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## **Reforming the EU agency governance: more control, greater accountability**

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**- First draft! Please do not quote! -**

### **Abstract**

*The agencification in the European Union, as in most of its member states, has mainly proceeded without firm legal framework and horizontal measures, leading to a creation of numerous more or less independent specialised administrative organisations with diverse structure and functions. The EU institutional setting, the relationship between the levels of governance, as well as the nature of the EU regulation represented powerful engines of agencification. Despite their importance for the EU governance, the existence of agencies was not envisaged nor recognised in the primary legislation before the Lisbon Treaty, while the more extensive data on agencies emerged only recently, due to the attempts to put agencies under more control. This descriptive paper aims to explore the elements of the EU agency governance and to highlight the drivers and the directions of the recent reforms of the EU agencies. The paper first 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. The main argument of the paper is that although the agencies in the EU have been perceived as being diverse, due to the numerous agencies in different policies and with various tasks, the recent developments inspired by the political and economic reasons show that the construction of common norms and practices for agencies is taking place, aimed at more control and greater accountability of agencies. These developments might have influence on the agencification process and agency models in the member states.*

### **I. Introduction**

Agencies are the feature of contemporary governance. The process of agencification in the meaning of the 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. The agencification in contemporary states has led to a creation of numerous agencies, justified by the reasons of effectiveness and efficiency under the new public management doctrine (quote) or the need for regulation insulated from political pressures within the new regulatory states (quote). After the years of mostly uncontrolled agencification, many states have took various measures to put agencies under control, especially with regard to their outputs and performance, spending and financial management, but also have tried to generate more unified structure of agency governance as a form of the ex ante agency control (see Verhoest et al, 2012)

The agencies are important element of the EU governance. In the EU, from its beginnings in the 1970 the agencification process has led to the creation of more than forty agencies in various policy domains, with different tasks and some 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 737 mil € from the EU budget. The reception of agency model as a suitable means to achieve EU policy targets is visible from the fact that even in even in period of moratorium (2008?), the proliferation of agencies remained unstoppable. However, as a part of the complex and insufficiently transparent 'executive governance' in the EU (Trondal, 2006), the agencies came into the focus of the EU institutional

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<sup>2</sup> Agencies which 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)

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 descriptive paper aims to give 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? What goals are to be achieved? What is the direction of the reform measures? Consequently, the paper aims to give some insights into the explanatory variables – institutional setting, main actors, and main drivers, as well as the measures which are taken in the reform process. It highlights the institutional context of the EU as an explanatory factor for the reform process, but also outlines 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.

## **2. The EU and agencies: a short overview of their emergence and types**

### **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 new public management approach to decentralisation and specialisation, as well as the concept of independent regulation. In sum, the 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, besides usual arguments, several features of the EU institutional architecture and policy have been conducive for the EU agency development, with implementation deficit, institutional balance and the necessities of respective EU policies being some of them.

First, the EU 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 into main force and the motor of the 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 already powerful Commission. In this way the member states remain in control via management boards comprised usually of the representatives of each country. Moreover, the seats of the agencies are spread all over Europe. On other hand, the Commission, already a giant institution, does not object delegation to the agencies, because it allows it to focus on the 'political' or policy issues, and promoting itself in the political arena (Majone and Surdej, 2006; Curtin, 2007: 524).<sup>3</sup> In addition, the Commission encourages the delegation of tasks to the agencies at European level and the creation of a network of national regulators in a particular area in order to legitimize its decision by their expertise and to ensure the implementation (Trondal and Jeppesen, 2006), thereby avoiding cooperation with national ministries (Egeberg, 2006). Finally, the European parliament supports agencies because in this way it gains greater impact on the establishment via co-decision procedure and avoids concentration of power in other institutions, namely the Commission. Hence, the Parliament enjoys more powerful position vis a vis agencies than in relation to the Commission –several instruments of control over agencies, set the main control into the hands of EP (reporting, ex ante appointments, hearings of the candidates, ombudsman, other independent control bodies such as Court of Auditors). As noted by Rittberger and Wonka (2011)

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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), what 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).

'agencies are said to represent a 'compromise' reflecting the interests of their multiple principals (the Council, 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' administration. 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 has not its own administrative apparatus for the formulation and implementation of policies. The agencies thus 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 and Cave, 1999: 163). Instead of leaving the implementation of a European policy or its segment in its entirety to 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. The similar agencification is taking place at the national level, with national agencies being established in the course of implementation of European policies. In sum, in order to cure implementation deficit of the EU, 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 regulatory state as explained by Majone (1996, 2003) is a part of the European Union, with the regulatory policies being main governance tool, as a consequence of the 'de-politicization of the common market '(1996: 330) - in an effort to achieve the main objectives of the EU, which is the common market, member states abandon public ownership and planning, and turn over the regulation of privatized monopolies to the expert agencies.

An increase of the 'statutory regulation' all over Europe, i.e. the regulation through an independent regulatory bodies in the EU and its member states, is a result of the strategy of privatization and deregulation, inspired regulatory reform. On the other side, it is connected to the EU legislative activity that is getting stronger since the end of 80s (see Majone, 1996) - regulation, rather than providing services, becomes the main mode of action of member states and the EU itself (Scharpf, 1997). Hence, the EU is a regulatory state which is keen to delegation to professional bodies (Majone) in order to achieve legitimacy of its decisions. The growing dominance of the expert bodies (non-political, non-majoritarian, see Coen and Thatcher, 2008) bodies is in line with both EU non-political character (outside political institutions) and regulatory state agenda. The proliferation of agencies and agency-like institutions (see Levi-Faur, 2011) based on expertise, professionalization and the specialisation is a key feature of European Union.

