The Accountability of European Agencies:
Legal Provisions and Ongoing Practices

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The Accountability of European Agencies: Legal Provisions and Ongoing Practices

De verantwoording van Europese agentschappen: juridische kaders en dagelijkse praktijken

(met een samenvatting in het Nederlands)

Proefschrift

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door

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Familiei mele

(To my family)

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List of Abbreviations

AWF	Analytical Work Files
CEDEFOP	European Centre for the Development of Vocational Training
CEPOL	European Police College
CFCA	Community Fisheries Control Agency
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
CPMP	Committee for Proprietary Medicinal Products
CPVO	Community Plant Variety Office
DG	Directorate General
EAR	European Agency for Reconstruction
EASA	European Aviation Safety Agency
EC	European Community
ECB	European Central Bank
ECDC	European Centre for Disease Prevention and Control
ECHA	European Chemicals Agency
ECJ	European Court of Justice
EDA	European Defence Agency
EEA	European Environment Agency
EFSA	European Food Safety Authority
EIS	Europol Information System
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMEA	European Medicines Agency
EMSA	European Maritime Safety Agency
ENVI	Committee on Environment, Public Health and Food Safety
EP	European Parliament
EU	European Union
EUMC	European Monitoring Centre for Racism and Xenophobia
EU-OSHA	European Agency for Health and Safety at Work
EUROFOUND	European Foundation for the Improvement of Living and Working Conditions

ETF	European Training Foundation
HENU	Heads of Europol National Units
IAC	Internal Audit Capacity
IAS	Internal Audit Service of the European Commission
IMCO	Committee on Internal Market and Consumer Protection
IRAs	Independent Regulatory Agencies
JAC	Joint Audit Committee
JHA	Justice and Home Affairs
JSB	Joint Supervisory Board
JURI	Committee on Legal Affairs
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of European Parliament
MS	Member State
NAAs	National Aviation Authorities
OHIM	Office for Harmonisation in the Internal Market
OLAF	European Anti-Fraud Office
PA	Principal Agent
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRAN	Committee on Transport and Tourism

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CHAPTER 1

In Search of Agency Accountability

> Real, serious, weighty decision-making powers are at stake. To put it simply, if you certificate the Airbus A380, the executive director of the European Aviation Safety Agency is signing a bit of paper that allows thousands of kilograms of metal to go into the air. It is very, very important, indeed. It is a very challenging, a very difficult exercise. If you get it wrong, then there is an accident… You can't afford to get it wrong![1]

This is how a management board representative summarised the powers of the European Aviation Safety Agency (EASA). EASA, however, is not alone in its capacity to wield wide-ranging powers at the European level. It is just one illustration of an array of new executive institutions spawned by the European *agencification* process that started in 1975 and has accelerated at an ever increasing pace in recent years. European agencies have been set up in a multitude of highly relevant and sensitive fields such as: medicines, food safety, chemicals, environment, border control, police co-operation, telecommunications, energy, disease prevention, to name just a few areas. The process shows no signs of relenting, and the trend in recent years is towards the delegation of ever-broader powers. The "EU's appetite" for setting up new agencies has been described as "limitless."[2] In fact, "one could even get the impression that for each and every new threat that the European Union is faced with (fraud; bio terrorism; unsafe food; planes falling from the sky; chemical attacks; unsafe trains; diseases; illegal fishing; violations of human rights etc.) the first reaction is to set up yet another Agency."[3] These bodies have real power and their opinions and decisions can have a direct impact on individuals, regulators and member states.

1 Interview with a management board representative of the European Aviation Safety Agency.

2 D. Geradin and N. Petit (2004), 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposal for Reform', *Jean Monnet Working Paper 01/04,* New York, p. 4.

3 R. van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance', in D. M. Curtin and R. A. Wessel (eds) (2005), *Good Governance and the European Union. Reflections on concepts, institutions and substance*, Antwerpen: Intersentia, 125-152, p. 127.

Given the powers wielded by the agencies, who is responsible for holding these (quasi-)autonomous actors to account? Scholars have increasingly called attention to the risk of placing too much power in the hands of such agencies, which operate at arm's length from traditional controls and cannot easily be held accountable for their actions.[4] Although this is a major issue of concern in the literature, systematic empirical research into the topic is lacking. This book will try to address empirically whether, and if so on what counts, agency accountability is problematic. Is the growing concern surrounding agency accountability "much ado about nothing" or are we faced with the threat of a powerful and unaccountable bureaucracy? The aim of this research is to unravel how the accountability system of European agencies operates *de jure* and *de facto* and to pinpoint exactly where failures occur. The research question this book seeks to answer is: *"What are the accountability arrangements and regimes to which European agencies are subject and are these regimes and the overall accountability system appropriate?"*

1.1 European Agencies and Accountability: the Key Issue

The European Union (EU) is no longer a strictly legislative player, but has become capable of exercising executive power in its own right or through a system of "integrated administration" involving "an intensive and often seamless co-operation"[5] between both European and national levels. The European agencification process is part and parcel of this highly relevant ongoing development: the emerging, composite European executive.[6] This agencification process started when the European

4 M. Everson (1995), 'Independent Agencies: Hierarchy Beaters?', *European Law Journal, 1*(2) 180-204; M. Shapiro (1997), 'The Problems of Independent Agencies in the United States and the European Union', *Journal of European Public Policy, 4*(2), 276-291; E. Vos (2000), 'Reforming the European Commission: What Role to Play for EU Agencies?', *Common Market Law Review*, *37*(5), 1113-1134; M. Flinders (2004), 'Distributed Public Governance in the European Union', *Journal of European Public Policy, 11*(3), 520-544; D. Curtin (2005), 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in D. Geradin, R. Munoz and N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance,* Cheltenham: Edward Elgar, 88-119; G. Williams (2005), 'Monomaniacs or schizophrenics? Responsible governance and the EU's independent agencies,' *Political Studies, 53*(1), 82-99; R. Dehousse (2008), 'Delegation of powers in the European Union: The need for a multi-principals model', *West European Politics, 31*(4), 789-805.

5 H. Hofmann (2008), 'Mapping the European Administrative Space', *West European Politics*, *31*(4), 662-676, p. 671.

6 M. Egeberg (ed) (2006), *Multilevel Union Administration: The Transformation of Executive Politics in Europe*, Basingstoke: Palgrave Macmillan; M. Busuioc, M. Groenleer and J. Trondal (2011), 'Introducing the Agency Phenomenon in the European Union' in M. Busuioc, M. Groenleer and J. Trondal (eds), *The Agency Phenomenon in the European Union,* Manchester: Manchester University Press, forthcoming.

"core executive", the European Commission, began "shedding off layers"[7] to (quasi-) autonomous agencies in an attempt to focus on its "core tasks." The growing workload of the Community as a result of the continuous expansion of its activities that accompanied the single market program, coupled with a substantial increase in the complex nature of its attributions, resulted in the need to delegate some of its policy implementation functions to decentralised agencies in an attempt to build further administrative capacity. This trend towards delegation and decentralisation of executive power "caught on" and at a subsequent stage another institutional actor with executive powers, the Council of Ministers, also commenced hiving off powers to a generation of second and third pillar agencies. More recently, member states have also begun delegating powers directly to European agencies, which had never previously been "Europeanized." The creation of European agencies is an instance of simultaneous processes of delegation, decentralisation and "Europeanization"[8] of executive powers.

In addition to the expert-based, technical input and the increase in administrative capacity they provide, part of the agencies' "charm" also came from their formal separation from the main political actors, which allows for credible commitments. Agencies are presumed to operate free of all political influence, as is expressly stipulated in most agencies' founding acts. In fact, much of the rhetoric surrounding the creation of agencies has emphasised their independence, which has been put forward as a core argument to justify their creation.[9]

Given the relatively large degree of independence and institutional complexity of these agencies, and on the other hand, the importance of the tasks delegated to them, this raises significant concerns regarding their accountability. While on the up side welcomed for their functional benefits and independence from political organs such as the Council and an increasingly politicised Commission,[10] on the down side, the creation of agencies gave rise to anxiety about the possibility of them becoming "uncontrollable centres of arbitrary power."[11]

7 D. Curtin (2009), *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford: Oxford University Press, pp. 140-146.

8 R. Dehousse (2002), 'Misfits: EU Law and the Transformation of European Governance', *Jean Monnet Working Paper 2/02,* New York, p. 13.

9 G. Majone (2000), 'The Credibility Crisis of Community Regulation', *Journal of Common Market Studies*, *38*(2), 273-302.

10 G. Majone (2002), 'Functional Interests: European Agencies', in J. Peterson and M. Shackleton (eds), *The Institutions of the European Union*, Oxford: Oxford University Press, 292-325.

11 M. Everson (1995), p. 190.

At the same time, while the need for agency oversight became undeniable, it became apparent that this could jeopardise their very *raison d'etre.* In other words, "the existing measures designed to ensure that EAs are accountable appear to be insufficient. This observation may be difficult to reconcile with the previous observation that they should be more independent. Indeed, it is sometimes considered that accountability and independence are conflicting concepts."[12] Or, in the words of Everson, "herein, the dilemma for any lawyer concerned with the institutional design of independent agencies. To satisfy the first criterion, that of the insulation of agencies from petty politics, agencies must be afforded independence. At the same time, however, the second prerequisite of public accountability must also be satisfied."[13] Consequently, it has been repeatedly pointed out that one of the central challenges with regard to non-majoritarian agencies is finding the right balance between independence on the one hand and control and accountability on the other.[14] That is to say, "the key issue underlying these questions is how to strike a balance between an agency's autonomy, the accountability it must render, and the mechanisms to control it."[15]

The issue is even more pressing given that, strikingly, agency creation has taken place by stealth and in a rather ad hoc manner. On a par with other new developments in the context of the emerging executive, agencification has arisen, grown and progressed in the shadow of the law without an explicit basis in the Treaty.[16] This divergence between legal texts and the reality of legal and institutional practices creates a potential for accountability gaps, unless these developments are matched by a parallel, compensatory shift in accountability provisions on a par with institutional realities. In fact, this has been identified as one of the "'sore points' when it comes to both legal and political accountability in the contemporary EU."[17] Given the shift that has occurred in European governance, there is a need to move beyond

12 D. Geradin (2005), 'The Development of European Regulatory Agencies: Lessons from the American Experience' in D. Geradin *et al.* (eds), 215-245, p. 231.

13 M. Everson (1995), p. 183.

14 A. Kreher (ed) (1998), *The EC Agencies Between Community Institutions and Constituents: Autonomy, Control and Accountability*, Second RSC Conference on EC Agencies, Conference Report, Florence, EUI RSC; M. Everson (1995), p. 183; P. Magnette (2005), 'The Politics of Regulation in the European Union' in D. Geradin *et al.* (eds), 3-22.

15 M. Groenleer (2006), 'The European Commission and Agencies' in D. Spence, *The European Commission,* London: John Harper Publishing, 156-172, p. 156.

16 For a more general discussion on the evolution of the European executive see D. Curtin (2004), 'European Union Executive Actors Evolving in the Shade?' in J. de Zwaan, J. Jans and F. Nelissen (eds), *The European Union: An Ongoing Process of European Integration*, Liber Amicorum Alfred E. Kellermann, The Hague: TMC Asser Press, 97-110 and D. Curtin (2009).

17 D. Curtin (2006), 'European Legal Integration: Paradise Lost?' in D. Curtin, A. Klip, J. McCahery, J. Smits, *European Integration and Law,* Antwerpen: Intersentia, 1-54, p. 36.

the "legislative bias"[18] that has dominated the EU debate and to take account of the roles and responsibilities of the newly evolving institutional actors. Much of the debate concerning EU level deficits has primarily been centred on the legislative component, as exemplified by the "chronic" debate concerning the powers of the European Parliament (EP). However, accountability at the formal stage of decision-making is no longer a sufficient guarantee, given the transformations that have occurred in European governance. Scholars have pointed at the "authoritarian temptation" inherent in executive power where institutions "seek dark shadows if not complete secrecy."[19] As executive products, part and parcel of the emerging European executive, this raises the issue of agency accountability once again and the extent to which countervailing accountability mechanisms are in place to scrutinise and keep a vigilant eye on the exercise of these powers.

The question becomes even more relevant as the importance of the agency model increases, with agencies being heralded as a form of administrative integration,[20] "the next mode of growth of the Union"[21] and "the new paradigm of European governance."[22] In other words, "it is clear that the more active agencies become, the more important also the design of mechanisms to keep agencies under some control and make them accountable becomes."[23]

The call for increased control and accountability of agencies is not strictly an academic exercise. Institutions such as the European Parliament and the Commission have increasingly expressed concern about this and drawn attention to the issue. The Commission issued the White Paper on Governance, in which it identified accountability as one of the main five principles underpinning good governance, democracy and the rule of law, which "are particularly important for the Union."[24] In the explanatory memorandum to the Draft Inter-institutional Agreement on the Operating Framework for the European Regulatory Agencies, the Commission also iterated that "the independence of these agencies goes hand in hand with an obligation to meet their responsibilities. In order to strengthen the legitimacy of Community action, it is important to establish and delimit the responsibilities of the institutions and agencies. Moreover, the principle of accountability requires that a clear system

18 R. Dehousse (2002), p. 1.
19 D. Curtin (2009), p. 244.
20 A. Kreher (1997), 'Agencies in the European Community–a step towards administrative integration in Europe', *Journal of European Public Policy*, *4*(2), 225-245.
21 M. Shapiro (1997), p. 291.
22 D. Geradin *et al.* (eds) (2005).
23 E. Vos (2000), p. 1126.
24 Commission of the European Communities, 'European Governance. A White Paper', COM (2001) 428 final, p. 10.

of controls be put in place."[25] As the inter-institutional agreement failed to obtain support at the Council level, the European Commission issued a new document in which it reiterated the need for agency accountability.[26] In the words of the Commission, "significant resources are now devoted to agencies. As a result, it has become increasingly important to have clarity about their role, and about the mechanisms to ensure the accountability of these public bodies."[27] And again, "the need for clear lines of accountability to govern agencies' actions is at the core of the debate about agencies."[28]

The European Parliament has also been a vociferous promoter of increased agency accountability.[29] In the words of the European Parliament, "given that the European regulatory agencies are in large measure decentralised or independent services, there must be particular emphasis on transparency and democratic control of their formation and operation. Otherwise, the proliferation of regulatory or executive formations which have or claim exclusive competence to regulate crucial areas of social activities is at risk of reducing the importance of and supplanting the representative institutions of the EU and hugely inflating bureaucracy."[30]

1.2 Contribution to the Literature: A Study of Legal Provisions and Ongoing Practices

In addition to the reasons outlined in the section above, there are several gaps in the literature that render this study relevant. Despite the fact that there is clear agreement on the relevance of investigating the issue of agency accountability, there are significant white areas in the research on this issue. First of all, the accountability regimes of European agencies have not been systematically researched, both *de jure*

25 Commission of the European Communities, 'Draft Interinstitutional Agreement on the operating framework for the European Regulatory Agencies', COM (2005)59 final, p. 2.

26 Commission of the European Communities, Communication from the Commission to the European Parliament and Council, 'European Agencies–The Way Forward', COM (2008) 135 final.

27 Ibid. p. 2.

28 Ibid. p. 5.

29 D. Keleman (2002), 'The Politics of 'Eurocratic' Structure and the New European Agencies, *West European Politics*, *25*(4), 93-118, p. 95; See also, European Parliament (2004), 'Resolution on the communication from the Commission: "The operating framework for the European regulatory agencies"', OJ C 92 E/119, 16.4.2004, pp.123-124; Commission of the European Communities (2008), DG Budget, 'Practical Guide of the DG Budget on Community Bodies (Traditional Agencies, Executive Agencies, Joint Undertakings, Joint Technology Initiatives)', June 2008, p. 4.

30 See European Parliament (2008), Committee on Constitutional Affairs, 'Report on a strategy for the future settlement of the institutional aspects of Regulatory agencies', 2008/2103(INI), Rapporteur Georgios Papastamkos and Rapporteur for opinion, Jutta Haug, p. 13.

and *de facto.* While there have been a few pioneering studies on the issue,[31] they aimed to put forward an analysis of the founding regulations of these agencies and other basic legal texts without going into the practice of accountability. Leaving these studies aside, the majority of the literature on agencies does not deal exclusively with the issue of accountability or control, but addresses these aspects only briefly and in a general fashion when describing the agencification process at large.[32] Although an ever-present topic, accountability is usually dealt with as a side issue together with other aspects relevant to the agency discussion. Generally, an inventory of accountability or control mechanisms is put forward in an enumerative fashion and a list of potential suggestions for improvement are proposed.

Moreover, many of these studies generally do not start from a clear definition of accountability, and the term is often used interchangeably, not only with the notion of control but also with terms such as transparency, visibility and participation. This is problematic since different authors are essentially discussing and assessing different phenomena.

Additionally, while there is agreement in the literature about the relevance of agency accountability, there is no global agreement on the overall assessment of such a regime. Some studies conclude on a rather positive note and propose a "wait-and-see" approach: "a more intense delegation of responsibilities and powers to agencies, it is true, may pose a threat to the Meroni principles of institutional balance and democratic accountability. But, for the time being, I think that it would be better to keep watching them, and to wait and see."[33] Others, on the other hand, point at the urgency for action: "European mechanisms must be found which ensure that such bodies, their independence notwithstanding, may nevertheless be answerable to each of the of the organs of the Union, to the individual Member States and to the European public."[34]

Furthermore, even when authors agree about the presence of accountability deficits, there is no agreement over remedial solutions to be adopted. Suggestions range from bigger involvement of the European Parliament[35] and increased stakeholder partici-

31 See for instance, M. Everson (1995); E. Vos (2000); D. Curtin (2005), 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability', in D. Geradin *et al.*; P. Craig (2006), *EU Administrative Law*, Oxford: Oxford University Press, pp. 143-190.

32 See for instance, R. van Ooik (2005) in D. Curtin and R. Wessel (eds), p. 145.

33 Ibid. p. 152.

34 M. Everson (1995), p. 198.

35 Ibid. p. 203.

pation[36] to the enactment of a sweeping EU Administrative Procedure Act for agencies similar to the US prototype[37] and other procedural guarantees.[38] Ever so often, what is proposed as part of the solution in some studies is pinpointed as part of the problem in others. For example, fostering the inclusion of agencies in expert networks is envisaged by some authors as a way of rendering agencies more accountable[39] (i.e., through professional accountability) while at the same time not jeopardising their independence. Other authors point out, however, that the inclusion in loose networks simply serves to dilute responsibility and to make agencies even more unaccountable.[40]

These inconsistencies can probably be explained by the lack of systematic research into both the law and the practice of accountability to identify the exact locus of the problem. The present study would remedy this gap through a systematic study of agencies' accountability arrangements in order to describe the overall regimes, their functioning, evaluate their appropriateness in the specific context of agencies and to observe whether, and if so, exactly where, these regimes fail. This book takes a holistic look at agency accountability and moves beyond formal approaches to the topic by incorporating both the de jure aspects as laid down in the agencies' basic acts and, very importantly, empirical research into ongoing practices. This study follows a multidisciplinary approach and by virtue of the research methods and sources of data used, it combines a legal perspective with a political science and public administration approach. Hence the audience of this study is a dual one, consisting of agency scholars and EU scholars, and more specifically, of legal as well as public administration scholars. It is, however, *not* a black letter law study, nor is it an explanatory or quantitative study. Given the lack of systematic research into the topic, the study is necessarily qualitative, exploratory, supplemented with analytical insights and reflections and in the final chapter, a contextual evaluation of the overall findings.

In terms of its temporal scope, the study was conducted between September 2005 and September 2009. Thus, the law is as stated in September 2009. However, given the fact that the Lisbon Treaty was likely to enter into force after the research had been completed, it was deemed necessary to incorporate some discussion, whenever relevant, on the implications of the Treaty of Lisbon for agency accountability. These

36 G. Majone (1996), *Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions,* EUI Working Paper RSC No 96/57, Florence: European University Institute.
37 D. Geradin (2005) in Geradin *et al.* (eds), p. 239.
38 P. Magnette (2005) in Geradin *et al.* (eds), p. 14.
39 E. Vos (2000), p. 1127; G. Majone (1997), 'The new European agencies: regulation by information', *Journal of European Public Policy*, *4*(2), 262-275.
40 M. Shapiro (1997).

however, do not affect as such the documentation of accountability *practices* as this necessarily entails an actual accumulation of relevant practices and cannot be undertaken for the future.

1.3 Outline of the Book

The structure of the book is as follows. *Chapter 2* introduces the reader to the "star actors" of this book: the European agencies. The aim is to provide an in-depth description of the agencification process, the various agencies and their powers so as to equip the reader with a contextual toolkit for the empirical chapters. *Chapter 3* lays down the central theoretical concept of this book, i.e., "accountability" and explains the rationale behind the choice of the preferred definition. At the same time, given its relevance to the agency debate, it also introduces the concept of "control" and differentiates this from "accountability." *Chapter 4* is the methodological chapter that provides insight into how the research was carried out and explains and justifies the methodological choices made.

Chapters 5, 6, 7 and *8* are the empirical chapters, each introducing a separate agency accountability arrangement. They each offer a micro-level view of accountability by describing and analysing one individual piece of the jigsaw puzzle that is the overall accountability regime of agencies. *Chapter 5* peers into the relationship between the agency, its directors and their hierarchical superiors: the management boards. *Chapter 6* presents the complex financial accountability regime of agencies, and describes and analyses the role of the multiple financial forums involved: the Internal Audit Capacity of the agency (IAC), the Internal Audit Service of the Commission (IAS), the Court of Auditors, the Joint Audit Committee (JAC) and the European Parliament and the Council in their discharge roles. *Chapter 7* deals with the topic of political accountability, and in this context examines the role of the European Parliament and the Council in scrutinising agencies. *Chapter 8* delves into the (quasi-)legal accountability regime of agencies. It looks into the contribution of the Court of Justice and the European Ombudsman in holding agencies to account.

Chapter 9 concludes the book by summarising the main empirical findings at the micro-level, and subsequently puts together all the various pieces examined in order to provide a general view on the accountability regime of agencies as a whole. The chapter also offers new insights for accountability theory as well as reflections on future agency (accountability) developments and possibilities for improvement.

CHAPTER 2

Introducing European Agencies

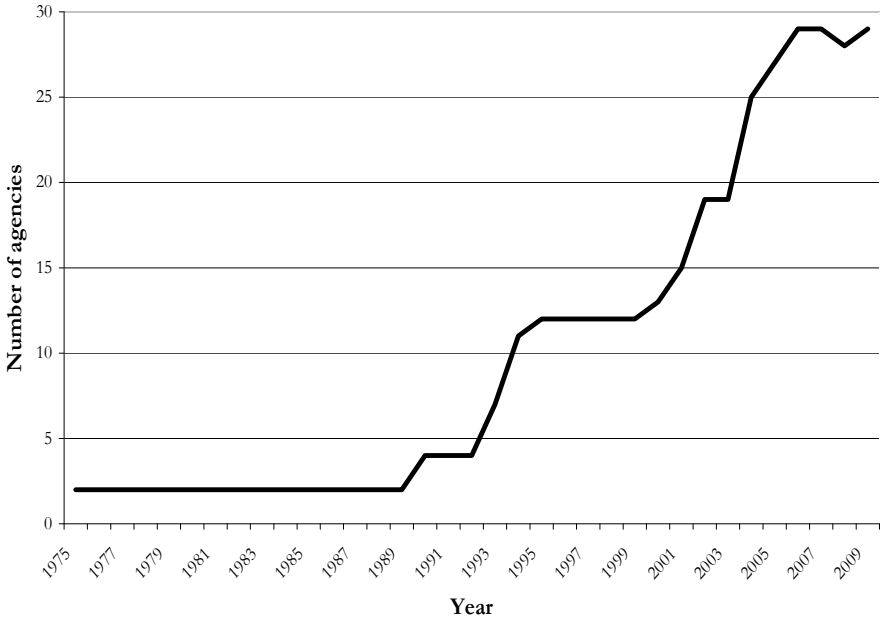
The aim of this chapter is to sketch a portrait of European agencies, the agencification process and its development, thus laying the first foundations, together with the following chapter on accountability, for the ensuing empirical chapters. Before delving into specific aspects of agency accountability, it is first necessary to have a general understanding of the extent of the agencification process, the types and tasks of agencies and the reasoning behind their creation. Discussions and assessments of agency accountability cannot be divorced from general considerations involving their powers, set up and the goals they are meant to achieve. To do so would detach the discussion of accountability from the reality of agencies.

2.1 A Growing Institutional Phenomenon

The European agencification process kicked off in 1975 with the creation of the first two agencies: the European Centre for the Development of Vocational Training (CEDEFOP) and the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND). These are considered the first generation of European agencies. They are both informational agencies in nature and as such generated little attention or contestation. This was followed by a dry spell in agency creation which lasted for roughly fifteen years. Then came the 1990s, when the agencification process at the European level really took off. Two new waves of agency creation ensued with a second generation being set up in the 1990s and a third starting in 2000. The result is that at present we are faced with approximately thirty agencies, over half of which were created in the past decade (see Figure 2.1 on the growth of agencification at the EU level). As observed by the French Senate in 2005, "more

autonomous organs had been created by the EU in the previous 50 months than in the 50 years that preceded it."[1]

Figure 2.1 The growth of agencification



Furthermore, the agencification process displays no signs of slowing down. At the time of this writing, a new agency had just been set up: the Agency for Co-operation of Energy Regulators and a second one was in the pipeline (i.e., the European Electronic Communications Market Authority).[2] Today, European agencies are a familiar element of the European institutional landscape. They have emerged as institutional players in their own right. They are now characterised as "a major institutional innovation within the political system of the European Union" and are seen as an indication of the "proliferation of administrative governance."[3]

1 R. Dehousse (2008), 'Delegation of Powers in the European Union: The Need for a Multi-Principal Model', *West European Politics, 31*(4), 789 – 805, paraphrasing the French Senate, p. 790.

2 See the Legislative Observatory, Proposal for an European Electronic Communications Market Authority ("Telecom Package", COD/2007/0249).

3 T. Gehring (2008), 'Regulatory Agencies and Other Network Structures in the European Executive Governance', *Paper prepared for the UACES Conference,* Edinburgh, 1-3 September 2008, p. 1.

2.1.1 Definition

There is no generally endorsed definition of what constitutes a European agency but there is an overall agreement on who they are. European agencies display a set of specific characteristics which set them apart from other institutions or bodies operating at the EU level. Agencies are non-majoritarian, specialised bodies which are established by secondary legislation. They exercise public authority, are institutionally separate from the Community institutions (i.e., Commission, Parliament, Council) and possess a legal personality. Therefore, the term does not include those institutions explicitly specified in Article 4 of the EU Treaty such as the European Central Bank or the European Investment Bank. Nor does it include those internal bodies or quasi-independent departments of the Commission such as the Humanitarian Aid Office or the European Anti-Fraud Office (OLAF). Starting in 2002, the Commission has also created a number of so-called "executive agencies", but these are also beyond the scope of this study due to their dependent nature on the Commission. Unlike other Community agencies, these bodies have their origin in the same piece of secondary legislation,[4] are established for a limited period of time and are instituted and wound up at the discretion of the European Commission.

2.1.2 Types of Agencies

Two main categories of agencies have emerged: Community agencies (EC agencies) and Council agencies (EU Agencies). Community agencies are part and parcel of the first pillar and have been created through the delegation of tasks by the Commission and, more recently, by the member states through the delegation of tasks which were previously not pooled at the European level. Council agencies, on the other hand, have been set up by Council with a mandate for operation in the area of the second and third pillar matters. At present, there are a total of six Council agencies in existence. A list of all agencies to date, with acronyms, is provided below.[5]

4 Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.

5 This list is based on Annex 1, List of Agencies, in European Parliament (2008), Committee on Budgetary Control, 'Discharge for the 2006 financial year: Resolutions on Agencies. Summary of Requests made to the Agencies, to the European Commission and to other Institutions and bodies', adopted in Plenary on 22 April 2008, 16 May 2008, with the necessary updates.

Table 2.1 European agencies: an overview

Community Agencies
- European Centre for the Development of Vocational Training (CEDEFOP) - European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) - European Environment Agency (EEA) - European Training Foundation (ETF) - European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) - European Medicines Agency (EMEA) - Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) - European Agency for Health and Safety at Work (EU-OSHA) - Community Plant Variety Office (CPVO) - Translation Centre for the Bodies of the European Union (CdT) - European Agency for Reconstruction (EAR)- *mandate ended* - European Food Safety Authority (EFSA) - European Maritime Safety Agency (EMSA) - European Aviation Safety Agency (EASA) - European Network and Information Security Agency (ENISA) - European Centre for Disease Prevention and Control (ECDC) - European Railway Agency (ERA) - European Global Navigation Satellite System Supervisory Authority (GSA) - European Agency for the Management of Operational Co-ordination at the External Borders of the Member States of the European Union (FRONTEX) - Community Fisheries Control Agency (CFCA) - European Chemicals Agency (ECHA) - European Institute for Gender Equality (EIGE) - European Union Agency for Fundamental Rights (FRA)[6] - Agency for the Co-operation of Energy Regulators (ACER) – *under preparation* - European Electronic Communications Market Authority- *under negotiation*
EU Agencies
(Second Pillar) - European Institute for Security Studies (ISS) - European Union Satellite Centre (EUSC) - European Defence Agency (EDA) *(Third Pillar)* - European Police Office (Europol) - European Police College (CEPOL) - European Union's Judicial Co-operation Unit (Eurojust)

6 FRA replaced the European Monitoring Centre for Racism and Xenophobia (i.e., EUMC).

2.2 Rationale for Agency Creation

As evidenced by the table above, a broad array of agencies has been created. What rendered their set up necessary? What is the rationale behind the creation of agencies? After all, the EU has functioned long enough without them. Agencies serve a number of purposes, which have been put forward for justifying their existence as an institutional necessity.

2.2.1 Community Agencies

Expertise, Increased Administrative Capacity, Efficiency: Reducing the Workload of the Commission

In line with the spillover theory, the Community has witnessed an expansion and deepening of its activities so as to include aspects of highly technical and scientific complexity. Given the Community's "serious mismatch between the increasingly specialised functions of government and the administrative instruments at its disposal",[7] agencies appeared to offer a viable solution to this impasse. They have been presented as a means to increase administrative capacity, to reduce the workload of the Commission and to allow it to focus on its "core tasks" by taking over some of its technical and administrative tasks. Arguably, agencies are particularly suitable for taking on some of the Community's workload due to their unique combination of effectiveness and technical expertise. Following a microeconomic efficiency logic, agency supporters subscribe to the belief that executive government work is more expediently and satisfactorily carried out by a smaller-scale, single purpose entity than by a large scale government department.[8] Additionally, agencies are highly specialised and can benefit from the input of expert committees, which makes them perfectly equipped for dealing with complex technical and scientific issues.

So far, the notion that agencies have had a significant impact on reducing the workload of the Commission shows few signs of ringing true. The increase in agencification, agency staff and thus agency administrative capacity does not appear to have resulted in a parallel decrease in either the Commission's staff or budget.[9]

7 M. Everson (1995), 'Independent Agencies: Hierarchy Beaters?', *European Law Journal, 1*(2) 180-204, p. 180.

8 A. Heringa and L. Verhey (2003) 'Independent Agencies and Political Control' in L. Verhey, and T. Zwart (eds), *Agencies in European and Comparative Law*, Antwerpen: Intersentia, 155-169, p. 157.

9 Parliamentary Question, Written Question by Jutta Haug (PSE) to the Commission, E-3156/2006 and Answer by Mr Barroso on Behalf of the Commission < http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-3156&language=EN>.

The explanation put forward for this by the Commission is the fact that some of the agencies' tasks were not carried out by the Commission in the first place, but by the member states. That being the case, it is difficult to see how the creation of agencies was meant to make such a significant impact on the Commission's ability to focus on its "core tasks."

Credible Commitment

Apart from providing a solution to the Community's need for efficiency, expertise and a substantial reduction in its ever-increasing workload, decentralised agencies were also instrumental to the Community's efforts to regain its credibility by placing some of its functions outside the area of direct political influence.[10] Therefore, as the Commission itself openly states "the main advantage of using the agencies is that their decisions are based on purely technical considerations of very high quality and are not influenced by political or contingent considerations."[11] Scandals surrounding the work of the Commission, such as food scares (e.g. dioxin contamination), had seriously called into question the credibility and legitimacy of the Union's work as a whole. As a result of its failure to commit itself to long term interests and to ensure for example, that the diffused and thus, less vocal interests of the consumer were protected against the specific economic interests of the member states, the Commission became involved in serious scandals with a resulting loss of public faith in its ability to regulate these sectors.

Lack of credible commitment is a common challenge, "notoriously difficult to achieve in a democracy, which is a form of government *pro tempore.* (…) the segmentation of the democratic process into relatively short time periods has serious consequences whenever the problems faced by society require long-term solutions. In the expectation of alternation, politicians have few incentives to develop policies whose success, if at all, will come after the next election."[12] An important means of ensuring policy credibility is to make long-term commitments through delegation to independent bodies. As pointed out by Hawkins *et al*., principals can mitigate the time inconsistency problem by delegating policy to enforcing agents with high discretion who will move policy in the direction of long-term rather than short-term

10 G. Majone (1998), 'Europe's 'Democratic Deficit': The Question of Standards', *European Law Journal*, *4*(1), 5-28; G. Majone (2000), 'The Credibility Crisis of Community Regulation', *Journal of Common Market Studies*, *38*(2), 273-302.

11 Commission of the European Communities, 'Communication from the Commission. The Operating Framework for the European Regulatory Agencies', COM (2002) 718 final, p. 5.

12 G. Majone (1997b), 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union', *European Institute of Public Administration EIPASCOPE*, *3*, 1-6, p. 2.

political success.[13] This trend can be observed for example, in the legal field, by the fact that the administration of justice has been assigned to the judiciary, an autonomous branch less likely to be swayed by majoritarian interests and thus able to guarantee the protection of minority interests. Likewise, it is exemplified by the fact that numerous countries have maintained the independence of their national banks from government, in an effort to ensure that regulatory policy is not corrupted by narrowly-drawn interests. On a more pessimistic side-note, it can also be a strategy for shifting responsibility for unpopular decisions and using the agent as a scapegoat.

Similarly, the transfer of powers to the new European agencies has been presented as part of the Community's search for credible commitment. The most notable promoter of this thesis has been Giandomenico Majone.[14] By shifting some of its powers to an insulated, non-majoritarian institution, which is not directly responsible to voters or to their elected representatives, the Community found "a means whereby the governments can commit themselves to regulatory strategies that would not be credible in the absence of such delegation."[15] Following this line of argument, the creation of European agencies for pharmaceuticals, disease control and foodstuffs for example, are prominent examples of delegation of competences in sensitive, high risk areas for consumers in an attempt to ensure long-term goals such as health and consumer protection.[16] Additionally, they are also meant to guarantee to European businesses credible regulatory efforts, consistent with European interests rather than narrow, nationally-drawn economic agendas. In the absence of such a commitment, "business will be less eager to trade across the borders of the Member States and the sole purpose of the internal market will be undermined."[17]

This is also why safeguarding the independence of agencies is such a central issue. Agencies are institutionally separate from the Commission and Council, possess their own budget and "most founding acts expressly stipulate that the agency concerned will be completely independent from the makers of law and politics. The

13 D. G. Hawkins, D. A. Lake, D. L. Nielson and M. J. Tierney (2006), 'Delegation under anarchy: states, international organizations, and principal-agent theory,' in D. G. Hawkins, D. A. Lake, D. L. Nielson and M. J. Tierney, *Delegation under Anarchy: States, International Organizations and Principal Agent Theory*, Cambridge: Cambridge University Press, p. 19.

14 See for example, G. Majone (2000).

15 G. Majone (2000), p. 289; See also, G. Majone (1998).

16 S. Krapohl (2004), 'Credible Commitment in Non-Independent Regulatory Agencies: A Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs', *European Law Journal*, *10*(5), 518-538.

17 M. Everson (1995), p. 194.

agency's output may and should not be influenced by political considerations."[18] To date, it appears that the agencies' technical, expert output is kept away from political interference. There has been only one public scandal where an instance of such interference surfaced in the case of the former European Monitoring Centre for Racism and Xenophobia (i.e., EUMC).[19] For example, studies of one of the most powerful agencies to date, the European Medicines Agency, have concluded that the agency "dominates the decision-making process for the authorization of medicinal products in the Single Market and virtually determines the content of authorization decisions, because it is well protected from interventions in its day-to-day decision making by the member states and other political actors."[20]

While agencies' scientific output is kept at an arm's length, this is not to say that agencies operate in a political vacuum. Quite the contrary, as we will see below, their set up was motivated by strong political considerations, forged through inter-institutional struggle and political compromise; this has been perpetuated in their governance structures and organisational configurations.

Better Implementation: "A Europe of Results"[21]

European agencies have also been presented as a solution to compliance problems with the Community law in the member states. The European Commission has pointed out that it expects that agencies "will improve the way rules are applied and enforced across the Union."[22] Several agencies have been afforded compliance related tasks, most notably inspection tasks, such as the European Aviation Safety Agency, European Maritime Safety Agency, Community Fisheries Control Agency. There have been a handful of initial studies on the matter, focused on the contribution of the European Aviation Safety Agency and/or the European Maritime Safety

18 R. van Ooik (2005), 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance', in D. M. Curtin and R. A. Wessel (eds), *Good Governance and the European Union. Reflections on concepts, institutions and substance*, Instersentia, 125-152, p. 145.

19 Allegedly the board suppressed an anti-Semitism expert study.

20 T. Gehring, and S. Krapohl (2007), 'Supranational regulatory agencies between independence and control: the EMEA and the authorization of pharmaceuticals in the European Single Market', *Journal of European Public Policy*, *14*(2), 208-226, p. 209.

21 E. Versluis (2008), 'A Europe of results? Analyzing the role of EU agencies in securing compliance in Central and Eastern Europe', *UACES Conference 'Exchanging Ideas on Europe: Rethinking the European Union',* Edinburgh, 1-3 September 2008.

22 Commission of the European Communities, 'European Governance. A White Paper', COM(2001) 428 final, (2001, C287/01), p. 24.

Agency.[23] They conclude on a positive note by observing that "EU agencies have indeed started to employ implementation activities"[24] and that agencies can "potentially play an important role in improving compliance results in the member states."[25] However, they stress the crucial role of other actors such as member states, the European Commission and international bodies and agencies' dependence on such actors in order to affect results. They also observe that in some cases, the gains observed are due to the Commission and to the Communitarisation of the system and less to the impact brought about through the set up of the agency.[26] All in all, the jury is still out on the contribution of agencies to better compliance and to bringing about a "Europe of results."[27] This is not surprising, particularly given the fact that these types of agencies are quite new and it is therefore relatively too soon to assess their actual impact on compliance.

Increased Networking and Participation

In addition to the reasons outlined above, another motive for the establishment of agencies is to ensure the involvement of more actors in the decision-making process. As pointed out by Heringa and Verhey "the agencies model offers a framework for institutionalizing the influence of interested parties, such as employers and employees or network of experts."[28] This reasoning seems to hold at least partly true for agencies such as the European Foundation for the Improvement of Living and Working Conditions, the European Agency for Health and Safety at Work, the European Medicines Agency, the European Food Safety Authority and for the European Centre for the Development of Vocational Training. Systematic assessments of the added value of the agency model for stakeholder involvement and participation are still lacking, but some early studies of specific agencies indicate that they "show a relative openness to stakeholders and a relatively good performance in terms of interactions."[29]

23 A. Schout (2008), 'Inspecting Aviation Safety in the EU: EASA as an Administrative Innovation?' in E. Vos (ed), *European Risk Governance – Its Science, its Inclusiveness and its Effectiveness,* Connex Report Series, Volume 6, 257-293; M. Groenleer, E. Versluis, M. Kaeding (2008), 'Regulatory governance through EU agencies? The Implementation of Transport Directives', *Paper presented at the ECPR Standing Group on Regulatory Governance Conference*, Utrecht, 5-7 June 2008; E. Versluis (2008).

24 M. Groenleer *et al.* (2008), p. 23.

25 E. Versluis (2008), p. 14.

26 A. Shout (2008).

27 E. Versluis (2008).

28 A. Heringa and L. Verhey (2003), p. 158.

29 S. Borras, C. Koutalakis, F. Wendler, (2007), 'European Agencies and Input Legitimacy: EFSA, EMeA and EPO in the Post-Delegation Phase', *Journal of European Integration*, *29*(5), 583-600.

At the same time, through their governance structures and working modes, agencies integrate both the European and national administrations "by providing structures of cooperation between the supranational and national levels and between the national authorities."[30] In fact it is precisely this integrative function of European agencies, including public and private stakeholders from multiple levels of government, that has been described as a very important function of agencies and, indeed, as their "strength" in the area of social regulation. That is to say, European agencies act as "information brokers, connecting the various national agencies with each other (Dehousse 1997:257). This inclusion in European orchestrated networks transforms national representatives from "locals" into "cosmopolitans" (Gouldner 1957, 1958), thus smoothing the way for a certain convergence of national regulation (cf Majone 2000: 295f.)."[31]

Inter-institutional Politics

However, the creation of agencies was not solely motivated by functional reasons. As hinted at above, strong political interests also played a large role. Agencies, it has been argued, have emerged as a strategic, political compromise between the main institutional actors at the EU level.[32] As observed by Keleman, "the single market initiative expanded the EU's regulatory tasks, the Commission saw a need and an opportunity to expand the EU's regulatory capacity. Recognising that additional transfer of power and resources to the European Commission would be unacceptable to the Council of Ministers, the Commission proposed the establishment of specialised, European agencies. The member states in the Council agreed to the establishment of agencies but limited the scope of their authority and demanded they be controlled by member state appointees."[33] These tensions between the main institutional actors explain not only the set up of agencies but also their design and governance structures. Management boards are generally comprised of representatives of the main institutional actors: the member states, the Commission and in some cases, representatives of the European Parliament. More recently, the Commission has also tried to secure a broader representation for itself on the boards. Furthermore, agencies were set up as institutionally separate from the Commission, thus removing them from the direct sphere of influence of the latter. In fact, the formal autonomy

30 H. Hofmann (2008), 'Mapping the European Administrative Space', *West European Politics*, *31*(4), 662-676.

31 B. Eberlein, and E. Grande (2005), 'Beyond delegation: transnational regulatory regimes and the EU regulatory state', *Journal of European Public Policy*, *12*(1), 89-112, p. 101.

32 D. Keleman (2002), 'The Politics of 'Eurocratic' Structure and the New European Agencies', *West European Politics*, *25*(4), 93-118.

33 Ibid. p. 95.

of agencies is aimed at guaranteeing "for each of these actors that the other would not gain too much and the power balance between them would not be disrupted."[34]

This inter-institutional power play has snaked in and out through the development of agencies and it is doubtful whether the power balance originally aimed for has been ensured. In line with the credible commitment thesis, there seems to be a non-interference policy in agencies' technical output, yet in other areas the Commission has at times exerted or attempted to exert a bigger influence over agencies, in the boards, than originally mandated.[35] By virtue of being generally better informed, having an intimate knowledge of the inner workings of the EU system as well as the power of budget proposal, the Commission has an advantageous position vis-à-vis other players. The agencies' emphasis on their independence vis-à-vis the Commission has reportedly given rise to inter-institutional tensions. As observed by Groenleer, "even if agencies' added value is often their independent position, forcible demonstrations of their autonomy, as both the EEA and EFSA experienced, had the opposite effect. Constant reiteration of its independent position has in the early years of the EFSA led to hostility from the side of the Commission, as a consequence trying to circumvent the EFSA when possible. The EEA and the EUMC also alienated themselves from the Commission by excessively focusing on their independence."[36] Exploring the evolution of the role of EEA vis-à-vis the Commission and its autonomy, Martens observes, "the message is more in the spirit of George Orwell: All institutions are equal, but some institutions are more equal than others."[37]

2.2.2 Council Agencies

The literature on agencies addresses the rationale behind the creation of European agencies through the prism of Community agencies. The reasoning behind the formation of Council agencies goes largely undiscussed, though clearly a different logic applies as many of the reasons put forward in the case of Community agencies do not apply. Council agencies such as Europol, Eurojust and the European Defence Agency did not originate in order to ease the workload of the Commission and allow

34 M. Groenleer (2008), 'Building autonomous European Union agencies? Identity, legitimacy and leadership in comparative perspective', *Paper presented at the 38th UACES Annual Conference*, Edinburgh, 1-3 September 2008, p. 4.

35 M. Busuioc (2009), 'Accountability, Control and Independence: The Case of European Agencies', *European Law Journal*, *15*(5), 599-615.

36 M. Groenleer (2008), p. 18.

37 M. Martens (2008), 'Voice or Loyalty? The Evolution of the European Environmental Agency (EEA)', *Paper presented at the ECPR Standing Group on Regulatory Governance Conference*, Utrecht, 5-7 June 2008, p. 3.

it to focus on its core tasks. Nor did they come about as a result of problems of regulatory credibility, as in the case of first pillar agencies. Nor did they spring from the need to increase visibility and stakeholder participation in these areas, since agencies such as Europol and EDA are some of the most exclusive "clubs" operating at the EU level.

What were the reasons behind this delegation of powers? After all, member states are notoriously protective of their powers in the second and third pillar. Instead of credibility, expertise, or increased stakeholder participation, the member states were mainly motivated by the sheer pragmatism of what they stood to gain: improved effectiveness as a result of co-ordination and collaboration at the European level. For example, in light of the increasing transnational character of most crimes, the perceived common threats (e.g. terrorism) and the clear benefits that can be derived from the creation of a specialised agency promoting trans-border operational co-operation and exchange of information, member states decided to delegate part of their prerogatives in this area to a newly set up agency: Europol. In this connection it has been observed that, "the disappearance of border controls between the EU member states in combination with the rise in transboundary crime as a result of the collapse of the Berlin Wall led many politicians to call for greater co-operation between European police forces."[38] This is furthermore illustrated by the fact that expansions to Europol's mandate came about in reaction to high profile events or crises,[39] thus indicating that the delegation of powers is related to perceived threats and the need for improved co-ordination. Similarly, the European Defence Agency was born out of the realisation of the need for a joint effort at the European level in the field and of the gains to be obtained as a result of co-operation. In other words, faced with a set of common problems and threats in the area of the second and third pillar and given the transnational character of many of these issues, the member states acknowledged the need for a common approach. Member states made a rational choice to delegate part of their powers, given the clear gains that can result from delegation. After all, "at the basis of all delegation lies the principle of division of labour and gains derived thereof."[40]

However, given the sensitivity of these fields and their close association with the issue of sovereignty, member states remain very protective of these institutions and are eager to maintain control. Moreover, the emphasis on autonomy is likely to be less strong given the need for control, especially as credible commitment and the

38 M. Groenleer (2009), *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development,* Delft: Eburon, p. 278.
39 Ibid. p. 280.
40 D. Hawkins, D. Lake, D. Nielson and M. Tierney (eds) (2006), p. 16.

ensuing autonomy was not a rationale in their set up. This concern for member state control is reflected in the choice of mechanisms provided for governing and scrutinising Council agencies. For example, in the case of Europol it has been pointed out that, "Member states have been reluctant to grant the Commission a role with regard to Europol. (…) Efforts to create an inter-parliamentary supervisory organ for Europol failed because the member states did not want the Parliament monitoring an intergovernmental body."[41]

Agency theory teaches us that in such situations, "principals will choose an agent that mirrors their preferences in order to ensure outcomes consistent with their desires."[42] Similarly, principals will also be less likely to assign the scrutiny of the agent's behaviour to independent third parties with "partially opposing mandates." Mirroring these theoretical claims, EU agencies generally fall outside the sphere of the more supranational institutions of the EU, so that the responsibility of watching over their actions rests primarily with the member states, acting via their representatives in the board or via the Council. Unlike in the case of Community agencies, representatives of the Commission or the European Parliament are generally not represented in the boards of such agencies. In the case of Europol, this changes as of 1 January 2010 with the application of the new Europol Council Decision.[43] Roughly a decade and a half after the creation of the agency, the Commission will obtain one voting right in the board. Furthermore, their contract design does not provide for an obligation of the directors to appear for hearings before the European Parliament, nor does it provide for legality review by the Court of Justice of the European Communities. Thus, their governance and scrutiny structures reproduce the intergovernmental logic, with the member states and the Council playing the central roles.

In the above, we have peered into the rationales for agency creation. A variety of rationales have been put forward, in retrospect some more pertinent than others, and we have seen that the reasoning behind the establishment of EC agencies is different from the logic behind the creation of EU agencies. These aspects are relevant and worth discussing within the context of this study because they (implicitly and, in some cases, even directly) impact the institutional configuration of agencies, their design and the constellation of and types of monitoring mechanisms in place.

41 M. Groenleer (2009), p. 300.

42 W. Bernhard (2002), 'Why Delegate: The International and Domestic Causes of Delegation', *Paper presented at the conference on 'Delegation to International Organizations'*, Cambridge MA, 13 December 2002, <http://www.internationalorganizations.org/bernhard_harvard.pdf>.

43 Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.05.2009, p. 37.

2.3 Legal Basis and Constraints

The proliferation of agencies is quite a remarkable development given the legal and institutional limitations on their creation. The biggest limitation of all is the lack of an explicit basis for their creation in the Treaty. As such, agencies have been established outside the Treaty, as a matter of secondary legislation.[44] Up till a decade ago, almost all Community agencies were set up on the basis of Article 308 of the EC Treaty, the residual clause for Community action and thus, in accordance with the consultation procedure, with only a marginal role for the European Parliament. This provision gives the Council the power to take appropriate measures, "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers."[45]

This situation gave rise to claims for an increased role of the Community's legislative, which eventually brought about a change in approach with regard to some of the third generation Community agencies. The European Aviation Safety Agency, the European Food Safety Authority, the European Chemicals Agency and the European Centre for Disease Control among others, were set up on the basis of different Treaty articles, but with the European Parliament as a co-legislator. In some cases, this involvement of the European Parliament as a co-legislator has translated into a larger role for the European Parliament in the governance and accountability structures of agencies. Council agencies have as a legal basis a Council Joint Action or a Council Decision, with the exception of Europol, which was originally set up on the basis of a Convention.

Another limitation on the creation of agencies is also constituted by the *Meroni* case,[46] dating from 1958, which placed clear limits on the delegation of powers. In *Meroni*, the Court issued a ban on the delegation of discretionary powers and provided that only the delegation of clearly defined, executive powers was permitted under the Treaty, so as not to upset the institutional balance of powers. The doctrine has been used, among others by the Commission and its legal service, particularly in the early years of agency creation, in order to prevent the granting of autonomous powers to agencies.[47] Arguably, some of the newer agencies[48] stretch the bound-

44 Europol was established through a Convention.
45 Article 308 EC Treaty.
46 Case 9/56, *Meroni &Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133.
47 R. Dehousse (2002), 'Misfits: EU Law and the Transformation of European Governance', *Jean Monnet Working Paper* 2/02, New York, p. 13.
48 For example, the European Aviation Safety Agency.

aries of the legal doctrine to the maximum. The use of the doctrine to justify a non-delegation approach has encountered some criticism, and has been labelled a political rather than a legal constraint used by other institutional players so as to justify their political preference for the status quo.[49] Some scholars have pointed out that the use of the doctrine for denying autonomous powers to (some) agencies is inappropriate, as this is not a process of delegation in the sense of *Meroni* but rather one of "Europeanization" of powers. In the words of Dehousse, "the concept of delegation is therefore quite ill-suited to such situations; as the Court pointed out in *Meroni*, such a concept makes sense only in relation to powers "which the delegating authority itself received under the Treaty." "Europeanization" would be a better description of a process in which powers are transferred vertically (from the national to the EU level) rather than horizontally (from Community institutions to specialized agencies). Yet, it is through the prism of delegation that the legal community has examined the legality of European agencies."[50]

2.4 Holding Power to Account: A Typology of Power

As we have seen in Chapter 1, European agencies have been established in a variety of fields ranging from pharmaceuticals and food safety to plant variety rights or maritime safety. There is considerable variety in the kind of tasks with which they are entrusted, with the main task of some agencies being to collect information, whereas others can adopt decisions that are binding on third parties, and in some cases even soft law provisions of wide application.

There is, however, no generally accepted functional classification of European agencies, with different studies using different labels for characterising agencies. For example, Everson refers to four types of European agencies: regulatory agencies, independent information collecting aides, adjudication agencies and agencies charged with the pursuit of distinct constitutional-type normative goals.[51] Chiti, on the other hand, draws a distinction between agencies based on a combined analysis of their field of action and their tasks and classifies them as: agencies acting in the sector of the internal market in order to ensure that private conduct is in compliance with the EC regime; agencies that are responsible, in the area of social regulation, for controlling and directing private conduct toward a public interest; information bodies operating in the area of social regulation; and information bodies active in the area

49 G. Majone (2000), p. 300.
50 R. Dehousse (2002), p. 13.
51 M. Everson (1995), pp. 186-189.

of social policy.[52] Another classification is proposed by Geradin and Petit,[53] who put forward a functional typology of agencies based on the duties entrusted to them. They isolate five main types of agencies or agency models: the regulatory model, the observatory model, the co-operation model, the executive model and the network safety/interoperability model.

The classification favoured for the purpose of this paper draws on a functional analysis of agencies' tasks as laid down in their constituent acts. It borrows and builds upon previous classifications by Ellen Vos, Ronald van Ooik and Paul Craig.[54] These types of classifications are favoured due to their emphasis on the types of powers exercised by agencies. Although relevant for other studies, other typologies based on the field of action of different agencies or other aspects which are not exclusively related to the agencies' powers (e.g. users, size, output etc.) are not relevant for the present one. This book investigates agency accountability. For accountability, the most useful classification is one based on the type of powers held by agencies, due to the strong link between accountability and power. After all, "the accountable is a holder of power. Accountability presupposes that a person is in a position to make decisions that are likely to have an impact on others and to implement these decisions."[55]

In light of their primary objectives and tasks as identified in their basic legislation, European agencies can be classified into: information providing, management, operational-cooperation agencies, decision-making and (quasi-)regulatory agencies (see Table 2.2 below). This is a progressive scale, starting from the least powerful (i.e., information providing) to the more powerful: operational co-ordination, decision-making and (quasi-)regulatory. In some cases, there is an overlap between the different categories as some agencies simultaneously perform multiple functions. For example, the European Aviation Safety Agency (EASA), as it will be seen below, can be classified as operational co-ordination, decision-making and quasi-regulatory by virtue of its contract design, which grants it all three types of powers.

52 E. Chiti (2000), 'The Emergence of a Community Administration: The Case of European Agencies', *Common Market Law Review*, *37*, 309-343, pp. 315-317.

53 D. Geradin, and N. Petit (2004), 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform', *Jean Monnet Working Paper 01/04,* New York, pp. 43-46, <http://www.jeanmonnetprogram.org/papers/04/040101.html>.

54 R. van Ooik (2005) in D. M. Curtin *et al.*, p. 15; See also E. Vos (2003), 'Agencies and the European Union', in L. Verhey, and T. Zwart (eds), *Agencies in European and Comparative Law*, Antwerpen: Intersentia, 113-147, pp. 119-121; P. Craig (2006), *EU Administrative Law*, Oxford: University Press, pp. 154-160.

55 R. M. Lastra and H. Shams (2001), 'Public Accountability in the Financial Sector' in E. Ferran and C. A. Goodhart (eds), *Regulating Financial Services and Markets in the 21st Century*, Oxford: Hart Publishing, 165-188, p. 167.

Table 2.2 A task-based typology of agencies

	First Pillar	Union Pillars 2nd Pillar	3rd Pillar
Information Providing	CEDEFOP, EEA, EU-OSHA, ECDC, EUROFOUND, FRA, EMCDDA, ENISA	EUSC, ISS	
Management	EAR *(closed down),* ETF, GSA, CdT		CEPOL
Operational Co-operation	FRONTEX, CFCA, EMSA, EASA	EDA	Europol, Eurojust
Decision-making	CPVO, EASA, OHIM, EMEA, ECHA		
(Quasi-)Regulatory	EASA, EFSA, EMEA, EMSA, ERA		

Information agencies are those agencies whose main task is the collection, processing and dissemination of information relating to a specific policy area. Their main output is statistical, documentary and technical information, which the Commission and/or member states can use as the basis for subsequent policy making in the respective area. Given the key role played by information in influencing policy decisions, the setting up of such agencies has been characterised as "sourcing out one of the basic tasks of any public administration, namely the gathering of sound and scientifically reliable information as an indispensable precondition for proper administration and good governance."[56] Agencies charged with such tasks are the European Centre for the Development of Vocational Training (CEDEFOP), the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND), the European Environment Agency (EEA), the European Agency for Health and Safety at Work (EU-OSHA), European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), and the European Network and Information Security Agency (ENISA). Similar functions are also provided by two Council agencies: the European Union Institute for Security Studies (ISS) and the European Unions Satellite Centre (EUSC).

Management agencies are those agencies in charge of implementing a particular Community regime or program. Although such agencies often also possess informational tasks, their main function lies in the management of a particular program and in providing specific services. Such agencies include the European

56 R. van Ooik (2005) in D.M. Curtin *et al.*, p. 17.

Training Foundation (ETF), the European Agency for Reconstruction (EAR), the European GNSS Supervisory Authority (GSA), the Translation Centre for Bodies of the European Union (CdT) and the European Police College (CEPOL).

Another category of agencies is that of the *operational co-operation* agencies. The tasks of such agencies consist of ensuring operational co-operation between member states in the respective field of operation. For example, the central task of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) is to co-ordinate operational co-operation between member states in the field of management of the external borders and to support member states requiring increased operational assistance. It moreover provides support in organising joint operations. Such agencies often possess operational tasks themselves such as the power to participate in joint investigation teams (Europol, Eurojust[57]) or to carry out inspections in their own right (the European Maritime Safety Agency, the European Aviation Safety Agency, the Community Fisheries Control Agency).

More controversial however, are agencies which possess *decision-making* powers. These bodies have the power to adopt decisions which are legally binding on third parties. It should be stressed though, that these legally binding decisions are restricted to applying general rules to specific cases and therefore are not decisions of broad application. The Community Plant Variety Office (CPVO) and the Office for Harmonisation in the Internal Market (OHIM) were the first agencies of this kind. These agencies make individual decisions concerning the granting of plant variety rights and trademark rights, respectively. Their number has grown through the creation of the European Aviation Safety Agency (EASA), the European Chemicals Agency (ECHA). The European Medicines Agency (EMEA) is also a decision-making agency. Though its main task consists of issuing opinions to the Commission, in some situations it can make decisions in its own right without any involvement from the European Commission.[58]

Even more controversial are the so-called *quasi-regulatory and regulatory agencies*. The Commission called for the future establishment of such agencies in its 2001 White Paper on European Governance.[59] De facto however, quasi-regulatory agencies have already been in operation for some time. For example, the European

57 See Article 9f of Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with the view of reinforcing the fight against serious crime.

58 See Chapter 8 on (quasi-)legal accountability where the different powers of the agency are differentiated at length.

59 Commission of the European Communities, 'European Governance. A White Paper', COM(2001) 428 final, (2001, C287/01).

Medicines Agency (EMEA), the European Food Safety Agency (EFSA) and the European Maritime Safety Agency (EMSA) are quasi-regulatory agencies by virtue of their "strong recommendatory power."[60] As observed by Craig, "the Commission is not bound by the recommendations thus made, but the views proffered by the relevant agency will nevertheless carry considerable weight, more particularly because they will commonly be concerned with technical and scientific matters."[61]

The most powerful quasi-regulatory agency operating at this moment at the EU level is the European Aviation Safety Agency (EASA). The agency drafts implementing rules for general application to the Commission's implementing rules to basic EC regulations. Furthermore, the agency adopts certification specifications (i.e., airworthiness codes), "that are in effect complex, highly detailed regulatory provisions regarded as binding by the industry, even though they do not have the force of law."[62]

2.5 Bringing the Threads Together: Pertinence to a Study of Agency Accountability

As we have seen in Chapter 1, agency accountability has been a subject of much discussion among a broad variety of actors, including academics and European institutions alike. The purpose of this chapter was to introduce the institutional actors responsible for setting off this debate. The debate continues, with the main institutional actors still searching for appropriate solutions that would bring about an improvement to the status quo. So what have we learned from the above characterisation and how is this pertinent to our study of agency accountability?

