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RE	Restricted to a group specified by the consortium (including the Commission Services)	
CO	Confidential, only for members of the consortium (including the Commission Services)	

Summary

The 3rd NEWGOV practitioner and stakeholder forum was held at the premises of the Fondation Universitaire, Brussels, on 20 April 2007. It was organized by the University of Cologne as co-ordinator of NEWGOV Cluster One and focused on issues of delegation and accountability with regard to EU agencies. As a means of best utilising the horizontal potentials of the NEWGOV consortium, a cross-cluster approach was adopted; among the participants were researchers from several NEWGOV Clusters and Task Forces who engaged in intensive discussion with officials from EU institutions and agencies. The workshop's goal was to present the hitherto results of NEWGOV sub-projects dealing with agencies to practitioners in order to disseminate these findings on the one hand, and to receive feed-back and comments from an inside perspective on the other.

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0. Welcome and Introduction

Wolfgang Wessels (chair of the Practitioner Forum) welcomed the participants and gave a brief introduction into the work of the consortium.

I. Session: “Meroni Revisited: Empowering European Agencies between Efficiency and Legitimacy“

The first presentation by Prof Griller / Vienna University of Economics and Business Administration aimed at reassessing the legal fundamentals of delegation of power to EU agencies by an analysis of the relevant ECJ case law (*Meroni* and *Romano* cases).

Delegation

Stefan Griller identified three different situations where delegation of powers takes place:

- the Council leaves “implementation” of EC rules to the Member States or the Commission;
- the EC transfers powers to an international body;
- the EC confers authority upon European agencies.

Meroni: the ECJ ruled on the latter kind of delegation. Principles:

- “*nemo plus iuris transferre potest quam ipse habet*”, a delegating authority can not confer on another body powers different from those possessed by the delegator under the Treaty (institutional balance)
- the delegating authority had to take an express decision transferring them.
- permissible delegation of “clearly defined executive powers” and the unlawfulness of conferring “discretionary power”

Romano: ECJ ruling affirming the first of the above principles (without citing *Meroni*)

Difference *Meroni* – *Romano*: Source of Delegation

- Delegator = Executive (Commission resp. High Authority).
- Delegator = Legislator (Council; European Parliament).

The first alternative – delegation of powers to agencies on the one hand with regard to Commission powers by the Commission itself – is, in the meantime, addressed by the Council regulation on executive agencies. The Commission may delegate powers only subject to two limitations:

- an agency may not take policy choices;
- an agency may not have discretionary powers in *translating* policy choices into action.

The second alternative relates to agencies being set up by the Council or jointly the Council and the European Parliament.

- limits for delegating powers from the EC legislative level to the executive level
- limits resulting from “exclusivity”, i.e. agencies not being Community institutions according to the treaty texts.

The ECJ is quite generous regarding the delegation of powers from the Council to the Commission; especially with regard to the Common Agricultural Policy. The so-called *Comitology*

decision of the Council draws on and corresponds to this jurisprudence and states, among others, that implementing measures not reserved to the Council shall be conferred to the Commission. Callback mechanisms and joint decisions shall ensure *prerogatives of the legislative*. Such a basis is lacking for agencies. Securing the *prerogatives of the legislative* would require to either take political choices and decisions making use of large discretion at the legislative level or to establish mechanisms similar to those available under the comitology procedures in order to maintain the legislative's influence.

Safeguarding the *Commission's prerogatives* in implementing Community legislation is a requirement flowing from the principle of separation of powers, or balancing of powers. It means that the Council or the Council together with the Parliament must not encroach upon the Commission's prerogative as the institution mainly responsible for implementing EC law. This role must not be undermined. Consequently, administration by agencies has to remain the exception rather than become the rule, and it must be justified against the equality principle.

Legitimacy

The second part of the presentation dealt more generally with ways of legitimising public authority.

- Output legitimacy (problem-solving capacity)
- Input legitimacy (consent of the governed)

Substantive legitimacy: binding of all acts of the Commission to the will of the Council and European Parliament, comprising both preventive elements, i.e. the democratic dimension of the principle of legality, and ex post controls, like the budgetary procedure (Art 274 EC). It is complemented by powers of supervision and control.

