly out', although they conclude on the basis of the existing data, that these agencies lean more towards the Commission than to any other potential master.[50]

Insights from the legal literature connect EU agencies more to the composite or shared administration of the EU. Agencies are, as Curtin observed, 'betwixt and between'[51] and in Everson's words, 'hierarchy beaters'.[52] This makes EU agencies 'interesting hybrids'.[53] 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.[54]

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[46] M. Everson, C. Monda and E. Vos, 'What is the Future of European Agencies?', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 235.

[47] See P. Dąbrowska, 'EU Governance of GMOs: Political Struggles and Experimentalist Solutions?', in C.F. Sabel & J. Zeitlin (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture,* (Oxford: Oxford University Press, 2010), 177–215.

[48] See E. Vos & F. Wendler, 'Food Safety Regulation at the EU Level', in E. Vos & F. Wendler (eds.), *Food Safety Regulation in Europe. A Comparative Institutional Analysis*, (Antwerp-Oxford: Intersentia, 2006), 65–138.

[49] H.C.H. Hofmann & A. Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"', *European Law Review* 37, no. 4 (2012): 419.

[50] M. Egeberg and J. Trondal, *supra* n. 4, p. 10 and 11.

[51] See Curtin, *supra* n. 7, at 174.

[52] M. Everson, 'Independent Agencies: Hierarchy Beaters?', *European Law Journal* 1, no. 2 (1995): 180–204.

[53] See M. Everson, 'Agencies: The 'Dark Hour' of the Executive?, in H.C.H. Hofmann & A. Türk (eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, (Cheltenham: Edward Elgar, 2009), 131.

[54] See in relation to Frontex, J.J. Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex', in M. Busuioc, M. Groenleer & J. Trondal (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making,* (Manchester: Manchester University Press, 2012), at 90.

Hence representatives of both Member States and the EU institutions sit in their steering boards and some of their other bodies. In view of the 'double-hattedness' of the members of these boards, serving both national and European authorities,[55] potential tension, competition and/or conflicts between national and European interests seem to be inherent to the composite character of the EU executive. The hybrid character of agencies is furthermore apparent when taking account of the fact that agencies not only assist the EU institutions but also Member States.[56] For example, EASA even acts as 'the authorised representation of EU Member States' when making arrangements at the global level. It also makes working arrangements with various third countries, such as Australia and Brazil or international organisations, including the Interstate Aviation Committee.[57] As such, this adds another dimension to the double-hattedness of agencies.[58] The 'borrowing' of EU agencies by Member States to implement EU law, as permitted by EU law, seems not to be problematic,[59] but is adding to the complexity of their accountability.

The latter is a general problem that is inherent to the hybrid character of EU agencies. The characterisation of EU agencies as 'in-betweeners', between the EU institutions, particularly the Commission, and the Member States, would seem appropriate as it indicates the close connection of the EU agencies to their masters: on the one hand, the institutions and the Commission and on the other, the Member States.[60]

This characterisation shows at the same time the intricate position of EU agencies in the constitutional framework. This together with the current trend, approved by the Court of Justice to empower EU agencies with (modest) discretionary powers, underlines the need to rethink control and accountability of EU agencies and their legitimacy more generally.

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55 See M. Egeberg & J. Trondal, 'EU-level Agencies: New Executive Centre Formation or Vehicles for National Control?', *Journal of European Public Policy* 18, no. 6 (2011): 883–884.

56 See M. Chamon, 'The Influence of "Regulatory Agencies" on Pluralisms in European Administrative Law', *Review of European Administrative Law* 5, no. 2 (2012): 61–91, at 76–80. See *inter alia*, Art. 17(e) of Regulation 216/2008. See A. Ott, E. Vos and F. Coman Kund, 'European Agencies on the Global Scene: EU and International Law Perspectives', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 87–122.

57 See working arrangement on the airworthiness between EASA and the Interstate Aviation Committee, <https://www.easa.europa.eu/system/files/dfu/intl_appro_IAC_EASA.pdf>, accessed on 25-7-2017. A similar wording is used in arrangements with Australia, Brazil, Japan, Singapore and Taipei. See for more examples, Ott, Vos and Coman Kund, *supra* n. 56, mentioned in footnote 81.

58 See Egeberg and Trondal, *supra* n. 55, p. 883.

59 In view of the Court's liberal attitude towards the 'borrowing' of EU institutions by Member States when implementing an international agreement outside the EU legal framework, see B. De Witte & T. Beukers, 'Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012', *Common Market Law Review* 50, no. 3 (2013): 805–848.

60 See M. Everson, C. Monda and E. Vos (eds.), *supra* n. 25.

3 Legal issues in relation to EU agencies

3.1 Constitutionalisation of agencification

Importantly, the Lisbon Treaty has formally recognised agencification of the EU executive as such, by introducing EU agencies formally into the Treaties. This Treaty has formalised jurisdiction of the Court over agency acts.[61] The Court may thus 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 agency acts in preliminary rulings.[62] With this provision, the Lisbon Treaty codified a longstanding unconstitutional practice[63] in which the Court had already accepted jurisdiction in conflicts over rejections of applications for a European trademark by the former OHIM, now EUIPO.[64] Although the provision does not confer the possibility for agencies to challenge acts of EU institutions, the limited constitutional legitimation of agencies is to be welcomed in ensuring more legal certainty in judicial review of agency acts.[65]

Agencies are furthermore put on par with the EU institutions in a variety of provisions in the Treaties, that is in relation to internal security,[66] financial measures and independence of the European Central Bank,[67] complaints on

[61] Now in Article 263 TFEU. See case law of the CJEU, e.g. Case T-411/06, *Sogelma v EAR* [2008] ECLI:EU:T:2008:419, paras 42 and 43.

[62] Art. 263 TFEU moreover permits that the founding regulation of agencies lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. The relevant Articles are: failure to act: Art. 265 TFEU, preliminary rulings: Art. 267 TFEU and plea of illegality: Art. 277 TFEU.

[63] See the Court of Auditors in its opinion no. 8/2001 on the Commission's proposal to lay down the statute for executive agencies, OJ 2001, C 345/1.

[64] Whilst having no constitutional basis for this, the founding regulation of the European trademark regulation provided for the possibility to have decisions of EUIPO's (formerly OHIM's) board of appeal reviewed by the Court, see Article 65 of Regulation 207/2009 on the Community trademark, OJ 2009 L 78/1. Moreover, in 1995, the Court of First Instance (CFI) expressly accepted jurisdiction to judge decisions of the OHIM and amended its Rules of Procedure to this end. In view of the anticipated workload, especially stemming from litigation relating to these decisions, the Council has additionally allowed the CFI to render judgment by a single judge. See Council Decision 1999/291/EC, ECSC, Euratom, OJ 1999, L 114/52.

[65] See already the Court's rulings in Case T-411/06, *Sogelma v EAR* [2008] ECLI:EU:T:2008:419, paras 42 and 43 and Case T-70/05 *Evropaiki Dynamiki* v. *EMSA*, ECLI:EU:T:2010:55. See J. Saurer, 'Transition to a New regime of Judicial Review of EU agencies', *European Journal of Risk Regulation* 1 (2010): 325; A. Alemanno and S. Mahieu, 'The European Food Safety Authority before European Courts. Some reflections on the judicial review of EFSA scientific opinions and administrative acts', *European Food and Feed Law* 5 (2008): 320–333.

[66] Article 71 TFEU.

[67] Articles 123(1), 124, 127(4), 130, 282(3) TFEU.

instances of maladministration submitted to the Ombudsman,[68] audits,[69] fraud,[70] and citizenship.[71] Importantly, agencies, in the same way as the institutions, must abide by the principle of transparency (including access to documents),[72] the requirement of personal data protection[73] and the respect for the constitutional right of citizens to write questions and have answers in their own language.[74] They too are required to hold an open, efficient and independent administration.[75]

The constitutionalisation of the operation and decision-making procedures of agencies strengthens agencies as part of the EU executive making it clear that agencies are subjected to the constitutional values of transparency, openness and participation. In view of the criticism on agencies' transparency,[76] *inter alia* in relation to the conflicts of interest declarations, the recognition of constitutional values in relation to EU agencies is of high importance. Yet, it is also true that the constitutionalisation will not solve the incoherencies that exist in practice where founding regulations stipulate transparency and participation in agency activities and decision making only in a very general way. Here shortcomings continue to exist about the role of participation, consultation and transparency in relation to binding and non-binding agency decisions[77] requiring a more general approach on these issues, for example by means of an EU administrative act.[78]

Moreover, the Lisbon Treaty did not shed full clarity on the position and powers of EU agencies. Three legal issues remain a concern: the compatibility of the possibility to delegate powers to agencies with the hierarchy of norms system as introduced by the Treaty, the legal basis of EU agencies and the delegation of powers to EU agencies together with the nature of their acts.