First of all, the discussion above helps situate the debate and some of its central elements by providing a broader context for agencification. We have seen why independence was such a vital issue to agency functioning and why different choices were made in terms of legal basis, as well as why a different palette of mechanisms of accountability were provided for in their various constituent acts and how this has evolved over time. Moreover, we saw that agencification is a continuing trend and that agencies are here to stay, and that they are being created on an ongoing basis. They are complex institutional entities, established not only within the Community pillar but also by the Council, with delegated powers not only from the European level, but also directly by the member states. As their prevalence, complex-

60 P. Craig (2006), p. 155.
61 Ibid. p. 156.
62 P. Craig (2006), p. 156.

ity and importance increases, so does the relevance of questions pertaining to their accountability arrangements and structures in place.

Of further relevance for our design is the realisation that there are, as we saw in the above, two primary types of agencies, i.e., EC and EU agencies, each with a different rationale behind their creation, which consequently impacts on their governance and accountability structures. As such, our study would have to include both EC and EU agencies. Given the discussion above, we will not focus on all of these, however. Agencies possess a variety of powers. Some have only information providing and advisory powers, whereas others can wield much more far-reaching powers. It is the latter that are most relevant from an accountability perspective. Substantively, accountability issues are most pertinent for the most powerful agencies. After all, "the principle of accountability (…) concerns itself with power."[63] The specificities of the case selection will not be addressed here; suffice it to say that our focus needs to be on the more powerful agencies i.e., agencies possessing operational co-operation, decision-making and quasi-regulatory tasks.

Additionally, as discussed above, each agency possesses its own legal basis, delimiting its mandate and scope of action, regulating its behaviour and providing for its accountability obligations. As such, the basic legal act of each of the sampled agencies will constitute our starting point for identifying the de jure accountability arrangements in place for each of these agencies. Before embarking upon this, however, we must first address the central concept of this study: accountability. What do we mean by accountability and how will we research it? This will be addressed in the following chapter.

63 S. B. Young (1989), 'Reconceptualising Accountability in the Early Nineteenth Century: How The Tort of Negligence Appeared', *Connecticut Law Review*, *21*, p. 202.

CHAPTER 3

Accountability: From Elusive "Buzzword" to Clear-cut Concept

Public accountability has been identified as one of the "golden concepts"[1] of modern governance and the very "lifeblood in guarding public interest."[2] Perhaps precisely due to its high relevance, the term has been overused to the extent that it has become an umbrella concept, a "label for all seasons"[3] in today's political and academic discourse. In the words of Richard Mulgan, "a word which a few decades ago was used only rarely and with relatively restricted meaning (and which, interestingly, has no obvious equivalent in other European languages) now crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of "democratic governance."'[4]

The downside is that the concept appears to be ever-expanding and has lost some of its conceptual sharpness to the extent that it is now referred to as "an old and tricky subject",[5] "a slippery, ambiguous term"[6] and a "chameleon-like"[7] concept. As modern governance's favourite "buzzword", it has taken on a variety of different meanings[8] and been used interchangeably with other political feel good standards

1 M. Bovens, T. Schillemans, P.'t Hart (2008), 'Does Accountability Work? An Assessment Tool', *Public Administration*, *86*(1), 225-242, p. 225.

2 G. Hodge (2005), 'Governing the Privatised State: New Accountability Guardians', *Paper presented at 'Accountable Governance: An International Research Colloquium'*, Queens University, Belfast, 20-22 October 2005, p. 4.

3 C. Hood (1991), 'A Public Management for All Seasons?', *Public Administration*, *69*, 3-19.

4 R. Mulgan (2000), '"Accountability": An Ever -Expanding Concept?', *Public Administration, 78*(3), 555-573, p. 555.

5 P. Barberis (1998), 'The New Public Management and a New Accountability', *Public Administration*, *76*(3), 451-470, p. 451.

6 P. Day and R. Klein (1987), *Accountabilities: Five Public Services*, London: Tavistock Publications, p. 26 .

7 R. Mulgan (2000), p. 555; P. Day and R. Klein (1987), p. 1.

8 R. D. Behn (2001), *Rethinking Democratic Accountability*, Washington DC: Brookings Institution Press, pp. 3-6; R. Mulgan (2003), *Holding Power to Account. Accountability in Modern Democracies*, Palgrave Macmillan, pp. 15-22; M. Bovens (2007), 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal*, *13*(4), 447-468, pp. 449-450; T. Schillemans (2009),

such as transparency, efficiency, responsiveness, responsibility, democracy, participation etc. In other words, "accountability is one of these alluring concepts that are like fine old wine: they are full of depth and complexity, they have a 'good feel', yet they are difficult to define in a conclusive way."[9] This lack of conceptual clarity is also characteristic of the debate on European agencies and accountability, where, despite the centrality of the concept very few actually start from a clear definition of accountability.[10]

3.1 Accountability as a Three-Stage Process

By contrast, the merit of the present study is that it will start from a narrow, clear-cut definition of accountability with a number of straightforward constitutive elements, which enables us to distinguish genuine forms of accountability and systematically map out accountability practices or arrangements. This allows us to avoid using accountability as an elusive concept, "a garbage can filled with good intensions, loosely defined concepts and vague images of good governance"[11] and to identify specifically which arrangements qualify as accountability. It thus, departs from the "catch all" use of accountability and pins the concept down to a clear set of identifiable characteristics by focusing on its core meaning.

Although the literature displays a plethora of approaches to accountability, "many authors agree upon a minimal understanding of accountability"[12] with a set of identifiable elements. For example, accountability "has been said to entail being liable to be required to give an account or explanation of actions and, where appropriate, to suffer the consequences, take the blame, or undertake to put matters right if it should appear that errors have been made."[13] In a similar vein, Shams and Lastra define accountability as "an obligation owed by one person (the accountable)

'Horizontal Accountability: A Partial Remedy for the Accountability Deficit of Agencies', *Paper presented at 5th Transatlantic Dialogue 'The Future of Governance'*, Washington DC, 11-13 June 2009, p. 3.

9 T. Schillemans (2009), p. 3.

10 For an exception, see D. Curtin (2007), 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account, *European Law Journal*, *13*(4), 523-541; D. Curtin (2005), 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in D. Geradin, R. Munoz and N. Petit (eds), *Regulation Through Agencies in the EU. A New Paradigm of European Governance*, Cheltenham: Edward Elgar, 88-119.

11 M. Bovens (2006), 'Analyzing and Assessing Public Accountability. A Conceptual Framework', *European Governance Papers*, No. C-06-01, p. 7.

12 T. Schillemans (2009), p. 3; See also, G. Hodge (2005), p. 4; R. Mulgan (2003), pp. 7-14; C. Pollitt (2003), *The Essential Public Manager,* Open University Press, p. 89.

13 D. Oliver (1991), *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*, Milton Keynes: Open University Press, p. 22.

to another person (the accountee) according to which the former must give account of, explain and justify his actions or decisions against criteria of some kind and take responsibility for any fault or damage."[14] This study adopts the definition developed by Bovens, who in a similar vein, defines accountability as "*a relationship between an actor and a forum, in which the actor has the obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment, and the actor might face consequences."*[15] This conceptualisation of accountability has been increasingly used in the literature[16] and is also in line with similar conceptualisations by other authors.[17]

In line with this narrow, core meaning of accountability, the process of account-giving is a relationship between an *actor* and a *forum,* which is characterised by three main stages or elements[18]: (i) *informing,* (ii) *debating (discussing and questioning)* and (iii) *possibility of consequences.* The first stage is the *information phase* in which the actor provides information about his actions *retrospectively* to the accountability forum. The provision of information is an indispensable, though not a sufficient, prerequisite of accountability; account-giving goes beyond the mere provision of information or transparency."[19] It is the first stage of an accountability process, which allows the accountability forum to exercise its other functions. On the basis of the information at hand, the forum engages the actor in some form of discussion; this constitutes the *debating phase* of an accountability process. After all "the provision of information is hardly ever a neutral account of what happens

14 R. M. Lastra and H. Shams (2001), 'Public Accountability in the Financial Sector ' in E. Ferran and C.A. Goodhart (eds), *Regulating Financial Services and Markets in the 21st Century*, Oxford: Hart Publishing, 165-188, p. 167.

15 M. Bovens (2007), p. 450.

16 See for example, A. Benz, C. Harlow, and Y. Papadopoulos (2007), 'Introduction', *European Law Journal*, *13* (4), 441-446; D. Curtin (2005) in Geradin *et al.*; D. Curtin (2007); A. Wille (2008), 'The Modernization of Executive Accountability in the European Commission', *Paper prepared for the Fourth Transatlantic Dialogue,* Bocconi University, Milan, 12-14 June 2008; T. Schillemans (2009).

17 See for example, P. Day and R. Klein (1987), p. 5; D. Oliver (1991), p. 22; B. S. Romzek, and M. J. Dubnick, (1998), 'Accountability' in J. M. Shafritz (ed), *International Encyclopedia of Public Policy and Administration*, vol. 1 A-C, Boulder: Westview Press, p. 6; C. Scott (2000), 'Accountability in the Regulatory State', *Journal of Law and Society*, *27*(1), 38-60, p. 40; R. Mulgan (2003), p. 9; C. Pollitt (2003), p. 89; M. J. Dubnick (2003), 'Accountability and Ethics: Reconsidering the Relationship', *Encyclopedia of Public Administration and Public Policy*, DOI**:** 10.1081/E-EPAP-120010928, p. 3; D. W. Brinkerhoff (2004), 'Accountability and health systems: toward conceptual clarity and policy relevance', *Health and Policy Planning*, *19*(6), 371-379, p. 372; R. M. Lastra and H. Shams (2001), p. 167.

18 R. Mulgan (2003); M. Bovens (2005), 'Public Accountability' in E. Ferlie, L. E. Lynn, C. Pollitt (eds), *The Oxford Handbook of Management*, Oxford: Oxford University Press, 182-208.

19 E. Fisher (2004), 'The European Union in the Age of Accountability', *Oxford Journal of Legal Studies*, *24*(3), 495-515, p. 504.

or of what is happening; hence the need for an explanation or justification of the agent's actions or decisions."[20] At this stage, the forum can ask questions, demand answers or additional information and the actor can explain his or her conduct, which enables the forum to reach an assessment or judgment of the actor's behaviour. The debating component has been described as the central element of accountability. In the words of Mulgan, "forcing people to explain what they have done is perhaps the essential component of making them accountable. In this sense, the core of accountability becomes a dialogue between accountors and account-holders."[21] Or in other words, "the heart of accountability is discourse. (…) accountability and accountability processes become means by which challenge and debate can occur."[22]

Finally, accountability also "involves an element of redistributive justice."[23] This constitutes the *consequences phase*, in which, based on its prior assessment of the actors' behaviour, the accountability forum has the possibility to impose sanctions. This can entail formal sanctions ranging from milder forms such as formal disapproval and fines to all sorts of disciplinary measures culminating in the "nuclear weapon of liquidation."[24] Furthermore, sanctions can also be informal in nature. As observed by Bovens, "sometimes the negative consequences will only be implicit or informal, such as the very fact of having to render account in front of television cameras, or, (…) the disintegration of public image and career as a result of the negative publicity generated by the process."[25] The possibility of consequences is a central element in an accountability process; nevertheless, some procedures entailing only informing and debate can still qualify as an accountability process as long as sanctions are available elsewhere.[26] In this sense, there can be a division of labour between different accountability forums, with some forums lacking the power of formal sanctioning, which is then remedied by other accountability forum(s). For example, ombudsmen and audit offices are accountability forums that lack the authority to impose formal sanctions, but such measures are available to parliaments or courts, that can step in and take the necessary measures.

20 R. M. Lastra and H. Shams (2001), p. 172.
21 R. Mulgan (2003), p. 9.
22 E. Fisher (2004), p. 513.
23 R. Mulgan (2003), p. 9.
24 C. Hood, C. Scott, O. James, G. Jones and T. Travers (1999), *Regulation inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*, Oxford: Oxford University Press, p. 47.
25 M. Bovens (2007), p. 452.
26 Ibid. p. 452.

3.2 Accountability and Control

It is important to differentiate between accountability and other dimensions of control. The two concepts have been used interchangeably and equated with one another in the general literature despite there being clear differences between the two. Although, indeed, mechanisms of accountability are mechanisms of control, the reverse is not true. In other words, "'control' in the Anglo-Saxon sense is broader than accountability and can include both ex ante and ex-post mechanisms of directing behaviour (Scott 2000:39). Control means 'having power over' and can involve very proactive means of directing conduct, for example through straight orders, directives, financial incentives or regulations. But these hierarchical, financial or legal mechanisms are not mechanisms of accountability *per se*, because they do not in themselves operate through procedures in which actors are to explain and justify their conduct to forums (Mulgan 2003: 19).[27] Control refers to a whole range of mechanisms employed by the controlling actor in order to direct, steer, and influence decision-making and behaviour of the controlled agents.[28]

Accountability, on the other hand, precludes direct control on the part of the principal. The need for accountability and the introduction of accountability mechanisms is relevant precisely because the principal has delegated powers to an agent and thus renounced direct control. Following this line of reasoning, accountability is concerned with ex post oversight, with ascertaining *after the fact,* the extent to which the agent has lived up to its ex ante mandate and has acted within its zone of discretion. It should be noted that when speaking of control, the terms used are "principals" and "agents" as opposed to the "actors" and "forums" referred to when speaking of accountability. The direct principal is the body or institution delegating certain powers or authority to an agent. The "principal" is not necessarily synonymous with the "accountability forum." Usually, after the delegation of powers by the principal, agents are subject to the oversight of multiple accountability forums, which can include the direct principal, but also third parties or even institutions with partially opposing mandates.

In order to better differentiate between mechanisms of control and accountability, I propose to conceptualise control along a temporal dimension. This makes it possible to distinguish three different types of control: *ex ante control, ongoing control* and *ex post control* or *accountability.* The presence of ex ante and ex post controls has

27 M. Bovens (2006), p. 14.

28 P. G. Roness, K. Rubecksen, K. Verhoest and M. MacCarthaigh (2007), 'Autonomy and Regulation of State Agencies: Reinforcement, Indifference or Compensation?', *Paper presented at the 4th ECPR General Conference*, Pisa, 6-8 September 2007, p. 5.

been clearly mentioned in delegation theory. Agency theory posits that once a principal has delegated powers to an agent, the key issue from the perspective of the principal is to ensure that the agent does not drift, that there are no "agency losses." Given that the interests of the principal and those of the agent do not always perfectly coincide, and that the agent is specialised and therefore in all likelihood better informed than the principal, the agent could choose to engage in self-interested behaviour. Principals can try to remedy this situation by setting in place ex ante and ex post controls in order to exert a certain degree of control over the delegation process. Kiewiet and McCubbins identify four types of such measures by which principals attempt to contain agency losses: contract design, screening and selection mechanisms, monitoring and reporting and additional institutional checks.[29]

The framework proposed below partially departs from this debate by presenting a temporal conceptualisation of control, and by introducing an intermediary dimension of control (i.e., ongoing control), which has not been previously identified but which has significant consequences for the real level of agency discretion. Thus, in addition to elements of formal design, informal aspects are integrated in an attempt to obtain a closer fit to reality. Moreover, for the purpose of clarification, it is important to mention that unlike the classic debate, the present framework does not exclusively assume the existence of a single principal delegating powers, but instead supports an expanded model with multiple principals.[30] European agencies have been delegated powers jointly by member states, the Commission, the Council and in many instances, by the European Parliament in its role as a co-legislator.

3.2.1 Ex Ante Control

Ex ante control is exercised by delimitating the boundaries within which the agency has autonomy of action, by drawing up the range of independent action available to the agent to accomplish the delegated tasks. It is a form of preliminary control mechanism, which refers to the basic mandate comprising the powers and tasks of the agent. This type of control is present in the case of all European agencies in the form of a founding regulation as well as other basic legal documents (such as financial regulations, fees and charges regulations etc.) setting out the powers of

29 R. Kiewiet and M. McCubbins (1991), *The Logic of Delegation. Congressional Parties and the Appropriation Process*, Chicago: University of Chicago Press; K. Strom (2000), 'Delegation and Accountability in Parliamentary Democracies', *European Journal of Political Research*, *37*, 261-289.

30 R. Waterman and K. Meier (1998), 'Principal-Agent Models: An Expansion?', *Journal of Public Administration Research and Theory, 8*(2), 173-202; R. Dehousse (2008), 'Delegation of powers in the European Union: The need for a multi-principals model', *West European Politics*, *31*(4), 789-805.

the agent, defining its zone of discretion, laying down screening and selection mechanisms, the position of the principal(s) vis-à-vis the agency, financing sources, the various mechanisms of accountability etc.

3.2.2 Ongoing Control

Ongoing control is an informal type of direct control exercised by a principal vis-à-vis an agent in which the agent's (future) actions are steered and/ or determined by the principal, resulting in a *decrease in the original mandated discretion* of the agent to accomplish the delegated tasks and implicitly, in its decision-making autonomy. Discretion entails a grant of authority that specifies the principal's goals but not the specific actions the agent must take to accomplish those objectives.[31] More precisely, the so-called "zone of discretion" can be conceptualised as the sum of powers delegated by the principal to the agent, minus the sum of control instruments, available for use by the principals.[32] Autonomy, in turn, "is about discretion, or the extent to which the agency can decide itself about matters it finds important."[33] Ongoing control restricts or nullifies the original, formal level of mandated discretion and implicitly the agent's decision-making autonomy, through the direct interference of the principal post-delegation.

3.2.3 Ex Post Control/Accountability

In this conceptualisation, accountability is synonymous with ex post control but not with control in general, thus it necessarily excludes ongoing control. Accountability is understood exclusively as an *after the fact* process of information, discussion and evaluation, as defined by Bovens.[34] In other words, accountability is a retrospective process. Occasionally, it can also have a forward-looking impact as actors can anticipate monitoring and potential sanctions and act accordingly. By creating a non-majoritarian body, politicians take a politically contingent decision to jointly bind

31 D. G. Hawkins, D. A. Lake, D. L. Nielson and M. J. Tierney (2006), 'Delegation under anarchy: states, international organizations, and principal-agent theory,' in D. G. Hawkins, D. A. Lake, D. L. Nielson and M. J. Tierney, *Delegation under Anarchy: States, International Organizations and Principal Agent Theory*, Cambridge: Cambridge University Press, p. 8.

32 A. Sweet Stone (2002), 'Constitutional Courts and Parliamentary Democracy', *West European Politics*, *25*(1), 77-100, p. 93.

33 P. G. Roness *et al.* (2007), p. 5.

34 M. Bovens (2007), p. 450.

their hands.[35] In this light, accountability, as previously mentioned, precludes direct intervention which would amount to reintroducing control into the picture. In other words, "it is clear that the aim of accountability is not to achieve a direct control on the independent governance bodies: the very reason for which independence has been given to these bodies excludes the possibility of direct control of the political power."[36]

This clarification is crucial for (quasi-)independent bodies such as European agencies. As observed in Chapter 1, the major challenge identified with regard to agencies has been to guarantee their independence while ensuring their accountability/control. These observations are premised on the juxtaposition of accountability and control. Overlooking the conceptual difference, however, can lead to a nonsensical situation in which independence is given with one hand and removed with the other. That is to say "if accountability must amount to direct control, it is to no avail to formally believe in, and establish independent central banks and agencies only to deprive them–on grounds that their legitimacy has to be ensured–of the very prerequisite for them to actively pursue those objectives (…)"[37] At a more general level, it demonstrates that the dilemma of accountable independence is a myth owing its existence to lack of conceptual clarity. Independence and accountability can and, actually, should co-exist. Accountability becomes relevant precisely in situations where a body is independent and the delegating body has relinquished direct control. On the contrary, independence and ongoing control are indeed contradictory, because ongoing control restricts and in extreme cases, nullifies the autonomy of the agent.

Furthermore, the focus of this research is the last dimension, accountability and this framework allows us to differentiate between genuine forms of accountability and other forms of control. This will be very relevant particularly in the descriptive stage, given that the original aim of the research is to map out mechanisms of accountability. In practice, there is often a commingling between mechanisms of accountability and control. It helps to ensure that we are indeed mapping out what we set out to map out.

Finally, this framework also draws attention to the need to shift the focus of accountability in cases where the principal maintains ongoing control. In such

35 J. Tallberg (2002), 'Delegation to Supranational Institutions: Why, How, and with What Consequences?', *West European Politics*, *25*(1), 23-46, p. 29.

36 C. Zilioli (2003), 'Accountability and Independence: Irreconcilable Values or Complementary Instruments for Democracy? The Specific Case of the European Central Bank', in G. Vandersanden (ed), *Mélanges en hommage à Jean-Victor Louis*, Brussels: Editions de l'Universite de Bruxelles, 395-422, p. 399.

37 C. Zilioli (2003), p. 400.

situations, the accountability of the principals exercising these controls becomes relevant and the burden of accountability should have to be shared by them, as well. After all, "responsibility presupposes, in the first place, that there are persons (those who bear responsibility) who have powers of decision and who also command resources for putting those decisions into effect. Without an ability to effectuate results, the responsibility of such persons would be merely emblematic or dramatic; we should be engaged in maintaining a constitutional myth. Responsibility, should, indeed, be commensurate with the extent of the power possessed."[38]

3.3 Purposes of Accountability

Having discussed at length the concept of accountability and before delving further into the literature, several questions beg an answer: Why do we care? Why do we need accountability? What purposes does it serve? A variety of rationales have been put forward. A systematic and comprehensive overview on this subject is provided by Bovens *et al*.[39] They identify three main perspectives on accountability: a "democratic perspective", a "constitutional perspective" (or "checks and balances perspective") and a "learning perspective". Each of these perspectives is characterized by a different vision of the "job" that accountability is meant to do, and by a different toolbox of criteria for assessment.

Thus, from a *democratic perspective*, accountability should enable democratic forums to effectively monitor the exercise of governmental power. That is to say, "public accountability is an essential precondition for the democratic process to work, since it provides citizens and their representatives with the information needed for judging the propriety and effectiveness of government conduct. (…) the quality of accountability arrangements hinges upon their demonstrated ability to consolidate and reaffirm the democratic chain of delegation."[40] On the other hand, from the *constitutional perspective*, accountability is aimed at avoiding the concentration and the abuse of powers through the presence of countervailing institutional powers. In this connection, "accountability arrangements are designed to 'keep the bastards honest.' They should prevent or at least uncover and redress abuse of public authority and other public resources."[41] From a *learning perspective*, the main purpose of accountability is to enhance the reflection and the learning capacity of public author-

38 C. Turpin (1994), 'Ministerial Responsibility' in J. Jowell and D. Oliver (eds), *The Changing Constitution*, Oxford: Clarendon, p. 111.
39 M. Bovens *et al.* (2008).
40 Ibid. p. 231.
41 Ibid. p. 232.

ities. It is a tool for increasing their effectiveness and efficiency. Thus, it "is not about 'keeping the bastards honest' but about 'keeping the bastards smart and sharp.'"[42]

To some extent, the three perspectives can and do overlap. For example, the checks and balances perspective can incorporate democratic instances, and both the democratic and the checks and balances perspective might result in learning, although admittedly this is not the primarily aim of accountability from these two perspectives.

3.4 Accountability How, for What, to Whom?

An accountability relation raises three main questions: "How?", "For what?" and "To whom?" "How?" refers to the actual mechanism of account-giving. An *accountability arrangement or mechanism* is an accountability relationship, as defined above, that has acquired an institutional character.[43] Ministerial responsibility is an example of such an accountability arrangement. Within the context of European agencies, such a mechanism would constitute for instance, the hearing of the agency director by the European Parliament. A coherent complex of accountability arrangements and relationships constitutes an *accountability regime*.[44] That is to say, an accountability regime consists of the sum and the interplay of the various accountability arrangements and relationships to which one agency or one group of agencies is subject. For example, a general financial accountability regime can consist of a set of various financial accountability mechanisms: accountability vis-à-vis an internal audit body, accountability vis-à-vis an external audit body etc.

Accountability "for what?" refers to the subject matter and the types of issues for which the actor is accountable vis-à-vis the forum. This concerns the aspect of conduct for which the actor is expected to be answerable.[45] Accountability "to whom?" refers to the type of forum to which accountability is to be rendered. The two aspects are interrelated, with particular types of forums investigating specific aspects of the actor's conduct and applying a separate set of standards. As observed by Bovens, "forums generally demand different kinds of information and apply different criteria as to what constitutes responsible conduct. They are therefore likely to pass different judgments on the conduct of the public organization or the public

42 Ibid. p. 232.
43 M. Bovens (2006), p. 14.
44 Ibid. p. 14.
45 Ibid. p. 15.

official."[46] For example, a financial forum will investigate the behaviour of the actor in aspects pertaining to financial matters whereas a legal forum will investigate compliance with an a priori set of obligations of the actor as set out under the law.

Based on the type of forum involved and/or the aspect of conduct subject to review, different forms of accountability can be identified. In effect, we can speak of a functional differentiation of accountability with different institutions being involved in different aspects of accountability.[47] The literature abounds with numerous classifications along these lines. For example, Day and Klein distinguish between two main types: political accountability and managerial accountability, with the latter being composed of three main subsets: fiscal or regularity accountability, process or efficiency accountability and programme or effectiveness accountability.[48] Sinclair identified five forms of accountability: political, public, managerial, professional and personal[49] and Romzek and Dubnik identify four major types: bureaucratic, legal, political and professional.[50]

Likewise, this book groups the various accountability arrangements under four major accountability headings: *managerial accountability, financial accountability, political accountability* and *(quasi-)legal accountability*. Each of these forms of agency accountability is dealt with in a separate chapter. Managerial accountability comprises the hierarchical accountability of agency directors vis-à-vis their management boards. Financial accountability refers to the accountability of the agency vis-à-vis the broad spectrum of financial forums i.e., internal auditors, the European Court of Auditors, the European Parliament and Council in their discharge roles etc. Political accountability is constituted by the variety of accountability arrangements vis-à-vis the main political forums: the European Parliament and the Council. Finally, (quasi-) legal accountability encompasses the accountability obligations of European agencies to the Court of Justice of the European Communities and the European Ombudsman.

3.5 The Interplay of Various Accountability Mechanisms

As observed above, different types of accountability are characterised by different informational requirements and different standards of judgment and as such, by

46 Ibid. p. 16.
47 P. Barberis (1998), p. 465.
48 P. Day and R. Klein (1987), p. 27.
49 A. Sinclair (1995), 'The Chameleon of Accountability: Forms and Discourses', *Accounting, Organizations and Society*, *20*, 219-237, pp. 224-231.
50 B. S. Romzek and M. J. Dubnik (1987), 'Accountability in the Public Sector: Lessons from the *Challenger* Tragedy', *Public Administration Review*, *47*, 227-238.

different expectations. To this extent, accountability is about the management of expectations[51] and how the actor is answerable given different, legitimate expectations from different forums. In the words of Romzek, "accountability expectations can conflict. There are instances where accountability to one authority under one standard violates the expectations of legitimate sources of authority under another standard."[52] The challenge that actors face is an "age-old one: how to manage the conflicting expectations they face in an institutional environment that relies on an overlapping array of accountability relationships. (…) they must continue to accommodate expectations from several different legitimate sources and be answerable for their behaviour under any and all accountability relationships that are relevant."[53]

In its extreme forms, the (institutional) actor is faced with irreconcilable expectations, which can give rise to the syndrome of *multiple accountabilities disorder*.[54] Accountability requirements place a strain on the actor, giving rise to a "schizophrenic" (institutional) actor engaged in a "bureaucratic version of Twister",[55] trying to satisfy conflicting and essentially irreconcilable pressures. In such cases, accountability becomes debilitating and paralysing in its effects. This is essentially an instance of an *accountability overload*[56] or accountability overkill, where accountability is no longer an unmitigated good and too much accountability becomes counterproductive. Too much of a good thing can also be deleterious, and accountability is a case in point. Excessive accountability obligations can become too cumbersome by placing, among others, extraordinarily high demands on actors in terms of time and energy expanded on account-giving, thus detracting from their core tasks. At the other end of the spectrum, there are situations of *accountability deficits*,[57] when the accountability arrangements in place are insufficient for ensuring the actor's accountability. It "refers to a condition where those who govern us are not sufficiently hemmed in by requirements to explain their conduct publicly – to

51 M. J. Dubnick and B. S. Romzek (1993), 'Accountability and the Centrality of Expectations in American Public Administration' in J. Perry, *Research in Public Administration*, Volume 2, Greenwich CT: JAI Press, 37-78, p. 38.

52 B. Romzek (1999), 'Dynamics of Public Sector Accountability in an Era of Reform', *Paper presented at the Specialized Conference on Public Accountability*, International Institute of Administrative Sciences, London, p. 10.

53 Ibid. p. 20.

54 J. GS Koppell (2005), 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"', *Public Administration Review*, *65*(1), 94-108.

55 Ibid, p. 99.

56 M. Bovens *et al.* (2008), pp. 227-230.

57 Ibid. pp. 227-230.

legal, professional, administrative, social or political forums who have some sort of power to sanction them."[58]

Ideally, the aim is to strike the right balance between the multiple accountability arrangements so as to avoid either of the two extremes. Scott identifies two different models of accountability: the *redundancy* and the *interdependence* models.[59] The *redundancy model* is premised on the presence of purposeful overlaps between the various accountability arrangements. It is "represented by the 'belts and braces' approach, within which two independent mechanisms are deployed to ensure the system does not fail, both of which are capable of working on their own. Where one fails, the other will still prevent disaster."[60] The *interdependence model* is one of co-dependence, in which, by virtue of being dependent on each other, the various actors ensure their "mutual accountability." In other words, "interdependent actors are dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise, and capacity to bestow legitimacy such that each of the principal actors has constantly to account for at least some of its actions to others within the space, as a prerequisite for action."[61] Although the model refers to actors keeping each other in check, this model can also be of relevance for describing the dynamics between the different accountability forums in which particular forums rely on and are in a co-dependent relation with other forums for the supply of information, the enactment of sanctions etc.

3.6 Studying Agency Accountability

Hence there are two aspects to be taken into account when assessing the appropriateness of accountability arrangements: (i) the individual level of a particular arrangement and its operation and (ii) the cumulative or systemic level of the complete regime. The reason for this is that, while obviously the identification of deficits and failures in the operation of a particular mechanism is relevant, these gaps could still be mitigated within the context of the overall regime. For example, whereas the political accountability vis-à-vis the European Parliament could be very marginal, this might be mitigated at the level of the overall regime by an accountability relationship with another political forum, i.e., the Council. Or, for example, the accountability arrangement vis-à-vis the European Ombudsman might lack credible sanctions, whereas at the level of the overall regime this might be compensated by

58 Ibid. p. 229.
59 C. Scott (2000).
60 Ibid. p. 53.
61 Ibid. p. 50.

credible sanctions undertaken by another forum, i.e., the European Parliament. The opposite, however, also holds: particular mechanisms could, on their own, be regarded as sound, but the interplay of the various mechanisms may well result in multiple accountabilities disorder or serious overlaps and overloads affecting the soundness of the overall accountability regime. As such, the present research will necessarily contain two levels: a *micro-level* in which individual accountability arrangements are described and analysed and a *macro-level* in which the agency accountability system as a whole is examined.

3.6.1 A Micro Level View on Accountability

When looking at the individual regimes, several aspects deserve consideration. First of all, in order for a mechanism to qualify as an accountability relationship, it needs to display three main steps: *informing*, *debating* and *the possibility of consequences* as identified by Bovens. However, the fulfilment of these "eligibility criteria" at the de jure level, while essential for qualifying an arrangement as an accountability arrangement is not a guarantee of accountability. Therefore, it is necessary not only to tick off some of the procedural steps in the accountability process, but also to examine how and whether each of these steps are undertaken de facto or simply amount to a mere formality.

First of all, it is necessary to investigate whether the information demanded is provided and to look at the quality of the information that is provided. Principal-Agent (PA) theory has long identified the presence of "asymmetries of information" between the agent and the principal as a significant concern in delegation relations and one of the central causes for agency losses. The oversight problem brought about by asymmetries of information is well documented in literature: "the crime of runaway bureaucracy requires opportunity as well as motive, and this is supplied by asymmetric information. A consequence of delegating authority to bureaucrats is that they may become more expert about their policy responsibilities than the elected representatives who created their bureau (…)."[62]Although primarily documented in the relationship between a principal and an agent, this concern is also highly relevant for the interaction between an actor and the forum, which may

62 M. D. McCubbins, R. G. Noll and B. R. Weingast (1987), 'Administrative Procedures as Instruments of Political Control', *Journal of Law, Economics and Organization, 3*(2), 243-277, p. 247; See also T. Moe (2006), 'Political Control and the Power of the Agent', *Journal of Law, Economics and Organization*, *22*(1), 1-29, p. 3; A. Lupia and M. D. McCubbins (2000), 'Representation or Abdication? How citizens use institutions to help delegation succeed', *European Journal of Political Research*, *37*, 291-307.

include, but is not necessarily restricted to the principal(s). The provision of information is essential to the success of an accountability relationship; it is the very "lifeblood of accountability."[63] In other words, "the most serious obstacle to accountability is the secrecy of government and the inequality of information (…)."[64] Relevant issues to be investigated in this context are the frequency with which information is provided, the actual information provided, the exact form this process takes (e.g. written reports, verbal testimonies etc.) and whether the information is provided in timely fashion or not. In the case of some arrangements, this will be stipulated a priori in the relevant legal acts. In the case of less formalised arrangements, however, this will be a matter of subsequent agreement and the result of interaction between the actor and the forum.

However, the provision of information is not a sufficient guarantee should the forum lack the technical knowledge and preparation to actually assess the information provided. Given the high level of specialisation of the actor, the lack of such knowledge on the part of the forum will negatively impact not only its ability to engage the actor in discussions but also its ability to judge and assess the behaviour of the actor and the need to enact sanctions. Thus, at the same time, it is equally important to ascertain whether the forum actually engages the actor in discussions, whether it is knowledgeable and specialised and prepared for the meetings so as to be able to judge the information provided, and to be able to engage the actor in debates. Finally, it is necessary to ascertain whether sanctions are indeed imposed, so that the possibility of consequences is a credible threat to the actor.

Merely having the possibility of holding the agent accountable is not sufficient; the forum must also actually hold the actor accountable. In this connection Mulgan points out, "strictly speaking, the concept of accountability implies potentiality (account-*ability*) the *possibility* of being called and held to account. (…) All that is necessary is that some account-holder has a right to call the agent to account, not that this right is actually exercised. (…) Accountability is not so much being called to account as the expectation of being called to account. In practice, however, 'accountability' normally refers to the actual practice of calling and holding people and institutions to account. If no one answers we are inclined to say that no one is accountable (…)."[65]

63 C. Turpin (1994), p. 147.
64 C. Turpin (1994), p. 146.
65 R. Mulgan (2003), p. 11.

The present study is concerned not only with the *potential* but also with the *actual* use of agency accountability. The possibility of holding an agency accountable is investigated by examining the formal, legal procedures. By investigating practices, we are in fact investigating the *actual* use of accountability. And while accountability does not entail that an actor is held accountable for every minute action undertaken, *potential* accountability which systematically fails to materialize into *actual* accountability is hardly more than a formality, which compromises the credibility of the respective mechanism. As explained in the context of PA literature, "principals must have the desire and energy to use the controls."[66] Oversight can involve significant costs (e.g. time, resources) and principals are likely to engage in cost-benefit analyses in terms of making use of the oversight capacities at their disposal.[67] Similarly, accountability forums, which can involve the principal but also third parties, must have the desire and energy to make use of their oversight powers. This aspect is even more relevant in the case of accountability arrangements where members of the forum -unlike the principal -sometimes have limited or only a marginal interest in the actor's performance.

The picture becomes slightly more complicated in the case of sanctions. The non-application of sanctions in itself is not sufficient to qualify an accountability arrangement as weak. It amounts to a phenomenon of "observational equivalence", that is to say, the same data can be used to support two opposing conclusions. Lack of punishment of the actor could be due to good performance on the part of the actor. The actor may have anticipated the preferences of the forum and acted accordingly and the forum recompenses the actor through *negative rewards,* i.e., by refraining from sanctions. On the other hand, a guardian forum's failure to punish non-compliant actors could be indicative of a malfunctioning arrangement.

What becomes relevant therefore, is the reason behind the lack of sanctions. The absence of sanctions becomes problematic only in situations where the forum is dissatisfied with the performance of the actor but, for a variety of reasons, is reluctant to use its powers and impose sanctions. This erodes the credibility of the respective arrangement. PA literature has already identified the possibility of such a phenomenon by pointing out that in some situations sanctions can be politically costly for principals, which may effectively dampen their ardour to impose sanctions on a non-compliant agent.[68] Thus, in light of the discussion above, when assessing the appropriateness of an accountability mechanism it is essential not only to investi-

66 M. Thatcher (2005), 'The third force? Independent regulatory agencies and elected politicians in Europe', *Governance*, *18*(3), 347-373, p. 350 (paraphrasing Terry Moe).
67 M. Thatcher (2005), p. 350.
68 M.D. McCubbins *et al.* (1987), pp. 252-253 and p. 273.

gate the presence or absence of sanctions, but also the reasons for the absence of sanctions.

3.6.2 Macro Level Accountability

In terms of the overall regime, we will be looking at the interplay of the various arrangements. Several issues become relevant at this level. How do the various arrangements interact with each other? Are they substitutes of each other or complementary in the fashion described by Scott? Are there significant overlaps and overloads, with multiple arrangements exercising essentially the same mandate? Are there accountability gaps? That is to say, are there aspects of the agencies' work and conduct that are not subject to oversight? For example, an investigation of the overall accountability arrangements to which agencies are subject might reveal that extensive political and legal accountability arrangements are in place, but that the financial conduct of the agency is lacking any form of oversight.

This book deliberately chooses not to examine accountability arrangements through a particular lens. Obviously, particular regimes would score differently if assessed from a democratic perspective, checks and balances perspective or a learning perspective. In fact, it should not be necessary to opt for one to the detriment of the other in the context of complex accountability regimes, as very often in practice all three elements will be encountered simultaneously, albeit in a different ratio. As observed by Bovens *et al.*, "in any given accountability relationship or set of arrangements, each of these critical components are designed in and safeguarded to a particular degree."[69] The aim of this study is precisely not to impose a static perspective and not to choose between the three but rather to include a minimum *common denominator* for all three. The elements outlined above, both at the micro and the macro levels are intrinsic to the sound operation of an accountability regime regardless of any superimposed normative lens. Thus, they are common to all three perspectives, allowing for an integrated assessment.

In conclusion, the in-depth analysis of the accountability literature provided in this chapter serves to lay down the theoretical foundations of this book, as well as to clarify the choice of approach which draws heavily on the knowledge in the accountability field. The study starts from a clear-cut definition of accountability, which allows for accountability arrangements to be identified and studied in terms of their three main components: informing, debating and consequences. The approach

69 M. Bovens *et al.* (2008), p. 234.

chosen is an integrated one. Agency accountability will be investigated at both the *de jure* level (i.e., potential for accountability) as well as at the *de facto* level (i.e., the actual use of accountability). Furthermore, it will be analysed at both the ground level of individual arrangements as well at the macro- level of the overall regime, relating to the interplay of the various arrangements. Four major types of accountability will be addressed in each chapter: managerial, political, financial and (quasi-) legal. Each accountability arrangement will be discussed and analysed along the three stages of an accountability process. Where the respective type of accountability is composed of more arrangements (e.g. financial accountability), the interplay between the various arrangements and forums will also be discussed. Finally, in the conclusion, all the different forms will be pieced together and the overall accountability system for European agencies will be analysed and reflected upon along the lines discussed above. Before delving into the empirical findings, however, the issue of how this research was carried out and implemented needs to be tackled. This will form the subject of the next chapter.

CHAPTER 4

Methodology: Behind the Research Scenes

The present chapter explores behind the scenes of this research to explain and justify the variety of methodological choices made. The issues that are dealt with and elaborated on include: the choice of method, the case selection, the data sources used and related aspects such as data collection and analysis. In other words, this chapter constitutes the methodological accountability of this research.

4.1 Method: Case Studies

Given the research aims, this study was geared towards a qualitative, in-depth study of the make-up and inner workings of European agencies' accountability arrangements and regimes. It is necessarily exploratory due to the lack of previous systematic research of European agencies' accountability. The field has not yet been mapped out and we have no set of clear, relevant variables of which to make use. It is precisely the aim of the present research to map the ground of agency accountability and to describe and analyse in depth how the various arrangements operate at the formal level, as well as in practice. Case studies are particularly well suited for exploratory research. In the words of Gerring, "case studies enjoy a natural advantage in research of an exploratory nature."[1] A case study approach is needed in order to identify and study the relevant variables and factors. Consequently, in the light of our aims, the present research has opted to make use of case study methodology.

Case study research has been defined as "an intensive study of a single unit or a small number of units (the cases) for the purpose of understanding a larger class of similar units (a population of cases)."[2] It is a widely used method and in fact,

1 J. Gerring (2007), *Case Study Research. Principles and Practices*, Cambridge: Cambridge University Press, p. 39.
2 Ibid. p. 37.

"it remains the workhorse of most disciplines and subfields in the social sciences."[3] For the purpose of this study, the accountability practices and arrangements of five European agencies were chosen to be investigated in terms of their accountability so as to gain insight into the operation of accountability of European agencies in general. The case selection logic used will be explained in a separate section below.

A clear advantage of this approach for our research regards the "richness" of case study analysis.[4] In other words, "one of the primary virtues of the case study method is the depth of analysis that it offers. One may think of depth as referring to the detail, richness, completeness, wholeness, or the degree of variance in an outcome that is accounted for by an explanation. (…) Case studies are thus rightly identified with "holistic" analysis and with "thick" description of events."[5] Our aim is precisely to identify and describe in depth how a variety of accountability arrangements operate and interrelate. This renders this method particularly well suited for our purposes. Another advantage is that this type of study also allows us to identify contextual factors and agency-specific considerations unlike "statistical studies, which omit all contextual factors except those codified in the variables selected for measurement or used in constituting a population of cases, [and] necessarily leave out many contextual and intervening variables."[6]

Finally, through its choice of method, the present study draws on both a *within-case analysis* and a *cross-case analysis*. In other words, we can benefit from in-depth insights into the specifics and particularities of a specific agency in terms of accountability but also from cross-agency comparisons.

4.2 Agency Sample

As observed above, case studies entail by definition an in-depth study of a case or a number of cases with the aim of obtaining insights about the broader, general population. In this connection, sampling is essential as it affects the external validity of the research, i.e., representativeness and the extent to which observations from the sample studied can be applied to the general, unstudied population.

3 Ibid. p. 65.
4 A. L. George and A. Bennett (2004), *Case Studies and Theory Development in the Social Sciences*, Cambridge Massachusetts: MIT Press, p. 22.
5 J. Gerring (2007), p. 49.
6 A. L. George and A. Bennett (2004), p. 21.

In this book we have opted for a *diverse technique of case selection*, where "the goal of case selection is to capture the full range of variation along the dimension(s) of interest."[7] "Diverse cases are likely to be representative in the minimal sense of representing the full variation of the population (though they might not mirror the distribution of that variation in the population)."[8]

Thus, the case selection in this study is intentional, rather than random. A representational sample has been selected, in a striving to maximise range. That is to say, the sample has been selected purposively in order to "include instances of all the important dissimilar forms present in the larger population."[9] The aim is to increase the representative character of the sample and thus the external validity of the research by ensuring variation with regard to the conditions impacting accountability. The diverse case selection method is particularly well suited for this purpose and it has been observed that "the diverse case method often has stronger claims to representativeness than any other small N-sample."[10]

Three criteria for case selection were used. They were derived from an *a priori* mapping exercise of all formal accountability arrangements in place for each individual agency in existence in September 2005, the starting date of this research. This mapping exercise was based on the formal constituent act of each individual agency in existence at the time. These criteria emerged as being relevant for the array of accountability arrangements in place in different agencies, as well as for the variation among types of arrangements. They are related to the different institutional structures in place, which impact on the (type of) accountability arrangements provided for. Thus, by ensuring variation along these dimensions, the range of accountability arrangements and regimes (as well as variants of those arrangements and regimes) covered is maximised.

i) *Financing*, three categories: *agencies that receive contributions charged to the EU's general budget*, *self-financed agencies* and *member state financed agencies*. This criterion is relevant because different budget sources result in different procedures for financial accountability and different institutional forums are involved in these types of oversight.

7 J. Gerring (2007), p. 99.
8 Ibid. p. 89.
9 R. S. Weiss (1994), *Learning from Strangers. The Art and Method of Qualitative Interview Studies*, New York: Free Press, p. 23.
10 J. Gerring (2007), p. 100.

ii) *Pillar structure,* two categories: the *Community pillar* (i.e., the supranational pillar) and the *Union pillars* (i.e., the second and third pillars). This criterion is relevant given the fact that agencies belonging to the Community pillar are subject to different accountability mechanisms than those operating in the intergovernmental sphere. Pillar embeddedness largely defines the institutional structure and the general scheme of checks in place. As pointed out in Chapter 2 under the section on rationale, in the intergovernmental pillars, unlike in the supranational pillar, there is a propensity towards intergovernmental schemes of monitoring to the exclusion of more supranational institutions.

iii) *Power*, which is related to the type of tasks exercised by each agency. Given that, as outlined in Chapter 2, accountability is related to the exercise of power, the most powerful agencies are relevant. Consequently, the third criterion for selection will be to choose the most powerful agencies. Thus, agencies exercising regulatory functions are clearly more powerful than those with simply informational and executive tasks. Consequently, the more powerful agencies, and thus, those most relevant for our investigation are those possessing: *decision-making, (quasi-)regulatory* and *operational co-operation* tasks.

Below, I have provided a table for a better visualization of the sample selection, coupling the three identified criteria (See Table 4.1, below). A few points of clarification are in order. First of all, this research is based on the law as it stands at the time of writing.[11] With the Treaty of Lisbon, the pillar structure is being abolished. However, the pillar differentiation remains relevant, as this book set out to investigate not only formal arrangements but also accountability *practices* and the manner in which these take place and have developed. Secondly, given that the aim of this research is to study accountability practices, agencies that had just been set up were not included in the study. As the research commenced in September 2005, agencies that had come only recently into operation would not have developed consistent and sufficient (if any) accountability practices. Also, necessarily, agencies that were not in existence at the time but have been set up in the meantime, were not considered.

11 The cut off point is September 2009.

Table 4.1 Investigating agency accountability: case selection

		Community Pillar	**Union Pillars**
Operational co-operation	**EU budget financed**	EASA, EMSA, FRONTEX *(agency only took up responsibilities in May 2005)*	Eurojust
	Self-financed	–	–
	Member state financed	–	Europol, EDA *(agency set up only in 2004)*
Decision-making	**EU budget financed**	EASA, EMEA	–
	Self -financed	OHIM**,** CPVO	
	Member state financed	–	–
Quasi-regulatory	**EU budged financed**	EMEA, EASA, EFSA, EMSA	–
	Self-financed	–	–
	Member state financed	–	–

In light of the criteria above, the final sample is constituted by the following five agencies:

- *EASA*: funded from the EU budget, Community agency, decision-making and quasi-regulatory
- *EMEA*: funded from the EU budget, Community agency, decision-making and quasi-regulatory
- *OHIM*: self -financed, Community pillar, decision-making
- *Eurojust*: funded from the EU budget, Union agency, operational co-operation
- *Europol*: member state financed, Union agency, operational co-operation

As observed above, the aim was to include one agency from each category. In some cases, a choice had to be made between several agencies within the same category. In such cases, it could be argued that it made little difference which agency was

chosen as long as one agency of each category was included. However, my choice was guided by the following considerations. First of all, some agencies were easily eliminated in favour of a counterpart within the same category due to the fact that they had only recently been set up. This was the case for FRONTEX and the European Defence Agency, both of which were established in 2004, and given additional delays while being set up (e.g. FRONTEX started operating in 2005), could therefore not provide sufficient practices to be researched. As a result, EASA, which was set up in 2002, was chosen instead of FRONTEX, and Europol, which was set up in 1995 was preferred over EDA.

In the case of OHIM and CPVO, two agencies which also belong to the same category, and have virtually the same types of formal accountability arrangements in place, the larger agency, OHIM, was selected. OHIM is the largest agency to date, employing a considerably larger staff (i.e., approximately 700 employees) as opposed to CPVO (i.e., 45 employees).

Furthermore, EASA was chosen over other agencies within the same category because of its far- reaching powers. By virtue of its soft law powers, its mandate goes beyond that of any other agency in existence. As a result, it was deemed essential to include this agency instead of one of the other agencies within the same category i.e., EMSA, EFSA, and EMEA.

The sample selection could have stopped here, having chosen the said four agencies: EASA, OHIM, Eurojust and Europol. However, the inclusion of EMEA was also deemed important. Despite the fact that the agency belongs to the same category as EASA, there is a difference between the two agencies in the level of formality of powers. Whereas EASA can adopt decisions in its own right, EMEA issues opinions to the Commission, which are then rubberstamped into decisions. Given the blurry lines of responsibility between the Commission and EMEA in this context, this was deemed a noteworthy difference that needed to be explored, hence warranting the addition of EMEA to the sample.

4.3 Sources of Data

This research draws on two main sources of data: (legal and policy) documents and interview material.

4.3.1 Legal and Policy Documents

The analysis of legal and policy documents is one of the main sources of information, particularly for mapping and describing the de jure accountability arrangements of European agencies. The documents analysed range from relevant legal texts of a broader application (e.g. the TEU and the EC Treaty, the Council Regulation on the Financial Regulation applicable to the General Budget of the European Communities,[12] the Commission's Framework Financial Regulation,[13] the Staff Regulations of Officials of the European Communities) to agency-specific legal texts (agency basic regulations, agency financial regulations). Additionally, documentary sources including agency-specific documents (e.g. minutes of the management board, rules of procedure of the management board, annual reports) and third party reports (European Parliament discharge reports, Court of Auditors reports, independent evaluation reports etc.) were also resorted to for further information on accountability practices. Finally, (inter-)institutional policy documents (e.g. the White Paper on European Governance, the Draft Inter-institutional Agreement on the Operating Framework for the European Regulatory Agencies, the European Parliament's Resolution on the communication from the Commission "The operating Framework for the European Regulatory Agencies", the European Commission's Communication "European Agencies–The Way Forward" etc.) were also consulted in order to gain further insight into the institutional vision and ongoing debate on agency accountability.

Additionally, Chapter 8 on (quasi-)legal accountability is based on an extensive analysis of the case law of the Court of Justice of the European Communities, and of European Ombudsman cases involving European agencies. In this case, case law constitutes the main source of data for documenting practices of (quasi-)legal accountability. This analysis was supplemented with interviews with legal experts from the sampled agencies for further information, as well as an additional check so as to ensure that all the relevant cases and legal provisions were covered. The Court of Justice cases referred to can be accessed on the Court of Justice of the European Communities case law database[14] as well as on the EUR-Lex search

12 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, 16.9.2002, p. 1.

13 Commission Regulation (EC, Euratom) 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 357, 31.12. 2002, p. 72.

14 <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>.

engine for cases prior to 17.06.1997. The European Ombudsman cases are accessible via its website, in the case database found there.[15]

4.3.2 Interview Data

Finally, the main source of data for accountability practices is constituted by 63 expert interviews. The aim, in terms of choice of respondents, was to include people with specific insight in the workings of agency accountability procedures. Moreover, in order to develop an in-depth understanding, it was deemed essential to include respondents "who view our topic from different perspectives or who know about different aspects of it."[16] In line with this reasoning, the respondents were deliberately selected so as not to constitute a single, homogeneous group. In order to gain a balanced view and to avoid bias, the sample not only included actor representatives but also representatives of the various accountability forums involved in holding the respective agencies to account.

First of all, high level agency practitioners, i.e., agency directors were interviewed due to their special knowledge of agency accountability. Thus, the key informants include the executive directors (or president in the case of Eurojust and OHIM) of all the sampled agencies as well as the administrative directors, where such a position is in place. Furthermore, in some cases, not only the current but also the former directors were interviewed. Directors are involved in or at least have knowledge of most of the accountability procedures to which the agency is subject. Moreover, by virtue of their position at the apex of the agency's hierarchical structure, they also have a panoramic view over the whole array of accountability regimes. Furthermore, directorate staff was also interviewed, as they have daily working knowledge of the accountability procedures. Additionally, as observed above, members of the legal office were interviewed in order to gain a better understanding of de jure arrangements, as well as of the interpretation of the jurisprudence involving the agency.

Secondly, for each accountability regime, this was matched with interviews conducted with members of the accountability forums holding the agency to account. Thus, interviews were conducted with members of the management board of each agency, as well as with internal and external auditors (i.e., Internal Audit Service of the Commission, the Court of Auditors), members of the European Parliament, representatives from the Council structures, and representatives from the European Commission.

15 <http://www.ombudsman.europa.eu/cases/home.faces>.
16 R. S. Weiss (1994), p. 17.

Thus, the group of respondents is composed of practitioners who have a general understanding of the overall functioning of multiple arrangements (e.g. director, members of the legal service, management board representatives) and respondents with a knowledge of and experience with only specific arrangements (e.g. MEPs, auditors). It not only includes agency representatives, but also representatives from other institutions involved with agency accountability. In other words, the aim is "to develop a wide-ranging panel of knowledgeable informants. (…) We would talk with everyone in a position to know what happened in the hope that each would provide part of the story and that all of their accounts together would provide the story in full."[17]

Interviews with agency respondents were generally conducted at the seat of the respective agency. Some of the members of the accountability forums were interviewed, where necessary, in Brussels and Luxembourg. Interviewees were contacted via email for an interview appointment. The interviews lasted roughly an hour to an hour and a half each and they were digitally recorded with the permission of the interviewees. The interviews were semi-structured in order to allow for comparable data, but, given the exploratory character of the research as well as particular specificities pertaining to different arrangements, room was also left for open questions.

The interview protocol was structured along the three phases of the accountability process as defined in Chapter 3: information, debate and consequences. Aspects covered referred to the detailed operation of the respective accountability arrangements, the type of information provided, whether information is provided in a timely fashion, whether debating takes place, the type of issues subject to debate, the level of participation in the debate, knowledge and preparation of members of the forum for the debate, whether consequences are enacted and if not, the reasons for not implementing sanctions etc. In cases where the respective arrangement was part of a broader accountability regime, questions relating to the interaction with the other accountability forums were included, more specifically relating to the division of tasks between the various forums, (informal or formal) contacts and co-ordination, the presence of duplication and overlaps etc. The interviews with the legal office were the only exception to this. There, the emphasis was particularly on the case law in existence and (additional checks and insights on) their interpretation.

The interviews were subsequently transcribed and systematically analysed. The respondents belonging to the same group were compared in reference to a particular

17 Ibid. p. 17.

mechanism in order to derive common patterns. Given the use of a semi-structured list of questions, the data was easily comparable and patterns were derived. Furthermore, attention was paid to the answers provided by members of the forum(s) and those of the actor in order to corroborate the information and to ensure that it was reliable, accurate and consistent. In this connection, it has been observed that, "multiple informants and multiple methods of data gathering or triangulation within a same study are themselves recursive checks against the validity of the researchers' interpretations."[18] Thus, the broad array of respondents as well as the attempt to triangulate some of the data by matching information from one set of respondents (e.g. actors: directors) with another set of respondents (e.g. forum: management board) on a specific phenomenon (e.g. the accountability of the director to the board) are important validity checks in the study. The interview material was used as a source of empirical information and respondent quotes were used to illustrate the main points. All the respondents were anonymised but numbers were provided for each interviewee, which are referred to throughout the text. Furthermore, the interviewee's position was generally given (e.g. management board representative, director, auditor etc.) to indicate from which perspective the account is given. Where respondents indicated that (part of) the information submitted need not be anonymised and the reference to a particular position and agency were needed, when quoting this information a reference to the specific respondent (i.e., the director of a specific agency) was included in the text. However, in this case, the respondent number was omitted so as to preserve their anonymity at later stages of the account. A full list of interviewees is provided at the end of the book, listing the interview number, as quoted in the book, their position and institutional affiliation. In the case of directors, to preserve their anonymity, the name of the agency is not listed, as this would automatically disclose the source.

To sum up, this chapter has provided insight into the methodological backbone of this research. The research will cover five European agencies, as discussed in the sample selection. The operation of the arrangements and of the various forums will be investigated, drawing on document analysis as well as interview data covering a broad range of key respondents. The data will not be presented according to individual agencies but will be structured cross-case, by focusing on the set of accountability arrangements. We will be looking across the board to identify general patterns while at the same time pinpointing specificities or divergences, where relevant.

Let us now turn to the empirical findings.

18 A. Ambert, P. A. Adler, P. Adler, D. F. Detzner (1995), 'Understanding and Evaluating Qualitative Research', *Journal of Marriage and Family*, *57*(4), 879-893, p. 884.

CHAPTER 5

Managerial Accountability: Too Much Board, Too Little Management

The main and most direct confines on the grant of authority to agencies and their directors respectively, are exercised by the agencies' management boards. Management boards carry out two basic functions: they steer the organisation and they exercise oversight over the functioning of the agency by monitoring the work of the director. By virtue of their dual role, boards are hybrid bodies, simultaneously internal and external to the organisation. It is, however, this external, monitoring role of the board vis-à-vis the agency and the director that is of relevance for the present study. Given the extensive formal powers entrusted to the latter, it is important to observe to which extent management boards are successful in exercising their supervisory roles and holding the agency and its director to account.

5.1 Management Boards and Directors: Formal Roles and (Accountability) Relations

Boards are referred to by different names across agencies. Several terms are used to refer to what are by and large similar bodies: management board (i.e., most commonly used; e.g. EASA, EMEA, Europol etc.), administrative board and budget committee (i.e., OHIM), administrative council (i.e., CPVO) and college (i.e., Eurojust). Interestingly, in the case of OHIM there is a split between the functions of the board, with two bodies carrying out board functions as opposed to one: the administrative board and the budget committee.

Agency heads also go by different names across agencies: (executive) director (i.e., most common) and president (e.g. OHIM, Eurojust). Whereas in some agencies the full array of agency head responsibilities is lodged with one person, in others, the traditional functions of the agency head have been divided between an executive director and an administrative director. This is the case at two of the agencies in our sample: Eurojust, where there is both a president and an administrative director;

and EASA, which has both an executive and an administrative director. Thus, in these cases, the accountability of the administrative director also becomes relevant.

Rules on the composition of the management boards vary, but in general, boards tend to be very large, comprising a representative from each member state[1] as well as, depending on the agency, representatives from the European Commission, and in some cases, the European Parliament and/or relevant stakeholders. For example, the board of EMEA is composed of 35 voting members: one representative from each member state, two representatives from the European Commission, two representatives from the European Parliament, two representatives of patients' organisations, one representative of doctors' organisations, one representative of veterinarians' organisations. In addition, the institutions and the member states also have alternate representatives. Furthermore, Iceland, Lichtenstein and Norway are also present in the board, as observers without voting rights. As a result, the current board of EMEA lists as many as 73 members.[2] The management board of Europol, for example, is composed of one representative per member state, with the European Commission acting as an observer, without voting rights.[3] Reportedly however, member state delegations to Europol are generally composed of three to four members, with the result that management board meetings can count as many as 110-120 members around the table (Respondent #26).

Representativeness, rather than factors such as expertise, has clearly been opted for as the criterion for selecting the members of the boards of European agencies. Given their composition, therefore, to a large extent management boards are not only an instance of managerial accountability, but also in fact, a lower tier of political accountability. As we shall see in the following chapter, this is supplemented, by other upper echelons of political accountability in the form of political accountability to the European Parliament and the Council.

