



TARN Brief No 5

Reported by Jens van Straalen 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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The Academic Research Network on Agencification of EU Executive Governance (TARN) is a Jean Monnet Network co-funded by the Erasmus+ programme of the European Union.



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EU Agencies and Banking

The first individual panel session of the conference had as theme ‘agencies and banking’ and was chaired by Professor Michelle Everson of Birkbeck College of the University of London. The three panel members of this session were Marta Bozina Beros of the Juraj Dobrila University of Pula, Anna Damaskou of the University of London, and Aneta Spendzharova of the University of Maastricht.

The first presentation by Marta Bozina Beros, focused on the special status of the Single Resolution Board (‘SRB’) as a specific agency. She pointed out that agency governance within the European Monetary Union (‘EMU’) holds a special place to begin with. Agencies enjoy a great deal of power in this area of governance, and further consolidation of powers after the European Supervisory Authorities (‘ESA’s’) now also includes new agencies, such as the SRB. Resolution of failing financial institutions is an important aspect to be harmonized within the EMU and particularly in the Banking Union. Resolution after all, fulfils the important function of breaking the loop of mutual dependence between banks and sovereigns. This is legally challenging however. The Treaties did not provide for a specific legal basis of the resolution framework to be harmonized in the EU. This makes research and assessment of the SRB’s activity and accountability both challenging and all the more important. The new resolution authority the EU opted for a new

resolution agency being created using Art. 114 TFEU as a legal basis rather than for delegating those powers to an existing agency or institution. This allows a more neutral approach in resolution without upsetting EU's institutional balance. Marta Bozina Beros continued in pointing out the unique aspects of the SRB in terms of both governance and accountability. Both are somewhat controversial. In terms of governance, the SRB's discretion has to be limited in order to stay within the limits of the Meroni doctrine. In terms of accountability, the SRB answers to parliaments. However, such meetings often take place behind closed doors, and can therefore be problematic in the light of transparency.

The second member of the panel, Anna Damaskou presented her paper: 'The Single Supervisory Mechanism ('SSM') and the European Central Bank ('ECB'): better married or divorced?'. In her presentation she dedicated the first part of her time to setting out the provisions governing the SSM, and its position within the ECB as an EU institution. Secondly, problems with this institutional arrangement were outlined. Whilst also pointing out the benefits and advantages of incorporating the SSM within the ECB, Anna Damaskou showed both the institutional and procedural flaws of this arrangement. These flaws predominantly surface when it comes down to the different mandates of the ECB. On the one hand this powerful institution is meant to safeguard price stability through coordination of monetary policy, whilst on the other hand supervising the significant credit institutions under the SSM. Neither goal should be given priority, and both tasks should be executed independently of the other. However, Anna Damaskou pointed out that the institutional and procedural framework, does not always allow such independence. Members of the supervisory board can for example also have positions in the Executive Board. Members of the Executive Board also hold a position in the Governing Council when it comes down to monetary policy. The longer standing flaws of the ECB, such as lack of transparency, accountability and conflicts of interest permeate down from the institution into the SSM arrangements. However, Anna Damaskou pointed out that the SSM is not an end in itself. After all the ultimate objective is the well-being of the EU and its citizens. So the success of the SSM is imperative, and its usefulness must be emphasized.

The third member of the panel - Aneta Spendzharova – expanded on: 'Harmonization after Centralization: Explaining the Growing Prominence of the European Securities and Markets Authority ('ESMA') in European Financial Sector Governance'. Her presentation provided a clear and descriptive overview of the powers of ESMA, how the ESMA short selling-case of the Court of Justice affected these competences and how these developed over time. The paper argued that these developments were the result of 'incrementalism', where policy makers gradually enhance existing frameworks, rather than creating an entirely new institutional framework when encountered with a new problem. In addition, Aneta Spendzharova's presentation set out how new pieces of legislation had further gradually increased ESMA's competences and mandate, without the necessary accompanying procedural safeguards, leading to an asymmetry in growing discretion but static accountability.

The discussion focused on the role of central banks and financial institutions where also an important balance must be struck for the role of an central bank as a regulatory agent, and a supervisory authority. Daniele D'Alvia argued that especially the regulatory role of the central bank cannot be underestimated due to its expertise and central role in the financial system, whereas specialized supervisory financial authorities can be better placed for a supervisory role. Questions were asked about the normative consequences of the growing powers of ESMA, about possible further independence of the SSM, and the particular accountability of the SRB to national parliaments and the European Parliament.

In her reflection on the discussion, Aneta Spendzharova expanded on her normative standpoint on the developments of ESMA's competences by emphasizing that the growing competences require agencies be placed on a stronger constitutional footing. Anna Damaskou concluded that in the marriage between the ECB and the SSM work must be done: This new institutional architecture certainly has some advantages of housing both mandates under the same roof. However a continuous balance must be struck between all sorts of legitimacy principles, for example: transparency towards the public vs. protection of market sensitive information. Marta Bozina Beros pointed out that it was particularly important that resolution was brought to a European level. When resolution was still on the national level, it did not contribute in completing the single market, and rather still posed an obstacle. Hence the creation of the SRB as an agency allows for an important step in integration.

The panel in perspective of the academic debate

The financial sector in the EU has proven to be a breeding ground for radical agencification. The creation of the three ESA's in 2010 and the attribution of wide ranging powers to these agencies were unprecedented. The advantage was that this institutional design allowed for the very precise rule setting by actors with high expertise, which was considered necessary in the financial sector after the crisis of 2008. Furthermore, agencification in the financial sector serves an additional range of purposes such as lowering costs of operation, increased public participation of market actors, higher efficiency of regulation and supervision, the pooling of knowledge and coordination between Member States. However the far-reaching (discretionary) powers that are given to agencies in the financial sector, different authors have pointed out the need for checks and balances on agencies.

In line with the academic debate, the panel contributed to these discussions by zooming in on different agencies, and assessing their specific mandates compared to the checks and balances in place. Each participant recognized the strengths of the institutional architecture in place, but also found different flaws for each agency discussed. Now that (relative) new agencies such as the SRB, or agency like constructions such as the SSM emerge, scrutiny must be maintained in order to ensure that their growing powers keep being assessed.