



## Agencification of EU Executive Governance

*Findings of the TARN Jean Monnet Network and implications for the reform of EU governance*

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## Executive Summary

**TODAY** EU agencies are ubiquitous and indispensable governance mechanisms. Sitting ‘in-between’ the Member States and Union institutions, agencies still have no clear legal basis within the Founding Treaties. However, they derive a significant degree of legitimacy from effectively serving national and European policy-making and regulatory communities. This output-legitimacy should of course also be complemented with sufficient throughput-legitimacy, whereby the latter depends on how EU agencies produce output.

**THREE KEY CHALLENGES** nonetheless have to be faced by both EU agencies and the political institutions. In a way, agencies have been a victim of their own success. Indeed, the institutions perceive them as useful instruments to address deficits in policy implementation or as answers to policy crises, resulting in a ‘mushrooming’ of agencies in absence of a clear framework for their establishment and operation. However, a well thought out framework would allow a more considered definition of the mandates of the EU agencies and the (accountability, budgetary, etc.) requirements imposed on them. Today therefore:

1. agencies are fighting to maintain their legitimating efficiency within more stringent budgetary requirements;
2. agencies struggle to balance European and international challenges;
3. agencies are trying to satisfy, an often burdensome and counterproductive, accountability regime.

**THREE OPTIONS** to address these challenges have been identified by TARN during the networking and discoursing with its stakeholders. Short-term reforms in three key areas appear possible and necessary:

1. *Budgetary control:* Agencies should be subject to a performance based budgetary review, which focuses more clearly on output rather than process.
2. *Co-ordination of both internal (European) and external (international) activities:* rather than endorsing the Common Approach on EU agencies, which foresees the possibility of merging existing agencies, TARN discussions point to synergies and efficiency gains that might be unlocked through greater co-ordination of agency activities, especially at international level.
3. *Reviewing accountability mechanisms:* agencies currently suffer an acute accountability overload which impacts upon their efficiency. TARN discussions indicate that accountability mechanisms have become a pro forma process which in some cases detracts from the purpose of accountability in legitimising agency operation. TARN urges a redefinition of applicable accountability mechanisms that reflect a common understanding on the agencies’ role and purpose in the EU administration and which are based on principles of transparency, granting effective means of review and ensure both effective discharge of duties as well as protection of individual rights.

**THE PURPOSE** of this brief is to identify areas where immediate (or short-term) action is possible to rationalise but also enhance EU agencification. The brief nonetheless fully recognizes that the legitimacy of EU agencies and agencification also has to be addressed at a more fundamental level. This aspect is explored in a separate Statement.

## EU Agencies: what are they and why have they become ubiquitous?

European Union (EU) agencies are executive bodies set up by the EU legislature to contribute to the implementation of EU policies, helping the EU institutions proper to concentrate on core policy-making tasks.<sup>1</sup> They are situated 'in between' the Member States and the core EU administration (the Commission), which explains their attractiveness to the Member States.<sup>2</sup> In addition, being physically placed in various Member States, they are presented as a tool for bringing EU bodies closer to citizens, also providing for a fairer geographical distribution of the EU governance structure. EU agencies have their own separate legal personality and a degree of administrative and financial autonomy and work at 'arms' length from the EU institutions.<sup>3</sup>

The first EU agencies date back to the 1970s but, since the EU Founding Treaties lack a legal basis explicitly allowing the establishment of EU agencies,<sup>4</sup> continually adding to constitutional debates over their position and role in the EU system of governance. The legislature was at first timid in establishing and empowering these subsidiary bodies. Over time, this has changed: as the body of EU regulation has become increasingly dense, so has the need for greater administrative integration and cooperation for which EU agencies are excellent and in some areas (e.g. financial services, energy, food safety, medicines, railways, aviation safety, etc.) also indispensable vehicles. Depending on their precise mandate, agencies may contribute to the implementation of EU law by providing the EU institutions and Member States with science based information, by giving operational support to the Member States, by bringing together national authorities in European networks or by regulating sectors of the internal market themselves. Over time, the EU institutions have grown increasingly accustomed to the EU agency instrument, also because it is a very visible response to policy problems or crises.<sup>5</sup>

## EU Agencies: A Victim of their Own Success?

As a result, governance within the EU today would be impossible without the aid of EU agencies. The EU decentralised agencies now number more than 30, working in all areas of EU policy-making. In many of these areas, they have become indispensable both to ensure a proper, effective and efficient application of the EU *acquis* and to allow a further development of the *acquis* that is expertise-based.

