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Reported by Martin Weinrich 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, Participation and Independence

A central purpose of government agencies is to act independent of political control and process information that a ministerial department could not process in the same way. The limits of agencies' independence and their relation and openness to other actors are a topic of constant academic and practical debate. As part of the Panel "EU Agencies, Participation and Independence" S. Pernuš presented a paper on participation models in EU agencies, M. Ortino discussed the necessity for independent financial supervisory authorities in the EU and H. Hijmans outlined how the high independence of data protection authorities might create a new branch of government.

In her paper "Opening the Black Box of Participation in European Agencies: Constitutionalization from below" Sara Pernuš introduces a theoretical framework to study participation venues in EU agencies and an empirical analysis of the participatory realities within EU agencies. Her distinction between management, general matter, quasi-regulatory and external public consultation participation reveals the variety of stakeholder inclusion in EU agencies. Her theoretical reflection and empirical analyses of these four participation forms in four different EU agencies reveals that participation is not an end in itself (e.g. in order to increase democratic participation) but rather a mean in order to guarantee the effective functioning of EU agencies.

The goals of participation vary depending on the participation mode but the benefits of participation (e.g. more information, greater stakeholder compliance or trust-building) are always linked to efficiency concerns. Her empirical analysis identifies strengths and shortcomings (e.g. unequal access to participation venues) for all participation modes. She concludes that there is a realistic chance that participation in EU agencies lives up to its (efficiency) potential.

Discussants emphasized the importance of unveiling different participation mechanisms and clarifying the underlying motives and objectives behind the creation of these mechanisms. Questions focused on the risk of agency capture by stakeholder interests via these participation forms, the role of corporatist participation models and the possible tension between the need to include diverse interest and the objective to create political steering capacity. While corporatist participation lays outside the scope of the analysis, Pernuš referred to her paper where she discusses risks involved with each participation mode including the risk of capture by specific interests and how to prevent this. In regard to the capacity of political steering, Pernuš underlined her core message, that participation venues were often created by EU agencies or required by EU legislation for functional reasons. They are thus supposed to contribute to the success and effectiveness of EU agencies and thereby their political steering capacity.

Matteo Ortino argues in his paper “The Independence of EU Agencies from EU Political Institutions in the Financial Services Sector” that the current set-up of the European Supervisory Authorities (ESAs) in the financial sector is insufficient to achieve their instrumental purpose, the creation of regulatory uniformity within the EU’s regulatory space. He argues that the ESAs need more independence to take autonomous decisions and that in cases where ‘one-size-fits-all’ approaches cannot be applied special national rules should be decided by the European level and by individual national authorities. Based upon a reading of Article 114 and 290 TFEU as well as recent interpretation of the Meroni doctrine, Ortino points out that a further empowerment of ESAs with rule-making power would be within the EU’s constitutive framework as long as these powers are necessary to achieve their objectives, responsibilities are clearly delineated and the ESAs are embedded within the EU’s legal system and its accountability structures. In this case politicians could rely for corrections of ESAs decisions via conventional control approaches (such as hearings and annual reports) without interfering in the ESAs’ independence in taking the decisions.

Many discussants shared the impression that the ESAs’ independence might not be sufficient. However, the discussion focused on the democratic requirements in Articles 10 and 11 TEU as well as of Article 298 TFEU. Some concerns were raised that effectiveness cannot trump principles of democratic representation and that the idea of strictly separated responsibilities in the field of financial regulation and supervision might be difficult to achieve. Furthermore, concerns were raised about the problems to distinguish between technical and political aspects of regulations. In his reply, Ortino emphasised that the Court judgements show that independent authorities are not in

conflict with representative democracy as long as there are democratic control mechanisms. Thus, democratically created independent supervisory authorities in the financial sector do not have to be in conflict with democratic principles and might fulfil the objectives of regulatory harmonization and be more effective.

In the last panel presentation on the topic “Independent Data Protection Authorities as a New Branch of Government: What Can Other Sectors Learn and How to Establish Cooperation Across the Board?”, Hielke Hijmans showed that due to EU regulation, national data protection authorities (DPAs) are so independent from other (political) institutions while at the same time performing possibly crucial gate-keeping functions that they could very well be described as a new branch of government. He points out that the newly created European Data Protection Board (EDPB) bears similarities to EU agencies but works practically more like an independent national DPA. In this autonomous policy field, experts take not necessarily technical but political decisions in regard to privacy and their decisions take binding effects for other political and institutional actors. Hijmans raises the question what it means for democratic societies if independent experts take possibly political decisions on behalf of citizens, what kind of accountability mechanisms would be necessary for DPAs and what other sectors could learn from the DPA model.

While discussants agreed on the uniqueness of data protection supervision, the term of a new branch of government was – mainly due to its possible negative connotation – contested. Furthermore, the legal consequences of the EDPB’s classification as an agency were raised. Finally, in the light of the EDPB’s ability to pass binding recommendations to national agencies, the repercussions on national DPA’s independence were brought up. The lengthy debate reduced the response time and Hijmans focused on emphasizing that the DPAs do not fit into the other three branches of government and that his argument thus stresses that the DPAs are not only a very independent form of supervision but can also possibly change our governance system.

The questions of agencies’ independence, who agencies’ listen to and how they change the administrative governance system in Western democracies are recurrent themes in legal and public administration research on EU agencies. The three papers contribute to this debate by mapping participation forms and their potential and reflecting about the future of EU agencies’ independence and the possible change in the administrative system caused by independent agencies. Thereby, the discussions of this panel encourage to further think about the impact and future of EU agencies. First, they ask how participation and independence can be expanded or specified in order to increase the effectiveness of EU agencies. This is intertwined with questions of constitutional limits to independence and minimum standards of participation and possible control and accountability venues for both. Second, this leads to the question how the political system in the EU and in member states changes if EU agencies become ever more independent, are able to interact by themselves with stakeholders and national actors and become with increasing decision-making power *de facto* veto-player. Third, the discussion

of DPAs raises the normative question in which policy fields the decision-making by expert bodies on behalf of the society is acceptable.