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## Democratic Input Legitimacy of IRAs: Proposing an Assessment Framework

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### 1. Introduction

Delegation of public authority to independent regulatory agencies (IRAs) has raised the question of their democratic legitimacy, an issue which has been widely discussed among scholars of political science, public administration, and law. According to Scharpf, one of the leading experts in the field, democratic legitimacy is a two-dimensional concept, which includes both the input and the output of a political system. Concerning the former, democratic legitimacy requires mechanisms and procedures to connect political decisions with the preferences of the people. In modern democracies, the conventional way of ensuring input legitimacy is via electing representative institutions. At the same time, Scharpf argues that democracy would be 'useless' if the democratic procedure was not able to produce effective results, i.e. 'achieving the goals that citizens collectively care about'.<sup>1</sup> While the two beliefs are 'generally complementary',<sup>2</sup> in relation to IRAs they seem to have a negative correlation.

The input legitimacy of 'unelected' IRAs is clearly problematic if viewed against the conventional way of ensuring democratic legitimacy, i.e. elections. Usually, the heads of IRAs are not elected<sup>3</sup> and they are in one way or another independent from the main executive institution, such as the Prime Minister or the President, who therefore only bears partial, if any, responsibility for them. In addition, since independence is the means to protect functional discretion,<sup>4</sup> IRAs normally enjoy greater discretion than other 'dependent' agencies. This may undermine proper democratic control by representative institutions.<sup>5</sup> Since independence breaks the delegation-accountability chain between the electorate and IRAs via the main executive, it has a negative effect on the input legitimacy of IRAs.

At the same time, the logic behind making agencies independent comes from the desire to produce more effective results in government policies. Independence is assumed to help ensure the output legitimacy of IRAs. IRAs are created because of the need for credibility and to show commitment.

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1 F. Scharpf, 'Economic integration, democracy and the welfare state', 1997 *Journal of European Public Policy*, vol. 4, no. 1, pp. 18-36.

2 F. Scharpf, *Governing in Europe: Effective and Democratic?*, 1999, p. 6.

3 There are independent agencies at state level in the US whose heads are elected. M. Asimow & R. Levin, *State and Federal Administrative Law*, 2009, p. 437.

4 M. Scholten, 'Independence vs. Accountability: Proving the negative correlation', 2014 *Maastricht Journal of European and Comparative Law*, vol. 21, no. 1, pp. 197-204.

5 J. Biela, 'What deficit? Legitimacy and Accountability of Regulatory Agencies', Paper prepared for the 42nd ECPR Joint Sessions, Salamanca, 10-15 April 2014. Workshop: Administrative Organization and the Welfare State: Wicked Issues and the Challenges of Accountability, Legitimacy and Coordination. Find at: <<http://www.ecpr.eu/Filestore/PaperProposal/c294ff37-abb7-4aff-8583-868a1fa3b227.pdf>> (last visited May 2015).

‘Politicians seek to enhance the credibility of long-term political commitments, but are constrained in these efforts by their relatively short time horizon – that is, the period until the next elections.’<sup>6</sup> Independent agencies can therefore be used to enhance ‘the credibility of promises made, either between multiple principles, or vis-à-vis principals and their constituencies, given the underlying collective action problems.’<sup>7</sup> In addition, the complexity of regulated issues requires (elected) representatives to use and to rely upon expert bodies.<sup>8</sup> Yet, ‘the more complex the policy area, the greater is the need to loosen provisions for control and accountability,’ because it is important ‘to let agencies incorporate their knowledge and information into their decisions.’<sup>9</sup> ‘Because they are one step removed from election returns,’<sup>10</sup> independent agencies can be expected ‘to develop and employ expertise in order to produce, or help principals produce appropriate public policy.’<sup>11</sup>

The negative correlation between input and output legitimacy suggests that the democratic legitimacy of IRAs is problematic by definition. This is because both input and output legitimacy seem necessary for them to be fully legitimate,<sup>12</sup> but IRAs only seem to be able to gain it on the output side.<sup>13</sup> Scholars seem to have proposed various solutions to mitigate this loss of input legitimacy or weak input legitimacy. They offer compensatory mechanisms, such as the emphasis on output legitimacy, enhancing accountability, transparency, and public participation.<sup>14</sup> However, ‘it is not sure that a deficit of “inputs legitimacy” could be perfectly compensated.’<sup>15</sup>

This article questions whether the input legitimacy of IRAs should be problematic by definition and elaborates on how it could be enhanced. What is input legitimacy and how is it ensured? In short, democratic legitimacy is acceptance of the authority of the governors by the governed. This acceptance on the input part rests on consent, mutual understandings and justifications (sources of input legitimacy). Whether input legitimacy is problematic can be assessed by determining what ‘unproblematic’ input legitimacy is. The conventional way of ensuring input legitimacy in modern democracies is via elections. That is why this article takes elections as its point of departure and by addressing the question of why the people accept the authority of the elected representatives it identifies the mechanisms that form the basis for the assessment of input legitimacy: *democratic input legitimacy = authorization + safeguards + accountability*. People accept the authority of their elected representatives because elections are the process that allows ensuring the sources of legitimacy, i.e. consent, mutual understanding, and justifications with the help of the three mechanisms: an act of authorization, a system of safeguards and a system of possibilities to hold to account. These mechanisms can ensure trust in the system, its institutions and decisions, and hence its acceptance, i.e. legitimacy. This article proposes to assess the presence and quality of these mechanisms in the relationship between the people and IRAs in order to assess IRAs’ input legitimacy. If these mechanisms can be ensured, input legitimacy does not have to be problematic.

Additionally, this article distinguishes two dimensions of the input legitimacy question regarding IRAs. The first dimension concerns the issue of the input legitimacy of IRAs as public institutions, i.e. whether their existence is democratically legitimate. The second dimension is about the democratic legitimacy of IRAs’ operation, i.e. whether the decisions of IRAs are taken in a democratically legitimate way. Assessing

6 C. Koop, *Measuring and Explaining Accountability: A Comparative Study of Independent Agencies*, Doctoral thesis defended at the European University Institute in June 2011, p. 49.

7 M. Thatcher & A. Stone Sweet, ‘Theory and Practice of Delegation to Non-Majoritarian Institutions’, in M. Thatcher & A. Stone Sweet (eds.), *The Politics of Delegation*, 2003, p. 4.

8 ‘The policy choices involved are thought to be characterized by a high level of technical complexity and, at the same time, a broad agreement on the criteria for distinguishing desirable from undesirable outcomes. Hence “good” decisions depend on expertise.’ See Scharpf, *supra* note 2, p. 16.

9 See Koop, *supra* note 6, p. 50.

10 G. Majone, *Regulating Europe*, 1996, p. 41.

11 See Thatcher & Stone Sweet, *supra* note 7, p. 4.

12 ‘Output legitimacy derives from the effectiveness of government policy. However, effectiveness has only a meaning in relation to the preferences of citizens.’ M. Boedeltje & J. Cornips, ‘Input and output legitimacy in interactive governance’, 2004 NIG Conference Paper, p. 7. Find at: <<http://repub.eur.nl/pub/1750/>> (last visited May 2015).