However, the proliferation of EU agencies, which some refer to as a 'mushrooming',<sup>6</sup> has also drawn attention to the EU agencies. The success of the agency instrument thereby stands in contrast to the EU institutions' lack of attention for a consistent approach in the agencification of the EU administration. Furthermore, because of their relative autonomy, agencies have always been an object of concern. Efforts made by the EU institutions to ensure that the agencies, despite their autonomy, remain legitimate through the application of a comprehensive series of accountability mechanisms have created their own problems: simply adding on accountability requirements for the agencies to comply with in an ill-thought out way does not lead to more genuine accountability but only to accountability overload and diverts agencies' (limited) resources from the tasks for which they were actually established. Combined with the current horizontal EU cost-saving exercise,<sup>7</sup> agencies' resources available for the fulfilment of their actual core mandate are under pressure.

**The primary problem remains one of ensuring the legitimacy of agency operation within the EU without, at the same time, undermining the operational efficiency of EU agencies.**

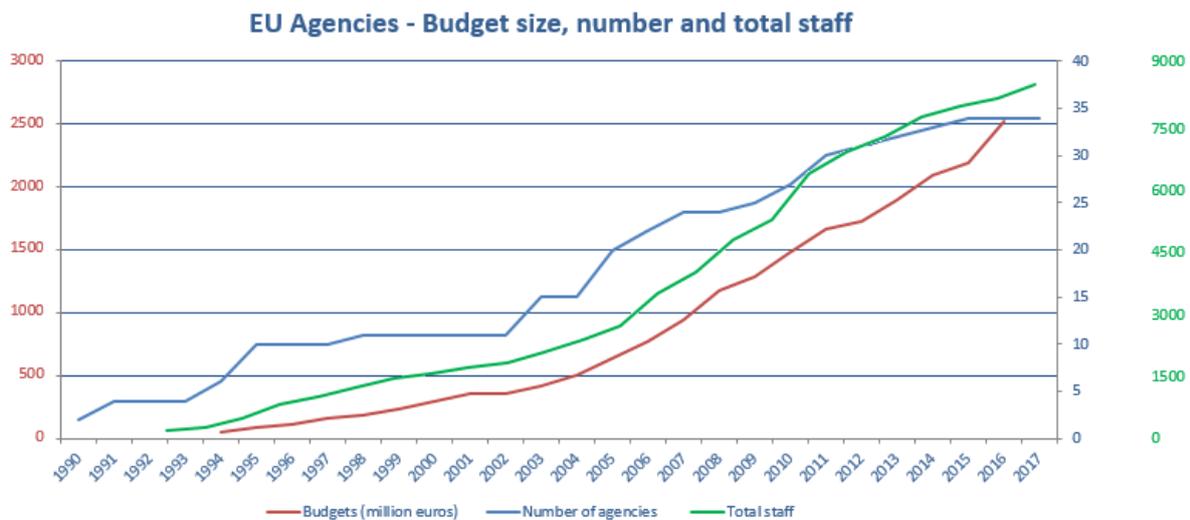


Figure 1. This figure is based on the figures in Merijn Chamon, *op. cit.*, p. 46, complemented by the Court of Auditors' reports on the annual accounts of the EU agencies for the more recent years.

## Heterogeneity in EU agencification

The agency debate has long been characterised by concern about the heterogeneity of agencies. Created on an *ad hoc* basis, if and where regulatory or policy-making demands arose, EU agencies are diverse in their structures, functions and mandates.<sup>8</sup> While structures, functions and mandates should depend on policy needs, which may vary from one policy areas to the next, the current degree of heterogeneity does not reflect genuine differences in policy needs. This exacerbates the problem of accountability and legitimacy. Different structures not only make it harder to establish one unitary mechanism of accountability, such as an EU Administrative Procedures Regulation,<sup>9</sup> but at the same time show the need of a more horizontal approach.<sup>10</sup> Clustering (see below) certain of the agencies' services and functions should be considered as a first possible step in tackling the heterogeneity overload.