The Commission in its documents (Communication 2002/718, p. 5) also emphasizes that the idea behind the creation of agencies is to ' make the executive more effective at 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'. Thus, the technical and scientific complexity that is one of the causes of the delegation in the modern regulatory state (Majone, 2003) is particularly prominent in the EU.

## **2.2. The process of the EU agencification**

There are numerous European agencies which differ in name, 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 developed through several waves (see Table I.; Appendix I.). The first agencies were established in the 1970s to develop 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 90s, with eight new agencies being established in the period 1990-1994 in

the 1<sup>st</sup> pillar to help implementing newly developed policies (e.g. for pharmaceuticals, environmental protection, harmonization markets, protect the diversity of plants) and additional two in late 90s (in the area of human rights and aid).<sup>4</sup> They were meant to facilitate the functioning of the single market, with a somewhat broader authority, which mainly consist in making decisions in individual cases. In the third and most intense wave, in the period 2000-2009, nine new agencies were founded in the 1<sup>st</sup> pillar following the development of European policies in the field of transport, data security, fisheries, protection of food safety, protection and control of infectious diseases, chemicals, electric power, etc.; in addition, five agencies were established under 2<sup>nd</sup> and 3<sup>rd</sup> pillar and six agencies emerged as executive agencies.

Despite efforts to stop or at least disregard agencification, it has continued in the 2009-2013 period, creating seven new agencies, out of which three are engaged in the regulation of financial markets, banking and pension insurance, the areas of key importance for the continuing economic and financial crisis. Three agencies were established for the regulation of the financial services market, which is of crucial importance for the political and economic stability of the Union; two agencies in the field of regulation of public services (energy services, ACER, and electronic communications, BEREC) as cornerstones of EU economy, and two agencies in the field of justice and home affairs, in which the cooperation between the countries has been intensified with the strengthening of security problems, border protection and the fight against international crime.

**Table I: 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	<i>art. 114 or 352. TFEU or sector policy provision; regulation;</i>	<i>art. 43 and 45 (EDA); Council decisions</i>	<i>art. 114 or 352. TFEU or sector policy provision; regulation; art. 85 and 88 TFEU</i>	<i>Euratom; Regulation EP &amp; Council</i>	<i>Regulation 58/2003</i>	-	-
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

Before the Lisbon treaty, the typology of EU agencies included those in the 1<sup>st</sup> pillar (EC), 2<sup>nd</sup> pillar agencies (foreign and security policy - CFSP) and 3<sup>rd</sup> pillar agencies (cooperation in home affairs and justice- JHA), two agencies under Euratom and one agency outside pillar structure. After Lisbon, 1<sup>st</sup> and 3<sup>rd</sup> pillar agencies were merged into the category of ‘decentralised agencies’, since the pillar structure was abolished.

According to functional criteria, decentralised agencies are usually classified as decision-making agencies, which adopt individual decisions which are legally binding on third parties (e.g. CVPO, OHIM, EASA, ECHA); agencies which provide direct assistance to the Commission (and to the Member States) 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

<sup>4</sup> Both agencies established at the end of 90s are not in function. The European Agency For Reconstruction (1999) was abolished in 2008, while the European Monitoring Center for Racism and Xenophobia (1997) was transformed into European Union Agency for Fundamental Rights in 2007.

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 the decision-making, and hence approach to genuine regulatory agencies. On the other hand, executive agencies are those established as semi-autonomous agencies of the Commission.<sup>5</sup>

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

### **2.3. *The legal framework for the EU agencies***

In the past decades the most important legal provisions regarding agencies were enshrined in the Treaties but, as in many European countries, the agencies were not systematically treated as special legal instrument for implementation of the policies. Due to the diversified policy structure, and complex relations among institutional actors and member states, the EU legal framework was not unambiguous with regard to the establishment of agencies, while the Treaties before the Lisbon completely overlooked the agencies as institutional actors.<sup>6</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 1<sup>st</sup> pillar agencies (EU policies), 2<sup>nd</sup> pillar agencies (Common Foreign and Security Agencies, three agencies), and 3<sup>rd</sup> pillar agencies (Justice and Home Affairs – JHA; three agencies), Euratom agencies, executive agencies and other agencies (EIT). The legal basis for the establishment was mainly given by the Treaties (art. 308 and 95 TEC; some agencies were specifically established by the Treaties), but the legal instruments were different: in the 1<sup>st</sup> pillar the agencies were established by the regulations (of the Council; later of the Council and the European Parliament), in the 2<sup>nd</sup> pillar by the joint actions of the Council, while in the 3<sup>rd</sup> pillar by the Council decision or the act of the Council: executive agencies were established by the Commission's decision, based on the special regulation; Euratom agencies were established by the decision of the Council as international organisations or by the Treaty.<sup>7</sup>

Although the recent amendments of the EU treaties did not significantly alter the position of agencies in the EU institutional setting, there are several changes worth to be noted as advancements in relation to the previous regulation. First of all, the Treaty of Lisbon abolished the three pillars structure of the EU, thus placing the earlier 1<sup>st</sup> (EU) and 3<sup>rd</sup> (JHA) pillar agencies into the common group of 'decentralised

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<sup>5</sup> Executive agencies established under Regulation 58/2003 follow standardised structure and the menu of functions, with Commission supervising their activities, and in some cases their decisions, and performing ex ante control of their work plan and the budget. They are governed by a director and a steering committee.

