

# *Reforming the European Union Agency Governance: More Control, Greater Accountability*

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Agencification in the European Union has mainly proceeded without firm legal framework and horizontal measures, leading to the creation of numerous more or less independent specialised administrative organisations with diverse structure and functions. The EU institutional setting and the nature of EU regulation have represented the powerful engines of agencification. The existence of agencies had not been envisaged in the primary legislation before the Lisbon Treaty, while the more extensive data on agencies emerged only recently. The paper aims to analyse the elements of the EU agency governance and to highlight the direction of the recent reforms of EU agencies. The paper outlines the rationale and legal basis for agencies, presents a short overview of the development of agencification, and gives insight into recent agency reforms. The recent developments show the evolving construction of common

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norms and practices for agencies, which should enable more control and their greater accountability.

*Key words:* European agencies, agencification, EU governance

## 1. Introduction<sup>1</sup>

The process of agencification in the meaning of delegation to the specialized and professional administrative organizations is an enduring feature of the EU governance, making the EU in this respect no different from its member states. Agencification as a feature of contemporary governance and a global phenomenon (Pollitt, Talbot, 2004) in many countries has led to the creation of numerous agencies, justified by the reasons of effectiveness and efficiency under the new public management (NPM) doctrine (Christensen, Laegreid, 2007) or the need for regulation insulated from political pressures within the new regulatory states (Majone, 1996, 2003). Agencies are considered to be organisations that perform public tasks at arm's length from the central government, for the reason of their superiority over traditional ministries in terms of specialisation and expertise and the absence of direct politicisation (Pollitt et al., 2004). The translation of the concept of agency in different institutional contexts has led to a different definition of agency, types of internal design and variety in agency relationship with its environment (politics, users, market; see Pollitt, Bouckaert, 2004; Pollitt, Talbot, 2004). However, after years of mostly uncontrolled agencification, many states have taken various measures to put agencies under control, especially with regard to their outputs and performance, transparency, spending, and financial management, but have also tried to generate a more unified structure of agency governance as a form of the *ex ante* agency control (see Verhoest et al., 2012). The post-NPM era combined with the good governance doctrine reflected itself in the reform processes enhancing coordination and centralisation that sought to improve the governance in general (see Christensen, Laegreid, 2007). Greater accountability and effectiveness had to be achieved

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with the help of clearer organisational and functional rules. Hence, the role of law and regulation in the government became more prominent (similarly Hood et al., 2004).

The agencies are an important element of the EU governance, which dates back to the beginning of the 1970s. Since then, the agencification process has led to the creation of more than forty agencies in various policy domains, with different tasks and peculiarities of the governance structure, functions, and relations to the other bodies or institutions. In 2011, decentralised agencies<sup>2</sup> employed more than 5.000 people and received € 737m from the EU budget. The reception of agency model as a suitable means of achieving EU policy targets was visible even in the period of moratorium on the establishment of new agencies (2008), as the proliferation of agencies remained unstoppable. However, as a part of the complex and insufficiently transparent 'executive governance' in the EU (Trondal, 2006; Trondal, Jeppesen, 2006), agencies came into the focus of the EU institutional and governance reform in the past years. Greater political accountability, greater effectiveness and efficiency as well as more transparency have been set as main goals of the reform process.

This paper's aim is to provide insight into the recent EU agency governance reform, its drivers, and directions of change. What are the main steps in the reform agenda? What circumstances gave the impetus for the reform? Which actors are included and what are their positions? Which goals are to be achieved? What is the direction of the reform measures? Consequently, the paper gives some insight into the explanatory variables – the institutional setting, the main actors and main drivers, as well as the measures taken in the reform process. It highlights the institutional context of the EU as an explanatory factor for the reform process, but also outlines the main directions of change which might be conducive for the similar reforms in the member states, through processes of diffusion and isomorphic pressures of the Europeanization process (Radaelli, 2003).

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<sup>2</sup> Agencies that are not defined as 'decentralised', are not included. Data from European Commission Press Release, Breakthrough as EU Institutions agree common approach on agencies, Brussels, 13 June 2012, [http://europa.eu/rapid/press-release\\_IP-12-604\\_en.htm](http://europa.eu/rapid/press-release_IP-12-604_en.htm)

## 2. The Emergence and Types of EU Agencies

### 2.1. The Rationale for the EU Agencies: Where Do They Come from?

The reasons for delegation to the independent agencies in the EU are in greater part similar to those fuelling agencification in nation states and related to the NPM approach to decentralisation and specialisation, as well as to the concept of independent regulation. In essence, agencification is justified by the need for expert and technical knowledge insulated from political pressures, with greater organisational and personnel flexibility, and greater capability to frame technical regulation which can hardly be absorbed by legislatures, together with the need for allowing executive to focus on policy and political issues. However, along with usual arguments, several features of the EU institutional architecture and policy have been conducive for the development of EU agencies, with implementation deficit, institutional balance, and the necessities of respective EU policies being the most prominent ones.

First, *the EU's institutional setting* is considered to be conducive for the formation of agencies as specialized and relatively independent bodies with regard to the main political actors. The holder of the executive power is the Commission, which has profiled itself as the motor of the EU integration. This has led the main political actors to be in favour of agencies to promote their specific interests (Dehousse, 2008). The Council, on one hand, delegates the tasks to the agencies to avoid strengthening the already powerful Commission. In this way, the member states remain in control via management boards usually comprised of the representatives of the member states (MS), and they host agencies' seats on their territories. On the other hand, the Commission, already a giant institution, does not object to delegation to the agencies, because it allows it to focus on the 'political' or policy issues, thus promoting itself as a policy actor in the political arena (Majone, Surdej, 2006; Curtin, 2007: 524).<sup>3</sup> In addition,

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<sup>3</sup> As Hofmann and Morini (2012) argue, the distinction between political and technical matter also favours agencification – Commission as primarily political executive is assisted by the agencies as expert bodies, which should provide scientific assessments based on technical evaluations and coordinate relevant expert actors (e.g. national agencies), which allows the Commission to focus on political issues and present itself as a 'motor of integration'. The Commission outlined this view explicitly in its 2001 White paper for the Commission, the creation of agencies is also a useful way of ensuring it focuses resources on core tasks (p. 24).

the Commission encourages the delegation of tasks to the agencies at the European level and the creation of a network of national regulators in a particular area in order to legitimize its decisions by their expertise and to ensure implementation (Trondal, 2006), thereby avoiding cooperation with national ministries (Egeberg, 2006). Finally, the European Parliament supports agencies because in this way it gains stronger influence on the establishment via co-decision procedure and avoids concentration of power in other institutions, namely the Commission. Hence, the Parliament enjoys a more powerful position *vis à vis* agencies than in relation to the Commission – several instruments of control over agencies set the main control into the hands of the EP (reporting, ex ante appointments, hearings of the candidates, ombudsman, other independent control bodies such as the Court of Auditors). As noted by Rittberger and Wonka (2011) »agencies are said to represent a ‘compromise’ reflecting the interests of their multiple principals (the Council, the Commission, and even the European Parliament).«

The other driver of agencification is the specific set-up of European governance which is conducive to *the implementation deficit* – the Commission, as the executive, relies heavily on the implementation by member states’ administrations. Therefore, a large number of agencies, boards and other entities serve as a compensation for the implementation deficit, i.e. the fact that the EU does not have its own administrative apparatus for the formulation and implementation of policies. Thus, agencies may be regarded as an attempt to solve the problem of institutional deficit of the European Union and its dependence on the implementation at the national level (Baldwin, Cave, 1999: 163). Instead of leaving the implementation of an EU policy or its segment in its entirety to the member states, the EU compensates for implementation deficit by establishing agencies within respective policies with the task to ensure coordination, provide technical support, construct information base, or even independently implement regulations. At the same time, the separation of highly specialized tasks into an agency, relieves the Commission’s already weak administrative capacity of a heavy burden and allows its resources to be redirected to the policy function, especially in terms of initiatives and evaluation and monitoring, with the technical basis provided by professional and independent agencies. Similar agencification has been taking place at the MS level, with national agencies being established in the course of implementation of European policies, thus creating the networks of agencies (national plus EU agencies) in diverse policy areas. In sum, in order to cure the EU’s implementation deficit, the networks of the EU and national level

agencies serve as a means of harmonization or coordination of policies and their implementation.

