

EU Agencies Going Global

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1. EU Agencies Research: Taking Stock

More than forty years of experience with EU decentralized agencies has made clear that EU agencies are part and parcel of the EU's institutional structure. These agencies can broadly be defined as bodies governed by European public law that are institutionally separate from the EU institutions, that have their own legal personality, that enjoy a certain degree of administrative and financial autonomy and that have clearly specified tasks. Agencification of EU executive governance has thus become a fundamental feature of the EU's institutional structure. Today there are 36 EU decentralised agencies, which assist in the implementation of EU law and policy, provide scientific advice for both legislation and implementation, collect information, provide specific services, adopt binding acts and fulfil central roles in the coordination of national authorities. Agencies are part of a process of functional decentralisation within the EU executive and operate in various policy fields, such as food and air safety, medicines, environment, telecommunications, disease prevention, border control, trademarks and banking, to name just a few.¹

For the last decades research on agencification has mainly focused on identifying and understanding agencies' function as contributing to the proper implementation and further development of the EU acquis.² In a recent review article taking stock of the burgeoning agencification literature, Trondal and Egeberg concluded: the "*agencification of the EU administration may be regarded as a compromise between functional needs for the supply of more regulatory capacity at the European level, on one hand, and Member States' reluctance to transfer executive authority to the European Commission on the other.*"³ In the traditional terms of EU integration studies: agencies are a compromise between supranationalism and intergovernmentalism. On the one hand, Member States realize that in order to give proper effect to commonly agreed EU policies (at the legislative level) some common EU action in the implementation phase (i.e. administrative integration) is required. On the other hand, Member States resist the default option prescribed by the EU Treaties to this end, since this would require expanding the supranational Commission.⁴

Focusing on the functional reasons for resorting to agencies shows that the fact that EU agencies have been established to ensure a more proper and uniform implementation of EU law means that EU agencies essentially have an inward function. As a result, academic research on agencification has also almost exclusively focused on issues internal to the EU legal order. This by now incredibly rich body of research in areas such as public administration, political science and law has focused on a breadth of topics.

¹ E. Vos, 'European agencies and the composite EU executive' in M. Everson, C. Monda and E. Vos (eds.), *European agencies in between Institutions and Member States* (Alphen a/d Rijn: Wolters Kluwer, 2014), p. 11-47.

² See i.a. Michael Kaeding & Esther Versluis, 'EU Agencies as a Solution to Pan-European Implementation Problems' in Michelle Everson, Cosimo Monda, & Ellen Vos (eds.), *European agencies in between institutions and Member States* (Alphen aan den Rijn: Kluwer Law International, 2014) 73,73-86; Marco Scipioni, 'De Novo Bodies and EU Integration: What is the Story behind EU Agencies' Expansion?', [2018] *JCMS* 4 768, 768-784.

³ Morten Egeberg & Jarle Trondal, 'Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?', [2017] *JCMS* 4 675, 675.

⁴ The Treaties (Article 291 TFEU) of course also allow the Council to take on an implementing role but apart from the fact that this is only so in exceptional cases, the Council lacks the governance structure to fulfil the functional need of a more uniform implementation of EU law.

For example, questions have been raised as to how these subsidiary bodies like agencies should be properly conceptualized in both the EU multi-level legal order⁵ and the EU administration or the European Administrative Space.⁶ Other authors have focused on the question why EU agencies are sometimes preferred over looser forms of administrative integration like networks (or vice versa).⁷ The fact that EU agencies are semi-detached from the main EU institutions raises questions over the actual degree of their autonomy,⁸ an issue which has as its corollary in the question of the EU agencies' accountability.⁹

In legal research, the main topic has been the question how to conceptualize the delegation of powers to EU agencies and how to fit the agencies in the EU's constitutional framework.¹⁰ This links with political

