

RECON Online Working Paper 2009/12

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RECON Online Working Paper 2009/12
November 2009

URL: www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html

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RECON Online Working Paper Series | ISSN 1504-6907

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Issued by ARENA
Centre for European Studies
University of Oslo
P.O.Box 1143 Blindern | 0317 Oslo | Norway
Tel: +47 22 85 87 00 | Fax +47 22 85 87 10
www.arena.uio.no

Abstract

In this working paper we explore the independence of European Union (EU) agencies from an institutionalist perspective. Drawing on Principal Agent-theory, we first offer a definition of formal independence of EU agencies. Having specified the concept of formal independence, the second part provides an operationalisation of the concept, which captures the agencies' mandate as well as different mechanisms of ex ante and ex post control. Thirdly, we employ our operationalization of agency independence and apply it empirically to twenty-nine EU agencies. For this purpose we present an index to assess the degree of independence of the different EU agencies. In the last section we relate our discussion on agencies' independence to different conceptualizations of accountability.

Keywords

Agency Theory - Council of Ministers - European Agencies - European Commission - Institutionalism

Introduction

The rapid proliferation of EU agencies in the past decades marks a rather novel institutional development in the EU's executive order and has been readily espoused by EU scholars. The creation of EU agencies is considered part and parcel of the formation and reform of 'executive satellites' (Curtin and Egeberg 2008) in the EU, which have been created in the orbits of the Commission and the Council Secretariat. Part of the current research agenda on EU agencies is to reveal the causes for the remarkable growth of agencies over the past two decades. Based primarily on case studies and comparative case analyses, the literature addresses structural factors as well as factors relating to the nature and development of inter-institutional politics in the EU. With regard to the former, the EU's *agencification* reflects a trend, which has unfolded in national political systems in Western Europe and other regions of the world (Christensen and Lægveid 2005; Gilardi 2008: 107-8; Elgie and McMenamin 2005). The remarkable growth of agencies throughout the industrialised world can be seen as part of a broader shift towards 'regulatory capitalism' (Levi-Faur and Jordana 2005). Others argue that the nature of inter-institutional politics has played an important role in the creation of new agencies at the EU level. Dan Kelemen has claimed, for instance, that the wave of agency creation in the EU in the 1990s was a response to the Commission's demand to extend its regulatory activities. With the Commission being under close scrutiny by Euro-sceptics, the member states were reluctant to expand its size and budget so that the Commission 'turned to the idea of establishing independent agencies' while, at the same time, it 'could expand the Community's governing capacity [...] [and] 'off-load' some highly technical, labour- and resource intensive activities' (Kelemen 2002: 101).

In the past years, another theme has gained prominence in research on EU agencies: Most founding acts of EU agencies demand that these agencies shall operate at arms' length from the Commission and the Council. Hence, agency independence has been heralded as a solution to overcome 'petty politics' which eschews credible and efficient regulatory policy-making (Majone 1997, 2000). Yet, it is precisely the discretionary nature of the EU agencies, which has spurred debates about agency control and accountability among academics and policy-makers alike (see, e.g. Curtin 2005; Busuioc 2009). This debate, as Busuioc (2009) aptly remarks, points to a dilemma: While agency independence is seen as a precondition to ensure credibility of regulatory policy commitments on behalf of elected policy-makers, attempts to hold agencies at bay by establishing oversight mechanisms threaten to jeopardise the agency's independence and thus 'defeat the very purpose for which they were created' (Busuioc 2009: 601). This argument, however, rests on the assumption that EU agencies are actually *independent*, i.e. that they can act autonomously from their principals, the Commission and the Council and sometimes the European Parliament (EP). This assumption is voiced by Martin Shapiro who claims that 'EU independent agencies are independent in the sense of being relatively free of control by any of the other organs of the Community' (Shapiro 1997: 289).

This assumption of agency independence is problematic for three reasons. The first problem is conceptual. What is captured by the term independence? What is implied if we claim that an agency can operate at arm's length from the Commission, the Council and EP? Is it legal (*de jure*) independence or behavioural (*de facto*) independence that we should take into account when assessing agency independence? The first task of this working paper is thus to cut through the clutter of concepts and

definitions. This is an important task since future empirical research benefits from such conceptual clarifications: It renders transparent the intension as well as the extension of the concept and offers guidance for the operationalisation of these concepts (see Sartori 1970; Wonka 2007). The latter task points at the second problem in the existing literature: Given the plethora of meanings and definitions of the independence-concept, the task of operationalisation appears daunting. In the second part of the working paper, we therefore offer an operationalisation of the concept of agency-independence. The third problem that arises from the assumption of agency independence is directly related to the first and second problems. Not only do scholars mean different things when they talk and write about agency independence; empirical research on agency independence is often carried out with different concepts and operationalisations in mind (and on paper). This makes it difficult to evaluate and compare the assessments and findings. Our third task is thus to employ our operationalisation of agency independence and apply it empirically to twenty-nine EU agencies. For this purpose we construct an index to assess the degrees of independence of the different EU agencies.