Finally, the *logic of the European project* favours delegation to professional and specialised bodies. The idea of the EU as the regulatory state (Majone, 1996, 2003) requires regulatory policies to be developed as a main governance tool, in response to »de-politicization of the common market« (Majone, 1996: 330). Thus, in an effort to achieve the main objectives of the EU (the common market), the MS abandon public ownership and planning, and turn over the regulation of privatized monopolies to the expert agencies. In other words, an increase of the 'statutory regulation' in Europe, i.e. the regulation through independent regulatory bodies in the EU and its MS, is a result of the strategy of privatization and deregulation, inspired by global regulatory reform. It is also connected to the EU's legislative activity that has been getting stronger since the end of the 1980s (Majone, 1996) – regulation, rather than providing services, becomes the main mode of action of the member states and the EU itself (Scharpf, 1997). Hence, the EU is a regulatory state keen on delegation to professional bodies (Majone, 1996) in order to achieve legitimacy of its decisions. The growing dominance of expert bodies (non-political, non-majoritarian, see Coen, Thatcher, 2008) is in line with both the EU's non-political character (outside political institutions) and regulatory state agenda. The proliferation of agencies and agency-like institutions based on expertise, professionalization, and specialisation is a key feature of the EU (Levi-Faur, 2011). The Commission frequently emphasizes that the idea behind the creation of agencies is to »make the executive more effective at the European level in highly specialised technical areas requiring advanced expertise and continuity, credibility and visibility of public action ... 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« (Communication 2002/718: 5). Thus, the technical and scientific complexity, which is one of the causes of delegation in the modern regulatory state (Majone, 2003), is particularly prominent in the EU. The rise of agencies at the European level might also be attributed to the strengthening of the concept of subsidiarity (Hofmann, 2010).

## 2.2. The Process of the EU Agencification

There are numerous European agencies which differ according to their type, size, formal structure, funding, appointment and composition of

management structures, range of functions, their importance, and location. However, even within this seemingly diverse context it is possible to identify some elements of the EU agency model.

The agencification in the EU has developed in several waves (see Table 1 in Appendix). The first agencies were established in the 1970s as a response to the development of the labour market (Eurofound and Cedefop). Their tasks consisted mainly in collecting data and preparing expert analysis in given areas. The second wave of agencification emerged in the 1990s, with eight new agencies being established in the period 1990–1994 in the first pillar to help implementing newly developed policies (e.g. for pharmaceuticals, environmental protection, market harmonization, etc.) and additional two in the late 1990s (in the area of human rights and aid). They were meant to facilitate the functioning of the single market, with a somewhat broader authority, which mainly consisted in issuing decisions in individual cases. In the third and most intense wave (2000–2009), nine new agencies were founded in the first pillar following the development of the EU policies related to transport, data security, fisheries, food safety, health, chemicals, electric power, etc. In addition, five agencies were established under second and third pillars and six agencies emerged as executive agencies.

Despite efforts to stop or at least disregard agencification, it continued in the period 2009–2013, creating seven new agencies for regulation in the key areas as a response to the shaken stability of the EU. Three agencies were established for the purpose of regulation of the financial services market, which is of crucial importance for the political and economic stability of the Union. Two agencies were established in the field of regulation of public services, as cornerstones of the EU economy (energy services, ACER, and electronic communications, BEREC), followed by two agencies in the field of justice and home affairs, in which the cooperation between the countries has been intensified as a response to the security problems, border protection and the fight against international crime.

Before the Lisbon treaty, the typology of EU agencies included those in the first pillar (EC), second pillar agencies (CFSP) and third pillar agencies (JHA), two agencies under EURATOM and one agency outside the pillar structure. After Lisbon, first and third pillar agencies were merged into the category of 'decentralised agencies', since the pillar structure was abolished.

Table 1. Agencies in the EU – Waves and Legal Bases

The EU agencies	1 <sup>st</sup> pillar / decentralised bodies	2 <sup>nd</sup> pillar	3 <sup>rd</sup> pillar (decentralised from 2009)	Other	Executive agencies	Number of agencies created	Total number of agencies
legal basis	Art. 114 or 352 TFEU or sector policy provision; regulation;	Art. 43 and 45 (EDA); Council decisions	Art. 114 or 352 TFEU or sector policy provision; regulation; Art. 85 and 88 TFEU	Euratom; Regulation EP & Council	Regulation 58/2003	–	–
1 <sup>st</sup> wave – 1970s	2	–	–	1	–	3	3
2 <sup>nd</sup> wave – 1990s	10	–	1	–	–	11	14
3 <sup>rd</sup> wave – 2000–2009	11(-1)	3	2	2	6	24	37
4 <sup>th</sup> wave – 2009–2012	5	-	2	–	–	7	44
Total 2013	28	3	5	3	6	45	44

Source: Author

According to functional criteria, decentralised agencies are usually classified as decision-making agencies, which adopt individual decisions that are legally binding on third parties (e.g. CVPO, OHIM, EASA, ECHA); agencies which provide direct assistance to the Commission (and to the MS) in the form of technical or scientific advice and/or inspection reports (EMSA, EFSA, ERA, EMEA); agencies conducting operational activities (EAR, GSA, CFCA, FRONTEX, EUROJUST, EUROPOL and CEPOL); information and coordination agencies (which gather, analyse, and disseminate information or coordinate networks; (e.g. CEDEFOP, EUROFOUND, EEA, ETF, EMCCDA, EU-OSHA, ENISA, ECDC, FRA, EIGE); and service agencies (CDT). Some of the recently established agencies in the area of financial markets, energy or electronic communication have even broader powers with regard to decision-making, and hence approach to genuine regulatory agencies. Executive agencies, however, are those established as semi-autonomous agencies of the Commission.<sup>4</sup>

<sup>4</sup> Executive agencies, established under Regulation 58/2003, follow standardised structure and the menu of functions, with the Commission supervising their activities, and

Some authors claim diversity of EU agencies (Andoura, Timmermans, 2008), but compared to the chaotic diversification of agencies at the national level, EU agencies seem to follow a similar pattern with regard to their organisation and practice.

### 2.3. The Legal Framework for the EU Agencies

In the past decades, the most important legal provisions applicable to agencies were enshrined in the Treaties but, as in many European countries, agencies were not systematically treated as a distinct institutional tool for the implementation of policies. Due to the diversified policy structure, and complex relations between the institutional actors and member states, the EU legal framework was ambiguous with regard to the establishment of agencies, while the Treaties before the Lisbon Treaty had completely overlooked the agencies as institutional actors.<sup>5</sup>

Until 2009, the main division of agencies was based on the legal basis for their establishment as set by the Treaties. Therefore, the differentiation existed between first pillar agencies (EU policies), second pillar agencies (Common Foreign and Security Agencies), and third pillar agencies (Justice and Home Affairs – JHA), EURATOM agencies, executive agencies, and other agencies (European Institute for Technology and Innovation – EIT). The legal basis for the establishment was given by the Treaties (Art. 308 and 95 TEC, with some agencies established directly under the Treaties), but the legal instruments were different: in the first pillar, the agencies were established by the regulations (of the Council; later of the Council and the EP), in the second pillar by the joint actions of the Council, while in the third pillar it was done by the Council's decision or the act of the Council: executive agencies were established by the Commission's decision, based on the special regulation. EURATOM agencies were esta-

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in some cases their decisions, and controlling their work plan and the budget. They are governed by a director and a steering committee.

<sup>5</sup> The division of tasks and implementation of European policies is known under the term of 'executive federalism' – implementation is in general delegated to the MS (former Art. 10 TEC, now Art. 4/3 TEU and 291/1 TFEU), but it is not limited only to the national level, entailing many tasks at the EU level (direct administration), such as the adoption of the implementing measures (the interpretation of rules, the application of rules, the rule setting and evaluation, the approval of funds, the extension or specification of funding programmes, information management, etc.; Hofmann, Türk, 2006: 74; see also Hofmann, 2010).

blished by the decision of the Council as international organisations or by the Treaty.<sup>6</sup>

Although the recent amendments of the EU Treaties have not significantly altered the position of agencies in the EU institutional setting, several advancements in relation to the previous regulation are worth mentioning. First of all, the Treaty of Lisbon has abolished the three pillars structure of the EU, thus placing the earlier first (EU) and third (JHA) pillar agencies into the common group of 'decentralised agencies' under the TFEU, while the three agencies of the former second pillar (now Common Foreign and Security Policy), although formally belonging to this group, have partially remained isolated.<sup>7</sup>

Secondly, after 2009, the legal basis for the establishment of EU agencies is determined by the Treaties.<sup>8</sup> Although the Treaties do not explicitly define the basis for their establishment or the basis for the delegation of powers to agencies, there are three possible legal grounds for the establishment of agencies as specialised bodies for implementation of the EU policies with legal personality: (1) for some agencies, the legal basis is enshrined in the Treaties, such as European Defence Agency (Art. 42/3 and 45 TEU), Eurojust (Art. 85 TFEU) and Europol (Art. 88 TFEU); (2) some agencies are based on special provisions contained in the chapters

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<sup>6</sup> Along with agencies, there are other decentralised bodies with special level of autonomy. Some are established by the Treaties, such as the European Investment Bank (Art. 308–309 TFEU and Protocol No. 5), or envisaged by the Treaties, such as the European Data Protection Supervisor (Art. 16 TFEU, Regulation EC 45/2001). The European Central Bank and the Court of Auditors have become 'institutions' of the Union (Art. 13. TEU). There are also agency-like bodies belonging to the group of services or interinstitutional bodies, such as the Publications Office, the European Personnel Selection Office, the European Administrative School and newly established (in 2011) Computer Emergency Response Team (CERT), as well as the semi-autonomous agency of the European Commission – the European Anti-Fraud Office (OLAF; ref. to Art. 325 UFEU). This institutional diversity is an indicator of the 'distributed governance' as a feature of contemporary governance (Flinders, 2004: 523; OECD, 2002).

