

# THE INSTITUTIONALIZATION OF EU AGENCIES: AGENCIES AS 'MINI COMMISSIONS'

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A stream of reviews that take stock of EU governance trends shows that the EU's governance agenda produces mixed results. EU agencies are part of the EU's search for new governance mechanisms. They have not proven to be a break with EU policy-making processes – underpinning administrative stability rather than reform. This article explores the institutionalization of EU agencies. Using the case of the EU's human resources (HR) policy, it concludes that administrative details are important in order to understand the development of EU agencies turning into institutions. The influence of the EU's institutional environment on their operations is so strong that they must operate as 'mini Commissions'. This tight control hinders their institutionalization.

## INTRODUCTION

Judging by the interest in 'new' instruments, it is clear that the EU is witnessing a 'governance turn'. The early years of the EU's governance debate were characterized by fragmentation and non-cumulative theory building (Jachtenfuchs 2001). More recently, a stream of reviews has emerged that takes stock and conceptualizes trends (Treib *et al.* 2007). These reviews discuss a broadening of instruments, including open methods of coordination, networks and agencies. One trend that seems to emerge is that the results of the governance agenda fall behind expectations (for example, Citi and Rhodes 2007; Eberlein and Newman 2008) and the literature has started to provide explanations for this by addressing political leadership, differences in cultural suitability for the alternatives to legislation, and administrative capacities (Schout and Jordan 2008).

What the literature may in fact be revealing is that changes in governance are technically complex administrative and sensitive political institution-building processes. Changes in governance are bound to be time-consuming. This is particularly true of EU administrative modernizations because the organizations are part of precarious multilevel networks (Peterson 2008). This article examines the institutionalization of EU agencies. Representative of 'depoliticization' and independent expertise, agencies were initially seen as a major new development in EU governance (Everson 1995; Majone 1996; CEC 2001). Although EU agencies constitute a mushrooming phenomenon, they have remained weak in terms of their roles and powers and are mainly used to gather information (Yataganas 2001; Gérardin *et al.* 2005; CEC 2008c). Hence, the European Commission and evaluators experience difficulties in defining their 'added value' and a discussion on whether they can be abolished is never far away (CEC 2003, 2008c).

Institutionalization as we used it here follows Selznick's (1957) seminal work on the 'crystallization' of the interactions between organization and environment. In this process, the organization changes into an institution. This change is influenced by many centripetal and centrifugal forces. Selznick himself focuses on the role of leadership, being quite optimistic about its influence and seeing the executive as a driving force in instilling the organization with a sense of purpose (Selznick 2004). In view of internal and external

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pressures on organizations, others are more sceptical about the influence of leadership (for a discussion, see Boin and Christensen 2008).

Selznick's optimism contrasts with the position EU agencies have gained thus far. The hypothesis developed here is that the institutionalization of EU agencies is especially demanding due to a governance system based on highly detailed administrative control and close oversight by their boards composed of Commission and member state representatives. To better understand the changes in EU governance, we need to unravel the complexity and examine the ways in which EU governance develops. The administrative 'details' concerning the EU's agencification involve: the setting-up of work planning and resource allocation mechanisms in relation to the broader Commission programme; building effective reporting and control mechanisms; external communication systems and; human resource policy (the administrative area considered here). Each administrative instrument will have its own particular set of variables relevant for understanding its development and performance. These are the elements that facilitate or frustrate the development of innovations in the EU's administrative system. Hence, rather than diving immediately into leadership contributions in setting values, this study examines the organizational complexity involved in institutionalization by focusing on a seemingly technical detail, that is, the development of a suitable human resource (HR) policy for EU agencies. The actual complexities of the area to which directors need to provide leadership influence whether they can actually make a difference.

The study on the development of HR is part of wider institutionalization research which analyses the influence of the agency's first director; conflicts between the Commission, Council and European Parliament (EP) in formulating general conditions for EU agencies (the failure to arrive at an interinstitutional agreement); and the discharge of the EP (Monda *et al.* forthcoming). This collection of empirical studies also examines the political struggles in the negotiations over revisions to the regulations of EU agencies. It aims to offer further insights into what Selznick's institutionalization involves in the EU context and broaden EU agency literature, which is largely dominated by rational theories in which institutionalization is assumed to be driven by functional incentive mechanisms – for example, principal-agency theories; regulatory state theories (Everson *et al.* 1999; Thatcher 2002). Tarrant and Kelemen (2007), for example, focus on the preferences of the Commission, the EP and the member states. Other theories emphasize the political nature of public sector institutions (Demortain 2008). The institutionalization research reported here tries to be more specific about the actual substance and change processes involved.

