

## Chapter I

# **Proceduralization of EU Agencies: Theory and Practice**

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## **1. The agencification of the EU executive power: discretion, delegation and procedures**

The delegation of regulatory powers to agencies is well established within nation states. In a complex society, in which public functions have expanded steadily, the delegation of highly technical tasks to non-majoritarian, professional bodies is increasingly common.<sup>1</sup> In the EU, although the first two agencies were set up in 1975,<sup>2</sup> the phenomenon gained momentum in the 1990s and especially in the new millennium, when agencies were seen as the best response to a number of crises.<sup>3</sup> Currently, thirty-seven agencies

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<sup>1</sup> For a comparative perspective on the rationales and the features of EU agencies and nation States' ones, M. SHAPIRO, *A comparison of US and European independent agencies*, in S. ACKERMAN-P. LINDSETH-B. EMERSON, *Comparative administrative law*, Edward Elgar, Cheltenham-Northampton, 2017, p. 234; P. CRAIG, *EU administrative law*, III edn., Oxford University Press, Oxford, 2018, pp. 150-5.

<sup>2</sup> Cedefop (European Centre for the Development of Vocational Training) was established with Regulation 337/75 of 10 February 1975, OJ 1975, L 39, and Eurofound (European Foundation for the Improvement of Living and Working Conditions) with Regulation (EEC) No. 1365/75 of 26 May 1975, OJ 1975, L 139/1.

<sup>3</sup> M. EVERSON-C. MONDA-E. VOS, *Eu Agencies In Between Institutions And Member*

can be counted,<sup>4</sup> to the extent that EU agencies constitute a solid element of the EU executive, and one of its defining features.<sup>5</sup>

EU agencies do not follow a single organisational model, although some common elements can be identified. They include an executive board, usually comprising one representative for each Member State (MS) and two members from the Commission. However, some agencies have smaller boards; in these cases, though, a broader body is also set up, so that the representation of all MS is ensured. As such, agencies work as an instrument of connection between MS and EU institutions and are a prime example of shared administration.<sup>6</sup>

From a functional perspective, the variety across agencies is even more extensive. EU agencies perform administrative tasks ranging from information gathering, to participation in decision-making, to enforcement. Their

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*States*, in ID. (eds.), *Eu Agencies In Between Institutions And Member States*, The Netherlands, Wolters Kluwer, 2014, pp. 3 ff.

<sup>4</sup>The agencies are: ACER (Agency for the Cooperation of Energy Regulators), BEREC (Body of European Regulators of Electronic Communications), CEPOL (European Union Agency for Law Enforcement Training), CPVO (Community Plant Variety Office), EASA (European Aviation Safety Agency), EASO (European Asylum Support Office), EBA (European Banking Authority), ECDC (European Centre for Disease Prevention and Control), ECHA (European Chemical Agency), EDA (European Defence Agency), EEA (European Environment Agency), EFCA (European Fisheries Control Agency), EFSA (European Food and Safety Authority), EIGE (European Institute for Gender Equality), EIOPA (European Insurance and Occupational Pensions Authority), ELA (European Labour Authority), EMA (European Medicines Agency), EMSA (European Maritime Safety Agency), EMCDDA (European Monitoring Centre for Drugs and Drug Addiction), ENISA (European Network and Information Security Agency), ERA (European Railway Agency), ESMA (European Securities and Markets Authority), ESRB (European Systemic Risk Board), ETF (European Training Foundation), EUIPO (European Union Intellectual Property Office), EU-LISA (European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice), EU-OSHA (European Agency for Safety and Health at Work), EUROFOUND (European Foundation for the Improvement of Living and Working Conditions), Eurojust, EUROPOL (European Police Office), FRA (European Union Agency for Fundamental Rights), Frontex (European Border and Coast Guard Agency), GSA (European GNSS Agency), SRB (Single Resolution Board), Translation Centre for the Bodies of the European Union (CdT).

<sup>5</sup>E. CHITI, *An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies*, in *Common Mkt. L.Rev.*, 2009, Vol. 46, Issue 5, pp. 1395 ff. For a different periodization in the evolution of agencies, see P. CRAIG, *EU Administrative Law*, cit., pp. 144-148.

<sup>6</sup>M. EVERSON-C. MONDA-E. VOS, *Eu Agencies In Between Institutions And Member States*, in ID. (eds.), *Eu Agencies In Between Institutions And Member States*, cit., p. 5.

areas of intervention range from chemicals to medicines to aviation to financial services.

The European Commission advocated a restructuring of the agencies as early as 2002.<sup>7</sup> However, due to the opposition of the Council, the EU institutions adopted a joint statement and a common approach on EU agencies only ten years later.<sup>8</sup> Albeit not legally binding, the 2012 common approach identifies shared principles for the structure, operation and governance of the agencies to be taken into account by EU institutions when taking decisions on agencies, also with the idea of guiding self reform process of the agencies.<sup>9</sup> The Treaties, instead, do not clearly provide a constitutional basis for the EU legislator to set up EU agencies, a choice that has been extensively criticized.<sup>10</sup>

Together with the growth in the significance of this phenomenon, a number of books<sup>11</sup> and journal articles<sup>12</sup> have been published. The Academic

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<sup>7</sup> EU Commission, Communication *The operating framework for the European Regulatory Agencies*, Brussels, 11 December 2002 COM(2002) 718 final. This approach is significantly different from the one adopted by the Commission later on: see EU Commission, Communication to the European Parliament and the Council – European agencies, *The way forward*, COM/2008/0135 final.

