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Reported by Letizia Gianni 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, Procedure and Courts

The panel dealt with the fundamental question of which instruments (either procedural or judicial) we have to enhance the legitimacy and the accountability of EU agencies. The first paper on *Procedural Rule-Making of European Supervisory Agencies: an effective tool for legitimacy?* by Maurizia De Bellis starts from the assumption that there are two paradigms of legitimation for the EU financial agencies co-existing: (1) the delegation paradigm (based on the Meroni doctrine) and (2) a new emerging procedural paradigm of legitimation (derived from the ECJ's reasoning in the ESMA/Short-selling case). The main focus in this case is on the latter. In this respect, the author wants to assess whether current procedural rules for rule-making really contribute to the legitimacy of European Supervisory Agencies (ESAs).

The three financial agencies are "endowed with a measure of real regulatory power such as it is possessed by true regulatory agencies in a far more restrictive constitutional framework of the ESAs". Does it serious represent a slide back to unaccountable governance in the EU? According to ESAs regulations, agencies have broad regulatory powers, while ongoing financial supervision is in the domain of national authorities, though partially centralised in the Banking Union. The rule-making powers involve very different tools, ranging from soft law to binding technical acts. The acts may

be divided into binding/non-binging acts. The regulation framework provides for stricter limits concerning the adoption of binding acts e.g. adoption of technical standards requires an endorsement by the Commission, which can reject or amend the regulation. The Commission's intervention has been designed as to be used in exceptional circumstances. However, the first experiences show that it is not a purely formal check, and real contrasts between the Commission and the financial agencies can arise. Certainly, ESAs' powers are stronger than those of other agencies. The limited supervisory powers granted meanwhile were diversified among the agencies, an in mostly exceptional cases. They are seldom used because of the composition of ESAs, where all national authorities are represented. There are specific sectors where certain entities (e.g. ESMA) have greater powers.

The instruments through which interested parties can participate in the rule-making of ESAs are two: public consultation and a stakeholders' group, which each agency must set up. What is the scope of participatory rights guaranteed through these different means? Do they provide only for participation, or also for transparency and reasons giving? Is participation only written, or do the ESAs also run oral hearings? Is participation taking place using these two instruments analogous, or are the stakeholders involved different in their composition? Ultimately, are the two instruments equally effective in ensuring that a balanced representation of all the affected parties is guaranteed?

To this end consultation aims to build consensus between all the interested or affected parties on the most appropriate regulatory practice and improving the decision making process of the agencies already at an early stage, sufficient for the agency to take the responses into account. Transparency entails an obligation to publish all formal proposals and advice, on their website, in a clear and visible way. Duty to give reasons requires that agencies commit to give due consideration of the responses received and publish a reasoned feedback on responses received.

Establishing a Stakeholders Group meanwhile entails a balanced representation of the industry, financial market participants, their employees' representatives, consumers, users of banking, financial or insurance services and representatives of SMEs. Within ESMA, a Securities Stakeholders Group rule of procedure exists: opinions must be generally taken by consensus and only in exceptional cases on a 2/3 majority. When consensus is not reached and at least 3 members consider that their views are not adequately reflected in an opinion to be issued by the Group, those member are entitled to include a minority opinion in the Group's opinion.

Do the above-described safeguards represent an efficient tool to ensure legitimacy of ESAs' action? The delegation of powers to technical agencies is deemed to be unavoidable in complex societies, and it also constitutes a best practice. However, according to the author, the recognition of participatory rights of the affected parties plays a key role in addressing these concerns. ESAs have developed a good legal framework for the consultation process. However, how this framework couples with other instruments and chains of accountability is still to be explored. An effective judicial review of

procedural safeguards enhances further the legitimacy of the system. However, the participatory rights have been developed in the context of the rule-making activity of the agencies, so that the protection of the same rights before supervisory powers of the EU agencies is still to be assessed. Moreover, control on EU agencies by national Parliament could represent another important tool in this perspective.