By virtue of their hybrid role, boards carry out a broad array of functions ranging from supervisory roles in terms of budgetary and planning matters, monitoring the work of the director and the agencies' performance to tasks such as setting the strategic direction of the agency, approving the work program, adopting implementing rules etc. Moreover, although rules on this vary, most basic regulations reserve a role for the board in the appointment and the dismissal of the director. Most commonly, management boards appoint the director on a proposal by the European

1 The board of the European Food Safety Authority takes exception from this.
2 See EMEA website, <http://www.emea.europa.eu/htms/general/manage/MB/MB_overview.html>.
3 This changes with the new Europol Decision and as of 1 January 2010 the European Commission is represented in the board of Europol by one representative with voting rights.

Commission. In some other cases, the board draws up a short list of applicants from which the Council or the Commission makes the final selection and appointment.

Two further specifications are in order in the case of Eurojust and OHIM. In the first case, the powers of the board (i.e., the college) are broader than usual. Composed of national prosecutors, judges or police officers, the college does not only fulfil the standard board functions. Unlike in the case of other European agencies, the college members are closely involved in the core tasks of the agency: they are the drivers of the operational (case)work. At OHIM, the powers of the board are, on the one hand, notably more circumscribed (in the case of the administrative board) and on the other hand, broader (in the case of the budget committee). Its administrative board is, by virtue of the OHIM Regulation,[4] an advisory body to the president of OHIM, falling short of the powers generally encountered on other agency boards. The budget committee, on the other hand, has broader powers than most boards as it is also the discharge authority on the budget. Normally, this power is lodged with political forums, such as the European Parliament or the Council in the case of EU budget funded or member state funded agencies. OHIM, however, together with the CPVO form exceptions to this rule by virtue of their fully self-funded nature.

At the de jure level, an analysis of agencies' basic regulations reveals that this line of accountability to the board is defined in a very cursory fashion. The legal instruments of most agencies specify: "the Director shall be accountable to the Management Board in respect of the performance of his duties",[5] "the Management Board shall exercise disciplinary authority over the Executive Director and over the Directors",[6] "the Administrative Director shall work under the authority of the College and its President."[7] However, other than representing a clear statement of the hierarchical relationship of the director to the board, these provisions offer little guidance on how this accountability arrangement is (to be) implemented. How is

4 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p. 1.

5 Article 29(4) of Council Act of 26 July 1995 drawing up the Convention based on Art K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316, 27 November 1995, pp. 0002-0032.

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

7 Article 29(4) of Council Decision 2002/187/JHA of 28 Feb. 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (Eurojust Decision), OJ L 63, 6.03.2002, p. 1 last amended by Council Decision 2009/426/JHA of 16 Dec. 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA (the New Eurojust Decision), OJ L 138, 04.06.2009, p. 14. There are exceptions to this rule. For example, the president of OHIM is "under the disciplinary authority of the Council" and the administrative board has only an advisory function.

the director accountable to the board? In which manner? How often? On what type of issues? Is it a fully fledged process of accountability: is there informing, debating and sanctioning?

Given that the reading of the relevant legal texts provides little insight as to what exactly this accountability arrangement entails, empirical research becomes necessary to elucidate this matter. In the pages below, I will attempt to answer the questions above and indicate how these abstract and salutary legal formulations have been fleshed out in practice by the various agencies. The analysis will be structured along the three phases of an accountability arrangement: informing, debating and consequences. Relying on insights from interviews, I will discuss and assess the rules and practices found and identify problematic aspects, which negatively affect the effective operation of this arrangement.

5.2 Informing: Providing Information versus the Quality of Being Informed

As observed in Chapter 3, the provision of information is an indispensable element of accountability. It represents the groundwork for the subsequent stages of the accountability process by providing forums with the needed ammunition to evaluate the performance of the actors and to hold them to account for their behaviour.

5.2.1 The Ins and Outs of Informing

The manner, content, timing and frequency of informing vary in practice from one agency to the next depending on the frequency of board meetings, agreed rules of procedure, established practices, internal dynamics etc. There are, nevertheless, specific documents pertaining to the functioning of the agency, which, according to the basic regulations, have to be submitted to the board. Such aspects include, for example, the annual report and the execution of the budget. These are implicit moments of accountability for the director, because they provide the board with information on the performance of the agency, and thus, by extension on the performance of the director. In practice, these reporting obligations are complied with in all the agencies studied. These documents are part of a bigger reporting cycle, and, subsequent to being presented to the board, are submitted to several European institutions and are publicly accessible.

Moreover, according to the Framework Financial Regulation, Article 40, EC agency directors, in their authorising officer capacity, are expected to submit an annual activity report to the board. The report is expected to contain information on “the

results of his/her operations by reference to the objectives set, the risks associated with these operations, the use made of the resources provided and the way the internal control system functions."[8] These accountability obligations parallel similar developments within the European Commission. Every Directorate General (DG) of the Commission is now required to publish an annual activity report, which reportedly has "powerfully reinforced the direct accountability of directors general."[9] In its special audit report of 2008, the Court of Auditors concluded that "all the agencies, as required, submitted activity reports in support of their year-end accounts and presented them to their management boards."[10] On a more critical note, however, it also observed that "the activity reports submitted by the directors were often merely descriptive. They dealt more with the type and scope of the work than with performance in terms of the objectives achieved."[11] The Court was also critical of the way the management boards played their role: "the management boards appeared to be satisfied with this partial application of the regulatory provisions. They had still not asked for reporting to be done on the basis of the objectives set out in the multiannual programmes in order to obtain an overview in terms of the results obtained. In general, where the agencies' management boards based themselves solely on the reports submitted to them, they were not able to precisely identify either the outcome or the impact of the agencies' work. However, they did obtain a reasonably reliable measure of the level of activity."[12]

Furthermore, the Framework Financial Regulation (Article 25, paragraph 4) requires agencies to regularly undertake evaluations of their programs and activities, which are to be sent to the management boards. The basic regulations of some agencies also provide for an initial evaluation after three or five years of operation, which is to be followed by subsequent evaluations at regular intervals. These reports are then submitted and discussed by the boards; changes in practices in light of recommendations can, and reportedly in some cases, have been undertaken (Respondent #19, #38). In situations where the problems encountered are more generic in nature, i.e., pertaining to the legal set up and framework, the Commission can step in and

8 Art 40(1) of the Commission Regulation (EC, Euratom) 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 357, 31.12.2002, p. 72.

9 A. Wille (2008), 'The Modernization of Executive Accountability in the European Commission', *Paper prepared for the Fourth Transatlantic Dialogue,* Bocconi University, Milan, 12-14 June 2008, p. 8.

10 European Court of Auditors (2008), *The European Union's Agencies: Getting Results*, Special Report No 5, p. 24, paragraph 30. The audit report was conducted with regard to the so-called regulatory agencies, covered by Article 185 of the Financial Regulation.

11 Ibid. p. 31, para. 54.

12 Ibid. p. 25, para. 33.

initiate proposals for changes in the legislation. In 2003, the Commission published a "meta-evaluation" compiling all the evaluations available at the time, containing a summary of findings as well as recommendations.[13]

In its 2008 special audit report, referred to above, the Court of Auditors concluded that "the agencies always complied with these rules and the evaluations were produced within the time limits."[14] It did observe, however, that whereas the results were generally positive, the Court had some concerns in terms of multi-annual programming, the lack of data relating objectives to actual results as well as the the independence of the reports. In the words of the Court, "most of these evaluations suffered from the weaknesses of the multiannual planning and from the lack of basic data relating to the objectives being pursued. The fact that these evaluations were organised by the agencies themselves without any other outside participants (such as the Commission) entailed risks as regards the independence of the expert's judgment."[15] The Court was also critical of the role of management boards as well as that of the Commission, as represented in the board. In the words of the Court, "the management boards had not asked for a systematic examination of the overall recommendations made on this occasion, [i.e., meta-evaluation] despite their relevance."[16] And later on, "the Court did not obtain proof that the Commission's representatives on the agencies' management boards had asked for the overall recommendations made in the meta-evaluation (…) to be systematically examined."[17]

In terms of additional informing and reporting to the board, informal informing practices have emerged. For example, in the case of EMEA, the director gives a verbal "highlights" presentation during each board meeting, in which he briefly reviews the agency's activities over the previous three months and discusses the planning for the following three months (Respondent #12, #20). In the case of Europol, the director is present at every management board meeting. He gives a brief written and oral report on various strategic aspects, such as key meetings attended and agreements signed etc. Moreover, once a year, in addition to the annual report, he submits an internal evaluation report to the board on the performance of Europol (Respondent #17). Thus, reporting requirements are a combination of formal requirements and institutional practices, which have evolved outside the legal provisions.

13 See Commission of the European Communities (2003), Budget Directorate General, 'Meta-Evaluation on the Community Agency System', <http://ec.europa.eu/budget/library/documents/evaluation/eval_review/meta_eval_agencies_en.pdf>.

14 European Court of Auditors (2008), 'The European Union's Agencies: Getting Results', Special Report No 5, p. 25, para. 56.

15 Ibid. p. 32, para. 35.

16 Ibid. p. 27, para. 40.

17 Ibid. p. 27, para. 43.

Generally, agencies have adopted rules as to when documents have to be submitted before the board. This is provided for in the rules of procedure adopted by the various management boards.[18] In the case of the EMEA, EASA and Europol, the agenda plus all relevant documents must be submitted to the management board two weeks prior to the board meetings. For the administrative board of OHIM, its rules of procedure provide that working documents are to be made available no later than three weeks in advance and for urgent matters no later than one week in advance. At Eurojust, the agreed deadline is two days in advance, given that board meetings take place twice a week.

This aspect is relevant to accountability, as delays in the submissions of information affect the ability of the member states' representatives in the board to prepare for these meetings. The quality of the accountability process as a whole varies accordingly. As one management board respondent from EMEA explained,

> We have a rule that it's being sent to us two weeks in advance. And we need that. Because this is going into my organisation. For the budget things I ask my controller to look at it and to give me advice. So I have a policy advisor here in the organisation and she's sending it out to different people asking for advice and then I get an annotated agenda back to the management board so I know what I should say there. It's the only way that you can do it. (Respondent #20)

Generally, board respondents of the sampled agencies reported that the information from the agency was provided in a timely manner and that it was received within the agreed deadline. Occasional delays could take place, but in such a situation the management board representatives would not hesitate to postpone the discussion for a later meeting, by which time the board would have had the opportunity to have reviewed the document (Respondent #6).

An exception is Europol, where management board representatives were displeased with the timing of the information provision. In the words of one respondent, the documents for the management board meeting would arrive "sometimes indeed on the day itself or the day before (…) So this is a real problem indeed. It takes ob-

18 See for example, Article 3(2)of the EMEA 'Rules of Procedure of the Management Board', <http://www.emea.europa.eu/pdfs/general/manage/mbar/11533904en.pdf>; Article 6(9) of Regulation No C-A-1-08 of the Administrative Board of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 19 December 2008, laying down the rules of procedure of the Administrative Board, <http://oami.europa.eu/ows/rw/resource/documents/OHIM/institutional/ABBC/regulation_ca-1-08_en_o.pdf>; Article 4(2) of the 'Rules of Procedure of the Management Board of the European Aviation Safety Agency', <http://www.easa.europa.eu/ws_prod/g/doc/About_EASA/Manag_Board/2002/2002_12_03_mb_decision_en.pdf>.

viously too much time for Europol to prepare a document and we receive it too late" (Respondent #26).

Another respondent also refers to delays, some documents being received only a couple of days before the meeting or even at the meeting itself, in the form of room documents. He summarised the situation as follows:

> First of all, you have to see that a package of the management board is about 10 centimetres of paper. You receive the first documents two weeks before the meeting (…). The last times we always see that you get a second package and then a third and even sometimes a fourth package which is only 24 or 48 hours before the management board meeting. And even then they present room documents, so things that you see before you during the first day and you read them in the evening in order to discuss it the day after. (Respondent #17)

This can have significant repercussions on the level of preparation of the members of the board and on their capacity to debate the key issues with the actor and to properly assess his performance.

Moreover, it is problematic for democratic accountability given that meetings generally need to be coordinated within a member state with the various ministries concerned so that a national position could be drawn up and defended in the board. In this connection, one of the respondents explained,

> It is not because I am a management board delegate that I may speak for the whole country. Normally I have to do some internal consultation. We do that on Fridays for preparatory meeting with all the people who are involved in Europol matters. But just imagine some documents arrived today. I sent them this and we have the preparation meeting tomorrow. (…) But not all countries are organised like that and I have heard not one but several management board delegates saying 'yes, I read the documents in the plane.' (Respondent #17)

All in all, information is provided regularly to the boards. Some cross-agency variations are present in terms of the manner, frequency and timing of reporting, as described above, with informal practices developing and being negotiated between the key actors. However, a common denominator of core documents, as laid out above, is submitted to all boards, as this is regulated by the specific legal framework of each agency and the Framework Financial Regulation, where applicable. Some problems remain with regard to activity reports and external evaluations reports in terms of content, set-up and the role of the management boards, as evidenced by the Court of Auditors report quoted above. With regard to specific agencies, Europol

appears to be more problematic in terms of the timing of information provision, with recurrent reports of delays in the submission of relevant information for board meetings.

5.2.2 A Forum's Perception of the Provision of Information

The question also arises of whether the information received by the board is sufficient to allow the board to be able to accurately judge the performance of the director and the agency. This issue is of specific relevance to this arrangement, given its rather low level of formalisation of specific obligations. Unlike in the case of other accountability arrangements, where the exact informing obligations are provided for (e.g. accountability vis-à-vis the Court of Auditors), in this case only a list of core documents is required to be submitted as a matter of law. The additional information that is provided is left to the discretion of the actor or is the result of an internal understanding between the board and the director that has evolved as a matter of practice. In this connection, it is difficult to judge from the outside whether the information provided is sufficient. When is information too little, too much or just enough? In this case, the perception of the forum itself gives more reliable insights.

Generally, management board representatives from OHIM, EMEA and EASA felt that they were sufficiently and adequately informed by the agency. In their opinion, they received extensive information from the director on all the relevant issues and were able to obtain additional information if needed promptly from the agency.

In the case of Eurojust, the respondents considered that they were sufficiently informed by the administrative director and that where needed, additional information was directly available. The president, who in this case is a forum for the administrative director on a par with the college, did feel, however, that while generally he was kept sufficiently informed, "sometimes there are things that afterwards I think 'I should have been told about that' but we have a fairly open relationship.'" The rationale for this was perceived to stem from the lack of formal clarification of what precisely the accountability relationship of the director to the president and the college entails. At Eurojust, steps were being undertaken to clarify this issue by means of internal guidelines drafted by the agency regulating the relationship between the executive director, the president and the college.

In the case of Europol, respondents found it difficult to give an overall assessment of the information received from the agency and pointed out that "it's difficult to judge whether we are getting enough information, the right information" (Respondent

#16). One of the main problems in their view was the fragmented nature of the information circulated by Europol among the various Europol structures: the management board meetings and the more expert meetings such as the Heads of Europol National Units (HENU) meetings and the liaison officers meetings. This fragmentation of information and the fact that the various meetings are attended by different representatives from the member states makes it difficult to obtain a "global overview" of the performance of the agency, particularly in the case of member states with poor co-ordination between the representatives attending the various meetings (Respondent #14, #16, #26).

Moreover, it was occasionally reported that the board had encountered difficulties in obtaining additional information or receiving information and reports in the form and manner desired (Respondent #17). On the other hand, the director spoke of the difficulty of satisfying often inconsistent or contradictory requests for information from different delegations of the board. In accounts from both management board representatives and the director and even in some minutes of the management board,[19] the rising tensions over reports to be drafted, then sent back, redrafted and rejected yet again are palpable. In the words of the director,

> They always criticise if I bring a document that it's too detailed. Ok, then I bring it to a higher level of abstraction. Then they say, 'this is too abstract, make it more detailed.' So whatever we do, it is appreciated by some but not the others. Just last week, members in the board criticised, 'we are micromanaging instead of managing.' Others said, 'no, this is our responsibility.'

This seems to be the result of what Mole describes in her study on national level bodies and their boards as "boundary issues" arising in the relationship between chief executives and their boards, i.e*.,* "difficulties and tensions in identifying working boundaries."[20]As she explains, "disappointment on both sides may be compounded by underlying disagreements as to 'who should be doing what'"[21] and, in this case, also how. This seems to be a central issue in the case of Europol with "boundary disputes" arising again and again between the two sides. As observed by the director, "if you look at the management board meetings, we have now had 64-65 meetings of the management board, you will see that very often the core of

19 See for instance, Europol (2006), Management Board, 'Draft Minutes of the 50th Management Board meeting: 15-16 May 2006', The Hague, 11 July 2006, 5500-20060515MI(Draft) #176889 (on file with author), p. 28.

20 V. Mole (2003), 'What are chief executives' expectations and experiences of their board?', in C. Cornforth, (ed), *The Governance of Public and Non-Profit Organisations. What do boards do?*, Routledge Studies, 150-163, p. 156.

21 Ibid. p. 152.

the debate was what are the rights of the director what are the rights of the management board."

Attempts at formulating the accountability of the director to the board and spelling out the various obligations of the director vis-à-vis the board proved difficult due to different understandings on the part of the various actors involved. One participant in the board described the situation as follows:

> It came out that the director's opinion of his accountability towards the board is quite different from the perception of some member states that were keen on reinforcing their control. The director felt that he was chosen by the Council and his political responsibility is to the Council and only to the Council and not to the board. (…) The issue is whether the management board has a right to evaluate the director. Is it the Council or the management board? And the position of the director was that since he was elected by the Council, his performance should be only evaluated by the Council and not a lower structure. It causes tensions especially when the management board's perception of how he should function differs from what the director believes he should do. (Respondent #41)

The origin of the problem seems to lie in the lack of a common agreement on the accountability of the director to the board, the precise obligations this involves and the exact division of responsibilities. The Convention actually provides that "the management board shall oversee the proper performance of the Director's duties" (Article 28 (12)) and "the Director shall be accountable to the Management Board in respect of the performance of his duties" (Article 29 (4)). Clearly in this case, the disagreement was not about the presence of an accountability relationship, since this is provided for in no uncertain terms in the Convention, but over what exactly this relationship entails. This situation can, and as seen above, does, result in serious disruptions in the practical operation of the accountability relation of the director to the board.

The matter becomes additionally complicated if a second tier of hierarchy is present, as observed in the case of Europol, vis-à-vis the Council. The accountability lines become entangled and distorted: "in many cases, you hear reports in the board from the director where he explains his meetings with the ministers. And the ministers are bosses of the board members*"* (Respondent #41). Furthermore, this also occasionally results in *multiple accountabilities disorder*, with the two forums pointing in different directions, with the board occasionally taking a different stance than the Council. As observed by the director,

> When I present to the management board what was discussed with the Council, I sometimes get as a reaction from the board and this happened last week, 'we do not fully share the view of the Council.' Interesting to me, how can a board not fully share the view of the Council. I was raised as a civil servant in Germany and being a civil servant in Germany, there's a clear law that political will is guiding the system and the civil servants have to support the political system unless it's contrary to the law, of course.

These tensions go beyond the mere lack of clarification of responsibilities. One possible explanation could be a lack of communication between the two forums. A more generic possible or even simultaneous explanation is that these dynamics reproduce tensions inherent in the creation as Europol and in fact, of the European Union in general, as a top-down, political project. In the case of Europol, this appears to have engendered resistance and mistrust at the lower levels with a clear dissonance between the higher political level and the lower, street level of the management board. As observed by the director,

> Unless you have a generation of people who have built up a common understanding, a mutual trust, you will always have the debate 'who is entitled to do what?' And the generation that is still now in the position to take decisions is perhaps not fully happy with the construction of Europol. And you should not forget, Europol was born by politicians (…) by a political, a pure political decision.

All in all, it seems that, as observed in a previous section, problems arise in the case of Europol over the provision of information. The root of this seems to be much deeper than a lack of specification of responsibilities. These tensions were not encountered, at least not in this form, at any of the other sampled agencies. Part of the rationale can be that Europol, by virtue of its mandate as a police organisation, deals with sensitive matters from a member state perspective, which impinge very closely on the national interest, rendering member states more protective of their prerogatives and more resistant to change.

5.2.3 The Boards' Preparation: Falling Below Expectations

So far the discussion has been focused on the obligation of the actor to provide information to the management board. However, the quality of *being informed* not only depends on being provided with sufficient information but also on whether the forum, in this case the management board, reads the information provided and prepares for the meetings. As such, the onus lies not only with the actor, but also with the forum. After all, as remarked by one agency director, "the level of dis-

cussions depends on the quality of the counterpart" (Respondent #45). In this connection, the preparation of the forum for the meetings becomes a highly relevant issue. The interviews revealed that for a significant number of delegations this is less than optimal. In other words, while provided with information, some delegations are not actually informed. It should be made clear from the very beginning, however, that this is by no means applicable to all delegations. Some delegations to the board are very well prepared and take their role seriously. Nevertheless, a large number are not and this comes across in interviews as a significant cross-agency concern, which has been pinpointed by both directors and management board representatives (in relation to some of their management board colleagues) alike. In this connection one of the EASA directors observed,

> I think that the vast majority of the members of the board do not have time enough to go in detail and to be sufficiently informed about the agency. They know of course the agency but not sufficiently in detail and maybe they don't read sufficiently all the documents we send to them and it doesn't appear that they make a reflection on those documents.

This was also confirmed by an EASA board representative, according to whom, "for a lot of people in the management board I don't think they pay much attention to EASA at all apart from that particular one time. There are relatively few people in the management board who really have any knowledge of how the agency is working, some do but not many" (Respondent #32). This he perceived as being in stark contrast with his own experience at the national level agency where the board, "works together very well and everybody is prepared and knows what's going on. It's not like that at all. And I'm sure some people come to the meetings who haven't read the papers and don't really understand the issues to be honest."

EASA is not the only agency to be facing this type of problem. Similar observations were made in connection with some of the members of the EMEA management board. It was felt that the information that the board was provided with was quite complex, and whereas some members were very professional and well prepared for discussions in the meetings,

> There are some that are more or less coming here not to put their EMEA hat on but just to sit and watch and you know, try to put their national perspective on it. So it's a mix of people. And it's not only about the composition from a generic point of the board, it's also highly dependent on individuals. And sometimes you could be happy to get good individuals in the board: professional people that have a professional understanding of what their responsibility in the board is. And sometimes you have political people or coming from the ministries and things like that. And

> you know, they think it's nice to come to London and sit in the board and go for some shopping and things like that. (Respondent #39)

Respondents generally believed that not all the board members prepared the documents provided for the board meetings. In this connection, the EMEA director gave a very telling anecdotal example:

> Some years ago, we made a mistake. We sent a mailing to the board in paper format, now we send it electronically and we forgot to copy, we had double copies (…). There was one page missing, not for all the members but for half of the members of the board. And before the meeting we didn't hear anything. Nobody noticed. They didn't read the document before they came to the meeting.

In the case of Europol, it was generally perceived that the members of the board were prepared, although some respondents did feel that there were exceptions. "I don't think all delegations are 100% well prepared. Let's put it like this. You see it on the level of discussion. Sometimes some countries are wise enough not to interfere but some others think they absolutely have to say something and sometimes you wonder 'this is not really to the point'" (Respondent #17).

All in all, this reveals that the level of preparation of some delegations to the board is suboptimal. The benefits of being provided with information by the actor are seriously diminished, if not nullified, when forums fail to hold the director and the agency effectively to account.

5.3 Debating: An Imperfect Interaction

The information submitted by the director to the board is largely discussed during the meetings of the management board. The frequency of management board meetings varies. For example, the management board of Europol meets six times a year, the management boards of EASA and EMEA meet four times a year, and that of OHIM meets twice a year. A more special case is Eurojust, where the management board representatives (i.e., the college members) are also the drivers of the operational work; they work at the Europol premises and they meet in full format twice a week.

All of the respondents felt that there was a possibility for discussions with the director. Specifically in the case of EASA and EMEA, where the director is present at every board meeting, the members of the management board felt that they were able to intervene and ask questions, as well as to obtain additional information. For

example, as an EASA management board representative summarised, "in practice, more informally it means that the executive director comes to each management board meeting obviously, and prepares a report of what has happened in the last three months and will speak to any agenda item and is there to answer questions and to address himself to anything that is asked by the members of the board" (Respondent #32). However, respondents from the five agencies recurrently mentioned several problematic aspects, which they perceived as negatively impacting the quality of the board discussions.

5.3.1 Large Boards, Small Agencies

Respondents felt that the size and the composition of the board negatively impact on the level of the board discussions. The size of the boards is outright plethoric. In the case of some agencies, the problem has taken on such proportions that the size of the board, including any alternates, observers and other members of member state delegations (e.g. advisors and experts) can be bigger than or close to the size of the overall staff of the agency. For example, EU-OSHA is listed in the latest audit report of the agency by the Court of Auditors as having a total staff of *63 employees*.[22] Its management board, however, is composed of one representative from each member state, one representative from the employers' organisations in each member state, one representative from the employees' organisations for each member state and three representatives from the Commission. All in all, this amounts to a grand total of *84 management board members* without even counting the alternates. Similarly, CEPOL has a staff of *21 employees*[23] and a governing board composed of one representative from each member state, or in other words, 27 *board members*. EU-OSHA and CEPOL are by no means alone in this predicament.[24]

22 European Court of Auditors (2008), 'Report on the annual accounts of the European Agency for Safety and Health at Work for the financial year 2007 together with the Agency's replies', OJ C 311, 05.12.2008, p. 50, <http://eca.europa.eu/portal/pls/portal/docs/1/1879627.PDF>.

23 Ibid. p. 136.

24 For instance, CPVO has a total staff of 45 employees whereas its administrative council is composed of 1 representative per MS and 1 representative from the Commission, plus alternates, a total of 56 members, including alternates. See European Court of Auditors (2008), 'Report on the annual accounts of the Community Plant Variety Office for the financial year 2007 together with the Office's replies', OJ C 311, 05.12.2008, p. 172, <http://eca.europa.eu/portal/pls/portal/docs/1/1898142.PDF>; Eurofound is listed as having a staff of 97 and a management board composed of 1 MS representative, 1 employers' organisation representative per each MS, 1 employees' representative per MS, 3 Commission representatives and alternates, a total of 84 members, without alternates. See European Court of Auditors (2008), 'Report on the annual accounts of the European Foundation for the Improvement of Living and Working Conditions for the financial year 2007 together with the Foundation's replies', OJ C 311, 05.12.2008, p. 156, <http://eca.europa.eu/portal/pls/portal/docs/1/1897923.PDF>; The FRA has a total staff of 57 and a management board composed of 1 independent

Whereas the situation within the five sampled agencies has not yet reached these extremes, the size of their boards is nevertheless overwhelming. As observed above, member state delegations usually have not only one representative, but also an alternate. In some cases, delegations are composed of three or four persons, thus swelling the number of board members to a hundred or even more. A management board representative of Europol tellingly described Europol board meetings as follows:

> It's 27 member states and then also you see a delegate and an alternate delegate and then an advisor in the back so then it's 27 times 4, then the Europol staff and the director with his 2-3 deputies and then 3 advisors around them and translating to 21 languages or 23 now of the European Union, this is terrible. I have to go to that meeting again and it takes each time 2 days and it's 6 times per year so it's more or less 12 days a year in this huge format, with all this translation so it's a very cumbersome decision-making. (Respondent #17)

The sheer size of the board allows very little time for interventions and addressing specific topics in depth (Respondent #14, #41).

Similar concerns were expressed by respondents from EASA and EMEA, who essentially saw the sheer size of the board as an impediment to discussion. In this context, one agency director commented that, "when you have large boards like this they are not operational, they can't be an inspiring partner to you, so the board and the construction of this kind of board does not help an executive director and does not help the agency in a professional way to steer the organisation." In a similar vein, he also observed "in general, what we have is not an optimal board in order to give a professional advice to the executive director or to give a professional advice on the running of the agency because of the complexity of the board from the number and the quality of members and the issue of political influence on the board."

In some agencies, attempts were made to render the work of the board more efficient through the creation of a small, executive committee, which would be responsible for preparing the meetings of the board. Due to its compact size, the committee would be able to discuss agency issues in greater depth and to hold more focused discussions. These proposals were repeatedly rejected, as member states represented in the board were concerned that they would be excluded from the decision-making

member per each MS, 1 independent member appointed by the Council of Europe, 2 appointed by the Commission and alternates, a total of 60 members, including alternates. See European Court of Auditors (2008), 'Report on the annual accounts of the European Union Fundamental Rights Agency for the financial year 2007 together with the Agency's replies', OJ C 311, 05.12.2008, p. 7, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:311:0007:0012:EN:PDF>.

process. This is an exemplification of the negative politicisation in the board to the detriment of good governance and the board's ability to comply with its obligations.

Another much-cited negative aspect, beside board size, concerned the frequently changing composition of delegations to the boards. This was particularly relevant for Europol. Respondents felt that members of the board lacked knowledge of the background and history of particular discussion points due to the constant changes in composition of the delegations sent in by various member states. This was felt to hamper efficient and in-depth discussions, with member states losing track of previous decisions or switching positions from one meeting to the next. The issue was furthermore exacerbated by the fact that the chairman of the board of Europol is rotated every six months. In the words of the director, "since I've started here there have been a lot of persons that have been replaced in the board. Many of them have no history. Some chairperson came to the board just to be a chairperson and left the board afterwards, so there is no knowledge about it. No relation to the past. No relation to the future."

This situation is due to improve with the new Europol Council Decision,[25] which provides that the mandate of the chairmanship of the board it is to be prolonged from six months to eighteen months.[26] However, the issue of inconsistent delegations to the board remains problematic, as each individual member state is responsible for ensuring consistency of its delegation of board members.

5.3.2 Shortages of Expertise

In some cases, the point was also made that the knowledge or expertise of various members of the board falls short of expectations. Across agencies, deficits in the knowledge of board members with regard to financial and budgetary issues, and management aspects were repeatedly noted. The majority of delegations are experts in the agency's core substantive fields, while lacking knowledge of the issues and aspects mentioned above. However, an understanding of these issues and aspects is crucial to performing their role as board members and to their ability to engage or contribute to discussions on these issues. As observed by one agency director, "the quality of the members of the delegation is not high. These are not really good people. (…) I think they are so much in their specialised world that they forgot normal management and normal policy making issues" (Respondent #38).

25 Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.05.2009, p. 37.

26 Ibid. Article 37(2).

And again, in the words of another director,

> We present the work program, the budget and the annual activity report to them. We are putting a lot of information to them. And all this information is from a financial point of view, from a budget point of view and it's not easy, it's quite complicated sometimes and I have the feeling that many of them who are coming to the board are not really qualified to be in the board. (Respondent #39)

In some cases, the situation has reached the point where the discussion of such issues becomes a conversation between a handful of people, with the rest of the board remaining silent. Such a situation is described by the president of OHIM, who observes, "a meeting of our budget committee is a conversation between my vice-president who deals with financial matters and these three people under the leadership of the chairman of the meeting. And the rest of the people sit there and fill in forms to get their travel costs reimbursed."

Similarly, a management board representative from EASA commented,

> There are relatively few people in the management board who really have any knowledge of how the agency is working, some do but not many. (…) We could do with that outside influence on the board I think. (…) It's not aviation safety expertise, it's managerial expertise actually. I think we could benefit by having a couple of really experienced high profile managers. People who know how to run, shift the culture of an organisation. So perhaps some financial expertise might help. (Respondent #32)

This is a pertinent aspect, given that lack of knowledge on the part of the forum can compromise its ability to judge the performance of the actor. At EASA, for example, the problem has been openly recognised and measures have been taken by the agency to deal with this issue along the lines suggested by the agency respondent quoted above. As reported by one of the EASA directors,

> We created now a new body called the budget committee because we felt that the management board was not enough informed and involved when deciding on the budget. So now there's a committee set up by the management board where they review the budget because we have this issue of fee income and so on and the prices we are charging, so they look at the budget and they make their comments to the management board. So they are experts who are not all members of the board. But they are appointed by the board and they look at our cost structure and make comments to the board as experts.

The source of this problem is rooted in the fact that no careful thought has been given to the composition of agency boards in view of their functions and tasks. Instead, the institutional discussions on board composition have been highly politicised and have been the subject of avid debate between the Commission, member states and even the European Parliament. The subject of concern has largely been the very political issue of representation and voting rights of the various parties concerned, all of whom are seeking to ensure that their various interests are represented. At present the debate continues, with the Commission trying to push for more votes on the management boards.[27] This is by no means exclusively an issue that concerns European agencies; it exemplifies an old tension in the composition of boards that can also be found at the national level: the *tension between representative versus professional boards.*[28] As Greer *et al.* observe, "despite its variety, the quasi-governmental world is structured by a central tension between the need for boards to be democratic and accountable, yet also provide effective governance and service delivery."[29]

With regard to the European agencies, representativeness was explicitly chosen as the core criterion for board selection. Nevertheless, there is no reason why this should come at the expense of expertise; while remaining representative, board composition can still be tailored to their roles. In light of the observations above, it seems that the discussion on the composition of the board needs to shift away from political squabbling over interest representation, and focus instead on how to ensure that these bodies are equipped with the knowledge and expertise needed to accomplish their tasks. Such matters are difficult to regulate at the European level, as the responsibility rests with the member states. Thus, individual member states need to become aware of the problem and ensure that their delegations to the boards are composed in such a way so as to include the palette of skills and knowledge needed for their representatives to effectively enact their roles in the board.

27 Commission of the European Communities (2008), Communication from the Commission to the European Parliament and the Council, 'European Agencies-The Way Forward', COM (2008) 135 final, Brussels, 11.3. 2008.

28 C. Cornforth (2003), 'Introduction. The changing context of governance–emerging issues and paradoxes' in C. Cornforth (ed), *The Governance of Public and Non-Profit Organisations. What do boards do?*, Routledge Studies, 1-19, p. 13.

29 A. Greer, P. Hoggett and S. Maile (2003) 'Are quasi-governmental organisations effective and accountable?' in C. Cornforth (ed), *The Governance of Public and Non-Profit Organisations. What do boards do?*, Routledge Studies, 40-56, p. 42.

5.3.3 Substance of the Debate: Overlooked Aspects

In terms of the substance of the debate, particularly regarding the three agencies EASA, OHIM and Europol, certain respondents felt that some topics received too much emphasis, while other – key – issues were clearly neglected. Subjects that, in their opinion, should be brought forward repeatedly go undiscussed. More specifically, respondents complained of (1) an overemphasis on micromanagement aspects, to the detriment of strategic discussions and (2) an overemphasis on issues pertaining to the national interest, to the detriment of discussions on the overall agency performance. Systematically omitting highly relevant topics from board discussions means that they elude monitoring, which can negatively impact the quality of agency accountability.

A Strategy Input and Oversight Deficit

This first aspect (i.e., micromanagement versus strategic discussions) appears to be particularly problematic in the case of Europol. Management board representatives were of the opinion that the monitoring by the board was almost exclusively focused on aspects of micromanagement to the detriment of issues pertaining to the strategic and operational performance of the agency. The board, it would seem, gets sidetracked into administrative and technical details, instead of considering the status of analytical work files (AWFs) or the agency's strategy. As one of the respondents stated, "the agenda of the management board is in my opinion too much buried in details. I think there is at the moment a lack of discussion on substance" (Respondent #26). This point was re-iterated by another management board representative as follows:

> Because there are some member states who are always focusing on the details instead of the main issues, Europol also has the tendency to put every little issue to the management board. (…) Usually there are like two, maybe three, interesting points on the agenda and the rest is all more administrative. So that's really a shame that we don't really discuss the work that Europol should be doing but we discuss everything around it. (Respondent #16)

This is further corroborated by Peter Storr, the UK representative on the Article 36 Committee, who in his evidence before the House of Lords, stated that the management board of Europol was becoming "a little bit bogged down in the sort

of day-to-day detail which in a police force within this country you would expect the chief officer of police to undertake without reference (…)."[30]

Given that the main output of Europol is of a strategic and operational nature, this casts doubts about the extent to which the management board is successful in holding the agency accountable for its work. The explanation for this state of affairs could lie in the composite nature of the board, the variety of interests represented and the difficulty of reaching any type of consensus on more strategic and thus, more politically sensitive issues. In the words of another respondent,

> Maybe due to the composition, maybe due to the fact that looking for unanimity in a group of 27 is nearly impossible, you see that the management board tends to put more effort and time in legal text, discussing commas, points and words; they do the work of the legal advisors preparing the text over and over again, spending too much time on this kind of issues whereas the bigger strategic decision-making processes, there they tend not to be able to make decisions (…) so the bigger issues they are very difficult to discuss. (Respondent #17)

As a result of these dynamics, the director of Europol seems to be in the peculiar situation of, on the one hand, being intensely monitored and, on the other, having a great deal of discretion on some aspects. Reportedly, minute administrative issues are presented and discussed by the board, largely nullifying the autonomy of the director on these aspects: "we even have a list of how many people, at which level work in every unit. Officially, the director can't decide to move someone from one unit to the other because then it wouldn't conform to the list anymore" (Respondent #16). At the same time, however, in terms of the core business of Europol, the board's oversight seems to be falling short of expectations. Under these conditions, it becomes very difficult for the management board to assess the actual performance of the director and the extent to which he is complying with his obligations. In the words of a management board respondent, "since we don't really discuss things like the AWFs because we mainly discuss administrative things, we know that side of Europol is usually in order. (...) but it's difficult to judge how well the director is doing when it comes to working on AWFs or so on; whether he makes the organisation focus on the right things" (Respondent #16).

The strategy deficit in the case of Europol was perceived to be so significant that remedial measures were undertaken. The new Council Decision that is to replace

30 House of Lords (2008b), European Union Committee, 'Europol: co-ordinating the fight against serious and organised crime', 29th Report of Session 2007-08, Report with Evidence, published 12 November 2008, p. 42.

the Europol Convention now specifically mentions that the board is "to adopt a strategy for Europol"[31] and that it is the responsibility of the chairman of the board to ensure "a specific focus on strategic issues"[32] on the part of the board.

This point was also mentioned by respondents at other agencies. At EASA, interviewees also felt that the management board meetings left much to be desired and that the discussions failed to touch upon some of the core issues. As one management board respondent reported: "the meetings weren't very well prepared, the papers tended to be very long and very process driven, there wasn't really meaningful discussion of the key issues the board should be discussing. It was getting involved sometimes in even drafting exercises which should be done outside". (Respondent #32).

This was a by-product of the constellation of interests represented on the board, as well as of the size of the board. An attempt was made to remedy this situation through the creation of a sub-committee of the board, composed of a small group of half a dozen agency and national authority representatives. It was generally felt that this informal body went a long way toward improving board meetings by allowing for better meetings and more focused discussions on the core issues.[33] Nevertheless, in the opinion of the agency, the meetings of the board still continue to fall short on the strategic side. Agency respondents felt that "strategic discussions" were, for the most part, lacking and that, as one of the directors put it, even when such discussions did occur they were "not very detailed and it's certainly a little bit frustrating" (Respondent #39). This was echoed by another director, who mentioned, "I would expect more strategic discussion and long term view" on the part of the board (Respondent #45).

This problem is not restricted to the agencies sampled. The 2003 meta-evaluation acknowledges that "the efficiency and effectiveness of the Boards' activities have sometimes suffered not only from their size, but also from the fact that insufficient time was devoted to discussing issues of real strategic importance."[34] For instance, the evaluator of CEDEFOP found that "too much time is spent on discussing administrative details" by the board, while the ETF report pointed out that the board "rarely

31 Article 37(9)(a) of Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.05.2009, p. 37.

32 Ibid. Article 37(3).

33 Efforts to formalise the body were reportedly strongly opposed by the management board, as numerous delegations felt that they would be excluded.

34 Commission of the European Communities (2003), Budget Directorate General, 'Meta-Evaluation on the Community Agency System', p. 53, <http://ec.europa.eu/budget/library/documents/evaluation/eval_review/meta_eval_agencies_en.pdf>.

changes the content of work programmes, and has not really been involved in strategic management of the Foundation." Similarly, in the case of EEA, it was observed that its management board "does not always provide the strategic guidance required by the Agency (…) or take the difficult decisions relating to priorities" while the EMCDDA board was found to be "ineffective in achieving its key objectives: Its agenda is poorly planned (…) and the meetings do not allow for real strategic discussions." Hence this would appear to be an issue of wide-spread and general relevance.

This ties in with our earlier observations regarding board recruitment, where we established that board composition tends not to be tailored to the needs of the agency and board members not to be equipped for the tasks they are expected to fulfil. In this connection, studies at the national level observe that "the selection of board members for their management expertise and experience contributed to the board's strategic contribution and its capacity to influence strategic decisions."[35] It is not surprising that the boards of agencies fall short on this aspect given that expertise does not feature among the criteria for board selection and the dominant consideration remains representation. It also emphasizes another tension in the role of the boards, between what has been labelled as the *conformance versus the performance* roles.[36] In the former role, the board is oriented primarily towards ensuring that the "organisation acts in the interest of its 'owners' and to be a careful steward of their resources."[37] The *performance role* of the board, on the other hand, is geared towards organisational performance and "adding value to the organisation's strategy."[38] Given the representational character of agency boards, it is not surprising that the balance has shifted in favour of the former. However, supervising performance and strategy is to some extent an intrinsic part of the task of all boards, even those focused on conformance. After all, "owners" may be expected to have a vested interest in ensuring not only that that their own preferences are represented but also that the body in question performs well. In this connection, the importance of finding a balance between both roles has been emphasized: "board legitimacy is a product of both board effectiveness and democratic accountability. (…) a board that fails on either of these fronts is likely to be perceived as lacking legitimacy."[39]

35 C. Edwards and C. Cornforth (2003), 'What influences the strategic contribution of boards?' in C. Cornforth (ed), *The Governance of Public and Non-Profit Organisations. What do boards do?*, Routledge Studies, 77-96, p. 91.

36 C. Cornforth (2003), p. 13.

37 Ibid. p. 13.

38 Ibid.

39 C. Cornforth (2003), 'Conclusion: Contextualising and managing the paradoxes of governance' in C. Cornforth (ed), *The Governance of Public and Non-Profit Organisations. What do boards do?*, Routledge Studies, 237-253, p. 246.

Double Hats? An Emphasis on National Interest

The second aspect (i.e., national interest versus agency performance) also proved to be an issue at some agencies. For example, at EASA respondents felt that the board was more preoccupied with issues affecting national interests while slow to react to issues pertaining to the agency's performance.

> So when you really want to do something it's quite a lot of work and I think many countries do not want to spend that time and effort. So we see a limited number of countries who look at the issue. And most of them, they appear in the meeting but just sit back. They only look if there is something clearly damaging for them. (Respondent #42, #43)

This was also an issue at OHIM, where, reportedly, aspects pertaining to the agency's performance did not give rise to much board interest. The board is composed of the heads of the parallel national patent and trademarks offices, which are in direct competition with OHIM as the European Trademarks Office. So, on the one hand, board members are the heads of the corresponding national agencies, while on the other hand they are heading and steering the European agency, which is in direct competition with their national offices. This has translated into a serious *accountability and governance problem.*

On the one hand, board delegations reportedly show little concern for the performance of the European agency. As observed by one board representative, "I personally appreciated very much what Mr. de Boer[40] has done, I support him as much as I can but there are people who have shown so far a limited interest. They think it is interesting that he has raised efficiency but if he had not then that could go by" (Respondent #19). The same situation is also reported by the president, who feels that the performance of the agency is of little to no interest to board members. In his own words,

> The agenda of the board would be that in a meeting of a day and half we would spend perhaps one hour at most on what happens in the Office: performance, developments, plans and the rest is about themselves. I remember one delegate saying, at

40 The President of OHIM.

> the beginning of one meeting as I was about to set out in my half an hour reporting of what happened in the last months, 'can we not speed this?'

On the other hand, and possibly even more worrying, this has reportedly translated into open competition between the two levels and wide-spread conflicts of interests. Keen to protect their national offices, board members not only do not take an interest in the performance of the European office, but according to the president, effectively seek to halt it. In his own words,

> There is a raging battle; very unpleasant, really very unpleasant, a war. (...) Ever since I took over I had a war with these guys, which more or less can be labelled as a competition war. They think that the better I do with my trademarks, the faster I deal with my procedures, the cheaper I get, the better the reputation and the quality of our work gets, the more electronic and modern our communication with them, the better therefore I do my job, the bigger I may be a threat to the national thing because it might just lead to the situation that people find it more convenient to go to Alicante.[41] So there is an inbuilt conflict in the minds of these people and they use that.

And yet again, "when they come to Alicante, they talk about the 'worries of their offices.' They don't say it in that way but they try to stop development from our side. That's what it is. And that is a very strange role for an administrator: they don't want us to get better." Granted, a degree of tension is to be expected. Given the multi-level nature of EU governance, struggles for competing, legitimate interests between the EU level and the national level are to some extent part and parcel of the system. However, the situation described above is extreme. In this case, the watchmen whose main job description is that of steering, overseeing and monitoring the good performance of the European agency simultaneously have, by virtue of their double-hattedness, a vested interest running contrary to their core tasks at the European level. This raises serious doubts as to whether they can actually fulfil their role. Furthermore, there is little hope of remedying or improving the situation. None of the EU institutions have voting rights on the board, which could help, at least partially, to balance out the push for national interest to the detriment of the performance of the European body.

41 Alicante is the seat of OHIM.

5.3.4 Participation in Discussions: An Occasional Monologue

Another aspect that seems to impact negatively on the level of discussions at some agencies is the fact that a large number of delegations do not engage in discussion. It was reported that there are delegations that systematically abstain from taking part in board debates, posing questions or making comments. In the case of EASA, for example, one of the directors observed, "there is a big number of countries who are most of the time quiet." A similar statement was made by a management board representative, who estimated that "there are at least half the people to be honest, who virtually say nothing, which is slightly strange" (Respondent #32). Or in the same vein, "although attendance is good, the number of people who play an active role in the meeting is relatively small" (Respondent #32). The respondents could name specific member state representatives, who, in their experience, took active part in the discussions (Respondent #5, #32).

A similar situation appears to be the case at EMEA. A member of the board there observed:

> There's a substantial part of the board that doesn't speak during the meetings. Mostly there are some people that you are absolutely sure that they will say something. I can give you five or six names that will speak up during the meeting next Thursday, maybe even more, but I can also tell you about ten people that I am dead sure that they won't speak up. (Respondent #20)

This appears to have been quite problematic for EMEA given that actual remedial measures were instituted in an attempt to tackle the issue. As the director explained,

> I have my board; some of them [members of the board] are frustrated also. And for the moment, we have put together a little working group in the board in order to look at the rules and responsibility of the board and how the board could participate in a more active way. (...) It's a lot of work for individuals if they should try to engage themselves you know, to participate in the budget process of the EMEA then you need to really be here you know. You need to have put resources and so on.

Similar concerns were voiced with regard to Europol. The director of Europol even took it upon himself to approach some of the "silent" member states to discover the reasons for their lack of participation. Reportedly, among the reasons given was the fact that they were representatives from new member states or small member states. As observed by the director, however, this "is not the case: some of them

are not new, some of them are not small. And even if you are new and even if you are small, if you disagree you have to say so; this is the principle: one vote."

It is hard to pinpoint the exact reasons for the lack of involvement and participation; these could range from a lack of interest in the workings of the agency or lack of preparation, as discussed above, to language problems. In fact, respondents gave all three reasons as possible explanations for some of the delegations' non -engagement in debates. In the case of EASA, for example, it was observed that the active participants generally come from countries with a strong manufacturing and aviation industry and as such, with a big stake in the workings of the agency.

The case for the board's lack of interest appears to be quite strong. It is highly questionable as to whether board members are socialised into the ways of the institution, given that they meet only few times a year and in very large formats. With the exception of Eurojust, where the members of the management board (i.e., the college) are virtually the drivers of the operational work and are involved in the daily work of the organisation, the members of the management board of all the other agencies are employed full time at national agencies, ministries etc. As such, it is doubtful whether they come to adopt the agency as "their own." Moreover, as the members of the management board of agencies such as EMEA, OHIM and EASA generally come from, or are heads of, corresponding national agencies, strong conflicts of interests arise at times in the boards. (Respondent #32, #38, #39) This is particularly the case when the discussion turns to the fees that the European agency is to pay to the national agencies for their services (i.e., EASA, EMEA) or the amount the European agency can charge so as not to jeopardize the volume of work of the national agencies in the event of the parallel existence of both systems (i.e., OHIM). This type of issue is felt to arouse the interest of the boards, whereas other aspects, such as those pertaining to the agencies' performance or efficiency fail to hold the interest of the boards.

In both the case of EMEA and EASA, the lack of time and resources of the participants were quoted as strong reasons for the passivity of board delegations. Simply not enough time, resources and staff are expended on these issues at the national level. In this connection, a management board respondent from EASA observed,

> Most members of the management board have an agenda of being this day here, next day there, the following week somewhere else; they have a lot of meetings. They work till 8 o'clock in the evening, sometimes even later. They hardly have the time to think of what is going on. They hardly have the time and the skills to organise their organisation in such a way to say: 'it is our duty because we have the powers of the management board, we have really to look at the working program,

> we have to look at what is right and good for the agency.' They hardly have the time to do it. Because it would need investment of the better people in the organisation to look after this. (…) So what I see is that there is a very poor investment in the participation in the management board. (Respondent #43)

Irrespective of the reasons behind the lack of involvement and participation of delegations, this in itself has repercussions on several levels. On the one hand, it impacts negatively on the quality of discussions, as contributions are made by only a handful of delegations. At the same time, it also changes the balance of power in the board, with the more active member states or the Commission being able to exert a stronger influence as a result. Instances of increased influence of specific member states and instances of stronger Commission influence over the board decision-making have both been reported in the context of European agencies.[42] In other words "often the representatives of only a few countries call the shots. Even then, Management Boards meet only several times a year and, consequently, lack the detailed information to control the agencies' activities. This provides agencies with the opportunity to enhance their autonomy, but it has also given the Commission, which is generally better informed than member state representatives, the chance to influence Board decision-making at will."[43]

The Commission has a "natural advantage" given its power of budget proposal (which on occasion it has not hesitated to use as power leverage[44]) and by virtue of being generally better informed than member states representatives and having a strong knowledge of the EU legal system and its intricacies etc. This has translated on occasion in overbearing influence on the part of the Commission in agency boards on aspects of priority-setting, work programme and reportedly, even board composition.[45]

Attempts by the European Commission to wield greater influence vis-à-vis agencies are well-documented in various evaluation reports. For instance, members of the management board at CEDEFOP have expressed fears that the Commission was attempting to "turn CEDEFOP into a mere technical support unit instead of an

42 M. Busuioc (2009), 'Accountability, Control and Independence: The Case of European Agencies', *European Law Journal, 15*(5), 599-615; M. Groenleer (2008), 'Building autonomous European Union agencies? Identity, legitimacy and leadership in comparative perspective', *Paper presented at the 38th UACES Annual Conference*, Edinburgh, 1-3 September 2008.

43 M. Groenleer (2008), p. 18.

44 M. Busuioc (2009).

45 M. Groenleer (2009), p. 194; Observation with regard to EFSA's board.

independent scientific institution serving all interests."[46] Similarly, board members of EUROFOUND expressed apprehension about the fact that they did not want "to see the Foundation become a sub-office of the Commission."[47] Also, attempts at exerting control over the agency by the Commission were observed in the case of EEA. In this connection, the EEA external evaluation report reads "there is ample evidence, both documentary and in our various discussions with those involved, that there have been considerable tensions in the past in the relationship between the EEA and DG Environment. (…) There have been instances in the past where DG Environment (then DG XI) has raised the prospect of EEA budget reductions, for example in June 2000 to try to ensure that the Topic Centres would focus principally on data collection (rather than prospective analysis, assessments etc). DG XI also insisted that the section on nuclear energy in the draft EU 98 report should be re-written. Interventions such as these clearly illustrate that the EEA is not wholly independent in practice, and has been susceptible to pressure from the Commission."[48]

Interventions of this kind raise questions about the level of some agencies' autonomy in practice, and point at the existence of levels of *ongoing control*, as described in Chapter 3, i.e., decreasing the mandated discretion of the agent through ongoing interventions post-delegation. Furthermore, this highlights the need for accountability of those exercising influence and control over the agency outside the mandate levels.[49]

5.4 Consequences: A Damocles' Sword

In terms of sanctioning, agencies' basic regulations provide for only one direct formal sanction: the dismissal of the director. The rules differ on the final authority to exercise the ultimate sanction vis-à-vis the director. The table below shows how this is provided for in the five agencies under review.

46 Commission of the European Communities (2003), Budget Directorate General, 'Meta-Evaluation on the Community Agency System', p. 44, <http://ec.europa.eu/budget/library/documents/evaluation/eval_review/meta_eval_agencies_en.pdf>.

47 Ibid.

48 Institute for European Environmental Policy and European Institute for Public Administration (2003), *Evaluation of the European Environment Agency,* An IEEP/EIPA Study, A Final Report to DG Environment, Part A: Final Report, p. 61, <http://ec.europa.eu/environment/pubs/pdf/eea_a_en.pdf>.

49 For a more detailed discussion on this see M. Busuioc (2009).

Indirectly, however, the board does have other means of sanctioning, as key aspects to agency functioning (e.g. work program, budget) need to be approved by the board. Withholding such approval offers additional possibilities for sanctioning to the board.

Table 5.1 Management boards' formal sanctioning powers

EMEA	The management board may dismiss the director based on a proposal from the Commission.
EASA	The management board can dismiss the director on a proposal from the Commission.
OHIM	The president can be dismissed by the Council acting on a proposal from the administrative board.
Eurojust	The administrative director may be removed from office by the college by a two-thirds majority.
Europol	The director can be dismissed by a decision of the Council after obtaining the opinion of the management board.

Despite the fact that a certain level of dissatisfaction with the work of the director was reported in some cases, the ultimate sanction, i.e., dismissal has, to date, never been applied at any of the five agencies studied. A strong reluctance to resort to this sanction was voiced by all the management board respondents. Similarly, directors also observed that dismissal was not a likely sanction to be employed by the board. As one director put it, "it is like the nuclear bomb you know…You don't want to use it because if you do, it destroys everything" (Respondent #53). Several respondents felt that incompetence or inefficiency alone would not result in removal, but that this ultimate sanction would be applied only in cases of criminal activities and fraud.

> For a director on a five year appointment to be sacked it would be a big step. Obviously if someone did something illegal or financially corrupt they would be removed straight away clearly but if it's just incompetence or inefficiency, he's not likely… They are on a limited term so in the end they just wouldn't be renewed. (Respondent #32)

Similarly, in the words of a respondent from a different agency, "it is very difficult in a board representing 27 countries to have somebody burned down. Then this person should either be totally nuts or fraudulous; but incompetent, I don't know if you could do anything about that" (Respondent #20).

These findings are in line with conclusions at the national level, where a low level of formal sanctioning has been documented.[50] For example, the study by Thatcher on the use of formal controls by elected politicians vis-à-vis independent regulatory agencies (IRAs) found that in a significant sample of IRAs from Britain, France, Germany and Italy, not a single IRA member had been formally dismissed.[51] Two possible interpretations were put forward for this state of affairs: 1. that principals did not use formal sanctions because alternative methods were effective and 2. that the agency losses were outweighed by the costs of using controls. With regard to the latter, the principal would not automatically apply sanctions in cases of misbehaviour of the agent but, would instead first assess the benefits and the costs of applying controls.[52] Both interpretations put forward by Thatcher are likely in the case of European agencies and are supported by a number of examples cited by respondents.

In support of the first interpretation, in the case of two European agencies other ad hoc, less disruptive strategies short of dismissal were reportedly employed in an attempt to address the situation or signal dissatisfaction. In one case, where one of the directors was underperforming, the executive director took internal managerial action and reorganised the agency in such a way as to "circumscribe the problem." A management board representative described the situation as follows:

> One of the concerns we had, which we generally shared, was that one of the directors was doing part of his job fine but there were other parts of the job which he should have been doing which he wasn't doing, which required skills he didn't really have. And the way it was resolved was for the executive director to change the organisation of the agency. To move work from one place to another.

Moreover, issues pertaining to underperformance and possible remedial actions would be reportedly addressed informally, outside the formal meetings of the board rather than through formal channels.

> So again, these things are done in the corridors. If we felt, as we have done that a particular director was not operating in a way he should have, I suppose I would first make our views known and ask what the views were of first of all, the chairman

50 M. Thatcher (2005), 'The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe', *Governance: An International Journal of Policy, Administration, and Institutions, 18*(3), 347-373, p. 357; M. Thatcher (2002), 'Regulation after delegation: independent regulatory agencies in Europe', *Journal of European Public Policy, 9*(6), 954-972, p. 960.

51 M. Thatcher (2005), p. 357.

52 J. D. Huber and C. R. Shipan (2000), 'The Costs of Control: Legislators, Agencies and Transaction Costs', *Legislative Studies Quarterly*, *25*(1), 25-52; M. Thatcher (2005), p. 350.

> of the board would be a key person, the Commission representative would be a key person and then we would perhaps go to one or two others, big countries; probably not. Probably initially we'd keep it with the chairman, the vice-chairman and the Commission. And then speak to the executive director. That would be the sort of way it would be handled.

Furthermore, in cases where the management board lacked the power to sanction the director directly, the management board resorted to alternative means to ensure compliance, i.e., by threatening to withhold approval of basic agency documents, rather than following the official channel via the Council. This was reported in the case of Europol, where a management board representative recounted "we told him [the executive director] 'if you do not present a strategic analysis before the draft work program we will not adopt a work program,' which means he cannot function" (Respondent #17).

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

Another aspect, which also seems to dampen the motivation of the forum to resort to such a measure is the negative reflection this would cast on the performance of the board itself. In other words: "if you appoint someone for a five year period, apart from anything else you as a board you've appointed them, haven't you? So then sacking them after three years is in a sense an admission of failure of the board as well as of the person, isn't it?" (Respondent #32) Again, this is a familiar tension from the national level concerning the role of boards: *involvement versus objectivity.* On the one hand, a level of involvement is needed for boards to develop an overview and understanding of the organisation. On the other hand, as boards become more involved in the organisation, this can impact negatively on their objectivity. In this connection it has been observed that, "this is a very important tension, because on

the one hand, it can be argued that without such involvement, non-executives would not gather the necessary knowledge and information that they need in order to be able to understand what managers are really doing, but on the other hand, it can lead to identification with certain roles or functions which can compromise objectivity."[53]All respondents regarded non-renewal as the most likely alternative to sanctioning. Although this solves the problem in the long term, it is questionable whether it is an optimal solution for the functioning of the agency in the short term.

Finally, one other reason that could also serve to explain the low rate of formal sanctioning in the case of European agencies is the size and composition of the board. Given the variety of interests represented on the board, it can be extremely difficult to reach concerted agreement, particularly on such a sensitive issue. Thus, the sheer inability of the board to reach agreement and to become mobilized into action can play a part in the board's failure to take formal action vis-à-vis the director.

To this extent, formal sanctioning is a sort of Damocles' sword, hanging over the directors' heads, but almost never used. This can be problematic. After all, "the more decision makers feel that they act in the shadow of possible sanctions, the more it will be rational for them to endogenise the preferences of their 'principal.'"[54] Accountability relies on a "logic of 'consequentiality': rulers behave in a responsive manner because they anticipate [and, one could add, fear] the costs of unresponsive behaviour."[55] However, in this case the risk of formal sanctions being applied in the form of dismissal is very low, with both sets of respondents -management board and directors–being aware that this almost never happens. This impacts negatively on the credibility of sanctions.

5.5 Managerial Accountability: In Place but Not up to Speed

From the analysis provided above, the first observation to be made is that the arrangement qualifies as a full-fledged accountability relationship as defined in Chapter 3. This arrangement displays the three phases of an accountability relation-

53 L. Asburner (2003), 'The Impact of new governance structures in the NHS' in C. Cornforth (ed), *The Governance of Public and Non-Profit Organisations. What do boards do?*, Routledge Studies, 207-220, p. 215.

54 Y. Papadopolous (2007), 'Problems of Democratic Accountability in Network and Multilevel Governance', *European Law Journal*, *13*(4), p. 472.

55 Ibid.

ship: the information phase, the debating phase and finally, the possibility for consequences or the sanctioning phase.