<sup>7</sup> This holds especially to the European Defence Agency, which is based on Art. 43/3 and Art. 45 TEU, also referred to by the Protocol No 10 on the Permanent Structured Cooperation Established by Art. 42 TEU.

<sup>8</sup> Hofmann and Morini (2012) argue that in contrast to pluralisation of the executive (divided between the Commission, the Council in some cases, as well as other institutions such as the ECB, the Court of Auditors and agencies, as well as the MS), the Treaty of Lisbon aimed at designing a more unitary structure of the executive, abolishing the three pillar structure and defining a single legal system and single typology of legislative acts.

regulating the respective EU policy;<sup>9</sup> (3) other agencies are based on the general provision (Art. 114 TFEU and 352 TFEU; ex 308 TEC)<sup>10</sup> which allows for the establishment of agencies, as the measures to be taken within respective policy.

Based on these Treaty provisions, agencies are established (a) by the Council and the EP regulation under regular legislative procedure, for the bulk of the decentralised bodies and agencies; (b) by the decision of the Council, for the agencies under CFSP, and (c) by the decision of the European Commission based on the Regulation for the executive agencies.<sup>11</sup> Different legal bases for the establishment of agencies have many implications on their functions and structure, such as the procedure of establishment, the tasks, the composition of governing bodies, the timeframe, etc. However, some common features of agencies and their specificities in comparison to national agencies (e.g. governance structure, restricted regulatory powers, provisions concerning specific issues), as well as recent attempts to set a common framework for agencies (see *infra*), indicate to the existence of the European model of agency (Barbieri, Ongaro, 2008).

Thirdly, the Lisbon Treaty has recognised the agencies as the EU level administrative organisations extending the scope of certain controlling powers and principles onto agencies. One of the most important changes is that the agencies' general and individual acts are explicitly subjected to the judicial review (Chamon, 2011) – according to Art. 263 TFEU, the ECJ reviews »the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties« (Art. 263/1

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<sup>9</sup> An example is the research and technological development policy (Art. 182/5 and 187 TFEU, as the basis for the ERC and EIT), but general provisions are incorporated into other policy regulations in the Treaties containing formulation that »the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives ...« of the respective policy.

<sup>10</sup> Art. 352/1 of the TFEU reads »If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.«

<sup>11</sup> Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 11, 16. 1. 2003. Six executive agencies have been established so far.

TFEU),<sup>12</sup> and it allows any natural or legal person to »institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures« (Art. 263/4 TFEU).<sup>13</sup> Moreover, the infringement procedure may be instituted before the ECJ in case an agency fails to act, after being called upon to act and does not do so within two months (Art. 265/1 and 2 TFEU).<sup>14</sup> The controlling powers are also explicitly delegated to the Court of Auditors, the European Ombudsman, and the OLAF with regard to the actions of the agencies.<sup>15</sup> Finally, the Lisbon Treaty has extended the application of the principles of the EU Treaties onto agencies,<sup>16</sup> while the Charter of Fundamental Rights of the EU, now an integral part of the Treaties, in its provision on the right to good administration (Art. 41) extends this right to all institutions, bodies, offices and agencies of the Union, requesting

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<sup>12</sup> This does not apply to CFSP agencies, notably the European Defence Agency, but does apply to other decentralised agencies, including the former third pillar agencies.

<sup>13</sup> According to Art. 263/4 TFEU, »Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.« Article 263/5 prescribes: »Acts setting up bodies, offices and agencies of the Union may 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.« It requires that internal complaint procedure be exhausted; some agencies have established the appealing bodies, such as the EASA, the CVPO, or the OHIM. See also Chamon, 2011.

<sup>14</sup> The infringement procedure may be instituted before the ECJ in case agencies fail to act (Art. 265/1 sentence 2), after the agency has been called to act and does not do so within two months (Art. 265/2). In addition, in case of silence of administration (including agencies), any natural or legal person may lodge a complaint to the ECJ (Art. 265/3). The EU Civil Service Tribunal resolves disputes between the Union's agencies and their servants (Annex 1 of the Protocol No 3 on the Statute of the Court of Justice of the European Union).

<sup>15</sup> The Court of Auditors examines the accounts of all revenue and expenditure of agencies »in so far as the relevant constituent instrument does not preclude such examination« (Art. 287/1 TFEU). The European Ombudsman is entitled to inspect complaints concerning instances of maladministration of the agencies (Art. 228 TFEU). The prevention of and fight against fraud is to be conducted also with regard to the agencies (Art. 325/4 TFEU).

<sup>16</sup> Those principles include the principle of equality (Art. 9 TEU), openness, and access to documents (Art. 15 TFEU), personal data protection (Art. 16 TFEU), the principle of open, efficient, and independent administration (Art. 298 TFEU).

for the handling of their affairs »impartially, fairly, and within a reasonable time«. <sup>17</sup>

With regard to the scope of delegation, in comparison to the national agencies, the EU agencies somehow escape the full definition of 'regulatory' agencies, as independent authorities that autonomously regulate certain sector (Geradin, Petit, 2004; Craig, 2006). The legal framework for such restricted scope of delegation is set by the EU Treaty provisions and their interpretations by the ECJ, and follows the logic of institutional balance and the division of powers between the states and the EU. In sum, it mainly leaves the implementation, including issuing of secondary legislation, in the hands of the MS. Hence, the European agencies have only restricted regulatory powers in a narrower sense, usually conducting inspections or issuing individual decisions (e.g. OHIM, ECHA, CPVO, EASA), or helping the Commission by issuing opinions and recommendations on the Commission's proposals for legislation (which are usually taken seriously by the Commission, having obligation to argument an opposing decision), collecting and disseminating information, coordinating the networks of national agencies.

The widely cited Meroni doctrine was defined by the ECJ in 1958 and confirmed in later judgements. In this judgement, <sup>18</sup> the ECJ narrowly defined the range of powers that may be delegated to bodies not envisaged in the Treaties, although not referring to agencies in particular (Craig, 2006; Chamon, 2011). Based on the institutional position of the Commission as the executive, the ECJ took the view that the delegation of the tasks from the Commission to other actors is admissible only if »it invol-

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<sup>17</sup> The Charter on Fundamental Rights of the European Union includes the principles which apply on the activities of agencies, such as the right to good administration (Art. 41), the right of access to documents (Art. 42), the right to submission of a complaint to the European Ombudsman's protection (Art. 42). Moreover, Art. 52 explicitly extends the application of the Charter's provisions to the acts taken by agencies. In the 2000 version of the Charter, those rights were not applicable to agencies, but only to institutions and bodies of the EU, which indicates that the perception of agencies has changed during the past decade.

<sup>18</sup> Case 9/56 Meroni & Co. Industrie Metallurgiche, S.p.A. v. High Authority of the ECSC [1957–58] ECR 133. For the detailed description of the judgement, see Craig (2006), Dehousse (2008), and Griller and Orator (2007). For subsequent judgements see Chamon (2011), who also argues that the Romano case is even more important for the issue of delegation to agencies (Case 98/80, Giuseppe Romano v. Institut national d'assurance-maladie-invalidité [1981] ECR 1259). The Romano Case poses even greater restrictions to the delegation to agencies, but it was ruled under the EEC Treaty and referred to the delegation by the legislator (the Council), not the Commission. The Romano case has also been quoted by the Commission on several occasions (see the Commission's Report by the Working Group 3a, 2001).

ves clearly defined executive powers, the exercise of which can, therefore, be subject to strict review in light of criteria determined by the delegating authority«. Therefore, the delegation of »a discretionary power, implying a wide margin of discretion« is excluded in all cases (Dehousse, 2008). Similar restricted stance has been taken by the Commission's Legal Service. In sum, the delegation to third bodies may not disturb the institutional balance, and therefore it has to involve only the Commission's proper powers. It cannot include empowerment to adopt legislative acts, but only their preparation or implementation; the bodies may not be given any discretionary powers, the Commission has supervising powers and is responsible for the delegated authorities (Majone, 2003; Dehousse, 2008). Hence, agencies should serve as expert assistants to the Commission.

