



EU Agencies, Common Approach and Parliamentary Scrutiny

European
Implementation
Assessment

STUDY

EPRS | European Parliamentary Research Service

Editor: Ron Korver
Ex-Post Evaluation Unit
PE 627.131 – November 2018

EN

EU Agencies, Common Approach and Parliamentary Scrutiny

Study

Decentralised agencies were set up on a case-by-case basis over the years, to respond to emerging individual policy needs. Currently there are 36 of them and they have been operating under very diverse conditions. In 2012, the European Parliament, the Council of the European Union and the European Commission sought to rectify this by adopting a [‘Joint Statement’](#) and a comprehensive set of guiding principles – a [‘Common Approach’](#) – to make the agencies more coherent, effective and accountable.

In the light of an expected revision of these guiding principles, the European Parliament’s Committee on Constitutional Affairs (AFCO) will produce an implementation report on the functioning of decentralised European agencies. The letter to the Conference of Committee Chairs (CCC) was sent on 11 April and the Conference of Presidents endorsed the request on 31 May 2018. In this framework, the Ex-Post Evaluation Unit (EVAL) provides expertise on the implementation of the agreed guidelines in the form of a European implementation assessment (EIA).

This EIA was drawn up by Professor Ellen Vos of Maastricht University, at the request of the Ex-post Evaluation Unit of EPRS. It provides an overview of the different decentralised EU agencies according to a number of criteria; including their functions, legal bases, sources of financing, respective roles of Parliament, Council, Commission and Member States, stakeholder involvement and transparency. In particular, it examines how parliamentary scrutiny over decentralised agencies is undertaken and suggests possible improvements to those mechanisms, in order to reach a more coherent, efficient and transparent institutional set-up for parliamentary scrutiny of agencies’ activities.

AUTHOR

This study has been written by Professor Ellen Vos of the University of Maastricht at the request of the Ex-post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament.

ADMINISTRATOR RESPONSIBLE

Ron Korver, Ex-post Evaluation Unit, EPRS

To contact the publisher, please e-mail EPRS-ExPostEvaluation@ep.europa.eu

LINGUISTIC VERSIONS

Original: EN

Manuscript completed in November 2018.

DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

Brussels © European Union, 2018.

PE 627.131
ISBN 978-92-846-3384-5
doi:10.2861/656418
QA-06-18-234-EN-N

eprs@ep.europa.eu
<http://www.eprs.ep.parl.union.eu> (intranet)
<http://www.europarl.europa.eu/thinktank> (internet)
<http://epthinktank.eu> (blog)

Executive summary

Rationales and characterisation of EU agencies in the EU's institutional landscape

- Agencification of EU executive governance has become a fundamental feature of the EU's institutional structure. Today the total number of EU decentralised agencies amounts to 36 (for a complete list, see the table of abbreviations). In addition, one proposal for a new agency - the European Labour Authority - is pending as its founding act is still under discussion. They are part of a process of functional decentralisation within the EU executive, with agencies being seated all over the EU. They assist in the implementation of EU law and policy, provide scientific advice for both legislation and implementation, collect information, provide specific services and fulfil central roles in the coordination of national authorities. They may adopt legally binding and non-binding acts.
- These agencies can broadly be defined as bodies governed by European public law that are institutionally separate from the EU institutions, have their own legal personality and a certain degree of administrative and financial autonomy and have clearly specified tasks.
- The rise and operation of agencies within the EU institutional structure fit well in the academic thinking on the nature of the EU executive. EU agencies as 'in-betweeners' amidst EU institutions and Member States are part and parcel of the EU executive and strengthen its composite character. EU agencies rely to a large extent on networks, both inside and outside their formal institutional structure, with national authorities, experts and/or stakeholders.
- Resort to EU agencies is attractive as they can deal with complex technical and scientific issues by providing expertise, leaving the Commission to concentrate on its core tasks and policy priorities. Yet, EU agencies give also raise to concern, in particular in relation to their constitutional position and legitimacy; their increasing role at the global level; their hierarchical way of knowledge production, their functional operation and effectiveness in furthering European integration. A particular point of attention is that EU agencies may be empowered to adopt 'not very' discretionary measures.

Joint Statement and Common Approach of 2012

- The [Common Approach](#) is a non-binding document adopted by the European Parliament, Council and Commission. It attempts to adopt a broader vision on EU agencies than the fragmented approach followed before and to stake stock of the coherence, effectiveness, accountability and transparency of these agencies and improve their operation.
- The Common Approach deals with the establishment and institutional position of agencies; the governing structure of agencies; operational questions, namely administrative support to agencies, data protection, international relations and communication activities; agencies' work programmes; human resources policies as well as sources of financing and budgetary management; the relationship between agencies and other EU institutions and the relations with stakeholders.
- Whilst the Common Approach has certainly helped to structure and rethink EU agencies in the EU's institutional landscape, analysis of the founding regulations adopted after the adoption of the Common Approach, reveals that the Common Approach currently is not always followed in practice.

Categorisation of EU agencies

- EU agencies can be categorised according to a functional, numerical and legal taxonomy.
- From a functional perspective, EU decentralized agencies can be classified according to the five main tasks conferred upon agencies: (1) expertise, (2) information and cooperation, (3) provision of services (registration and certification), (4) facilitation and support, and (5) supervision, inspection, and enforcement.

- From a numerical perspective, agencies are different and vary in size (in staff and consequently in budget) enormously.
- From a legal perspective, agencies can be distinguished according to their legal basis, the nature of their powers, the instruments that they may adopt and the autonomy in decision-making.

Legal Basis

- Presently, there is no general legal basis to create EU agencies. The current prevailing view in legal literature and case law of the European Court of Justice is that EU agencies may be created on the relevant Treaty article that provides the legal basis in a specific policy area. The Common Approach is silent on this issue.

Sources of Financing

- Most agencies have their own budget. Currently, 11 agencies are entirely financed by the EU budget, whilst four agencies are completely self-financed. The other 21 agencies are partly dependent on EU subsidies.
- The Common Approach stipulates that in the latter cases fees should cover the cost of the service provided.

Constitutionalisation and constitutional neglect

- The Lisbon Treaty has formally recognised agencification of the EU executive by introducing EU agencies into the Treaties. Agencies are so put on par with the EU institutions in a variety of provisions in the Treaties, inter alia related to internal security, complaints on instances of maladministration submitted to the Ombudsman, audits, fraud and citizenship. Agencies are moreover required to hold an open, efficient and independent administration. Importantly, the Treaty has formalised jurisdiction of the Court over agency acts in Article 263 TFEU. In this manner, the Court may review the legality of agency acts 'intended to produce legal effects vis-à-vis third parties' and their failure to act, while it may also interpret the legality of agency acts in preliminary rulings.
- It is remarkable though that the drafters of the Lisbon Treaty neglected agencies in provisions where one would have expected them most; the system of delegation laid down by the Treaty neglects to position agencies as bodies to whom powers can be delegated in Articles 290 and 291 TFEU. With its pragmatic approach in *ESMA*, the Court remedies the constitutional gap in EU executive rulemaking and recognises agencies as bearers of executive powers.

Delegation of Powers

- The *Meroni* doctrine, which arose from cases C-9/56 and C-10/56 (*Meroni v High Authority* [1957/1958] ECR 133), relates to the extent to which EU institutions may delegate their tasks to regulatory agencies. The Court of Justice confirmed in its *ESMA* ruling that *Meroni* is still good law: viz., the delegation of powers to EU agencies is in fact limited by *Meroni*, specifying that this case law only allows delegation of precisely delineated executive powers to EU agencies.
- Yet, in *ESMA* the Court de facto relaxed the *Meroni* conditions: it did not rule out entirely the possibility to delegate discretionary powers. The Court first appeared to be sensitive to the fact that, contrary to the bodies in *Meroni* that were governed by private law, *ESMA* was a 'European Union entity, created by the EU legislature'. Subsequently, it limited *ESMA*'s discretion rather than excluding it. The Court moreover considered it essential that the powers delegated to *ESMA* by the EU legislature were 'circumscribed by various conditions and criteria which limit *ESMA*'s discretion'.
- The *ESMA* ruling can therefore be seen as adapting the *Meroni* doctrine to the 21st century and the Lisbon amendments to a constitutional framework of the Treaties: the Court established *Meroni* 2.0. If delegation complies with the legal guarantees set by the amended Treaties, the

Court sees no objections to have delineated but ‘somewhat’ discretionary powers conferred upon EU agencies. Of crucial importance hereby is that such delegation takes place in relation to agencies that are set up by the EU legislature and that judicial review of acts of these agencies is guaranteed.

- It must be considered though that the exercise of fairly discretionary powers may entail important political, economic or social choices to be made by agencies, which would require adequate control and accountability mechanisms.

Relationship with EU institutions and Member States

- EU agencies are often not merely operating at ‘arm’s-length’ from the Commission, Parliament or the Member States but the latter are frequently involved in the institutional design and operation of agencies. EU agencies have been expressly designed to be dependent on various institutions, mainly the European Commission, and to act as part of networks relying heavily on their national counterparts. This demonstrates the delicate nature of the relationship of EU agencies with EU institutions and the Member States.
- Hence, the hybrid character of EU agencies is expressed in their organisational structure as well as in their multiple tasks. The relation of EU agencies with the EU institutions and Member States is one of independence and control.
- The Common Approach provides for Member State representatives to be on the Management Boards of agencies. Legal practice is in line with this provision. Member States representation on agency management boards is in line with the conceptual understanding of the EU executive as an integrated administration and is an expression of the composite or shared character of the EU executive.
- Yet, agency independence from political and national influence is an extremely sensitive issue. This issue is particularly pertinent in relation to the supervisory agencies in the financial sector. Legal provisions therefore put strong focus on the independence of members of their Boards of Supervisors, Management Boards, Chairperson and Executive Directors. The Common Approach is therefore not suitable for these financial supervisory agencies.

Relationship with stakeholders

- The majority of EU decentralised agencies is required to establish and maintain contact with relevant stakeholders, both at Union and national level. This is in line with the Common Approach, which requires that stakeholder relations should be in accordance with the agency’s mandate, its tasks in international relations, the EU’s policies and priorities and the Commission’s actions.
- The Common Approach stipulates that when stakeholders are not part of the Management Board, they should participate in other internal bodies and/or advisory or working groups, ‘if appropriate’. In the legal practice two formats of stakeholder participation can be observed: 1) stakeholder representation in the agency’s Management Board and 2) stakeholders represented in stakeholder boards, groups or networks.
- Difficult to achieve is the issue of agency independence from commercially driven interests. Crucial hereby is the problem of the ‘revolving doors’ where board, committee and/or staff members of agencies leave their position for a job in industry. Clearly, independence from market interests requires elaborate rules on conflicts of interest for all people who work with and for EU agencies.

Parliamentary Scrutiny

- Parliamentary control over EU agencies takes place in various forms, both formally, by means of budgetary discharge, involvement in the appointment of the Executive Director, annual reports, and membership of Management Boards as well as informally through the linking up of an MEP to an agency.

- The Common Approach allows, where appropriate, the European Parliament to designate one member on the Management Board. The legal reality shows a number of different models of agencies' involvement in the Management Boards. A quite diffuse picture emerges with the European Parliament appointing representatives, designates, members, or experts. Most agencies do not have parliamentary involvement in the Management Boards.
- Examination of the appointment procedures of Executive Directors in the founding regulations reveals a broad variety, mounting to no less than twelve appointment procedures. In practice the founding regulations are more favourable towards parliamentary involvement in the appointment procedure that the Common Approach provides.
- Agencies are subjected to budgetary discharge by the European parliament. In these cases, the European parliament does not shy away from using the discharge procedure to control also for example agencies' independence from commercial interests. The three fully-self-financed agencies, EUIPO, SRB and CPVO are not subjected to discharge by the Parliament. In these agencies, the discharge is conducted by internal bodies. The Common Approach proposes that these agencies should submit an annual report to the European Parliament, the Council and the Commission with regard to the execution of their budget and take recommendations into account. For now no true procedure for this has been established. Therefore ensuring democratic accountability for fully self-financed agencies therefore remains challenging.
- Multi-annual and annual work programmes are a means to ensure ex ante control over agencies. The Common Approach prescribes that the Commission should be consulted on both documents whilst the European Parliament is consulted on multi-annual work programme and informed of the annual work programme. Practice shows a variety of parliamentary involvement.
- The Common Approach provides for the submission of a Single Annual report to the European Parliament, the Court of Auditors, the Council and the Commission. In this document, agencies should report on the implementation of the work programmes as well as budget and staff plans and findings and follow-up measures of audits. The founding regulations of all agencies analysed comply with this provision.

Compliance Founding Regulations with Common Approach

- Out of the 36 founding acts examined, 16 were adopted prior to the Common Approach and can hence not be expected to comply with the guidelines established therein in relation to the issues scrutinised. Yet, for the majority of founding acts, compliance could have been expected.
- The analysis reveals, however, that there is no significant difference in compliance rates of founding acts adopted (or amended) before and after the Common Approach. This suggests that the Common Approach has not significantly changed the institutional design choices by the European legislator; partly because it merely codifies existing practice, but partly also because it has not been followed in the adoption or amendment of founding acts.
- Compliance is generally high for the budgetary procedures and the submission of annual reports. The picture is more mixed for the appointment of the executive director as well as the composition of management boards. Above all agencies in political sensitive fields (Eurojust, Europol, European Supervisory Agencies) deviate from the Common Approach. The lowest rate of compliance has been identified with regards to agencies' work programmes. Here, the required consultation of the European Parliament for multi-annual work programmes is often not foreseen.
- The reasons for these variations lie in the heterogeneity of agencies tasks and political necessities as well as in path dependencies in the revision of existing agencies.

Recommendations

- It should be considered whether it is worthwhile to continue with the Common Approach in the current non-binding format. As there is a need for more coherence and consistency, it is

advisable to set general provisions and procedures whilst recognising the heterogeneity of EU agencies, e.g. establishing provisions that apply for groups or clusters of agencies. This could be achieved by means of an Interinstitutional Agreement.

- Hereby the position of EU agencies in the EU's institutional structure combined with appropriate accountability mechanisms must be carefully reflected upon.

The following recommendations can be made in relation to improvement of the provisions that are currently laid down in the Common Approach:

There is a need:

- to define the meaning and remit of agencies;
- to prevent (accusations of) conflicts of interest as a result of EP representatives or designates taking part in formal decision making in Management Boards and EP Members at the same time being the discharge authority; EP involvement in Management Boards should therefore preferably be in the capacity of observer;
- to define the European Parliament's role in the multi annual and annual work programmes and to design a coherent model of parliamentary scrutiny, more generally;
- to improve the appointment procedure of Executive Directors laid down in the Common Approach and follow the more progressive practice of the Interinstitutional Agreement between the Commission and the Parliament by means of which candidates for agency directors are heard before the European Parliament;
- to streamline the various models of stakeholder participation for agencies taking into account the nature and mandate of the agencies and the relevant policy areas;
- to (re)structure accountability mechanisms so as to avoid overload and take into account that agencies operate at times also on behalf of Member States so as to formulate accountability accordingly;
- to formulate rules on conflicts of interests; taking into account the diversity of agencies and acknowledging that a 'one-size-fits all' model is not desirable in this respect;
- to put fully self-financed agencies, as EU public bodies, under budgetary control and to consider whether (part of) their gain should not flow back to the EU budget.

Table of contents

Executive summary	5
1. Introduction	17
2. The rise of EU agencies in the EU's institutional landscape	19
2.1. Agencification of EU executive governance	19
2.2. Rationales for EU agencies	20
2.3. Conceptualisation of EU agencies	21
3. The Joint Statement and Common Approach of 2012	24
3.1. The need for an institutional framework	24
3.2. Non-binding basic framework: overview	25
3.3. Establishment and closing of agencies	26
3.4. Organisational Structure	26
3.5. Mechanisms to ensure accountability	28
4. Categorisation of EU agencies	33
4.1. Functional Taxonomy	33
4.2. Numerical Taxonomy	34
4.3. Legal Taxonomy	34
5. Legal basis	36
6. Sources of financing	38
7. Constitutionalisation and constitutional neglect	39
7.1. Constitutionalisation of agencification	39
7.2. Constitutional neglect in Articles 290 and 291 TFEU	40
8. Delegation of powers	43
8.1. Meroni case law	43
8.2. 'Mellowing Meroni': ESMA case	44

8.3. Post-ESMA: Meroni 2.0	45
9. Relationship with EU institutions and Member States	48
9.1. EU agencies in-between EU institutions and Member States	48
9.2. Independence as a relative concept	49
9.3. EU Agencies under Control	50
9.4. Independence from political and national influence	53
10. Relationship with stakeholders	54
10.1. Legal obligation to connect	54
10.2. Independence from commercially driven interests	54
11. Parliamentary Scrutiny	57
11.1. Composition of the Management Board	57
11.2. Appointment of the Executive Director	59
11.3. Work Programmes	62
11.4. Annual Report	63
11.5. Budget	64
11.6. Informal Mechanisms of Parliamentary Scrutiny	65
12. Relevance of the Common Approach in Founding Acts of EU Agencies	67
13. Concluding Remarks and Recommendations	70
14. Annexes	74
Annex 1: Functions	74
Annex 2: Legal bases	76
Annex 3: Sources of Financing	78
Annex 4: Role of the Commission	80
Annex 5: Role of the European Parliament	82
Annex 6: Role of the Council	87

Annex 7: Role of the Member States <i>vis-à-vis</i> Agencies	89
Annex 8: Stakeholders	91
Annex 9: Transparency	96
Annex 10: Management Boards – Composition and Appointing Authority	100
REFERENCES	104

Table of figures

Figure 1: Organisational Structure of EU Agencies. _____	28
Figure 2: Work Programmes. _____	30
Figure 3: Audits. _____	31
Figure 4: Compliance with the Common Approach. _____	67

Table of tables

Table 1: EP Involvement in Management Boards.	59
Table 2: Appointment of the Executive Director.	61
Table 3: Annual and Multi-Annual work programmes.	63
Table 4: EP Committee and EU Agencies.	66

Abbreviations of EU decentralised Agencies

Abbreviation	Name
ACER	Agency for the Cooperation of Energy Regulators
APPF	Authority for European Political Parties and European Political Foundations
BEREC	Office of the Body of European Regulators for Electronic Communications
CdT	Translation Centre for the Bodies of the European Union
Cedefop	European Centre for the Development of Vocational Training
CEPOL	European Union Agency for Law Enforcement Training
CPVO	Community Plant Variety Office
EASA	European Aviation Safety Agency
EASO	European Asylum Support Office
EBA	European Banking Authority
ECDC	European Centre for Disease Prevention and Control
ECHA	European Chemicals Agency
EDPB	European Data Protection Board
EEA	European Environment Agency
EFCA	European Fisheries Control Agency
EFSA	European Food Safety Authority
EIGE	European Institute for Gender Equality
EIOPA	European Insurance and Occupational Pensions Authority
ELA	<i>European Labour Authority (founding act still under negotiation)</i>
EMA	European Medicines Agency
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMSA	European Maritime Safety Agency
ENISA	European Union Agency for Network and Information Security
EPPO	European Public Prosecutor's Office
ERA	European Union Agency for Railways
ESMA	European Securities and Markets Authority
ETF	European Training Foundation
EUIPO	European Union Intellectual Property Office
EU-LISA	European Agency for the Operational Management
EU-OSHA	European Agency for Safety and Health at Work
Eurofound	European Foundation for the Improvement of Living and Working Conditions
Eurojust	Eurojust
Europol	European Union Agency for Law Enforcement Cooperation
FRA	European Union agency for Fundamental Rights

Abbreviation	Name
FRONTEX	European Border and Coast Guard
GSA	European GNSS Agency
SRB	Single Resolution Board

Further Abbreviations

Abbreviation	Word
CJEU	Court of Justice of the European Union
CoA	Court of Auditors
COM	European Commission
ECB	European Central Bank
ED	Executive Director
EP	European Parliament
ESRB	European Systemic Risk Board
EU	European Union
MB	Management Board
MS	Member State
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

EU agencies are vital components of the EU's institutional structure. They carry out a mixture of tasks, varying from provision of information to decision making in various policy fields, such as food and air safety, medicines, environment, telecommunications, disease prevention, border control, trademarks and banking. They are part of a process of functional decentralisation within the EU executive, with agencies being seated all over the EU. These agencies rely to a large extent on networks, both inside and outside their formal institutional structure, with national authorities, experts and/or stakeholders.¹

The trend of 'agencification', where new entities (agencies) are created in the public sector, or where existing agencies are given more autonomy to carry out specific tasks,² is an old phenomenon within national executives in Europe.³ The 'agency fever'⁴ at the EU level is more recent. Today agencification is characteristic of the EU executive⁵ within a system of integrated administrations characterised by intense cooperation between the various executive levels.⁶

In the last decades, the number and importance of so-called decentralised agencies have only increased. These agencies can broadly be defined as bodies governed by European public law that are institutionally separate from the EU institutions, have their own legal personality and a certain degree of administrative and financial autonomy and have clearly specified tasks.⁷ Accordingly, other independent bodies of the EU that are created by the Treaty itself, such as the European Investment Bank, fall outside the scope of this study.⁸

These agencies have been particularly resorted to in responding to crises, such as the 'mad cow' (Bovine Spongiform Encephalopathy - BSE) crisis and the oil tanker Erika crisis. The financial crisis led to the creation of another three supervisory authorities: the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) and another agency, the Single Resolution Board (SRB). And, in relation to the current refugee crisis, the EU transformed the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) into another, more

¹ E. Vos, 'European agencies and the composite EU executive' in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 11-47.

² B. Jacobsson and G. Sundström, *Governing State Agencies Transformations in the Swedish Administrative Model*, Scores rapportserie 2007:5, p. 5.

³ M. Egeberg and J. Trondal, *Agencification of the European Union administration: Connecting the dots*, TARN working paper no 1/2016, p. 1.

⁴ *Ibid.*

⁵ D. Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution* (Oxford: Oxford University Press, 2009).

⁶ See H.C.H. Hofmann, 'Mapping the European Administrative Space', *West European Politics* 31 (2008): 671.

⁷ This excludes the three agencies set up in the field of Common Foreign and Security Policy, the executive agencies and other agency-like bodies.

⁸ Before the European Central Bank gained the official status of an EU institution (as introduced by the Lisbon Treaty), it was discussed in literature whether the European Central Bank should not be considered an as independent agency, see e.g., 'Executive Agencies within the EC: The European Central Bank – A Model?', editorial comment to *Common Market Law Review* 33 (1996): 623–631.

powerful agency: the European Border and Coast Guard or the new Frontex.⁹ In this crisis, the role of the European Police Office (Europol) has also gained importance.¹⁰

This study will examine the current state-of-the-art of EU decentralised agencies in particular in relation to the numbers of existing and proposed agencies, their legal basis, function, source of financing, their relationship with the Institutions and stakeholders and well as their transparency and accountability. To this end, the founding regulations of EU agencies, case law and literature will be analysed whilst to some extent the activities of agencies in practice is taken account of. The founding regulations of 36 decentralised EU-agencies as well as the proposal for the new European Labour Authority (ELA)¹¹ will be analysed. It will examine in how far the Common Approach is followed by the EU institutions in the more recently created, refurbished and proposed EU agencies. It will also analyse to which extent delegation of powers to agencies conforms to the prevailing Meroni doctrine¹² as interpreted by the European Court of Justice in the ESMA or Short Selling case.¹³ It will pay particular attention to parliamentary scrutiny of agencies' activities. It will suggest where possible improvements for a more coherent, efficient and transparent set up for parliamentary scrutiny.

⁹ See critically: S. Carrera and L. den Hertog, *A European Border and Coast Guard: What's in a name?* CEPS paper, No. 88 / March 2016.

¹⁰ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

¹¹ COM(2018)131. All statements with regard to this agency are based on the Commission's proposal and do not include any possible amendments by the legislator.

¹² ECJ, Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR 0011.

¹³ Chamon, Merijn. 2010. "Eu Agencies: Does the Meroni Doctrine Make Sense?" *Maastricht Journal of European and Comparative Law* 17 (3): 281–305.

2. The rise of EU agencies in the EU's institutional landscape

2.1. Agencification of EU executive governance

Although the creation of the first two European agencies (the European Foundation for the Improvement of Living and Working Conditions – EUROFOUND and the European Centre for the Development of Vocational Training – CEDEFOP), dates back to the 1970s, it was not until the early 1990s that agencification of the EU executive took off. In the early 1990s the European Environment Agency (EEA) and the European Medicines Agency (EMA - now EMA) were set up to coordinate and gather information on the environment (EEA)¹⁴ and to provide the EU institutions with the 'best possible' scientific advice (EMA).¹⁵ Since then many agencies have been created in the EU's institutional. At the beginning of the 2000s European agencies became very popular as they were seen as an appropriate solution for problems of lack of trust in, and credibility of, the EU and its regulation¹⁶ to combat a series of scandals, e.g., relating to food and maritime pollution.¹⁷

Hence, unsurprisingly, today we find a host of EU agencies in the EU's institutional structure with the total number of agencies amounting to 36. In addition, the proposal for the entirely new European Labour Authority (ELA) is still pending at the time of writing.¹⁸ The European Parliament has, moreover, asked the Commission to consider the establishment of a European Agency for Robotics and Artificial Intelligence.¹⁹ As the Commission has not made any such proposal by the time of writing, this will not be taken into account for the purpose of this study.

The current overall budget for these agencies is more than two billion Euros per year and they employ more than 9,000 staff members.²⁰ They assist in the implementation of EU law and policy,

¹⁴ Council Regulation (EEC) 1210/90 [1990] OJ L120/1, as amended by Council Regulation (EC) 933/1999 of 29 April 1999 on the establishment of the European Environment Agency and the European environment information and observation network [1999] OJ L117/1.

¹⁵ See the new Regulation (EC) 726/2004 of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L136/1.

¹⁶ The importance of establishing agencies within the institutional setting of the EU was indeed underlined in 1999 by the Committee of Independent Experts, established after the Cresson affaire, that held that it was difficult to find in the Commission persons who had 'even the slightest sense of responsibility', and recommended delegation and decentralisation of day-to-day executive tasks to such bodies. See the Committee of Independent Experts in its First Report on 'Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission' of 15 March 1999, para. 9.4.25, available at: < <http://www.europarl.europa.eu/experts/pdf/reporten.pdf> >.

¹⁷ The literature on European agencies is by now abundant. Publications include: M. Busuioc, *European Agencies. Law and practices of accountability*, OUP, 2013; E. Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', *Common Market Law Review* 46, no. 5 (2009): 1395–1442; E. Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment', *European Law Journal* 19, no. 1 (2013): 93–110; M. Busuioc, M. Groenleer & J. Trondal (eds.), *The Agency Phenomenon in the European Union. Emergence, Institutionalisation and Everyday Decision-making* (Manchester: Manchester University Press, 2012); M. Everson, C. Monda and E. Vos (eds.), *European Agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 3; M. Chamon, *EU Agencies, legal and Political Limits to the Transformation of the EU administration* (Oxford: OUP, 2016). Scholten, M. *The Political Accountability of EU and US Independent Regulatory Agencies*, Brill, Nijhoff Studies in European Union Law; Scholten M. & Luchtman M. (eds) *Law Enforcement by EU Authorities. Political and judicial accountability in shared enforcement*, Edward Elgar.

¹⁸ Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority, COM/2018/131 final. This study will examine ELA on the basis of this proposal.

¹⁹ European Parliament, *European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics* (2015/2103(INL)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0051&language=EN&ring=A8-2017-0005>.

²⁰ TARN Policy Brief, no. 1/2018, and Merijn Chamon, 2016, p. 46.

fulfil central roles in the coordination of national authorities, provide scientific advice for both legislation and implementation, collect information and provide specific services. They may adopt legally binding and non-binding acts. They increasingly operate in emergency situations²¹ and actively contribute or are even responsible for setting standards within and even outside the EU.²²

2.2. Rationales for EU agencies

Some scholars have explained the popularity of EU agencies in terms of what political scientists call 'the rational-choice approaches', or in particular the principal-agent approach.²³ Following the American model, the idea is that sectoral regulation often requires a degree of technical complexity that can and should not be dealt with by an organisation headed by politicians.²⁴ Agencies instead can deal with complex technical and scientific issues by providing expertise. The creation of EU agencies has thus allowed the European Commission greater room to concentrate on its core-tasks and policy priorities,²⁵ as more specific and technical administrative tasks were delegated to these agencies.

Literature has moreover emphasised that agencies introduce more, and more flexible, administrative capacity and efficiency and facilitate, coordinate and strengthen cooperation between national authorities. The creation of agencies herewith responded to the need for more uniformity in the implementation of EU policies where the harmonisation model appeared to be less attractive while upholding the EU's system of decentralised implementation.²⁶

Scholars have also pointed to what Egeberg and Trondal call 'contingent events'²⁷ in order to help explain institutional change and the creation of agencies. The creation of agencies, and/or the strengthening of agencies has been very appealing in responding to crises, such as the BSE crisis, oil tanker Erika crisis, financial crisis and very recently the migration or refugee crisis. The attractiveness of agencification after the occurrence of certain crises is surely also closely linked to the desire to rationalise the relevant policy area and reinforce the science-based approach to decision-making in these areas.

Moreover, the creation of agencies may also be the outcome of the interplay of strategic and political interests in a power game between the institutions and Member States.²⁸ Hereby Member States' desire to gain prestige for having an agency seated in their territory has indubitably played a role.²⁹

²¹ See e.g. ESMA and Article 28 of Regulation No 236/2012 on short selling and certain aspects of credit default swaps, OJ 2012, L86/1.

²² H.C.H. Hofmann, 'European regulatory Union? The role of agencies and standards', in: P. Koutrakos and J. Snell (eds.), *Research handbook on the EU's internal market*, (Cheltenham: Edward Elgar publishing), 2017, 460-479.

²³ M. Egeberg and J. Trondal, *Agencification of the European Union administration: Connecting the dots*, TARN working paper no 1/2016, p. 4.

²⁴ G. Majone, 'The Rise of the Regulatory State in Europe', *West European Politics* 17, no. 3 (1994): 77-101.