Accountability

The comment by Andreas Follesdal focused on aspects of legitimacy and accountability with regard to agencies. In view of a trade-off between effectiveness and control, it was recommended to guarantee transparency and a clear allocation of authority as best means to reach the normative goal of full democratic accountability. Follesdal raised three issues in the case of independent agencies which seem to violate the prerequisite that agencies enhance effectiveness:

- Agencies cannot be trusted to pursue interests of citizens in the long run;
- Effectiveness benefits are overdrawn as Pareto-improvements are likely to also raise distributive issues;
- Effectiveness is evaluated according to the agencies' objectives. These have to be democratically determined – which costs resources

Policy recommendations in order to increase 'responsiveness' to citizen's interests were therefore:

- Evade long chains of institutions;
- Clarify scope of authority/competence;
- Increase transparency so as to foster scrutiny of agencies' work.

Wolfgang Wessels (University of Cologne) asked what exactly the „long run“ is and who decides whether objectives are met, have to be revised etc. Referring to a Lijphartian „consensus

democracy“, he furthermore stated that more consensus usually comes along with less accountability. Francis Jacobs drew the parallel to the US system, where departments interact in a competitive rather than a consensual way.

Delegation and inter-institutional relations

The second comment on the Presentation by Griller was given by Manuel Szapiro (European Commission), who pointed towards an issue beyond the output legitimacy debate: EU legitimacy is based on interest representation and not on the division of power. This explains why the COM is in quest for legitimacy in order to justify its existence. He cautioned against a pure imitation of the US-type regulatory practice, advocating the allocation of more discretionary powers to agencies.

In the following, the position of various institutions towards the delegation issue was intensively discussed. Szapiro sees the EP to be in favour of delegation as it can control (and veto) executive decisions. Meanwhile, the Commission is in a difficult position because it depends on the agencies' expertise but has only very limited control. For this reason, it might be reasonable to also delegate the responsibility for the respective policy goal. He furthermore said that the Commission was the responsible institution for guaranteeing the citizens interest.

Another observation made was that the Commission seems to be reluctant to throw agencies into the political game, and makes a case for their independence as far as expert knowledge is concerned.

Markku Junkkari gave a description of the EASA's features providing input legitimacy. He stated that these features were very prominent in the agency's day-to-day operations so that its independence is not an issue. At the same time, these practices claim a huge price in terms of efficiency. Furthermore, he elaborated on the discrepancy in the role of national parliaments and the EP towards agencies, stating that the recommendations in terms of transparency and clarification of competences cannot be assumed for agencies if not at the same time valid for the whole EU.

The role of agencies at the national level was further elaborated by Francis Jacobs (European Parliament). He gave the example of Sweden where a number of ministries employ only some 180 staff (agriculture), as many tasks have been transferred to agencies.

Adriaan Schout (EIPA) said that if one argued for more input legitimacy for agencies, it should be kept in mind that more control does not necessarily mean better control. In contrary, it is important to identify the essential mechanisms. Francis Jacobs concurred, stating that oversight had – if anything – weakened and questioned the effectiveness of an ever growing number of meetings and reporting mechanisms. Colin Shaw (University College Dublin) proposed that a scoreboard might help to distinguish best practices from worst practices.

Stefan Griller stated that it was difficult to distinguish technical decisions and political discretion – a weakness of Majone's concept of a regulatory state. He claimed that the current ECJ ruling is stricter than what the wording of the treaties (*lege lata*) requires, which would allow for a reform of the court's reasoning without compromising the fundamentals established by Meroni. At the same time, the ECJ is softer on delegation issues to the Commission than, for example, the German Bundesverfassungsgericht.

