TARN Dialogue

Conclusions from the breakout sessions
29 June 2016

Group 1: Interinstitutional relations, constitutionality and accountability
Chair: Deirdre Curtin (EUI)
Rapporteur: Anita Spendzharova (Maastricht University)

The discussion in panel 1 focused on two questions about the added value of EU agencies and what alternatives there are, as well as the main challenges and problems.

• Added value of agencies and alternatives:

- A trend was pointed out that in the past 10 years, at the member state level, the number of agencies has been reduced by 25-30% by merging or closing down agencies.
- This downward trend at the national level has been accompanied by an increase in the number of and tasks delegated to EU agencies.

• What is the added value of agencies?

- They contribute to co-governing complex domains together with the member states and other EU actorsThey have a problem-solving attitude in contrast to a starkly political one.
- They provide important additional administrative capacity and technical expertise beyond what is available in the European Commission alone.
- They are supranational hubs of information, data, guidelines, trainings which facilitate the interoperability of European infrastructure in sectors such as transport, energy, finance
- They enable specialization at the national level, as the European agency can take a lead in task allocation and specialization across the national counterparts

The difference between decision-making agencies and

information exchange agencies is pointed out and there were different rationales for the creation of these two types of agencies, thus there are different alternatives.
For decision-making agencies, one alternative would be networked national regulatory bodies, but this is often the origin of decision-making agencies.
For information agencies, one alternative would be expert committees, again a configuration that often preceded the formal creation of an agency.

- In terms of main challenges and problems, the group identified the following issues:

- Member states want to preserve flexibility, some national discretion and sovereignty. There is a tendency to keep important sensitive information especially in the defense section, police and border control, but also in the single market domain
- In practice, the boundaries between what is the responsibility of European agencies v. their national counterparts v. other European bodies is unclear, which leads to difficulties in co-governing the complex domains they are responsible for
- Administrative capacity and resources are limited, while the tasks and responsibilities of agencies are growing. They do not have access to a Legal Service comparable to that of the Commission (or that of the Commission) which makes it difficult to strike the right balance of policy objectives, especially in tough cases such as data protection, when regulators need to consider the trade-off between transparency (i.e. publish the minutes of all meetings) v. secrecy

Group 2: Power, procedures and judicial review
Chair: Giacinto della Cananea (University of 'Tor Vergata', Rome)
Rapporteur: Merijn Chamon (University of Gent)
During the discussions several issues were raised, some falling squarely within the assigned topic, other issues being (in)directly linked to the agencies' powers, procedures and judicial review.

On a preliminary note, one agency representative remarked that sufficient attention should be paid to the unique environment in which each EU agency operates: differences in legal and political context as well as differences in the national contexts in which the agencies operate and on which they depend. As a result, it would be erroneous to try and impose a one-size-fits-all solution on the agencies.

The discussants agreed to this all the while noting that EU agencies also share a lot of similarities. To discover these and to identify those areas in which 'horizontal' solutions (applicable to all agencies) may be devised, sound typologies should be elaborated. These typologies can also be flexible: for instance, categorizing the EU agencies in light of their external (international relations') powers will not result in the same typology as, e.g., categorizing the EU agencies depending on their enforcement powers.

Following from this the following ten issues were discussed:

1 *The standard of judicial review in light of Article 6 ECHR*

One major question is whether continued respect for Article 6 ECHR is safeguarded with the ongoing agencification. This may be problematic in light of the ECtHR's jurisprudence in several ways. Firstly, if the available remedies are too vague, this may jeopardize the right to a fair trial; secondly there is the problem that the remedies available to private parties will depend on the court that is competent, which in turn may affect a party's right under Article 6 ECHR; thirdly the inconsistent case law of the CJEU is noted as regards compensation for damages resulting from joint EU-national action; lastly there is the question of the intensity of judicial review of agencies' acts. These four issues would merit further consideration.

