



More Room for European Agencies in the EU Decision-Making Process?

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The European institutions are not always able to address crises in a timely manner due to the cumbersome decision-making process. European agencies often provide the most appropriate response to the concerns of citizens and businesses that are experienced across the single market. They should be granted greater autonomy to bring to life EU policies while being made more responsible. At a time of growing uncertainties, the EU needs to further develop existing EU agencies and create new ones for addressing new cross-border challenges. A common legal framework should also be created for all EU agencies in order to harmonize their overall functioning.

INTRODUCTION

Since European agencies experienced a boom in the 2000s, the EU legislator has always granted them more power.¹ New, decentralised agencies were created in response to the financial crisis. Today, agencies are again presented as solutions to the challenges facing Europe, such as the

refugee crisis, cyber-attacks, posted workers and terrorism.

In his 2018 State of the Union address, President Juncker proposed to strengthen the European Border and Coast Guard Agency (Frontex) with an additional 10,000 operating staff by 2020. Last year he announced the creation of a European Labour Authority and the transformation of the EU Agency for Network and Information Security into a fully-fledged Cybersecurity Agency by doubling its budget.² In its proposals for the next Multiannual Financial Framework (MFF), the Commission decided to step up activities of EU agencies in the areas of security, border and migration management, whose budget should rise from €4.2 billion to €14 billion.

This budgetary increase for agencies who deal with the most pressing and critical challenges in Europe, reflects how suited they are to delivering EU policies. The EU already spends today ten times more than it did 15 years ago on its agencies, which further increases their importance in the EU institutional landscape.³ But it remains only a marginal expenditure of the EU budget, amounting to 0,8% and costing

every inhabitant €2,35 per year.⁴ In this context, the crucial question is whether the EU is making the right choice by delegating more power to agencies.

In this Policy Brief, we argue that extending the scope of agencies would be a positive step for the EU. We set out criteria to understand why EU agencies are often more suited than national competent authorities (NCAs). EU agencies are a way to exert powers at the most relevant level and provide adequate solutions to problems met by businesses and citizens, thanks to their expertise and impartial approach. We also advocate a broader interpretation of powers that can be delegated to EU agencies. Granting more autonomy to EU agencies would strengthen the efficiency of the EU's action, without threatening its democratic dimension, as EU legislators would still be able to control agencies' activities.

KEY ACTORS FOR DELIVERING EU POLICIES EFFICIENTLY

Five reasons explain why EU agencies are very efficient in implementing EU policies. They (1) tackle problems with a cross-border dimension, (2) pool together EU expertise, (3) provide independent advices to the EU legislator, (4) offer cost-efficient solutions and (5) also increase the Union's visibility by being spread across Member States.

First, a growing number of issues are better solved at European level. New EU agencies are created for taking over competences previously exercised by NCAs. They coordinate Member States' actions to tackle problems faced by economic actors. The new EU Cybersecurity Agency aims to prevent cyber-attacks, which know no borders and can be harmful to the stability of the EU economy.⁵ From 2019, the European Labour Authority will ease the exchange of information between Member States and ensure that EU rules on labour

mobility are enforced in practice. From 2020, the EU Public Prosecutor's Office will prosecute terrorist cases and crimes against the EU's financial interests, including cross-border VAT fraud cases.

Second, EU agencies are often preferred to NCAs as they meet the increasing requirements for technical expertise and bring together knowledge from across Europe. EU agencies can implement policies more efficiently in their area of competences as they operate in a centralised manner compared to 28 dispersed NCAs. Experience has shown that national solutions are insufficient when it comes to the refugee crisis, which requires coordination and expertise at the European level. Frontex will therefore be allocated €12 billion in the new MFF.⁶

Third, the actions of EU agencies are highly relevant as they take a neutral approach in managing problems and prevent "gold-plating" practices of national regulators. They make the general interest of EU citizens prevail over vested interests. The EU Food Security Authority, for instance, provides independent scientific advice on food risks and thus supports policy-makers in taking decisions.⁷

Fourth, EU agencies are also a way to save money in pooling competences previously exercised at national level. The resources allocated by each Member State to its own NCA are made available to a single EU Agency, that usually needs only a smaller budget than the sum of NCA budgets. This concentration of technical and human capacity allows significant economies of scale. EU agencies reduce the administrative burden for companies, which only need a single point of contact to access the EU market. The EU Medicines Agency (EMA) conduct scientific evaluation of applications for marketing authorisations that, once granted, are valid in all Member States.

