Accountability of EU regulatory agencies

A wide range of EU agencies have been set up to implement policy in specific fields, with the aim of simplifying procedures, ensuring cost-effectiveness, bringing outsourced activities closer to the final beneficiaries and improving visibility of the EU. A number are executive agencies directly supervised by the Commission, but the many autonomous regulatory agencies created have thrown up a series of problems linked to accountability and oversight by the EU institutions.

What are EU regulatory agencies?
European regulatory agencies (or 'decentralised' agencies because they are spread across Member States) are permanent autonomous bodies set up outside the EU institutions to provide technical, scientific and managerial support for EU policy-making and implementation. With the European Centre for the Development of Vocational Training (CEDEFOP) set up in 1975, there are now 34 regulatory agencies, such as the European Aviation Safety Agency, Community Plant Variety Office, European Medicines Agency, European Food Safety Authority, and Frontex. They regulate specific sectors by adopting individual decisions legally binding on third parties. They also provide expertise for Commission decisions and work with national authorities, and thus play an important part in implementing policies based on close collaboration between the EU and the Member States. They are mostly funded by the EU budget, and the ordinary legislative procedure generally applies to their establishment, as well as for any changes to their founding acts. Unlike executive agencies, which are established for a limited period through a single legal base, to undertake clearly defined tasks in EU programme management (e.g. the European Research Council, Research Executive Agency), regulatory agencies present problems in terms of their relationships with the institutions and public accountability. Their ad hoc creation over the years, and the lack of a single set of operating rules, has led to calls for reform of their governance and to long-standing interinstitutional debate on their accountability. This debate has focused on issues of conflict of interest of members of management boards, the lack of real and effective supervision of agencies, inter alia on account of the large size of their management boards, and their position in the EU’s political and administrative system in general.

The interinstitutional debate on regulatory agencies' accountability
The discussion was started in 2001 with the Commission’s White Paper on European Governance setting out the need for a clear framework for regulatory agencies’ responsibilities, and establishing transparency requirements. These aspects were further fleshed out in the 2002 Communication proposing a framework for such agencies. It focused on procedure – the use of co-decision for creating agencies, of a specific legal basis rather than the flexibility clause (now Article 352 TFEU), and the selection of agencies' locations. The document also proposed fewer constraints on decision-making agencies' powers to achieve policy coherence in a specified area, stressing their non-involvement in arbitration in conflicts of public interests. It also addressed the composition of agencies' administrative boards (institutional and stakeholder representation) and their appointment and supervision, proposing political supervision of agencies by the European Parliament (EP) and the Council, with the EP not being formally represented in their boards.

Interinstitutional follow-up of the Commission proposal
This initiative was broadly welcomed by Parliament, which called for direct supervision of new regulatory agencies by the Commission, within the bounds of their autonomy, and the Council, which insisted on the need for democratic control and respect for subsidiarity and proportionality. This support led to the proposal in 2005 of a draft interinstitutional agreement on the operating framework for the European regulatory agencies. It provided a comprehensive definition of 'regulatory activities' (beyond the mere application of binding legal norms) and fixed the principle of specific Treaty provisions as a legal base, i.e. the use of the
flexibility clause as an exception. On accountability, the draft stressed the need for a balance between necessary autonomy and control, making provisions for direct accountability to the institutions, Member States and citizens, and a role for the Court of Auditors and OLAF, the Anti-Fraud Office. In this context, the Commission and Member States would be represented on agencies' management boards, but not the EP, in order to ensure its role as the authority exercising external political control. The EP would be involved in the appointment procedure of directors of agencies, through hearings of directors-designate.

This draft agreement, though welcomed by the EP, albeit with the demand for representation on agencies' management boards, was ultimately rejected in the Council due to the lack of agreement between Member States on the framework's form – the interinstitutional agreement as proposed, a framework regulation on the basis of the flexibility clause, or a less detailed interinstitutional agreement.

**The 2008 Commission initiative on regulatory agencies**

The debate was relaunched in 2008 through a new initiative of the Commission on regulatory agencies aiming at a common approach to regulatory agencies' governance through a common understanding on agencies' tasks, their structure, accountability and relationship with other institutions and stakeholders. In addition, the Commission proposed to evaluate existing agencies and to set up an interinstitutional working group on the issue in 2009. In another important development in 2012, a Report of the Court of Auditors on conflict of interest in selected EU agencies, requested by the EP, identified weaknesses in policies in this area, and recommended that the EU consider the adoption of a regulatory framework on management of conflict of interest in line with OECD Guidelines.

**The 2012 common approach on agencies**

The working group resulted in the legally non-binding 2012 Common approach on regulatory agencies agreed by the EP, the Council and the Commission which fixes principles for creating regulatory agencies on the basis of an objective impact assessment, their review and the choice of agencies' seats. It determines agency board structures consisting of Member State and Commission representatives and, 'where appropriate', other stakeholders and experts designated by the EP. The approach also fixes voting rules and regulates the functioning of agencies' boards of appeal. The principle of operating within their mandate, not representing the EU vis-à-vis external actors, and working in close coordination with the Commission, forms the framework for agencies' activities. It provides for the use of multiannual programming and consultation with the Commission and the EP while respecting agencies' autonomy. Standards are introduced for the accountability of agencies and their directors: reporting requirements, internal audit and external audit by the Court of Auditors, the annual discharge procedure and a separate procedure for discharge of self-financed agencies, as well as the use of key performance indicators. In this context, the common approach also provides for systematic and periodic performance evaluation by the Commission to determine agencies' long-term viability, requires it to regularly inform the EP and Council, and aims to ensure transparency in relations with stakeholders not represented on boards, along with fraud prevention through a stronger role for OLAF. A related 2012 Commission roadmap on implementation introduces further instruments for ensuring balanced governance and accountability such as the 'alert-warning system' requiring the Commission to warn the EP and Council in case of a possible management board decision compromising the agency's mandate or violating EU law.

**Post-2012 developments and the position of the European Parliament**

In 2013 the Commission published its first progress report on the implementation of the common approach, detailing the structural measures adopted to rationalise agencies' functioning, i.e. proposals for merging agencies, ensuring coherence between agency documents, prevention of conflicts of interest, creation of evaluation guidelines, anti-fraud strategies, guidelines on performance indicators and on performance budgeting. On its part, in April 2014 the European Parliament adopted a resolution on the budget discharge of regulatory agencies. While stressing the importance of agencies' independence vis-à-vis the Commission, it also addresses the issues of weaknesses in planning (in terms of administrative costs and use of EU budget commitments) and potential conflicts of interest, calls for more efficient coordination of agencies' audits by the Commission, and highlights the need for a stronger and better structured system of reporting to the EP.

This position is closely in line with a tendency among experts to view EU agencies in a critical light, in particular with regard to their role as building blocks in the emergence of a new and wider Commission-led EU executive order, making it necessary to exert regular and closer scrutiny and monitor their activities.