In more recent times, efforts have been made to rationalise the functioning of EU agencies.<sup>11</sup> This has been done not just by the EU institutions but also by the agencies themselves. Agencies have set up an informal network of EU agencies to voice their common interests. To this end the agencies have defined three priorities (the so called 'Dublin Agenda'), one of which is the 'sharing of services and capabilities'.<sup>12</sup> One example of this is the 'House of Agencies' bringing together all the agencies' liaison officers stationed in Brussels.<sup>13</sup> The clustering suggested above could take the form of sharing certain agency services and functions, at least within related policy areas.<sup>14</sup> This could be a first feasible step in alleviating problems not only of efficiency but also of accountability, transparency and independence.<sup>15</sup>

## The TARN Network: Dialogue Sessions

TARN is an academic network set up in 2015 to foster and sustain research on agency governance within the EU. The network's main academic component is complemented and enriched by its discussions with EU agencies and EU institutions. Stakeholders collaborating within the network include the EU agencies and the EU agencies network, the European Commission, the European Parliament, the European Ombudsman. TARN's approach is to systematically engage with these stakeholders and to invite them to its academic workshops and conferences.

So far, TARN has also organised three dedicated **dialogue sessions**, held in Brussels, aimed specifically at the stakeholders and designed to discuss the particular issues that mark current agency operations.

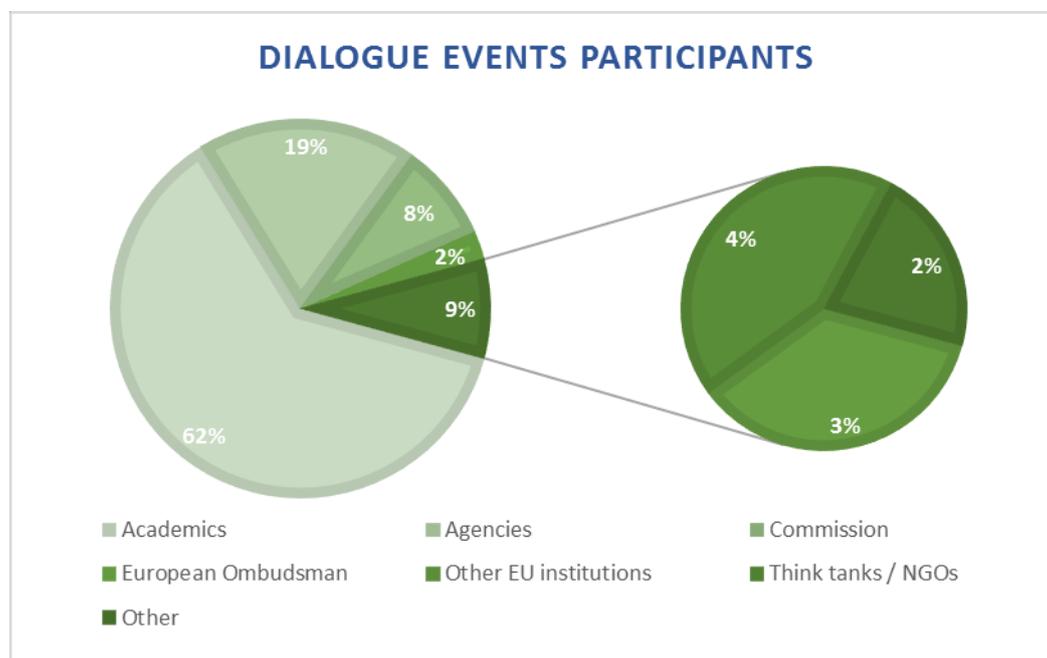


Figure 2. TARN dialogue events participants

Through its dialogue with institutional and agency actors and subsequently disseminating the results of these sessions via the **TARN website**, TARN has identified three unique areas of current concern which form the basis for the policy recommendations made to the EU agency community:

1. Policy consistency and budgetary control – defining agencies’ tasks
2. Co-ordination and legitimacy of agencies’ (external) action– the international dimension
3. Strains on agencies due to multiple and sometimes overlapping accountability mechanisms

**A core insight resulting from the research and dialogue within the network is one that the legitimacy and accountability of agencies is inextricable linked with their efficiency, or ability to perform the tasks assigned to them.**

*Policy consistency and budgetary control: Defining EU agencies’ tasks*

The EU institutions renewed focus on a ‘performance-based’ approach to the pursuit of EU policy-making and regulatory action<sup>16</sup> also translates in their approach to EU agencification<sup>17</sup> and is primarily driven by efficiency and legitimacy concerns. How can the European public be given the best results with the best possible use of resources? In addition, as discussion within TARN Dialogue sessions has revealed,<sup>18</sup> a performance-based approach may also be harnessed in order to augment the accountability of EU agencies, in particular when applied to the budgetary accountability of EU agencies.

