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Introduction: agency governance in the European Union

Berthold Rittberger and Arndt Wonka

ABSTRACT The literature on European Union (EU) agencies has proliferated rapidly since the first essay collection on EU agencies was published by the *Journal of European Public Policy* in 1997. This collection picks up three thematic threads contained in the initial collection and provides state-of-the-art treatises on these different themes. The first theme addresses the causes and dynamics of the creation and design of regulatory bodies in EU governance, focusing not only on EU agencies but also on alternatives to the agency format, such as regulatory networks. Second, once agencies are established the consequences and trajectories of governance with and by EU agencies will be explored. Third, the design of EU agencies as independent, non-majoritarian institutions poses pressing questions with a view to their legitimacy and accountability.

KEY WORDS Accountability; autonomy; delegation; EU agencies; legitimacy.

In 1997, the *Journal of European Public Policy* published a special issue on ‘European Agencies’, edited by Alexander Kreher and Yves Mény (Kreher and Mény 1997). At the time, the agency-phenomenon was hardly known and recognized by scholars of the European Union (EU). This has changed considerably as scholarly work on EU agencies has proliferated remarkably in the past decade and half. However, the 1997 special issue already addressed a set of pressing questions that continue to occupy scholars until the present day (Kreher 1997; see also Busuioac *et al.* 2011a): First, how can the creation and proliferation of EU-level agencies be accounted for? What is the relationship between agencies and other regulatory bodies, such as regulatory networks? Second, what is the trajectory of governance by agencies for executive governance in the EU? To what degree can agencies act autonomously from their principals, once they are operational? Do agencies affect the pattern of policy-making and implementation in the EU in particular ways? Third, what are the implications of agency involvement in EU policy-making for legitimate and accountable EU governance?

1. THE CREATION AND DESIGN OF EU REGULATORY BODIES: AGENCIES AND NETWORKS

Part of the current research agenda on EU agencies is to uncover the factors causing the remarkable proliferation of EU agencies over the past two

decades. The existing literature focuses on (a) structural factors and trends, such as rise and growth of the regulatory state, (b) functional imperatives triggering the demand for independent agencies, as well as (c) the role of inter-institutional politics and 'power games' in the EU. With regard to *structural* factors, the 'agencification' of the EU is said to reflect a broader trend, which has unfolded in national political systems in Western Europe and other regions of the world (Christensen and Lægreid 2005; Gilardi 2005, 2008: 107–8; Elgie and McMenamin 2005). It is claimed that the remarkable growth of regulatory agencies throughout the industrialized world can be seen as part of a broader shift towards 'regulatory capitalism' (Levi-Faur and Jordana 2005), which is fuelled by attempts of policy-makers to credibly commit to liberalization agendas and effective regulatory rules. The argument about credible commitments reflects the claim that regulatory policy decisions and the provision of information for regulatory policy-making are more credible when they are insulated from re-election seeking politicians and instead are left in the hands of independent regulators following professional considerations. Independent regulators and agencies can thus be considered a *functional* solution to the credible commitment problem faced by policy-makers in regulatory policy-making. Some of the very early works on the creation of EU agencies, published in the 1997 special issue, develop this argument to explain why regulatory functions, which have traditionally rested with the Commission, have been 'outsourced' to EU agencies (Dehousse 1997, Majone 1997). One stipulation is that the capacity and resources of the Commission to ensure the uniform implementation of EU legislation is limited and that the structure of decision-making inside the Commission renders it prone to 'politicization', which is detrimental to provision of credible regulation. The collegiate character and composition of Commissioners and the concomitant concern that political considerations enter the debates inside the college of Commissioners (Wonka 2007, 2008) undermine the credibility of regulation since it might be driven by political rather than functional concerns (Dehousse 1997: 253).

From this perspective, EU agencies are considered integral in ensuring that regulatory policies can be implemented coherently and consistently throughout the EU 'by ensuring that the actors in charge of the implementation of Community policies behave in a similar manner. In practice, this will only be possible if they agree on the definition of a given problem, and on the response it calls for' (Dehousse 1997: 254). To work towards the uniform definition and solution of regulatory policy problems, EU agencies help to establish and run pan-European networks to bring together the relevant (public and private) regulatory players in the domestic and transnational sphere to promote 'horizontal cross-fertilization among national administrations' and stakeholders to ensure consistency of information (Dehousse 1997: 255) and 'to facilitate the development of behavioural standards and working practices that create shared expectations and enhance the effectiveness of social mechanisms of reputational enforcement' (Majone 1997: 272). In the EU-27, which is marked by considerable political, economic and administrative differences, agencies' role in

collecting and processing information might be even more important because of their direct involvement in the implementation of EU decisions.