3.2 Constitutional neglect

Agencies are disregarded by the drafters of the Lisbon Treaty in provisions where one would have expected them most; the system of delegation laid down by the Treaty neglects to position agencies as bodies to whom powers can be delegated

[68] Article 228(1) TFEU.
[69] Article 287(1) and (3) TFEU.
[70] Article 352(1) and (4) TFEU.
[71] Article 9 TEU.
[72] Article 15(1) and (3) TFEU.
[73] Article 16(2) TFEU.
[74] Article 24 TFEU.
[75] Article 298 TFEU.
[76] See *inter alia*, the European Court of Auditors, *Management of conflicts of interests of selected EU agencies*, Special report No. 15/2012.
[77] Chiti 2013, *supra* n. 25, at 104–108.
[78] See D. Curtin, H. Hofmann & J. Mendes, 'Constitutionalising EU Executive Rule-making Procedures: A Research Agenda', *European Law Journal* Vol. 19, No. 1, (2013): 1–21.

in Articles 290[79] and 291[80] TFEU. The neglect of agencies is quite extraordinary in view of the composite character of the EU executive and is more remarkable now that agencies do appear in the Treaties elsewhere, as pointed to above. This constitutional neglect should mostly likely be explained in terms of the Commission's own unitary view on the EU executive. The view was explicitly stated in the Commission's White Paper on European Governance where the Commission presented itself 'as the lone hero of European policy-making and implementation'.[81] This was in a time where the Commission had just swept away the proposal by some Member States to insert in the Treaties a separate legal basis for the creation of agencies[82] as it feared the insertion of a legal basis for the creation of agencies would risk creating conflicting centres of power.[83] Although in the same White Paper the Commission did acknowledge the merits of resorting to agencies, it blatantly focussed on the Community method and the institutional triangle of the Council, Parliament and the Commission, which led it to suggest that the impact of comitology on its decision-making be diminished and to replace comitology with the adoption of delegated acts with a direct *ex-post*[84] control mechanism on the exercise of the Commission's powers.

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[79] Article 290 TFEU reads:
'1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.
2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:
(a) the European Parliament or the Council may decide to revoke the delegation;
(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.
For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.
3. The adjective "delegated" shall be inserted in the title of delegated acts'.

[80] Article 291 TFEU reads:
'1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
4. The word "implementing" shall be inserted in the title of implementing acts'.

[81] F.W. Scharpf, *European Governance: Common Concerns vs. The Challenges of Diversity*, New York Jean Monnet Working Paper 6/01, 2001, 8.

[82] See Vos, *supra* n. 3.

[83] Speech by R. Prodi before the European Parliament, 3 October 2002, SPEECH/00/352, see <http://europa.eu/rapid/press-release_SPEECH-00-352_en.htm?locale=EN>, accessed on 25-7-2017.

[84] I.e. after the adoption and before the entry into force of the Commission act.

It is precisely this thinking that has been codified in Articles 290 and 291 TFEU. In the hierarchy of norms introduced by the Lisbon Treaty, no attention is nevertheless paid to the fact that agencies form part of the EU executive and may adopt binding decision-making powers. For example, binding legal acts on the registration or refusal of a European trademark adopted by EUIPO are clearly acts of an executive nature and comparable with Commission decisions on the approval or refusal of an EU-wide approval of a novel food. However, while the latter decisions are implementing decisions in the sense of Article 291 based on comitology, EUIPO's acts clearly do not fall under this category. This highlights the uncomfortable and even 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 of powers in accordance with Article 5 (2) TEU. The Treaty, however, does recognise that agencies can adopt binding acts. In Articles 263 and 277 TFEU the Court has explicit jurisdiction for agency acts that 'intend to produce legal effect vis-à-vis third parties.'

Seen in this context, the claim put forward by the UK in *ESMA*, also referred to as *Short-selling*, that the delegation of powers to ESMA would be incompatible with Articles 290 and 291 TFEU, made very good sense. In this case, the Court was explicitly asked to judge whether Articles 290 and 291 TFEU were intended to establish a single framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union agencies may be contemplated by the EU legislature.[85] In its judgment, the Court affirmed the latter and found no difficulty in circumventing the carefully crafted hierarchy of norms in these Treaty provisions. The Court hereby deduced from the inclusion of agencies in other Treaty provisions that the possibility to confer powers upon such bodies exists; 'a number of provisions in the FEU Treaty none the less presuppose that such a possibility exists'.[86] Crucial for the Court was also the fact that the amended judicial review provisions also apply to agencies. It hereby explicitly referred to the practice of the EU legislature to delegate decision-making powers to agencies such as ECHA, EUIPO, CVPO and EASA. In relation to ESMA, the Court underlined that the conferral of certain decision-making powers on ESMA in 'an area which requires the deployment of specific technical and professional expertise'[87] does not 'correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU'.[88] The Court views that this does not undermine the rules on delegation of powers laid down in Articles 290 and 291 TFEU.[89]

85 Case C-270/12, *UK v. Council and European Parliament* [2014] ECLI:EU:C:2014:18, para 78.
86 *Idem*, para 79.
87 *Idem*, para 82.
88 *Idem*, para 83.
89 *Idem*, para 86.

With its pragmatic approach in *ESMA*, the Court upholds the delegation of decision-making powers to EU agencies and bridges the 'constitutional gap in EU executive rulemaking'.[90] It remedies the evidently uncomfortable and unconstitutional position of agencies as bearers of executive powers that operate in the shadow of hierarchy. This is quite courageous as the Court admittedly argues that the mentioning of agencies in other Treaty provisions 'presupposes' that the possibility to delegate powers to agencies exists, having particular regard to the amended judicial review provisions:[91] if agencies can adopt acts that can be judicially reviewed and if Member States' courts can even ask the Court to interpret agency acts, it must be possible to confer the powers to adopt such decisions to agencies. The Court herewith gives a constitutional mandate to confer powers upon agencies despite the constitutional neglect. The Court could not have been clearer in confirming that the intention of the Lisbon Treaty to introduce an all-embracing hierarchy and categorisation of norms is a genuine failure also in relation to agency acts, in addition to its intricate division into delegated and implementing acts.[92]

3.3 Legal basis

In line with the principle of conferral of powers,[93] the EU's competences are not unlimited. This principle requires the EU to only adopt decisions in relation to subject-matters and policy areas where powers have been conferred upon the EU, making the legal basis requirement essential for each EU decision to be adopted, ensuring that the EU does not act outside its powers. In relation to agencies, it means that the creation of EU agencies needs to have a legal basis that is suitable for those purposes, whilst also powers conferred upon these agencies by the EU legislator are limited. The question of the correct legal basis for the creation of EU agencies has been subject to debate between the EU institutions and Member States.

Looking at the legal basis of existing EU agencies, we can distinguish agencies that have been created by a Commission act, a Council joint action, a Council act or a European Parliament and Council act. Agencies created by the Commission are meant to only assist the Commission in the implementation of EU programmes and are called executive agencies. The three agencies that operate in the field of foreign security and defence policy, European Defence Agency (EDA), European Union Institute for Security Studies (EUISS) and European Union Satellite Centre (SatCen), are all established by a Council joint action. These agencies have a different organisational structure than the other agencies as, for example, in the case of EDA the defence ministers participate

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[90] H. Marjosola, 'Bridging the constitutional gap in EU executive rulemaking: the Court of Justice approves legislative conferral of intervention powers to the European Securities and Markets Authority', *European Constitutional Law Review* 10 no. 3 (2014): 500–527.

[91] *Ibid.*, p. 527.

[92] See Vos, *supra* n. 3.

[93] Articles 4 and 5 TEU.

in the agency's administrative board. These agencies are therefore excluded from our analysis.

Notwithstanding several attempts at the end of the 1990s to insert an explicit legal basis for the creation of EU agencies in the Treaty,[94] the Lisbon Treaty did not address this issue. What is the correct legal basis on which EU agencies can be created has been the subject of legal contestation for some time. In the 1990s, the Council still insisted on the use of the general clause of former Article 235 EEC/308 EC (now Article 253 TFEU) offering a legal basis for EU measures in cases where no other specific Treaty provision provided for the powers to adopt such measures and where measures would be necessary in the course of the operation of the common market.[95] In the 2000s however, the Council relaxed its position and agreed that EU agencies could indeed be adopted on the basis of the provisions in relation to relevant various policy areas, such as the legal basis in the field of environment, transport and the internal market.

Yet, the institutional practice of creating agencies on the basis of the internal market legal basis was not entirely uncontroversial. It was opposed by the UK, leading to legal disputes before the Court. In most cases, though the UK was not so much concerned with the creation of agencies as such, it mostly did not agree with the substantive EU measures or the powers conferred upon the agency. It attempted to prevent the adoption of these measures by formally protesting against the use of the internal market legal basis. Under the latter provision, the UK was outvoted as this required qualified majority voting. Under the general clause of Article 235 EEC/308 EC it would have blocked the adoption of the measures as this Article provided for a unanimity vote in the Council.

The UK, for example, challenged the creation of the European Union Agency for Network and Information Security (ENISA) under Article 114 TFEU as the latter article provides for the power to harmonise national laws and would not allow for a measure which is aimed at setting up EU bodies and conferring tasks upon such bodies.[96] The Court rejected the UK's arguments. The Court held that the EU legislature may establish an agency that is 'responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures

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[94] During the negotiations prior to the Nice Treaty a separate legal basis allowing for the creation of agencies was debated in various proposals. See Vos, *supra* n. 3.

[95] E.g. as regards the legal basis of the creation of a centralised authorisation system for medicines and the creation of an agency, that the Commission proposed to base on former Article 100a COM (90) 283 final – SYN 309 to 312. The Council did not agree and ultimately the regulation was adopted on the former 235 EEC; Council Regulation (EEC) No 2309/93 OJ 1993 L 214/1.

[96] Case C-217/04, *United Kingdom* v *European Parliament and Council* [2006] ECLI:EU:C:2006:279.

seems appropriate'.[97] It emphasised nevertheless that 'the tasks conferred on such an agency must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States'.[98] This ruling thus confirms the broad ambit of harmonisation measures that can be adopted under the internal market legal basis, including the creation of EU agencies.