Where EU agency actors feel that good performance, or completion of their mandate, is a primary indicator of their functional accountability, ‘performance-based’ budgeting by policy area might be argued to produce its own added value for agency accountability.<sup>19</sup>

Currently, budgetary sign-off for an agency, by the European Parliament and by the Court of Auditors, is the central mechanism within the plural accountability scheme applied to EU agencies. Parliamentary review of agency budgets ensures transparency of agency action to the European citizen and enhances the ‘constitutional legitimacy’ of agency structures within the EU.

The (budgetary) accountability, and hence legitimacy, of EU agencies could nevertheless be significantly increased through further reform. Two suggestions may be made here:

### **Moving away from the current budgetary scheme**

First, we suggest moving away from the current budgetary scheme, whereby agency budgets are treated within the EU budget as a package. It should be fully transformed to treat the budgets of EU agencies as part of the policy area to which they belong. This is already partially foreseen within the existing architecture of the EU budget: the budgets of individual agencies are located within the heading of the multiannual financial framework in which their policy area falls.<sup>20</sup> Implying a policy-based approach to budget allocation, a similar approach to the allocation of agency budgets would allow for a greater measure of accountability review, based on the success (or lack thereof) with which agencies have fulfilled their mandates. Such a policy-based approach would also facilitate greater co-ordination between the activities of agencies working in the same or similar policy agencies.

### **Moving towards performance-based accountability**

Secondly, holding agencies to account based on their performance in realizing policy objectives requires a precise definition of key performance indicators which ought to reflect the agency’s general mandate as defined in its establishing act. Agencies’ mandates should therefore be defined in terms of policy output rather than process.<sup>21</sup> One major obstacle here is that the EU legislature, for legal and political reasons, has defined the powers and responsibilities of EU agencies in a circumspect way, shying away from granting them full regulatory powers. This means that policy output is typically the result of composite procedures<sup>22</sup> involving several actors (EU agencies, the Commission, national authorities). While such procedures may aptly reflect the principle of subsidiarity, they also make it more difficult to link specific output to a specific actor, making it more difficult to hold the actors involved to account.

#### *The International Dimension: Legitimacy and enhanced co-ordination*

The international dimension of EU agency action is underexplored within academic literature. TARN has sought to strengthen current and future research in this area.<sup>23</sup> The preliminary conclusion of this effort so far is that agencies’ external action and international co-operation, for example in the field of international risk management, is a crucial development.<sup>24</sup> Furthermore, having in mind ‘reflection phase’ the EU is going through and wide ‘enlargement fatigue’ among member states, decentralised agencies might become even more important factor in cooperation and rule transfer to (potential) candidate countries and those states covered by EU Neighbourhood policies.

The TARN dialogue events have revealed the following two areas in which immediate improvements might be made, in order to optimise the international activities of EU agencies:



### *Agencies under strain: the accountability overload*

A recurring theme within TARN Dialogue sessions has been the ‘problem’ of agency accountability.<sup>28</sup> Accountability has always formed a key part of the legitimacy scheme for agencies: agencies may act autonomously only to the degree that they remain ‘accountable’ to all of their principals or stakeholders.<sup>29</sup> Over the 30 odd years of operation of EU agencies, a dense scheme of accountability has been developed in order to call EU agencies to account.

However, with the growth in tasks and functions of EU agencies, their continuing heterogeneity and the increased burdens of data management, ‘accountability’ is more like an imposition upon agencies rather than an essential mechanism, ensuring institutional and public trust in their activities.

