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Agencies for European Regulatory Governance: A Regimes Approach

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* I am grateful for comments on an earlier draft of this chapter to Imelda Maher and to participants at a workshop organised by the Institute for European Legal Studies, University of Liége on European Agencies held in Brussels in March 2004.
1. Introduction

EU institutions and norms form a key part of many aspects of contemporary regulation in the member states. Equally, a large part of the EU’s activity is regulatory in character. The interdependence between member state and EU levels makes it difficult to apply models of regulatory governance developed to describe policy processes at national level. Nevertheless recent debate about EU regulatory processes, both official and scholarly, has included discussion of ideas about developing agencies closer in character to the US independent agency model. The debate about agencies, prominent in the mid-1990s, has been given a new lease of life first by the publication of the Commission’s White Paper on European Governance, second by the creation of a third wave of new agencies and thirdly by the report to the President of the European Commission of the independent high-level study group chaired by André Sapir. The Governance White Paper was part of the Commission’s response to the crisis which brought down the Santer Commission in 2000. It represented a taking stock of the institutions and mechanisms of EU governance. The Sapir report was concerned with giving guidance on how to make economic governance within the EU more effective and efficient.

The primary objective of this chapter is to offer a mapping of the variety of forms of regulatory governance available at the level of the EU. The analysis is based in a regimes approach which starts from the observation that the different components of the regulatory system are widely dispersed among different organisations, at different levels, and of both governmental and non-governmental character. I suggest that there are at least ten models of regulatory governance currently in play at the level of the EU.

2 The White Paper largely focuses on policy and legislative processes – and constitutes, in particular, a rearguard action to defend and deepen the ‘Community method’ in which the Commission plays a key role in initiating and brokering legislation, against incursions from new policy models such as the Open Method of Coordination (by which the Commission role is substantially undermined).
Amongst these ten regime types there are a number of different forms of agency. I suggest that of the available models for EU regulation first, that the independent agency model is one of the least well developed, and second, that there are some pretty significant obstacles in the way of the development of such a model. A central methodological assumption of the paper is that institutional development is likely to be incremental, building on existing successful models, rather than discontinuous with existing patterns. Equipped with a map it is then possible to provide some hint of the normative issues surrounding the development of independent agencies in the concluding section.

2. A Regimes Approach to Regulation

Regulation is an attractive policy instrument for the EU because it is relatively inexpensive (when compared with expenditure based instruments such as subsidy or direct provision of services), and because its basis in legal rules enables a degree of separation between rule making and implementation processes, an important characteristic of the way that EU governance has developed. Within the EU, as with many governance systems, there is no single organisational focus for the observer seeking to understand how regulation works in any particular domain. This observation makes it appropriate to think in terms of regulatory regimes. A regulatory regime may be conceived of as ‘a historically specific configuration of policies and institutions which structures the relationship between social interests, the state and economic actors in multiple sectors of the economy’.

More specifically a complete regime consists of each of the elements necessary to comprise a complete system of control over some social or economic domain. These components include goals, standards, rules or norms which the system is seeking to achieve, a mechanism for monitoring or feeding back information about the state of the system, together with a mechanisms for bringing back into

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alignment behaviour which deviates from the goals, standards, rules or norms.\(^5\) It is common to find overlapping capacities for standard-setting or rule making, monitoring and enforcement diffused among different levels of government, sub-national, national and supranational and between governmental, non-governmental and private organisations.

Within a classical regulatory model the elements of a regulatory regime comprise legal rules, agency monitoring, and the application of formal sanctions for breach of the rules. The widely discussed American model of the independent regulatory agency often combines these components within a single agency. Agencies such as the Federal Trade Commission (established 1914) and the Federal Communications Commission (established 1934) provide the core cases from which theories of independent agencies are developed.\(^6\) The establishment of such a complete regime within a single agency is much less common outside the United States. It is more usual to find that much of the regime is focused on ministerial government departments, or that there is wide diffusion of the components, perhaps with rule making reserved to legislative bodies, monitoring assigned to an agency, and the application of formal sanctions reserved to a court, perhaps at the instigation of an agency or of third parties.

### 3. Institutional Models for EU Regulation

The development of regulatory governance at the level of the EU is characterised by considerable variety. Application of a regimes analysis suggest there are at least ten different models currently in use. The particular forms taken are shaped in part by constraints in the constitutional structures of the EU itself. Thus any EU action must first, be underpinned by demonstration that there is competence to act. The EU institutions are creatures of Treaty and may only do that which they are authorized to do. Thus there are some fields which, however attractive supranational regulation might appear, lack a


legitimate basis for action. Where competence is shared between EU and member state levels a second constraint comes in the form of the subsidiarity doctrine with its central norm that the Community should act ‘only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.’ A third constraint on the possible forms of regulation is provided by doctrines on the ‘inter-institutional balance’ within the Community. Article 7(1) assigns the tasks set out in the Treaties to the five community institutions. Under the Meroni doctrine it has been held that the EC legislative institutions may not empower others to adopt legislation and that the Commission may not delegate a decision-making power conferred on it by the Treaty or by legislation except for the limited purposes of implementation. A strict interpretation of the Meroni doctrine appears to limit the scope for delegation to agencies.