<sup>6</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 member states (ex 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 European level (direct administration) – implementing measures include interpretation of rules, application of rules, rule setting and evaluation, approval of funds, extension or specification of funding programmes, information management, etc. financing (Hofmann and Türk, 2006: 74).

<sup>7</sup> Besides 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 the Protocol No 5) or envisaged by the Treaties, such as the European Data Protection Supervisor (art. 16 UFEU, Regulation (EC) 45/2001). The European Central Bank and the Court of Auditors became 'institutions' of the Union (art. 13. TEU). There are also agency-like bodies belonging to the group of services or interinstitutional bodies, such as Publications Office, European Personnel Selection Office, 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 (see Flinders, 2004: 523; OECD, 2002).

agencies' under the TFEU, while three agencies of the former 2<sup>nd</sup> pillar (now Common Foreign and Security Policy) although formally belonging to this group, have partially remained isolated.<sup>8</sup>

Secondly, after 2009 the legal basis for the establishment of the EU agencies is determined by the Treaties.<sup>9</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 establishment of agencies as specialised bodies for implementation of the EU policies having 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 the special provisions contained in the chapters regulating respective EU policy;<sup>10</sup> (3) based on the general provision of the art. 114 TFEU and 352. TFEU (ex 308 TEC)<sup>11</sup> which allows for the establishment of agencies, as the measures to be taken within respective policy.

Based on these Treaty provisions, agencies are mostly established<sup>12</sup> a) by the Council and the EP regulation under regular legislative procedure, when it comes to the bulk of the decentralised bodies and agencies; b) by the decision of the Council when it comes to the agencies under CFSP, and c) by the decision of the European Commission based on the Council Regulation (EC) 58/2003<sup>13</sup> for the executive agencies. Different legal basis for the establishment of agencies has many implications on the functions and structure of agencies, such as the procedure of establishment, tasks, composition of governing bodies, 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 common framework for agencies (see *infra*), indicate to the existence of the European model agency (see also Barbieri and Ongaro, 2008),

Thirdly, the Lisbon Treaty has recognised the agencies as 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 (see Chamon, 2011) - according to the 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' (263/1 TFEU),<sup>14</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.' (263/4 TFEU).<sup>15</sup> Moreover, the infringement procedure may be

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<sup>8</sup> This holds especially to the European Defence Agency, which is based on the art. 43/3 and art. 45 of the TEU and also referred to by the Protocol No 10 on the Permanent Structured Cooperation Established by Article 42 of the Treaty on the European Union.

<sup>9</sup> Hofmann and Morini (2012) argue that in contrast to pluralisation of the executive (divided between the Commission, the Council in some cases, other institutions such as ECB, CoA and agencies, as well as the member states), the Treaty of Lisbon tried to design more unitary structure of the executive, abolishing the three pillar structure and defining one legal system and one typology of legislative acts.

<sup>10</sup> An example is the research and technological development policy (art. 182/5 and 187 TFEU, as the bases 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>11</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>12</sup> Remaining agencies include two Euratom agencies and the European Institute for Technology and Innovation.

<sup>13</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. Six executive agencies have been established so far.

<sup>14</sup> This does not apply to CFSP agencies, notably European Defence Agency, but does apply to other decentralised agencies, including ex 3rd pillar agencies.

<sup>15</sup> According to the art. 263. TFEU para 4 '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

instituted before the ECJ in case if an agency fails to act, after being called upon to act and does not do so within two months (265/1 and 2 TFEU) , (art. 265/2).<sup>16</sup>In addition, the Treaty prescribes the case of silence of administration in this case the agencies - any natural or legal person may complain to the Court that an agency has failed to address to that person any act other than a recommendation or an opinion (265/3 TFEU). 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>17</sup> Finally, the Lisbon Treaty has extended the application of the EU Treaties principles onto agencies,<sup>18</sup> while the Charter of Fundamental Rights of the EU, now integral part of the Treaties, in its provision on the right to good administration (art. 41) extends this right on all institutions, bodies, offices and agencies of the Union, requesting for the handling of their affairs 'impartially, fairly and within a reasonable time'.<sup>19</sup>

With regard to the scope of delegation to the agencies in the EU, it has to be noted that in comparison to the national agencies, the European agencies somehow escape to the full definition of 'regulatory' agencies, as independent authorities which autonomously regulate certain sector (see Majone, 2001b, Geradin and Petit, 2004; Craig, 2006). The legal framework for such restricted scope of delegation to the agencies 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, which leaves the implementation, including issuing of secondary legislation, mainly in the hands of the member states. Hence, the European agencies have only restricted regulatory powers in narrower sense, usually conducting inspections or issuing individual decisions (e.g. OHIM, ECHA, CPVO, EASA), or they help Commission by issuing opinions and recommendations on Commissions proposals for legislation (which are usually taken seriously by the Commission, having obligation to argument an opposing decision), collect and disseminate information, coordinate 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>20</sup> the ECJ narrowly defined the range of powers that may be delegated to bodies not

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direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.' In the art. 263/5 it is prescribed that 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. See also Chamon (2011).

It requires that internal complaint procedure has been exhausted, what is possible in most agencies having appealing bodies, such as EASA, CVPO, or OHIM.

<sup>16</sup> The infringement procedure may be instituted before the Court of Justice in case agencies fail to act (art. 265, para 1 sentence 2), after the agencies has been called to act and does not do so within two months (art. 265/2). In addition, the Treaty prescribes the case of silence of administration, in this case the agencies - any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.(art. 265/3)

The EU Civil service tribunal resolves disputes between Union's agencies and their servants (Annex I of the Protocol No 3 on the Statute of the Court of Justice of the European Union).