The accountability overload must be regarded as an urgent problem to be addressed with due regard to:

- The functions, structures and size of individual agencies;
- A coherent approach in the rules and principles that apply to EU agencies, for instance including a horizontal approach to the prevention of conflicts of interest;
- The interplay between the precise definition of an agency’s mandate and to which extent (and for what) an agency can be held to account;
- The exact purposes of individual accountability mechanisms (control vs legitimacy);
- The need to ensure that agencies are able to perform the tasks entrusted to them, and not be overwhelmed by *pro forma* accountability procedures;
- The need to craft new accountability mechanisms, which properly reflect the full range of EU agency activity, including their growing task of assisting member states in regulation and policy making at national level (ensuring there is no accountability deficit or ‘underload’);
- Recent evolutions in public administration practice, including measures of reputational risk management, to ensure continuity of public trust in the process of public policy-making and regulation.



*‘A question to ask is how accountable we want agencies to be, as this seemingly influences the kind of accountability that we want. In practice we see how agencies are often burdened with rules to ensure “accountability” and an automatic reflex to malpractices or misconduct is come up with even more rules “to ensure that it never happens again”. However, EU agencies do not need more rules; they need coherence in the rules that already exist, as these are often in conflict. We should consider in this regard that accountability should not be equated with terms such as compliance, transparency, and streamlining. These are instruments of control, not of accountability. In fact, these instruments can even work to the detriment of accountability. Accountability should be tailored to the specific tasks that the agencies fulfils and the risks that are associated with that task. One size does not fit all in light of the vast differences that exist between EU agencies. Therefore, we should better specify and classify what it is that we are actually talking about when referring to this widely differing class of public organizations.’*

Dialogue Session, Brussels, 21 September 2017

## Implications for agency governance and policy recommendations

Drawing the necessary implications from the findings on the three key areas of concern identified above, the following policy recommendations can be made:

### **Budgetary control**

The reform of the budgetary procedure in line with activity based budgeting should be stepped up with a special focus on evaluating the agencies' activities in light of policy output. This will require the definition of agency-tailored key performance indicators that do not exclusively or predominantly focus on process as is presently the case, but rather on output. Ultimately this should elicit a reflection among and between stakeholders on a possible simplification of the often complex composite procedures currently in force. This simplification ought to be in line with the principle of subsidiarity but might result in granting EU agencies greater powers. This possibility ought to be contemplated when and if a sound but lean and coherent system of accountability mechanisms is put in place (see below).

### **Co-ordination of (external) activities**

While the Common Approach on EU agencies foresees the possibility of merging existing agencies, such a radical approach does not seem necessary to unlock possible synergies and efficiency gains. The possibilities of further coordination of activities (both administrative and in terms of policy) should be explored. This also applies for the EU agencies' external relations which are often ancillary, but necessary, complements to the agencies' core internal mandate. While the Common Approach aims to make sure that EU agencies are not seen to represent the EU, a coordination of agencies' external relations (with the Commission and between the agencies) is still vital. Finally, in those limited cases when external representation of the EU by the agencies is needed for practical reasons, it should be regulated in a manner that is not overburdening for the operation of the agencies but allows for a control by institutions and member states.

### **Reviewing accountability mechanisms**

The myriad of accountability mechanisms currently imposed on EU agencies is not informed by a fully considered idea of where EU agencies fit in the EU's institutional architecture. Instead, layer upon layer of accountability mechanism have been imposed, in some cases frustrating the efficient functioning of the EU agencies. It therefore seems essential to redefine the applicable accountability mechanisms. Which mechanisms are necessary ought to be informed by a common understanding on the agencies' role and purpose in the EU administration. This question was left open by the Common Approach. The EU institutions should thus go back to the drawing board, reflecting on this fundamental issue and drawing the necessary conclusions for the accountability framework for EU agencies. Ideally the result of this thought exercise should be reflected in a reinforced and upgraded Common Approach on Decentralised Agencies.

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<sup>1</sup> See the Joint Statement of the European Parliament, Council and Commission accompanying the Common Approach on EU Decentralised Agencies.

<sup>2</sup> Michelle Everson, Cosimo Monda & Ellen Vos, *European Agencies in between Institutions and Member States*, in: Everson, Monda & Vos, *European Agencies in between Institutions and Member States*, Alphen aan den Rijn, Kluwer Law International, 2014, pp. 3-7.