The wide sphere of harmonisation measures was subsequently endorsed in *ESMA*, or *Short Selling*. In this case, the UK argued that the internal market legal basis, i.e. Article 114 TFEU, did not allow to confer upon ESMA far-reaching enforcement and intervention powers. The Court, however, unlike Advocate General Jääskinen,[99] disagreed. It confirmed the broad interpretation of Article 114 TFEU, to also include such powers. At the same time, it reiterated its ruling in *ENISA* that the EU legislature may deem it necessary to provide for the establishment of 'an EU body responsible for contributing to the implementation of a process of harmonisation'.[100] On the basis of this case law, EU agencies can therefore be established under Article 114 TFEU as long as they contribute to the implementation of 'a process of harmonisation'. In view of the Court's lenient case law, in many cases Article 114 TFEU will therefore offer the correct legal basis for the creation of EU agencies.

3.4 Delegation of powers to EU agencies

Legal quarrelling about the kind of powers that agencies may exercise (discretionary or merely executive, binding or advisory) has emphasised the importance of examining the nature of powers that are delegated to EU agencies. The most extensively discussed legal question in relation to EU agencies in the legal literature and to a lesser extent in practice, is therefore which powers may be delegated to EU agencies. According to the nature of their powers and the instruments *agencies* have at their disposal, EU agencies can today be divided into agencies with and without binding decision-making powers. Only a few agencies have been allotted formal and binding decision-making powers, although it is noteworthy that increasingly binding decision-making powers are being conferred upon agencies. Such powers mainly relate to the registration of trademarks and certain chemicals, and the issuance of certificates. These agencies adopt final and binding decisions on, for example, the registration of trademarks and chemicals, that individual actors can challenge before the General Court of the EU. At present, EUIPO, CPVO, EASA, ECHA, EMA, ESMA, EBA and EIOPA[101] have powers to adopt binding decisions.

[97] *Idem*, para 44.
[98] *Idem*, para 45.
[99] According to Advocate General Jääskinen, the correct legal basis of this regulation should have been Article 352 TFEU. See Opinion AG Jääskinen in Case C-270/12, para 54.
[100] Case C-270/12, *supra* n. 85, para 104.
[101] See annex 1 for an overview of all existing agencies and their respective abbreviations.

Whilst the Lisbon Treaty for the first time introduced the notion of delegation in Article 290 TFEU, it does not define delegation and is silent of the possibility to delegate powers to agencies, the nature of these powers and the acts of agencies. Before discussing the Lisbon Treaty's silence on the possibility for agencies to exercise decision-making powers within the current constitutional system of delegation (see section 4.2.3), we will first address the question of which powers can be delegated to EU agencies. A vital point of departure for this discussion is the review of the leading case law from the Court of Justice of the European Union on this subject matter: *Meroni* and *ESMA.*[102]

Meroni

Until the Court's judgment in *ESMA*, legal thinking within the EU institutions and literature was dominated by the 'limited-delegation'[103] or *Meroni* doctrine. This doctrine allowed for delegation of very limited powers to EU agencies based on the *Meroni* rulings of the Court in the 1950s.[104] In *Meroni*, the Court was asked to rule upon the delegation of powers from the Commission to an organisation established on the basis of Belgian private law. In these cases, the Court rejected the transfer of sovereign powers to subordinate authorities outside the EU institutions and ruled that only 'clearly defined executive powers' could be delegated, the exercise of which was to remain at all times subject to Commission supervision.

Although the *Meroni* judgments related to the ECSC, their applicability to the EU Treaty has been generally accepted[105] and was confirmed by the CJEU in its case law in the 2000s.[106] The *Meroni* case law would suggest that the following conditions apply to the admissibility of transferring sovereign powers to subordinate authorities outside the EU institutions:

- the delegating authority cannot delegate broader powers than it enjoys itself;
- only strictly executive powers may be delegated;
- discretionary powers may not be delegated;
- the exercise of delegated powers cannot be exempt from the conditions to which they would have been subject had they been directly exercised by the delegating authority, in particular the obligation to state reasons for decisions taken, and judicial control of decisions;
- the powers delegated remain subject to conditions determined by the delegating authority and subject to its continuing supervision.

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[102] Case C-270/12, *supra* n. 85.

[103] As rightly pointed out by G. Della Cananea at the workshop *The place of European agencies in the EU institutional structure*, University of Tor Vergata, Rome, 9 May 2013.

[104] Cases 9/56 and 10/56 *Meroni v. High Authority* [1957–1958] ECLI:EU:C:1958:7.

[105] See, e.g. K. Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community', *European Law Review* 18, no. 1 (1993): at 41.

[106] Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others* [2005] ECLI:EU:C:2005:449, para 90.

Ultimately, these conditions would come down to requiring that the institutional balance will not be distorted. The Court's understanding of democratic legitimacy implies that it must be possible to eventually trace the powers of any rule-making body to the authority of a democratically-elected parliament.[107] In *Meroni*, the Court considered that the institutional balance would be distorted if discretionary powers were delegated to bodies other than those established by the Treaty. This also explains the Court's underlying concern about the distinction between 'clearly defined executive powers' and 'discretionary powers' and the concern about the prohibition to delegate the latter to bodies other than the institutions.

This thinking has dominated legal literature and practice for many years. In 2002, however, Majone observed a struggle between various Directorate Generals (DG) in the Commission whereby the policy DGs increasingly acknowledged the need to confer more powers on agencies in view of the growing complexity of the EU's tasks, and the Commission's Legal Service anxiously attempted to stick to a strict interpretation of the *Meroni* doctrine.[108] It is thus perhaps not surprising that the legislative reality shows a much more indulgent attitude towards the delegation of powers.[109] The far-reaching enforcement and intervention powers conferred upon the three supervisory authorities serve as examples.[110] It is the latter kind of powers conferred upon ESMA that the UK authorities decided to challenge in 2012.[111]

ESMA

Hence, after more than 50 years of discussion in the legal literature, the Court was finally called upon to answer *the* question whether the *Meroni* case law, judged in a different time of thinking about the functions of administration and in a different situation that was about delegation of powers conferred upon the Commission by the Treaty to a body established under Belgian private law, still made 'good law'. In *ESMA*, the UK sought the annulment of Article 28 of Regulation 236/2012 that conferred upon ESMA the power to issue legally binding measures (prohibit or impose conditions) in relation to short selling against financial institutions of the Member States in the event of a threat to the orderly functioning and integrity of financial markets or to the stability of

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[107] See C. Joerges, H. Schepel & E. Vos, *The Law's Problems with the Involvement of Non-governmental Actors in Europe's Legislative Processes: The Case of Standardisation*, EUI Working Paper, Law 99/9 (Florence 1999).

[108] G. Majone, 'Delegation of Regulatory Powers in a Mixed Polity', *European Law Journal* 3, no. 3 (2002): 329.

[109] Vos, *supra* n. 3.

[110] See A. Ottow, 'The New European Supervisory Architecture of the Financial Markets', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 123–143. See for a discussion of rulemaking powers of agencies, Chiti 2013, *supra* n. 25, at 93–110.

[111] Case 270/12, *supra* n. 85.

the whole or part of the financial system in the EU.[112] In addition to other pleas, the UK authorities held that this power entailed a wide discretionary power and therefore infringed the principles established in relation to delegation of powers in the *Meroni* case law. The Court rejected this and all other claims held by the UK. The Court confirmed that the delegation of powers is in fact limited by *Meroni*, specifying that this case law only allows delegation of strictly circumscribed executive powers to EU agencies. In other words: *Meroni* is indeed still good law.[113]

The Court was nevertheless visibly torn between the need to confirm the stricter *Meroni* requirements set in the 1950s and the recognition that ESMA does need to carry out the intervention tasks conferred upon it. The Court therefore 'mellows' *Meroni*:[114] it did not rule out entirely the possibility to delegate discretionary powers. The Court first appeared to be sensitive to the fact that, contrary to the bodies in *Meroni* that were governed by private law, ESMA was a 'European Union entity, created by the EU legislature'.[115] Subsequently, it limited ESMA's discretion rather than excluding it.[116] The Court moreover considered it essential that the powers delegated to ESMA by the EU legislature were 'circumscribed by various conditions and criteria which limit ESMA's discretion'.[117] This meant that ultimately, 'ESMA is not vested with "a very large measure of discretion"'.[118] The Court found, therefore, that delegation of the intervention powers to the ESMA was accorded with the stipulations established under *Meroni*, in particular with the demand for enhanced protection of individual rights which it had established in its *Romano*[119] ruling.[120]

Hence the Court did not rule out completely that discretionary powers were conferred upon agencies as such but instead focussed on the possibility to limit the discretion of agencies.

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[112] European Parliament and Council Regulation (236/2012 on short selling and certain aspects of credit default swaps, OJ 2012 L86/1.

[113] K. Lenaerts, 'EMU and the EU's constitutional framework', *E.L. Rev.* 39, no. 6 (2014): 753–769, at 760.

[114] See J. Pelkmans and M. Simoncini, *Mellowing Meroni: How ESMA can help build the single market*, CEPS commentary, 18 February 2014.

[115] Case 270/12, *supra* n. 85, para 43.

[116] *Idem, supra* n. 85, e.g. paras 45 and 50.

[117] *Idem*, *supra* n. 85, para 45.

[118] *Idem*, *supra* n. 85, para 54.

[119] Case 98/80, *Guiseppe Romano v. Institut national d'assurance maladie-invalidité* [1981] ECR 1259.

[120] See M. Everson and E. Vos, 'European Agencies: What About the Institutional Balance?', in A. Łazowski and S. Blockmans, *Research Handbook on Institutional Law of the EU* (Cheltenham: Edward Elgar publishing, 2016), 139–155.