The information on which this article is based comes from two sources. Empirical data is used from studies on the development of EU agencies (Schout 2007, 2008). These studies have been based on extensive interviews with agency management (administrative directors, executive directors and work planners), national and Commission officials and MEPs. In addition, since one of the above authors has been responsible for managing HR policy in two EU agencies (Eurojust from 2002 to mid 2006; the EMCDDA from mid 2006 onwards) he has been intimately involved in the evolving discussions on HR policy. This function also implied taking part in 'Heads of Administration' meetings and the related 'Inter-agencies–Commission working group on the implementing provisions to the Staff Regulations'. Awareness of the bias such cooperation may involve has led us to conduct additional interviews in the Commission on the development of HR policy. To ensure a balanced representation, drafts were circulated at different points in time among national

and EU officials and the final version has been read by two senior officials – one from an agency and one from the Commission. Their comments have been incorporated.

To explore the influence of the EU's HR policy on the institutionalization of EU agencies, the section that follows addresses the subject of why the agencies are being created and how they are controlled. We then introduce Selznick's institutionalization theory and why it is relevant to analyse the EU's agencification. To understand how the administrative context of the EU affects the development of agencies and how directors may be able to provide leadership, we then present the EU's HR policy and the detailed constraints it implies. A brief discussion on possible explanations and on how this may influence future institutionalization follows. The final section presents our conclusions.

## EU AGENCIES AND AGENCIFICATION

All (multilevel) administrations need systems for taking the many routine decisions involved in governing market economies and for ensuring reliable and condensed input in policy processes. The EU depends on the Commission for this, in combination with consultants, national experts and comitology. Traditional mechanisms have been highly criticized for being biased and for making EU governance opaque (for a review, see Dehousse 2007). Moreover, primarily from the 1990s onwards, the Commission found it needed new resources without creating an ever-growing apparatus in Brussels. It found the solution by working in subsidiarity-type networks gathering national administrative capacities around small EU agencies. Over the past decade, the cap on Commission staff – now approximately 26,000 civil servants – has implied a diversion of growth in staff towards EU agencies. Finally, setting up agencies is part of a wider trend in national and international administrations, strongly influenced by new public management (OECD 2002). Responding to doubts about the legitimacy and the feasibility of political systems to operate in technologically complex societies, agencies offer the prospect of professional management, independent expertise, and depoliticized decisions (Majone 1996).

An agency can be defined as a decentralized government body with sufficient autonomy to perform its tasks without interference (Wettenhall 2005). In the EU context, agencies are characterized both by their legal personality and by administrative and financial autonomy. The delineation of their responsibilities and the ways in which they are controlled are defined in each agency's Basic Regulation. Any definition is hard to apply in practice since an organization in this category is not always named an 'agency' – it may be called an authority, a centre, and so on. Likewise, the way in which the term 'agency' is used by governments may not fit theoretical definitions. Moreover, given unavoidable interdependencies, 'autonomy' is hard to operationalize. Similarly, distinguishing which EU bodies are agencies is no small matter. There are various ways of categorizing EU agencies. The EP uses a wider definition than the Commission (EP 2006), taking as a starting point the kinds of bodies it should control – including joint undertakings between the Commission and the Council such as the European Space Agency. The Commission, on the other hand, builds on a rather ambiguous distinction between 'regulatory' and 'executive' agencies. In the EU, agencies are not formally called 'institutions', but are usually referred to as 'bodies'. Amidst the potential range of 'EU agencies and bodies' (see Gérardin *et al.* 2005), we deal here only with those bodies set up by the Communities, which have a legal personality and which are subject to the discharge of the EP. These are all subject to the Staff Regulations of Officials and the Conditions of Employment of other servants of the European Communities. The bodies affected are the 26 'decentralized bodies' or 'regulatory agencies'

(CEC2008b). EU agencies have been created in different areas with different levels of 'Europeanization' (Krapohl 2004). Given the multitude of defining factors, EU agencies – and the same holds true for national agencies – come in many shapes and sizes. Using a broad definition, the EP (2006) lists 51 EU agency-type bodies employing some 6,000 members of staff. The 26 agencies in our sample encompass approximately 4,000 full time equivalents (FTEs). Irrespective of definition, it is clear that the number of agencies is increasing.

Apart from differences over definitions and number of agencies, there is some friction concerning their roles. In the 1990s, a trend favoured moving towards new ways of governing in which EU agencies would play independent regulatory roles (Majone 1996; CEC 2001). Originally, the option of 'US type' agencies was still open but, for various reasons, EU agencies did not develop in this direction. Instead, they became more information gathering and processing bodies servicing the Commission as well as the general public (Gérardin *et al.* 2005; CEC 2008c). This included creating soft powers such as 'peer pressure' or 'regulation by information', as is the case of the centres monitoring drugs and drug addiction, and racism.