3.1 Commission as Regulator

The EU regulatory regime which appears closest in character to that of the classical regulatory model is that over competition policy. The main rules creating prohibitions on abuse of dominant position and restrictive agreements are set down in the EC Treaty. These provisions of the Treaty are unusual because they create binding obligations on undertakings within the members states. The Treaty is has little to say about monitoring and enforcement of the rules, but as early as 1962 the Council legislated for the Commission to have extensive powers of monitoring and enforcement, including the capacity to fine undertakings found to be in breach of the rules.

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7 EC Treaty A 5. Protocol (30) to the EC Treaty, on the application of the principles of subsidiarity and proportionality, adopted in 1997, introduces also a requirement of proportionality - Grainne de Burca, Reappraising Subsidiarity’s Significance After Amsterdam, Harvard Law School, 7/99 (1999).
9 EC Treaty Arts 81, 82, 86, 87.
10 EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty Official Journal P 013 , 21/02/1962 P. 0204 – 021. The Provision for the application of fines, both for the failure to comply with the Commission investigatory powers and the Treaty rules is contained in Art 15.
The EU competition regime is most like a classical regulatory system in those aspects where the Commission combines rule making powers with its monitoring and enforcement functions. Though the Commission has no control over the Treaty rules which make up the core of the normative structure, it has at least three different ways in which it can make norms which elaborate on that structure. First it has power to issue its own directives for the purposes of clarifying the nature of the Treaty competition obligations has they apply to the state.\(^{11}\) In practice directives made under this power were central to the liberalization of the European telecommunications sector,\(^ {12}\) but have been not much used otherwise because of political sensitivities.\(^ {13}\) Second, the power to issue Block Exemption Regulations under Article 81(3) of the EC Treaty was delegated to the Commission by the Council.\(^ {14}\) Third, the Commission makes extensive use of soft law instruments providing guidance of various sorts as to the application of the competition rules.\(^ {15}\)

In other respects the competition regime diverges from the classical model, in particular because the Commission is a multi-purpose executive authority, not just a regulator. While the Commission has developed considerable expertise in respect of competition matters, final decision making is for the non-expert College of Commissioners and is liable to be diluted by other strategic considerations which would be alien to an independent regulatory agency.

\(^{11}\) EC Treaty Art 86(3).


\(^{13}\) These sensitivities were reflected in litigation initiated by member state governments to challenge the extensive use made of the Commission’s autonomous legislative power in the Terminals and Services Directives: Case C-202/88 *French Republic v Commission of the EC* [1991] ECR-I 2223; Joined Cases C-271, C-281, C-289/90 *Spain v Commission of the EC* [1992] ECR-I 5833

\(^{14}\) Regulation No 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices *OJ P 036 , 06/03/1965 P. 0533 - 0535*

Reflecting the substantial move towards adoption of national competition laws similar to those of the EU, reforms to the procedural rules which took effect in May 2004 promote shared competence between national competition authorities (NCAs) and the Commission.\textsuperscript{16} The new Regulation abolishes requirements of prior clearance under Article 81(3), thus reducing the Commission’s rule making power. The net effects of the new Regulation are to move the EU competition regime further from a classical regulatory model, making it more like the kind of diffused, multi-level regime found in other EU policy domains.

\subsection*{3.2 Metaregulation and the Community Method}

The ‘Community method’ of policy making and implementation, as the Commission labelled it in the 2001 White Paper on European Governance,\textsuperscript{17} involves the Commission in initiating legislative policy which is then adopted by the legislative institutions of the Council and the Parliament. Responsibility for implementation, which includes transposition of the rules into national law, and assignment of monitoring and enforcement responsibilities falls to the member state governments, which may then assign some of these functions to other state agencies. The Commission retains a key role in monitoring and enforcing implementation processes. Thus, as far as oversight of the member states is concerned, the role of the Commission is that of ‘metaregulator’. Metaregulators operate through seeking to steer the regulatory processes of others, influencing behaviour in the regime indirectly.\textsuperscript{18} In the case of the Commission emphasis has traditionally been given to its role in monitoring the conduct of member state governments in transposing and implementing directives. The Commission has a form of enforcement pyramid which it can deploy with states which do not comply with the legislative requirements, first opening a case with informal discussion and, where such

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negotiation is not successful seeking condemnation and ultimately financial penalties in the European Court of Justice.\footnote{Christopher Hood, et al., Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters (Oxford University Press, Oxford, 1999)} It is clear that the Commission also uses other meta-regulatory strategies, for example convening regular meetings of national regulators so as to educate them in the requirements of the EU regime, or issuing guidance addressed directly to actors within the regulatory domain.\footnote{For the energy sectors see the discussion of the Florence and Madrid processes in Leigh Hancher’s contribution to this volume.}