<sup>8</sup> Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralized agencies of 19 July 2012.

<sup>9</sup> EU Parliament, *EU Agencies, Common Approach and Parliamentary Scrutiny European Implementation Assessment*, 2018, prepared by Ellen Vos.

<sup>10</sup> M. EVERSON-C. MONDA-E. VOS, *What is the future of European agencies*, in ID. (eds.), *EU Agencies In Between Institutions And Member States*, cit., p. 231.

<sup>11</sup> The first comprehensive monograph on the topic is E. CHITI, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Cedam, Padova, 2002. Among the most recent volumes, see M. BUSUIOC-M. GROENLEER-J. TRONDAL (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making*, Manchester University Press, Manchester, 2012; M. BUSUIOC, *European Agencies: Law and Practices of Accountability*, Oxford University Press, Oxford, 2013; B. RITBERGER-A. WONKA (eds.), *Agency Governance in the EU*, Routledge, Abingdon, Oxon, and New York, 2012; M. SCHOLTEN, *The Political Accountability of EU Agencies: Learning from the US Experience*, Maastricht, 2014; J. ALBERTI, *Le agenzie dell'Unione Europea*, Giuffrè, Milano, 2018; M. SIMONCINI, *Administrative Regulation beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Hart Publishing, Oxford, 2018.

<sup>12</sup> Among the first contributions, see the 1997 Special Issue of the *Journal of European Public Policy* on European agencies, and in particular R. DEHOUSSE, *Regulation by Networks in the European Community: The Role of European Agencies*, in *J. Eur. Pub. Pol'y*, Vol. 4, Issue 2, 1997, pp. 246-261. Among more recent contributions, M. BUSUIOC, *Accountability, Control and Independence: The Case of European Agencies*, in *Eur. L.J.*, Vol. 15, Issue 5,

Research Network on Agencification of EU Executive Governance (TARN), established under the Erasmus plus programme, aims at promoting multi- and interdisciplinary research regarding the agencification of EU executive governance. This volume does not seek to address the many and pressing questions connected with EU agencies and agency-like bodies in a comprehensive way. Instead, its aim is to focus on one specific aspect – the procedures that these agencies have to follow (or bind themselves to follow) – and of investigating the role that these procedural instruments can play in addressing the issues of legitimacy and accountability of the agencies.

The traditional answer to the problem of identifying the boundaries within which the delegation of powers to an EU agency is legitimate has long found its basis in the guiding criteria set by the Court of Justice in a judgment from more than sixty years ago. In the *Meroni* case, dating back to 1958, the Court argued that only a delegation of *executive* powers could be admitted under EU law, whereas a delegation of *discretionary* powers would be unlawful: replacing the choices of the delegator with the choices of the delegate, such a delegation would entail an «actual transfer of responsibility». <sup>13</sup> At the core of the *Meroni* ruling, lies the willingness to preserve the institutional balance of powers within the EU. <sup>14</sup> Criticisms regarding the suitability of the *Meroni* doctrine in the context of the evolution of the EU institutional framework are not new. Already almost twenty years ago, it was argued that «additional means to enhance administrative legitimacy», going well beyond the *Meroni* doctrine, were needed. <sup>15</sup> Moreover, both the

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2009, p. 599; M. EGEBERG-J. TRONDAL, *EU-level agencies: new executive centre formation or vehicles for national control?*, in *J. Eur. Pub. Pol'y*, Vol. 18, Issue 6, 2011, pp. 868-887; H.C.H. HOFMANN-A. MORINI, *Constitutional Aspects of the Pluralisation of the EU Executive Through 'Agencification'*, in *Eur. L.Rev.*, Vol. 37, Issue 4, 2012, pp. 419 ff.; E. CHITI, *European Agencies' Rulemaking: Powers, Procedures and Assessment*, in *Eur. L.J.*, Vol. 19, Issue 1, 2013, pp. 93 ff.

<sup>13</sup> CJEU, 13 June 1958, Case 10/56, *Meroni & Co., Industrie Metallurgiche, S.A.S., v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7; CJEU, 14 May 1981, Case C-98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, ECLI:EU:C:1981:104.

<sup>14</sup> M. CHAMON, *EU Agencies: Does the Meroni Doctrine Make Sense?*, in *Maastricht J. Eur. Comp. L.*, Vol. 17, Issue 3, 2010, p. 281 ff.; R. SCHÜTZE, *"Delegated" Legislation in the (New) European Union: A Constitutional Analysis*, in *Mod. L. Rev.*, Vol. 74, Issue 3, 2011, p. 661.

<sup>15</sup> E. VOS, *Reforming the European Commission: What Role to Play for EU Agencies?*, in *Common Mkt. L.Rev.*, Vol. 37, Issue 5, 2000, p. 1113, at 1123.

main elements at the basis of the Meroni construction have been criticised. First, it could be argued that, for a delegation to take place, the powers exercised by the agencies should originally have been given to another EU institution; instead, such powers are often conferred to the agencies, without originally falling within the mandate of another EU institution, at least explicitly. Second, the concept of “balance of powers” used by the Court in the Meroni ruling is quite far removed from the current concept of institutional balance, due to the evolution of the latter over time.<sup>16</sup>