Discussions over the 'independence' of agencies underline their sensitive positions. The White Paper on EU governance stresses that agencies should have 'a degree of independence' (CEC 2001; emphasis added) whereas in a separate Communication the Commission underlines that independence is '... their real *raison d'être*' (CEC 2002). The 2008 Communication from the Commission underlines that there are 'clear and strict limitations to the autonomous power of regulatory agencies' (CEC 2008b). Terms such as independent and autonomy mark major clashes over the role of agencies in the EU's multilevel administration.

The role confusion that has emerged from these discussions can be illustrated using the aviation safety agency as an example. Its regulation speaks of financial independence and an autonomous budget, whereas in fact many of its financial decisions are taken or approved by the member states and the Commission, all of whom sit on its board. These mechanisms have contributed to major losses for the agency because the board decided, for industrial policy reasons, to lower the fees the industry must pay for certificates. Yet the board, which includes the member states – where in many cases board members are directors of national aviation safety bodies – set the fee that the national experts receive for services provided to the agency at a high rate. Similarly, the EU's trademark body (OHIM) makes huge profits because the board set steep prices for trademark approvals to avoid competition with national trademark bodies. However, industry prefers an EU-wide trademark rather than a version that operates only for the national market. Such financial issues underline the kinds of sensitivities at stake in the relations between agencies, member states and the Commission (Schout 2007; Monda *et al.* forthcoming).

Many of the problems in the design and governance of the agencies date back to the negotiations on their Basic Regulations. Studies of these negotiations show that the Commission's proposal for a new agency can be heavily adapted by member states to minimize competition with existing national systems; task descriptions can, in addition, be turned into compromises regarding their roles while choices are avoided (Everson *et al.* 1999; Everson 2005; Schout 2007, 2008). These constituting negotiations and the controls imposed on them imply that 'more EU agencies' does not mean 'agencification' (in the sense of autonomous and professionally managed bodies). Apart from better information, the added value is still under discussion (ECA 2008; CEC 2008c). Typically, the creation of EU agencies has been inspired by a mix of pragmatic solutions and changes in views

on governance without much precision in their designs (compare Lascoumes and Le Galès 2007).

### GOVERNANCE BY PILING UP CONTROL MECHANISMS

Any public body has to guard its legitimacy in the eyes of the public. Following Scharpf (2003), legitimacy relates to input and output criteria. Input legitimacy concerns the political control on the processes leading to output. Output legitimacy is related to effectiveness, that is, controlling results. In more detail, Curtin (2005) discusses a range of accountability mechanisms applying to EU agencies including hierarchical – or political – supervision. Curtin's discussion includes hierarchical control by politicians and administrative procedures related to approvals for work plans, financial control and HR plans and annual reports; access to justice and boards of appeal. Proper design of control mechanisms is necessary to ensure that agencies fit into the context of the EU's institutional balance and do not upset the relations between the Council and the Commission; that output is effective, transparent and accountable; and that they are useful to the political masters.

The board that is made up of the Commission and member states, organizes the hierarchical supervision of agencies, although some agencies also have representatives in the European Parliament (Jacobs forthcoming). In some agencies, for example the European Monitoring Centre for Drugs and Drug Addiction and the European Medicines Agency, the board is officially called 'management board'. This underlines a bias towards detailed control. Indeed, one agency director commented on the blurring of responsibilities of management and board. The board decides on work plans and budgets and appoints the director on the basis of a shortlist from the Commission.

Boards of agencies suffer from a number of difficulties (CEC 2003; Schout 2007; Monda *et al.* forthcoming). They are extremely large given that the member states all have a seat and the Commission itself can have up to four representatives (CEC 2008b). Moreover, as our interviews show, the member states are often not adequately informed about the items on the agenda; in addition, they usually focus on potential consequences for their own agencies (for example, on the distribution of projects) (Everson *et al.* 1999; Schout 2007). The board members are often national directors who are not involved in the EU agencies on a regular basis. As several interviewees stated, for most decisions, the member states will look to the Commission. Thus, the Commission's influence on the board is much larger than its number of seats (1–4) would suggest. However, there is a broadly shared awareness of the inefficiency of current board arrangements (CEC 2003, 2008b). The board's size, diversity, inclination for micromanagement and lack of focus make it hard for agencies to draw attention to technical details or to take issue with the Commission, a topic expanded upon below.

As regards administrative procedures, EU agencies are subject to, amongst others:

- the Commission's opinion on budget and establishment plan;
- approval by the EP on the budget and establishment plan;
- discharge of the budget by the EP;
- audits by the European Court of Auditors;
- periodical evaluation of agencies;
- financial and Staff regulations.