II. Session: “Delegation in the US Agency System. How Europe Could Make Use of the American Experience“

Andreas Orator / Vienna University of Economics and Business Administration outlined the development of agency structures in US political system. The systems of the US and the EU can be said to be in different stages of development, with the US at a head start of 150 years. As Markku Junkkari concurred, the fact that the starting points were so different makes it difficult to draw parallels between both systems, which show much heterogeneity in terms of denomination and setup of agencies. The expectation was voiced that the development of agencies will continue in an ad-hoc fashion rather than along a predefined standard model. A framework put forward by the COM some years ago did not become widely accepted.

The most important feature of US agencies is their separation and – as a result – independence from the executive branch of government. Most importantly, their directors cannot be easily removed from office.

The non-delegation doctrine prevents the delegation of legislative functions. However, it was almost never used (twice in the 1930's).

- Legislative oversight: Congressional checks (committee oversight); Accounting office;
- Executive oversight: President (appointment of allies, but no removal from office without any cause)
- Judicial oversight: Any agency measure finalized is liable for judicial review

He also addressed the effectiveness of the scrutinising committees on agencies. Quantitatively, there is a reduction of supervisory work identifiable. This is, however, more due to passing political factors than to changes in constitutional interpretation.

Another point discussed were cooperative networks. Edoardo Chiti emphasized that these networks give room for both national and Commission activity. This administrative cooperation, however, was negated for the case of EASA by Markku Junkkari. He said that EASA was monitoring national authorities anyway. Andreas Follesdal hinted at the possibility of mistrust between the member states – the more so as it is unclear in these networks who is setting the agenda. Francis Jacobs stated that these networks were even harder to control, at the same time alluding to the democratic shortcomings of the Open Method of Coordination.

Can Agencies produce hard law?

The question whether agencies were able to produce hard law was somewhat contested between the participants. While there was general agreement that agencies were not entitled to produce hard law in a strict legal sense, Markku Junkkari described EASA guidelines as a hard-law equivalent in the long run. Private operators may propose alternatives to these, but ultimately it is EASA's decision to introduce any changes within the guidelines. While Meroni rules out any “general rules”, Adriaan Schout gave the example of a certain type of airplane being grounded by EASA. Such a ruling would, in fact, have a general effect. Manuel Szapiro said that the jurisprudence was not clear on such questions and allows for political manoeuvre.

The European Parliament and Agencies

Francis Jacobs gave an account of EP relations towards agencies. He stated that these relations were, according to the heterogeneity of agency constructions, very variable themselves. Basically, there are three ways of interaction:

- Sectoral committees
- Constitutional committees
- Budget + Budget control committees

The agencies come pleading on the budget committee, furthermore there is an annual discharge on the budget control committee. The sectoral committees give opinions on how agencies have done.

The EP partly is represented by designees on the agencies' management boards. In general, where the EP has nominees on the management board, there are more reports to the sectoral committee and more EP involvement visible.

III. Session: “Smoothing Eastern Enlargement: Independent Regulatory Agencies in the area of pharmaceutical harmonization”

In his presentation, Charalampos Koutalakis looked at the role of Independent Regulatory Agencies during eastern enlargement. With principal-agent approaches and their limitations as a starting point, he tackled the question whether and how these IRA's as a New Mode of Governance can be and are used as effective and efficient alternative to traditional command-and-control steering modes. Pharmaceutical harmonization was very contested during the enlargement process. Different countries coped with this challenge in different ways. While the introduction of IRA's failed in Poland, it succeeded in Hungary. For the Hungarian case, Kálmán Dezséri and Lena Kolarska-Bobinska hinted at domestic scope conditions as the decisive factor for the success of IRA's in pharmaceutical harmonization, for example its monarch tradition. For the Polish case, the explanation was voiced that there was a demand of private companies for government control in order to avoid control through national agencies, which would then have to answer to EMEA.

Agencies and the concept of learning

In his comment, Adriaan Schout raised a number of issues regarding the concept of agencies contributing to learning. He highlighted four points:

- Is change introduced through learning, or rather through the 'shadow of hierarchy'?
- How to differentiate learning processes from path-dependency processes?
- What exactly is the role of agencies in a 'learning' process: are they mediator/coordinator or just "bearer of the news", or do they learn themselves?
- How can the results be generalized?