In a recent case, concerning the delegation of certain specific supervisory powers to the European Securities and Markets Authorities (ESMA),<sup>17</sup> the Court formally upheld the Meroni doctrine; yet, it also provided a flexible interpretation of its principles and offered a different ground of legitimation for EU agencies, based on the high degree of professional expertise needed in the financial sector, on the conditions circumscribing their powers, and on the possibility of a judicial review on the activity of the agency.<sup>18</sup>

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<sup>16</sup>E. CHITI, *An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies*, cit., pp. 1422-4 and M. CHAMON, *EU agencies between Meroni and Romano or the devil and the deep blue sea*, in *Common Mkt. L.Rev.*, Vol. 48, Issue 4, 2011, p. 1055, at 1058. *Contra*, arguing that the Meroni doctrine is well founded, S. GRILLER-A. ORATOR, *Everything Under Control? The “Way Forward” for European Agencies in the Footsteps of the Meroni Doctrine*, in *Eur. L.Rev.*, Vol. 35, Issue 1, 2010, p. 3.

<sup>17</sup>CJEU, 22 January 2014, C-270/12 *United Kingdom v Council of the European Union and European Parliament*, ECLI:EU:C:2014:18 (*Esma-shortselling case*). Among the first comments, see M. DE BELLIS, *I poteri di intervento dell’Esma sulle vendite allo scoperto*, in *Giorn. dir. amm.*, 7/2014, p. 692; M. CHAMON, *The empowerment of agencies under the Meroni doctrine and article 114 TFEU: comment on United Kingdom v Parliament and Council (short-selling) and the proposed single resolution mechanism*, in *Eur. L.Rev.*, Vol. 39, Issue 3, 2014, pp. 380 ff.; H. MARJOSOLA, *Bridging the constitutional gap in EU executive rule-making: the Court of Justice approves legislative conferral of intervention powers to European securities markets authority*, in *Eur. Const. L.Rev.*, Vol. 10, Issue 3, 2014, p. 500; J. PELKMANS-M. SIMONCINI, *Mellowing Meroni: How ESMA Can Help Build the Single Market, Regulatory Policy, CEPS Commentaries*, 1, 2014.

<sup>18</sup>On the crucial relevance of the “criteria and conditions” circumscribing the powers of the agencies for the legitimacy of such powers, see M. DE BELLIS, *I poteri di intervento dell’Esma sulle vendite allo scoperto*, cit., at p. 696 and C.F. BERGSTRÖM, *Shaping the new system for delegation of powers to EU agencies: United Kingdom v. European Parliament and Council (Short Selling)*, in *Common Mkt. L.Rev.*, Vol. 52, Issue 1, 2015, p. 219, p. 237 and pp. 239-240. On the capacity for the Court of Justice to dismiss all the pleas without ever mentioning the institutional balance principle in the Esma case, and on the implications for this principle as an actionable principle, see M. CHAMON, *The Institutional Balance, an Ill-Fated Principle of EU Law?*, in *Eur. Pub. L.*, Vol. 21, Issue 2, 2015, p. 371, pp. 374-75.

Opinions on the outcome of the ESMA judgment vary. Some welcomed the new development, providing for a more flexible standard for assessing the delegation of powers to agencies.<sup>19</sup> Others have claimed that the ESMA judgment risks increasing the democratic deficit of EU agencies.<sup>20</sup> Others have argued that, after the ruling of the Court of Justice in the ESMA/short-selling case, two paradigms of legitimation for EU agencies seem to co-exist: the delegation paradigm, based on the long-standing Meroni doctrine, and an emerging procedural paradigm of legitimation.<sup>21</sup>

Whether the Court will confirm (and clarify) the approach taken in the ESMA case will be seen only in future developments. However, what cannot be doubted is that the Court focused on procedures as a key element to be considered in the assessment of the powers of the agencies. This is by no means a surprising suggestion for scholars of administrative law.

In the EU, a general legal framework for procedural rules to be applied by the agencies is lacking. The Research Network on EU Administrative Law (ReNEUAL) drafted the Model Rules on EU Administrative Procedure in order to address this gap.<sup>22</sup> In 2016, the European Parliament invited the Commission to make a legislative proposal for the adoption of a general law on the EU administrative procedure, building mainly on the results of the ReNEUAL project.<sup>23</sup> At the time of writing, none of these proposals have

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<sup>19</sup>G. LO SCHIAVO, *A Judicial Re-thinking on the Delegation of Powers to European Agencies under EU Law? Comment on Case C-270/12 UK v. Council and Parliament, in German L.J.*, Vol. 16, Issue 2, 2015, p. 315.

<sup>20</sup>M. SCHOLTEN, *The Limits of Agencification in the European Union*, in *German L.J.*, Vol. 15, Issue 7, 2014, p. 1223.

<sup>21</sup>M. DE BELLIS, *Procedural rule-making of European Supervisory Agencies (ESAs). An effective tool for legitimacy*, TARN Working Paper 12/2017. In this perspective, see also D. CURTIN-H.C.H. HOFMANN-J. MENDES, *Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda*, in *Eur. L.J.*, Vol. 19, Issue 1, 2013, p. 1; E. VOS-M. EVERSON, *European Agencies: What About the Institutional Balance?*, July 17, 2014, Maastricht Faculty of Law Working Paper, No. 4.