⁵ Morten Egeberg & Jarle Trondal, 'EU-level agencies: new executive centre formation or vehicles for national control?', [2011] *JEPP* 6 868, 868-887; Ellen Vos, 'European agencies and the composite EU executive', in Everson, Monda, & Vos (eds.), *European agencies in between institutions and Member States* (Alphen aan den Rijn: Kluwer Law International, 2014) 11, 11-47.; Eva Heidbreder, 'Strategies in multilevel policy implementation: moving beyond the limited focus on compliance', [2017] *JEPP* 9 1367, 1367-1384.; Torbjørn Jevnaker, 'Pushing administrative EU integration: the path towards European network codes for electricity', [2015] *JEPP* 7 927, 927-947.

⁶ Herwig Hofmann, Gerard Rowe & Alexander Türk, *Administrative Law and Policy of the European Union* (OUP, 2011), 977; Alie de Boer, Miriam Urlings, Ellen Vos & Aalt Bast, 'Enforcement of the nutrition and health claim regulation', [2015] *EFFLR* 5 334, 334-344.; Jarle Trondal & Lene Jeppesen, 'Images of Agency Governance in the European Union', [2008] *WEP* 3 417, 417-441.; Rik Joosen & Gijs Jan Brandsma, 'Transnational executive bodies: EU policy implementation between the EU and member state level', [2017] *Public Administration* 2 423, 423-436.

⁷ Daniel Kelemen & Andrew Tarrant, 'The Political Foundations of the Eurocracy', [2011] *WEP* 5 922, 922-947; Mark Thatcher, 'The creation of European regulatory agencies and its limits: a comparative analysis of European delegation', [2011] *JEPP* 6 790, 790-809; Sarah Wolff & Adriaan Schout, 'Frontex as Agency: More of the Same?', [2013] *Perspectives on European Politics and Society* 3 305, 305-324; David Levi-Faur, 'Regulatory networks and regulatory agencification: Towards a Single European Regulatory Space', [2011] *JEPP* 6 810, 810-829; Michael Blauberger & Berthold Rittberger, 'Conceptualizing and theorizing EU regulatory networks', [2015] *Regulation & Governance* 4 367, 367-376.

⁸ Martijn Groenleer, *The autonomy of European Union agencies: a comparative study of institutional development* (Delft: Eburon, 2009), 432; Maria Martens, 'Voice or Loyalty? The Evolution of the European Environment Agency (EEA)', [2010] *JCMS* 4 881, 881-901; Arndt Wonka & Berthold Rittberger, 'Credibility, complexity and uncertainty: explaining the institutional independence of 29 EU agencies', [2010] *WEP* 4 730, 730-752.; Ellen Vos, 'EU agencies and independence' in Ritleng (ed.), *Independence and legitimacy in the institutional system of the European Union* (Oxford: OUP, 2016) 206, 206-227.

⁹ Madalina Busuioc, 'European agencies and their boards: promises and pitfalls of accountability beyond design', [2012] *JEPP* 5 719, 719-736.; Madalina Busuioc, *European Agencies - Law and Practices of Accountability* (Oxford: OUP, 2013); Michael Buess, 'Accountable and Under Control? Explaining Governments' Selection of Management Board Representatives', [2015] *JCMS* 3 493, 493-508.; Nuria Font & Ixchel Pérez Durán, 'The European Parliament oversight of EU agencies through written questions', [2016] *JEPP* 9 1349, 1349-1366; Miroslava Scholten, *The political accountability of EU and US independent regulatory agencies* (Brill, Leiden, 2014); Christopher Lord, 'The European Parliament and the legitimation of agencification', [2011] *JEPP* 6 909, 909-925; Julia Jansson, 'Building resilience, demolishing accountability? The role of Europol in counter-terrorism', [2016] *Policing and Society* 4 432, 432-477; Michael Buess, 'European Union Agencies' Vertical Relationships with the Member States: Domestic Sources of Accountability', [2014] *Journal of European Integration* 5 509, 509-524.

