

# European Agencies and Their Boards

## Too Much Board, Too Little Monitoring

Madalina Busuioc - University of Amsterdam ([e.m.busuioc@uva.nl](mailto:e.m.busuioc@uva.nl))

Paper presented at the EUSA Twelfth Biennial International Conference,

Boston, March 3-5, 2011

### Abstract

*European agencies have become an established part of the European Union's architectural set up and are the most proliferating institutional entities at the EU level. However, as their relevance and prevalence in the EU institutional landscape has increased, so have concerns with regards to the possibility for such bodies to escape scrutiny. This article takes up this issue and investigates a central element of agency accountability: their accountability vis-à-vis the management boards. The main and most direct confines on the grant of authority to agencies and their directors respectively, are represented by the management boards. Given the formal powers exercised by European agencies, it is important to observe to which extent boards are successful in exercising their scrutinising roles. Based on interviews with agency directors as well as board representatives, the paper unravels how these accountability ties operate in practice and identifies recurring weaknesses that seriously impinge upon their effectiveness.*

## 1. Introduction: Boards' Promising Potential for Agency Accountability

European agencies have become an established part of the European Union's (EU) architectural set up and are the most proliferating institutional entities at the EU level. At present, we are faced with just over thirty such executive creations, operating in and often regulating a multitude of highly sensitive areas such as medicines, aviation safety, chemicals, food safety, police co-operation, disease prevention, among others. Their powers started off as information-providing and executive, as evidenced by the early years of agency creation. We are recently witnessing however, the increasing "mushrooming" of more powerful agencies possessing operational, decision-making or even quasi-regulatory powers (see further Groenleer 2009; Busuioc 2010a;b). This trend towards agencification at the EU level is accelerating with various newly established agencies<sup>1</sup>, including three in the financial sector, which effectively become the most powerful European agencies to date (Chiti 2009; Busuioc et. al. forthcoming).

These institutional developments at the EU level have not gone unnoticed and have given rise to concerns regarding the presence of institutional checks, fencing in the exercise of these powers. The risks inherent in placing too much power in the hands of such bodies in the absence of appropriate accountability arrangements have increasingly been signalled in the literature (Everson 1995; Shapiro 1997; Vos 2000; Flinders 2004; Curtin 2005, 2007; Williams 2005; Dehousse 2008). The present article contributes to this debate by zooming in on and investigating what could arguably be agencies' most crucial accountability relation: their accountability vis-à-vis their management boards. The article aims to make an empirical contribution to a highly debated and pertinent topic—the accountability of European agencies—yet one which has generally been focused on (and limited to) the analysis of formal provisions as derived from the constitutive rules, overlooking de facto developments (see further, Busuioc et. al. forthcoming).

The main and most immediate confines on the grant of authority to agencies and their directors are exercised by the agencies' management boards. Boards are generally mandated by the agencies' constituent acts (i.e. EU secondary legislation), as part of their core duties, to monitor agency performance and to hold the director to account. Given their hybrid nature, both internal and, by virtue of their monitoring role, also external to the organisation, these account-holders are in a unique position to oversee the director and the agency's performance and to extract

---

<sup>1</sup> The European Asylum Support Office, the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority.

accountability. Boards simply have an advantaged position compared to other account-holders (such as the European Parliament, the Council, the European Court of Auditors) due to their role in the agency as the highest steering organ, proximity, privileged access to internal documents, involvement in agency decision-making etc. Also, as it will be shown later on below, they are legally provided with powers to undertake punitive measures and enact consequences. This creates the potential for a crucial role for boards in monitoring and disciplining agency behaviour.

However, despite this considerable potential, studies investigating the role and contribution of boards in holding European agencies to account are lacking. Do management boards live up to their potential and make use of their powers and *de facto* hold agencies and their directors to account? Or are they perhaps falling short in their monitoring roles? In order to answer these questions, this article analyses this accountability relation to the boards both at the *de jure* level, in terms of the formal obligations in place as well as at the *de facto* level, by investigating and analysing how these obligations are enacted in practice, in the case of five European agencies.

The article will proceed as follows: first of all, the concept of accountability will be introduced. Secondly, the methodological choices behind the empirical material presented will be justified. This will be followed by a general introduction of European agencies' management boards i.e. composition, the types of powers they possess, so as to set the context for the ensuing section on agency accountability vis-à-vis the boards. Next, the paper unravels how these accountability ties operate *de jure* and *de facto* and identifies recurring failures that seriously impinge upon the effectiveness of management boards in their monitoring roles.

Before embarking upon this however, the central concept: accountability needs clarification. What do we mean by accountability and how can it be studied, will be discussed below.

## **2. Demarcating Accountability**

Accountability has been identified as one of the “golden concepts” (Bovens et. al. 2008: 225) of modern governance and the very “lifeblood in guarding public interest” (Hodge 2005: 4). Perhaps precisely due to its high relevance, the term has been overused to the extent that it has become an umbrella concept, a “label for all seasons” (Hood 1991) in today's political and academic discourse. As modern governance's favourite ‘buzzword’, it has taken on a variety of different meanings (Behn 2001; Mulgan 2003; Bovens 2007) and been used interchangeably with

other political feel good standards such as transparency, efficiency, responsiveness, responsibility, democracy, participation etc. Precisely to avoid a lack of conceptual clarity, this article starts from a narrow, clear-cut definition of accountability. This allows us to avoid using accountability as a “catch all” concept, “a garbage can filled with good intensions, loosely defined concepts and vague images of good governance” (Bovens 2006: 7) and to pin the concept down to a clear set of identifiable characteristics by focusing on its core meaning.