<sup>17</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>18</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).

<sup>19</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 on the acts taken by agencies. In the 2000 version of the Charter those rights were not applicable onto agencies, but only onto institutions and bodies of the Union, showing that the perception of agencies has change during past decade.

<sup>20</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 (2007), and Griller and Orator (2007). For subsequent judgements see Chamon (2011) and Dehousse (2011). For the opposing view see

envisaged in the Treaties, although not referring to agencies in particular (see 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 involves 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 (see Dehousse, 2007). Similar restricted stance has been taken by Commission's Legal Service. In sum, the delegation to third bodies may not disturb the institutional balance, and therefore it has to involve only 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 (see Majone, 2001:8-9; Dehousse, 2007). 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 (see also Curtin, 2007), and some of the newly established agencies, such as ESMA or ACER have significant margin of discretion, including power to issue binding regulation in the respective markets (securities; energy). In addition, the agencies' role in policy formulation, including their obligation to issue scientific or expert analyses and issue recommendations and opinions to Commission's proposals, makes them more powerful than formally acknowledged, legitimising the Commission's decisions (see Griller and Orator, 2007: 11) Still, the controlling mechanisms, such as judicial review, might compensate for the autonomy they received even beyond Treaty provisions and judicial doctrines.

### 3. Back and forth on the reform of agencies

The interest of EU institutions towards agencies, as well as the need for their reform, has been gradually acknowledged from 2000 onwards, since the agencies have been discovered as one of the institutional shortcomings leading to a democratic deficit. From that point forward, there have been an ongoing debate over the possible direction and content of the reform of agencies in the EU, but specific proposals for measures usually have ended up in stalemate. However, it has to be noted that parallel to these developments, the agencification process has continued unstopably – from 14 agencies in 1999 (12 in the first pillar) it has arisen to 44 agencies in 2013. Still, after the financial and economic crisis had put stronger pressure for the reform towards more efficiency, effectiveness and control, the recent initiatives have been presented with more feasible substance. Greater activities of controlling bodies (Court of Auditor, Parliament) have helped to put the agency governance on the reform agenda. Similar role was played by recent agency scandals and the parallel reform processes in the member states. In following paragraphs the description of various attempts from 2000 onwards is given, with the reference on possible drivers and main actors in the reform process.

#### *Attempt 1: The Commission's jump into unknown: Agencies are at the core of the democratic deficit*

An attempt to bring order into the creation, configuration and operation of the agencies, as 'tolerated anomaly' (Sauer, 2001) at EU level, should be viewed in the context of the overall reform of the governance and the reform of the executive branch, particularly the Commission.<sup>21</sup> At the turn of the Millennium the discussion about democratic deficit was at its peak, mobilising politicians, institutions, experts and academia in the search for 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>22</sup> to the

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Chamon (2011) who argues that for the issue of delegation to agencies the Romano case is even more important in a (*Case 98/80, Giuseppe Romano v. Institut national d'assurance maladie-invalidité [ 1981] ECR 1259*). 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 was also quoted by the Commission on several occasions (see the Commission's Report by the Working Group 3a, 2001). The agencies which represent delegation from the Commission are the executive agencies.

<sup>21</sup> The Commission itself has been continuously reformed, especially after 1999 scandal with Santer's Commission. First reform was attempted by Romano Prodi.

<sup>22</sup> The core of the problem concerns the fact that the EU tasks have been delegated by the transfer of the sovereignty from the states to the European level, but to the institutions defined in the treaties as carriers of



specialised agencies, perceived as technocratic fortresses which deepen already great space between citizens and the EU, but are simultaneously considered as the main instrument for the preservation of institutional balance and the compensation for the implementation deficit at the EU level and a weak institutional capacity of the Commission and the Parliament (see Majone, 1996; Etzioni 2007, Moravcsik, 2002).

The starting impetus for the agency reform emerged in one of the most important strategic documents for the EU institutional affairs, namely the *White Paper on the European Governance (July 2001)*,<sup>23</sup> which highlighted the problem of unstandardized agencies, 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 the means for the implementation of policies, 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 the supervision in accordance with the principles of good governance.<sup>24</sup>

The White Paper opts for following advancements with regard to the 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 are within range set by the Treaties, with restrictions with regard to the delegation of powers directly conferred upon Commission, with regard to the 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 agencies should be restricted to individual decisions for which special technical expertise is needed for the realisation of public interest, and do not contain any arbitration between conflicting political or economic interests (e.g air aviation). In addition, such decisions must be subjected to the effective control mechanism.<sup>25</sup>

In the White Paper the Commission determined that in 2002 it will '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 has started extensive analysis and consultation process, as in other areas mentioned by the White paper.<sup>26</sup> Based on the detailed Report of the Working group 3a which had the task to define

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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.

<sup>23</sup> *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 EU governance under existing Treaties (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.

<sup>24</sup> The principles include openness, participation, accountability, effectiveness and coherence, reinforcing the principles of subsidiarity and proportionality enshrined in the Treaties.

<sup>25</sup> The decision-making agencies have set their appeal boards ensuring internal control system, while their final decisions are subjected to the judicial control according to the art. 263 TFEU.

<sup>26</sup> The White Paper proposes a set of initial actions in different areas, such as better law making, tripartite arrangements, use of the expert advice, establishing more systematic dialogue with the representatives of regional and local authorities, establish consultation standards, etc. The actions were taken forward immediately after the WP and the consultative processes have been launched.

