

Empowering European Agencies – or How to Tame the Sorcerer’s Apprentice

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1. Introduction

The March 11th, 2008 Commission Communication on European agencies gives yet more proof of the ongoing debate on the clearly discernible trend of delegating specific tasks to non-majoritarian institutions at the European level. With more than twenty such European agencies having been established in diverse fields and dispersed all over EU territory, the emergence of European agencies accounts for one of the most remarkable EU institutional developments outside of treaty amendments. Today, European agencies employ more than 3800 staff and dispose of an annual budget of more than one billion EUR. While the delegation of specific tasks to agencies can now be widely observed in almost all European countries, the European legislator has increasingly, but on an ad-hoc basis, resorted to using agencies since 2000 in order to enhance the provision of impartial and highly specialized expertise, enhance transparency and the visibility of EU decision-making.

While the establishment of European agencies in accordance with the principles of good governance has already been an issue in the Commission’s White Paper on European Governance in 2001 and in a subsequent proposal for a common framework setting out the conditions relating to the creation, operation and supervision of European (regulatory) agencies, they have to be enacted as an interinstitutional agreement between the Commission, the Council and the European Parliament. With the academic literature disagreeing on the possible limits of making use of the concept of agencies and interinstitutional discussions having been brought to a halt (the Commission announced its intention to withdraw its pro-

posal), it seems worthwhile taking stock of the institutional phenomenon and legally assess prospects and limits of European agencies.

2. Taking stock of European agencies

For the purpose of analyzing the limits of permissible delegations of powers to European agencies, the Commission’s definitions and typologies are not convincing. On the one hand, the Commission distinguishes between executive and regulatory agencies. While the first are devised to implement specific Community programmes under the strict supervision of the Commission, regulatory agencies also actively perform executive functions in order to contribute to the regulation of specific sectors. With both executive and regulatory agencies performing executive functions, the terminology is rather confusing. On the other hand, for the constitutional question of democratic legitimacy, the commonly established functional typologies of agencies are largely unsuitable, since the kind of legal instruments a European agency disposes of determines the answer to questions of the legality (and legitimacy) of delegation.

European agencies are relatively independent, permanent bodies with legal personality, established by secondary Community or Union law (mainly through a regulation based on either Art 308 EC or a specific treaty basis) and charged with specific tasks. Judicial restraints and uncertainty as to their reach led to several “waves” of European agency creation since 1975 (temporal approach) and under all three pillars (structural approach). While a common method of classification consists of looking at the kind

of functions carried out (functional approach), many important legal questions are to be tackled by looking at the instruments available to the agency; this instrumental approach emphasizes the mode and scope of instruments.

While European agencies differ substantially in terms of functions, powers, staff, and budget, they all feature a common organizational structure. Following a “dual approach”, they are made up of an executive director and a management board. The latter is mostly composed of representatives of the Member States, mirroring the composition of the Council, and is in charge of appointing the executive director, adopting the agency’s work programme and laying down the agency’s general guidelines. The executive director is the legal representative of the agency and is responsible for the preparation, implementation, day-to-day administration and budgetary duties of all matters relating to staff. Moreover, agencies are usually assisted by advisory bodies and scientific committees.

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Unlike other executive entities of the European Union, European agencies have legal personality, which enables them to exercise the widest possible legal powers accorded to legal persons under national legislation in each Member State. Neither inter-institutional offices like EPSO nor special offices of the Commission like the Joint Research Centre enjoy this legal quality. While some Treaty-based entities, the European Central Bank in particular, would be included in this definition as well, legal literature and Community practice confine European agencies to bodies of secondary Community or Union law. Therefore, “European” international organisations like the European Patent Office or the European University Institute are not European agencies, nor is, strictly speaking, Europol. However, with its new legal basis (a new Council Decision replaces the Europol Convention) the latter will become an agency of the European Union. Moreover, some agencies could be regarded as institutional “consolidations” of committees of Comitology. Lacking permanence, a certain degree of institutional and personal stability, and, not the least, legal personality, such committees are not considered agencies.

EC legislation distinguishes “executive agencies” from other European agencies. Unlike “regulatory” European agencies, executive agencies (e.g. the Education, Audiovisual and Culture Executive Agency) dispose of a common legal framework, Regulation (EC) No. 58/2003, and are set up by the Commission (and not by the Council or the Council and the European Parliament). Since they are entrusted with certain tasks relating to the management of Community programmes for a fixed time period and are closely supervised by the Commission, they are not generally regarded as problematic and therefore not further dealt with in the debate on European agencies. Since the institutional design of agencies often follows ad-hoc political considerations, there also are, however, “regulatory” agencies with a time-limited mandate (e.g. ENISA).

Finally, European agencies dispose of a certain degree of organisational and financial independence, which differs substantially from case to case. While some agen-

cies (e.g., the Office for the Harmonisation of the Internal Market) collect fees and are financially independent – with particular consequences for control through the European Parliament – most European agencies are dependent on European or national (e.g. Second Pillar agencies) budgets.