Concept specification: What is agency independence?

When authors refer to agency independence there are at least two analytically different ways to conceptualise agency independence. First, scholars may employ the term to denote what Busuioc (2009: 602) refers to as formal or legal independence of EU agencies. Agency independence can thus be defined as the formal institutional separation of the agency from the Commission and Council, which is legally enacted and mirrored in the agencies founding act. One criticism voiced against this definition holds that legal independence is not the same as an agency's de facto independence: 'While European agencies are [...] *legally separate* institutions from the Council and the Commission, it does not necessarily follow that agencies are *independent* from these bodies and able to exercise decision-making autonomy within their mandate' (Busuioc 2009: 604). This perspective is supported by empirical research on agencies from the domestic as well as the EU context, which warns against overestimating the effect of formal independence on agencies' ability to act autonomously (see, for example, Thatcher 2002; Gehring and Krapohl 2007). We agree that agency behaviour cannot be fully deduced from formal institutional design – we also know of no theory which would advance such a stark claim. Yet, we contend that in order to assess the relationship between formal institutional design and agency behaviour in the post-delegation phase, it is necessary to have a common point of reference. Otherwise it may be difficult to tell whether differences in scholars' assessments of agencies de facto independence result from differences in measuring their formal independence or from alternative factors.

This paper is thus concerned with agencies' formal or de jure independence. In order to clarify what this term entails we turn to principal agent (PA) theory. PA theory is a rationalist variant of the institutionalist literature whose basic reasoning is functionalist: Political principals delegate some tasks and competencies to an agent, in our case EU agencies, and the institutional design reflects the purposes and functions intended by the principals at the time of delegation. As EU agencies are established through EU secondary law, their principals are the EU's legislative institutions, the European Commission, the Council and, depending on the legislative procedure

under which the legislation establishing an agency is adopted, occasionally also the European Parliament.¹

At the centre of PA theory is the relation between a principal and an agent. Principals delegate competencies to an agent so that the agent can help the principal to solve certain collective action problems, such as agenda-setting or to overcoming credible commitment problems. Moreover, delegation may also be an instrument for principals to shift blame and to compensate for their own lack of resources, such as time and expertise (see Pollack 1997; Tallberg 2002). Principal-agent relationships are considered to be inherently problematic because of asymmetric information, which finds expression in the concepts of *adverse selection* and *moral hazard*: Adverse selection describes a situation in which the principal does not know about the agent's 'true' intentions and capabilities and may select an agent which does not act in accordance with the principal's preferences. Moral hazard, in turn, describes a situation whereby the agent may have the opportunity to gain from acting contrary to the principal's interest. Again, asymmetric information is the crucial ingredient: The agent has more information about his or her intentions and actions than the principal and may thus have an incentive to not act according to the principal's preferences.² In the PA-literature, such behaviour is referred to as shirking. Thus, while it may be beneficial for the principal to create independent agents to enable them to fulfil their functions, adverse selection and moral hazard stand in the way of delegation being effective (at least from the perspective of the principal). Hence, principals create a set of control mechanisms, which involve instruments to monitor or sanction the agent, to hold him 'at bay'. In this context, the PA literature distinguishes between *ex ante* and *ex post* control mechanisms. Procedural or administrative requirements specifying the agent's tasks, mandate and the rules through which agents are selected are among the range of *ex ante* control mechanisms. *Ex post* controls are oversight mechanisms, destined to monitor and, if necessary, sanction agents' behaviour. Oversight mechanisms range from public hearings, reporting requirements, investigations, budget reviews to sanctions involving personnel decisions (see Lupia 2003).

The ensuing paragraphs offer a first taste of relevant control mechanisms applied to EU agencies. The rules of appointment, for instance, are important *ex ante control* mechanisms as they define which actors are allowed to select those who are in principle to be considered for a position in the administrative leadership or at staff level and who is eventually allowed to decide on the appointment. Both steps, the selection of potential candidates and the decision on the appointment of candidates, are important for the future work of EU agencies. The selection of candidates allows principals to screen candidates for qualities they consider important. Since principals expect agents to perform the functions which are delegated to them in line with their own preferences in the respective area, principals are expected to select candidates that share their own preferences (Kiewiet and McCubbins 1991; Lupia 2003). How much discretion they have in the screening process and the selection of preferred

¹ Table 2 indicates that only a minority of EU agencies have been established through the co-decision procedure, and hence with the European Parliament as veto player. The majority of agencies were established following a proposal of the European Commission and the decision by the member state governments in the Council.