Those interviewed in the agencies and institutions expressed major concerns as to whether these accountability mechanisms have become too demanding for all concerned. Moreover, the variety of control mechanisms may actually undermine transparency and accountability. As a Commission official commented: an agency can avoid control because it has 'too many trees to hide behind'. This underlines the tension between the need for different kinds of control mechanisms and limiting control to what is useful and feasible.

The Commission considers it important that the public is not given the impression that EU bureaucracy is continually growing, that staff members are overpaid, or resources used illegally or otherwise squandered. The Commission has a particular responsibility to prevent hiccups when it comes to the legitimacy of its agencies since it has to write – and adapt – their constituting regulations. Moreover, the Commission has to defend its annual budget – including the agency budget lines – and in many cases the Commission is the main client of an agency. Ultimately, the Commission is the first one to be called before the EP, the Council or the press when there are problems with an agency. This happened for instance when experts from the agency charged with monitoring racism and xenophobia decided not to publish a report on increasing anti-Semitism and Romano Prodi, President of the Commission from 1999 to 2004, was taken completely by surprise when journalists asked him whether this sensitive information was repressed for political reasons. All in all, then, the Commission feels a direct need for control *vis-à-vis* its own work programme as well as its political responsibility.

The Commission has acknowledged these difficulties concerning the governance of agencies and has produced several Communications where it has tried to get an agreement between the EP and the Council on the major design principles of EU agencies. This endeavour has so far failed, partly due to a lack of a common understanding on design and control issues (CEC 2008b). What remains is a struggle on position and design between the Commission, the EP, the Council, and the agencies. This results in negotiation processes in which traditions and values are being shaped (institutionalized) or in which ideals are being frustrated.

## INSTITUTIONALIZATION AND HUMAN RESOURCES

Selznick (1957) defines an organization as a formal association of individuals based on official mission statements. In the beginning of its life, the organization will be expendable because the tasks can be arranged in different ways. Over time, the organization becomes 'alive' (p. 17) and matures into an institution as it develops an idea of purpose and, beyond the technical requirements, establishes its own value systems. The surrounding environment also starts to recognize its 'distinctive competence' (p. 46) and to respect it because it symbolizes part of the community's aspirations (p. 19). While gaining its specific position in society, the institution becomes 'recalcitrant' – resistant to change – and it is no longer dispensable. The institutionalization process can be understood as a search for autonomy and a fight to limit external control (p. 121). Leadership both prevents the organization from 'drifting' and sets its goals and values (p. 25).

Moe (1986) and Majone (1996) have added to this discussion that the institutionalization of (EU) agencies does not stop with efforts made by the director. The staff is embedded in expert communities so that part of the organization's value system is rooted in external peer pressure. This symbiotic relation between professional staff and director reinforces the external prestige and the stability of the organization. Institutionalization theory may be relevant to explain the immobility in the position of EU agencies. Agencies are

often created as organizations with formal task descriptions. Unclear missions, power struggles between the agencies and EU institutions, budgetary problems, incompatible personalities, and agreeing on effective and efficient supervision are just some of the challenges in the institutionalization process that require leadership. In terms of the EU, various things – the stalemate on an interinstitutional agreement defining the main principles of EU agencies (CEC 2003, 2008c), the limited or at least varying degrees of autonomy of agencies, and the focus on basic information gathering – suggest that leadership here has not been overly successful.

The difficulty in creating a suitable HR system for EU agencies is just one of the areas that bear witness to the struggle for autonomy. The process at work can be extended to apply to the design of agencies more generally. Institutionalization will differ from agency to agency and depend on elements such as the ideas and abilities of the executive director, or the Director-General responsible in the Commission, and the organization's history. However, HR is a horizontal issue applying to all agencies and is organized not by individual DGs, but by DG Admin. Moreover, according to the Commission itself, HR is plainly a problem (CEC 2003, 2008c) and, despite the Basic Regulations, a good illustration of how agencies are not permitted to be independent.

Selznick's institutionalization theory is based on a distinction between 'administrative management' and 'leadership' (p. 4). Management involves applying the 'logic of efficiency' to situations with limited discretion. He moves quickly towards leadership as a driver to change but does not really address what differentiates management from leadership. In the EU context, this distinction may be crucial for understanding the institutionalization of agencies. Their governance systems – with a high level of procedural control and a strong Commission presence on the board – indicate that management is more appreciated than leadership. According to our interviews, the first director of the environment agency encountered many conflicts when trying to define the agency's autonomy by applying a more change oriented leadership style. After his return to the Commission he was given early retirement. His successor focused on being more 'relevant' to the Commission and encouraged 'good relations' (as expressed in interviews). The problems between the environment agency and the Commission were apparently partly due to incompatible personalities, but there were also major differences over the interpretation of the agency's independence (Everson *et al.* 1999). Providing leadership can be painful.