However, despite formal restrictions of delegation to agencies, many agencies in fact have decision-making powers, at least with regard their authority to issue decisions in individual cases (also Curtin, 2007), and some of the newly established agencies, such as the ESMA or the ACER have a significant margin of discretion, including the power to issue binding regulation in the respective markets (securities, energy). In addition, the role of agencies in policy formulation, including their obligation to issue scientific or expert analyses and issue recommendations and opinions to the Commission's proposals, makes them more powerful than formally acknowledged, legitimising the Commission's decisions (Griller, Orator, 2007: 11). Still, the controlling mechanisms, such as judicial review, might compensate for the autonomy they have received even beyond Treaty provisions and judicial doctrines.

### 3. Back and Forth on the Reform of Agencies

The interest of EU institutions in agencies, as well as the need for their reform, has been gradually acknowledged from 2000 onwards, as the agencies have been discovered as the institutional shortcoming which adds to the democratic deficit. From that point forward, there has been an ongoing debate over the possible direction and content of the reform of the EU agencies, but specific proposals for measures have usually ended up in stalemate. However, parallel to these developments, the process of agencification has continued unstoppably – from 14 agencies in 1999 (12 in the first pillar) it increased to 44 agencies in 2013. Still, after the financial and economic crisis voiced out stronger demands for the reform

that would achieve greater efficiency, effectiveness, and control, the recent initiatives have been more feasible concerning their substance. More intensive activities of controlling bodies (the Court of Auditor, the EP) have helped to put the agency governance on the reform agenda. A similar role has been played by recent agency scandals and the parallel reform processes in the member states. The following paragraphs contain the description of various attempts from 2000 onwards, with the reference to possible drivers and main actors in the reform process.

### 3.1. Attempt No. 1: The Commission's Jump into Unknown: Agencies as a Source of the Democratic Deficit

An attempt to bring into order the creation, configuration, and operation of agencies, as 'tolerated anomaly' at the EU level, should be viewed in the context of the overall reform of governance and the reform of the executive branch, particularly the Commission.<sup>19</sup> At the turn of the Millennium, the discussion about democratic deficit was at its peak, mobilising politicians, institutions, experts, and academia in search of the response to the perceived lack of democracy, legitimacy, and accountability in the EU. This concern was augmented by the delegation of already delegated tasks<sup>20</sup> to the specialised agencies, which were perceived as technocratic fortresses deepening the already existing divide between citizens and the EU. At the same time, agencies were considered the main instrument for the preservation of institutional balance, and the compensation for the implementation deficit at the EU level as well as for the weak institutional capacity of the Commission and the Parliament (Majone, 1996; Etzioni, 2007; Moravcsik, 2002).

The initial impetus for the reform emerged in one of the most important strategic documents for the EU institutional affairs, namely the White

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<sup>19</sup> The Commission itself has been continuously reformed, especially after the 1999 scandal with Santer's Commission. The first reform was attempted by Romano Prodi (Trondal, 2006; Egeberg, 2006).

<sup>20</sup> The core of the problem concerns the fact that the EU tasks have been delegated by the transfer of sovereignty from the states to the European level, but to the institutions defined in the Treaties as carriers of the legislative, executive, and judicial powers. Subsequent delegation from the institutions (where the states have their say) to the agencies as specialised administrative organisations has been considered as a problem itself.

Paper on the European Governance (July 2001),<sup>21</sup> which highlighted the problem of agencies, their diversified structures and functioning, as well as the need for defining conditions and setting the framework for their establishment and workings. In its White Paper, the Commission argues that the agencies, as a means of policy implementation, are one of the most pressing problems of the EU, and that they deserve sufficient attention, with final output being the creation of legal framework which would set the basis for their establishment, functioning, and supervision in accordance with the principles of good governance (openness, participation, accountability, effectiveness and coherence, reinforcing the principles of subsidiarity and proportionality).

The White Paper opted for the following advancements with regard to agencies (1) the extension of their scope to the issuing of individual decisions (»should be granted the power to take individual decisions in application of regulatory measures«), (2) independence combined with a clear framework established by the legislator, (3) regulations creating particular agencies should »set out the limits of their activities and powers, their responsibilities and requirements for openness« (ibid., p. 24). Still, the Commission's proposals do not run across the framework set by the Treaties, regarding the restrictions of delegation of powers directly conferred upon the Commission, with regard to general regulatory measures (»cannot adopt general regulatory measures«), discretionary powers (decision making could be allowed only »in areas where a single public interest predominates and the tasks ... require particular technical expertise« and they cannot be allowed »to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments«) and only if the effective system of control is in place (ibid., p. 24). In other words, the decision-making powers of the EU agencies should be restricted to individual decisions for which special technical expertise is needed in order to realise a public interest, and do not contain any arbitration

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<sup>21</sup> The Commission of the European Communities (2002) European Governance: A White Paper, Brussels, 25. 7. 2001, COM (2001) 428 final. The reform of European governance was identified as one of four strategic objectives in early 2000, as a response to two different circumstances – the need to adapt the EU governance under existing Treaties (the Amsterdam Treaty entered into force on 1 May 1999, while the Nice Treaty was expected to be signed in February 2001) and as a basis for a broader debate on the future of Europe in view of the future Inter-Governmental Conference.

between conflicting political or economic interests. In addition, such decisions must be subjected to the effective control mechanism.<sup>22</sup>

In the White Paper, the Commission determined that in 2002 it would »define the criteria for the creation of new regulatory agencies in line with the above conditions and the framework within they should operate« and »set out the Community's supervisory responsibilities over such agencies« (p. 24). Following this plan, the Commission started an extensive analysis and consultation process, as in other areas mentioned by the White paper.<sup>23</sup> Based on the detailed Report of the Working group 3a, which had the task to define the analytical report on agencies,<sup>24</sup> the Commission initiated the consultation process which resulted in the Operating Fra-

<sup>22</sup> The decision-making agencies have set their appeal boards ensuring the internal control system, while their final decisions are subjected to the judicial control according to Art. 263 TFEU.

<sup>23</sup> The White Paper proposed a set of initial actions in different areas, such as better law making, tripartite arrangements, the use of expert advice, establishing a more systematic dialogue with the representatives of regional and local authorities, establishing consultation standards, etc. The actions were taken immediately after the WP and consultative processes had been launched. The agency issue was also addressed in other areas, such as the Commission of the European Communities (2002) Communication: European Governance: Better Law Making, COM(2002) 275 final, Brussels 5. 6. 2002.

<sup>24</sup> European Commission (2001) White Paper on Governance, Work area 3 Improving the exercise of executive responsibilities: Report by the Working group 'Establishing a framework for decision-making regulatory agencies' (group 3a) Pilot: F. Sauer, Rapporteur A. Quero, June 2001. The Report analyses various elements of agencies, and states that »insufficient thought about the place of European agencies in the Community executive has prevented the emergence of a clear approach regarding the means of democratic control to be provided« (p. 17) and recognises the need for »a common constitutive framework organising both the autonomy and the control of European agencies« (p. 17). The report highlights the *main principles* of agency governance in the EU: specialisation, autonomy, fairness and transparency, limited size of the supervisory body (maximum twenty), equal representation of the Commission and the member states (parity of the executive), representation of the stakeholders, direct democratic accountability (to the European Parliament). It also sets out *possible governing structure* (executive director, supervisory board, appeal bodies, advisory committee, and restricted executive board). Special chapter deals with the *control mechanisms* – procedural control (transparency, due regard for all pertinent opinions, independence of decision making), democratic control (the EP), executive control (the EC and MS), external financial control (the Court of Auditors), and judicial control. The Commission's *coordinating and supervising* role is defined: »There is consequently a real need for the agencies to be steered and monitored. To do this, there must be the appropriate infrastructure, which must necessarily include a decentralised element (supervisory and across-the-board directorates-general) and a central element responsible for ensuring homogeneity of action. This infrastructure could take the form of a permanent interdepartmental network, consisting of the DGs responsible for the agencies, the DG for Staff and Administration, the DG for the Budget and Financial Control, and run by a central structure housed at the Secretariat-General.« (p. 25).

mework for the European Regulatory Agencies (December 2002).<sup>25</sup> The document emphasizes the need for a coherent approach to agencies, despite their diverse functions, in order to achieve effectiveness and transparency, and thus ensure the unity and the integrity of the executive function, which is a prerequisite for the legitimacy, effectiveness, and credibility of the Union. In this regard, the creation of the framework for EU agencies is aimed at solving the democratic deficit issue. The Operating Framework distinguishes between executive and regulatory agencies. Executive agencies are those responsible for purely managerial tasks (assisting the Commission in implementing financial support programmes and subjected to control by Commission).<sup>26</sup> Regulatory agencies are »actively involved in the executive function by enacting instruments which help to regulate a specific sector« (p. 4). The Operating framework defines functional typology of regulatory agencies, as those that provide assistance in the form of opinions and recommendations, which provide the technical and scientific bases for the Commission's decisions (EMEA, EFSA), those that provide assistance in the form of inspection reports, intended to enable the Commission to meet its responsibilities as the 'guardian' of Community law (EMSA), and those empowered to adopt individual decisions legally binding on third parties (OHIM, CPVO, EASA). The Framework clearly adopts the agency model where organisational and functional autonomy must be combined with accountability and transparency. In the Operating Framework, various elements of agency governance are established, such as legal basis; legal personality; location, powers, and scope of functions; governance structure (administrative board,<sup>27</sup> director,

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<sup>25</sup> The Commission of the European Communities (2002) Communication: The Operating Framework for the European Regulatory Agencies, COM (2002) 718 final, Brussels 11. 12. 2002. At that moment there were 20 agencies (15 under EC Treaty, one under EURATOM, and four in the second and third pillars), with two additional being established.