² The literature differentiates between situations where an agent shirks by not taking the expected effort ('leisure shirking'), by acting not in line with the principals' preferences due to divergent preferences ('dissent shirking') or by directly obstructing the principals' delegation intentions ('sabotage') (see Brehm and Gates, 1997).

candidates again depends on the rules of appointment. In the design of an EU agency, principals are free to lay down specific criteria a candidate for a certain position has to fulfil. Thus, the legislation establishing an EU agency may demand that a candidate for the position of agency head needs to have specific qualifications and working experiences in the agency's field of activity. While this still puts principals in the central position to select a candidate, they may be prevented from selecting a merited and loyal party member and instead select a specialist, of course, possibly also from their partisan ranks. The exact rules of appointment, that is the rules on which actors have the right to propose candidates and finally decide on their appointment, in the end decide on whose criteria of appropriate qualifications and qualities will prevail and thus who will for the time being decisively shape agencies' substantive work. Finally, rules of appointment also define the lengths of terms and conditions under which personnel can be replaced. These rules are important in case the appointed office holders do not behave as expected by the principals as they determine whether and how they can be replaced.

What about *ex post control* (oversight) mechanisms? Decision-making rules in EU agencies are important from the perspective of the principals (i.e. institutional designers of EU agencies) as the specification of these rules allow them to determine the degree to which the agency personnel is obliged to transparency during the formulation process of a policy, both internally as well as vis-à-vis principals and interested third parties, and which actors finally decide on standards, admissions, proposals or reports to be issued (McCubbins et al. 1987; McCubbins and Schwartz 1984). Thus, internal transparency in the formulation phase of an agency decision can be institutionally enforced by obliging those involved in the formulation of a decision at any hierarchical level to regularly inform either their superiors or other agency units at the same hierarchical level on the content and progress of a decision. Transparency vis-à-vis interested third parties such as firms and interest groups but also the principals themselves can be established through consultation requirements, which agencies might have to fulfil when formulating a decision. In addition, principals might install a rival agency to enhance the external transparency of an agency's action (Lupia and McCubbins 2000). Both types of information and consultation requirements, internal and external, serve the same purpose: they allow those actors not directly involved in the process to follow the progress and content of a decision at relatively little effort. The designing of an agency's rules of decision-making thus allow principals to address the problem of information asymmetry which, as we argued above, is inherent in any principal-agent relationship. Yet, when being informed during the process of formulating a particular decision, principals might interfere before a decision is taken. However, following these processes might still cost principals considerable time and resources. Principals' efforts might therefore be significantly reduced, if agencies are obliged to engage in external consultation during the formulation phase and interested third parties such as firms and interested groups can then raise their concerns vis-à-vis the principals who can then decide whether to intervene or not. This latter decision will most likely be strongly affected by the political importance they attribute to the respective constituent.

Before empirically assessing EU agencies' formal independence, we can now offer an operational definition of formal independence: Following Thatcher and Stone Sweet (2002: 5) an agency's formal independence is defined as the sum of delegated powers granted by the principal, i.e. the Council and the Commission (and, if applicable, the

EP) to the agency minus the sum of control instruments (ex ante and ex post controls), which the principals employ to constrain the actions of the agent.

Operationalisation: How do we know an independent agency when we see one?

To empirically assess EU agencies' formal independence we constructed an index, which takes due account of the different types of control mechanisms presented in the previous section (see Table 1 below). In the construction of our index we heavily drew on Fabrizio Gilardi's independence index for national agencies (Gilardi 2008: 140-3). Building our efforts to construct an index on an existing one has a number of advantages: First, from the conceptual and theoretical perspective adopted in this paper, Gilardi's index captures the most important aspects of agencies' formal independence. This is hardly surprising, given that Gilardi also draws on PA theory. Second, building on another index should increase readers' confidence in our index as our choice of variables included in the construction of the index is not susceptible to bias. Third, the results of employing comparable indices should also be broadly comparable. Of course, any comparison of EU agencies to national agencies must bear in mind differences in the institutional make-up and the politics within and between the member states and the EU.

With a view to the construction of the index and the interpretation of the results, we want to re-emphasise the point that our index exclusively captures formal independence and does hence not take into account ex post delegation behaviour of EU agencies' staff. Thus, we do not claim to be able to tell the 'whole story' about the independence of EU agencies. Yet, we do think that our independence index will make future discussion on EU agencies' independence and their influence on EU policy-making more transparent and comprehensible by analytically and empirically separating institutional from behavioural factors.

Our empirical analysis includes all 29 EU agencies currently operating in the EU's first pillar (23 agencies), the second pillar (3 agencies), and the third pillar (3 agencies) (for a complete list of the EU agencies included in our analysis, see Table 1). Excluded from our empirical analysis are those agencies which are established only for a fixed period of time in order to manage and support the implementation of a particular EU programme. By restricting our sample to the EU's permanent agencies we hope to secure as much comparability of our units of analysis as possible. The empirical information on EU agencies' formal independence was derived from the secondary legislation establishing these agencies (since all EU agencies are established through secondary legislation). In some cases, this legislation has been amended. In our coding, we took account of these amendments up until December 2008 so that our independence index reflects EU agencies' formal independence as of that date.