13 However, this has yet to be proved. See Maggetti who points out that the existing research results are not conclusive in this respect; M. Maggetti, ‘Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review’, 2010 *Living Reviews in Democracy*, vol. 2. Find at: <<http://democracy.livingreviews.org/index.php/lrd/article/viewarticle/lrd-2010-4/30>> (last visited May 2015).

14 Ibid.

15 Ibid. (‘It appears that ex-post legitimacy cannot be conceptually separated from input legitimacy, notably because the positive evaluation of results by political actors depends primarily on the previous agreement about the existence and framing of a specific problem.’)

both dimensions against the identified elements (authorization, safeguards and accountability) helps to spot the location of the input legitimacy problem more accurately in order to propose appropriate solutions. This is not necessarily the case at this moment, where these dimensions seem to be mixed, which means that the solutions for specific problems are not properly aligned. For instance, promoting public participation in the decision-making of an IRA and the latter's accountability are thought to compensate for the weaknesses in the input delegation chain from the people to the IRA. This article shows that enhancing participation in the decision-making process promotes the input legitimacy of the operation of an IRA; how IRAs take their decisions. This cannot however fully compensate for the weak input legitimacy of IRAs as public institutions, a problem which triggers other (additional) solutions, such as enhancing the accountability of IRAs' creators and safeguarding the process of delegation of public power away from the people, e.g. by imposing certain restrictions on agencies' creators when they can create IRAs. Strengthening the legitimacy of an IRA as a public institution will in turn enhance the legitimacy of its decisions. As a final remark, since it is thought problematic, assessments of input legitimacy of IRAs are quite scarce in the existing literature, which is why the assessment framework is not (strongly) developed.<sup>16</sup> This article wishes to fill in these gaps.

This article proceeds as follows. First, it proposes its assessment framework for democratic input legitimacy: *democratic input legitimacy* = *authorization* + *safeguards* + *accountability* (Section 2). In addition, Section 2 distinguishes two dimensions of the input legitimacy question of IRAs. For illustration purposes regarding how the assessment formula could be used, these two dimensions are assessed in relation to US and EU IRAs in Section 3.<sup>17</sup> In light of the results, Section 4 concludes the article with a discussion of the ways democratic input legitimacy could be enhanced.

As a final remark, this article does not address the debate on the necessity of democratic legitimacy of IRAs. IRAs differ greatly between jurisdictions and within the same jurisdiction. There is a sufficient number of publications showing that what they do is more than mere 'standard-using',<sup>18</sup> which is one of the major arguments of those who argue that IRAs do not need to be democratically legitimated. In the opinion of the author of this article, the IRAs that can and do govern the people, have to be democratically legitimate, though this objective may be obtained in different ways depending on the powers and influence that IRAs may have. This should be kept in mind when using the assessment framework proposed and analysing its results.

## 2. Unelected, therefore democratically illegitimate?

### 2.1. Problem setting

The argument about problematic democratic input legitimacy of IRAs is classically linked to elections as the conventional mechanism to ensure democratic input legitimacy of public power holders.<sup>19</sup> The line of the argument can be briefly summarized as follows. People delegate the power to take political decisions on their behalf to their representatives and can hold the latter to account by re-electing their representatives or not. Within jurisdiction-specific constitutional frameworks, people's representatives can further delegate public authority to various executive institutions.<sup>20</sup> The democratic legitimacy

16 S. Borrás et al., 'European agencies and input legitimacy: EFSA, EMeA and EPO in the post-delegation phase', 2007 *Journal of European Integration*, vol. 29, no. 5, pp. 583-600. See e.g. Wolff & Schout on assessing input legitimacy via accountability; S. Wolff & A. Schout, 'FRONTEX: More of the Same?', Paper presented at the EUSIM – The Governance of Asylum and Migration in the European Union, University of Salford – Centre for European Security – 26-27 January 2012. Find at: <[http://www.clingendael.nl/sites/default/files/20120126\\_frontex\\_final\\_schout\\_wolff.pdf](http://www.clingendael.nl/sites/default/files/20120126_frontex_final_schout_wolff.pdf)> (last visited May 2015).

17 The selection of these jurisdictions is based on the PhD dissertation of the author of this paper (defended in April 2014 at Maastricht University). M. Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies*, 2014.

18 The necessity of democratic legitimation of IRAs has been questioned based on the fact that what IRAs do is, roughly speaking, 'standard-using', which is 'the relatively straight-forward process of assessing various dimensions of performance against given benchmarks'. This is in contrast to standard-setting which 'is a process of deliberation where it is open to anyone to put forward a proposal as to what the standards should be, and to use persuasion to influence others to accept the proposal'. G. Majone, *Europe as the Would-be World Power: The EU at Fifty*, 2009, p. 151.

19 IRAs are often defined as unelected, see e.g. F. Vibert, *The Rise of the Unelected. Democracy and the New Separation of Powers*, 2007.

20 This is very much related to the 'non-delegation' doctrines that specific jurisdictions have. For instance, the US Supreme Court's standard of delegation is the so-called intelligibility principle, which requires Congress to prescribe procedural and substantive standards for agencies to follow when exercising their delegated powers. M. Scholten, 'Independent, hence unaccountable? The need for a broader debate on accountability of the executive', 2011 *Review of European Administrative Law*, vol. 4, no. 1, p. 5.

of the executive branch can be ensured in two ways: either directly before the people by electing the head of the executive branch (for instance, the President of the US) or indirectly before the people via people's representatives, i.e. the so-called ministerial accountability mechanism (for instance, in the UK and the Netherlands). Presidents, Prime Ministers, ministers and other executive officers can thus be held to account by the people directly by re-electing (or not) the head of the executive and indirectly by people's representatives who may appoint, remove, and scrutinize the executive branch. The idea is that dependence of the elected office holders on the electorate will promote their responsiveness to the preferences of the electorate. This is why their authority is accepted, i.e. legitimate.

Being a part of the executive branch,<sup>21</sup> IRAs' input legitimacy becomes problematic because they are not elected by the people and because the ministerial accountability mechanism may only partly apply to them. As was mentioned earlier, IRAs' independent status usually implies having less or no relationship with the main executive institution, which may lead to being less responsive to the preferences of the electorate. This is why the question becomes relevant of whether IRAs are democratically legitimate.

## 2.2. Tackling the problem

Legitimacy is 'a value whereby something or someone is recognized and accepted as right and proper'.<sup>22</sup> In political science, legitimacy implies popular acceptance of the authority of a governing regime. The authority has political power through consent and mutual understandings, not coercion.<sup>23</sup> With respect to democratic legitimacy, the exercise of coercive power is legitimate 'only insofar as it is actually justified by and to the very people over whom it is exercised'.<sup>24</sup> Consent, mutual understandings, and justifications form the sources of input legitimacy.<sup>25</sup> Consent and justifications facilitate trust in the system and hence its acceptance. In addition, 'it is doubtful that the exercise of public authority may be perceived as legitimate if it is not understood'.<sup>26</sup> Concerning the mechanisms, in modern representative democracies, 'notions of input legitimacy (...) are generally based upon the assumption of a congruence between rulers and the ruled through mechanisms of representation and public contestation'.<sup>27</sup> Elections are the conventional way of ensuring representation and indirect public participation in decision-making processes and hence the democratic input legitimacy.