<sup>3</sup> The autonomy or independence of EU decentralised agencies has become a research field in its own right, see Martijn Groenleer, *The autonomy of European Union agencies: a comparative study of institutional development*, Delft, Eburon, 2009, 432 p; Maria Martens, *Voice or Loyalty? The Evolution of the European Environment Agency (EEA)*, (2010) 48 *JCMS* 4, 881-901; Arndt Wonka & Berthold Rittberger, *Credibility, complexity and uncertainty: explaining the institutional independence of 29 EU agencies*, (2010) 33 *WEP* 4, pp. 730-752; Ellen Vos, *EU agencies and independence*, in Ritleng (ed.), *Independence and legitimacy in the institutional system of the European Union*, Oxford, OUP, 2016, pp. 206-227.

<sup>4</sup> The only exceptions here are the European Defence Agency, Europol, Eurojust and the European Public Prosecutor. See Articles 45 TEU and 85, 86 and 88 TFEU.

<sup>5</sup> For instance, the European Food Safety Authority was established in 2001 following the BSE and dioxin food scares; the European Maritime Safety Agency was set up in 2002 following the Erika and Prestige accidents; the European Supervisory Authorities were founded in 2010 following the financial crisis; etc.

<sup>6</sup> Michelle Everson & Ellen Vos, *European agencies : what about the institutional balance*, in: Adam Lazowski & Steven Blockmans, *Research Handbook on EU Institutional Law*, Cheltenham, Edward Elgar, p. 140.

<sup>7</sup> See European Commission, *Programming of human and financial resources for decentralised agencies 2014-2020*, COM (2013) 519 final.

<sup>8</sup> See i.a. Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford, OUP, 2016, pp. 15-45.

<sup>9</sup> See the Parliament's proposal for such a Regulation annexed to European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration.

<sup>10</sup> Arguing for the proceduralisation of (agencies') decision-making, see Herwig Hofmann, 'Agencies in the European Regulatory Union', TARN Working Papers, 5/2016; Edoardo Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment', (2013) 19 *European Law Journal* 1, pp. 93-110.

<sup>11</sup> See the Common Approach on EU decentralised agencies adopted in 2012 by the European Parliament, Council and the Commission.

<sup>12</sup> *EU Agencies Network, EU Agencies – working for you*, EU Publication Office, 2016, p. 5.

<sup>13</sup> See the 2017-2018 Work Programme of the Network of EU Agencies, EFSA, p. 5; 2018-2019 Work Programme of the Network of EU Agencies, Frontex and ECDC, p. 4.

<sup>14</sup> *Ibid.*, see also the Common Approach on EU Decentralized Agencies, para. 5. See also the Conclusions from the second TARN Dialogue Event, available at: <http://tarn.maastrichtuniversity.nl/wp-content/uploads/2016/12/TARN-Dialogue-Final-Conclusions.pdf>.

<sup>15</sup> *Ibid.*

<sup>16</sup> See the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ 2016 L 123/1, para. 20.

<sup>17</sup> See the Common Approach on EU Decentralised Agencies, paras 15 & 31.

<sup>18</sup> See the third TARN Dialogue session, 11-13 April 2018.

<sup>19</sup> *Ibid.*

<sup>20</sup> See the Conclusions from the second TARN Dialogue Event, available at: <http://tarn.maastrichtuniversity.nl/wp-content/uploads/2016/12/TARN-Dialogue-Final-Conclusions.pdf>.

<sup>21</sup> See Florentin Blanc and Giuseppa Ottimofiore, 'The interplay of mandates and accountability in enforcement within the EU', in M. Scholten and M. Luchtman (eds.), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability*, Cheltenham, Edward Elgar, 2017, pp. 272-304.

<sup>22</sup> On the composite administration and proceduress, see Oswald Jansen and Bettina Schöndorf-Haubold (eds.), *The European composite administration*, Cambridge, Intersentia, 2011; Herwig C.H. Hofmann, 'Composite Decision Making Procedures in EU Administrative Law', in: HCH Hofmann, A Türk (eds.) *Legal challenges in EU Administrative Law*, Cheltenham, Elgar, 2009 pp. 136-167; Edoardo Chiti, 'Les agences et l'administration directe dans l'Union européenne', in Auby and Dutheil de la Rochère (eds.), *Droit administratif européen*, Bruxelles, Bruylant, 2007, pp. 275-277.

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<sup>23</sup> This notably by organizing a conference devoted to the external relations of EU agencies (and agency like bodies) in June 2017 in Luxembourg. An edited volume on the topic is also in preparation.