Accountability is thus understood as “a relationship between an actor and a forum, in which the actor has the obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment, and the actor might face consequences” (Bovens 2007: 450). This conceptualisation of accountability contains clear constitutive elements, which render it particularly suitable for empirical research by allowing to systematically map out accountability relation(s) as well as to pinpoint exactly where failures occur. It has been increasingly used in the EU literature (Curtin 2005, 2007; Benz et. al. 2007; Papadopoulos 2007; Curtin and Egeberg 2008; Wille 2010; Bovens et. al. 2010) and is also in line with similar conceptualisations by various authors (Day and Klein 1987; Oliver 1991; Romzek and Dubnick 1998; Scott 2000; Lastra and Shams 2001; Mulgan 2003; Pollitt 2003; Dubnick 2003; Brinkerhoff 2004). Furthermore, given its retrospective, ex post facto character, this conceptualisation is particularly suitable in the context of non-majoritarian bodies such as agencies, as equating accountability with (ex ante or ongoing) control would run contrary to the reason to set up such bodies: their independence (Busuioc 2009).

In line with this narrow, core meaning of accountability, the process of account-giving is a relationship between an actor and a (individual or collective) forum, characterised by three main stages or elements. The first stage is the *information phase* in which the actor provides information about his actions retrospectively to the accountability forum. On the basis of the information at hand, the forum engages the actor in some form of discussion; this constitutes *the debating phase* of an accountability process. At this stage, the forum can ask questions, demand answers or additional information and the actor can explain his or her conduct, which enables the forum to reach an assessment or judgment of the actor’s behaviour. The debating component has been described as the central element of accountability. In the words of Fisher, “the heart of accountability is discourse. (...) accountability and accountability processes become means by which challenge and debate can occur” (Fisher 2004: 513).

Finally, accountability also “involves an element of redistributive justice” (Mulgan 2003: 9). This constitutes *the consequences phase*, in which, based on its prior assessment of the actors’ behaviour, the accountability forum has the possibility to impose sanctions. This can entail informal as well as formal sanctions ranging from milder forms such as formal disapproval and fines to all sorts of disciplinary measures culminating in the “nuclear weapon of liquidation” (Hood et al. 1999: 47). The possibility of consequences is a central element in an accountability process; nevertheless, some procedures entailing only informing and debate can still qualify as an accountability process as long as sanctions are available elsewhere (Fisher 2004: 452). In this sense, there can be a division of labour between different accountability forums, with some forums lacking the power of formal sanctioning, which is then remedied by other accountability forum(s).

This article examines the accountability relation between management boards and agency directors. In line with this theoretical framework, the analysis will be structured along the three phases of an accountability relationship in order to: first of all, ascertain to which extent these elements are present, and secondly, how the various phases are discharged in practice and if failures occur.

### **3. Methodological Note**

This analysis draws on two main sources of data: (legal and policy documents) and interviews. The main source of data for the empirical material is constituted by 38 semi-structured expert interviews.<sup>2</sup> The interviews were conducted at five agencies: the European Medicines Agency (EMA), the Office for Harmonisation of the Internal Market (OHIM), the European Aviation Safety Agency (EASA), Europol and Eurojust. Interviews were generally conducted at the seat of the various agencies, respectively London, Alicante, Cologne and The Hague as well as in Brussels.

Following the theoretical underpinnings of this study, i.e. accountability as a relational interaction between an actor and a forum, and in order to obtain a balanced view and avoid bias, interviews were conducted with both the actor (i.e. agency directors) as well as the forum (i.e. members of the management board). The (executive) directors of all five agencies were interviewed as well as

---

<sup>2</sup> They make part of a broader research project on the accountability of European agencies with a sample of over 60 interviews.

the administrative directors, where such a position is in place (i.e. EASA, Eurojust). This was matched with interviews with members of the management board from all sampled agencies.

The interviews were taped, transcribed and systematically analysed. Given the use of a semi-structured list of questions, the data was easily comparable and patterns were derived. Furthermore, attention was paid to the answers provided by members of the forum(s) and those of the actor in order to corroborate the information obtained and to ensure that it was reliable, accurate and consistent. The interview material was used as a source of empirical information and respondent quotes are used to illustrate the main points. All the respondents were anonymised and numbers were provided for each interviewee, which are referred to throughout the text.

Two criteria guided the selection of agencies: the institutional field of operation and agency “power” (i.e. related to tasks). First of all, with regards to the institutional field of operation, this is likely to impact agencies’ governance and accountability structures. Agencies operating in the former third pillar prior to Lisbon (i.e. currently falling under the Area of Freedom Security and Justice, AFSJ) differ from the classic, former first pillar agencies, by virtue of the fact that “these bodies were established and operate[d] under the intergovernmental pillars” (Chiti 2009: 1398). As a result of its “gradual communitarisation”, the Area of Freedom, Security and Justice has developed specific institutional governance structures (Rijpma 2010). Although the Treaty of Lisbon has collapsed the pillar structure, this area continues to maintain distinct peculiarities e.g. a more prominent role of member states, a greater role for the Council (and its Secretariat), weaker or absent role for the Commission (in both the board of agencies as well as in appointment and removal procedures for the director). This heterogeneity needs to be reflected in the case selection. Following this logic, the case selection includes both agencies operating in the former first pillar (i.e. EASA, EMA, OHIM) as well as those operating in the Area of Freedom, Security and Justice (i.e. Europol, Eurojust).

With regard to the second criterion, accountability is related to the exercise of power; after all, “the principle of accountability (...) concerns itself with power” (Young 1989:202). As, accountability issues are most pertinent for the most powerful agencies rather than the weaker ones, the former need to be examined. Thus, the more powerful agencies, and thus, those most relevant for this investigation are those possessing: *decision-making, (quasi-) regulatory and operational*

*co-operation tasks* rather than those discharging merely information- gathering and executive tasks.<sup>3</sup> The five agencies selected are instances of these three categories, that is: OHIM (decision-making), EASA and EMA (decision-making and quasi-regulatory) and Europol and Eurojust (operational co-operation).

#### **4. Management Boards: Formal Roles and Accountability Relations**

Boards are referred to by different names across agencies. Several terms are used to refer to what is by and large the same type of body: management board (i.e. the most commonly used, which will be adopted hereafter), administrative board and budget committee (i.e. OHIM)<sup>4</sup>, college (i.e. Eurojust) etc. Also in the case of agency heads, different terms are used for this function across agencies: (executive) director (i.e. most common) and president (for example, OHIM, Eurojust).