3.5 Meroni 2.0 and remaining pitfalls

ESMA can therefore be seen as adapting the *Meroni* doctrine to the 21st century and the Lisbon amendments to a constitutional framework of the Treaties: the Court established *Meroni* 2.0. If delegation complies with the legal guarantees set by the amended Treaties, the Court sees no objections to have delineated but discretionary powers conferred upon agencies.[121] 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*.

Whereas *Meroni* has generally been considered as a ruling that hinders agency operation, *ESMA* can now be viewed as a case that supports further development of agencies. The *de facto* relaxation of the *Meroni* conditions[122] is so matched by an implied, but important, modification to the exact character of the principle of institutional balance. Although the Court does not expressly refer to the institutional balance principle in its judgment, it implicitly relies on it when referring to the recent Treaty reforms, identifying agencies as bodies of the Union whose acts will be subject to judicial review proceedings (Articles 263 and 277 TFEU).[123] The Court herewith appears to emphasise an interpretation of the institutional balance which stresses the importance of protection for the interests of the individual within the EU. *ESMA* thus entails an important adaptation of the principle of the institutional balance to 'the new realities of European governance',[124] and gives agencies an autonomous character whilst at same time, it attempts to constitutionally demarcate the mode of their operation.

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 is certainly to be welcomed in functional regulatory terms. Yet the Court's eagerness to allow the delegation of intervention powers to ESMA and its fresh interpretation of *Meroni* is not unproblematic.

First, the Court's statement that the possibility to delegate intervention powers to ESMA in exceptional circumstances did 'not correspond to any of the situations defined in Articles 290 and 291 TFEU', is incorrect as it disregards the fact that in other fields, such as foodstuffs, the EU legislature confers similar powers upon the Commission who will be able to adopt an act in emergency situations, based on the advice of an agency and after consultation with a comitology committee.[125]

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[121] Everson, Monda and Vos, *supra* n. 46.

[122] Marjosola, *supra* n. 90. This relaxation is also referred to as 'Meroni-light', see M. Chamon, 'The empowerment of agencies under the Meroni doctrine and article 114 TFEU: comment on United Kingdon v. Parliament and Council (Short-selling) and the proposed Single Resolution Mechanism', *European Law Review* 39, no. 3 (2014): 394.

[123] Case 270/12, *supra* n. 85, paras 65 and 66. See also K. Lenaerts, *supra* n. 113.

[124] Everson, Monda and Vos, *supra* n. 46.

[125] See, for example, Article 53 of Regulation 178/2002 (OJ 2002, L031/1) (consolidated version).

Second, the Court quite light-heartedly discusses the nature of the powers that are delegated to ESMA. Whilst considering that ESMA's powers were not very discretionary, the Court ignores that the exercise of the powers delegated may entail important political, economic or social choices to be made by ESMA.[126] However, such a view based on the non-majoritarian model of independent technocratic agencies clearly fails to take into account the value laden nature of many regulatory issues. It is illusionary to think that the managerial and scientific tasks conferred upon agencies in these fields are merely technical and do not embrace political issues. The need for a 'political administration' and the demand to 'reintroduce politics into the apolitical sphere of economic regulation' has indeed been recognised in the literature.[127]

It is striking that the Court does not take account of the case law of the General Court reviewing decisions by the CPVO and ECHA.[128] In *Schräder*, Mr. Schräder challenged a rejection of his application for a Community plant variety right by the CVPO. Here the General Court held that where an EU authority is required to make 'complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to limited review'.[129] The General Court confirmed its limited review over agency decisions in *Rütgers*, in which a decision by ECHA to include a substance in the list of substances of very high concern was challenged. In relation to the applicant's plea that ECHA had breached the proportionality principle, the Court held that ECHA has broad discretion in a sphere which involves 'political, economic and social choices on its part' and in which it is required to undertake complex assessments.[130] In such cases, the General Court views 'the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the legislature is seeking to pursue'.[131]

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[126] See P. Schammo, 'The European Securities and markets Authority: Lifting the Veil on the Allocation of Powers', (2011), 48 *CMLR*, 1879–1887.

[127] M. Everson, 'Good Governance and European Agencies: The Balance', in D. Geradin, N. Petit & R. Munoz (eds.) *Regulation through Agencies in the EU: A New Paradigm for European Governance,* (Cheltenham, Edward Elgar, 2005), 156.

[128] See M. Chamon, *supra* n. 122, p. 395–396.

[129] Case T-187/06, *Schräder* v *CPVO* [2008] ECLI:EU:T:2008:511, para 59.

[130] Case T-96/10, *Rütgers Germany GmbH* v. *ECHA* [2013], ECLI:EU:T:2013:109, para 134 confirmed by the CJEU in C290/13 P. Case ECLI:EU:C:2014:2174.

[131] *Idem.*

These and other cases thus seem to already sanction the transfer of broad discretionary powers to agencies.[132] Critically, the General Court recognises in *Schräder* and *Rütgers* that the tasks conferred upon these agencies are going beyond a mere technical assessment and may involve political, economic or social choices. These agencies would therefore take part in a politicised administration, indicated above. Two issues deserve particular attention. First, it seems difficult to reconcile the Court's limitation of agency powers and formal insistence on clearly delineated powers in *ESMA* with this kind of reasoning of the General Court, should it be transposed to possible future challenges of ESMA decisions. Second, the formal recognition 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.

[132] See H.C.H. Hofmann, *supra* n. 28. Case T-187/06 was upheld by the Court in C-38/09, [2010] ECLI:EU:C:2010:196. See also C-281/10 P, *PepsiCo* v. *Grupo Promer Mon Graphic SA* [2011] ECLI:EU:C:2011:679, where the Court admitted that 'the General Court may afford OHIM some latitude, in particular where OHIM is called upon to perform highly technical assessments, and restrict itself, in terms of the scope of its review of the Board of Appeal's decisions in industrial design matters, to an examination of manifest errors of assessment' (para 67). This wording was repeated in Joined cases C-101, 102/11 P *Neuman and Galdeano* v. *José Manuel Baena Grupo SA* [2012] ECLI:EU:C:2012:641 (para 41). In case C-534/10 P, *Brookfield New Zealand* v *CVPO and Schniga GmbH* [2012] ECLI:EU:C:2012:813, the Court emphasised the broad discretion of the CVPO in the carrying out of its functions (para 50). In case T-145/08 *Atlas Transport* v [2011] ECLI:EU:T:2011:213, the General Court viewed that the discretion of the Board of Appeal to suspend proceedings or not to, is a broad discretion and confirmed that in such cases of broad discretion the Court carries out only a limited review (paras 69–70). See Hoffmann, footnote 51 of his article.

4 EU agencies' independence and accountability

4.1 Independently under control

The half-hearted constitutionalisation of EU agencies by the Lisbon Treaty has only impaired existing concerns about the control and accountability of EU agencies. The question of control of agencies seems contrary to the very purpose of why agencies are created: they need to be independent, at 'arm's length' of the European Commission and other institutions. As a matter of fact, the appeal of agencies lies precisely in the fact that agencies can perform technical tasks independently of the European Commission. For the European Commission, the independence of the technical and/or scientific assessments of agencies is:

> in fact, their real raison d'être. The main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations.[133]

In principle, therefore, a combination of technical regulatory efficacy and political independence, ensured by means of institutional-legal accountability has acted as a legitimising power for these agencies.[134] In this manner, the proliferation of agencies in the EU landscape has required mechanisms for keeping agencies under control and making them accountable. The Commission considered that ideally agencies should be subject to an effective system of supervision and control.[135] Unlike their more independent American counterparts, EU agencies have consequently 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,[136] which contributes to the complexity of their accountability mechanisms. This shows the delicate nature of 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.

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[133] Communication from the Commission, 'The Operating Framework for the European Regulatory Agencies', COM (2002) 718, 11 December 2002, at 5.

[134] Everson, *supra* n. 53.

[135] See Commission, 'European Governance: A White Paper', COM (2001) 428 final, 25 July 2001, at 24.

[136] See D. Geradin, 'The Development of European Regulatory Agencies: Lessons from the American Experience', in D. Geradin, N. Petit & R. Munoz (eds.) *Regulation through Agencies in the EU: A New Paradigm for European Governance* (Cheltenham, Edward Elgar, 2005), 215–245.

4.2 Independence

4.2.1 Independence and autonomy

The characterisation of EU agencies as in-betweeners indicates their complex relationship with the notion of independence. This together with the demand that agencies are controlled and held accountable has led Madalina Busuioc[137] and Jeroen Groenleer to argue for the use of the term autonomy instead of independence. The use of the term autonomy is very appropriate as it allows for a subtle assessment of the agencies' position vis-à-vis other parties and their accountability. Yet, as the notion of independence is used in the legal language of the Treaties, the founding regulations and the case law of the Court of Justice,[138] we will continue to speak both in terms of independence and autonomy.

4.2.2 Independence as a legal and relative concept in EU law

Independence is not generally defined. The EU treaties both refer to independence in relation to the functioning of various institutions and Member States. Article 17(3) TEU, for example, stipulates that the members of the Commission shall neither seek nor take instructions from any government or other institution, body, office, or entity and that they shall refrain from any actions incompatible with their duties or the performance of their tasks. Similar wording is used in the treaties for the members of the Court, Advocates-General, and the European Central Bank. For the European Central Bank, the Treaty adds the requirement for EU institutions and agencies and the Member States' governments to respect this principle and proscribes attempts to influence the members of the decision-making bodies of the European Central Bank or the national central banks in the performance of their tasks.[139]

Importantly, the Lisbon Treaty has introduced the notion of independence in relation to the EU administration. Article 298 TFEU stipulates that in the carrying out of their missions, the institutions, bodies, offices and agencies of the

[137] See also Busuioc, *supra* n. 25.