While functional arguments focus on the demand side of agency creation, they ignore the supply side and hence the *politics* and inter-institutional bargaining over the creation of EU agencies (Kelemen 2002; Kelemen and Tarrant 2011; Roederer-Rynning and Daugbjerg 2010). Kelemen and Tarrant (2011) argue, for example, that not functional imperatives but rather political considerations and the strategic interaction among the member states, Commission and European Parliament are the key to understanding the design choice for a particular type of regulatory body, i.e., whether EU agencies or rather loose regulatory networks are being created. Moreover, the degree of distributional conflict in a particular policy area affects the design choice: The higher the level of distributional conflict, e.g. when core politico-economic and electoral interests are at stake, the less likely the agency solution becomes given member state resistance. Concomitantly, when distributional stakes are high, member states tend to prefer looser regulatory networks. This has been the case with regard to the regulation of utilities (e.g. electricity, railway, telecoms), policies where distributional conflicts are prominent and where, consequently, not agencies but weak regulatory networks issuing non-binding opinions have been established (see Kelemen and Tarrant 2011).

In this collection, two papers address the question of agency creation and proliferation as well as the question of design choice for regulatory bodies. Mark Thatcher's contribution provides a supply-side explanation for the creation of EU-level regulatory agencies. His point of departure is the puzzle why the pattern of agency creation in the EU differs so markedly from that in domestic contexts: Why have EU agencies been predominantly established in areas of social regulation and not economic regulation (e.g. utilities, competition)? He argues that the pattern of 'agencification' in the EU has been heavily conditioned by the past delegation of powers to the Commission as well as by the role played by domestic regulators. The Commission, eager to defend its turf, has agreed to the establishment of EU-level agencies only when this strategy promised to enhance the Commission's own objectives. Hence, 'in domains where the Commission had limited discretion and powers, an [EU agency] represented an opportunity for an expansion in the Commission's role not a rival to it' (Thatcher 2011, this collection). At the same time, domestic regulatory agencies and networks of national regulators have been equally alert and resistant to the creation of EU-level agencies, most notably in the area of economic regulation (see also Coen and Thatcher 2008).

David Levi-Faur's contribution to this collection starts from the observation of a 'double movement toward a single market and a single European regulatory space' and maps and discusses the different (institutional) manifestations of the European regulatory space comprising a diverse set of agencies and agency-like institutions ranging from the European Central Bank to OLAF (European Anti-Fraud Office) as well as regulatory networks such as ENISA (European Network and Information Security Agency). Levi-Faur (2011) argues that the

development of the 'European regulatory space reflects' a set of interesting patterns: Agencies are increasingly replacing or dominating regulatory networks through processes that he labels 'agencification of networks' or 'agencified networks'. The focus of the paper is on mapping forms of institutionalization and the extent to which agencies and networks (co-)exist in EU forming regulatory regimes. While Levi-Faur's analysis indicates that the process of 'agencification of networks' is driven by both, the Commission and agencies, functional and structural factors also play a decisive role. Future analyses will have to discuss the political, functional and structural factors explaining the institutionalization of what he labels the single European regulatory space.

2. AGENCIES IN ACTION: CONSEQUENCES AND TRAJECTORIES OF AGENCY GOVERNANCE

Focusing on the causes of agency creation hardly permits definitive conclusions on how agencies act and employ their competencies 'post delegation'. Agencies may have been created for various reasons and mirror different degrees of formal, *de jure* autonomy (Wonka and Rittberger 2010), yet this may tell us very little about their actual autonomy or day-to-day policy-making practices (see, for example, Busioc *et al.* 2011; Groenleer 2009; Krapohl 2004). The study of 'actual' or *de facto* agency autonomy is an interesting field of study, since it shifts our focus on different dimensions of agency governance and its consequences. How agencies work and operate is likely to have an effect on various dimensions of governance with and by agencies. In this collection we will highlight three dimensions: first, the capacity of regulatory governance arrangements to obtain particular regulatory objectives will be explored. Second, it will be demonstrated that the capacity of an agency to act autonomously is affected by accountability practices. Third, analysing behavioural patterns of the personnel of EU agencies permits conclusions with regard to questions about the trajectory of agency governance: Do agencies 'look' to the member state governments as their masters, or do they spur supranational centre-formation?