Furthermore, it was welcomed that the paper looks into the role of agencies in state-building, which is an important factor often overlooked.

Financial control through EP committees

Lena Kolarska-Bobinska briefly illustrated the development of agencies in Poland to have come full circle since pre-enlargement. She then addressed the question of who is controlling the effectiveness of Agencies in the long run. The budget (control) committee was named to be responsible in that regard, budget being the parliament's sole real power. However, the budget committees only implement the special committees' decisions. Fabia Jones gave an account of how the actual room for control of each agency's budget was reduced with a growing number of agencies, so that the budget is now scrutinized rather for all agencies as a whole instead of individually. Markku Junkkari added that for this reason, three-year plans were in-

roduced which are scrutinized by the sectoral committees, and gave credit to the EP's work in agency oversight. Furthermore, the Commission internal audit service and the Court of Auditors control the budgets of all agencies. Wolfgang Wessels remarked that such an organized peer-review process of control always risks to suppress any kind of innovation. Here, a reasonable balance has to be found.

With regard to the hypothesis that the lower a state's political capacity in a given policy sector, the more likely the use of NMG becomes, Egle Svilpaite put forward the objection that a state always retains the power not to opt for these alternative modes.

IV. Session: “Keeping Independent Agencies Under Control. De-Centralisation of European Administrations”

Edoardo Chiti focused on the implications of agency control. He identified four elements:

- Interinstitutional control
- Judicial control
- Administrative rule of law
- Institutional control within the EU (agencies) network

Controlling Agencies

Control over EU agencies has to be assessed starting from the differences. In this regard, he proposed to speak of transnational – i.e. bodies which are designed internally to represent the Member States – rather than supranational agencies. Other participants took the position that at least for first pillar agencies supranational was the more appropriate term and raised the question of how to fit these different types into a coherent typology. The different legal construction of the second and third pillar was highlighted. Fabia Jones added that the EP has a limited role in the third pillar (again budget), but none in the second.

It was said that the Independent Group of Regulators was beyond an auxiliary group of the COM, a setup one could describe as “double regulators”.

Lack of Technical Expertise

The existence of tasks which cannot be carried out by the COM was seen as primary rationale for De-Centralisation. Accordingly Edoardo Chiti stated that independence often is used as expression of technical expertise and does not mean insulation from political influence. The lack of expertise is the main obstacle to COM control. In this regard, Francis Jacobs added that the assertion of some agencies not being under any control was exaggerated. Even if there was a lack of formal control rights, strong informal relations can be expected to guarantee sufficient control. Following Edoardo Chiti with regard to decentralised agencies, working programmes are the main instrument for the COM to exert control. It has power to approve these programmes, but makes a rather formal job of this.

Fabia Jones clarified that no agency is “independent” as such, one always has to specify “from whom?” or “from what?”. She also addressed the issue that almost no agency has a “expiry date”. Furthermore, it was hypothesized that as judicial control increases, political control decreases. In this context, Stefan Griller raised the question of whether the ECJ would check the material content of any agency decision or rather just the general application of the Meroni principles. He believed that the former possibility was more probable, an indication of how far its position has departed from the original ruling.

Transparency

Another part of the discussion dealt with transparency. One of the key problems with regard to transparency was seen in the multitude of languages within the Union. Regarding Agencies, transparency was deemed a most vital issue as it constitutes one of the few possibilities to address a lack of input-legitimacy.

V. Conclusions

Francis Jacobs and Wolfgang Wessels provided a short conclusion and gave some suggestions for further research on the topic.

- Typology of Agencies → How to grasp heterogeneity?
- Measuring of usefulness → EU competition agency?
- Nature of links between COM and agencies → to what extent has the COM influenced annual work programmes etc.?
- Links between agencies and Member States → what is the relationship between EU agencies and national administrations/agencies who often remain very powerful?
- Role of Advisory Boards → Which role for the Member State representatives?
- Agency reform → Should agencies set up in the 70's be revisited? (Expiry date?)
- Strategy, trends of development → Is there a normative expectation?