Although in some cases the ultimate weapon, the power to dismiss the director, lies with another forum (i.e., the Council in the case of Europol) or is dependent on the initiative of a third institution (i.e., the Commission in the case of EMEA), this in itself is not problematic from an accountability perspective. In fact, consequences are not necessarily imposed by the forum itself but can also be exercised by another forum.[56] Moreover, as observed in the case of Europol, even a board that formally lacks the authority to dismiss the director always has sufficient leverage over the director, as it can resort to threats to delay or stop the agency's work by refusing to adopt the work program or the budget. Cessation of agency activity can be a powerful threat and as such, a strong incentive to gain compliance.

This, however, is a purely descriptive assessment and only serves to qualify this relationship as an accountability process. As observed in Chapter 3 of this book, ticking off procedural steps in the accountability process (i.e., informing, debate and possibility for consequences) is not sufficient to ensure that while undertaken, the accountability process is not just a mere formality, but is actually effective in its operation. In this connection, several observations can be made which raise concerns about the proper operation of this procedure.

First of all, there is a lack of clarity as to what the arrangement entails. In many agencies, the accountability of the director has evolved as a matter of practice and different, non-formalised practices have developed across agencies. The process is opaque and nearly impossible to keep track of from the outside short of engaging in empirical research on the matter. Inside the agency, the issue can be equally problematic, giving rise to confusion over the exact obligations due by the actor and vis-à-vis which forum. As we have seen, some agencies have taken steps to clarify these obligations internally (i.e., Eurojust, Europol) but this has at times resulted in serious internal tensions (i.e., Europol), which can negatively affect not only the operation of this accountability process, but also that of the agency.

Secondly, some key accountability documents such as annual activity reports and evaluation reports are not always adequate. Particularly, in some cases, as evidenced by the Court of Auditors report, no clear objectives and guidelines were adopted, and follow up action and systematic evaluation of findings were often found lacking.

56 M. Bovens (2007), 'Analyzing and assessing accountability: a conceptual framework', *European Law Journal*, *13*(4), 447-468, p. 452.

This points at a deficiency from a learning perspective on accountability, as "simply generating knowledge is not enough; learning also involves the use of knowledge to influence organisational practices. Evaluations such as impact assessments can thus be said to contribute to learning only when they lead to behavioural change in an organisation. Simply identifying shortfalls in organisational performance and assuming that the information will be used by the organisation to improve performance is insufficient for ensuring actual change."[57]

Thirdly, in terms of the actual operation of this arrangement as a whole, recurring patterns of failures can be identified, which seriously impinge upon the effectiveness of the mechanism. Whereas all of these failures were not present in the case of all the five agencies studied, they are consistently reported across all agencies. Accountability failures have been reported at all three stages of the accountability process, but are most frequently seen during the last two stages. Whereas in the first stage, failures pertain both to the actor and to the forum, in the debating and sanctioning phases the accountability failures can be imputed exclusively to the forum.

Due to either generic shortcomings (e.g. size and composition of the board) or other reasons such as lack of time, resources or simply lack of interest and involvement, a national mindset which is not aligned with their European roles, management board delegations often display problems in adequately holding directors to account. In this case, the already present asymmetries of information inherent in any delegation process are only extrapolated through failures of a large number of delegations to the boards to prepare for meetings and participate in discussions. Moreover, an overwhelming number of board members lack knowledge and expertise in financial, budgetary and managerial issues, which represent a significant part of their monitoring and steering responsibilities. Furthermore, board members tend to be primordially preoccupied with aspects of the agencies' functioning directly impacting on the national interest, but less so with the overall performance of the agency or the strategic planning of the future and development of the agency. In this connection, as we have seen, directors and management board participants recurrently reported high interest among board colleagues in issues pertaining to the national interest, with member state representatives squabbling over issues affecting the national interest or the national industry, while losing interest in issues pertaining to the overall performance of the agency, long term strategy etc.

57 A. Ebrahim (2005), 'Accountability Myopia: Losing Sight of Organisational Learning', *Non-Profit and Voluntary Sector Quarterly*, *34*(1), 56-87, p. 67.

Furthermore, in cases of dissatisfaction with the performance of agency heads, board members are very reluctant to resort to formal sanctions as this can cast a negative reflection on the performance of the boards themselves. Consequently, formal sanctions run the risk of becoming an ineffective and non-credible means of exerting compliance.

However, these pervasive failures of the boards are not necessarily strictly due to individual failures but are more likely attributable to generic or systemic oversights. For example, the lack of preparation of board members might largely be the by-product of the failure at the national level to prioritize European agencies and to provide board members with the needed training, administrative support and resources to enable them to carry out their tasks in an adequate way. Very often, insufficient time and resources are expended on these matters at the national level, "because those are not the problems for which the member states, people in the ministry and the ministers are accountable in the Parliament" (Respondent #43). For most board members, participation on the board is a part-time job, which is performed sporadically, a few times a year. The members remain, at the same time, fully employed within the national ministry or parallel national level agencies. As such, they are occasional players on the European level with a strong national baggage and as a result their "national outlook dominates their encounters" and they "come in with a focus on their national interests."[58] As we saw in the case of OHIM, this is even further exacerbated if the national offices and the European agency are in direct competition with each other on the market.

Moreover, the size and composition of the boards as provided for in the agencies' basic acts are not conducive to efficient, in-depth discussions. Additionally, the lack of formal sanctioning might be rooted in the set up of the agency structure where a body such as the board, by virtue of its hybrid nature, is responsible for partially "monitoring itself."

Next to the EU level specific tensions, the accountability problems described largely reproduce tensions encountered in boards at the national level as well. Tensions concerning *representative boards versus expert or professional boards*, *conformance versus performance* roles of boards and *involvement versus objective detachment* are all common dilemmas that are recurrently encountered in boards at national level. At the same time, in the case of European agencies, the picture is further complicated by EU level specific tensions. Thus, we observe EU specific tensions pertaining

58 K. Geuijen, P.'t Hart, S. Princen, K. Yesilkagit (2008), *The New Eurocrats: National Civil Servants in EU Policy-Making*, Amsterdam: Amsterdam University Press, p. 86.

to clashes of competing legitimate interests between the two levels (i.e., the EU and the national level) or between the top down approach and tensions for acceptance of the political will at the lower levels (i.e., Europol).

Be that as it may, the result is that many of these account forums can and do become weak links in the accountability chain. This is a very interesting insight for accountability theory, given that until now, the theory has placed the actor in the limelight. It has been concerned mainly with the manner in which the *actor* renders account for his or her behaviour, or in other words whether and how satisfactorily the actor complies with the obligation to render account. The above makes it clear that the manner in which the forum complies with its responsibility of holding the actor to account is an equally valid issue. The interview material reveals that this is a realistic concern and demonstrates the relevance of *shifting the focus of accountability* to the forum as well and questioning and investigating their role and input in the process.

CHAPTER 6

Political Accountability: A Patchy Picture

The present chapter delves into agencies' accountability vis-à-vis the European Parliament and the Council as the ultimate loci of political accountability. The two institutions fulfil largely parallel roles as high-level political watchmen of agencies, with the European Parliament having a dominant role in the context of first pillar agencies and the Council vis-à-vis second and third pillar ones. This division is not watertight and there are crosscutting areas, which will be pointed out below.

6.1 Accountability vis-à-vis the European Parliament: Piecing Together the Puzzle

The relationship between agencies and the European Parliament has been largely neglected[1] and there is a deficit of studies systematically investigating the role and influence of the European Parliament in holding agencies accountable. This is surprising given that an increase in the powers of the European Parliament has been repeatedly proposed as a means of improving agency accountability. Moreover, it is a highly relevant issue in the broader context of the increase of executive power, "the decline of parliaments" and the ability of parliaments to oversee the exercise of executive power.[2] As European agencies are executive creations of an ever-increasing power and importance at the EU level, the extent to which the European Parliament is able to oversee their actions becomes crucial from a democratic perspective as well as from a constitutional perspective, as a check on the exercise of executive power. This has been recognised by the European Parliament itself,

1 T. Bach and J. Fleischer (2008), 'Watchdogs or pussy cats? How parliaments hold agencies accountable at EU and national level', *Paper presented at the 2nd Biennial Conference of the ECPR Standing Group on Regulation and Governance*, Utrecht, 5-7 June 2008, p. 1.

2 S. Hix (2000), 'Parliamentary oversight of executive power: what role for the European parliament in comitology?' in T. Christiansen and E. Kirchner (eds.) *Europe in change: Committee governance in the European Union,* Manchester: Manchester University Press, 62-78, pp. 62-63.

which has observed in this connection that "the establishment of parliamentary control over the structure and work of the regulatory agencies is consistent with the classic democratic principle requiring political responsibility of anybody wielding any executive power. The possibility of the European Parliament assigning political responsibility to the agencies concerned touches on a core principle of representative democracy, which consists in examining the legality and expediency of the choices made by the executive power."[3]

The accountability powers of the European Parliament vis-à-vis agencies pertain primarily to two dimensions: performance- related aspects and a budgetary/financial dimension. With regard to the former, the European Parliament has a few instruments at its disposal (e.g. annual report, hearings) that allow it to scrutinise aspects relating to the performance of a particular agency and the execution of its tasks. The locus of this type of monitoring tends to be primarily within specialised, technical committees. Specific agencies are linked to a specialised committee in their area of expertise. In the case of our sampled agencies, these are the Committee on Transport and Tourism (TRAN) for EASA, the Committee on Environment, Public Health and Food Safety (ENVI) for EMEA, the Committee on Legal Affairs (JURI) for OHIM and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) for Europol and Eurojust.[4] Secondly, the European Parliament, with the close involvement of its two budgetary committees: the Committee on Budgetary Control and the Committee on Budgets is the authority responsible for the budget discharge of agencies funded from the EU budget. In this context, the EP is at the centre of a nexus of forums, including the Commission's internal auditor (IAS) and the European Court of Auditors that are involved in the financial accountability of agencies.

The formal accountability obligations of various agencies vis-à-vis the European Parliament vary. Thus, agencies belonging to the first pillar, the Community pillar, where the EP has a strong role as the joint legislative and budgetary authority, have a broader array of accountability obligations vis-à-vis the Parliament.[5] The European Parliament has been able to progressively expand its powers vis-à-vis first pillar agencies particularly in the third wave of agency creation. This is most likely a "by-

3 European Parliament (2008), Committee on Constitutional Affairs, 'Report on a strategy for the future settlement of the institutional aspects of Regulatory Agencies', 2008/2103(INI), Rapporteur Georgios Papastamkos and Rapporteur for opinion, Jutta Haug, p. 13.

4 Ibid. pp.15-17.

5 With the exception of OHIM, CPVO and the Translation Centre for the Bodies of the European Union, which are entirely self-financed, Community agencies are fully or at least partially financed from the EU budget and as such the EP acts as the discharge authority.

product" of the growing legislative influence of the European Parliament.[6] Prior to this period, as discussed in Chapter 2, Community agencies were originally set up on the basis of Article 308 of the EC Treaty.[7] This particular choice of legal basis entailed that the respective agencies were established in accordance with the consultation procedure, with only a limited involvement of the European Parliament. As agencies started being set up on the basis of the co-decision procedure, the European Parliament had the possibility to play a significant role in the contract design of agencies. The Parliament used its powers to insert new procedures of parliamentary accountability in the basic regulations of agencies thus, increasing parliamentary power vis-à-vis agencies. Consequently, hearings of the director prior to appointment and/or regular hearings on the performance of his/her tasks by the competent committee of the European Parliament were provided for in the case of more recent agencies (e.g. EASA, ERA, ECHA etc.). This is also the case for previously established agencies whose legal basis has been revised, with the new basic act having been adopted on the basis of co-decision (e.g. EMEA).

In the case of agencies belonging to the second and third, i.e., the more intergovernmental pillars, the European Parliament plays a low key and, at times, almost non-existent role in agency oversight. This is the product of the microscopic powers of the EP in these pillars. The EP was not involved in the institution of the three agencies belonging to the second pillar: the European Institute for Security Studies, the European Defence Agency and the European Union Satellite Centre. Similarly, the European Parliament played virtually no role in the contract design of Europol, to the extent that it was not even consulted during the negotiation and drafting of the Europol Convention.[8] As a result, procedures of parliamentary accountability are largely lacking in the case of all four agencies, and instruments of accountability remain in the hands of intergovernmental actors such as the Council and the management boards, which are composed of member states. Moreover, these bodies are not funded from the EU budget but directly by member states' contributions.

6 M. Groenleer (2006), 'The European Commission and Agencies' in D. Spence (ed), *The European Commission,* London: John Harper Publishing, 156-172, p. 164.

7 With the exception of the European Environment Agency, which was set up pursuant to Article 175 EC.

8 M. den Boer (2002), 'Towards an Accountability Regime for an Emerging European Policing Governance', *Policing and Society, 12*(4), 275-289, p. 283; D. Curtin (2005), 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in D. Geradin, R. Munoz and N. Petit (eds), *Regulation through Agencies in the EU: A New Paradigm of European Governance,* Cheltenham: Edward Elgar, 88-119, p. 100; S. Peers (2005), 'Governance and the Third Pillar: The Accountability of Europol' in D.M. Curtin and R.A. Wessel (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance,* Antwerpen: Intersentia, 253-276.

Consequently, they are not subject to the discharge procedure by the European Parliament. Exceptions to this rule are the European Police College and Eurojust. Although, like Europol, both are third pillar agencies, they have been "communitarised" in terms of their budget. As such the EP has a stronger position as the budgetary authority and implicitly, as the budget discharge authority. Also, the new Europol Council Decision,[9] effective as from 1 January 2010, will considerably improve the status of the EP vis-à-vis Europol. By virtue of this Decision, the Europol budget will likewise be "communitarised", thus elevating the status of the EP to that of budget discharge authority.

This chapter will zoom in on the role of the EP in holding agencies accountable *by means of its specialised committees* without delving into the EP's supervisory role as discharge authority. This dimension of parliamentary oversight will be addressed in the following chapter dealing with financial accountability since the role of the EP is intricately connected to that of the other forums involved in the process and as such cannot be approached separately.

6.1.1 Informing and Debating: De Jure Requirements and De Facto Practices

In terms of informing and reporting obligations, all agencies under study submit reports to the European Parliament in the form of an annual report as well as in some cases, a work programme. The work programme is not an element of accountability per se given its ex ante dimension. It can, however, play a role in ex post accountability since it allows the Parliament to assess ex post the agency's performance, as shown by its annual report, on the basis of the priorities as laid out in the work program.

As provided for in their constituent acts, Europol and Eurojust submit their reports to the Council instead of directly to the Parliament. The Council subsequently forwards these to the Parliament. This clearly illustrates the lack of a direct line of accountability between these agencies and the Parliament. Concerning the annual report of Europol, one point of clarification is in order. Much has been made in the literature of the fact that the Council and the European Parliament received different versions of the annual report, with the EP gaining access to only an "abridged" or "sanitized" version of the report in 2001.[10] The European Parliament no longer

9 Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.05.2009, p. 37.

10 J. D. Occhipinti (2003), *The Politics of EU Police Co-operation: Toward a European FBI?*, Boulder, CO: Lynne Rienner Publishers, p. 138.

receives a "special report" but is now issued the same annual report as the Council (Respondent #17, #28). Originally, the Convention provided only that a "special report" be sent to the European Parliament, but this was changed by Article 28(10), replaced by the Council Act of 27 November 2003. The article reads, "such reports [i.e., work program and annual report] shall be submitted to the Council to take note and endorse. They shall also be forwarded by the Council to the European Parliament for information."[11] This signals a clear improvement in terms of parliamentary accountability, as both the Council and the European Parliament now have access to the same document. Nevertheless, the question remains as to whether this is sufficient. After all, the European Parliament does not have access to the evaluation report of Europol, which is an internal document intended only for the management board and members states. The annual report is a "strictly political document" (Respondent #17), which in the words of one of the respondents "is certainly not a report which gives you a good insight in the real functioning of Europol. Not at all." The evaluation report however, is a "very thick, critical document", which remains internal to the organisation.

There are no legal provisions for a dialogue with the Parliament on the reports. De jure, the EP is not required to respond to the annual report and, in fact, it has reportedly responded to none of the agencies' reports, according to directors. This makes it difficult to assess the informative character of the report, the extent to which it is read and the impact it has. In fact, the EP Committee on Budgets felt that the attention given to the annual report by the specialised committee was poor (Respondent #13), which led in 2007 to its stipulating as one of the conditions for the release of 10% of agency reserves that the "the specialised committees have to give a positive evaluation of the performance of the agency against its work programme."[12] This basically means that the specialised committee "has to write a letter saying 'ok, we looked at the work program and we looked at the performance of the agency and we can say ok, fine, they are doing their job as we want them to'" (Respondent #13). Although this letter of assurance provides no watertight guarantee that the two reports will actually have an impact, it is an attempt to ensure that they are at least reviewed by the specialised committees, although no feedback or comments go back to the agency. This guarantee, however meagre, did not apply to Europol, or any other agency not funded from the EU budget, since the Committee on Budgets has no powers in this case.

11 Article 28(10) of the Europol Convention as replaced by the Council Act of 27 November 2003, OJ C 002, 06.01. 2004, p. 0007.

12 European Parliament (2008), Committee on Budgets, 'Working Document on a Meeting with the Decentralised Agencies on the PDB for 2008', DT\666715EN.doc, Rapporteur: Jutta Haug and Kyosti Virrankoski, 23.5.2007, pp. 5-6.

Agency respondents themselves recognise the relevance of the annual report as an accountability instrument, but are generally reluctant to regard it as a powerful instrument of parliamentary accountability. They regard it as a hybrid between an information instrument of usefulness for the general public and a "political marketing instrument for the agency" (Respondent #39). In the words an agency director,

> We try to be of course as honest as possible and to explain what we have done and to explain what our difficulties were because we had difficulties of course. That's natural and I think it is a good report as such, not hiding anything. We also try to promote a bit the agency, which is natural. But it is a good piece for the accountability of the agency because it's a public report and I think the citizens could go and see what we have done. (Respondent #45)

In addition to the annual reports, the Parliament also has access to the horizontal evaluations of agencies. As we saw in Chapter 5, the Framework Financial Regulation and the constituent acts of some agencies provide that independent evaluation reports are to be undertaken periodically. In September 2003, a meta-evaluation was published by the Commission based on the external evaluations available at the time. A new horizontal evaluation is envisaged to take place this year and the Commission is to submit the results to the European Parliament and the Council. The European Parliament has already urged the Commission to ensure that the results of the evaluation are submitted before the end of the 2009-2010 period.[13] They are to serve as a basis to assess agency performance, revise or, in extreme cases, even end an agency's mandate, and as a source of information for the inter-institutional working group tasked with drafting a common framework for agencies and defining the competences of each EU institution vis-à-vis agencies. Relevant, too, in this respect are the amendments to the Eurojust Decision and the adoption of the new Europol Decision, providing that independent periodic evaluation reports which are to be forwarded to the European Parliament, are to be undertaken for these bodies.[14]

Furthermore, direct interaction between the Parliament and some of the agencies is possible in the form of hearings, as mentioned above. There are three types of parliamentary hearings: (i) hearings before the two budgetary committees; (ii)

13 European Parliament (2008), Committee on Constitutional Affairs, 'Report on a strategy for the future settlement of the institutional aspects of Regulatory Agencies', 2008/2103(INI), Rapporteur Georgios Papastamkos, Rapporteur for Opinion, Jutta Haug.

14 Article 41(a) of Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA, OJ L 138, 04.06.2009, p. 14; Article 37 (11) of Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.05.2009, p. 37.

hearings of the director before appointment; (iii) hearings of the director on the performance of his/her tasks. The first type of hearings take place before the Committee on Budgets and/or the Committee on Budgetary Control and are part of the budgetary cycle. Only agencies funded from the Community budget (i.e., Eurojust and CEPOL) take part in this type of hearing. This will be more closely examined in the next chapter on financial accountability.

The hearings of agency directors prior to their appointment as well as the hearings on their task performance take place before the specialised "parent" committee of the agency. These are more common in the case of agencies set up on the basis of the co-decision procedure. Thus, the EASA basic regulation provides that the successful candidate selected by the management board "may be asked" to make a statement before the competent committee and answer questions.[15] Similarly, according to the basic regulation of EMEA, prior to the formal appointment, the candidate nominated by the board "shall be invited forthwith to make a statement to the European Parliament and to answer any questions put by its Members."[16] These provisions are new and have been inserted as a result of the latest revisions to the basic regulations dating back to 2004 for EMEA and 2008 for EASA. They did not appear in the earlier versions of these regulations. Moreover, in addition to appointment hearings, the EASA basic regulation also provides that the European Parliament "may invite the Executive Director to report on the carrying out of his/her tasks."[17] No similar provisions are contained in the basic regulation of EMEA. The heads of Europol, Eurojust and OHIM, are not required to appear for hearings before the European Parliament. In the case of Europol, the possibility of the director appearing before the EP is left open, but there is no obligation to do so. Thus, it is provided that the Presidency of the Council "may appear before the European Parliament with a view to discuss general questions relating to Europol", and "may be assisted by the director" when doing so.[18] De facto, however, the heads of EASA, EMEA, Eurojust appear for hearings before the relevant technical committees of the European

15 Article 39(1) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79, 19.3. 2008, p. 1.

16 Article 64(1) of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136, 30.4.2004, p. 1.

17 Article 38(2) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ L 79, 19.3. 2008, p. 1.

18 Article 34(2) of the Europol Convention, as substituted by Articles 18 of the Danish Protocol, OJ C 002, 06/01/2004 P. 0003-0012.

Parliament. The director of OHIM is not required to appear for hearings and has de facto not attended any hearings before the JURI Committee. Relevant in this connection is the case of Europol. Much has been made in the literature of the lack of any form of parliamentary accountability of Europol. While this is indeed the case at the formal level, de facto there are regular contacts between MEPs and Europol as well as hearings of the Europol director before the LIBE committee. As clarified by the director, "the Parliament is not foreseen for the time being but the Parliament is nevertheless involved. On various occasions: some parliamentarians are simply interested in Europol so they give me a phone call, they send me letters: 'can you provide me with some information?', they invite me to meetings, they come to visit Europol."

Furthermore, the new Europol Decision formalises these hearings. The Decision provides that the director of Europol, the Chairman of the Board and the Presidency of the Council must appear for hearings before the EP at the latter's request.[19] Table 6.1 below provides an overview of these arrangements, both de facto and de jure, across the five agencies. Based on the overview of de jure provisions and de facto practices, the European Parliament's role vis-à-vis OHIM is more restricted compared to the other sampled agencies; the EP only receives a management report and there are no hearings (either de jure or de facto) before the specialised committee.

The frequency of the hearings depends on invitations received from the specialised committees. However, they generally do not occur on a yearly basis, but approximately every two years. The hearings are divided into two parts: a presentation by the director, which is then followed by questions from the parliamentary committee. The choice of topic for the presentation is generally left to the latitude of the director. As such, the subject of the directors' presentations can deal with a variety of different topics, ranging from, in the words of an MEP, "special issues or special tasks or the outcome of special tasks and the results and the whole working program for the next year" (Respondent #13). For example, the director can choose to give a brief overview of the work of the agency with particular focus on some areas of special relevance for the EP. As recounted by the EMEA director,

> I select a topic for presentation myself and I will bring out highlights where I believe the Parliament has an interest. Because I know where they have an interest, in which area. Obviously when they have decided upon a new legislation, they are interested to see how we have implemented it. Like for example, the legislation on orphan medicinal products, you may have heard about that. That is medicines for rare

19 Article 48 of the Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.05.2009, p. 37.

diseases. And that was a baby of the Parliament; they were pushing for that legislation.

Table 6.1 Accountability obligations before the European Parliament

	EMEA	**EASA**	**OHIM**	**Europol**	**Eurojust**
Reporting	the management board forwards the annual report and the work programme	the management board forwards the annual report and the work programme	the president submits a management report	indirect reporting: the Council *forwards* the annual report and the future activities report to the EP	indirect reporting: the Presidency of the Council *forwards* the activities report to the EP
Hearings	hearings prior to appointment; de jure no other hearings, de facto also annual hearings before the specialised committee	hearings prior to appointment and hearings before the specialised committee	no hearings	de jure no hearings; de facto hearings before the specialised committee	de jure no hearings; de facto hearings before the specialised committee

The President of Eurojust, for instance, uses the opportunity to present the annual report. In the second part of the hearing the members of the specialised committees can ask the director questions. These can touch on a wide variety of issues: "they put questions about the way we do the missions and it is quite useful for us and for them. It could be very specific technical questions on the day to day work of the agency but also how we are established here, what is the support from the [local] government."

All of the agencies sampled comply with their reporting obligations. However, MEPs are not always satisfied with the quality of reporting. Europol is a case in point. Whereas Eurojust, which is assigned to the same specialised committee (i.e., LIBE) is referred to as being "*definitely accountable"* (Respondent #60), the LIBE committee MEPs reportedly adopt a different, more distrustful parliamentary attitude of

is toward Europol. This does not appear to be a reflection on the performance of the body, but rather a general lack of trust in and opposition to the creation of such a body in the first place. In the words of a LIBE MEP, "there is a lack of trust. Why? Because many, many members did not want to give more powers to Europol" (Respondent #60). Another reason put forward by the same respondent for the different parliamentary attitude towards the two bodies was the preceived difference in the scope of their powers, with Eurojust being "a co-ordinating body, whereas Europol can undertake investigations." It could also be a by-product of the low (almost non-existent) profile reserved for the European Parliament in the Europol Convention when the agency was set up. Furthermore, the EP was not involved in highly controversial agreements such the agreement with the US on the transfer of personal data.[20] This has engendered discontent within the EP, with the Parliament repeatedly advising against the approval of the Europol budget, advice which has always been ignored by the Council.[21]

Overcoming Informational Asymmetries: Parliamentary Knowledge and Specialisation

As discussed in previous chapters, the capacity of the account holder to engage the actor in meaningful discussions and to pass judgment is also dependent on the knowledge and expertise of the account holder. Given the small number of respondents that actually appear before the European Parliament,[22] the analysis will necessarily be limited. Nevertheless, some patterns do emerge. The picture that emerges is a mixed one, with some members of the technical committees having knowledge of the agency and others being very poorly informed. According to one of the directors,

> Well you know, it's always the same. Those people are very busy. They don't have in mind our agency every time. And so we have some Members of the EP who are very aware of agencies in general and of our agency of course, specifically but in general of agencies and also those who are much less. And so it is sometimes a bit difficult to have a dialogue with those people. But we have also members of the Parliament who are very aware of our situation. (Respondent #45)

Hence, ambivalence would appear to reign regarding the level of parliamentary knowledge and preparation. In the words of the same respondent, "so they know

20 M. Groenleer (2009), *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development,* Delft: Eburon, p. 300.

21 Ibid.

22 Only agency directors appear before the European Parliament. However, out of the sample of 5 agencies, the OHIM president does not appear for hearings before the "parent committee."

that we are there, sometimes they are not up to date and it's sometimes difficult (…) but at least we have some particular Members of the EP who are well prepared and they are asking questions and they know exactly what we do and what we are" (Respondent #45).

In other words, in terms of overall knowledge about the agency, just as in the case of the management board representatives some members are well informed about the agency and its work, whereas others are poorly informed. It should also be observed that although far from ideal, EASA, EMEA and Eurojust are likely to be among the better practices in terms of parliamentary oversight of agency performance. These agencies are high profile, they possess significant powers and as such, they are likely to benefit from more parliamentary exposure than other agencies. In addition to this, EMEA has been in operation since 1993 and, in the words of its director, "it has had time to establish relations with the EP." The Parliament has two representatives on the board, providing the EP with ample opportunity to familiarise itself with the agency. In terms of EASA, its competences have recently been expanded. As a result, it has come under parliamentary attention and has been the subject of discussions between the EP and the other institutions involved: the Commission and the Council.

Informational deficits could be exacerbated in other cases, particularly for lower profile and less powerful agencies. The Parliament itself seems to acknowledge that the level of information among MEPs is often insufficient. In a recent draft proposal for amending the statute of the European Training Foundation, a provision for the presence of the EP representatives in the board was justified by referring to the low level of information among MEPs: "relations between the decentralized European agencies and the European Parliament are inadequate. MEPs are often very poorly informed of the functions these agencies fulfil and what they actually do."[23]

It was in fact the need to familiarise the committees with their agencies that moved the EP budget rapporteur to make the release of reserves conditional upon a positive endorsement of the agency's annual report by the specialised committees: "because I thought these specialised committees didn't care a lot about their agencies."

In terms of the technical knowledge in the area of expertise of the agency and the ability to ask pertinent questions, respondents found that technical, focused questions

23 European Parliament (2008), Committee on Employment and Social Affairs, 'Draft report on the proposal for a Regulation of the European Parliament and of the Council establishing a European Training Foundation (recast)', 2007/0163(COD), 7.1. 2008, Rapporteur: Bernard Lehideux, p. 6.

are raised when the deputy has expertise in the area. Again, the picture that emerges is mixed. In the words of one agency head,

> I think the questions can be very good and very focused when the deputy has a question that he or she knows well. So I remember two years ago there were a lot of questions about data protection by some deputies who were clearly very enthusiastic about data protection issues. So that was very focused (…) other issues, if it's of interest to the deputy then there will be questions and they will focus on this. But often if it's not of interest, it's not something that is explored in any depth. (Respondent #53)

Similarly, one of the EASA directors remarked upon the high technical expertise of some of the parliamentarians in discussions in the Transport Committee, though admittedly in the area of road transport.

> What I have seen few times, the discussions in the Transport Committee I have been impressed by the expertise some parliamentarians have on very technical issues. Mainly road transport but still … I mean what they discussed there was really technical, not at all political. How to improve safety in cars and roads, they know really amazing things.

All in all, the picture that emerges is a mixed one, with some MEPs displaying a high level of knowledge of the agency and/or expertise while others fall short on both fronts. The lack of knowledge of the agency is quite problematic from an accountability perspective, something which, as we have seen, the EP has become aware and has undertaken measures to redress, by improving the communication between "parent" committees and their agencies.

With regard to the lack of technical expertise in the agency's field of operation, the fact that highly political forums are deficient in such knowledge is not surprising. To a large extent, it is to be expected, given the inherent tension between representation and expertise. Parliaments are political, generalist forums meant to represent a variety of interests and not technocratic, highly expert-based forums. As such, the point of reference is different. In fact, from a parliamentary perspective, an analysis of the EP committee structure, the backgrounds of MEPs and committee assignment reveals that the EP is in fact well specialised when compared to other parliaments. In terms of specialisation in committees, the European Parliament has 20 committees–a similar level of committee specialisation to that of national parlia-

ments such as the House of Commons or the German Parliament.[24] Moreover, studies of EP committee assignment have also found a link between the educational and professional expertise of MEPs and committee assignment.[25] In other words, MEPs with a background in medical science are more likely to be assigned to the Committee on Environment, Public, Health and Food Safety and those who have a background in the sphere of transport and telecommunications to the Committee on Transport and Tourism.[26] Moreover, in the case of Community agencies, each specialised committee has appointed a standing rapporteur on the agencies, who operates in the remit of the respective committee.[27] This arrangement is meant to contribute to increasing the overall committee knowledge of the agency.

Specialisation of committees is likely to bring informational benefits to the various committees and increase their capacity to hold agencies to account. In this connection it has been observed that "the committee system allows MEPs to develop specific areas of specialisation, thereby strengthening the EP's claims to expertise in the relevant areas."[28] It can reduce informational asymmetries and generally, better equip the Parliament to hold agencies to account. That is to say, strong specialised committees "can provide legislators with the information that they need to participate effectively with the executive across a wide range of issues."[29]

Capturing the EP's Attention: Accountability as a Lobbying Exercise

In the previous chapter, it was discussed how the lack of interest on the part of accountholders can obstruct meaningful discussions. By contrast, agency respondents from EASA and EMEA report that members of the relevant technical committees are interested in the agency and its work. In the words of the EMEA executive director, "we always have good relations and they are always interested in what we are doing and they have been happy what we have delivered." Or according to the

24 T. Bach and J. Fleischer (2008), p. 10. The House of Commons has 19 Standing Committees and the German Bundestag has twenty-two Standing Committees.

25 N. Yordanova (2007), 'Rationale behind Committee Assignment in the European Parliament: Distributive, Informational and Partisan Perspectives', *Paper presented to the Conference of the European Consortium for Political Research*, Pisa, 7 September 2007.

26 Ibid.

27 European Parliament (2008), Directorate General Internal Policies of the Union, 'Best Practice in Governance of Agencies–A comparative study in view of identifying best practice for governing agencies carrying out activities on behalf of the European Union', Brussels, 30 January 2008.

28 C. Burns (2006), 'Co-decision and Inter-Committee Conflict in the European Parliament post-Amsterdam', *Government and Opposition*, *41*(2), 230-248, p. 236.

29 M. L. Mezey (1998), 'Executive-legislative relations' in G. T. Kurian (ed.), *World encyclopedia of parliaments and legislatures*, Vol. II. Washington, DC: Congressional Quarterly, 780-786, p. 783.

EASA administrative director, "they [TRAN Committee MEPs] are very active and they know us well and they support us as well."

The present situation as reported in the case of these two agencies appears to be a clear improvement/break with the past and an indication of a shift in attitude, with the EP and some of its relevant committees taking more interest in agencies. At the early stages of the agencification process, the interest and involvement of the European Parliament was virtually non- existent and it was agencies that often initiated contact and virtually lobbied for the attention of the European Parliament. In the words of the first EMEA executive director,

> At the beginning of the EMEA (in 1995), it was difficult to get the attention of the Parliament. In a way, the appointment of two university professors in the board was considered sufficient to represent Parliament's interests. In fact, the EP Committee responsible for Environment and Health did not have regular contacts with their own representatives (no funds available initially for them to meet the Committee). I had to ask to be heard and invited MEPs to visit the EMEA in London. This started a tradition of annual 'hearings' of the EMEA during the Parliament's Environment and Health Committee sessions in Brussels, in the presence of the two EP representatives in the board.

The improvement in the interaction between the European Parliament and agencies is also echoed within the Parliament itself. According to one of the EP rapporteurs, "in the past the connection between all the agencies and the European Parliament was not so strong, not so clear but now the communication and the working together has improved a lot" (Respondent #63).

There is reportedly a growing interest in agencies and this development is partially the result of ad hoc accountability practices initiated by some agencies in an effort to gain parliamentary attention. With the passage of time, these procedures have become "fossilised" into regular practices and some have even been codified, although others still retain the status of informal practices. EMEA is not the only example of such initiatives. For instance, although not formally provided for, EP delegations of the Transport Committee are regularly invited for informal visits to EASA. Similarly, the president of Eurojust, in the absence of any legal obligation to do so, has taken the initiative to appear for hearings before the relevant technical EP committee (i.e., the LIBE Committee). Moreover, MEP delegations from the LIBE committee regularly visit Eurojust at the latter's invitation.

To some extent, these findings appear counter-intuitive. According to the premises of the PA literature, agents have a tendency to shirk and are expected to attempt

to escape control. Why then, would these agents purposefully initiate new, voluntary forms of political accountability? One of the possible explanations could be, as Schillemans argues in respect of Dutch agencies and their tendency to initiate new forms of horizontal accountability, that voluntary accountability arrangements serve as a strategy to promote agency credibility and implicitly, also to achieve greater autonomy.[30] Given that these bodies have often come under attack for their independence and insulation from political accountability, the set up of voluntary accountability links to the parliament can help increase their legitimacy. A similar situation has already been documented in the case of the European Central Bank (ECB) which, with the complicity of the Parliament, has initiated new arrangements of parliamentary accountability in the form of regular hearings of its president before the EP's Economic and Monetary Affairs Committee.[31] Simply put, "the ECB wanted more democratic legitimacy, which it could acquire through good relations with the European Parliament."[32] The new arrangements while "not very constraining", served as an instrument for the ECB "to increase its legitimacy and defend its independence."[33]

European agencies seem to have resorted to similar strategies to increase their legitimacy and visibility by opening new accountability channels to the Parliament. In addition, another more vital element to organisational survival might have played a role: the "competition for limited resources." Agencies have to compete with each other for a limited amount of resources and the European Parliament can be a powerful ally in this struggle. Thus, an explanation for certain agencies' eagerness to approach the EP unilaterally and to voluntarily adopt new informing and account-giving practices was the desire to familiarise the EP with the agency, its work and needs as a way to enlist parliamentary support at the budgetary phase. The support of the technical committee is indispensable. As explained by an agency director, "in the absence of sufficient support from the Committee responsible for the subject matter there was little chance to be successful on budget" (Respondent #56).

Consequently, in an effort to promote their cause, some agencies have been very eager to engage with the Parliament and voluntarily submit to the scrutiny of the EP. In the words of one of the executive directors, "every year it's a new issue, because every year you need to get money. So you need to interact with them in order to

30 T. Schillemans (2006), 'Horizontal Accountability of Agencies as Extensions of Control and Instruments for Autonomy', (paper on file with author).

31 N. Jabko (2003), 'Democracy in the age of the Euro', *Journal of European Public Policy*, *10*(5), 710-739, pp. 719-721.

32 Ibid. p. 719.

33 Ibid. p. 721.

have the right relation with them and give them the right information and justification why we should have all the money and not the other ones" (Respondent #39).

This is confirmed by the standing rapporteur on agencies in the Committee on Budgets. According to the rapporteur, a strong relationship with the specialised committee is crucial:

> Some colleagues in the specialised committees are very strong and they know a lot about their agency and the connection is very strong between the specialised committee and the agencies. I think this is the best way to get what you need to get as an agency. To have a strong connection to your parent committee.

Overall, what this indicates is that there are other strategic interests that take priority and can, in fact, offset the alleged propensity of the agent to escape scrutiny. "Accountability is good for business" and some agencies have not hesitated to take up the opportunity to "invest" in new accountability relations with the EP.

Nevertheless, not all agencies have been equally successful in capturing the attention of their "parent" parliamentary committee. While EMEA and EASA directors reported interest from their technical committees, the situation appears to be completely different in the case of the Eurojust. Capturing the attention of the European Parliament and specifically, the LIBE Committee remains a work in progress. As explained by the Eurojust president,

> The committee I have made presentation in front of, I think what is disappointing is that there are not actually many deputies there. We go to the committee and expect a lot of deputies to be there and sometimes there are seven or eight. And they come in and go during the course of the presentation. Maybe one and two stay and ask questions.

The full participation of only one to two MEPs is a blatant display of low involvement in the accountability of the agency, given that the LIBE Committee has a total of fifty-five permanent members. The low level of attendance of LIBE Committee members during agency hearings has been corroborated on the parliamentary side as well. The explanations put forward referred to the busy parliamentary agendas, the different interests of the various committee members as well as the lack of public allegations of misconduct or underperformance involving the agency. Clearly, good news is no news for a "fire-alarm"[34]-type accountability ethos. In fact, one MEP

34 M. D. McCubbins and T. Schwartz (1984), 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms', *American Journal of Political Science, 28*(1), 165-179.

observed that "if there were one or two allegations, please be sure that there would be enough colleagues to have a tough discussion" (Respondent #60). Another possible explanation for this state of affairs could also be the fact that the LIBE Committee has no special rapporteur on Eurojust or Europol, which fall under its remit.

Parliamentary interest is reportedly also low in the case of OHIM. As we have seen, there are no formal provisions in place for parliamentary scrutiny and this has not been supplemented by ongoing practices, as in the case of the other agencies studied. In fact, given the lack of contact, the president of OHIM reports how he was not aware for a period of two years that the "parent" committee of the agency had changed from the Committee on Internal Market and Consumer Protection (i.e., IMCO) to the Committee on Legal Affairs. In his own words, "we seem to belong to the field of the Legal affairs committee. Mark my words, 'seem to'. I have never appeared before this committee. Never, ever. It took me two years to realise that it had changed from one parliamentary committee that I did not meet to another committee that I did not meet either."

All in all, this indicates that there are very big differences among committees in terms of parliamentary interest in the work of the agency, with some displaying interest and others none at all.

To conclude this section, the level of parliamentary interest in agencies is on the rise and agencies' lobbying efforts seem to have played a significant role in bringing about this situation. Nevertheless, this is not true for all committees and to some extent the EP is not a unitary actor in this respect. Although there is an increase in parliamentary attention this is displayed more by some committees and less so by others. The committees responsible for EMEA and EASA are reportedly interested in the agencies' work. Moreover, as we will see in the following chapter, the Committee on Budgets and the Committee on Budgetary Control have been extremely active in monitoring agencies. But this is not at all the case for some other committees where, as seen above, the lack of interest and involvement remain quite low.

Substance of the Debate: Political Salience and "Cherry Picking"

In terms of the substance of the debate before the European Parliament, several characteristics emerge. First of all, the hearings before the parliament tend to be focused on limited issues, there is an inclination to "cherry pick" certain aspects rather than overseeing the performance of the agency as a whole. In the words of one of the directors, "EP hearings and 'grillings' are impressive but tend to focus on a limited number of sensitive issues, rather than on the overall performance of an agency or its director" (Respondent #56).

Attention is reportedly targeted on highly mediatised and politicised issues. By remaining confined only to certain aspects, accountability tends to be a bit patchy and not geared towards the "broad picture." To this extent, parliamentary accountability takes the form of a "fire alarm" as opposed to a "police patrolling" form.[35] This, in itself, is not surprising. In fact, based on the experience of other legislatures (particularly the US Congress), it has been suggested that fire alarm supervision is a more desirable role for the EP than ongoing supervision (i.e., police patrolling), which would amount to a huge drain on the EP's financial and staffing resources.[36] Nevertheless, this does mean that parliamentary accountability becomes an inappropriate tool for assessing overall agency performance and that it plays more of a role in addressing highly publicised misbehaviour. Furthermore, the accountability process does not result in any feedback to the agency and as such, it seems to score quite low in terms of institutional learning. The lack of feedback provokes a real sense of dissatisfaction among directors who do not see real returns from the process.

> It's very good to be accountable but if you have to explain each time to everyone what you are doing, what is your task, what will be your future, it's a bit tiring. The Parliament, the Commission, everyone, they want a lot of reports but what do they do with these reports? What do they do with these reports?

Or again, "I never get any feedback. This is also a bit frustrating. No feedback whatsoever. I would also be pleased to have sometimes criticism why not, or congratulations on the work done, because it was not so easy" (Respondent #45).

Reportedly, in the experience of the Eurojust president, the scope of the debate can be quite narrow and not as rigorous compared to the same type of parliamentary exercise before his own national parliament. In his words,

> The accountability is not so intensive. For example, under my own UK parliamentary system where we have the Home Affairs Select Committee from the House of Commons or one of the sub-committees of the House of Lords they can call individuals to give evidence before the committee and it can be quite tough. They produce extremely detailed reports. (…) The report has both written evidence and the debate in question recorded by the witnesses who actually appear before the committee. They take evidence from all corners, all spectrum: from European institutions, the Commission, European organisations as well as national authorities

35 M. D. McCubbins and T. Schwartz (1984).
36 S. Hix (2000), pp. 76-78.

and so on. The LIBE committee, although the questions can be very good, is not quite so focused sometimes as it might be.

The hearings before the specialised committee do not produce written reports that can be accessed by concerned stakeholders or the public at large. Moreover, evidence is not taken from other interested parties or institutions during hearings before the specialised committees, and unless contrary evidence surfaces, the statements are taken at face value. The only exceptions are institutions where the EP is represented in the board (e.g. EMEA, EEA, EMCDDA, ECDC, ECHA), in which case the representatives are present at the hearings.

These findings are not surprising and are generally in line with observations at the national level. While the UK Parliament, referred to above, is a notably active parliament in terms of scrutiny, many of the EP scrutiny failings have been reported in terms of national parliaments and their accountability roles. In this connection, Mulgan observes, "legislative committees continue to disappoint as mechanisms for monitoring the performance of government agencies. (…) Key accountability issues relating to the quality or cost of government performance in major areas of public expenditure are often neglected in favour of more politically sensational inquiries. Topics for investigation tend to be set by political rather than administrative agendas, undermining the expectation, probably unrealistic, that committees of politicians could act as professional and dispassionate scrutinizers of bureaucratic efficiency and effectiveness."[37] On a similar note, Schillemans points at the inadequacies of parliamentary accountability in ensuring comprehensive and systematic scrutiny. In his words, "the oversight of ministers and parliament is always focused on a limited number of politically salient issues. (…) The consequence is that demands for accountability from the centre may focus on issues that are peripheral to the tasks of specific agencies and that important or even all aspects of their behaviour remain unaccounted for. In addition, this also implies that hierarchical accountability in complex organisations will not necessarily contribute to enhancing the operations of agencies, as these may be taken for granted or seen primarily through the lens of political saliency."[38]

Thus, the accountability of agencies vis-à-vis the EP displays the familiar patterns encountered in parliaments at the national level. While acknowledging that the EP

37 R. Mulgan (2003), *Holding Power to Account. Accountability in Modern Democracies*, Palgrave Macmillan, p. 61.

38 T. Schillemans (2009), 'Horizontal Accountability: A Partial Remedy for the Accountability Deficit of Agencies', *Paper presented at the 5th Transatlantic Dialogue 'The Future of Governance'*, Washington DC, 11-13 June 2009, p. 10.

is not alone and that similar failings occur at the national level, this nevertheless remains problematic, as without the supplementation of other forms of accountability, key areas of European agencies' behaviour remain shaded from scrutiny.

Moreover, the presence of "isolated pockets of accountability" also translates into a lack of a coherent view on the future of the agency and the impossibility of conducting discussions on the development of the agency and long-term strategic planning. In the words of an agency director,

> I think that the Parliament should have a clear view on the future of the agency and the strategy of the agency. (…) I feel a bit isolated, I would say regarding strategy. We are doing our strategy together here with the directors but it is difficult to discuss the strategy of the agency with someone else, be that the Commission, the management board or even the Parliament.
>
> I can go of course and talk to someone face to face and to MEPs and explain what are my expectations for the future but there is no formalised work floor, I would say, or structure to discuss strategic issues. And it's very important for us because of course, we have to prepare the future and are not here just to implement the work program. I have to see for future years and to make sure we will be able to carry out our tasks and the increasing amount of different issues we have to deal with in the future. And it's a bit difficult to have this kind of strategy discussions. (Respondent #45)

This relates to a deficit in terms of oversight but also to a failure in the governance of agencies. What is at stake here is, again, the *"accountability of accountholders"*, in this case the *"accountability of principals"* for the agencification process. Neither the European Parliament, nor any of the other institutions involved in agency creation seem to have a clear view of where any of these particular bodies are going, where they should be going and what they should look like in the next decade or so. This lack of strategic planning started with their establishment agencies and has perpetuated ever since. The multiple principals with opposing interests has resulted in agencies being set up without forethought as to what is needed for their functioning, or whether the instruments at their disposal equip them for accomplishing their tasks, without a sense of direction for the specific agencies and a diluted sense of responsibility for their governance.

6.1.2 Consequences: The European Parliament, Empowered or "Toothless"?

The question is then: what happens if an examination of the annual report and/or the results of the hearings should lead to a negative parliamentary assessment? Are sanctions possible? Or is the European Parliament "toothless" vis-à-vis agencies?

First of all, as seen above, in its attempt to ensure a rapprochement between agencies and their relevant specialised committees, the Committee on Budgets has "armed" the specialised committees. Should the relevant specialised committees choose to withhold endorsement of the agencies' annual report and work program, the Committee on Budgets will refuse to release 10% of the respective agencies' budget. This has not yet taken place. The Committee on Budgets declared itself satisfied, pointing out that "most committees have already sent official letters to the Committee on Budgets giving green light for releasing the reserves for their agencies."[39]

Additionally, as discussed above, the specialised committee can play a role in the budget drafting process and champion the cause of the agency, fight its corner as it were, before the Budget Committee. However, if the committee should be dissatisfied, or the relations between the agency and the relevant committee should be poor, a negative sanction is immediately available: the withdrawal of support. These sanctions, however, apply only to those agencies funded from the Community budget. In case of self-funded agencies (e.g. OHIM) or member state funded ones (e.g. Europol to date), the specialised committee cannot resort to these type of sanctions.

Finally, the European Parliament has the ultimate weapon at its disposal: it can rewrite or even end the mandate of its agencies in the event of underperformance. In fact, in expectation of the upcoming horizontal evaluation of European agencies, the Parliament has requested the Commission to devise clear benchmarks for comparing cross-agency results and "to lay down clear rules for ending the mandate of agencies in the event of poor performance."[40]

Vis-à-vis Europol, the sanctioning powers of the European Parliament at present are practically non-existent. From the very beginning, the EP lacked the power to

39 Committee on Budgets (2008), 'Working Document on a Meeting with the Decentralised Agencies on the PDB for 2008', DT\666715EN.doc, Rapporteur: Jutta Haug and Kyosti Virrankoski, 23.5.2007, p. 6.

40 European Parliament (2008), Committee on Constitutional Affairs, 'Report on a strategy for the future settlement of the institutional aspects of Regulatory agencies', 2008/2103(INI), Rapporteur Georgios Papastamkos and Rapporteur for opinion, Jutta Haug, p. 7.

block amendments to the Europol Convention or implementing measures, and to exert any type of control over the conclusion of treaties by Europol with third countries or bodies. In fact, in an attempt to express its disapproval, the EP has rejected all proposals for implementing measures or protocols to the Europol Convention.[41] De facto, this remained a moot exercise in terms of impact, since the refusal of the EP has no binding power or effect and is an illustration of the EP's complete powerlessness in this area. This situation will greatly improve with the application of the new Council Decision, which will result in a veritable empowerment of the Parliament as the budgetary authority.

6.2 Political Accountability vis-à-vis the Council

Having examined the role of the European Parliament in holding agencies to account, the time has come to peer into the role of the other high-level political guardian. The question which then arises is: what procedures of accountability are there in place vis-à-vis the Council and how do they operate? As we have seen, the role of the European Parliament is more pronounced vis-à-vis first pillar agencies, while still possessing some scrutinising instruments vis-à-vis third pillar bodies such as Europol and Eurojust. However, both Europol and Eurojust are primordially Council agencies. As such, they owe political allegiance first and foremost to the Council. Political accountability of these bodies takes place via the Council structures, the elements of which will be discussed below. Furthermore, as in the case of the European Parliament, the accountability to the Council also has a budgetary dimension. The Council is the discharge authority for agencies funded by member states. In the case of agencies funded from the EU budget, the Council can only issue a recommendation on discharge to the European Parliament.

6.2.1 Informing and Debating in the Council Echelons: Fluid Practices

Both Europol and Eurojust are required to submit reports to the Council. According to the Eurojust Decision, the president is expected to "report to the Council every year on the activities and management, including budgetary management, of Euro-

41 S. Peers (2005), 'Governance and the Third Pillar: The Accountability of Europol' in D.M. Curtin and R.A. Wessel (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance,* Antwerpen: Intersentia, 253-276, p. 259.

just."[42] This is essentially an annual report from the Eurojust president to the Council, which may also contain "proposals for the improvement of judicial co-operation in criminal matters."[43] In addition to the annual report, the Decision provides that the president should submit any report or any information on the operation of Eurojust required by the Council, thus granting the Council unbounded access to information on issues pertinent to Eurojust's operation. The new amendments to the Eurojust Decision also provide for periodic independent evaluation reports on Eurojust's activities to be commissioned by the college, which are to be forwarded to the Council.[44]

According to Europol Convention Article 28(10),[45] the management board of Europol is required to submit a general report to the Council on Europol's "activities during the previous year" and a report on "Europol's future activities taking into account Member States' operational requirements and budgetary and staffing implications for Europol." In other words, Europol has to submit an annual report and a work programme. As in the case of Eurojust, provisions are made in the new Decision for the undertaking of periodic external evaluations, which will be forwarded to the Council.[46] Moreover, the director is required to report regularly by means of its annual report on Europol's external relations with third states and non-EU related bodies.[47] Furthermore, the Council also exercises *control* as opposed to *accountability* over Europol's agreements with third states and non-EU related bodies. As mentioned above, the European Parliament is powerless in this respect. The Council, however, has several controls at its disposal.[48] First of all, the director can only start negotiations with third states and non-EU bodies with the unanimous agreement of the Council.[49] The director needs the specific authorisation of the Council, and this authorisation can be conditional. Moreover, the draft agreement

42 Art 32(1) of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (Eurojust Decision), OJ L 63, 6.03.2002, p. 1 last amended by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA (the New Eurojust Decision), OJ L 138, 04.06.2009, p. 14.

43 Ibid.

44 Article 41(a) of the Eurojust Decision inserted by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA, OJ L 138, 04.06.2009, p. 14.

45 Article 28(10) of the Europol Convention replaced by the Council Act of 27 November 2003, OJ C 002, 06.01.2004, p. 0007.

46 Article 37(11) of Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.05.2009, p. 37.

47 Article 6 of Council Act of 3 November 1998 laying down rules governing Europol's external relations with third States and non-European Union related bodies (1999/C26/04), OJ C 26, 30.01.1999, p. 19.

48 Ibid.

49 Ibid. Article 2.

negotiated can only be concluded once the Council has given its unanimous approval after receiving a report from the Joint Supervisory Authority on data protection rules. In the words of a Council respondent,

> It is very much a control process. (…) They need an approval by the Council in order to formally conclude the agreement and then the approval can only be given on the basis of sufficient backing by the Joint Supervisory Authority and data protection people who do their own study and they present a thorough, totally independent document. (Respondent #62)

This is an instance of control, as the Council not only retrospectively demands explanations from the actor (i.e., Europol) but, in fact, remains in the driving seat during the whole process. The actor is unable to act without the prior consent of the principal (i.e., the Council).

This demonstrates the necessity of differentiating between accountability and control. As the Council is in charge of the process, responsibility and corresponding accountability for the final agreements adopted should fall not only on Europol, but also squarely on the shoulders of the Council. Additionally, this also illustrates the usefulness of examining and assessing accountability at a macro level. Assessing the accountability of Europol in the field of external relations strictly based on its account-giving obligations to the European Parliament, would lead to the conclusion, and has often lead to the conclusion, that Europol is highly unaccountable in this area. However, when additionally inspecting Europol's relation to the Council, not only is Europol shown to undergo political scrutiny in the field of external relations (albeit by the Council), it also becomes apparent that to a large extent, it is not in charge of the process. Separately assessing individual mechanisms rather than the system as a whole can provide an incomplete, skewed perception, given that deficits within one arrangement could be offset by another arrangement. In this case while obviously the supervision and control exercised by the Council are no substitute for supervision by a democratic, directly elected European Parliament, this nevertheless entails that the Europol director is by no means a free agent in the adoption of such agreements.

Vis-à-vis first pillar agencies, the Council is by and large absent in terms of political accountability of these bodies, except for provisions for receiving the annual report and the work programmes. Among the sampled agencies, this is the case for EASA and EMEA. In the case of EASA, its basic regulation goes even further and affords, uncharacteristically so for a first pillar agency, the possibility of hearings before

the Council (just as in the case of EP).[50] A role is reserved for the Council in the case of two (out of the three) fully self-financed agencies as well, i.e., OHIM and CPVO. In the case of OHIM, as discussed above, the EP only receives a management report and there are no hearings before the specialised committee, either de jure or de facto. The powers of the Council at the formal level are broader. According to the OHIM's constituent act, the Council "shall exercise disciplinary authority"[51] over the president and the vice-president(s). Furthermore, the Council has a role in the appointment and dismissal of the president and vice-president(s). The Council appoints the president from a short list drawn up by the administrative board and it can dismiss him at the administrative board's proposal.[52]

A further question is whether the Council engages agencies in discussions or whether we are in fact dealing with a "monologue without engagement." The latter is indeed the case for EASA and OHIM. For instance, although the EASA regulation provides for the possibility of hearings before the Council, such hearings are, in practice, not undertaken. In the case of OHIM, although formally the Council has the power to "exercise disciplinary authority", the president of OHIM reports that he has never had to appear before the Council. In his own words, "I have never been the subject of the Council's disciplinary authority. What does it mean? No one actually knows." In fact, even in the case of a highly formal moment i.e., the appointment of the president, where the Council is the appointing authority, the president was not required to appear before the Council prior to appointment. The president reports having had individual meetings with a handful of members of the management board of OHIM,

> But this was pretty much a private thing. The rest was lobbying by the (national) embassy. But I never ever went through a test or a meeting so this is completely different from what happens in any normal post for a national administration. And it is also different to what happens in those agencies where the Commission has an appointing right. (…) So actually I never ever appeared before the Council or the administrative board.

50 Article 38(2) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety agency and repealing Council Directive 91/670 EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79, 19. 3. 2008, p. 1.

51 Article 125(4) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p.1. Similar procedures are in place for the Community Plant Variety Office, with the power to appoint and dismiss the president being lodged with the Council.

52 Article 125(1) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p. 1.

This can be quite problematic. As we saw in Chapter 5, the OHIM board is fraught with strong conflicts of interests and reportedly, the agency's performance did not give rise to much interest in the board. The European Parliament has virtually no role vis-à-vis the Office other than receiving a management report and the European Commission does not have voting rights in the board. The Council is the only European institution that has a formal power vis-à-vis the Office. However, given its de facto non-involvement, this entails that there is a dire deficit of oversight from a European perspective and no possibility to balance out the push for national interests on the board.

In the case of Europol and Eurojust, the texts of the Europol Convention and the Eurojust Decision do not provide for any follow ups on the annual reports or any hearings before the Council or its lower structures. De facto, however, such meetings take place regularly. Both the director of Europol and the president of Eurojust appear before the Council and/or its lower structures at the latter's invitation. For example, the president of Eurojust generally appears before the Council for hearings, which last for approximately half an hour. As in the case of hearings before the EP, the first part of the hearing consists of a presentation of the annual report, which is followed by questions from the forum. This is usually complemented or even replaced by meetings before lower Council structures: lower working groups and the Article 36 Committee particularly, which prepare the meetings and the agenda for the Justice and Home Affairs (JHA) Council. A similar situation was described for Europol, with the director appearing before various Council working groups, the Article 36 Committee, as well as occasionally before the JHA Council.

Thus, the accountability practices before the Council structures are more fluid and the number of hearings and the forums before which the agencies heads appear is dependent upon a series of factors such as: previous hearings, priorities and interests of the Council Secretariat and the current Presidency, overall level of satisfaction with agency performance etc. For example, the president of Eurojust did not appear for hearings before the ministers in 2008. The forum declared itself satisfied with the performance of the actor and lacked the interest to engage him in a discussion or debate on the manner in which he had discharged his tasks.

> It depends on the Council Presidency and the Council Secretariat and what business they have, what takes priority for the current presidency. Many presidencies have been quite enthusiastic about our work and I think we've been seen to be quite successful. And so in some ways they want to hear about it but in some ways if you're successful, then 'leave it, don't worry, it's not a priority.' And that's the way it worked with the German Presidency whereas with previous presidencies, Luxem-

> bourg, Austria they were quite keen to have a presentation and to hear a little bit about some real cases and so on.

Moreover, the president had appeared for meetings in the lower structures of the Council. This meant that most issues had already been discussed, which decreased the need for high level hearings.

> Because we did so many presentations at the lower level I think the ministers were happy. The German Presidency said they did not want me to make a presentation because they had read the report, they produced draft conclusions and everyone was quite happy. They had some other items on the agenda and as you know with ministers, if they are happy about it, then they don't want to have a debate about it. It's all about time.

This is an interesting situation from an accountability perspective, given that the forum thus passes judgment on the performance of the actor without a debate and discussion with the actor, but based on discussions held by subordinate structures to the forum. Even when they do take place, hearings at the Council level are more like "ritual dances" given the fact that a significant part of the issues had already been decided in the lower structures and the ministers simply rubber stamp these decisions. This situation is a particularity of the institutional structure of the Council, where a high number of issues on the Council agenda are essentially agreed upon before reaching the ministerial sessions and are adopted as point A on the agenda. For example, Hayes-Renshaw and Wallace[53] claim that about 85 per cent of all issues on Council agendas will have been agreed upon at a lower level: 70 per cent in working groups and 10-15 per cent in COREPER I and II. Essentially, "the ministers play second violin to the working group, Secretariat and Coreper officials"[54] and this seems to be the case for the accountability process as well:

> It is normal that we make a presentation of the annual report at an early stage, especially to the groups below down because they draft the conclusions and they consider the report and I answer questions on it. And there is more of an interchange at this working group level because as you probably know when you get higher up at Article 36 and into COREPER and Council everything is almost decided. But it's useful to have this opportunity to make this presentation and to have an exchange and that's what we do, what I do.