Using elections as a benchmark to assess the democratic input legitimacy of IRAs does not make sense; elections are a way to ensure input legitimacy. At the same time, since it is the conventional way of ensuring input legitimacy, it makes sense to examine the essence of the election process and to address the question of why people accept the authority of those whom they elect. Why are elections the mechanism to ensure input legitimacy? This article argues that elections promote input legitimacy because it is a process that can ensure the sources of legitimacy: consent, mutual understanding, and justifications. It does so with the help of the three mechanisms that are part of this process. I call these *authorization, safeguards, and accountability*. These elements promote consent, understanding, and justifications of the relationship between the governors and the governed, which in turn facilitates trust and thus acceptance (legitimacy) of the system, its institutions and decisions. It is these three elements that input legitimacy of IRAs is proposed to be assessed with.

First of all, elections are a process where people give their consent to the fact that their representatives will govern on their behalf. They also give their consent to an individual and/or a party to represent

21 Please note that in some jurisdictions the placement of IRAs within the executive branch is a matter of debate. See, *Free Enterprise Fund et al. v Public Company Accounting Oversight Board et al.* 561 U.S. \_\_ (2010) where the US Supreme Court considers the Securities and Exchange Commission as 'a freestanding component of the executive branch' but does not express its opinion about the place of the agency in light of the opinions' clause of the Constitution. The 'opinions clause' reads as follows: "The President (...) may require the Opinion in writing, of the principal Officer in each of the executive Department, upon any subject relating to the Duties of their respective Offices.' (Article II § 2 US Constitution).

22 J. Locke, *The Second Treatise on Government*, 1690.

23 M. Vinod & M. Deshpande, *Contemporary Political Theory*, 2013, p. 150.

24 A. Abizadeh, 'Democratic Legitimacy and State Coercion: A Reply to David Miller', 2010 *Political Theory*, vol. 38, no.1, pp. 121–130.

25 J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, 1995, p. 356.

26 P. Dyrberg, 'Accountability and Legitimacy: What is the Contribution of Transparency?', in A. Arnall & D. Wincott (eds.), *Accountability and Legitimacy in the European Union*, 2002, p. 83.

27 T. Risse & M. Kleine, 'Assessing the Legitimacy of the EU's Treaty Revision Methods', 2007 *Journal of Common Market Studies*, vol. 45, no. 1, p. 72.

their interests in future deliberations. Giving consent can be seen as an act of *authorization*. It involves participation in and contributing to the decision-making process and hence to the result of that process by involving people in the deliberation process directly or via the institution and/or the person who has been authorized by them. People accept the authority of government institutions and their decisions because they have authorized these institutions in their constitutions and they have participated in decision-making processes directly (referendums) or indirectly (via their representatives). Authorization can be further sub-divided into two types: personal (authorization of individuals as office holders) and institutional (authorization of government institutions and their decisions).

Second, why do people trust the system of elections and its implications (that they will obey the decisions taken by their representatives)? This 'belief in the rightness of the decision and the process of decision-making', using the words of Dahl,<sup>28</sup> is facilitated by a set of *safeguards*. These may include equal participation in the election process, freedom of association, transparency, clarity and openness of deliberations and in accountability processes. Such safeguards facilitate the process of giving consent or authorization as well as subsequent stages, such as decision-making by people's representatives. Safeguards promote protection against abuse and mitigate the possibility of arbitrary actions and in this way, acceptance of the system because they facilitate 'proper' (e.g. fair, equal) involvement of the 'ultimate' decision-makers, i.e. the people.

Third, the possibility of *holding* the recipient of delegated powers *to account* contributes to ensuring legitimacy since accountability promotes understanding of the actions of the governors through the obligation to justify those actions.<sup>29</sup> In addition, accountability enhances the protection against the abuse of delegated powers. Justifications of the actions relate to both *ex ante* (parties' manifestos and pre-elections campaigns) and *ex post* (laws, rules and other decisions taken when in office) processes. Understanding the actions of and justifications by the governors facilitates the acceptance of those actions, even if one may disagree with them.<sup>30</sup> Furthermore, the prospect of rendering account promotes incentives to act in public interest in the first place. This in turn facilitates trust in ensuring the responsiveness to the preferences of the public. This also enhances trust of the people in the system and its decision-makers and in this way its legitimacy. In contrast to scholars who regard accountability as a compensatory mechanism in cases of problematic input legitimacy of, for instance, international organizations, this paper argues that this is one of the three constituting elements ensuring input legitimacy.<sup>31</sup> This means that accountability cannot be a complete compensator.

Having distinguished these elements, one can see that elections allow people to *authorize* people/institutions and prospective decisions. They are the instrument to hold office holders *to account*; people can assess past results and future plans in making their choice for a particular party or individual. Finally, such rights can *safeguard* elections as the instrument for equal participation and freedom of association and forming political parties. At the same time, input legitimacy is ensured not because of the existence of elections as such, but because they are a process that promotes the sources of legitimacy (consent, understanding and justifications) through the distinguished mechanisms. In fact, the distinguished mechanisms can be used in assessing to what extent elections can ensure democratic input legitimacy in the one or the other jurisdiction. For instance, the higher the turnout is, the higher the authorization element will score. Or, the higher the degree of protection of political rights and freedoms is, the stronger the safeguard element will be. All in all, *democratic input legitimacy = authorization + safeguards + accountability*.

### 2.3. Two dimensions of the democratic input legitimacy issue of IRAs

The absence of elections for the heads of IRAs and their distance from the elected officials interrupts the input legitimacy line from the people to the IRAs. Promoting direct participation of people and stakeholders in the decision-making process at the IRA's level seems to be seen as a compensator for this interruption. However, this is not necessarily a complete compensation. Making people or at least stakeholders

28 R. Dahl, *A Preface to Democratic Theory*, 1956, p. 46.

29 M. Bovens, 'Analysing and Assessing Public Accountability: A Conceptual Framework', 2007 *European Law Journal*, vol. 13, no. 4, pp. 447-468.

30 See Maggetti, *supra* note 13.

31 *Ibid.*



participate in the decision-making process of IRAs can ensure the input legitimacy of IRAs' operation, but this is unlikely to fully compensate for the weak input legitimacy of IRAs as public institutions. Decisions concerning the creation of and delegation to IRAs need to be democratically legitimized, too. This is because the legitimacy status of an IRA as a public institution rests on such decisions. In addition, the decisions of a legitimate authority are likely to have stronger legitimacy on the input side.