²⁵ G. Majone, *Regulating Europe* (London: Routledge, 1996).

²⁶ R. Dehousse, 'Regulation by Networks in the European Community: The Role of European Agencies', *Journal of European Public Policy* 4, no. 2 (1997): 246-261.

²⁷ M. Egeberg and J. Trondal, *Agencification of the European Union administration: Connecting the dots*, TARN working paper no 1/2016, p. 4.

²⁸ See e.g. R. Dehousse, 'Delegation of Powers in the European Union: The Need for a Multi-principals Model', *West European Politics* 4 (2008): 789-805; M. Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development* (Delft: Eburon, 2009).

²⁹ Exemplary of this is the fight for the seat of the European Food Safety Authority. See the quote in footnote 35 of E. Vos, 'European agencies and the composite EU executive' in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014).

Agencification of EU executive governance³⁰ may also be regarded as a political compromise in situations with clear functional needs for more regulatory capacity at the EU level but in which Member States were reluctant to transfer more powers to the European Commission.³¹ The recent strengthening of Frontex³² and Europol³³ and the proposal for reform of EASO³⁴ in the refugee or migration crisis are illustrative hereof.

2.3. Conceptualisation of EU agencies

Egeberg and Trondal have summarised the existing literature on the agencification of EU executive governance into three broad conceptual images: an intergovernmental, transnational and supranational image. The intergovernmental image regards EU agencies as set up to implement or monitor the implementation of policies agreed upon by Member States. The transnational image presupposes that EU agencies are 'loosely coupled' to national and EU institutions and view agencies as regulator networks. A supranational image sees EU agencies as integral elements of the EU administration, more specifically the Commission. According to Egeberg and Trondal, these images highlight 'overlapping, supplementary, co-existing and enduring governance dynamics within and among EU agencies' and these three images are likely to co-exist and the various elements may change over time and per agency. As a matter of fact, they state that studies on EU agencies reflect all three images.³⁵

What is clear from this analysis is that agencies have induced a shift from a model of indirect administration, where EU policies were implemented by Member States and not by EU bodies to a more direct administration, whereby implementation is carried out at the EU level, by inter alia EU agencies.³⁶ They find more elements indicating an ongoing trend towards supranationalisation of executive power in the EU.³⁷ EU agencies may be argued to have contributed to the centralisation of EU administration, but not at the expense of the Commission's executive power, as they largely perform functions that the Commission cannot perform itself because of the lack of expertise. Importantly, as Keleman argues, tasks have been assumed at the EU level by means of agencies, which otherwise would not have been possible at the EU level because of the political resistance against the Commission.³⁸ Busuioac and Groenleer argue that agencies have been established within

³⁰ See in general on this: The Academic Research Network on EU Agencies and Institutional innovation, TARN, <http://tarn.maastrichtuniversity.nl>.

³¹ D. R. Keleman, 'The Politics of 'Eurocratic' Structure and the New European Agencies', *West European Politics*, 25, no. 4 (2002): 93–118, at p. 95.

³² Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, (2016) OJ L251/1.

³³ Regulation (EU) 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, (2016) OJ L 135/53.

³⁴ Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM (2016) 271 final.

³⁵ M. Egeberg and J. Trondal, *Agencification of the European Union administration: Connecting the dots*, TARN working paper no 1/2016, p. 2–3.

³⁶ M. Egeberg and J. Trondal, *Agencification of the European Union administration: Connecting the dots*, TARN working paper no 1/2016, p. 8; M. Keating and E. Versluis, 'EU Agencies as a Solution to Pan-European Implementation Problems', in: M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 73–86.

³⁷ M. Egeberg and J. Trondal, *Agencification of the European Union administration: Connecting the dots*, TARN working paper no 1/2016, p. 9.

³⁸ D. R. Keleman, 'The Politics of 'Eurocratic' Structure and the New European Agencies', *West European Politics*, 25, no. 4 (2002): 93–118, p. 112.

the Union because it was deemed to not be *politically* appropriate to entrust certain tasks to the European Commission as the latter would be too bureaucratic, too politicised and composed of only generalists.³⁹ A lack of political faith in the Commission which arises by virtue of its own politicised, generalist or bureaucratic nature, and its vulnerability to Member State interests in the context of comitology, have greatly facilitated the rise of agencies within the EU structure.⁴⁰ The conferral of powers upon ESMA to intervene in emergency situations in the national financial markets seems indicative of this.

The trend towards direct administration and supranationalisation is confirmed by findings of EU agencies operating on the basis of networks. EFSA, for example, has been designed to operate with national counterparts and/or stakeholders and manoeuvre as a kind of *primus inter pares* with the national authorities, instead of being hierarchically placed above the national authorities. This agency has therefore been conceptualised as the apex of an interdependent network with various national authorities and other actors in a 'multi-level procedural labyrinth'⁴¹ or even a 'super-agency'.⁴²

The fact that EU agencies contribute to a reinforcement of EU executive power and lead to a pluralisation of the EU executive⁴³ is, however, not in itself conclusive in determining the precise location of agencies in the political-administrative setting and the characterisation of agencies. As Egeberg and Trondal have stated: 'the jury is still partly out', although they conclude on the basis of the existing data, that these agencies lean more towards the Commission than to any other potential master.⁴⁴

Insights from the legal literature connect EU agencies more to the composite or shared administration of the EU. Agencies are, as Curtin observed, 'betwixt and between' and in Everson's words, 'hierarchy beaters'.⁴⁵ This makes EU agencies 'interesting hybrids'.⁴⁶ The hybridity of EU agencies is expressed, both institutionally, in their relation with and their dependence on the EU institutions and the Member States and substantively, in their multiple tasks.⁴⁷ Hence representatives of both Member States and the EU institutions sit in their steering boards and some of their other bodies. In view of the 'double-hattedness' of the members of these boards, serving both national and European authorities,⁴⁸ potential tension, competition and/or conflicts between

³⁹ M. Busuioc and M. Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 179.

⁴⁰ M. Everson, C. Monda and E. Vos, 'What is the Future of European Agencies?', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 235.

⁴¹ See P. Dąbrowska, 'EU Governance of GMOs: Political Struggles and Experimentalist Solutions?', in C.F. Sabel & J. Zeitlin (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture*, (Oxford: Oxford University Press, 2010), 177–215.

⁴² See E. Vos & F. Wendler, 'Food Safety Regulation at the EU Level', in E. Vos & F. Wendler (eds.), *Food Safety Regulation in Europe. A Comparative Institutional Analysis*, (Antwerp-Oxford: Intersentia, 2006), 65–138.

⁴³ H.C.H. Hofmann & A. Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"', *European Law Review* 37, no. 4 (2012): 419.

⁴⁴ M. Egeberg and J. Trondal, *Agencification of the European Union administration: Connecting the dots*, TARN working paper no 1/2016, p. 10 and 11.

⁴⁵ M. Everson, 'Independent Agencies: Hierarchy Beaters?', *European Law Journal* 1, no. 2 (1995): 180–204.

⁴⁶ See M. Everson, 'Agencies: The 'Dark Hour' of the Executive?', in H.C.H. Hofmann & A. Türk (eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, (Cheltenham: Edward Elgar, 2009), 131.

⁴⁷ See in relation to Frontex, J.J. Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex', in M. Busuioc, M. Groenleer & J. Trondal (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making*, (Manchester: Manchester University Press, 2012), at 90.

⁴⁸ See M. Egeberg & J. Trondal, 'EU-level Agencies: New Executive Centre Formation or Vehicles for National Control?', *Journal of European Public Policy* 18, no. 6 (2011): 883–884.

national and European interests seems to be inherent to the composite character of the EU executive. The hybrid character of agencies is furthermore apparent when taking account of the fact that agencies not only assist the EU institutions but also Member States.⁴⁹ For example, EASA even acts as ‘the authorised representation of EU Member States’ when making arrangements at the global level. It also makes working arrangements with various third countries, such as Australia and Brazil or international organisations, including the Interstate Aviation Committee.⁵⁰ As such, this adds another dimension to the double-hattedness of agencies.⁵¹ The ‘borrowing’ of EU agencies by Member States to implement EU law, as permitted by EU law, seems not to be problematic,⁵² but is adding to the complexity of their accountability.

The latter is a general problem that is inherent to the hybrid character of EU agencies. The characterisation of EU agencies as ‘in-betweeners’, between the EU institutions, particularly the Commission, and the Member States, would seem appropriate as it indicates the close connection of the EU agencies to their masters: on the one hand, the institutions and the Commission and on the other, the Member States.⁵³

This characterisation shows at the same time the intricate position of EU agencies in the constitutional framework. This together with the current trend, approved by the Court of Justice to empower EU agencies with (modest) discretionary powers, underlines the need to rethink control and accountability of EU agencies and their legitimacy more generally (see Sections 9-12).

⁴⁹ See M. Chamon, ‘The Influence of “Regulatory Agencies” on Pluralisms in European Administrative Law’, *Review of European Administrative Law* 5, no. 2 (2012): 61–91, at 76–80. See *inter alia*, Art. 17(e) of Regulation 216/2008. See A. Ott, E. Vos and F. Coman Kund, ‘European Agencies on the Global Scene: EU and International Law Perspectives’, in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 87–122.

⁵⁰ See working arrangement on the airworthiness between EASA and the Interstate Aviation Committee, <https://www.easa.europa.eu/system/files/dfu/intl_appro_IAC_EASA.pdf>,. A similar wording is used in arrangements with Australia, Brazil, Japan, Singapore and Taipei. See for more examples, Ott, Vos and Coman Kund, A. Ott, E. Vos and F. Coman Kund, ‘European Agencies on the Global Scene: EU and International Law Perspectives’, in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 87–122.

⁵¹ See M. Egeberg & J. Trondal, ‘EU-level Agencies: New Executive Centre Formation or Vehicles for National Control?’, *Journal of European Public Policy* 18, no. 6 (2011): p. 883.

⁵² In view of the Court’s liberal attitude towards the ‘borrowing’ of EU institutions by Member States when implementing an international agreement outside the EU legal framework, see B. De Witte & T. Beukers, ‘Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012’, *Common Market Law Review* 50, no. 3 (2013): 805–848.

⁵³ See M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014).

3. The Joint Statement and Common Approach of 2012

3.1. The need for an institutional framework

Until 2000, the EU institutions had not taken any particular vision or strategy on the creation and design of agencies, thus leaving both functional and political interests to be determined at the micro-level of the founding regulations of agencies.⁵⁴ At the beginning of 2000, however, it became clear that a more general strategy on agencies was necessary. In the aftermath of the critical report of the Committee of Independent Experts relating to allegations about fraud, financial mismanagement and nepotism in the European Commission that led to the fall of the Santer Commission⁵⁵ and the various crises mentioned above,⁵⁶ the European Commission was faced with the urgent need for a more open government, increased accountability and new forms of partnerships between the different levels of European governance. The Commission's answer came in the form of a White paper on European Governance of 2001⁵⁷ in which it envisaged agencies as playing a role in the broader context of the exercise of the executive function and definition of the responsibilities of the institutions. It viewed agencies as being of great importance within the context of the guiding principles for administrative governance: less direct management, better control of delivery and greater cost-effectiveness.⁵⁸ The delegation of a number of tasks and powers to agencies which were non-majoritarian⁵⁹ bodies was herewith developed as a new mode of governance.⁶⁰

After this formal endorsement of agencies, we can observe in the 2000s a third wave of creation with at least 20 new agencies reflecting the EU's seemingly unending appetite for agencies.⁶¹ The Commission reckoned at that moment that an overall framework was necessary to establish common provisions on the role and position of agencies in the EU's institutional structure, in accordance with the principles of good governance.⁶² In 2005, the Commission presented a draft for

⁵⁴ See D. Curtin and R. Dehousse, 'EU Agencies: Tipping the Balance?', in M. Busuioc, M. Groenleer & J. Trondal (eds.) *The Agency Phenomenon in the European Union. Emergence, Institutionalisation and Everyday Decision-making* (Manchester: Manchester University Press, 2012), 194.

⁵⁵ Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and nepotism in the European Commission, 15 March 1999.

⁵⁶ Such as the BSE crisis, see E. Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', *Journal of Consumer Policy* vol. 23, issue 3 (2000): 227–255.

⁵⁷ Commission (EC), 'European Governance – A White Paper (White Paper) COM (2001) 428 final, 27 July 2001, 24.

⁵⁸ See Commission (EC), 'Reforming the Commission – Part I and II (Action Plan – White Paper) COM(2000) 200 final, 1 March 2000; Commission (EC), 'Shaping the new Europe' (Communication) COM(2000) 154 final, 21 March 2000; Commission (EC), 'European Governance: Better Lawmaking' (Communication) COM(2002) 275 final, 5 June 2002 and Commission (EC), 'Building our Common Future – Policy challenges and Budgetary means of the Enlarged Union 2007–2013 (Communication) COM(2004) 101 final/2, 26 February 2004, Annex 1.

⁵⁹ See G. Majone, 'The New European Agencies: Regulation by Information', *Journal of European Public Policy* 4, no. 2 (1997): 262–275. See in general G. Majone, *Regulating Europe* (London: Routledge, 1996). A. Sweet Stone and M. Thatcher define *non-majoritarian institutions*, as 'those governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials', A. Sweet Stone and M. Thatcher, *Theory and Practice of Delegation to Non-Majoritarian Institutions* (2002). Faculty Scholarship Series. Paper 74. http://digitalcommons.law.yale.edu/fss_papers/74, p. 2.

⁶⁰ See D. Curtin and R. Dehousse, 'EU Agencies: Tipping the Balance?', in M. Busuioc, M. Groenleer & J. Trondal (eds.) *The Agency Phenomenon in the European Union. Emergence, Institutionalisation and Everyday Decision-making* (Manchester: Manchester University Press, 2012), at 195.

⁶¹ See M. Egeberg, M. Martens & J. Trondal, *Building Executive Power at the European Level: Some Preliminary Findings on the Role of EU Agencies*, ARENA Working Paper No. 10, June 2009, 9.

⁶² COM (2001) 428 final.

an interinstitutional agreement on European regulatory agencies.⁶³ The European Parliament and especially the Council however did not see the need for such a general framework. The draft interinstitutional agreement was therefore rejected by eleven Member States in the Council and was not adopted.⁶⁴ The three Institutions decided instead to set up an inter-institutional working group consisting of representatives of the Commission, Council and the European Parliament. After lengthy discussions, the Commission, Council and Parliament agreed finally in 2012 on various common issues of design, powers, operation and governance of EU agencies⁶⁵ and adopted a non-binding Common Approach to EU agencies.⁶⁶

3.2. Non-binding basic framework: overview

In the Joint Statement, the three institutions set out why they deem decentralised agencies to be highly important for the functioning of the Union. They explain that the Common Approach was drawn up with a view to taking stock of the 'coherence, effectiveness, accountability and transparency of these agencies' and, after confirming that it is of non-binding nature, pledge to take it into account in future decisions 'following a case by case analysis'.

The Common Approach subsequently lays down a basic framework and a number of fundamental principles that are to be taken into account both by the legislator when it creates and evaluates agencies and by the agency itself. The underlying aim was to assess 'the existing situation, specifically the coherence, effectiveness, accountability and transparency of these agencies, and [to find] common ground on how to improve their work'.⁶⁷ The Joint Statement underlines that the Common Approach sees only to 'decentralised agencies' and does not relate to agencies operating in the field of foreign and security policy nor to executive agencies.⁶⁸ It fails nevertheless to give a definition of decentralised agencies.

The document comprises 66 paragraphs divided in five main chapters and several sub-chapters. The first chapter (paragraphs 1-9) deals with the establishment and institutional position of agencies. It deals with the establishment, evaluation and dissolution of agencies as well as with considerations of headquarters and the role of the host Member State.

Internal matters of agencies are addressed in Chapters II, III and IV. The first one of these (paragraphs 10-22) concerns the governing structure of agencies and lays down the composition and functioning of Management Boards, of Executive Directors and of other internal bodies such as Scientific Committees and Boards of Appeal. Chapter III (paragraphs 23-26) deals with operational questions, namely administrative support to agencies, data protection, international relations and communication activities. Under the title 'Programming of activities and resources', Chapter IV (paragraphs 27-45) sets out the requirements for work programmes, human resources policies as well as sources of financing and budgetary management. Finally, Chapter V (paragraphs 46-66) concerns the relationship between agencies and other EU institutions. It sets out reporting requirements, provisions on the internal and external audits, the discharge procedure, an alert/

⁶³ European Commission, *Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies*, COM(2005)59.

⁶⁴ Council of the European Union, *Outcome of proceedings in the Working Party on General Affairs on 27 May 2005*, ST-9738/05-INIT. Retrieved from <http://data.consilium.europa.eu/doc/document/ST-9738-2005-INIT/en/pdf>.

⁶⁵ See E. Vos, 'European Agencies and the Composite EU Executive', in M. Everson, C. Monda, & E. Vos (Eds.), *European agencies in between institutions and Member States* (pp. 87-122). (European Monographs; No. 85). Alphen aan den Rijn: Kluwer Law International.

⁶⁶ See COM (2008) 135.

⁶⁷ Joint Statement, second paragraph.

⁶⁸ Joint Statement, fourth paragraph.

warning system, the evaluation of agencies, transparency and relations with stakeholders as well as cooperation with OLAF on matters of fraud.

The Common Approach was further implemented by the Commission in its 'Roadmap on the follow-up to the Common Approach on EU decentralised agencies', published five months after the adoption of the approach. Based on the policy aims agreed by the three institutions, the Commission identified 90 concrete actions to be undertaken in most cases by itself or by agencies. Whilst some of them refer to steps to be taken 'whenever needed',⁶⁹ others concern guidance documents to be developed by the Commission in order to refine and further develop the requirements.⁷⁰ In order to understand the precise framework for decentralised agencies resulting from the Common approach it is therefore necessary to take into account not only the original document but, where conducive, also the additional documents developed by the Commission.

3.3. Establishment and closing of agencies

The Common Approach seeks to streamline the establishment of agencies and achieve consistency between various founding regulations. It suggests a common naming formula using the terms 'European Union agency for...' in order to provide for transparency.⁷¹ Interestingly, the recently proposed labour agency is called the European Labour Authority and hence does not conform to this provision in the new Approach.⁷² In addition, an impact assessment has to be carried out by the Commission prior to the decision to create an agency. Once this decision has been taken, the founding regulation should be based on standard provisions, to be developed by the Commission.⁷³ Already during this phase, it should also be decided where the agency is to be located.⁷⁴ To this end, the Commission announced to present guidelines, first, regarding the criteria to determine the choice of a location and, second, standard provisions for headquarters agreements.⁷⁵ In the first phase after its establishment, the so-called 'start-up phase' can, according to the Common Approach, take 'management measures' for the agency.⁷⁶ To formalise these procedures, it has developed a start-up kit.⁷⁷

3.4. Organisational Structure

With regards to the governance of agencies, the Common Approach lays down fundamental rules for the organisational structure of decentralised agencies. The question as to whether Member States should be represented on the *Management Boards* of agencies was for many years a stern point of controversy between the institutions. On this matter the Council favoured a large(r)-sized board with all Member States being represented and the Commission a small board. It was one of the main reasons, together with the instrument (viz. interinstitutional agreement) to be used, that had prevented an agreement being reached on a common framework on agencies between the Council and the Commission. The diverging opinions on the composition of the Management Boards

⁶⁹ See for example Roadmap Action 1: „Prepare an objective impact assessment“.

⁷⁰ See for example Roadmap Action 7: “Develop guidelines with standard provisions for headquarter agreements on the basis of existing best practices.”

⁷¹ Common Approach, para 1.

⁷² Vos, E., *The proposed European Labour Authority: Profile and Governance*, Briefing requested by the EMPL committee of the European Parliament. Retrieved from: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/619005/IPOL_BRI\(2018\)619005_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/619005/IPOL_BRI(2018)619005_EN.pdf)

⁷³ Common Approach, para 2 and Roadmap Action 2.

⁷⁴ Paras 6-9.

⁷⁵ Roadmap Actions 3 and 7.

⁷⁶ Common Approach, para 3.

⁷⁷ Roadmap Action 10; 2015 Progress Report on the implementation of the Common approach, p. 3.

between the Commission and the Council seem to find their roots in different views on the EU executive and the operation of agencies in it, as well who bears responsibility for acts of the Management Boards (see section 11.1) in addition to an issue of size and efficiency. Hereby the Council has firmly held that in areas where Member States retain large responsibilities, all Member States must be on the boards of agencies. In the Common Approach the Commission has finally given in and accepted the large-sized Management Boards with all Member States represented, two Commission representatives and, where appropriate, one member designated by the European Parliament and a fairly limited number of stakeholders' representatives.⁷⁸ The institutions hereby agreed to introduce a two-level governance structure 'when this promises more efficiency', and to create a small executive board in addition to the Management Board.⁷⁹

The Commission's 2005 draft inter-institutional agreement had not foreseen a representative appointed by the European Parliament, with the aim of maintaining the EP's role as independent instance of control. Although the EP was generally in favour of the Commission's initiative, it strongly criticised this point and demanded to be represented in the Management Board.⁸⁰ As the Common Approach stands now, this is at least possible 'where appropriate'.⁸¹ In addition, an Executive Board may be created to monitor the agency more closely. In principle, the Appointing Authority is vested in the Management Board, but may be delegated to the Director.⁸² Decisions shall be taken by an absolute majority except for cases of appointment and dismissal, for which a two-thirds majority is required.

The *Director* serves as the legal representative of the agency and is responsible for its day-to-day management.⁸³ The Common Approach stipulates that, 'to respect the autonomy of the agencies', the director is appointed by the Management Board based on a list drafted by the Commission.⁸⁴ The procedure for dismissal shall 'mirror' that of appointment.⁸⁵ As a consequence, the director is mainly accountable to the Management Board, whilst he or she⁸⁶ is responsible to the European Parliament and Council only with regards to financial management.⁸⁷ In practice, however, and as enshrined in the founding acts of some agencies, the appointment is often preceded by a hearing in the relevant EP-committee and the adoption of a non-binding opinion by the European Parliament. To enhance accountability, the Common Approach suggests to make agency directors more clearly accountable for performance. It call therefore to establish tailored performance indicators that allow for effective assessment of the results achieved in terms of objectives.⁸⁸ The Commission has subsequently drafted Guidelines on Key Performance Indicators to assess the results achieved by directors.⁸⁹

⁷⁸ See the Common Approach, para. 10.

⁷⁹ *Idem*.

⁸⁰ Atanassov, N., *Accountability of EU Regulatory Agencies*, European Parliamentary Research Service. Retrieved from: <https://epthinktank.eu/2015/03/03/accountability-of-eu-regulatory-agencies/>.

⁸¹ Common Approach, para 10.

⁸² Common Approach, para 12.

⁸³ Common Approach, para 14.

⁸⁴ Common Approach, para 16.

⁸⁵ Common Approach, para 19.

⁸⁶ K. Siderius and M. Scholten note in their research that 6 out of 33 agencies they investigated are headed by a woman. See TARN Blog, *Appointment of EU agency directors*, forthcoming.

⁸⁷ Common Approach, para 15.

⁸⁸ Common Approach para 15.

⁸⁹ Common Approach, para 15; Roadmap Action 89; European Commission, *Guidelines on Key Performance Indicators (KPI) for directors of EU decentralized agencies* (SWD(2015)62 final), 2015, <https://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/10102-2015-62-EN-F1-1.PDF>.

Finally, with regards to *scientific committees*, the Common Approach merely sets out that a coordinated approach should be developed, selection procedures should be subject to regular review and independence should be ensured.⁹⁰ The requirements regarding the organisational structure were followed up by the Commission by means of 'Guidelines on the prevention and management of conflicts of interest in EU decentralised agencies'.⁹¹ As regards *boards of appeal* that are established as part of agencies that have binding decision-making powers, the Common Approach equally stresses the importance of the impartiality and independence of their members and calls upon the agencies to refine the selection procedures and to exchange best practices.⁹² Moreover, various other questions remain unanswered such as the precise jurisdiction of the Boards, the payment of a fee when challenging an agency decision to the Board.

The Common Approach stresses also the importance of the contributions of *Member States* to the work of the agencies' internal bodies. It therefore recommends that Member States regularly review the adequacy of resources/staff that they assign for this purpose and take appropriate measures to remedy possible weaknesses. It moreover considers the information flows between the national authorities in relation to agencies' activities of high importance; as examples hereof it mentions the appointment of national contact points, that should in principle be the national representative sitting in the Management Board.⁹³

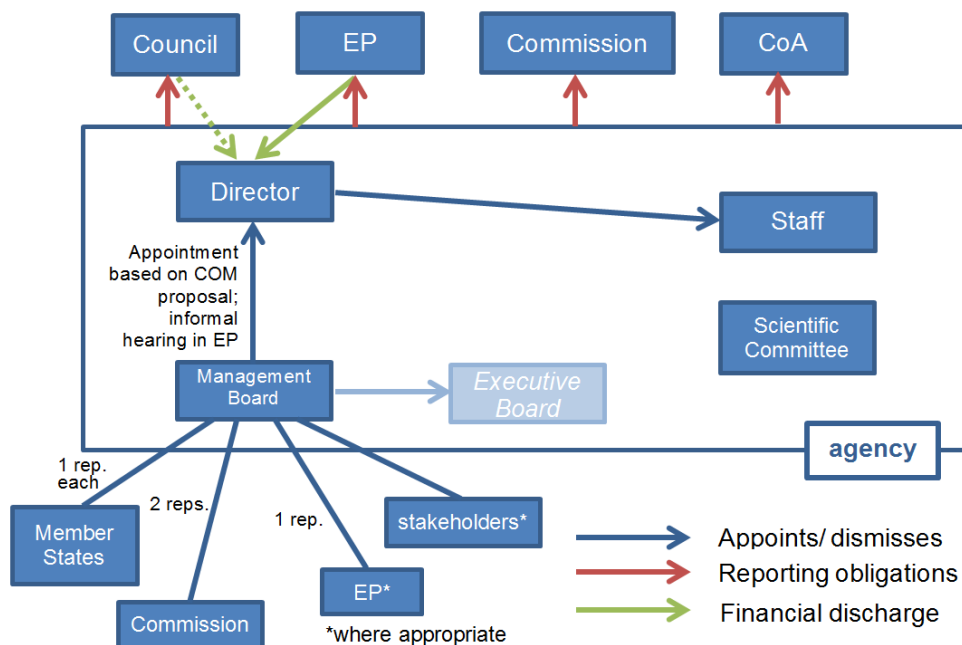


Figure 1: Organisational Structure of EU Agencies.

3.5. Mechanisms to ensure accountability

In addition to the organisational structure that mainly sets out rules for appointment and dismissal, the Common Approach lays down two further categories of rules. First, it imposes obligations on the agency itself with regards to, for example, communications and data protection (A). Second, it

⁹⁰ See Common Approach, para 20 for scientific committees.

⁹¹ European Commission, *Guidelines on the prevention and management of conflicts of interest in EU decentralized agencies*, 2013, https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_guidelines_on_conflict_of_interests_en.pdf.

⁹² Common Approach, para 21.

⁹³ Common approach, para 22.

regulates the relationship between agencies on the one hand and EU institutions on the other to facilitate sufficient scrutiny while ensuring accountability (B).

A. Obligations for EU agencies

The Common Approach imposes a number of obligations on agencies. It obliges them, first, to ensure a high level of protection for EU classified information. Yet, these rules should avoid an interference with Parliament's access rights to agency documents. Relevant provisions should be contained in founding acts.⁹⁴ In addition, the Commission has established a network of agency representatives responsible for the treatment of such data in order to facilitate an exchange of best practice.⁹⁵

Second, the Common Approach entitles agencies to maintain communication activities in as much as they have no negative effect on their core tasks.⁹⁶ Their communication strategies should be coordinated with the Commission. The latter has also in this case developed guidelines for communication in cooperation with agencies.⁹⁷

Finally, agencies are expected to ensure adequate planning and programming. They have to indicate their staff needs by means of Staff Policy Plans.⁹⁸ This procedure has meanwhile been streamlined by the Commission with other planning and programming activities. To this end, the Commission has published a template to be used by agencies.⁹⁹ In addition, the Common Approach urges to limit surpluses in agencies' budgets and calls for a system of activity-based budgeting (ABB) and activity-based management (ABM). The Commission has, again, followed up on both proposals.¹⁰⁰

In addition, the Common Approach obliges agencies to ensure transparency. This is to be achieved by maintaining multilingual websites to provide information, including on financial matters.¹⁰¹ The Commission has complemented this general requirement with a Communication Handbook for agencies.¹⁰² Moreover, agencies have to ensure consistency with their mandate in relationships with stakeholders and coordination with other EU institutions and bodies.¹⁰³

In order to facilitate agency's work in an efficient way, the Common Approach furthermore considers various options to provide administrative support. The options set out include the improvement of the services provided by the Commission, mergers of smaller agencies or service-sharing among

⁹⁴ Common Approach, para 24; Roadmap Action 36-37.

⁹⁵ European Commission, *Progress report on the implementation of the Common Approach on EU decentralised agencies*, 2015, p.5.

⁹⁶ Common Approach, para 26.

⁹⁷ Roadmap Action 21; European Commission, *Communication Handbook for the EU Agencies*, 2015, https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_communication_handbook_en.pdf.

⁹⁸ Common Approach, para 34.

⁹⁹ European Commission, *Communication from the Commission on the guidelines for programming document for decentralised agencies and the template for the Consolidated Annual Activity Report for decentralised agencies* (C(2014)9641 final), 2014, <https://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-9641-EN-F1-1.PDF>.

¹⁰⁰ Regarding surpluses of partially self-financed agencies: Roadmap Action 72; European Commission, *Analytical paper on the possibility to create a limited ring-fenced reserve fund for partially self-financed agencies*, 2013, https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_analytical_paper_reserve_fund_en.pdf.

Regarding ABB and ABM: Roadmap Action 76; European Commission, *Performance budgeting and decentralized agencies – Guidelines*, 2013, https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_guidelines_performance-budgeting_en.pdf.

¹⁰¹ Common Approach, para 64.

¹⁰² European Commission, *Communication Handbook for the EU Agencies*, 2013, https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_communication_handbook_en.pdf.