\textbf{3.3 EU Agencies and the Community Method}

In some policy domains the regulatory function at the EU level is not restricted to meta-regulation, and involves direct regulatory activity concerned with such matters the elaboration of the requirements of legal rules, issuing authorisations, and the taking of emergency regulatory action affecting health and safety. In some domains the Commission has initiated legislation creating independent agencies. These agencies are
not full regulators, but generally operate to assist the Commission in fulfilment of its functions. The European Commission’s count lists between fifteen and twenty such agencies, established in a number of ‘waves’ in the 1970s, the 1990s and most recently in the noughties.\textsuperscript{23} Further agencies are proposed.\textsuperscript{24}

For the European Commission an agency has a number of characteristics: it has its own legal personality and is distinct from the institutions established in the Treaties; it is established by legislation for the performance of technical, scientific or managerial tasks.\textsuperscript{25} The European Commission persists in describing agencies as a mechanism of decentralised governance,\textsuperscript{26} and this claim has been adopted by most commentators.\textsuperscript{27} It

\begin{itemize}
\item\textsuperscript{23} Fifteen of the agencies were established under the EC Treaty, one under the Euratom Treaty and four under the second and third pillars of the European Union: Commission Communication ‘The Operating Framework for the European Regulatory Agencies’ COM (2002) 718 Final 11.12.202, p.3. The EC Treaty Agencies are: European Centre for the Development of Vocational Training (Regulation (EEC) No 337/73 of 10.02.75); European Foundation for the Improvement of Living and Working Conditions (Regulation (EEC) No 1365/75 of 26.05.75); European Environment Agency (Regulation (EEC) No 1210/90 of 07.05.90); European Training Foundation (Regulation (EEC) No 1360/90 of 07.05.90); European Monitoring Centre for Drugs and Drug Addiction (Regulation (EEC) No 302/93 of 08.02.93); European Agency for the Evaluation of Medicinal Products (Regulation (EEC) 2309/93 of 22.07.93); Office for Harmonisation in the Internal Market (Regulation (EC) No 40/94 of 20.12.93); European Agency for Safety and Health at Work (Regulation (EC) No 2062/94 of 18.07.94); Community Plant Variety Office (Regulation (EC) No 2100/94 of 27.07.94); Translation Centre for bodies of the European Union (Regulation (EC) No 2965/94 of 28.11.94); European Monitoring Centre on Racism and Xenophobia (Regulation (EC) No 1035/97 of 02.06.97); European Agency for Reconstruction (Regulation (EC) No 2454/1999 of 15.11.99); European Food Safety Authority (Regulation (EC) No 178/2002 of 28.01.02); European Maritime Safety Agency (Regulation (EC) No 1406/2002 of 27.06.02); European Aviation Safety Agency (Regulation (EC) No 1592/2002 of 15.07.02). The other agencies are: Euratom Supply Agency, Article 52 ff of the Euratom Treaty (see also the Statutes of the Agency, published in OJEC No 534, 06.12.58); European Union Institute for Security Studies (Joint Action of 20.07.2001, OJEC No L 200, 25.07.01); European Union Satellite Centre (Joint Action of 20.07.2001, OJEC No L 200, 25.07.01), European Police Office-Europol (Convention of 26.07.95, OJEC No C 316, 27.11.95); Eurojust (Decision of 28.02.02, OJEC No L 63, 06.03.02).

\item\textsuperscript{24} The most developed is the proposal for a Regulation establishing a European Railway Agency, COM (2002) 23, 23.01.2002

\item\textsuperscript{25} Commission Communication ‘The Operating Framework for the European Regulatory Agencies’ COM (2002) 718 Final 11.12.202, p.3. It is reported that the Legal Service of the Commission has a fuller definition ‘according to which the concept of a Community agency relates to decentralised bodies have the following characteristics: creation by regulation, legal personality, autonomous management bodies, financial independence, staff covered by the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities, defined missions and tasks.’ White Paper on Governance, Work Area 3, Improving the Exercise of Executive Responsibilities ,Report by the Working Group “Establishing a Framework of Decision-Making Regulatory Agencies” (Group 3a) SG/8597/01-EN

must be clear that EU agencies only represent decentralization in the very narrow sense relating to their locations and relationship with the Commission itself. In all other respects, and in particular vis-à-vis the Member States, EU agencies are instruments of centralization.\textsuperscript{28}

Not all the agencies are involved in what we might think of as regulatory domains, and those that are possess few regulatory powers. Thus, the European Medicines Evaluation Agency (EMEA) was established to advise the Commission on the granting of authorisations for medicinal products derived from biotechnology and on the Commission’s role in resolving disputes concerning the application of the principle of mutual recognition in respect of other medicinal products authorised by member state authorities.\textsuperscript{29} The powers to grant authorisations and to determine disputes remain with the Commission. The European Food Safety Authority (EFSA) is largely advisory to the Commission on matters relating to food standards and food emergencies. The Regulation establishing EFSA creates a set of general principles for EU food law and provides the normative basis for a European network for the regulation of food safety involving member state authorities, the EFSA and the Commission.\textsuperscript{30} In effect EFSA’s creation partially displaces the role of comitology in policy processes which continue to be dominated by the Commission.