53 F. Hayes-Renshaw and H. Wallace (1997), *The Council of Ministers*, Basingstoke: MacMillan Press, p. 78.

54 A. E. Stie (2009), *Co-decision–the panacea for EU democracy?* (Ph.D. dissertation), Oslo: University of Oslo, p. 252.

What is also important to observe is that in the case of Eurojust, the examination of the annual report results in direct feedback to the actor. The Council responds to the annual report in the form of conclusions on the annual report. The conclusions contain both an assessment of the work of Eurojust for the previous year, but also future directions and tasks to be taken up by Eurojust in the following year. As reported by the president,

> They would say this is something that Eurojust should look at and (...) if you've seen the conclusions from the previous reports, then you can see they focus on things to do with priorities for our negotiations, they also wanted us to do something on case types and to try to focus on more serious multilateral cases. So you know, they make that point and sometimes they are quite detailed and I think the last conclusions there were about eighteen points. So there were a lot anyway and of course the member states in the working groups and Article 36 committees they redraft and add to these conclusions; so that's the real sort of accountability and feedback that we get. That's the direct way that we are as it were held to account or at least comment is made on what we are doing and how we are doing it.

The conclusions also invite Eurojust to report on the implementation of the conclusions. In other words, there is a follow- up and Eurojust is expected to give feedback to the Council on the state of implementation. Eurojust replies every year in its annual report to the conclusions drafted by the Council. Thus, the annual report regularly contains a section with the key guidelines and issues for improvement issued by the Council for the previous year and what Eurojust has done to implement each of them. Surprisingly, in the case of Europol, the accountability process before the Council structures goes further than the accountability arrangements before the European Parliament, where, as seen above, the examination of the annual report did not result in any feedback or suggestions for improvement, to the frustration of some of the actors involved. In the assessment of the Eurojust president, who appears both before the Council structures and the LIBE Committee of the European Parliament, the Council compares positively to the Parliament:

> I think the accountability in the working groups and the way they prepare the draft conclusions means they have to consider the report in detail. Whilst the Parliament, I'm sure some members of the Parliament consider it in detail, it's not quite focused in the same way. (…) I think it could be more developed in other institutions; so the Parliament could develop the idea better.

This is quite interesting given that the Parliament has been insisting on procedures of parliamentary accountability in the case of EU agencies in order to render such bodies accountable. In the case of Eurojust, however, the accountability procedures

before the Council appear to be more thorough than those before the LIBE Committee of the European Parliament.

The same procedures do not apply for Europol. The annual report of Europol is submitted to the Council only "to take note and endorse."[55] To this extent, the accountability process through the Council structures is more comprehensive and better developed from an institutional learning perspective in the case of Eurojust than it is for Europol. Moreover, respondents from the board reportedly regard the assessment of Europol at the ministerial level as unrealistically positive. Respondents felt that the ministers have a skewed view compared to the reality on the ground. In the words of one respondent,

> The political speech is very much in favour: 'you are so important, you are doing so well' whereas in reality, most member states in the board say 'it's not going well at all', 'this organisation is not really effective and we are not really co-operating well.' But yeah, they can't say it because their ministers would not be pleased. (Respondent #14)

This was also confirmed by one of the management board respondents who had previously been part of the Article 36 Committee and as such involved in the Council oversight of Europol. Having been on both sides of the divide, he felt that the Council assessment of Europol was overly positive.

> I was active in the framework of Article 36 Committee, which is the preparatory meeting for the JHA Council, so I've been on the other side for almost four years [and] I can make a comparison between what the Council thinks of Europol and what I see as a member of the management board and the esteem or the expectations the Council has on what Europol is and what Europol could do are too high.

And reiterated, "I think that the image of the Council is too high compared to what Europol at the moment can do" (Respondent #26).

This relates to the observations in Chapter 5, concerning the dissonance between the high political level (i.e., Council) and the lower level represented by the management board. The Council has generally been very supportive of Europol, whereas the board has tended to display a much more distrustful and critical attitude. In this connection, it has been observed that "there has been a wide gap in support between

55 Article 28(10) of the Europol Convention replaced by the Council Act of 27 November 2003, OJ C 002, 06.01.2004, p. 0007.

the political and the bureaucratic and professional level."[56] This dissonance is further exacerbated by the lack of a direct line of communication between the board as a whole and the Council. Communication is restricted to only a handful of formal moments relating to the appointment of the director, the endorsement of the work plan and the budget etc. Furthermore, the director also refers to the lack of communication between individual representatives in the board and their ministers. In his words, "I feel that some people in the board are not really connected to their ministers. I know their ministers but I doubt if they have direct links to their ministers. When I talk to the minister and try to find out 'what is your political will?', this is not reflected in the management board." And yet again, "each board member in my view should inform his or her minister in an according way, but I doubt if this happens."

Respondents also assign the lack of communication and openness to the fact that this could result in a negative reflection on the board and the member states. Europol's central task is to facilitate the exchange of information between member states. In other words, in order to show results, Europol is heavily dependent on member states inputting information. For this purpose, Europol has an IT database in place, composed of three elements: the Europol Information System (EIS), the Analysis Work Files (AWFs) and the index system.[57] One of the central challenges Europol is facing is the lack of information contributed by member states. Both respondents from the board as well as the director reported in interviews that the organisation is being hampered in meeting expectations due to the underuse by member states of the Europol data base. In the words of a management board respondent,

> Everybody knows the problem or at least should know it or is able to know it because we have some statistics on this. But it is as if we do not dare to say to each other and really make it transparent: 'it's not going well. We should improve.' I think that's the reality. I think most member states do not want to see the truth, the full truth. Because then of course they become responsible. Because if I gave you the impression until now that Europol is a bad organisation, it's not true. I always say the same. If the concept of Europol is not working well today, 80% the member states are to blame and only 20% the organisation itself. This could be a better organisation: better management, better leadership. But every organisation can be improved. But it's 80% due to the member states who do not contribute information

56 M. Groenleer (2009), *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development,* Delft: Eburon, p. 301.

57 Article 6(1) of Council Act of 26 July 1995 drawing up the Convention based on Art K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316, 27.11.1995, pp. 0002-0032.

> like they should, who do not really work together and so on and so on. And that's the reality. (Respondent #17)

Similar concerns were reported by various key witnesses in the House of Lords' report on Europol. These witnesses also referred to a tendency to bypass Europol in the exchange of information. To illustrate, "the vast majority of information exchanges between liaison bureaux occurs outside the formal systems, and thus while providing very significant benefit to the participating countries the main loser is Europol, which is denied the opportunity to access the information. It is reported that up to 80% of bilateral engagement occurs this way."[58]

The Europol director also expressed his concern about the lack of information input of member states and his own powerlessness to change the situation.

> I would appreciate if there was more accountability. We have established the Europol Information System. It was very expensive. The joint audit committee is coming to us and one of their questions is 'are you satisfied with the joint information system?' And I can simply answer 'No.' But I cannot influence the member states to insert more data. I appeal, I remind them all the time and now they are getting very tired. (…) The system is by far not filled as they should be. But I cannot urge the member states to do something.

This strongly relates to the issue of accountability, control and the locus of power. If Europol is underperforming, the agency becomes accountable. In the words of the Europol director, "I will be criticised for that as the director of the organisation. But we [Europol] are not even able to fill in any data, the data has to filled in by the twenty-seven member states. I cannot urge the member states to do something."

In this connection it has been observed that "Europol is invested with limited powers to make member states share information (…)"[59] At the same time, Europol's ability to bring about results is tightly related to information being provided by member states. In this crucial area to Europol's functioning, the locus of power remains with the member states. As such, the line of responsibility and corresponding accountability should be linked to the member states. In other words, the accountability of member states for their input in the process or lack thereof becomes relevant.

58 House of Lords (2008b), European Union Committee, 'Europol: co-ordinating the fight against serious and organised crime', 29th Report of Session 2007-08, Report with Evidence, published 12 November 2008, p. 22.

59 M. Groenleer (2009), *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development,* Delft: Eburon, p. 282.

Given that Europol itself does not have the power to influence member states' information sharing, the Council, as the ultimate political authority, has the capacity to play a larger role in ensuring that member states do comply with their obligations. In this connection, Patrick Zanders, a management board representatives wrote, "national police services prefer to run the information and investigation themselves with the sole object to pat oneself on the back (me -culture). This culture should change into a European 'we-culture' in which a common quest for security output becomes more important than the personal or corps interest. This change in mentality is nevertheless very difficult to realise (…) There is a lack of EU courage (but also a suitable forum) to congratulate a national police and a European police service or to lodge a complaint against the lack of co-operation by a service."[60] This is precisely an area where the Council could step in and take the matter into its hands. The director, however, reports little improvement on this matter after approaching individual ministers.

> I have brought it up now to various ministers: 'oh I will change this.' But I don't see any changes. So the accountability is addressing the issue to me, but I am not the person to be able to do so. This is a clear misconstruction in the system. And then when I address it to the management board they say 'oh we are not really in charge to do that.' Then I address it to the police chiefs they say 'oh, we are not really in charge to do that.' When I address it to the heads of the Europol national units 'oh, we don't have the power to ask our people to do that.' The ministers say: 'oh course this can be done' but I don't know if when they get back home they task somebody to do that. This is still a difficult issue to be developed.

This state of affairs is in stark contrast with the situation at Eurojust, which is reportedly rather successful in exercising pressure on member states so as to ensure their co-operation.[61] For instance, under Article 7(a) of its Decision, Eurojust, acting as a College, can request competent authorities of a member state to undertake investigations or prosecutions of specific acts. If the latter decides not to comply, however, it is required, according to the Decision, to give reasons for failing to follow up on Europol's request.[62] In other words, for every instance of non-cooperation, member states have to justify themselves. Refusals to co-operate run the risk

60 P. Zanders (2002), '"Speaking Points" of M. Patrick Zanders, Director of the Federal Police (Belgium) at the Group meeting of 25 September 2002', Working Group X, "Freedom, Security and Justice", Working Document 1 (WG X-WD 1), Brussels, 2 October 2002, p. 5.

61 M. Groneleer (2009), pp. 319-220.

62 Article 8 of Council Decision 2002/187/JHA of 28 Feb. 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (Eurojust Decision), OJ L 63, 6.03.2002, p.1, last amended by Council Decision 2009/426/JHA of 16 Dec. 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA (the New Eurojust Decision), OJ L 138, 04.06.2009, p. 14.

of the respective country being called before the JHA Council as well as the threat of public disclosure in the Eurojust annual report.[63] Such methods have "reportedly had an effect on member states."[64]

Some of these approaches could be emulated in the case of Europol. Credible warnings of "naming and shaming", a stronger involvement of the JHA Council vis-à-vis non-cooperative states might help Europol make headway in this matter.

6.2.2 Consequences: Possible but Not Likely

The Council has several sanctioning instruments at its disposal. According to the Europol Convention, the Council appoints the director and the deputy directors of Europol and it can also dismiss them, after obtaining the opinion of the management board.[65] Similarly, in the case of OHIM, the Council appoints the president and the vice-presidents and it can remove them from Office, at the proposal of the administrative board.[66] As in the case of the sampled agencies where the board has the power of dismissal (see Chapter 5), no dismissals have been made by the Council so far. As observed in Chapter 5, this is a highly sensitive political issue and it is also hardly ever resorted to, even in the case of national agencies. The Council lacks such sanctioning powers vis-à-vis the Eurojust president and the administrative director and only has an approval power in terms of the appointment of the president.[67]

Furthermore, an implicit sanctioning instrument of the Council is the possibility to rewrite and amend the constituent act of these agencies. In the case of Europol, this was a very difficult process and could only be achieved through the adoption of

63 M. Groenleer (2009), p. 320.

64 Ibid.

65 Article 29(1) and 29(6) of the Europol Convention, amended by amended by the Council Act of 27 November 2003, O J 002, 06.01.2004, p. 0008; According to the new Europol Decision, the Director and Deputy Directors will be appointed by the Council from a list drawn by the management board (Article 38 (1)and (2)) and may be dismissed by the Council after obtaining the opinion of the management board (Article 38 (7)), OJ L 121, 15.05.2009, p. 37.

66 Article 125(1) and 125(3) of Council Regulation No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p. 1.

67 Article 28(2) of Council Decision 2002/187/JHA of 28 Feb. 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (Eurojust Decision), OJ L 63, 6.03.2002, p.1, last amended by Council Decision 2009/426/JHA of 16 Dec. 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA (the New Eurojust Decision), OJ L 138, 04.06.2009, p. 14.

protocols to the Convention, which had to be ratified by the national parliaments of all member states. With the implementation of the new Europol Decision, the process becomes much less cumbersome and the Council can make amendments through the adoption of new Council Decisions.

6.3 Political Accountability: At an Arm's Length but Not Too Aloof From Scrutinising Eyes

All in all, the two political forums clearly play a role in overseeing agencies. While generally at an arms' length from political control, agencies are not altogether removed from the scrutinising eyes of these two political forums: the European Parliament and the Council. This has been part of a developing process with the European Parliament gaining greater say by virtue of its co-decision powers as well as informal arrangements that have arisen and developed as a matter of practice. Thus, both in the case of the Parliament as well as the Council, there has been a supplementation of accountability practices (i.e. particularly in the form of hearings), which have developed informally, as a matter of practice, going above and beyond the stated obligations.

Instruments for political accountability are in place and the issues that arise are, as in the case of managerial accountability, primarily related to the actual use of these instruments. In the case of the European Parliament, the intensiveness with which it makes use of the various arrangements at its disposal varies significantly from one committee to the next. Whereas some EP committees reportedly display a high level of interest and involvement with their agencies as well as knowledge of their agencies, others are blatantly and conspicuously passive. This remains an area for improvement for the EP to increase the profile and raise awareness of agencies among its various expert committees.

Similarly, in the case of the Council, variation is present in terms of account-holding, with the Council systematically supervising some agencies, and in others playing virtually no role in practice, despite the formal role provided for in the agency's contract design (i.e., OHIM, EASA). In this connection, two observations are in order. First of all, in the case of OHIM, the Council, as the sole political accountability forum provided for in OHIM's constituent act, de facto is absent in terms of exercising scrutiny and supervision. This is not a satisfactory situation, given that the other high level political forum, the EP, plays no role at all in overseeing OHIM. As such, this creates a gap in terms of political accountability. Secondly, in the case of Europol, although the Council is generally active, there has been a failure to address the accountability of member states for their input of information

directly impacting Europol's performance and functioning. This could potentially be improved through a better communication between the management board as a body and the Council, a stronger role of the Council vis-à-vis non-cooperative states and an overall better clarification of the share of responsibility and ensuing accountability vested in the member states. The reluctance to "blame and shame" the member states negatively impacts the ability of the agency to perform its tasks as well as shading this area from accountability or misplacing the locus of accountability.

Generally speaking, political accountability tends to be rather sketchy and sporadic. It is also less "intensive", lacking the "police patrolling" aspect and relying heavily on "fire alarms" while focusing on a limited number of issues, driven by political priorities. To a large extent, these findings are not surprising and reproduce patterns encountered at the national level. This, however, does entail that political accountability is an inappropriate or at best, an insufficient mechanism for overseeing agency performance. However, one should not dismiss these forums too easily. Their strong point lies elsewhere. It is in situations of "fire alarms" that the merit and value of these forums can be found. Whereas MEPs might lack the incentive to listen to a director's report and engage the latter in a debate, in situations of crisis or where serious problems involving a particular agency come to the public eye, these forums are likely to "get their groove back" and very eagerly request information and demand answers.

CHAPTER 7

Financial Accountability: More than Just Number Crunching

Financial accountability is indispensable for a well-functioning, healthy administration. The Santer Commission crisis and the findings of the report of the Committee of Independent Experts[1] pointing at widespread fraud, mismanagement and nepotism inside the European Commission and in the running of certain Community policies demonstrated beyond a doubt the critical importance of a strong system of internal financial controls and audit. It is precisely this system and the way this is implemented in the context of European agencies that forms the topic of the present chapter. In the pages below, the financial accountability regime of agencies will be unveiled in terms of its formal and informal procedures. The central actors involved are discussed and the relative strengths and weaknesses of the system are examined. Before delving further into this matter, however, it is important first to provide a brief introduction to the relevant legal provisions governing the agencies' financial regime.

7.1 The Relevant Legal Regime

The adoption of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002[2] (hereafter the General Financial Regulation) was part of the effort aimed at addressing aspects of the Community malaise ushering in a wave of unprecedented reform in the aftermath of the Santer crisis. The new Regulation, replacing the old Financial Regulation dating from 1977[3] has been heralded as much more than a set of financial

1 Committee of Independent Experts (1999), 'First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission', 15 March 1999, <http://www.europarl.europa.eu/experts/report1_en.htm>.

2 Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, 16.9.2002, p. 1.

3 Financial Regulation of 21 December 1977 applicable to the General Budget of the European Communities, OJ L 356, 31.12.1977, p. 1.

rules, and even welcomed as the embodiment of a "constitutional framework for Community administration of the kind that has not existed hitherto."[4]

It is this General Financial Regulation, together with the Commission's Regulation 2343/2002[5] (hereafter the Framework Financial Regulation) that forms the backbone of the financial regime for agencies funded from the Community budget. The adoption of the Framework Financial Regulation was provided for in Article 185(1) of the General Financial Regulation "for the bodies set up by the Communities and having legal personality which actually receive contributions charged to the budget." It essentially makes relevant principles of the General Financial Regulation applicable to agencies that receive grants from the Community budget. It is, in other words, a more compact version of the General Financial Regulation, tailored for agencies.

Figure 7.1 The financial regime for agencies receiving grants charged to the Community budget

Moreover, on a lower level, each agency's management board has "cloned" its own financial regulation, which is essentially a copy-paste version of the Framework

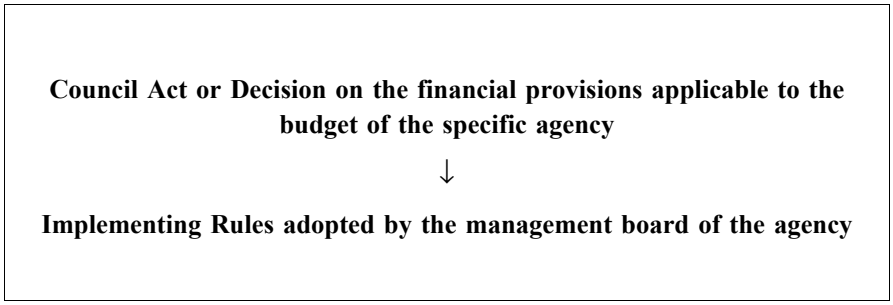
4 P. Craig, *EU Administrative Law*, Oxford: Oxford University Press, 2006, p. 26.

5 Commission Regulation (EC, Euratom) 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 357, 31.12. 2002, p. 72.

Financial Regulation[6] and the implementing rules to the regulation. Where necessary, however, modifications tailored to the specific operating needs of the agency are made, but these are always subject to the Commission's prior consent. The Court of Auditors must be informed of any internal financial rules adopted.[7]

In the case of Europol, however, a different regime applies (and is still in place at the time of writing).[8] The relevant financial rules are contained in the Council Act of 4 October 1999[9] adopting the Financial Regulation applicable to the budget of Europol and the Council Act of 29 April 2004 amending the Financial Regulation applicable to the budget of Europol.[10] Moreover, in accordance with Article 57(2) of the Europol Financial Regulation, implementing rules have also been unanimously adopted by the management board. This approach is commonly adopted by member state financed agencies. The Council generally adopts a Council Act or a Council Decision laying down the financial rules for the specific agency, and the management board adopts implementing rules and/or other provisions amending or reviewing the Council rules.[11]

Figure 7.2 The financial regime applicable to member state financed agencies



6 See for example, the Financial Regulation Applicable to the Budget of the European Medicines Agency as adopted by the Management Board on 11 December 2008.

7 Article 92(2) of the Framework Financial Regulation, OJ L 357, 31.12. 2002, p. 72.

8 The Europol Convention will be replaced by Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.05.2009, p. 37, as of 1 January 2010 Europol will be funded from the EU budget and subject to the (General and Framework) Financial Regulation.

9 OJ C 312, 29.10.1999, p. 01.

10 OJ C 114, 30.04. 2004, p. 01.

11 See for example Article 18(1) of the Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L 245, 17.7.2004, p. 17.

The various financial regimes form the basis for the budget implementation and the financial management of agencies. Moreover, they lay down procedures for financial accountability and they identify the various forums involved. These procedures will be discussed at length below. At the same time, relevant idiosyncrasies among agencies are pointed out.

7.2 Internal Audit Bodies: Accountability Forums in Their Own Right

One of the major changes brought about by the General Financial Regulation is a "re-casting of responsibilities."[12] The responsibility for the implementation of revenue and expenditure has been linked with the responsibility for validating expenditure and authorising payments and the authorising officer effectively became responsible for both.[13] The declared aim was to "give authorizing officers the entire responsibility for the internal controls in their departments and for the financial decisions they take in the exercise of their functions."[14] Specific rules have been put in place to provide for the financial liability of authorising officers resulting from misconduct in the performance of their duties.[15] In the case of agencies, the authorising officer is usually the director of the agency,[16] although he or she has the option of delegating his/her powers of budget implementation.[17]

One of the central responsibilities of the authorising officer is also to put in place financial control systems[18] and to "establish within his/her department an expertise and advice function designed to help him/her control the risks involved in his/her activities."[19] This is where the internal audit comes in. It is aimed at identifying risks, conducting risks assessment and assisting the director/authorising officer to control the risks associated with his/her activities. The internal auditor also provides information to the management board, the external audit authority and in suspected cases of fraud also to the European Anti-Fraud Office (OLAF). In other words, it not only performs supervisory and monitoring tasks in its own right, but it also serves

12 P. Craig (2006), p. 54.
13 Article 60 of the General Financial Regulation, O J L 248, 16.9.2002, p. 1.
14 Proposal for a Council Regulation on the Financial Regulation applicable to the general budget of the EC, COM (2000) 461 final, Explanatory Memorandum, p. 17. See P. Craig (2006), p. 36.
15 Articles 64-66 of the General Financial Regulation, OJ L 248, 16.9.2002, p. 1; Specifically for agencies, Articles 45- 47 of the Commission's Framework Financial Regulation, OJ L 357, 31.12. 2002, p. 72.
16 Article 33 of the Commission's Framework Financial Regulation, OJ L 357, 31.12. 2002, p. 72.
17 Ibid. Article 34.
18 Ibid. Article 38(4).
19 Ibid.

as a source of information for other accountability bodies. An overview of the various internal auditors of each of the sample agencies is provided below.

Table 7.1 Overview of the internal auditors of the sample agencies

	OHIM	**EASA**	**EMEA**	**Eurojust**	**Europol**
Internal Auditor	OHIM Internal Auditor	Internal Audit Service of the European Commission (IAS)	IAS	IAS	Europol Financial Controller[20]

Provisions pertaining to the financial controller at Europol, who is essentially the counterpart of the "internal auditor", are laid down in Article 35(7) of the Europol Convention. The financial controller is responsible for producing reports on each separate inspection, evaluation and investigation carried out and submitting them to both the director and the management board.[21] Moreover, the controller is also required to submit a report on the internal activities for the year in question to the management board and to the Joint Audit Committee[22](JAC), which performs parallel functions to those of the Court of Auditors. In other words, there is a direct line of communication and flow of information to forums that have the capacity to hold the director accountable.

For the Community agencies receiving grants from the EU budget, the General Financial Regulation and the Framework Financial Regulation provide that the Commission's Internal Audit Service (IAS) also serves as the internal auditor for agencies.[23] Some agencies, however, had already set up an internal audit capacity (IAC) within the agency itself (e.g. EMEA, EASA). This created confusion about the exact division of labour and the relation between the two bodies, both of which effectively function as internal auditors of the agency. At the same time, inconsistencies in the legal mandate of IAS also contributed to further confusion about its exact role and responsibilities. Legally, the IAS was proclaimed the internal auditor of agencies, while de facto, of course, given the legally independent status of

20 As of 1 January 2010, Europol's budget becomes "communitarised" and the IAS becomes the internal auditor of Europol.

21 Article 20(4) of the Europol Financial Regulation, Council Act of 4 October 1999 adopting the Financial Regulation applicable to the budget of Europol and repealing Council Act 1999/C 25/01, OJ C 312, 29.10.1999, p. 01 and Council Act of 29 April 2004 amending the Financial Regulation applicable to the budget of Europol, OJ C 114, 30. 04. 2004, p. 01.

22 Ibid. Article 20(5).

23 Art 185(3) of the General Financial Regulation, OJ L 248, 16.9.2002, p. 1 and Article 71 (2) of the Framework Financial Regulation OJ L 357, 31.12. 2002, p. 72.

agencies from the Commission, the IAS was as external to the agency as the Court of Auditors. Navigating through all these actors in the auditing landscape, and trying to define its "auditing turf" while at the same time not duplicating either the work of the already existing internal auditors, nor that of the Court of Auditors proved a very difficult joggling exercise for the IAS. Furthermore, to make matters worse, the office also suffered from a dire lack of resources (Respondent #35).[24] As a result, in its early years, the IAS was not very successful in carrying out its mandate.

In fact, the IAS managed to "ruffle quite a few feathers" on its first audit visits to agencies, with some internal auditors and directors describing the visit as "not very professional" (Respondent #45), "redoing the work that has been done by others", "a waste of time", "lacking any clear focus" (Respondent #44), "a bit disappointing" (Respondent #23) and describing the IAS as "a tool for the Commission to oversee the agencies, which is not the goal" (Respondent #45). Additionally, due to lack of staff and resources, the IAS was not able to conduct its first audit visits to some agencies until the year 2006 (Respondent #35, Respondent #46), three years after receiving its mandate. One audit per agency in three years time is a poor record, indeed, compared to the twelve audits a year carried out, for example, by the internal audit controllers of EMEA. Given that the main aim of the internal audit is to advise on risks, many agencies saw themselves at a serious disadvantage and created their own IACs. At present, there are approximately ten agencies that have their own internal audit capabilities existing in parallel to the internal auditor of the Commission (Respondent #35).

Over the last few years, the situation of the IAS has reportedly improved significantly. Its second follow up visit was described as "much better, with real people, knowing their job and doing a good job" (Respondent #45). In the meantime, the IAS has also been granted additional staff resources in order to be able to better handle its workload.[25] Furthermore, the IAS seems to have defined its role more clearly, and more in line with its legal mandate. As observed by one agency director,

> The objective of an internal audit is to give a good picture of the risk to the manager in order for the management to take actions. It's not a tool for sanctions. It's a tool for better management in the future. I think that now the internal auditor of the

24 European Parliament (2008), Committee on Budgetary Control, 'Discharge for the 2006 financial year: Resolutions on agencies. Summary of Requests made to the Agencies, to the European Commission and to other Institutions and bodies', adopted in Plenary on 22 April 2008, 16 May 2008, para. 23.

25 Ibid. para. 24.

> Commission has changed its mind and is much more in line with this kind of objectives. (Respondent #45)

They also seem to have devised an informal division of labour with the Court of Auditors. The internal control systems and standards are now IAS domain, of which the Court therefore steers clear. As explained by a representative of the Court,

> They have the internal control system, organisation, internal control standards. Ok, they look at that. A priori we suppose they are good and they do it well so we don't care. We don't look at it. What we do is simply to read their conclusions and see if we can extract some indication to orient and define what we have to do for the rest. (Respondent #46)

Additionally, the two bodies informally exchange their audit programs for the purpose of material co-ordination. Furthermore, the reports of the IAS, which are sent to the Court of Auditors, now serve as a fire alarm source for the Court. If the IAS reports on a specific irregularity or warns the Court informally of a problem that became apparent during an internal audit visit, the Court will follow it up during its audit mission (Respondent #46).

The role of the internal auditor is not solely that of investigating and providing information. Subsequent to the internal audits and investigations performed, the internal auditor reports to the management board and the director. The internal auditor is empowered by the Framework Financial Regulation to "ensure that action is taken on recommendations resulting from audits."[26] In other words, consequences and remedial action are both potentially possible. This is further given teeth by the involvement of additional forums in the process, such as the discharge authority. By virtue of the Framework Financial Regulation, agencies are required to send to the Parliament (as well as the Commission), a report by the director "summarising the number and type of internal audits conducted by the internal auditor, the recommendations made and the action taken on these recommendations."[27] Thus, although the IAS does not directly send a report to the Parliament and is not a participant in the discharge procedure, the discharge reports of the European Parliament nowadays contain occasional observations referring to points made by the IAS in its audit reports.[28] Furthermore, although not provided for in the financial rules, the body sends a copy of its report to the parent Commission DG of the agency. It also

26 Article 72(3) of the Framework Financial Regulation, OJ L 357, 31.12. 2002, p. 72.

27 Article 72(5) of the Framework Financial Regulation, OJ L 357, 31.12. 2002, p. 72.

28 See for example, European Parliament (2008), Committee on Budgetary Control, 'Discharge for the 2006 financial year: Resolutions on agencies. Summary of Requests made to the Agencies, to

maintains an open channel of communication with OLAF, as the two bodies have co-ordination meetings "at least twice a year" (Respondent #35).

In summary, the internal audit bodies are relevant forums in the financial accountability process, tasked as they are with supervising the quality of management and control systems. They are thus monitoring and promoting the sound financial management of agencies. Furthermore, both the report of the Europol financial controller and that of the IAS are sources of information or act as fire alarm mechanisms for other accountability bodies. The IAS itself had a difficult start. This, however, can be part and parcel of the process of institutional identity forging and is not far removed from the early years of the Court of Auditors, which reportedly "had great difficulty in developing an institutional identity for itself and in gaining the attention of the Union's executive powers.[29] However, recently the IAS seems to have found its feet in the Community "auditing landscape." It has received the funding needed to be able to comply with its obligations and is now in a position to conduct regular audits. In this connection, the Commission has observed, "the IAS has received the resources necessary to fulfil its current obligations assigned by Article 185 of the financial regulation. In 2007, audits were conducted in all operating regulatory agencies in the IAS scope. Audits for agencies that started in operations in 2007 are planned for 2008."[30] As reported above, its coordinating role with the Court of Auditors has improved, as has its interaction with the IACs as a network between internal auditors has been established, in cooperation with the IAS, which is meant to ensure the "exchange of best practices."[31]

7.3 External Audit: The European Court of Auditors and the Joint Audit Committee

Referred to as the "financial conscience of the Union", the Court of Auditors plays a central role in the accountability of European agencies. According to Article 91 of the Framework Financial Regulation, the Court of Auditors is the authority in charge of scrutinising the accounts of Community bodies possessing a legal personal-

the European Commission and to other Institutions and bodies', adopted in Plenary on 22 April 2008, 16 May 2008.

29 B. Laffan (2003), 'Auditing and accountability in the European Union', *Journal of European Public Policy*, *10*(5), 762-777, p. 767.

30 European Court of Auditors (2008), 'The European Union Agencies: Getting Results', Special Report No. 5 p. 41, para. 25.

31 European Parliament (2008), 'Discharge 2006: Questions to the Agencies and replies – Général, Cover letter, and in annex the responses of the Troika to questions 65-67', p. 6 <http://www.europarl.europa.eu/comparl/cont/adopt/discharge/2006/questionnaires/easa_letter.pdf>.

ity and funded from the Community budget (i.e., EU budget funded agencies). This is reiterated in the founding regulations of each of these agencies, where provisions are made identifying the Court as the external audit body for the agency. Consequently, EASA, EMEA and Eurojust fall under the scrutiny of the Court of Auditors. Though OHIM, by virtue of its self-funded status, does not fall under the financial regime of the Framework Financial Regulation, its founding Regulation identifies the Court of Auditors as the audit authority.[32]

The Court, however, lacks mandate in the case of member state financed bodies, where, as previously described, a different regime applies. For example, the external audit of Europol is not performed by the Court of Auditors, but by the Joint Audit Committee (Table 7.2 below). The three members of the Europol Joint Audit Committee are, however, appointed by the Court of Auditors[33] and the audit is carried out "in accordance with generally accepted international auditing standards."[34] Moreover, though not acting as representatives of the Court, they are members of the Court (Respondent #33). As such, the actual audit procedure is not expected to diverge substantially from that of agencies scrutinised by the Court itself. The detailed provisions for the presentation and auditing of the accounts are contained in the Europol Financial Regulation.[35]

Table 7.2 Overview of the external audit for the sample agencies

	OHIM	**EASA**	**EMEA**	**Eurojust**	**Europol**
External Audit	European Court of Auditors	European Court of Auditors	European Court of Auditors	European Court of Auditors	Joint Audit Committee

Both the European Court of Auditors and the Joint Audit Committee act as financial accountability forums. In this connection, the mandate of the Court is "to examine whether all revenue has been received and all expenditure incurred in a lawful and proper manner."[36] Similarly, the JAC's role is to "establish that the financial state-

32 Article 142 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p. 1.

33 Article 36(2) of Council Act of 26 July 1995 drawing up the Convention based on Art K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316, 27 November 1995, pp. 0002-0032.

34 Article 52 of the Europol Financial Regulation, Council Act of 4 October 1999 adopting the Financial Regulation applicable to the budget of Europol and repealing Council Act 1999/C 25/01, OJ C 312, 29.10.1999, p. 01 and Council Act of 29 April 2004 amending the Financial Regulation applicable to the budget of Europol, OJ C 114, 30. 04. 2004, p. 01.

35 Ibid.

36 Article 140(1) of the General Financial Regulation, OJ L 248, 16.9.2002, p. 1.

ments present fairly the financial position of Europol at 31 December, that all revenue has been received and all expenditure incurred in a lawful and regular manner."[37]

In the paragraphs below, it will be described what precisely these accountability mechanisms entail, based on the relevant legal provisions as well as ongoing practices. The discussion will be structured along the three phases of accountability: informing, debating and consequences.

7.3.1 Informing: Extensive Access to Information

In terms of reporting obligations, agencies are expected to submit extensive financial information to their external audit authority (i.e., the Court of Auditors or JAC). The provisions of the General Financial Regulation apply to agencies scrutinised by the Court of Auditors.[38] The agencies are expected to "afford the Court of Auditors all the facilities and give it *all the information* which the Court of Auditors considers necessary for the performance of its tasks."[39] Similarly, the Europol Financial Regulation specifies that the director has to provide the members of the Joint Audit Committee and anyone assisting them with "*all information* and every assistance which they require in order to perform their task."[40] Moreover, the members of the JAC and their staff also have access to the Europol premises and "shall have the right to interview the Director, the Deputy Directors and any other employee of Europol responsible for transactions involving revenue or expenditure."[41] However, one limitation has been imposed. In exceptional cases, the director can deny the members of JAC access to confidential information.[42] In order to avoid abuse of this clause, additional checks are provided for. If this restriction is applied, the director is obliged to inform the management board immediately.

37 Article 52 of the Europol Financial Regulation, Council Act of 4 October 1999 adopting the Financial Regulation applicable to the budget of Europol and repealing Council Act 1999/C 25/01, OJ C 312 29.10.1999, p. 01 and Council Act of 29 April 2004 amending the Financial Regulation applicable to the budget of Europol, OJ C 114, 30. 04. 2004, p. 01.

38 Article 93 of the Commission's Framework Regulation provides that the scrutiny to be carried out by the Court of Auditors is governed by Articles 139 to 144 of the general Financial Regulation, OJ L 357, 31.12. 2002, p. 72.

39 Article 142(1) of the General Financial Regulation, OJ L 248, 16.9.2002, p. 1.

40 Article 53(1) of the Europol Financial Regulation, Council Act of 4 October 1999 adopting the Financial Regulation applicable to the budget of Europol and repealing Council Act 1999/C 25/01, OJ C 312, 29.10.1999, p. 01 and Council Act of 29 April 2004 amending the Financial Regulation applicable to the budget of Europol, OJ C 114, 30. 04. 2004, p. 01.

41 Ibid.

42 Ibid. Article 53(2).

The management board can revoke the decision of the director by unanimous decision and grant access to JAC to the information in question.[43]

Additionally, as observed above, the Internal Audit Service and the financial controller of Europol submit a report to the external audit authority. Furthermore, both the Court of Auditors and JAC are not only passive receptors of information, they also gather first hand information and conduct audits on the spot.[44] The Court of Auditors, for example, visits agencies twice a year for approximately one week at a time (Respondent #35, #46). The first audit takes place in October- November and is focused primarily on the implementation of the current year's budget as well as specific topics such as: procurement, management of contracts, HR issues, invoicing etc. (Respondent #46). During the second audit, which is usually scheduled for February -March, the Court focuses on the closing of the previous financial year's accounts (Respondent #46).

7.3.2 Debating: Talking Numbers

The audit procedure is not restricted to acquiring information, but is a dynamic process in which the actor and the forum engage in a discussion. Moreover, the actor has the opportunity to provide explanations before the formal report is issued. Thus, as a matter of practice, at the end of each mission, the Court of Auditors meets with the director and, where applicable, with the internal audit capacity of the agency. Preliminary findings are discussed at this informal stage and there is a possibility for explanation and clarification on the part of the agency. This provides a niche for the agency to influence or alter the findings of the Court by providing new insights or explanations of the problematic issues identified by the Court. The head of the internal audit capacity at EMEA describes this interaction as follows:

> When they [the Court of Auditors] bring something that is a misinterpretation from their part or they have not received all the information that could give them a complete view then we, as internal auditors, we may be more familiar with the specific situation because we may have been looking at certain processes and say: 'yes, but have you seen this or have you seen that?' And we can in this way change their opinion.

Additionally, at the end of the audit mission a confidential report is produced and sent to the agency. The agency is expected to reply to the report findings and provide

43 Ibid. Article 53(2).
44 Ibid. Article 52.

additional information if needed or required by the Court (Respondent #44). This represents an additional opportunity for clarification on the part of the agency or for bringing to the attention of the Court further documentation that would support the agency's case. As described by one agency director: "there is always a report on the audit mission. We have to reply on every finding and then they [the Court of Auditors] sometimes say, 'Ok, please send this and this document to clarify or justify.' And they sometimes change their comments when they get the additional information" (Respondent #2).

As a matter of law, the Court is required to produce a formal annual audit report of the agency, which is submitted to the Council and the Parliament before the 15th of November of each year and published in the Official Journal. This report is in fact the distilled version of the findings of the two confidential mission reports and contains a selection of the most important issues (Respondent #2).

Before the definitive version is submitted to the Council and Parliament, the annual audit report is sent to the agency and the agency has to reply yet again to each of the Court's observations. The agency's replies are then attached to the Court's report and sent to the Parliament and the Council, forming the basis of the discharge procedure. At this stage, the agency' s replies can no longer assuage the Court of Auditors, but they can play a role in the discharge procedure, when the European Parliament will examine the findings of the Court and the replies of the agency. In other words, the agency's formal replies represent the beginning of a new dialogue with a different forum: the European Parliament. More details on this procedure are provided later on in this chapter. For now, it is important to observe that a real dialogue takes place between the agency and the Court on the interpretation of the available information.

This is not only emblematic for Community agencies, but also for Council agencies. For example, there is also an ongoing dialogue between the Joint Audit Committee and Europol. Prior to issuing a formal report, the Joint Audit Committee is under the obligation to bring to the attention of the director and the financial controller any comments that the Joint Audit Committee considers should be contained in the audit report.[45] The director and the financial controller have to reply to the JAC comments and as such, have the possibility to clarify and justify certain aspects and thus, to modify the final findings of the JAC. The final report is issued by the 31st

45 Article 54(2) of the Europol Financial Regulation, Council Act of 4 October 1999 adopting the Financial Regulation applicable to the budget of Europol and repealing Council Act 1999/C 25/01, OJ C 312, 29.10.1999, p. 01 and Council Act of 29 April 2004 amending the Financial Regulation applicable to the budget of Europol, OJ C 114, 30. 04. 2004, p. 01.

of October and sent to the director, the management board and the financial controller.[46] At this formal stage, the director and the financial controller may again advise the management board and the Joint Audit Committee of their comments on the final report.[47]

Let us have a look at the contents of some of these reports and their main findings. First of all, it should be noted that the Court of Auditors and the Joint Audit Committee have at no time denied their stamp of approval to any agency's budget or their statement of assurance as to the legality and the reliability of the accounts and underlying transactions. It is never a clean bill of health, though, and both audit bodies have made clear observations identifying financial irregularities that need to be addressed. In the paragraphs below, some of the financial problems affecting agencies are more fully discussed.

Community Agencies

Cross-agency recurring observations of the Court[48] refer to issues such as: the breach or lax application of budgetary principles (i.e., largely the principles of annuality[49] and specification[50]) as provided for in the Financial Regulation, non-compliance with certain procedures of the Staff Regulations and irregularities in recruitment procedures, anomalies in procurement procedures, lack of internal controls for some agencies etc. The replies of each agency contain a clarification and justification of the situation reported by the Court as well as, usually, feedback on remedial measures (to be) undertaken.

What is somewhat startling to observe, however, is that at times it is impossible for the agency and its director to remedy the irregularities identified by the Court of Auditors. The agency finds itself in the proverbial situation of being "between a rock and a hard place", with the Court of Auditors demanding changes to ensure financial soundness and the member states on the board blocking these at all costs. This is a classic example of *multiple accountabilities disorder* or *MAD*.[51] MAD

46 Ibid. Article 55(1).
47 Ibid.
48 See for example, European Court of Auditors (2007), 'Notices from European Union Institutions and Bodies: Court of Auditors', OJ C 309, Volume 50, 19 December 2007.
49 See Title II (Budgetary Principles), Chapter 2 of Framework Financial Regulation, OJ L 357, 31.12. 2002, p. 72.
50 See Title II (Budgetary Principles), Chapter 6 of Framework Financial Regulation, OJ L 357, 31.12. 2002, p. 72.
51 J. GS Koppell (2005), 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder", *Public Administration Review*, *65*(1), 94-108.

occurs when an organisation that is accountable to different sets of forums on different dimensions of accountability faces conflicting or opposing accountability expectations and pressures, with different forums pushing it in different directions.[52] This is clearly the situation in which EMEA finds itself.

In the case of EMEA, the Court of Auditors pointed out in its 2006 report that the agency's fee system is in breach of the Fee Regulation.[53] However, the management board members, who are generally also heads of the corresponding national agencies, have resisted change along the lines demanded by the Court, mainly because the current payment system is beneficial to the national offices. They refuse to provide evidence and documentation of the real costs of the services provided by the national medicines agencies to EMEA, which would enable EMEA to calculate its fees in line with the applicable financial rules.[54] The situation was summarised as follows by the EMEA executive director:

> In some areas where we are discussing things in the board there is tremendous conflict of interest in the board. I pay the national agencies for the work they are doing for me. So I pay nearly forty million euro to the national agencies. And now we have a discussion in the board about that payment system. So you can imagine which kind of conflict of interest. And they do not want to change it because it is favourable to them at the moment and I have the Court of Auditors and the Commission Audit Service saying to me that I need to change because it's not sound financial management. And I am trying to do it but I get total resistance in the board. I put a proposal to the board and they reacted; it's a tricky political balance. But last board meeting I managed to get them to agree in principle to a decision to change but not when and not how.

This situation is illustrative, not only of a multiple accountabilities disorder, but also of the serious governance problem afflicting agencies. In the case of EMEA, the management board, rather than protecting the efficiency and financial health of the agency which it steers, has chosen to protect the interests of the national offices, which in this case run contrary to that of the agency. This is a problem afflicting not only EMEA, but other income-generating agencies as well. As summarised by a member of the Commission's Internal Audit Office: "the members in the board of the agencies are at the same time beneficiaries or interested parties of the work

52 Ibid.

53 European Court of Auditors (2007), 'Report on the annual accounts of the European Medicines Agency for the financial year 2006 together with the Agencies' replies', OJ C 309, 19.12.2007, p. 34.

54 Ibid.

program. They are deciding on the budget and once the budget is decided they are on the other side of the table getting the contract or the money" (Respondent #35).

The reverse situation is true for OHIM, where the member states have been resisting attempts to lower the agencies' fees at an appropriate level – in line with its actual costs, because this would increase OHIM's competitiveness vis-à-vis the national offices. In its 2007 report, the Court of Auditors pointed out that OHIM's "accumulated surplus in 2006 reached 200 million euro, the equivalent of the annual budget. On the basis of the recent analysis made, there was a need for the Office to propose to the Commission a level of fees which more accurately reflects its real costs."[55] In the meantime, the Office, which is supposed to have a balanced budget, has accumulated a surplus of 350 million euro in overcharged fees from users.

Despite this situation and despite the recommendation of the Court of Auditors, member states have been very resistant to attempts of the president of the Office to reduce the fees charged by the OHIM for its trademarks applications. The European Trademarks Office operates in parallel with the national trademarks offices. A company can choose whether to apply for an EU-wide trademark from OHIM or for a national trademark protection, applicable only in the member state in which the application was made. As such, the two systems are in competition with each other, and lower OHIM fees are perceived by the heads of the national trademark offices, who incidentally are members of the board of both the agency and of the comitology committee in charge of setting the fees and charges of the agency, as affecting the competitive advantage of their national offices. As described by the president of the Office: "what happens is that to get the fees down we have to have the approval of a substantial majority of member states. And they say no because they don't want the fees to go down because they feel there is competition with the national trademark offices."

In the end, in September 2008, a compromise was reached with the member states allowing OHIM to reduce its fees but also providing that the Office will invest 50 million euro of the accumulated surplus in a Cooperation Fund aimed at benefitting the national offices and that member states are to receive a 50% share of future renewal fees.[56] What is more, it is likely that the reduction in fees agreed upon will

55 European Court of Auditors (2007), 'Report on the annual accounts of the Office for Harmonisation in the Internal Market for the financial year 2006 with the Office's replies', OJ C 309/141, 19.12.2007, p. 141.

56 Office for Harmonization in the Internal Market (Trade Marks and Designs) (2009), 'Contribution to the Study on the Overall Functioning of the Trade Mark System in Europe', <http://oami.europa.eu/ows/rw/resource/documents/OHIM/OHIMPublications/ohim_contribution.pdf>.

not resolve the "surplus problem" in the long term and that the agency will be faced with this issue again and paralysed in its ability to address this problem by the governance set up. In this connection a recent OHIM report observes, "The role given to the Member States by the current legislation in the fee-setting process led to paralysis to the detriment of users of the system. If this institutional arrangement is not changed, there is a real risk of a repeat of such paralysis. Further, now that it has been agreed that Member States will receive a 50% share in renewal fees, the need for change in OHIM's financial governance is all the more necessary. Beneficiaries should never be in the position to vote on the level of fees in which they have a direct interest should a further reduction of the fees need to be undertaken in the – not unlikely – event of the reappearance of substantial annual surpluses."[57]

This is yet again illustrative of the serious governance problems affecting some European agencies, where the governance structure is fraught with conflicts of interest and as a result, the agency finds itself in the position of being paralysed in its ability to run a sound and balanced budget and to follow up on the recommendations of the European Court of Auditors.

It is also interesting to observe that financial inadequacies imputed to agencies can be traced back to inadequacies in agency planning and poor set up. The best illustration of this situation is EASA, which, in 2006, was on the brink of bankruptcy, forcing the Commission to step in and make a quick salvage. According to the reports of the Court, agency expenditures were about 48 million euro in 2006, versus revenues of about 35 million euro, despite the fact that the agency's fees were supposed to fully cover its certification costs. This situation was due to an inadequate level of fees and charges.[58] In other words, it was the result of poor planning through the adoption of fee levels that did not cover the agency costs. Lacking foresight, member states were happy to keep certification charges low so as to benefit national aviation industries, while at the same time setting high fees for the national experts hired out to EASA by the national aviation authorities (NAAs) (Respondent #15, #42). In other words, "the fees that EASA needed to pay to the NAAs for the expertise it hired (…) did not match the prices that EASA was allowed (…) to charge industry."[59] A member of the management board explained the situation as follows:

57 Ibid.

58 European Court of Auditors (2007), 'Report on the annual accounts of the European Aviation Safety Agency for the financial year 2006 together with the Agency's replies', OJ C 309, 19.12. 2007, p. 47; Also corroborated by Respondent # 32 and Respondent # 35; See also A. Schout (2008), 'Inspecting Aviation Safety in the EU: EASA as an Administrative Innovation?' in E. Vos (ed), *European Risk Governance – Its Science, its Inclusiveness and its Effectiveness,* Connex Report Series, Volume 6, 257-293, p. 271.

59 A. Schout (2008), p. 271.

> The first Fees and Charges Regulation, which was brought in about 18 months ago was a disaster and that was partly because member states in the comitology committee either did not understand the details of it or were fighting to keep the fees too low. When they introduced it the agency did not raise enough money so it was close to bankruptcy. You get the Commission to move when things get absolutely desperate, as they did. The Commission put in another X million euro because they had to, there was no way. Basically the agency came along and said 'if you don't give us any more money, we would have to delay or defer certification projects.' And if they had done that the industry would have gone ballistic. And so the industry put some more money and the Commission put some more money and we got by. (Respondent #32)

Yet again, as outlined in the previous chapter on the accountability to the management board, what is at stake here is the *accountability of the principals* for their role in the agency set up. An inappropriate set up can have serious repercussions on the ability of the agency to run a balanced budget and to perform its tasks. For instance, the potential dangers in the way EASA was set up are documented in the literature. It has been observed that, "from the start, there was a clash between centralisation (moving tasks to Köln) and decentralisation (subsidiarity or network-type arrangements with NAAs). The result was a potentially dangerous confusion. Member states were under the assumption that they could discontinue certain actions while EASA lacked the budget to hire sufficient people and, more importantly, has had to comply with the EU's complicated hiring arrangements."[60] In such situations, if failures do occur as a result, the locus of responsibility and ensuing accountability should fall with the principals that set up the system in the first place.

Europol

In the case of Europol, discharge documents are available online in the Public Register of the Council, starting with the 2001 audit up to the present. Documents made available generally encompass, the Joint Audit Committee reports, the opinions of the management board on the JAC reports as well as, in some cases, the replies of the director and the comments of the Europol financial controller and the Financial Committee. For 2002, however, while the audit report is available, the opinion of the management board in respect of discharge is not accessible to the public. It is difficult to see the rationale behind denying public access to such a document and to imagine a parallel situation being acceptable for a Community agency. Generally, in terms of transparency and access to financial documents, Europol seems to have a poorer record than agencies that fall under the Community financial regime.

60 Ibid. p. 270.

In terms of the audit comments, judging from the Europol replies, the agency would frequently seem to receive an extensive list of critical comments. An overview of the publicly available documents[61] shows that comments of the JAC touch on a multitude of issues such as: procurement issues, irregularities with the establishment plan and budget appropriations, the lack of a proper and comprehensive business continuity plan, recurrent under-spending of the budget, weaknesses in the payroll system etc. As in the case of agencies scrutinised by the Court of Auditors, the replies of Europol consist of a justification for the negative aspects noted in the audit report and generally a list of remedial measures to be undertaken or even an action plan for addressing the situation.

On a more critical note, in the case of Europol there seems to be a considerable backlog in terms of addressing some of the issues observed by the JAC. Certain issues are reiterated again and again in the JAC audit reports throughout the years. To illustrate, the 2001 audit report pointed, among other things, at problems with the asset management system and the lack of an asset register as well as to the absence of an agreement between Europol and the host state for the financing of security and building costs and the necessity to conclude such an agreement. The JAC came back to both issues in every audit for the next 5 years. Despite Europol's adoption of action plans for addressing these issues and despite yearly assurances of progress in these areas in its replies to the JAC, it was not until 5 years later, in 2006 that the first issue concerning asset management was resolved. The agreement issue with the host state is still pending at the time of writing. The delayed

61 Europol (2003) to Article 36 Committee/COREPER/Council, 'Audit Report and discharge for the period of 1 January 2001-31 December 2001–Clarification on the specific items raised in the 2001 audit report from the Joint Audit Committee', 15752/02 Europol 109, Brussels, 17 February 2003; Joint Audit Committee of Europol (2005) to Article 36 Committee/ COREPER/Council, 'Audit Report and discharge for the period of 1 January 2003-31 December 2003–Opinion of the Europol Management Board, as well as of the Director of Europol and the Europol Financial Controller, in respect of the discharge to the Europol Director for the implementation of the budget 2003', 16290/04 Europol 62, Brussels, 3 January 2005; Joint Audit Committee of Europol (2005) to Article 36 Committee/COREPER/Council, 'Audit Report and discharge for the period of 1 January 2004-31 January 2004–Opinion of the Europol Management Board, as well as of the Director of Europol and the Europol Financial Controller, in respect of the discharge to the Europol Director for the implementation of the budget 2004', 15118/05 Europol 37, Brussels, 1 December 2005; Joint Audit Committee of Europol (2006) to Article 36 Committee/COREPER/ Council, 'Audit report and discharge for the period of 1 January 2005-31 December 2005 - Opinion of the Europol management board as well as of the Director of Europol and the Europol Financial Controller in respect of the discharge to the Europol Director for the implementation of the budget 2005', 16330/06, Europol 101, Brussels, 18 December 2006; Joint Audit Committee of Europol (2007) to Article 36 Committee/ COREPER/Council, 'Audit report and discharge for the period of 1 January 2006 - 31 December 2006–Decision of the Europol Management Board, Comments on the Audit report of the Joint Audit Committee (JAC) concerning the financial statements for the financial year 1 January to 31 December 2006', 16459/07 Europol 130, Brussels, 18 December 2007.

reaction of Europol on implementing audit recommendations is also evident from the opinions expressed by the Europol financial controller on the JAC audit reports. The Europol financial controller agreed on multiple issues with the observations of the Joint Audit Committee and has pointed out that it had expressed concerns on the respective issues in its own previous (annual and/or quarterly) reports.[62]

7.3.3 Audit Reports as (Informal) Consequences

The third, central element of accountability is that the forum can pass judgment and, in case of a negative judgment, the actor may face consequences. Audit forums such as the Court of Auditors and the Joint Audit Committee do not have the authority to impose formal sanctions. However, as seen above, both bodies are responsible for producing an annual audit report exposing irregularities and demanding improvement. This in itself can act as a powerful informal consequence for the scrutinised agencies. The report of the Court of Auditors, for example, is a highly publicised and widely disseminated instrument, as it is published in the Official Journal of the European Communities. Moreover, both the Joint Audit Committee and the Court of Auditors have a direct line of communication to the political arena, since both reports are sent to the European Parliament and/or the Council and form the basis of the discharge procedure. While it is the European Parliament and/or the Council that can enact the actual sanctions, there is no doubt that a very negative assessment from the JAC or the Court has real consequences.

In fact, the Court of Auditors and the JAC fulfil a double function from an accountability perspective. On the one hand, they are accountability forums in their own right to which the agency is obliged to provide information, explain and justify its actions. They also have the possibility of imposing consequences, albeit informal ones. At the same time, these bodies are also, to paraphrase Laffan, sources of "raw material"[63] for other forums of the financial accountability system. They act as filters through which technical financial information is assessed, distilled and transmitted to more political and less technical forums like the Parliament and the Council.

62 See for example, the Opinion of the Europol Financial Controller in Audit Report and Discharge for the period of 1 January 2003-31 December 2003 and also on the Discharge for period 1 January 2004-31 December 2004.

63 B. Laffan (2003), p. 773.

7.4 The Discharge Procedure: At the Crossroads of Political and Financial Accountability

The discharge procedure represents the political component of the financial accountability regime, i.e., the political endorsement of the implementation of the budget. The European Parliament is the authority responsible for granting discharge to EU funded agencies on their implementation of the EU budget, based on a recommendation of the Council.[64] This is always in relation to the budget of two years back, or in other words, the budgetary discharge is granted in budgetary year *n* for the budgetary year of *n-2.*

In the case of OHIM and Europol, the EP is not the discharge authority, since neither body receives Community funding. The discharge authority for OHIM is its own budget committee, composed of representatives from the member states.[65] In the case of Europol, the discharge is granted by the Council.[66]

Table 7.3 Overview of the relevant discharge authority for the sample agencies

	OHIM	**EASA**	**EMEA**	**Eurojust**	**Europol**
Discharge Authority	OHIM budget committee	European Parliament	European Parliament	European Parliament	Council[67]

7.4.1 Informing and Debating: Multiple Sources and Testimonies

Within the European Parliament, the discharge process is the responsibility of the Committee on Budgetary Control. The Committee and its discharge rapporteur are responsible for drafting a discharge report on each individual agency. The report contains a proposal to the Parliament to grant, postpone or refuse discharge to the body in question, accompanied by a list of specific observations on the agency in question, as well as broad observations relating to agencies in general.

64 Article 185(2) of the General Financial Regulation, OJ L 248, 16.9.2002, p.1.

65 Article 142(2) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p. 1.

66 Article 36(5) of Council Act of 26 July 1995 drawing up the Convention based on Art K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316, 27 November 1995, pp. 0002-0032.

67 As of 1 January 2010, the budget of Europol is 'communitarised' and the European Parliament becomes the discharge authority for Europol.

The discharge report is based on the examination of a broad range of information. The committee examines the agency's accounts and financial statements, the annual report of the Court of Auditors together with the replies of the director and the Court of Auditors' statement of assurance on the reliability of the accounts and the legality and regularity of the underlying transactions.[68] Moreover, it also considers the annual activity report of the agency as well as the opinion of the "parent" EP committee of the agency.[69] Furthermore, the agency director is legally obliged to submit to the European Parliament at the latter's request, "*any information* required for the smooth application of the discharge procedure for the year in question."[70]

The discharge procedure before the European Parliament allows for a "written dialogue" between the Committee on Budgetary Control and the relevant agency. The Committee can and does address agency-specific written questions to the agency, and the agency is obliged to reply. The questions are often a follow up on specific observations made by the Court of Auditors in its audit report, but may also relate to issues from the agency's annual and/or activity reports or any other aspects that the Parliament deems relevant for the discharge procedure. In addition to a list of agency-specific questions, the Committee on Budgetary Control can also request agencies to provide answers to a list of general, "horizontal" questions. For example, the discharge for 2006, carried out in 2008, contained a list of 61 general questions addressed to all agencies subject to discharge, touching on a very broad array of issues ranging from: the daily allowance of the members of the management board and the number of square meters of office space available to the agency to the number of overtime hours of the director. In addition to the agency-specific and "horizontal" questions, the Committee also addressed a number of agency-related questions to the European Commission for information.[71]

Aside from being an opportunity for the Parliament to occasionally snub the Commission, raising questions to the Commission could actually enhance the quality of the accountability process. First of all, this allows for the possibility to obtain an overview of cross-agency data, which the Commission has at its disposal on issues such as internal audit, staffing, evaluation reports etc. Secondly, it gives access to third-party information about issues such as agency compliance with certain accountability obligations (e.g. annual activity reports). By virtue of being represented in the boards

68 Article 146(2) of the General Financial Regulation, OJ L 248, 16.9.2002, p. 1.

69 See the 2007 Discharge for Agencies, <http://www.europarl.europa.eu/activities/committees/editoDisplay.do?language=EN&menuId=2058&id=3&body=CONT>.

70 Article 96(3) of the Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002.

71 European Parliament (2008), Committee on Budgetary Control, 'Questionnaire: Discharge 2006: Agencies', Questions to the Commission, 15.1. 2008, <http://www.europarl.europa.eu/comparl/cont/adopt/discharge/2006/questionnaires/commission_agencies.pdf>.

of most EC agencies as well as by virtue of the close relation of specific Commission DGs to individual agencies, the Commission is in a privileged position and can provide insightful feedback to the discharge authority. To the extent to which it is used as a tool for obtaining additional information or a clarification of agency-related issues, as opposed to an exercise in parliamentary muscle flexing, raising questions to the Commission can yield a positive contribution to the accountability process.