<sup>26</sup> The Commission was able to initiate the legislative procedure establishing the framework for those agencies, resulting in adoption of the Council Regulation No. 58/2003 on executive agencies.

<sup>27</sup> As was the case with the position taken in previous documents' principles, the Commission proposed equal partition of the Commission and Member states (6 by each) and three members of interested parties (representatives of the stakeholders). However, this idea has not been replicated in any of the agencies, since almost all of them have representatives of all the member states (28) and one or two Commission's representatives. These attempts by the Commission to further a completely different managing structure are somewhat inconsistent with both agency developments and institutional balance in the EU.

advisory committee, restricted executive board,<sup>28</sup> boards of appeal); financial and budgetary aspects; other administrative aspects (transparency, data protection, business confidentiality, obligation to justify instruments, combating fraud, etc.); and control mechanisms (the Commission, political supervision by the EP and the Council, administrative supervision by the European Ombudsman, judicial control, financial control by the EP, the Court of Auditors and the OLAF, compensation of damages, appeal mechanism).

While the Commission had been trying to elaborate on agencies, the agencification proceeded, having reached the number of 24 agencies by 2004, with 13 agencies established in the period 2000–2004, making it the most fruitful with regard to agencification.

### 3.2. Attempt No. 2: The Council Fights Back: A Failed Framework for Regulatory Agencies

The discussions on the Commission's 2002 Communication continued in 2003 and 2004. It was welcomed by both the EP<sup>29</sup> and the Council, which called upon the Commission to submit a proposal for a framework that should be preceded by an inter-institutional agreement. Hence, based on the Operating Framework and subsequent discussions, the Commission presented the Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies (DIIA)<sup>30</sup> to the EP and

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<sup>28</sup> The restricted executive board would consist of the chairperson of the Advisory Committee and several senior officials of the agency. It would give the director an opinion in specific cases, such as on highly sensitive subjects or if major differences of opinions arise in the Advisory Committee.

<sup>29</sup> See Resolution of 13 January 2004, P5\_TA (2004)0015 of the European Parliament. The EP considers that »it is essential to rationalise and standardise the structure of the present and future agencies in the interests of clarity, transparency, and legal security' and emphasizes that 'an urgent review of the present agencies is required.« See also the Council Conclusions of 28 June 2004, Doc. 17046/04.

<sup>30</sup> The Commission of the European Communities (2005) Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, COM (2005) 59 final, Brussels 25. 02. 2005. The Interinstitutional agreement (IIA) is a legal instrument which may have a binding nature if its content implies that all three institutions (the Council, the EP, the Commission) have the intent to be committed by it (according to the Judgment of the ECJ of 19. 3. 2009, 1996 Commission vs. Council C-25/94, ECR I-1469). The IIAs do not preclude later usage of another legal instrument with a binding nature, such as a regulation. In previous Treaties, the IIA was mentioned in Art. 218 TEC as an instrument of bilateral or multilateral cooperation among institutions, and in the Declara-

the Council in February 2005. Just as the Operating Framework of 2002, the DIIA defines the main principles and elements of agency governance, and then drafts the guidelines and rules for them. However, based on the recent developments in the EU (development of the regulatory impact assessment and the conflict of interest regulation) and the debates between 2002 and 2005, the DIIA contains additional elements or additional elaboration of some elements, such as the need to provide an impact assessment prior to the establishment of an agency (elements are defined into detail), transparency and conflict of interest, good administration, annual work programme and activity report, international activities and participation of third parties, evaluation mechanism, and detailed description of financial elements. The DIIA is based on the need to enhance independence, competence, and credibility of agencies; and to strengthen transparency and accountability of agencies. It develops a functional typology of agencies – decision-making agencies, technical and scientific assistance agencies, network agencies, and collection and dissemination of information agencies. In addition, the DIIA confirms earlier interpretation on the restricted delegation of powers.<sup>31</sup>

However, the Draft IIA was not accepted by all three partner institutions. Although the EP adopted the DIIA by its resolution in December 2005,<sup>32</sup> it was dismissed by the Council without even reaching the stage of politi-

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tion no. 3 in relation to Art. 10 TEC adopted in Nice, foreseeing the adoption of IIA in cases when it is necessary to achieve good cooperation for facilitating the implementation of the Treaties. After Lisbon, the TFEU in Art. 295 states that the EP, the Council, and the Commission are obliged to consult and agree on cooperation, and for that purpose, they are invited to conclude interinstitutional agreements that may have obligatory nature. To achieve IIAs is one of the tasks of the Commission defined in Art 17. TEU. The IIAs have different titles (Joint Declaration, Declaration, Agreement, Decision, Exchange of Letters, Code of Conduct, *Modus Vivendi*), forms and procedures (formal conciliation, agreed consultation, informal understanding), content (some have the purpose to strengthen the EP), and legal effects (Hummer, 2007). They are connected to the 'interinstitutional offices/bodies' which are outside institutions but have functions related to many of them, such as EPSO or Publications office. For the role of the IIAs in democratisation of the EU see Punttscher Riekman (2007); for an extensive study of 123 IIAs in the EU see Hummer (2007).

<sup>31</sup> It explicitly excludes the possibility to issue general regulatory measures, to resolve issues that need arbitration between the conflicting interests or political discretion, or to take decisions in areas explicitly entrusted with the Commission.

<sup>32</sup> The European Parliament Resolution on the Draft Inter-institutional Agreement presented by the Commission on the Operating Framework for the European Regulatory Agencies, P6\_TA(2005)0460, OJ C 285 E/123, 1 December 2005

cal discussion at the Council or Coreper level.<sup>33</sup> Instead, the Legal Service of the Council concluded that the use of an inter-institutional agreement for the regulation of agencies had no base in the Treaties, and therefore was not an appropriate legal instrument.

However, the EP in its Resolution (OJ C 285E/123 of 22 November 2006) expressed their regret at the Council's unwillingness to accept the DIIA and called upon the Commission to intensify its efforts towards the Council. The EP welcomed the DIIA but also underlined additional mechanisms which had to be incorporated, such as the co-decision procedure for the establishment of an agency, cost-benefit analysis for each agency, the role of the EP and legal protection against the decisions of agencies (appeal to the Commission, judicial control).

Paradoxically, although the DIIA was chosen as a more suitable means for reforming agencies in order to please the EP, it was the Council that blocked further progress and dismissed the IIA as inappropriate. The efforts made by the EP and the attempts of the Commission's Legal Service to argument its decision to use IIA failed.<sup>34</sup>

Following the political crisis of the EU (i.e. the failure of the Constitution for Europe), the EP called upon the Commission and the Council to stop their activities regarding the framework for agencies during the 'period of reflection', and in 2009 the Draft IIA was formally withdrawn by the Commission as obsolete.<sup>35</sup> Hence, the agencification process went further, untouched by the attempts to increase their accountability, transparency, or effectiveness, resulting in the establishment of six new agencies in the period 2005-2008.

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<sup>33</sup> The member states discussed the legal form for the framework for agencies within the Working group on general affairs of the Council on 27 May 2005 (Council 9735/05) and analysed three possible options (to support the IIA, to support more general IIA or to adopt the regulation in accordance with Art. 208), but none of the options reached a majority of votes.

<sup>34</sup> See Document 7861/05. The Legal Service expressed the opinion that IIA was not appropriate and went beyond the established cooperation between the institutions, creating 'supra-legislative' legal rules which would commit the legislator *pro futuro*. Evaluating the failure of this attempt, Craig (2006: 162–163; see also Dehousse, 2008) insists on inconsistent temporality of the 2002 and 2005 documents, because in 2005 the EU had already entered the crisis period which did not favour a strong Commission and the unity and integrity of the executive function. The Convention on the future of Europe had already set up different treatment of the executive function, by its division between the Commission and the Council. Another obstacle was the composition of boards, because the MS opposed to the decrease in the number of representatives of the states and the exclusion of the EP.

<sup>35</sup> See Withdrawal of Obsolete Commission Proposals, OJ C 71/17, 25. 3. 2009.

### 3.3. Attempt No. 3: All on Board: Moving Forward Together

The deadlock was resolved three years later, with the new initiative by the Commission, elaborated in its Communication *European Agencies – The Way Forward*,<sup>36</sup> which re-launched a debate on the role of agencies and their place in the EU governance. This move was favoured by the emerging economic and financial crisis that thrust the agencies into the spotlight, as one of the sources of inefficiency and overspending. Thus, by its Communication, the Commission tried to drum up interest in agencies and to promote its 'framework' agenda.