Annex 1: Programme

Friday, 20 April 2007

09.45	Arrival
10.00 – 10.15	<p>Welcome and Introduction <i>Wolfgang Wessels</i> and <i>Udo Diedrichs</i>, NEWGOV Cluster 1 Leader</p>
10.15 – 11.45	<p>1st Session: “Meroni Revisited: Empowering European Agencies between Efficiency and Legitimacy“ <i>Stefan Griller</i> and <i>Andreas Orator</i>, Vienna University of Economics and Business Administration</p> <p>Comments by: <i>Andreas Follesdal</i>, Oslo University <i>Manuel Szapiro</i>, European Commission, Brussels</p> <p>Open discussion</p>
11.45 – 13.00	<p>2nd Session: “Delegation in the US Agency System. How Europe Could Make Use of the American Experience“ <i>Stefan Griller</i> and <i>Andreas Orator</i>, Vienna University of Economics and Business Administration</p> <p>Comments by: <i>Markku Junkkari</i>, European Aviation Security Agency, Cologne</p> <p>Open discussion</p>
13.00 – 13.30	<p>Final Comments: “The European Parliament and the Role of EU Agencies” <i>Francis Jacobs</i>, European Parliament</p>
13.30 – 14.30	Lunch Break at the Fondation Universitaire
14.30 – 16.00	<p>3rd Session: “Smoothing Eastern Enlargement: Independent Regulatory Agencies in the area of pharmaceutical harmonization” <i>Charalampos Koutalakis</i>, Free University of Berlin</p> <p>Comments by: <i>Adriaan Schout</i>, European Institute of Public Administration, Maastricht / Dutch Institute of International Relations – 'Institute Clingendael' – The Hague</p> <p>Open discussion</p>
16.00 – 16.15	Coffee break
16.15 – 17.45	<p>4th Session: “Keeping Independent Agencies Under Control. De-Centralisation of European Administrations” <i>Edoardo Chiti</i>, Lecce University</p> <p>Comments by: <i>Fabia Jones</i>, European Parliament, Brussels</p> <p>Open discussion</p>
17.45 – 18.00	Conclusions

Annex 2: List of Participants

1. Mr. Holger Bähr, Institute for Advanced Studies, Vienna
2. Mr. Steve Bainbridge, European Center for Development of Vocational Training
3. Prof. Edoardo Chiti, Lecce University
4. Ms. Anya Dahmani, Université Robert Schuman Strasbourg
5. Dr. Kálmán Dezséri, Institute for World Economics of the Hungarian Academy of Sciences
6. Prof. Andreas Follesdal, University of Oslo
7. Prof. Stefan Griller, Vienna University of Economics and Business Administration
8. Mr. Francis Jacobs, European Parliament
9. Ms. Fabia Jones, European Parliament
10. Mr. Markku Junkkari, European Aviation Safety Agency, Cologne
11. Prof. Lena Kolarska-Bobinska, Foundation The Institute of Public Affairs, Warsaw
12. Dr. Charalampos Koutalakis, Free University Berlin
13. Mr. Tobias Kunstein, University of Cologne
14. Ms. Maria del Mar Martin Raba, College of Europe, Bruges
15. Mr. Cosimo Monda, European Institute of Public Administration, Maastricht
16. Dr. David Natali, Observatoire social européen, Brussels
17. Mr. Andreas Orator, Vienna University of Economics and Business Administration
18. Ms. Anna Rieder, Office of Harmonization for the Internal Market, Brussels
19. Mr. Colin Shaw, University College Dublin
20. Dr. Adriaan Schout, European Institute of Public Administration, Maastricht / Dutch Institute of International Relations - 'Institute Clingendael', The Hague
21. Dr. Egle Svilpaite, University of Basel
22. Mr. Manuel Szapiro, European Commission
23. Mr. Thomas Traguth, University of Cologne
24. Dr. Oliver Treib, Institute for Advanced Studies, Vienna
25. Prof. Wolfgang Wessels, University of Cologne; NewGov Cluster One Leader