*Table 1 Applying the formula to both dimensions of the input legitimacy of IRAs*

	<b>Democratic input legitimacy of IRAs as public institutions</b>	<b>Democratic input legitimacy of IRAs' operation and decisions</b>
<b>Authorization</b>	To what extent do constitutional texts, principles and conventions allow the creation of IRAs? How do legislators involve the public when creating and delegating to IRAs (e.g. referendum, consultations, public debates, election campaigns' manifesto, appointment procedure's speech)? Is the authorization of agencies' top-level officials direct (elections) or indirect (appointments)?	To what extent can and do people participate in IRAs' decision-making procedures (e.g. obligatory consultation, minimum response rate and/or notification)? What role can and do collective actors (e.g. stakeholders) play in the authorization process and how representative are the collective/representative actors?
<b>Safeguards</b>	Do the creators of agencies establish certain limits on when IRAs can be created (general frameworks for agencies' creation and operation)? Do they act within those limits (are the existing safeguards effective)? Are the authorization processes (creation, delegation, appointment, removal) transparent?	What safeguards are put in place to promote (equal) involvement of the people, including interest groups, into IRAs' decision-making processes? How transparent is the operation of an IRA? Do (if so how often) IRAs derogate from the requirements to involve public participation in its decision-making upon good reasons?
<b>Accountability</b>	How do the creators of IRAs render account for the act of creation and delegation? Do they use cost-benefit analysis and/or other assessments to justify the need to create an IRA instead of e.g. giving the task to a ministry? Do they regularly reassess the necessity of IRAs?	How do IRAs justify their plans/activities/decisions before (different groups of) the public (including those who are directly affected, stakeholders, society at large)? How effective is direct or indirect (political) accountability? What problems does accountability face and to what extent can and do different types/ levels <sup>32</sup> of accountability effectively work together and compensate for one another's shortcomings?

In this light, it is useful to distinguish two dimensions of the democratic input legitimacy issue of IRAs. The first dimension concerns the issue of democratic legitimacy of creating IRAs and delegating public power to them or of the IRA as a public institution; to what extent are people involved in the decision to create an IRA and delegate to it? The second dimension is about input legitimacy of IRAs' operation (e.g. rule-making procedures) and their decisions; to what extent are people involved in taking the decision issued by an IRA? Studying these dimensions in light of the identified elements of input legitimacy will lead to different sets of questions and consequently solutions to address potential problems. For the authorization element, for instance, this will imply investigating the involvement of the people into the questions of creation, delegation and appointment for Dimension 1 and public participation in the decision-making at the level of IRA for Dimension 2. Here, one will see (see further in Section 3) that the input legitimacy of IRAs as public institutions also needs to be promoted by introducing general frameworks determining when IRAs can be created. This is because such restrictions would enhance the understanding of the actions of the legislator and mitigate the risks of misusing public power by giving it to independent agencies without good reason. This in turn would enhance public confidence and hence acceptance of IRAs. Enhancing this dimension of input legitimacy is likely to promote the other one: decisions of legitimized public institutions (Dimension 1) are likely to have stronger legitimacy

32 Multi-level accountability is especially relevant in the EU context. See, Papadopoulos discussing potential effects thereof; Y. Papadopoulos, 'Accountability and Multi-level Governance: More Accountability, Less Democracy?', 2010 *West European Politics*, vol. 33, no. 5, p. 1041.

(Dimension 2). Table 1 gives the reader an idea of the questions, which could be necessary to analyze when assessing both types of the democratic legitimacy problems in relation to IRAs; this list is not exhaustive. Distinguishing these dimensions facilitates identification of the exact location of a potential problem, which is essential in formulating an appropriate solution.

### **3. Applying the assessment framework: IRAs in the US and the EU**

#### **3.1. Introducing US and EU IRAs**

IRAs are public authorities created by legislative acts, such as Congressional statutes in the US or secondary legislation (in most cases a regulation) in the EU. In one way or another (institutionally, personally and/or financially<sup>33</sup>) IRAs may enjoy a position that is at some distance from the main executive institution, i.e. the US President and the EU Commission, and the relevant sector. For instance, making an IRA a separate legal entity ensures institutional distance from the main executive. Separating the budget of an IRA or making it self-funded can promote financial independence. Personal independence of the heads of IRAs can be promoted by making removal procedures subject to certain conditions, such as the US famous ‘removal for cause’ formula, and involving various institutions, which could have conflicting interests, in the appointment procedure.

Generally, management boards and executive directors run these agencies. In the US, the members of the management boards are appointed by the President and the Senate according to a constitutionally prescribed procedure (Article II of the US Constitution). On average, management boards have five members who work at the agency on a daily basis. They take all official decisions and are held to account for the performance of the agency and individually, predominantly by Congress.<sup>34</sup> In the EU, management boards are much larger (up to 100 members) since they can include representatives or designates from national ministries or agencies of all member states as well as from the Commission, the European Parliament and stakeholder organizations. That is why the role of a director of an EU agency involves more than the ‘purely’ administrative tasks of his US counterpart. The appointment procedures of directors of EU agencies vary greatly from agency to agency; in fact, there are 12 different appointment and 5 removal procedures.<sup>35</sup>

With respect to IRAs’ functions, IRAs are entrusted with the so-called regulatory powers. The US Federal Trade Commission, for instance, was set up to prevent unfair methods of competition. To attain their legislative goals US IRAs can issue rules of general applicability and adjudicate cases involving individual parties pursuant to various statutory requirements, including the US Administrative Procedure Act (APA), and relevant case law. In the EU, agencies’ regulatory powers are understood in a broad sense, implying tasks ranging from information gathering to decision-making, facilitating cooperation among Member States, providing specific services and legislative advice.<sup>36</sup> Most EU agencies have no formal legally binding powers affecting third parties; this does not necessarily mean, however, that they are deprived of any direct influence on policy shaping and implementation. Despite the lack of formal legally binding powers in most cases an increasing number of scholars have been arguing that ‘the absence of formal authority does not necessarily mean that’ EU agencies are ‘deprived of any influence’.<sup>37</sup> Dehousse notes in this respect that, for instance, recommendations of the European Medicines Agency, which can inter alia advise on the lists of elements allowed in the manufacturing of medicines, ‘are

33 See Scholten, *supra* note 4.

34 See Scholten, *supra* note 17, pp. 223-235.

35 *Ibid.*, pp. 99-100, 103-105.

36 It has to be noted that various classifications exist in relation to EU agencies’ functions. See e.g. E. Chiti, ‘An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies’, 2009 *Common Market Law Review*, vol. 46, p. 1395; S. Griller & A. Orator, ‘Everything under control? The “Way Forward” for European agencies in the footsteps of the Meroni doctrine’, 2010 *European Law Review*, vol. 35, no. 1, p. 3; and S. Lavrijssen & A. Ottow, ‘Independent Supervisory Authorities: A Fragile Concept’, 2012 *Legal Issues of Economic Integration*, vol. 39, no. 4, p. 423.