Our index consists of four analytically distinct components (A1 – A4): first, the formal mandate of an agency (A1); second, the rules of appointment for the agency's head and the terms of office (A2); third, the rules on an agency's management board appointment and its terms of office (A3); fourth, the rules on the agency's internal organisation and decision-making (A4). With the exception of the first component, each component is sub-divided into a number of variables (cf. Table 1). Our index is additive and each of the four components has the same weight. To calculate each

agency's formal independence we add the values of the variables of each component and divide it by the number variables in each component. Afterwards we add the mean values for each component and divide it by four. Given that our variable values vary between 0 and 1, our index also varies from 0 to 1, where '1' means 'maximum independence' and '0' no independence at all. Please note that our first component, agency's formal mandate, consists of one variable only. The weight of this variable is thus greater than that of the individual variables that went into the other components. Attaching such weight to this (one) variable can be justified on the basis that the formal mandate is a central factor in measuring an agency's formal independence: In section II, we defined formal independence as the sum of delegated powers granted by the principal to the agency minus the sum of control instruments (ex ante and ex post controls), which the principals employ to constrain the actions of the agent. The mandate of an agency, which is captured by A1, is hence the central variable to capture an agency's delegated powers.

Taking a closer look at the agency's formal mandate-variable (V1), we distinguish between agencies that are competent to take binding decisions and those that cannot. Binding decisions may, for example, relate to the definition of specific technical standards and the authorisation of specific products. Agencies with the authority to take binding decisions are distinguished from agencies which are involved in the preparation of regulation in specific areas and agencies whose competencies are restricted to information gathering and dissemination or the implementation of particular EU programmes and regimes (Kreher 1997; Yataganas 2001; Kelemen 2005). Obviously, the former category of agencies, i.e. those involved in taking binding decisions and policy-making, has a greater potential to influence policy-making than those agencies whose competencies are restricted to informational tasks and the execution of policies. Thus, when designing these agencies, the European Commission, the European Parliament and the governments in the Council face the important question with which of these competencies they want to endow an agency.

The second component of index (A2) captures the rules of appointment for the agency head (AH) and the AH's terms of office. This component of the index consists of eight variables, which cover the length of AHs' term of office (V2), the actors selecting and appointing the AH (V3) and the appointment quorum (V4) as well as the rules for an AH's dismissal (V5). These variables enable us to capture the actors involved in choosing the AH as well as the procedures applied to select the AH. In the logic of PA theory, the selection of particular candidates is important since it has an influence on the professional characteristics and the basic policy outlook of the person heading the agency administratively (Kiewiet and McCubbins 1991: 27-31; Lupia 2003: 45-8). In conceptual terms, the appointment process thus relates to a set of *ex ante* control mechanisms and is considered to be the most powerful 'before the fact political weapon' for principals to control their agents (Shepsle and Bonchek 1997: 366). The more involved an agency's management board is in the selection of the AH, the longer an AH's term of office and the more restricted the principals' ability to replace the AH, the more independent is the AH. Further adding to an AH's relative independence are restrictions with a view to holding other offices (V6), restrictions on reappointment (V7), whether the independence of the AH is formally stated (V8) and whether the AH needs to hold particular qualifications (V9). Ruling out reappointment should enhance an AH's independence, as should the formal requirement for independence and the demand for specific qualifications as all these factors constrain the 'selectorate' in reigning in the agency's conduct of affairs.

Our third index-component (A3), which captures the appointment of the members of the management board of EU agencies, is constructed analogous to the second component. Members of EU agencies management boards are individually appointed by the member state governments (acting via the Council), the Commission, the EP and, in a few cases, third parties. Thus, no collective decision is taken on the appointment of management board members. We therefore did not include a variable on the appointment quorum, as was the case for the AH.

The fourth component (A4) captures EU agencies' reporting and consultation requirements as well as agencies' capacity to autonomously decide on its actions and internal organisation. Conceptually, this component comprises both *ex ante* control mechanisms (such as procedural controls about how agencies should go about their affairs) as well as *ex post* control mechanisms. V17, which captures whether agency's independence as institution is formally stated in its founding legislation, as well as V18 (prospective reporting requirements) belong to the former category, V19 belongs to the latter (*ex post* controls) as it captures retrospective reporting requirements. These requirements make it easier for third actors to follow an agency's activities by reducing the costs of obtaining such information. While V18 and V19 capture annual reporting requirements, V22 (an agency's external consultation practice) follows the same theoretical reasoning, i.e. reducing the information costs for third actors thereby reducing the danger of information asymmetries with respect to individual decisions taken by the agency (McCubbins and Schwartz 1984; McCubbins et al. 1987). V20 refers to agency's competence in a given field and captures whether this competence is of exclusive character or has to be shared with other institutions thereby affecting an agency's room for manoeuvre. Conceptually, this variable can be subsumed under the *ex ante* controls established by the principals. V23 and V24 are classical oversight mechanisms as they capture whether an agency's decision can be overturned and by whom. The logic here is that agencies are most independent if no other institutions can appeal and overturn their decisions (V24). Empirically speaking, this is never the case. We therefore take it as a sign of independence if EU agencies have their own appeal boards (V23), which allows them to deal with potential conflicts themselves and reduces the likelihood of external intervention. Variables 25 and 26 are procedural (*ex ante*) controls capturing whether EU agencies can decide autonomously on their internal organisation (V25) and recruit their own permanent staff (V26). Finally, variable 27 captures EU agencies' relative resource dependencies. Agencies which are resource independent (because they can finance themselves through levies) are considered more independent than agencies which fully depend on the Commission, the Council and occasionally the EP for their financial endowments.

