

Accountability, Control and Independence The Case of European Agencies

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Abstract: *This article points at two problematic assumptions made in some of the contemporary European agency literature. It proposes a conceptual framework integrating accountability, autonomy and control and aims to demonstrate how this type of conceptualization contributes to clarifying problematic aspects of the current European agency debate. Empirical evidence from interviews with high-level practitioners is provided to illustrate the relevance of the proposed framework. The empirical information reveals that the de facto level of autonomy displayed by some European agencies is far below the autonomy as a matter of the formal legal rules as a result of ongoing controls exercised by one (or other) of the principals. The significant repercussions that flow from these empirical insights for the agency debate in general as well as for our understanding of agency accountability will be discussed at length.*

I Introduction

The growing workload of the Union as a result of a continuous expansion of its activities coupled with a substantial increase in the complex nature of its attributions has resulted in the need to delegate some of its policy implementation functions to decentralized agencies. Established by both the Commission and the Council¹, these non-majoritarian bodies have multiplied at an increasing pace in recent years. Although this trend helped to partially quell inefficiency charges by rendering the process more effective and expedient, it also opened a veritable Pandora box of problems relating to independence, control and accountability.

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¹ See, further, D. Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in D. Geradin *et al*, *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar, 2005), 88-119

The purpose of this article is to reopen the box—to revisit the academic debate on the topic and to identify and address some problematic aspects of the contemporary research. With this aim in mind, the article will show first of all, that the productivity of some of the academic discourse on agencies could be improved by critically analyzing two of its core assumptions. Secondly, in light of this, an alternative taxonomy will be put forward and it will be demonstrated how this type of conceptualization contributes to clarifying these central aspects of the agency debate. Thirdly, some empirical evidence from provisional interviews conducted at European agencies will be presented and this plausibility probe is meant to illustrate the practical relevance of the proposed conceptualization. Finally, additional relevant consequences that flow from such an approach and have been overlooked in the agency debate will be revealed.

Before going in depth into these issues however, the general background on the issue at hand will be provided below by presenting in brief some highlights of the academic discussion surrounding agencies. This is relevant for setting the context for the ensuing discussion by mapping out the evolution of the contemporary European agency debate, its status quo as well as pinpointing where some of the knotty issues lie.

II Retracing the Debate on the Accountability of European Agencies: Origins and Highlights

The creation of European agencies is one of the most remarkable institutional developments at the EU level in recent years. Agencies are supposed to operate free of all political influence and ‘most founding acts expressly stipulate that the agency concerned will be completely independent from the makers of law and politics. The agency’s output may and should not be

influenced by political considerations.’² Although the first European agencies were established as early as mid-70s, the issue of control and accountability did not come to the forefront initially given the fact that the tasks to be performed by the earliest agencies were meant to be purely informational and non-discretionary in nature. However, with the passage of time, the process of agencification gained momentum and is now increasingly heralded as ‘the new paradigm of European governance’³ and ‘the next mode of growth of the Union.’⁴

At present, we are faced with a veritable mushrooming of agencies coupled with an increase in agencies’ tasks touching on issues of adjudication, regulation and decision- making, functions quite discretionary in nature. As Geradin and Petit succinctly state ‘the EU’s appetite for creating new agencies seems limitless’⁵ While originally welcomed for their functional benefits and separation from political organs such as the Council and an increasingly politicized Commission⁶, agencies subsequently came under attack precisely due to their operation at a distance from the reach of long-established controls. Anxiety arose at the possibility of agencies escaping accountability and control, predated on the democratic character of the Union and further increasing the EU’s democratic deficit. The need for agency control and accountability was iterated by both agency academics⁷ as well as by EU

² R. Van Ooik, ‘The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance’ in Curtin *et al.*, ‘*Good Governance and the European Union. Reflections on concepts, institutions and substance*’, Intersentia, 2005, 145

³ Geradin *et al.*, *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar, 2005)