<sup>24</sup> There is a wide external practice, closely linked and necessitated by the functions and tasks of the agencies. Among the areas of activity, which were discussed during the session was risk assessment for setting of policies; especially as in some policy fields where risk is imminent and there is often need of urgent action. It is imperative to cooperate with international actors, to avoid catastrophic results of the divergent language in the implementation of policy by EU and non-EU national and international bodies (as with the Zika outbreak). As standards and approaches in assessment of risk are related to scientific evidence, working arrangements are often the basis for commonly generated scientific evidence and/or the approach of interpretation. See the Conclusions from the breakout session by Group 3 during the TARN Dialogue Session of 29 June 2016, available at: <http://tarn.maastrichtuniversity.nl/wp-content/uploads/2016/12/TARN-Dialogue-Conclusions-g3.pdf>.

<sup>25</sup> Ibid.

<sup>26</sup> See the third TARN Dialogue session, 11-13 April 2018.

<sup>27</sup> This is very clear from the DGs different approaches to the working arrangements on the agencies' external relations, concluded between the DGs and the agencies.

<sup>28</sup> See i.a. Ilaria Graceffa and Maia Ignatenko, Report on the 11-13 April TARN Workshop and Dialogue Session in Brussels, available at: <https://eutarn.blogactiv.eu/2018/04/29/report-11-13-april-tarn-workshop-and-dialogue-session-in-brussels/>.

<sup>29</sup> Just like the aspect of agency autonomy, that of agency accountability has become a field of research on its own, see i.a. Madalina Busuioc, European agencies and their boards: promises and pitfalls of accountability beyond design, (2012) 19 JEPP 5, pp. 719-736; Madalina Busuioc, *European Agencies - Law and Practices of Accountability*, Oxford: OUP, 2013, 326 p; Michael Buess, Accountable and Under Control? Explaining Governments' Selection of Management Board Representatives, (2015) 53 JCMS 3, pp. 493-508; Nuria Font & Ixchel Pérez Durán, The European Parliament oversight of EU agencies through written questions, (2016) 23 JEPP 9, pp. 1349-1366; Miroslava Scholten, The political accountability of EU and US independent regulatory agencies, Brill, Leiden, 2014, 493 p.; Christopher Lord, The European Parliament and the legitimation of agencification, (2011) 18 JEPP 6, 909-925; Julia Jansson, Building resilience, demolishing accountability? The role of Europol in counter-terrorism, (2016) 28 Policing and Society 4, 432-447; Michael Buess, 'European Union Agencies' Vertical Relationships with the Member States: Domestic Sources of Accountability', (2014) 34 Journal of European Integration 5, 509-524.

# TARN Statement

ON EU AGENCIES REFORM



5 April 2019

## TARN STATEMENT ON EU AGENCIES REFORM

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The TARN academic research network studies EU agencies in a way that is relevant for policy makers and actors within the EU institutional environment. Over the past three years, the network has engaged in widespread consultation with stakeholders and has prepared a series of policy recommendations which may be implemented within the current institutional environment. In addition, the TARN network has set out to find a longer-term constitutional perspective upon the appropriate place and framing of EU agencies within the Treaties and the operation of the EU institutional system.

This is a pressing issue, since the EU administration has so far been ‘agencified’ in absence of sound anchoring of the EU agencies in the EU Treaties leading to large heterogeneity of EU agencies, and numerous accountability concerns resulting in ‘overloaded’ and sometimes confusing set of control mechanisms.

Above all, where agencies have emerged as a form of EU ‘civil service’ with a useful and appropriate role in the development and even implementation of European policies and programmes, a pressing need has arisen to clarify the nature of agency mandates, and to secure the agency-instrument within the Treaties. If agencies are to retain their legitimacy as impartial bodies of expertise, they must first be supplied with clear and comprehensive mandates, even where those mandates detail a political programme.

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By the same token, however, agencies must be given their own source of formal legitimacy through their recognition in and regulation by the European treaties.

In particular, five key recommendations may be made. Unlike the TARN policy recommendations, they are not necessarily feasible to implement in the short-term. In constitutional terms however they suggest themselves as necessary.

## Legal basis

1. At least in a number of language versions, i.a. the English one, 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 (Article 298 TFEU). Moreover, 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.