A general note on the conceptualisation of the relationship between EU agencies and their political principals is due. We have already stated above that all EU agencies are established through secondary EU legislation. Consequently, EU agencies have three possible political principals, namely the European Commission, the member states in the Council and, in the case that an agency is established through the co-decision procedure, the EP. We treat these three institutions as unitary actors. Moreover, the relationship with any of these institutions with an EU agency is attributed equal weight. Thus, we do not assume that a formal tie with the Council makes an agency less independent than a formal tie with the Commission. As has been shown above, the 'ties' accounted for by our index are agencies' obligations to consult with the Commission, member state governments and the EP (V21, V24, V25, V26) when taking policy or organisational decision or agencies' long term reporting requirements

(V18, V19). Yet, if all three possible political principals have a say in a specific aspect, as for example in the appointment of the members of the management board (V11), we judge these multiple 'ties' not to decrease but instead to increase EU agencies' independence. The reasoning behind this argument is the 'problem of many hands': If an agency is accountable to multiple principals, this tends to increase an agency's political room for manoeuvre, enabling the agency to play principals with diverging preferences off against each other. Moreover, multiple principals might have greater difficulties to agree on the change of an agency's legal basis and its resources than an individual (unitary) principal (Scharpf 1988; Tsebelis 2002; Pollack 2003: 40, 43-5).

Table 2, rightmost column, presents the independence scores for the 29 EU agencies covered by our index. Moreover, the table provides information on the EU pillar in which an agency is located, its year of establishment, the size of its staff and budget, the number of representatives the EU legislative institutions can appoint to agencies' management boards, their task³ and, finally, whether the EP has been involved in the establishment of the respective agency. As far as agencies' relative independence is concerned, we see considerable variation between the twenty-nine agencies. The least formally independent agencies are, according to our index, the European Agency for Safety and Health at Work (EU-OSHA) and the European Environment Agency (EEA). Both have an independence score of 0.21. The European Chemicals Agency (ECHA) with an independence score of 0.62 and the European Training Foundation (ETF) scoring 0.64, on the other hand, are the most formally independent EU agencies. Yet, the maximum score of 0.64 shows that EU agencies independence is considerably restricted. All agencies are under control through considerable institutional checks.

Table 2 also shows that the majority of regulatory agencies can be found among the more independent EU agencies. This particularly holds for those agencies involved in economic regulation (see Wonka and Rittberger forthcoming). Moreover, the more independent EU agencies all operate in the first pillar, i.e. in the European Community, whereas second and third pillar EU agencies all range among the less independent agencies. We interpreted this finding as an effort by EU legislators to lock-in certain policies given strong political uncertainty in first pillar decision-making, which is due to the fact that legislative coalitions in the Council show little stability along ideological lines and only moderate stability among regional lines (see Wonka and Rittberger forthcoming). Thus, legislators who want to make sure at point 't' that their preferred policy will be in place at 't+1' are inclined to establish an independent agency. Another interesting institutional feature of EU agencies is the distribution of management board members from different institutions. Except for three agencies (EDA, 'Fusion for Energy' and EFSA) each member state has a representative with voting rights on EU agencies' management boards. The number of Commission representatives with votes varies between zero and six and the EP has a representative on only a few agencies' management boards and a formal vote on only three (ECHA, ECDC and EMEA). This seems to confirm earlier studies which found that EU governments have an important role in directly controlling EU agencies' actions (Kelemen 2002). Yet, future research should probe into deliberations and decision-making inside EU agencies to explore to which extent and in what form

³ For this classification we relied on Yataganas (2001) and Kelemen (2005). Drawing on the classification in these studies reduces the likelihood of any additional bias introduced through our coding decisions. The analysis of the two authors covers all agencies established until 1999 and 2004. Their classification diverges for three agencies. For these and the more recently established agencies we decided on our own coding.

this strong representation of governments on EU agencies' management board affects agencies' internal decision-making processes.

Independence and accountability: What can we learn from the numbers?