¹⁰³ Common Approach, para 65.

agencies.¹⁰⁴ In its 2015 progress report on the implementation of the Common Approach, the Commission wrote that it planned to adopt a guidance document on the charge-back of services provided to other EU bodies. Whilst a similar document already exists for the provision of services among Commission Directorates General and services, it has not yet been adopted for other Union bodies.¹⁰⁵ The EU Agencies Network has by its own initiative already established a shared support service located in Brussels. The aim is to provide 'administrative, operational and secretarial support to the Network'.¹⁰⁶

B. Procedures ensuring control

The Common Approach also addresses the relationships between agencies and EU institutions. On the one hand, these are meant to ensure that EU institutions, as principals of the agencies, have sufficient influence and can hold the latter to account. On the other hand, however, the very *raison d'être* of agencies would be undermined if they were not sufficiently independent of institutions (see in more detail Section 9). Therefore, the Common Approach entails various procedures to ensure *ex-ante* and *ex-post* control and, where necessary, sanctioning mechanisms.¹⁰⁷

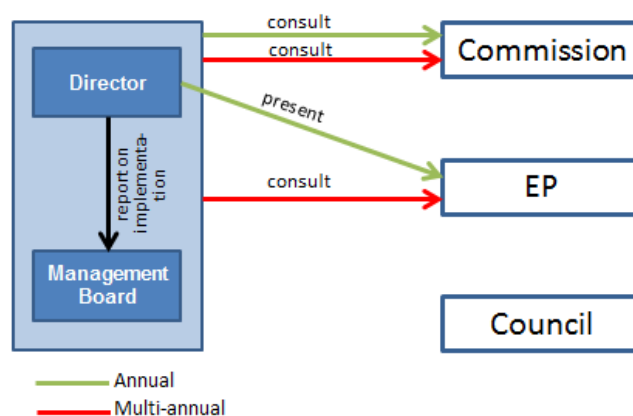


Figure 2: Work Programmes.

Ex-ante control is facilitated by means of the annual and multi-annual work programmes. For both annual and multi-annual programmes, agencies have to consult the Commission for formal advice. The European Parliament only has to be consulted for multi-annual work programmes. Yet, the Common Approach acknowledges, that, in practice, directors of European agencies at least present their respective agencies' annual work programme to the competent committee of the European Parliament. This practice, the Common Approach holds, should be maintained. Agencies and the Commission should moreover develop key performance indicators.¹⁰⁸

¹⁰⁴ Common Approach, para 23; Roadmap Action 12.

¹⁰⁵ European Commission, Progress Report on the implementation of the Common Approach on decentralised EU agencies, p. 4.

¹⁰⁶ European Agencies Network (EUAN), 2018-2019 Work Programme. Network of EU Agencies under the chairmanship of Frontex and ECDC, p. 8. Retrieved from https://euagencies.eu/sites/default/files/euan_wp_2018_19_final_.pdf.

¹⁰⁷ Common approach, paras 27-32.

¹⁰⁸ European Commission, Commission Staff Working Document: Guidelines on key performance indicators (KPI) for directors of EU decentralized agencies, SWD(2015)62 final. Retrieved from <https://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/10102-2015-62-EN-F1-1.PDF>.

Linked to this but set out distinctly in the Common Approach is the issue of agencies' international activities. Agencies can, in principle, also cooperate with non-EU Member States, where relevant for the carrying out of their mandate and tasks. To make sure that agencies operate within their mandate, they have to develop a strategy on this matter and include this in their annual or multi-annual work programmes, which is subject to approval by the Management Board.¹⁰⁹ In order to respect the institutional balance in EU external relations, and to make sure that agencies are not seen as representing the EU position, agencies' international activities are subject to *ex-ante* consultation by the Commission. To the extent that the strategy is included in the multi-annual work programme and that the EP is consulted on this in line with the Common Approach, there is possibly a second instance of control. In order to ensure consistency and avoid transgressions of agencies' mandates, agencies are required to cooperate closely with the Commission and relevant EU Delegations.

The *ex-post* control of agencies is assured in three different ways under the Common Approach. First, agencies have to submit one single annual report covering issues such as the implementation of the work programme, resource planning and audit findings.¹¹⁰ As set out in the Common Approach, the Commission has adopted in cooperation with the agencies a template for these reports.¹¹¹ This report is drafted by the Director and subsequently assessed by the Management Board. Both the report and its assessment by the Management Board will be submitted by the director to the Commission, the European Parliament, the Court of Auditors and the Council.¹¹²

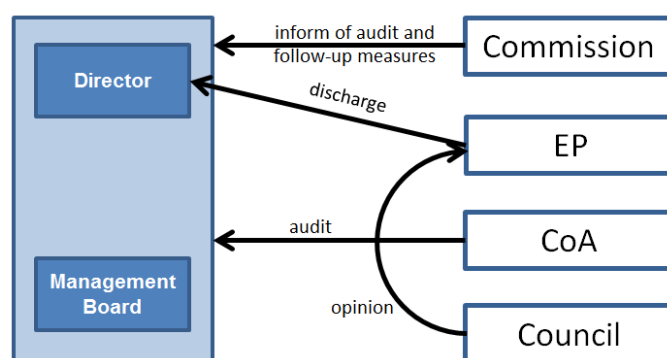


Figure 3: Audits.

Second, agencies have to undergo an audit and discharge procedure. Audits are undertaken both by the Internal Audit Service (IAS) of the European Commission and by the European Court of Auditors (or a third party appointed by the Court of Auditors).¹¹³ The agency has subsequently to report on the outcome of the audit and the measures taken to comply with the recommendations to the Commission.¹¹⁴ The Common Approach also stipulates that agencies should have the possibility to set up internal audit services to complement the work of the IAS.

¹⁰⁹ Common Approach, para 25; Roadmap Action 17.

¹¹⁰ Common Approach, para 47.

¹¹¹ Common Approach, para 48; Roadmap Action 31; European Commission, Communication from the Commission on the guidance for programming document for decentralised agencies and the template for the Consolidated Annual Activity Report for decentralised agencies (C(2014)9641 final), 2014, <https://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-9641-EN-F1-1.PDF>.

¹¹² Common Approach, para 49.

¹¹³ Common Approach, paras 50-55.

¹¹⁴ Common Approach, para 56.

The European Parliament, taking full account of recommendations by the Council, will give discharge to the director.¹¹⁵ This equips the European Parliament with its most notable powers to hold agencies to account. Although the discharge is in principle limited to ‘accountability and regulatory compliance rather than [to] performance per se’,¹¹⁶ the EP has used the discharge procedure as a means of exerting pressure on agency directors as it is the only possible sanctioning mechanism at hand for the EP.¹¹⁷ This becomes particularly problematic with regards to fully self-financed agencies for which no discharge is currently taking place. The Common Approach therefore urges to explore ‘possibilities for securing democratic accountability for fully self-financed agencies (i.e. financed by their clients)’. The document continues by proposing a procedure under which these agencies would submit an annual report on their budget to the EP, the Council and the Commission and receive recommendations from the former two institutions.¹¹⁸ Yet, the Commission did not follow up on this point of the Common Approach in its Roadmap.

The final mechanism for *ex-post* accountability is the evaluation of agencies. Agencies shall be evaluated every five years with a view to assessing whether to continue their mandate. Every ten years, the sunset- or review clause is to be applied.¹¹⁹ The evaluations are conducted by the Commission which has to inform the Parliament and Council of the evaluations.¹²⁰ In addition, *ex ante* evaluation is possible for activities with significant budgetary implications or upon request by the Management Board or Executive Board.¹²¹ In order to make this process more transparent, the Commission plans to adopt a handbook on agency evaluations.¹²²

In addition to these regular *ex-ante* and *ex-post* accountability mechanisms, the Common Approach provides for an alert-/warning system.¹²³ If the Commission has doubts about a decision which the Management Board is about to take, for instance regarding its compatibility with the mandate or EU law and policy as such, it can formally raise a question to the latter. Should the Management Board ‘set aside’ this request, the Commission informs the European Parliament and Council and the agency is asked not to implement the decision as long as negotiations are still ongoing. This approach again puts the Commission in a central position of scrutinizing the agency. In its Roadmap, the Commission clarifies in the ‘comments’-section that a ‘coordinated approach [is] to be discussed with the European Parliament and the Council.’¹²⁴ The relevance of this system for accountability will be discussed in more detail in section 11.

¹¹⁵ Common Approach, para 57.

¹¹⁶ Common Approach, paragraph 15.

¹¹⁷ See section 11.

¹¹⁸ Common Approach, para 58.

¹¹⁹ Common Approach, para 60.

¹²⁰ Common Approach, para 63.

¹²¹ Common Approach, para 61.

¹²² European Commission, *Progress Report on the implementation of the Common Approach on EU decentralised agencies*, 2015, p. 5.

¹²³ Common Approach, para 59.

¹²⁴ Roadmap Action 41.

4. Categorisation of EU agencies

Since the beginning of the 2000s, the European Commission has distinguished EU agencies into regulatory agencies, operating in specific policy areas and executive agencies, assisting in the management of EU programmes.¹²⁵ The use of the word 'regulatory' was however severely criticized by academics and the European Parliament for being inconsistent and rather deceiving as regards the nature of the agencies.¹²⁶ Faced with this critique the EU modified its classification and rebaptised 'regulatory agencies' into 'decentralized agencies'.¹²⁷ The term 'decentralized agencies' is certainly more appropriate as it indicates more clearly the level at which the agencies are operating in the executive, as well as the geographical spread of agencies over the EU. Yet, this distinction does not clarify what agencies exactly are and do. The academic literature has therefore come up with several classifications of agencies, varying from functional to instrumental typologies. We argue that, depending on the purpose of analysis, it is useful to distinguish agencies according to: (a) their functions, (b) their sheer size, (c) their legal basis, (d) the nature of their powers and the instruments that they can adopt, and (e) the way in which they can exercise their powers autonomously. Taken together agencies can roughly be classified according to a functional (a) numerical (b) and legal taxonomy (c-e).

4.1. Functional Taxonomy

From a functional perspective, agencies can be classified according to the six main tasks conferred upon agencies: (1) expertise, (2) information and cooperation, (3) provision of services (registration and certification), (4) facilitation and support, (5) supervision, inspection, and enforcement, and (6) execution of EU programmes. The provision of expertise and the delivery of scientific opinions are typical of agencies such as EFSA and EMA. The gathering of information and the creation of information networks is typical for agencies such as EEA and EMDDC, while the provision of a specific service, namely the registration of trade marks or plant variety, is the main task of EUIPO and CPVC. Facilitation and giving support to national authorities in their investigations and prosecutions and other operational tasks are carried out by Eurojust. Supervision is the key mandate of the three supervisory authorities in the financial sector: EBA, ESMA and EIOPA. All agencies may serve the EU institutions and in some cases also the Member States.¹²⁸ EU decentralised agencies carry out the first five main tasks. The agencies that are mandated to carry out the sixth task are currently termed executive agencies.¹²⁹ They are very different from the other five types of agencies in that they are set up by the European Commission and are entrusted with purely managerial tasks and hence assist the Commission in implementing the EU's financial support programmes. They are set up for a fixed

¹²⁵ See e.g., COM(2002) 718 and COM(2005) 59 final.

¹²⁶ See J.J. Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex', in *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making*, eds. M. Busuioc, M. Groenleer & J. Trondal (Manchester: Manchester University Press, 2012), 85; E. Vos, 'Independence, Accountability and Transparency of European Regulatory Agencies', in *Regulation through Agencies: A New Paradigm of European Governance*, eds. D. Geradin, R. Munoz & N. Petit (Cheltenham UK/Northampton MA, USA: Edward Elgar, 2005), 120–137. The term decentralized was explicitly proposed by the European Parliament in its 2009 Resolution on financial management and control of agencies, 23/04/2009, P6 TA (2009)074, para. 6.

¹²⁷ In 2008 the Commission still referred to these agencies as regulatory agencies (Communication on European agencies – The way forward COM (2008) 135 fin. As of the common approach of 2012 the EU institutions started to use the terminology decentralised agencies.

¹²⁸ See Annex 7.

¹²⁹ The governance structure of the European Agency for Reconstruction was set up as a regulatory agency in 2000 to deal with the management of the EU assistance programmes in Serbia and Montenegro and the FYR of Macedonia (Council Regulation 2667/2000, OJ 2003, L 11. It was closed down in 2008. Nowadays, following Regulation 58/2003, such an agency would be set up as an executive agency.

period and are strictly supervised by the Commission.¹³⁰ The execution of specific EU programmes is the mandate of, for example, EAHC and EACEA.

It is noteworthy that increasingly a plurality of functions is conferred upon agencies, which makes it difficult to distinguish clearly the above-mentioned types. Examples of this mixed, or 'plural-functional' type, are ECHA and EASA that are tasked with the delivery of both expertise and services (issuance of environmental certificates, registration of chemicals), as well as inspection tasks (EASA).

4.2. Numerical Taxonomy

From a numerical perspective, agencies are different and vary in size (in staff and consequently in budget) enormously. The smallest agency is EIGE that employs approximately 50 persons, with an annual budget of approximately EUR 7,7 million.¹³¹ The biggest agency is the EUIPO employing 939 persons, having an annual budget of around EUR 401 million, entirely self-financed.¹³²

4.3. Legal Taxonomy

From a legal perspective we can distinguish agencies in various manners, taking account of legal basis, nature of powers, and instruments and autonomy in decision-making. As regards their *legal basis*, we can distinguish agencies that have been created by a Commission act, a Council joint action, a Council act or a European Parliament and Council act. The three agencies that operate in the field of foreign security and defence policy, European Defence Agency (EDA), European Union Institute for Security Studies (EUISS) and European Union Satellite Centre (SatCen), are all established by a Council joint action. These agencies have a different organisational structure than the other agencies as, for example, in the case of EDA the defence ministers participate in the agency's administrative board. These agencies are therefore excluded from our analysis. Agencies created by the Commission are meant to purely assist the Commission in the implementation of EU programmes and are called executive agencies, as we referred to above. The legal basis of agencies will be further elaborated in section 5.

According to *the nature of their powers* and the *instruments* they have at their disposal, agencies can be divided into agencies with and without decision-making powers to adopt binding legal instruments. Only a few agencies have been allotted formal and binding decision-making powers, although it is noteworthy that increasingly binding decision-making powers are being conferred upon agencies. Agencies may thus adopt final and binding decisions on the registration of trademarks and chemicals, that individual actors can challenge before the General Court of the EU. At present, EUIPO, CPVO, EASA, ECHA, EMA, ESMA, EBA, and EIOPA have powers to adopt binding decisions. All other agencies adopt a variety of informal documents, such as recommendations, opinions, standards, guidelines, guidance documents, scientific reports, a code of conduct, an annual report, a work plan, and a strategic plan. In addition, they are also active at the global level, concluding informal agreements and memoranda of understanding with national or international organizations with a similar mandate. Although most agencies have powers of an advisory nature, it may be clear that the scientific opinions given for example, by EMA or EFSA carry significant weight in Commission decision making.¹³³ EASA is very close to adopting quasi-binding rules, as it is

¹³⁰ Council Regulation (EC) No. 58/2003 (OJ L11, 16 January 2003).

¹³¹ EIGE: 2017 Annual Report (https://eige.europa.eu/sites/default/files/documents/20182925_mhad18001enn.pdf).

¹³² EUIPO, Annual Report 2017. Annex 1: Management of Resources and Assurance. Retrieved from: (https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euiipo/annual_report/ar_2017_annex_01_en.pdf).

¹³³ See P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006), 155; M.B.A. Van Asselt & E. Vos, 'Wrestling with Uncertain Risks: EU Regulation of GMOs and the Uncertainty Paradox', *Journal of Risk Research* 11, no. 1–2 (2008): 281–300.

empowered to adopt technical guidelines in relation to certification specifications while it prepares technical rules from which the Commission cannot deviate without EASA's prior consent.¹³⁴ EBA is also playing a crucial role in the setting of regulatory technical standards. Whereas the Commission is delegated the task to adopt such regulatory standards, in practice it is the EBA that drafts them and the European Commission will merely endorse these draft standards.¹³⁵ Moreover case law of the Court indicates that other acts of agencies may intend to produce legal effects *vis-à-vis* third parties, which consequently may be reviewed by the Court,¹³⁶ as is now also formally recognized by Article 263 TFEU.¹³⁷ The possibility to delegate powers to EU agencies will be addressed in more detail in section 8.

As regards the *autonomy* to adopt specific acts, agencies may be divided into three categories, viz. (1) agencies that need prior approval for the conclusion of an act, (2) agencies that need prior consultation with the Commission and (3) agencies that can autonomously adopt acts. This typology has proved particularly useful in assessing whether - in the exercise of their external relation tasks - agencies have been delegated decision-making powers and whether this upsets the institutional balance of powers.¹³⁸

¹³⁴ Art. 17(2b) of Regulation (EC) 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) 1592/2002 and Directive 2004/36/EC, OJ 2008, L79/1.

¹³⁵ Art. 10 Regulation 1093/2010, as lastly amended by European Parliament and Council Directive (EU), OJ 2015, L 337/35.

¹³⁶ Case T-411/06, *Sogelma v. EAR* [2008] ECR II-2771, paras 42 and 43.

¹³⁷ See E. Vos, 'European Agencies and the Composite EU Executive', in M. Everson, C. Monda, & E. Vos (Eds.), *European agencies in between institutions and Member States* (pp. 87-122). (European Monographs; No. 85). Alphen aan den Rijn: Kluwer Law International.

¹³⁸ A. Ott, E. Vos and F. Coman Kund, 'European Agencies on the Global Scene: EU and International Law Perspectives', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 87-122.

5. Legal basis

In line with the principle of conferral of powers,¹³⁹ the EU's competences are not unlimited. This principle requires the EU to only adopt decisions in relation to subject-matters and policy areas where powers have been conferred upon the EU, making the legal basis requirement essential for each EU decision to be adopted, ensuring that the EU does not act outside its powers. In relation to EU agencies, it means that the creation of agencies needs to have a legal basis that is suitable for those purposes, whilst also powers conferred upon these agencies by the EU legislator are limited. What is the correct legal basis on which EU agencies can be created has been the subject of legal contestation for some time.

At the end of the 1990s during the negotiations prior to the Nice Treaty, Member States had issued several proposals to insert an explicit legal basis for the creation of EU agencies in the Treaty. Yet, the Commission did not get along with these proposals¹⁴⁰ as it feared the insertion of a legal basis for the creation of agencies would risk creating conflicting centres of power.¹⁴¹

Hence, today there is no explicit legal basis to create agencies in the Treaties. Until the end of the 1990s the dominant legal thinking was that, EU agencies could only be created on the basis of Article 235 EEC/308 EC (now Article 352 TFEU).¹⁴² In the 2000s however, this opinion changed in both legal doctrine and institutional practice upholding the view that EU agencies could be adopted on the basis of the provisions in relation to sectoral policy areas, such as the legal basis in the field of environment, transport and the internal market.

However, especially the institutional practice of creating agencies on the basis of the internal market legal basis has not been uncontroversial. It was opposed by the UK, leading to various legal disputes before the Court. In these cases, the UK was not so much concerned with the creation of agencies as such but rather with the substantive EU measures or the specific powers conferred upon the agency. The UK authorities thus argued that those measures were adopted on the incorrect legal basis, as it would have been able to block decision-making where the flexibility clause would have been used as this Article provided for a unanimity vote in the Council.

The UK, for example, challenged the creation of the European Union Agency for Network and Information Security (ENISA) under Article 114 TFEU claiming that the latter article, providing for the power to harmonise national laws, would not allow for the adoption of a measure aimed at setting up an EU agency and conferring tasks upon such a body.¹⁴³ The Court rejected the UK's arguments. The Court held that the EU legislature may establish an agency that is 'responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate'.¹⁴⁴ It emphasised nevertheless that 'the tasks conferred on such an agency must be closely linked to the subject-matter of the acts

¹³⁹ Articles 4 and 5 TEU.

¹⁴⁰ See E. Vos, 'European Agencies and the Composite EU Executive', in M. Everson, C. Monda, & E. Vos (Eds.), *European agencies in between institutions and Member States* (pp. 87-122). (European Monographs; No. 85). Alphen aan den Rijn: Kluwer Law International.

¹⁴¹ Speech by R. Prodi before the European Parliament, 3 October 2002, SPEECH/00/352, see <http://europa.eu/rapid/press-release_SPEECH-00-352_en.htm?locale=EN>.

¹⁴² E.g. as regards the legal basis of the creation of a centralised authorisation system for medicines and the creation of an agency, that the Commission proposed to base on former Article 100a COM (90) 283 final – SYN 309 to 312. The Council did not agree and ultimately the regulation was adopted on the former 235 EEC; Council Regulation (EEC) No 2309/93 OJ 1993 L 214/1.

¹⁴³ Case C-217/04, *United Kingdom v European Parliament and Council* [2006] ECLI:EU:C:2006:279.

¹⁴⁴ *Idem*, para 44.

approximating the laws, regulations and administrative provisions of the Member States'.¹⁴⁵ This ruling thus confirms the broad ambit of harmonisation measures that can be adopted under the internal market legal basis, including the creation of EU agencies.

The wide sphere of harmonisation measures was subsequently endorsed by the Court in *ESMA*, or *Short Selling*. In this case, the UK argued that the internal market legal basis, i.e. Article 114 TFEU, did not allow to confer upon ESMA far-reaching enforcement and intervention powers. The Court, however, unlike Advocate General Jääskinen,¹⁴⁶ disagreed. It confirmed the broad interpretation of Article 114 TFEU, to also include such powers. At the same time, it reiterated its ruling in *ENISA* that the EU legislature may deem it necessary to provide for the establishment of 'an EU body responsible for contributing to the implementation of a process of harmonisation'.¹⁴⁷ On the basis of this case law, EU agencies can therefore be established under Article 114 TFEU as long as they contribute to the implementation of 'a process of harmonisation'. In view of the Court's lenient case law, in many cases Article 114 TFEU will therefore offer the correct legal basis for the creation of EU agencies.

We may therefore conclude that the current dominant legal thinking and case law is that EU agencies may be established on the relevant Treaty article that provides the legal basis in a specific policy area (see Annex 2). The Common Approach is silent on this issue.

¹⁴⁵ *Idem*, para 45.

¹⁴⁶ According to Advocate General Jääskinen, the correct legal basis of this regulation should have been Article 352 TFEU. See Opinion AG Jääskinen in Case C-270/12, para 54.

¹⁴⁷ Case C-270/12, *UK v. Council and European Parliament* [2014] ECLI:EU:C:2014:18, para 104.

6. Sources of financing

Most decentralised agencies have their own budget¹⁴⁸ in order to ensure full independence from the budgetary authority (see Annex 3). Yet, they differ with regards to the question as to how this budget is composed. In the case of eleven agencies, the budget comes entirely from the Union's budget.¹⁴⁹ The Common Approach stipulates that in those cases, any surplus should be recovered by reducing the EU-contribution.¹⁵⁰

In the vast majority of cases, agencies have at least one other source of financing in addition to the Union's budget. Based on this, four different models can be identified. First, for twelve agencies, this additional source consists of fees or payments for services.¹⁵¹ These can, for instance, be fees paid by a company for the authorisation of new medicines, which is the case for EMA. The founding regulation of EMA stipulates at the same time that the budget of the agency consists of a contribution of the EU and the fees paid by undertakings for obtaining and maintaining Union marketing authorisations and for other services provided by the Agency.¹⁵² Over the years however, the EU contribution paid to EMA is in continuous decline.¹⁵³ The Common Approach views that these fees should cover the cost of the service provided.¹⁵⁴ Second, two agencies¹⁵⁵ and the newly proposed ELA, receive voluntary contributions by Member States as source of financing in addition to the contribution from the Union budget. Moreover, eight agencies receive both fees or payments and voluntary contributions by Member States as additional sources of financing in addition to the EU subsidy.¹⁵⁶

Finally, four agencies are fully self-financed.¹⁵⁷ For these agencies, the Common Approach merely mentions that "fees should be set at a realistic level" so as to avoid that surpluses are accumulated.¹⁵⁸

¹⁴⁸ Exceptions: APPF and EDPB. In these cases, no discharge is foreseen in the founding acts.

¹⁴⁹ These fully financed agencies are: APPF, Cedefop, CEPOL, EDPB, EIOPA, ENISA, Eurofound, Eurojust, Europol, FRA, GSA.

¹⁵⁰ Common Approach, para 37.

¹⁵¹ These agencies are: EBA, EEA, EFCA, EFSA, EMA, EMCDDA, EMSA, EPPO, ERA, ESMA, ETF, EU-OSHA.

¹⁵² Article 67 (3), Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency. OJ L 136.

¹⁵³ The EU subsidy to EMA amounts to approximately 10 % of the EMA budget. EMA annual report 2017, p. 98.

¹⁵⁴ Common Approach, para 39.

¹⁵⁵ These agencies are: BEREC and EU-LISA.

¹⁵⁶ These agencies are: ACER, EASA, EASO, ECDC, ECHA, EIGE, ELA, FRONTEX.

¹⁵⁷ These agencies are: CdT, CPVO, EUIPO, SRB.

¹⁵⁸ Common Approach, para 38.

7. Constitutionalisation and constitutional neglect

7.1. Constitutionalisation of agencification

Importantly, the Lisbon Treaty has formally recognised agencification of the EU executive by introducing EU agencies formally into the Treaties.¹⁵⁹ Importantly, this Treaty has formalised jurisdiction of the Court over agency acts in Article 263 TFEU.¹⁶⁰ The Court may thus review the legality of agency acts ‘intended to produce legal effects vis-à-vis third parties’ and their failure to act, while it may also interpret agency acts in preliminary rulings.¹⁶¹ With this provision, the Lisbon Treaty codified a longstanding unconstitutional practice¹⁶² in which the Court had already accepted jurisdiction in conflicts over rejections of applications for a European trademark by the former OHIM, now EUIPO.¹⁶³ Although the provision does not confer the possibility for agencies to challenge acts of EU institutions, the limited constitutional legitimisation of agencies is to be welcomed in ensuring more legal certainty in judicial review of agency acts.¹⁶⁴

Agencies are furthermore put on par with the EU Institutions in a variety of provisions in the Treaties, that is in relation to internal security,¹⁶⁵ financial measures and independence of the European Central Bank,¹⁶⁶ complaints on instances of maladministration submitted to the Ombudsman,¹⁶⁷ audits,¹⁶⁸ fraud,¹⁶⁹ and citizenship.¹⁷⁰ Importantly, agencies, in the same way as the institutions, must abide by the principle of transparency (including access to documents),¹⁷¹ the requirement of personal data protection¹⁷² and the respect for the constitutional right of citizens to write questions

¹⁵⁹ See E. Vos, ‘European Agencies and the Composite EU Executive’, in M. Everson, C. Monda, & E. Vos (Eds.), *European agencies in between institutions and Member States* (pp. 87-122). (European Monographs; No. 85). Alphen aan den Rijn: Kluwer Law International.

¹⁶⁰ Now in Article 263 TFEU. See case law of the CJEU, e.g. Case T-411/06, *Sogelma v EAR* [2008] ECLI:EU:T:2008:419, paras 42 and 43.

¹⁶¹ Art. 263 TFEU moreover permits that the founding regulation of agencies lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. The relevant Articles are: failure to act: Art. 265 TFEU, preliminary rulings: Art. 267 TFEU and plea of illegality: Art. 277 TFEU.

¹⁶² See the Court of Auditors in its opinion no. 8/2001 on the Commission’s proposal to lay down the statute for executive agencies, OJ 2001, C 345/1.

¹⁶³ Whilst having no constitutional basis for this, the founding regulation of the European trademark regulation provided for the possibility to have decisions of EUIPO’s (formerly OHIM’s) board of appeal reviewed by the Court, see Article 65 of Regulation 207/2009 on the Community trademark, OJ 2009 L 78/1. Moreover, in 1995, the Court of First Instance (CFI) expressly accepted jurisdiction to judge decisions of the OHIM and amended its Rules of Procedure to this end. In view of the anticipated workload, especially stemming from litigation relating to these decisions, the Council has additionally allowed the CFI to render judgment by a single judge. See Council Decision 1999/291/EC, ECSC, Euratom, OJ 1999, L 114/52.

¹⁶⁴ See already the Court’s rulings in Case T-411/06, *Sogelma v EAR* [2008] ECLI:EU:T:2008:419, paras 42 and 43 and Case T-70/05 *Evropaiki Dynamiki v. EMSA*, ECLI:EU:T:2010:55. See J. Saurer, ‘Transition to a New regime of Judicial Review of EU agencies’, *European Journal of Risk Regulation* 1 (2010): 325; A. Alemanno and S. Mahieu, ‘The European Food Safety Authority before European Courts. Some reflections on the judicial review of EFSA scientific opinions and administrative acts’, *European Food and Feed Law* 5 (2008): 320–333.

¹⁶⁵ Article 71 TFEU.

¹⁶⁶ Articles 123(1), 124, 127(4), 130, 282(3) TFEU.

¹⁶⁷ Article 228(1) TFEU.

¹⁶⁸ Article 287(1) and (3) TFEU.

¹⁶⁹ Article 352(1) and (4) TFEU.

¹⁷⁰ Article 9 TEU.

¹⁷¹ Article 15(1) and (3) TFEU.