The Community Plant Varieties Office and the Office for Harmonization in the Internal Market (OHIM) are unusual in that they do possess autonomous power to grant registrations of intellectual property rights with legal effect. Thus their actions do bind third parties. However, the two agencies barely comply with the definition of regulators

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\textsuperscript{27} Eg Carl Fredrik Bergström and Matilda Rotkirch, \textit{Decentralized Agencies and the IGC: A Question of Accountability}, Swedish Institute for European Policy Studies, 14 (2003). Geradin and Petit appear to recognise the contradiction between their acceptance of the argument that the development of the agencies represents a decentralization, on the one hand, and their normative agenda which is very much orientated towards the centralization of regulatory decision making within EU level agencies, at the expense of National Regulatory Authorities: Jean Monnet Working Paper No 14, New York University Law School.

\textsuperscript{28} A point effectively made in the case study of EMEA written by Les Metcalfe in M. Everson, G. Majone, L. Metcalfe and A. Schout \textit{The Role of Specialised Agencies in Decentralising EU Governance} Report Presented to the Commission (1999), 178.

\textsuperscript{29} Regulation (EEC) 2309/93 of 22.07.93.

\textsuperscript{30} Regulation (EC) No 178/2002 of 28.01.02.
since they do not engage in monitoring. Rather they are part of a wider and more complex regulatory regime in which norms are created by the EU legislative institutions and enforcement falls to holders of intellectual property rights (see the discussion of private enforcement in section 3.8 below).

It is striking that the development of EU agencies merits no discussion in the preparatory work for the White Paper on improving regulatory processes. This may be indicative of the ‘agencies strategy’ being somewhat detached from the mainstream of Commission thinking on better regulation, or perhaps just being irrelevant to it. If the latter is the case it is because it is relatively clear that as presently constituted the EU agencies have little regulatory power and are destined to be minor players, at best, within key regulatory regimes. It is difficult to see how the Commission could shuffle off its Treaty responsibilities sufficiently to create independent and potent regulatory agencies at the EU level without Treaty amendment.

3.4 Commission Agencies

An alternative to the legally separate EU agency is the establishment of somewhat distinct units within the Commission itself. The creation of independent units within the Commission has been achieved in the case of Eurostat, which is described as a service of the European Commission, but under the terms of its regulation (the ‘statistical law’) is an independent European statistical authority. 31 The EU Fraud Office (OLAF) is said to be a department of the Commission, 32 but independent in its decision making both from other parts of the Commission and from anyone else. While Eurostat may be an independent unit within the Commission, it does not, of course, exercise regulatory functions. It has no powers to make or enforce rules against anyone. OLAF is a more interesting case. It does have law enforcement powers against any who spend EU funds. Thus it provides the monitoring and enforcement element of the wider regime of fraud control.

31 M. Everson, G. Majone, L. Metcalfe and A. Schout The Role of Specialised Agencies in Decentralising EU Governance Report Presented to the Commission (1999), chapter XII.
32 Case C-11/00, Commission v ECB ECR [2003] 0000 para 41.
An interesting case is provided by the Food and Veterinary Office, which is a unit of DG Consumer Protection and Health. The FVO is charged with monitoring the compliance by member state and third nation governments with food safety and animal health legislation. In pursuit of these functions the FVO is directly involved in inspection of private facilities in the member states, but not as a direct regulator, but rather as a monitoring check on national regulatory systems. It has no enforcement capacity of its own, but its reports may be used as the basis for Commission decision making on enforcement action against member state governments or import controls affection non-EU states on health and safety grounds. The plan to turn the FVO into an agency was rejected because the Commission felt its independence as a regulator could be better guaranteed within the hierarchy of the Commission than in an independent agency where it would be subject to greater oversight from member state governments.\(^{33}\) In other words, independent agencies do not provide an appropriate model for regulation of member state governments.

### 3.5 Independent (Treaty) Agencies

The EU organisations which correspond most closely with the independent agency model are those established by the Treaties which are, nevertheless, not ‘institutions’. The leading examples are the European Central Bank and the European Ombudsman. The ECB’s mission is to control the money supply within the Eurozone and, linked to this, to maintain low inflation (below 2%). The strict independence given to the ECB in the Treaty was granted in order to insulate it from the macro-economic policy making of governments and of the EU institutions.\(^{34}\) The decision to insulate the ECB in this way follows similar decisions made for national central banks in the EU by member state governments. The ECB demonstrates that it is possible to have an independent and powerful agency operating at EU level and to assign to it functions such as the making of

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34 Kathleen R. McNamara, 'Rational Fictions: Central Bank Independence and the Social Logic of Delegation' Ibid. 47.
regulations.\textsuperscript{35} The independence of the ECB is, of course, open to criticisms, firstly that it is insufficiently transparent and accountable for its actions, and secondly that it is too insulated from vital macro-economic considerations such as levels of unemployment.

The European Ombudsman was established under the Maastricht Treaty to investigate grievances against other EU institutions and is said to be independent, though under the general scrutiny of the European Parliament.\textsuperscript{36} The Ombudsman is chiefly a grievance handler, rather than a regulator, though his work may have regulatory effects to the extent that it sets standards for future conduct which are then monitored in further investigations. To this extent the Ombudsman may be conceived of as a regulator of EU institutions.

