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Reported by Andrea Peripoli in the context of the TARN Conference on *Constitutionality, Powers and Legitimacy of EU Agencies or Agency-Like Bodies,* held in Florence

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EU Agencies, Accountability and Legitimacy

The first presentation of the panel, by Dr Vlachou, focused on the role that national parliaments can play in ensuring accountability and legitimacy of EU agencies. Dr Vlachou introduced the topic by outlining the potential role that national parliaments (NPs) have gained so far, thanks to both the legislative framework introduced by the Lisbon Treaty – art. 12 TEU and Protocols 1 and 2 – and to a number of mechanisms of interparliamentary cooperation – the Conference of Parliamentary Committees for Union Affairs (COSAC) and the Network of representatives of national parliaments in Brussels.

While so far NPs 'have never carried out an overall consideration of the role, functions and accountability mechanisms of EU agencies, or of any specific agency' (COSAC, 22nd Bi-annual Report, 2014), Dr Vlachou highlighted how NPs can be active players with regards to EU agencies in two ways. First, NPs can exert their influence through involvement in the legislative procedure which leads to the creation of EU agencies. On the one hand, art. 12(a) TEU provides that NPs should be informed by the institution of the Union – and more specifically they should have 'draft legislative acts [...] forwarded to them'. However, this provision seems to be substantially hindered by the lack of transparency of trilogues, given that 'information, findings of parliamentary rapporteurs are not exchanged in practice' (COSAC 2016). On the other hand, NPs can issue a so called 'yellow card'. Dr Vlachou analysed the example of the

2013 ‘yellow card’ issued regarding the creation of the European Public Prosecutor’s Office. From this illustration she then extracted the principles of the procedure itself, highlighting its scope – protection of subsidiarity –, the obligation for the Commission to give reasons and the timeline for the exercise of control.

Second, Dr Vlachou reflected on how agencies’ accountability can be ensured. This objective can be achieved both through the control of national executives and through direct engagement with EU agencies. The former objective can be reached through various means, such us through participation in the Management Board by national officers or through best practices – e.g. the ‘practice of appointing a rapporteur or "EU promoter", using parliamentary debates for controlling national governments’ positions during question time and adopting resolutions as a valuable instruction to the government’ (COSAC, 2016). Dr Vlachou illustrated these points by reference to the Europol framework where, as an example, national liaison officers are invited to attend meetings of the relevant parliamentary committees and direct relations between the Parliaments and their country’s national representative are established on the Europol Management Board.

As to the direct engagement with EU agencies, no legal provisions are in place so administrative practices should be arranged (COMAC 2014). These practices should not only follow the formula of informal contacts, but also try to forge more stable mechanisms, such as the exchange of documents, the access to information and the use of the IPEX platform by agencies among others. Also this case of direct engagement was illustrated by Dr Vlachou with references to relevant aspects of Europol – which is peculiar for the presence of both primary (art. 88(2) and 85(1) TFEU) and secondary law (art. 51 of Regulation (EU) 2016/794 on the Europol). This legislation details some specific forms of scrutiny by NPs, such as the Joint Parliamentary Scrutiny Group – which ‘politically monitors Europol’s activities in fulfilling its mission, including as regards the impact of those activities on the fundamental rights and freedoms of natural persons’ – along with processes of political monitoring, the possibility for a representative of the JSPG to attend meetings of the MB as a non-voting observer.

To conlude, Dr Vlachou mentioned how the existing mechanisms confirm the need for clear rules and guidelines which should take into account different levels of governance and different national experiences, avoiding the trap of cumbersome structures (COSAC Chairs meeting, February 2016).

Dr Busuioc’s presentation put forward an interesting account on the ‘politics of reputation’, according to which the concept of reputation is essential in our understanding of the regulatory state. The starting point of Dr Busuioc’s talk has been that the existing literature on regulation has missed to acknowledge the role of politics in shaping the regulatory state. Dr Busuioc explored the concept of reputation following three steps.

Firstly, she questioned the virtues of regulatory independence and insulation from direct political control as legitimising strategies for independent agencies. These strategies have become the paradigmatic regulatory model for

agencies – i.e. guidance by technical and expert-based rationale and not by political motivations – but they might have a paradoxical de-legitimising effect. As a matter of fact, such insulation from politics would lead to a lack of regulatory credibility. Pointing to empirical data which highlight how the politicisation of appointments at senior levels in regulatory agencies increases with the level of formal independence of agencies, Dr Busuioc questioned whether a real independence from politics is feasible at all for agencies. This poses a serious challenge to the myth of independent bodies as truly insulated and neutral spheres. Therefore, Dr Busuioc highlighted how agencies should take care of their reputation rather than looking for independence per se also because high levels of regulatory independence seems to be in fact negatively related to regulatory credibility. This is well illustrated by the case of the European Food and Safety Agency. National authorities were excluded from the EFSA board, but this triggered national distrust and unwillingness to cooperate. Insulation, designed in principle to prevent political interference, harmed EFSA's reputation in the eyes of those actors which should have collaborated closely with it. To conclude on this first part, Dr Busuioc proposed that the key to ensure credibility rests on institutional features such as governance and institutional arrangements, judicial review and administrative checks and balances. In these approaches stability derives from combinations of commitment mechanisms which exalts processes through which reputation can be built.