In addition to written exchanges, the Committee on Budgetary Control also has a verbal exchange of views with the agencies. Originally, all the agencies to be discharged by the Parliament had to be present at the exchange. Reportedly, this was not a very productive exercise given the large number of agencies. Recently, this practice has been abolished and only a selected number of agencies, from whom the Committee on Budgetary Control considers that further explanations and justifications are needed, are invited to the meeting (Respondent #13, #39). In 2008, for example, only seven agencies were invited to attend the meeting in respect of the 2006 discharge (i.e., FRONTEX, EAR, EFSA, EASA, CEDEFOP, EUROFOUND, ERA).[72] For the 2007 discharge, only four agencies were invited to attend the meeting (i.e., CEPOL, GSA, ERA and FRONTEX).[73]

Discharge by the Council also includes a dialogue between the main actors and forums involved in the process, but this takes place primarily in writing. Thus, the management board of Europol, on the basis of an opinion of the Financial Committee, discusses the audit report of the Joint Audit Committee and draws up a recommendation to the Council concerning discharge.[74] Once this has taken place, the Joint Audit Committee submits its report on the annual accounts to the Council together with the opinion of the director and the financial controller, which have been taken into account.[75] It is then the Council that grants discharge to Europol, based on the information and observations provided.

In the case of OHIM, as a self-financed agency, a different regime applies. The discharge is granted by the OHIM budget committee based on its examination of

72 European Parliament, Committee on Budgetary Control, 'Minutes Meeting Monday 28 January 2008 from 15.00 to 18.30, and 29 January 2008, from 09.00 to 12.30, Brussels, CONT_PV(2008)0128_1.

73 European Parliament, Committee on Budgetary Control, 'COCOBU Info', Issue 12/2008, pp. 6-7 <http://www.europarl.europa.eu/document/activities/cont/200811/20081125ATT43053/20081125ATT43053EN.pdf>.

74 Article 55(2) of the Europol Financial Regulation, Council Act of 4 October 1999 adopting the Financial Regulation applicable to the budget of Europol and repealing Council Act 1999/C 25/01, OJ C 312, 29.10.1999, p. 01 and Council Act of 29 April 2004 amending the Financial Regulation applicable to the budget of Europol, OJ C 114, 30. 04. 2004, p. 01.

75 Ibid.

the accounts and financial statements of the Office, the annual report by the Court of Auditors (together with the president's replies), any special report of the Court of Auditors pertaining to the year in question as well as the statement of assurance of the Court of Auditors as to the reliability of the accounts and the legality and regularity of the underlying transaction.[76] Additionally, the budget committee is required to inform the European Parliament, the Council, the Commission and the Court of Auditors of the decision taken on discharge.[77]

7.4.2 Consequences: Finances and Governance Intertwined

The question arises of the extent to which the discharge authority can impose sanctions in cases of dissatisfaction with the implementation of the budget. The discharge authority, be it the OHIM budget committee, the Council or the European Parliament has a powerful weapon at its disposal: it can postpone or refuse to grant a discharge. So far, all the agencies have been granted discharge, although there have been instances where the draft report of the Committee on Budgetary Control has proposed a postponement of the discharge for specific agencies.[78] The final report adopted in the plenary, however, ultimately granted the discharge. It is not clear what exactly the outcome would be if one of these political forums refused to give their stamp of approval to the agency director for the implementation of the authorised budget, but the risk is that the consequences would be dire indeed. In 1984, the refusal to grant discharge to the Commission did not result in the resignation of the Commission, but the respective Commission was within weeks of completing its mandate.[79] In 1998, the Committee on Budgetary Control's recommendation to delay the grant of the discharge to the Commission acted as a catalyst for the ensuing political crisis that resulted in the resignation of the Santer Commission in March 1999. Ultimately, the EP is also the budgetary authority (in addition to the discharge authority) so any irregularities on budget implementation could impact on the budget that is approved for the upcoming year. Furthermore, in the case of

76 Article 95(2) of the OHIM Financial Regulation, <http://oami.europa.eu/en/office/admin/pdf/CB-2-03.pdf>.

77 Ibid. Article 94(4).

78 See for example, Draft Report on the 2006 Discharge-European Aviation Safety Agency; Draft Report on the 2006 Discharge-European Centre for the Development of Vocational Training (CEDEFOP); Draft Report on the 2006 Discharge-European Foundation for the Improvement of Living and Working Conditions (EUROFOUND); Draft Report on the 2006 Discharge-European Environment Agency (EEA); Draft Report on 2006 Discharge-European Agency for Safety and Health at Work (EU-OSHA); Draft Report on 2006 Discharge – Translation Centre for the Bodies of the European Union (CDT); Draft Report on 2006 Discharge–European Training Foundation (ETF). The reports are available at <http://www.europarl.europa.eu/comparl/cont/adopt/discharge/2006/agences_en.htm>.

79 B. Laffan (2003), p. 773.

Europol, the discharge authority (i.e., the Council) is also the appointing authority and, in the event of strong dissatisfaction, it has the possibility of firing the director.

Short of the more extreme measures outlined above, the discharge authority has other powers at its disposal: through its discharge comments, it can demand that the problematic aspects be remedied. Thus, Article 56(4) of the Europol Financial Regulation provides that "the director shall take all appropriate steps to act on the comments appearing in the decision giving discharge." Similarly, the Framework Financial Regulation also provides that the respective agency director is legally bound "to take appropriate steps to act on the observations accompanying the European Parliament's discharge decision and on the comments accompanying the recommendations for discharge adopted by the Council."[80] Moreover, the director is under an obligation to report at the request of the European Parliament or the Council on the measures taken in light of their observations. Similar obligations apply in respect of the president of OHIM, who is required to take appropriate steps to act on the discharge observations, to report on this at the request of the discharge authority, i.e., the budget committee, and to send a copy thereof to the Court of Auditors and the Commission.[81]

The comments of the Parliament in the final discharge report tend to be extensive and to contain calls and demands for redress. It is made up of two types of recommendations: "agency -specific recommendations" and the so-called "horizontal recommendations" (i.e., cross-agency recommendations). The agency-specific recommendations contain comments addressed to each individual agency for which the EP is the discharge authority. The comments are generally very technical and refer to very particular and detailed budgetary issues. The focus tends to be on aspects of financial regularity and generally do not take up aspects of agency performance, however. More recently, the Parliament is trying to address this and is increasingly urging agencies in its recommendations to report on their results and to provide performance indicators.

The horizontal recommendations are addressed to all agencies and to the European Commission as "the coordinator bearing overall responsibility for the implementation of the budget (for example on matters of internal audit and control or on accounting issues)"[82] as well as to the European Court of Auditors. Such horizontal observa-

80 Article 96 of the Commission's Framework Financial Regulation, OJ L 357, 31.12. 2002, p. 72.
81 Article 96 of OHIM Financial Regulation, <http://oami.europa.eu/en/office/admin/pdf/CB-2-03.pdf>.
82 European Parliament (2007), Committee on Budgetary Control, 'Discharge of the 2005 Financial Year. Resolutions on Agencies adopted in Plenary on 24 April 2007', Summary of Request made

tions refer to broad, systemic issues such as: the need for the European Commission to present an overall policy for the setting up of new Community agencies as well as a cost-benefit study before setting up a new agency,[83] the necessity of an inter-institutional agreement,[84] the need to harmonize the format of the annual reporting of agencies,[85] the need for clear performance indicators for agencies[86] etc.

These horizontal recommendations go far beyond the observations of an exclusively financial forum and are, in fact, indicative of a spillover from accountability on strictly financial issues to governance aspects. In other words, the focus of control has shifted from exclusively financial issues into essential aspects of agencies' "meta-governance" and changes to "the overall institutional framework."[87] This is not only symptomatic of the Committee on Budgetary Control, but also of the EP's other budgetary Committee, the Committee on Budgets, which is responsible for the other end of the budgetary process, the adoption of the budget. Both budgetary committees of the European Parliament have assumed a pioneering role by becoming actively involved in governance aspects, and are raising serious questions about the appropriateness of agencies' governance and institutional framework.[88]

This striving for better governance might be partially motivated by the Parliament's attempt to increase its prominence and influence vis-à-vis agencies. Beyond, or more accurately perhaps, besides institutional "squabbling" and power struggles, the current expansion of focus of the two budgetary committees might be related to the fact that unlike other committees of the EP, the two budgetary committees meet the agencies and their heads en bloc. Whereas specialised parliamentary committees are involved with a specific agency in their field of expertise, the budgetary committees have horizontal meetings with most agencies. This has created a venue to which agencies have been able to bring their concerns and it has consequently raised parliamentary awareness of cross-agency problems and the need for improved

to the Agencies, to the European Commission and to other Institutions and bodies, Rapporteur: Edit Herczog, 26 April 2007, p. 3.

83 Ibid. p. 4.

84 Ibid. p. 4.

85 Ibid. p. 5.

86 Ibid. p. 5; See also, for further horizontal points, European Parliament (2008), Committee on Budgetary Control, 'Discharge for the 2006 Financial Year. Resolutions on Agencies adopted in Plenary on 22 April 2008', Summary of Requests made to the Agencies, to the European Commission and to other Institutions and bodies, Rapporteur: Hans-Peter Martin, 16 May 2008.

87 T. Bach and J. Fleischer (2008), 'Watchdogs or pussy cats? How parliaments hold agencies accountable at EU and national level', *Paper presented at the 2nd Biennial Conference of the ECPR Standing Group on Regulation and Governance*, Utrecht, 5-7 June 2008.

88 See for example the COCOBU annual meetings with the heads of European agencies chaired by the Committee on Budgets and co-chaired by the Chairman of the Committee on Budgetary Control.

governance. Regardless of the rationale behind the increase in parliamentary attention to governance problems, it is important that the European Parliament is finally asking questions that are long overdue. This process is still new and tentative but could prove of critical importance given the fact that, as it was observed in the previous chapters, the most critical issues affecting agencies are related to and closely intertwined with governance problems.

7.5 Agencies' Financial Accountability: A Balance Sheet

First of all, what stands out from the very beginning is that when speaking of financial accountability, we are faced with a complex system. As such, we no longer refer to an *accountability mechanism* but to an *accountability regime.* The financial accountability of agencies takes place towards a plurality of intertwined forums that are in a nexus relation with each other: sending and/or exchanging information at a formal or informal level. (See Figures 7.3, 7.4 and 7.5 below)

Figure 7.3 The financial accountability regime: the nexus of financial satellites (I), (agencies that receive contributions from the EU budget)

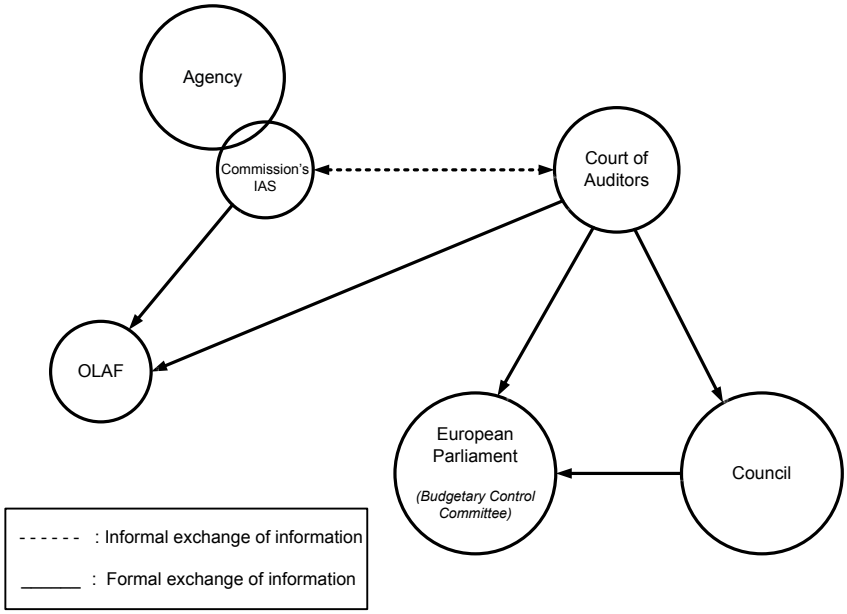


Figure 7.4 The financial accountability regime: the nexus of financial satellites (II), (OHIM, fully self-financed)

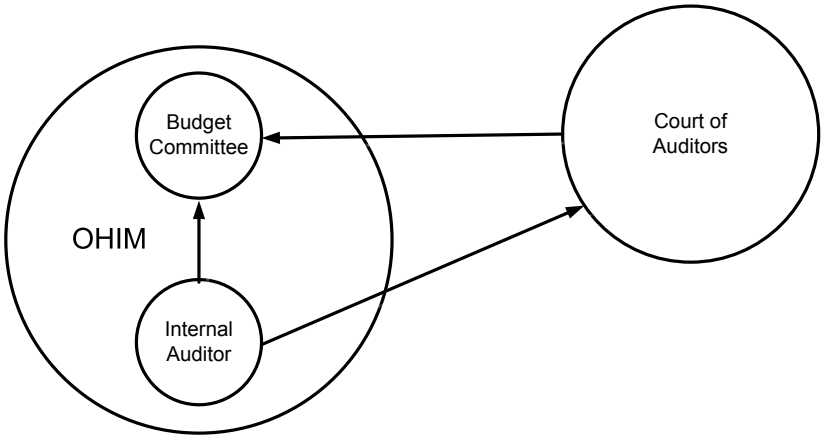
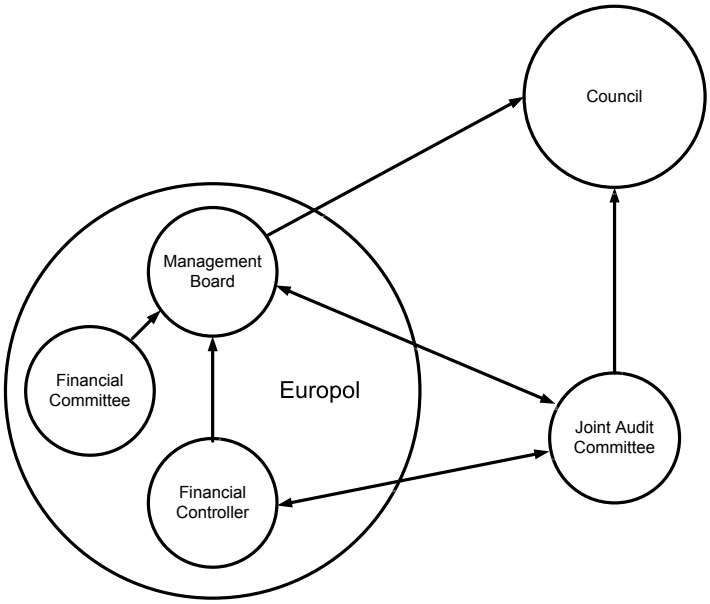


Figure 7.5 The financial accountability regime: the nexus of financial satellites (*III)*, (Europol, member state financed)



Moreover, the roles of the various actors are blurred, with actors simultaneously acting as accountability forums that are informed, participate in discussions and can enact consequences vis-à-vis the actor as well as sources of raw, technical information for other forums (e.g. the Court of Auditors) or even as fire alarms. This is

interesting for accountability theory because it provides insight into the fact that in practice, accountability relations are not always clear and straightforward, but rather intricate webs with bodies performing overlapping roles.

Furthermore, borrowing Scott's terminology, the various accountability forums are both in a relationship of *interdependence* and *redundancy*.[89] On the one hand, in some cases they are dependent on each other's information and expertise. For example, the discharge authorities (i.e., the management board, the Council or the European Parliament) rely heavily on the expertise and the reports of audit bodies such as the Court of Auditors or the Joint Audit Committee. On the other hand, the accountability forums have at times overlapping responsibilities and duplicate each other's work, as we saw in the case of IAS and some of the internal audit capabilities of specific agencies. Redundancy can be purposefully cultivated in an accountability regime and acts a "failsafe mechanism."[90] In the case of the financial accountability regime of agencies, the observed redundancy does not seem to be a purposefully laid out failsafe model, but rather the result of a poor set up and lack of co-ordination in the system as a whole and/or of the fact that the system is quite new and some of the forums are still defining their role within it.

Overall, the financial accountability system seems thorough. Concerns raised in the previous chapters regarding the passive monitoring performance and lack of technical expertise of other accountability forums, no longer play a role. For instance, the Court of Auditors and the Joint Audit Committee are very technical, expertise-based accountability forums for whom accountability is a full time business. What is more, rather than slacking in their monitoring duties, some of these forums (i.e., the Committee on Budgets and the Committee on Budgetary Control) are taking on new issues, expanding their monitoring role from strictly financial issues and "number crunching" into areas of agency governance. Nevertheless, the system does display a set of weaknesses.

First of all, the discussion above pinpointed a very critical issue: the occurrence of what has been termed as the *multiple accountabilities disorder* or *MAD*. This was observed in the case of OHIM and EMEA, for example, where the Court of Auditors (as well as the IAS) made formal recommendations to the director to change the fee system of the agency in order to ensure sound financial management, only to find these opposed by the member states. Such cases, however, are not the result of conflicting aims between different forms of accountability. Rather, the problem

89 C. Scott (2000), 'Accountability in the Regulatory State', *Journal of Law and Society*, *27*(1), 38-60.
90 Ibid. p. 53.

lies with the strong conflict of interests of the management board members of some agencies. As we have seen, these boards are continuously striving to protect the interests of their national level agencies, even to the detriment of the financial soundness and efficiency of the European agency and, very importantly, in the face of criticism and recommendations for change from the Court of Auditors. In other cases, deficiencies in agency set up and poor planning have subsequently affected agency ability to run a balanced budget (i.e., EASA). In such cases, the responsibility and ensuing accountability of the actors in charge of setting up the system needs to be called into question. Air safety, for example, is a highly crucial issue. To the extent that the agency runs into financial problems that push it to the verge of bankruptcy and endanger its capacity to perform its tasks, or undertakes operations without the financial and administrative capacity to do so, the consequences could be dire indeed.

Also still on a critical note, agencies' financial accountability is almost exclusively focused on aspects of regularity and does not take up aspects of agency performance. The budgetary process in general, but also the discharge process, is largely disconnected from performance aspects and the monitoring of results. In the same critical vein, an additional "accountability pathology" is afflicting the financial accountability regime: *accountability overloads*. The sheer number of forums involved and the complexity of the various accountability procedures can give rise to a veritable "accountability overkill." While referring to going through three months of audit within the same financial year by different audit services, one of the agency executive directors remarked: "we are spending so much time and resources on this… It's not efficient, it's duplication" (Respondent #45).

Overload is a realistic concern. Most agencies are subject to the same financial oversight and cumbersome procedures as the European Commission: internal audit by the IAS, external audit by the Court of Auditors and a complex discharge procedure before the European Parliament. These procedures were put in place for large institutions like the European Commission. While OHIM, by far the biggest agency has a staff of roughly 700, there are agencies that have a total staff numbering fewer than 50 employees. For example, the European Police College has a staff of 21 employees,[91] the Community Plant Variety Office employs 45 people,[92] the Euro-

91 European Court of Auditors (2008), 'Report on the annual accounts of the European Police College for the financial year 2007 together with the College's replies', OJ C 311, 5.12. 2008, p. 136.

92 European Court of Auditors (2008), 'Report on the annual accounts of the Community Plant Variety Office for the financial year 2007 together with the Office's replies', OJ C 311, 5.12. 2008, p. 172.

pean Union Fundamental Rights Agency has a total staff of 57 employees.[93] Yet these bodies are subject to similar accountability procedures as the European Commission. Leaving aside the immense costs involved for the European Union and its taxpayers, these are extremely cumbersome procedures that can outright paralyse such small scale bodies and run the risk of turning "account-giving" into their full-time business as opposed to the actual implementation of their tasks. Maybe it is time European institutions conducted a new generation of risk assessments and cost-benefit checks, this time focusing on the (financial) soundness and efficiency of the system they set up.

93 European Court of Auditors (2008), 'Report on the annual accounts of the European Union Fundamental Rights Agency for the financial year 2007 together with the Agency's replies', OJ C 311, 5.12.2008, p. 7.

CHAPTER 8

(Quasi-)Judicial Accountability: Life Within and Beyond Legality

The challenge embarked upon in this chapter is to depict the (quasi-)legal accountability regime of European agencies. As such, the role of Court of First Instance and the European Court of Justice in affording judicial review of agencies' acts will be explored. In other words, do the European Courts have a role in curbing the power of agencies? Is there a possibility for judicial review of agency decisions? In the second part of the chapter, this is supplemented by an investigation of the role of the European Ombudsman as a quasi-judicial forum, potentially playing a complementary role to that of the Court.

8.1 Accountability vis-à-vis the Court: Life Within Legality

The focus of the section is on the extent to which acts and measures emanating from EU bodies with legal personality and subject to EU law are and can be reviewed by the Court of Justice of the European Communities. Given the extensive powers of agencies and, particularly in some cases, their power to adopt decisions binding on third parties, this issue becomes the crux of the matter in a discussion of agencies' legal accountability. As pointed out by Craig, "the Community prides itself on being a legal order based on the rule of law. It is axiomatic to such an order that there should be proper mechanisms for the control of legality. (…) It is right and proper in normative terms that those that those who have suffered some substantial adverse impact should have access to judicial review."[1]Although uttered in a different context,[2] the point is axiomatic and of direct relevance for agencies. These bodies are established outside the Treaty, but are they also outside the reach of its Courts?

1 P. Craig (2006), *EU Administrative Law*, Oxford: Oxford University Press, p. 343.
2 The point was made concerning the narrow standing rules for a direct challenge via Article 230 EC.

Given the stated aim, the chapter zooms in on the issue of judicial review of agencies' substantive decisions; other aspects of the agencies' legal regime such as contractual and non-contractual liability and staff disputes will not be addressed. In elucidating this matter, three major issues need to be tackled. First of all, does the judicial process before the European Courts qualify as an accountability relationship and what is the link between judicial review and judicial accountability? Secondly, does the Court have jurisdiction to review agency decisions? Under what circumstances and what is the exact scope of its jurisdiction? Thirdly, and finally, to what extent can this relationship be used and has it been used in practice to curb the power of agencies, i.e., to reverse agency decisions?

As in previous chapters, the analysis will focus on the five sample agencies and will be based on an assessment of the relevant legislation as well as existing case law. Additionally, this will be supplemented with interviews conducted with key legal experts from the respective agencies. As pointed out in Chapter 1, the law is as stated in September 2009. The concluding sections contain insights for the future and in particular reflections concerning the impact of the Treaty of Lisbon.

8.1.1 A Full -Blown Accountability Relation: Informing, Debating and Consequences

Before delving into detailed legal provisions and case law on the possibility of judicial review of agency power, the first question deserves consideration As such, whether or not the judicial process before the Court qualifies as a fully fledged accountability relation is discussed below. At the same time, the link between judicial accountability and judicial review will be spelt out, and its relevance as a check on agency power will be closely examined.

The first aspect can be easily elucidated based on a brief overview of the legal process before the Court. As a result, the remainder of the chapter will not centre on this, but rather on an *a priori* issue: ascertaining the possibility of such an accountability process taking place in the first place as well as to establish, in the event of a positive answer, the scope of review. In other words, a crucial issue to be assessed is whether there is an obligation to appear before the relevant accountability forum; that is to say, whether the judicial forum has jurisdiction to hold the actor to account. In contrast to the other accountability arrangements discussed at length in previous chapters, it cannot be taken for granted that there is any obligation to appear before the forum, and settling this issue involves delving deep into agencies' constitutive acts, agency case law and other relevant jurisprudence of the Court. By contrast, focusing the discussion along the three phases of the accountability process would entail in this case shifting the focus to an in-depth analysis of the

rules of procedure of the Court rather than concentrating on the actual possibility of review and the scope of that review. Whereas this might well be interesting, it would not address the central concern of this study: the growing power of agencies and the extent to which these powers can be scrutinised and, if necessary, curbed.

The actual judicial process is straightforward and is generally contained in the Court's rules of procedure.[3] From the onset, it is directly identifiable as an accountability arrangement, as it clearly displays the three stages of providing information (i.e., the application initiating the proceedings and the defence pleading), debating (i.e., the actual court proceedings) and consequences (i.e., the judgment). The procedure before the ECJ has both a written and an oral phase. The written phase involves the submission of the original application and of the defence pleading, which contain extensive *information* such as the subject matter of the proceedings, a summary of the pleas in law relied on, the form of order sought as well as any evidence offered in support.[4] These can be supplemented by a reply from the applicant and a rejoinder from the defendant,[5] in which the parties may offer further evidence.[6] In fact, this stage goes beyond the mere provision of information; this is the beginning of a *debate* between the two parties, albeit in a written manner, with each party offering arguments of fact, law and evidence to support their case and to counter-act those of the other party. The centrality of the phase of debate and deliberation is further evident during the oral proceedings before the Court. The case is held at a public hearing, during the course of which the Judges and the Advocate General can put any questions to the parties. Thus, "once the access-to-the -Court issue is clear then the Court is in the driving seat in terms of not only obtaining the information it wishes from the actor being held to account but also in debating with the lawyers representing both sides (as well as with possibly other institutions and representatives of member states) the manner in which the information must be interpreted. In addition, the Court can request to hear certain 'witnesses' including specific civil servants, including in an appropriate case Directors of Agencies."[7] Finally, the *consequences* phase is represented by the judgment of the Court, delivered in open Court, subsequent to deliberation by the Judges, after having heard the opinion of the

3 See for instance, Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, OJ L 176 of 04.07.1991, p. 7 and OJ L 383 of 29.12. 1992 (corrigenda) and amendments. Latest amendment, OJ L 24 of 28.01.2009, p. 8.

4 Article 38 and Article 40 of the Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, OJ L 176 of 04.07.1991, p. 7 and OJ L 383 of 29.12. 1992 (corrigenda) and amendments. Latest amendment, OJ L 24 of 28.01.2009, p. 8.

5 Ibid. Article 41.

6 Ibid. Article 42(1).

7 D. Curtin (2009), *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford: Oxford University Press, p. 266.

Advocate General. In terms of the possibility of inflicting actual consequences, unlike in the case of some of the forums examined in other chapters, these are formal and binding (i.e., starting from the date of delivery of the judgment). In fact, this is one of the strengths of this arrangement compared to other accountability relations, where the emphasis might be on debating while sanctions are milder or left to other forums. The verdicts of the Court have a real bite and, depending on the action in question, they can amount to annulment or alteration of the contested decision and an order to pay damages. As such, given the elements identified above, the judicial process is outright recognisable as a full-fledged accountability process.

What is, however, the connection between judicial/legal accountability and judicial review and why does it warrant such a central role in a discussion of agency accountability? With regard to the former, it has been pointed out that "the most significant aspect of legal accountability is that of judicial review (whether constitutional or administrative) and the most important enforcers of legal accountability are the courts."[8] As a central element of legal accountability, judicial review allows for contesting and scrutinising executive action, and even demanding remedial actions. That is to say, "judicial review in all its various forms is clearly a fundamental aspect of executive accountability, particularly for insuring that governments have followed the correct legal procedures. Without the possibility for legal intervention to restrain government illegality, citizens would have little chance of holding governments to account for breaking the law."[9] In other words, judicial review is the most crucial aspect of legal accountability and a fundamental element in ensuring the accountability of the executive.

The importance of judicial review as a check on agency power has been echoed repeatedly. In this connection, it has been observed that "judicial review of the agency's actions and decisions (conducted by an independent and depoliticised judiciary) is essential to prevent and control the arbitrary and unreasonable exercise of discretionary powers. This is a fundamental element of the rule of law. The discretion of public officials should never be unfettered but subject to legal control."[10] In a similar vein, Vibert also points at the importance of judicial review as a recourse against the actions of the unelected: "the new bodies take decisions

8 E. Fisher (2004), 'The European Union in the Age of Accountability', *Oxford Journal of Legal Studies*, *24*(3), 495-515, pp. 504-505 paraphrasing A. Tomkins, *Public Law*, Oxford: Clarendon Press, 2003.

9 R. Mulgan (2003), *Holding Power to Account. Accountability in Modern Democracies*, Palgrave Macmillan, p. 81.

10 R. M. Lastra and H. Shams (2001), 'Public Accountability in the Financial Sector' in E. Ferran and C. A. Goodhart (eds), *Regulating Financial Services and Markets in the 21st Century*, Oxford: Hart Publishing, 165-188, p. 173.

or arrive at conclusions that can have a major impact on citizens or businesses or on government. It is therefore important that they provide an opportunity for all the evidence to be presented and an opportunity for its rebuttal by those claiming to have counter-evidence. If such standards are not followed, or if the institution is wrong on the facts, then an avenue for challenge is open through judicial review."[11] Judicial review thus becomes an indispensible check on the discretionary exercise of power. In the words of the late ECJ Judge, Federico Mancini, "no society can be considered truly democratic if its citizens are denied the possibility of vindicating their legal rights in judicial proceedings, whether against the oppressive acts of a powerful legislature–even a democratically elected one–or against the unlawful practices of an overweening administration."[12] Are there possibilities for such vindication with respect to acts and decisions of European agencies or are European citizens left without recourse?

8.1.2 Judicial Review of Agencies' Acts

The notion of judicial review lies at the core of the European Union legal order. As the European Court of Justice held in the seminal case, *Les Verts,* "The European Community is a Community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[13] As such, judicial review is a "fundamental component of a Community based on the rule of law",[14] it is an "intrinsic component" of the rule of law.[15]

The Community action can be the subject of legal review by means of a direct challenge under Article 230 EC (i.e., review of legality) as well as an indirect challenge under Article 234 EC (i.e., preliminary rulings). Furthermore, under Article 232 EC, member states and the Community may also bring an action for failure to act. In other words, not only is Community action, its inaction, too, is subject to review. In fact, the ECJ has repeatedly pointed out that through a combination of direct and indirect action, the Treaty provides for a complete system of legal

11 F. Vibert (2007), *The Rise of the Unelected. Democracy and the New Separation of Powers*, Cambridge: Cambridge University Press, pp. 172-173.
12 F. Mancini (2000), *Democracy and Constitutionalism in the European Union: Collected Essays*, Hart Publishing: Oxford and Portland, Oregon, p. 39.
13 Case 294/83, *Parti Ecologiste 'Les Verts'v European Parliament*, [1986] ECR 1339, para. 23.
14 K. Lenaerts (2007), 'The Rule of Law and the Coherence of the Judicial System of the European Union', *Common Market Law Review, 44*(6), 1625-1659, p. 1635.
15 Ibid. p. 1626.

protection.[16] Whereas this system might not be as watertight as proclaimed by the Court,[17] the point remains that the rule of law and the possibility for judicial review is one of its central tenets and that acts of the European Parliament, the Council, the Commission and the ECB, which are intended to produce legal effects vis-à-vis third parties, are reviewable by the Court of Justice (i.e., Article 230 EC).

The issue is not as straightforward in the case of European agencies. Although a number of agencies can issue recommendations to the Commission that are de facto rubberstamped into decisions (e.g. EMEA) or can even directly adopt decisions that are binding on third parties (e.g. EASA, OHIM, EMEA), they are not among the institutions listed in Article 230 EC, whose actions are amenable to judicial review. Agencies are set up by secondary legislation and the Treaty by and large contains no mention of their existence.[18] Furthermore, a number of agencies have been set up under the Union pillars, where the powers of review of the ECJ are highly circumscribed, to say the least. Hence, the agencies we sampled fall, on a sliding scale, into three different categories with regard to the possibilities for judicial review: agencies for which judicial review is provided in their constituent act (e.g. EASA and OHIM), agencies whose constituent act makes no mention of judicial review (e.g. EMEA) and finally, agencies whose constituent act makes no mention of judicial review *and* are part of a much more restrictive overall system in terms of Court jurisdiction, i.e., third pillar agencies (e.g. Europol and Eurojust).

EASA and OHIM

From an accountability perspective, both EASA and OHIM make for interesting case studies given the fact that they are decision-making agencies (i.e., they adopt decisions binding upon third parties). Furthermore, EASA also has quasi-regulatory tasks, meaning it can adopt implementing standards of general application. By virtue of the nature of their tasks, these agencies' decisions have a direct impact (and occasionally an adverse impact) on individuals. Consequently, whether and to what extent their decisions are reviewable by the Court becomes a stringent issue.

In the case of OHIM, the issue of whether agency decisions are challengeable before the Court is straightforward. Unlike in the case of most other agencies, OHIM's

16 See for instance, Case 294/83, *Parti Ecologiste 'Les Verts' v European Parliament,* [1986] ECR 1339, para 23.

17 For a further discussion on this point and the difficulties with the Court's narrow interpretation of standing see for instance, P. Craig (2006), pp. 331-347.

18 Exceptions to this are Europol and Eurojust. See Article 29 TEU, Article 30 TEU and Article 31 TEU.

constitutive act[19] contains explicit provisions in this respect. A two-tiered appeals structure is provided for. First of all, the OHIM Regulation contains detailed provisions for the internal appeals procedure before the Boards of Appeal[20] in which an agency decision can be appealed by any party to proceedings adversely affected by it.[21] The decisions of the Boards of Appeal can subsequently be appealed before the Court of Justice. Actions can be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of the Regulation or any rule of law relating to their application or misuse of powers. In terms of consequences, the Court of Justice has jurisdiction to both annul and alter the contested decision and the action is open to any party to the proceedings adversely affected by the decision before the Boards of Appeal.[22]

Applicants have certainly not shied away from making good use of this option for further judicial remedy. The sheer number of cases is overwhelming. The Court of First Instance has issued judgments in over four hundred cases[23] and the ECJ has issued over sixty judgments in final appeal cases.[24] Furthermore, according to the OHIM Regulation applicants can also raise an action for annulment under Article 230 EC against decisions on access to documents taken by the Office pursuant to Article 8 of Regulation (EC) No 1049/2001.[25]

Similarly, the basic regulation of EASA also specifically provides for the jurisdiction of the Court of Justice. As in the case of OHIM, two appeal routes against the agency's decisions are provided for: (i) an indirect, two-tiered appeal structure (ii) a direct appeals route for privileged applicants (i.e., member states and Community institutions).

Concerning the former, Article 44(1), provides that "an appeal may be brought against decisions of the agency pursuant to Article 20, 21, 22, 23, 55 or 64." In other words, agency decisions may be appealed relating to airworthiness and environmental certification (Article 20), pilot certification (Article 21), air operation certification (Article 22), third country operations authorisations (Article 23), the investigation

19 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p. 1.
20 Ibid. See Title VII on Appeals.
21 Ibid. Article 59.
22 Ibid. Article 65.
23 See the database kept by the Office, <http://oami.europa.eu/ows/rw/pages/CTM/caseLaw/appealsOffice.en.do>.
24 See the database kept by the Office, <http://oami.europa.eu/ows/rw/pages/CTM/caseLaw/appealsCFI.en.do>.
25 Article 123(3) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p. 1.

of undertakings (Article 55) and agency decisions pursuant to the fees and charges regulation (Article 64), i.e., agency invoice decisions. The decisions can be appealed by any natural or legal person to whom the decision is addressed, as well as decisions directed at another person, as long as these can be demonstrated to be of *direct and individual concern* to them.[26]

Concerning judicial review by the Court, Article 50(2) provides that actions for annulment of decisions mentioned above (i.e., decisions of the agency taken pursuant to Article 20, 21, 23, 55 or 64) may be brought before the Court, but only after the internal appeals route has been exhausted. So far, no cases have been lodged under this provision.

Concerning the latter, Article 51 provides that "Member States and the Community institutions may lodge a direct appeal before the Court of Justice of the European Communities against *decisions* of the agency." This provision is much broader and general than the previous one; it no longer makes reference to a finite list of specific types of decisions. In fact, it is so general that it is difficult to assess, in the absence of case law, which decision could form the subject of direct appeals (Respondent #51). The agency decisions listed in Article 50(2) address individual legal or natural persons able to challenge the decisions referred to above. The assumption is that the article 51 would then cover decisions which are not covered by Article 50(2) and it would in fact refer to measures of the agency mentioned in Article 18(c) i.e., certification specifications, including airworthiness codes and acceptable means of compliance, as well as any guidance material for the application of the Regulation and its implementing rules (Respondent #51). This amounts to what have been described as the "soft law" powers of the agency. EASA can adopt certification specifications (including airworthiness codes and acceptable means of compliance) and guidance material for the application of the Community law and these measures take the form of decisions by the executive director.[27]

These certification specifications, which lay down standards in order to fulfil the essential requirements, constitute the agency's interpretation of the Community legislation. However, they are not binding on the regulated persons. The applicants can and, in fact at times, do choose to depart from the certification specifications

26 Article 45 of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety agency and repealing Council Directive 91/670 EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79, 19. 3. 2008, p. 1.

27 Ibid. Article 18(c) and Article 38(3)(a).

of the agency (Respondent #51) but in such cases the onus is on the applicant to demonstrate that this is an appropriate standard to fulfil the essential requirements as laid out by the Community legislator. To the extent to which the applicant is in compliance with the certification specifications drawn up by the agency, *there is a presumption of conformity* with the essential requirements and thus, certificates will be issued. That is to say, as far as regulated persons are concerned, the certification requirements are not binding, but they do have more "weight" than regular guidelines for compliance since departing from them in the certification procedure comes with additional "costs" (i.e., places the onus on the applicant to demonstrate compliance by alternative means) and complying with them comes with clear benefits (i.e., the presumption of compliance with the essential requirements). For member states, however, once adopted, the requirements are binding. When the agency develops opinions, certification requirements and guidance material to be applied by member states, these standards are adopted after a consultation procedure with the member states.[28] Nevertheless, one could envisage a situation in which a member state or even the Commission might be dissatisfied with the certification requirements adopted by EASA. For example, a member state could argue that the requirements, which are meant to serve as appropriate standards to fulfil the essential requirements, do not in fact fulfil the essential requirements. Or alternatively, they could claim that the specific certification requirements are too cumbersome and that the essential requirements could be fulfilled at a lower threshold.

It can be argued that in such cases, the member state(s) or the Community institutions could lodge an appeal under the aforementioned Article 51. The issue is highly relevant given that, in the absence of the possibility to bring a case before the Court in such circumstances, the agency would effectively be sitting in the chair of the legislator and its rules would be beyond judicial review. Arguably, this would upset the principle of institutional balance and be in direct violation of the doctrine set out in the *Meroni* case.

For now, this is open to interpretation and it is difficult to give a final verdict on this matter, given that no cases have been brought against EASA decisions before the Court.[29] This absence of case law is quite surprising given OHIM's massive case log. A possible explanation proposed by a member of the EASA legal office was that the absence of appeals might be intrinsic to the field regulated by EASA, i.e., the field of certification and airworthiness. The addressees of the decisions are manufacturers and maintenance organisations who are extremely familiar with the

28 Ibid. Article 52(2).

29 Based on a search in the database of case law of the Court of Justice of the European Communities, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>; Corroborated by Respondent #51.

rules and are very closely involved and consulted throughout the certification process. In other words, "the rules are not new, they have been in existence for thirty years, the certification process is quite straightforward and the result of that process comes about through consultation and co-ordination with the applicant."

This contention is also supported by this respondent's previous experience at the national level, at a Ministry of Transport, where "out of 100 appeals, 99% of appeals were not in the field." Regardless of the reasons for the lack of cases, in their absence, the provisions are at times very general and it remains for the Court to hash out its role once cases arise before it.

Furthermore, in addition to actions for annulment, cases can be brought before the ECJ for failure to act.[30] Once again, this provision is very general and provides no clarifications as to the circumstances under which an action for failure to act could arise. Again, in the absence of case law, this becomes a matter of speculation. One could argue that an action could arise in cases where the agency fails to fulfil one of its tasks. For example, under Article 24 the agency has an obligation to monitor the application of the Regulation and its implementing rules by conducting 1) standardisation inspections of national competent authorities and 2) investigations of undertakings. Arguably, failure to do so could give cause for an action under Article 50(1) for failure to act. Additionally, as in the case of OHIM, applicants can lodge an action for annulment under Article 230 EC against decisions of the agency on access to documents pursuant to Regulation (EC) No 1049/2001.

In conclusion, in the case of EASA and OHIM, the Court has clear jurisdiction to review the decisions of the agency binding on third parties, by virtue of their respective basic regulations. With regard to EASA's additional powers of adopting specification requirements, it remains open to interpretation, in the absence of case law, whether these specification requirements are challengeable before the Court.

EMEA

EMEA is described in the literature as a de facto decision-making agency whose acts are "rubberstamped" by the Commission, the formal decision maker. Given the close synergy between the scientific opinion and the actual "political" decision,

30 Article 50(1) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety agency and repealing Council Directive 91/670 EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79, 19. 3. 2008, p. 1.

this raises interesting issues concerning judicial review and the assignment of the locus of responsibility.

EMEA Opinions to the Commission

In accordance with its basic regulation,[31] the main task of EMEA is to provide the European Commission with scientific opinions within the context of a centralised authorisation procedure, by advising the Commission on the issuance, suspension or revocation of marketing authorisations. Most of the opinions are related to the pre-authorisation procedure (Respondent #50). A company files an application for a marketing authorisation of a medicinal product with the EMEA, the scientific committee assesses the quality, safety and efficacy of the product(s) and based on a risk benefit assessment, the EMEA recommends the European Commission either to issue or not to issue a marketing authorisation. Should problems arise or an adverse reaction be reported during the post authorisation phase after a medicinal product has been marketed, the EMEA can issue the Commission a scientific opinion, advising that a market authorisation be suspended if it should consider further investigation to be needed. If the EMEA scientific committee is convinced that the product is no longer safe it can address an opinion to the Commission recommending the revocation of the market authorisation. In other words, the EMEA does not adopt decisions on marketing authorisations but only issues opinions to the Commission in order to support it in its decision-making power. The final act is the Commission's authorisation, suspension or revocation of the marketing authorisation.

However, de facto, "the EMEA virtually determines the content of authorization decisions"[32]; and "in spite of its inferior status as an advisory body, the expert committee dominates the authorization process."[33] The set up of the system makes it unlikely that the Commission would deviate from the opinion of the EMEA. First of all, any such deviation has to be justified by the European Commission through "a detailed explanation of the reasons for the differences", and secondly even more importantly, it lacks the scientific apparatus for examining and second guessing each authorisation opinion of the EMEA. Additionally, "decisions adopted within the EMEA will usually be difficult for the member states to challenge for scientific

31 Regulation (EC) No 726/2004 of the European Parliament and the Council of 31 March 2004 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136, 30.4. 2004, p. 1.

32 T. Gering and S. Krapohl (2007), 'Supranational regulatory agencies between independence and control: the EMEA and the authorization of pharmaceuticals in the European Single Market', *Journal of European Public Policy*, *14*(2), 208 -226, p. 209.

33 Ibid. p. 218.

reasons, because their own expert administrations are closely involved in their elaboration and will not complain about a particular decision, unless it is considered as grossly unconvincing by an outvoted representative."[34] The European Commission has not yet departed from the content of the EMEA opinion (Respondent #50).[35]

Given the weight carried by the EMEA opinion and its impact on the actual decision outcome, the question arises as to the extent to which judicial review is possible. As, formally speaking, the agency has only advisory status, does this mean that the agency is shielded from judicial probing of its scientific opinions? As astutely observed by Craig, "if judicial review is to be effective it must be capable of being applied to the institution that made the operative decision. (…) If review is to be effective it is necessary for the Community courts to be able to go behind the Commission decision and consider the agency's reasoning. The agency itself must be susceptible to review even though it is not the formal author of the decision."[36]

First of all, unlike in the two cases examined above (OHIM and EASA), the EMEA basic Regulation contains no mention of any possible actions for annulment against EMEA opinions before the Court (except for agency decisions pursuant to Article 8 of Regulation (EC) No 1049/2001 on access to documents).[37] This is not surprising given that formally, EMEA only issues *advisory opinions* as opposed to binding acts that have legal effect vis-à-vis third parties. It is the final Commission decision, based on the EMEA opinion that is a binding legal act and this can be challenged normally under Article 230 EC. Does this mean that the EMEA opinions are completely shielded from judicial scrutiny? This would hardly be a satisfactory outcome given that in most cases EMEA makes the de facto operative decision. To answer this question, an examination of the Court's jurisprudence in this matter is warranted.

This issue arose in *Artegodan v Commission*,[38] which dealt with an action for annulment of Commission decisions [based on an EMEA scientific committee recommendation] concerning the withdrawal of the marketing authorisations of several medicinal products used in the treatment of obesity (i.e., anorectics). The

34 Ibid. p. 215.
35 See also, ibid. p. 216.
36 P. Craig (2006), p. 167.
37 Article 73 of Regulation (EC) No 726/2004 of the European Parliament and the Council of 31 March 2004 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136, 30.4.2004, p. 1.
38 Joined Cases T-74/00, 76, 83, 85, 132, 137, 141, *Artegodan GmbH v Commission*, [2002] ECR II-4945.

Court of First Instance recognised from the beginning the "vital role" of the scientific opinion issued by the EMEA Committee for Proprietary Medicinal Products (CPMP). It observed that since the Commission is not in a position to carry out scientific assessments concerning the efficacy and/or harmfulness of medicinal products, the CPMP scientific assessment is essential to the Commission's ability to make informed decisions.[39] Thus, the Court held that while the CPMP opinion is not binding on the Commission it is "extremely important so that any unlawfulness of that opinion must be regarded as a breach of essential procedural requirements rendering the Commission's decision unlawful."[40] As such, in order to assess the lawfulness of the Commission's decision "the Community judicature may be called upon to review, first, the formal legality of the CPMP's scientific opinion and, second, the Commission's exercise of its discretion."[41]

While the Court could not review the EMEA scientific opinion in its own right, it nevertheless managed to reason its way into being able to examine the opinion indirectly while reviewing the legality of the Commission decision. The Court also defined the *scope of its review* in such cases. It acknowledged that it could not substitute its own assessment for that of the scientific committee and as such, its review would be limited to three main aspects: the proper functioning of the committee, the internal consistency of the opinion and the statement of reasons.[42] With regard to the statement of reasons, the Court elaborated and explained that it [the Court] "is empowered only to examine whether the opinion contains a statement of reasons from which it is possible to ascertain the considerations on which the opinion is based, and whether it establishes a comprehensible link between the medical and/or scientific findings and its conclusions. In that respect, in its opinion the CPMP is obliged to refer to the main reports and scientific expert opinions on which it relies and to explain, in the event of a significant discrepancy, the reasons why it has departed from the conclusions of the reports or expert opinions supplied by the undertaking concerned."[43] In other words, the Court is able to consider the scientific committee's reasoning process, how it reached its conclusions, based on the information at hand.

The Court's approach was confirmed in a subsequent judgment *Olivieri v Commission and EMEA*.[44] In this case, the applicant sought an application for annulment of

39 Ibid. para. 198.
40 Ibid. para. 197.
41 Ibid. para. 199.
42 Ibid. para. 200.
43 Ibid.
44 Case T-326/99, *Nancy Fern Olivieri v Commission* of *the European Communities and European Agency for the Evaluation of Medicinal Products*, [2003] ECR II-6053.

a Commission decision granting marketing authorisation for a medicinal product for human use known as Ferriprox-Deferiprone and of the revised opinion of the EMEA. This is very interesting because the applicant sought to annul not only the Commission decision but also the EMEA opinion on which it was based. The Court rejected the application for annulment against the EMEA opinion by pointing out that the opinion was an intermediate measure as opposed to a final binding decision. In the words of the Court, "it is a preparatory measure which does not definitively lay down the Commission's position and is therefore not a challengeable act (…)."[45] While rejecting the possibility of an action for annulment against the opinion, the Court nevertheless, following a similar line of argument as in *Artegodan*, asserted its power to review the opinion in the context of an action for annulment against the Commission decision, given its vital role to the decision. In the words of the Court, "the contested decision purely and simply confirms the revised opinion, to which it refers in its fourth recital. The content of that opinion, and also that of the assessment reports upon which it is based, are therefore an integral part of the statement of reasons for the contested decision, with regard in particular to the scientific assessment of deferiprone carried out by the CPMP and its rapporteurs. The content of the revised opinion must therefore be examined in the context of the application for annulment of the contested decision."[46]

In summary, EMEA opinions by virtue of being preparatory acts as opposed to binding ones, cannot directly form the subject of actions for annulment. Nevertheless, as seen above, through a clever subterfuge, the Court has found ways to examine EMEA opinions in actions directed against the Commission decision (which unlike the opinion is actionable before the Court). In an activist, forward-looking manner, the Court has indirectly extended its reach over these blurred areas of responsibility.

EMEA Binding Acts at the Preliminary (Administrative) Phase

In addition to issuing recommendations to the Commission, the EMEA also has the power to adopt in and of itself final binding acts without any involvement from the European Commission at the preliminary stage of the marketing authorisation procedure. This is an aspect of EMEA powers that has so far, to my knowledge not been considered in the literature. Most studies have described the EMEA powers as advisory because they have been focused on the outcome of the application procedure for marketing authorisations. However, in the preliminary administrative phase, before entering into substantive considerations, an application can be accepted

45 Ibid. para. 53.
46 Ibid. para. 55.

or rejected and this decision lies solely with the EMEA. The issue whether such a decision is actionable in Court is crucial given that, in the event of a refusal of validation, this is a legal act which adversely affects the applicant and brings about a clear change in his/her legal position. As we have seen above, the Court rejected an action for annulment of an EMEA opinion by virtue of its being "an intermediary measure" as opposed to a final act that could be challenged under Article 230 EC. Does this entail that final binding acts of the EMEA are challengeable before the Court?

The issue arose in *Thomae v Commission.*[47] The case concerned an application for annulment of a decision (as opposed to an opinion!) of the European Agency for the Evaluation of Medicinal Products, rejecting an application for variation of certain terms of the marketing authorisation for a medicinal product. The action was directed against the Commission, but it concerned an EMEA decision not to validate an application for variation. The decision in this case was a final binding act taken by the EMEA without any involvement of the Commission. As explained by the EMEA respondent from the legal service,

> With regard to validation, you have to consider that whenever we receive an application we have to validate the application; that is we have to check from an administrative point of view if the applicant met the requirements in order to proceed and the concerned application is eligible for being assessed. So there could be a case where we do not validate the application. That is to say, the procedure is stopped at a preliminary phase because we consider that the applicant did not meet the requirements and the committee is not involved at all in the scientific requirements. And in this case, the final decision is not called a decision, it's a non-validation. But in case of non-validation, that is the final act of a procedure.

This was precisely the situation that arose in *Thomae v Commission.* Interestingly, the Court upheld the direct action under Article 230 EC *against the Commission* and annulled *the decision of the EMEA*.

This approach was reiterated in a subsequent case of *Schering-Plough v Commission and the EMEA,*[48] which dealt with an application for annulling an EMEA measure refusing a variation of the name of a pharmaceutical product. Once again, this was exclusively an EMEA measure. The agency refused to accept the application for

47 Case T-123/00*, Dr Karl Thomae GmbH v Commission of the European Communities*, [2002] ECR II-5193.

48 Case T-133/03, *Schering Plough Ltd v Commission of the European Communities and European Agency for the Evaluation of Medicinal Products (EMEA)*, order of 5 December 2007.

variation of the holder for a marketing authorisation, which constituted a final binding measure adopted without any involvement of the Commission. The action was directed against both the Commission and the EMEA. The Court, however, rejected the action against the EMEA and held that "the EMEA is not one of the bodies referred to in Article 230 EC, whose acts may be challenged."[49] The Court held that according to its founding regulation, the EMEA's aim was to provide scientific advice. Thus, in so far as the regulation affords only advisory powers to the EMEA, the refusal in question *"must be deemed to emanate from the Commission itself.* Since the contested measure is imputable to the Commission, it may be the subject of an action directed against that institution. It follows that the action must be dismissed as inadmissible in so far as it is directed against the EMEA."[50]

At the same time, the Court also sent a critical message at the end of its verdict concerning the lack of legal clarity of the system. While making a decision on costs the Court ordered the applicant to pay its own costs and those of the Commission but *not* those of the EMEA. In the words of the Court, "the Court considers that, taking account of the legal uncertainty surrounding the respective powers of the Commission and the EMEA, the applicant cannot be criticized for having directed its actions also against the EMEA. Accordingly, it is unreasonable to order the applicant to pay the costs of the EMEA, which will therefore bear its own costs."[51]

To sum up, both cases are again illustrative of the proactive role of the Court in its efforts to ensure applicants' recourse to legal process where the legislator had failed to provide any. The Court found itself in a tough spot indeed. On the one hand, according to the EU legislator as provided for in the agency's constituent act, the agency's functions were advisory by nature. On the other hand, the agency was, in fact, able to adopt a final binding act of a procedure. The Court could not reconcile this advisory nature with the possibility for allowing actions of annulment against such a body. In order to ensure that the applicants were not deprived of all judicial protection, the Court resorted once again to a subterfuge, regarding the EMEA decision as an emanation of the Commission and upholding an action against the Commission instead.

EMEA's New Decision-Making Tasks

The matter becomes even more complicated, however. In recent years, the EMEA has acquired a number of new, explicitly decision-making (according to the relevant

49 Ibid. para. 16.
50 Ibid. paras. 22 and 23.
51 Ibid. para. 39.

legislation) tasks in the area of paediatric regulation and with regard to orphan medicinal products. (Respondent #50) For example, in the context of orphan medicinal products, the agency has the power to grant or refuse a designation. The refusal to grant a designation is a final binding act and the procedure is finished at the agency level (Respondent #50). In the context of the paediatric regulation, the EMEA is empowered to issue decisions on the paediatric investigation plan, which specifies the studies a company should perform in order to obtain an authorisation for a medicinal product. The paediatric investigation plan is approved by the EMEA Paediatric Committee, after which the executive director of the agency issues a decision on the paediatric investigation plan in question, which is a binding decision.[52]

There is currently a case before the Court of First Instance dealing with an action of annulment against an EMEA decision to refuse to continue the designation procedure,[53] but the ECJ has not yet ruled on this matter. The procedure was over at the agency level and there was no involvement from the Commission. No case has to date arisen regarding an EMEA decision on an investigation plan.

Should such cases arise, given these clearly demarcated decision-making powers of the agency, it would be very difficult for the Court to adopt a similar reasoning as in *Thomae* v *Commission* or *Schering -Plough v Commission and EMEA*. In the words of the EMEA respondent from the legal office, "this [the paediatric investigation plan] is a clear case where the legislation assigned to the agency a power of decision so the Court can no longer say that we do not have any decision making powers. Because in this case the legislation says that the agency is invested with the power of decision."

This might warrant a change in the approach of the Court. As observed by the same respondent, the Court rulings in *Thomae v Commission* and *Schering -Plough v Commission and EMEA,*

> are the first days of the Court's approach to this issue because what they say, agencies have not been assigned with decision-making powers. As they do not have

52 For a detailed description of the procedure see Regulation (EC) No 1901/2006 of the European Parliament and of the Council of 12 December 2006 on medicinal products for paediatric use and amending Regulation (EEC) No 1768/92, Directive 2001/20/EC, Directive 2001/83/EC and Regulation (EC) No 726/2004 (Text with EEA relevance), OJ L 378, 27.12.2006, p. 1-19. Last amended by Regulation (EC) No 1902/2006 of the European Parliament and of the Council of 20 December 2006 amending Regulation 1901/2006 on medicinal products for paediatric use, OJ L 378, 27.12.2006, pp. 20-21.

53 T-264/07, *CSL Behring v Commission and EMEA,* action brought on 18 July 2007.

> decision-making powers, whichever act they issue, this act is under the responsibility of the Commission. Now the situation has slightly changed because it is no longer true that the agency has no decision making power. Because the agency has decision-making power for paediatric issues and for orphan medicinal products. So how can you transfer the liability of an act issued by an independent body to another body without that this second body is at all aware of the ongoing procedure?

This is indeed a very "thorny" matter; given that agencies are endowed with legal personality and their independence from the main Treaty institutions is proclaimed in their constituent act. Hence, the approach of the Court, through which responsibility for agency decisions is transferred to the Commission, becomes very difficult to sustain in the situations outlined above.

The Court would most probably change its approach vis-à-vis the EMEA in such situations and adopt a similar line of reasoning to that in *Les Verts.*[54] At the time, Article 173 EC (now Article 230) was only applicable to the Commission and the Council. The ECJ, however, ruled that measures adopted by the European Parliament (EP) were also reviewable and that the original omission of the EP from Article 173 was due to the fact that in the original EEC Treaty the EP only had powers of consultation and political control. The Court broadened the scope of Article 173 by reasoning that acts intended to produce legal effects should be reviewable, and excluding such EP measures from review would lead to a situation contrary to both the spirit of the Treaty and to its system.[55]

In fact, the Court has already done so in a recent case that arose against the European Agency for Reconstruction.[56] In this case, the applicant brought an action for annulment of decisions of the EAR concerning the cancellation of a tender procedure and the organisation of a new tender procedure. The case was directed against the EAR (as opposed to the Commission!) under Article 230 EC. As discussed above, Article 230 does not list European agencies among the institutions whose acts are reviewable by the Court. Furthermore, the EAR basic regulation (just like the EMEA basic regulation and most agencies' regulations) contained no provisions for the jurisdiction of the Court against such decisions (i.e., the jurisdiction of the Court

54 Case 294/83, *Parti Ecologiste 'Les Verts' v European Parliament,* [1986] ECR 1339; See also P. Craig (2006), p. 165.

55 Case 294/83, *Parti Ecologiste 'Les Verts' v European Parliament,* [1986] ECR 1339, paras. 24 and 25.

56 Case T-411/06, *Sogelma v EAR,* judgment of 8 October 2008. For an analysis of the case see D. Curtin (2009), *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford: Oxford University Press, pp. 162-163.

was restricted to contractual and non-contractual liability cases and EAR decisions relating to access to documents).

The Court nevertheless claimed jurisdiction over the case and accepted the action against the EAR decision reasoning by analogy with *Les Verts*. In the words of the Court, "the general principle to be elicited from that judgment [i.e., Les Verts] is that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review. It is true that *Les Verts*, paragraph 24, refers only to Community institutions and the EAR is not one of the institutions listed in Article 7 EC. None the less, the situation of Community bodies endowed with the power to take measures intended to produce legal effects vis-à-vis third parties is identical to the situation which led to the L*es Verts* judgment: it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review."[57]

The significance of this case cannot be understated. It thus clarifies that binding legal acts adopted by agencies are open to judicial review under Article 230 EC. The Court has stepped up to fill in a "legal vacuum", "taking a stance of legal realism in the sense that it recognises what is happening in practice and refuses to accept that the result can deprive individuals affected of their right to a judicial remedy."[58]

Europol and Eurojust

Although lacking the decision-making powers of their first pillar counterparts examined above, Europol and Eurojust nevertheless possess significant powers: they can participate in joint investigation teams, they can make requests to initiate criminal investigations (i.e., Europol) or requests to undertake an investigation or prosecution of specific acts (i.e., Eurojust), enter into agreements with third states and organisations,[59]store and exchange sensitive personal data etc. The principle of the jurisdiction of the Court of Justice for the third pillar is provided in Article 46(b) of the Treaty on European Union (TEU) under the conditions provided for in Article 35 TEU of Title VI on Provisions on Police and Judicial Co-operation in Criminal Matters, inserted with the Treaty of Amsterdam.

57 Case T-411/06, *Sogelma v EAR,* judgment of 8 October 2008, para. 37.

58 D. Curtin (2009), p. 163.

59 For Eurojust, this was introduced by the new Eurojust Decision. See Article 26(a) of Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4.6.2009, p. 14.

Preliminary Rulings

According to Article 35(1), the Court has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions, decisions on the interpretation of conventions established under Title VI TEU and on the validity and interpretation of the measures implementing them. However, this jurisdiction must be explicitly accepted by the member states "by a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter."[60] In other words, member states can opt in on the Court's jurisdiction by means of a declaration. Furthermore, member states have the option of choosing whether only the final courts (i.e., courts against whose decision there is no judicial remedy under national law) or all courts and tribunals may submit preliminary questions to the ECJ. All of the "old" EU member states with the exception of United Kingdom, Ireland and Denmark have accepted the jurisdiction of the Court, and of the new member states only Hungary, Latvia, Czech Republic and Slovenia have done so.[61] Thus, on the basis of this the national courts (final or all courts and tribunals) of the countries that have made the requisite declaration referred to above, may send questions for preliminary rulings concerning the validity and interpretation of the Eurojust decision.