\textbf{3.6 Transnational Regulatory Networks}

An alternative mechanism to the Community method for exploiting and coordinating regulatory capacities in the member states is to build EU regulation as a process of coordination through transnational regulatory networks.\textsuperscript{37} Such networks bring together national regulatory authorities and use them as the engine for coordinated policy development. The European Securities Regulators Committee (RESCO) established in response to the recommendations of the Lamfalussy report in 2000, provides a key example of this mode of regulation.\textsuperscript{38} RESCO is advisory to the Commission on matters of securities policy, but also acts as an instrument of informal coordination among national regulators. Such transnational regulatory networks do not, of course, have to be the product of stimulation by the Commission or other supranational authorities. A network of competition regulators appears to have emerged more or less spontaneously as

\textsuperscript{35} Art 110 EC.
\textsuperscript{38} Commission decision of 6 June 2001 (2001/1501/EC).
a means to coordinate international policy enforcement well beyond the EU, though it has subsequently been given statutory status. Similar observations might be made for telecommunications.

3.7 The Open Method of Coordination

The open method of coordination (OMC) is the term coined at the Lisbon meeting of the Council of Ministers in March 2000 to encompass a range of mechanisms through which the Council could coordinate policy developments in different domains without recourse to traditional the legislative mechanisms of the Community. An early analysis noted three distinctive elements to the mechanism: common assessment on the situation (through sharing of information; agreement on appropriate policy response; mutual adjustment by member state governments of their policy structures with peer pressure from other governments. The leading case of deployment is in the field of Economic and Monetary Union where there is perhaps rather more effort on attempts to coordinate the fiscal policies of the members of the Eurozone than there is on the openness dimensions, implying as it does experimentation and learning from the experiences of others. In other policy fields there is greater openness, for example in respect of social policy. An interesting feature of the OMC is the extent to which it reduces the Commission’s responsibility and capacity for executive action.

3.8 Negative Integration and Mutual Recognition

An earlier and alternative method for addressing the tensions between diversity of national regulatory policies, on the one hand, and the need for harmonization on the other is found in processes of negative integration and the doctrine of mutual recognition.

The main institutional focus for this form of regulatory regime is the European Court of Justice and on national legislative authorities. The ECJ held in the celebrated *Cassis de Dijon* case that the provisions of the EC Treaty directed towards completion of a single market in goods required mutual recognition of regulatory rules of one member state by another – permitting products capable of being lawfully sold in one member state to be similarly lawfully sold in another.\(^43\) The processes of ‘negative integration’ generated by the judgment effectively cut out the legislative institutions of the EC, though it does not preclude the adoption of positive harmonizing or approximating measures.

### 3.9 Better Regulation, Co-Regulation and Enforced Self-Regulation

The eight models of regulatory regimes discussed hitherto focus very much on governmental capacities and organisations. An approach which focuses exclusively on such state and super-state activity neglects the observation that many non-governmental and private organisations have substantial resources relevant to the exercise of regulatory power.\(^44\) Contemporary thinking about ‘better regulation’ recognises the benefits of conceiving of a wider range of actors as involved in regulatory regimes.

Co-regulation is generally thought of as a model of regulation under which an industry association engages in self-regulation “with some oversight or ratification by government”.\(^45\) In the proposals on “Better Regulation” the Governance White Paper highlights the use which has already been made of processes of co-regulation – unconventionally defined as the setting down of essential requirements in legislation with detailed regulatory rules to be worked out by non-governmental actors such as standard

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setting organizations or trade associations – and proposes its further development as a governance strategy.\textsuperscript{46}

A key example of co-regulation is provided by the ‘new approach’ to technical regulation developed in the 1980s as a refinement of the Community method.\textsuperscript{47} Within the ‘new approach’ the standard setting function is split between the legislative institutions, which set minimum standards, and non-governmental, but mostly supranational standard setting bodies which fill in most of the detailed standards, compliance with which is necessary to comply with the law.

Another example is provided by the social dialogue, introduced in the Maastricht Treaty, under which the Commission is empowered to initiate policy discussions with the so-called social partners (employers and trade unions) with a view to them reaching agreement on norms which are then implemented by means of a Council and Parliament Directive.\textsuperscript{48}

### 3.10 Private Enforcement

A final form important to EU regulatory regimes is that of private enforcement. Consumers may be involved as private enforcers of regulatory norms, though in most sectors the value of the products involved makes it unlikely that consumers will engage in formal enforcement. A number of EC Directives empower consumer groups to enforce Community law,\textsuperscript{49} exemplifying the model of ‘tripartite regulation’\textsuperscript{50}. Perhaps more


\textsuperscript{48} Arts 138,139 EC.


\textsuperscript{50} Ian Ayres and John Braithwaite, \textit{Responsive Regulation: Transcending the Deregulation Debate} (Oxford University Press, Oxford, 1992).
significant are the activities of firms in enforcing rules. Often such enforcement will be
directed against competitors. Thus we are discussing regimes in which the standards are
set elsewhere, for example in respect of anti-competitive behaviour (largely set down in
the EC Treaty), or intellectual property rights (EU and national legislation). Where a firm
is harmed by breach of the rules and this harm is significant they may consider they have
an incentive to pursue formal legal enforcement. Such private enforcement may also be
directed against the state for breach of the rules of a Community regime, for example in
respect of procurement, or for a more general failure to comply with Community
requirements such that EC directives may have direct effect against state bodies or failure
to implement properly may give rise to a right to damages against the state.

