



TARN Dialogue

Conclusions from the breakout sessions 29 June 2016

Group 2: Power, procedures and judicial review

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During the discussions several issues were raised, some falling squarely within the assigned topic, other issues being (in)directly linked to the agencies' powers, procedures and judicial review.

On a preliminary note, one agency representative remarked that sufficient attention should be paid to the unique environment in which each EU agency operates: differences in legal and political context as well as differences in the national contexts in which the agencies operate and on which they depend. As a result, it would be erroneous to try and impose a one-size-fits-all solution on the agencies.

The discussants agreed to this all the while noting that EU agencies also share a lot of similarities. To discover these and to identify those areas in which 'horizontal' solutions (applicable to all agencies) may be devised, sound typologies should be elaborated. These typologies can also be flexible: for instance, categorizing the EU agencies in light of their external (international relations') powers will not result in the same typology as, e.g., categorizing the EU agencies depending on their enforcement powers.

Following from this the following ten issues were discussed:

1 The standard of judicial review in light of Article 6 ECHR

One major question is whether continued respect for Article 6 ECHR is safeguarded with the ongoing agencification. This may be problematic in light of the ECtHR's jurisprudence in several ways. Firstly, if the available remedies are too vague, this may jeopardize the right to a fair trial; secondly there is the problem that the remedies available to private parties will depend on the court that is competent, which in turn may affect a party's right under Article 6 ECHR; thirdly the inconsistent case law of the CJEU is noted as regards compensation for damages resulting from joint EU-national action; lastly there is the question of the intensity of judicial review of agencies' acts. These four issues would merit further consideration.

2 The accountability overload and discretion

Several participants identified a risk in that a significant number of accountability requirements is being imposed on the EU agencies, resulting in what has been coined an 'accountability overload', whereby the agency may find it hard to deliver on its actual mandate. It was noted that the emphasis on accountability (which is greater for the agencies than for the institutions) partially has to do with the requirement that no discretionary powers may be conferred on agencies. The latter proves to be untenable however, especially if agencies are asked to exercise supervisory (and not just regulatory) tasks.

In this regard it was suggested that it should (finally) be recognized that agencies may and do exercise discretionary powers and that the accountability mechanisms should be devised so as to reflect this.

3 The reform of the General Court and the Boards of Appeal

An issue on which no consensus could be found was whether the recent reform of the General Court will in any way affect the Boards of Appeal of agencies. Although the latter never were specialised tribunals in the sense of Article 257 TFEU, they did share some characteristics with them. For now, the possibility to establish specialised chambers in the GC has not been used, raising the question how the judicial review process of agencies' acts may be imbued with the necessary technical expertise. Here, several remarks were made: in the past, the GC has employed certain (economic) experts, but the judges did not make use of this in-house expertise when scrutinizing contested acts since they felt this would be a delegation of their judicial authority. In any event there is a possibility for some expertise to be incorporated in the cabinets of the judges. Still it was pointed out that one should be mindful that regardless of how a court may draw on expertise (external, internal), it will always have less expertise than the body whose decisions are being challenged. As a result, judges will often not engage with the substantive aspects of a contested decision (although one participant remarked that this may also be a cultural thing, since in some national legal orders, judges find no problem in substantively scrutinising decisions) and will try to solve cases on procedural issues. In this regard, it was remarked that this again underlines the need to have a horizontal instrument setting out basic procedural requirements which every administrative actor in the EU legal order ought to respect. Another participant remarked on this point that we should not be overzealous in trying to formalize procedures, since any (administrative) actor will always resort to informal procedures outside the formal framework.

The issue of expertise may also mean that the Boards of Appeal are de facto the last instance to appeal agency decisions, even if de iure there is an appeal open before the GC (and following that before the CJEU). From this perspective, the GC's review of Board of Appeal decisions should be a topic for further study. What could also be further explored is the possibility to upgrade the role of the Boards of Appeal. For now, their jurisdiction is defined in a very narrow manner, but the Treaties leave ample room to broaden the jurisdiction of the Boards of Appeal. As the responsibilities of the members of the Boards of Appeal grow, so should the attention to their independence and impartiality which already today may give cause for concern.

4 The separation of functions within an agency

Several participants stressed the ill-understood effects and added-value of the separation of functions introduced in the statutes of the agencies, prescribing that different persons or departments are responsible for different stages in a decision-making procedure. Evidently, the purpose of this separation is to make sure that final decisions are impartial and unbiased, but sometimes the complexity of the procedure (as a result of the separation of functions) very much negatively affects the efficiency in decision-making. In other instances there is insufficient attention to a separation of functions, for

instance when nominally different committees re-assess each other's work but where virtually the same people or national departments staff those committees. Further research on this issue would help in better understanding which degree of separation of functions is necessary and when such a separation becomes dysfunctional.

5 The agencies' use of soft law

Several participants noted that EU agencies rely to a great extent on soft law to perform their tasks. This could be explained by the fact that problems resulting from the agencies' unclear constitutional position may be partially circumvented by not giving them hard but only soft powers. Generally, soft law is seen as something (potentially) problematic but the question was raised whether this really is the case. Is it genuinely problematic that agencies resort to soft law? How do the EU agencies and the regulated industries see this? Should this problem be addressed? If so how may this be done?

6 Agencies' resources and tasks

The ongoing agencification not only means that new agencies are being established, but also that the mandates of existing agencies are elaborated. For the agencies this means that they have to prioritize among their tasks, given their limited resources. The participants identified a number of relevant questions: how do agencies prioritize? How should they prioritize? How does the gap between means available and means required to fulfill all assigned tasks affect the agencies' functioning, output, etc.

7 Increasing enforcement by EU agencies

One participant noted that EU agencies are increasingly involved in the enforcement of EU law, whereas this is traditionally a task of the Member State authorities. This trend foremost means that enforcement is not being transferred wholesale to the EU level, but instead that enforcement is being shared between both EU and national authorities. This raises a host of questions: who is ultimately responsible for the enforcement action when that action is shared? Which legal remedies are available against shared enforcement action? How does this affect the rights of parties against which EU law is enforced? Etc.

8 EU agencies and the Commission

When discussing different topics, one horizontal issue kept popping up, that is the unclear role of the Commission and its relation with the agencies. Although most Boards of the agencies are Member State-dominated, the Commission plays an important role which is also determined by the degree to which the agencies depend on the EU budget. A number of agency representatives deplored the fact that agencies do not have direct access to the Commission Legal Service. In terms of governance but also generally, one participant stressed that sufficient attention should be paid towards the original Commission legislative proposals and the final legislative act, where it will often be the Parliament introducing requirements which may lead to accountability overload (see above).

9 A legal basis for agencies in the Treaties

One participant remarked that a lot of the issues discussed in the panel ultimately come down to the unclear constitutional position of the agencies, even if another participant stressed that we now have a framework in the form of the Common Approach. The extent to which the latter indeed constitutes a (sufficient) framework could be studied. Regardless of that however, ideally a legal basis should be inserted in the Treaties, giving a constitutional foundation to EU agencification. How such a legal basis should look like (and be workable) should be the topic of further research.

10 *EU agencies and the EU's legitimacy*

Finally, one participant remarked that the current EU legitimacy crisis could be, partially, addressed by having the agencies operate in a more transparent manner, using clear (and uniform) procedures. This would enhance the EU agencies' (and ultimately the EU's) procedural legitimacy. This question would need to be studied together with the problem of accountability overload (see above).