The Commission opted for »a consistent political handling of the approach to agencies«. At that point, the EU had reached the number of 29 regulatory agencies (and 6 executive agencies), employing 3,800 staff, and the budget of €1,100m, with more variation with regard to their size, structure, and functions. As the main problems of the agencies, the Commission outlined the varied role, structure, and profile, which led to un-transparent system and rased doubts with regard to their accountability and legitimacy; undefined scope and diversification of functions, which may lead to their intrusion into policy-making branches; and the lack of elaborated responsibilities of other institutions in relation to agencies (p. 6). The Commission asked for a common approach to the governance of agencies, but with respect to their specific features, in order to achieve the basic principles of accountability and sound financial management (*ibid.*). The building blocks of the future common approach should be the tasks, operation, and workings of the agencies; accountability and their relationship with the other institutions; better regulation; the process of establishing and ending; and the communication strategy. The main principles include coherence, accountability, participation and openness, and good governance.

As the main activities, the Commission proposed the formation of an interinstitutional working group;<sup>37</sup> an analysis of available studies and reports (including the Commission's reports and the reports of the Court of Auditors); the preparation of a thorough evaluation of agencies taking

<sup>36</sup> Communication from the Commission to the European Parliament and the Council: *European Agencies – The Way Forward* SEC (2008) 323.

<sup>37</sup> In a conciliatory tone, the Commission states »The Commission remains open to alternatives to the route of an inter-institutional agreement, whether legally binding or not.« (Communication SEC (2008) 323, p. 9)

a horizontal approach and reporting its results to the EP and the Council. It also proposed to withdraw its draft for IIA, to refrain from initiating the formation of new agencies,<sup>38</sup> and to undertake a review of the Commission's internal systems governing its relations with agencies, as well as the methodology for conducting the impact assessment of agencies (p. 8-9). The EP welcomed the Communication in September 2008 and insisted on stronger parliamentary control over the formation and operation of agencies and budgetary considerations.<sup>39</sup> The Council reacted in a similar manner. The new *Inter-institutional working group* – IIWG was established in 2009 with the task to define the common approach.

From this point forward, the agencification proceeded in two directions: the setting up of new agencies continued, while simultaneously the activities aimed at building the common approach were undertaken. Seven new agencies were established from the end of 2009 to 2012. Their establishment was justified by the needs of sector policies and urgent economic and financial needs.<sup>40</sup>

Simultaneously, numerous studies and analyses of the European agencies or particular issues regarding agencies were conducted by various institutions.<sup>41</sup> The Court of Auditors, eager to shed a light on financial aspects of agencies, produced the first partial evaluation of EU agencies from the

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<sup>38</sup> At that point, the proposals for BEREC and ACER, as well as for the EASO were pending, and the amendments to the existing regulations on some agencies had been proposed. See e.g. Agency for the Cooperation of Energy Regulators COM (2007) 530 final of 19. 9. 2007; European Electronic Communications Market Authority, COM (2007)699 of 13. 11. 2007.

<sup>39</sup> See the Report of the European Parliament on a Strategy for the Future Settlement of the Institutional Aspects of Regulatory Agencies, PE407.635v02-00 and the European Parliament Resolution of 21 October 2008 on a Strategy for the Future Settlement of the Institutional Aspects of Regulatory Agencies (2008/2103(INI)), OJ C 15 E/27

<sup>40</sup> The new agencies were established in the electronic communication sector (BEREC) and energy sector (ACER) in 2009, asylum policy (EASO) in 2009, and in the sector of operational management of large scale IT systems for the area of freedom security and justice (eu-LISA) in 2011. Three agencies were established in 2010 in the financial sector (EBA, ESMA; EIOPA) forming a complex regulatory structure. The process of network agencification was in place, as defined by Levi-Faur (2011) since some of the agencies replaced earlier networks governed by the Commission.

<sup>41</sup> The Budgetary Control Committee of the European Parliament ordered a comparative study of agencies in several member states and in the EU in order to define the best practice and issue recommendations. See Jann et al. (2008).

aspect of 'good financial management'.<sup>42</sup> This study (2008) focused on the planning activities, the usage of monitoring instruments and the evaluation of results. The conclusions of the report painted a very pessimistic picture – the *ex ante* evaluations were missing, as well as the multiannual planning documents, which led to the inefficient allocation of funds, absence of performance indicators, too descriptive and too detailed reports which did not bear relevant information, etc. Hence, the Report proposed that agencies define fixed goals and assess the results, as the prerequisites for the improvement of their workings. The second Report (2009)<sup>43</sup> encompassed six executive agencies, also with a negative note – the establishment of executive agencies was resulting from the need to overcome the restrictions regarding employment, and what was missing was sound financial management as well as effective supervision by the Commission. A third Report focused on the management of the conflict of interest in four of the EU agencies,<sup>44</sup> also showing underdeveloped practices.

Following its agenda set in the 2008 Communication, the Commission organised the external and internal evaluation of agencies. After an external study in 2008,<sup>45</sup> which was aimed at more transparency, the complex evaluation was produced in 2009, focusing on 26 agencies, employing 4,698 staff and having €1.2m budgets.<sup>46</sup> The Report, which was to be used as a basis for the work of the IIWG, showed that the agencies were established as a response to different political interests, and that they lacked performance management, periodical evaluations, and a unified structure and supervision. The study recommended several important mechanisms for agency governance, such as periodical evaluations, merging the agencies with complementary tasks, greater transparency in defining the location of agencies, reducing administrative burdens, etc. Finally, an extensive

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<sup>42</sup> The European Court of Auditors (2008) The European Union's Agencies: Getting Results. Special Report No. 5. <http://eca.europa.eu/portal/pls/portal/docs/1/8429032.PDF>

<sup>43</sup> The European Court of Auditors (2009) Delegating Implementing Tasks to Executive Agencies: A Successful Option? Special Report No. 13. <http://eca.europa.eu/portal/pls/portal/docs/1/8034812.PDF>

<sup>44</sup> The European Court of Auditors (2012) Management of Conflict of Interest in Selected EU Agencies, Special Report No. 15. <http://eca.europa.eu/portal/pls/portal/docs/1/18686746.PDF> The agencies studied are EASA, EFSA, EMA, and ECHA.

<sup>45</sup> Euréval (2008) Meta-study on decentralised agencies: Cross-cutting analysis of evaluation findings. Final Report, September 2008. [http://ec.europa.eu/dgs/secretariat\\_general/evaluation/docs/study\\_decentralised\\_agencies\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/evaluation/docs/study_decentralised_agencies_en.pdf)

<sup>46</sup> Rambùll-Euréval-Matrix (2009) Evaluation of the EU decentralised agencies in 2009. [http://europa.eu/agencies/regulatory\\_agencies\\_bodies/index\\_en.htm](http://europa.eu/agencies/regulatory_agencies_bodies/index_en.htm)

horizontal evaluation was conducted with regard to 31 elements concerning the establishment and design of agencies, their financing, supervision, and relations with other institutions.

Shortly, a new step was taken by the institutions with the aim of defining a common approach to agencies. In July 2012, three institutions issued the Joint Statement on decentralised agencies, which signified the first political agreement between the institutions by adoption of the Common Approach to Decentralised Agencies<sup>47</sup> based on the evaluations and conclusions made by the IIWG, thus forming the (non-binding) basis for further decisions, but also the guidelines for the agencies to adapt their workings. The Common Approach included 66 points on certain aspects of the establishment and operation of the EU agencies, aimed at harmonizing and creating a uniform model. This model need not necessarily be formally formulated, but ought to be in accordance with the principles of good governance, efficiency, effectiveness, transparency, and accountability, and aimed at achieving direct political and economic results. These principles and recommendations provided for several ways to improve the system agencies in the EU, as well as an objective assessment of the impact before the establishment of the agency, the criteria for selection of the agency headquarters, regular comprehensive evaluation, prior and subsequent evaluations of the programs and activities of the agency, the introduction of sunset clauses, the connection between the multi-annual plans and funding of agencies, the appropriate relationship between the agencies' tasks and its resources (financial, human), as well as the uniform management structure.<sup>48</sup> These elements are forms of the *ex ante* or *ex post* control aimed at enhancing accountability or effectiveness.

By issuing a Joint Statement, the institutions committed the Commission to draw up a plan with a specific timetable for the planned initiatives, taking into account the possible particularities of individual agencies. The Commission adopted the Roadmap in December 2012,<sup>49</sup> defining main

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<sup>47</sup> Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, 19 July 2012 [http://europa.eu/agencies/documents/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf) The Joint statement relates to 31 agencies, including neither the three agencies under CFSP nor executive agencies.