By virtue of their hybrid role, boards carry out a broad array of functions ranging from supervisory roles in terms of budgetary and planning matters, monitoring the work of the director and the agencies' performance as well as tasks in terms of setting the strategic direction of the agency, approving the work program, adopting legally binding implementing rules etc. Moreover, although rules on this vary, most basic regulations reserve a role for the board in the appointment and the removal of the director. For example, in terms of appointment some management boards appoint the director on a proposal by the European Commission. In some other cases, the board draws a short list of applicants from which the Council or the Commission makes the final selection and appointment.

Rules regarding the composition of the management boards vary but in general boards tend to be very large, comprising a representative from each member state as well as depending on agency representatives from the European Commission and, in some cases, the European Parliament and/or relevant stakeholders. The members' term of office varies from 2.5 to 5 years, which is short in comparison with national agencies (Groenleer 2009: 120).

---

<sup>3</sup> For a general classification of EU agencies according to their tasks see Craig 2006:154-160; Busuioc 2010a: 25-29.

<sup>4</sup> In the case of OHIM there is a split between the functions of the board, with two bodies carrying out board functions as opposed to one: the administrative board and the budget committee.

Formal lines of accountability to the board tend to be defined very broadly: “the Director shall be accountable to the Management Board in respect of the performance of his duties”,<sup>5</sup> “the Management Board shall exercise disciplinary authority over the Executive Director and over the Directors”<sup>6</sup> etc. Other than representing a clear statement of the hierarchical relation of the director to the board, such provisions give little guidance as to how this accountability arrangement is (to be) implemented in practice. For what is the director accountable to the board? How does it take place? And to what extent? Is it a fully-fledged process of accountability informing, debating, and consequences?

## **5. Information: Provided, but Processed?**

Two key aspects of informing deserve consideration: whether the actor supplies information, and whether this information results in the forum being “informed”. Below we will see that whereas the first element is generally satisfied, challenges intervene in terms of the forum actually processing the information received from the actor.

The manner and content of information provision by the agency vary in practice from one agency to the next depending on among others the frequency of board meetings, agreed rules of procedure, established practices as well as internal dynamics of the executive-board relationship. There are nevertheless specific documents pertaining to the functioning of the agency, which according to the basic regulations have to be submitted to the board. Such aspects include for instance, the annual report and information regarding the execution of the budget. These documents are part of a bigger reporting cycle. After the board has seen them, they are also submitted to several European institutions and are also publicly accessible. These reporting obligations are complied with in all the agencies studied.

Moreover, according to the framework Financial Regulation, agency directors of all agencies receiving contributions charged to the EU budget, are expected to submit, in their authorising

---

<sup>5</sup> Article 38(5) of Council Decision of 6 April 2009 establishing the European Police Office (Europol), (2009/371/JHA), OJ L 121, 15.05. 2009, p. 37

<sup>6</sup> Article 33(2)(h) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79, 19/03/2008, p. 1



officer capacity, an annual activity report to the board.<sup>7</sup> By virtue of the same regulation, agencies are also required to regularly undertake evaluations of their programs and activities, which are to be submitted to the management boards.<sup>8</sup> The basic regulations of some agencies specifically provide for an initial evaluation after three or five years of operation, which are to be followed by subsequent evaluations at regular intervals. In its 2008 special audit report, the Court of Auditors concluded that all the agencies had submitted activity reports to their boards as well as complied with their evaluation requirements, with reports being produced within the time limits (European Court of Auditors 2008: 24, 25). While noting that the results were generally positive, the Court of Auditors did express some concerns on issues ranging from the “merely descriptive” character of annual activity reports, their lack of performance indicators to weaknesses of the multiannual planning in evaluation reports as well as the independence of such evaluation reports when organised by the agencies themselves (European Court of Auditors 2008: 31, 32).

Additional informal informing practices have also emerged. For example, the EMA director gives a verbal “highlights” presentation during each board meeting describing the work of the agency for the previous three months as well as planning for the following three months. The Europol director gives a brief written and oral report at every management board meeting. Moreover, once a year, in addition to the annual report, he submits an internal evaluation report to the board on the performance of Europol.

Management board representatives interviewed generally felt that they were sufficiently and adequately informed by the agency. Not all boards were satisfied, however. In the case of Europol particularly, respondents found it difficult to give an overall assessment of the information received from the agency and pointed out that “it’s difficult to judge whether we are getting enough information, the right information” (Respondent #16). One of the main problems was deemed to be the fragmentation of information provided by Europol to various Europol structures: the management board meetings, the Heads of National Unit meetings and the liaison officers meetings, rendering it reportedly difficult to obtain a “global overview” of the performance of the agency.

---

<sup>7</sup> Article 40(1) of Commission Regulation (EC, Euratom) 2343/2002 of 23 December 2002 on the framework Financial Regulation for the Bodies Referred to in Article 185 of Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the General Budget of the European Communities, OJ L 357, 31.12. 2002, p. 72

<sup>8</sup> Article 25(4) of the Framework Financial Regulation

The quality of being informed does not only depend on being provided with sufficient information. The forum should also be able to prepare for the meetings, digest the information provided, and have the expertise to assess the information provided. These conditions are not always met and the boards' level of preparation often falls below expectations.

Whereas some board delegations are well- prepared and take their role seriously, a significant number of delegations tend to be poorly prepared for meetings. This constitutes a significant cross-agency concern. One of the EASA directors observed, "I think that the vast majority of the members of the board do not have time enough to go in detail and to be sufficiently informed about the agency. They know of course the agency but not sufficiently in detail and maybe they don't read sufficiently all the documents we send to them and it doesn't appear that they make a reflection on those documents" (Respondent #45). After relating the same problem, a management board representative of the agency assessed this to be in stark contrast with his own experience at the national level, where the board "works very well and everybody is prepared and knows what's going on. Here it's not like that at all. And I'm sure some people come to the meetings who haven't read the papers and don't really understand the issues to be honest" (Respondent #32).