<sup>22</sup>The findings of the project are available at <http://www.reneual.eu/> and are published in P. CRAIG-H. HOFFMAN-J.-P. SCHNEIDER-J. ZILLER (eds.), *ReNEUAL Model Rules on EU Administrative Procedure*, Oxford University Press, Oxford, 2017. For a presentation and discussion on the project, see D.U. GALETTA-H.C.H. HOFMANN-O.M. PUIGPELAT-J. ZILLER, *Context and legal elements of a proposal for a Regulation on the administrative procedure of the European Union's institutions, bodies, offices and agencies*, in *Riv. it. dir. pubbl. comunit.*, 1/2016, pp. 313 ss.; G. DELLA CANANEA, *Le model rules come esempio di codificazione innovativa*, in *Riv. it. dir. pubbl. com.*, 2/2018, p. 341.

<sup>23</sup>European Parliament, Resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP)).

resulted in the adoption of a binding document. However, these initiatives are relevant for this volume for two reasons. First, they testify that the approach taken here as a preferential perspective – *i.e.* the focus on procedures – is widely shared among the academic community.<sup>24</sup> Second, the comparison with these documents is helpful in order to assess EU the procedures of the EU agencies.

## 2. Investigating the procedures of the EU Agencies: theoretical issues

A decade ago, Edoardo Chiti argued that procedures for EU agencies were underdeveloped and that such lack of development contributed to the deficit of legitimacy within these bodies.<sup>25</sup> Such a gap was explained on the basis of the evolution in the powers of the agencies: since the first agencies had mainly instrumental administrative powers, which could not directly affect the position of the individual, the need to control such powers was considered lower and hence the administrative rule of law was limited. How far has the normative framework for EU agencies evolved, in this regard? What is the extension of the procedures that EU agencies have to follow? Can procedural safeguards compensate for the shortcomings of institutional accountability?

The volume seeks to focus, on the one hand, on the extension of procedural obligations, and, on the other hand, on their goal and on their capacity to reach that goal.

From the first point of view, EU agencies are subject to the Treaty of Lisbon, and hence to the principles of good administration, access and participation set forth therein.<sup>26</sup> But how are these principles implemented for

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<sup>24</sup> For a general overview on procedures in EU administrative law, see G. DELLA CANA-NEA-C. FRANCHINI, *I principi dell'amministrazione europea*, Giappichelli, Torino, 2017; M.P. CHITI, *Trattato di diritto amministrativo europeo*, Giuffrè, Milano, 2007; M.P. CHITI (ed.), *Manuale di diritto amministrativo europeo*, Giuffrè, Milano, 2013; L. DE LUCIA-B. MARCHETTI, *L'amministrazione europea e le sue regole*, il Mulino, Bologna, 2015. For an in-depth analysis of EU procedures, S. CASSESE, *European Administrative Proceedings*, in *Law Contemp. Probs*, Vol. 68, Issue 1, 2004, p. 21 and F. BIGNAMI-S. CASSESE (ed.), *Il procedimento amministrativo nel diritto europeo*, Giuffrè, Milano, 2004. On the role of law and lawyers, in contributing the legitimacy of the EU, A. SANDULLI, *Il ruolo del diritto in Europa*, Franco Angeli, Milano, 2018.

<sup>25</sup> E. CHITI, *An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies*, cit., p. 1426.

<sup>26</sup> On the limits in the implementation of these principles, see J. MENDES, *Executive Rule-*

EU agencies? Is there an obligation for the agencies to follow certain specific procedures (for example, because the establishing regulation provides for such obligations), or is the procedure flexible, in the sense that the agency can decide, for example, whether to follow a notice-and-comment procedure, at which stage, and with how many rounds of comment?

From the second point of view, procedures can serve various purposes. For example, the participation of stakeholders not only contributes to improving the input legitimacy of regulatory bodies: it can also aim at fostering the quality of regulation and hence its effectiveness. Is there a tension between these different goals?

Within the very high number of agencies, this volume focuses on some of the newest agencies, entrusted with binding (or quasi-binding) powers. As mentioned above, there is a great variety in the type of functions that EU agencies perform. Some groupings have been suggested on the basis of these differences. However, even though at first agencies had mainly instrumental powers, over time some of these bodies have been entrusted with the power to adopt binding legal acts:<sup>27</sup> in these latter cases, the need to control their action through procedures is even greater.

Among the newest agencies are the Agency for the Cooperation of Energy Regulators (ACER), having significant rule-making powers in the area of energy regulation,<sup>28</sup> and the Body of European Regulators for Electronic Communications (BEREC).<sup>29</sup> This latter is an anomalous body, lacking legal personality; albeit not formally binding, however, its powers are far-reaching. The European Aviation Safety Agency (EASA), dating back to 2002, is less recent and has long had the task of setting

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*making: Procedures in Between Constitutional Principles and Institutional Entrenchment*, in C. HARLOW-P. LEINO-G. DELLA CANANEA (eds.), *Research Handbook on European Union Administrative Law*, Edward Elgar, Oxford, 2017, p. 371 ff.; L. LEPPÄVIRTA-H. DARBISHIRE, *The Right to Ask ... The Right to Know – The Successes and Failures in Access to Documents Rules and Practices from an NGO Perspective*, in *op. ult. cit.*, p. 399 ff.; D. CURTIN-P. LEINO, *Openness, Transparency and the Right of Access to Documents in the EU*, EUI RSCAS working paper 2016/63; B.G. MATTARELLA, *Procedimento e atti amministrativi*, in M.P. CHITI, *Manuale di diritto amministrativo europeo*, cit., pp. 327 ff., in particular pp. 346 ff.

<sup>27</sup> Discussing such evolution and the first cases in which agencies have been given binding powers, D. CURTIN, *Executive Power of the European Union. Law, Practices, and the Living Constitution*, Oxford University Press, Oxford, 2009, p. 161.