Yet, the absence of EU agencies notably in the system of Articles 290-291 TFEU raises concerns in relation to the nature of the EU executive and the possible conflicting roles of the Commission and agencies as well as accountability and measures of control on agencies. This ‘constitutional neglect’ shows the current unclear position of agencies as actors that can adopt binding executive acts, while conformity with the principle of conferral of powers is being raised. The recognition by the Court (in ESMA – Case C-270/12) of the possibility that agencies can be delegated binding decision-making powers can only be a temporary solution and Treaty change is needed to clarify and consolidate the institutional realities. This need is intensified in view of the trend to grant agencies increasingly more discretionary powers.

A legal basis should thus be inscribed in the Treaties, preferably in Part 6, Title I – Institutional Provisions of the Treaty on the Functioning of the European Union, so as to provide an enabling clause to create and empower EU agencies. Similarly to Article 291(3) TFEU it could also contain a legal basis for the adoption of a new framework instrument. It would have to refer back to Articles 290-291 TFEU and explain the role that EU agencies can play. Conversely Articles 290-291 TFEU should be changed so as to reflect and explain the role that EU agencies can play.

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## Need for an overall vision laid down in a Regulation

2. The 2012 Common Approach should be updated and be made binding. In the Joint Statement accompanying the Common Approach, the EU institutions themselves noted that the proliferation of agencies 'has not been accompanied by an overall vision of their role and place in the Union.' However, the Common Approach also fails to address that question. The EU institutions should address this question. Solving the question of the 'role and place of agencies in the Union', will allow them to solve the question how agencies relate to the Commission, Parliament, Council and Member States which in turn will allow the institutions to define a clear and simplified accountability framework for agencies.

Ideally, the new Common Approach would be an act of infra-constitutional nature (similar to the Comitology and Transparency Regulations) and should first reflect the EU's fundamental constitutional principles which are now neglected in the Common Approach and in institutional practice: conferral, subsidiarity, proportionality and institutional balance. For this however a legal basis in the Treaties would be needed (similar to Article 291(3) TFEU), requiring the institutions to adopt such a framework instrument in the form of a Regulation pursuant to the ordinary legislative procedure. Since it is unclear whether the institutions could rely on Article 352 TFEU (which in any case also prescribes unanimity in the Council) and a revision of the Treaties does not seem realistic presently, a second best alternative would be to upgrade the Common Approach to a binding inter-institutional agreement under Article 295 TFEU, as previously tried in 2005.

## Control and Accountability

3. The proliferation of EU agencies in the EU institutional landscape also requires a rethink of control mechanisms on agencies and underlines the need for a set of general principles that govern EU agencies. The current Common Approach tries to adopt a somewhat broader vision on EU agencies than the fragmented approach followed before 2012 in order to improve the existing situation, specifically the coherence, effectiveness, accountability and transparency of these agencies. 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. This again underlines that the Common Approach should be revisited.

# TARN Statement

ON EU AGENCIES REFORM



As stated, this should ideally be done through a Regulation or alternatively by means of an interinstitutional agreement. This agreement should specifically aim:

- to define agencies
- to set up a coherent model of parliamentary scrutiny
- to formulate rules on independence from both commercial and political interests; taking into account the diversity of agencies
- 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 underline the importance of stakeholder involvement, but leave flexibility as regards the means of involvement depending on the nature and mandate of the agencies and the relevant policy areas while providing for appropriate mechanisms of independence from commercial and political interests as stated above
- 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.

## Heterogeneity

4. It is time to address the issue of heterogeneity of EU agencies in a manner that will genuinely assist them to continue performing important missions in the EU system. While structures, functions and mandates should depend on policy needs, which may vary from one policy areas to another, the current degree of heterogeneity does not reflect genuine differences in policy needs. This exacerbates the problem of accountability and legitimacy. Different structures not only make it harder to establish one unitary mechanism of accountability, such as an EU Administrative Procedures Regulation, but at the same time show the need of a more horizontal approach, e.g. prescribing uniform but lean accountability mechanisms for all agencies. Clustering certain of the agencies' services and functions should be considered as a first possible step in tackling the heterogeneity overload, but further debates and actions are needed.

## Dialogue

5. It is necessary to hold regular dialogue sessions between representatives of agencies, Commission, Parliament, Council, Member States, stakeholders and academics to discuss topics of concern and research findings in a Chatham house setting.