⁴ M. Shapiro, ‘The problems of Independent Agencies in the United States and the European Union’, (1997) 4 (2) *Journal of European Public Policy*, 279-291

⁵ D. Gerardin and N. Petit, ‘The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposal for Reform’, (2004) *Jean Monnet Working Paper*, 4

⁶ See, further, G. Majone, ‘Functional Interests: European Agencies’ in M. Shackleton *The Institutions of the European Union*, (Oxford University Press: 2002) and M. Everson, G. Majone, L. Metcalfe, A. Schout, *The Role of Specialised Agencies in Decentralising EU Governance*, (1999) Report to the Commission

⁷ See, further, M. Shapiro, ‘The Problems of Independent Agencies in the United States and the European Union’, (1997) 4(2) *Journal of European Public Policy* 279-291; M. Everson, ‘Independent Agencies: Hierarchy Beaters?’, (1995) 1 (2) *European Law Journal*, 180-204; E. Vos, ‘Reforming the European Commission: What Role to Play for EU Agencies?’, (2000) 37 *Common Market Law Review*, 1113-1134; M. Flinders ‘Distributed Public Governance in the European Union’, (2004) 11(3) *Journal of European Public Policy*, 520-544; D. Curtin 2005, *op cit*, note 1 *supra* ; P. Craig, *EU Administrative Law* (Oxford University

institutions such as the European Parliament and the Commission. As pointed out by the European Commission ‘the independence of these agencies goes hand in hand with an obligation to meet their responsibilities. In order to strengthen the legitimacy of Community action, it is important to establish and delimit the responsibilities of the institutions and agencies. (...) Moreover, the principle of accountability requires that a clear system of controls be put in place.’⁸

The subject of agency accountability became even more relevant as a result of the fact that the delegation of tasks to agencies moved beyond the wording of the treaties and the established case law and their proliferation took place by stealth and in a rather ad hoc manner. As certain agencies (ie EMEA, EFSA, OHIM, CPVO and EASA) seemed to go beyond the *Meroni* doctrine laid down by the ECJ, which prohibits the delegation of discretionary powers by the Treaty institutions, the call for increased accountability was also voiced in order to counter constitutionality concerns. For example, as Van Ooik argues ‘an effective system of supervision and control may mitigate legal objections against far reaching delegation of powers to independent agencies.’⁹

The debate intensified even more however, as a result of what appears to be an insurmountable institutional dilemma. Given that the ‘independence of agencies is often seen as the most central principle of good governance’¹⁰ and that a large number were established specifically in order to remedy, through their independence, credible commitment failures of

Press, 2006); S. Puntser Riekman, ‘In Search of Lost Norms: Is Accountability the Solution to the Legitimacy Problems in the European Union?’, (2007) 5 (1) *Comparative European Politics*, 121-137

⁸ Commission of the European Communities, ‘Explanatory Memorandum. Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies’, COM (2005) 59 final, 2

⁹ Van Ooik, *op cit*, note 2 *supra*

¹⁰ D. Geradin, ‘The Development of European Regulatory Agencies: Lessons from the American Experience’ in Geradin *et al*, *op cit*, note 3 *supra*, 231

the Commission ¹¹jeopardizing this independence would defeat the very purpose for which they were created. Consequently, it has been repeatedly pointed out that one of the central challenges with regards to non-majoritarian agencies is to strike the right balance between independence on the one hand and control/accountability on the other.¹²

Thus, in light of this brief discussion, it appears that two problematic assumptions have entered the agency literature. The first assumption was that as a result of their ‘organizational divorce’ from the Commission or the Council, agencies must possess a significant degree of independence within the framework of their mandate, which raised questions about the extent to which they are controlled. Almost at the same time, a second problematic assumption entered the debate, according to which independence and accountability are contradictory and that therefore, the needed degree of control could not be achieved without jeopardizing their very *raison d’etre*. Thus, while the need for agencies’ oversight became undeniable due to their perceived independence, at the same time it became apparent that this could not be achieved without running into an unsolvable dilemma. European agencies thus, became locked in a veritable catch 22.

