Supranational Governance and Networked Accountability Structures: Member State Oversight of EU Agencies*

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The most remarkable recent development in EU administrative law is the widespread establishment of European agencies. Beginning in the early 1990s, EU agencies emerged as significant actors in a number of areas, including trademark law, pharmaceutical licensing and aviation safety. EU agencies are best understood, however, not as autonomous regulators at the federal level, but as the most recent expression of European governance through administrative networks. The regulatory intertwining of supranational and national authorities in the EU is significantly different from the division of authority between federal and state bureaucracies in the United States federal system.[1] *Hence, the accountability of European agencies to the EU and to Member States has unique features that can be traced to the dynamics of European integration. Accountability is largely a function of networked institutional relations that link European administrative entities to both supranational and national forums of accountability.*[2] *This article concentrates on the second form of accountability through an in-depth exploration of the way Member States oversee EU agencies. Oversight, here, covers monitoring, hearings, budgetary reviews or judicial actions, as well as procedural constraints.*[3]

I. The transformation of European administration: From the paradigm of indirect administration to the governance of administrative networks

A distinctive feature of European governance[4] is the way in which the various levels of government share responsibility. Traditionally, the supranational level was responsible for policy formulation and legislation, while the Member States were responsible for implementation and administrative adjudication under the model of "indirect administration". National authorities acted as agents for both domestic and European policy implementation.[5] EU institutions carried out a few tasks themselves (for example, in competition law, agriculture and state subsidies);

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1 Brainard Guy Peters, Federalism and public administration: The United States and the European Union, in: Comparative Federalism: The European Union and the United States in a Comparative Perspective (Anand Menon & Martin A. Schain eds.), 2006, p. 177 ff.

2 Herwig C.H. Hofmann, Mapping the European Administrative Space, West European Politics 31 (2008), p. 662, 671; Ellen Vos, Independence, Accountability and Transparency of European Regulatory Agencies, in: Regulation through Agencies in the EU (Damien Geradin, Rodolphe Muñoz & Nicolas Petit eds.), 2005, p. 120, 125 ff.

3 For a similar inclusive concept of "oversight" see Erika de Wet, "Holding International Institutions Accountable", 9 *German Law Journal* (2008), pp. 1987, 1991 *et sqq.*; Peter L. Lindseth, Alfred C. Aman and Alan Charles Raul, "Oversight", in George A. Bermann *et al.* (eds), *Administrative Law of the European Union* (ABA Publishers, 2008), pp. 7 *et sqq.*; for a distinction of "oversight" and "accountability" Carol Harlow, *Accountability in the European Union* (2002), p. 146.

4 Christoph Möllers, "European Governance: Meaning and Value of a Concept", 43 *Common Market Law Review* (2006), pp. 313 *et sqq.*

5 Rostane Mehdi, "L'autonomie institutionnelle et procédurale et le droit administratif", in Jean-Bernard Auby and Jacqueline Dutheil de La Rochère (eds), *Droit administratif européen* (2007), pp. 685 *et sqq.*

these were seen as exceptions to the rule. For many years, institutional reform stalled in the light of the 1958 *Meroni* jurisprudence,[6] in which the European Court of Justice articulated rather strict limits for the delegation of administrative powers.[7] However, as European integration became ever closer, the scope of tasks to be fulfilled on the EU level enlarged tremendously, in terms of both regulation and adjudication. European structures increasingly influences national administrations. The EU directly assigned more and more tasks to supranational actors – particularly to actors other than the Commission. EU administration developed into a networked form of governance with extensive interplay and interconnection between national and supranational authorities.[8] A recent study located three forms of networked administrative governance: EU agencies that rely on contributions from national authorities, institutionalized networks of national authorities (for example, the network of European competition authorities), and the Open Method of Coordination (especially in the area of social policy).[9] A common feature of those institutions is the existence of committees that are closely associated with the formal decision-making bodies and subject to various attempts in the direction of procedural rationalization.[10] The EU agencies emerged gradually from humble beginnings in the 1970s (when only two information-managing agencies existed) into a broad and diversified set of more than 30 EU agencies at present.[11] This evolution occurred even though the European treaties contain no explicit provisions foreseeing the establishment of supranational agencies or – until recently – providing for their control.[12] Today, the tasks and competences of the various agencies are remarkably diverse and are having a growing impact on EU citizens and enterprises.[13] Illustrative examples of significant opinion-giving agencies are the European Agency for the Evaluation of Medicinal Products (EMEA) and the European Food Safety Agency (EFSA). Agencies entrusted with formal decision-making-powers are the Office for Harmonization in the Internal Market (OHIM), the Community Plant Variety Office (CPVO) and the European Aviation Safety Agency (EASA). The EASA is the first agency with an actual licensing competence, issuing *inter alia* type-certificates for airplanes and environmental certificates. However, many agencies are organizationally weak, with relatively small staffs of no more than about 500 employees. As a consequence there is a huge practical need for cooperation with the Member State administrations, for example through national representatives on scientific committees that operate within the organizational structure of the agencies.