[138] The European Parliament's proposed Law of EU Administrative Procedure of 2013 placed independence under the umbrella of the principle of impartiality. It stipulated that 'the Union's administration shall be impartial and independent. It shall abstain from any arbitrary action adversely affecting persons, and from any preferential treatment on any grounds. The Union's administration shall always act in the Union's interest and for the public good. No action shall be guided by any personal (including financial), family or national interest or by political pressure. The Union's administration shall guarantee a fair balance between different types of citizens' interests (business, consumers and other)'. See European Parliament Resolution of 15 January 2013, P7_TA-PROV (2013)0004). After the Commission had questioned in 2016 the added value of the proposed act, the European Parliament proposed in 2016 a new initiative, namely a Regulation of the European Parliament and of the Council for an open, efficient and independent European Union administration. In this proposal it does not further specify independence but instead speaks about conflicts of interest and the duty of the Union Institution or agency to carefully and impartially investigate a case. See European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP)).

[139] Art. 130 TFEU.

Union shall have the support of an open, efficient and independent European administration. Independence can therefore be viewed as one of the key principles of good administration as laid down in the Charter on Fundamental Rights.[140] The concept of independence is refined in the various codes of the institutions. Most prominently it features in the European Code of Good Administrative Behaviour that was developed by the European Ombudsman and formally endorsed by the European Parliament in September 2001.[141] The Code stipulates that an EU official 'shall be impartial and independent. The official shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever'. It moreover defines that 'the conduct of the official shall never be guided by personal, family, or national interest or by political pressure. The official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest'.[142] The European Commission[143] and the Council[144] however have their own Codes of Good Administrative Behaviour that are less elaborate on this point.[145]

In the literature, independence has been argued to generally refer to independence from political influence and industry or market interests. In the EU context, the reference to independence from national interests is often explicitly added.[146] Independence is therefore currently not a general concept or principle and very much depends on the specific wording of the relevant legislation.[147] Independence can therefore be argued to be a relative concept as it is necessary to specify in relation to whom or what and at what level such independence must exist.[148] In order to interpret the independence requirements laid down in the relevant EU legislation regarding the European and national data protection supervisors, the Court has closely linked the concept to its case law on the independence of judiciary bodies. In the latter, it has distinguished between two aspects: external independence that concerns the protection against external intervention or

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[140] Art. 41 of the Charter.

[141] European Parliament Resolution of 6 September 2001, OJ 2002 C 72 E/331.

[142] Art. 8 of the Code of Good Administrative Behaviour, *supra* n. 141. The European Parliament asked the Ombudsman to apply this code in cases of alleged maladministration.

[143] As adopted on 13 September 2000, see Commission, 'Code of Good Administrative Behaviour: Relations with the Public', available at <http://ec.europa.eu/transparency/code/_docs/code_en.pdf> (accessed on 25-7-2017).

[144] Council Decision of 25 June 2001, OJ 2001 C 189/1.

[145] The Commission's Code does not include family interest whilst the Council's Code is much more vague and does not refer to independence as such. It merely states that 'members of staff shall in all circumstances act in the interests of the European Union and of the Council and shall not allow themselves to be influenced by personal or national considerations nor by political pressure or express personal legal opinions'.

[146] Geradin and Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, Jean Monnet Working Paper 01/04 (2004), at 49–50.

[147] See *Ibid.*, with reference to the Court's case law on independence of data protection supervisors.

[148] Opinion AG Mazák in Case C-518/07, *European Commission v. Germany* [2010] ECLI:EU:C:2010:125, at para. 16.

pressure liable to jeopardise the independent judgment of the relevant body involved, and internal independence linked to impartiality that seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings.[149]

In the literature, it is common to distinguish between formal, *de iure* or legal independence, related to the independence that an organisation has according to the law, and informal or *de facto* independence, related to the independence that an organisation has according to practice.[150] In relation to the European Central Bank, some have further divided formal independence into personal and organisational independence, the former referring to the organisation of the personal independence of bankers vis-à-vis political leaders and the latter referring to the operational independence of the banks vis-à-vis governments.[151] Others have divided formal independence into institutional, staffing, financial, and functional independence.[152] This analysis will adhere to the latter distinction as it gives, in my view, a better understanding of, and insight into, the most relevant issues with regard to agencies and highlights their complexities.

4.2.3 EU agencies and 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.[153] Often, the institutional design of agencies and the legal requirements imposed upon them demand that agencies' principals, namely the Parliament, Council, Commission, and Member States are included and form an integral part of the agencies. The membership of Member States' management boards can be considered as an expression of a 'Member State-oriented' institutional balance of powers principle, having due

[149] See e.g. Case C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg,* [2006] ECLI:EU:C:2006:587, at paras 49–51. See also Case C-517/09, *RTL Belgium SA.* [2010] ECLI:EU:C:2010:821, referring to that case in paras 38–40. See Neppi-Modona, 'The Various Aspects of External and Internal Independence of the Judiciary', paper presented at the Seminar on Independence of Justice, Venice Commission, March 2012, available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)035-e> (accessed on 25-7-2017).

[150] C. Hanretty, P. Larouche and A. Reindle, *Independence, Accountability and Perceived Quality of Regulators*: *A CERRE Study* (2012), available at <http://www.cerre.eu/sites/cerre/files/120306_IndependenceAccountabilityPerceivedQualityofNRAs.pdf> (accessed on 25-7-2017), at 23.

[151] P. Magnette, 'Towards "Accountable Independence"? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model', *European Law Journal* 6 (2000): 326.

[152] See A.T. Ottow & S.A.C.M. Lavrijssen, 'Independent Supervisory Authorities: A Fragile Concept', *Legal Issues of Economic Integration* 39, no. 4 (2012): 419–446; Makhasvili and Stephenson, 'Differentiating Agency Independence: Perceptions from Inside the European Medicines Agency', *Journal of Contemporary European Research* 9 (2013): 4.

[153] See for a detailed study: E. Vos, 'EU agencies and Independence', in D. Ritleng (ed.), *Independence and legitimacy in the institutional system of the EU* (Oxford: Oxford University Press, 2016), pp. 206–228.

regard for the powers of both the EU institutions and the Member States.[154] Fundamentally, having all Member States represented 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[155] or shared character of the EU executive. Agencies as 'hierarchy beaters'[156] have become crucial amalgams between EU institutions and Member States.[157] The intricate relationship between agencies and institutions is particularly evident in the so-called 'alert or warning mechanism' laid down in the Common Approach, mentioned above. This mechanism can be triggered by the Commission in relation to decisions by management boards of agencies and would severely encroach upon the independent decision-making by these boards.

The same intricacy can be observed in relation to the financial independence of agencies. Whilst all agencies have their own budget, they all, with the exception of the EUIPO and CVPO, are largely dependent on subsidies from the EU. Agencies such as the EMA and EFSA which operate in the realm of public interest have an explicit provision in their founding regulations designed to loosen their ties with industry and avoid capture by industry and to ensure that they will at least partly depend on the EU subsidy, thus allowing for all sorts of controls, of which most importantly is the awarding of the EU subsidy and budgetary discharge by the Parliament. As set forth above, the European Parliament does not shy away from using the discharge procedure, not only to control cases of mismanagement in the budgets of the agencies but also to control the functioning and governance of agencies, most notably in relation to their transparency and conflicts of interests, as we have seen. Further, the Court of Auditors' control on the agencies' budgets is broader than purely financial control alone: in fact it dedicated a special report to its investigation of the management of conflicts of interests in four agencies: the EFSA, EMA, ECHA, and EASA.[158] These mechanisms are rather instruments of control rather than signs of independence.

This analysis corroborates that the legal concept of independence is not absolute but relative and that there are various degrees of independence, just as we can speak in terms of degrees of autonomy. This thus confirms the independence of EU agencies as 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

[154] See for an elaboration of this concept, E. Vos, *Institutional Frameworks of Community Health and Safety Regulation, Committees, Agencies and Private Bodies* (Oxford: Hart Publishing, 1999), Chapter 2.5.

[155] See L. Besselink, *A Composite European Constitution*, Groningen, Europa Law Publishing, 2007 and G. Della Cananea, *L'Unione Europea. Un ordinamento composito*, Bari-Roma, 2003.

[156] M. Everson, *supra* n. 52.

[157] See Curtin, *supra* n. 7.

[158] Special Report no. 15/2012, *supra* n. 76.

the Commission, Parliament or the Member States but the latter are frequently involved in the institutional design and operation of agencies: EU agencies are 'in-betweeners'.

This, however, does not solve the extremely sensitive and problematic issue of agency independence from political and national influence – an issue particularly pertinent in relation to the supervisory agencies in the financial sector. In these agencies, members of the supervisory boards and management boards are not representatives of Member States but heads of the national authorities competent regarding the supervision of credit institutions, and have clear requirements of acting 'independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body'.[159] The strong focus on independence must be understood in light of the supervisory tasks of these agencies, and the particular position of their counterparts in the national settings that are independent from other government structures. Yet, at the same time, (national) supervisory authorities too are not completely independent of the political arena. In particular, the *dédoublement fonctionnel* of the board members serving two masters indicates that independence is in practice a very fragile concept and underlines the relativity of the concept of independence.[160] This underlines the inadequacy of the current mechanisms on accountability of these agencies (see section 4.3.).