2 *The accountability overload and discretion*

Several participants identified a risk in that a significant number of accountability requirements is being imposed

on the EU agencies, resulting in what has been coined an 'accountability overload', whereby the agency may find it hard to deliver on its actual mandate. It was noted that the emphasis on accountability (which is greater for the agencies than for the institutions) partially has to do with the requirement that no discretionary powers may be conferred on agencies. The latter proves to be untenable however, especially if agencies are asked to exercise supervisory (and not just regulatory) tasks. In this regard it was suggested that it should (finally) be recognized that agencies may and do exercise discretionary powers and that the accountability mechanisms should be devised so as to reflect this.

3 *The reform of the General Court and the Boards of Appeal*

An issue on which no consensus could be found was whether the recent reform of the General Court will in any way affect the Boards of Appeal of agencies. Although the latter never were specialised tribunals in the sense of Article 257 TFEU, they did share some characteristics with them. For now, the possibility to establish specialised chambers in the GC has not been used, raising the question how the judicial review process of agencies' acts may be imbued with the necessary technical expertise. Here, several remarks were made: in the past, the GC has employed certain (economic) experts, but the judges did not make use of this in-house expertise when scrutinizing contested acts since they felt this would be a delegation of their judicial authority. In any event there is a possibility for some expertise to be incorporated in the cabinets of the judges. Still it was pointed out that one should be mindful that regardless of how a court may draw on expertise (external, internal), it will always have less expertise than the body whose decisions are being challenged. As a result, judges will often not engage with the substantive aspects of a contested decision (although one participant remarked that this may also be a cultural thing, since in some national legal orders, judges find no problem in

substantively scrutinising decisions) and will try to solve cases on procedural issues. In this regard, it was remarked that this again underlines the need to have a horizontal instrument setting out basic procedural requirements which every administrative actor in the EU legal order ought to respect. Another participant remarked on this point that we should not be overzealous in trying to formalize procedures, since any (administrative) actor will always resort to informal procedures outside the formal framework.

The issue of expertise may also mean that the Boards of Appeal are de facto the last instance to appeal agency decisions, even if de iure there is an appeal open before the GC (and following that before the CJEU). From this perspective, the GC's review of Board of Appeal decisions should be a topic for further study. What could also be further explored is the possibility to upgrade the role of the Boards of Appeal. For now, their jurisdiction is defined in a very narrow manner, but the Treaties leave ample room to broaden the jurisdiction of the Boards of Appeal. As the responsibilities of the members of the Boards of Appeal grow, so should the attention to their independence and impartiality which already today may give cause for concern.

4 *The separation of functions within an agency*

Several participants stressed the ill-understood effects and added-value of the separation of functions introduced in the statutes of the agencies, prescribing that different persons or departments are responsible for different stages in a decision-making procedure. Evidently, the purpose of this separation is to make sure that final decisions are impartial and unbiased, but sometimes the complexity of the procedure (as a result of the separation of functions) very much negatively effects the efficiency in decision-making. In other instances there is insufficient attention to a separation of functions, for instance when nominally different committees re-assess each other's work but where virtually the same people or national

departments staff those committees. Further research on this issue would help in better understanding which degree of separation of functions is necessary and when such a separation becomes dysfunctional.

5 *The agencies' use of soft law*

Several participants noted that EU agencies rely to a great extent on soft law to perform their tasks. This could be explained by the fact that problems resulting from the agencies' unclear constitutional position may be partially circumvented by not giving them hard but only soft powers. Generally, soft law is seen as something (potentially) problematic but the question was raised whether this really is the case. Is it genuinely problematic that agencies resort to soft law? How do the EU agencies and the regulated industries see this? Should this problem be addressed? If so how may this be done?

6 *Agencies' resources and tasks*

The ongoing agencification not only means that new agencies are being established, but also that the mandates of existing agencies are elaborated. For the agencies this means that they have to prioritize among their tasks, given their limited resources. The participants identified a number of relevant questions: how do agencies prioritize? How should they prioritize? How does the gap between means available and means required to fulfil all assigned tasks affect the agencies' functioning, output, etc.