II. The accountability framework of European agency administration

1. The multi-principals system

The emergence of administrative networks as the paradigmatic feature of European administrative law is paralleled by evolving structures of networked accountability.[14] This is particularly true for EU agencies. Whereas in the United States, the federal agencies are accountable to the President and Congress as their two major principals, there is no identifiable hegemon in the European multi-principals system.[15] On the supranational scale the EU agencies are held accountable to the Council, the Commission and the European Parliament, all of which play important

6 Cases 9/56 and 10/56, Meroni & Co., *Industrie Metallurgiche, SpA, v. High Auth. of the European Coal & Steel Cmty.*, 1958 ECR 11, 53.

7 Jens-Peter Schneider, "A Common Framework for Decentralized EU Agencies and the Meroni Doctrine", 61 *Administrative Law Review* (2009), pp. 29, 34 *et sqq.*

8 Wolfgang Weiß, "Agencies versus Networks: From Divide to Convergence in the Administrative Governance in the EU", 61 *Administrative Law Review* (2009), pp. 45 *et sqq.*, 69; Matthias Ruffert, "The transformation of administrative law as a transnational methodological project", in Matthias Ruffert (ed.), *The transformation of administrative law in Europe* (2007), pp. 3 *et sqq.*

9 Charles F. Sabel and Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU", 14 *European Law Journal* (2008), pp. 271, 278–292.

10 Manuel Szapiro, "Comitology: The ongoing reform", in Herwig C. Hofmann and Alexander Türk (eds), *Legal challenges in EU administrative law* (2009), pp. 89 *et sqq.*

11 European Agencies – The Way Forward, at pp. 5 *et sqq.*, COM (2008) 135 final.

12 For a complete register of the existing EU agencies see <http://europa.eu/agencies/index_en.htm> (last accessed on 27 August 2009); on the reforms through the Treaty of Lisbon infra at III.2.a).

13 Paul Craig, *EU Administrative Law* (2006), pp. 148 *et sqq.*; Johannes Saurer, "The Accountability of Supranational Administration: The Case of European Union Agencies", 24 *American University International Law Review* (2009), pp. 429, 440 *et sqq.*

14 Carol Harlow and Richard Rawlings, "Promoting accountability in multilevel governance: A network Approach", 14 *European Law Journal* (2007), pp. 542 *et sqq.*

15 Renaud Dehousse, "Delegation of Powers in the European Union: The Need for a Multi-principals Model", 31 *West European Politics* (2008), pp. 789 *et sqq.*; J.H.H. Weiler, "The Transformation of Europe", 100 *Yale Law Journal* (1991), pp. 2403, 2413–2431.

roles in both ex ante and ex post accountability.[16] In addition, institutions such as the Court of Auditors and the European Ombudsman, which deploy particularly evaluative and communicative *soft law* tools, are becoming increasingly significance.[17] Finally, Member State governments seek to control agency activities.

2. Unity and diversity of accountability designs

All European agencies share a core set of common institutional features, including the limited mandate for each agency laid down by its establishing secondary legislation. Generally, agencies have a dual management structure with a management board and an executive director. However, the accountability provisions are remarkably diverse when one considers aspects such as the availability of access to boards of appeal and judicial review. For example, the basic regulations of several powerful agencies with legal decision-making competences include detailed and layered systems of administrative appeal and judicial review. These mechanisms, included in secondary legislation, are found, for example, at OHIM and EASA, and, most recently, at the European Chemicals Agency.[18] However, outside those agencies, protection of individual rights is much more complicated in agencies that have no agency-specific review mechanisms. Several recent judgments document the problems that can arise. For example, in the *Olivieri* case the Court of First Instance denied the admissibility of an action against the scientific opinion of the EMEA, noting that a legal challenge would be possible against the final decision of the Commission.[19] The European courts issued a similar judgment with respect to the EFSA.[20] In the *Artegodan* case, however, the CFI acknowledged the factual significance of a scientific opinion of a subcommittee of the EMEA and held that effective review requires exploration beyond the Commission's formal decision into the findings of the agency and its committee.[21] As I discuss below, the recent judgment of the Court of First Instance in the *Sogelma* case is particularly important.[22]

III. Mechanisms of Member State oversight

The following section reviews the oversight competences and activities of the Member States. The analysis proceeds in two major parts – distinguishing internalized and external oversight mechanisms. "Internalized" mechanisms are built *into* the institutional architecture of an agency. "External" oversight mechanisms, on the contrary, cover instruments of control and accountability that the Member States deploy outside the agencies' organizational framework.

1. Internalized mechanisms of Member State oversight

a. Management and administrative boards

A first line of internalized oversight is the representation of the Member States on the agencies' management and administrative boards.[23] The powers of these boards include the appointment of the executive head of the agency and competences related to the budget and the working procedures. The representational structures vary among the agencies, but the most common model guarantees one representative from each Member State. For example, the basic legal framework of the EASA explicitly states that the "Member States should be represented within a Management Board in order to control effectively the functions of the Agency"[24] – and thus follows the rule of one seat per Member State. The same mechanism applies to the EMEA. Most boards

16 See, e.g., Interinstitutional Agreement Between the European Parliament, the Council and the Commission on Budgetary Discipline and Sound Financial Management, 2006 O.J. (C 139) 1 (EC).

17 European Court of Editors, Special Report No 5/2008: The European Union's Agencies: Getting results; EU Ombudsman, Annual Report 2005, p. 160; *id.*, Annual Report 2006, p. 74.