An issue which is less controversial but no less difficult to achieve is the issue of agency independence from commercially driven interests. Literature and practice agree that EU agencies should be independent of the market parties so as to avoid capture.[161] Particular reference is made to the membership of the technical and scientific organs of agencies that are to adopt the opinions of agencies on technical or scientific matters. Yet, market independence in relation to EU agencies appears to be particularly troublesome to achieve. Thus, the problem of the 'revolving doors' is crucial, where board, committee and/or staff members of agencies leave their position for a job in industry. Examples hereof are the Chair of EFSA's Management Board Diána Bánáti who was involved in the management of a life science research institute, and after resignation took on again a management position at this institute,[162] and the case of EMA's executive

[159] See Arts 42 (Board of Supervisors), 46 (Management Board), 49 (Chairperson), and 52 (Director) of the Founding Regulations of the Supervisory Authorities (Regulation 1093/2010 of the European Parliament and of the Council, EBA, OJ 2010 L 331/12; Regulation 1094/2010 of the European Parliament and of the Council, EIOPA, OJ 2010 L 331/48; and Regulation 1095/2010 of the European Parliament and of the Council, ESMA, OJ 2010 L 331/84).

[160] Ottow and Lavrijssen, *supra* n. 152.

[161] *Ibid.*

[162] See 'EU Agencies Stained by "Conflicts of Interest", Wrongdoing', available at < http://www.euractiv.com/section/future-eu/news/eu-agencies-stained-by-conflicts-of-interest-wrongdoing/ > (accessed on 25-7-2017).

director Thomas Lönngren who took up an advisory role within the private pharmaceutical sector just weeks after leaving his position with the agency.[163]

These practices were rigorously condemned by the European Parliament who was unwilling to give a budgetary discharge to agencies like EMA and EFSA in view of problems of independence of their experts and staff.[164] This kind of independence is not explicitly mentioned in the Codes of Conduct or the Principle of Impartiality as proposed by the Parliament. Moreover, it is also evident in practice where scientists of good repute who could serve on staff committees of agencies will always be likely to be or have been involved in industry or national affairs. Independence of members on agency committees therefore is often a matter of transparency and a question of how to deal with cases of conflict of interest. Forced by the European Parliament, several agencies (in particular EMA and EFSA) have begun to design formal policies on independence of scientific advice and how to deal with conflicts of interests that apply to their staff and members of agency committees or other organs such as the boards as well as external experts.[165]

Moreover, the principle of impartiality as proposed by Parliament seems to be inadequate to cover the market independence and would need to clearly designate commercial or business interests as well, whilst this would also need to apply to cases of rulemaking. Clearly, independence from market interest requires elaborate rules on conflicts of interest for all people who work with and for EU agencies.

4.3 Control and accountability

Although most agencies have powers of an advisory nature, it may be clear that the scientific opinions given, for example, by EMA or EFSA carry significant weight in Commission decision making.[166] Installing proper accountability mechanisms in relation to these agencies becomes therefore of key importance.

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[163] See Report on discharge in respect of the implementation of the budget of the European Medicines Agency for the financial year 2010 (C7-0281/2011 – 2011/2220(DEC)), Committee on Budgetary Control, A7-0107/2012.

[164] See Report on discharge in respect of the implementation of the budget of the European Union Agencies for the financial year 2010: performance, financial management and control of European Union Agencies, 2011/2232(DEC), Committee on Budgetary Control, A7-0103/2012.

[165] See e.g. EFSA's new *Independence Policy, How the European Food Safety Authority assures the impartiality of professionals contributing to its operations*. <https://www.efsa.europa.eu/en/corporate/pub/policyonindependence > accessed on 25-7-2017; European Medicines Agency policy on the handling of competing interests of scientific committees' members and experts, 6 October 2016 EMA/626261/2014,Rev. 1, <http://www.ema.europa.eu/docs/en_GB/document_library/Other/2016/11/WC500216190.pdf> accessed on 25-7-2017.

[166] See P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006), 155; M.B.A. Van Asselt & E. Vos, 'Wrestling with Uncertain Risks: EU Regulation of GMOs and the Uncertainty Paradox', *Journal of Risk Research* 11, no. 1–2 (2008): 281–300.

During the 1990s and early 2000s, agencies were considered to boost the EU's legitimacy by means of the expertise that agencies embraced, as well as the way in which such expertise was rendered: it was more visible and open to public participation, particularly by comparison to the opaque (scientific) committee system, whilst agencies' expertise would be independent from political and industry interference. Unsurprisingly agencies were in these times hailed as a solution to the many problems the EU was facing.

However, as Madalina Busuioc and Martijn Groenleer point out, today, the mushrooming of EU agencies with over 30 agencies currently in operation, led EU agencies to often be perceived as a problem instead, subject to reform themselves.[167] Their non-majoritarian character, and perceived independence have given rise to growing anxiety about agencies becoming 'uncontrollable centres of arbitrary power'.[168] Accordingly many mechanisms have been put in place for keeping EU agencies under control and holding them accountable for what they do. Before discussing these, it is first important to distinguish between control and accountability, with the term control to be understood broadly including accountability.[169] Control in this context denotes a situation where a principal has power over the delegate and covers a wide range of instruments employed by the principal to direct, steer and influence behaviour and decision making of the agent or delegate.[170] Accountability refers to the control *ex-post*, to ascertain whether the agent or delegate has carried out its tasks correctly.

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. In this way, the autonomy of agencies is reduced and made more dependent of the controlling principals.[171] Examples hereof are the European Parliament's initiatives to link up a Member of European Parliament to a European agency to be able to follow

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[167] Busuioc and Groenleer, *supra* n. 45, p. 175.

[168] Referring to M. Everson, *supra* n. 53, p.190.

[169] See E. Vos, 'Independence, Accountability and Transparency of European Regulatory Agencies', in D. Geradin, N. Petit & R. Munoz (eds.) *Regulation through Agencies in the EU: A New Paradigm for European Governance* (Cheltenham: Edward Elgar, 2005), 120–137.

[170] Busuioc, *supra* n. 25, at 35 with reference to P.G. Rubecksen, K. Verhoest & M. MacCarthaigh, 'Autonomy and Regulation of States Agencies: Reinforcement, Indifference or Compensation?', *Public Organization Review* 8, no. 2 (2008): 155–174.

[171] Busuioc, *supra* n. 25, at 35–37.

this agency better,[172] the position of Member States as representatives in the Management Board or as competent authorities in other advisory organs of the agencies and more powerful, the above discussed alert or warning mechanism given to the Commission for actions of agencies' management boards. It is most evident in the exercise of their external relations where some agencies are obliged to ask for approval from the Council or Commission prior to the conclusion of international cooperation acts (e.g., Europol and EASA) or consult with the Commission (e.g., Frontex). [173] Looking at the agencies' autonomy to adopt specific acts is particularly relevant for the assessment of whether in the exercise of their external relation tasks agencies have been delegated decision-making powers and whether this upsets the institutional balance of powers.[174] In how far the Council and the Commission really make use of these powers in practice is still a matter for research.[175]

Ex-post control describes 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;[176] 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.

In the absence of a true fully-fledged ministerial responsibility with EU commissioners being responsible for EU agencies,[177] it is interesting to observe that in the European Union too, there is a growing interest in arrangements of

[172] See F. Jacobs, 'EU agencies and the European Parliament', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 201–228.

[173] See Ott, Vos and Coman Kund, *supra* n. 56.

[174] See Ott, Vos and Coman-Kund, *supra* n. 56.

[175] See F. Coman Kund, *The international dimension of the EU agencies Charting a legal-institutional 'twilight zone'*, TARN Working paper 5/2017.

[176] Special report from the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents, OJ 1998 C44/9. The Lisbon Treaty has formalised this type of control, now laid down in Art. 288 TFEU.

[177] See V. Mehde, 'Responsibility and Accountability in the European Commission', *Common Market Law Review* 40, no. 2 (2003): 423–442.

what has also been called a 'horizontal responsibility' or 'public accountability',[178] paying much attention to responding to the clients of an entity or network.[179] All agencies have, for example, just as the Commission, adopted a code of conduct.

A nascent 'ministerial' responsibility for agencies' acts in relation to EU commissioners may however be evolving. Curiously, the 'alert or warning mechanism' introduced by the Common Approach, obliges the Commission to raise alarm if it has 'serious reasons for concern' that the relevant management board of an agency will adopt a decision that *i)* may not comply with the mandate of the agency, *ii)* may violate EU law or *iii)* be in manifest contradiction with EU policy objectives. In such a situation the Commission will raise the question formally in the relevant management board and request it to refrain from adopting the relevant decision. If the management board does not respond, the Commission will formally inform the European Parliament and the Council, with a view to allow the three institutions to react quickly.[180]

The alert mechanism thus gives the Commission powers to bring the matter to the attention of the Council and the Parliament if it does not agree with an act that the management board envisages to adopt. Of even more interest is the question of what this obligation means in cases where the Commission does not raise the alarm. A literal interpretation of the text seems to suggest that in the situation where the Commission keeps silent, it agrees with that act and it assumes responsibility for it. Consequently, if a subsequent act of a management board appears to be problematic, the Commission would rightfully need to answer for it. However, the Commission forcefully underlines the non-binding nature of this provision and that as such it will not appear in the legal provisions of the founding regulations. This will nevertheless not prevent other actors from attributing responsibility to the Commission for acts adopted by the management boards. This mechanism would severely intrude upon the independence of management boards,[181] and increase control and accountability by the EU institutions. This mechanism is likely to be incompatible with the

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[178] See also D. Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability', in D. Geradin, N. Petit & R. Munoz eds., *Regulation through Agencies in the EU: A New Paradigm for European Governance,* (Cheltenham: Edward Elgar, 2005). See in general Curtin, *supra* n. 7; M. Bovens, D. Curtin & P. 't Hart (eds.), *The Real World of EU Accountability. What Deficit?* (Oxford: Oxford University Press, 2010).