Similar observations were made in connection with some of the members of the EMA management board. Respondents generally believed that not all EMA board members prepared the documents provided for the board meetings. Its director gave a very telling example: "Some years ago, we made a mistake. We sent a mailing to the board in paper format, now we send it electronically and we forgot to copy, we had double copies ... there was one page missing, not for all the members but for half of the members of the board. And before the meeting we didn't hear anything. Nobody noticed. They didn't read the document before they came to the meeting".

In addition to preparation deficits, a recurring issue across the five agencies studied pertains to underlying knowledge deficits of board members on financial and administrative matters, which are crucial aspects of their role as board members. While generally experts in the core substantive subject matter of the agency's work, most delegations are not equipped with managerial knowledge. This compromises their ability to process the information received and to assess the actor's performance in these matters. In the words of one agency director, "the quality of the members of the delegation is not high. These are not really good people ... I think they are so

much in their specialised world that they forgot normal management and normal policy making issues” (Respondent #38). Similarly a management board representative from EASA observed, “There are relatively few people in the management board who really have any knowledge of how the agency is working, some do but not many. (...) It’s not aviation safety expertise; it’s managerial expertise, actually. I think we could benefit by having a couple of really experienced high profile managers” (Respondent # 32). This occasionally reaches the point where the discussion of such issue takes place between only a handful of representatives. In the words of a director “a meeting of our budget committee is a conversation between my vice-president who deals with financial matters and these three people under the leadership of the chairman of the meeting. And the rest of the people sit there and fill in forms to get their travel costs reimbursed” (Respondent # 38).

The source of this problem is rooted in the fact that no careful thought has been given to the composition of agency boards in view of their functions and tasks. Foundational discussions on board composition have tended to be fairly politicised and frequently entailed avid debate between the Commission, member states and the European Parliament on issues of representation and voting rights of the various parties concerned. How to safeguard their competence and commitment as members of an accountability forum was not under consideration.

This is by no means exclusively an issue that concerns European agencies; it exemplifies an old tension in the composition of boards that can also be found at the national level: the tension between representative and professional boards (Cornforth 2003: 13). On the one hand, there is a need for boards to be democratic and accountable and on the other hand, there is a need to ensure output, service delivery and effective and efficient governance (Greer et. al. 2003). With regard to European agencies, representativeness has been chosen as a sole criterion for board selection. There is no reason why this should happen to the detriment of expertise, however. While remaining representative, board composition can still be tailored in light of board tasks. Board composition needs to shift away from political squabbling over votes and focus instead on how to ensure that the representatives to the board are actually equipped with the knowledge and expertise needed to accomplish their tasks. Such matters are difficult to regulate at the European level, as the responsibility rests with the member states. The individual member states need to ensure that their delegations to the board do possess the skills and knowledge needed to effectively enact their roles in the board.

## 6. Debate: Not without Hiccups

Information submitted by the director to the board is largely discussed during the meetings of the management board, whose meeting frequencies vary. The management board of Europol meets six times a year, those of EASA and EMA four times, OHIM's only twice. A more special case is Eurojust, where the management board representatives (i.e. the college members) are also the drivers of the operational (case)work, and thus, they meet twice a week. All board respondents felt that there were satisfactory possibilities for discussions with the director. They did, however, mention various impediments to quality deliberation: board size; board focus; conflicts of interest; and inadequate participation from board delegations.

### *Large Boards, Small Agencies*

Boards are generally outright plethoric in their composition, which seriously restricts their capacity to enact their roles. In some agencies, the size of the board (when including the presence of alternates, observers as well as other members of member state delegations, for example, in some cases advisors and experts) actually eclipses the size of the overall staff of the agency. Whereas this is common (and to some extent justifiable) for starting agencies, it is not restricted to them. For example, the European Agency for Health and Safety at Work (EU-OSHA) is listed as having a total staff of sixty-four employees (European Court of Auditors 2009a: 52). Its management board however, has a grand total of eighty-four management board members without even counting in alternates. Similarly, the European Police College (CEPOL) has a staff of twenty-one employees (European Court of Auditors 2009b: 127) and a governing board composed of one delegation from each member state, so at least twenty-seven board members. EU-OSHA and CEPOL are by no means alone in this predicament.

Though not so utterly excessive, compared to staff size that is, board size in the five sampled agencies is nevertheless unwieldy. Member state delegations do not have only one representative but an alternate as well, and in some cases delegations are composed of three or four persons. The Europol board thus counts well above a hundred participants, for example. The board of EMA has 35 voting members, but when counting in alternates and observers, the board counts as many as 73 members. The sheer size of such boards allows very little time for interventions, let alone for debate going in any depth on specific topics. In this connection, one agency director remarked, "when you have large boards like this they are not operational, they can't be an inspiring partner to you, so the board and the construction of this kind of board does not help

an executive director and does not help the agency in a professional way to steer the organisation”(Respondent #39).

#### *A Problematic Focus*

Secondly, respondents felt that the board’s focus was unhelpful. Two problems stood out: (i) overemphasizing micromanagement details at the expense of strategic discussion, and (ii) focusing on issues affecting national interests to the detriment of scrutiny of overall agency performance. The bias towards micromanagement seems to be particularly problematic in the case of Europol. The board would reportedly get almost completely sidetracked into administrative and technical details as opposed to considering the status of analytical work files (AWFs) or the agency’s strategy. In the words of one respondent, “maybe due to the composition, maybe due to the fact that looking for unanimity in a group of twenty-seven is nearly impossible, you see that the management board tends to put more effort and time in legal text, discussing commas, points and words; they do the work of the legal advisors preparing the text over and over again, spending too much time on this kind of issues, whereas the bigger strategic decision-making processes, there they tend not to be able to take decisions(...). So the bigger issues, they are very difficult to discuss” (Respondent #17). This tendency towards micromanaging was further corroborated by Peter Storr, from the UK Home Office, who in his evidence before the House of Lords, stated that the management board of Europol was becoming “a little bit bogged down in the sort of day-to-day detail which in a police force within this country you would expect the chief officer of police to undertake without reference.” (House of Lords 2008: 42).