18 Council Regulation (EC) No 40/94, art. 63 (1) (OHIM); Parliament & Council Regulation 216/2008, Art. 50 (2) (EASA); Parliament & Council Regulation 1907/2006 (EU), Art. 94 (ECHA).

19 Case T-326/99, *Nancy Fern Olivieri v. Commission*, 2000 E.C.R. II-1985.

20 Alberto Alemanno and Stéphanie Mahieu, "The European Food Safety Authority before European Courts", 5 *European Food and Feed Law Review* (2008), pp. 320 *et sqq*.

21 Case T-74/00, *Artegodan GmbH v. Commission*, 2002 E.C.R. II-494, at paras. 197–200.

22 Infra III.2.a).

23 The terminology varies: for examples of "management boards" see the following paragraphs, the term "administrative board" is used, e.g., at the Community Fisheries Control Agency and the European Maritime Safety Agency.

24 See Parliament & Council Regulation 216/2008, reason (23).

also include representatives of the Commission, the European Parliament and societal actors, mostly from affected interest groups such as (in the case of EMEA) patients, doctors, and veterinarians. In terms of institutional dynamics, the ongoing dominance of Member State representatives on the Management Boards appears to be the result of the dominance of the Council vis-à-vis the Commission (and the European Parliament) in the institutional bargaining process that determines the EU administrative structure. The Council, as a representative of the Member State governments, seeks agency control through management boards dominated by Member State representatives, and through the integration of national regulatory authorities into agency operations via a hub-and-spoke model.[25] The Commission pressed largely unsuccessfully for a more professional and scientific model favoring professional experts instead of nation state representatives.[26]

The one major exception to the rule of one representative per Member State is the European Food Safety Agency (EFSA), which was created in 2002. During the establishment process, the Commission drew on growing public concerns about food safety and succeeded in promoting its ideal of enhanced independence in the agency architecture.[27] Thus, the EFSA's enabling act stresses that the Management Board should be appointed in a way to secure the highest standard of competence and a broad range of relevant expertise, and it sets up a rotation mechanism among the Member States to fill the 14 seats on the Management Board.[28]

b. Expert committees

A second internalized oversight mechanism is the numerous committees that are built into the operational structures of most EU agencies. As a consequence of the small number of directly employed staff, agencies rely on a large number of scientific and expert committees mostly comprised of national representatives, oftentimes officials from the corresponding national sectoral administrations. For example, in evaluating pharmaceuticals the EMEA regularly entrusts scientific committees with developing and giving substantive opinions, including a recommendation to the Commission to either grant or refuse the permission.[29] The final market authorization takes the form of a decision issued by the Commission, but it usually follows the recommendation of the agency's expert committees.[30] Another illustrative example is the air safety agency, EASA. Before issuing rules or making other important decisions it consults with two bodies comprised of members of national aviation authorities and of private experts from the airplane industry. The committee structure supplements other types of cooperation, including information exchange and infrastructural resources administered by national aviation authorities. Given the small administrative bodies of the European agencies, the committee procedure has become an important mechanism for incorporating external expertise. Making use of knowledge and experience from the Member States appears to deal efficiently with the scarcity of the agency's own human resources. Integrating national officials into the agency's licensing procedure also enables Member States to exercise informal controls on the day-to-day-practice at the European level.[31]

2. External mechanisms of Member State oversight

a. Judicial review

Member States can seek judicial review of agency actions. The Treaty of the Functioning of the European Union (TFEU) – established through the Treaty of Lisbon as the successor of the former EC Treaty – grants Member States privileged standing to bring an

25 R. Daniel Kelemen, "The Politics of Eurocracy: Building a New European State?", in Nicolas Jabko and Craig Parsons (eds), *With US or against US?: European trends in American perspective* (2005), pp. 173 *et sqq*.

26 See "The Operating Framework for the European Regulatory Agencies", at p. 9, COM (2002) 718 final; see also Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, Art. 11(5), COM (2005) 59 final.

27 Renaud Dehousse, "Delegation of Powers in the European Union: The Need for a Multi-principals Model", 31 *West European Politics* (2008), pp. 789, 798.

28 Regulation (EC) No 178/2002 of the European Parliament and of the Council.

29 The four committees deal with medicinal products for human use (CHMP), medicinal products for veterinary use (CVMP), orphan medicinal products (COMP) and herbal medicinal products (HMPC).

30 Charles F. Sabel and Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU", *supra* note 9, pp. 271, 284.

31 Mario P. Chiti, "Forms of European Administrative Action", 68 *Law & Contemporary Problems* (2004), pp. 37, 45; Paul Craig, *EU Administrative Law, supra* note 13, p. 178.

action for annulment.[32] Moreover, as a result of the Lisbon treaty reform, the European treaties for the first time explicitly allow for actions of annulment against EU agencies.[33] The new provision is fully in line with the most recent jurisprudence of the European courts. Most importantly, in 2008 the Court of First Instance applied the holding of the seminal *Les Verts* case of 1986 to European agencies. In *Les Verts*, the ECJ, on the premise of a "Community of Law", extended the action for annulment to actions of European institutions not explicitly mentioned in the relevant treaty provision (then-Art. 173 EC).[34] In *Sogelma,* the CFI extended *Les Verts* to any EU institution as long as they are "endowed with the power to take measures intended to produce legal effects vis-à-vis third parties".[35]