<sup>28</sup> See Regulation (EC) No. 713/2009 of 13 July 2009, OJ 2009, L 211 and Regulation (EU) No. 1227/2011 of 25 October 2011, OJ 2011, L 326 (hereinafter ACER Regulation).

<sup>29</sup> Regulation (EU) No. 2018/1971 of 11 December 2018, OJ 2018, L 321/1, repealing Regulation (EC) No 1211/2009 (hereinafter BEREC Regulation).



technical rules; in 2018, it was reorganized and strengthened.<sup>30</sup>

In the financial sector, the three European Supervisory Authorities (ESAs) – the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA) – were set up in 2010, as part of the European System of Financial Supervision (ESFS).<sup>31</sup> Although their main functions are rule-making ones, they also perform certain supervisory tasks. Reform proposals aim at further increasing the adjudication tasks of the ESAs (and in particular of the ESMA).<sup>32</sup>

With the deepening of the banking crisis and its transformation into a debit crisis, the European Banking Union (EBU) was set up. Within the first pillar of the EBU, the Single Supervisory Mechanism (SSM), the Supervisory Board (SB) of the European Central Bank (ECB) has been entrusted with banking supervisory functions.<sup>33</sup> Within the second pillar, the Single Resolution Mechanism (SRM), the Single Resolution Board (SRB) has been set up, entrusted with the specific and new function of “resolution”, separated from banking supervision and involving decisions concerning the future of banks in crisis, which includes adjudication functions.<sup>34</sup> Only the SRB cor-

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<sup>30</sup> Regulation (EU) no. 2018/1139/EU of 4 July 2018, OJ 2018, L 212 (hereinafter EASA Regulation).

<sup>31</sup> Regulations (EU) No. 1093/2010 of 24 November, OJ 2010, L 331/12; 1094/2010 of 24 November, OJ 2010, L 331/48; 1095/2010 of 24 November, OJ 2010, L 331/84 (hereinafter ESA Regulations).

<sup>32</sup> Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market [Brussels, 20.9.2017, COM(2017) 536 final, 2017/0230 (COD)].

<sup>33</sup> Regulation (EU) No. 1024/2013 of 15 October 2013, OJ 2013, L 287 (hereinafter SSM Regulation).

<sup>34</sup> Regulation (EU) No 806/2014 of 15 July 2014, OJ 2014, L 225 (hereinafter SRM Regulation).

responds to the organisational model of an agency, while the SB is a separate division (and hence an internal body) of the ECB. However, the two bodies have significant features in common, so that the SB can be considered an agency-like body<sup>35</sup> and might provide a useful comparison.

Two cross cutting issues have also been selected. The first one is that of soft law: a growing phenomenon according to which agencies are given powers that are not formally binding, yet having a significant impact. Hence, there is a need to control the action of these agencies. In controlling these powers, procedures have a key role. The second one concerns another recurrent novelty of the EU administration, i.e. the increasing setting up of the board of appeals.<sup>36</sup>

### 3. Proceduralisation of EU Agencies in practice: extension and goals

The empirical work undertaken in the essays collected in this book provides a series of interesting findings. While single chapters will be discussed in the next paragraph, the extension and implications of the procedures for both the input and the output legitimacy of the agencies will now be identified.<sup>37</sup>

The sectors examined confirm that the newest agencies have been entrusted with powers that tend to go well beyond the Meroni doctrine. As a general response to such an expansion of powers, all sectors experience a meaningful development in procedural settings for any function the agencies may be called on to perform, according to the multiple roles laid down for

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<sup>35</sup> M. MACCHIA, *Procedural Decision-Making and the Banking Union: The Accountability Mechanisms*, TARN Working Paper Series 4/2017, April 2017, available at <https://ssrn.com/abstract=2948873> or <http://dx.doi.org/10.2139/ssrn.2948873>, p. 2.

<sup>36</sup> For a general overview, see B. MARCHETTI (ed.), *Administrative Remedies in the European Union. The Emergence of a Quasi-Judicial Administration*, Giappichelli, Torino, 2017. Board of appeals in the banking and financial areas have attracted significant attention: see Banca d'Italia, *Judicial review in the Banking Union and in the EU financial architecture*, Quaderni di Ricerca Giuridica della Consulenza Legale, n. 84, 2018; M. CLARICH, *Il riesame amministrativo delle decisioni della BCE*, in *Riv. it. dir. pubbl. com.*, 6/2015, pp. 1513 ff.; C. BRESCIA MORRA, *The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field*, Quaderni di Banca d'Italia, n. 81/2016.

<sup>37</sup> For the distinction between input and output legitimacy, see F. SCHARPF, *Economic Integration, Democracy and the Welfare State*, in *J. Eur. Publ. Pol'y*, Vol. 4, Issue 1, 1997, p. 18.

many of them during the last decade. Procedural relevance is generally affirmed, both in rule making and adjudication. Also, administrative review is growing and is susceptible to developing into a form of pre-judicial activity, in line with the hopes expressed for boards of appeal and their possible evolutionary path.<sup>38</sup> Nevertheless, proceduralisation varies, from sector to sector, as regards the degree of extension of guarantees and the goals pursued.