¹⁷² Article 16(2) TFEU.

and have answers in their own language.¹⁷³ They too are required to hold an open, efficient and independent administration.¹⁷⁴

The constitutionalisation of the operation and decision-making procedures of agencies strengthens agencies as part of the EU executive and clarifies that agencies too are subjected to the constitutional values of transparency, openness and participation. In view of the criticism on agencies' transparency, *inter alia* in relation to the conflicts of interest declarations,¹⁷⁵ the recognition of constitutional values in relation to EU agencies is of high importance. Yet, it is also true that constitutionalisation will not solve the incoherencies that exist in practice where founding regulations stipulate transparency and participation in agency activities and decision making only in a very general way. Here shortcomings continue to exist about the role of participation, consultation and transparency in relation to binding and non-binding agency decisions¹⁷⁶ requiring a more general approach on these issues, for example by means of an EU administrative act.¹⁷⁷

7.2. Constitutional neglect in Articles 290 and 291 TFEU

Before extensively discussing the possibility of delegation of powers to EU agencies (see section 8), it is crucial to first highlight the constitutional gap that exist in the EU treaties following Lisbon. Whilst Lisbon recognised EU agencies as part of the EU institutional structure, the drafters of the Lisbon Treaty neglected agencies in provisions where one would have expected them most; the system of delegation laid down by the Treaty neglects to position agencies as bodies to whom powers can be delegated in Articles 290 and 291 TFEU.¹⁷⁸ The disregard of agencies is quite extraordinary in view of the composite character of the EU executive and is more remarkable now that agencies do appear in the Treaties elsewhere, as pointed to above. This constitutional neglect should mostly likely be explained in terms of the Commission's own unitary view on the EU executive in its White Paper on European Governance.¹⁷⁹ Although in the same White Paper the Commission proposed to increasingly resort to agencies,¹⁸⁰ it blatantly focussed on the Community method and the institutional triangle of the Council, Parliament and the Commission, which led it to suggest that the impact of comitology on its decision-making be diminished and to replace comitology with the adoption of delegated acts with a direct *ex-post*¹⁸¹ control mechanism on the exercise of the Commission's powers. It is precisely this thinking that has been codified in Articles 290 and 291 TFEU.¹⁸²

¹⁷³ Article 24 TFEU.

¹⁷⁴ Article 298 TFEU.

¹⁷⁵ See *inter alia*, the European Court of Auditors, *Management of conflicts of interests of selected EU agencies*, Special report No. 15/2012.

¹⁷⁶ E. Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment', *European Law Journal* 19, no. 1 (2013): 93–110, at 104–108.

¹⁷⁷ See D. Curtin, H. Hofmann & J. Mendes, 'Constitutionalising EU Executive Rule-making Procedures: A Research Agenda', *European Law Journal* Vol. 19, No. 1, (2013): 1–21.

¹⁷⁸ E. Vos, 'EU Agencies on the move: Challenges ahead', SIEPS, 2018. Retrieved from: http://www.sieps.se/globalassets/publikationer/2018/sieps-2018_1-web.pdf?

¹⁷⁹ The view was explicitly stated in the Commission's White Paper on European Governance where the Commission presented itself 'as the lone hero of European policy-making and implementation'. See Vos 2014 in book. See F.W. Scharpf, *European Governance: Common Concerns vs. The Challenges of Diversity*, New York Jean Monnet Working Paper 6/01, 2001, 8.

¹⁸⁰ See above, section 3.1.

¹⁸¹ I.e. after the adoption and before the entry into force of the Commission act.

¹⁸² E. Vos, 'EU Agencies on the move: Challenges ahead', SIEPS, 2018. Retrieved from: http://www.sieps.se/globalassets/publikationer/2018/sieps-2018_1-web.pdf?

In the hierarchy of norms introduced by the Lisbon Treaty, no attention is paid to the fact that today agencies form part of the EU executive and may adopt binding decision-making powers. For example, binding legal acts on the registration or refusal of a European trademark adopted by EUIPO are clearly acts of an executive nature and comparable with Commission decisions on the approval or refusal of an EU-wide approval of a novel food. However, while the latter decisions are implementing decisions in the sense of Article 291 TFEU based on comitology, EUIPO's acts clearly do not fall under this category. This highlights the uncomfortable and even unconstitutional position of agencies as actors operating in the shadow of hierarchy that can adopt binding executive acts that would ultimately be at odds with the principle of conferral of powers in accordance with Article 5 (2) TEU. The Treaty, however, does recognise that agencies can adopt binding acts. In Article 263 and 277 TFEU the Court has explicit jurisdiction for agency acts that 'intend to produce legal effect vis-à-vis third parties'.¹⁸³

Seen in this context, the claim put forward by the UK in *ESMA*, also referred to as *Short-selling*, that the delegation of powers to ESMA was incompatible with Articles 290 and 291 TFEU, made very good sense. In this case, the Court was explicitly asked to judge whether Articles 290 and 291 TFEU were intended to establish a single framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union agencies may be contemplated by the EU legislature.¹⁸⁴ In its judgment, the Court affirmed the latter and found no difficulty in circumventing the carefully crafted hierarchy of norms in these Treaty provisions. The Court hereby deduced from the inclusion of agencies in other Treaty provisions that the possibility to confer powers upon such bodies exists; 'a number of provisions in the TFEU none the less presuppose that such a possibility exists'.¹⁸⁵ Crucial for the Court was also the fact that the amended judicial review provisions also apply to agencies. It hereby explicitly referred to the practice of the EU legislature to delegate decision-making powers to agencies such as ECHA, EUIPO, CVPO and EASA. In relation to ESMA, the Court underlined that the conferral of certain decision-making powers on ESMA in 'an area which requires the deployment of specific technical and professional expertise'¹⁸⁶ does not 'correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU'.¹⁸⁷ The Court views that this does not undermine the rules on delegation of powers laid down in Articles 290 and 291 TFEU.¹⁸⁸

With its pragmatic approach in *ESMA*, the Court upholds the delegation of decision-making powers to EU agencies and bridges the 'constitutional gap in EU executive rulemaking'.¹⁸⁹ It remedies the evidently uncomfortable and unconstitutional position of agencies as bearers of executive powers. The Court admittedly argues that the mentioning of agencies in other Treaty provisions 'presupposes' that the possibility to delegate powers to agencies exists, having particular regard to the amended judicial review provisions:¹⁹⁰ if agencies can adopt acts that can be judicially reviewed and if Member States' courts can even ask the Court to interpret agency acts, it must be possible to confer the powers to adopt such decisions to agencies. The Court herewith gives a constitutional mandate to confer powers upon agencies despite the constitutional neglect. The Court could not

¹⁸³ E. Vos, 'EU Agencies on the move: Challenges ahead', SIEPS, 2018. Retrieved from: http://www.sieps.se/globalassets/publikationer/2018/sieps-2018_1-web.pdf?

¹⁸⁴ Case C-270/12, *UK v. Council and European Parliament [2014]* ECLI:EU:C:2014:18, para 78.

¹⁸⁵ *Idem*, para 79.

¹⁸⁶ *Idem*, para 82.

¹⁸⁷ *Idem*, para 83.

¹⁸⁸ *Idem*, para 86.

¹⁸⁹ H. Marjosola, 'Bridging the constitutional gap in EU executive rulemaking: the Court of Justice approves legislative conferral of intervention powers to the European Securities and Markets Authority', *European Constitutional Law Review* 10 no. 3 (2014): 500–527.

¹⁹⁰ *Ibid.*, p. 527.

have been clearer in confirming that the intention of the Lisbon Treaty to introduce an all-embracing hierarchy and categorisation of norms is a genuine failure also in relation to agency acts, in addition to its complicated division into delegated and implementing acts.¹⁹¹

¹⁹¹ See Vos, E. I. L., & Everson, E. (2016). European Agencies: What about the institutional balance? In S. Blockmans, & A. Lazowski (Eds.), *Research handbook EU institutional law* (pp. 139-155). Cheltenham: Edward Elgar Publishing.

8. Delegation of powers

The most extensively discussed legal question in relation to EU agencies in the legal literature and to a lesser extent in practice, is which powers may be delegated to EU agencies. Whilst the Lisbon Treaty for the first time introduced the notion of delegation in Article 290 TFEU, it does not define delegation. It moreover is silent of the possibility to delegate powers to agencies, the nature of these powers and the acts of agencies. Legal quarrelling about the kind of powers that agencies may exercise (discretionary or merely executive, binding or advisory) emphasises the importance of examining the nature of powers that are delegated to EU agencies. A vital point of departure for this discussion is the review of the leading case law from the Court of Justice of the European Union on this subject matter: *Meroni* and *ESMA*.¹⁹²

8.1. Meroni case law

Until the Court's judgment in *ESMA*, legal thinking within the EU institutions and literature was dominated by the 'anti-delegation', or better 'limited-delegation' or *Meroni* doctrine. This doctrine allowed for delegation of very limited powers to EU agencies based on the *Meroni* rulings of the Court in the 1950s.¹⁹³ In *Meroni*, the Court was asked to rule upon the delegation of powers from the Commission to an organisation established on the basis of Belgian private law. In these cases, the Court rejected the transfer of sovereign powers to subordinate authorities outside the EU institutions and ruled that only 'clearly defined executive powers' could be delegated, the exercise of which was to remain at all times subject to Commission supervision.

Although the *Meroni* judgments related to the ECSC, their applicability to the EU Treaty has been generally accepted¹⁹⁴ and was confirmed by the CJEU in its case law in the 2000s.¹⁹⁵ The *Meroni* case law would suggest that the following conditions apply to the admissibility of transferring sovereign powers to subordinate authorities outside the EU institutions:

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

Ultimately, these conditions would come down to requiring that the institutional balance will not be distorted. The Court's understanding of democratic legitimacy implies that it must be possible to eventually trace the powers of any rule-making body to the authority of a democratically-elected parliament.¹⁹⁶ In *Meroni*, the Court considered that the institutional balance would be distorted if discretionary powers were delegated to bodies other than those established by the Treaty. This also explains the Court's underlying concern about the distinction between 'clearly defined executive

¹⁹² Case C-270/12, *UK v. Council and European Parliament* [2014] ECLI:EU:C:2014:18.

¹⁹³ Cases 9/56 and 10/56 *Meroni v. High Authority* [1957–1958] ECLI:EU:C:1958:7.

¹⁹⁴ See, e.g. K. Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community', *European Law Review* 18, no. 1 (1993): at 41.

¹⁹⁵ Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others* [2005] ECLI:EU:C:2005:449, para 90.

¹⁹⁶ See C. Joerges, H. Schepel & E. Vos, *The Law's Problems with the Involvement of Non-governmental Actors in Europe's Legislative Processes: The Case of Standardisation*, EUI Working Paper, Law 99/9 (Florence 1999).

powers' and 'discretionary powers' and the concern about the prohibition to delegate the latter to bodies other than the institutions.¹⁹⁷

This thinking has dominated legal literature and practice for many years. In 2002, however, Majone observed a struggle between various Directorate Generals (DG) in the Commission whereby the policy DGs increasingly acknowledged the need to confer more powers on agencies in view of the growing complexity of the EU's tasks, and the Commission's Legal Service anxiously attempted to stick to a strict interpretation of the *Meroni* doctrine.¹⁹⁸ It is thus perhaps not surprising that the legislative reality shows a much more indulgent attitude towards the delegation of powers.¹⁹⁹ The far-reaching enforcement and intervention powers conferred upon the three supervisory authorities serve as examples.²⁰⁰ It is the latter kind of powers conferred upon ESMA that the UK authorities decided to challenge in 2012.²⁰¹

8.2. 'Mellowing Meroni':²⁰² ESMA case

Hence, after more than 50 years of discussion in the legal literature, the Court was finally called upon to answer *the* question whether the *Meroni* case law, judged in a different time of thinking about the functions of administration and in a different situation that was about delegation of powers conferred upon the Commission by the Treaty to a body established under Belgian private law, still made 'good law'. In *ESMA*, the UK sought the annulment of Article 28 of Regulation 236/2012 that conferred upon ESMA the power to issue legally binding measures (prohibit or impose conditions) in relation to short selling against financial institutions of the Member States in the event of a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the EU.²⁰³ In addition to other pleas, the UK authorities held that this power entailed a wide discretionary power and therefore infringed the principles established in relation to delegation of powers in the *Meroni* case law. The Court rejected this and all other claims held by the UK. The Court confirmed that the delegation of powers is in fact limited by *Meroni*, specifying that this case law only allows delegation of precisely delineated executive powers to EU agencies. In other words: *Meroni* is indeed still good law.²⁰⁴

The Court was nevertheless visibly torn between the need to confirm the stricter *Meroni* requirements set in the 1950s and the recognition that ESMA does need to carry out the intervention tasks conferred upon it. The Court therefore 'mellows' *Meroni*.²⁰⁵ It did not rule out entirely the possibility to delegate discretionary powers, but instead focussed on the possibility to limit the

¹⁹⁷ E. Vos, 'European Agencies and the Composite EU Executive', in M. Everson, C. Monda, & E. Vos (Eds.), *European agencies in between institutions and Member States* (pp. 87-122). (European Monographs; No. 85). Alphen aan den Rijn: Kluwer Law International.

¹⁹⁸ G. Majone, 'Delegation of Regulatory Powers in a Mixed Polity', *European Law Journal* 3, no. 3 (2002): 329.

¹⁹⁹ Vos, E., 'European agencies and the composite EU executive' in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014).

²⁰⁰ See A. Ottow, 'The New European Supervisory Architecture of the Financial Markets', in Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 123-143. See for a discussion of rulemaking powers of agencies, E. Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment', *European Law Journal* 19, no. 1 (2013), at 93-110.

²⁰¹ Case 270/12, *UK v. Council and European Parliament* [2014] ECLI:EU:C:2014:18.

²⁰² See J. Pelkmans and M. Simoncini, *Mellowing Meroni: How ESMA can help build the single market*, CEPS commentary, 18 February 2014.

²⁰³ European Parliament and Council Regulation (236/2012 on short selling and certain aspects of credit default swaps, OJ 2012 L86/1.

²⁰⁴ K. Lenaerts, 'EMU and the EU's constitutional framework', *E.L. Rev.* 39, no. 6 (2014): 753-769, at 760.

²⁰⁵ See J. Pelkmans and M. Simoncini, *Mellowing Meroni: How ESMA can help build the single market*, CEPS commentary, 18 February 2014.

discretion of agencies.²⁰⁶ The Court first appeared to be sensitive to the fact that, contrary to the bodies in *Meroni* that were governed by private law, ESMA was a 'European Union entity, created by the EU legislature'.²⁰⁷ Subsequently, it limited ESMA's discretion rather than excluding it.²⁰⁸ The Court moreover considered it essential that the powers delegated to ESMA by the EU legislature were 'circumscribed by various conditions and criteria which limit ESMA's discretion'.²⁰⁹ This meant that ultimately, 'ESMA is not vested with 'a very large measure of discretion''.²¹⁰ The Court found, therefore, that delegation of the intervention powers to the ESMA was accorded with the stipulations established under *Meroni*, in particular with the demand for enhanced protection of individual rights which it had established in its *Romano*²¹¹ ruling.²¹²

Interestingly, the Court's statement that the possibility to delegate intervention powers to ESMA in exceptional circumstances did 'not correspond to any of the situations defined in Articles 290 and 291 TFEU', is incorrect as it ignores the fact that in other fields, such as foodstuffs, the EU legislature confers similar powers upon the Commission to adopt an act in emergency situations, based on the advice of an agency and after consultation with a comitology committee.²¹³

8.3. Post-ESMA: Meroni 2.0

The *ESMA* ruling can therefore be seen as adapting the *Meroni* doctrine to the 21st century and the Lisbon amendments to a constitutional framework of the Treaties: the Court established *Meroni* 2.0. If delegation complies with the legal guarantees set by the amended Treaties, the Court sees no objections to have delineated but 'somewhat' discretionary powers conferred upon EU agencies. Of crucial importance hereby is that such delegation takes place in relation to agencies that are set up by the EU legislature and not bodies governed by (Belgian) private law, as was the case in *Meroni* and that judicial review of acts of these agencies is guaranteed.

Whereas *Meroni* has generally been considered as a ruling that hinders agency operation, *ESMA* can now be viewed as a case that supports further development of agencies. The *de facto* relaxation of the *Meroni* conditions²¹⁴ is so matched by an implied, but important, modification to the exact character of the principle of institutional balance. Although the Court does not expressly refer to the institutional balance principle in its judgment, it implicitly relies on it when referring to the recent Treaty reforms, identifying agencies as bodies of the Union whose acts will be subject to judicial review proceedings (Articles 263 and 277 TFEU).²¹⁵ The Court herewith appears to emphasise an interpretation of the institutional balance that stresses the importance of protection for the interests

²⁰⁶ E. Vos, 'EU Agencies on the move: Challenges ahead', SIEPS, 2018. Retrieved from: http://www.sieps.se/globalassets/publikationer/2018/sieps-2018_1-web.pdf?

²⁰⁷ Case 270/12, *UK v. Council and European Parliament* [2014] ECLI:EU:C:2014:18, para 43.

²⁰⁸ *Idem*, e.g. paras 45 and 50.

²⁰⁹ *Idem*, para 45.

²¹⁰ *Idem*, para 54.

²¹¹ Case 98/80, *Guiseppe Romano v. Institut national d'assurance maladie-invalidité* [1981] ECR 1259.

²¹² See M. Everson and E. Vos, 'European Agencies: What About the Institutional Balance?', in A. Łazowski and S. Blockmans, *Research Handbook on Institutional Law of the EU* (Cheltenham: Edward Elgar publishing, 2016), 139–155.

²¹³ See, for example, Article 53 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. OJ 2002, L031/1, (consolidated version).

²¹⁴ H. Marjosola, 'Bridging the constitutional gap in EU executive rulemaking: the Court of Justice approves legislative conferral of intervention powers to the European Securities and Markets Authority', *European Constitutional Law Review* 10 no. 3 (2014): 500–527. This relaxation is also referred to as 'Meroni-light', see M. Chamon, 'The empowerment of agencies under the Meroni doctrine and article 114 TFEU: comment on United Kingdom v. Parliament and Council (Short-selling) and the proposed Single Resolution Mechanism', *European Law Review* 39, no. 3 (2014): 394.

²¹⁵ Case 270/12, *UK v. Council and European Parliament* [2014] ECLI:EU:C:2014:18, paras 65 and 66.

of the individual within the EU. *ESMA* thus entails an important adaptation of the principle of the institutional balance to 'the new realities of European governance',²¹⁶ and gives agencies an autonomous character whilst at the same time, it attempts to constitutionally demarcate the mode of their operation.²¹⁷

Hence the Court in *ESMA* both protects and confines the *Meroni* doctrine to EU agencies operating beyond the modes of delegation described in Articles 290 and 291 TFEU. This new *Meroni* 2.0 is certainly to be welcomed in functional regulatory terms. Yet the Court's willingness to allow the delegation of intervention powers to *ESMA* and its fresh interpretation of *Meroni* is at the same time problematic.²¹⁸

For the Court quite light-heartedly discusses the nature of the powers that are delegated to *ESMA*. Whilst considering that *ESMA*'s powers were not very discretionary, the Court ignores that the exercise of the powers delegated may entail important political, economic or social choices to be made by *ESMA*.²¹⁹ However, such a view based on the non-majoritarian model of independent technocratic agencies clearly fails to take into account the value laden nature of many regulatory issues. It is illusory to think that the managerial and scientific tasks conferred upon agencies in these fields are merely technical and do not embrace political issues. The need for a 'political administration' and the demand to 'reintroduce politics into the apolitical sphere of economic regulation' has indeed been recognised in the literature.²²⁰

It is noteworthy that the Court does not take account of the case law of the General Court reviewing decisions by the CPVO and ECHA.²²¹ In *Schröder*, Mr. Schröder challenged a rejection of his application for a Community plant variety right by the CPVO. Here the General Court held that where an EU authority is required to make 'complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to limited review'.²²² The General Court confirmed its limited review over agency decisions in *Rütgers*, in which a decision by ECHA to include a substance in the list of substances of very high concern was challenged. In relation to the applicant's plea that ECHA had breached the proportionality principle, the Court held that ECHA has broad discretion in a sphere which involves 'political, economic and social choices on its part' and in which it is required to undertake complex assessments.²²³ In such cases, the General Court views 'the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the legislature is seeking to pursue'.²²⁴ These and other cases thus seem to

²¹⁶ M. Everson, C. Monda and E. Vos, 'What is the Future of European Agencies?', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 235.

²¹⁷ E. Vos, 'EU Agencies on the move: Challenges ahead', SIEPS, 2018. Retrieved from: http://www.sieps.se/globalassets/publikationer/2018/sieps-2018_1-web.pdf?

²¹⁸ E. Vos, 'EU Agencies on the move: Challenges ahead', SIEPS, 2018. Retrieved from: http://www.sieps.se/globalassets/publikationer/2018/sieps-2018_1-web.pdf?

²¹⁹ See P. Schammo, 'The European Securities and markets Authority: Lifting the Veil on the Allocation of Powers', (2011), 48 *CMLR*, 1879-1887.

²²⁰ M. Everson, 'Good Governance and European Agencies: The Balance', in D. Geradin, N. Petit & R. Munoz (eds.) *Regulation through Agencies in the EU: A New Paradigm for European Governance*, (Cheltenham, Edward Elgar, 2005), 156.

²²¹ See M. Chamon, 'The empowerment of agencies under the *Meroni* doctrine and article 114 TFEU: comment on *United Kingdom v. Parliament and Council* (Short-selling) and the proposed Single Resolution Mechanism', *European Law Review* 39, no. 3 (2014), p. 395-396.

²²² Case T-187/06, *Schröder v CPVO* [2008] ECLI:EU:T:2008:511, para 59.

²²³ Case T-96/10, *Rütgers Germany GmbH v. ECHA* [2013], ECLI:EU:T:2013:109, para 134 confirmed by the CJEU in C-290/13 P. Case ECLI:EU:C:2014:2174

²²⁴ *Idem*.

already sanction the transfer of discretionary powers to agencies.²²⁵ In *Schröder* and *Rütgers* the Court recognises that the tasks conferred upon these agencies are beyond a mere technical assessment and may involve political, economic or social choices.

Here, two issues deserve particular attention. First, it seems difficult to reconcile the Court's limitation of agency powers and formal insistence on clearly delineated powers in *ESMA* with this kind of reasoning of the General Court, should it be transposed to possible future challenges of *ESMA* decisions. Second, the formal recognition of agencies as entities that may balance various interests and that only limited judicial control will be carried out in relation to their exercise of these powers, raises concerns about the adequacy of the current accountability mechanisms.²²⁶

Therefore, it may ultimately be crucial to consider that EU agencies, being part of the EU's institutional framework as set forth in Article 13 (1) TEU, that operate in the EU setting and granted with a particular function, may fall under the scope of application of the fundamental principles governing the existence and exercise the power laid down in Article 13(2) TEU.²²⁷

²²⁵ Case T-187/06 was upheld by the Court in C-38/09, [2010] ECLI:EU:C:2010:196. See also C-281/10 P, *PepsiCo v. Grupo Promer Mon Graphic SA* [2011] ECLI:EU:C:2011:679, where the Court admitted that 'the General Court may afford OHIM some latitude, in particular where OHIM is called upon to perform highly technical assessments, and restrict itself, in terms of the scope of its review of the Board of Appeal's decisions in industrial design matters, to an examination of manifest errors of assessment' (para 67). This wording was repeated in Joined cases C-101, 102/11 P *Neuman and Galdeano v. José Manuel Baena Grupo SA* [2012] ECLI:EU:C:2012:641 (para 41). In case C-534/10 P, *Brookfield New Zealand v CVPO and Schniga GmbH* [2012] ECLI:EU:C:2012:813, the Court emphasised the broad discretion of the CVPO in the carrying out of its functions (para 50). In case T-145/08 *Atlas Transport v* [2011] ECLI:EU:T:2011:213, the General Court viewed that the discretion of the Board of Appeal to suspend proceedings or not to, is a broad discretion and confirmed that in such cases of broad discretion the Court carries out only a limited review (paras 69–70). See Hoffmann, footnote 51 in H.C.H. Hofmann, 'European regulatory Union? The role of agencies and standards', in: P. Koutrakos and J. Snell (eds.), *Research handbook on the EU's internal market*, (Cheltenham: Edward Elgar publishing), 2017, 460–479.

²²⁶E. Vos, 'EU Agencies on the move: Challenges ahead', SIEPS, 2018. Retrieved from: http://www.sieps.se/globalassets/publikationer/2018/sieps-2018_1-web.pdf?

²²⁷ C. Hillion (2018), *Conferral, Cooperation and Balance in the Institutional Framework of EU External Action*. In: Cremona M. (Ed.) *Structural Principles in EU External Relations Law*. Oxford: Hart Publishing. 117–174; p. 173.

9. Relationship with EU institutions and Member States

9.1. EU agencies in-between EU institutions and Member States

During the 1990s and early 2000s, agencies were considered to boost the EU's legitimacy by means of the expertise that agencies embraced, as well as the way in which such expertise was rendered: it was more visible and open to public participation, particularly by comparison to the opaque (scientific) committee system, whilst agencies' expertise would be independent from political and industry interference. The appeal of agencies lies precisely in the fact that agencies can perform technical tasks independently of the EU institutions. EU agencies therefore needed to be independent, at 'arm's length' of the European Commission and other institutions. For the European Commission, the independence of the technical and/or scientific assessments of agencies was 'in fact, their real *raison d'être*'.²²⁸ It viewed that their main advantage was that they would act on purely technical evaluations of very high quality and were not influenced by political or contingent considerations.²²⁹

In principle, therefore, a combination of technical regulatory efficacy and political independence, ensured by means of institutional-legal accountability has acted as a legitimising power for these agencies. Unsurprisingly agencies were in these times hailed as a *solution* to the many problems the EU was facing.

However, as Madalina Busuioc and Martijn Groenleer point out, today, the mushrooming of EU agencies – with 36 agencies currently in operation –, led them to often be perceived as a *problem instead of solutions*, subject to improvement themselves.²³⁰ Their non-majoritarian character, and perceived independence have given rise to growing anxiety about agencies becoming 'uncontrollable centres of arbitrary power'.²³¹

EU agencies have therefore, unlike their more independent American counterparts, and seemingly contradictorily, been expressly designed to be dependent on various institutions, mainly the European Commission, and to act as part of networks relying heavily on their national counterparts.²³² This shows the delicate nature of the relationship of EU agencies with EU institutions and the Member States. As indicated above²³³ agencies' hybrid character is clearly expressed in their organisational structure as well as in their multiple tasks. The proliferation of agencies in the EU landscape reveals therefore the need for mechanisms to keep agencies under control and make

²²⁸ Communication from the Commission, 'The Operating Framework for the European Regulatory Agencies', COM (2002) 718, 11 December 2002, at 5.

²²⁹ Communication from the Commission, 'The Operating Framework for the European Regulatory Agencies', COM (2002) 718, 11 December 2002, at 5.

²³⁰ M. Busuioc and M. Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 175.

²³¹ Referring to M. Everson, 'Agencies: The 'Dark Hour' of the Executive?', in H.C.H. Hofmann & A. Türk (eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, (Cheltenham: Edward Elgar, 2009), p.190.

²³² See D. Geradin, 'The Development of European Regulatory Agencies: Lessons from the American Experience', in D. Geradin, N. Petit & R. Munoz (eds.) *Regulation through Agencies in the EU: A New Paradigm for European Governance* (Cheltenham, Edward Elgar, 2005), 215–245.

²³³ Section 2.3.

them accountable.²³⁴ The relation of EU agencies with the EU institutions and Member States is therefore one of independence and control.

9.2. Independence as a relative concept

Madalina Busuioc and Jeroen Groenleer have suggested to use the term autonomy instead of independence, in view of agencies' link with the EU institutions and need for control.²³⁵ The use of the term autonomy is indeed very appropriate as it allows for a subtle assessment of the agencies' position vis-à-vis other parties and their accountability. Yet, the notion of independence is also used to indicate impartiality and is referred to in the legal language of the Treaties, the founding regulations and the case law of the Court of Justice.²³⁶ It is therefore appropriate to speak both in terms of independence and autonomy.²³⁷

Independence is not generally defined in EU law. The EU treaties both refer to independence in relation to the functioning of various institutions and Member States.²³⁸ Importantly, the Lisbon Treaty has introduced the notion of independence in relation to the EU administration. Article 298 TFEU stipulates that in the carrying out of their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. Independence can therefore be viewed as one of the key principles of good administration as laid down in the Charter on Fundamental Rights.²³⁹ The concept of independence is refined in the various codes of the institutions. Most prominently it features in the European Code of Good Administrative Behaviour that was developed by the European Ombudsman and formally endorsed by the European Parliament in September 2001.²⁴⁰ The Code stipulates that an EU official 'shall be impartial and independent. The official shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever'. It moreover defines that 'the conduct of the official shall never be guided by personal, family, or

²³⁴ See already Commission, 'European Governance: A White Paper', COM (2001) 428 final, 25 July 2001, at 24.

²³⁵ M. Busuioc and M. Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014).

²³⁶ The European Parliament's proposed Law of EU Administrative Procedure of 2013 placed independence under the umbrella of the principle of impartiality. It stipulated that 'the Union's administration shall be impartial and independent. It shall abstain from any arbitrary action adversely affecting persons, and from any preferential treatment on any grounds. The Union's administration shall always act in the Union's interest and for the public good. No action shall be guided by any personal (including financial), family or national interest or by political pressure. The Union's administration shall guarantee a fair balance between different types of citizens' interests (business, consumers and other)'. See European Parliament Resolution of 15 January 2013, P7_TA-PROV (2013)0004. After the Commission had questioned in 2016 the added value of the proposed act, the European Parliament proposed in 2016 a new initiative, namely a Regulation of the European Parliament and of the Council for an open, efficient and independent European Union administration. In this proposal it does not further specify independence but instead speaks about conflicts of interest and the duty of the Union Institution or agency to carefully and impartially investigate a case. See European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration ([2016/2610\(RSP\)](#)).

²³⁷ E. Vos, 'EU agencies and Independence', in: D. Ritleng (ed.), *Independence and legitimacy in the institutional system of the EU* (Oxford: Oxford University Press, 2016), pp. 206–228.

²³⁸ Article 17(3) TEU, for example, stipulates that the members of the Commission shall neither seek nor take instructions from any government or other institution, body, office, or entity and that they shall refrain from any actions incompatible with their duties or the performance of their tasks. Similar wording is used in the treaties for the members of the Court, Advocates-General, and the European Central Bank. For the European Central Bank, the Treaty adds the requirement for EU institutions and agencies and the Member States' governments to respect this principle and proscribes attempts to influence the members of the decision-making bodies of the European Central Bank or the national central banks in the performance of their tasks, see Art. 130 TFEU.

²³⁹ Art. 41 of the Charter.