The Treaty of Lisbon also improves the availability of judicial review of agency actions taken in the "area of freedom, security and justice". Most importantly, the reform treaty transfers the policy of the former "third pillar" from intergovernmental co-operation between Member States to what is traditionally known as the "Community method". As a result of this incorporation, the actions of agencies such as Europol and Eurojust become subject of the "regular" mechanism of judicial review based on Art. 263 TFEU. Prior to the Treaty of Lisbon, the availability of judicial review was a source of contention. Before the ECJ, the issues at stake have been discussed most prominently in the case *Spain v. Eurojust*.[36] The plaintiff, supported by Finland, challenged a call for recruitment of temporary staff issued by Eurojust. The action was brought to the ECJ mainly because of language requirements in the application process that allegedly disadvantaged non-native English speakers. Spain argued for the admissibility of the action on the ground that because the EU is a "community based on the rule of law", no action of a European institution with legal personality can be excluded from judicial review.[37] Similarly, Advocate General Poiares Maduro concluded that the Court should extend the reasoning in *Les Verts* from the EC treaty to the intergovernmental area.[38] To the contrary, the ECJ declared that the action was inadmissible. The Court particularly relied on textual and structural arguments related to then Title VI of the EU treaty.[39]

b. Oversight through political processes

Significant oversight activities also occur in the political processes inside Member States. In particular, national legislatures are taking an increasingly vigilant approach towards the EU agencies. They demonstrate the power of negative publicity as a form of sanctioning despite the lack of a formal retribution.[40] Political oversight exercised by Member State legislatures focuses on both the overall agency system and its day-to-day practices.

Both chambers of the federal legislature in Germany, the largest EU Member State, have recently criticized the entire agency system. In 2008 the *Bundestag* thoroughly explored the EU agency system. The federal parliament distinguished ordinary "regulatory agencies" from the few "executive agencies" that were created with limited powers through Council Regulation (EC) 58/2003.[41] It deemed that only the latter were not problematic and questioned the legality of the regulatory agencies by pointing to the principle of subsidiarity.[42] The *Bundestag* argued for enhanced parliamentary controls over all regulatory agencies, in particular, by giving enhanced powers to the European Parliament in the appointment of executive directors. The *Bundestag* also urged that each regulatory agency be subordinated to the oversight of a single European Commissioner.[43] Perhaps even more critically, the

32 Art. 263 TFEU; for earlier acknowledgements Case 131/86, *United Kingdom v. Council*, 1988 E.C.R. 905, at para. 6; Case 41/83, *Italy/Commission*, 1985 E.C.R. 873, at para. 30.

33 Art. 263 (1) TFEU reads: "The Court of Justice (…) shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties."

34 Case 294/83, *Parti Ecologiste 'Les Verts'*, 1986 E.C.R. 1339, at paras. 21, 23–25.

35 Case T-411/06, *Sogelma v. European Agency for Reconstruction*, 2008 E.C.R. II-2771, at para. 37.

36 Case C-160/03, *Spain v. Eurojust*, 2005 E.C.R. I-2077.

37 *Id.*, at paras. 32–34.

38 *Id.*, Opinion of AG Poiares Maduro, at paras. 11–25.

39 *Id.*, at para. 38.

40 Carol Harlow and Richard Rawlings, "Promoting accountability in multilevel governance", *supra* note 14, pp. 542, 545.

41 Paul Craig, *EU Administrative Law, supra* note 13, p. 153.

42 Deutscher Bundestag, Beschlussempfehlung und Bericht des Ausschusses für die Angelegenheiten der Europäischen Union, Drucksache 16/9695 (2008), p. 3. For judicial discussions of subsidiarity see, e.g., ECJ, C-377/98, 2001 E.C.R. I-7079, at paras. 30–33 and – from the (German) Member State perspective – Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 et. al., at paras. 240, 251, 304 *et sqq*. (on the Treaty of Lisbon); English translation available on the Internet at <http://www.bverfg.de>.

43 Deutscher Bundestag, Beschlussempfehlung und Bericht des Ausschusses für die Angelegenheiten der Europäischen Union, *supra* note 42, p. 3.

Bundesrat – the second chamber of the federal legislature representing the 16 German states (*Länder*) – called into question not only the "regulatory" but also the "executive" European agencies (arguing in terms of subsidiarity, proportionality, de-regulation and de-bureaucratization).[44] A salient issue was the lack of a coherent system of judicial review.[45] The *Bundesrat* called for a moratorium on the further establishment of EU agencies. Regulatory agencies should only be established in exceptional cases on the basis of extensive cost-benefit-analysis by external institutions. Along these same lines, the French *Assemblée Nationale* recently started its own extended inquiry into the entire European Agency system.[46] Its report questioned the overall performance and, in particular, the legal framework of EU agencies. The French pushed for a thorough evaluation of the agency system by the Commission, and the agencies were urged to make information on their work available in the languages of all Member States.[47]