Despite the clear agreement on the relevance of investigating the issue of agency accountability, it appears that the discussion has reached an impasse. The central argument of this article is that in order to come out of this stalemate we need to critically analyze its assumptions. It will be pointed out that by questioning these two underlying assumptions put

¹¹ See, further, G. Majone, ‘The Credibility Crisis of Community Regulation, (2002) 38 (2) *Journal of Common Market Studies*, 284-290 and Vos, *op cit*, note 7 *supra*

¹² A. Kreher in A. Kreher, (ed), ‘The EC Agencies Between Community Institutions and Constituents: Autonomy, Control and Accountability’, Second RSC Conference on EC Agencies, Conference Report (EUI, 1998), 5; Michelle, Everson, *op cit*, note 7 *supra*, 183; P. Magnette, ‘The Politics of Regulation in the European Union’ in Geradin *et al*, *op cit*, note 3 *supra*, 3-22

forward in the literature and identifying and addressing their source by conceptualizing them differently we can move further in the debate.

The present state of affairs appears to find its source in the fact that some of the central concepts of the debate and their relation to one another have not been fully fleshed out. More specifically, at the normative level, there is a lack of a clear delimitation and clarification of the terms of autonomy, accountability and control with a direct application to European agencies.

First of all, the notion of '*independence*' has been largely used as identical in the debate with that of '*formal institutional separation*'. The implications of this are that a significant normative leap was undertaken in the absence of empirical research pointing in this direction.

Secondly, many of the agency studies generally do not start from a clear definition of '*accountability*' and the term is often used interchangeably with the notion of '*control*'. That is to say, the two terms have been regarded as largely synonymous and the debate has used the two concepts simultaneously.

Each of the two juxtapositions (ie formal separation/independence and accountability /control) has given rise, in my opinion, to the two pronouncements that lie at the core of the agency accountability debate. Below it will be discussed at length how exactly the two terminological juxtapositions gave rise to these problematic aspects of the agency debate as well as the consequences that flowed from there. At the same time, a more detailed operationalization of the concepts will be put forward, which demonstrates that the assumptions do not hold and that the impasse is only apparent and can be overcome.

III The Missing Link: Formal Separation/Independence

As briefly mentioned above, an underlying assumption in a significant part of the agency literature was that because agencies were set up as entities formally separated from their ‘parent bodies’ they automatically benefit from a considerable autonomy in the use of their decision-making competencies and implicitly, independence. Many authors refer to agency ‘independence’ or ‘autonomy’ but they only look at the level of formal, legal independence.¹³ Although evidence only showed that agencies were organizationally detached from the Commission and the Council, this was implicitly equated with the real degree of agency independence. In the words of Shapiro, ‘in any event it is clear that EU independent agencies are independent in the sense of being relatively free of control by any of the other organs of the Community.’¹⁴ That is to say, the formal mandate was implicitly taken as a proxy for the actual degree of agency autonomy. The source of this is probably the fact that a large majority of European agency studies are legal studies and as such concentrate exclusively on the *de jure* situation. While legal arrangements give an indication of formal autonomy, they do not by any means convey the full post delegation picture of agency autonomy. They are a starting point which needs to be complemented by an investigation of actual behaviour in order to ascertain how these formal rules have evolved and have been transformed in practice. In the words of Thatcher, ‘although formal institutional arrangements are important, they do not determine the behaviour of IRAs and their relationships with other actors because powers and controls can be used in many diverse ways and institutional frameworks are incomplete.’¹⁵

¹³ Shapiro, *op cit*, note 7 *supra*; Everson, *op cit*, note 7 *supra* ; Vos, *op cit*, note 7 *supra* ; Van Ooik, *op cit*, note 2 *supra*; M. Szapiro, ‘The Framework for European Regulatory Agencies: A Balance between Accountability and Autonomy’, 3rd ECPR Conference, 2005