First, the *source* of procedural rules varies from agency to agency. Legal requirements depend, first of all, on the legislative framework of the sectors, usually finding a basis in the founding Regulation. However, the agencies often adopt internal regulations or codes of procedures specifying these obligations (this is the case with ACER, EASA, and the ESAs, but also of the SB within the SSM). Yet, in some cases, the provisions of the Regulations leave room for a broad flexibility of the agency (BEREC<sup>39</sup>), and the praxis is not always in line with the internal regulations autonomously adopted by the agencies (ACER<sup>40</sup>).

Second, as for the *extension* of due process, the quest for transparency is almost always affirmed, even though it can be limited on the basis of conflicting public interests, such as financial stability (this is the case with the SRB<sup>41</sup>). In most cases, the right to be heard and a general duty to state reasons are also taken into consideration. Yet, the extension of consultation is clearly specified only for some agencies (such as the ESAs and EASA<sup>42</sup>), while in other cases it can vary greatly, either because of the flexible approach of the legal framework (BEREC) or because of a differentiated approach undertaken within the different segments of the activity of the agency or because of inconsistencies in the praxis (ACER). These differences in the extension of procedural requirements cannot be explained on the basis of the distinction between rule-making and adjudication. On the contrary, these inconsistencies are found within rule-making activities (ESAs, EASA, BEREC and ACER all are entrusted with this type of function). Within adjudication activity, significant differences can also be identified: while the SB expanded the transparency and openness of its inspecting and sanctioning activity well beyond the formal framework laid down in the founding regu-

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<sup>38</sup> See Alberti, in this volume.

<sup>39</sup> See Mariniello, in this volume.

<sup>40</sup> See Vlachou, in this volume.

<sup>41</sup> See Figliolia, in this volume.

<sup>42</sup> See Alberti and Simoncini, respectively, in this volume.

lations, so that the limitation of procedural rights – albeit possible – is an exception,<sup>43</sup> in the resolution activity of the SRB both transparency and the right to be heard are severely limited.<sup>44</sup>

Lastly, as regards the *aim*, the empirical analysis confirms that setting procedural requirements may pursue different goals. Besides being a tool to increase the input legitimacy and to hold the agency accountable, procedures, and in particular stakeholders' participation, are considered by the agencies themselves also as an instrument through which information and expertise are gathered, so that the quality of regulation and hence their output legitimacy can be fostered. This is particularly the case with the BEREC and the ACER.<sup>45</sup>

But how far do procedural standards go in strengthening the legitimacy of the agencies? The empirical analysis in general recognises the efforts put in place by the agencies in developing procedural requirements. That is evident not only with regards to rule-making activity (e.g. for ACER, EASA, BEREC), but also with reference to adjudication (e.g. in the case of SSM<sup>46</sup>). However, criticisms have also been raised. Some focus on specific aspects. First, this is the case of the limitations on both transparency and participation in the activity of the SRB, which, even though explained on the basis of the specific features of the resolution procedure, still cannot be considered satisfactory, so that a different balance between the guarantees for the affected private actors and the relevant public interests involved should be looked for.<sup>47</sup> Secondly, another specific problem, observed in the electricity sector (but also in the financial sector there are some examples<sup>48</sup>), is the one that occurs when the Commission exercises its substitution power over the agency, that had in turn followed an extensive consultation and participative procedure; a consultation to which the Commission itself is not bound. In this way, the broader stakeholders' involvement at agency level can be obliterated and nullified.

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<sup>43</sup> See Sciascia, in this volume.

<sup>44</sup> See Figliolia, in this volume.

<sup>45</sup> See Mariniello and Vlachou, in this volume.

<sup>46</sup> See Sciascia, in this volume.

<sup>47</sup> See Figliolia, in this volume.

<sup>48</sup> For the electricity case, see Vlachou, in this volume; for a discussion of the Commission's substitution powers and their effect on the scope of procedural requirements, see M. DE BELLIS, *Procedural rule-making of European Supervisory Agencies (ESAs). An effective tool for legitimacy*, cit.

More general doubts have been raised on the possibility of procedural tools to legitimise the agencies, in the absence of their “constitutionalisation” under the Lisbon Treaty.<sup>49</sup> A further recurrent criticism, that can impact significantly the legitimation of the agencies, is the one concerning the gaps in the justiciability of their activity. Such gaps can concern some specific acts (this is the case with the rule-making acts of EASA<sup>50</sup>), but can also be considered to be a problem involving the agencies in a horizontal way: this emerges clearly when soft law, adopted by almost half of the existing agencies, is concerned.<sup>51</sup>

All in all, despite remarkable sector improvements and the existence of best practices, no generalization is possible on the capacity of procedural tools to achieve the goal of legitimising EU agencies. Hence, the results of the research corroborate the perspective according to which a process of codification of EU procedure would constitute a significant step. Moreover, further research, aimed at deepening the understanding of the connection between procedural tools of accountability and institutional ones would be welcome.

#### 4. This volume and its contributions

This edited volume is a collection of works written and discussed in July 2018, during a workshop in Rome. The seminar and this volume were financed by the Tarn project, a Jean Monnet network co-funded by the Erasmus+ Programme of the European Union.

The book proceeds as follows.

Chapters from 2 to 4 deal with rule-making and regulation in public utilities and aviation safety. The chosen fields of investigation are those of electronic communications, energy and aviation safety.

*Luce Mariniello* discusses the nature of the BEREC, a cooperation network and an agency-like body which, differently from the ACER, resisted to more radical changes during the most recent reforms. Moving from the European Regulators Group for electronic communications networks and services (ERG) experience, the Author examines the process of institutionalization of the BEREC. Over the years, many legislative proposals have been

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<sup>49</sup> See Magliari, in this volume.