The British House of Commons has also recently scrutinized the general EU agency system.[48] More specifically, the Transport Committee explored the organization and work practice of the EASA[49] and summoned the head of the national British Civil Aviation Authority – widely acknowledged as a worldwide authority in its field –, representatives of pilots and aircraft engineers organizations, and several experts from the social sciences. The Committee was not satisfied with the performance of the EASA, decrying the fact that the speed of rule-making had slowed down since it was transferred from the British to the European level.[50] In the highly technical and evolutionary field of aircraft safety, this raised worries about keeping pace with the necessary standards.[51] Other concerns pertained to a lack of responsibility among the EASA staff, the personnel choices of the management board, as well as the deficiencies in the personal and technical resources that EASA needed to manage its current tasks.[52] As a conclusion of its assessment, the British Parliamentary Committee stated in drastic words: "It is with dismay that we have learnt of the chaotic state of the European Aviation Safety Agency (EASA), which at this time is not able to fulfill its declared purpose. EASA is an accident waiting to happen – if its problems are left unchecked, we believe it has the potential to put aviation safety in the UK and the rest of Europe at risk at some point in the future."[53]

The Committee also warned against transferring further powers from the national level to the EU agency, stating that "[t]he United Kingdom cannot and must not transfer any further powers from the CAA to EASA until the Government is assured that the serious problems of governance, management and resources at EASA have been resolved," expecting assurances from the Minister on the topic.[54] It urged the British government to work towards resolving the operational problems of EASA. Faced with these charges, the British government took various actions. About six months later, it claimed to have "played a leading role in improving the performance of the EASA" and announced that it would "continue to take steps to ensure that the Agency is firmly established as a properly resourced and high performing safety regulator."[55] The United Kingdom pointed especially to the influential work of their member on the EASA Management Board to improve manpower, planning, and risk management.[56] In addition, the British government stressed the close informational and personal exchange of the EU agency and its national equivalent.[57]

44 Bundesrat, BR-Drs. 228/08 (B) (2008) pp. 4–5; for a corresponding earlier statement see BR-Drs. 168/05 (2005).

45 Bundesrat, BR-Drs. 228/08 (B) (2008) p. 7 and earlier BR-Drs. 134/08 (B).

46 Assemblée Nationale, Rapport D'Information N° 3069 déposé par la Délégation de l'Assemblée Nationale pour l'Union Européenne sur les agences européennes par M. Christian Philip, Député, 2006, available on the Internet at <http://www.assemblee-nationale.fr/12/europe/rap-info/i3069.asp> (last accessed on 10 January 2011).

47 *Id.*, at p. 85.

48 House of Commons, European Scrutiny Committee, Twenty-Second Report of Session 2007-2008, HC 16-xx, published on 14 May 2008, pp. 7–10.

49 House of Commons Transport Committee, The Work of the Civil Aviation Authority, 2005–06, HC 809, published on 8 November 2006. pp. 13–22.

50 *Id.*, p. 17.

51 *Id.*, p. 17.

52 *Id.*, p. 15.

53 *Id.*, p. 16.

54 *Id.*, p. 16.

55 House of Commons Transport Committee, The Work of the Civil Aviation Authority: Government Response to the Committee's Thirteenth Report of Session 2005–06, Fifth Special Report of Session 2006–07, HC 371, published on 13 March 2007, p. 3.

56 *Id.*, p. 5.

57 *Id.*, p. 5.

IV. Conclusions

1. Dominance of Member States as a genuinely supranational feature

The analysis demonstrates the important role that the Member States play in overseeing EU agencies. Through various oversight mechanisms the Member States have emerged as the agencies' most visible critics. Moreover, the dominance of the Member States constitutes a genuinely supranational form of accountability. The significance of the Member States becomes particularly clear in comparison to state control of federal actions on the national level, for example, in the United States and in Germany.

First, the U.S. administrative system allocates authority through a divided federalism that formally segregates central, and state bureaucracies.[58] Accountability at the federal level operates vertically through oversight structures that hold the federal agencies accountable to the federal political branches, namely the President and Congress. Unlike the EU Member States, the 50 States of the US traditionally have little or no power to oversee the federal agencies.[59] This difference in the accountability environment is especially interesting once one recognizes that the European agency model was initially inspired by US models before taking on its novel, networked form. Since the 1980s, vertical accountability in the US has even increased, particularly through extending the influence of the President. Since the Presidency of Ronald Reagan various institutional and substantial reforms added up to the movement toward "Presidential Administration".[60] The most significant elements of this process, mostly promulgated through Executive Orders, include the establishment of the Office of Information and Regulatory Activities (OIRA) in the Office of Management and Budget (OMB), along with increasing emphasis on cost-benefit-analysis and growing Presidential attempts to intervene in agency rulemaking.[61]

In contrast, efforts by the American States to control the federal government appear to be relatively insignificant. They mostly take the form of political interventions, such as meetings of the National Governors Association that discusses and comments on federal policies that affect the states, for example, in the area of environmental policy.[62]

However, an interesting recent development with the potential to produce more active State oversight of federal agencies is the judgment of the US Supreme Court in *Massachusetts v. EPA* (2007).[63] Here, the Court granted standing to the State of Massachusetts to sue the EPA for its failure to regulate CO2 emissions relating to global warming. The Court started from the notion of "the special position and interest of Massachusetts".[64] It significantly relaxed the standing requirements for States vis-à-vis those for individuals, as set out, for example, in *Lujan v. Defenders of Wildlife*. The *Lujan* Court stated that the "irreducible constitutional minimum of standing contains three elements", namely (1) that "the plaintiff must have suffered an 'injury in fact'", (2) a "causal connection between the injury and the conduct complained of", and 3) that it "must be 'likely' as opposed to merely 'speculative', that the injury will be "redressed by a favorable decision".[65] Thus, *Massachusetts v. EPA* (by granting standing on the basis of Massachusetts' geographical conditions) could be understood as allowing States to exercise oversight powers over federal agencies using the trigger of Supreme Court review.