4. The Normative Case for Agencies

This paper offers an analysis of the variety of forms currently deployed for regulatory
governance in the EU. The main argument of the paper is that a regimes approach
highlights the extent to which regulatory agency models are marginal within
contemporary EU-level governance. Given the tendency of institutional development to
occur incrementally the prospects for a radical shift towards independent European
regulators appear limited. It might be more fruitful to think about how the objectives of
the proposed radical institutional reform might be met through adaptation of the existing
institutional arrangements.

While I may argue that other forms than the independent agency have greater prospects
for successful adoption, I recognise that the arguments in favour of independent agencies
are unlikely to go away, in particular because they are espoused by influential actors both
in academic and within policy circles. Some assessment of the normative case for
independent agencies is required. Questions about the appropriateness of developing an
independent agency model for EU governance have a horizontal and vertical dimension.
In the horizontal dimension there is first the question whether some operational or
regulatory functions of the Commission would be better carried out by independent
agencies. To the extent that a transfer of functions included the allocation of powers to
make rules or apply sanctions it would require that constitutional limits on delegation of
powers within the EU be addressed. A second aspect of the horizontal issue is whether
some of the Commission’s meta-regulatory functions in monitoring compliance by
national authorities with EU requirements would better be carried out by independent
agencies, for example in the telecommunications sector. The vertical dimension to the
question is whether regulatory functions carried out by member state governmental
bodies would be better carried out by EU independent agencies. This is a much more
complex matter, involving as it does not only the prospect of a change in the balance of
power between member state and EU level governance, but also a re-working if not an
unpicking of the conventional methods of indirect governance of the EU, discussed
above.

The central case for independent regulatory agencies, as set out by their most influential
proponent, Giandomenico Majone, is that they increase the credibility of policy processes
which might otherwise be tainted with political influence. Majone and his co-authors
refer to a general trend towards the use of ‘non-majoritarian institutions’ as a means to
insulate policy processes from politics.51 To the extent that the creation of EU agencies
shifts powers from the Commission to agencies it is questionable whether the
development of the EU agencies actually represents a shift from majoritarian to non-
majoritarian institutions. The agencies are fulfilling tasks which, were they not
established, would be carried out by the European Commission. Indeed, one might go so
far as to suggest that the EU already has a ‘generalist independent agency’ in the form of
the Commission itself.52 While there is no question that there is a complex political life in
the Commission, and particularly among the College of Commissioners, the latter are
appointed by national governments to be non-partisan. The Commission itself is a non-
majoritarian institution,53 and the modest increase in influence of the European

51 M. Everson, G. Majone, L. Metcalfe and A. Schout *The Role of Specialised Agencies in Decentralising
*West European Politics* 93.
Institutions’ (2002) 25 *West European Politics* 1. define non-majoritarian institutions as ‘those
governmental entities that (a) possess and exercise some grant of specialised authority, separate from that
Parliament,\textsuperscript{54} shows little sign of fundamentally changing the position. If it is correct that the Commission is becoming politicised then it is a non-majoritarian form of politicisation. If there was a likelihood of transferring powers to agencies which are currently held by the EU legislative institutions, the Council and the Parliament, then the case for agencies at EU level, might be closer to the non-majoritarian case in the governance of nation states.

A variation on the case independent agencies is presented in the recent Sapir report which argues that institutional arrangements under which the Commission exercises regulatory functions combined with policy formation functions are too complex and the former should be hived off to independent agencies.\textsuperscript{55} Sapir suggests that regulatory functions over member states (including aspects of the competition regime dealing with state aids and services of general interest) should remain with the commission while regulatory functions over businesses should be hived off to independent agencies.\textsuperscript{56} The only example that Sapir mentions of the latter case is competition policy.\textsuperscript{57} This is because it is the only example of the Commission having a direct regulatory role over businesses. Thus what appears to be a radical proposal involving the development of independent regulatory agencies in truth simply involves splitting the competition enforcement functions of the Commission in half, with the risk, no doubt, that the independent agency
might develop different interpretations of the common rules to be applied from the residue of DG Competition in the Commission.

The other main policy area mentioned by Sapir requiring independent agencies is in respect of safety of medicines and consumer products58 where, they suggest, risk assessment is currently carried out at EU level while risk management is carried out at national level and/or by the Commission.59 I do not think this analysis is correct. Most of the evaluation of medicinal products is carried out at national level and the same is true for consumer products. The principal of mutual recognition is deployed to permit the free movement of such goods around the EU.60 There are some general norms relating to consumer and food safety at EU level, but under the new approach much of the detail is filled in either by non-governmental standards institutions (in the case of consumer products) and through national or sub-national enforcement in the case of food products. Regulatory enforcement falls almost exclusively to national and sub-national authorities, save for the limited role of the Commission in addressing consumer product and food safety emergencies. Thus the proposal for independent EU agencies in these domains amounts to displacing a meta-regulatory approach with a command and control approach, not unfamiliar within some national jurisdictions, but rather alien to governance at the EU level.