<sup>48</sup> The draft proposal of the Joint Statement from June 2012 included the establishment of the interagency committee for revision and impact assessment, but this proposal was not included in the final version.

<sup>49</sup> European Commission (2012) Roadmap on the Follow-up to the Common Approach on EU Decentralised Agencies (19 December 2012) <http://europa.eu/agencies/>

goals of the Commission («more balanced governance, improved efficiency and accountability, and greater coherence») and elaborating on the implementation of the Common Approach.

In comparison to the existing structure and workings of agencies, the Roadmap brought several important innovations, with expected time of realization (in the period 2013–2014) and promoted a clear definition of tasks and uniform composition of management boards (one representative of each MS, two representatives of the Commission).<sup>50</sup> Management boards should have a supervisory role, especially for the evaluation of internal and external audits, etc., and a counterpart to the executive director. The MS were invited to pay attention to the managerial skills of the candidates for the board and the director – they need to possess certain competences to be engaged. The alert-warning system was proposed – the Commission should alert the EP and the Council in case »it has serious reasons for concern that an agency’s Management Board is about to take decisions which may not comply with the mandate of the agency, may violate EU law or be in manifest contradiction with EU policy objectives« (p. 2). In order to increase efficiency and accountability, there should be synergy among agencies (including shared services, possible mergers, etc.). Drawing up of multi-annual plans was recommended, as well as the development of sound key performance indicators for both the agency and the director. Coherent policy guidelines for the prevention and management of conflicts of interest must be developed.

By defining a Common Approach, the new agency model in the EU has been indicative for the period ahead; especially in terms of explicit stance that creating a formal legal framework for agencies (regulation) is not necessary but it can be an alternative to the definition of the existing rules and standards, and the development of guidelines and good practices. The 66 points of the Common approach and the Roadmap suggest that the EU has come to an understating on horizontal guidelines for the establishment, structure, operation, funding, and control of agencies. In addition, the Commission is to prepare a horizontal standard procedure for founding acts for agencies and harmonization of decision rules for management boards, and revise the horizontal regulations (Staff Regulations, Financial Framework Regulation). Given the functional diversity of agen-

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documents/2012-12-18\_roadmap\_on\_the\_follow\_up\_to\_the\_common\_approach\_on\_eu\_decentralised\_agencies\_en.pdf

<sup>50</sup> »Where appropriate, the European Parliament may designate one member and stakeholders may have a limited number of representatives.« (The Roadmap, p. 2)

cies, as well as the political sensitivity of the agency model in the EU, the intended direction of development in terms of creating a common set of rules and guidelines and best practices has proven to be the least painful way to harmonize the features of a European agency model. In addition, seven agencies established in the fourth wave, and influenced by the recommendations of these documents, show that there has been a relatively similar approach to the regulation of certain issues, particularly transparency, financial management, data protection, conflicts of interest, and, in particular, the evaluation agency, which was generally not provided for the previously established agencies. However, a considerable diversity in governance structure is still present, primarily in the prescribed bodies (their composition and the method of appointment), but it is the consequence of the role of different agencies in European governance, their primary task, and the nature of individual policies. Still, the importance of political factors in the establishment and decisions on individual elements of agency governance substantially affects the formation of the European agency models.

Parallel with the work of the Commission and other institutions to improve the agency governance, other European controllers attempted to shed light on the agency. Their attempts have also been influenced by recent agency scandals, often related to financial abuse and unjustifiably high costs,<sup>51</sup> or to direct relationship with customers or regulated entities,<sup>52</sup> as well as to other irregularities. Reports from OLAF show that some agencies are under investigation, particularly with regard to their employment practices. In her 2011 programme, the European Ombudsman announced that visits to the EU agencies would be initiated in order to promote good governance and sharing the best practice among agencies.<sup>53</sup>

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<sup>51</sup> Several agencies had problems with receiving budget approval because of high and unjustified costs or inadequate public procurement system (e.g. EEA, EMEA). EFSA had unjustified costs for the management board meetings – almost €100,000 per session (European Parliament, Press Release, 27. 3. 2012).

<sup>52</sup> Certain scandals received significant media attention, such as the EEA case where the executive director had a close connection to the civil society organisation whose members enjoyed expensive education benefits from the agency, or the EFSA management board member who resigned due to the conflict of interest.

<sup>53</sup> According to the Report of the European Ombudsman, the complaints on agencies represent 10 per cent of all complaints that lead to investigation. European Ombudsman (2011) Annual Report 2011, <http://www.ombudsman.europa.eu/activities/annualreports.faces>

## 4. Discussion and Conclusion

In the preceding chapters, the development of the framework of agency governance in the EU has been presented. Numerous analyses have indicated the diversification of agency governance, justified by the political factors and lack of an appropriate framework. The lack of appropriate instruments of sound financial management and efficient control mechanisms have been particularly noticeable, which is in sharp contrast to the new public management justification of agencies – they should be controlled precisely through the instruments of performance control, financial management, focused control by other supervising institutions, and greater transparency, which are to compensate for the weaker external control by political bodies. In the European context, with the weak controlling mechanism based on the giant and politicised managing boards, the use of these instruments is of even greater importance. However, the agencification in the EU strongly resembles similar process in the member states; in most countries, agencification has been a result of the NPM doctrine and the regulatory state concept which was not based on the strong legal framework that would pressure for greater and more efficient control. As a response to the strong decentralisation process, since 2000, the post-NPM agenda has sought to improve inter-organisational coordination and to centralize control, to advance ethical norms and accountability mechanisms, and to set clear guidance as to how to achieve greater effectiveness focusing on results. The post-NPM approach has not been intended to replace, but to cure those features of administrative reform that NPM failed to observe and prevent. This has evoked the attempts to create more formal agency models in many countries, in order to meet the post-NPM requirements, by setting stricter rules on the establishment, functioning, and the organisation of agencies. The new direction of development has been provoked not only by the modification of the doctrinal frame (from NPM to post-NPM), but has also had its source in the changed external circumstances, especially in the economic and political crisis which targeted the agencies, as decentralised administrative units, as one of the most important causes of increased spending, ineffectiveness, and lack of political accountability.

The efforts to prepare the EU agency model have been influenced by political factors. First, the perceived democratic deficit had to be addressed by tackling the problem of numerous agencies that had been functioning below the radar adding to the blurred EU governance. In addition, political actors pursued their own agendas which would allow them to exert

greater control and gain greater power. As the description shows, the interests of political actors were conducive to particular elements of the new framework – the Commission's efforts to gain more control over agencies, as expressed in the 2002 and 2005 documents (Operating Framework and DIIA) were stopped by the Council's (member states') unwillingness to give up its own power over agencies. The EP, however, favoured a more centralised approach, hoping for stronger influence on the agencies.<sup>54</sup> The inability of political actors to solve the interest conflict led to a stalemate and the agency problem was put aside for a while.

The deadlock was resolved after the economic crisis had changed the preferences of actors, especially the Council, who became aware of the need to rationalise agency governance – to cut spending and to set the basis for more effective agency governance. The public perception of agencies as uncontrolled users of public funds (e.g. member states' money) was even worsened by scandals that appeared in the media. Hence, there was a need for greater transparency and accountability of agencies to respond to the democratic deficit, but also as a prerequisite for stricter financial control and greater effectiveness. However, unlike with the previous attempts, the progress could be made only as a compromise solution, with the Commission's appetite put under control and greater influence of the member states in the process. As a consequence of the 2012 Joint Decision and the Roadmap, several documents were prepared during 2013, setting clear guidelines and the framework for the establishment and organisation of agencies. In sum, the changed interests of political actors, which favoured the need to resolve the problem of agencies as a part of the economic crisis puzzle, have stimulated taking fresh approach in the creation of the new agency model. However, the logic of consequence (calculation of actors; March, Olsen, 1989) was soon complemented by the logic of appropriateness – the new value perspective promoted in the good governance doctrine favoured greater accountability, stakeholders' control, the management of conflict of interest, and a transparent functioning of public organisations.

With regard to the content of measures taken or proposed, the elements presented in final documents point towards the attempt to achieve more

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<sup>54</sup> There has been an informal debate on possible merger of agencies in the area of employment and training (Cedefop, ETF, Eurofound, EU-OSHA) and in the area of human rights (FRA, EIGE, EPSO), since they have complementary tasks. It is assumed that the mergers would allow for financial savings and greater effectiveness. However, given the different locations of the agencies, some Member States oppose the mergers.

control in agency governance, but also towards more managerial approach to agencies – e.g. sound financial management, the need to connect the planning, the outcomes, and the allocated funds (performance management), more elaborated impact assessment of the establishment of agencies, periodical evaluation of agencies, stricter control of appointments and composition of boards. In addition, democratic and political control is expected to be enhanced through greater transparency and more pronounced role of the controlling institutions, such as the EP and the Court of Auditors. Finally, legal control has been strengthened, especially with regard to the explicit ECJ's authority to review agencies' decisions, but also by the stronger reliance on the *ex ante* control based on legal instruments, such as the issuing of guidelines, frameworks, and other soft law instruments.