¹⁰ Herwig Hofmann & Alessandro Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through 'Agencification'', [2012] *ELRev* 4 419, 419-443; Michelle Everson & Ellen Vos, 'European Agencies: What about the institutional balance?' in Blockmans & Lazowski (eds), *Research handbook EU institutional law* (Cheltenham: Edward Elgar Publishing, 2016) 139, 139-155; Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP, 2016); Katja Michel, *Institutionelles Gleichgewicht und EU-Agenturen* (Berlin: Duncker & Humblot, 2015); Andreas Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen* (Tübingen: Mohr Siebeck, 2017); Jacopo Alberti, *Le Agenzie dell'Unione europea* (Milano: Giuffrè, 2018); Carlo Tovo, *Le agenzie decentrate dell'Unione europea*, (Napoli: Editoriale Scientifica, 2016).

science research on the relation between EU agencies and the Commission¹¹ or stakeholders,¹² and the role of specific agencies in the EU's policies.¹³ In still other research, EU agencies are the object of case studies in their own right or agencies are used as case studies to test a number of hypotheses deduced from general theories on regional integration.¹⁴

2. EU Agencies Research: the External Dimension

Without pretending to have presented an exhaustive or even representative overview of this vibrant research field, it was already noted that the existing research has almost exclusively focused inwardly. This is not surprising in view of the fundamental role played by the agencies in the various EU policies. However, agencies become increasingly active at the international level as it has become very clear that in order for these agencies to fulfil their mandate, they need to interact with third countries, international organisations and other non-EU bodies. Indeed, most agencies' establishing acts refer in one way or another to the agency's external action, although the relevant provisions governing this action are remarkably succinct even for those agencies that have developed elaborate external relations.

Hence, since a few years, there is also a growing interest among scholars in the agencification's external dimension. Consequently pioneering research has been carried out by various scholars to gain understanding of what it is that agencies precisely do at the global level in both functional and legal terms.¹⁵ Current practice of agencies at the international stage, as revealed by research, sees a variety of actions that are closely linked with the agencies' mandate and powers in their respective founding regulations. Agencies for example collaborate in training matters, organise common events such as

¹¹ Daniel Fiott, 'The European Commission and the European Defence Agency: A Case of Rivalry?', [2015] *JCMS* 3 542, 542-557; Morten Egeberg, Jarle Trondal & Nina M. Vestlund, 'The Quest for Order: Unravelling the Relationship between the European Commission and European Union Agencies', [2015] *JEPP* 5 609, 609-629.

¹² Sarah Arras & Caelesta Braun, 'Stakeholders wanted! Why and how European Union agencies involve non-state stakeholders', [2018] *JEPP* 9 1257, 1257-1275; Ixchel Pérez Durán, 'Political and stakeholder's ties in European Union agencies', [2017] *JEPP*.

¹³ Martijn Groenleer, Michael Kaeding & Esther Versluis, 'Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation', [2010] *JEPP* 8 1212, 1212-1230; Esther Versluis & Erika Tarr, 'Improving Compliance with European Union Law via Agencies: The Case of the European Railway Agency', [2013] *JCMS* 2 316, 316-333; Gabriel Toggenburg & Jonas Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?', [2016] *JCMS* 5 1093, 1093-1104.; Alicia Hinarejos, 'A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis', [2016] *ELJ* 1 61, 61-73.