²⁴⁰ European Parliament Resolution of 6 September 2001, OJ 2002 C 72 E/331.

national interest or by political pressure. The official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest'.²⁴¹ The European Commission²⁴² and the Council²⁴³ however have their own Codes of Good Administrative Behaviour that are less elaborate on this point.²⁴⁴

In the literature, independence has been argued to generally refer to independence from political influence and industry or market interests. In the EU context, the reference to independence from national interests is often explicitly added.²⁴⁵ Independence is currently not a general concept or principle and very much depends on the specific wording of the relevant legislation.²⁴⁶ Independence can therefore be argued to be a relative concept as it is necessary to specify in relation to whom or what and at what level such independence must exist.²⁴⁷

The literature commonly distinguishes between formal, *de iure* or legal independence, related to the independence that an organisation has according to the law, and informal or *de facto* independence, related to the independence that an organisation has according to practice.²⁴⁸ In relation to the European Central Bank, some have further divided formal independence into personal and organisational independence, the former referring to the organisation of the personal independence of bankers *vis-à-vis* political leaders and the latter referring to the operational independence of the banks *vis-à-vis* governments.²⁴⁹ Others have divided formal independence into institutional, staffing, financial, and functional independence.²⁵⁰ This analysis will adhere to the latter distinction as it gives, in my view, a better understanding of, and insight into, the most relevant issues with regard to agencies and highlights their complexities.

9.3. EU Agencies under Control

Analysis of the formal, *de iure* independence of EU agencies in relation to their institutional design, staffing, finances and functions discloses a diffused picture: agencies' independence very much depends on the specific context in which they operate and legal requirements placed on agencies.²⁵¹

²⁴¹ Art. 8 of the Code of Good Administrative Behaviour. The European Parliament asked the Ombudsman to apply this code in cases of alleged maladministration.

²⁴² As adopted on 13 September 2000, see Commission, 'Code of Good Administrative Behaviour: Relations with the Public', available at <http://ec.europa.eu/transparency/code/_docs/code_en.pdf>.

²⁴³ Council Decision of 25 June 2001, OJ 2001 C 189/1.

²⁴⁴ The Commission's Code does not include family interest whilst the Council's Code is much more vague and does not refer to independence as such. It merely states that 'members of staff shall in all circumstances act in the interests of the European Union and of the Council and shall not allow themselves to be influenced by personal or national considerations nor by political pressure or express personal legal opinions'.

²⁴⁵ Geradin and Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, Jean Monnet Working Paper 01/04 (2004), at 49–50.

²⁴⁶ See A.T. Ottow & S.A.C.M. Lavrijssen, 'Independent Supervisory Authorities: A Fragile Concept', *Legal Issues of Economic Integration* 39, no. 4 (2012): 419–446, with reference to the Court's case law on independence of data protection supervisors.

²⁴⁷ Opinion AG Mazák in Case C-518/07, *European Commission v. Germany* [2010] ECLI:EU:C:2010:125, at para. 16.

²⁴⁸ C. Hanretty, P. Larouche and A. Reindle, *Independence, Accountability and Perceived Quality of Regulators: A CERRE Study* (2012), available at <http://www.cerre.eu/sites/cerre/files/120306_IndependenceAccountabilityPerceivedQualityofNRAs.pdf> at 23.

²⁴⁹ P. Magnoste, 'Towards "Accountable Independence"? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model', *European Law Journal* 6 (2000): 326.

²⁵⁰ See A.T. Ottow & S.A.C.M. Lavrijssen, 'Independent Supervisory Authorities: A Fragile Concept', *Legal Issues of Economic Integration* 39, no. 4 (2012): 419–446; Makhasvili and Stephenson, 'Differentiating Agency Independence: Perceptions from Inside the European Medicines Agency', *Journal of Contemporary European Research* 9 (2013): 4.

²⁵¹ See for a detailed study: E. Vos, 'EU agencies and Independence', in: D. Ritleng (ed.), *Independence and legitimacy in the institutional system of the EU* (Oxford: Oxford University Press, 2016), pp. 206–228.

Hence, often the institutional design of agencies and the legal requirements imposed upon them demand that agencies' principals, namely the Parliament, Council, Commission, and Member States are included and form an integral part of the agencies. The membership of Member States' Management Boards can be considered as an expression of a 'Member State-oriented' institutional balance of powers principle, having due regard for the powers of both the EU institutions and the Member States.²⁵² Fundamentally, having all Member States represented on agency boards is in line with the conceptual understanding of the EU executive as an integrated administration and is an expression of the composite²⁵³ or shared character of the EU executive.

The design of agencies includes hence an intriguing mix of control (*ex ante* and ongoing) and accountability (*ex post*).²⁵⁴ *Ex-ante* control is determined by the legal boundaries set in the founding regulations of agencies, as already indicated above, such as the scope of action, powers, finances and the determination and position of the agencies' principals as well as the general principles that apply to or are declared applicable to agencies. Most prominently involved in the *ex-ante* control are therefore the European Parliament and the Council as legislators. *Ongoing* control refers to the direct control by the principals in order to steer or influence the actions of the agencies. In this way, the autonomy of agencies is reduced and made more dependent of the controlling principals.²⁵⁵

Examples hereof are the European Parliament's initiatives to link up a Member of European Parliament to a European agency to be able to follow this agency better,²⁵⁶ the Parliament's appointment of a representative or a designate as a member of the agency's Management Board, the position of Member States as representatives in the Management Board or as competent authorities in other advisory organs of the agencies and more powerful, the above discussed alert or warning mechanism given to the Commission for actions of agencies' Management Boards. It is most evident in the exercise of their external relations where some agencies are obliged to ask for approval from the Council or Commission prior to the conclusion of international cooperation acts (e.g., Europol and EASA) or consult with the Commission (e.g., Frontex).²⁵⁷ Looking at *the agencies' autonomy to adopt specific acts* is particularly relevant for the assessment of whether in the exercise of their external relation tasks agencies have been delegated decision-making powers and

²⁵² See for an elaboration of this concept, E. Vos, *Institutional Frameworks of Community Health and Safety Regulation, Committees, Agencies and Private Bodies* (Oxford: Hart Publishing, 1999), Chapter 2.5.

²⁵³ See L. Besselink, *A Composite European Constitution*, Groningen, Europa Law Publishing, 2007 and G. Della Cananea, *L'Unione Europea. Un ordinamento composito*, Bari-Roma, 2003.

²⁵⁴ Hereby control is to be understood broadly including accountability. See E. Vos, 'Independence, Accountability and Transparency of European Regulatory Agencies', in D. Geradin, N. Petit & R. Munoz (eds.) *Regulation through Agencies in the EU: A New Paradigm for European Governance* (Cheltenham: Edward Elgar, 2005), 120–137. Control in this context denotes a situation where a principal has power over the delegate and covers a wide range of instruments employed by the principal to direct, steer and influence behaviour and decision making of the agent or delegate. See Busuioc with reference to P.G. Rubecksen, K. Verhoest & M. MacCarthaigh, 'Autonomy and Regulation of States Agencies: Reinforcement, Indifference or Compensation?', *Public Organization Review* 8, no. 2 (2008): 155–174.

²⁵⁵ M. Busuioc, *The Accountability of European Agencies. Legal Provisions and Ongoing Practices*, (Delft: Eburon, 2010), at 35–37.

²⁵⁶ See F. Jacobs, 'EU agencies and the European Parliament', in: in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 201–228.

²⁵⁷ A. Ott, E. Vos and F. Coman Kund, 'European Agencies on the Global Scene: EU and International Law Perspectives', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 87–122.

whether this upsets the institutional balance of powers.²⁵⁸ In how far the Council and the Commission really make use of these powers in practice is still a matter for research.²⁵⁹

Ex-post control describes accountability that carries out a retrospective process of information, discussion and evaluation of agencies' actions. It expressly precludes direct intervention and herewith ongoing control. We observe five types of accountability: managerial accountability whereby in particular the supervisory roles that Management Boards play is key; political accountability that refers to the role of the European Parliament and the Council; administrative accountability, whereby the European Ombudsman plays an important role in supervising general rules on transparency and access to documents;²⁶⁰ financial accountability which concerns the role of the Commission's financial controller, the Council and the European Parliament as budgetary authorities, the latter of which is also responsible for the annual budgetary discharge and the Court of Auditors; and judicial accountability, that regards the possibility at last foreseen in Article 263 TFEU to challenge agency acts that have legal effect vis-à-vis third parties before the General Court.

The intricate relationship between agencies and institutions is particularly evident in the so-called 'alert or warning mechanism' laid down in the Common Approach, mentioned above.²⁶¹ This mechanism can be triggered by the Commission in relation to decisions by Management Boards of agencies. It would severely encroach upon the independent decision-making by these boards and increase control and accountability by the EU institutions. This mechanism is likely to be incompatible with the particular independence requirements placed on the various organs of the supervisory authorities EBA, ESMA and EIOPA. It is not clear whether this mechanism has ever been used in practice.

The same intricacy can be observed in relation to the financial independence of agencies. Whilst all agencies have their own budget, they all, with the exception of the EUIPO and CVPO, are to a great or lesser extent dependent on subsidies from the EU. Agencies such as the EMA that operate in the realm of public interest, often have an explicit provision in their founding regulations to ensure that they at least partly depend on the EU subsidy, designed to loosen their ties with industry and avoid capture by industry. This dependence allows for all sorts of controls, of which most importantly is the awarding of the EU subsidy and budgetary discharge by the Parliament. As set forth below, the European Parliament does not shy away from using the discharge procedure, not only to control cases of mismanagement in the budgets of the agencies but also to control the functioning and governance of agencies, most notably in relation to their transparency and conflicts of interests. Problematic however is the control over fully self-financed agencies such as EUIPO. Below we will discuss in more detail the particular powers of scrutiny of the European Parliament. Further, the Court of Auditors' control on the agencies' budgets is broader than purely financial control alone.²⁶² These mechanisms are hence used as instruments of control.

This analysis corroborates that the legal concept of independence is not absolute but relative and that there are various degrees of independence, just as we can speak in terms of degrees of autonomy. In terms of institutional design, finances and operational activities agencies have been

²⁵⁸ A. Ott, E. Vos and F. Coman Kund, 'European Agencies on the Global Scene: EU and International Law Perspectives', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 87–122.

²⁵⁹ See F. Coman Kund *The international dimension of the EU agencies Charting a legal-institutional 'twilight zone'*, TARN Working paper 5/2017.

²⁶⁰ Special report from the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents, OJ 1998 C44/9. The Lisbon Treaty has formalised this type of control, now laid down in Art. 288 TFEU.

²⁶¹ Section 3.

²⁶² In 2012 it dedicated for example a special report to its investigation of the management of conflicts of interests in four agencies: the EFSA, EMA, ECHA, and EASA. Special Report no. 15/2012.

intricately connected to their principals. EU agencies are often not merely operating at ‘arm’s-length’ from the Commission, Parliament or the Member States but the latter are frequently involved in the institutional design and operation of agencies: EU agencies are ‘in-betweeners’.²⁶³ This would require rethinking control and accountability mechanisms on agencies and underlines the need to develop a set of general principles that govern EU agencies, whilst taking into account their heterogeneity.²⁶⁴

9.4. Independence from political and national influence

The foregoing analysis highlights that agency independence from political and national influence is an extremely sensitive issue. This issue is particularly pertinent in relation to the supervisory agencies in the financial sector. In these agencies, members of the supervisory boards and Management Boards are not representatives of Member States but heads and representatives of the national authorities competent regarding the supervision of credit institutions. Legal provisions therefore put strong focus on the independence of members of their Boards of Supervisors, Management Boards, Chairperson and Executive Directors.²⁶⁵ They stipulate clear requirements of acting ‘independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body’.²⁶⁶

As such, therefore, the Common Approach on EU agencies is not suitable for these agencies. The strong focus on independence of the organs of these agencies must be understood in light of the supervisory tasks of these agencies, and the particular position of their counterparts in the national settings that are independent from other government structures. Yet, at the same time, (national) supervisory authorities too are not completely independent of the political arena. In particular, the *dédoulement fonctionnel* of the board members serving two masters indicates that independence is in practice a very fragile concept and underscores the relativity of the concept of independence.²⁶⁷

This underlines the inadequacy of the current accountability mechanisms of these agencies. This would require to rethink control and accountability mechanisms on agencies and underlines the need to develop a set of general principles that govern EU agencies, whilst taking into account their heterogeneity.²⁶⁸

²⁶³ Everson, M. & Vos, E., ‘European Agencies: What About the Institutional Balance?’, in A. Łazowski and S. Blockmans, *Research Handbook on Institutional Law of the EU* (Cheltenham: Edward Elgar publishing, 2016), 139–155.

²⁶⁴ See TARN policy brief, no. 1.

²⁶⁵ See Arts 42 (Board of Supervisors), 46 (Management Board), 49 (chairperson) and 52 (director) of the funding regulations of the supervisory authorities (Regulation 1093/2010, Regulation 1094/2010, Regulation 1095/2010). An independence requirement is also laid down in EFSA’s founding regulation (article 37).

²⁶⁶ See Arts 42 (Board of Supervisors), 46 (Management Board), 49 (Chairperson), and 52 (Director) of the Founding Regulations of the Supervisory Authorities (Regulation 1093/2010 of the European Parliament and of the Council, EBA, OJ 2010 L 331/12; Regulation 1094/2010 of the European Parliament and of the Council, EIOPA, OJ 2010 L 331/48; and Regulation 1095/2010 of the European Parliament and of the Council, ESMA, OJ 2010 L 331/84).

²⁶⁷ A.T. Ottow & S.A.C.M. Lavrijssen, ‘Independent Supervisory Authorities: A Fragile Concept’, *Legal Issues of Economic Integration* 39, no. 4 (2012): 419–446.

²⁶⁸ See TARN policy brief, no. 1.

10. Relationship with stakeholders

10.1. Legal obligation to connect

The majority of EU decentralised agencies is required to establish and maintain contact with relevant stakeholders,²⁶⁹ both at Union and national level. This is in line with the Common Approach, which requires that stakeholder relations should be in accordance with the agency's mandate, its tasks in international relations, the EU's policies and priorities and the Commission's actions.²⁷⁰ The Common Approach stipulate that when stakeholders are not part of the Management Board, they should participate in other internal bodies and/or advisory or working groups, 'if appropriate'.²⁷¹ In the legal practice two formats of stakeholder participation can indeed be observed. First, some founding acts require that stakeholders be represented in the agency's Management Board. This applies to seven out of the 36 founding acts. These stakeholders are then designated by the Council (EMA, EU-OSHA, Cedefop, Eurofound), by the Commission (ERA, EMSA) or by the European Parliament (ECHA).

Second, twenty agencies are required to establish additional boards, groups or networks to cooperate with stakeholders. In some agencies, these boards have regular meetings and clearly defined advisory functions. The founding act of ECHA provides for an accreditation system of stakeholders who may *inter alia* join meetings as observers. Various agencies have specific groups or fora to involve stakeholders. In some cases, these are created by the founding regulation (EBA, ESMA, EIOPA), whereas others are created by the agency itself (EFSA, EASA). Finally, ERA is required to establish a network of representative bodies. Besides these institutionalised forms of stakeholder involvement, some agencies are merely required to take into account the views of stakeholders on evaluation reports.²⁷² In the case of EMA, stakeholders are, exceptionally, represented not only in the Management Board but also in a scientific committee within the agency.

For most agencies, these requirements are alternative: they either have to include stakeholders in the Management Board or involve them in another form. Yet, there are also some agencies to which both mechanisms apply.²⁷³ In ten cases, there is no legal obligation at all to establish contacts with stakeholders.²⁷⁴

Whilst the manner by which stakeholders are involved in the activities of agencies surely needs flexibility in view of the heterogeneity of the mandates of the agencies, it is suggested to streamline the various models of stakeholder participation for agencies that have similar mandates.

10.2. Independence from commercially driven interests

An issue that is less controversial than independence from political and national interests discussed above (section 9), but no less difficult to achieve is the issue of agency independence from commercially driven interests. Literature and practice agree that EU agencies should be independent of the market parties so as to avoid capture.²⁷⁵ Particular reference is made to the membership of the technical and scientific organs of agencies that are to adopt the opinions of agencies on technical or scientific matters as well as the staff of EU agencies. Yet, market independence in relation to EU

²⁶⁹ For the purpose of this study and in line with the founding regulations of EU agencies, stakeholders are considered as representatives of organisations or interest groups.

²⁷⁰ Common Approach, para 65.

²⁷¹ Common Approach, para 65.

²⁷² BEREC, EASA.

²⁷³ ECHA, EMA, ERA, EU-OSHA, Europol, FRONTEX.

²⁷⁴ ACER, APPF, CdT, CEPOL, CPVO, EDPB, EPPO, Eurofound, GSA, SRB.

²⁷⁵ *Ibid.*

agencies appears to be particularly troublesome to achieve. It is evident in practice where scientists of good repute who could serve on staff committees of agencies often are or have been involved in industry or national affairs.²⁷⁶

Various practices of ‘revolving doors’ and cases of conflict of interest of members on EFSA’s Management Board were rigorously condemned by the European Ombudsman²⁷⁷ and the European Parliament. The latter refused to give a budgetary discharge to agencies like EMA and EFSA in view of problems of independence of their experts and staff.²⁷⁸ This kind of independence is not explicitly mentioned in the Codes of Conduct or the Principle of Impartiality as proposed by the Parliament.²⁷⁹ The Common Approach on European agencies views that ‘the independence of the scientific experts should be fully ensured, inter alia by promoting the highest standards, setting sound selection criteria and promoting best practices’.²⁸⁰

Staff members of agencies are moreover bound by the Staff regulations of the EU civil servants regarding conflicts of interest. This means for example that staff members of the agencies must declare any personal interest that might impair their independence and that they must seek approval for engaging in external activities. In addition, they continue to be bound by the duties of integrity and discretion after leaving office with respect to acceptance of certain jobs or benefits and must notify any employment entered into two years after leaving the service.²⁸¹

Yet, in practice agencies appear not to implement these provisions strictly. The European Court of Auditors held so in 2012 that the four agencies it investigated (i.e. EFSA, EMA, ECHA and EASA) did not adequately manage the conflict of interest situations, whereby it remarked that EFSA and EMA had developed the most advanced policies and procedures for managing these conflicts and that EASA did not have any.²⁸² As there is no general EU framework on conflicts of interest, the Court suggested the EU legislator to reflect on developing such a framework. The Common Approach recognises the need to develop a coherent policy on preventing and managing conflict of interests concerning agencies’ Executive Director and the members of the Management Boards (whether or not they sit in personal capacity) and scientific committees. The Commission published ‘Guidelines

²⁷⁶ See in more detail: E. Vos, ‘EU agencies and Independence’, in: D. Ritleng (ed.), *Independence and legitimacy in the institutional system of the EU* (Oxford: Oxford University Press, 2016), pp. 206–228.

²⁷⁷ In a specific case of a head of unit leaving EFSA to take on a position in a biotechnology company, the European Ombudsman reproached EFSA as it had failed to fulfil the procedural obligations emanating from these rules. Moreover, he ruled that EFSA’s failure to carry out as thorough an assessment of the alleged potential conflict of interest of its former staff member as it could and ought to have carried out, constituted maladministration. He recommended that EFSA should strengthen its rules and procedures with regard to negotiations by serving staff members concerning future jobs of the ‘revolving doors’ type. European Ombudsman, Case 0775/2010/ANA, Draft recommendation on 07 Dec 2011 - Decision on 23 May 2013.

²⁷⁸ See Report on discharge in respect of the implementation of the budget of the European Union Agencies for the financial year 2010: performance, financial management and control of European Union Agencies, 2011/2232(DEC), Committee on Budgetary Control A7-0103/2012.

²⁷⁹ The EP has repeatedly issued resolutions in order to ask the Commission to make a proposal (2012/2024(INL), 2016/2610(RSP), 2017/2011(INI)). According to the European Parliament, the Commission was not in favour of proposing such a law. At the moment, the Commission has however undertaken no further action on this.

Source: <http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-eu-administrative-procedure>

²⁸⁰ Common Approach, para 20.

²⁸¹ See Articles 11a, 12b, 13 and 16 of the Staff regulations.

²⁸² The EASA came out worst in the score report, but significant shortcomings were identified at EMA and EFSA as well. See Court of Auditors, in its report on management of conflicts of interest in selected EU agencies, Special report no. 15/2012.

on the prevention and management of conflicts of interest in EU decentralised agencies' in December 2013.²⁸³

It is therefore vital to have a framework on how to deal with conflicts of interest for agencies with similar mandates. Yet hereby attention must be paid to the various types of agencies taking into account the various policy areas. Here it is important to acknowledge that a 'one-size-fits all' model seems difficult, if not undesirable, to achieve.

²⁸³ European Commission, Guidelines on the prevention and management of conflicts of interest in Eu decentralised agencies, 2013. Retrieved from: https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_guidelines_on_conflict_of_interests_en.pdf

11. Parliamentary Scrutiny

In section 9, the relationship of agencies with the EU institutions was examined. This section will investigate the parliamentary scrutiny in more detail. As set forth above, parliamentary control over EU agencies takes place in various forms, both formally, by means of budgetary discharge, involvement in the appointment of the Executive Director, annual reports, and membership of Management Boards as well as informally through the linking up of an MEP to an agency. To outline the overall landscape of parliamentary scrutiny of agencies, it is necessary to examine all founding regulations in the light of the aims set out in the Common Approach. Only eleven of these founding regulations are based on founding regulations adopted after the Common Approach, some of them being recasts of previously existing agencies.²⁸⁴ A further ten founding acts were at least amended post July 2012.²⁸⁵ The main categories analysed are the composition of the Management Board, the procedure for appointment of the Executive Director, the information of the institutions of the multi-annual and annual work programmes as well as of the annual reports, and finally the financial oversight.²⁸⁶

11.1. Composition of the Management Board

The Management Board is the central organ to steer and manage the agency. As set forth above (section 3), the Common Approach provides that it should be composed of one representative per Member State as well as two Commission representatives. Where appropriate, there may be additional members designated by the European Parliament and representatives of stakeholders.²⁸⁷ It is not specified, which circumstances would be regarded as ‘appropriate’ in this matter.

Yet, there are ten cases in which the EP may in fact appoint a limited number of designates or representatives to the Management Boards of agencies (see Table 1). In the case of EFSA, whilst the European Parliament may not directly appoint members, it is consulted by the Council on the basis of a list of proposals drawn up by the Commission. In this case as well as in the case of ACER, there is a slight deviation from the Common Approach in that not each Member State individually appoints its representative, but the Council as a whole selects the members.

Nevertheless, the vast majority of cases comply with the Common Approach in that the Management Board consist exclusively of representatives of the Commission and Member States, without any involvement of the European Parliament (see Annex 10). EIGE, EPPO and Eurojust are exceptional in this regard. The Management Board of EIGE is comprised of 18 members appointed by the Council instead of Member State representatives, as well as Commission representatives. The Management Board of ACER includes five members appointed by the Council in addition to two members appointed by the Commission and two appointed by the European Parliament. Also instead of one representative per Member State, the board of EFSA 14 independent members who have a background in consumer organisations or interest in the food chain.

Whilst normally all boards include representatives of the Commission, these are absent from the Management Boards of the EPPO and Eurojust, (in both cases called ‘College’), in which only Member States are represented. In the case of the EPPO, members are even appointed by the Council, with a

²⁸⁴ Agencies whose founding acts post-date the Common Approach are: CEPOL (2015), APPF (2014), EASA (2018), EDPB (2016), ENISA (2013), ERA (2016), EPPO (2017), Europol (2016), Frontex (2016), OHIM (2017), SRB (2014).

²⁸⁵ Agencies whose founding acts were adopted after July 2012 are: ACER (2013), EBA (2015), EFCA (2016), EFSA (2014), EIOPA (2014), EMA (2012), EMSA (2016), ESMA (2014), GSA (2014), eu-LISA (2017).

²⁸⁶ APPF and EDPB are not included in this general analysis but referred to in the last part of this Chapter since they significantly deviate from all other agencies.

²⁸⁷ Common Approach, paragraph 10.

veto right for the sending Member State in each case.²⁸⁸ Another exception is the Single Resolution Board. In this case, the Board consists of representatives of Member States as well as a chair and four members appointed by the Council. The European Parliament has no role in this appointment.

In the case of the three European Supervisory Authorities EBA, EIOPA and ESMA, the organ called 'Management Board' rather corresponds to what the Common Approach names Executive Board. The board containing all representatives, not of Member States but of the national supervisory authorities, is the Board of Supervisors consisting of a Chairperson, heads of national supervisory authorities, and one representative each of the Commission, the ECB, the ESRB and the other two Supervisory Authorities.

In a total of twelve boards, additional members are included. In the boards of EMA, EMSA, ECHA, ERA, EU-OSHA, Cedefop and Eurofound stakeholders are present which are appointed by the Council, the European Parliament or the European Commission. The boards of ECHA, EMCDDA, ETF, EEA and EFSA include independent experts are present. Except for the more complex system of EFSA set out above, these experts are designated by the European Parliament. In a recent proposal, the Commission has suggested to align the composition of EFSA's Management Board with the Common Approach. Pursuant to this proposed amendment, it would consist of one representative per Member State (nominated by the MS but appointed by the Council), two representatives of the Commission, one member appointed by the EP and four stakeholders (from a consumer organisation, an environmental NGO, a farmers' organisation and an industry organisation) who are proposed by the Commission and appointed by the Council in consultation with the EP.²⁸⁹

One could critically ask whether the European Parliament, as the main institution to which agencies need to account, should be able to appoint a designate (in some regulations still mentioned as 'representative'²⁹⁰) as this seems to blur their controlling function. The European Parliament has been divided in its wish to designate a representative on the Management Board; with some viewing that this would clash with the Parliament's supervisory role and others considering this a good idea for purposes of information provision and feedback, especially also in view of the large sizes of Management Boards and in cases of shared competence.²⁹¹ Instead of membership of such designates, one could think of the European Parliament having an observer in the Management Board, so that the control function (more information and more awareness of what the agency is doing) will be served best.²⁹²

²⁸⁸ Article 16(2), Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). OJ L 283.

²⁸⁹ See: Art. 25 of Proposal for a Regulation of the European Parliament and of the Council on the transparency and sustainability of the EU risk assessment in the food chain amending Regulation (EC) No 178/2002, Directive 2001/18/EC, Regulation (EC) No 1829/2003, Regulation (EC) No 1831/2003, Regulation (EC) No 2065/2003, Regulation (EC) No 1935/2004, Regulation (EC) No 1331/2008, Regulation (EC) No 1107/2009 and Regulation (EU) No 2015/2283.

²⁹⁰ Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136.

²⁹¹ F. Jacobs, 'EU Agencies and the European Parliament', in M. Everson, C. Monda and E. Vos, *EU agencies in between the institutions and Member States*, Kluwer law International 2014, pp. 221-222.

²⁹² E. Vos, 'European Agencies and the Composite EU Executive', in M. Everson, C. Monda, & E. Vos (Eds.), *European agencies in between institutions and Member States* (pp. 87-122). (European Monographs; No. 85). Alphen aan den Rijn: Kluwer Law International.

EP Involvement		No EP involvement
Representatives	Designates	
	Qualified	Unqualified
EMA, EUIPO, GSA	ECHA ⁺ , EEA [*] , EFSA [*] , EMCDDA [*] , ETF [*]	ACER, ECDC
		APPF, BEREC, CdT, Cedefop, CEPOL, CPVO, EASA, EASO, EBA, ECDC, ECHA, EDPB, EEA, EFCA, EIGE, EIOPA, ELA, EMSA, ENISA, EPPO, ERA, ESMA, EU-LISA, EU-OSHA, Eurofound, Eurojust, Europol, FRA, FRONTEX, SRB

^{*} the EP appoints experts.

⁺ the EP appoints stakeholders.

Table 1: EP Involvement in Management Boards.

11.2. Appointment of the Executive Director

The procedure for appointment of the Executive Director is the area in which the legal practice in the founding regulations deviates most strongly from the Common Approach in favour of parliamentary scrutiny. Pursuant to the Common Approach, the appointment procedure is meant to be simple and apolitical. The director should be appointed by the Management Board on the basis of a list of potential candidates drawn up by the Commission and resulting from a transparent selection procedure.²⁹³ In addition, a Framework Agreement between the European Parliament and the Commission specifies that the 'nominees for the post of Executive Director of regulatory agencies should come to parliamentary committee hearings.'²⁹⁴ This is, however, not reflected in the Common Approach.

Examination of the appointment procedures of the Directors in the founding regulations reveals a broad variety, mounting to no less than 12 appointment procedures.²⁹⁵ In relation to the involvement of the European Parliament, there exist eight main models depending on the appointing authority on the one hand and the degree of influence of the European Parliament on the other. These are summarised in Table 2.

In the first category, the European Parliament is most influential. These are cases in which the selected candidate *shall* be invited to give a statement and answer questions in the European Parliament or its competent committee. To be sure, this does not give any 'real powers' of parliamentary scrutiny. Even if the competent committee were to object the selected candidate, it would have no legal right to ask for his or her replacement. Yet, the hearings can be regarded as a political tool, relying on the visibility of the hearings and the overall relationship between the agency and the EP. In some cases, the Management Board even has to explain how it took the EP's opinion into account or why it deviated from its opinion.²⁹⁶

²⁹³ Common Approach, para 16.

²⁹⁴ Framework Agreement on relations between the European Parliament and the Commission, paragraph 32, OJ L 304/47, 20/11/2010.

²⁹⁵ See K. Siderius and M. Scholten, *Appointment of EU agency directors*, TARN Blog, forthcoming.

²⁹⁶ See the founding act of Frontex, Article 69, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. OJ L 251.