The recent horizontal evaluation of European agencies also points at a strategy deficit, observing that “some agencies are not governed in strategic enough manner” (Ramboll evaluation 2009: 14). Similarly, the 2003 agency meta-evaluation also refers to an overemphasis of boards’ activities on administrative details to the detriment of strategic issues in the case of several other agencies i.e. the European Centre for the Development of Vocational Training, the European Training Foundation, the European Environment Agency, European Monitoring Centre for Drugs and Drug Addiction (European Commission 2003: 53). A board focus on micromanagement at the expense of strategic discussion thus, does not appear to be restricted to the sampled agencies. This ties in with the previous observations concerning board recruitment and the fact that board composition is not fully tailored to the needs of the agency and the subsequent tasks board members are expected to fulfil. In this connection, studies at the national

level observe that “the selection of board members for their management expertise and experience contributed to the board’s strategic contribution and its capacity to influence strategic decisions” (Edwards and Cornforth 2003: 91). It is not surprising that the boards of agencies fall short on this aspect given that expertise is not featuring among the criteria for board selection and the dominant consideration remains representation.

Respondents also noted board tendencies to be preoccupied by national interest issues rather than overall agency performance. This is particularly problematic for fee -generating agencies such as EASA, EMA and OHIM. Their board members are often the heads of corresponding national agencies. As such, their national offices are either beneficiaries or of the European agency’ work programme and payment system or are in direct competition with the European agency. This can result in tremendous conflicts of interest. As summarised by a member of the Commission’s Internal Audit Service, “the members of the board of the agencies are at the same time the beneficiaries or interested parties of the work programme. They are deciding on the budget and once the budget is decided they are on the other side getting the contracts of the money” (Busuioc 2010a: 146,147). Similar conflicts were also reported in the case of EASA and EMA, when the discussion turns to the fees that the European agency is to pay to the national agencies for their services. This situation was most pronounced in case of OHIM, where, reportedly, aspects pertaining to the agency’s performance did not raise much interest in the board. The board is composed of the heads of national patent and trademarks offices, which exist in parallel with OHIM. Not surprisingly, board delegations show little concern for the performance of the European agency. As observed by one board representative, “I personally appreciated very much what Mr. de Boer [the president of OHIM] has done, I support him as much as I can but there are people who have shown so far a limited interest. They think it is interesting that he has raised efficiency but if he had not then that could go by” (Respondent #19). The same situation is also reported by the president, who felt that the performance of the agency was of minimal concern among board members. In his own words, “the agenda of the board would be that in a meeting of a day and half we would spend perhaps one hour at most on what happens in the Office: performance, developments, plans and the rest is about themselves. I remember one delegate saying, at the beginning of one meeting as I was about to set out on my half an hour reporting of what happened in the last months, ‘can we not speed this up?’”

There are clear indications that OHIM’s board behaviour is shaped in no small part by conflicts of interest. Keen to protect their national offices, not only do board members not take an

interest in the performance of European office, but according to the president, effectively seek to halt it.

There is a raging battle; very unpleasant, really very unpleasant a war that ever since I took over I had a war with these guys, which more or less can be labelled as a competition war. They think that the better I do with my trademarks, the faster I deal with my procedures, the cheaper I get, the better the reputation and the quality of our work gets, the more electronic and modern our communication with them, the better therefore I do my job, the bigger I may be a threat to the national thing because it might just lead to the situation that people find it more convenient to go to Alicante.<sup>9</sup> So there is an inbuilt conflict in the minds of these people and they use that.

And yet again, “when they come to Alicante, they talk about the ‘worries of their offices’. They don’t say it in that way but they try to stop development from our side. That’s what it is. And that is a very strange role for an administrator: they don’t want us to get better.”

Given the multi-level nature of EU governance struggles for competing, legitimate interests between the EU level and the national level are to some extent part and parcel of the system. However in this case, the “watchmen” whose main job description is that of steering, overseeing and monitoring the good performance of the European agencies, simultaneously have a vested interest running contrary to their acting as a proper accountability forum at the European level. This raises serious doubts as to whether they can actually fulfil their role.

#### *Participation in Discussions: An Occasional Monologue*

Another serious constraint on the quality of debate in some boards is that a large number of delegations systematically do not participate, do not raise questions or make comments. In the case of EASA a management board representative observed that “there are at least half the people to be honest, who virtually say nothing, which is slightly strange” (Respondent #32). Similarly one EMA board member observed that “there’s a substantial part of the board that doesn’t speak during the meetings. Mostly there are some people that you are absolutely sure that they will say something. I can give you five or six names that will speak up during the meeting next Thursday, maybe even more, but I can also tell you about ten people that I am dead sure that they won’t speak up” (Respondent # 20). Similar concerns were voiced in the context of Europol.

---

<sup>9</sup> Alicante is the seat of OHIM.

Board members' lack of time and resources were cited as being at the heart of the problem. By default, board debates are dominated by only a handful of delegations whose constituent organisations do properly facilitate their work. In addition to resource issues, lack of interest in the workings of the agency, lack of preparation or even language problems have also been put forward as possible explanations for lack of participation in debates. The case for the boards' lack of time combined with a lack of interest in agency matters appears to be quite strong. With the exception of Eurojust, where the members of the board (i.e. the college) are virtually the drivers of the operational work and are involved in the day-to day work of the organisation, the members of the management board of the other sampled agencies are generally employed full time in national agencies or ministries. They remain national-minded bureaucrats, whose local priorities and national outlook dominate their encounters (Geuijen et al., 2008: 86). As such, it is doubtful that they have come to regard the agency as "their own".

## 7. Enacting Consequences: A Damoclian Sword

Agencies' basic regulations provide for only one direct formal sanction: the dismissal of the director. There are different rules in place over who is the final authority to exercise the ultimate sanction vis-à-vis the director. An overview of these provisions for the five agencies researched is provided in Table 1 below.

<i>Table 1</i>	<i>The Management Boards' Role in the Dismissal of the Director</i>
EMA	The management board may dismiss the director based on a proposal from the Commission.
EASA	The management board can dismiss the director on a proposal from the Commission.
OHIM	The president can be dismissed by the Council acting on a proposal from the administrative board.
Eurojust	The administrative director may be removed from office by the college by a two-thirds majority.
Europol	The director can be dismissed by a decision of the Council after obtaining the opinion of the management board.