In this working paper we have addressed the theme of the independence of EU agencies from the angle of a positive theory of delegation and control. We employed PA theory to establish an operational definition of agency independence and to conceptually guide the construction of an index in order to empirically assess the degree to which twenty-nine EU agencies are formally independent. By analysing agencies' formal independence, we explicitly studied agency independence in a narrow sense, excluding an analysis of their post-delegation behaviour. However, we hope that our measure of formal independence will serve as a reference point for other analyses on agency independence: We thus hope that research efforts and the results obtained will be rendered comparable; we also hope that this will induce researchers to adopt comparable measures when including the level of an agency's formal independence as an explanatory variable in research designs assessing the independence of agencies in a broader sense, including agencies' post-delegation behaviour.

Our paper has been mute on the relationship between agencies' formal independence and the broader theme about accountability, which is a central concern in normative analyses on the evolution and legitimacy of the EU's executive order. In assessing the formal independence of EU agencies we have to be very careful when making claims that relate formal independence to accountability. Even though our conceptualisation of formal independence captures the variegated nature of controls instituted to hold the agency at bay, the relationship between control and accountability is viewed differently in the literature. While there is a multitude of definitions of accountability, control plays a prominent role in many conceptualisations of the term (see, e.g., Lupia 2003; Bovens 2007). According to Lupia, an 'agent is accountable to a principal if the principal can exercise control over the agent and delegation is not accountable if the principal is unable to exercise control. If a principal in situation A exerts more control than a principal in situation B, then accountability is greater in situation A than it is in situation B.' (Lupia 2003: 35) In the PA-model adopted in this paper, the purpose of instituting control mechanisms in the founding statutes of EU agencies is to minimise agency loss. In this vein, we argued that principals enact *ex ante* and *ex post* mechanisms to control the agent so as to learn about her actions before she acts (thereby addressing the adverse selection problem), and to learn about the agent's actions after the fact respectively (thereby addressing moral hazard problems) (see Lupia 2003: 45). Our index of independence captures the degree to which principals can exercise formal control over the agents: The higher the independence score of agency is, the less restrictive the institutionally specified *ex ante* and *ex post* control mechanisms are. Conversely, the lower the independent the score, the more restrictive *ex ante* and *ex post* accountability mechanisms. In another paper (Wonka and Rittberger forthcoming), we discuss and test different explanations about why principals opt for these differences in agencies' institutional design.

Bovens takes issue with Lupia's definition of accountability. Both acknowledge that what is constitutive of accountability is the social relationship between a principal and

an agent. Accountability is 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.' (Bovens 2007: 450) The difference between Lupia's and Bovens's conceptualisations of accountability rests primarily in the difference in the relationship between accountability and ex ante and ex post control mechanisms. While accountability in Lupia's conceptualisation comprises both ex ante and ex post controls, Bovens argues that 'not all forms of control are accountability mechanisms' (Bovens 2007: 454) for especially ex ante control mechanisms lack the 'procedures in which actors are to *explain* and *justify* their conduct to forums.' (Bovens 2007: 454, emphasis added; see also Busuioc 2009) The social relationship between principal and agent is thus characterised not only by the aspiration of the former to obtain information from the latter to prevent agency loss, as is argued in standard PA-accounts, but also in the agent being compelled to explain and justify her conduct to a 'forum', which can pass its judgement on the agent's conduct. The justification aspect of accountability is captured by a number of variables in the fourth component of our index (V18, V19, V22-24, see also Table 1).

What are the implications of these two different conceptualisations of accountability from a democracy theoretic perspective? Adopting the PA-inspired perspective of accountability, ex ante and ex post control mechanisms serve their democratic purpose of controlling politicians and public officials when these accountability mechanisms minimise agency losses: Ex ante and ex post controls provide the principals at every link in the chain of delegation – i.e. voters, elected representatives, cabinet ministers – with important information about the intentions and conduct of their respective agents. If deemed necessary, i.e. if the agent departs too far from the policy preferences of the principals, sanctions will be imposed onto the agents – by vote, dismissal from office, etc. – so as to signal disapproval with their conduct. This conception of accountability is at the heart of liberal theories of democracy: For citizens to prevent the abuse of state power and for government to pursue policies 'commensurate with citizens' interests as a whole' (Held 1996: 99), institutional features to control and sanction political agents are of central importance: 'the governors must be held accountable to the governed through political mechanisms ... which give citizens satisfactory means for choosing, authorising and controlling political decisions.' (Held 1996: 88-9)