In the case of Europol, a special protocol to the Convention was adopted dealing specifically with the jurisdiction of the Court of Justice to give preliminary rulings.[62] The protocol was necessary, because at the time of the adoption of the Europol Convention, the ECJ had no mandatory jurisdiction over the Maastricht-era third pillar.[63] According to Article 2(1) of the aforementioned protocol, "by a declaration made at the time of the signing of this Protocol or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice of the European Communities to give preliminary rulings on the interpretation of the Europol Convention under the conditions specified (…)." The scope of the Court's jurisdiction as a result of the protocol is more limited than in Article 35(1) TEU. As mentioned above, Article 35(1) TEU provides for the jurisdiction of the Court on both the interpretation of Conventions but also *on the validity and interpretation of the measures implementing them.* Thus, under the Treaty provisions as they stand now, individuals could indirectly challenge the validity of measures implementing

60 Article 35(2) TEU.

61 An overview is available at,<http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/art35_2008-09-25_17-37-4_434.pdf>.

62 Council Act of 23 July 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office, OJ C 299, 09.10.1996, p. 0001–0014.

63 S. Peers (2006), *EU Justice and Home Affairs Law,* Oxford: Oxford University Press, Second Edition, p. 17.

the Europol Convention as long as the national court in question had referred the issue for a preliminary ruling to the ECJ. Such indirect actions are not possible, it seems, under the protocol to the Europol Convention, given that the protocol is specifically limited only to preliminary rulings on the interpretation of the Convention. There is no mention whatsoever of rulings on the validity and interpretation of the measures implementing the Convention. It seems that member states were keen on demarcating this area as "hands off" for the Court. Such implementing rules consist for example, among others, of highly topical and sensitive aspects such as the rules governing Europol's external relations with third states and non-European Union related bodies[64] or rules governing the transmission of personal data by Europol to third states and third bodies.[65] In theory, this could have allowed for example for the possibility of indirectly challenging the legality of a Europol agreement with a non-EU country through a preliminary question challenging the legality of the rules governing Europol's external relations with third countries.

Fourteen out of fifteen "old" member states have made declarations under the protocol, thus agreeing to the jurisdiction of the Court, with the exception of the United Kingdom. With regard to the new member states, Cyprus, Malta, Poland, Romania and Slovakia have not made declarations under the protocol accepting the jurisdiction of the Court to give preliminary rulings.[66] Despite the wide-range ratification of the protocol, the situation, however, is not ideal since it gives rise to variation across member states and as such, it can "limit the prospect of uniform interpretation of the Convention."[67] As it now stands, no national court has sent preliminary questions to the ECJ concerning the interpretation of the Europol Convention.[68]

The situation will alter slightly with the entry into force of the new Europol Decision, which is envisaged for January 2010 and will replace the Europol Convention and

64 Council Act of 3 November 1998 laying down rules governing Europol's external relations with third States and non-European Union related bodies, OJ C 26, 30.01.1999, p. 19.

65 Council Act of 12 of March 1999 adopting the rules governing the transmission of personal data by Europol to third States and third bodies, OJ C 088, 30. 03. 1999, p. 0001-0003 and Council Act of 28 February 2002 amending the Council Act of 12 of March 1999, OJ C 076, 27.03. 2002, p. 0001-0002.

66 See the Agreements Database on the Council's website, <http://www.consilium.europa.eu/applications/Accords/details.asp?cmsid=297&id=1996059&lang=EN&doclang=EN>.

67 S. Peers (2005), 'Governance and the Third Pillar: The Accountability of Europol' in D.M Curtin and R.A. Wessel (eds), *Good Governance and the European Union: Reflections on Concepts,* Institutions and Substance, Antwerpen: Intersentia, 253-276, p. 261.

68 Based on a search in the database of case law of the Court of Justice of the European Communities, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>; Corroborated by Respondent #28.

its amending protocols. The only reference to judicial control in the new Decision is in its Preamble, 21 which specifies that "judicial control over Europol will be exercised in accordance with Article 35 of the Treaty on the European Union." So with regard to preliminary rulings for Europol, the regular Article 35 TEU regime becomes applicable.

Legality Review

Under Article 35(6) TEU, the Court has jurisdiction to review the legality of framework decisions and decisions in actions brought by a member state or the Commission. The action can be brought on grounds of: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application. This is in fact the much more restricted, third pillar equivalent of Article 230 EC "the main distinctions being that *locus standi* to bring such an action under article 35(6) is limited to Member States and this only on specific grounds."[69] Furthermore, the list of legal acts mentioned in the article, the legality of which may be reviewed by the Court, is limited to *framework decisions and decisions adopted by the Council.* There is no mention of other binding acts or measures adopted by EU bodies with separate legal personality. As such, the legal protection afforded under Title VI TEU is incomplete on at least two grounds: lack of *locus standi* for individuals to challenge third pillar measures directly and a very narrow list of measures that are open for challenge. On this basis, the Court would only have jurisdiction for instance, to review the legality of the Decision creating Eurojust or the new Europol Decision (if such an action were brought before the Court by the Commission or a Member State) but it could not review the actual decisions taken by these agencies.

What is clear is that both Europol and Eurojust decisions concerning individual requests to access data stored relating to that individual or to have such data checked cannot be appealed to the Court. In the case of both agencies, such decisions can be appealed to their respective Joint Supervisory Body (JSB), which is an independent body whose decisions are binding and final on the organisation. However, the route of appeals stops here. The respondent from the Europol Legal Office explains the rationale for this as follows:

> The Joint Supervisory Body for good reason has no possibility to issue some sort of a binding ruling in this area because this was simply not desired by the member

69 E. Sanfrutos Cano (2008), 'The Third Pillar and the Court of Justice: A "Praetorian Communitarization" of Police and Judicial Cooperation in Criminal Matters?' in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Co-operation in the European Union,* Ashgate Publishing, 51-69, p. 52.

> states. Because should there be a conflict between the opinion of a member state that refuses access to a particular piece of information that the individual would like to have access to and should this negative opinion be overruled by the JSB and the JSB's decision would be of a binding nature then basically Europol would be forced to disclose the information. And the member states made quite a step in entrusting comparatively sensitive information, from a police point of view, to this organisation and they also want to retain a certain control of it.

While this might be a satisfactory outcome from the perspective of the member states, it is more than questionable whether this would serve the best interests of and afford the best legal protection to the individuals concerned. In the event that the JSB should turn down a request of this kind, and deny access to having personal data checked that is being stored, processed and even communicated by Europol to third bodies and states, the individual lacks any recourse to the European Courts.

As we have seen above, the Court would lack jurisdiction to review other decisions of Europol and Eurojust based on the provisions of the Treaty. However, before giving a final verdict on this matter it is important to review relevant case law given that, as we have seen in the previous section, the Court did not shy away from broadening the scope of its mandate when measures that produced legal effects formally lacked the possibility of review (i.e., *les Verts, the Sogelma v EAR* case).

In the case of Europol, no such cases have been brought before the Court. All the actions against Europol to date have exclusively related to Staff Regulations, dealing with disputes between a (former) Europol employee and the organisation.[70] In fact, the legal expert interviewed corroborated that the work of the legal office is focused on the Staff Regulations and contractual matters and aspects of preliminary rulings or legality review never come up.

The issue was raised, however, in a case concerning Eurojust: *Spain v Eurojust*,[71] the only case to date that gives some insight into the Court's approach to legality review of decisions of third pillar agencies. Spain sought the annulment of agency measures contained in calls for application for the recruitment of temporary staff

70 A number of 26 applications were brought before the Tribunal starting from 2002 until the time of the writing of this chapter, out of which nine cases were removed. The majority of the remaining cases are still pending with judgments having been issued in six cases: T -258/03 *Mausolf v Europol,* T-143/03 *Smit v Europol*, T-210/04 and T-209/02 *Mausolf v Europol,* F-52/06 *Pimlott v Europol,* F-121/06 *Spee v Europol*.

71 Case C-160/03, *Spain v Eurojust* [2005] ECR I-2077.

by Eurojust on the grounds that the language requirements violated the Staff Regulations, the Eurojust Decision and the principle of the prohibition of discrimination and the obligation to state reasons. Spain opted to bring the action under Article 230 EC, rather than Article 35 and 46 TEU discussed above, as in its own admission "pursuant to Article 35 EU and 46 EU the jurisdiction of the Court in the context of the third pillar is limited." Its central claim for admissibility of the action was that "the Community is a community based on the rule of law, whose acts are subject to judicial review (Case C-50/00 P *Union de Pequenos Agricultores v Council* [2002] ECR I-6677, paragraph 38) and (…) no act emanating from a body with legal personality which is subject to Community law can be exempt from judicial review."[72]

The opinion of the Advocate General Maduro in this case was ground-breaking. While rejecting the admissibility of the action under Article 230 EC, given that a Eurojust measure is not a Community measure, the Advocate General pleaded for the admissibility of the annulment action under Article 35 TEU, reasoning by analogy to *Les Verts*: "the fact that such a lacuna cannot constitute an absolute impediment to the admission of an action is clear from the judgments in *Les Verts v Parliament*, cited above. Just as the Court declared admissible, in that judgment, an action against an institution whose legislative function had gradually become an essential feature, it is appropriate to admit an action against a Union body to the extent to which it has a legislative function, even if it is used only on an exceptional basis. If Eurojust measures do not expressly appear in Article 35 TEU, that too is because they emanate from a body which was not created until after the original version of that provision was drafted. It cannot therefore be inferred from that omission that its measures enjoy immunity."[73]

In his opinion, the admissibility of actions for annulment of any measures adopted in the context of Title VI, which produce legal effects vis-à-vis third is required by "'the very idea of legality', as it must prevail in a Union governed by the rule of law (…)."[74]

The ECJ did not follow the opinion of the Advocate General and managed to steer clear of ruling whether third pillar agency acts that produce binding effects vis-à-vis

72 Ibid. para. 32.

73 Opinion of the Advocate General Poiares Maduro of 16 December 2004 in Case C-160/03, *Spain v Eurojust* [2005] ECR I-2077, para. 20.

74 Ibid. Advocate General Poiares Maduro, para. 21.

third parties are challengeable under Article 35 TEU. The Court rejected the action under Article 230 EC by observing that a Eurojust act is not one of the acts listed under Article 230 EC as amenable for judicial review and, moreover, that the article is not applicable to provisions on police and judicial co-operation matters. The Court pointed out, however, that judicial remedies were available to the relevant staff via Article 91 of the Staff Regulations. In the words of the Court, "as regards the right to effective judicial protection in a community based on the rule of law which, in the view of Kingdom of Spain, requires that all decisions of a body with legal personality subject to Community law be amenable to judicial review, it must be observed that the acts contested in this case are not exempt from judicial review."[75]

Thus, the question remains open. As we have seen in the present case, judicial remedies were available to the staff in question. Should a situation arise where a binding act lacks any type of judicial remedy, the Court might opt for a similar interpretation of Article 35 TEU as that purported by the Advocate General. The possibility is there, particularly given the previous record of the Court's circumventing limits to its review power and broadening the scope of review where no remedies are available (i.e., *les Verts*). Furthermore, the Court has already demonstrated a willingness to go beyond the limitations set out in the EU Treaty and has occasionally adopted a creative construction of Article 35 TEU. Thus, in *Gestoras Pro Amnistia*[76] and *Segi*[77] the Court stated the right to make a reference for preliminary ruling to the ECJ concerning a *common position* despite the fact that, as was described above, according to Article 35(1) the jurisdiction of the Court does not extend to common positions (but only to framework decisions, decisions, conventions and implementing rules). In the words of the Court, "given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) narrowly. The right to make a reference to the Court for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties."[78]

For now, whether the Court will assert its control over binding agency acts in the third pillar remains a matter for speculation. In the case of first pillar agencies, the Court has clearly played a very activist role. It remains to be seen whether it will follow its own example in the case of third pillar agencies as well, particularly given

75 Case C-160/03, *Spain v Eurojust* [2005] ECR I-2077, para. 41.
76 Case C-354/04 P *Gestoras Pro Amnistia and Others v Council,* [2007] ECR I-1579.
77 Case C-355/04 P *Segi and Others v Council,* [2007] ECR I-1657.
78 Case C-354/04 P *Gestoras Pro Amnistia and Others v Council,* [2007] ECR I-1579, para. 53.

its more restricted powers in this pillar. To date, the Court has not denied judicial review of a third pillar agency act where none was available (i.e., since no such case has arisen) but whether it will be forced to do so in the future and whether it will adopt a pioneering approach on the matter, only time will tell.

Liability for Data Processing and Participation in Joint Investigation Teams
Furthermore, while this chapter set out not to delve into the contractual and non-contractual regime of agencies, in the case of Europol and Eurojust some aspects on non-contractual liability deserve consideration because they are directly related to aspects of their core operative tasks. In the case of both agencies, provisions are made for liability for unauthorised or incorrect data processing.[79] In both cases, such matters do not fall under the jurisdiction of Community courts but are to be settled by national courts.[80] So far, no such cases have cropped up for either Europol or Eurojust (Respondent #28, #47, #48).

Additionally, and very importantly, the Europol Convention was amended to provide for liability with regard to Europol's participation in joint investigation teams.[81] The amendment lays down that any member state in the territory of which damage was caused by the Europol official participating in a joint investigation team is to make good such damage under the conditions applicable to damage caused by its own officials.[82] Europol will reimburse in full the sums paid by the member state unless otherwise agreed by the member state concerned.[83] Furthermore, the officials themselves can be held criminally liable. As provided in Article 3(a)(6): "during the operations of a joint investigation team referred to in this Article, Europol officials, shall, with respect to offences committed against them or by them, be

79 Article 38 of Council Act of 26 July 1995 drawing up the Convention based on Art K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316, 27 November 1995, pp. 0002-0032; Article 52 of Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.05.2009, p. 37; Article 24 of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (Eurojust Decision), OJ L 63, 6.03.2002, p. 1 last amended by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA (the New Eurojust Decision), OJ L 138, 04.06.2009, p. 14.

80 For Eurojust such complaints would be heard by Dutch courts (Article 24 (2)); For Europol, they would be heard by the courts of the member state in which the event which gave rise to the damage occurred (Article 38(1)). In the event that the damage was caused as a result of unauthorised or incorrect storage or processing by Europol, Europol is bound to repay on request, the amounts paid as compensation unless the data were used by the member state in the territory of which the damage was caused in breach of the Convention (Article 38(2)).

81 Article 39(a) of the Europol Convention inserted by the Council Act of 28 November 2002, OJ C 312, 16. 12. 2002, p. 0002.

82 Article 39(a)(1) inserted by the Council Act of 28 November 2002, OJ C 312, 16. 12. 2002, p. 0002.

83 Article 39(a)(2) inserted by the Council Act of 28 November 2002, OJ C 312, 16. 12. 2002, p. 0002.

subject to the national law of the Member State of operation applicable to persons with comparable functions." The Protocol on privileges and immunities was altered and the immunity of Europol officials from legal process has been specifically lifted in respect of official acts undertaken while participating in a joint investigation team.[84] As a respondent from the Europol legal service explained:

> In the context of joint investigation teams member states have decided that it is not acceptable that Europol officials are very close to the investigations and are also practically involved in the investigations in the sense that they could go together with the investigators to the scene of the crime for instance and give advice on what they see but at the same time they are not liable. And that it was said: 'this is so near to actually investigating themselves that there should not be any kind of exemptions in terms of liability' and consequently, also the protocol on privileges and immunities was changed and in this specific situation Europol officials were exempted from immunity.

The importance of this change cannot be overemphasized: the core operational task of Europol is no longer shielded from legal process. So far there have been no cases involving Europol staff and their participation in joint investigation teams.

8.1.3 European Agencies: Outside the Treaty but Not Above the Law

So, in terms of the questions we set out to answer at the beginning of this chapter – are agency decisions reviewable by the Court and can this relationship be used to curb the power of agencies? – the answer with regard to Community agencies is "yes", with some minor qualifications. From the outset, decisions of decision-making agencies such as OHIM and EASA were clearly reviewable by virtue of the specific provisions outlined above in their constituent regulations. In the case of EASA, the question still remains open with regard to the actionability of its certification requirements. In the case of agencies whose constituent acts contain no provisions concerning judicial review, but who nevertheless have the ability to adopt binding acts vis-à-vis third parties, the Court has taken the matter into its own hands and ruled in a trail-blazing manner that they are reviewable under Article 230 EC (i.e., *Sogelma v EAR* case). This is a prime example of the Court in an activist mode, ensuring that judicial remedies and access to justice are afforded in cases

84 See Article 2 of Council Act of 28 of November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ C 312, 16.12. 2002, p. 0002-0007.

where lacunae had developed (as a result of agencies' growing powers and evolution outside the Treaty).

The Court has not restricted its role to formally binding acts only. With regard to EMEA advisory opinions to the Commission, the Court has rightfully recognised their significance and the need for them to be amenable to review. Thus, in its case law, the Court has taken a proactive role and in the absence of any provisions for judicial review from the legislator, it has asserted control over the reasoning process of the EMEA scientific committee. By pointing at the crucial role of the EMEA opinion in the final Commission decision, the Court has reasoned its way into being able to scrutinise EMEA opinions in actions against Commission decisions. Thus, while not being able to accept actions against the EMEA opinions directly, it has nevertheless found a subterfuge to scrutinise them.

There is, however, a limit to what the Court can do. Unfortunately, in the third pillar the role adopted by the Court has been less groundbreaking than some would have hoped for.[85] In the *Eurojust* case dealing with the issue of whether acts of third pillar agencies are reviewable, rather than taking the issue full on, the Court steered clear of adjudicating on this issue by pointing out that other remedies were available. If one speaks of pockets of legal accountability deficits of agencies, it would certainly be in the Union pillars. However, this is not exclusively an "agency problem." It is a legal accountability deficit at the Union level as a whole, given the restricted role envisaged for the Court in the Union pillars by the Treaty. While the Court has at times been able to create a more influential role for itself in the third pillar through creative interpretation,[86] judicial protection in this pillar remain very different (and much more restricted) in comparison with its powers vis-à-vis the Community pillar. This situation, as we will see later on below, will be significantly improved by the Treaty of Lisbon.

In conclusion, one note of caution is warranted concerning the limits of accountability before the Court. Even where the Court does have jurisdiction to review, the generally narrow rules on standing (the requirement of direct and individual concern), time limits and the significant costs involved means that this is not always an available recourse for some applicants. Furthermore, the Court can only delve so deep when it comes to discretionary choices. As observed by Craig, "judicial review is designed to control the legality of decisions, rather than their merits. It is true,

85 See opinion of the Advocate General Poiares Maduro of 16 December 2004 in Case C-160/03, *Spain v Eurojust* [2005] ECR I-2077.

86 E. Sanfrutos Cano (2008); P. Craig and G. De Burca (2008), *EU Law: Text, Cases, and Materials,* Fourth Edition, Oxford: Oxford University Press, pp. 253-254.

(…) that the Community courts have extended their conception of legality and consider the reasoning used and the results reached by institutions more intensively than hitherto. There are nonetheless limits to the extent to which judicial review can be used to hold the content of discretionary policy choices involving the balancing of public interests accountable."[87] For now, the delegation of broad discretionary powers to agencies has been kept in "some" check by the *Meroni* case,[88] where the ECJ ruled a clear prohibition on the delegation of discretionary powers involving a "wide margin of discretion." Should broader discretionary powers be granted through the creation of truly regulatory agencies, this is an aspect that would warrant caution and consideration in the future.

8.2 The European Ombudsman: "Life Beyond Legality"[89]

Some of the shortcomings identified above can by side-stepped through recourse to another institution, namely the European Ombudsman. To this extent, the European Ombudsman plays a complementary role to that of the European Courts and this is to a large degree the rationale for its existence. In other words, "the rationale for the adoption of a European Ombudsman was rooted in the shortcomings of the Community judicial system and the Ombudsman's effectiveness as an extra-judicial mechanism for control over the executive."[90] The European Ombudsman was set up by the Treaty of Maastricht. Its mandate, as provided for in Article 195 EC is to "receive complaints from any citizen of the Union or any natural legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First of First Instance acting in their judicial role." Furthermore, most agencies' basic regulations contain explicit provisions stating that decisions taken by the respective agency pursuant to Article 8 of Regulation (EC) No 1049/2001, regarding access to public documents, can give rise to complaints to the European Ombudsman.

87 P. Craig (2006), p. 186.

88 Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133.

89 European Ombudsman (2007a), 'Good Administration in the European Union: the role of the European Ombudsman', Speech by the European Ombudsman, Mr P. Nikiforos Diamandouros, to the Heads of External Delegations of the European Commission, Brussels, Belgium, 12 September 2007.

90 A. Tsadiras (2006), 'The Ombudsman' in P. Craig, *EU Administrative Law,* Oxford: Oxford University Press, 829-855, p. 830.

8.2.1 The Complementary Role of the European Ombudsman

The European Ombudsman is appointed by and reports to the European Parliament, while at the same time being completely independent in the performance of his duties. As such, the Ombudsman can be construed as "a vector of parliamentary control over the executive"[91] as well as an "independent guardian of citizen's rights."[92] The nature of the Ombudsman is dual. It is a hybrid institution: on the one hand, "a parliamentary body designed to strengthen the control of EU institutions and administrations by Members of the European Parliament (MEPs); on the other hand, the profile and role of this organ is close to that of a Court."[93]

Unlike the Court, however, the Ombudsman cannot adopt legally binding decisions; it does, nevertheless, offer other significant benefits, precisely due to its non-judicial nature. First of all, some of its procedures display more flexibility than the Court procedures, which render this recourse more attractive to some applicants or more appropriate in some circumstances. For example, the Ombudsman model, unlike the Court model, is not based on a strictly adversarial logic. Instead, its procedures allow for the possibility of reaching a solution that is acceptable to both sides. In fact, achieving a friendly solution in instances of maladministration is part and parcel of the Ombudsman's working procedure.[94] Thus, in addition to an adversarial mode, the procedure before the Ombudsman also incorporates elements of "problem-solving, conflict reduction, possibilities for compromise and win-win outcomes."[95]

Secondly, there are some clear benefits in appealing to the Ombudsman in terms of *accessibility*. As observed above, the threshold of access to the Courts (i.e., individually and directly concerned) is very high; the costs involved can be outright prohibitive for some applicants or the time constraints can render certain actions no longer possible. In terms of the rules on standing, these are much more lax and there is no requirement of a personal interest in order to lodge a case before the European Ombudsman. In fact, as observed by Tsadiras, "the disengagement of the admissibility question from the existence of a personal interest of the complainant gives rise to cases where the inquiries of the Ombudsman are undertaken without,

91 P. Magnette (2003), 'Between parliamentary control and the rule of law: the political role of the Ombudsman in the European Union', *Journal of European Public Policy, 10*(5), 677-694, p. 681.
92 Ibid.
93 Ibid. p. 678.
94 Article 3(5) of the Ombudsman's Statue, Article 6 of the Implementing Procedures.
95 European Ombudsman (2007b), 'Legality and good administration: is there a difference?', Speech by the European Ombudsman, P. Nikiforos Diamandouros, at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on 'Rethinking Good Administration in the European Union', Strasbourg, France, 15 October 2007.

or even contrary to the consent of the person who is directly and personally affected by the alleged instance of maladministration."[96]

Moreover, its review criteria are broader than those of the Court which means that complaints of individuals are possible where actions of annulment before the Court are not. The mandate of the European Ombudsman is to inquire into potential situations of maladministration, which it has defined more broadly than acting unlawfully. In the words of the European Ombudsman, "whilst an unlawful act is always maladministration, the converse is not true: there may be maladministration even if the institution or body has not acted unlawfully. Or, as I like to put it, there is 'life beyond legality.'"[97]

Finally, there are no financial costs involved in bringing a case before the Ombudsman; the procedure is free of charge and there is no need for legal representation. With regard to time limits, the complaint to the Ombudsman has to be made within two years from the date the applicant became aware of the situation that gave rise to the complaint.[98] However, this can be circumvented by the Ombudsman through the initiation of own-initiative investigations, which, as opposed to complaint based investigations, are not bound by any time restrictions.

All of these aspects render this body a viable and sometimes preferable alternative to the Courts. That is to say, "the non-binding quality of an ombudsman's decisions makes it possible for the ombudsman to offer citizens an alternative remedy, with a different balance of advantages and disadvantages as compared to judicial proceedings and, more generally, to play a role complementary to that of the courts."[99]

8.2.2 The European Ombudsman as an Institution of Accountability

The inquiries by the European Ombudsman display the three phases of an accountability process: information, debate and possibility for consequences, as will be described below. This was also observed by Harlow and Rawlings, according to

96 A. Tsadiras (2006), p. 835.
97 European Ombudsman (2007a).
98 Article 2(4) of the Ombudsman's Statue.
99 European Ombudsman (2006a), 'The institution of the ombudsman as an extra-judicial mechanism for resolving disputes in the context o the evolving European legal order', Speech by the European Ombudsman, Professor P. Nikiforos Diamandouros, at a symposium on 'Greece in the European community of law', Athens, 14 April 2006.

whom, "the ombudsman technique is a paradigm of Bovens' 'thin' concept of accountability, being closely engaged in 'account giving', 'questioning' and 'passing judgment', while lacking 'sanction.'"[100] In fact, the European Ombudsman has referred to his own office as an "institution of accountability."[101] Also interesting to observe within the context of this study is that the European Ombudsman has a very similar understanding of accountability to the definition which is at the basis of this study. In the words of the European Ombudsman, "To be accountable means to have *the duty to provide an account*: that is, *to explain and justify one's actions* in terms of appropriate criteria of sufficient detail. The criteria and the level of detail that are required depend, of course, on the context. (…) The concept of accountability also includes *liability to some form of sanction* if the performance revealed by the account is considered unsatisfactory. The sanction may be legal or, in a broad sense, political. As I will explain later, public criticism can be a significant form of sanction in a democracy."[102]

First of all, in terms of *information*, the European Ombudsman has a wide ambit of access to information. According to its Statute, "the Community institutions and bodies *shall be obliged* to supply the Ombudsman with any information he has requested from them and give him access to the files concerned."[103] The Ombudsman has the prerogative to conduct "*all the enquiries he considers justified* to clarify any suspected maladministration"[104] and this can include investigative tools such as: inspecting the files of the institution concerned, requiring officials to give evidence, inquiries on the spot, the commissioning of studies or expert reports.[105] This is subject to restrictions where classified information and sensitive documents are concerned.[106]

Furthermore, given that as explained above, the Ombudsman model is premised on problem-solving, on a "conciliatory ethos"[107] as opposed to a strictly adjudication logic, the idea of *debate* or *dialogue* is central to the Ombudsman's intervention. Once the Ombudsman has decided to make inquiries into a particular complaint, he sends the complaint to the institution concerned and invites the latter to submit

100 C. Harlow and R. Rawlings (2007), 'Promoting Accountability in Multilevel Governance: A Network Approach', *European Law Journal, 13*(4), 542-562, p. 555.
101 European Ombudsman (2006a).
102 European Ombudsman (2006c), 'Transparency, Accountability, and Democracy in the EU', Lecture by the European Ombudsman, Professor P. Nikiforos Diamandouros, at the School of Advanced International Studies of the Johns Hopkins University, Bologna, Italy, 17 October 2006.
103 Article 3(2) of the Ombudsman's Statute.
104 Article 3(1) of the Ombudsman's Statute.
105 Article 5 of the Implementing Provisions.
106 Article 3(2) of the Ombudsman's Statute.
107 A. Tsadiras (2006), p. 845.

an opinion within a specified time limit.[108] The institution's opinion is subsequently forwarded to the complainant, who is also given the opportunity to submit observations within a specified time limit.[109] If necessary the Ombudsman can make further inquiries to the institution concerned and with the complainant.[110] The original complaint, the inquiry of the Ombudsman with the debate between the two parties and the assessment of the Ombudsman of the arguments put forward by the two parties are all part of the final decision and can be easily examined. From the cases concerning the five sampled European agencies, it appears that agencies have co-operated with the office of the Ombudsman in supplying information and making observations. There are no instances of an agency refusing to heed the Ombudsman's request for information or clarification. It is striking to observe that generally, from the cases at hand, the Ombudsman's inquiries are based only on the factual information supplied by the agency and the complainant. The Ombudsman has not resorted in these cases to its other investigative tools such as interviews, on the spot inquiries or studies, and expert reports. In fact, the Ombudsman has repeatedly refused to pursue an inquiry due to the fact that the complainant had not been able to bring any concrete elements or proof to support certain claims.[111]

With regard to the final element, the *possibility of consequences*, the Ombudsman has several remedial powers at his disposal. First of all, if the Ombudsman finds an instance of maladministration, the Ombudsman will seek to reach a friendly solution with the institution concerned in order to satisfy the complainant.[112] This is generally an attempt to find a solution that is mutually agreeable to both parties concerned. In cases involving European agencies, the Ombudsman has issued friendly solution proposals seven times: in three cases against EASA, in three cases against EMEA and in one case against Europol.[113]

108 Article 4(3) of the Implementing Provisions.

109 Article 4(6) of the Implementing Provisions.

110 Article 4(7) of the Implementing Provisions.

111 E.g. Decision of the European Ombudsman on complaint 183/2006/MF against Europol, para. 2.11, "the Ombudsman notes that the complainant has not provided, either in his complaint or in his observations, any concrete elements that would support his allegation that Europol acted wrongly or abusively when, after checking its files, it decided that there were no data concerning him to which he was entitled to have access in accordance with Article 19(1) of the Europol Convention in combination with the applicable legislation in France." See further, Decision of the European Ombudsman on complaint 1493/2002/GG against Europol, para. 2.2.

112 Article 3(5) of the Ombudsman's Statue, Article 6 of the Implementing Procedures.

113 EASA: Complaint 1729/2005/(PB)JF, Complaint 1103/2006/BU, Complaint 3567/2006/JF; EMEA: Complaint 2370/2005/OV, Complaint 524/2005/BB, Complaint 1678/2005/(ID)MF; Europol: Complaint 3130/2006/ID.

In the event that the friendly solution is unsuccessful or the Ombudsman considers that a friendly solution is not possible, the Ombudsman has the option either (i) to close the case with a critical remark or (ii) to issue a draft recommendation. The first option is chosen when it is no longer possible for the institution to eliminate the instance of maladministration and the case does not have a general implication.[114] Should either of these conditions not apply, the Ombudsman will issue a draft recommendation.[115] In the past, the Ombudsman has issued a draft recommendation four times.[116] What happens then is that the institution concerned is required to send in a detailed opinion within three months, which could contain, for instance, acceptance of the Ombudsman's draft recommendation and remedial measures undertaken in line with the recommendation.[117] It should be stressed that the decisions of the Ombudsman, unlike legal decisions are not binding on the institution concerned. However, the European Ombudsman has described the non-binding character of his decisions as "a strength, not a weakness"[118] as this makes it possible to pursue mutually satisfactory outcomes, win-win situations for both parties to the process. In fact, these non-binding decisions have been referred to as "a source of diffuse power" as "unlike judges who are compelled to adopt a moderate tone in order to preserve the legal authority of their decisions, the Ombudsman may, and often does, exercise political pressure."[119]

Nevertheless, if the Ombudsman is not satisfied with the detailed opinion received from the institution in reply to his draft recommendation, he does have a final weapon at his disposal: he can send a special report to the European Parliament.[120] Thus, whereas the decisions of the Ombudsman are not binding, the possibility of a special report is a potential threat engendering compliance. In fact, the European Ombudsman has described the special reports and the Parliament's response as "the very key stone of the arch that supports the Ombudsman's work."[121] However, it is the declared policy of the Ombudsman not to resort to this recourse too frequently but rather "only in relation to important matters, on which Parliament could help

114 Article 7(1) of the Implementing Rules.
115 Article 8(1) of the Implementing Rules.
116 EASA: Complaint 3567/2006/JF; EMEA: Complaint 524/2005/BB, Complaint 1678/2005 (ID)MF; Europol: Complaint OI/1/99/IJH, Decision of the European Ombudsman closing own initiative inquiry OI/1/99/IJH as regards Europol, an own initiative inquiry of the Ombudsman.
117 Article 8(3) of the Implementing Rules.
118 European Ombudsman (2006a).
119 P. Magnette (2003), p. 682.
120 Article 8(4) of the Implementing Rules.
121 European Ombudsman (2006b), Speech by the European Ombudsman, Mr P. Nikiforos Diamandouros, to the Committee on Petitions of the European Parliament, Brussels, 13 September 2006.

persuade the institution or body concerned to alter its position."[122] In fact, this has only been used in one instance involving European agencies, in the case of the own initiative inquiry on the adoption of a Code of Good Administrative Behaviour.[123]

8.2.3 The European Ombudsman and Agencies: Furthering Agency Accountability

A search on the Ombudsman case database reveals that the European Ombudsman has issued decisions on twenty-four complaints involving the five sample European agencies. In addition, the European Ombudsman has also made three own initiative inquiries: on public access to documents,[124] on age limits for recruitment to the Community institutions and bodies[125] and on the existence and public accessibility of a Code of good administrative behaviour.[126] The majority of complaints are concerned with issues involving personnel matters (e.g. recruitment, grading etc). As in the case of the Court, personnel cases are excluded from the scope of this chapter, the emphasis being on issues pertaining to substantive aspects of agencies' work. In addition to personnel cases, the cases before the Ombudsman dealt with issues such as: access to documents, access to personal data, alleged discrimination and procedural errors. Furthermore, there have also been a handful of cases dealing with more specialised matters pertaining to the agencies' core tasks such as: alleged lack of a legal basis for an EASA decision (i.e., 1103/2006/BU), two complaints against EMEA opinions (i.e., 545/98/(OV)/GG and 1193/99/GG). For an overview of cases for the sample agencies, excluding personnel cases, see Table 8.1 below. There are no cases for Eurojust, other than two cases involving personnel matters.[127]

The case record for the five European agencies is rather small for reaching a clear verdict on the scope of the Ombudsman's contribution, but nevertheless, based on the cases that have been addressed to date, some observations can be made.

122 Ibid.
123 Decision of the European Ombudsman on own initiative inquiry OI/1/98/OV.
124 See Decision of the European Ombudsman closing own initiative inquiry OI/1/99/IJH as regards Europol.
125 See Decision of the European Ombudsman in the own initiative inquiry OI/2/2001/BB (OV).
126 See Decision of the European Ombudsman on own initiative inquiry OI/1/98/OV on a Code of Good Administrative Behavior.
127 Complaint 1237/2004/MHZ; Complaint 991/2006/WP.

Table 8.1 Overview of the Ombudsman cases against sample agencies

	Case number	Subject Matter
EASA	1103/2006/BU	Alleged lack of a legal basis for a decision on airworthiness certification of aircraft *(friendly solution issued)*
EMEA	545/98/(OV)/GG	Complaint against an EMEA opinion
	1193/99/GG	Complaint against an EMEA opinion
	2370/2005/OV	Alleged lack of information and transparency concerning a medicinal product *(friendly solution issued)*
	1161/2007/TN	Access to documents
OHIM	366/2006/ID	Alleged failure to grant access to a document and properly deal with a request for payment
	1999/2007/FOR	Alleged discrimination and procedural errors in the context of an a application procedure for a trademark revocation
Europol	202/2001/OV	Access to documents
	785/2002/OV	Access to documents
	183/2006/MF	Alleged abuse of power with regard to access to personal data
	111/2008/TS	Access to documents

First of all, the Ombudsman does play a role in the accountability of European agencies. His most visible contribution is particularly in starting a dialogue between the two parties concerned. Whereas in some cases the individual concerned had encountered difficulties in obtaining a (satisfactory) reply from the agency[128] or any reaction at all,[129] the intervention of the Ombudsman, by virtue of his position, prompted a reaction from the relevant institution, accompanied by a statement of reasons. While in some cases the intervention can result in the outcome desired by

128 See for example, Complaint 893/2006/BU against the European Aviation Safety Agency; Complaint 2370/2005/OV against the European Medicines Agency.

129 See for example, Complaint 3130/2006/ID against Europol. Complaint 111/2008/TS against Europol.

the complainant,[130] at the very least it forces the agency concerned to give a statement of reasons and justify the decisions taken. This is illustrative of the Ombudsman's position as a "magistrate of influence."[131] The Ombudsman relies on his position of influence as well as on the "mutual confidence and co-operation"[132] with other institutions in order to effect results. This is evidenced occasionally in the tone taken by agencies in their comments, stressing that their compliance is due to their regard for the office of the Ombudsman. To illustrate, EASA for example, complied with the Ombudsman's opinion observing that "whilst maintaining its opinion that no maladministration had taken place and having regard to the unique nature of the case and having the highest regard towards the opinion of the Ombudsman, EASA agreed to the Ombudsman's friendly solution proposal."[133]

The Ombudsman can also play a role in more horizontal issues of general application, where it can become a strong advocate on issues of its choice, pushing for improvements or redress measures. Examples of this are the three own initiative inquiries on age limits for recruitment, access to documents rules and the adoption of a code of Good Administrative Behaviour. These are the only horizontal cases with applicability to agencies to date, but they are indicative of the fundamental privilege of the Ombudsman to set his own agenda, to bring about changes of broad application in areas that fall within his remit and priorities. This has been identified as a distinct advantage of the Ombudsman over the Courts. While lacking the power to enact coercive measures "his capacity to choose his priorities and make inquiries is larger than that of the Court. The apparent weakness of his office can thus be turned into advantages in the institutional arena."[134]

In terms of issues, the contribution of Ombudsman to date has been primarily in the field of personnel matters and access to documents, as evidenced by the relevant cases. However, in a couple of cases, the intervention of the Ombudsman has had a very real impact on matters pertaining to the agencies' substantive tasks. Highly relevant in this connection are a complaint involving EMEA (though not directed against it)[135] and a case against EASA.[136] In the former, the applicants lodged

130 See for example, Complaint 1493/2002/GG against Europol; Complaint 1729/2005/(PB)JF against the European Aviation Safety Agency; Complaint 111/2008/TS against Europol; Complaint 1678/2005/(ID)MF against the European Agency for Evaluation of Medicinal Products; Complaint 524/2005/BB against the European Agency for the Evaluation of Medicinal Products.

131 P. Magnette (2003), p. 681.

132 Ibid. p. 683.

133 Complaint 1729/2005/(PB)JF against the European Aviation Safety Agency.

134 P. Magnette (2003), p. 682.

135 European Ombudsman (2007c), Annual Report 2007, p. 38, <http://www.ombudsman.europa.eu/activities/annualreports.faces>.

136 Complaint 1103/2006/BU against the European Aviation Safety Agency.

a complaint against a drug manufacturer, claiming serious side-effects of the drug and seeking to have it banned. The Ombudsman transferred the case to the European Commission, which subsequently sought the advice of the EMEA on the matter. The result of the Ombudsman's informal intervention was groundbreaking. At the EMEA's recommendation, the Commission adopted a decision requiring member states to withdraw market authorisations for all the medicinal products containing the respective substance.[137]

The case against EASA was equally far reaching in terms of results. The complaint dealt with a complex matter, pertaining to the substantive work of EASA: an EASA decision concerning the type certification basis for an aircraft. The Ombudsman sided with the complainant and was of the opinion that the contested decision lacked sufficient legal basis and issued a proposal for a friendly solution. As a result, the EASA repealed the contested decision. These two instances illustrate that the Ombudsman can be a real alternative to the Courts in being able to bring about redress.

In some situations, however, the contribution of the Ombudsman is necessarily limited, due to his interpretation of the scope of his own mandate. In this context, two aspects emerged in cases involving European agencies: complex technical issues and merits of legislation. In cases involving highly complex technical aspects, the Ombudsman has recognised the limits of his own office and the role of the courts as more appropriate instances for adjudicating these matters. Such a situation arose in a case against the EMEA, where the Ombudsman observed that his office "is not in a position to decided whether the EMEA could have adopted a less strict approach towards the substances concerned as the complainant claims, basing itself on the product as a whole rather than on its components. This question could ultimately only be decided by the Community courts."[138]

Finally, with regard to the merits of legislation, the Ombudsman ruled that this falls outside his mandate of inquiring into instances of maladministration. In his words, "maladministration occurs when a public body fails to act in accordance with a rule or principle which was binding upon it. Allegations which only concern the merit of legislation, rather than the application of this legislation by a public body do not raise issues of maladministration. Such allegations thus fall outside the mandate of the Ombudsman."[139] And again, "the Ombudsman considers that since this question

137 European Ombudsman (2007c), Annual Report 2007, p. 38, <http://www.ombudsman.europa.eu/activities/annualreports.faces>.

138 Complaint 1193/99/GG against the European Agency for the Evaluation of Medicinal Products, para. 1.3.

139 Complaint 1999/2007/FOR against the Office for Harmonisation in the Internal Market.

relates to the merits of legislation, it appears to be a political question and does not concern maladministration."[140]

In light of his choice of investigative powers and the reliance on the information provided by the two parties, the contribution of the Ombudsman can only be very marginal, if any, with regard to cases of access to documents where information was refused on the basis of confidentiality. Take for example, two such cases that arose with regard to Europol. In complaint 202/2001/OV, Eurowatch, a research office on European justice and interior policy complained about Europol's refusal to allow access to 37 overviews on terrorism distributed to the member states, which were mentioned in the Europol's 1999 annual report and which were based on open sources material. In complaint 785/2002/OV, Mr S lodged a complaint against Europol's refusal to grant access to the documents of a conference on terrorism. In both cases, Europol reasoned abstractly and word-by-word identically in its observations, stating that "the decision by Europol to refuse access was based on the protection of public interest. In weighing the legitimate interest of the complainant to have access to documents against the legal obligations of Europol and the Member States of the EU to prevent and combat terrorism, the latter was deemed to clearly outweigh the first one."[141]

In both cases, the Ombudsman accepted the arguments provided by the agency and its classification of confidentiality at face value. In both cases, while quoting case T-174/95 of the Court of First Instance referring to the objective to "give effect to the principle of the largest access for citizens to information" the Ombudsman proceeded to observe that "the very nature of police work necessarily involves the handling of information and documents which, in the interest of citizens, must be treated confidentially."[142] It concluded, in both cases, that "the reasons invoked by Europol (…) appear to be justified."[143] By this logic, virtually any case in which Europol would invoke confidentiality with an aim of protecting public interest would "appear justified" to the Ombudsman, given the absence of further inquiries. Thus, the individual is left at the whim of the agency in question. Once the respective institution classifies a document as confidential, no further inquiries are undertaken, as observed in the two relevant cases, with the result that the respective individual's right to the "largest access to information" is basically obliterated.

140 Complaint 1193/99/GG against the European Agency for the Evaluation of Medicinal Products, para. 1.4.

141 Complaint 202/2001/OV against Europol; Complaint 785/2002/OV against Europol.

142 Complaint 202/2001/OV against Europol, para. 1.4.

143 Complaint 202/ 2001/OV against Europol, para. 1.5 and Complaint 785/202/ OV against Europol, para. 1.5.

While this is highly problematic, the stance of the Ombudsman can be partially justified by the limitations in his own mandate to access to classified and secretive information.[144] Nevertheless, there are means by which the Ombudsman can obtain greater access. Its Statute provides that the Ombudsman can agree in advance with the institution or body concerned the conditions for treatment of classified information or documents.[145] Plus, while the institution concerned cannot release to the Ombudsman documents originating in a member state and classed as secret by law or regulation, it can do so once the member state has given its prior agreement.[146] The Ombudsman, may not, however, divulge the information obtained. Nevertheless, in the present cases, there is no evidence to suggest that any of these steps were undertaken to at least ascertain whether the information denied was rightfully classified as confidential.

On another issue, however, the Ombudsman has indicated that it might be willing to go further than the Court, thus offsetting one of the gaps in terms of judicial review. As observed in the section of judicial review, decisions of the Joint Supervisory Body (JSB) of Europol cannot be appealed to the European Courts. In its case 183/2006/MF, the Ombudsman, while not taking a definitive position on the matter, has nevertheless indicated that it might be willing to take on cases appealing JSB decisions, which according to the Europol Convention are to be "final as regards all the parties concerned."[147] In fact, the Ombudsman stated that "it is not convinced that the Appeals Committee [JSB] should be considered as constituting a judicial body for the purposes of Article 195 of the EC Treaty and that the fact that it examined a given case should therefore prevent the Ombudsman from carrying out an inquiry. (…) the Ombudsman considers that the fact that the Appeals Committee has already examined the relevant decision of Europol does not oblige him to close his inquiry. (…)"[148] The Ombudsman stopped short of a definitive ruling on the issue. He chose to first look at the merits and reasoned that only if instances of maladministration were found, would there be a need to rule on this matter. Since no instances of maladministration were found, the issue is still open but from the statements of the Ombudsman in the case, it appears that he might be willing to step in and remedy the gap, should such a future case arise.

144 Article 3(2) of the Ombudsman's Statue.
145 Article 3(2) of the Ombudsman's Statue.
146 Article 3(2) of the Ombudsman's Statue.
147 Article 24(7) of Council Act of 26 July 1995 drawing up the Convention based on Art K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316, 27 November 1995, pp. 0002-0032.
148 Complaint 183/2006/MF against Europol, para 2.6.

8.3 (Quasi-)Judicial Accountability: The Full Picture

In the pages above, we explored the role of the Court of Justice of the European Communities and that of the European Ombudsman in acting as judicial and respectively, quasi-judicial checks on agency power. Based on the examination of formal provisions in place and the case law to date, it can be observed that both institutions play a role in scrutinising agency decisions.

With regard to the former, the role of the Court has been far-reaching vis-à-vis Community agencies, as evidenced by the case law examined. The Court has shaped and moulded its role and powers and stepped up to the challenge by matching judicial remedies to the reality of agencies' powers. Taking a proactive role, even in the absence of legal provisions to that effect, the Court has creatively and broadly interpreted its mandate so as to afford recourse. All in all, the Court has kept itself synchronised with developments in agencies' powers and has found ways to ensure that affected individuals are not deprived of judicial protection. This, once again, demonstrates the high relevance of an accountability forum for a meaningful accountability process.

On the other hand, its role vis-à-vis third pillar agencies remains minute compared to its role vis-à-vis first pillar ones. This, however, is in line with its restricted mandate in the third pillar at large. As observed by Peers, "despite the best efforts of the high priests of European integration, the legal system established by the third pillar cannot sufficiently ensure an effective an uniform application of EU law or an adequate system of judicial control of the legality of EU measures."[149] There is, however, no telling what might happen if push comes to shove and the Court is faced with a case involving a binding act adopted by a third pillar agency adversely affecting a third party, and all legal remedies are lacking. Furthermore, as we will see in more detail in the last chapter, under the Treaty of Lisbon, this gap in recourse to the Court is bridged. By virtue of the Treaty of Lisbon, the Court is explicitly granted jurisdiction over agencies' binding acts,[150] including those of Europol and Eurojust. This would amount to the final act of an evolving process, in which the system of judicial review in respect of agencies has been progressively improved and expanded through the activist role of the Court. The Treaty entails a codification of that system as well as a (much needed) supplementation, in the case of Union agencies.

149 S. Peers (2007), 'Salvation Outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgments', *Common Market Law Review*, *44*(4), 883-929, p. 885.

150 Article 263 TFEU.

The presence of the European Ombudsman is also felt in the scrutiny scheme of agencies. By virtue of its mandate, procedures, investigation powers, review criteria etc., the office of the European Ombudsman constitutes an alternative avenue of redress supplementing some of the inadequacies inherent in the legal process particularly related to accessibility, costs, time limits etc. The contribution of the European Ombudsman displays its own set of limitations as well, however, as discussed above. Through his choice of methods, relying exclusively on the information brought to him by the two parties, the impact of the Ombudsman is sometimes restricted, particularly in cases involving confidential information and access to data, where it becomes virtually impossible for the complainant to bring proof that the institution concerned has acted abusively. However, in other instances described above, the European Ombudsman has been able to accomplish substantive results, demonstrating that his office can have real added value to the Courts. Through a unique combination of influence, mediation, (political) pressure, arbitration, and in its role as a (quasi-) judicial body and parliamentary body, it has shown an ability to afford redress. Furthermore, its involvement with agency accountability is still in its early years, and hence "as European governance relies ever more on delegation and independent regulation, this new and hybrid form of scrutiny may become ever more important."[151]

151 P. Magnette (2003), p. 690.

CHAPTER 9

Agency Accountability: Between Deficits and Overloads

European agencies have become "an established part of the way the European Union does its business."[1] However, as observed in Chapter 1, as the relevance and prevalence of these "micro-institutions" of "macro-impact"[2] in the EU institutional landscape have increased, so have concerns voiced by both academics and European institutions with regard to their accountability. The central aim of this study was to investigate empirically whether these concerns are justified and if so, where the problems lie. As such, the research question this book sought to answer is "*What are the accountability arrangements and regimes to which European agencies are subject and are these regimes and the overall accountability system appropriate?"* With this aim in mind, in each of the four empirical chapters, one form of agency accountability was described and analysed, thus shedding light on the operation of individual accountability arrangements and/or regimes, and building a *micro-level view of accountability.* In the section below, an overview is provided of the main findings pertaining to the individual forms of accountability investigated.

In the second part of the chapter, the various elements will be pieced together and we will look at the operation of the overall system, thus taking a *macro-level view of accountability*. This is relevant, as pointed out in Chapter 3 due to the fact that failures identified at the level of one arrangement or regime can be assuaged at the level of the overall system, through the intervening, supplementing effect of other mechanisms. Similarly, whereas an individual mechanism or regime might be very thorough when inspected on its own, at the overall level serious overlaps and overloads might arise through duplication with other arrangements. Thus, once having

1 Commission of the European Communities (2008), Communication from the Commission to the European Parliament and the Council, 'European Agencies-The Way Forward', COM (2008) 135 final, Brussels, 11.3. 2008, p. 1.

2 Paraphrasing the European Parliament (2008), Committee on Constitutional Affairs, 'Report on a strategy for the future settlement of the institutional aspects of Regulatory Agencies', 2008/2103(INI), Rapporteur: Georgios Papastamkos, Rapporteur for opinion: Jutta Haug, p. 4.

assessed the individual level it is necessary to take a panoramic view of the dynamic operation and interaction of the various accountability arrangements and regimes in place. By contrast, viewing accountability as "a set of binary and unconnected relations rather than as a broader system of relations", results in a form of accountability myopia, so that the bigger picture is lost.[3]

9.1 Individual Accountability Arrangements: The Micro Level

European agencies are enveloped in a complex web of accountability relations to a multiplicity of forums. In this context, we notice a "functional differentiation of accountability", with different institutional forums being involved in different aspects of agency accountability.[4] When examining these individual forms of accountability, several observations can be made, based on an investigation of legal accountability provisions as well as practices, in the case of the five sampled agencies.

9.1.1 Managerial Accountability: Fully Fledged but Not Fully Implemented

First of all, the nearest and most direct accountability relation is that vis-à-vis the management boards. The picture that emerges from the empirical investigation is that of a fully fledged accountability process characterised by the three phases of informing, debating and the possibility of consequences. Failures, however, are prevalent and they intervene at the level of how these aspects are implemented in practice.

Whereas some delegations to the boards are well prepared and on top of their game, an overwhelming number are not the vigilantes that they are officially meant to be. The interview material reveals that a large number of delegations are dormant in their watchmen roles as evidenced by low levels of preparation for board meetings and a low level of involvement in discussions, often to the extreme of consistently remaining completely silent during board meetings. This could be an indication and a by-product of the fact that European agencies are not high on national agendas and that insufficient time, resources and administrative capacity are being invested in preparing for board meetings.

3 A. Ebrahim (2005) 'Accountability Myopia: Losing Sight of Organisational Learning', *Non-Profit and Voluntary Sector Quarterly, 34*(1), 56-87, p. 71.

4 P. Barberis (1998), 'The New Public Management and a New Accountability', *Public Administration, 76*(3), 451-470, p. 465.

Furthermore, the manner in which the board is structurally set up in terms of size and composition has additional negative consequences for the efficient operation of the accountability process. Boards are plethoric in size, with board members occasionally outnumbering the overall staff of the agency they are supervising. This has resulted in a cumbersome board process as well as a focus on administrative detail due to difficulties in reaching agreement on bigger issues or in having substantive discussions. The criterion for board recruitment is representativeness, with each member state being generally represented in the board. As such, boards are not necessarily composed with a view to their functions and tasks. This has translated into a deficit on strategic input and oversight, an overemphasis on national interest as opposed to the efficient performance of the European body, strong conflicts of interests as well as a lack of expertise in financial and budgetary matters, a central aspect to the boards' monitoring and steering roles.

Additionally, in terms of sanctioning, there is a tendency not to resort to formal sanctions and to keep the problem contained within the organisation, as this could become a very sensitive, political matter, casting a negative light on both the agency and the board, as part of the organisation. This is in line with findings at the national level as well, where very low levels of sanctioning are reported.

All in all, the supervision of management boards displays a broad range of failings. The general set up, in which members of the board are only part time players at the European level while working full time in parallel institutions at the national level, creates a bias towards a "national-focused outlook", to the detriment of an agency-focused perspective. The emergence of new accountability relationships involves a change in role expectations.[5] However, this shift in role expectations does not take place only with respect to the actor, but also with respect to the forum. Some management boards have not fully assumed their new roles. By virtue of being only occasional players on the European stage, many representatives seem to remain largely national-minded bureaucrats. This might be an indication of a lack of ownership of the agency and of coming to terms with their new superimposed, co-existing role expectations. This has been rendered more difficult by the manner in which the system is set up, as sometimes these co-existing role expectations clash, particularly in the case of fee generating agencies. Members of the board are generally also the heads or representatives of the corresponding national agencies. As such, they are either beneficiaries of the European agency's work programme and payment system or are in direct competition with the agency, whose increased efficiency

5 A. Wille (2008), 'The Modernization of Executive Accountability in the European Commission', *Paper prepared for the Fourth Transatlantic Dialogue,* Bocconi University, Milan, 12-14 June 2008.

affects the competitive advantage of the national agency they head. The most extreme situation was seen at the board of OHIM, where strong conflicts of interest were reported, due to the fact that the national agencies and the European Office co-exist and are in competition with each other. The representatives of the national offices sit on the board and there are no representatives from other European institutions with a voting right to offset the push for the national interest.

Thus, some of the governance and accountability problems depicted often reflect the inherent EU tensions and struggles for competing, legitimate interests between the EU level and the national level. The management boards of agencies become the grounds where these tensions become most explicit due to the *double-hatted* nature of representatives, who are bound to represent the national interest while at the same time mandated to steer and oversee the performance of the European body they are governing.

For now, the fact remains that many board delegations have not fully stepped up to the challenge and due to either generic shortcomings or other reasons, fall short in many cases of adequately holding directors to account and comprehensively assessing the performance of the agency.

9.1.2 Political Accountability: Pockets of Accountability

Accountability takes place both vis-à-vis the European Parliament and the Council, with the Parliament playing a stronger role vis-à-vis Community agencies, and the Council in respect of intergovernmental ones. This takes the form of (annual and evaluation) reports and (informal) hearings, with both bodies being able to enact consequences towards agencies within their remit.

Political accountability is on the rise, particularly in the case of the European Parliament. It is part of an evolving process through which the EP is gaining a larger foothold in agency oversight. This has been a by-product of the increase in parliamentary powers through co-decision. Particularly in the third wave of agency creation, the Parliament was often involved as a co-legislator in the contract design of agencies, on a par with the Council. As such, provisions for parliamentary oversight were introduced, allowing the EP to play a larger part in agency accountability. Furthermore, the increase in EP involvement is to no small extent due to lobbying efforts on the part of the agencies themselves for increased parliamentary attention. In an attempt to raise their profile, gain legitimacy and additional resources, agencies started lobbying the parliament for hearings and parliamentary visits, thus voluntarily enveloping themselves in new accountability ties. Both in the case of the Parliament

as well as the Council, there has been an expansion of accountability practices (i.e., particularly in the form of hearings), which have developed informally, as a matter of practice. For instance, in the absence of any formal obligation to do so, both the director of Europol and the president of Eurojust have appeared for hearings before the European Parliament and the Council. Nevertheless, EP powers do remain more restricted vis-à-vis Europol and Eurojust by comparison with its powers vis-à-vis first pillar agencies, as it has only an advisory power in terms of the adoption or amendment of their constituent acts.

All in all, while an examination of formal provisions and practices reveals that the elements of accountability are in place, practical problems have nevertheless come to the light, such as those seen on the management boards. The picture that emerges is a mixed one, with some EP committees being knowledgeable of and involved with agencies within their remit, and others displaying a low level of knowledge and poor attendance at hearing meetings. To this extent, the EP is not a unitary actor and further measures need to be taken at the parliamentary level to raise awareness, knowledge and interest among its committees vis-à-vis agencies. Correspondingly, the Council tends to be more conscientious about scrutinising its agencies (i.e., Europol, Eurojust), while wholly neglecting the supervision of some first pillar agencies (i.e., OHIM an EASA), despite formal provisions stipulating a role for the Council. Particularly in the case of OHIM, this is highly unsatisfactory as the Council is the only political European institution provided for in OHIM's contract design. Given the problematic aspects relating to OHIM's accountability and governance practices, the Council's de facto absence entails that there is no one to counteract the strong push for national interests and negative politicisation in the board and to oversee the agency's performance through a European lens.

All in all, political accountability is an important element of agencies' accountability, but not a sufficient one. It is less intensive, incident-driven, focused on a limited number of issues and guided by political priorities and political saliency. This is not unusual and similar findings are reported at the national level. Furthermore, it has been observed that a "fire-alarm" approach is preferable for a high level political forum, as full-time supervision would be a huge drain on resources. This does entail, however, that while necessary, political accountability is not sufficient in and of itself as in the absence of monitoring by other forums, whole areas of agencies' mandate would be deprived of supervision. It is particularly less suitable for overseeing agency performance and long term strategic planning. In fact, respondents pointed at a deficit in parliamentary oversight in this direction. This is not surprising, as a focus on a limited number of issues translates into a lack of a coherent view on the future of the agency and the impossibility to have discussions on the development of the agency. It is, however, problematic at a more systemic level given that,

as observed in the previous section, this was precisely one of the areas where management boards were also falling short.

The strength of this mechanism comes from elsewhere, however. In case of serious misbehaviour or underperformance, these high level political forums have the capacity to take sweeping remedial action and the consequences can be dire indeed, such as highly publicised hearings, slashing of budgets, rewriting or even ending an agency's mandate.

9.1.3 Financial Accountability: Full Time Account Holders

An analysis of the General Financial Regulation, the Framework Financial Regulation as well as of the agencies' basic constituent acts and the relevant financial rules reveals that agencies are also subject to an extensive and complex system of financial accountability. They are accountable to a multitude of intertwined and co-dependent forums that are, as we have seen, in a network relation with each other, receiving and exchanging information. For agencies funded from the Community budget, the network of financial forums is composed *of internal audit bodies:* the Commission's Internal Audit Service and generally also an internal audit capacity within the agency; an *external audit body:* the European Court of Auditors; and an *external discharge body*, which is a hybrid of political and financial accountability: the European Parliament in its discharge role. For member state funded agencies (i.e., Europol), a similar type of layered structure involving different financial satellites emerges due to the intergovernmental nature of this pillar. Thus, the *internal audit function* is exercised by the financial controller, the *external audit* by the Joint Audit Committee and the *external discharge function* by the Council. With the adoption of Europol's new Council Decision, which brings about the "communitarisation" of Europol's budget, this structure will be altered and brought in line with that of other agencies funded from the Community budget.

These accountability arrangements follow the three steps of an accountability process: information, debate and the possibility of consequences. The last element is largely informal, as most financial forums lack the possibility to impose outright sanctions. However, their findings, in the form of audit reports represent strong informal consequences and can bring about formal sanctions from the more political forums (i.e., EP, Council). For example, the report of the Court of Auditors is a highly publicised document that plays a central role in the discharge procedure by the European Parliament. Should the Court report significant irregularities or even go as far as to refuse its stamp of approval as to the reliability of the agencies' accounts and legality and regularity of the underlying transactions, this could result in the

European Parliament refusing to grant discharge. This has not yet occurred, as no such wide-ranging irregularities have been reported. Nevertheless, the importance of the Court of Auditors report is evidenced by it being a key element to the discharge process and the fact that comments in the reports of the Court of Auditors resurface in the discharge reports.