In the German federal administrative law system agency-related oversight also differs tremendously from the European structures.[66] It is almost exclu-

58 Brainard Guy Peters, "Federalism and public administration: The United States and the European Union", in Anand Menon and Martin A. Schain (eds), *Comparative Federalism: The European Union and the United States in a Comparative Perspective* (2006), pp. 177 *et sqq.*; Daniel Halberstam and Roderick M. Hills, JR., "State Autonomy in Germany and the United States", 574 *The Annals of the American Academy of Politics and Social Science* (2001), pp. 173 *et sqq*.

59 Damien Geradin, "The Development of European Regulatory Agencies: Lessons from the American Experience", in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulation through Agencies in the EU* (2005), pp. 215, 236 *et sqq*.

60 Elena Kagan, "Presidential Administration", 114 *Harvard Law Review* (2001), pp. 2245 *et sqq*.

61 Elena Kagan, "Presidential Administration", *supra* note 60, pp. 2245, 2277 *et sqq*., 2285 *et sqq.*; Damien Geradin, "The Development of European Regulatory Agencies", *supra* note 59, pp. 215, 237 *et sqq*.

62 See, e.g., the list of policy positions of the NGA-Natural Resources Committee available on the Internet at <http://www.nga.org> (last accessed on 26 August 2009), that includes statements related to the EPA's policy, for example under the Clean Air Act and the Endangered Species Act.

63 U.S. Supreme Court, *Massachusetts v. E.P.A.*, 127 S.Ct. 1438, 1451 (2007).

64 *Id.*, 127 S. Ct. at para. 1454.

65 J. Scalia (Opinion of the Court), 504 U.S. 555, 560–61 (1992).

66 For bilateral comparisons of German and US federalism see Daniel Halberstam and Roderick M. Hills, JR., "State Autonomy in Germany and the United States", *supra* note 58, pp. 173 *et sqq.*; Susan Rose-Ackerman, *Umweltrecht und -politik in den Vereinigten Staaten und der Bundesrepublik Deutschland* (1994), pp. 85 *et sqq*.

sively practiced through mechanisms at the federal level. First, the few federal agencies that have existed for several decades, such as the *Bundeskartellamt* (Federal Cartel Office), are subject to general instructions from the Federal Ministry of Economics and Technology.[67] Second, several more recently established autonomous federal agencies, including the *Bundesagentur für Arbeit* (Federal Employment Agency) and the *Bundesfinanzagentur*, which is the central service provider for federal borrowing and debt management, possess similar properties. The agency with the broadest ranging tasks is the *Bundesnetzagentur* (Federal Network Agency), the central regulatory institution for German electricity, gas, telecommunications, postal and railway markets.[68] The oversight process of the *Bundesnetzagentur* takes place almost exclusively on the federal level. For example, the agency is subject to detailed instructions from the Federal Ministry of Environment and the Federal Ministry of Economics and Telecommunications.[69] According to the constitutional principle of the "prohibition of mixed administration"[70] and the constitutional clause assigning specific infrastructural tasks to the federal level (Article 87 f (2) Grundgesetz), there is almost no role for the German States in overseeing the *Bundesnetzagentur*. As a modest concession to the States, an Advisory Council was created that is comprised both of Members of the *Bundestag* (federal parliament) and of the *Bundesrat* (federal chamber representing the *Länder*). Moreover, a Coordination Committee coordinates the regulatory activities of the Federal Network Agency and the corresponding sector agencies on the state level.

2. The compensatory and complimentary functions of Member State oversight

On one view, the oversight by the Member States of the EU agencies is meant to *compensate* for the loss of substantial Member State competences. The EU agencies have gained power at the expense of Member State authorities, rather than at the expense of the Commission.[71] As an example, consider the European Aviation Safety Agency. The tasks carried out by EASA, such as the issuance of type-certificates of airworthiness licenses and environmental certificates, were never within the competences of the Commission. On the contrary, until the establishment of the EASA through Parliament and Council Regulation (EC) 1592/2002, the equivalents of today's European licenses were issued by national aviation safety authorities.[72] Similarly, prior to the establishment of the EMEA and the OHIM, national bodies issued marketing authorizations for medicinal products and registered trademarks. The Commission played no role.[73] However, from the Member States' perspective the new oversight mechanisms do not compensate entirely for the loss of national authority. The Member States have lost proactive regulatory powers and only gain reactive powers – similar to patterns in the context of legislative competences.[74]

In relation to supranational institutions, the oversight exercised by the Member States fulfils a *complementary* function. The accountability forums at supranational and national level interact.[75] Oversight activities at national level are related to a lack of corresponding action at supranational scale and vice versa. The Member States intervene because of accountability gaps caused by deficiencies of other forums and principals, including both individuals and institutional actors such as the Commission or the European Parliament.[76] The inherent flexibility of this complementary relation implies that the accountability environment may adapt over time. Thus, if other actors increase their accountability activities, Member States might become less active. In particular, the European Parliament has become an increasingly significant factor in holding EU agencies accountable and might contribute to less extensive

67 The agency operates essentially on the basis of the Act Against Restraints of Competition (Gesetz gegen unlautere Wettbewerbsbeschränkungen, GWB) of 1958.