Other than being somewhat excruciating, the existing HR rules prevent institutionalization in three ways. In operational terms, the technical details limit the possibilities for directors to lead due to understaffing. In 2008, only seven out of 26 agencies were relatively comfortable with less than 10 per cent open vacancies; twelve had 10 to 40 per cent unfilled positions and six had between 40 and 60 per cent vacancies (for one of the agencies considered information was not available). Most also face a high staff turnover of 20 to 25 per cent per year. Quite a lot of people are therefore either new to the job or actively orienting themselves to leave. To take one example, as a result of under-staffing, the aviation safety agency has fallen way behind its ambitions and was only half-way to meeting its goal of 600 staff members by 2007. This led to comments in the UK Parliament and in the press that the agency made air traffic in the EU unsafe (House of Commons Transport Committee 2006). The HR situation resulted in comments during the interviews with agency management that the interference in their operations is 'ridiculous'.

The problem is compounded by the fact that HR interacts with other rules. Staff policy plans cover three years, budgets are earmarked, and there are separate rules on which

staff can be employed and for what length of time. In practice this may mean that since all positions and budgets are accounted for, there is little flexibility to hire someone extra when a new project needs to be prepared (for example, in relation to a pre-accession project). Hence, ironically, projects can only be prepared after they are approved – but in order to be approved, they must be prepared. Due to these controls and the way they are interrelated, and despite the generality of the problem and the strong views among agency management, little has changed thus far in terms of adapting to or working around these constraints.

As an example, a French director of Eurostat (a *de facto* rather than a formal agency; see Everson *et al.* 1999), faced with the challenge of preparing statistics on the Euro and enlargement at the end of the 1990s, acted thus. Preparing statistics requires several years, therefore projects have to start ahead of political decisions. Eurostat entered into agreements with (French) statistical bodies to raise funds and initiate projects. Working around the formal rules, a double accounting system and secret bank accounts were used. This reached the press as: 'A vast enterprise for looting Community Funds' (*Financial Times* 16 May 2003). Although three managers were removed from their posts and OLAF (the European anti-fraud office) concluded cronyism and financial irregularities had occurred, no evidence of personal enrichment was found. Thus Majone's (1989) theory on leaders creating room for manoeuvre may be very dangerous from a legitimacy point of view if the rules are tight and intertwined.

Secondly, HR policy encroaches into the development of professional values. Writing before DiMaggio and Powell (1991) introduced isomorphology, Selznick underlines the dangers of uncongenial HR routines introduced from above: 'An organization requiring considerable flexibility in personnel practice may find itself seriously hampered as part of a larger enterprise that must, considering the interest of the whole, enforce more rigid standards' (p. 42). He stresses that this is more than just a 'technical' issue and relates it to the need to create a meaningful staff composition to ensure that the 'social milieu' supports the values the institution needs. Hence, 'personnel policy cannot be dealt with as routine management' (p. 57).

Majone (1996) is also optimistic about the institutionalization of agencies because experts build their own communities so that even politically appointed directors will be socialized in the thinking of the agency rather than be subservient to the board. This assumes that the agency is staffed with professionals embodying expert values. However, HR policy 'places agencies in a competitive disadvantage' when attracting experts (CEC 2008C). One way to fill positions is to work with seconded national experts. However, one cannot assume that civil servants have the same values, networks and level of expertise as experts. Moreover, as our interviews show, member states seldom send their best officials. The inability to attract highly qualified specialists means that agencies find themselves in less of a position to mobilize the expert forces needed to guarantee a professional edge.

The quantity and quality of the experts involved matter when it comes to establishing independent expert values. To give one example, our interviews indicated that the maritime safety agency has a sensitive role in inspecting harbours: its inspection reports are carefully monitored by the Commission to avoid political disturbances. This is quite different from aviation safety where inspections and reports are more open. One explanation for this can be found in staff composition. The aviation safety agency is staffed with technicians who pride themselves on 'safety comes first' whereas the maritime agency relies to a large degree on seconded civil servants, much more accustomed to thinking in terms of political realism (Schout 2008).



Thirdly, according to our interviews, working around resource constraints makes the agencies more dependent on the Commission. Agencies often try to get additional contracts from the Commission so that they can cover more areas and hire temporary staff (and thus better perform their tasks). This situation makes it more important to manage relations with the Commission than to fight for autonomy.