Once we depart from the control-perspective of accountability, accountability mechanisms may serve an additional purpose from a democracy theoretic perspective: Mechanisms demanding agents to explain and justify their conduct and procedures enabling political, legal, administrative, professional or societal 'fora' to pass judgement (see Bovens 2007), add to legitimacy of democratic governance in ways that are better captured by deliberative theories of democracy (see, e.g. Habermas 1994; Fossum and Eriksen 2003). The focus on communicative processes in deliberative theories of democracy implies that the democratic quality of governance is not assessed by solely focussing on the parliamentary arena, or political-administrative actors and courts, 'but also on the possibility for wielding influence via institutions of civil society – press media, non-governmental organisations – and the possibility of participation in opinion formation and the shaping and channelling of communicative power into the institutional complex' of political decision systems (Eriksen and Fossum 2000: 21). It comes to little surprise then that researchers have come to focus increasingly on concepts such as the public sphere and civil society and their contribution to the democratic legitimacy of the EU in both normative and

empirical terms (see Neyer 2006 for an overview). Bovens points at the implications of such a perspective for the legitimising potential of accountability procedures in the following way: 'Processes of accountability in which administrators are given the opportunity to explain and justify their intentions, and in which citizens and interest groups can pose questions and offer their opinion, can promote acceptance of government authority and the citizens' confidence in the government's administration.' (Bovens 2007: 464)

Future research which intends to address the adequacy of accountability mechanisms of the EU's administrative order in general (see Curtin and Egeberg 2008), and of EU agencies in particular (see Busuioc 2009), can benefit substantially by taking into account the results of 'positive' analyses of agencies' independence and control features: Do different levels of formal independence influence the effectiveness of accountability arrangements with a view to ensuring popular control, preventing abuses of power, effective policy-making or enhancing the legitimacy of governance (see Bovens 2007: 462-4)?

Table 1: Index 'Formal-institutional independence of EU-Agencies'

Variable	Content	Values
A1: Formal mandate of agency		
V1	Competence EU-Agency	1,00 = taking binding decisions 0,50 = preparing proposals for decisions 0,00 = issuing opinions and information
A2: Appointment 1: Agency Head (AH)		
V2	Term of agency head (AH)	1,00 = over 8 years 0,80 = 6 to 8 years 0,60 = 4 to 6 years 0,40 = 2 to 4 years 0,20 = 0 to 2 years 0,00 = no fixed term
V3	Selectorate/appointees of AH	1,00 = members of management board select and appoint agency head 0,67 = members of management board select AH; governments and/or Commission and/or EP appoints AH 0,33 = governments and/or Commission and/or EP selects candidates; management board appoints agency head 0,00 = governments and/or Commission and/or EP select and appoint agency head
V4	Quorum appointment AH	1,00 = simple majority 0,50 = qualified majority of 2/3 majority 0,00 = unanimity
V5	Rules for AH dismissal	1,00 = dismissal impossible 0,67 = dismissal possible for reasons not related to policy (fraud etc.) 0,33 = dismissal possible; no specific reasons explicated 0,00 = dismissal at appointers' discretion
V6	Other offices AH	1,00 = explicitly ruled out 0,50 = only with permission of appointees 0,00 = yes (no specific provision)
V7	Reappointment of AH	1,00 = no 0,50 = yes, once 0,00 = yes, more than once
V8	(Formal) AH independence	1,00 = yes, <i>formal</i> requirement 0,00 = no <i>formal</i> requirement
V9	Formal requirement for AH qualification	1,00 = yes 0,00 = no

A3: Appointment 2: Members of the Management Board (MMB)

V10	Term of office MMB	1,00 = over 8 years 0,80 = 6 to 8 years 0,60 = 4 to 6 years 0,40 = 2 to 4 years 0,20 = 0 to 2 years 0,00 = no fixed term
V11	Selectorate/appointees of MMB	1,00 = governments and Commission and EP 0,50 = governments and Commission or EP 0,00 = governments or Commission or EP
V12	Rules for MMB dismissal	1,00 = dismissal impossible 0,67 = dismissal possible for reasons not related to policy (fraud etc.) 0,33 = no specific provisions for dismissal 0,00 = dismissal possible at appointers' discretion
V13	Other offices MMB	1,00 = no other offices 0,50 = only with permission of appointees 0,00 = yes (no specific provision)
V14	Reappointment of MMB	1,00 = no 0,50 = yes, once 0,00 = yes, more than once
V15	(Formal) MMB independence	1,00 = yes, formal requirement 0,50 = yes, but not all 0,00 = no formal requirement
V16	Formal requirement MMB qualification	1,00 = yes 0,50 = yes, but not all 0,00 = no

A4: Regulations on agencies' (internal) decision-making

V17	Formal independence of agency	1,00 = agency's independence formally stated 0,00 = no, agency's independence not formally stated
V18	Agency's formal reporting obligations – annual reports (retrospective)	1,00 = no formal reporting obligations 0,50 = presentation of annual report – for information 0,00 = presentation of annual report – for approval
V19	Agency's formal reporting obligations – annual working programme (prospective)	1,00 = no formal reporting obligations 0,50 = presentation of annual working programme – for information 0,00 = presentation of annual working programme – for approval