The agency issue was also addressed in other areas, such as *Commission of the European Communities (2002) Communication: European Governance: Better Lawmaking, COM(2002) 275 final, Brussels 5.6.2002*. This short document refers to the agencies as the element of the reform of the executive functions, promoting the view that the decentralisation through agencies does not relieve the Commission of its responsibilities. It announced that the Commission will submit an interinstitutional agreement to the Parliament and the Council, setting out

the analytical report on agencies,<sup>27</sup> the Commission has initiated the consultation process which resulted with the Commission's *Communication on the Operating Framework for the European Regulatory Agencies (December 2002)*.<sup>28</sup> The document emphasizes the need for coherent approach to the agencies, despite their diverse functions, in order to achieve effectiveness and the 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 the solving of the democratic deficit issue. The Operating framework makes distinction 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), and the Commission has already initiated the legislative procedure for establishing the framework for those agencies (resulting in adoption of the Council Regulation no 58/2003 on executive agencies).<sup>29</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 who provide assistance in the form of opinions and recommendations, which provide the technical and scientific basis for the Commission's decisions (EMEA, EFSA), those who provide assistance in the form of inspection reports, intended to enable the Commission to meet its responsibilities as "guardian" of Community law (EMSA), and those empowered to adopt individual decisions which are legally binding on third parties (OHIM, CPVO, EASA). The Framework clearly adopts the model of agency where an organisational and functional autonomy must be encountered with the 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>30</sup>

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the conditions for the creation of such agencies, based on the principles of a clear separation of responsibilities. (p. 5).

<sup>27</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 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, the independence of decision making), democratic control (the EP), executive control (the EC and MS), external financial control (Court of Auditors) and the judicial control. The Commissions *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).

<sup>28</sup> *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 2<sup>nd</sup> and 3<sup>rd</sup> pillar), with two additional being established.

<sup>29</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*

<sup>30</sup> Similarly to the position taken in previous document's principles, the Commission proposes equal partition of the Commission and Member states (6 by each) and three members of interested parties (representatives of the stakeholders). However, this idea was not replicated in any of the agencies, since almost all of them have representatives of all member states (27) and one or two Commission' representatives. These attempts by the Commission to further completely different managing structure are somehow inconsistent by both agency developments and institutional balance in the EU.

director, advisory committee, restricted executive board,<sup>31</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 (Commission, political supervision by the EP and the Council, administrative supervision by European Ombudsman, judicial control, financial control by EP, the Court of Auditors and the OLAF, compensation of damages, appeal mechanism).

While the Commission has tried to elaborate on agencies, the agencification proceeded, having reached the number of 24 agencies by 2004, with 13 agencies established in period 2000-2004, what makes this period the most fruitful with regard to the agencification.

#### 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, and it was welcomed by both the EP<sup>32</sup> and the Council, which called upon the Commission to submit a proposal for framework, which should be preceded by an interinstitutional agreement. Hence, based on the Operating Framework and subsequent discussions, the Commission has presented the *Draft Interinstitutional Agreement on the Operating framework for the European regulatory agencies (DIIA)*<sup>33</sup> to the European Parliament and the Council in February 2005. Similarly to the Operating Framework 2002, the DIIA defines main principles and elements of agency governance, and then drafts the guidelines and rules for respective elements. However, based on the recent developments in the EU,<sup>34</sup> and the debates between 2002 and 2005, the DIIA contains additional elements or additional elaboration 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, detailed description of financial elements. The DIIA is based on the need to enhance independence, competence

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<sup>31</sup> The restricted executive board would consist of the chairman 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 arose in the Advisory Committee.

<sup>32</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'. It also 'Welcomes the Commission Communication following up the White Paper on Governance as a first step towards greater clarity in relation to the Commission's position in this field' and it 'Calls on the Commission to define the framework conditions for the use of regulatory agencies by adopting a framework regulation, as it has done for 'executive' agencies, which should be preceded by an interinstitutional agreement spelling out common Guidelines'. Also see the Council Conclusions of 28 June 2004, Doc. 17046/04.

<sup>33</sup> *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, (dalje 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 19.03.2009, 1996 Commission vs. Council C-25/94, ECR I-1469). The IIAs does 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 also in the Declaration no. 3 in relation to the art. 10 TEC which was adopted in Nice, foreseeing the adoption of IIA in cases when it is necessary to achieve good cooperation for the facilitating of 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 mutual cooperation, and for that purpose they are invited to conclude interinstitutional agreements which may have obligatory nature. To achieve IIAs is one of the tasks of the Commission which are defined in art 17. TEU.

For an extensive study of 123 interinstitutional agreements in the EU see Hummer (2007). 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) and content (some have the purpose to to strengthen the EP), and the legal effects. They are connected to the 'interinstitutional offices/bodies' which are outside institutions but have function related to many of them, such as EPSO or Publications office. For the role of the IIAs in democratisation of the EI see Puntser Riekman (2007).

<sup>34</sup> Parallel to that, the issues of the conflict of interest, regulatory impact assessment, etc.

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>35</sup>

However, the DIIA was not accepted by all three partner institutions. Although the EP has adopted the Draft IIA by his resolution in December 2005,<sup>36</sup> it was dismissed by the Council without even reaching the stage of the political discussion at the Council or Coreper level.<sup>37</sup> Instead, the Legal Service of the Council concluded that the use of an inter-institutional agreement for regulation of agencies has no base in the Treaties, and therefore is not appropriate legal instrument.