Moving to the second point, Dr Busuioc showed how regulation has a political nature rather than an objective one. This is because regulators themselves do give due consideration to matters of politics and reputation. For example, studies show how actors tend to prioritise responses to complaints or incidents not only on the basis of objective severity, but more importantly on the basis of the risks to themselves that may result from adverse publicity. Maintaining the appearances of 'neutrality' in regulatory practice becomes a mere social construction and seemingly neutral approaches have in fact a political essence. After all, the reliance on expertise is in itself a political strategy. Finally, and this is her third point, Dr Busuioc argued that the EU has a bias towards formal commands (i.e. the law) while overlooking the issue of reputation. This is well exemplified by the case of trans-national police co-operation. The European Commission, to address concerns, tried to strengthen the obligation on the part national authorities to share information with Europol. However, an exclusive focus on greater rule specification like this, did little to address the underlying reputational considerations pre-empting co-operation efforts in practice. According to Dr Busuioc, examples of regulatory dynamics in the European regulatory state do exist – e.g. socialisation, co-optation by design or pre-existing 'group bondness' – but they seem to have occurred more by accident rather than by design. Reputational considerations are still overlooked in a regulatory system, which strongly prefers to recur to command-type fixes.

Marco Macchia's presentation examined the accountability mechanisms of Banking Union institutions, focusing in particular on the 'political dimension' of the 'technical' decisions taken by the Single Supervisory Board (SSB) and by the Single Resolution Board (SRB). According to Macchia, it is a growing 'political dimension' which calls for a close scrutiny of the action of the two

bodies, scrutiny which he then conducts by analysing three mechanisms which characterise both the SSB and the SRB.
First, parliamentary control over SSB and SRB should be taken into account. SSB and SRB are responsible both before the European Parliament – as for their functioning – and before national Parliaments – where they have to provide reasons and justification to national representatives on the way they use the powers granted for the pursuit of supranational goals. It is particularly interesting to highlight that SSB's and SRB's Chairs can be convened before parliamentary bodies in a hearing and asked to exchange opinions or written explanations on their activity. Two facts should be underlined regarding this point. *In primis*, hearings are not a form of routine control, as they are convened to provide justification for specific decisions adopted and actions taken at European level. *In secundis*, not only the European Parliament is entitled to ask to be accounted to, but national parliaments too. This is a fundamental point since major concerns can derive from the effects caused at national level by decisions taken at European level. Second, both SSB and SRB have to provide justification for the decisions taken within their action. Two types of external review are in place. The first one is that of the Administrative Boards of Review, a compulsory and not binding tool. The second type of review is that of the Courts with all relating guarantees of neutrality (art. 263 TFEU). According to Macchia, this combination creates a sufficiently articulated framework which includes both a 'horizontal level' – with administrative remedies within the ECB system – and 'vertical level' – with remedies involving EU justice authorities and national courts. Third, the SSB and the SRB are part of a wide and complex system of power involving European Authorities and National authorities which cooperate from a structural and a functional viewpoint.

From a structural point of view, for example, the authorities under examination are characterized by a mixed composition of national and supranational bodies. A good illustration is provided by the composition of the SBR, which is not fixed. In fact, depending on the interests which make the object of the decision, the SBR can have sessions working according to different rules (e.g. participation only by full-time permanent members plus national representatives of the resolution authority of the State in which the financial institution or group addressed by the decision operate, formula of the full representativeness, participation by representatives of the Commission and of the ECB etc).

From a functional point of view, attention should be paid to a number of controls among European institutions as well as among supranational and national bodies. This ranges from the controls of the ECB Governing Council on SSB decisions to the Governing Council assessing draft decisions of the Supervisory Board; from the ECB Mediation Panel to some forms horizontal interactions – such as the potential involvement of both the Commission and the Council in the decision-making phase.

Prof Macchia concluded by pointing out two shortcomings of the current situation. First of all, the participation of the addressees to the decision-making procedure is not always allowed. Secondly, transparency is not always sufficiently guaranteed, since information exchange is covered by secret and

third parties cannot have access to documents and information relating to the supervisory and resolution activity. According to Macchia, autonomy and independence of the BU regulators are actually balanced by what he defines as a 'network system of integration regime', characterised by the coexistence of national parliamentary control, European parliamentary control, controls by the Administrative Board of Review and by the Tribunal and the Court of Justice. An integrating regime of this type appears to be a modern instrument, which can be adopted and modified according to the European context, where uniformity and differences coexist. All in all, Prof Macchia argued that accountability is not weakened, since such a system is in itself a source of legitimacy and effective control with regard to decision-making powers and which aims at the proper functioning of financial markets.