37 R. Dehousse, ‘Delegation of powers in the European Union: The need for a multi-principals model’, 2008 *West European Politics*, vol. 31, no. 4, pp. 790, 799; see, also, E. Vos, ‘Agencies and the European Union,’ in L. Verhey & T. Zwart, *Agencies in European and Comparative Law*, 2003, p. 142; M. Shapiro, ‘The Emergence of Global Administrative Law: “Deliberative,” “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the EU?’, 2005 *Law and Contemporary Problems*, vol. 68, p. 353; and L. Senden & A. van den Brink, ‘Checks and balances of soft rule-making in the EU’, 2012 Study for the European Parliament, PE 462.433, p. 8.

systemically rubber-stamped by the Commission' which is, according to him, hardly surprising because 'if an institution pooling the best expertise available at the European level warns against the dangers of a given pharmaceutical, the "political power" could not ignore its advice without taking substantial risks'.<sup>38</sup>

Next to the existing differences between *de jure* and *de facto* powers, the concerns about proliferation of EU agencies and their democratic credentials are also intertwined with the trend of their increasing number<sup>39</sup> and powers despite the restrictions imposed by the *Meroni* delegation standard of entrusting EU agencies with merely executive powers involving no policy discretion. In 40 years (1975-2015), EU agencies have developed from mere information-gathering assistants of the Commission and Member States into bodies enjoying advisory functions in the EU legislative process and taking decisions affecting third parties. The most recent development here is empowering EU agencies with supervisory and enforcement powers, as is true for e.g. the European Securities and Markets Authority (ESMA) created in 2010. This agency can adopt individual decisions directed to national supervisory authorities and financial markets' participants and is exclusively responsible for registering and supervising, including the power to sanction, credit rating agencies. ESMA's power arsenal includes the possibilities to examine and take copies of any relevant records and material, ask for oral explanation, summon and hear persons, require telephone and data traffic records, and interview persons (Article 23(b) of Regulation 513/2011), powers not available even to the European Parliament in its investigatory capacity. Considering the potential scope of this power and the absence of a specific treaty provision allowing creating and delegating it to agencies, it is not surprising that the delegation of powers to adopt decisions of general application to ESMA was recently challenged before the Court of Justice of the European Union.<sup>40</sup> The Court upheld the delegation of decision-making powers of general application to EU agencies on the condition that this discretion is sufficiently conditioned.<sup>41</sup>

### 3.2. Assessing the democratic input legitimacy of US and EU IRAs: an illustration

The purpose of this section is to give an illustration of how the proposed assessment framework could be applied in order to support the somewhat abstract discussion of Section 2 with more concrete examples. The comparative assessment is performed in light of the expertise of the author of this paper: it concerns the comparison of US and EU IRAs. Furthermore, it is mainly performed from a legal perspective and at a general level. This does not undermine the relevance of the assessment framework for more specific case studies, other jurisdictions and other disciplines, which could investigate the sub-questions of each element (proposed in Table 1 as well as additional issues) using other methods. The question of effectiveness of individual mechanisms is not addressed, and the debatable issue of to what extent democratic legitimacy concept should be applicable to the EU and its agencies, is also left outside the focus of this article.

So, to what extent is the democratic input legitimacy of US and EU IRAs ensured? This section shows that the input legitimacy of IRAs *as public institutions* is problematic in both jurisdictions. The input legitimacy of IRAs' *operation* seems better ensured in the US in comparison with the EU, though it has to be taken into account that the great majority of EU agencies are much less powerful than their US counterparts and far-reaching decision-making powers have been only recently given to EU agencies. Table 2 gives an overview of this assessment.

#### • The democratic input legitimacy of US and EU IRAs as public institutions

The *authorization element* for an IRA as a public institution can be subdivided into two aspects: personal and institutional authorization. Concerning the former, in both jurisdictions those heading the IRAs are 'unelected'. Since no direct elections take place, the personal authorization of agencies' heads is indirect.

38 See Dehousse, *supra* note 37.

39 See M. Egeberg et al., 'Building executive power at the European level: on the role of European Union agencies', in M. Busuioac et al., *The agency phenomenon in the European Union*, 2012, p. 26.

40 Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, *European Parliament*, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=146621&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=681746>> (last visited 26 June 2015).

41 M. Scholten & M. van Rijsbergen, 'The ESMA-short selling case: Erecting a new delegation doctrine in the EU upon the Meroni-Romano remnants', 2014 *Legal Issues of Economic Integration*, vol. 41, no. 4, pp. 389-406.



In the US, it is the President and the Senate who, acting in accordance with the constitutionally prescribed procedure, appoint the members of the management board of an IRA. The fact that the appointment procedure of the members of the management boards of IRAs does not differ from that of other agencies and departments (ministries in the European tradition) and is constitutionally prescribed can be seen as factors contributing to ensuring the input legitimacy of IRAs. This is in contrast to the situation in the EU. Here, the appointment procedures differ greatly from agency to agency and derive from secondary legislation. The existing variety of appointment formulas raises the questions, on the one hand, based on which treaty provisions the involvement of EU institutions in the appointment procedures to EU agencies has been arranged and, on the other hand, why the appointment of office holders of the same rank (e.g. agencies' directors) is not organized in the same way. The absence of a common appointment procedure and of justifications explaining the necessity of the differences increases the likelihood of abuse of public power. The lack of clarity and justifications for the existing arrangements and differences decreases the understanding of the system and is likely to negatively affect its legitimacy.<sup>42</sup> Concerning the institutional component, neither the US Constitution, nor the EU treaties envisage the possibility to create independent regulators. The creation of IRAs has been upheld by the courts with the help of the implied powers doctrine.<sup>43</sup> The institutional authorization is therefore indirect.

Concerning the second element, *safeguards*, the existing legal frameworks in the US and EU imply that the representative institutions can set up IRAs at any time and for whatever reason. This is because they are not bound by any restrictions concerning when an *independent* agency can be created and when it cannot. This implies the absence of safeguards against an arbitrary use of the power to delegate public power away from the people; the absence of such restrictions is likely to undermine input legitimacy.

Epstein and O'Halloran show that politics influence the choice of creation of and delegation to an IRA in the US: the choice to delegate a power to an executive agency is used 'relatively more often under unified government, while independent agencies and commissions are used more often under divided control'.<sup>44</sup> Under the unified government, independent regulatory commissions have been the recipients of delegated authority in 17 per cent of the cases, whereas under the divided government this was 36 per cent.<sup>45</sup> A similar situation exists in the EU. 'Rather than functional necessities, political considerations drive' the agencification process and 'the fundamental choice of whether to create a centralised, EU-level body or instead to establish a looser network of national regulatory authorities'.<sup>46</sup> 'Since the beginning of the 1990s, it has become clear that Member State governments are unwilling to countenance any significant expansion of the Commission and instead prefer delegating new regulatory tasks to bodies outside the Commission hierarchy'.<sup>47</sup> In this light, agencies represent an attempt 'to solve the traditional Community administrative deficit through instruments that may be politically acceptable both to the national governments and the supranational institution (...) without implying a direct reinforcement of the Commission'.<sup>48</sup> Only in 2012 did the so-called 'Common Approach' on EU agencies establish some guidance concerning the creation and operation of EU agencies; these rules are not legally binding and it therefore remains to be seen how closely they will be followed in practice.<sup>49</sup>

There is a piece of Dutch legislation<sup>50</sup> that is an example of a possible safeguard in this respect: 'An agency can only be created if: a. there is a need for independent assessment based on specific expertise; b. it concerns the execution of legislation without discretionary powers and a large amount of individual decisions have to be made; or c. it concerns the carrying out of administrative tasks in which the participation of civil society is deemed to be necessary. Although these criteria are perhaps not always

42 See Scholten, *supra* note 17, pp. 172-179.

43 For the EU, see: Case 9-56, *Meroni & Co., Industrie Metallurgiche, S.p.A v High Authority of the European Coal and Steel Community*, 1956, ECLI:EU:C:1958:7. For the US, see: *Wayman v. Southard* 23 U.S. 1, 1825 WL 3149 U.S., 1825.