Indirectly, the board does possess other sanctions. Agency work programs and budgets need their approval; withholding it constitutes an important stick boards can wield. The ultimate sanction of dismissal has never been used in practice in any of the five agencies studied. Strong reluctance to do so was voiced by all the management board respondents. Similarly, directors also observed that dismissal was not a likely sanction to be employed by the board. In the words of one of them, it “is like the nuclear bomb you know ... You don’t want to use it because if you do, it destroys everything” (Respondent #53). Several respondents felt that incompetence or inefficiency alone would not result in removal and that it would only be used in cases of criminal activities and fraud: “For a director on a five-year appointment to be sacked it would be a big step. Obviously if someone did something illegal or financially corrupt they would be removed straight away clearly but if it’s just incompetence or inefficiency, he’s not likely... They are on a limited term so in the end they just wouldn’t be renewed” (Respondent #32). Similarly, in the words of a respondent from a different agency, “it is very difficult in a board representing twenty-seven countries to have somebody burned down. Then this person should either be totally nuts or fraudulent; but incompetent, I don’t know if you could do anything about that” (Respondent #20).

These findings are in line with conclusions at the national level, where a low level of formal sanctioning has been documented (Thatcher 2002: 960, 2005: 357). Two possible interpretations were put forward for this state of affairs: 1. that principals did not use formal sanctions because alternative methods were effective and 2. that the agency losses were outweighed by the costs of using controls. Both interpretations are likely in the case of European agencies and are supported by a number of examples cited by respondents.

In support of the first interpretation, in the case of two European agencies other ad hoc, less disruptive strategies short of dismissal were reportedly employed in an attempt to address the situation or signal dissatisfaction. In one case, where one of the directors was underperforming in part of his task responsibilities, the executive director took internal managerial action and reorganised the work division within the agency, “moving work from one place to another”, so as to “circumscribe the problem”. Moreover, issues pertaining to underperformance and possible remedial actions would be reportedly addressed informally, “in the corridors”, outside the formal meetings of the board rather than through formal channels.

In cases where the management board lacked the power to sanction the director directly, the management board resorted to alternative means to ensure compliance, i.e., by threatening to

withhold approval of basic agency documents, rather than following the official channel via the Council. This was reported in the case of Europol, where a management board representative recounted “we told him [the executive director] ‘if you do not present a strategic analysis before the draft work program we will not adopt a work program,’ which means he cannot function” (Respondent #17).

All the examples above indicate a strong preference for keeping the problem contained within the organisation and a clear reluctance to resort to formal sanctions, which would signal to the outside that the organisation was underperforming. Additionally, it could also result in other costs for the board, such as having to clean up the mess (e.g. new recruitment procedures, political damage control etc.), which are perceived as being (too) high by the board. This relates to the second explanation put forward by Thatcher. It seems that the high costs involved in sanctioning play a significant role in the decision not to resort to formal sanctions. The dismissal of a director who, very often, is politically endorsed could become a politically sensitive issue for the management board: “in practice that [the removal of the director] would be a fairly extreme step and could become a political issue if you’re not careful” (Respondent #19).

Another aspect, which also seems to dampen the motivation of the forum to resort to such a measure is the negative reflection this would cast on the performance of the board itself. In other words: “if you appoint someone for a five- year period, apart from anything else you as a board you’ve appointed them, haven’t you? So then sacking them after three years is in a sense an admission of failure of the board as well as of the person, isn’t it?” (Respondent #32) All respondents regarded non-renewal as the most likely alternative to sanctioning. These observations are also further corroborated by the recent horizontal evaluation of European agencies, which recounts that non-renewal of a director’s mandate has reportedly only been resorted to twice in cases of dissatisfaction with the performance of an agency director (Ramboll evaluation 2009: 25), leading the evaluators to conclude that “directors’ accountability is limited in scope” (Ramboll evaluation 2009: 25). Although non-renewal does solve the problem in the long term, it is questionable whether it is an optimal solution for the functioning of the agency in the short term.

All in all, formal sanctioning is a sort of Damocles’ sword, hanging over the directors’ heads, but rather unlikely to be wielded. This can be problematic from an accountability perspective. Accountability relies on a “logic of ‘consequentiality’: rulers behave in a responsive manner because they anticipate [and, one could add, fear] the costs of unresponsive behaviour” (Papadopolous 2007: 472). However, in this case the risk of formal sanctions being applied in the

form of dismissal is very low, with both sets of respondents –management board and directors—being aware that this almost never happens. This impacts negatively on the credibility of sanctions.

## **8. Conclusion: Management Boards, Falling Short of (or Living up to) Expectations?**

As discussed at the beginning of this article, management boards had the potential and the institutional means to play a crucial role in holding agencies to account. However, the actual operation of this arrangement in the five agencies investigated reveals recurring weaknesses which seriously impinge upon its effectiveness.

Whereas some board delegations of the sampled agencies are indeed well prepared and on top of their game, an overwhelming number are not the vigilantes that they are formally mandated to be. The already present asymmetries of information inherent in any delegation process are only extrapolated by the fact that a large number of delegations to the boards do not prepare for meetings or participate in discussions. What is more, the size and composition of boards, as provided for in the agencies' basic acts are not conducive to efficient, in-depth discussions. This has resulted in a cumbersome board process as well as a focus on administrative detail due to difficulties in reaching agreement on bigger issues or in having substantive discussions. These gaps in oversight are further extrapolated by the fact that a large number of board members lack knowledge and expertise in financial, budgetary and managerial issues, which represent a significant part of their monitoring and steering responsibilities.