The EP is most powerful in the cases of EBA, EIOPA and ESMA as the European Parliament has to 'confirm' the candidate. In these agencies it is not up to the Management Board, but to the Board of Supervisors, which is comparable to the Management Board in other agencies, to appoint the Executive Director. In addition, the Board of Supervisors also selects its own chair, who is "a full-time independent professional."²⁹⁷ Moreover, a Management Board exists as well, but this is in essence a mere selection of Supervisors who are then given additional responsibilities for the management of the agency (this Board can be compared with the Executive Board proposed in the Common Approach). In the appointment of the Executive Director, the Supervisory Board therefore depends on the 'confirmation' by Parliament. This vague terminology in all likelihood implies that a hearing in the Parliament is also mandatory in these cases and that the European Parliament's opinion has practical relevance. If it refuses confirmation, the candidates cannot be appointed.²⁹⁸

For agencies in the second category, founding acts are less explicit on how much power should be given to the EP. They set out that the candidate selected by the Management Board on the basis of the list of proposals drawn up by the Commission *may* be invited to the EP to make a statement and answer questions. This seems to suggest that there is some degree of discretion for the EP, albeit not for the candidate him- or herself.

Third, there are seven agencies whose founding regulations closely follow the procedure which is literally set out in the Common Approach. In these cases, the Management Board appoints the director on the basis of the list proposed by the Commission whilst the European Parliament is not involved. In the eighth agency in this category, the EPPO, the appointment is also made by the Management Board with no role to play for the European Parliament. However, the proposal comes from the European Chief Prosecutor in lieu of the Commission.

The final categories differ significantly from the Common Approach. In the case of the Single Resolution Board, the role of Executive Director corresponds to that of 'Chair of the Board'. Whilst a hearing is not explicitly mentioned in the founding regulation, it states that the European Parliament has to give its approval before the Council can appoint the candidate, hence potentially implying a hearing. This deviation is surprising because the founding act of the SRB was adopted in 2014 and thus after the Common Approach.

In the case of Cedefop and Eurofound, the appointment is made by the Commission without any involvement of the European Parliament. However, both founding regulations were adopted in 1975 and have last been amended before the Common Approach, which appears to explain the deviation. A similar explanation is also likely in the case of CPVO. The director of this agency is appointed by the Council, again with no role for the EP to play.

The situation is more curious for the mandates of Europol and EUIPO. For both mandates, there has been a recent recast. Nonetheless, appointment is made by the Council on the basis of a proposal by the Management Board and the European Parliament *may* invite the candidate for a hearing. Although the mandates were adopted in 2016 (Europol) and 2017 (EUIPO), the reason for this deviation is probably path dependency. For Europol, the Commission had foreseen in its proposal that the appointment procedure be streamlined with that of other agencies (i.e. the Management Board appoints based on the Commission list and the EP may invite the candidate).²⁹⁹ Yet, the

²⁹⁷ Article 48(1), Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC. OJ L 331/12.

²⁹⁸ For example, hearings were conducted for the re-appointment of the Executive Directors of EBA and ESMA. See: European Parliament, Committee on Economic and Monetary Affairs, Minutes of the Meeting of 17 November 2015, ECON_PV(2015)1117, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-571.746+01+DOC+PDF+V0//EN&language=EN>.

²⁹⁹ Commission Proposal COM 2013(173) final, Article 56.

legislator did not follow this proposal and instead returned to the procedure of the previous founding act.³⁰⁰

In the case of EUIPO, the Commission did not even make such a proposal in the proposal for a recast regulation.³⁰¹ This is probably due to the fact, that it had included this idea in a 2013 proposal for a regulation amending EUIPO's previous founding act.³⁰² Again the legislator had not followed this change and returned to the 'old' system.³⁰³ Yet, in both cases, parliamentary scrutiny is ensured in that the European Parliament may invite the candidates, hence again going beyond the Common Approach.

The above demonstrates deviations from the Common Approach in two directions. First, whilst the Commission is aware of the necessity to adjust existing legislation in the course of a revision, the legislator seems reluctant to change existing organisational structures of agencies. Second, in some respects, legal practice is more favourable with regard to parliamentary scrutiny than what is foreseen in the Common Approach. The document does not mention informal hearings of designated Executive Directors in the EP. Yet, this is an emerging trend in most newly adopted founding acts.

Executive Director	EP confirmation needed	Candidate <i>shall</i> be invited to EP. ³⁰⁴	Candidate <i>may</i> be invited to EP.	No involvement of the EP.
The Management Board appoints on the basis of a list proposed by the Commission.		BEREC, EASA, EASO, ECDC, ECHA, EFSA, EIGE, EMA, EMCDDA, ENISA, ETF, FRA, FRONTEX, eu-LISA	ACER, EMSA, ERA, GSA,	CDT, CEPOL, EEA, EFCA, ELA, EU-OSHA, EPPO, ³⁰⁵ Eurojust,
The Board of Supervisors appoints.	EBA, EIOPA, ESMA			
The Council appoints.		SRB	Europol, EUIPO	CPVO
The Commission appoints.				Cedefop, Eurofound

Table 2: Appointment of the Executive Director.

In some founding regulations of agencies, parliamentary scrutiny of the director is even further strengthened. For a total of 16 agencies, the European Parliament can invite the Director and ask

³⁰⁰ Council Decision (EC) No 2009/371/JHA establishing the European Police Office (Europol) (OJ L 212/37), Article 36(1); now Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135/53), Article 54.

³⁰¹ Commission Proposal COM 2016(702), Article 158.

³⁰² Commission Proposal COM 2013 (016)final, Article 129(2).

³⁰³ Regulation Article 129(2), Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs). OJ L 341/21.

³⁰⁴ In cases where the Board of supervisors appoints, instead of using the standard phrasing, the regulation mentions that the Board shall make its appointment upon „confirmation“ by the EP.

³⁰⁵ In case of the EPPO, the proposal is not made by the Commission, but by the European Chief Prosecutor.

questions about the agency.³⁰⁶ In addition, in the case of Europol, it is the Joint Parliamentary Scrutiny Group that can invite the Director at any time.³⁰⁷ For EASA, the new mandate provides an evaluation hearing in the EP halfway through the Executive Director's term of office.³⁰⁸ Again, this does not grant the European Parliament any particular 'real powers'. Moreover, formally the director is accountable only to the Management Board. However, this procedure nonetheless provides the EP with a possibility to hold the Executive Director accountable for the management of the agency.

It is clear that the Common Approach has not been able to rationalise the appointment procedures of the Director. The existing variety in appointment procedures of the director should therefore be tackled.³⁰⁹ As regards the involvement of the European Parliament, no less than eight different models have been observed. In view that it will not inflict on the agencies' autonomy to involve the European Parliament, but on the contrary, involvement of the European Parliament will enhance agencies' accountability and legitimacy more generally. To this end, one model of how the Parliament should be involved needs to be developed.

11.3. Work Programmes

The adoption and transmission of work programmes is a way to ensure *ex-ante* control of agencies. The Common Approach therefore states that agencies should adopt both annual and multi-annual strategic programmes.³¹⁰ Furthermore, the Commission should be consulted on both documents. The European Parliament only needs to be consulted on the multiannual work programme and should be informed of the annual programme.³¹¹ Yet, this consultation is not binding. In practice, five different models of parliamentary involvement could be detected in the founding acts of the agencies examined. These are summarised in Table 3.

First, the most far-reaching involvement of the EP exists in those cases where the EP is consulted on the agency's multi-annual programme and informed about its annual programme. This corresponds to the requirements set out in the Common Approach. Yet, of all agencies examined, only eight agencies fall into this category. In most of these cases, the mandates have only recently been adopted or amended after the adoption of the Common Approach.³¹²

Second, in six agencies the EP is merely informed both of the annual and multiannual work programmes. The mandates of five of these agencies were adopted prior to the Common Approach. In the cases of EBA, EIOPA and ESMA, the founding acts were amended subsequently, yet the issue of multi-annual or annual work programmes was not touched upon.³¹³ A surprising case in this

³⁰⁶ ACER, CEPOL, EASA, EASO, ECHA, EFSA, EIGE, ELA, EMCDDA, EMSA, ERA, ETF, FRA, FRONTEX, GSA, IT Agency.

³⁰⁷ Article 51, Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. OJ L 135/53.

³⁰⁸ Article 103(3), Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91.

³⁰⁹ K. Siderius and M. Scholten, *Appointment of EU agency directors*, TARN Blog, <https://eutarn.blogactiv.eu/2018/10/11/appointment-of-eu-agency-directors/>.

³¹⁰ Common Approach, para 28.

³¹¹ Common Approach, para 29.

³¹² The mandates were adopted in 2018 (EASA), 2017 (OHIM), 2016 (ERA, Europol, FRONTEX), 2015 (CEPOL), 2010 (GSA, NB: Article 8a concerning work programmes was amended by regulation 512/2014). The only exception is the FRA whose mandate was already adopted in 2007.

³¹³ The most recent amendments took place in 2014 for ESMA (Reg. 2014/51) and EIOPA (Reg. 2014/51) and in 2015 for EBA (Reg. 2015/2366).

category is the proposal of the ELA which was published by the Commission in 2018 and yet does not fully comply with the Common Approach. In this, the European Parliament is only informed of both the annual and multi-annual programme instead of being consulted on the latter as foreseen in the Common Approach.

In the case of ENISA and Eurofound, no mention is made of the European Parliament's involvement in a possible multiannual work programme. Yet, it is consulted on the annual programme. The situation is similar for another seven agencies in the case of which the EP is, however, not even consulted but only informed of the annual programme.

For the largest category of agencies in this comparison, the EP is informed of the annual work programme whereas no mention is made of (EP involvement in) a multi-annual work programme. This is the case for nine agencies.

Finally, there are two categories of agencies, in whose work programmes the European Parliament does not play any role at all. In some cases, it is simply not mentioned that the work programmes shall be submitted to the Parliament. In the case of the CPVO and Eurojust, the requirement to lay down a work programme is not mentioned in the founding regulations at all. However, it should be noted that the mandates of these agencies were largely adopted before the Common Approach. The only exception in this regard is the EPPO.

		No (involvement) multi-annual programme	Multi-annual programme	Multi-annual programme
			EP informed	EP consulted
Annual programme	EP informed	ACER, BEREC, EASO, EFCA, EFSA, EMA, EMSA, eu-LISA, SRB	EBA, ECHA, EIOPA, ELA, EMCDDA, ESMA	CEPOL, EASA, ERA, Europol, FRA, FRONTEX, GSA, OHIM,
Annual programme	EP consulted	ENISA, Eurofound		
No EP involvement: CDT, Cedefop, ECDC, EEA, EIGE, EU-OSHA, EPPO, ETF				
No provision on work programme: CPVO, Eurojust				

Table 3: Annual and Multi-Annual work programmes.

Clearly the variety parliamentary involvement in relation to the work programmes should be addressed. There seems to be no valid reason to differentiate between the involvement (consultation and/or information) of the Parliament in annual and multi-annual work programmes. One model should be applied.

11.4. Annual Report

Mirroring the work programmes, agencies also have to submit a report about their activities. The Common Approach provides for the submission of a Single Annual report to the European Parliament, the Court of Auditors, the Council and the Commission.³¹⁴ The Common Approach also foresees that the political practice of agencies directors presenting their reports to the European Parliament should be continued. In this document, agencies should report on the implementation

³¹⁴ Common Approach, para 49.

of the work programmes as well as budget and staff plans and findings and follow-up measures of audits.³¹⁵ This is in fact foreseen in the mandates of all agencies analysed.

In the founding acts of four agencies, additional requirements are made. The Executive Directors of BEREC and EASO are required to present the annual reports of their agencies to the European Parliament or its competent committee. In the case of CEPOL and EPPO an additional requirement is made that annual reports should also be transmitted to national parliaments.³¹⁶

11.5. Budget

In principle, the procedure is the same for most agencies. For budgetary planning, estimates of the budget are drawn up by the agencies and transmitted to the European Parliament and Council, commonly referred to as 'budgetary authority in this context', which then decide on the appropriations.

For the evaluation of the budget implementation, the report on budgetary and financial management as well as the final accounts for the financial year to be evaluated is first transmitted to the European Parliament. The founding acts further provide that the Executive Director shall submit all information to the European Parliament which is necessary for the proper functioning of the discharge procedure. Finally, the European Parliament, upon recommendation from the Council, grants the discharge to the agency or its director.

The exceptions to this are three fully-self-financed agencies, namely EUIPO, SRB and CPVO. In these cases, the discharge is conducted by internal bodies. This is problematic because, as the Common Approach states, 'they are Union bodies in charge of implementing EU policies but not subject to a discharge within the meaning of the TFEU'.³¹⁷ The Common Approach therefore states that solutions to this should be explored and proposes that these agencies should submit an annual report to the European Parliament, the Council and the Commission with regard to the execution of their budget and take recommendations into account.³¹⁸ For two agencies the EU-legislator has now required EUIPO and SRB to transmit their accounts to the European Parliament, the Commission and the Court of Auditors.

In the 2012 Financial Regulation³¹⁹ which was adopted only three months after the Common Approach, the legislator would have had the possibility to implement the proposal set out in the Common Approach. Article 208(1) of this Regulation delegates to the Commission the power to adopt a Framework Financial Regulation for 'bodies set up under the TFEU and Euratom Treaty', but limits this to those bodies that 'receive contributions charged to the budget', hence excluding fully self-financed agencies. The European Parliament had proposed in its amendments to delete this last part of the sentence, hence broadening the scope of the Commission Delegated Regulation to include self-financed agencies.³²⁰ Yet, this was discarded during the legislative process. Neither did the Commission follow up on this point of the Common Approach in its Roadmap. By contrast, the

³¹⁵ Common Approach, para 47.

³¹⁶ CEPOL: Regulation 2015/2219, Article 9(1)(c); EPPO: Regulation 2017/1939, Article 7(1).

³¹⁷ Common Approach, para 58.

³¹⁸ Common Approach, para 58.

³¹⁹ Regulation 2012/966 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation 1605/2002, OJ L 298/1.

³²⁰ Amendment 241, European Parliament amendments adopted on 26 October 2011 to the proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the Union (COM (2010)0815 – C7-0016/2011 – 2010/0395 (COD)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0465>.

European Parliament did show awareness of this difficulty by organising a workshop.³²¹ Yet, this was not followed up by other initiatives. This situation has remained unchanged in the most recently adopted Financial Regulation.³²² Therefore ensuring democratic accountability for fully self-financed agencies therefore remains challenging.

The Court of Auditors also plays a central role in the budgetary oversight of agencies. It is in principle responsible for examining the accounts of all agencies.³²³ In most cases, it receives both the agency's provisional accounts and the report on budgetary and financial management. It then states its observations on the provisional accounts, which are considered by the Executive Director in drawing up the agency's final accounts. Finally, this latter document is again forwarded to the Court of Auditors together with a response by the Executive Director to the Court of Auditor's observations. In addition, the Common Approach states the possibility for the Court of Auditors to involve private sector auditors 'to remedy [its] lack of resources'.³²⁴ Yet the Court of Auditors remains responsible for the external audit.

11.6. Informal Mechanisms of Parliamentary Scrutiny

In addition to the formal mechanisms of control discussed in this section, the European Parliament has developed a number of informal ways to ensure parliamentary scrutiny of agencies. These largely rely on personal contacts between committees (or their rapporteurs or chairs) and agency representatives. Since these mechanisms are not laid down in legally binding documents, they are largely voluntary in nature and difficult to enforce. Yet, it should be kept in mind that, ultimately, agencies are dependent on the European Parliament for their budgets.

Depending on their respective policy areas, a number of EP committees have established contacts with EU agencies. Jacobs revealed that these contacts are maintained by means of delegation visits to agencies, contact persons in committees, hearings, requests for information and negotiations about the budget.³²⁵ In addition, Busuioc found that also written questions and own initiative reports are commonly used by the EP as an instrument of holding agencies to account.³²⁶

However, following up on agencies' activities in addition to the committee's normal tasks is a time consuming exercise. Moreover, the contacts to agencies are unevenly divided over European parliamentary committees. Ten committees are not linked to decentralised agencies at all.³²⁷ By contrast, the AGRI-, FEMM-, JURI- and PECH-committee have one agency each to maintain contacts with. The TRAN-committee is linked to three agencies, the ECON-, EMPL- and ITRE-committees to five agencies each, the ENVI-committee to five and the LIBE-committee is even responsible for eleven agencies.

³²¹ Workshop on Oversight and Resources of Partially and Fully self-financed agencies, organised by the Policy Department on Budgetary Affairs for the Committee on Budgets and the Committee on Budgetary Control, 4th May 2017.

³²² See Article 70, Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU), No 1316/2013, (EU) No 223/2014, (EU), No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012. OJ L 193/1.

³²³ Article 287(1) TFEU.

³²⁴ Common Approach, para 54.

³²⁵ F. Jacobs, 'EU Agencies and the European Parliament' in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 201-228.

³²⁶ M. Busuioc, *European Agencies: Law and Practices of Accountability*, 2013. Oxford: Oxford University Press, p. 114-155.

³²⁷ AFET, DROI, SEDE, DEVE, INTA, IMCO, REGI, CULT, AFCO and PETI.

NB: The Security and Defence Subcommittee (SEDE) is in contact with three agencies in the field of foreign affairs: the European Defence Agency, the European Union Institute for Security Studies and the European Union Satellite Centre. However, these fall outside the scope of this study.

EP Committee	Agencies
Committee on Agriculture and Rural Development (AGRI)	CPVO
Committee on Economic and Monetary Affairs (ECON)	EBA, EIOPA, ESMA, SRB
Committee on Employment and Social Affairs (EMPL)	Cedefop, ETF, EU-OSHA, Eurofound
Committee on Environment, Public Health and Food Safety (ENVI)	ECDC, ECHA, EEA, EFSA, EMA
Committee on Women's Rights and Gender Equality (FEMM)	EIGE
Committee on Industry, Research and Energy (ITRE)	ACER, BEREC, ENISA, GSA
Committee on Legal Affairs (JURI)	EUIPO
Committee on Civil Liberties, Justice and Home Affairs (LIBE)	CEPOL, EASO, EDPB, EMCDDA, ENISA, EPPO, EU-LISA, Eurojust, Europol, FRA, FRONTEX
Committee on Fisheries (PECH)	EFCA
Committee on Transport and Tourism (TRAN)	EASA, EMSA, ERA

Table 4: EP Committees and EU Agencies.

Busuioc found that these links between agencies and specialised committees are reinforced by the Budget Committee. Budgets for agencies are only released if the specialised committee has given a positive assessment of the agency's performance.³²⁸ By means of this requirement, she argues, the 'Committee on Budgets has 'armed' the specialized committees'.³²⁹ The latter can use this procedure to exert pressure on agencies to cooperate with them. However, whilst this mechanism might be useful for the vast majority of agencies, it cannot solve the problem of the supervision of exclusively self-financed agencies. In these cases, no budget has to be released and, as a consequence, this cannot be used as a means to exert pressure on agencies.

Yet, according to Jacobs, such pressure on agencies might not even be necessary. He argues that agencies do not necessarily have to be forced to establish contacts with the European Parliament, but increasingly seek this contact themselves.³³⁰ He argues that this proactive role of agencies is intended to 'increase their own margin of manoeuvre' by avoiding that they are under the sole control by the Commission. Thus, the interest in closer collaboration might be reciprocal. This would facilitate parliamentary scrutiny despite the limited formal powers of the European Parliament in this regard.

³²⁸ M. Busuioc, *European Agencies: Law and Practices of Accountability*, 2013. Oxford: Oxford University Press, p. 114-155.

³²⁹ M. Busuioc, *European Agencies: Law and Practices of Accountability*, 2013. Oxford: Oxford University Press, p. 136.

³³⁰ F. Jacobs, 'EU Agencies and the European Parliament' in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 201-228.

12. Relevance of the Common Approach in Founding Acts of EU Agencies

The above analysis displays a rather mixed image of compliance with the Common Approach by the founding acts of EU Agencies. The overall compliance is represented by the yellow line in Figure 1. As can be seen, for the budgetary procedure and annual reports, the compliance rate is relatively high. This might be due to the fact that these procedures hardly involve political decisions and can be adapted to any agency, regardless of its field of activity. The only notable exceptions are the two fully self-financed agencies EUIPO and CPVO. Whilst the Common Approach has acknowledged this problem, no further action has been taken to ensure budgetary control.

The composition of the Management Board and Appointment of the Executive Director seem to depend strongly on the tasks of the agency. Deviations notably occur in more politicised fields, such as the financial sector or Europol and Eurojust. Compliance is most problematic for work programmes. Whilst most founding acts do foresee the adoption of work programmes, the requirement that the EP should be consulted on multi-annual work programmes is usually not met.

As stated before, not all founding acts were adopted after the Common Approach. This makes it possible to examine the extent to which the adoption of the Common Approach had an impact on the way in which EU decentralised agencies' mandates are structured. If the Common Approach was influential, compliance rates for newly adopted or recently revised founding regulations should show higher compliance rates than the rate for acts adopted or amended before the Common Approach. This comparison is displayed in Figure 4.

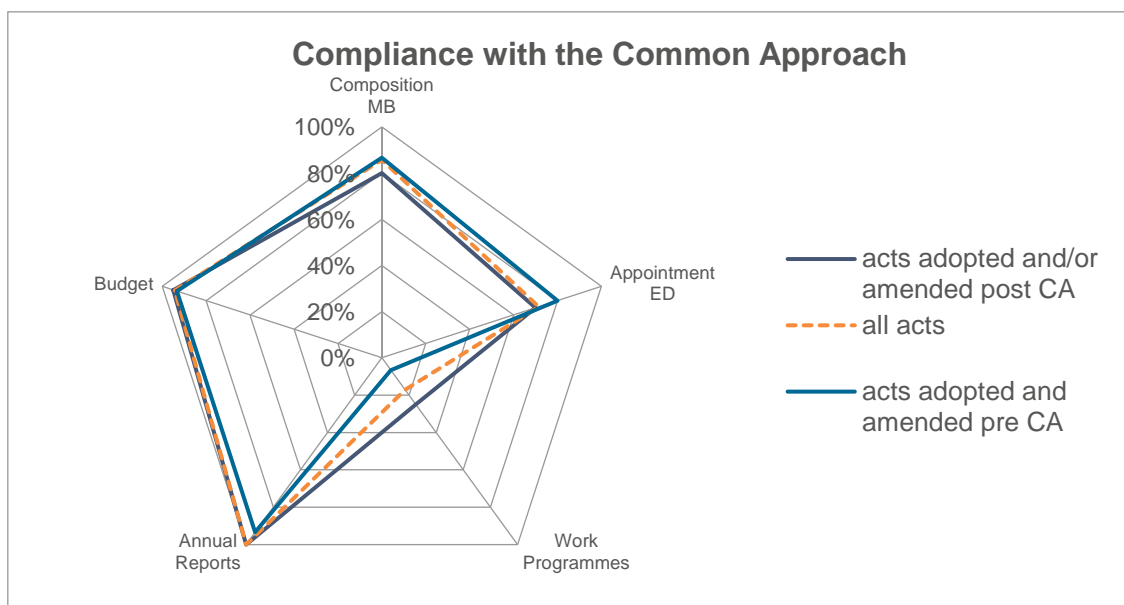


Figure 4: Compliance with the Common Approach.

For acts either adopted or amended after the Common Approach (blue line), there are hardly any differences to the overall picture. Whilst compliance is slightly higher for the adoption of work programmes, it is even lower for the appointment of the Executive Director. For acts adopted and amended prior to the Common Approach it is only the work programme that shows significant deviations in that compliance is lower.

It is noteworthy that two recently adopted mandates deviate entirely from this approach. First, the Authority for European political parties and political foundations (APPF) legally counts as an EU

agency, given that it has legal personality and full independence.³³¹ However, neither does it have its own premises,³³² nor does it comprise any staff members other than its Director.³³³ The latter is appointed by the European Parliament, the Council and the Commission.³³⁴ The regulation does not mention any procedures comparable to those foreseen for other agencies.

Second, the General Data Protection regulation established the European Data Protection Board (EDPB), consisting of the head of each national data protection authority and the European Data Protection Supervisor.³³⁵ The board's legal representative is its chair, elected by the board.³³⁶ Again, the most fundamental procedures foreseen in other founding regulations are not in place for this body. Nonetheless it is formally independent and has legal personality.³³⁷ To be sure, these are very small agencies with a very limited range of tasks. Yet, such exceptions for small agencies were, in principle, not foreseen in the Common Approach.

The question as to why deviations from the Common Approach occur although it is based on a common accord among the European Parliament, the Commission and the Council is difficult to answer in a general manner for all agencies. As demonstrated above, one reason might be practical considerations. Negotiations of mandates are sometimes guided not by what is foreseen in the Common Approach but by what practical requirements necessitate. This is evident above all for the so-called European Supervisory Authorities. Leino found that in these cases, deviation were often explained by reference to the specific requirements of financial regulation.³³⁸

Another reason might lie in political interests and path dependencies. Once established, the management structure of an agency is not easily changed given the potential loss of power involved for some actors. A case in point is the revision of the founding acts of EUIPO and Europol in which the Commission proposed changes in order to align the mandates to the Common Approach, but had to face opposition by the legislator. In a number of proposals, which are still pending, this tension between path dependencies or political interests on the one hand and the desire to comply with the Common Approach on the other becomes evident. Whilst small aspects like a consolidated annual report or a headquarters agreement, are streamlined with the Common Approach, full compliance is not always ensured. In three cases, the Commission explained that some elements were excluded from the review 'pending further evaluation'.³³⁹ The more fundamental problem underlying these complications is, however, the circumstance that the Common Approach 'it is not

³³¹ Articles 6(1) and (2), Regulation (EU, Euratom), No 114/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations. OJ L 317.

³³² It is physically located within the European Parliament. See Article 6(4), Regulation (EU, Euratom), No 114/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations. OJ L 317.

³³³ It uses staff from other EU institutions. See Article 6(5) Regulation (EU, Euratom), No 114/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations. OJ L 317.

³³⁴ Article 6(3), Regulation (EU, Euratom), No 114/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations. OJ L 317.

³³⁵ Article 68(3), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119.

³³⁶ Articles 73 and 68(2), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119.

³³⁷ Articles 69 and 68(1), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119.

³³⁸ Leino, Päivi. "Accountability dilemmas of regulating financial markets through the European Supervisory Agencies". In *Research Handbook on EU Administrative Law*, (Cheltenham, UK: Edward Elgar Publishing, 2017), p. 213-214.

³³⁹ COM(2016)528, COM(2016)532 and COM(2016)531.

the fruit of a genuine common understanding shared between the institutions', as stated by Chamon.³⁴⁰

³⁴⁰ Merijn Chamon (2016), *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*. Oxford: Oxford University Press, p. 52-101.

13. Concluding Remarks and Recommendations

EU decentralised agencies are well-established components of the EU's institutional landscape. The role and position of these agencies within the EU executive fit well in the academic legal thinking on the nature of the EU executive, reinforcing its composite character. Whilst EU agencies were introduced as instruments to further integration and responses to crises, today they give also raise to concern, in particular in relation to their constitutional position and legitimacy; their increasing role at the global level; their hierarchical way of knowledge production, their functional operation and effectiveness in furthering European integration. A few points need to be stressed:

- The notable absence of agencies in the system of Articles 290-291 TFEU raises concerns in relation to the position of agencies in the EU executive. The recognition by the European Court of Justice of the possibility that agencies can be delegated binding decision-making powers can only be a temporary solution and Treaty change would be needed.
- Agencies' tasks may go beyond a mere technical assessment and involve political, economic or social choices. The traditional depoliticised agency model seems thus in the EU to convert into a model of 'politicised depoliticisation'³⁴¹ whereby increasingly agencies are empowered to adopt 'not very' discretionary measures.
- This would require to rethink control and accountability mechanisms on agencies and underlines the need to develop a set of general principles that govern EU agencies, whilst taking into account their heterogeneity.³⁴²
- The Common Approach already sets forth a few provisions, trying to adopt a somewhat broader vision on EU agencies than the fragmented approach followed before and to improve the coherence, effectiveness, accountability and transparency of these agencies.
- The Common Approach has helped to reflect on the position of EU agencies in the EU's institutional landscape. Yet, the findings of the analysis reveal that the Common Approach has not significantly changed the institutional design choices by the European legislator; partly because it merely codifies existing practice, but partly also because it has not always been followed in the adoption or amendment of founding acts.
- It should be considered whether it is worthwhile to continue with the Common Approach in its non-binding format. Whilst the heterogeneity of agencies requires a flexible approach, the differentiated picture that emerges as regards for example the procedure of appointing the Executive Director is not justified by compelling reasons relating to the mandates of agencies. As there is a need for more coherence and consistency, it is advisable to set general provisions and procedures whilst recognising the heterogeneity of EU agencies, e.g. establishing provisions that apply for groups or clusters of agencies. This could be achieved by means of an Interinstitutional agreement.
- Hereby the position of EU agencies in the EU's institutional structure combined with appropriate accountability mechanisms must be carefully reflected upon.

A few points in relation to the Common Approach require further attention:

- The practice displays a rather mixed image of compliance with the Common Approach by the founding acts of EU Agencies. Whilst the Commission seems to be aware of the necessity to adjust existing legislation in the course of a revision, the other institutions seem to have been more reluctant. The political declaration enshrined in the Common Approach thus at times conflicts with legal realities in which path dependencies may play a central role.

³⁴¹ Everson, M., Monda, C. & Vos, E., 'What is the Future of European Agencies?', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 236.

³⁴² See TARN policy brief, no. 1.