44 D. Epstein & S. O'Halloran, *Delegating Powers*, 1999, pp. 154-155.

45 *Ibid.*, p. 156.

46 D. Kelemen & A. Tarrant, 'The Political Foundations of the Eurocracy,' 2011 *West European Politics*, vol. 34, no. 5, p. 923.

47 *Ibid.*, p. 929.

48 See Chiti, *supra* note 36, p. 1398.

49 For a critical analysis of the Common Approach, please see: M. Scholten, 'The Newly Released 'Common Approach' on EU Agencies: Going Forward or Standing Still?', 2012 *Columbia Journal of European Law*, vol. 19, no. 1. Find at: <<http://www.cjel.net/online/search-by-author/?a=Miroslava%20Scholten>> (last visited May 2015).

50 Article 3 Autonomous Administrative Authorities Framework Act (*Kaderwet zelfstandige bestuursorganen*).

easy to apply in practice, they do provide at least some indication<sup>51</sup> and impose certain restrictions on the legislator concerning when they can delegate public power further away from the people. Such self-restriction constitutes protection against abuse of public power and offers justification to the public on when the legislator can create an independent agency. This makes it possible to hold the legislator to account for respective actions and promotes understanding for the legislator's actions. This in turn enhances the input legitimacy of IRAs as public institutions.

The third element that is necessary to enhance input legitimacy is accountability, which requires justification of the elected representatives for their actions in relation to IRAs, i.e. the acts of creation and delegation as well as holding IRAs to account. As mentioned above, politics have played a decisive role in the proliferation of IRAs. This is why it is not surprising that EU agencies' founding acts 'did not sufficiently explain why new instruments had to be implemented through an agency, rather than something else'.<sup>52</sup> EU agencies' founding acts refer to various treaty provisions as their legal basis, but they seem to do so for procedural, rather than substantive purposes.<sup>53</sup> While this can ensure procedural legitimacy of EU agencies that are created in accordance with the legislative procedures set by the Treaty, substantive legitimacy suffers from the lack of justification on the substance.<sup>54</sup> Likewise, the US Constitution does not impose any reasoning requirements upon Congress to justify how the one or the other law regulating the issues that are not explicitly mentioned in the Constitution fall within the federal competence. This means that Congress does not have to explain its decision, when creating an IRA. Interestingly, in December 2010, the House of Representatives amended its Rules of Procedures by introducing an obligation to make statements with any submission of a bill or a joint resolution. Such statements should have stipulated 'as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill and joint resolution' (Rule XII, clause 7 as amended, Resolution 'Adopting rules for the One Hundred Twelfth Congress'). 'The idea was to demonstrate that a new (...) majority respected the enduring restraints of the Constitution'.<sup>55</sup> However, 'over nine months, the House has passed laws about a variety of modern issues that the Founders didn't mention — abortion, charter schools and lasers'; for justification Congress has often turned to 'broad clauses about "commerce," the "general welfare," and the need for "necessary and proper" laws'.<sup>56</sup>

All in all, the input legitimacy of US and EU IRAs as public institutions seems problematic because of the absence of proper safeguards and accountability in relation to the questions regarding (the necessity of) creation of and delegation to IRAs, rather than the fact that these agencies are headed by unelected officials.

#### • *The democratic input legitimacy of US and EU IRAs' operation*

The US Congress has passed numerous statutes with the purpose of regulating agencies' behaviour. All these statutes could be placed under the 'APA +' umbrella.<sup>57</sup> The informal rule-making procedure, for

51 L. Verhey, 'Good Governance: Lessons from Constitutional Law', in D. Curtin & R. Wessel (eds.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, 2005, p. 65.

52 'Alternatives to creating agencies were paid limited attention until impact assessments came into practice. The creation of agencies is now justified in a transparent way, although it is not yet fully evidence-based and still does not cover all relevant issues' (*Ramboll Management-Eureval-Matrix evaluation of 26 decentralised agencies*, December 2009, Volume I, pp. i-ii).

53 See Scholten, *supra* note 17, p. 70.

54 Using Majone's terminology of procedural and substantive legitimacy. See Majone, *supra* note 10, pp. 291-296.

55 D. Fahrenthold, 'Congress Finds, and Lists, Meaning the Constitution', *The Washington Post*, 14 September 2011, <[http://www.washingtonpost.com/politics/congress-finds-and-lists-meaning-in-constitution/2011/09/14/gIQA1VQzXK\\_story.html](http://www.washingtonpost.com/politics/congress-finds-and-lists-meaning-in-constitution/2011/09/14/gIQA1VQzXK_story.html)> (last visited May 2015).

56 *Ibid.*

57 The Administrative Procedure Act (APA) passed in 1946 regulates rulemaking and adjudication procedures; the steps that agencies have to follow when taking their decisions, the internal appeal and judicial review issues. These procedures establish the cornerstone of agencies' functioning. However, Congress has also passed additional statutes to regulate more specific issues. As they often supplement and are sometimes codified within the APA, they seem to form a common system of agencies' operation, which I call the 'APA+' body of laws. The other statutes '+' include, among others, the *Federal Register Act* (44 USC §§ 1501-1511) which requires agencies to publish their proposed and final rules; the *Freedom of Information Act* (5 USC § 552), which obliges agencies to disclose information about themselves and any material they hold upon request; the *Information Quality Act* (44 USCA § 3516 Note), according to which agencies have to issue various guidelines to facilitate comprehension of the disseminated information; pursuant to the *Government in the Sunshine Act* (5 USC § 552b) independent agencies' meetings have to be held in public and under the *E-Government Act* (44 USC § 41) agencies have to provide all kinds of information online. In addition, to prevent unnecessary paperwork the *Paperwork Reduction Act* (44 USC §§ 3501-3521) requires agencies to submit information collecting requirements that are imposed on the public to the Office of Information and Regulatory Affairs, a part of OMB. The *Negotiated Rulemaking Act* (5 USC §§ 561-570) establishes a procedure whereby interested groups

instance, follows the steps of the notice, the commentary and the final decision. All interested parties and individuals may comment on the proposed rule, these comments have to be taken into account by the respective agency, and the substantial comments have to be reflected in the preamble of the final rule.<sup>58</sup> These statutes and the relevant case law can ensure all three mechanisms: authorization, safeguards, and accountability. *Authorization* is promoted by establishing the possibility for the people to participate in the rule-making procedure directly by commenting on the draft rule. The system involves various *safeguards*, such as obligations of agencies to reflect on the received comments in the preamble of the final rule or hold specific decision-making meetings in public. The public can rest assured that their input will be taken into consideration. The APA also establishes the system of judicial *accountability*. The political and financial accountability is arranged before Congress and partially the President, though *de jure* possibilities of Congress to hold agencies to account may not be (fully) realized in practice for political reasons.<sup>59</sup> The congressional chamber that has the same political majority as the majority of the members of an independent agency's management board is likely to be more favourable to the independent agency than the chamber with a different party in control. There will be fewer checks and questions when the political colour of the overseers and those whom they oversee are a match. This indicates some weaknesses in the system.