68 For an organization chart see <http://www.bundesnetzagentur.de/media/archive/10837.pdf> (last accessed on 2 April 2009).

69 § 117 TKG (Federal Telecommunication Act); the instructions have to be published in the federal gazette.

70 See Bundesverfassungsgericht, BverfGE 119, 331, 365 *et sqq*. (2007), Hartz IV-Arbeitsgemeinschaften; BVerfGE 108, 169, 182 (2003), Zugangsberechtigungssysteme im TKG.

71 On the inherent challenge to the Meroni-Doctrine Renaud Dehousse, "Delegation of Powers in the European Union: The Need for a Multi-principals Model", 31 *West European Politics* 31 (2008), pp. 789, 793.

72 Daniel Riedel, *Die Gemeinschaftszulassung für Luftfahrtgerät* (2006), pp. 50 *et sqq*.

73 Renaud Dehousse, "Delegation of Powers in the European Union", *supra* note 71, pp. 789, 793; Martin Lorenz, *Das gemeinschaftliche Arzneimittelzulassungsrecht* (2006), pp. 41 *et sqq*.

74 Philipp Dann, "The Political Institutions", in A. v. Bogdandy (ed.), *Principles of European Constitutional Law* (2007), pp. 229 *et sqq*.

75 Herwig C.H. Hofmann, "Mapping the European Administrative Space", 31 *West European Politics* (2008), pp. 662, 664–668.

76 On accountability features involving both supra II.1. and 2.

political oversight processes, particularly in the national legislatures.[77] Moreover, individual due process rights before European agencies (such as the rights to notice, to be heard and for a reasoned decision) have also become more important.[78] The same is true for judicial remedies, particularly with regard to the most recent judgment of the CFI in the *Sogelma* case.[79] A further extension of individual rights of access to the European courts could turn those courts into increasingly significant accountability forums. If the process of strengthening individual rights continues, a possible result will be an internal shift within the EU agencies accountability system, strengthening the control functions of individuals and potentially cutting back on the significance of oversight activities of Member State governments and legislatures.

3. The democratic promise of networked accountability

European law scholarship places particular emphasis on the democratic potential of networked accountability. This scholarship argues that the interactive committee structures of EU administrative law further deliberative values.[80] Thus, these structures are seen as sources of procedural democratization and an expression of constitutional values.[81] Due to its specific discursive character, EU procedures are said to favour arguments that are capable of universal application.[82] This literature views various forms of cooperation and communication in EU governance as significant instruments for rendering the "institutions of European decision making comprehensible and democratically accountable".[83] Sabel and Zeitlin claim that the "regulatory successes" of the EU have occurred because "decision making is at least in part deliberative: actors' initial preferences are transformed through discussion by the force of the better argument". Moreover, they emphasize the significance of the socialization of various deliberators (civil servants, scientific experts, representatives of interests groups) into "epistemic communities, via their participation in 'comitological' committees: committees of expert and member state representatives that advise the Commission on new regulation and review its eventual regulatory proposals".[84] The authors particularly point to EU agencies to prove their point. They claim that networked EU agencies are an example of "processes of framework making and revision ... that give precise definition to the deliberation, informalism, and multi-level decision making characteristic of the EU".[85] In their concept of a "directly-deliberative polyarchy", agencies in the domain of public health and safety comprising the regulation of, for example, drug authorization, occupational health and safety, environmental protection, food safety, rail, and aviation safety, are becoming "animating centers ... for pooling experience under the current regulations and learning about possible alternatives".[86] Together with other conditions, the deliberative character of agency administration opens up "the possibility for transforming distributive bargaining into deliberative problem solving through the institutional mechanisms of experimentalist governance.[87]

77 Ellen Vos, "Independence, Accountability and Transparency of European Regulatory Agencies", in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulation through Agencies in the EU* (2005), pp. 120, 126 *et sqq*. The increase of powers at the EP relates to the claims of various national actors, see *supra* III.2.b) for the example of the German federal legislature.

78 Jerry L. Mashaw, "Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance", 76 *George Washington Law Review* (2007), pp. 99 *et sqq.*; David E. Shipley, "Due Process Rights before EU Agencies: The Rights of Defense", 37 *Georgia Journal of International and Comparative Law* (2008), pp. 1 *et sqq*.

79 Johannes Saurer, "Individualrechtsschutz gegen das Handeln der Europäischen Agenturen", 45 Europarecht (EuR) (2010), pp. 51, 60–61; Alberto Alemanno and Stéphanie Mahieu, "The European Food Safety Authority before European Courts", *supra* note 20, pp. 320 *et sqq.*; Case T-411/06, *Sogelma v. European Agency for Reconstruction*, 2008 E.C.R. II-2771.

80 Oliver Gerstenberg, "Expanding the Constitution Beyond the Court: The Case of Euro-Constitutionalism", 8 *European Law Journal* (2002), pp. 172, 183; Michelle Everson and Christian Joerges, "Re-conceptualizing Europeanization as a public law of collisions: comitology, agencies and an interactive public adjudication", in Herwig C. Hofmann and Alexander Türk (eds), *EU Administrative Governance* (2006), pp. 512, 528 *et sqq*.