- The Common Approach fails to give a definition of decentralised agencies and is silent on the legal basis for the creation of agencies.
- The Common Approach suggests a common naming formula using the terms 'European Union agency for...' in order to provide for transparency. Yet, in practice this is not always adhered to. Interestingly, the recently proposed labour agency is called the European Labour Authority and hence does not conform to this provision in the new Approach. An other example forms the recent amendment of the trade mark regulation where the name OHIM was changed into EUIPO, not referring to the name agency.
- The Common Approach settles at last that representatives of the Member States should be on the Management Boards of agencies. Yet, in practice, the composition of the Management Board and Appointment of the Executive Director seem to depend strongly on the tasks of the agency. Deviations were identified above all in politically sensitive fields, such as Eurojust, Europol and in the case of European Supervisory Authorities.
- In the current practice the Executive Director is mainly accountable to the Management Board, whilst he or she is responsible to the European Parliament and Council only with regards to financial management. To enhance accountability, the Common Approach suggests to make Executive Directors more clearly accountable for performance. It calls therefore to establish tailored performance indicators that allow for effective assessment of the results achieved in terms of objectives. The Commission has subsequently drafted Guidelines on Key Performance Indicators to assess the results achieved by directors. It is not clear whether and how this is implemented in practice.
- It is clear that the Common Approach has not been able to streamline the appointment procedures for the Executive Director. The existing variety in appointment procedures of the Director does not seem to be justified in terms of functions. It would be important to have one standard procedure for the appointment of all agency Directors.
- Independence from commercial interests is underlined by the Common Approach, and elaborated in practice by most agencies. Whilst it is important to recognise that a 'one-size-fits-all' model to deal with conflicts of interest for agencies is not desirable, it is crucial to have a framework on conflict of interests for agencies with similar mandates taking account of the different policy areas.
- Independence from political and national interests is a sensitive and complex issue. In practice, agencies are designed to be dependent on both EU institutions and Member States; agencies are 'in-betweeners'. The requirement of the Common Approach that Member States are represented on agencies' management boards does not hold for the agencies in the financial sector. The supervisory and management boards of these agencies are heads and representatives of national supervisory authorities. This underlines the inadequacy of the current mechanisms on accountability of these agencies.
- The Common Approach provides that agencies should adopt both annual and multi-annual strategic programmes. It provides different roles for the Commission and the Parliament in the drafting of such programmes. The Commission should be consulted on both documents and issue a formal advice on both documents. The European Parliament however needs to be consulted only on the multiannual work programme and should be informed of the annual work programme. This issue needs to be addressed (see below).
- For the budgetary procedure and annual reports, the compliance rate to the Common Approach is relatively high. This might be due to the fact that these procedures hardly involve political decisions and can be adapted to any agency, regardless of its field of activity. The only notable exceptions are the four fully self-financed agencies. The Common Approach has acknowledged this problem, no further action has been taken to ensure budgetary control by the European Parliament. Currently two agencies (EUIPO and SRB) are merely required to transmit their accounts to the European Parliament, the Commission and the Court of Auditors.
- Like its predecessor, also the new Framework Financial Regulation does not apply to 'bodies set up under the TFEU and Euratom Treaty' that 'receive contributions charged to the budget',

hence excluding fully self-financed agencies. Therefore ensuring democratic accountability for fully self-financed agencies therefore remains challenging and should be addressed.

- It may be wondered whether fully self-financed agencies, as EU public bodies, should not be required to propose (part of) their gain to the EU budget.
- The Common Approach underlines the importance for agencies to connect with their stakeholders in accordance with their mandate, EU policy, institutional division of tasks in international relation and Commission's actions. Practice shows a differentiated picture of various, often institutionalised, forms of stakeholder involvement. Such a variety of models is in line with the Common Approach's differentiated approach. It would however be recommendable to streamline the various models of stakeholder participation for agencies that have similar mandates. It may be considered to extend the legal obligation to 'connect' with stakeholder to all agencies.
- The Common Approach does not provide a coherent view on control and accountability mechanisms in relation to the agencies. It is desirable to rethink the current means of control and establish a general view on how agencies should be made accountable.

As regards parliamentary scrutiny of agencies the following can be observed:

- The Common Approach stipulates that the European Parliament may designate one member on the Management Board of an agency, where appropriate (without prejudice to the relevant arrangements for existing agencies). Practice shows that the vast majority of agencies do not make use of this opportunity. This is a positive development as such membership could conflict with the European Parliament's function of control. Instead of membership of designates, the European Parliament could appoint an observer in the Management Board, so that the control function (more information and more awareness what the Management Board is doing) will be served best.
- The procedure for appointment of the Executive Director is the area in which the legal practice in the founding regulations deviates most strongly from the Common Approach in favour of parliamentary scrutiny. Pursuant to the Common Approach, the appointment procedure is meant to be simple and apolitical. The director should be appointed by the Management Board on the basis of a list of potential candidates drawn up by the Commission and resulting from a transparent selection procedure.³⁴³ In addition, a Framework Agreement between the European Parliament and the Commission specifies that the 'nominees for the post of Executive Director of regulatory agencies should come to parliamentary committee hearings.'
- Study of the agencies' founding acts reveals a broad variety of involvement of the European Parliament in the appointment of the Executive Director; with no less than eight different models being observed. It will not inflict on the agencies' autonomy to involve the European Parliament. On the contrary, involvement of the European Parliament will enhance agencies' accountability and legitimacy more generally. The procedure for appointment of the Executive Director is the area in which the legal practice in the founding regulations deviates most strongly from the Common Approach in favour of parliamentary scrutiny. To this end, one standard model of how the Parliament should be involved needs to be developed.
- There is great variety in parliamentary involvement in relation to the work programmes. The Common Approach states that the European Parliament should be consulted only on the multiannual work programme and informed of the annual work programme. Consultation of the Parliament, so the Common Approach views, is an exchange of views and the outcome is not binding on the agency. In relation to the annual work programme, the Common Approach recommends to continue the actual practice of the agency's Director presenting it to the relevant EP committee. The practice of the founding acts of the agencies reveals various models of parliamentary involvement in drafting annual and multi-annual strategic

³⁴³ Common Approach, para 16.

programmes. Whilst most founding acts do foresee the adoption of work programmes, the requirement that the EP is consulted on multi-annual work programmes is generally not met. There seems to be no valid reason however to differentiate between the involvement (consultation and/or information) of the Parliament in annual and multi-annual work programmes and to develop one model of parliamentary involvement.

- The EP has used the discharge procedure as a means of exerting pressure on agency directors; not only in regard financial matters but also in relation to problems of independence of staff or experts working for the agencies. This has appeared to be in practice an effective means of control and has pushed agencies to become more independence from commercial interests and be more transparent.
- Yet, such control instrument does not exist with regards to fully self-financed agencies. As these agencies however are EU public bodies, they should be submitted to budgetary control too; a perhaps a revised discharge procedure. The Common Approach suggests a procedure under which these agencies would submit an annual report on their budget to the Commission, the EP and the Council and receive recommendations from the latter two institutions.
- Informal mechanisms of control by the European Parliament could be strengthened. Agencies are currently divided over the various parliamentary committees according to the various policy areas in which they operate. This results however in an unbalanced division of the agencies over the committees, whilst some agencies perhaps do not receive the needed attention.

14. Annexes

Annex 1: Functions

Name	Function	Legally binding acts?
ACER	Supervision	Yes
APPF	Registration	Yes
BEREC	Cooperation	No
CdT	Operational activities	No
Cedefop	Information	No
CEPOL	Information	No
CPVO	Certification	Yes
EASA	Certification + Scientific/technical expertise	Yes
EASO	Information + Cooperation + operational activities + scientific/technical expertise	No
EBA	Supervision	Yes
ECDC	Information + Cooperation	No
ECHA	Scientific/technical expertise + Registration	Yes
EDPB	Supervision	No
EEA	Information + Scientific/technical expertise	No
EFCA	Operational activities + Cooperation + inspection	No
EFSA	Scientific/technical expertise	No
EIGE	Information + Cooperation	No
EIOPA	Supervision + cooperation	Yes
ELA	Information + inspection + cooperation	No
EMA	Scientific/technical expertise	No
EMCDDA	Information	No
EMSA	Cooperation + Supervision	No
ENISA	Information	No
EPPO	Operational activities	Yes
ERA	Cooperation + Supervision	Yes
ESMA	Supervision	Yes
ETF	Information + Cooperation	No
EUIPO	Registration	Yes
EU-LISA	Operational activities	No
EU-OSHA	Information + Cooperation	No
Eurofound	Information	No
Eurojust	Cooperation+ Operational activities	Yes

Name	Function	Legally binding acts?
Europol	Cooperation + Operational activities	No
FRA	Information	No
FRONTEX	Operational activities	No
GSA	Information	No
SRB	Supervision	Yes

Annex 2: Legal bases

Name	Founding Regulation	Legal basis	Comments
ACER	Reg 713/2009	114 TFEU	Proposal pending to amend legal basis to 194(2) TFEU
APPF	Reg 1141/2014	224 and 294 TFEU	
BEREC	Reg 1211/2009	114 TFEU	
CdT	Council Reg 2965/94	352(1) TFEU	
Cedefop	Council Reg 337/75	352(1) TFEU	Proposal pending to amend legal basis to 166(4), 165(4) and 149 TFEU
CEPOL	Reg 2015/2219	87(2)(b) TFEU	
CPVO	Council Reg 2100/94	352(1) TFEU	
EASA	Reg 2018/1139	100 TFEU	
EASO	Reg 439/2010	74, 78(1)(2) TFEU	Proposal pending to amend legal basis to 78(1) and (2) TFEU
EBA	Reg 1093/2010	114 TFEU	
ECDC	Reg 851/2004	168 TFEU	
ECHA	Reg 1907/2006	114 TFEU	
EDPB	Reg 2016/679	16 TFEU	
EEA	Reg 401/2009	192 TFEU	
EFCA	Council Reg 768/2005	43 TFEU	
EFSA	Reg 178/2002	43, 114, 207, 168(4)(b) TFEU	
EIGE	Reg 1922/2006	19(2), 157(3) TFEU	
EIOPA	Reg 1094/2010	114 TFEU	
EMA	Reg 726/2004	114, 168(4)(c) TFEU	
EMCDDA	Reg 1920/2006	168 TFEU	
EMSA	Reg 1406/2002	100(2) TFEU	
ENISA	Reg 526/2013	114 TFEU	
EPPO	Reg 2017/1939	86 TFEU	
ERA	Reg 2016/796	91 TFEU	
ESMA	Reg 1095/2010	114 TFEU	
ETF	Reg 1339/2008	166 TFEU	
eu-LISA	Reg 1077/2011	74, 77(2)(a) and (b), 78(2)(e), 79(2)(c), 82(1)(d), 85(1), 87(2)(a), 88(2) TFEU	
EU-OSHA	Council Reg 2062/94	352(1) TFEU	Proposal pending to amend legal basis to 153(2)(a) TFEU
EUIPO	Reg 2017/1001	118(1) TFEU	

Name	Founding Regulation	Legal basis	Comments
Eurofound	Council Reg 1365/75	352(1) TFEU	Proposal pending to amend legal basis to 153(2) TFEU
Eurojust	Council Decision 2002/187	82, 83, 85 TFEU	Proposal pending to amend legal basis to 85 TFEU
Europol	Reg 2016/794	88 TFEU	
FRA	Council Reg 168/2007	352(1) TFEU	
FRONTEX	Reg 2016/1624	77(2)(b), 77(2)(d), 79 TFEU	
GSA	Reg 912/2010	188 TFEU	Proposal pending to amend legal basis to 189(2) TFEU
SRB	Reg 806/2014	114 and 294 TFEU	

Annex 3: Sources of Financing

Name	EU Budget	Voluntary contributions MS	Fees/Payment for services	Other
ACER	X	X	X	Legacies, donations or grants
APPF	X			
BEREC	X	X		
CdT			X	
Cedefop	X			
CEPOL	X			
CPVO			X	
EASA	X	X	X	Contributions by participating third countries
EASO	X	X	X	Contributions from associate countries
EBA	X		X	Obligatory contributions from MS public authorities
ECDC	X	X	X	
ECHA	X	X	X	
EDPB	X			
EEA	X		X	
EFCA	X		X	
EFSA	X		X	Contributions from third countries
EIGE	X	X	X	Contributions from third countries
EIOPA	X			Obligatory contributions from MS public authorities
ELA	X	X	X	Contributions from participating third countries
EMA	X		X	
EMCDDA	X		X	Financial contributions from third countries
EMSA	X		X	Financial contributions from third countries
ENISA	X			Financial contributions from third countries
EPPO	X		X	

Name	EU Budget	Voluntary contributions MS	Fees/Payment for services	Other
ERA	X		X	Contributions by participating third countries
ESMA	X		X	Obligatory contribution by MS public authorities
ETF	X		X	
EUIPO			X	
EU-LISA	X	X		Contribution from countries associated with Schengen acquis and Eurodac measures
EU-OSHA	X		X	
Eurofound	X			
Eurojust	X			
Europol	X			
FRA	X			
FRONTEX	X	X	X	Contribution from countries associated with the Schengen acquis
GSA	X			
SRB			X	Contributions by MS institutions, loans, returns on investments

Annex 4: Role of the Commission

	Representation Management Board	Nomination power	Political supervision
ACER	1 rep, non voting	MB + Director + Board of Appeal	Consulted on adoption of annual framework
APPF	/	Appoints Director with EP and Council	/
BEREC	1 rep	/	/
CdT	2 reps	Proposes Director	/
Cedefop	/	Director	Agrees on adoption of annual framework
CEPOL	1 rep	/	Consulted on adoption of annual framework
CPVO	1 rep	Proposes President	/
EASA	1 rep	Proposes Executive Director	Gives opinion before adoption of annual framework
EASO	2 reps	Finds candidates for ED	Gives opinion before adoption of annual framework
EBA	1 rep, non voting	/	/
ECDC	3 reps	Proposes candidates Director	/
ECHA	6 reps	Proposes candidates ED	/
EDPB	1 rep, non-voting	/	/
EEA	2 reps	Proposes ED	/
EFCA	6 reps	Proposes candidates ED	Gives opinion before adoption of annual framework
EFSA	1 rep	Proposes candidates MB + proposes candidates ED	Consulted on adoption of annual framework
EIGE	1 rep	Proposes candidates Director	Consulted on adoption of annual framework
EIOPA	/	/	/
ELA	2 reps	Proposes candidates ED	Gives opinion before adoption of annual framework
EMA	2 reps	Proposes candidates ED	/
EMCDDA	2 reps	Proposes Director	Gives opinion before adoption of annual framework

	Representation Management Board	Nomination power	Political supervision
EMSA	4 reps	Nominates 4 non-voting reps Admin. Board + proposes candidates ED	Gives opinion before adoption of annual framework
ENISA	2 reps in MB, 1 rep in Executive Board	/	Gives opinion before adoption of annual framework
EPPO	/	Proposes members selection panel for European Chief Prosecutor	/
ERA	2 reps	Appoints stakeholders in MB + nominates Board of Appeal + proposes Director	Gives opinion before adoption of annual framework
ESMA	1 non-voting rep in MB and Executive Board	/	/
ETF	3 rep in Governing Board	Proposes candidates Director	Consulted on adoption of annual framework
Eu-LISA	2 reps	Proposes candidates ED	Gives opinion before adoption of annual framework
EU-OSHA	3 reps in Governing Board	Proposes Director	Consulted on adoption of annual framework
EUIPO	2 reps	/	
Eurofound	3 reps	Appoints Director	Agrees on adoption of annual framework
Eurojust	/	Part of selection board Admin. Director	/
Europol	1 rep	/	Gives opinion before adoption of annual framework
FRA	2 reps	Proposes candidates Director	Gives opinion before adoption of annual framework
FRONTEX	2 reps	Proposes candidates ED	Gives opinion before adoption of annual framework
GSA	5 reps in Admin. Board	Proposes candidates ED	Gives opinion before adoption of annual framework
SRB	1 rep, non-voting	Proposes candidates Chair	/

Annex 5: Role of the European Parliament

Agency	Management Board	Executive Director	Work Programme	Annual Report	Oversight budget
ACER	2 members appointed by EP	candidate may be invited (also for extension of term of office)	annual WP submitted to EP	x	discharge procedure
APPF	/	/	no information on WP	/	budget from EP
BEREC	/	candidate shall be invited; EP informed of extension of term of office	annual WP submitted to EP	x	discharge procedure
CDT	/	/	no EP involvement	x	discharge procedure
Cedefop	/	/	no EP involvement	x	discharge procedure
CEPOL	/	/	EP consulted on multi-annual WP annual WP submitted to EP	x	discharge procedure
CPVO	/	/	no information on WP	x	no discharge by EP
EASA (new)	/	candidate shall be invited; may be invited for extension of term of office	EP consulted on multi-annual WP annual WP submitted to EP	x	discharge procedure
EASO	/	candidate shall be invited, MB must inform EP of its decision; for extension: shall be invited	annual WP submitted to EP	x	discharge procedure
EBA	/	confirmation by EP	annual and multi-annual WP submitted to EP	x	discharge procedure
ECDC	2 members appointed by EP	candidate shall be invited	EP not involved	x	discharge procedure
ECHA	2 members appointed by EP	candidate shall be invited	annual and multi-annual WP submitted to EP	x	discharge procedure

Agency	Management Board	Executive Director	Work Programme	Annual Report	Oversight budget
EDPB	/	/	no information on WP	/	no information
EEA	2 members appointed by EP	/	no EP involvement	x	discharge procedure
EFCA	/	/	annual WP submitted to EP	x	discharge procedure
EFSA	EP adopts opinion for appointment of members by Council	candidate shall be invited	annual WP submitted to EP	x	discharge procedure
EIGE	/	candidate shall be invited	no EP involvement	x	discharge procedure
EIOPA	/	confirmation by EP	annual and multi-annual WP submitted to EP	x	discharge procedure
ELA	/	/	annual and multi-annual WP submitted to EP	x	discharge procedure
EMA	2 members appointed by EP; 2 members appointed by Council in consultation with EP	candidate shall be invited	annual WP submitted to EP	x	discharge procedure
EMCDDA	2 members appointed by EP	candidate shall be invited	annual and multi-annual WP submitted to EP	x	discharge procedure
EMSA	/	candidate may be invited (also for extension of term of office)	annual WP submitted to EP	x	discharge procedure
ENISA	/	candidate shall be invited; may be invited for extension of term of office	EP consulted on annual WP, no multi-annual WP	x	discharge procedure
EPPO	/	/	no EP involvement	x	discharge procedure
ERA	/	candidate may be invited (also for extension of term of office)	EP consulted on multi-annual WP annual WP submitted to EP	x	discharge procedure
ESMA	/	confirmation by EP	annual and multi-annual WP submitted to EP	x	discharge procedure

Agency	Management Board	Executive Director	Work Programme	Annual Report	Oversight budget
ETF	3 members appointed by EP	candidate shall be invited; may be invited for extension of term of office	no information on WP	x	discharge procedure
eu-LISA	/	candidate shall be invited (also for extension of term of office)	annual WP submitted to EP	x	discharge procedure
EU-OSHA	/	/	no EP involvement	x	discharge procedure
Eurofound	/	/	EP consulted on annual WP, no multi-annual WP	x	discharge procedure
Eurojust	/	/	no information on WP	x	discharge procedure
Europol	/	candidate may be invited (also for extension of term of office); EP informed of removal from office	EP consulted on multi-annual WP annual WP submitted to EP	x	discharge procedure
FRA	/	candidate will be asked to address EP; may be invited for extension of term of office	EP consulted on multi-annual WP annual WP submitted to EP	x	discharge procedure
FRONTEX	/	candidate shall be invited, EP gives opinion, if deviation MB has to explain its decision to EP	EP consulted on multi-annual WP annual WP submitted to EP	x	discharge procedure
GSA	1 member appointed by EP	candidate may be invited (also for extension of term of office)	EP consulted on multi-annual WP annual WP submitted to EP	x	discharge procedure
OHIM	one member appointed by EP	candidate may be invited	EP consulted on multi-annual WP annual WP submitted to EP	x	no discharge by EP; EP receives biannual reports and annual accounts

Agency	Management Board	Executive Director	Work Programme	Annual Report	Oversight budget
SRB	/	EP is informed of appointment; approval by EP necessary to remove ED from office	annual WP submitted to EP	x	no discharge by EP

Annex 6: Role of the Council

Name	Legislator	Nomination power	Political supervision
ACER	EP + Council	5 reps Admin. Board	Invite ED to report on tasks
APPF	EP + Council	Appoints Director with EP and Com	/
BEREC	EP + Council	/	/
CdT	Council	/	/
Cedefop	Council	1 rep per MS in MB	Approves Rules of Procedure
CEPOL	EP + Council	/	Approves annual work programme
CPVO	Council	President	/
EASA	EP + Council	/	Invite ED to report on tasks
EASO	EP + Council	/	Invite ED to report on tasks
EBA	EP + Council	/	/
ECDC	EP + Council	/	/
ECHA	EP + Council	1 rep per MS in MB	/
EDPB	EP + Council	/	/
EEA	EP + Council	/	/
EFCA	Council	/	/
EFSA	EP + Council	4 reps of organisations in MB + 10 reps in individual capacity	/
EIGE	EP + Council	1 rep per MS in MB	/
EIOPA	EP + Council	/	/
ELA	EP + Council	/	Invite ED to report on tasks
EMA	EP+ Council	4 stakeholder reps in MB	/
EMCDDA	EP + Council	/	/
EMSA	EP + Council	/	/
ENISA	EP + Council	/	Adopt establishment plan agency
EPPO	EP + Council	Appoints the European Chief Prosecutor with the EP + appoints	/

Name	Legislator	Nomination power	Political supervision
		European Prosecutor of each MS	
ERA	EP + Council	/	Invite ED to report on tasks
ESMA	EP + Council	/	/
ETF	EP + Council	/	Hear the ED on any related topic
Eu-LISA	EP + Council	/	Invite ED to report on tasks
EU-OSHA	Council	1 rep per MS in Gov. Board	/
EUIPO	EP + Council	Appoints ED	/
Eurofound	Council	1 rep per MS in MB	/
Eurojust	Council	/	Approves rules of procedure
Europol	EP + Council	/	Receives report on future activities + approves rules of procedures
FRA	Council	1 rep	Approves multi-annual framework
FRONTEX	EP + Council	/	/
GSA	EP + Council	/	/
SRB	EP + Council	Appoints Chair	The Chair may be heard by the Council, at the Council's request, on the performance of the resolution tasks by the Board.

Annex 7: Role of the Member States *vis-à-vis* Agencies

Name	Member States	Member States in MB
ACER	/	/
APPF		/
BEREC	/	One member of each MS
CdT	/	One member of each MS
Cedefop	/	One member of each MS
CEPOL	/	One member of each MS
CPVO	/	One member of each MS
ERA	MS can request training and other activities concerning the application of railway safety and interoperability legislation	One member of each MS
EASA	/	One member of each MS
EASO	/	One member of each MS
EBA	/	/
ECDC	The MS can request a scientific opinion on matters falling within its mission. + MS are part of the Advisory Forum	One member per MS
ECHA	A MS Committee is responsible for resolving potential divergences of opinions on draft decisions proposed by the Agency. The MS competent authorities are involved in the coordination of the substance evaluation process.	One member per MS
EDPB	/	/
EEA	/	One member of each MS
EFCA	The MS can request contractual services relating to control and inspection in Community and/or international waters.	One member of each MS
EFSA	The MS can request scientific opinions on any question within EFSA's mission. + MS are part of the Stakeholder Forum	/
EIGE	/	Eighteen representatives proposed by each MS concerned
EIOPA	/	/
ELA	MS can request the coordination of concerted or joint inspections.	One member of each MS
EMA	MS can request a scientific opinion on any scientific matter concerning the evaluation of medicinal products for human use.	One member of each MS

Name	Member States	Member States in MB
EMCDDA	MS are part of the European Information Network on Drug and Drug Addiction.	One member of each MS
EMSA	/	One member of each MS
ENISA	/	One member of each MS
EPPO	MS nominate candidates for the position of European Prosecutor.	One member of each MS
ESMA	/	/
ETF	/	One member of each MS
Eu-LISA		One member of each MS
EU-OSHA	/	One member of each MS
EUIPO		One member of each MS
Eurofound	/	One member of each MS
Eurojust	MS can request assistance in the coordination of investigations and prosecutions.	One member of each MS
Europol	/	One member of each MS
FRA	/	One member of each MS
FRONTEX	/	One member of each MS
GSA	MS shall cooperate with the GSA on all matters related to security accreditation.	One member of each MS
SRB	/	One member of each MS

Annex 8: Stakeholders

Name	Founding Act	Specific provisions on Stakeholders	Stakeholders in the MB
ACER	Reg 713/2009	/	/
APPF	Reg 1141/2014		
BEREC	Reg 1211/2009	Article 25 Stakeholders' views are taken into account for the Commission's evaluation report.	/
CdT	Council Reg 2965/94	/	/
Cedefop	Council Reg 337/75	/	Article 4 One representative of the employees' organisations from each MS + one rep of employers' organisations from each MS
CEPOL	Reg 2015/2219	/	/
CPVO	Council Reg 2100/94	/	/
EASA	Reg 2018/1139	Article 62 Stakeholders' views are taken into account for the independent external evaluation of the implementation of the Regulation.	/
EASO	Reg 439/2010	Article 51 Stakeholders maintain a close dialogue with the Agency, and are involved in the Consultative Forum for the exchange of information.	/
EBA	Reg 1093/2010	Article 37 Stakeholders are in the Banking Stakeholder Group and are consulted in matters concerning regulatory technical standards and their implementation. It may also submit opinions and advice to the Authority.	/
ECDC	Reg 851/2004	Article 18 Stakeholders are in the Advisory Forum, which shall support the director in ensuring the scientific excellence and independence of activities and opinions of the Centre, and exchange information.	/

ECHA	Reg 1907/2006	Article 76 Stakeholders are in the Forum for Exchange of Information on Enforcement, which coordinates a network of MS authorities, and which supports the coordination and harmonization of ECHA's tasks.	Article 79 Three individuals from interested parties without voting rights
EDPB	Reg 2016/679	/	/
EEA	Reg 401/2009	/	Article 8 Two scientific personalities particularly qualified in the field of environmental protection
EFCA	Council Reg 768/2005	Article 31 Stakeholders are in the Advisory Board which will advise the Executive Director at his request.	/
EFSA	Reg 178/2002	Article 27 Stakeholders are in the Advisory Forum, which shall advise the Executive Director in the performance of his duties under this Regulation, as well as constitute a mechanism for exchange of information and ensure close cooperation between the Authority and the competent bodies in the Member States.	Article 25 Four of the members shall have their background in organisations representing consumers and other interests in the food chain.
EIGE	Reg 1922/2006	Article 11 Stakeholders are in the Experts' Forum, which shall support the Director in ensuring the excellence and independence of activities of the Institute, constitute a mechanism for an exchange of information, and ensure close cooperation between the Institute and competent bodies in the Member States.	/
EIOPA	Reg 1094/2010	Article 37 Stakeholders are in the Stakeholder Group, which shall be consulted on actions concerning regulatory technical standards and implementing technical standards, and guidelines and recommendations. It may also submit opinions and advice to the	/

		Authority on any issue related to the tasks of the Authority.	
ELA	/	Article 24 Stakeholders are in the Stakeholder Group which has advisory functions, and may submit opinions and advice to the Authority.	/
EMA	Reg 726/2004	Article 78 Stakeholders are in contact with the Agency, which may include the participation as observers in the Agency's work.	Article 65 Two representatives of patients' organizations, one representative of veterinarians' organisations.
EMCDDA	Reg 1920/2006	/	Article 9 Two independent experts particularly knowledgeable in the field of drugs
EMSA	Reg 1406/2002	/	Article 11 Four professionals from the sectors most concerned, without the right to vote
ENISA	Reg 526/2013	Article 12 Stakeholders are in a Permanent Stakeholders' Group, which shall advise the Agency in respect of the performance of its activities.	/
EPPO	Reg 2017/1939	/	/
ERA	Reg 2016/796	Article 38 Stakeholders are in a network of representative bodies from the railway sector acting at Union level. Its tasks are the exchange of information, the promotion of good practices, and the provision of data. It may also comment on draft opinions.	Article 47 The MS shall include, without a right to vote, representing at European level, the following stakeholders: railway undertakings; infrastructure managers; the railway industry; trade-union organisations; passengers' and freight customers
ESMA	Reg 1095/2010	Article 37 Stakeholders are part of a Stakeholder Group, which shall be consulted on actions concerning regulatory technical standards and implementing technical standards and guidelines and recommendations. It may also submit opinions and advice to the Authority on any issue related to the tasks of the Authority.	/

ETF	Reg 1339/2008	/	Article 7 Three non-voting experts
Eu-LISA	Reg 1077/2011	Article 19 Stakeholders are in the Advisory Group, which shall provide the Management Board with expertise relating to large-scale IT systems and, in particular, in the context of the preparation of the annual work program and the annual activity report.	/
EU-OSHA	Council Reg 2062/94	/	Article 8 One member representing the employers' organisations from each MS + one member representing the employees' organisations from each MS
EUIPO	Reg 2017/1001	/	/
Eurofound	Council Reg 1365/75	/	Article 6 One member representing the employers' organisations from each MS + one member representing the employees' organisations from each MS
Eurojust	Council Decision 2002/187	/	Article 2 Eurojust shall have one national member seconded by each MS in accordance with its legal system, who is a prosecutor, judge or police officer of equivalent competence
Europol	Reg 2016/794	Article 45 Stakeholders are in the Cooperation Board, which discusses general policy and strategy on data protection. It may also issue opinions, guidelines, recommendations and best practices.	/
FRA	Council Reg 168/2007	Article 10 Stakeholders are in the Fundamental Rights Platform, which shall constitute a mechanism for the exchange of information and	Article 12 One independent person appointed by each MS, having high level responsibilities in an

		pooling of knowledge, as well as to give feedback on the Agency's reports.	independent national human rights institution + one independent person appointed by the Council of Europe
FRONTEX	Reg 2016/1624	Article 70 Stakeholders are in the consultative forum, which assists the executive director and the management board with independent advice in fundamental rights matters and on fundamental rights strategy	/
GSA	Reg 912/2010	/	/
SRB	Reg 806/2014	/	/

Annex 9: Transparency

Name	Founding Act	Transparency
ACER	Reg 713/2009	<p>Article 10 The Agency shall consult extensively and at an early stage with stakeholders, in an open and transparent manner. It shall ensure that the public and any interested parties are given objective, reliable and easily accessible information.</p> <p>All documents and minutes of consultation meetings conducted during the development of framework guidelines shall be made public.</p> <p>Before adopting framework guidelines or proposing amendments to network codes, the Agency shall indicate how the observations received during the consultation have been taken into account and shall provide reasons where those observations have not been followed.</p> <p>The Agency shall make public on its own website, at least the agenda, the background documents and, where appropriate, the minutes of the meetings of the Administrative Board, of the Board of Regulators and of the Board of Appeal.</p>
APPF	Reg 1141/2014	<p>Article 32 The EP shall publish on its website all relevant information and documents regarding European political parties and foundations, as well as rejected applications, including all information relating to financing, donations, and all support provided to them by the EP.</p>
BEREC	Reg 1211/2009	<p>Article 18 BEREC and the Office shall carry out their activities with a high level of transparency, including objective, reliable and easily accessible information.</p>
CdT	Council 2965/94	Reg /
Cedefop	Council 337/75	Reg /
CEPOL	Reg 2015/2219	<p>Article 28 Access to documents rules apply to documents held by CEPOL. (Reg 1049/2001)</p>
CPVO	Council 2100/94	Reg /
EASA	Reg 2018/1139	<p>Article 58 Access to documents rules shall apply to documents held by the Agency. The Agency shall ensure that the public and any interested party are rapidly given objective, reliable and easily understandable information</p>
EASO	Reg 439/2010	<p>Article 42 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)</p>

EBA	Reg 1093/2010	Article 72 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)
ECDC	Reg 851/2004	Article 20 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)
ECHA	Reg 1907/2006	Article 109 To ensure transparency, the Management Board shall, adopt rules to ensure the availability to the public of regulatory, scientific or technical information concerning the safety of substances on their own, in preparations or in articles which is not of a confidential nature.
EDPB	Reg 2016/679	/
EEA	Reg 401/2009	Article 6 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)
EFCA	Council 768/2005	Reg Article 32 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001) The Agency may also communicate on its own initiative in the fields within its mission. It shall ensure in particular that the public and any interested party are rapidly given objective, reliable and easily understandable information with regard to its work.
EFSA	Reg 178/2002	Article 38 The Authority shall ensure that it carries out its activities with a high level of transparency. It shall in particular make public without delay the agendas and minutes of the Scientific Committees and Panels, their opinions, including minority opinions, as well as the information on which they are based, the declarations of interest, the results of its studies, its annual report and requests for scientific opinions which have been refused. In addition, the MB shall hold its meetings in public. Access to documents rules shall apply to documents held by the Agency (Reg 1049/2001)
EIGE	Reg 1922/2006	Article 7 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)
EIOPA	Reg 1094/2010	Article 72 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)
ELA	/	Article 37 Access to documents rules shall apply to documents held by the Agency (Reg 1049/2001). The Authority may also engage in communication activities on its own initiative within its field of competence.
EMA	Reg 726/2004	Article 80 To ensure an appropriate level of transparency, the MB shall adopt rules to ensure the availability to the public of regulatory, scientific or technical information concerning the authorisation or supervision of medicinal products which is not of a confidential nature.