Last, the geographical distribution of EU agencies throughout the Member States makes Europe more visible for its citizens, from Lisbon to Tallinn. Local businesses profit from supporting agencies activities. Their importance is demonstrated by the rivalry between European capitals over the relocation of agencies after Brexit. The move of 900 EMA employees to Amsterdam and of 150 employees of the EU Banking Authority (EBA) to Paris will have broad consequences, especially since stakeholders remain close to regulators. For instance, many financial services industry workers could move to the continent and stimulate the local economy.

FURTHER EMPOWERING EU AGENCIES

The reliability and effectiveness of EU agencies calls for granting them still more autonomy, although efforts have already been made in this direction. In 2011, the three EU Supervisory Authorities (ESAs) were given significant powers to prevent a new financial crisis.⁸ They ensure supervisory convergence, issue guidance but also have direct “product intervention powers”, which allow them to ban a product in the EU. For instance, the EU Securities and Markets Authority (ESMA) decided in June 2018 to prohibit two kinds of financial products to protect investors.⁹ ESAs might soon have even greater powers if the new regulation on financial supervision is adopted.

This extensive conferral of powers has been questioned in the light of the Meroni case-law. The latter allows EU institutions to delegate only strictly defined competences to EU agencies but no “discretionary power implying a wide margin of discretion”.¹⁰ Some considered that powers conferred to ESMA exceeded the limits that were laid down by the CJEU in 1958, which considers the EU legislator to remain solely responsible for political choices. However, the Court agreed with this delegation

of powers as they were precisely delineated and under the control of EU institutions.¹¹

It is now time to interpret the Meroni doctrine with greater flexibility. The very narrow interpretation of “discretionary powers” complicates the regulatory process and creates additional bureaucracy. This overly precautionary approach forces the legislator to prepare highly prescriptive mandates for EU agencies, while not being equipped with sufficient technical knowledge. Instead, the EU legislator should set principle-based law that would allow agencies to be more flexible in finding the best ways to apply the agreed legal framework. One may wonder if supposed legal certainty is more important than the ability of EU agencies to respond more adequately to businesses’ and citizens’ concerns.

Since EU law has become increasingly detailed and prescriptive, agencies are now instrumental in developing secondary laws and guidelines. The level of expertise provided by EU agencies is in line with the Commission’s commitment to improve the policy-making process. Aiming to enhance its efficiency, the Better Regulation Package prioritizes expertise over politics.¹² This is also the case for EU agencies, which act within the framework defined by EU legislators.

Greater flexibility for the EU agencies’ functioning should be accompanied by a commitment to meet legally-enshrined deadlines. At present, the Commission frequently fails to respect the time limits for secondary legislation. For instance, ESAs are often tasked to prepare draft “technical standards”, which then need to be adopted by the Commission. The deadlines are strictly set, but as a rule the Commission takes longer, either due to political interests or resource constraints.¹³ It is a paradox that the Guardian of the Treaties fails to impose high standards upon its own staff. The Parliament and the

Council should denounce these delays more systematically.

IMPROVING EU GOVERNANCE

After the “last chance Commission”, the Union could find its salvation through the growing importance of agencies in the implementation of EU policies. Whilst some might fear a power grab by these agencies and a weakening of the political dimension of the EU’s action, the reality would be very different, if certain safeguards accompany the empowerment of agencies.

The notion of ‘government by agency’ could be criticised along similar lines as the so-called ‘judicial activism’ that bedevils CJEU case-law. Yet such an agency-centric approach might not be a negative evolution. Facing the growing complexity of EU issues, the European Parliament often lacks expertise and looks for solutions through EU agencies. MEPs hand over competences to agencies more easily, sometimes because of their inability to agree on technical specifics rather than their willingness to empower agencies. Member States more often believe that agencies should decide only on the technical aspects of political decisions. This dynamic results in prescriptive mandates for the agencies that take a long time to negotiate, leave little room for manoeuvre and often prove to be flawed (in turn requiring amendments later).