## HUMAN RESOURCE POLICY AND EU AGENCIES

Examining the details of HR policy shows that these policies were not created for agencies *per se*. We now present the detailed constraints the EU's HR policy implies and how it leads to over-control. HR relates to output legitimacy since staff are evidently key in producing high quality products and in building a strong external reputation. It also relates to input legitimacy, that is, the political control on activities and use of resources. EU agencies require highly skilled staff representing a fair distribution between member states to be able to relate to national administrations and cultures and to gather and analyse information received from the member states. Employing suitable international experts involves payment, an international school, career development, and the possibility of granting tenure to maintain expertise. Some EU agencies have specifications in their Regulations that grant them operational independence and power but it is unclear to what extent they can formulate their own HR policy. However, the finer details show that this independence is highly relative. Using Selznick's distinction between leadership and management, the detailed rules hint at the need for leadership but also imply that directors are forced to act as managers. The concept of isomorphology is relevant since the Commission's own operational mechanisms are copied onto the agencies. The work and resource planning instruments of the Commission – including HR – are imposed in order to link the agencies to the Commission's own planning and reporting systems. Hence, managers have to implement the rules.

### The idiosyncrasies of agency staff

Three types of contracts exist for European civil servants: lifetime civil servant contracts (EU officials from the institutions who might be seconded to agencies or directly employed by them), temporary agents (officials working FTE as defined in the establishment plan) and contract agents (officials usually hired for specific projects and not assigned to posts included in the establishment plan). The key document in HR policy discussions is the Staff Regulations and – attached to this – the Conditions of Employment. The Staff Regulations apply to the EU institutions as well as agencies and were designed for the EU institutions, that is, for large organizations with mainly permanent staff. The EU institutions have a total of 37,304 officials and 2,095 temporary staff (CEC 2008a). Agencies, however, are much smaller, with an average of approximately 150 staff members each. Moreover, restricting the figures to the 26 decentralized agencies, they employ 617 permanent officials and 3,310 temporary agents.

The full body of HR rules applies to the biggest agency, the trademark agency (OHIM 643 FTE) as well as the smallest, the European Institute for Gender Equality (20 FTE). Discussions in the meetings of the Heads of EU agencies have repeatedly addressed questions about proportionality and the efficiency of the full body of HR controls.

These figures indicate not just a difference between permanent and temporary staff but a difference between generalists (policy officials with mostly legal backgrounds (Page 1997)) and specialists (for example, on anti-microbial resistance or safety in aircrafts).

This, again, has implications for the applicability of the Staff Regulations since the labour market for experts varies enormously in terms of payment between sectors. The market for translators relevant to the translation agency cannot be compared to that for pharmacists relevant to the medicines agency, and the market for test pilots cannot be compared to that for recent graduates highly motivated to enter the European administration.

## THE LEGAL STRUCTURE OF THE HR POLICY OF EU AGENCIES

Four general principles determine HR policy in EU agencies and help explain why it is so carefully monitored.

1. Agencies should not be a stepping stone for entering the EU administration. Permanent EU officials can work in the agencies as secondees and go back to their institutions, but temporary staff hired by agencies cannot enter the institutions nor should they assume they can move between agencies when their contracts expire.
2. EU agencies are not supposed to grow indefinitely and must remain flexible bodies. The institutions therefore made the decision that EU agencies cannot grant permanent contracts. The establishment plans determine how many positions agencies should have. These plans grant positions for up to five years. Some agencies allow repeated contracts but others renew contracts only once. Although a second renewal is for an indefinite period, this does not mean that the position becomes permanent and contracts can be terminated at short notice. Nor do such indefinite contracts offer the back-up of security entitlements even though contracts may run up to retirement age.
3. The positions follow EU pay scales and temporary staff enter at the lowest relevant scale. This leads to difficulties in paying experts competitive wages – test pilots cannot be hired at a low entry rate. ‘Contract agents’ hired for specific projects are treated in the same way; they do the same work as EU officials or the temporary officials but earn, on average, one third less.
4. EU civil servants working in one of the institutions or agencies should be treated equally (Case C-459/98, P, *Martínez del Peral Cagigal v. Commission*, of 11 January 2001).

The rules and requirements for the fulfilment of permanent posts are listed in the Staff Regulations. Permanent staff members are recruited through an open competition organized by the European Personnel Selection Office. Competitions involve checking formal requirements (at least two languages, EU citizenship and appropriate academic training), written tests and multiple-choice questions on general (EU) knowledge. In addition, there is a written test related to the post concerned and the open competition concludes with an oral examination. The Staff Regulations are composed of 40 pages of basic documents followed by some 80 pages of annexes with detailed guidelines and updates and some additional 40 pages devoted to ‘Conditions of Employment of Other Servants of the European Communities’ (CEOS). The Regulations are regularly updated by ‘implementing rules’. These central EU rules imply meticulous control by defining the details relating to gender equality, payment, additional services related to housing and education of children, and so on.