All in all, these accountability arrangements stand in stark contrast to the previous ones. Failures identified in respect of management boards such as lack of preparation, lack of motivation to engage the actor in debate, and informational asymmetries are no longer an issue. Part of the rationale for this could be the fact that, unlike management boards, the financial forums are highly technical and professionalised. Even the more political, less technical forums such as the European Parliament and the Council rely heavily on the expert assessments of the Court of Auditors and the Joint Audit Committee in reaching a judgment. Unlike management boards, bodies such as the European Parliament in its discharge role and the Court of Auditors are not "freshmen" to the accountability game. They are full time account-holders and very familiar landmarks in the European landscape, having already actively discharged their accountability role vis-à-vis the other European institutions for decades. As such, they have been able to forge their institutional identity, build up expertise and professionalised staff. This is even further corroborated by the fact that when problems do occur they are related to the advent of "new kids on the block" in the auditing landscape: IAS and IACs and the ensuing interaction and "turf" division between these newer forums or between a new forum and an established one (i.e., the IAS and the Court of Auditors).

Furthermore, unlike management boards the financial forum are very active, taking the reins of the accountability process by being extensively informed and debating with the actor, and even dynamically pushing their role further. For example, the two budgetary committees of the European Parliament (the Committee on Budgets and the Committee on Budgetary Control), have expanded their scrutinising roles to include governance matters, thus tapping into the more "political" side of their dual financial-political capacity.

When examining the financial accountability regime as a whole, despite the positive aspects outlined above, some "accountability pathologies" can be diagnosed. First of all, there is the issue of accountability overloads, which occur because agencies are accountable, as seen above, to three or even four different forums on financial matters. Other than the immense costs involved, the cumbersomeness of this regime runs the risk of straight out paralysing smaller scale agencies, some having no more than fifty employees.

Secondly, performance issues could be better integrated into the financial oversight regime. The focus of the discharge process is almost exclusively on regularity; aspects relating to agencies' results and performance are generally not addressed. In this context, the EP, in its discharge role, is increasingly taking this issue up and urging agencies to report on these matters.

9.1.4 (Quasi-)Judicial Accountability: Signs of Life Within and Beyond Legality

As evidenced by a combined analysis of legal provisions and relevant case law, both the Court of Justice of the European Communities as well as the European Ombudsman play a role in scrutinising agencies' decisions.

The role of the Court has been far-reaching vis-à-vis Community agencies, as evidenced by the case law examined. Cases can be brought against EASA and OHIM decisions, as clear provisions are in place in their constituent acts that make this possible. Particularly, for OHIM, applicants have not hesitated to make extensive use of this recourse as evidenced by the large amount of jurisprudence in this case. Even in the case of first pillar agencies, where no provisions are made for judicial review in their basic act, but they can adopt decisions that are binding upon third parties, the Court has interpreted its role and mandate broadly, ruling that they are reviewable under Article 230 EC.

The Court has gone even further than only restricting its scrutiny to formally binding acts. Thus, in the case of EMEA and its advisory opinions, which are stamped into binding acts by the Commission, the Court has circumvented its restricted power of review and scrutinised such opinions in actions directed against the Commission decisions. It has rightfully recognised that meaningful judicial review of the Commission decision cannot steer clear of examining the scientific opinion which forms such an integral part of the formal decision. While clearly pointing out that it cannot substitute its view for that of the scientific committee, it has nevertheless scrutinised the reasoning process that led the committee to its stated view. In such situations, "the logic of the CFI's reasoning is unassailable."[6]

Whereas in a joint and often unguided effort, the Community legislature, the Commission and the member states have created new agencies in an ad hoc manner, delegated powers and stacked up new tasks on these bodies, the Court has understood the significance of these broader developments, kept itself synchronised with the

6 P. Craig (2006), *EU Administrative Law,* Oxford University Press, p. 168.

times and found manners to ensure that individuals affected are not deprived of legal protection. This also once again demonstrates the high relevance of an active accountability forum for a meaningful accountability process. The success of an accountability process is highly dependent not only on the actor but also on the quality of its forum; the accountability forum can make or break an accountability process. In previous sections, we have seen accountability forums that have at times fallen asleep at the wheel (i.e., some management boards or members of these boards and even some European Parliament specialised committees) as well as forums that have been very active (e.g. the European Court of Auditors) and even pushed their scrutinising roles further (e.g. the Budgetary Committees of the EP). The Court of Justice definitely ranks high among the latter as it has proactively and diligently construed and moulded its role and its own powers in line with developments in agency powers.

The Court, however, can only push its role so far in the face of strict institutional constraints. Its contribution in the case of third pillar agencies has been much more modest, in line with the very restricted role envisaged for the Court in this pillar by the Treaty Makers. As it stands, should an individual be adversely affected by a decision of a third pillar agency, he/she is not in a position to challenge this decision. Thus, in terms of accountability deficits, this is certainly an area of deficits that needs to be addressed and, as we shall see later on, is being addressed in the Treaty of Lisbon.

Furthermore, even when the Court does have jurisdiction to review an agency act, due to narrow rules on standing, time limits and the high costs involved, the judicial avenue is not necessarily a possible or realistic option for European citizens. With regard to this, it has been observed that "today the possibilities for individuals, notably European citizens, to be heard by Community Courts and to interact with the Union's political system, are limited."[7] Or yet again, private individuals as plaintiffs before the Court "are few in number considering the constraints in terms of costs and time (…)."[8]

In this connection however, the European Ombudsman can become an alternative route for redress. The procedure before the European Ombudsman is free of charge, rules on accessibility are lax (as there is no requirement for a personal interest in lodging a case) and time limits can be bypassed by the Ombudsman through the initiation of own-initiative inquiries. Furthermore, even more importantly, the mandate of the Ombudsman covers not only Community agencies, but also EU agencies.

7 O. Costa (2003), 'The European Court of Justice and democratic control in the European Union', *Journal of European Public Policy, 10*(5), 740-761, p. 756.

8 Ibid. p. 748.

The empirical research in the five sampled agencies revealed that cases were lodged with the European Ombudsman. These mainly concerned issues such as personnel matters, access to documents, data protection and alleged discrimination, with a couple of cases dealing with substantive agency decisions (i.e., EASA) or opinions (i.e., EMEA). At the very least, the intervention of the Ombudsman gave plaintiffs the possibility to obtain additional information as well as a statement of reasons from the institution concerned. In some cases, however, the Ombudsman found instances of maladministration and the agency in question was sent a friendly solution and a draft recommendation, if necessary, laying down remedial measures to be undertaken to satisfy the complainant. All the agencies sampled complied with the requests for information and the justification made, as well as with the final decisions of the Ombudsman. The impact of the Ombudsman has been more limited, however, in terms of agency cases examined involving access to confidential documents and data protection issues. By relying exclusively on the information provided by the two parties and not taking up any other investigations, the Ombudsman's contribution was marginal. On the other hand, it has indicated that it might be willing to take up data protection cases appealing decisions of the Joint Supervisory Body of Europol. This would amount to an important development in furthering accountability, as such cases cannot be appealed to the Court.

All in all, there are clear signs of life both within as well as beyond legality. The Court of Justice and the European Ombudsman are both important avenues for redress against agency decisions (and in some cases, as observed, opinions as well). The Court particularly has been a highly diligent forum in ensuring that this is the case.

9.2 A Bird's Eye View of Agency Accountability: The Macro Level

Having briefly summed up some of the virtues and failings of the specific arrangements, it is time to move beyond individual arrangements and take a bird's eye view of the accountability system as a whole. The accountability system of European agencies is a composite one; it is impossible to given an assessment of the overall system without gluing all the pieces together and examining the emerging picture in its entirety. How does the accountability system function altogether? Are agencies held accountable? With these questions in mind, we will first look at what there is in terms of accountability, a kind of across-the-board inventory. Secondly, we will examine how the various arrangements interact with each other and the accountability dynamics that arise. Finally, problematic aspects and disorders that intervene at this systemic level will be diagnosed.

9.2.1 The Array of Accountability Mechanisms in Place

First of all, in terms of the *existence of accountability mechanisms*, there is no support for the original claim that agencies operate as independent, unaccountable agents, with a qualification for the third pillar, which will be addressed later on, below. An examination of agencies' accountability arrangements reveals that there is a large menu of accountability mechanisms in place; the sheer number is overwhelming, even if not always perfect or watertight. As we have seen above, this study identified as many as four major types of accountability regimes clustered around a multitude of accountability forums such as management boards, the European Parliament, the Council, the European Courts (the Court of First Instance and the European Court of Justice), the European Ombudsman, the European Court of Auditors, the Commission's Internal Audit Service, the Internal Audit Service of the Commission etc.

These major types of accountability are generally also encountered in the case of national level agencies. Thus, a recent cross-agency study[9] observed that "in many countries, agencies have management boards", "are subject to hierarchical oversight relations with one or (exceptionally) several ministries" and although "ministerial responsibility for agencies is clearly prevailing at national level", "some direct interactions between parliament and chief executives can be observed" in specific countries. Furthermore, "agencies at national level issue annual reports and accounts", "the possibility for judicial review of agency decisions is a general characteristic of national level agency governance" and that for auditing agencies, "most countries have a specialised audit office which mainly focuses on financial management issues and proper use of public money." In other words, as in the case of European agencies, instances of political, managerial, legal and financial accountability are generally in place for agencies at the national level. Thus, European agencies do not fare at all badly compared to their national level relatives in terms of the accountability structures in place. Furthermore, as we have seen in the case of European agencies, these major forms of accountability are composed of a multitude of account-giving obligations (e.g. annual reports, annual activity reports, hearings, evaluation reports) to a broad variety of forums and occasionally part of a complex accountability cycle (e.g. the discharge process). In fact, given the sheer magnitude of these procedures at the European level and the number of forums involved, compared to the administrative capacity of some of the agencies, the level of account-

9 European Parliament (2008), Directorate General Internal Policies of the Union, 'Best Practice in Governance of Agencies–A comparative study in view of identifying best practice for governing agencies carrying out activities on behalf of the European Union', Brussels, 30 January 2008.

ability obligations to which European agencies are subject is likely to be unparalleled in similar bodies at the national level.

Thus, in the first pillar, we can speak of possible instances of *accountability overloads*[10] with some small agencies subject to a similar set of controls as an institution like the European Commission, which a number of commentators consider to be "the most controlled executive in the world."[11] This observation was initially made within the context of financial accountability procedures alone, where EU funded agencies, for example, give account to four different financial accountability bodies: the internal audit capacity, the Commission's Internal Auditor, the Court of Auditors and the European Parliament as the discharge authority. However, the issue of overloads is relevant beyond the financial accountability regime and permeates the system as a whole. The sheer number and complexity of some procedures can put a real strain on smaller scale bodies. Whereas the larger agencies such as EMEA or OHIM boast staffs of approximately 500 and respectively 700 employees, there are also agencies with a staff capacity of a mere 50 employees (e.g. the Community Plant Variety Office, the European Network and Information Security Agency, the Fundamental Rights Agency) or even less (e.g. European Police Office).[12] Yet, all of these bodies are subject to extensive accountability procedures on a par with a body like the European Commission, which employs a staff of approximately 25,000 employees. Such extensive and cumbersome procedures run the risk of outright paralysing smaller scale agencies and turning accountability into their full time business. The situation is exacerbated in the case of management boards alone, the meetings of which respondents reported as being attended by as many as 100-120 people.[13] In fact, as we have observed above, in some cases the size of the management board is larger than the permanent staff of the agency itself.

Admittedly, the menu of accountability arrangements is more limited for third pillar agencies, where, as a result of the intergovernmental nature of this pillar, a restricted role is envisaged for some of the more "supranational" institutions of the EU i.e., the European Parliament and the Court of Justice of the European Communities.

10 M. Bovens, T. Schillemans, P.'t Hart (2008), 'Does Accountability Work? An Assessment Tool', *Public Administration, 86*(1), 225-242, pp. 227-230.

11 A. Wille (2009), *Executive Accountability in the European Commission,* 28 June 2009, paper on file with author, p. 26.

12 Based on the latest specific annual reports of the Court of Auditors (for the financial year 2007), the Community Plant Variety Office has a total staff of 45, the European Network and Information Security Agency a total staff of 56, the European Union Fundamental Rights Agency a staff of 57 and the European Police Office a total staff 21. For more detail see, <http://eca.europa.eu/portal/page/portal/publications/auditreportsandopinions/specificannualreports>.

13 Such estimates generally include management board representatives, their alternates, translators and a handful of agency staff.

However, these limitations are simply inherited from the general set up of the EU system. This is a general problem in the Union pillars and not exclusively an agency problem. Protective of their prerogatives in these pillars, member states have long been reluctant to allow for a broader mandate of the more "supranational" institutions of the EU. In this connection, particularly with reference to the absence of judicial review of third pillar agencies' acts and decisions as well as the restricted role envisaged for the European Parliament, it is not too far-fetched to speak of *accountability deficits.*[14] To some extent, improvements have already been made in terms of the powers of the European Parliament in the third pillar. At the de facto level, parliamentary accountability is on the rise, with both the Europol director and the Eurojust president appearing for hearings before the European Parliament. Furthermore, the new Europol Council Decision formalises the obligation of the director to appear before the European Parliament. Europol's budget is being "communitarised", with the result that the Community financial accountability procedures will be applicable. This is already the case for Eurojust and CEPOL, which are both Community financed (as opposed to member state financed). This is a significant development, as the European Parliament replaces the Council as Europol's discharge authority and its standing vis-à-vis the agency will increase by virtue of its budgetary role. Given, however, that the EP lacks co-legislator prerogatives vis-à-vis these bodies, the EP will continue to have a less powerful position as it cannot change, amend their basic legal acts or introduce new accountability provisions should it so desire. However, this too as we shall see, is being improved through the Treaty of Lisbon.

9.2.2 The Interplay Between the Various Accountability Mechanisms

The overall accountability system is intertwined, with actors simultaneously performing different roles at different stages of the accountability regime, with accountability forums in their own right also serving as information providers or fire alarms for other forums. In fact, some of the accountability mechanisms mirror the EU system and the way the EU conducts its business, where "actors are not nested within one level but cross over into other levels or arenas."[15]

Given the extensive web of accountability relations contained therein, the accountability regime of European agencies is a breeding ground for complex accountability

14 M. Bovens *et al.* (2008), pp. 227-230.

15 D. Curtin and A. Wille (2008), 'Meaning and Practice of Accountability in the EU Multi-Level Context' in D. Curtin and A. Wille (eds), *Meaning and Practice of Accountability in the EU Multi-Level Context,* Mannheim: Connex Report Series No 07.

dynamics. Accountability mechanisms are generally complementary and cover different, major areas relevant to the agency's work: financial, administrative, performance-related but also substantive decisions (i.e., vis-à-vis the European Courts). Some mechanisms also tend to reinforce each other and are at times in a co-dependent relation to one another. For example, the expertise and audit reports of the European Court of Auditors and the Joint Audit Committee help bolster and give ammunition to bodies such as the European Parliament and respectively the Council, in their discharge role. Or a body like the European Parliament can give teeth to the findings of the European Ombudsman, who lacks the possibility to enact formal consequences. Also, as we observed in the financial chapter, the various forums are in a network relation to each other, exchanging vital information that is used as an indication of a need for further inquiries or as basis for judgment or sanctions by other forums. This is in line with the observations of Papadopolus, according to whom "a complexification of the decisional system requires thus an equivalent complexification of controlling institutions, which may be formulated in terms of a problem of adjusting the 'requisite variety' of accountors to the increasing variety of actors who should be accountable."[16] In other words, in parallel with the growing complexity of European governance, we are noticing a shift in accountability obligations, allowing for a broad array of account holders, pertaining to different levels of governance, in an intertwined relation with each other. To this extent, the accountability regime of European agencies can be described as a *multicentric model of accountability* as opposed to a command model of accountability, in which accountability is enacted towards "different authorities, for different purposes, to different degrees and in terms of different, though mutually complementary standards."[17]

The various accountability arrangements are not always in a symbiotic relation, however, and tensions do occasionally arise. Several instances of *multiple accountabilities disorder (MAD)* have been pointed out with conflicting expectations arising. There are also some instances of redundancy in terms of the subject matter covered by different forums, particularly in the area of financial accountability between the Internal Audit Capacity of the agency, the Internal Audit Service and the European Court of Auditors. Redundancy can be purposefully cultivated in an accountability regime as a "failsafe" mechanism.[18] In the case of the auditing regime of agencies, however, redundancy does not seem to be the outcome of a masterly laid out failsafe

16 Y. Papadopoulos (2007b), 'Accountability in EU Multilevel Governance', *Position paper for the 'Connex' RG2 Wrapping-up Workshop,* Utrecht University, 11-12 October 2007, p. 2.

17 P. Barberis (1998), p. 464 quoting H. J. Spiro (1969).

18 C. Scott (2000), 'Accountability in the Regulatory State', *Journal of Law and Society, 27*(1), 38-60, p. 53.

strategy but rather a by-product of problems in the system at its inception and the way the system evolved. Thus, the original intention was not for both internal audit capacities and the IAS to co-exist. Due to the fact that the IAS only gained a mandate vis-à-vis agencies in 2003, some agencies had already set up an internal audit capacity. Additionally, since the IAS lacked resources in its early years and was unable to comply with its obligations, other agencies had little choice but to establish their own internal audit capacity. The result was the set up of two parallel internal audit capacities. However, both the IACs and the IAS have a relatively new mandate vis-à-vis agencies and are still defining their institutional identity and finding their place in the auditing landscape.

So in terms of the question: "are agencies subject to (sufficient) accountability arrangements and do they comply in practice with these account giving obligations?", the answer is yes (with the exception of certain deficits, described above in the third pillar) and in this study I have shown step by step, at the de jure and the de facto level, what exactly these obligations entail and the manner in which they are complied with. None of the forums involved referred to failures or refusal on the part of the agencies to comply with their account-giving obligations. With the exception of occasional informational delays or dissatisfaction on the part of the forums with the quality of some of the information supplied, which made follow-up necessary, all the sampled agencies reportedly discharged their accountability obligations. Furthermore, whereas some arrangements are more ad hoc in nature (e.g. supervision by the management boards, hearings before the EP), others are highly formalised with account-giving obligations being discharged at fixed times as part of broader accountability or budgetary cycles (e.g. annual reports, annual activity reports, accountability vis-à-vis the Court of Auditors, discharge by the European Parliament).

Moreover, the potential for agencies escaping supervision is further mitigated by the fact that, as pointed out in Chapter 5, in some cases, ongoing control is exercised by the Commission in the boards. Furthermore, studies of agency autonomy show that "none of the agencies studied appears to be fully autonomous from the Commission or the member states neither on paper nor in practice, and the assertion of some EU agencies being 'out of control' or not being under any control is therefore exaggerated."[19] Whereas some agencies seem to be capable of task expansion beyond their formal design and have done so, others to the contrary, have not.[20]

19 M. Groenleer (2009), *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development,* Delft: Eburon p. 347.

20 M. Groenleer (2008), 'Building autonomous European Union agencies? Identity, legitimacy and leadership in comparative perspective', *Paper presented at the 38th UACES Annual Conference,* Edinburgh 1-3 September 2008, p. 7.

However, all in all, directors have not expanded significantly on agency autonomy and there is no evidence to suggest that agencies are turning into self-aggrandising bureaucracies.[21] Furthermore, in some highly controversial cases such as Europol's data agreements with third states, the Council formally maintains control over this process. As such, political control in this area is present. At Europol, too, member states have maintained control and responsibility for a central aspect of Europol's functioning: the input of information. Europol is highly dependent in the performance of its tasks and the results it can show, on the information provided by member states. Thus, discussions of accountability need to take these aspects into account. A greater clarification of the role of the various institutional actors and member states vis-à-vis agencies and their stake in agency performance is desirable from an accountability perspective. Their accountability should be commensurate with their influence on the agencies' functioning.

9.2.3 De Facto Operation and Institutional Design: the "Unusual" Suspects

This is not to say, however, that the accountability regime of European agencies is watertight. Agency accountability seems to be viewed through a PA-coloured prism. The emphasis of the debate has been on the possibility of such bodies dodging and escaping control and being able to exercise arbitrary power. However, even when sufficient accountability arrangements are in place to prevent agencies from sidestepping and agencies comply with their account giving obligations, failures in the accountability regime can and do occur at other levels, which will be pinpointed below.

First of all, as we have seen above, *the presence of overloads* is problematic at the level of formal procedures. Whereas much of the literature on EU agency accountability has focused on the potential for agency deficits, overloads are equally worrisome. From an accountability perspective, overloads, just as deficits, are failures of accountability, the "negative externalities" of accountability. In the case of agencies, accountability procedures already in place for the main EU institutions were simply transplanted without much forethought as to the extent to which they were compatible with these smaller scale executive organisms. This has resulted, as observed above, in overloads and overlaps that affect the "health" of the overall accountability system.

21 M. Busuioc and M. Groenleer (2008), 'Wielders of Supranational Power? The Administrative Behaviour of the Heads of European Union Agencies', *Paper presented at the ECPR Standing Group on Regulatory Governance,* 5-7 June, Utrecht.

Secondly, what emerges from this study is that problematic aspects intervene at the level of how the various arrangements are used in practice i.e., *"failures of practice."*[22] Forums possess a range of scrutinising powers and the manner in which they avail themselves of these powers is crucial to the success or failure of an arrangement. The underuse of accountability arrangements becomes an issue of concern. An obligation to supply an annual report and an actor that complies with this obligation will have very little impact if the forum does not have the time, resources, or interest to read the report or engage the actor in discussion. The present study points, for instance, at a sharp difference between the level of preparation, interest, and involvement of some management board delegations in their supervisory role and the supervision exercised by other forums. To this extent, management boards are the weaker links of the accountability system. This is a significant accountability concern, particularly as agency respondents repeatedly refer to this form of accountability as the most important mechanism of agency accountability. These observations concerning the underuse of accountability arrangements are particularly relevant for some management board delegations, though not exclusively restricted to them. Hearings of directors before the European Parliament are hardly relevant if almost no one is present to "hear" the director, which, as we have seen, does occur in some cases. The formal accountability privileges of the Council vis-à-vis OHIM and EASA are hardly comforting, since the Council never exercises them in practice. Moreover, the issue of underuse pertains not only to specific arrangements but also to the monitoring of particular aspects of agencies' functioning. In this connection respondents consistently reported a deficit in terms of both input and oversight of strategy as well as performance aspects, both at the level of management boards and that of the European Parliament, which has not stepped in to fill in this gap.

Furthermore, the manner in which formal procedures are enacted can become a source of tension if the alignment of interests between the agency and the forum is less than perfect. As we have seen, management boards at times push for their national interest to the detriment of the agency's interest, which results in divergent and irreconcilable pressures on the agency. The agency occasionally finds itself in the position of having to fight its own board in order to follow up on feedback from another forum (e.g. financial soundness requirements from the Court of Auditors). Similarly, in the case of Europol, tensions arose between the political will and oversight as expressed and enacted on the part of the Council and the management board. Interviews revealed the presence of a disconnect between the political level

22 M. Busuioc (2010), 'European Agencies: Pockets of Accountability' in M. Bovens, D. Curtin and P. 't Hart (eds) in *The Real World of EU Accountability: What Deficit?*, Oxford: Oxford University Press, forthcoming.

and the lower management level, with a reluctance and resistance of the latter to Europol, as a top down political project. Thus, the tensions encountered do not appear to stem from inherently conflicting aims between two different accountability arrangements but rather from an imperfect alignment of interests and preferences between the agency and (one of) its forums. This brings me to my next observation.

Many of the problematic aspects outlined above have their origin in *the poor set up of the agency system*. There is a direct link between accountability and institutional design. When the system is set up in such as way that oversight and steering is exercised by boards composed of an overwhelming number of members, fraught with strong conflicts of interests, when there is an overload of accountability mechanisms on small scale bodies, then the ensuing problems and failures are no longer imputable to the agent but to the principals that devised this system. This relates to a notion put forward by Wood and Waterman who regard *accountability as "a two-way street*." In addition to bureaucracies being held accountable by elected officials, the latter should also be held accountable for their direction of the bureaucracy.[23] On a similar vein, in the context of the accountability of European agencies, principals bear shared responsibility for the accountability system they have put in place.

Generally speaking, the agencification process has taken place in an ad hoc manner, in reaction to a variety of pressures, lacking an overall vision and without sufficiently taking into account and making allowance for agencies' specificities. Take, for example, the two issues described above: the overwhelming number of accountability procedures and the size and composition of management boards.

Faced with increasing questions concerning the accountability of agencies, there has been a concerted institutional push towards a horizontal harmonisation of procedures of agencies and a stacking up of new procedures as a way to counterbalance accountability deficit concerns as well as democratic deficit claims stemming from their weak democratic credentials (i.e., the non-majoritarian character of such bodies). This epitomizes "the tendency just to add more rules and regulations when something goes wrong."[24] Given that this has taken place in an ad hoc manner and there was not (and still is not) a coherent approach in terms of agencies' accountability structures as well as the role of the various institutional actors vis-à-vis agencies, this has at times resulted in overloads as well as piecemeal, patchy provisions.

23 B. D. Wood and R. W. Waterman (1994), *Bureaucratic Dynamics: The Role of Bureaucracy in a Democracy,* Boulder: West View Press.

24 C. Pollitt (2003), *The Essential Public Manager,* Philadelphia: Open University Press, p. 95, paraphrasing Behn.

With regard to the size of management boards, this is on the one hand the result of an effort to facilitate co-operation between the European and the national levels and to engender acceptance and legitimacy of the newly established European agency by including representatives of all member states (as well as, in some cases, other relevant stakeholders) in their governance. At the same time, it is the by-product of member states' unwillingness to fully relinquish control.[25] Furthermore, "inter-institutional politics and sectoral/particularistic considerations have at times prevailed at the expense of good governance."[26] The result of these "politics of Eurocratic structure"[27] has been the establishment of plethoric boards, disproportionate to the size of the agency they are managing and in some cases fraught with conflicts of interests.

9.3 Accountability: Theoretical Insights

That said, what are, at a more general level, the theoretical lessons yielded by this study? First of all, the accountability definition forming the basis of this study is a very useful tool for identifying, describing and mapping a variety of accountability relations. By clearly demarcating what counts as an accountability arrangement, and breaking it down into three main elements, this theoretical tool made it possible to empirically study an array of accountability relations. Additionally, the three step division allowed for the possibility to precisely diagnose where failures intervene in the operation at the arrangement and as such, where remedial measures are needed.

Secondly, one of the main insights arising from this study is *the need to shift the focus of accountability to the forum.* The study points at the importance of the forum in an accountability process, since the forum can be a weak element in the accountability process. This is an interesting insight for accountability theory, since accountability studies are generally focused on the actor and the extent to which the latter is obliged to and does, in fact, render account. There seems to be an implicit assumption that the forum will hold the actor to account. In a simple delegation model, in which a principal places part of its assets or powers under the stewardship of an agent, the former will have an unmitigated interest in monitoring the latter so as to avoid agency losses. However, when the principal also delegates its monitoring functions to an accountability forum or to a set of accountability forums, the incentive

25 R. D. Keleman (2002), 'The Politics of 'Eurocratic' Structure and the New European Agencies', *West European Politics, 25*(4), 93-118.

26 M. Szapiro (2005), 'The Framework for European Regulatory Agencies: A Balance between Accountability and Autonomy', *3rd ECPR 2005 Conference,* Budapest, 8-11 September 2005, p. 4.

27 R. D. Keleman (2002), p. 94.

structure can change as the forum, unlike the principal, does not have a direct stake or ownership in the stewardship exercised by the agent.

Additionally, the EU level complicates incentive structures further, with accountability forums having competing interests or simply lacking the incentive to monitor the actor. As we have seen in Chapter 6, the European Parliament, particularly at the beginning of the agencification process had little interest in scrutinising agencies, and it was often the agencies themselves that started lobbying for parliamentary attention and initiating new accountability moments. Similarly, a large number of delegations to the management boards are very passive in exercising their supervisory roles.

Thus, the important message is that the role of the forum and its input in an accountability process cannot be taken for granted. In previous chapters, we saw dormant accountability forums (i.e., some delegations to management boards and some European Parliament specialised committees) as well as forums that were very active (e.g. the European Court of Auditors) and had even pushed their scrutinising roles further (e.g. the Court and the EP budgetary committees). A bias towards the actor is implicit in the conceptualisation of accountability, which generally refers to *an obligation or a duty on the part of the actor* to provide information and to explain and justify his actions. No duties appear to arise on the part of the forum, though, as far as this conceptualisation goes. Accountability, however, is a relational process and it arises from the interaction of both the actor and the forum. When one of the two parties to the process fails to fulfil their role (as an account-giver or an account-holder), the process is compromised. As such, complementary obligations arise on the part of the forum to fulfil its account-holding role by reading the information provided, preparing for meetings, attending and participating in debates etc. Thus, studies of accountability should start from a theoretical framework that explicitly investigates the role of the forum as well, on a par with that of the actor.

Thirdly, this study points at the relevance of *differentiating between accountability and control.* As we have discussed before, much of the literature on agency accountability has used the two terms interchangeably. However, this is a crucial distinction, particularly for bodies that are meant to operate independently, at arm's length from (political) control. Equating accountability with control, with steering, would place independence and accountability in a zero sum relationship. However, even independent bodies are not ex post facto relieved of the responsibility of giving account for their choices and actions. In fact, it is precisely their independence that renders accountability necessary. The distinction is also pertinent to studies of accountability for the purpose of differentiating between instances of the two concepts in practice. As we have seen in this study, instances of control can and do exist in parallel with

accountability mechanisms. In such cases, the responsibility of those exercising control and their ensuing accountability becomes relevant.

Accountability relations are fluid (as opposed to static) and assessments of accountability need to go beyond formal arrangements and take into account ongoing practices. Most studies on the accountability of European agencies to date have largely been focused on the de jure arrangements as provided for in the agencies' basic acts without delving into the de facto operation of such arrangements. While this is an indispensable first step, it is not a sufficient one. As evidenced by this study, accountability forums can mould and shape their own role above and beyond their formal powers. Similarly, actors can "lobby" for the attention of the forum, and they can at times actually choose to voluntarily submit themselves to accountability procedures, thus initiating new accountability practices. While this may be strategic behaviour, it is nevertheless at odds with the PA vision of "agents forever trying to escape control." Accountability is good for business and can be a strategy to enhance visibility and legitimacy or to increase resources and as a result, some actors actually voluntarily subject themselves to new or stricter accountability ties. These ad hoc practices become "fossilised" into ongoing practices. For example, as pointed out above, de jure the directors of third pillar agencies are not accountable to the EP. De facto, however, the directors of such bodies regularly appear before the EP, MEPs visit their headquarters etc. Taking snapshots of the formal design and formal expectations sometimes misses the point.

9.4 European Agencies and Accountability: "*Quo Vadis*?"

Having discussed the general theoretical implications, let us come back to the European agencies. Where are these bodies headed and where should they be headed?

In my opinion, the risk inherent in the EU agencification process is not the possibility that agencies might escape control, but rather the manner in which this process has taken place. The danger lies in delegating (what are at times) considerable powers in a haphazard effort, in response to ad hoc functional concerns, without a long term vision of agencies' development, without equipping them with all the tools needed to operate efficiently and without tailoring account-giving obligations to their administrative capacities. In other words, the risk lies in the fact that while the agencification process has proceeded full steam, with new agencies sprouting up at an increasing pace, none of the institutional actors involved seems to have a clear vision of "*Quo Vadis agencies?*" (i.e., where this process is headed). In this connection, the Parliament itself remarked that it "regrets the absence of a general strategy for the creation of EU agencies; notes that new agencies are being created on a case-by-case

basis, leading to a non-transparent patchwork of regulatory agencies, executive agencies and other Community bodies each constituting *a sui generis* creation."[28]

In light of the problems observed, the answer is generally *not* to pile up more accountability arrangements on these agencies. Two qualifications are in order. First of all, in the case of OHIM, strong conflicts of interests were observed in the boards, with no European institution being in a position to counter-act such forces. Although the Council does have a mandate to exercise in the OHIM accountability scheme, it has reportedly never done so and kept itself aloof. Consequently, the legal framework of the agency could be altered to allow for the role of other EU forums such as the European Parliament or the Commission, to help offset the strong push for national interests and negative politicisation in the board. Secondly, with regard to third pillar agencies, we have observed some deficits, particularly relating to the limited role of the Court as well as of the EP. The Treaty of Lisbon significantly improves these issues.

9.4.1 The Impact of the Lisbon Treaty

The Treaty of Lisbon dismantles the pillar structure as we know it; the third pillar ceases to exist and is absorbed into pillar one. This has repercussions, among others, for the role of the Court of Justice of the European Union (CJEU), as it is referred to in the Treaty. Thus, "the transfer of the third pillar into the first means that the CJEU gains jurisdiction over this area."[29] With regard to agencies, Article 263 of the Treaty on the Functioning of the European Union (TFEU) explicitly provides for judicial review of agencies' acts on a par with those of the European Parliament, the Council, the Commission, the European Council and the European Central Bank. Thus, the Court of Justice of the European Union, the Treaty reads, "shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties." Moreover, the Court also gains jurisdiction over cases involving failure to act of bodies, offices or agencies of the Union[30]as well as over preliminary rulings involving the validity and the interpretation of acts of such bodies, which may be referred to it by any national court or tribunal.[31]

28 European Parliament (2008), Committee on Constitutional Affairs, 'Report on a strategy for the future settlement of the institutional aspects of Regulatory Agencies', (2008/2103(INI)), Rapporteur: Georgios Papastamkos, Rapporteur for Opinion, Jutta Haug, p. 6.

29 House of Lords (2008a), European Union Committee, 'The Treaty of Lisbon: an impact assessment', 10th Report of Session 2007-08, Volume I: Report, published 13 March 2008, p. 74.

30 Article 265 TFEU.

31 Article 267 TFEU.

In addition to these far-reaching improvements in judicial scrutiny, parliamentary standing vis-à-vis Europol as well as Eurojust would also be enhanced. As we have seen, the European Parliament lacks co-legislator powers vis-à-vis these bodies and as such, there is only a consultation process with the Parliament when their constituent acts are adopted or amended. For instance, with regard to the new Europol Council Decision, the Parliament proposed 82 amendments, one of them involving a role for the European Parliament in the appointment and the dismissal of the Europol director.[32] Out of those 82 amendments only 18 were accepted by the Council. The Treaty of Lisbon however, provides that "the European Parliament and the Council, by means of regulations *adopted in accordance with the ordinary legislative procedure* shall determine Europol's structure, operation, field of action and tasks."[33] Additionally, "these regulations shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments."[34] Similar provisions are in place for Eurojust.[35] In fact, if the Treaty of Lisbon had been approved before the adoption of the Europol Council Decision, Europol's new constituent act would have had to be adopted by co-decision of the Parliament and the Council. The Parliament has expressed its discontent with the Europol Decision and a commitment to take up the matter again post -Lisbon. In the words of an MEP of the LIBE committee and rapporteur on the Europol Council Decision, "the European Parliament is not happy. We are not pleased because our opinion has not been taken into account but as Rapporteur I think that what we will do now is freeze our opinion. We will wait and see if the Lisbon Treaty is approved. If that is the case we will have the co-decision process and we will ask for the file again. We will look at this subject again and then we will give our opinion about Europol."[36] An increase in parliamentary power vis-à-vis these bodies is quite likely. As observed in the case of first pillar agencies, once the EP gained co-decision powers, it used them to insert new procedures of parliamentary accountability in their basic acts.

Thus, from the analysis above, it follows that the Treaty of Lisbon goes a long way toward addressing some of the accountability deficits identified at an earlier part of this chapter.

32 House of Lords (2008b), European Union Committee, 'Europol: coordinating the fight against serious and organised crime', 29th Report of Session 2007-08, Report with Evidence, published 12 November 2008, p.140.

33 Article 88(2) TFEU.

34 Ibid.

35 See Article 85(1) TFEU. The wording is slightly different as the regulations jointly adopted by the European Parliament and the Council "shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities."

36 House of Lords (2008b), p. 142.

9.4.2 Not *More* but *Better* Accountability

Consolidating and Improving Existing Arrangements

With respect to further improvements to agencies' accountability, the emphasis should be on better fine tuning and consolidating some of the arrangements already in place by clarifying, improving and streamlining them for categories of agencies, as well as on clarifying the role of the various institutional actors. Only now, several decades after the first agencies were set up, after having created powerful decision-making agencies in areas such as medicines, aviation safety, food safety etc., has the European Commission issued a moratorium on the creation of agencies, in order to be able to actually assess and evaluate the development. The Commission has launched an evaluation of all regulatory agencies and is to report on this by 2009-2010. An inter-institutional working group, drawing on the results of the evaluation, is to agree on a "common approach", which "would allow the key issues facing agencies to be set out as ground rules to apply to all."[37] The common approach is aimed at clarifying, "the responsibilities of the other institutions toward agencies, and of the Commission in particular" as this still suffers "from the lack of a clear framework and defined lines of responsibility."[38] The efforts of the Commission are commendable, but whether it will be successful, and what the results will be, if any, still remains to be seen. The Commission launched a similar effort in 2005 in the form of a draft inter-institutional agreement, which "made no substantial progress due to the Council's institutional and political opposition."[39]

The new approach would have to include specific solutions geared at addressing the problematic aspects, as opposed to general, "quick fix" solutions. For example, some of the failures relating to management boards could be addressed: by creating smaller scale "bureaus" composed of fewer delegations functioning on a rotating principle, by explicitly stipulating the formal obligation of the board to monitor strategic aspects, by regulating the requirements and qualifications that a national delegate to the board should satisfy, which would equip him/her for its role and tasks in the board as well as by taking responsibility for certain issues (e.g. fees and payments) away from the boards etc. This would allow for more efficient decision-making and monitoring by the boards while at the same time not alienating the

37 Commission of the European Communities (2008), Communication from the Commission to the European Parliament and the Council, 'European Agencies–The Way Forward', COM (2008) 135 final, p. 9.

38 Ibid. p. 6.

39 European Parliament (2008), Committee on Constitutional Affairs, 'Report on a strategy for the future settlement of the institutional aspects of Regulatory Agencies', 2008/2103(INI), Rapporteur: Georgios Papastamkos, Rapporteur for opinion: Jutta Haug, p. 3.

member states, since they would not be ousted from the boards. Similarly, some account-giving obligations could be clarified and some of the existing mechanisms could be streamlined, as there is still quite some variation present across agencies with relation to the same arrangement. For instance, while the constituent acts of some agencies contain provisions for hearings of the director before the Parliament, in other cases (i.e., EASA) hearings are provided both vis-à-vis the EP as well as the Council, while yet in other cases no hearings are provided for at all but nevertheless do take place de facto. This makes the accountability system rather patchy, confusing and non-transparent, and measures would need to be undertaken to streamline some of these procedures, in order to clarify the exact role of various institutions vis-à-vis agencies. In this connection, independent evaluation reports are also a case in point. For instance, more effective rules for the evaluation of agencies should be devised, with clear parameters of what needs to be investigated and evaluated. Often evaluations lack information relating to the effectiveness of the agency in achieving policy objectives or any data relating objectives to actual results. Independent evaluations are often (though not always) commissioned by the agencies themselves and the Court of Auditors has, as we have seen, raised questions concerning the independence of such reports.[40] Also, measures should be undertaken to ensure that when carried out, the recommendations made are examined and if necessary, implemented, which as reported by the Court, has not systematically been the case.[41] Evaluation reports are highly relevant from a learning perspective on accountability; however, "linking evaluation to learning requires explicit attention to how information generated from evaluations can find its way into decision-making processes."[42]

Accountability Forums: Aligning Forum Input with their Role Expectations

Some improvements, however, would have to go beyond changes to legal provisions and are more difficult to achieve. One of the major findings of this research was that in some cases, the forum's input in an accountability process (i.e., involvement, participation) is suboptimal, with some forums failing to come to terms with their new role expectations. Improvements in this direction would need to involve a change in the culture, outlook and mindset of the forum in line with their new roles at the European level. This is an evolutionary process and will require time. Better involvement of forums, however, could be generated by raising awareness of agencies and their profiles within the EP's committees, the Council as well as the member states.

40 European Court of Auditors (2008), 'The European Union's Agencies: Getting Results', Special Report No 5, p. 26 and p. 32.
41 Ibid. p. 27.
42 A. Ebrahim (2005), pp. 70-71.

For instance, with regard to member states this might result in a higher prioritising of agencies at the national level, leading member states to provide the administrative capacity needed by their delegates to prepare for meetings, enabling them to thoroughly and diligently enact their monitoring roles. With regard to the Council, a bigger involvement of the Council vis-à-vis Europol is necessary, to stimulate and to "nudge" member states to comply with their obligations of providing Europol with information, the "lifeblood" for its being able to carry out its mandate.

9.4.3 Beyond the "One-Size-Fits-All" Approach

In addition to the modifications suggested above which would clarify and improve existing arrangements, this development should be pushed further by shaping the accountability regime better to the tasks and needs of individual agencies or categories of agencies. For now, for the sake of transparency and decreased complexity, the institutional discussion has been focused on "across-the -board" harmonisation of procedures. In some cases, previously existing arrangements for the European institutions (e.g. IAS, discharge etc.) were simply replicated for agencies, despite their much smaller scale. In this connection, the financial accountability process, and particularly the discharge process, is too cumbersome for small scale entities. Thus, the "accountability overload" issue could be addressed by tailoring accountability mechanisms to the power and size of agencies. This could entail, for example, exempting small scale agencies from certain accountability obligations or simplifying some of these processes in respect of agencies. Accountability arrangements need to be tweaked and tailored so as to reinforce and align them with the aims and tasks of agencies, going beyond the "one -size-fits-all" approach. This is an equally valid concern and should be undertaken in parallel as "the result of misapplied accountability mechanisms can prove tragic as well as administratively costly."[43]

All in all, the present the accountability system of agencies has developed in a "muddling-through" manner, more as an afterthought rather than a thought-through process of institutional design. Nevertheless, on a more positive note, significant developments have taken place since the early years of agency creation, as part of an evolving process. This process has to be taken one step further by reconfiguring accountability structures through a concerted and, very importantly, *conscious* institutional effort. This book has diagnosed some of the accountability ailments

43 M. J. Dubnick and B. S. Romzek (1993), 'Accountability and the Centrality of Expectations in American public administration' in J. Perry, *Research in Public Administration,* Volume 2, Greenwich CT: JAI Press, 37-78.

present and in light of them, suggested solutions for improvement. It goes without saying that there are serious dilemmas and difficulties involved in restructuring. However, should the political will be present, architectural possibilities for restructuring do exist.

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Meroni &Co, Industrie Metallurgiche SpA v High Authority (Case 9/56) [1958] ECR 133

Parti Ecologiste 'Les Verts' v European Parliament (Case 294/83) [1986] ECR 1339

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Nancy Fern Olivieri v Commission of the European Communities and European Agency for the Evaluation of Medicinal Products (Case T-326/99) [2003] ECR II-6053

Schering Plough Ltd v Commission of the European Communities and European Agency for the Evaluation of Medicinal Products (EMEA) (Case T-133/03) 5 December 2007

Sogelma v EAR (Case T-411/06) 8 October 2008

List of Respondents

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Agency director, #2
Management board respondent, Eurojust, #3
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Samenvatting (Summary in Dutch)

Europese agentschappen: "de verantwoording van de macht"

Europese agentschappen zijn een vast onderdeel geworden van de EU's institutionele architectuur en zijn waarschijnlijk de snelstgroeiende institutionele eenheden op Europees niveau. De drang van de EU tot het opzetten van nieuwe agentschappen is omschreven als "grenzeloos". In slechts enkele decennia zijn Europese agentschappen opgericht op een grote hoeveelheid relevante en gevoelige terreinen als medicijnen, voedselveiligheid, chemicaliën, grensbewaking, politiesamenwerking, telecommunicatie, energie en de preventie van ziekten, om slechts een paar terreinen te noemen. Dit proces vertoont geen tekenen van vertraging en de trend van de afgelopen jaren is geweest naar de delegatie van almaar groter wordende bevoegdheden. Agentschappen oefenen een reële macht uit en hun standpunten en besluiten kunnen direct effect hebben op personen, regulatoren en lidstaten.

In het licht van de macht die zij uitoefenen, kan de vraag worden gesteld wie ervoor zorgt dat deze (semi-)autonome actoren verantwoording afleggen. Wetenschappers hebben in toenemende mate gewaarschuwd voor de risico's en gevaren van het plaatsen van te veel macht in de handen van agentschappen, die op afstand van traditionele controlemechanismen opereren en niet gemakkelijk verantwoordelijk kunnen worden gehouden voor hun handelingen. Ondanks het feit dat dit een belangrijk vraagstuk is in de wetenschappelijke literatuur, ontbreekt systematisch empirisch onderzoek. Dit boek probeert door middel van empirisch onderzoek te achterhalen of en, zo ja, op welke gronden de verantwoording van agentschappen problematisch is. Het doel is te ontrafelen hoe het systeem van verantwoording van Europese agentschappen *de jure* en *de facto* werkt en om precies aan te geven waar zich tekortkomingen voordoen. De onderzoeksvraag die dit boek poogt te beantwoorden is: "*Aan welke verantwoordingsarrangementen en -regimes zijn Europese agentschappen onderworpen en voldoen deze regimes en het algehele verantwoordingssysteem*?"

De troika van verantwoording

Dit onderzoek begint met een ondubbelzinnige definitie van verantwoording. Volgens onze interpretatie verwijst verantwoording naar de *relatie tussen een actor en een forum waarbij de actor zich verplicht voelt om informatie en uitleg te verstrekken over zijn eigen optreden, het forum nadere vragen kan stellen, een oordeel uitspreekt en er consequenties kunnen volgen*. In lijn met de kernbetekenis van het begrip verantwoording is het proces van verantwoording afleggen dus een relatie tussen een actor en een forum, die wordt gekenmerkt door drie stadia of elementen: (i) informeren, (ii) debatteren (discussiëren en vragen stellen) en (iii) de mogelijkheid van gevolgen.

Op basis van deze definitie identificeert, beschrijft en beoordeelt dit boek de verantwoordingsarrangementen waar agentschappen aan onderworpen zijn. Vier centrale typen verantwoordingsarrangementen rond agentschappen worden onderscheiden: organisationele verantwoording, politieke verantwoording, financiële verantwoording, en (quasi-)juridische verantwoording. Elk van deze soorten van verantwoording door agentschappen wordt behandeld in een apart hoofdstuk. Gekozen is voor een geïntegreerde benadering. Dat wil zeggen dat verantwoording door agentschappen wordt onderzocht zowel op het *de jure* niveau (het formele niveau als voorzien in de regeling die aan het agentschap ten grondslag ligt) als op het *de facto* niveau (de daadwerkelijke toepassing van verantwoording in de praktijk). Verder wordt de verantwoording van agentschappen beoordeeld op zowel het microniveau van individuele arrangementen als op het macroniveau van het verantwoordingsregime als geheel, dat gevormd wordt door de interactie tussen de verschillende arrangementen.

Het methodologische raamwerk van het onderzoek

De Europese Unie telt momenteel ongeveer 30 Europese agentschappen. Om de centrale onderzoeksvraag te kunnen beantwoorden beperkt deze studie zich tot een steekproef binnen deze hele populatie. Vijf Europese agentschappen worden onder het vergrootglas gelegd: het Europees Geneesmiddelenbureau (EMEA), het Europees Agentschap voor de Veiligheid van de Luchtvaart (EASA), het Harmonisatiebureau voor de interne markt (OHIM), Europol en Eurojust. Er zijn drie criteria gebruikt bij deze selectie van cases: de financieringsbron, de invloed (dat wil zeggen het soort taken dat wordt uitgevoerd door het agentschap) en de pijlerstructuur. Door ervoor te zorgen dat er variatie is langs deze drie dimensies, is er maximale variatie in verantwoordingsarrangementen en -regimes die worden bestudeerd.

Het onderzoek maakt gebruik van twee soorten gegevens: (juridische en beleids)documenten en 63 semi-gestructureerde interviews met kernpersonen. De analyse van juridische en beleidsdocumenten is een van de hoofdbronnen van informatie, vooral voor het in kaart brengen en beschrijven de *de jure* verantwoordingsarrangementen rond Europese agentschappen. Het interviewmateriaal is de belangrijkste bron van gegevens voor het documenteren en beoordelen van verantwoordings*praktijken*. Interviews zijn zowel afgenomen met respondenten binnen agentschappen als met leden van de verschillende fora waaraan de agentschappen verantwoording afleggen.

Europese agentschappen en verantwoording: onderzoeksresultaten

Het empirische onderzoek vindt geen steun voor de aanvankelijke bewering dat agentschappen opereren als onafhankelijke instanties die geen verantwoording afleggen. Onderzoek naar de verantwoordingsarrangementen rond de agentschappen laat zien dat *er een breed scala aan verantwoordingsmechanismen bestaat* en dat actoren hun verantwoordingsplichten nakomen. Het onderzoek heeft niet minder dan vier hoofdsoorten van verantwoordingsregimes gevonden, die gegroepeerd zijn rond een groot aantal verantwoordingsfora zoals managementraden, het Europees Parlement, de Raad, het Europese Gerechtshof, de Europese Ombudsman, de Europese Rekenkamer, de interne accountantsdienst van de Europese Commissie enzovoort. Europese agentschappen worden omgeven door een complex netwerk van verantwoordingsrelaties tegenover een grote hoeveelheid fora. De bestaande verantwoordingsprocedures zijn een combinatie van formele eisen en institutionele praktijken die ontwikkeld zijn door de betrokken actoren en fora.

Tekortkomingen zijn echter wijd verbreid en spelen vaak een rol op het niveau van de praktische implementatie; het zijn toepassingsfouten. De *onderbenutting van verantwoordingsarrangementen* is een steeds terugkerend punt van zorg. Een groot aantal delegaties in managementraden zijn inactief in hun bewakersrol, zoals blijkt uit hun gebrekkige voorbereiding voor vergaderingen en een lage betrokkenheid bij en interesse in discussies. In het uiterste geval betekent dit dat ze helemaal niets zeggen gedurende vergaderingen. Bovendien laat het empirische onderzoek zien dat ook in het geval van de politieke fora (dat wil zeggen het Europees Parlement en de Raad) een onderbenutting van verantwoordingsmechanismen plaatsvindt. Hoewel sommige commissies in het Europees Parlement interesse tonen en binnen hun bevoegdheden betrokken zijn bij agentschappen, laten andere een laag niveau van betrokkenheid zien en een lage opkomst bij hoorzittingen. De Raad is evenzeer geneigd zijn eigen agentschappen (Europol en Eurojust) intensief te volgen, terwijl sommige agentschappen binnen de eerste pijler (OHIM en EASA) vrijwel helemaal worden genegeerd, ondanks de formele bevoegdheid van de Raad om in te grijpen.

De kwestie van onderbenutting is niet alleen van toepassing op specifieke arrangementen maar ook op het toezicht op specifieke aspecten van het functioneren van agentschappen. Een groot aantal leden van managementraden heeft een gebrek aan kennis en expertise op het gebied van financiële, budgettaire, en managementvraagstukken, hoewel die een aanzienlijk deel uitmaken van hun toezichthoudende en sturende verantwoordelijkheden. Politieke verantwoordingspraktijken zijn gewoonlijk minder intensief, worden gedreven door incidenten, zijn gericht op een beperkt aantal onderwerpen en worden gestuurd door politieke prioriteiten en politieke aandacht. Vaak ontbreekt bij zowel managementraden als politieke verantwoordingsfora een coherente visie op de toekomst van het agentschap en zijn zij niet in staat een discussie te voeren over de ontwikkeling van het agentschap. Deze fora staan in schril contrast met financiële en (quasi-)juridische verantwoordingsfora. Financiële verantwoordingsfora, bijvoorbeeld, (zoals de Rekenkamer en het "Joint Audit Comittee") zijn zeer technische en op expertise gebaseerde verantwoordingsfora waarvoor verantwoording een voltijdse bezigheid is. Sterker nog, in plaats van hun toezichtsverantwoordelijkheden te licht op te vatten, pakken sommige van deze fora nieuwe kwesties op, waardoor hun toezichtsrol wordt uitgebreid van strikt-financiële onderwerpen en "number crunching" naar vraagstukken van het bestuur van agentschappen. Het Europese Gerechtshof is ook een goed voorbeeld van een activistisch forum. Het heeft proactief zijn rol vormgegeven en zijn bevoegdheden gelijk op laten gaan met ontwikkelingen in de bevoegdheden van agentschappen. Daardoor heeft het Hof de beschikbare juridische waarborgen aangepast aan de realiteit van de bevoegdheden van agentschappen.

Tekortkomingen in de verantwoording zijn vaak generiek en het gevolg van de over het geheel genomen zwakke structurele vormgeving van het agentschapsysteem. Managementraden zijn bijvoorbeeld vaak erg groot, waarbij het aantal leden soms groter is dan de hoeveelheid personeel van het agentschap waar ze op toezien. Dit heeft zowel geleid tot omslachtige processen binnen de managementraad als tot een nadruk op bestuurlijke details, vanwege de moeilijkheden om te komen tot overeenstemming over grotere kwesties of tot wezenlijke discussies. Binnen de eerste pijler, bijvoorbeeld, kan men mogelijk zelfs spreken van gevallen van verantwoordingsoverbelasting, waarbij sommige kleine agentschappen aan dezelfde controlemechanismen onderworpen zijn als de Europese Commissie. Het grote aantal en de complexiteit van sommige procedures is erg belastend voor kleinere agentschappen; hierdoor wordt verantwoording afleggen een voltijds bezigheid. Als het gaat om financiële verantwoording zijn agentschappen verantwoording schuldig aan drie of zelfs vier verschillende fora. Behalve de enorme kosten die dit veroorzaakt, brengt de omslachtigheid van dit regime ook het risico mee dat kleinere agentschappen (van 50 of minder medewerkers) worden verlamd.

Deze problematische aspecten komen voort uit de slechte opzet van het agentschapsysteem. Er is een direct verband tussen verantwoording en institutioneel ontwerp. Wanneer het systeem zo wordt opgezet dat toezicht en aansturing worden uitgeoefend door raden met een overweldigend aantal leden, die onderling verdeeld worden door belangenconflicten, en wanneer kleinere agentschappen worden overbelast door verantwoordingsmechanismen, dan kunnen de daaruit voortvloeiende problemen en tekortkomingen niet langer worden toegeschreven aan de "agent" maar aan de "principalen" die dit systeem hebben ontwikkeld.

Implicaties

Een van de belangrijkste inzichten uit dit onderzoek voor verantwoordingstheorieën betreft het belang van het forum in een verantwoordingsproces.

- *Het is belangrijk de focus van verantwoording te verschuiven naar het forum*

De rol van het forum en zijn input binnen het verantwoordingsproces moet niet als vanzelfsprekend worden beschouwd. Onderzoek naar verantwoording is over het algemeen gericht op de actor en de mate waarin deze actor verplicht is om verantwoording af te leggen en dat daadwerkelijk doet. Er schijnt een impliciete theoretische aanname te zijn dat het forum de actor ter verantwoording zal roepen. Echter, dit empirische onderzoek laat zien dat er zowel slapende verantwoordingsfora zijn (bijvoorbeeld sommige vertegenwoordigers in managementraden en sommige commissies in het Europees Parlement) als erg actieve fora (bijvoorbeeld de Europese Rekenkamer), als fora die hun rol zelfs hebben uitgebreid (bijvoorbeeld het Europees Gerechtshof en begrotingscommissies in het Europees Parlement). Onderzoek naar verantwoording moet dus uitgaan van een theoretisch kader dat nadrukkelijk de rol van het forum onderzoekt, op gelijke voet met de rol van de actor.

Verder laat dit onderzoek op conceptueel niveau zien dat,

- *Er onderscheid dient te worden gemaakt tussen verantwoording en beheersing*

Veel wetenschappelijke literatuur over verantwoording heeft deze twee termen door elkaar gebruikt. Er is echter een cruciaal verschil, vooral voor organisaties, zoals agentschappen, die geacht worden onafhankelijk te opereren, op afstand van (politieke) beheersing. Het gelijkstellen van verantwoording aan beheersing, of sturing, zou onafhankelijkheid en verantwoording tot communicerende vaten maken. Echter, zelfs onafhankelijke organisaties zijn niet ontheven van hun verantwoordelijkheid om verantwoording af te leggen voor hun keuzes en handelingen. Het is in feite juist hun onafhankelijkheid die verantwoording noodzakelijk maakt.

Wat zijn de implicaties van dit onderzoek voor het verbeteren van het verantwoordingssysteem rond agentschappen? Dit onderzoek laat zien dat de weg naar het

verbeteren van de verantwoording van agentschappen over het algemeen niet ligt in het almaar uitbreiden van verantwoordingsarrangementen. Hoewel verantwoordingsgebreken en -tekortkomingen zeker voorkomen, zijn zij in het algemeen niet het gevolg van een gebrek aan verantwoordingsprocedures. We hebben dus niet *meer* maar *betere* verantwoording nodig. Die verbeteringen kunnen op de volgende manier worden bereikt:

- *Het consolideren en verbeteren van de bestaande arrangementen*

Geconfronteerd met groeiende zorg over de verantwoording van agentschappen is de automatische institutionele reactie geweest om verantwoordingsarrangementen op elkaar te stapelen zonder vooraf systematisch hierover na te denken. Een nieuwe benadering zou specifieke oplossingen moeten aangeven die zijn toegesneden op de problematische aspecten in het functioneren van specifieke verantwoordingsarrangementen. Specifieke verantwoordingsplichten moeten worden verduidelijkt, verfijnd, geconsolideerd en zelfs opnieuw ontworpen om ze geschikter te maken.

- *Het op één lijn brengen van de input van fora met hun rolverwachtingen*

Sommige verbeteringen moeten verder gaan dan de juridische bepalingen en zijn moeilijker te bereiken. Een van de hoofdbevindingen van dit onderzoek was dat in sommige gevallen de hoeveelheid en kwaliteit van de input van het forum in het verantwoordingsproces beneden niveau is omdat sommige fora geplaagd worden door tegengestelde belangen, nationaal gericht blijven en zich nog niet hebben aangepast aan hun nieuwe rolverwachtingen op Europees niveau. Om dit te verbeteren is een verandering nodig in de cultuur, opvattingen, en denkwijze van de leden van de fora, in lijn met hun nieuwe rol op het Europees niveau.

- *Verder gaan dan de "One-Size-Fits-All"-benadering*

In veel gevallen zijn de al bestaande verantwoordingsarrangementen voor de Europese instituties (bijvoorbeeld de interne accountantsdienst en procedures voor het verlenen van decharge) simpelweg 'gekloond' voor de agentschappen, ondanks hun veel kleinere schaal. In die context zijn ze ongeschikt en vaak ook omslachtig. Verantwoordingsarrangementen moeten op maat worden gemaakt om ze te versterken en ze beter aan te laten sluiten bij de doelen en taken van de agentschappen. Daarmee wordt verder gegaan dan de "one-size-fits-all"-benadering.

In positieve zin hebben zich belangrijke ontwikkelingen voltrokken op het gebied van de verantwoording van agentschappen sinds de beginjaren van hun instelling. Dit is gebeurd als onderdeel van een zich evoluerend proces. Dit proces moet weer een stap verder worden gebracht door de verantwoordingsstructuur aan te passen met een samenhangende en, nog belangrijker, *bewuste* institutionele inspanning.

Curriculum Vitae

Elena Madalina Busuioc was born on the 24th of February 1982 in Slatina, Romania. She studied at University College Utrecht, the international Honors College of Utrecht University, from 2000 to 2003 and obtained her Bachelor of Arts degree in Social Sciences (cum laude). Subsequently, from 2003 she followed the two year Masters program in International and European Legal Studies at the Law Department of Utrecht University and graduated in 2005 (with honourable mention). For the following four years she worked as a PhD candidate at the Utrecht School of Governance, where she conducted the research presented in this book. In 2008, she was awarded together with Martijn Groenleer a grant by the Netherlands Organisation for Scientific Research (NWO) for a study of the administrative behaviour of European agency heads within the framework of "Contested Democracy" research programme. In June 2009, her article "Accountability, Control and Independence: The Case of European Agencies", written during her PhD, was awarded the Europe Award for Junior Academics by the Montesquieu Institute. Currently, she works as a post-doctoral researcher at the Amsterdam Centre for European Law and Governance (ACELG), at the University of Amsterdam.