		<p>The internal rules and procedures of the Agency, its committees and its working groups shall be made available to the public at the Agency and on the Internet.</p> <p>The Agency shall also make public members of the Committees and the members of the coordination group, together with their professional qualifications and with the declarations of interests, agendas and minutes from each meeting of the Committees, information relating to the authorization (process), and conclusions of assessments, recommendations, opinions, approvals and decisions taken by the Committees and by the coordination group, the national competent authorities and the Commission.</p>
EMCDDA	Reg 1920/2006	<p>Article 7</p> <p>Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)</p>
EMSA	Reg 1406/2002	<p>Article 4</p> <p>Access to documents rules shall apply to documents held by the Agency (Reg 1049/2001). The Agency may communicate on its own initiative in the fields within its mission. It shall ensure in particular that the public and any interested party are rapidly given objective, reliable and easily understandable information with regard to its work.</p>
ENISA	Reg 526/2013	<p>Article 15</p> <p>Members of the MB, the ED and MS officials shall make a declaration of commitments and interests. The Agency shall ensure that the public and any interested parties are given appropriate, objective, reliable and easily accessible information, in particular with regard to the results of its work. The Management Board, acting on a proposal from the Executive Director, may authorise interested parties to observe the proceedings of some of the Agency's activities.</p>
EPPO	Reg 2017/1939	<p>Article 109</p> <p>Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)</p>
ERA	Reg 2016/796	<p>Article 77</p> <p>Access to documents rules shall apply to documents held by the Agency (Reg 1049/2001). The Agency shall also publish its recommendations, opinions, studies, reports and outcomes of impact assessments on its website. It shall also make public the declarations of interests of the members of the Agency's management and administrative structure listed in Article 46. The Management Board shall adopt measures to ensure that the Agency provides efficient, user-friendly and easily accessible information on its website about railway interoperability and safety processes and about other relevant railway documents.</p>
ESMA	Reg 1095/2010	<p>Article 72</p> <p>Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)</p>
ETF	Reg 1339/2008	<p>Article 4</p> <p>Access to documents rules shall apply to documents held by the Agency (Reg 1049/2001). The Foundation shall make public the</p>

			rules of procedure of the Foundation and its Governing Board, and its annual activities. It may authorise representatives of interested parties to attend meetings of the Foundation's bodies in the capacity of observers.
Eu-LISA	Reg 1077/2011		Article 26 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)
EU-OSHA	Council 2062/94	Reg	/
EUIPO	Reg 2017/1001		Article 113 Access to documents rules shall apply to documents held by the Agency (Reg 1049/2001). The Office's decisions shall be made available online. The Office may also provide online access to judgments of national and Union courts related to its tasks in order to raise public awareness of intellectual property matters and promote convergence of practices.
Eurofound	Council 1365/75	Reg	/
Eurojust	Council Decision 2002/187		Article 39 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)
Europol	Reg 2016/794		Article 65 Access to documents rules shall apply to documents held by the Agency (Reg 1049/2001). Europol shall publish on its website a list of the Management Board members and summaries of the outcome of the meetings of the Management Board.
FRA	Council 168/2007	Reg	Article 17 Access to documents rules shall apply to documents held by the Agency (Reg 1049/2001)
FRONTEX	Reg 2016/1624		Article 74 Access to documents rules shall apply to documents held by the Agency (Reg 1049/2001). The Agency shall communicate on matters falling within the scope of its tasks on its own initiative. It shall make public relevant information including the annual activity report and ensure that the public and any interested party are rapidly given objective, comprehensive, reliable and easily understandable information with regard to its work. It shall do so without revealing operational information which, if made public, would jeopardise attainment of the objective of operations.
GSA	Reg 912/2010		Article 21 Access to documents rules shall apply to documents held by the Agency. (Reg 1049/2001)
SRB	Reg 806/2014		/

Annex 10: Management Boards – Composition and Appointing Authority

Agency	Composition	Appointing Authority
ACER	2 members appointed by COM	Commission
	2 members appointed by EP (no MEP)	EP
	5 members appointed by Council	Council
APPF	-	-
BEREC	1 representative per MS (from independent NRA)	MS
	1 representative Commission	Commission
CDT	1 representative of agencies listed	Agencies
	1 representative per MS	MS
	2 representatives Commission	Commission
	1 representative each of bodies that have agreements with CDT	bodies
Cedefop	1 representative per MS	Council
	1 representative employers' organisation per MS	Council
	1 representative employees' organisation per MS	Council
	2 representatives Commission	Commission
CEPOL	1 representative per MS	MS
	1 representative Commission	Commission
CPVO	1 representative per MS	MS
	1 representative Commission	Commission
EASA	1 representative per MS	MS
	2 representatives Commission	Commission
EASO	1 representative per MS	MS
	2 representatives Commission	Commission
EBA	Chairperson	Chairperson
	head of each national supervisory authority	Supervisory authority
	1 Commission representative	Commission
	1 representative of ECB	ECB

	1 representative of ESRB	ESRB
	1 representative each of other 2 ESAs	ESAs
ECDC	1 designated by each MS	MS
	2 designated by EP	EP
	3 representing Commission	Commission
ECHA	MS representatives	MS
	6 COM representatives	Commission
	3 individual from interested parties	EP
	2 independent persons	EP
EDPB	head of supervisory authority of each MS	MS
	EDPS	EDPS
	1 representative of Commission	Commission
EEA	1 representative per MS	MS
	2 representatives Commission	Commission
	1 representative other participating countries	Other countries
	2 scientific personalities	EP
EFCA	1 representative per MS	MS
	6 representatives Commission	Commission
EFSA	14 members (4 shall have background in consumer organizations or interests in foodchain)	Council (in consultation with EP)
	1 Commission representative	Commission
EIGE	18 representatives	Council (proposal by MS)
	1 representative Commission	Commission
EIOPA	Chairperson	Chairperson
	head of national supervisory authorities	National supervisory authorities
	1 representative Commission	Commission
	1 representative ESRB	ESRB
	1 representative each of other 2 ESAs	ESAs
ELA	1 representative per MS	MS

	2 representatives Commission	Commission
EMA	1 representative per MS	MS
	2 Commission representatives	Commission
	2 EP representatives	EP
	2 representatives patients' organisations	Council (consult EP)
	1 representative doctors' organisation	Council (consult EP)
	1 representative veterinarians' organisation	Council (consult EP)
EMCDDA	1 representative per MS	MS
	2 representatives Commission	Commission
	2 experts in drugs	EP
	1 representative of each country that has an agreement	countries
EMSA	1 representative per MS	MS
	4 representatives Commission	Commission
	4 professionals	Commission
ENISA	1 representative per MS	MS
	2 representatives Commission	Commission
EPPO	European Chief Prosecutor	Council
	1 European Prosecutor per MS	Council
ERA	1 representative per MS	MS
	2 representatives Commission	Commission
	1 representative each of: railway undertakings, infrastructure managers, railway industry, trade-union org., passengers, freight customers	Commission
ESMA	Chairperson	Chairperson
	head of national supervisory authorities	National supervisory authorities
	1 representative Commission	Commission
	1 representative ESRB	ESRB
	1 representative each of other ESAs	ESAs
ETF	1 representative per MS	MS
	3 representatives Commission	Commission

	3 experts	EP
EUIPO	1 representative per MS	MS
	2 representatives Commission	Commission
	1 representative EP	EP
EU-LISA	1 representative per MS	MS
	2 representatives Commission	Commission
EU-OSHA	1 representative per MS	Council
	1 representative employers' organisation per MS	Council
	1 representative employees' organisation per MS	Council
	3 representatives Commission	Commission
Eurofound	1 per MS	Council
	1 representative employers' organisation per MS	Council
	1 representative employee's organisation per MS	Council
	3 representatives Commission	Commission
Eurojust	1 prosecutor/ judge/ police officer per MS	MS
Europol	1 representative per MS	MS
	1 representative Commission	Commission
FRA	1 independent person per MS	MS
	1 independent person by Council of Europe	Council of Europe
	2 representatives Commission	Commission
FRONTEX	1 representative per MS	MS
	2 representatives Commission	Commission
	1 representative per other state participating	Participating states
GSA	1 representative per MS	MS
	4 representatives of Commission	Commission
	1 representative EP	EP
SRB	Chair	Commission proposes, EP approves, Council appoints
	4 fulltime members	

REFERENCES

- Alemanno, A. & Mahieu, S., 'The European Food Safety Authority before European Courts. Some reflections on the judicial review of EFSA scientific opinions and administrative acts', *European Food and Feed Law* 5, 2008, p. 320–333.
- Atanassov, N., 'Accountability of EU Regulatory Agencies', European Parliamentary Research Service, European Parliament, 2015. Available at: <https://epthinktank.eu/2015/03/03/accountability-of-eu-regulatory-agencies/>.
- Besselink, L., *A Composite European Constitution*, Europa Law Publishing, 2007 and Della Cananea, G., *L'Unione Europea. Un ordinamento composito*, Laterza, 2003.
- Busuioc, M. & Groenleer, M., 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives', in Everson, M., Monda C., and Vos, E., (eds.), *European Agencies in Between Institutions and Member States*, Wolters Kluwer, 2014.
- Busuioc, M., *European Agencies: Law and Practices of Accountability*, Oxford University Press, 2013, p. 114-155.
- Busuioc, M., *The Accountability of European Agencies. Legal Provisions and Ongoing Practices*, Eburon, 2010.
- Busuioc, M., Groenleer M. & Trondal, J. (eds.), *The Agency Phenomenon in the European Union. Emergence, Institutionalisation and Everyday Decision-making*, Manchester University Press, 2012.
- Carrera, S., & den Hertog, L., *A European Border and Coast Guard: What's in a name?* CEPS paper, No. 88 / March 2016.
- Chamon, M., 'The empowerment of agencies under the Meroni doctrine and article 114 TFEU: comment on United Kingdom v. Parliament and Council (Short-selling) and the proposed Single Resolution Mechanism', *European Law Review* 39, no. 3, 2014.
- Chamon, M., *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*. Oxford University Press, 2016, p. 52-101.
- Chamon, M., 'The Influence of "Regulatory Agencies" on Pluralisms in European Administrative Law', *Review of European Administrative Law* 5, no. 2, 2012.
- Chamon, M., "EU Agencies: Does the Meroni Doctrine Make Sense?" *Maastricht Journal of European and Comparative Law* 17 (3), 2010, p. 281–305.
- Chiti, E., 'European Agencies' Rulemaking: Powers, Procedures and Assessment', *European Law Journal* 19, no. 1, 2013, p. 93–110.
- Chiti, E., 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', *Common Market Law Review* 46, no. 5, 2009, p. 1395–1442.
- Coman Kund, F., *The international dimension of the EU agencies: Charting a legal-institutional 'twilight zone'*, TARN Working paper 5/2017.
- Committee of Independent Experts in its First Report on 'Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission' of 15 March 1999, para. 9.4.25, available at: < <http://www.europarl.europa.eu/experts/pdf/reporten.pdf> >.
- Council Decision 1999/291/EC, ECSC, Euratom, OJ 1999, L 114/52.
- Council of the European Union, *Outcome of proceedings in the Working Party on General Affairs on 27 May 2005*, ST-9738/05-INIT. Available at: <http://data.consilium.europa.eu/doc/document/ST-9738-2005-INIT/en/pdf>.
- Council Regulation (EEC) 1210/90 [1990] OJ L120/1, as amended by Council Regulation (EC) 933/1999 of 29 April 1999 on the establishment of the European Environment Agency and the European environment information and observation network [1999] OJ L117/1.

- Court of Auditors opinion no. 8/2001 on the Commission's proposal to lay down the statute for executive agencies, OJ 2001, C 345/1.
- Court of Auditors, report on management of conflicts of interest in selected EU agencies, Special report no. 15/2012.
- Craig, P., *EU Administrative Law*, Oxford University Press, 2006.
- Curtin, D. & Dehousse, R., 'EU Agencies: Tipping the Balance?', in Busuioc, M., Groenleer, M., & Trondal, J., (eds.) *The Agency Phenomenon in the European Union. Emergence, Institutionalisation and Everyday Decision-making*, Manchester University Press, 2012.
- Curtin, D., *Executive Power of the European Union. Law, Practices and the Living Constitution* Oxford University Press, 2009.
- Curtin, D., Hofmann, H., & Mendes, J., 'Constitutionalising EU Executive Rule-making Procedures: A Research Agenda', *European Law Journal* Vol. 19, No. 1, 2013, p. 1–21.
- Dąbrowska, P., 'EU Governance of GMOs: Political Struggles and Experimentalist Solutions?', in Sabel, C. & Zeitlin, J. (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford University Press, 2010, p. 177–215.
- De Witte, B. & Beukers, T., 'Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012', *Common Market Law Review* 50, no. 3, 2013, p. 805–848.
- Dehousse, R., 'Delegation of Powers in the European Union: The Need for a Multi-principals Model', *West European Politics* 4, 2008, p. 789–805.
- Dehousse, R., 'Regulation by Networks in the European Community: The Role of European Agencies', *Journal of European Public Policy* 4, no. 2, 1997.
- C-281/10 P, *PepsiCo v. Grupo Promer Mon Graphic SA* [2011] ECLI:EU:C:2011:679.
- C-534/10 P, *Brookfield New Zealand v CVPO and Schniga GmbH* [2012] ECLI:EU:C:2012:813.
- Case 270/12, *UK v. Council and European Parliament* [2014] ECLI:EU:C:2014:18.
- Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR 0011.
- Case 98/80, *Guiseppe Romano v. Institut national d'assurance maladie-invalidité* [1981] ECR 1259.
- Case C-217/04, *United Kingdom v European Parliament and Council* [2006] ECLI:EU:C:2006:279.
- Case T-145/08 *Atlas Transport v* [2011] ECLI:EU:T:2011:213.
- Case T-187/06, *Schröder v CPVO* [2008] ECLI:EU:T:2008:511.
- Case T-411/06, *Sogelma v EAR* [2008] ECLI:EU:T:2008:419.
- Case T-70/05 *Evropaiki Dynamiki v. EMSA*, ECLI:EU:T:2010:55.
- Case T-96/10, *Rütgers Germany GmbH v. ECHA* [2013], ECLI:EU:T:2013:109.
- Joined cases C-101, 102/11 P *Neuman and Galdeano v. José Manuel Baena Grupo SA* [2012] ECLI:EU:C:2012:641.
- Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others* [2005] ECLI:EU:C:2005:449.
- Egeberg, M. & Trondal, J., 'Agencification of the European Union administration: Connecting the dots', TARN working paper no 1/2016.
- Egeberg, M. & Trondal, J., 'EU-level Agencies: New Executive Centre Formation or Vehicles for National Control?', *Journal of European Public Policy* 18, no. 6, 2011.
- Egeberg, M., Martens, M. & Trondal, J., 'Building Executive Power at the European Level: Some Preliminary Findings on the Role of EU Agencies', ARENA Working Paper No. 10, June 2009.

European Agencies Network (EUAN), 2018-2019 Work Programme. Network of EU Agencies under the chairmanship of Frontex and ECDC, p. 8. Available at: https://euagencies.eu/sites/default/files/euan_wp_2018_19_final_.pdf.

European Commission & European Parliament, Framework Agreement on relations between the European Parliament and the Commission, paragraph 32, OJ L 304/47, 20/11/2010.

European Commission, 'Reforming the Commission – Part I and II (Action Plan – White Paper) COM (2000) 200 final, 1 March 2000.

European Commission, 'Shaping the new Europe' (Communication) COM (2000) 154 final, 21 March 2000.

European Commission, 'Code of Good Administrative Behaviour: Relations with the Public', 2000, available at <http://ec.europa.eu/transparency/code/_docs/code_en.pdf>.

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

European Commission, 'European Governance: Better Lawmaking' (Communication) COM (2002) 275 final, 5 June 2002.

European Commission, 'The Operating Framework for the European Regulatory Agencies', COM (2002) 718, 11 December 2002, p. 5.

European Commission, 'Building our Common Future – Policy challenges and Budgetary means of the Enlarged Union 2007–2013 (Communication) COM(2004) 101 final/2, 26 February 2004.

European Commission, Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, COM(2005)59. Available at: http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2005/0059/COM_COM%282005%290059_EN.pdf.

European Commission, Analytical paper on the possibility to create a limited ring-fenced reserve fund for partially self-financed agencies, 2013, https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_analytical_paper_reserve_fund_en.pdf.

European Commission, Communication Handbook for the EU Agencies, 2013. Available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_communication_handbook_en.pdf.

European Commission, Guidelines on the prevention and management of conflicts of interest in Eu decentralised agencies, 2013. Available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_guidelines_on_conflict_of_interests_en.pdf

European Commission, Performance budgeting and decentralized agencies – Guidelines, 2013. Available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_guidelines_performance-budgeting_en.pdf.

European Commission, Communication from the Commission on the guidelines for programming document for decentralised agencies and the template for the Consolidated Annual Activity Report for decentralised agencies (C(2014)9641 final), 2014. Available at: <https://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-9641-EN-F1-1.PDF>.

European Commission, Commission Staff Working Document: Guidelines on key performance indicators (KPI) for directors of EU decentralized agencies, SWD(2015)62 final. Available: <https://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/10102-2015-62-EN-F1-1.PDF>.

European Commission, Guidelines on Key Performance Indicators (KPI) for directors of EU decentralized agencies, (SWD(2015)62 final), 2015. Available at: <https://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/10102-2015-62-EN-F1-1.PDF>.

- European Commission, Progress report on the implementation of the Common Approach on EU decentralised agencies, 2015. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0179>.
- European Court of Auditors, Management of conflicts of interests of selected EU agencies, Special report No. 15/2012.
- European Ombudsman, Case 0775/2010/ANA, Draft recommendation on 07 Dec 2011 - Decision on 23 May 2013.
- European Ombudsman, Special report from the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents, OJ 1998 C44/9. The Lisbon Treaty has formalised this type of control, now laid down in Art. 288 TFEU.
- European Parliament Resolution of 6 September 2001, OJ 2002 C 72 E/331.
- European Parliament, Amendment 241, European Parliament amendments adopted on 26 October 2011 to the proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the Union (COM (2010)0815 – C7-0016/2011 – 2010/0395 (COD)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0465>.
- European Parliament, Report on discharge in respect of the implementation of the budget of the European Union Agencies for the financial year 2010: performance, financial management and control of European Union Agencies, 2011/2232(DEC), Committee on Budgetary Control A7-0103/2012.
- European Parliament Resolution of 15 January 2013, P7_TA-PROV (2013)0004).
- European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP)).
- Everson, M. & Vos, E., 'European Agencies: What About the Institutional Balance?', in A. Łazowski and S. Blockmans, *Research Handbook on Institutional Law of the EU* (Cheltenham: Edward Elgar publishing, 2016), 139–155.
- Everson, M., 'Agencies: The 'Dark Hour' of the Executive?', in H.C.H. Hofmann & A. Türk (eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, (Cheltenham: Edward Elgar, 2009).
- Everson, M., 'Good Governance and European Agencies: The Balance', in D. Geradin, N. Petit & R. Munoz (eds.) *Regulation through Agencies in the EU: A New Paradigm for European Governance*, (Cheltenham, Edward Elgar, 2005).
- Everson, M., 'Independent Agencies: Hierarchy Beaters?', *European Law Journal* 1, no. 2 (1995): 180–204.
- Everson, M., Monda, C. & Vos, E., 'What is the Future of European Agencies?', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014).
- Everson, M., Monda, C., & Vos, E. (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014).
- Geradin, D. & Petit, N., *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, Jean Monnet Working Paper 01/04 (2004).
- Geradin, D., 'The Development of European Regulatory Agencies: Lessons from the American Experience', in D. Geradin, N. Petit & R. Munoz (eds.) *Regulation through Agencies in the EU: A New Paradigm for European Governance* (Cheltenham, Edward Elgar, 2005), 215–245.
- Groenleer, M., *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, Eburon, 2009.

- Hanretty, C., P. Larouche & A. Reindle, *Independence, Accountability and Perceived Quality of Regulators: A CERRE Study* (2012), available at <http://www.cerre.eu/sites/cerre/files/120306_IndependenceAccountabilityPerceivedQualityofNRAs.pdf>.
- Hillion, C., Conferral, Cooperation and Balance in the Institutional Framework of EU External Action, in: Cremona M. (Ed.) *Structural Principles in EU External Relations Law*, (Oxford: Hart Publishing), 2018, p. 117-174
- Hofmann, H.C.H. & Morini, A., 'Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"', *European Law Review* 37, no. 4 (2012).
- Hofmann, H.C.H., 'European regulatory Union? The role of agencies and standards', in: P. Koutrakos and J. Snell (eds.), *Research handbook on the EU's internal market*, (Cheltenham: Edward Elgar publishing), 2017, 460-479.
- Hofmann, H.C.H., 'Mapping the European Administrative Space', *West European Politics* 31 (2008).
- Jacobs, F., 'EU Agencies and the European Parliament' in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 201-228.
- Jacobsson, B. and G. Sundstro m, *Governing State Agencies Transformations in the Swedish Administrative Model*, Scores rapportserie 2007:5.
- Joerges, C., Schepel, H. & Vos, E., *The Law's Problems with the Involvement of Non-governmental Actors in Europe's Legislative Processes: The Case of Standardisation*, EUI Working Paper, Law 99/9 (Florence 1999).
- Keading, M. & Versluis, E., 'EU Agencies as a Solution to Pan-European Implementation Problems', in: M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 73-86.
- Keleman, D.R., 'The Politics of 'Eurocratic' Structure and the New European Agencies', *West European Politics*, 25, no. 4 (2002): 93-118.
- Leino, P. "Accountability dilemmas of regulating financial markets through the European Supervisory Agencies". In *Research Handbook on EU Administrative Law*, (Cheltenham, UK: Edward Elgar Publishing, 2017).
- Lenaerts, K., 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community', *European Law Review* 18, no. 1 (1993).
- Lenaerts, K., 'EMU and the EU's constitutional framework', *E.L. Rev.* 39, no. 6 (2014): 753-769.
- Magnette, P., 'Towards "Accountable Independence"? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model', *European Law Journal* 6 (2000).
- Majone, G., 'The Rise of the Regulatory State in Europe', *West European Politics* 17, no. 3 (1994): 77-101.
- Majone, G., *Regulating Europe* (London: Routledge, 1996).
- Majone, G., 'The New European Agencies: Regulation by Information', *Journal of European Public Policy* 4, no. 2 (1997): 262-275.
- Majone, G., 'Delegation of Regulatory Powers in a Mixed Polity', *European Law Journal* 3, no. 3 (2002).
- Makhasvili, L. & Stephenson, P., 'Differentiating Agency Independence: Perceptions from Inside the European Medicines Agency', *Journal of Contemporary European Research* 9 (2013).
- Marjosola, H., 'Bridging the constitutional gap in EU executive rulemaking: the Court of Justice approves legislative conferral of intervention powers to the European Securities and Markets Authority', *European Constitutional Law Review* 10 no. 3 (2014): 500-527.

- Ott, A., E. Vos & F. Coman Kund, 'European Agencies on the Global Scene: EU and International Law Perspectives', in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 87–122.
- Ottow, A., 'The New European Supervisory Architecture of the Financial Markets', in Everson, C. Monda and E. Vos (eds.), *European Agencies in Between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), 123–143.
- Ottow, A.T. & Lavrijssen, S.A.C.M.; 'Independent Supervisory Authorities: A Fragile Concept', *Legal Issues of Economic Integration* 39, no. 4 (2012): 419–446;
- Pelkmans, J. & Simoncini, M., *Mellowing Meroni: How ESMA can help build the single market*, CEPS commentary, 18 February 2014.
- Rijpma, J.J., 'Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex', in *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making*, eds. M. Busuioc, M. Groenleer & J. Trondal (Manchester: Manchester University Press, 2012),
- Saurer, J., 'Transition to a New regime of Judicial Review of EU agencies', *European Journal of Risk Regulation* 1 (2010):
- Schammo, P., 'The European Securities and markets Authority: Lifting the Veil on the Allocation of Powers', (2011), 48 *CMLR*, 1879–1887.
- Scharpf, F.W., *European Governance: Common Concerns vs. The Challenges of Diversity*, New York Jean Monnet Working Paper 6/01, 2001.
- Scholten, M. & Luchtman, M. (eds), *Law Enforcement by EU Authorities. Political and judicial accountability in shared enforcement*, 2017, Edward Elgar.
- Scholten, M. *The Political Accountability of EU and US Independent Regulatory Agencies*, 2015, Brill, Nijhoff Studies in European Union Law;
- Siderius, K. & Scholten, M., *Appointment of EU agency directors*, TARN Blog, forthcoming.
- Sweet Stone, A. & Thatcher, M., *Theory and Practice of Delegation to Non-Majoritarian Institutions* (2002). Faculty Scholarship Series. Paper 74. http://digitalcommons.law.yale.edu/fss_papers/74.
- Prodi, R., Speech before the European Parliament, 3 October 2002, SPEECH/00/352, see <http://europa.eu/rapid/press-release_SPEECH-00-352_en.htm?locale=EN>.
- TARN Policy Brief, no. 1/2018, forthcoming
- Van Asselt, M.B.A. & Vos, E., 'Wrestling with Uncertain Risks: EU Regulation of GMOs and the Uncertainty Paradox', *Journal of Risk Research* 11, no. 1–2 (2008): 281–300.
- Vos, E., *Institutional Frameworks of Community Health and Safety Regulation, Committees, Agencies and Private Bodies* (Oxford: Hart Publishing, 1999).
- Vos, E., 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', *Journal of Consumer Policy* vol. 23, issue 3, 2000, p. 227–255.
- Vos, E., 'Reforming the European Commission: What Role to Play for EU Agencies?', *Common Market Law Review*, 2000, p. 1113–1134.
- Vos, E., 'Independence, Accountability and Transparency of European Regulatory Agencies', in D. Geradin, N. Petit & R. Munoz (eds.) *Regulation through Agencies in the EU: A New Paradigm for European Governance* (Cheltenham: Edward Elgar, 2005), 120–137.
- Vos, E., 'European agencies and the composite EU executive' in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 11–47.
- Vos, E., 'EU agencies and Independence', in: D. Ritleng (ed.), *Independence and legitimacy in the institutional system of the EU* (Oxford: Oxford University Press, 2016), pp. 206–228.

- Vos, E., *The proposed European Labour Authority: Profile and Governance*, Briefing requested by the EMPL committee of the European Parliament, 2018. Retrieved from: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/619005/IPOL_BRI\(2018\)619005_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/619005/IPOL_BRI(2018)619005_EN.pdf).
- Vos, E. & Wendler, F., 'Food Safety Regulation at the EU Level', in E. Vos & F. Wendler (eds.), *Food Safety Regulation in Europe. A Comparative Institutional Analysis*, (Antwerp-Oxford: Intersentia, 2006), 65–138.

Decentralised agencies were set up on a case-by-case basis over the years, to respond to emerging individual policy needs. They have been operating in very diverse conditions. In 2012, the European Parliament, the Council and the Commission sought to rectify this by adopting a Joint Statement and a comprehensive set of guiding principles – a ‘Common Approach’ – to make the agencies more coherent, effective and accountable.

This study has been prepared in the light of an expected revision of these guiding principles, and provides an analysis of the different decentralised EU agencies according to a number of criteria.

It examines in particular if and how parliamentary scrutiny over decentralised agencies is undertaken, and makes recommendations for reaching a more coherent, efficient and transparent institutional set-up for parliamentary scrutiny of the activities of decentralised agencies

This is a publication of the Ex-Post Evaluation Unit
EPRS | European Parliamentary Research Service

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.



ISBN 978-92-846-3384-5
doi:10.2861/656418
QA-06-18-234-EN-N