Furthermore, board members tend to be strongly preoccupied with aspects of agencies' functioning directly impacting on the national interest, but less so with the overall performance of the agency or the strategic planning of the future and the development of the agency. To this extent, these aspects of monitoring can escape oversight. Whereas these bureaucrats fulfil “double-hatted” roles (i.e. both national and European), in terms of actual administrative behaviour, board members, more often than not, seem to remain “national –minded bureaucrats”. What is more, in case of conflict between the roles of these double-hatted actors, the national mode takes precedence, particularly in the case of fee-generating agencies (i.e. EASA, OHIM, EMA). In this connection, as we have seen, directors and management board participants recurrently reported high interest among board colleagues in issues pertaining to the national interest, with member state representatives squabbling over issues affecting the national

interest or the national industry, while losing interest in issues pertaining to the overall performance of the agency, long term strategy etc. Some of the problems depicted often reflect inherent tensions and struggles for competing, legitimate interests between the EU level and the national level. The management boards of agencies often become the grounds where these tensions become most explicit due to the double-hatted and sometimes conflicting nature of the roles of board members.

All in all, the supervision of management boards displays a broad range of weaknesses. Management board representatives have not fully assumed responsibility of their monitoring roles. The emergence of new accountability relations involves a shift in role expectations (Wille 2010: 1096, 1097). There seems to be a lack of “ownership” of the agency among many board delegations in the sampled agencies and of coming to terms with their new, superimposed role expectations.

However, these pervasive gaps in supervision are not necessarily strictly due to individual failures but are more likely attributable to generic or systemic oversights. The lack of preparation of board members might largely be the by-product of the fact that European agencies are not high on national agendas. Very often, insufficient time, training, administrative support and resources are expended on board preparation at the national level, “because those are not the problems for which the member states, people in the ministry and the ministers are accountable in the Parliament” (Respondent #43).

The bias towards a “national mindset” (to the detriment of an “agency-minded” outlook) not aligned with their European roles and the presence of conflicts of interests are most likely the direct result of the manner in which board members are recruited, the occasionally conflicting nature of their role expectations and few opportunities for board members to meet and become familiarised with and invested in the agency. For most board members, participation on the board is a part-time job, which is performed sporadically, a few times a year. As such, as occasional players on the European level with a strong national baggage, they “come in with a focus on their national interests” (Geuijen et. al. 2008: 86). This process has been rendered even more difficult by the fact that sometimes their co-existing role expectations clash, particularly in the case of fee-generating agencies.

Be that as it may, the result is that as observed in the case of the five studied agencies, many of these account-holders can and do become weak links in the accountability chain. Some board delegations have simply not fully stepped up to the challenge and due to generic shortcomings or

other reasons fall short in many cases of adequately holding directors to account and comprehensively assessing the performance of the agency.

This is an interesting insight for the (agency) accountability literature, given that the debate has placed the actor (i.e. agencies) in the limelight. The concern has been mainly whether agencies are accountable. The above makes it clear that the manner in which the accountability forum complies with its responsibility of holding the actor to account is an equally valid issue. The interview material reveals that this is a realistic concern and demonstrates the relevance of shifting the focus of accountability to the forum(s) as well and questioning and investigating their actual role and input in the process. Ensuring that accountability arrangements are provided by formal design is not a sufficient guarantee of actual agency accountability. Crucial to this is that the powers gained by formal design are actually used diligently in practice by forums, actively monitoring and demanding answers.

## References

- Ashburner, L. (2003). "The Impact of new governance structures in the NHS", in C. Cornforth (ed), *The Governance of Public and Non-Profit Organisations: What do boards do?* Routledge Studies, 207-220.
- Barberis, P. (1998). "The New Public Management and a New Accountability", *Public Administration*, 76: 3, 451-470.
- Behn, R. D. (2001). *Rethinking Democratic Accountability*. Washington DC: Brookings Institution Press.
- Benz, A., Harlow, C. and Papadopoulos, Y. (2007). "Introduction", *European Law Journal*, 13: 4, 441-446.
- Bovens, M. (2005). "Public Accountability", in E. Ferlie, L. E. Lynn, C. Pollitt (eds), *The Oxford Handbook of Management*, Oxford: Oxford University Press, 182-208.
- Bovens, M. (2006). "Analyzing and Assessing Public Accountability. A Conceptual Framework", *European Governance Papers*, No. C-06-01.
- Bovens, M. (2007). "Analysing and Assessing Accountability: A Conceptual Framework", *European Law Journal*, 13: 4, 447-468.
- Bovens, M., Schillemans, T., 't Hart, P. (2008). "Does Accountability Work? An Assessment Tool", *Public Administration*, 86: 1, 225-242.
- Bovens, M., Curtin D., 't Hart, P., eds. (2010). *The Real World of EU Accountability: What Deficit?*, Oxford: Oxford University Press.
- Brinkerhoff, D. W. (2004). "Accountability and health systems: toward conceptual clarity and policy relevance", *Health and Policy Planning*, 19: 6, 371-379.
- Busuioc, M. (2009). "Accountability, Control and Independence: The Case of European Agencies", *European Law Journal*, 15: 5, 599-615.
- Busuioc, M. (2010a). *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*. Delft: Eburon.
- Busuioc, M. (2010b). "European Agencies: Pockets of Accountability", in M. Bovens, D. Curtin and P.'t Hart (eds), *The Real World of EU Accountability: What Deficit?* Oxford: Oxford University Press, 87-116.
- Busuioc, M., Groenleer, M. and Trondal, J. (forthcoming). "Introducing the Phenomenon of European Union Agencies" in M. Busuioc, M. Groenleer and J. Trondal (eds), *The Agency*