Kathryn Wright in her paper *When National Courts Meet European Regulatory Networks* considers the role of national courts in the EU regulatory governance, focusing on networks of regulators and agencies in economic regulation. As conversion of regulatory networks into European agencies with legal personality, in theory it allows for greater judicial scrutiny at the EU level. However, legal accountability gaps remain due to two prominent features of European regulatory networks: integrated administration and reliance on soft law. With regard to this first point, there is an interdependence of authorities between EU and national level, reliant on information exchange and mutual assistance. There is a mismatch between this integrated administration, and the separation of judicial competence between the EU and national levels. Two points flow from this. One is the fact that 'preparatory acts' are generally not reviewable. The other issue is the question of determining authorship and allocating responsibility for a decision. Secondly with soft law prominent, national regulatory authorities have 'soft' obligations towards the European agency, such as 'comply or explain' (e.g. ESMA regulation) or the duty to take 'utmost account' of recommendations (e.g. BEREC regulation). Those recommendations are not binding, but NRAs must state reasons if they are not going to comply. This raises the question of the extent to which national courts might take account of recommendations and preparatory sources when reviewing national regulators. National courts may only rule on decisions of national regulators implementing the guidance of the European agency, not on the guidance directly. According to Grimaldi and various Court of Justice case law since, the CJEU recognises that while an instrument may not have binding force, it may still have legal significance for national courts. Deriving from the duty of loyal cooperation (now Article 4(3) TEU), national courts are bound to take account of recommendations and guidelines.

In this context there is a more prominent role to be played by courts in European regulatory networks. First, there are possible new judicial functions: legality control, particularly through ex post judicial review; and improving implementation of and compliance with EU law and policy at the national level. In the relationship with soft law, these two roles might militate in different directions. If soft law is about increasing compliance, and the role of national courts is to encourage implementation of EU law and policy, national judges might be more inclined to engage with it. However, if the national judge is undertaking strict legality control, s/he may be less inclined to accept soft law standards. Secondly as decisions made based on or influenced by ostensibly soft law guidance do come before national courts. Thus, there is a role for national courts in European regulatory networks.

Where a national agency's decision comes before a national court in a judicial review situation, the court needs to assess whether the NRA has upheld its

'utmost account' obligations. This could consist of two limbs: (a) whether the NRA has considered the Commission's/EU agency's assessment and (b) whether it has given reasons for following it or departing from it. A role for national courts could also come in the investigation and sanctioning elements of a European regulatory network's competences. This is particularly likely in the case of ESMA, given that it is the only agency with direct enforcement powers relating to private parties. While it has inspection powers established by the Regulation, inspections take place subject to national procedural law. National courts therefore have a role in granting authorisation. The level of scrutiny applied to the adequacy of the NRA's reasoning is a further open question.

In order to respond to the mismatch between the integrated administration and the fragmented judiciary, an enhanced judicial role is proposed, through a combination of the traditional judicial cooperation channel of the preliminary reference procedure – perhaps used in a more creative way, in particular with respect to the interpretation of non-binding acts – and horizontal coordination between courts. An ancillary channel between the national court and the CJEU could be opened where access to judicial protection is likely to be denied, as in the Borelli & Tillack situations. For example, this could be used where a national court does not consider it has jurisdiction to review the correctness of information from EU agencies. A procedure for review of preparatory (pre-formal decision) and implementing (post-decision) acts should be established.

Angela Ward spoke of *Agencies and access to justice,* defending the principles of transparency, coherence, and equality, which become more and more important in order to answer the criticisms of democratic deficit and excessive intergovernamentalism. Unfortunately, the current formulation of Article 263 TFEU does not clarify sufficiently who can be sued and before which court, when the facts involve an EU agency. However, the case law of the European Court for Human Rights has stated clearly that effective and coherent access to justice shall be granted.

