

TARN Statement

ON EU AGENCIES REFORM



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Authors

Giacinto della Cananea, Bocconi University
Deirdre Curtin, European University Institute
Merijn Chamon, Ghent University
Michelle Everson, Birkbeck College
Justin Frosini, Bocconi University
Herwig Hofmann, University of Luxembourg

Christian Joerges, Hertie School of Governance
Marko Milenkovic, SAIS Europe
Johannes Pollak, Institute for Adv. Studies Vienna
Jarle Trondal, ARENA Oslo
Esther Versluis, Maastricht University
Ellen Vos, Maastricht University
Bruno de Witte, Maastricht University

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.

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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.