Concerning the weaknesses, Raso also argues that 'rulemaking procedures do less than commonly thought to promote public deliberation in the rulemaking process'.<sup>60</sup> 'Analysis of Unified Agenda data from 1995 to 2012 shows that agencies avoided APA notice-and-comment on 52 percent of all rules and on 37 percent of major rules.'<sup>61</sup> This indicates that public participation is not always present and therefore enhancing input legitimacy of IRAs' operation by promoting public participation is not a waterproof compensator for the weak input legitimacy of IRAs as public institutions. Furthermore, the downside of the system in relation to safeguards can be the fact that although everybody is entitled to comment on draft rules, some groups of society could be better organized and informed than other groups (e.g. due to possible differences in financial resources of an industry vs. consumer protection groups). According to Wagner, 'a group of affected interests will participate when their stakes are greater than the costs of participation'.<sup>62</sup> By the cost of participation she implies costs of organization, information and access. 'When public interest groups that represent diffuse interests must compete against the associations and trade groups sponsored by regulated parties, it is difficult for them to keep up.'<sup>63</sup> Better-organized and better-informed groups have more personnel and financial resources; they could deliver more elaborate comments and thus have more or stronger influence in the rule-making process. The system does not seem to address this concern.

This can be also said in relation to the EU agencies. Here, the challenge is also to be able to involve all relevant parties in the decision-making process at EU level when they are all spread across the Union and communicate in different languages.<sup>64</sup> Moreover, stakeholders present at the management board of some agencies<sup>65</sup> do not enjoy voting rights. At the same time, the assessment of the input legitimacy of the operation of EU agencies has to be qualified in two respects. First, EU agencies are in general less powerful than their US counterparts. There are only seven agencies with decision-making powers,<sup>66</sup> the

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could be involved in the rulemaking proceedings at the 'embryonic' stages. See more details of statutes that regulate the rulemaking procedure, e.g., in: J. Lubbers, *Guide to Federal Agency Rulemaking*, 5<sup>th</sup> edition, 2012.

58 See, e.g. *Independent U.S. Tanker Owners Committee v. Dole* 809 F.2d 847 (1987).

59 See Scholten, *supra* note 17, pp. 192-196.

60 C. Raso, 'Agency Avoidance of Rulemaking Procedures', forthcoming in *Administrative Law Review*. Find at: <<http://www.osservatorioair.it/research-note-agency-avoidance-of-rulemaking-procedures-administrative-law-review-forthcoming/>> (last visited May 2015).

61 *Ibid.*

62 W. Wagner, 'The Participation-Centered Model Meets Administrative Process,' 2013 *Wis. L. Rev.*, pp. 671-692.

63 *Ibid.*, p. 681. 'A typical, forty-plus page preamble and rule published in the Federal Register typically demands dozens of hours of research and drafting time from a savvy public interest staffer who plans to submit a comment. If the staffer also reviews background information or comments filed by others, the time spent to prepare comments on a rule easily doubles. With hundreds of rules published just by EPA annually, the workload to submit comments on the environmental rules alone would seem to far exceed a public interest group's capacity.' (*ibid.*, pp. 682-683).

64 Concerning the problems with different translations of EU decisions, see e.g. M. van Rijsbergen, 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority', 2014 *Utrecht Law Review*, vol. 10, no. 5, pp. 116-131.

65 See Scholten, *supra* note 17, pp. 90-91.

66 The Community Plant Variety Office (CPVO), the European Aviation Safety Agency (EASA), the European Banking Authority (EBA), the

majority of whom issue individual decisions, such as permits and licenses, instead of making rules of general application. Also, the most powerful agencies have been set up quite recently, which makes a direct comparison a bit unfair. The 'APA+' body of laws has been in the making since 1946 and this process started almost 60 years after the creation of the first independent agency (Interstate Commerce Commission in 1887). Therefore, it is logical that the EU needs some more time to organize the system of operation of EU agencies.

At this moment, no general framework such as the US APA+ body of laws exists in the EU. But some mechanisms promoting the authorization element do appear. For instance, according to the founding regulations of the three financial agencies (EBA, EIOPA and ESMA), these agencies can submit a draft technical standards to the Commission only once they have consulted publicly and requested the opinion of relevant stakeholders as well as have conducted cost-benefit analysis (Articles 10(1) and 15(1) Regulations 1094/2010, 1095/2010, and 1096/2010). At the same time, while the Commission takes the final decision, not the agency, it can reject the draft or amend it only within the limits set up by the Regulation, including providing justifications and, if invited, appearing for explanatory hearings before the European Parliament. This increases the *de facto* power of such agencies and leads us to the second issue.

*De jure* powers of EU agencies do not necessarily correspond to *de facto* influence of EU agencies, which has implications for the input legitimacy issue.<sup>67</sup> The mentioned financial agencies can issue recommendations, which are not legally-binding instruments. However, 'they cannot simply be ignored by national competent authorities or financial institutions,'<sup>68</sup> who must to 'make every effort to comply' (Article 16(3) Regulations 1094/2010, 1095/2010, and 1096/2010) with them, otherwise, they have to provide explanations. In issuing these recommendations and guidelines, however, the financial agencies may, but they do not have to, conduct cost-benefit analysis and organize open public consultations. The *de facto* binding decision taken without having involved the public has weak input legitimacy, also due to the questionable possibility of judicial review of such soft-law.<sup>69</sup>

In addition, the political accountability of EU agencies does not necessarily work properly. The EU institutions themselves do not seem to have a clear view on who does what in relation to EU agencies. For instance, the Commission shares the conclusion of the Ramboll evaluation of 26 EU agencies that it is 'sometimes made accountable for what is beyond its responsibility'.<sup>70</sup> Yet, the European Parliament believes that 'the autonomy which is to be conferred on the agency in respect of technical matters falling within its remit does not relieve the Commission of its political responsibility for the agency's activities'.<sup>71</sup> There are, roughly speaking, 35 accountability regimes. Generally, all EU agencies have to send annual and possibly other reports to the European Parliament and the Council, but there are some exceptions without justifications for these differences. For instance, the Community Plant Variety Office is not formally obliged to send its report to the European Parliament and the Council, although the majority of agencies is. Furthermore, the European Parliament has the power to question 16 (out of 35) directors of EU agencies on their performance and there are 12 different procedures in relation to appointing EU agencies' directors. In addition, the existence of some mechanisms, such as reporting procedures, says little about their quality, which has been a cause for concern. The recent Ramboll evaluation of 26 EU agencies concluded that monitoring and reporting procedures are not at a satisfactory level. 'Performance information relates to the agency's own responsibility in achieving its intended outputs, and results at a reasonable cost. (...) such information is scarce'<sup>72</sup> and 'performance reporting is almost non-existent'.<sup>73</sup> Furthermore, concerning the possibility to question an agency's director, this only exists in approximately

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European Insurance and Occupation Pensions Authority (EIOPA), the European Chemicals Agency (ECHA), The European Securities and Markets Authority (ESMA), and the Office for Harmonization in the Internal Market (OHIM).