Relevant for temporary staff (that is, the great majority of agency staff) is the appendix detailing the CEOS. This appendix is, however, silent regarding agencies and hence on

issues such as the recruitment of temporary agents. This suggests that agencies are free to set up their own staff policy and selection procedures. Agencies have tried to avoid the written test on the EU's general structure and history as this is a major obstacle for technical experts. However, the final article of the Staff Regulations (Art. 110) is short, but decisive for EU agencies, since it states that: 'Agencies shall adopt the appropriate implementing rules for giving effect to these Staff Regulations, after consultation of the relevant Staff Committee and in agreement with the Commission'. Hence, the Regulations must be fully implemented – including the written test – and agencies have to submit their HR policy to the Commission for approval.

The Staff Regulations and Conditions of Employment documents have been amended many times and now represent a vast and complex body of rules. These details show the pervasiveness of the Commission's administrative control and the extent to which input legitimacy interacts with output control. Given the multitude of rules and the interrelations between the various sections and annexes, the working group on the implementation of the Staff Regulations distinguished four categories (see below) ranging from those that must be fully respected to those that are not relevant to the agencies. The working group devoted considerable attention to this categorization in order to separate the dead regulations from those that require specific attention and priority.

1. The implementing provisions that agencies must fully adopt by analogy to the Commission's own implementing rules include all rules related to, among others, leave (parental leave, leave due to illness), allowances (for family, household allowance), reimbursements (for medical expenses, travel costs, and so on) and pension rights.
2. Provisions that need technical or formal amendments while maintaining the content as implemented within the Commission. Topics covered include policies on part-time work, job-sharing and the use of leave.
3. This category of implementing provisions relates to those that need substantial amendments. These require a considerable margin of manoeuvre to tailor the rules to real needs. They include requirements for appointing middle managers, rules for dealing with sexual harassment, performance appraisal and promotion regulations.
4. This includes implementing rules that have no compulsory implementation at agency level (including rules on duties of drivers and on professional underperformance, unless the agency has lifetime civil servants among its staff).

According to those interviewed, the total weight of these detailed measures reduces agency flexibility and their appeal on the labour markets. Moreover, the complexity of the system creates considerable confusion since the Staff Regulations, Conditions of Employment and the many annexes are difficult to consolidate. Given the range of rules and the level of detail, none of the agencies have been able to implement all of the Articles.

Recruitment procedures show detailed constraints. The system is so strict that the director has very little leeway for action. Recruitment rules must be modelled on the recruitment of permanent officials, including passing a written test, regardless of post. This written test covers general capacities and language abilities to the extent needed for the performance of the duties concerned; knowledge on European integration and the agency in question; and competencies specific to the position including writing and presentation skills. Such tests are closely related to the generalist nature of the work of policy officials in the institutions yet the agencies have to apply the written test principle

to highly trained temporary experts. As regards language, a second official language is required and for promotion there should be an interest in learning a third language.

A director from an agency concluded that this test is 'absurd' given that the expert already has the necessary qualifications and a proven track record. Moreover, interviewees argued that highly specialized professionals should not 'think European' but think independently; moreover, their tasks do not require them to be familiar with the ins and outs of the European Constitution. In addition, the language requirements have been criticized on professional grounds (for example, the expert concerned may need only English; in addition, the composition of the agency's staff already offers language flexibility).

Similarly, strict interpretation of education allowances creates major difficulties for the agencies since many staff members have children. Evidently, 'equal' treatment of institutions can be interpreted in different ways. The seats of the EU institutions have European schools nearby so that additional educational allowances are not required. However, only ten seats of agencies offer a European school. Staff of most agencies must send their children to international schools. The tuition fee is up to EUR 15,000 per annum, but the rules only allow an education allowance up to EUR 5,652. The strict interpretation of the equal treatment of EU officials prevents the coverage of these costs (Official Journal of the European Union C-273 of 15 November 2007).

## INSTITUTIONALIZATION PRESSURES AND PROSPECTS

Our study on administrative constraints also provides some insight into the intricacies of institutionalization processes in the EU system. Explaining this requires a more detailed examination of the actors and the attempts at change-oriented leadership; however, some conclusions can be drawn. Determining forces in the HR debate, forces which appeared in the interviews, include the Commission's reticence in handing over powers and responsibilities (see also CEC 2003, p. 6) and legal limitations (the Commission is not permitted to hand over powers to other bodies (the 'Meroni doctrine'; see Everson *et al.* 1999)). Moreover, during the constituting negotiations there seems to be a lack of understanding in both the member states and EU institutions of what agencies actually are and how they should be structured in order to operate independently (Schout 2007). Similarly, discussions within the boards of agencies show keen interest in national priorities, but much less realism when it comes to issues related to operations. This results in board decisions that conflict with one another, for example, when decisions are taken both to increase tasks and lower income, while the impact on staffing is not discussed.