¹⁴ For learning theory and principal agent theory, see Anthony Zito, 'European agencies as agents of governance and EU learning', [2009] *JEPP* 8 1224, 1224-1243; On principal agent theory, see Daniel Keleman, 'The Politics of 'Eurocratic' Structure and the New European Agencies', [2002] *WEP* 4 93, 93-118.; Florian Trauner, 'The European Parliament and Agency Control in the Area of Freedom, Security and Justice', [2012] *WEP* 4 784, 784-802; For institutionalization theory, see Jon Pierre & Guy Peters, 'From a club to a bureaucracy: JAA, EASA, and European aviation regulation', [2009] *JEPP* 3 337, 337-355.; For structural choice theory, see Jørgen Grønnegaard Christensen & Vibeke Lehmann Nielsen, 'Administrative capacity, structural choice and the creation of EU agencies', [2010] *JEPP* 2 176, 176-204.; For rational choice theory, see Björn Fägersten, 'Bureaucratic Resistance to International Intelligence Cooperation – The Case of Europol', [2010] *Intelligence and National Security* 4 500, 500-520; For socialization theory, see Semin Suvarierol, Madalina Busuioc & Martijn Groenleer, 'Working for Europe? Socialization in the European Commission and Agencies of the European Union', [2013] *Public Administration* 4 908, 908-927; Arndt Wonka & Berthold Rittberger, 'Perspectives on EU governance: an empirical assessment of the political attitudes of EU agency professionals', [2011] *JEPP* 6 888, 888-908.

¹⁵ For pioneering work, see i.a. Martijn Groenleer & Simone Gabbi, 'Regulatory Agencies of the European Union as International Actors', [2013] *EJRR* 4 479, 479-492; Andrea Ott, Ellen Vos, & Florin Coman Kund, 'European agencies on the global scene: EU and international law perspectives' in Everson, Monda, & Vos (eds), *European agencies in between institutions and Member States* (Alphen aan den Rijn: Kluwer Law International, 2014) 87, 87-122.; Sandra Lavanex, 'The external face of differentiated integration: third country participation in EU sectoral bodies', [2015] *JEPP* 6 836, 836-853; Florin Coman Kund, *European Union Agencies as Global Actors* (Basingstoke: Taylor & Francis, 2017).

workshops and conferences and capacity building activities whilst also develop common procedures, exchange information and personal data and carry out joint operations.¹⁶ Agencies are further active in setting standards, in ensuring mutual recognition and incorporation of international best practices as well as standards of scientific knowledge. In order to do so, agencies enter into more or less binding arrangements of sometimes not entirely well-established legal nature.

In view of this diversity of activities, this book contributes in an inter-disciplinary way to fostering and showcasing research on the external dimension of EU agencies as well as developing questions for further research. The different chapters present a cross-section view of the different research strands currently developing in political and legal science on the external relations of EU agencies, giving at the same time a taste of the breadth of issues where knowledge remains thin or non-existent and suggesting to fill such blind-spots in order to contribute to the

3. Book Chapters

In chapter 1, *Chamon* and *Demedts* sketch the constitutional framework that governs, or ought to govern, the external action of EU agencies. To this end they first analyse the positive law including Treaty provisions, norms resulting from the agencies' establishing acts, the Common Approach on Decentralised Agencies and the working arrangements concluded between agencies and their parent DGs. They then deduce limits from the principles of conferral and institutional balance as well as the Meroni doctrine and more recent jurisprudence of the Court. Bringing together these elements, *Chamon* and *Demedts* identify preliminary findings, that raise new questions for future research. One of the main questions being today, whether the specific administrative agreements concluded by individual agencies with third country counterparts (or international organisations) conform to the identified composite legal framework.

Chapter 2 by *Coman-Kund* takes up part of this research agenda by scrutinizing the revised Frontex Regulation (recast following and in light of the migration crisis) and the working arrangements concluded by Frontex against some of the constitutional limits identified by *Chamon* and *Demedts*. Frontex is indeed one of the (few) EU agencies for which external action is part of its core mandate, as reaching out to the EU's neighbours is necessary to properly secure the Schengenzone's external borders. *Coman-Kund* shows how the new 2016 Frontex regulation has not radically altered the international mission of the agency and how its external action is generally compliant with the constitutional limits. At the same time, *Coman-Kund* identifies some salient issues, notably the possibility for Frontex to conduct operational activities on third countries' territories, which merit further scholarly attention.