¹⁴ Shapiro, *op cit*, note 7 *supra*, 289

¹⁵ M. Thatcher, ‘Regulation after Delegation: Independent Regulatory Agencies in Europe’, (2002) 9 (6) *Journal of European Public Policy* 954-972, 955

In fact, as national agency research has already demonstrated, it is not automatically the case that the degree of formal-legal independence necessarily corresponds to the degree of real independence. For example, as Pollitt *et al* clarify, independence has in fact two dimensions: (i) separation or disaggregation, which is defined as the degree to which an organization is institutionally separated from the ‘parent body’ and (ii) autonomization, which necessarily entails discretion and autonomy in decision-making.¹⁶ To use a mundane analogy, ‘divorce, as many ex-couples know, can easily mean separation but not independence. While a divorce couple is clearly no longer ‘together’ (they have been ‘disaggregated’ in our terminology) it does not mean that there are not still important elements of dependence between them. Often this is resource dependence but it may include other forms of mutually dependent interactions (...) To continue to use the marital analogy, agencies may lie at almost any point between ‘trial separation’ and complete legally sanctioned divorce.’¹⁷

Similarly, other national agency researchers differentiate between formal autonomy¹⁸ and real autonomy¹⁹, each characterized by various sub-dimensions and studies point out that the two major dimensions do not necessarily correspond. As Yesilkagit puts it, ‘delegation involves the conceding of formally approved degree of formal autonomy. Ideally, in a world without goal conflicts and complete information, this formally approved degree of formal autonomy may indeed become the real degree of autonomy (...) In reality, (...) the real autonomy may not correspond with the formal autonomy of agencies. Depending on the issue, agencies may

¹⁶ C. Pollitt *et al*, ‘Agencies. How Governments Do Things Through Semi-Autonomous Organizations’, (Palgrave Macmillan: 2004), 34-38

¹⁷ Pollitt *et al.*, *op cit*, note 16 *supra*, 36

¹⁸ F. Gilardi, ‘Policy Credibility and Delegation to Independent Regulatory Agencies: A Comparative Empirical Analysis’, (2002) 9 (6) *Journal of European Public Policy* 9:6, 873-893

¹⁹ See, further, Verhoest *et al*, ‘The Study of Organisational Autonomy: A Conceptual Review’, (2004) 24 *Public Administration and Development*, 101-118; K. Yesilkagit, ‘Bureaucratic Autonomy, Organizational Culture, and Habituation. Politicians and Independent Administrative Bodies in the Netherlands’, (2004) 36 (5) *Administration and Society*, 528-522, 531

enjoy more or less (...) autonomy than formally is granted to them.’²⁰ Moreover, there is empirical evidence from national studies on agencies that supports these claims and demonstrates that agencies endowed with high levels of formal autonomy often display low levels of autonomy in the actual use of decision-making competencies.²¹

Therefore, unless a formally separate body also benefits from decision-making autonomy it cannot be claimed that it is independent within its mandate. Unfortunately, this was precisely the implicit assumption in some of the reviewed literature and this was also an important contributor to sparking off the EU agency accountability debate. The creation of ‘quasi-independent’ or ‘independent’ bodies at the European level exercising powers, which previously belonged to the Commission and the Council and were subject to strong institutionalized legal and administrative constraints, raised concerns about the accountability of these newly set up bodies and the extent to which adequate controls were put in place. The academic discussion on agency accountability largely emerged as a result of agencies being perceived as benefiting from a substantial degree of real autonomy by virtue of operating at an arm’s length from the Commission and the Council and having been granted a considerable level of formal autonomy. To illustrate, ‘the Commission cannot give instructions to the agencies or oblige them to withdraw certain decisions. Quite the contrary, they are given considerable legal, budgetary and operational autonomy. Precisely because of this autonomy, agencies must be held responsible directly for their actions, notably in view of their active contribution to the European regulatory area. The direct corollary of an agency’s autonomy is thus the need to develop mechanisms of accountability.’²² This is why