2.1 Attainment of regulatory objectives

In the 1997 special issue, Renaud Dehousse argued that one of the most pressing problems of European integration is to ensure the uniform application of EU regulations in the member states. While the approximation of legislation or the strengthening of the Commission provides only partial solutions at best, he argued that what is really required is 'that the actors in charge of the implementation of Community policies behave in a similar manner. In practice, this will only be possible if they agree on the definition of a given problem, and on the response it calls for' (Dehousse 1997: 254). How can this be achieved? The solution propagated by Dehousse lies in the establishment of pan-European regulatory networks bringing together the relevant regulatory players to improve information exchanges and enable mutual learning processes by promoting

'horizontal cross-fertilization among national administrations' (Dehousse 1997: 255).

In their contribution to this collection Maggetti and Gilardi (2011) focus on one area of regulatory governance, the securities sector, where, until recently, the Committee of European Securities Regulators (CESR) has played a crucial role in the regulatory policy-making and implementation process. On 1 January 2011, the European Securities and Markets Authority (ESMA), a new independent EU-level agency, replaced the European network of national securities' regulators. Following the turmoil on the financial markets and the ensuing financial crisis, ESMA was instituted to play a central role in safeguarding the stability of the EU's financial system. Maggetti and Gilardi explore, *inter alia*, the effectiveness of the CESR network in achieving regulatory harmonization across its members. They find that the regulatory bodies of countries with larger financial industries tend to occupy more central positions in the network and that network centrality is associated with a swifter domestic implementation of standards. They conclude that the creation of new EU-level agencies in the regulation of financial markets, and ESMA in particular, can hardly be accounted for by a concern about regulatory failure, since CESR 'seems to be effective in performing its main task, namely the promotion of harmonized rules' (Maggetti and Gilardi 2011).

2.2 The (im)balance between autonomy and accountability

While scholarship on the relative effectiveness of (different) regulatory governance arrangements constitutes a promising field for future research, the contribution by Busuioc *et al.* (2011b) points to yet another exciting field in the study of the consequences of governance with agencies: the nexus and tension between agency autonomy and accountability. On the one hand, there is the 'functional' argument that agencies must be independent from the interference of their principals so as to provide credible, unbiased information and regulatory decisions. On the other hand, there is the normative argument that agencies have to be held to account for their actions and policies by different accountability forums to prevent them from abusing their powers (see Busuioc *et al.* 2011b; Curtin 2005). How can these two objectives be reconciled? Busuioc, Curtin and Groenleer approach this tension conceptually and empirically. Conceptually, they argue that autonomy and accountability are in balance when high levels of *de facto* or 'actual autonomy' coincide with a robust framework of *de facto* accountability. Consequently, they envisage situations in which there can be autonomy overload when accountability practices are underused and lag behind an agency's exercise of its actual autonomy. Conversely, an accountability overload occurs when an agency lacks actual or *de facto* autonomy. Tracing the fragile balance between autonomy and accountability, the contribution shows in the case of Europol that despite a subsequent increase in the agency's *de jure* autonomy, the lack of close co-operation with its national counterparts has prevented the agency from exercising these formal powers

effectively. Moreover, the increase in the European Parliament's powers has led to a situation whereby parliament employed its role in holding Europol to account much more actively. While the authors emphasize that accountability not necessarily impacts on agencies' ability to act autonomously, the contribution highlights conditions under which the expansion of accountability mechanisms can work to the detriment of an agency's capacity to act autonomously.