The first fundamental issue is that a definition of what an 'agency' or a 'body of the EU' is does not exist. Given that, many cases show the difficulties faced by private parties wanting to get judicial protection against EU agencies' acts. Case C-455/14, P. H. v. Council and Commission, is a really interesting judgment in this regard. H, a woman seconded to Bosnia to the European Union Police Mission (EUPM), sought the annulment of a decision signed by the Chief of Personnel of the EUPM, by which the appellant was redeployed to the post of 'Criminal Justice Adviser – Prosecutor' in the regional office of Banca Luka (Bosnia) and, secondly, an order to the Council, the Commission and the EUPM to pay damages. She was a national expert seconded to the EUPM. The EU judiciary has jurisdiction, in accordance with Article 270 TFEU, to rule on all actions brought by EU staff members having been seconded to the EUPM, but not on national experts. For this reason, the appellant had started also parallel proceedings before a national court as well. However, the ECJ recognized that "the scope of the limitation, by way of derogation, on the Court's jurisdiction, which is laid down in the final sentence of the second subparagraph of Article 24(1) TEU and in the first paragraph of

Article 275 TFEU, cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions".

C-439/13 P, Elitaliana v. Eulex Kosovo, the case concerned a public tender procedure for a supply of helicopters to the EUlex Kosovo mission, where the claimant was ranked second. Eulex Kosovo raised a plea of inadmissibility in accordance with Article 114(1) of the Rules of Procedure of the General Court, maintaining (i) that Elitaliana's action for annulment could not be brought against Eulex Kosovo, since, given that the latter was not an independent body, it did not have capacity to act as defendant and (ii) that the General Court did not have jurisdiction given that the measures at issue had been adopted on the basis of the provisions of the FEU Treaty relating to the common foreign and security policy (CFSP). By the order under appeal, the General Court, at paragraphs 19 to 37 of that order, accepted the plea of inadmissibility raised by Eulex Kosovo and therefore dismissed Elitaliana's action. The General Court, first, at paragraphs 19 to 25 of the order under appeal, considered whether Eulex Kosovo was a 'body, office or agency of the Union' within the meaning of the first paragraph of Article 263 TFEU and accordingly had capacity to act as defendant in the proceedings before it. It reached the conclusion that Eulex Kosovo does not have legal personality and there is no provision that it can be a party to proceedings before the European Union Courts. As confirmed by the CJEU in 2015, the political and strategic action of Eulex Kosovo is directed by the Political and Security Committee (PSC) under the control of the Council and the High Representative of the EU for Foreign Affairs and Security Policy. The EU Courts stated that there was no excusable error by the claimant.

C-562/12, Liivimaa Lihaveis MTÜ, the appellant took action against the Estonia Development Fund. Under the relevant EU regulation, each Member State has to set up a monitoring committee, whose act was at stake. The matter could not be decided under Estonian law. Under Article 263 TFEU, the Court of Justice is also to review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. The ECJ stated that it "must be interpreted as meaning that, in the context of an operational programme under Regulations Nos 1083/2006 and 1080/2006 and intended to promote European territorial cooperation, an action against a decision of a monitoring committee rejecting an application for aid does not fall within the jurisdiction of the General Court of the European Union".

The uncertainty of the system is further increased by the co-existence of a mix of legally binding and non-binding provisions. There is no clear signal in the CJEU case law. In the context of cases where the Memorandum of Understanding between Cyprus and the Stability Mechanism was challenged against the Commission and the ECB (Mallis and Malli, Joined Cases C-105/15 P to C-109/15 P; Ledra Advertising, Joined Cases C-8/15 P to C-10/15P), the CJEU recalled the traditional case law, and restated that the ESM Treaty is not part of the EU legal order (see Pringle judgement, C- 370/12). Therefore, the

EU institutions can only make public statements about what is a political agreement.

Art. 41 of the EU Charter for Fundamental Rights provides for the right to good administration. This provision could provide an important tool in terms of access to justice. Indeed, claims about insufficient transparency in the conduct of an EU agency could be brought before an EU Court, since non-binding acts still fall under the scope of the concept of good administration. Still quite often national courts (e.g. German courts) do not give remedies to the claimant, who is forced to go before the European Courts. According to A. Ward, even if national courts prefer not to give remedies in cases of wrongdoing by an agency, in this case there would not be any problem in terms of interference with the legislative process. The agency is quite low level in the hierarchy.