²⁰ Yesilkagit, *op cit*, note 19 *supra*, 532

²¹ See, further, K. Verhoest, G. Peters, G. Bouckaert, B. Verschuere, ‘The Study of Organisational Autonomy: A Conceptual Review, (2004) 24 *Public Administration and Development* 101-118

²² Szapiro *op cit*, note 13, *supra*, 4

accountability concerns surfaced in relation to agencies as opposed to one of the Commission's departments or one of the Council's working groups.

However, as outlined above, the missing link is the relation between formal separation and independence. While European agencies are indeed *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. In fact, the empirical evidence which is presented at a later stage of this study indicates that in some cases the opposite is true and the real decisional powers of some European agencies are below the formal scope of delegated authority. To the extent that the 'parent bodies' are capable to exert a large degree of control over agencies and to significantly limit their discretion, agency accountability or lack thereof, becomes less problematic.

What follows from this discussion is that the debate on agency accountability has to take a step back. Before evaluating agency accountability and identifying deficits, it has to be ascertained *a priori* whether agencies really benefit from all the discretion and independence they are formally said to possess.

IV Accountability and Control

A The Paradox

The other conceptual juxtaposition, accountability/control led to a separate but equally problematic assumption briefly outlined in the introduction to this article: the zero sum relationship between agency independence and accountability. In other words, 'herein, the dilemma for any lawyer concerned with the institutional design of independent agencies. To satisfy the first criterion, that of the insulation of agencies from petty politics, agencies must

be afforded independence. At the same time, however, the second prerequisite of public accountability must also be satisfied.²³ A body cannot be two opposite things at the same time: independent and controlled. However, this was precisely what was being demanded of European agencies. As these bodies came to be perceived as increasingly independent, given the line of reasoning outlined above, anxiety arose about the possibility of them becoming ‘uncontrollable centers of arbitrary power’²⁴ and demands were made for putting in place significant controls on their power. This contradiction was aptly observed by Geradin, ‘the existing measures designed to ensure that EAs are accountable appear to be insufficient. This observation may be difficult to reconcile with the previous observation that they should be more independent. Indeed, it is sometimes considered that accountability and independence are conflicting concepts.’²⁵

In fact, it will be argued that this is only an apparent dilemma and it finds its source in lack of a clear differentiation between the terms ‘accountability’ and ‘control.’ Both terms have often been used interchangeably and equated with one another in the general literature despite there being clear differences between the two. By expounding the difference between the issue of control and accountability, it becomes apparent that whereas control and independence might be contradictory, accountability and independence are not. Although indeed mechanisms of accountability are mechanisms of control the reverse is not true. In other words,

“Control’ in the Anglo-Saxon sense is broader than accountability and can include both ex ante and ex-post mechanisms of directing behavior (Scott 2000:39). Control means ‘having power over’ and can involve very proactive means of directing conduct, for example through

²³ Everson, *op cit*, note 7 *supra*, 183

²⁴ Everson, *op cit*, note 7 *supra*, 190

²⁵ Geradin, *op cit*, note 10 *supra*, 231

straight orders, directives, financial incentives or regulations. But these hierarchical, financial or legal mechanisms are not mechanisms of accountability *pre se*, because they do not in themselves operate through procedures in which actors are to explain and justify their conduct to forums (Mulgan 2003: 19).²⁶ Control refers to a whole range of mechanisms employed by the controlling actor in order to direct, steer, and influence decision-making and behaviour of the controlled agents.²⁷