- Phenomenon in the European Union: Emergence, institutionalisation and everyday decision-making.* Manchester: Manchester University Press.
- Chiti, E. (2009). “An Important Part of EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies”, *Common Market Law Review*, 46, 1395-1442.
- Cornforth, C. (2003). ‘Introduction. The changing context of governance—emerging issues and Paradoxes”, in C. Cornforth (ed.), *The Governance of Public and Non-Profit Organisations. What do boards do?* Routledge Studies, 1-19.
- Craig, P. (2006). *EU Administrative Law*, Oxford: Oxford University Press.
- Curtin, D. (2005). “Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability”, in D. Geradin, R. Munoz and N. Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance*. Cheltenham: Edward Elgar, 88-119.
- Curtin, D. (2007). “Holding (Quasi-) Autonomous EU Administrative Actors to Public Account”, *European Law Journal*, 13: 4, 523-541.
- Curtin, D. and Egeberg, M. (2008). “Tradition and Innovation: Europe’s Accumulated Executive Order”, *West European Politics*, 31: 4, 639-661.
- Day, P. and Klein, R. (1987). *Accountabilities: Five Public Services*. London: Tavistock Publications.
- Dehousse, R. (2008). “Delegation of powers in the European Union: The need for a multi-principals model”, *West European Politics*, 31: 4, 789 – 805.
- Dubnick, M. J. (2003). “Accountability and Ethics: Reconsidering the Relationship”, *Encyclopedia of Public Administration and Public Policy*, DOI: 10.1081/E-EPAP-120010928.
- Edwards, C. and Cornforth, C. (2003). “What influences the strategic contribution of boards?”, in C. Cornforth (ed.), *The Governance of Public and Non-Profit Organisations. What do boards do?* Routledge Studies, 77-96.
- European Commission (2003). Budget Directorate General, “Meta-Evaluation on the Community Agency System”, <[http://ec.europa.eu/budget/library/documents/evaluation/eval\\_review/meta\\_eval\\_agencies\\_en.pdf](http://ec.europa.eu/budget/library/documents/evaluation/eval_review/meta_eval_agencies_en.pdf)>.
- European Court of Auditors (2008). “The European Union’s Agencies: Getting Results”, Special Report No 5.
- European Court of Auditors (2009a). “Report on the annual accounts of the European Agency for Safety and Health at Work for the financial year 2008, together with the Agency’s replies”, OJ C 304, 15.12.2009, p. 49.
- European Court of Auditors (2009b). “Report on the annual accounts of the European Police

- College for the financial year 2008, together with the College's replies", OJ C 304, 15.12.2009, p. 124.
- Everson, M. (1995). "Independent Agencies: Hierarchy Beaters?", *European Law Journal*, 1: 2, 180-204.
- Fisher, E. (2004). "The European Union in the Age of Accountability", *Oxford Journal of Legal Studies*, 24: 3, 495-515.
- Flinders, M. (2004). "Distributed Public Governance in the European Union", *Journal of European Public Policy*, 11: 3, 520-544.
- Geuijen, K., 't Hart, P., Princen, S., Yesilkagit, K. (2008). *The New Eurocrats: National Civil Servants in EU Policy-Making*. Amsterdam: Amsterdam University Press.
- Greer, A., Hoggett, P., and Maile, S. (2003). "Are quasi-governmental organisations effective and accountable?", in C. Cornforth (ed.), *The Governance of Public and Non-Profit Organisations. What do boards do?* Routledge Studies, 40-56.
- Groenleer, M. (2009). *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*. Delft: Eburon.
- Hodge, G. (2005). "Governing the Privatised State: New Accountability Guardians", *Paper presented at 'Accountable Governance: An International Research Colloquium'*, Queens University, Belfast, 20-22 October 2005.
- Hood, C. (1991). "A Public Management for All Seasons?", *Public Administration*, 69, 3-19.
- Hood, C., Scott, C., James, O., Jones, G. and Travers, T. (1999). *Regulation inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*. Oxford: Oxford University Press.
- House of Lords (2008). European Union Committee, "Europol: co-ordinating the fight against serious and organised crime", 29<sup>th</sup> Report of Session 2007-08, Report with Evidence, published 12 November 2008.
- Lastra, R. M. and Shams, H. (2001). "Public Accountability in the Financial Sector", in E. Ferran and C.A. Goodhart (eds), *Regulating Financial Services and Markets in the 21<sup>st</sup> Century*. Oxford: Hart Publishing, 165- 188.
- Mulgan, R. (2003). *Holding Power to Account. Accountability in Modern Democracies*. Palgrave Macmillan.
- Oliver, D. (1991). *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*. Milton Keynes: Open University Press.
- Papadopolous, Y. (2007). "Problems of Democratic Accountability in Network and Multilevel Governance", *European Law Journal*, 13: 4, 469-486.
- Pollitt, C. (2003). *The Essential Public Manager*, Philadelphia: Open University Press.



- Ramboll evaluation (2009). *Evaluation of the EU Decentralised Agencies in 2009, Final Report Volume I: Synthesis and Prospects*, Evaluation for the European Commission, December 2009.
- Rijpma, J. (2010). "Justice and Home Affairs Agencies: Governing the Area of Freedom, Security and Justice after Lisbon", *Paper presented at the ECPR Fifth Pan-European Conference*, Porto 24-26 June 2010.
- Romzek, B. S. and. Dubnick, M. J (1998). "Accountability", in J. M. Shafritz(ed.), *International Encyclopedia of Public Policy and Administration*. Vol. 1 A-C, Boulder: Westview Press.
- Scott, C. (2000). "Accountability in the Regulatory State", *Journal of Law and Society*, 27: 1, 38-60.
- Shapiro, M. (1997). "The Problems of Independent Agencies in the United States and the European Union", *Journal of European Public Policy*, 4: 2, 276-291.
- Thatcher, M. (2002). "Regulation after delegation: independent regulatory agencies in Europe", *Journal of European Public Policy*, 9: 6, 954-972.
- Thatcher, M. (2005). "The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe", *Governance: An International Journal of Policy, Administration, and Institutions*, 18: 3, 347-373.
- Vos, E. (2000). "Reforming the European Commission: What Role to Play for EU Agencies?", *Common Market Law Review*, 37: 5, 1113-1134.
- Wille, A. (2010). "Political -Bureaucratic Accountability in the EU Commission: Modernising the Executive", *West European Politics*, 33: 5, 1093-1116.
- Williams, G. (2005). "Monomaniacs or schizophrenics? Responsible governance and the EU's independent agencies," *Political Studies*, 53: 1, 82-99.
- Young, S. B. (1989). "Reconceptualising Accountability in the Early Nineteenth Century: How The Tort of Negligence Appeared", *Connecticut Law Review*, 21.