An exhaustive stock-taking shows that the vast majority of European agencies have no genuine or de-facto decision-making powers. As supporting agencies, they serve as sub-contractors (e.g., Translation Centre for the Bodies of the EU), as observatories or network-managers (e.g., European Environment Agency), as other cooperation-enhancing (e.g., FRONTEX) or information-collecting agencies (e.g. EU Institute for Security Studies). Short of formal decision-making powers, another group of European agencies enjoys a substantial degree of influence over the adoption of decisions made by the Commission. The opinions of the European Medicines Agency, for instance, are taken as binding by the Commission which finally adopts a decision and are reviewable by European courts. So far, only four agencies are formally empowered to adopt binding decisions vis-à-vis third parties: the Office for the Harmonisation of the Internal Market, the Community Plant Variety Office, the European Aviation Safety Agency, and the recently set-up European Chemicals Agency.

3. The limits of delegation for European agencies

When considering a “simple” information-gathering agency, an agency issuing binding decisions on trademarks or – currently, due to judicial restraints only a theoretical option – a general law-making agency, legal questions with regard to legitimacy and accountability, questions of judicial control, executive and legislative oversight, play different roles and have different impacts. Since democracy is a constitutional principle of all Member States of the European Union and an integral principle of EU law, the question of the democratic legitimacy of delegating certain tasks and respective powers from the European treaty-based institutions in general and the Commission in particular to such autonomous decentralized

bodies arises. The different degrees and kinds of powers which European agencies enjoy require a highly flexible system of democratic legitimation via legislative steering and control, judicial review and administrative oversight. Together, these mechanisms amount to an adequate “level of legitimation” of European agencies.

In its 1958 Meroni ruling the Court of Justice developed a first set of criteria for scrutinizing a transfer of powers. First, the receiver of authority is subject to the same restrictions as the delegator (e.g., obligation to give reasons and to publish decisions) and a conferral of powers must be made expressly. Secondly, only “clearly defined executive powers” may be delegated and, thirdly, the institutional balance of the treaties must be preserved. Later case law, in which the Court refers to the Meroni doctrine in the context of general community law, clearly shows the ‘transposability’ of the Meroni ruling from

Further reading

This policy brief is based on research carried out within the NEWGOV project no. 4 on “Legal Perspectives on Democracy and New Modes of Governance”. The project’s primary objective is the further development of democratic theory against the background of new modes of governance in a developed multilevel polity such as the EU. This further development is based on a critical scientific analysis of the literature on democratic theory and classical academic research-work like comparing constitutional traditions and / or institutional arrangements. On this basis, not only the modes of governance that are described and analysed by the other groups of the project are evaluated, but also selected scenarios and forms of governance are discussed. The project concentrates on two issues, namely democracy and delegation and self- and co-regulation. It is jointly led by Stefan Griller and Anne Peters (Basle University).

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the narrow ECSC Treaty to the *traité-cadre* of the EC Treaty. There is no empirical evidence that the European courts have substantially changed their reasoning. To this day, the Meroni criteria represent a decisive constitutional limit to delegation.

This court-based set of criteria represents a first step in testing the democratic legitimacy of empowering European agencies. The Court of First Instance explicitly regards this “input-based” approach of democratic legitimacy important. To this end, the question of the exact composition, appointment and responsibility of agency boards becomes crucial. Moreover, a “material” dimension of legitimation will depend, to a large degree, on the actual steering exercised by the Council and the European Parliament in framing the founding regulation including the delegation of powers. Budgetary procedures and means of supervision at the disposal of the legislator are other important factors to ensure material democratic legitimation.

In order to establish the necessarily more

complex and highly flexible system to measure democratic legitimacy, the following outline shall give a rough idea. As to legislative controls, open competition for agency directors is desirable, with candidates being heard by the European Parliament. More generally, the supervisory role of the European Parliament should be enhanced. The respective competence of the European Ombudsman should be extended to agency activities. Administrative supervision by the Commission should be strengthened, while reassessing the role of OLAF and standardizing supervision over European agencies. Finally, judicial review of all legal European agencies’ acts should be generalized.

However, concerns of legitimacy could not stop at applying a purely “input-oriented” model of legitimation. The rationale for the setting-up of agencies (e.g., enhanced credibility, transparency, impartial expertise, flexibility, efficiency) are ‘output-oriented’ factors which must also be taken into account to find the adequate level of legitimation.

4. Conclusion

It should not be overlooked that strengthening the influence of the Community institutions – in particular the European Parliament and the Commission – would at the same time compromise the independence of European agencies. To a certain extent, this would result in transforming them from independent expert bodies to administrative expert bodies. There may be a general trade-off between efficiency and effectiveness on the one hand and democratic participation and control on the other hand. Yet input- and output-oriented models of legitimacy are closely intertwined, and democracy cannot be based solely on one or the other.

By strengthening the review mechanisms of European agencies’ action, the Lisbon Treaty already constitutes a first step in the right direction. An understanding of the Council, the European Parliament and the Commission on a common framework on European agencies could enhance institutional and procedural certainty to the phenomena of European agencies. It remains to be seen whether the recent initiative of the Commission forges the right “way forward”.

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