On the other hand, the EP has in its Resolution (OJ C 285E/123 of 22 November 2006) expressed regrets for Council's unwillingness to accept the IIA and called upon the Commission to intensify its efforts towards the Council. The EP has welcomed the IIA but also underlined additional mechanisms which have 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 the legal protection against the decisions of agencies (appeal to Commission, judicial control).

Paradoxically, although the IIA was chosen as more suitable means for reforming agencies in order to please the EP, it was the Council who blocked further progress and dismissed the IIA as inappropriate. The efforts made by EP and the Commission's Legal service's attempts to argue its decision to use IIA have failed.<sup>38</sup>

Following the current EU political crisis,<sup>39</sup> the EP has 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 being obsolete.<sup>40</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.

### 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>41</sup> re-launching 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, which has brought the agencies into the spotlight, as one of the sources of inefficiency and overspending.

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<sup>35</sup> It explicitly excludes the possibility to issue general regulatory measures, to resolve issues which need arbitration between conflicting interests or political discretion, or to take decisions in areas explicitly entrusted with the Commission.

<sup>36</sup> *European Parliament Resolution on the Draft Interinstitutional 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*

<sup>37</sup> The members states have 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 to the art 208), but none of the options reached a majority of votes.

<sup>38</sup> See Document 7861/05. The Legal service expressed the opinion that IIA is not appropriate and goes beyond the established cooperation between the institutions, creating 'supra-legislative' legal rules which would commit the legislator pro futuro.

By 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 has already entered the crisis period which did not favour strong Commission and the unity and the integrity of the executive function. The Convention on the future of Europe has already set up different treatment of the executive function, by its division between the Commission and the Council. Other obstacle was the composition of boards, because the MS opposed to the decrease in the number of the representatives of the states and the exclusion of the EP.

<sup>39</sup> The failure of the Constitution for Europe.

<sup>40</sup> See *Withdrawal Of Obsolete Commission Proposals, OJ C 71/17, 25.3.2009*

<sup>41</sup> *Communication from the Commission to the European Parliament and the Council: European Agencies – The Way Forward SEC (2008) 323.*

Thus, the by its Communication the Commission has tried to arouse interest on 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 has reached the number of 29 regulatory agencies (and 6 executive agencies), employing 3800 staff, and the budget of 1.100 mil eur, with more variation with regard their size, structure and functions. As the main problems of the agencies, the Commission outlines the varied role, structure and profile which leads to untransparent system and raises doubts with regard to their accountability and legitimacy; undefined scope and diversification of functions which may lead to their intrusion into policy-making branches; the lack of elaborated responsibilities of other institutions in relation to agencies (p. 6). The Commission asks for the common approach to the governance of agencies, but with the respect to their specific features, with the aim to achieve 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 the good governance.

As the main activities, the Commission proposes the formation of an interinstitutional working group,<sup>42</sup> the analysis of available studies and reports (including Commission's reports and the reports of the Court of Auditors), the undertake a thorough evaluation of the agencies taking a horizontal approach, and to report its results to the EP and the Council, to withdraw its proposal for IIA,<sup>43</sup> to refrain of initiating new proposals of agencies,<sup>44</sup> and to undertake a review of the Commission's internal systems governing its relations with agencies, as well as the methodology for conducting impact assessment of agencies (p. 8-9).

The European Parliament has welcomed the Communication in September 2008 and insisted on greater parliamentary control over the formation and operation of agencies and budgetary considerations.<sup>45</sup> The similar was done by the Council. The new *Inter-institutional working group* – IIVG 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 has continued, while simultaneously the activities aimed at the building the common approach have been undertaken. Firstly, the decrease in the number of agencies has continued and 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>46</sup>

Simultaneously, numerous studies and analyses of European agencies or particular issues regarding agencies were conducted by various institutions.<sup>47</sup> The Court of Auditors, being eager to shed a light on financial aspects of agencies, produced the first partial evaluation of EU agencies from the aspect of 'good

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<sup>42</sup> In 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)

<sup>43</sup> See *Withdrawal Of Obsolete Commission Proposals*, OJ C 71/17, 25.3.2009

<sup>44</sup> At that point, the proposals for BEREC and ACER, as well as for the EASO were pending, and the amendments of the existing regulations on some agencies were proposed. See e.g. *Agency for the Cooperation of Energy Regulators COM (2007) 530 final of 19/09/2007*; *European Electronic Communications Market Authority, COM (2007)699 of 13.11.2007*

<sup>45</sup> See The Report of the European Parliament on a strategy for the future settlement of the institutional aspects of regulatory agencies, PE 407.635v02-00 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>46</sup> The new agencies were established in the electronic communication sector (BEREC) and energy sector (ACER) in 2009, asylum policy (EASO) in 2009, and IT systems the area of freedom security and justice (IT Agency) in 2001. Three agencies were established in 2010 in the financial sector (EBA, ESMA; EIOPA) forming 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>47</sup> The Budgetary Control Committee of the European Parliament has ordered a comparative study of agencies in several member states and the EU in order to define the best practice and issue recommendations. See Jann *et al.* (2008).

financial management'.<sup>48</sup> This study (2008) focused on the planning activities, the usage of the monitoring instruments and the evaluation of results. The conclusions of the report pointed at the very pessimistic picture – the ex ante evaluations are missing, as well as the multiannual planning documents, what has led to the inefficient allocation of funds, absence of the performance indicators, too descriptive and too detailed reports which do not bear relevant information, etc. Hence, the Report proposes that agencies define fixed goals and assess the results, as the prerequisites for the improvement of their workings. The second Report (2009)<sup>49</sup> encompassed six executive agencies, also with negative note – the establishment of the executive agencies is resulting from the need to overcome the restrictions regarding employment and a sound financial management is missing, as well as the effective supervision by the Commission. A third Report focused on the management of the conflict of interest in four EU agencies,<sup>50</sup> also showing underdeveloped practices.