2.3 Supranational centre formation?

The proliferation of EU agencies is considered to be part and parcel of the transformation of the EU's 'executive order', which denotes a process whereby the organization and exercise of executive power in the EU have undergone profound changes in the past decades, which is reflected first and foremost by the 'emergence and consolidation of the position of the Commission as a central executive actor' (Curtin and Egeberg 2008: 640, see also Trondal 2010). Within this new executive order, agencies are said to represent a 'compromise' reflecting the interests of their multiple principals (the Council, Commission and even the European Parliament). This begs the general question of how autonomous agencies can actually act *vis-à-vis* their principals. Does the agency-phenomenon mirror a development towards more European integration, 'in the sense of a supranational state in the mould of European nation states, or as a step back towards the strengthening of member states'? (Kreher 1997: 226). In their contribution to this collection, Egeberg and Trondal (2011a) delve into this question by asking what role EU agencies play in the process of 'executive centre formation' at the EU level. Presenting new data from a survey among senior agency officials, they argue that EU agencies spur the development of executive centre formation at the EU level: 'EU-level agencies find themselves much closer to the Commission than to the Council and national ministries' (Egeberg and Trondal 2011a, this collection).

3. LEGITIMACY AND ACCOUNTABILITY OF AGENCY GOVERNANCE

EU agencies exert political authority: Their opinions and decisions impact directly on policy outcomes and thus on citizens, governments and stakeholders. Yet, as we have already seen, agencies are deliberately designed to operate at arm's length from their political principals. Hence, agency independence has been heralded as a solution to overcome 'petty politics' which eschews credible and efficient regulatory policy-making (Majone 1997, 2000). It is precisely the discretionary nature of the EU agencies, which has spurred debates about the sources of EU agencies' legitimacy. Shapiro (1997) has issued the caution that substituting the legitimacy of expertise for democratic legitimacy is highly problematic: 'If the independent agency argument is that information = technical expertise outside of politics = technocracy = a non-democratic

legitimacy, the response is that information is not technical but political and that technocracy is, these days, not perceived by the public as legitimate' (Shapiro 1997: 287). Thus, there is a potential legitimacy 'cost' associated with governance by and through agencies since the provision of expertise and information is not politically neutral (see Vibert 2007 for a contrasting argument).

Given the limitations of justifying the authority of agencies via the principle of technocratic legitimacy, the democratic principle, which legitimizes the exercise of political authority as long as it reflects the decisions and deliberations of representative institutions (parliaments) and citizen involvement, seems to be no less problematic given the deliberate non-majoritarian character of EU agencies. To escape this legitimacy 'trap', scholars have turned to the question about how non-majoritarian institutions can be 'checked' and held to account (see, for example, Bovens 2007; Busuioc 2009, 2010): Accountability mechanisms demand from 'agents' to explain and justify their conduct and procedures enabling political, legal, administrative, professional or societal 'forums' to pass judgement and thereby add to the legitimacy of democratic governance (see Fossum and Eriksen 2003).

The last section of this collection presents work, which pushes the normative agenda of EU agency governance in an empirical–analytical direction. Wonka and Rittberger (2011) explore the political attitudes of EU agency staff focusing, *inter alia*, on perceptions about the sources of legitimate and accountable governance. One of the main findings holds that while EU agency professionals strongly and almost uniformly approve of the notion of 'professional' accountability, forms of 'social' accountability and the desire for public approval are also considered important. The authors interpret these findings as an indication that the self-understanding of EU agency professionals is rooted in strong sense of professionalism with, at the same time, an acute awareness of the political character (and impact) of their work. This self-understanding might result from agency professionals' principled scepticism towards a purely 'technocratic' notion of legitimacy and accountability. Moreover, it may also reflect the conviction that efficient regulation in the heterogeneous EU context relies on the general approval of the public and of political elites.

The final contribution to this collection by Christopher Lord considers the role played by the European Parliament in ensuring that the agencies are controlled and held to account. He sets out with the normative claim that '[o]nly democratically elected legislatures can ultimately establish the legitimacy of delegations to executive bodies by deciding those questions of public control, justice, values and rights which are raised by the exercise of their functions' (Lord 2011, this collection). He argues that the role of the European Parliament can be considered paradoxical given parliament's strong scepticism *vis-à-vis* EU agencies on the one hand, and the legislative efforts on behalf of parliament to increase the powers and autonomy of EU agencies on the other hand. Lord argues that the paradox can be 'solved' when considering the argument that the European Parliament was willing to grant greater powers as long as it

contained the possibility to project its own legitimization beliefs and requirements onto the design of EU agencies via legislative amendments. Notions about the appropriate form and level of public control, fair treatment and rights protection featured prominently in parliament's justifications for the amendments the European Parliament tabled for the legislation to establish new EU-level agencies.

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