67 L. Senden, 'Soft post-legislative rulemaking in the EU: A Time for More Stringent Control', 2013 *European Law Journal*, vol. 19, no. 1, pp. 57-75; M. Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope', 2013 *European Law Journal*, vol. 19, no. 1, pp. 111-125.

68 See Busuioc, *supra* note 67, pp. 118-119.

69 See, van Rijsbergen, *supra* note 64.

70 Analytical Fiche Nr° 31 'Commission's Role', p. 4; Ramboll evaluation, *supra* note 52, p. 25.

71 Motion for a Resolution 'Further to Question for Oral Answer O-93/05 pursuant to Rule 108(5)', p. 3.

72 See, the Ramboll evaluation, *supra* note 52, p. 23.

73 *Ibid.*

half of the 35 EU agencies. While the accountability obligations of the recently created agencies seem to be more similar, at this moment the political accountability is yet in the making. The existing excessive diversity of accountability regimes and hence accountability roles of the EU institutions, unsupported by justifications for these differences, undermines the understanding of the system and consequently its legitimacy.<sup>74</sup>

All in all, the input legitimacy of IRAs' operation in the US and the EU is promoted by the statutory possibilities to involve the public into the decision-making process at the IRAs' level. At the same time, IRAs have the discretion to bypass this obligation to involve the public in its decision-making processes and holding IRAs to account may encounter various problems. These could weaken the input channel from the public. Table 2 gives the reader a short summary of this general assessment using traffic light colours; green stands for ensuring an individual element, whereas red indicates troublesome issues. Yellow (for amber) draws attention to mixed situations.

Table 2 Applying the assessment formula to IRAs in the US and the EU

	Democratic legitimacy of IRAs as public institutions		Democratic legitimacy of IRAs' operation and decisions	
	US	EU	US	EU
Authorization	Personal: indirect, according to the <i>constitutionally</i> prescribed appointment procedure.	Personal: indirect, according to the founding acts of agencies, varies greatly from agency to agency.	'APA +' body of statutes promotes direct public participation in the rule-making procedure.	Participation of stakeholders is predominantly at the management board's level without voting rights but the majority of EU agencies has no decision-making powers. But some mechanisms allowing public participation are present.
	Institutional: the concept of implied powers (the creation of IRAs is not envisaged in the constitution or similar texts).			
Safeguards	The existing IRAs were created without any legislative framework regulating when independent agencies can be created.		Mechanisms allowing public participation in the decision-making process at the IRAs' level exist, but may be bypassed.	
Accountability	The creation of the existing IRAs was not necessarily supported by justifications for the need to create <i>independent</i> agencies.		IRAs are subject to judicial, financial and political accountability (strong <i>de jure</i> powers of Congress may not necessarily be used in practice yet).	The judicial review of soft law produced by agencies is questionable.  The political accountability is in the making.

#### 4. Enhancing the democratic input legitimacy of IRAs

The topic of democratic legitimacy of IRAs has attracted considerable attention in the literature. The classic debate concerns the issue that independent agencies can have strong regulatory powers but are headed by 'unelected' individuals who are in one way or another independent from the main executive institution. Since the input from those governed by them is limited, if applicable at all, the question of acceptance of IRAs' decisions by the governed appears. This article has focused on the question of whether the input legitimacy of IRAs should be problematic by definition. It argued that it does not

74 This paragraph is based on Scholten, *supra* note 17.



need to be. Elections are not the appropriate reference level for the assessment of input legitimacy. ‘Input legitimacy’ does not equal ‘elections’; rather, *democratic input legitimacy* = *authorization* + *safeguards* + *accountability*. Elections are the most straightforward way of ensuring input legitimacy because it promotes the sources of legitimacy (consent, understanding, justifications) through the identified three mechanisms: an act of authorization of individuals, institutions and decisions, possibilities to hold to account, and a set of safeguards facilitating the faith in the system. If the input relationship between the people and the IRAs is properly organized along these three elements, the input legitimacy of IRAs need not be problematic.

In addition, this article showed that it is better to discuss the question regarding democratic legitimacy of IRAs from two perspectives: democratic legitimacy of (1) an IRA as a public institution and (2) the IRA’s operation. The assessment of these two aspects in light of the three elements distinguished (authorization, safeguards, accountability) shows that if input legitimacy of IRAs’ operation is better organized, this may not necessarily compensate for a weak input legitimacy of IRAs as public institutions. This is because public participation in the decision-making processes of IRAs may at times be set aside by IRAs and the input legitimacy of IRAs as public institutions should be supported by additional means, such as imposing restrictions and requirements of providing reasons on legislators to justify the IRAs’ creation and delegation. Distinguishing two dimensions of the input legitimacy issue of IRAs makes it more feasible to determine the exact location of potential problems. This is essential since knowing the source of a problem is necessary to find an appropriate solution.

Concerning finding appropriate solutions, how can the input legitimacy of IRAs be enhanced? The comparative assessment of the democratic input legitimacy of US and EU IRAs in Section 3 showed what aspects could enhance or upset the level of democratic input legitimacy. At a general level, the democratic input legitimacy of IRAs’ operation seems less problematic in both jurisdictions. Its assessment is closely related to powers that IRAs have and the presence of relevant safeguards, procedures and mechanisms for authorization via public participation in the decision-making process of IRAs (via representatives in management boards and/or directly in a rule-making procedure) and their accountability (possibilities for appeal, political and financial accountability). The US APA is one of the best examples of how the input legitimacy of IRAs’ operation could be arranged, though there are some reservations as to how well it works in practice. Allowing public participation may be not the same as ensuring it; different groups of society have different resources, which can affect their ability to participate. Therefore, next to establishing various mechanisms to involve the public and agencies’ accountability to various forums, the challenge is also to find safeguards ensuring these processes.

With respect to the input legitimacy of an IRA as a public institution, the sources for authorization (e.g. constitution-based or statute-based appointment and creation/delegation procedures) and the presence of restrictions and justifications for the legislator to justify the respective acts and actions are among the issues that need to be analyzed to determine how high or low the degree of input legitimacy is. For instance, a constitutionally prescribed or treaty-prescribed appointment procedure could contribute more to the authorization element than a procedure deriving from a secondary legal source, especially if the procedure is different for each and every independent agency without clear reasons for these differences. The more complex the procedure and structure are, the less likely it is that they are understood and hence accepted by people. Restrictions and justifications mitigate the risk of abuse when delegating public power, which is what happens when creating independent agencies. In both jurisdictions, the democratic input legitimacy of IRAs as public institutions seems problematic exactly because of the absence of such restrictions and justifications for delegating public power further away from the people. In this light, following Madison’s legacy of first ensuring that the government controls the governed and then obliging the government to control itself,<sup>75</sup> the greatest challenges regarding the democratic input legitimacy of IRAs seem to lie largely in the second step. ¶

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75 J. Madison, ‘The Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments,’ in C. Kessler & C. Rossiter (eds.), *The Federalist Papers*, 2003, p. 319.