Following its agenda set in the 2008 Communication, the Commission organised the production of external and internal evaluation of agencies. After one external study in 2008<sup>51</sup> which aimed at the more transparency, the complex evaluation was produced in 2009, focusing on 26 agencies, employing 4.698 staff and having 1,2 mil € budgets.<sup>52</sup> This report, which was to be used as a basis for the work of the IIWG, has shown that the agencies were established as a response to the current political interests, and that their lack performance management, periodical evaluations, and unified structure and supervision. The study recommends 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 horizontal evaluation has been conducted with regard 31 elements of the agency establishment and design, their financing, supervision and the relation with other institutions.

Shortly, the new step was taken by the institutions with the aim to define the common approach to agencies. In July 2012 three institutions issued the Joint Statement on decentralised agencies, which signifies the first political agreement between the institutions by adoption of the Common Approach to Decentralised Agencies<sup>53</sup> based on the evaluations and the 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 includes 66 points on certain aspects of the establishment and operation of the agencies, which is aimed at harmonizing and creating a uniform model, not necessarily formally formulated, but in accordance with the principles of good governance, efficiency, effectiveness, transparency and accountability, aimed at the creation of the direct political and economic results. These principles and recommendations provide 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

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<sup>48</sup> 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>49</sup> 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>50</sup> 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>51</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>52</sup> Rambøll- 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)

<sup>53</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, not including three agencies under CFSP nor executive agencies.

and its resources (financial, human), as well as the uniform management structure.<sup>54</sup> These elements are forms of the ex ante or ex post control aimed at enhanced accountability or effectiveness.

By issuing a Joint Statement the institutions have committed the Commission to draw up a plan with a specific timetable for the planned initiatives, taking into account the eventual particularities of individual agencies. The Commission has adopted the Roadmap in December 2012,<sup>55</sup> defining main goals of the Commission ('more balanced governance, improved efficiency and accountability and greater coherence') and elaborating the implementation of the Common Approach.

In comparison to the existing structure and workings of agencies, the Roadmap brings several important innovations, with expected time of realization (in the period from 2013 to 2014) and promotes a clear definition of tasks agencies and uniform composition of management boards (one representative of each Member State, two representatives of the Commission),<sup>56</sup> management boards should have a supervisory role, especially for evaluation of internal and external audits, etc., and a counterpart to the executive director; the Member States are invited to pay attention to the managerial skills of the candidates for the board and the director, who need competency to be engaged; the alert-warning system is introduced - 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 the synergy among agencies should be achieved (including shared services, possible mergers, etc.); drawing up of multi-annual plans is recommended, as well as the development of sound key performance indicators for both the agency and the director; there is a need to develop a coherent policy guidelines for prevention and management of conflicts of interest.

By defining a Common Approach, the new agency model in the EU has been indicated for the period ahead, especially in terms of contained 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 common understating on horizontal guidelines for the establishment, structure, operation, funding and oversight agencies has been achieved. 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 agencies, but also 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 shown to be the most painless way to harmonize the features of a European agency model. In addition, the seven agencies that were 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 of the evaluation agency, which generally was not provided for the previously established agencies. However, a considerable diversity in governance structures still remains, 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.

In 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

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<sup>54</sup> The draft proposal of the Joint statement dating 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>55</sup> *European Commission (2012) Roadmap on the follow-up to the Common Approach on EU decentralised agencies (19 December 2012)*

[http://europa.eu/agencies/documents/2012-12-18\\_roadmap\\_on\\_the\\_follow\\_up\\_to\\_the\\_common\\_approach\\_on\\_eu\\_decentralised\\_agencies\\_en.pdf](http://europa.eu/agencies/documents/2012-12-18_roadmap_on_the_follow_up_to_the_common_approach_on_eu_decentralised_agencies_en.pdf)

<sup>56</sup> 'Where appropriate, the European Parliament may designate one member and stakeholders may have a limited number of representatives.' (The Roadmap, p.2)

influenced by recent agency scandals, often related to financial abuse and unjustifiably high costs,<sup>57</sup> or with direct relationship with customers or regulated entities,<sup>58</sup> as well as other irregularities. Reports from OLAF show that some agencies are under investigation, particularly with regard to their employment practice. The European Ombudsman has also announced in his 2011 program that the visits to the EU agencies will be initiated, in order to promote good governance and sharing the best practice among agencies.<sup>59</sup>

#### 4. Discussion and conclusions

In the preceding chapters developments of the framework of agency governance in the EU were presented. Numerous analyzes have indicated to diversification of agency governance, which was justified by the political factors and the lack of an appropriate framework. Particularly noticeable was the lack of appropriate instruments of sound financial management and efficient control mechanisms, which is in sharp contrast to the new public management justification of agencies – they should be controlled precisely through instruments of performance control, financial management, the 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 through the giant and politicised managing boards, the use of these instruments has an even greater importance.

The efforts on preparing the agency model EU were provoked firstly by the political factors, i.e. perception of the democratic deficit but further advanced by the financial and economic reasons induced by crises.<sup>60</sup> As the description shows, the interests of political actors were conducive for 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 its own power over agencies. European Parliament, however, favoured more centralised approach, hoping for more influence on the agencies.