7 *Increasing enforcement by EU agencies*

One participant noted that EU agencies are increasingly involved in the enforcement of EU law, whereas this is traditionally a task of the Member State authorities. This trend foremost means that enforcement is not being transferred wholesale to the EU level, but instead that enforcement is being shared between both EU and national authorities. This raises a host of questions: who is ultimately responsible for the enforcement action when that action is shared? Which legal remedies are available against shared enforcement action? How does this affect

the rights of parties against which EU law is enforced? Etc.

8 *EU agencies and the Commission*

When discussing different topics, one horizontal issue kept popping up, that is the unclear role of the Commission and its relation with the agencies. Although most Boards of the agencies are Member State-dominated, the Commission plays an important role which is also determined by the degree to which the agencies depend on the EU budget. A number of agency representatives deplored the fact that agencies do not have direct access to the Commission Legal Service. In terms of governance but also generally, one participant stressed that sufficient attention should be paid towards the original Commission legislative proposals and the final legislative act, where it will often be the Parliament introducing requirements which may lead to accountability overload (see above).

9 *A legal basis for agencies in the Treaties*

One participant remarked that a lot of the issues discussed in the panel ultimately come down to the unclear constitutional position of the agencies, even if another participant stressed that we now have a framework in the form of the Common Approach. The extent to which the latter indeed constitutes a (sufficient) framework could be studied. Regardless of that however, ideally a legal basis should be inserted in the Treaties, giving a constitutional foundation to EU agencification. How such a legal basis should look like (and be workable) should be the topic of further research.

10 *EU agencies and the EU's legitimacy*

Finally, one participant remarked that the current EU legitimacy crisis could be, partially, addressed by having the agencies operate in a more transparent manner, using clear (and uniform) procedures. This would enhance the EU agencies' (and ultimately the EU's) procedural legitimacy. This question would need to be studied

together with the problem of accountability overload (see above).

Group 3: International Dimension of EU agencies
Chair: H.C.H. Hofmann (Luxembourg University)
Rapporteur: Zheni Zhekova (Luxembourg University)

The group discussion focused on the modalities of external mandates, instruments, procedures and practices in the external cooperation of agencies. A conclusion was reached as regards the externalization of their activity - agencies differ largely in type and intensity of international cooperation due to their mission, tasks, tools and degree of actual input into policy-making. That is why generalizations should be avoided.

However, the discussion made obvious that a number of overarching matters still exist:

1 *The need for international cooperation is as wide as any mandate and a practical reality*

2 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.

2*A plurality of instruments and modes of cooperation are used in external cooperation*

3 Generally, there are not only a is wide resort to conclusion of documents formalizing cooperation in various forms (i.e working arrangements), but cooperation occurs through the mutual exchange of liaison officers and therefore is an additional channel for exchange of information. Reportedly, the bodies see instruments such as working arrangements as binding (be it with IOs, states or even directly with big cities), because those are credible commitments for cooperation with their international partners. Additionally, *ad hoc* arrangements are also functionally called for, as a functional externalization of the mandate, which may occur in the absence of a specific framework. In addition, third states or parties may have an observer position in the agencies as well, connected to an existent Union cooperation instruments with candidate countries or via the European Neighborhood Policy, yet without a reported impact.

3 *Agencies form strong substantive and procedural connections with epistemic communities* Many agencies are not in the decision-making realm, but rather supply information and advice, which still touches base with the international level in its procedure and substantive approach. Generally, in risk regulation agencies recognize the need for forming regulator networks with a common interest, purpose and spirit – thus the international collaboration. In some fields, the Commission generates a risk-management networks. Alike, international organizations also run international information exchange networks, however then they are the ones which set the standards of the type of information that enters in the networks. However, agencies cooperation via networks generates information, which also 'feeds' into policy and legislative acts at EU level.

4 *More tensions emerge from dynamic international cooperation and proceduralisation* Agencies often have to respond swiftly in emergencies and formalities are seen as burdening. In some fields, such as food, there is heavy regulation, while in others such as health, there is not. In the latter case, agencies actually prefer to avoid over-proceduralisation, in order to stay efficient in their risk response. Yet, risk assessment is tied with huge economic consequences. At the same time the assessment is based on current evidence, also tied with the duty to inform and protect. The bodies need to exhort 'technical' authority in the management of their policy mandates, irrespective of whether it is a EU or non-EU management. Hence, there is an emphasized need for careful procedures in the context of internationally cooperation, for instance in the exchange of information, to reduce liability of issuing warnings.