81 Christian Joerges, "'Deliberative Political Processes' Revisited: What Have we Learnt about the Legitimacy of Supranational Decision-Making", 44 *Journal of Common Market Studies* (2006), pp. 779, 781.

82 Christian Joerges, "'Deliberative Political Processes'" Revisited", *supra* note 81, pp. 779, 795; Jürgen Neyer, "Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance", 41 *Journal of Common Market Studies* (2003), pp. 687 *et sqq*.

83 Charles F. Sabel and Jonathan Zeitlin, "Learning from Difference", *supra* note 9, pp. 271, 272.

84 *Ibid.*, pp. 271, 284.

85 *Ibid.*, pp. 271, 276.

86 *Ibid.*, pp. 271, 279–280.

87 *Ibid.*, pp. 271, 280.

If applied to EU agencies, however, these broad claims must confront several challenges that undermine much of the power of the argument. There are at least two major objections to be raised. First, even though the opacity of the comitology process[88] is less of a problem in the context of EU agencies,[89] the deliberative quality of the Committees that advise agencies is limited. Most importantly, the discourse is by and large limited to the circle of technical or sectoral experts who belong to the particular "epistemic community". There is no communicative link to the general public.[90] Thus, the novel organizational structure of the EU agencies lacks essential features of democratic processes as conceptualized in modern political theory. For example, the concept of democratic public discourse understands public and deliberative discourses as necessarily interconnected features of democratic governance.[91] Accordingly, institutions of representative democracy do depend on both administrative input and implementation, as well as forums for the general public to articulate "public opinion" and a citizenry that is not determined or constrained by particular decision-centered procedures. This open-ended "weak public" is lacking in the case of scientific and technical committees attached to EU agencies.[92]

Second, the procedural position of Member State representatives in the agencies' management boards and various committees is mostly of a reactive rather than a pro-active nature.[93] Usually, the agenda-setting power lies with the agency itself rather than the national representatives concern. Member States are all too often limited to the exercise of ex post-controls. This mechanism resembles other structures of institutional interaction in the multi-level system of European governance. For example, European law scholarship identifies a "communication gap" in the procedural structure of comitology in the context of the regulatory responsibilities of the Commission.[94] In the European legislative process, the persistent dominance of the Commission and the Council over the European Parliament, which still lacks the power to initiate legislation, is one of the main aspects of the notorious "democratic deficit" of European integration.[95] Similarly, the reactive nature of Member State participation in EU agency administration significantly limits the democratic quality of this procedure. Political theory suggests that the democratic quality of political rationalization procedures depends ultimately upon a link to democratic will-formation that is expressed not only through ex post control over political power but also "more or less programs it as well".[96]

However, the finding of a limited democratic potential of the networked accountability environment of EU agencies does not constitute an argument against supranational administration through agencies as such. Rather, it supports a functional conception of agency administration that relies on the qualitative advantage of agencies in areas of technical and scientific complexity,[97] without neglecting the political dimensions of economic regulation.[98] EU agencies could derive institutional legitimacy from the duality of the responsibility taken on by European political institutions through the actual creation of each agency and the development of networked accountability structures, guaranteed particularly through Member State oversight.

88 Renaud Dehousse, "Comitology: Who Watches the Watchmen?", 10 *Journal of European Public Policy* (2003), pp. 798 *et sqq.*; J.H.H. Weiler, "Epilogue: 'Comitology' as Revolution – Infranationalism, Constitutionalism and Democracy, in Christian Joerges and Ellen Vos (eds), *EU Committees: Social Regulation, Law and Politics* (1999), pp. 339, 347–349.

89 For example, the EASA publishes a list of the members of the consulting Committees on its homepage as well as the minutes of the regular meetings, see <http://www.easa.europa.eu/ws_prod/r/r_cb_sscc.php> and <http://www.easa.europa.eu/ws_prod/r/r_cb_agna.php> (last accessed on 4 April 2009).

90 Stijn Smismans, "New Modes of Governance and the Participatory Myth", 31 West European Politics (2008), pp. 874 *et sqq.*

91 Jürgen Habermas (W. Rehg, translator), *Between Facts and Norms* (1997), pp. 304, 306 *et sqq.*

92 Jürgen Habermas, *Between Facts and Norms*, *supra* note 91, p. 306; for the term Habermas (*ibid.*) refers to the distinction of "strong" and "weak" publics by Nancy Fraser, "Rethinking the Public Sphere", in Craig Calhoun (ed.), *Habermas and the Public Sphere* (1992), pp. 109 *et sqq.*

93 *Supra* IV.2.

94 Manuel Szapiro, "Comitology: The ongoing reform", *supra* note 10, pp. 89, 93 *et sqq.*

95 Instead of many, Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (1999), pp. 6 *et sqq.*; Robert A. Dahl, "Can international organizations be democratic?", in Ian Shapiro and Casiano Hacker-Corón (eds), *Democracy's Edges* (1999), pp. 19 *et sqq.*

96 Jürgen Habermas, *Between Facts and Norms*, *supra* note 91, p. 300.

97 Giandomenico Majone, *Regulating Europe* (1996), pp. 15 *et sqq.*; *id.*, "Delegation of Regulatory Powers in a Mixed Policy", 8 *European Law Journal* (2002), pp. 319, 331–336.

98 Paul Craig, *EU Administrative Law*, *supra* note 13, p. 188.