The formal adoption of the Common Approach to agencies supports the expectations on relative approximation of the agency model, especially in terms of form and structure, as well as the introduction of mechanisms that should ensure good governance and increase the efficiency of the agency, and thus justify the delegation of powers to European agencies, either by the European institutions, or by the member states themselves. The elements of agency governance, as defined in the final documents, might also be of use in the agency-related reforms that are continuing in the member states, with adjustments to their particular circumstances, which could add to the Europeanization argument. Inspired by the practices of various MS (uploading), the proposals for the improvements of agency governance in the EU have a power to become the source of inspiration to the MS in the downloading direction of Europeanization (Radaelli, 2003). However, the fact that the proposed model of the EU agency governance indicates the turn towards greater role of the controlling bodies (court, parliament, auditing institutions) and more frequent use of managerial practices (multi-annual planning, performance management, professional leadership), as well as of the improved better regulation practices (impact assessments, evaluations), indicates that the agency governance is not an isolated issue but a part of a bigger governance problem that has to be addressed in order to have agencies functioning properly.

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Official documents and acts are referenced in the footnotes

### Appendix: European Agencies (2013)

2013	The Agency	Year	Seat/Country	European Policy
Decentralised agencies				
	European Centre for the Development of Vocational Training (CEDEFOP)	1975	Thessaloniki / Greece	social policy (vocational training)
	European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)	1975	Dublin / Ireland	social policy / workers' mobility
	European Training Foundation (ETF)	1990	Turin / Italy	foreign relations / social policy
	European Environment Agency (EEA)	1990	Copenhagen / Denmark	environmental protection
	European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)	1993	Lisbon / Portugal	public health, social policy, crime
	European Medicines Agency (EMA)	1993	London / UK	public health, movement of goods
	European Agency for Safety and Health at Work (EU-OSHA)	1994	Bilbao / Spain	public health / social policy
	Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)	1994	Alicante / Spain	intellectual property / market
	Community Plant Variety Office (CPVO)	1994	Angers / France	intellectual property / movement of goods
	Translation Centre for the Bodies of the European Union (CDT)	1994	Luxembourg	internal functioning / service
	European Police Office (EUROPOL)	1995	The Hague / The Netherlands	home affairs and justice cooperation

	European Police College (CEPOL)	2000	Bramshill / UK	home affairs and justice cooperation
	European Union's Judicial Cooperation Unit (EUROJUST)	2002	The Hague / The Netherlands	home affairs and justice cooperation
	European Food Safety Authority (EFSA)	2002	Parma / Italy	public health, agriculture
	European Maritime Safety Agency (EMSA)	2002	Lisbon / Portugal	transport / internal market
	European Aviation Safety Agency (EASA)	2002	Cologne / Germany	transport
	European Network and Information Security Agency (ENISA)	2004 (-2013)	Heraklion / Greece	information / internal market
	European Centre for Disease Prevention and Control (ECDC)	2004	Stockholm / Sweden	public health
	European Railway Agency (ERA)	2004	Lille / France	transport / internal market
	European GNSS Supervisory Authority (GSA)	2004	Brussels / Belgium	transport / internal market
	European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)	2004	Warsaw / Poland	free movement of people / crime control
	Community Fisheries Control Agency (CFCA)	2005	Vigo / Spain	internal market
	European Chemicals Agency (ECHA)	2006	Helsinki / Finland	intellectual property / internal market
	European Fundamental Rights Agency (FRA)	2007 (1997)	Vienna / Austria	free movement of people / human rights
	European Institute for Gender Equality (EIGE)	2006	Vilnius / Lithuania	social policy/ human rights
	Agency for Cooperation of Energy Regulators (ACER)	2009	Ljubljana / Slovenia	energy policy
	Body of European Regulators for Electronic Communications (BEREC)	2009	Riga / Latvia	electronic communications / information society
	European Asylum Support Office (EASO)	2010	Valetta / Malta	border safety / internal affairs
	European Banking Authority (EBA)	2010	London / UK	financial sector, bank services

	European Insurance and Occupational Pensions Authority (EIOPA)	2010	Frankfurt / Germany	financial sector/ insurance
	European Securities and Markets Authority (ESMA)	2010	Paris / France	financial sector
	European Agency for Operational Management of Large Scale IT systems in the area of freedom, security and justice (IT-Agency)	2011	Tallinn / Estonia	home affairs (borders and visa information systems)
	European Union Institute for security studies (ISS)	2001	Paris / France	common foreign and security policy
	European Union Satellite Centre (EUSC)	2001	Torrejón de Ardoz / Spain	common foreign and security policy
	European Defence Agency (EDA)	2004	Brussels / Belgium	common foreign and security policy
<b>Euratom agencies</b>				
36.	EURATOM Supply Agency (ESA)	1958	Luxembourg	common nuclear policy
37.	European Joint Undertaking for ITER and the Development of Fusion Energy (Fusion for Energy)	2007 (-2042)	Barcelona / Spain	common nuclear policy
<b>Executive agencies</b>				
38.	Executive Agency for Competitiveness and Innovation (EACI)	2004 (-2015)	Brussels / Belgium	economy, energy, industry
39.	Education, Audiovisual and Culture Executive Agency (EACEA)	2005 (-2015)	Brussels / Belgium	information society / education
40.	Executive Agency for Health and Consumers (EAHC)	2005 (-2015)	Luxembourg	consumer health and protection
41.	Trans-European Transport Network Executive Agency (TEN-T EA)	2006 (-2015)	Brussels / Belgium	energy and transport
42.	European Research Council Executive Agency (ERC Executive Agency)	2007 (-2013)	Brussels / Belgium	research
43.	Research Executive Agency (REA)	2008 (-2017)	Brussels / Belgium	research, economy
<b>Other agencies</b>				
44.	European Institute of Innovation and Technology (EIT)	2008	Budapest / Hungary	research, economy

## REFORMING THE EU AGENCY GOVERNANCE: MORE CONTROL, GREATER ACCOUNTABILITY

### *Summary*

*Agencification in the European Union, as in most of its member states, has mainly proceeded without firm legal framework and horizontal measures, leading to the creation of numerous more or less independent specialised administrative organisations with diverse structure and functions. The EU institutional setting and the nature of EU regulation have represented powerful engines of agencification. However, despite their importance for the EU governance, the existence of agencies had not been envisaged or recognised in the primary legislation before the Lisbon Treaty, while the more extensive data on them emerged only recently, due to the attempts to put agencies under stricter control. The paper aims to analyse the elements of the EU agency governance and to highlight the direction of the recent reforms of EU agencies. The paper outlines the rationale and legal basis for agencies, then presents a short overview of the development of agencification, and finally gives insight into recent agency reforms. Although the EU agencies, exercising various tasks in different policy areas, have been perceived as being diverse, the recent developments inspired by the political and economic reasons show the evolving construction of common norms and practices for agencies, which should enable more control and greater accountability of agencies. It is possible that these developments will influence the agency models in the EU member states.*

Key words: *European agencies, agencification, EU governance*

## REFORMA EUROPSKOG AGENCIJSKOG UPRAVLJANJA: VIŠE KONTROLE, VEĆA ODGOVORNOST

### Sažetak

Agencifikacija se u Europskoj uniji, kao i u većini država članica, odvijala bez čvrstog zakonodavnog okvira i horizontalnih mjera, što je dovelo do osnivanja više-manje neovisnih specijaliziranih upravnih organizacija raznolikih struktura i funkcija. Institucionalni okvir EU i priroda Unijine pravne regulacije bili su moćni zamašnjaci agencifikacije. Međutim, unatoč njihovoj važnosti za upravljanje Unijom, postojanje agencija nije bilo predviđeno niti prepoznato u europskom pravu prije Lisabonskog ugovora, a opširnija regulacija agencija pojavila se tek nedavno, prilikom nastojanja da ih se stavi pod stroži nadzor. U radu se analiziraju elementi europskog agencijskog upravljanja te prikazuje smjer nedavnih reformi agencija u EU. Daje se argumentacija i zakonski temelj za osnivanje agencija, nastavlja se kratkim pregledom razvoja agencifikacije te se, na kraju, prikazuju nedavne reforme na području agencija. Iako se agencije EU, koje izvršavaju raznolike zadatke u različitim područjima javnih politika, smatraju diversificiranim tijelima, recentni događaji potaknuti političkim i ekonomskim razlozima pokazali su da se i dalje stvara struktura zajedničkih pravila i prakse za sve agencije, što bi trebalo omogućiti stroži nadzor nad njima i njihovu veću odgovornost. Moguće je da će ta pravila utjecati i na agencijske modele država članica Unije.

Ključne riječi: agencije Europske unije, agencifikacija, europsko upravljanje