V20	'Exclusiveness' of agency's competencies in its field of responsibility	1,00 = agency exclusive competencies 0,67 = agency and another independent agency 0,33 = agency and/or Commission/EP/Council 0,00 = agency has only consultative competencies
V21	Agency discretion to decide on activities	1,00 = agency decides autonomously on when to act 0,50 = Governments, Commission and EP can agency ask to act 0,00 = Governments, Commission and EP can commit agency to act
V22	Agency's external consultation practice	1,00 = no consultation obligations laid down in agency statute 0,75 = agency must consult external private actors after it has decided on a proposal 0,50 = agency consults external actors after it drafted a proposal and before it decides 0,25 = agency consults external actors during the preparation of proposals 0,00 = agency consults external actors before it drafts its proposals
V23	Agency appeals board	1,00 = agency does have an appeals board 0,00 = agency does not have an appeals board
V24	Competent bodies to appeal agency decisions	1,00 = no body 0,80 = agency's own appeals board 0,60 = another agency (EU or domestic) 0,40 = court (EU and/or national) 0,20 = governments and/or Commission and/or EP – with qualifications 0,00 = governments and/or Commission and/or EP – without qualifications
V25	Competence to design agency's internal organisation	1,00 = agency (management board + agency head) 0,50 = agency + governments, Commission and EP 0,00 = governments, Commission and EP
V26	Recruitment of agency's permanent staff	1,00 = agency (MMB) 0,50 = agency (MMB) and governments and/or Commission and/or EP 0,00 = management board – on proposal of governments and/or Commission and/or EP
V27	Resource dependency of agency	1,00 = agency levies fees for its services and exclusively finances itself with these 0,67 = agency is run on mixed financial resources (EU budget, member state contributions, fees) 0,33 = agency is run on the EU's (yearly) budget plan 0,00 = agency is run on a budget which needs to be approved by governments and/or Commission and/or EP on a yearly basis

Table 2: EU Agencies – pillar, establishment, budget, staff and formal-institutional independence

Nr.	Agency Name	Pillar	Year*	EP involvement	Independence Score**
1	European Agency for Safety and Health at Work (EU-OSHA)	1	1994	No	0.21
2	European Environment Agency (EEA)	1	1990	Yes	0.21
3	European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)	1	2006	Yes	0.23
4	European Police Office (EUROPOL)	3	2005	No	0.26
5	European Defence Agency (EDA)	2	2004	No	0.26
6	European Police College (CEPOL)	3	2002	No	0.29
7	Community Fisheries Control Agency (CFCA)	1	2005	No	0.31
8	The European Union's Judicial Cooperation Unit (EUROJUST)	3	2002	No	0.31
9	European Medicines Agency (EMA)	1	2004	Yes	0.33
10	European Union Satellite Centre (EUSC)	2	2001	No	0.34
11	European Network and Information Security Agency (ENISA)	1	2004	Yes	0.40
12	European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)	1	2004	No	0.45
13	European Centre for the Development of Vocational Training (Cedefop)	1	1975	No	0.45
14	European Union Institute for Security Studies (ISS)	2	2001	No	0.45
15	Translation Centre for the Bodies of the European Union (CdT)	1	1994	No	0.46
16	European Joint Undertaking for ITER and the Development of Fusion Energy (Fusion for Energy)	1	2007	No	0.49
17	European Fundamental Rights Agency (FRA) - previously EUMC	1	2007	No	0.49
18	Community Plant Variety Office (CPVO)	1	1994	No	0.50
19	European Agency for Reconstruction (EAR)	1	2000	No	0.51
20	European Railway Agency (ERA)	1	2004	Yes	0.51
21	European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)	1	1975	No	0.54
22	Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)	1	1993	No	0.54
23	European GNSS Supervisory Authority (GSA)	1	2004	No	0.56
24	European Maritime Safety Agency (EMSA)	1	2002	Yes	0.59
25	European Aviation Safety Agency (EASA)	1	2002	Yes	0.59
26	European Centre for Disease Prevention and Control (ECDC)	1	2004	Yes	0.60
27	European Food Safety Authority (EFSA)	1	2002	Yes	0.62
28	European Chemicals Agency (ECHA)	1	2006	Yes	0.62
29	European Training Foundation (ETF)	1	1990	No	0.64

Note: *: The date of establishment reports the 'year' in which the legislation establishing the agency was adopted as the basic institutional design decisions were taken at that time.

** : The independence index was calculated by adding the mean of the variables covering different aspects (A1 – A4) of agencies' formal-institutional design (cf. appendix 1; cf. also Gilardi, 2008), divided by four. The index can vary, in principle, between '0' (no independence) to '1' (fully independent).

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RECON is an Integrated Project financed by the European Commission's Sixth Framework Programme for Research, Priority 7 – Citizens and Governance in a Knowledge-based Society. Project No.: CIT4-CT-2006-028698.

Coordinator: ARENA – Centre for European Studies, University of Oslo.

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