5 *Relationships with the EU institutions are policy-related, but not centered on internationality* The goups discussion made obvious that often agencies have have ongoing collaboration inter-institutionally with DGs of respective (and many other) policy fields. That is complemented by an EU inter-agency community with similar risk-based and also emergency-response mandates. Additionally, the agencies actually have a strong EU (reportedly informal) network among themselves in which they regularly meet and unofficially align views, approaches and exchange planning in ongoing matters.

6*Accountability mechanisms are overloading and it seems not focused specifically on externality either*

7 The discussion revealed that agencies certainly feel an

overloaded with oversight and reporting. It was discussed that agencies at times see procedures as constraining and the reporting are excessive. First, because all agency fields are mainstreamed by an EU policy. Second, because the bodies have to report to a number of forums and stakeholders, such as the Court of Auditors or are subject to external audits; they are controlled by the European Parliament as the budgetary authority; they also have to generate Reports and Planning. Third, reportedly this occurs at the expense of resources and time, while faced with budget and staff cuts. Practically, legal conditions can leave agencies constrained, an example being the outbreak of Ebola. Even though international partners had been alarmed and called for action, internal procedure and substantive political considerations had delayed thee response, in practice exacerbating the outbreak.

7 *There is an unexpected duplication of tasks with projects of Executive agencies* Some decentalized agenices also have to compete with executive agencies.The discussing agencies have reported that executive agencies have competed with some of their tasks by drafting projects that duplicated their work, also some of their international work. This underlined problem may be related to the prerogative of executive agencies to rely on funding for projects. The decentralized agencies at the same time cannot compete for new tasks, due to the 'steady as you go' expectations for their working plans, tasks and budgeting.

8*Against this backdrop, the question of a shift in the institutional balance remains open*

9 It is evident that the functional externalization of agencies is growing, with inherent substantive and procedural modalities. However, this functional

reality may have already led to tectonic shift in the constitutional criteria, thus reconciling external agency practice.

Group 4: Functionality, budgets, risks and efficiency
Chair: Michelle Everson (Birkbeck College, London)
Rapporteur: Machiel van der Heijden (Leiden University)

In the day-to-day management and operation of EU agencies, public officials are confronted with challenges and problems that ring true for a broader population of *public* organizations as well. Under conditions of cutbacks and reforms that characterize the public sector in general, EU agencies operate in a setting in which they are expected to *do more with less*. Recent years have seen an expansion of agencies' functional tasks, but the staff and resources with which they are required to fulfill these tasks have not grown proportionally or have even decreased. Although founding mandates are often clear, the real question thus becomes whether agencies have the necessary administrative capacity and expertise to fulfill them. Moreover, the numerous accountability relationships toward various stakeholders seemingly increases this administrative burden, particularly within in the specific constellation of the EU in which such accountability relationships point in multiple and often contradicting directions. For EU agencies, this situation potentially creates a trade-off between efficiency and accountability in which EU agencies are forced to almost play a zero-sum game in favor of either the former or the latter.

Important to consider in this regard is the way in which EU agencies are originally conceived, as this potentially influences the institutional make-up of the agency and the way in which it functions and operates. In practice,

agencies are often times born out of crises, meaning that their mandates are given in contested political arenas. Also, agencies sometimes originate because either the Commission or EU member states do not have the capacity to fulfill the mandated tasks themselves and the problem is accordingly cast into the lap of the newly formed EU agency. In that sense, the initial conception of EU agencies and the according tasks they come to fulfill often have no real (instrumental) rationale behind it. Although sometimes presented as neutral and technological solutions to interdependent policy problems, the practice of EU agencies often shows a far more messier picture. Delegation is perhaps then more realistically understood as a pushing away of responsibility from other actors. These considerations should be taken into account when analyzing and assessing how EU agencies operate and the problems with which they are confronted.

The above-named issues also influence the way in which accountability should be conceived and how it plays out in practice. 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.