In a second chapter on the AFSJ, *Brière* addresses in Chapter 3 the cooperation of Europol and Eurojust with external partners in the fight against crime and discusses the recently revised legal frameworks organising the modalities of Europol and Eurojust's external cooperation. She finds that the revision was necessary to modernise the agencies' frameworks following the entry into force of the Lisbon Treaty and to come to a greater degree of harmonisation. The chapter identifies two challenges of the agencies' external activities. First, she points at the diversity in their relations with external partners, and, second, the need to ensure an appropriate balance between efficient cooperation and protection of fundamental rights. *Brière* thereby identifies two further parts of the future research agenda in this field: First, whether the new legal framework allows EU agencies to produce sufficient policy output, and, second, whether the new legal framework and the possibilities for data transfer in absence of an adequacy decision strike

¹⁶ Andrea Ott, Ellen Vos, & Florin Coman Kund, 'European agencies on the global scene: EU and international law perspectives' in Everson, Monda, & Vos (eds), *European agencies in between institutions and Member States* (Alphen aan den Rijn: Kluwer Law International, 2014) 87, 87-88

a right balance (in practice) between the right to privacy on the one hand and security cooperation on the other.

Chapter 4 by *Ekelund*, Manner's 'Normative Power Europe' is applied to Frontex by a critical analysis of the agency's founding regulation and the agency's working arrangements. As Ekelund notes, her findings are preliminary. However on the basis of her ongoing research, she concludes encouragingly that fundamental rights take a central role in Frontex' relevant legislative framework and there is a high level of consistency within the provisions relating to fundamental rights. The author however notes herself that her research is necessary as to the agency also implements its mandate in the ground in conformity with its own 'discourse' and how the agency manages possible conflicting expectations. Evidently it would be useful to make a similar horizontal assessment for the other agencies working in the AFSJ.

Chapter 5 by *Chatzopoulou* relies on organization theory to study EU policy promotion beyond the EU's borders by EU agencies and suggests that they acquire organization structural characteristics that enhance the agencies' role in the international arena with respect to the diffusion of policy ideas, principles, practices and policy models. The EU agencies develop their own capacity, interests and strategies; organize international arrangements, and become actors with the intention to diffuse policy ideas and standards beyond the EU. Chatzopolou's findings raise the questions whether the structural characteristics have general predictive value and whether a relationship can also be established between the actual impact of agencies' external activities and the structural characteristics identified by Chatzopoulou.

De Bellis analyses in Chapter 6 in essence a case study in the, for EU agencies, traditional area of tension between formal legitimacy and output legitimacy: in the area of financial standards, a number of key international bodies are active. These bodies adopt soft law which is later incorporated in domestic law. To ensure that the EU may effectively contribute to shaping international norms it should be represented in these fora by the most appropriate actors which, typically, would be the EU agencies. However, in addition to the problematic formal legitimacy of the reception of international soft law standards, the EU is also confronted here with the problematic formal legitimacy of the EU agencies involved. While *De Bellis*, rightly, stresses the need to ensure accountability and transparency of these processes in the short term, the questions implicitly raised by *De Bellis* stress the need to address this area of tension in a more sustainable and long term manner.

In Chapter 7 *Van Cleynenbreugel* notes a trend whereby agencies are increasingly called upon to assess in one way or another the equivalence of third country legal regimes. Van Cleynenbreugel offers an overview of the equivalence procedures in place before reflecting on the accountability challenges specific to those procedures. One of the challenges identified is that of a particular gap in the accountability features in place. The chapter finalizes with elaborating a future research agenda to overcome the identified gap, centered around three main questions.