[179] In The Netherlands, for example, the Charter Group for Public Accountability, consisting of a few national autonomous bodies (the Central Agency for the Reception of Asylum Seekers, the Information Management Group, the Land Registry Office, the Government Road Transport Agency, the Social Insurance Bank and the National Forest Service) adopted in 2004 a Governance Code for Autonomous Administrative Authorities, (updated in 2005). See < http://www.publiekverantwoorden.nl/data/files/alg/id19/HPV_governance%20code.pdf>, accessed on 25-7-2017.

[180] See for a full discussion and explanation of the reasons for introducing this system, Vos, *supra* n. 3.

[181] It must be emphasised that this system is about acts of agencies' management boards and is not concerned with acts that are adopted by other organs (scientific committees) of the agencies giving scientific advice to the EU institutions.

particular independence requirements placed on the various organs of the supervisory authorities EBA, ESMA and EIOPA. It is not clear whether this mechanism has ever been used in practice.

This intricate relationship between independence and control and accountability of agencies is exemplary of the many existing legal arrangements. Shortcomings relate to the unfolding of accountability 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'.[182] This necessitates rethinking the current mechanisms. This is particularly pressing for the supervisory authorities in the financial sector in view of the discretionary powers that are conferred upon these agencies, such as the intervention powers of ESMA discussed above, in relation to requirements of independence.

[182] Busuioc, *supra* n. 25, at 230.

5 EU agencies: challenges ahead

In conclusion, a few particular challenges that require further consideration are highlighted. The rise and operation of agencies within the EU institutional structure fits well in the academic thinking on the nature of the EU executive. EU agencies as 'in-betweeners' amidst EU institutions and Member States are part and parcel of the EU executive and strengthen its 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 way of knowledge production, their functional operation and effectiveness in furthering European integration.

This worry is intensified by the new *Meroni* 2.0 as developed by the Court that allows agencies to further develop their own regulatory roles. 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 measures of control on 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. Ultimately, this situation would be at odds with the principle of conferral of powers. The recognition of the possibility that agencies can be delegated binding decision-making powers in *ESMA* can nevertheless only be a stopgap solution.

The proliferation of agencies and the diversification of their tasks have made it increasingly difficult to reconcile agency operation with the traditional agency model based on depoliticised operation. Agencies have acquired new tasks and new rationales, which continue to justify their intensified position at the EU level that goes far beyond the traditional justifications. To be sure, where the Commission is expected also to play a more politicised role, as the Juncker Commission has clearly taken on, certain technical tasks might be better undertaken in isolation from the political process by EU agencies. However, practice shows that the tasks conferred upon agencies are often going beyond a mere technical assessment and involve political, economic or social choices. The recognition of this practice by the General Court in *Schräder* and *Rütgers* is meaningful. Agencies are increasingly deciding upon the public good.

The traditional depoliticised agency model seems thus to be growing into a model of 'politicised depoliticisation'.[183] Highly problematic is the situation that

[183] Everson, Monda and Vos, *supra* n. 46, p. 236.

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. This is precisely the case with the three supervisory authorities that have powers to set harmonised standards and need to operate within a political minefield of conflicts between Member States and the EU institutions about the development of a single financial regime divided between members and non-members of the Eurozone. The same seems now to occur with the refugee crisis. Problematic is not only that EU agencies are asked to engage in political processes and need to operate within complex and conflicting interests to pursue rather open-ended mandates instead of clear mandates, but also that these agencies confronted with these open-ended mandates in relation to highly contentious situations might be unable to carry out such tasks.

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 at the same time that they 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.

Annex. Overview of EU decentralised agencies

1. Agency for the Cooperation of Energy Regulators (ACER)[184]
2. Body of European Regulators for Electronic Communications (BEREC)[185]
3. Community Plant Variety Office (CPVO)[186]
4. European Agency for Safety and Health at Work (EU-OSHA)[187]
5. European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA)[188]
6. European Asylum Support Office (EASO)[189]
7. European Aviation Safety Agency (EASA)[190]
8. European Banking Authority (EBA)[191]
9. European Border and Coast Guard Agency (formerly European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) [192]
10. European Centre for Disease Prevention and Control (ECDC)[193]
11. European Centre for the Development of Vocational Training (Cedefop)[194]
12. European Chemicals Agency (ECHA)[195]
13. European Defence Agency (EDA)[196]
14. European Environment Agency (EEA)[197]
15. European Fisheries Control Agency (EFCA)[198]
16. European Food Safety Authority (EFSA)[199]
17. European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)[200]
18. European GNSS Agency (GSA)[201]

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[184] Reg. 713/2009/EC, (OJ 2009, L211/1).
[185] Reg. 1211/2009 (OJ 2009, L337/1).
[186] Reg. 2100/94 (OJ 1994, L227/1).
[187] Reg. 2062/94 (OJ 1994, L216/1).
[188] Reg. 1077/2011 (OJ 2011, L286/1).
[189] Reg. 439/2010 (OJ 2010, L132/11). See for the proposal to create a new agency: European Union Agency for Asylum, COM (2016) 271 final.
[190] Reg. 1592/2002 (OJ 2002, L240/1), replaced by Reg. 216/2008 (OJ 2008, L79/1).
[191] Reg. 1093/2010 (OJ 2010, L331/12).
[192] Reg. 2016/1624 (OJ 2016, L251/1).
[193] Reg. 851/04 (OJ 2004, L41/1).
[194] Reg. 337/75 (OJ 1975, L039/1).
[195] Reg. 1907/2006 (OJ 2006, L396/1).
[196] Council Joint Action 2004/551/CFSP (OJ 2004, L245/17).
[197] Reg. 1210/90 (OJ 1990, L139/1).
[198] Reg. 768/2005/EC (OJ 2005, L128/1).
[199] Reg. 178/2002/EC (OJ 2002, L031/1).
[200] Reg. 1365/75 (OJ 1975, L139/1).
[201] Reg. 1321/2004 (OJ 2004, L246/1), replaced by Reg. 912/2010 (OJ 2010, L276/11).

19. European Institute for Gender Equality (EIGE)[202]
20. European Maritime Safety Agency (EMSA)[203]
21. European Medicines Agency (EMA)[204]
22. European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)[205]
23. European Network and Information Security Agency (ENISA)[206]
24. European Insurance and Occupational Pensions Authority (EIOPA)[207]
25. European Police College (CEPOL)[208]
26. European Police Office (EUROPOL)[209]
27. European Railway Agency (ERA)[210]
28. European Securities and Markets Authority (ESMA)[211]
29. European Training Foundation (ETF)[212]
30. European Union Agency for Fundamental Rights (FRA)[213]
31. Single Resolution Board (SRB)[214]
32. The European Union's Judicial Cooperation Unit (EUROJUST)[215]
33. European Union Intellectual Property Office (EUIPO) (formerly: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM))[216]
34. Translation Centre for the Bodies of the European Union (CdT)[217]

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[202] Reg. 1922/2006 (OJ 2006, L403/9).
[203] Reg. 1406/2002 (OJ 2002, L208/1).
[204] Reg. 726/2004 (OJ 2004, L136/1).
[205] Reg. 302/93 (OJ 1993, L036/1).
[206] Reg. 460/2004 (OJ 2004, L77/1).
[207] Reg. 1094/2010 (OJ 2010, L331/48).
[208] Council Decision 2005/681/JHA (OJ 2005, L256/63).
[209] Council Decision 2009/371/JHA (OJ 2009, L21/37).
[210] Reg. 881/2004 (OJ 2004, L220/3).
[211] Reg. 1095/2010 (OJ 2010, L331/84).
[212] Reg. 1360/90 (OJ 1990, L131/1).
[213] Reg. 168/2007 (OJ 2007, L53/1).
[214] Reg. 806/2014 (OJ 2014, L225/1).
[215] Council Decision 2002/187/JHA (OJ 2002, L63/1).
[216] Reg. 2015/2424 (OJ 2015, L341/21).
[217] Reg. 2965/94 (OJ 1994, L3149).

Svensk sammanfattning

EU:s myndigheter: bakgrund

När EU grundades fanns inga ambitioner om en gemensam förvaltning av EU-politiken. Tanken var att varje medlemsstat på egen hand skulle genomföra de EU-gemensamma besluten. Samtidigt som det fortfarande är grundtanken har det allt närmare europeiska samarbetet ökat behovet av en gemensam förvaltning. Det har nämligen visat sig svårt att få medlemsländerna att tillämpa EU-reglerna på ett likvärdigt sätt utan en tydlig EU-samordning.

Antalet EU-myndigheter började på allvar växa för ungefär 25 år sedan. Idag finns ett fyrtiotal myndigheter etablerade i olika länder inom en lång rad områden, bland annat polissamarbete, livsmedelssäkerhet, jämställdhet, bankväsende, gränskontroll, immaterialrättsfrågor och smittskydd.

Författaren till denna rapport, Ellen Vos, är professor i EU-rätt vid universitetet i Maastricht. Hon menar att EU idag inte skulle klara sig utan sina myndigheter – som verkställande organ fyller de en central roll för kommissionen.