There is implicit in Sapir’s approach a preference for EU level regulation over the various metaregulatory forms which have been the hallmark of the distinctive arrangements for EU governance. The case for EU-level regulation is more directly made by Geradin and Petit who express surprise that the solution of EU-level independent agencies has not been taken up more vigorously by the Commission as a means to address the externalities associated with diverse national regulatory regimes.61 These externalities include both diversity in regulatory approaches, but also the consequences of weaknesses in

58 Ibid.
59 Ibid.
61
enforcement.\textsuperscript{62} Such weaknesses, it is said, are demonstrated by crises in the food safety area, such as that relating to BSE.\textsuperscript{63} My judgment is that the argument that EU agencies are to be preferred \textit{whenever} national regulation causes externalities, pays insufficient attention to questions of proportionality – does the degree of harm from externalities justify the costs associated with the supranational remedy? The argument also comes up against subsidiarity arguments. It is far from clear how arguments based on efficiency of regulation should be weighed up against arguments that regulatory decision making should be made at the lowest level possible. While Majone and Everson argue that EU independent agencies will be additional to national agencies, engaged in coordinating national efforts to implement EU regimes,\textsuperscript{64} the proposed agencies must also take some autonomy from such national institutions. This involves decisions not just about regulatory efficiency, but also about the relative weight of national democratic governance arrangements as compared with the supranational institutions and processes of the EU.

A key aspect of proposals for powerful EU agencies is that they should be both independent and accountable. Independence of agencies, as it is understood within the doctrines which may be derived from EU legislation, focuses largely on the relationship between agencies and business whose activities they oversee.\textsuperscript{65} The regulatory and business activities are to be organisationally separate; agencies are to show no


\textsuperscript{63} Ibid. A detailed account of the role of the BSE crisis in stimulating the creation of the European Food Safety Agency can be found in R. Daniel Keleman, 'The Politics of 'Eurocratic' Structure and the New European Agencies' (2002) 25 \textit{West European Politics} 93.

\textsuperscript{64} Giandomenico Majone and Michelle Everson, 'Institutional Reform: Independent Agencies, Oversight, Coordination and Procedural Control' in O d Schutter, N Lebessis and J Paterson (eds), \textit{Governance in the European Union} (European Commission, Brussels, 2001).

\textsuperscript{65} A similar bias towards independence from regulated businesses is found in WTO documents. The Reference Paper on Telecommunications Services, which forms the basis for trade in telecommunications at the WTO level specifies

‘The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants’

discrimination in favour of particular firms. But independence in this dimension is more complex than the EU doctrine might suggest. Rigorous appointments processes, organisational separation, controls over ‘revolving doors’ cannot remove the reality that most agencies are likely to be dependent on the businesses they regulate not just for the provision of information, but also for knowledge about how the world they regulate should be seen. Put another way, organizational independence is no guarantee of operational independence, and the latter is extremely difficult to achieve. Recognition of this dependence is reflected in formal provisions which empower agencies to demand information for firms. It may be accentuated by provisions requiring not just consultation with businesses over changes in regulatory policy, but even the consent of the regulatee. This dependence is found not only in formal policy making, but it also typically characterises regulatory relations over matters of enforcement, where the absence of ‘epistemic independence’ forces regulators to accept interpretations of regulatory rules developed by and for the regulatees’ purposes.

With the current EU agencies it is clear that few are properly independent of the Commission. Not only is the Commission responsible for appointments to and financing of most of the agencies, but it also possesses key decision making powers within the policy domains. The position of the Commission vis-à-vis the agencies has analogies to the relationship between ministers and agencies in the member states, and particularly the problem of independence. It is common for ministries to combine functions concerned with regulatory policy and the promotion of the industry and these functions may conflict where the protection of national champions (whether or not still publicly owned) is inimical to the development of transparent and fair regulation. In many parliamentary systems of government it is actually very difficult for ministers to give away executive

power. In many member states this factor is recognised in provisions which provide for the sharing of regulatory power between ministers and agencies. Formal provisions for ministerial oversight of agencies may justify nearly wholly opaque, but regular intervention in agency decision making by ministry officials. But greater independence may not be desirable. It is suggested that among the effects of establishing independent competition agencies in Europe are the unintended consequences of promoting detached and over-zealous advocacy of competitive markets, together with a pursuit of expertise which has placed economists and lawyers at the heart of regulatory decision making.70

As regards accountability, a focus on agencies alone might encourage us to focus on traditional mechanisms of political and judicial accountability. Certainly we can envisage a role for the European Parliament and for the Court of Justice in holding agencies accountable for meeting the objectives set down in legislation and for acting within their powers. The European Ombudsman would play role in handling grievances about maladministration and the agencies would fall within the purview of the European Court of Auditors in respect of the regularity and efficiency of their expenditure.