Inglese focuses in Chapter 8 on the role which the European Ombuds(wo)man can play in securing good administration also in the EU agencies' external relations. His finding of a positive influence of the decisions of the Ombudsman, the so called 'ombudsprudence', on the EU agencies' external action generally contributes to our understanding of the relationship between the European Ombudsman and the EU agencies and how the EU agencies conceive this relationship themselves. This picture, which focuses on accountability at EU-level would need to be complemented by future research in order to sufficiently take into account the multilevel nature of EU administration. Indeed, given the composite nature of many EU administrative procedures, a holistic view on good administration will require adding the cooperation between the European Ombudsman and the Network of European Ombudsmen to the equation.

In Chapter 9 *Rimkute and Shyrokykh* address the question how EU agencies can fulfil a role in exporting the EU *acquis* to third countries. They focus on the European Neighbourhood Policy and build a theoretic argument explaining the varying degrees of third-country cooperation by EU agencies. They contrast a foreign policy dynamic with a functional interdependence dynamic. Further empirical research would need to test these findings. The authors themselves also note that further research should seek to review whether third-country norms actually are subject to change due to the influence exercise in the context of cooperation mechanisms and whether they resulting from such cooperation end up to be in line to those of the EU. A further follow-up question would then be whether such norms are also properly implemented and enforced in third countries.

Chapter 8 by *Öberg* finally changes the perspective and looks at the EU agencies from third countries' perspective: what is their interest in participating as third countries in an EU body and under which constellations is this possible? Can third countries, through their participation, actually influence (or 'shape') the EU *acquis* which they either unilaterally or contractually (through an international agreement with the EU) agree to adopt themselves? *Öberg* explores this issue and puts forward the hypothesis that the possibility to shape is a function both of the agency's capacity to influence the *acquis* as well as the third country's possibilities of contributing to the work of the agency. This finding calls for empirical case studies aiming at falsifying and refining this hypothesis.

4. Setting a Research Agenda

The chapters in this book outline a fascinating research agenda in a nascent field of EU agencies' research dealing with their external relations. The chapters point clearly in the direction of more research being needed in many aspects of the agencies' role in the international area, on agencies' mandates, organizational structures, behaviour as well as what could be called their 'actorness'. It is also true that there is still a lack of raw information on how EU agencies operate in the relevant policy areas at the international level. Chapters thus stressed the need for more in-depth and empirical research on activities of agencies such as Frontex, Europol and Eurojust as well as the cooperation between EU agencies and ENP countries.

Moreover, the findings put forward in the chapters show a set of general legal questions, which remain largely unresolved. Legal questions include *inter alia*, the exact understanding of constitutional limits of agency powers on the international sphere, the specific nature of administrative arrangements that agencies conclude, as well as the criteria for assessing the legality of agencies' activities, e.g. by Frontex to conduct operational activities on third countries' territories. Other areas that require further in-depth research include the tension between fundamental rights, data protection and security cooperation in the fight against terrorism and organized crime.

More generally, the chapters in this book point to the need to deepen research into questions of legitimacy and accountability of EU's agencies external actions. One example is the question of the formal legitimacy of the reception of international soft law standards into EU law. Here EU agencies may effectively contribute to shaping international norms; how this may be done and how this impacts legitimacy of agency action at the EU level is however still unclear. Another example is the cooperation agencies will undertake in the context of today's generation of free trade agreements, which include requirements of regulatory cooperation and mutual recognition of standards. Accountability of agency action is not only a matter to be studied in relation to inward activities of agencies, but also in relation to external action of agencies as various chapters in this book show. It is therefore unsurprising that the right to good administration is mentioned throughout this book as relevant also for external action of agencies. At the same time, it is apparent that the various procedures to establish the equivalence of third country legal rules or regimes with EU regulatory standards also need more reflection on the accountability challenges specific to those procedures.

The ongoing scholarly debate on EU agencies, to which this book contributes, is thus only one-step in the direction of illuminating this fascinating field of EU external action and EU administrative law scholarship. We hope it will inspire and encourage scholars to do more research in relation to the external dimension of EU agencies activities as set forth in this research agenda.