Att beskriva EU-myndigheterna på ett generellt sätt är dock svårt, påpekar hon, eftersom de har varierande funktioner och organisationer. En gemensam nämnare är att de förflyttar EU:s verkställande makt från kommissionens direkta beslutskorridorer till externa organ. Generellt kan EU-myndigheterna också sägas ha en sits mittemellan EU:s institutioner, i synnerhet mellan kommissionen och medlemsländerna. Det betyder att myndigheterna har en tydlig koppling till sina båda överordnade nivåer: å ena sidan EU:s institutioner (framför allt kommissionen) och å andra sidan medlemsstaterna. Statsvetare brukar påpeka att EU-myndigheterna i första hand ser kommissionen som sin överordnade, men författaren menar att relationen mellan EU-myndigheterna och EU:s medlemsstater också behöver undersökas mer noggrant.

I rapporten uppmärksammar författaren tre huvudsakliga problemområden som uppstått i och med att EU-länderna samarbetar allt närmare på förvaltningsnivå. Problemen berör systemets funktion. Det som behövs är en ordning som ger institutionerna bättre förutsättningar att förverkliga demokratiskt fattade beslut.

Överföring av makt till myndigheterna: bristande rättslig grund

Det första problemområdet handlar om hur makt överförs till EU-myndigheterna. Idag används olika rättsliga grunder i fördragen, men endast ett fåtal ger EU:s lagstiftare befogenhet att etablera och överföra makt till EU-myndigheter. En rättslig grund som har använts flera gånger för att upprätta en EU-myndighet

är den så kallade ”flexibilitetsartikeln”, artikel 352. Denna artikel ger EU-lagstiftaren befogenhet att anta en lag om den är nödvändig för att uppnå något av de mål som anges i fördraget, med vissa undantag. EU-domstolen har slagit fast att artikeln kan användas för att upprätta en EU-myndighet. Författaren pekar dock på risken för att möjligheten används fel. Avsaknaden av en tydligare struktur för maktöverföring innebär exempelvis att frågor om oberoende och ansvarsutkrävande hamnar i skymundan.

Lissabonfördraget: ett välkommet men inte tillräckligt framsteg

Genom Lissabonfördraget tydliggjordes kommissionens befogenhet att anta delegerade rättsakter. Det betyder att kommissionen – ett organ där medlemsstaterna inte är representerade – får komplettera eller ändra innehållet i vissa delar av EU-lagarna. Samtidigt stärktes Europaparlamentets och ministerrådets efterhandskontroll av delegeringen. Detta är ett tydligt tecken på att medlemsstaterna ville tydliggöra formerna för den verkställande maktens befogenheter samtidigt som de strävade efter få viss kontroll över dess beslut.

Mot den bakgrunden, menar författaren, är det svårt att förstå varför EU-myndigheterna inte uppmärksammades. Hon konstaterar att det är en påtaglig brist att medlemsländerna inte tog tillfället i akt att identifiera EU-myndigheterna som aktörer till vilka EU-lagstiftaren kan delegera makt. På den punkten borde Lissabonfördraget ha varit tydligare. Situationen riskerar i sin tur leda till problem som rör myndigheternas oberoende och möjligheterna att utkräva ansvar av dem.

Samtidigt konstaterar författaren att Lissabonfördraget innebar vissa förbättringar. Fördraget klargör framför allt att EU-myndigheterna är en del av EU:s verkställande makt, vilket gör att de blir bundna av viktiga konstitutionella EU-principer. Beslut som fattas av myndigheterna måste till exempel vara tillgängliga och begripliga, och beslut som är direkt bindande för enskilda måste kunna prövas av EU-domstolen. Även nationella domstolar kan väcka frågor som rör giltigheten av myndigheternas beslut, inom ramen för så kallade förhandsavgöranden.

Rapportförfattaren välkomnar denna utveckling, som hon menar är nödvändig för att ge ökad legitimitet åt myndigheternas beslut. Samtidigt är hon kritisk till att verkligheten inte återspeglar de konstitutionella framstegen: det är fortfarande oklart hur myndigheterna de facto fattar beslut. Och framför allt saknas tydliga krav på delaktighet, samråd och öppenhet när myndigheterna fattar rättsligt bindande beslut och ger råd om EU-politikens genomförande.

EU-domstolens ståndpunkt

EU-domstolen har dömt i mål som rör delegering av makt åt EU-myndigheter, senast i den så kallade *ESMA*-domen från 2014. Domstolen ser inte problem

med att EU-myndigheter upprättas, trots att en tydlig rättslig grund saknas i fördragen. EU-domstolen har också bekräftat att makt kan överlåtas åt EU-myndigheter så länge besluten underkastas laglighetsprövning och inte innebär alltför stora skönsmässiga bedömningar, det vill säga självständiga avvägningar. *ESMA*-domen är en uppdaterad version av ett gammalt rättsfall, *Meroni* från 1958, som också bekräftade möjligheten att överlåta makt till EU:s myndigheter. Författaren menar dock att rättsfallen förbiser att de beslut som idag fattas av myndigheterna innebär ett stort utrymme för egna bedömningar i viktiga politiska, sociala och ekonomiska frågor. Eftersom flera myndigheter idag har betydande ansvarsområden menar hon framför allt att mekanismerna för ansvarsutkrävande bör stärkas.

Myndigheternas oberoende: behov av tydligare regler

Det andra problemområde som lyfts fram i rapporten är myndigheternas oberoende ställning i förhållande till andra beslutsfattande nivåer. Eftersom systemen för finansiering, bemanning och inte minst funktioner skiljer sig från myndighet till myndighet är det svårt att säga något generellt också om detta område.

Ett vanligt mönster är dock att medlemsstaterna oftast finns representerade i myndigheternas styrelser. Det betyder att styrelsemedlemmarna många gånger har dubbla hattar, vilket visar att det är viktigt med tydligare former för myndigheternas oberoende ställning. Särskilt viktigt är detta för EU:s övervakande finansiella myndigheter: där ska styrelsemedlemmarna värna om både EU:s och det egna medlemslandets finansiella stabilitet.

Det faktum att myndigheterna är ett mellanting mellan direkta beslutsfattare och verkställare av andras makt tydliggör hur viktigt det är att de inte utsätts för vare sig påtryckningar av enskilda medlemsländer eller andra politiska påtryckningar.

Många EU-myndigheter är verksamma inom områden med kommersiella intressen, som livsmedels- och läkemedelsområdet. Författaren menar att det behövs ett tydligt regelverk för när exempelvis höga myndighetschefer går till näringslivet.

Kontroll av myndigheterna: gällande system försvårar ansvarsutkrävande

Det tredje problemområde som diskuteras i rapporten handlar om hur det är tänkt att myndigheterna ska kontrolleras och ställas till svars för sina beslut. Som nämndes ovan saknas tydliga strukturer för detta i fördraget. Istället är det sekundärrätten – lagar som är rättsligt underordnade fördraget – som innehåller ramarna för myndigheternas befogenheter, finansiering, styrelsesammansättning och grundläggande principer.

Det går att identifiera två parallella system: det ena fokuserar på förhandskontroll (*ex ante*) och det andra på efterhandskontroll (*ex post*). Den mest centrala formen av förhandskontroll utövas av Europaparlamentet och rådet i egenskap av lagstiftare. Genom sekundärrättslagstiftningen kan de styra hur myndigheternas verksamheter ska begränsas och kontrolleras. I förhandskontrollen ingår också att välja vem som görs till myndighetschef över verksamheten.

Efterhandskontrollen kan likställas med hur myndigheternas beslut följs upp. Den typen av kontroll utesluter att aktören lägger sig i redan fattade beslut, vilket gör att efterhandskontrollen kan begränsas till fem olika typer av ansvarsutkrävande: *i)* chefernas ansvar för verksamheten, *ii)* Europaparlamentets och rådets politiska ansvar i egenskap av lagstiftare, *iii)* Europeiska ombudsmannens ansvar i egenskap av kontrollant av EU:s allmänna administrativa regler, *iv)* EU-institutionernas ekonomiska ansvar och *v)* EU-domstolens lagprövning, som säkerställer rättsligt ansvar.

Författaren medger att majoriteten av EU-myndigheterna i första hand har en rådgivande funktion, men att exempelvis myndigheterna på livsmedels- och läkemedelsområdet (EMA och EFSA) ger så pass tunga råd att de förutsätter tydliga strukturer för ansvarsutkrävande. Dagens system gör det i praktiken svårare att faktiskt ställa myndigheterna till svars för deras beslut. En ytterligare omständighet som försvårar ett effektivt ansvarsutkrävande är att det finns spänningar mellan hur kommissionen, rådet och medlemsstaterna ser på myndigheternas roller.

Rekommendationer

Sammanfattningsvis pekar författaren ut några vägar som kan ge EU-myndigheterna en tydligare rättslig och politisk inramning. Det handlar om följande: *i)* EU-myndigheternas konstitutionella ställning i fördragen bör klargöras, eftersom EU:s verkställande makt har blivit påtagligt större genom myndigheternas verksamhet, *ii)* medlemsstaterna bör se över ramarna för delegeringen av makt till myndigheterna, som de gjort när det gäller kommissionen i artiklarna 290–291 FEUF och *iii)* myndigheterna bör inte få så olika uppgifter att de upphör att vara myndigheter i strikt mening och övergår till att bli politiska aktörer.

Slutligen menar hon att det är en uppgift för både forskare och beslutsfattare att göra en grundlig översyn av hur EU-myndigheternas oberoende ska tryggas och hur myndigheterna ska kunna ställas till svars för sina beslut.

“What is clear from this analysis is that agencies have induced a shift from a model of indirect administration, where EU policies were implemented by Member States and not by EU bodies to a more direct administration, whereby implementation is carried out at the EU level.”

Ellen Vos

SIEPS carries out multidisciplinary research in current European affairs. As an independent governmental agency, we connect academic analysis and policy-making at Swedish and European levels.

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