<sup>50</sup> See Simoncini, in this volume.

<sup>51</sup> See Eliantonio and Rocca, in this volume.

launched, which aimed at turning BEREC into a standard EU agency. Lastly, a form of “agencification in practice” was experimented through the “Telecoms Single Market” (TSM) Regulation, adopted in 2015, which conferred the BEREC normative powers, including the one to issue guidelines regarding net neutrality. In the exercise of its quasi-binding powers, as in the case of net neutrality, transparency and procedural guarantees are relevant mechanisms, used mainly, according to the Author, to enhance output legitimacy and the acceptance of standards among stakeholders.

Market regulation through independent bodies is common to most sectors, as it is shared administration through networks or cooperative bodies. One of these is the energy market, where the transition from the previous forum of regulators (ERGEG) was completed with the institution of a proper agency like body. Rule-making by ACER is the object of the analysis undertaken by *Charikleia Vlacou*. Established in 2009, this third generation Agency is given a meaningful role in the drafting of network codes, intervening in the composite rule-making procedures which lead to the adoption of these technical standards. Cooperation and composite decision making process in this area preceded the institution of ACER and was effective since the establishment of the Network of European regulators in the energy sector. Participation by the wider public was affirmed since the beginning, thus prior to the agency itself, and it has been confirmed with the establishment of ACER. In the absence of a general legal framework, procedural guarantees for rule-making find a basis in the agency foundation regulation. However, the empirical analysis shows that the European Commission has often substituted network codes with guidelines, hence bypassing the participated procedure carried on by ACER. Stronger guarantees are applied in the implementation stage.

*Marta Simoncini* focuses her research on the role of EASA, highlighting the evolution of its position and its progressive growth, from its establishment in 2002 to the latest reform in 2018, when the Commission promoted a further enhancement of its mandate, reinforcing its leading role in aviation safety. The intervention translated, mainly, into the conferring of additional responsibilities on environmental compatibility of operations, cyber-security, research and innovation programs, and international cooperation. Thanks to these changes, the key role performed by this Agency grew in quantity and substance, not only through certificatory functions but also through rule-making ones. In addition, during the last years, the Agency confirmed its leading role also in the global arena. Further responsibilities may be attracted in its area of competence, during the course of the Brexit process, in par-

ticular after its completion. The Author focuses on the rule-making functions of the agency, both through its involvement in formal rule-making proceedings and through the adoption of technical standards, informal rules and soft law instruments. Though not legally binding, the latter are likely to have a practical regulatory impact, as suggested by the Author. As far as participation in rule-making is concerned, the position of EASA is likely to be meaningful both in the preparatory stage, as well as in the follow up one, being it a qualified institutional actor both for the legislative rule-making and for the executive rule-making process. Technical standards issued by the Agency are likely to be more and more effective, even if not binding. Transparency and participation in the form of notice and comment are laid down in the 2018 Regulation as well as in internal rules of procedure. Notwithstanding the set of rules governing procedures, which look coherent with the most recent proposals for codification, the author highlights how justiciability remains a controversial issues, both within the Board of Appeal, and before ordinary courts. Hence, the Author suggests further interventions to clearly state the limits of executive rule-making by EU agencies.

Chapters from 5 to 7 deal with legitimacy and accountability in banking and financial regulation.

*Giuseppe Sciascia* examines the supervisory role of the ECB within the SSM. The Chapter aims to contribute to the debate on transparency and accountability of the ECB. The Author examines procedural rules and praxis shaped within the SSM, analysing both formal and informal instruments of participation of financial institutions subject to ECB supervisory powers. The essay aims at assessing administrative participation to decision-making in adjudication-type activities carried out within the SSM, discussing whether these instruments enhance legitimacy and accountability, and whether due process requirements are met. The supervisory functions within the SSM are sketched so as to highlight the complex procedural interactions among supranational and national constituencies, shedding light on a reality which the Author considers not sufficiently explored. Due to the wide range of competences entrusted to the ECB and the variety of powers it can exercise towards private parties, the SSM also raises unprecedented questions from the point of view of legitimacy and accountability. Examples of procedural participation in supervisory activities, chosen from the ongoing practice of the SSM after five years since its launch, are: the so called “ECB Supervisory Dialogue”, in off-site supervision; practical supervisory activities in the area of on-site inspections; and sanctioning proceedings. In his concluding remarks, the Author provides a provisional positive assessment on the effec-

tiveness of the current framework in fostering the legitimacy of SSM decision-making. Although further cases will need to be examined, the current rules governing the SSM framework reinstate the importance of due process rights and transparency vis-à-vis supervised entities in the exercise of the ECB supervisory functions, while enlisting a number of specific arrangements aimed at ensuring an effective protection of private parties' rights – mainly through the possibility to submit written observations on facts and findings under consideration by the supervisory units. In addition, in the practice and in the SSM internal rules such rights have expanded beyond the formal legal framework laid down in the regulations, thus giving rise to an extensive web of interactions, which occur at different stages of the supervision process.