The deadlock was resolved after the economic crisis changed the preferences of actors, especially the Council, who became aware of the need to rationalise agency governance. The public perception of agencies as uncontrolled users of public funds (e.g. member states' money) was even worsened by scandals which appeared in the media. Hence, there was a need for a greater transparency and accountability of agencies in response to the democratic deficit, but also as a prerequisite for greater financial control. However, the progress could be made only as a compromise solution, with Commission's appetite put under control and greater say of member states in the process.

With regard to the content, the elements presented in final documents point out towards more control in agency governance, but also towards more managerial approach to agencies – sound financial management, the need to connect the planning, outcomes and the allocated funds (performance management), more elaborated impact assessment of the establishment of agencies, periodical evaluation of agencies, greater control in appointments and composition of boards. Democratic and political control through greater transparency and the greater role of the controlling institutions, such as the European Parliament and the Court of Auditors also confirm that conclusion. Finally, legal control was strengthened, especially with regard to the explicit ECJ's authority to review agencies' decisions.

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<sup>57</sup> Several agencies had problem in 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, 27.03.2012).

<sup>58</sup> Some scandals received significant media attention, such as the EEA case where the executive director had 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>59</sup> According to the Report of the European Ombudsman, the complaints on agencies represent 10% of all complaints which lead to investigation. See European Ombudsman (2011) Annual Report 2011, <http://www.ombudsman.europa.eu/activities/annualreports.faces>

<sup>60</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.



A formal adoption of a Common Approach to agencies supports the expectations on relative approximation of the agency model, especially in terms of form and structure, but also 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 final documents might be of use also in the agency reforms that are continuing in member states, with the adjustments to their particular circumstances. However, the proposed model of the EU agency governance indicates the turn towards greater role of the controlling bodies (court, parliament, auditing institutions) and greater use of managerial practices (multi-annual planning, performance management, professional leadership) and better regulation practices (impact assessments, evaluations).

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Appendix: European agencies (2013)

2013.	The Agency	Year	Seat/Country	European Policy
<b>Decentralised agencies</b>				
1.	European Centre for the Development of Vocational Training (CEDEFOP)	1975	Thessaloniki/ Greece	social policy (vocational training)
2.	European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)	1975	Dublin / Ireland	social policy / worker mobility
3.	European Training Foundation (ETF)	1990	Turin / Italy	foreign relations / social policy
4.	European Environment Agency (EEA)	1990	Copenhagen / Denmark	environmental protection
5.	European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)	1993	Lisbon / Portugal	public health, social policy, crime
6.	European Medicines Agency (EMA)	1993	London / UK	public health, movement of goods
7.	European Agency for Safety and Health at Work (EU-OSHA)	1994	Bilbao / Špain	public health / social policy
8.	Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)	1994	Alicante / Špain	intellectual property / market
9.	Community Plant Variety Office (CPVO)	1994	Angers / France	intellectual property / movement of goods
10.	Translation Centre for the Bodies of the European Union (CDT)	1994	Luxembourg	internal functioning / service
11.	European Police Office (EUROPOL)	1995	The Hague / The Netherlands	home affairs and justice cooperation
12.	European Police College (CEPOL)	2000	Bramshill/ UK	home affairs and justice cooperation
13.	European Union's Judicial Cooperation Unit (EUROJUST)	2002	The Hague / The Netherlands	home affairs and justice cooperation
14.	European Food Safety Authority (EFSA)	2002	Parma / Italy	public health, agriculture
15.	European Maritime Safety Agency (EMSA)	2002	Lisbon / Portugal	transport / internal market
16.	European Aviation Safety Agency (EASA)	2002	Cologne / Germany	transport
17.	European Network and Information Security Agency (ENISA)	2004 (- 2013)	Heraklion / Greece	information / internal market
18.	European Centre for Disease Prevention and Control (ECDC)	2004	Stockholm / Sweden	public health
19.	European Railway Agency (ERA)	2004	Lille / France	transport / internal market
20.	European GNSS Supervisory Authority (GSA)	2004	Brussels / Belgium	transport / internal market
21.	European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)	2004	Warsaw / Poland	free movement of people / crime control
22.	Community Fisheries Control Agency (CFCA)	2005	Vigo / Spain	internal market
23.	European Chemicals Agency (ECHA)	2006	Helsinki / Finland	intellectual property / internal market
24.	European Fundamental Rights Agency (FRA)	2007 (1997)	Vienna / Austria	free movement of people / human rights
25.	European Institute for Gender Equality (EIGE)	2006	Vilnius / Lithuania	social policy/ human rights
26.	Agency for Cooperation of Energy Regulators (ACER)	2009	Ljubljana / Slovenia	energy policy
27.	Body of European Regulators for Electronic Communications (BEREC)	2009	Riga / Latvia	electronic communications / information society
28.	European Asylum Support Office (EASO)	2010	Valetta / Malta	border safety / internal affairs

29.	European Banking Authority (EBA)	2010	London / UK	financial sector, bank services
30.	European Insurance and Occupational Pensions Authority (EIOPA)	2010	Frankfurt / Germany	financial sector/ insurance
31.	European Securities and Markets Authority (ESMA)	2010	Paris / France	financial sector
32.	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)
33.	European Union Institute for security studies (ISS)	2001	Paris / France	common foreign and security policy
34.	European Union Satellite Centre (EUSC)	2001	Torrejón de Ardoz / Spain	common foreign and security policy
35.	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