Accountability on the other hand, precludes direct control from the principal. The need for accountability and the introduction of accountability mechanisms is relevant precisely because the principal has delegated powers to an agent and thus, renounced direct control. Following this line of reasoning, accountability is concerned with ex post oversight, with ascertaining *after the fact*, to which extent the agent has lived up to its ex ante mandate and has acted within its zone of discretion. Thus, as defined by Bovens, accountability is ‘a relationship between an actor and a forum, in which the actor has the obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment, and the actor might face consequences.’²⁸ Overlooking this conceptual difference, can lead to a nonsensical situation in which independence is given with one hand and removed with the other. That is to say ‘if accountability must amount to direct control, it is to no avail to formally believe in, and establish independent central banks and agencies only to deprive them—on

²⁶ M. Bovens, ‘Analyzing and Assessing Public Accountability. A Conceptual Framework’, (2006) C-06-01 *European Governance Papers* 14

²⁷ P. Roness, K. Rubecksen, K. Verhoest, M. MacCarthaigh, ‘Autonomy and Regulation of State Agencies: Reinforcement, Indifference or Compensation?’ Paper Presented at the 4th ECPR General Conference, Pisa, Italy 6-8 September 2007, 5

²⁸ M. Bovens, ‘Analyzing and Assessing Public Accountability: A Conceptual Framework’, (2007) 13 (4) *European Law Journal* 447-468, 452; See also R. Lastra and H. Shams, ‘Public Accountability in the Financial Sector’, in E. Ferran and C. Goodhart (eds), *Regulating Financial Services and Markets in the 21st Century*, (Oxford: Hart Publishing, 2001), 167; C. Turpin, ‘Ministerial Responsibility’ in J. Jowell and D. Oliver (eds), *The Changing Constitution*, (Oxford: Clarendon, 1994), 111-112

grounds that their legitimacy has to be ensured—of the very prerequisite for them to actively pursue those objectives (...)²⁹

B Alternative Framework

In order to better differentiate between mechanisms of control and accountability, I propose conceptualizing control along a temporal dimension. One could distinguish three different types of controls: *ex ante control, simultaneous control or ongoing control and ex post control/accountability*. The presence of *ex ante* and *ex post* controls has been clearly mentioned in delegation theory. Agency theory posits that once a principal has delegated powers to an agent, the key issue from the perspective of the principal is to ensure that agent does not drift, that there are no ‘agency losses’. Given that there is not a perfect correspondence between the interests of the principal and those of the agent and that the agent is specialized and thus, likely possesses more information than the principal (ie informational asymmetries), the agent could choose to engage in self- interested behavior. Principals can try to remedy this situation by setting in place *ex ante* and *ex post* controls in order to exert a certain degree of control over the delegation process. Kiewiet and McCubbins identify four types of such measures by which principals attempt to contain agency losses: contract design, screening and selection mechanisms, monitoring and reporting and additional institutional checks.³⁰

The framework proposed below partially departs from this debate by presenting a temporal conceptualization of control and introducing an intermediary dimension of control (ie

²⁹ C. Zilioli, ‘Accountability and Independence: Irreconcilable Values or Complementary Instruments for Democracy? The Specific Case of the European Central Bank’, in G. Vandersanden (ed), *Mélanges en hommage à Jean-Victor Louis* (Brussels: Editions de l’Université de Bruxelles, 2003), 395-422, 400

³⁰ R. Kiewiet and M. McCubbins, *The Logic of Delegation. Congressional Parties and the Appropriation Process*, (Chicago: University of Chicago Press, 1991); K. Strom, ‘Delegation and Accountability in Parliamentary Democracies’, (2000) 37 *European Journal of Political Research* 261-289

ongoing control), which has not been previously identified but which has significant consequences for the real level of agency discretion. Thus, in addition to elements of formal design, informal aspects are integrated in an attempt to obtain a closer fit to reality. Moreover, for the purpose of clarification, it is important to mention that unlike the classic debate, the present framework does not exclusively assume the existence of a single principal delegating powers but instead supports an expanded model with multiple principals.³¹ European agencies have been delegated powers jointly by Member States, the Commission, the Council and in many instances, by the European Parliament in its role as a legislator.