Commission officials, who are in the lead when it comes to agency design, seem to simply extrapolate HR policies from EU institutions to the agencies without really knowing the particular needs of agencies. Similarly, the Commission expects the agencies to be treated 'equally', as other EU bodies, irrespective of their particular idiosyncrasies. Moreover, the Commission prefers a harmonized planning system so that the operations of the agencies can be easily incorporated in the Commission's planning and budgets. To some extent, these examples reveal a rational risk-avoiding attitude on the part of the Commission since flexibility in decentralized HR policy might result in negative publicity. Yet, as was stressed several times in the interviews, the institutions are insufficiently aware of the specific challenges involved in formulating workable HR policies when it comes to issues such as educational allowances, mobility, recruitment, and so on.

Partly due to the ongoing discussions in the meetings of HR officials and heads of agencies, and the active involvement of the Commission in these meetings, there is now a growing awareness in the Commission that it needs to take a fresh look at HR issues. Some officials have even hinted that full adherence to Article 110 is not possible and in any case would be a mistake. The HR situation *vis à vis* agencies is not very different from the financial regulations for EU institutions which were imposed in a similar blanket approach on agencies to ensure tight control (Commission Regulation (EC Euratom) No. 652/2008 of 9 July 2008). This regulation proved to be unworkable for EU agencies and was scaled down and tailored to their particular situations. Financial Regulation now takes the form of a framework regulation for agencies that, although based on the existing rules for the institutions, makes allowances according to size, location and tasks. As regards HR policy, however, such discussions are in their infancy and the EU institutions have shown little interest in reforming this part of the agencies' input control. Thorny questions include: what minimum issues must be decided upon centrally; should mobility between agencies be allowed and what demands are reasonable on the agencies with a small (HR) team; and how should agencies be categorized to allow for more specific treatments? Despite the Commission's acknowledgement that flexibility is needed, the same document also emphasized the need for consistency (CEC 2008b). Moreover, the issue seems to be too operational in nature for the European Parliament and for member states sitting on agency boards or when negotiating the interinstitutional agreements of agencies. This diversified environment has made it hard for entrepreneurial directors to gather political momentum.

However, the interviews also show that fear of legal problems – as discussed above, the HR system simply cannot be implemented in full – and concerns over operational inefficiencies, may force the Commission to reconsider the governance of agencies. Only when discussions on HR and related administrative constraints start moving will directors be able to change from administrative managers to leaders.

## CONCLUSIONS

The EU is exploring the use of new governance instruments. Moving beyond earlier criticism that the conceptualization of governance suffers from fragmentation, EU governance research is now identifying specific patterns. One of these relates to the mixed results new instruments generate. This begs explanation and this article has explored the institutionalization of EU agencies to see where things may have become stuck. Since the early 1990s, EU agencies have developed rapidly and they have become a major part of the EU administrative system. Although originally seen as innovations in the EU's governance by depoliticizing and professionalizing policy processes, the EU agencies have not proven, so far, to be a break with EU policy processes – thus they underpin administrative stability rather than reform. As a result, doubts about their added value have remained. Using Selznick's terminology, it is not yet clear whether they are in the process of developing from organizations into institutions – and hence whether they are developing into authorities with the independence they need to function as expert bodies.

This contrasts with Selznick's optimistic institutionalization theory focusing on the director. The conclusion of this study is that we have to be careful in applying his theory to the EU's administrative reality. The HR case presented here is only one of the design elements involved in the governance of EU agencies. It identifies the mechanisms that compound the institutionalization of EU agencies and qualifies what a leader can



contribute. First of all, the influence of the institutional environment on the agencies' HR policy – and with that on the operations of the agencies – is so strong that they have to operate as mini Commissions. Although in need of leadership, there is little the managers of agencies can do. Secondly, the administrative framework influences both the quality and the quantity of experts, and thus HR has an impact on the internal value system and, hence, on external expert power. As a result, what is meant to be administrative modernization remains on a tight leash.

Despite a growing awareness in the Commission that there is a real problem with HR, the concern for input control has prevented a discussion on appropriate conditions in relation to the missions of agencies. Carbon copying the EU's HR system onto much smaller agencies with temporary employees creates the risk of damaging the performance of the agencies and prevents managers from becoming leaders. In the context of the EU's administration, agencies as governance innovation is bound to take a long time and there are many points that may stand in the way of institutionalization.

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