But, within a regimes approach such traditional mechanisms of accountability may not be as important as more pressing and systematic controls which arise out of relationships of interdependence between agencies and other key actors within the regime.71 The particular interdependencies are likely to vary from regime to regime. Each of the current EU agencies is in a relationship of interdependence with the Commission. In many cases the agencies depend on cooperation both from member state governments and from undertakings within member states, particularly for gathering of information and for knowledge about the operation of activities within the domain. Agencies are liable to be caught within networks of accountability.72

For those who support the assignment of more expansive powers to agencies a solution to somewhat greater problems of accountability is to import the mechanisms developed in the United States which accompany widespread delegation of powers. These mechanisms would include an administrative procedure act, creating general principles and procedures for transparent and fair decision making, and the creation of an organisation akin to the Office of Management and Budget to monitor the activities of agencies against a set of criteria of sound management, including the development of the kind of regulatory impact assessment which is widely used in the member states to assess regulatory proposals.  

My own view is that such proposals are based on a false premise that the burgeoning of independent agencies at the EU level is politically possible. Such a development would appear to require Treaty revisions similar to those which established the ECB. The ECB provides an exceptional case and it appears likely that the member states and the Commission would oppose a more extensive delegation of regulatory power. If I am wrong on this, and agency proliferation proves possible, we would then need to have a serious debate about the normative issues only hinted at in this paper.

5. Conclusions: Prospects for Independent Agencies

We have already noted the structural constraints on mechanisms for regulatory governance in the EU and may, at least, hypothesize that they have played a role in shaping the variety of models discussed in the previous section. My own methodological bias would suggest that future changes in the models for regulatory governance are likely to occur along the current, observable trajectories. It is important to be clear that the making of a strong normative case for the adoption of the independent agency model does not, by itself, enhance the prospects that it will be adopted in the face of structural and political obstacles. Central to my doubts about whether an independent agency model might be widely adopted is the ambivalence of the European Commission.

The Commission formula for the EU regulatory agencies appears to represent, simultaneously, an embracing of the agency model, and a rejection of its development along the lines of the independent regulatory agency. In its limited attention to institutional reforms at the level of operations or implementation in the Governance White Paper the Commission proposes the creation of new autonomous regulatory agencies to improve the application and enforcement of rules across the EU.\(^\text{74}\) It is stated that such agencies can draw on greater expertise, achieve greater visibility, and reduce costs for businesses.\(^\text{75}\) The Commission’s vision of this new breed of regulatory agencies is a restricted one. While they will have power to make decisions on particular cases, along the lines of the existing ‘regulatory’ agencies – Office for Harmonization in the Internal Market; Community Plant Varieties Office; European Medicines Evaluation Agency - they will not have power to make regulatory rules.\(^\text{76}\) Additionally they will not be permitted to exercise powers assigned to the Commission in the Treaties (thus ruling out an EU competition agency), nor will they be assigned responsibilities which require them ‘to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments’.\(^\text{77}\)

Under the Commission’s classification ‘executive agencies’ are said to be responsible for ‘purely managerial tasks’ while ‘regulatory agencies are required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector.’\(^\text{78}\) The Commission proposes a different distinction as the basis for developing an inter-institutional agreement on an operating framework for the agencies. This


\(^{75}\) ibid. These virtues appear to be outlined by way of comparison with how things would be if the Commission were to fulfil the tasks. But arguments about reduced costs to business would also apply to EU agencies when compared with national regulatory authorities, especially for firms operating in more than one state and thus subject to multiple regimes.

\(^{76}\) This position set out in the Governance White Paper, p24, appears to be at variance with the later communication: Commission Communication ‘The Operating Framework for the European Regulatory Agencies’ COM (2002) 718 Final 11.12.202, p4, in which the Commission states that ‘The Concept of European Regulatory Agency designates agencies required to be actively involved in exercising the executive function be enacting instruments which contribute to regulating a specific sector’. The reference to enactment suggests that agencies will have general rule making powers, but in fact must refer only to the power to make legally binding decisions in individual cases.

\(^{77}\) p24

distinguishes decision-making agencies from executive agencies, the former having the capacity to make decisions which legally bind third parties, the latter having lesser, managerial powers.\textsuperscript{79}

The Commission’s position could demonstrate the desire of the Commission to guard its own powers and protect them from diffusion or it might simply be a recognition of the cultural and political obstacles in the way of a more expansive regulatory agency model. The Commission has explicitly stated that the use of regulatory agencies does not dilute the Commission’s policy responsibility in the applicable domain, but rather represents a transfer of limited executive functions.\textsuperscript{80} The Commission seeks to delegate to agencies rather routine operational tasks, but seeks to retain control of higher profile and more important policy making, monitoring and enforcement processes.\textsuperscript{81} This preference may be explained both by reference to the limited resources available to the Commission and to a wish to engage in a form of bureau-shaping, under which utility maximising officials are seen to increase the proportion of their work which relates to high policy making.\textsuperscript{82} Whatever the explanation it is difficult to conclude in any other way than to say it seems most unlikely that the independent agency model for the EU will rise sufficiently up the policy agenda to have a serious chance of adoption.

\textsuperscript{82} Patrick Dunleavy, \textit{Democracy, Bureaucracy and Public Choice} (Harvester Wheatsheaf, Hemel Hempstead, 1991).