Handing more powers to EU agencies could also have downsides. The experts in one area might be missing the bigger picture. The EU budget is limited and needs to be attributed based on political priorities. Therefore, it remains essential for the Council to steer the EU and for the Commission to ensure policy coherence.

The expansion of agencies’ remit could be accompanied by measures improving their

democratic legitimacy and transparency. Article 15 TFEU states that agencies shall conduct their work as openly as possible in order to promote good governance. Each year the European Parliament approves, and the Court of Auditors controls, the budget of EU agencies. If agencies are granted more freedom to bring European policies to life, they should also be made more responsible. An annual hearing of every EU agency executive director should be held in the European Parliament to report on all agency activities.

New agencies could be set up to fulfil tasks that are more relevant to organise at EU level than at national level. The idea of an EU agency for anti-money laundering and financial crime was recently raised, as well as a new agency to organise the distribution of refugees. If new agencies are created, their increasing diversity could make the decision-making process harder to understand. While one size does not fit all situations, the proliferation of agencies nonetheless calls for the adoption of a common (legal) framework. Such a streamlined set of procedures would harmonise their functioning and make agency work easier to understand.

CONCLUSION

Europe is facing a growing number of challenges that are better addressed by all Member States acting in common. Be it migratory flows, cyber space threats or financial crimes, these challenges cut across borders, and the EU needs to address them efficiently. The Commission rightly proposed to set up agencies to meet technical challenges that feature a European dimension. EU agencies take measures that are appropriate to present-day realities, but they also face artificial limits of the half-century old Meroni case. However, should these remain fundamental obstacles?

EU agencies offer the best answer to the most technical questions in their respective area of

expertise. As such, they can provide added value and not just an additional layer of bureaucracy if there is sufficient political will. Legislators need to be more courageous to adopt principle-based laws. EU agencies need to act with greater autonomy, while keeping in mind that the CJEU still has a final say on the interpretation of these laws.

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ENDNOTES

¹ The number of EU decentralised agencies has grown from 11 in 2000 to 28 in 2005. There are currently 44 EU agencies across the Union: 36 decentralised agencies and 8 joint undertakings (public-private partnerships).

² The Commission's proposal provides for an increase of the agency budget from €11 million to €23 million within four years. This doubling of budget remains insufficient. It will not match the increase in tasks for the agency, which has a broader mandate since the entry into force of the directive on security of network and information systems in 2016.

³ The EU spent €95 million in 2000 and €937 million in 2015. The increase has been lower from 2010, as the EU contribution to decentralised agencies had already reached €706 million. European Commission, "Programming of human and financial resources for decentralised agencies 2014-2020", July 2013, COM (2013) 519 final, p. 11.

⁴ According to the *EU Agencies Network*, EU Agencies have currently a total budget of €1,2 billion per year.

⁵ The creation of a 24/7 crisis centre was recently proposed to better protect businesses and infrastructures across Europe. Catherine Stupp, "Cybersecurity agency hopes for 24/7 crisis response centre in Brussels", *Euractiv*, 7 June 2018.

⁶ For the same reasons, the Agency for Asylum budget will be doubled and make the Common Asylum System more coherent.

⁷ Although ESFA aims to provide independent analysis, the agency is not infallible. In 2017, EFSA assessed that glyphosate was safe for public use, based on a report which parts simply quoted Monsanto-funded studies.

⁸ The European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA) were created in 2011.

⁹ www.esma.europa.eu/press-news/esma-news/esma-adopts-final-product-intervention-measures-cfds

¹⁰ Cases C-9/56 and C-10/56, *Meroni v High Authority*, 1957/1958.

¹¹ Case C-270/12, *United Kingdom v European Parliament and Council*, 2014.

¹² Charles de Marcilly, Matthias Touillon, "The 'Better Regulation' programme: expertise over politics?", *European issues*, Robert Schuman Foundation, 2015.

¹³ Within three months of receipt of a draft regulatory technical standard submitted by EBA, ESMA or EIOPA, the Commission shall decide whether to endorse it or to amend it. This deadline is however often not respected. The eight technical standards drafted by ESMA on 30 March 2017 under the Benchmarks Regulation were adopted by the Commission only on 13 July 2018.



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