In her Chapter, *Claudia Figliolia* analyses the SRB, the EU agency in charge for the resolution of significant credit institutions. The angle chosen by the author is the one of examining the procedural guarantees present in bank resolution proceedings, as well as judicial review and non-judicial control over the activity of the SRB. The essay moves from the recognition of the EU legislative framework for bank resolution as the exemplification of a new era in Administrative Law, due to the shift from the individual and private (mainly creditor) dimension of the interest underlying bank failure management to the recognition of the overarching public interest of European financial stability. The paper argues that the allocation of pervasive powers is not adequately balanced in terms of administrative guarantees. A probable explanation is the one for which procedural participation and transparency seem to be incompatible with a procedure in which the exercise of public authority must take place in a timely manner in order to effectively safeguard financial stability. The essay discusses whether proceedings serve to guarantee an adequate balance between the protection of the financial system of the Union and the safeguard of those affected by the resolution powers. The analysis of the legislation proves, first, that the SRB has competences that go beyond the application of strictly technical parameters, being characterized by broad discretion; second, that scope for uncertainty still remains, as parameters and objectives for compliance are often presented as “general clauses”.

*Andrea Magliari* undertakes an analysis of the European Commission proposal issued on 2017, for an EU Regulation setting out a comprehensive reform of the European System of Financial Supervision (ESFS). With the aim of promoting financial integration and market integrity, and safeguarding financial stability, the proposal reshapes the powers, the internal governance and the funding of the three ESAs, and transfers supervisory tasks from



national authorities to the ESMA. The essay aims at discussing the evolution of the agencies operating in the financial sector, which proves a meaningful deviation of the latest agencies' format from the traditional model of regulatory agencies, experimented both in their structural features and in the range of adjudicatory powers conferred. Through the discussion of procedural legitimation, the Author examines the tasks and powers of the ESAs in the perspective of assessing the limits and the conditions underpinning the conferral of executive powers on EU agencies. The Author concludes that the legitimation paradigm set out in the ESMA-Short selling judgment is likely to be of limited significance when applied to EU enforcement authorities carrying out direct supervisory tasks, calling for the necessity of a renewed legal foundation of agencies, which implies a reassessment of the current validity and of the actual meaning of the Meroni doctrine.

The last chapters collected in this book are devoted to cross cutting and horizontal issues.

*Penelope Rocca* and *Mariolina Eliantonio* focus on the procedural framework for the adoption of soft law, a topic less investigated so far and only touched by few authors. In the perspective of assessing the legitimacy of these procedures, regarding nearly twenty EU agencies, the Authors assume the “(in)existence of sufficient ex ante control mechanisms over the power of the agencies to issue soft law, given the lack of ex post ones”. The topic is investigated taking into account three requirements – access to documents, accountability and participation –, as indicators of the ‘proceduralization’ of soft law, both in the founding Regulations of the selected European agencies and in their rules of procedures, where existing. According to the starting premise set by the Authors, the higher the level of proceduralization, the higher the level of legitimacy. According to this categorization, agencies are grouped into four different categories: EASA, EMA, ECHA, EBA, EIOPA and ESMA proved to have a high level of legitimacy, providing fully-fledged participation, while BEREC, ESRB, ACER, CPVO, ERA and FRA show a medium-high level of transparency. The list goes on with EFSA and EMCDDA, with a medium-low level of participation, and ENISA, ECDC, EMSA, EUROFOUND, EDA and EUIPO, showing a low level of legitimacy, since committed solely to transparency. The analysis highlights a consistent gap within the last two groups, and a low level of transparency in most of the agencies. Hence, the research confirms the need for greater certainty and for a more stable normative framework for procedural rules, recalling the call for codification launched by the European Parliament and supported by the ReNEUal research group. The Authors conclude for the

need of further research, aimed at including in the analysis all the agencies and at discussing the legitimacy and the procedural framework also of bodies which are *de facto* issuing soft law.

In the following chapter, *Jacopo Alberti* investigates the amendments to the Protocol n. 3 on the Statute of the Court of Justice of the European Union, in the perspective of a possible impact or simply of a re-thinking for a new turn in the role and in the position of the Boards of Appeal of the agencies. The Chapter moves from the analysis of *the status quo*, underlining the peculiar ‘functional continuity’ between the agencies and their Boards of Appeal, and then discusses the genesis and the framework of the reform. The Author concludes that the changes are likely to introduce a quite revolutionary approach and a new scenario for the role and function of the Boards of Appeal. The impact in terms of amendments in the Boards of Appeal’s procedures, composition, independence, and jurisdiction is likely to be relevant. This will be tested in the forthcoming years with regard to CPVO, EASA and ECHA decisions, subsequently extending in other fields. The reform, however, could be interpreted in different ways. On the one hand, it could be a first step towards the possibility of making Boards’ jurisdiction always compulsory. On the other hand, it could also be interpreted as legitimising the current status quo of the Boards of Appeal, hence blocking their evolution in terms of independence, role and procedural guarantees given to the parties. The Author considers this latter scenario as a missed opportunity.

In the last chapter, *Giacinto della Cananea* puts the implications and the empirical results of this volume in a broader context, examining two overarching themes of EU integration: on the one hand, the relationship between the European administration and the broader constitutional framework; on the other hand, the changes concerning the structure of the European administration itself. These two evolutions show that judicial protection no longer suffices to ensure an adequate protection of individual and collective interests and must, therefore, be supplemented by a regulation of administrative procedures of the EU. As a matter of fact, accountability and judicial review are two related, but distinct concepts. Judicial review must be activated by someone who has an interest to defend or a claim or protest to make; moreover, rules on standing might be restrictive, especially when claims are brought against acts or measures of general application. This suggests judicial review must be coupled with different methods of accountability, including administrative appeals and a legislative regulation of administrative procedures, aimed at avoiding fragmentation and ensuring consistency.