(i) Ex Ante Control/ Proactive Control: It is a form of preliminary control mechanism, which refers to the basic mandate comprising the powers and tasks of the agent. Ex ante control is exercised by delimitating the boundaries within which the agency has autonomy of action, by drawing up the range of independent action available to the agent to accomplish the delegated tasks. This type of control is present in the case of all European agencies in the form of a founding regulation as well as other basic legal documents such as financial regulations, fees and charges regulations setting out the powers of the agent, defining its zone of discretion, screening and selection mechanisms, the position of the principal vis-à-vis the agency, financing, the various mechanisms of accountability etc.

(ii) Ongoing/ Simultaneous control

Ongoing control is an informal type of direct control exercised by a principal vis-à-vis an agent in which the agent's (future) actions are steered and/ or determined by the principal resulting in a *decrease in the original mandated discretion* of the agent to accomplish the

³¹ R. Waterman and K. Meier, 'Principal-Agent Models: An Expansion?', (1998) 8 (2) *Journal of Public Administration Research and Theory* 173-202; R. Dehousse, 'Delegation of Powers in the European Union: The Need for a Multi-Principals Model', Connex Thematic Conference on Accountability, Florence, 29-30 June 2007

delegated tasks and implicitly, its decision-making autonomy. Discretion entails a grant of authority that specifies the principal's goals but not the specific actions the agent must take to accomplish those objectives.³² More precisely, the so-called 'zone of discretion' can be conceptualized as the sum of powers delegated by the principal to the agent, minus the sum of control instruments, available for use by the principals.³³ Autonomy, in turn, 'is about discretion, or the extent to which the agency can decide itself about matters it finds important.'³⁴ Ongoing control restricts or nullifies the original, formal level of mandated discretion and implicitly the agent's decision-making autonomy, through the direct interference of the principal. It should be noted that when speaking of control, one refers to 'principals' and 'agents' and no longer to 'actors' and 'fora' as is the case with accountability. The direct principal is the body/institution delegating certain powers/authority to an agent. The 'principal' is not necessarily synonymous with 'the accountability forum'. Usually, after the delegation of powers by the principal, agents are subject to the oversight of multiple accountability fora, which can include the direct principal but also third parties or even institutions with partially opposing mandates.

(iii) Ex Post Control/Accountability

In this conceptualization, accountability is synonymous with ex post control but not with control in general, thus it necessarily excludes ongoing control. Accountability is understood exclusively as an *after the fact* process of information, discussion and evaluation, as has been presented by Bovens.³⁵ By creating a non-majoritarian body, politicians take a politically

³² D. Hawkins, D. Lake, D. Nielson and M. Tierney, 'Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory,' in D. Hawkins et al (eds) *Delegation under Anarchy: States, International Organizations and Principal Agent Theory*, (Cambridge University Press, 2006), 8

³³ A. Sweet Stone, 'Constitutional Courts and Parliamentary Democracy', 2002 25 (1) *West European Politics*, 77-100, 93

³⁴ Roness, Rubecksen, Verhoest, MacCarthaigh, *op cit*, note 27 *supra*, 5

³⁵ Bovens, *op cit*, notes 26 and 28 *supra*

contingent decision to jointly bind their hands.³⁶ In light of this, accountability, as previously mentioned, precludes direct intervention which would amount to reintroducing control into the picture. In other words, ‘it is clear that the aim of accountability is not to achieve a direct control on the independent governance bodies: the very reason for which independence has been given to these bodies excludes the possibility of direct control of the political power.’³⁷ These types of accountability mechanisms are common among European agencies and are provided for in all agencies’ basic regulations. They include mechanisms such as: budget discharge by the European Parliament, financial accountability to the Court of Auditors, hearings of agency directors by the European Parliament, the role of the Ombudsman, annual reports, independent evaluation reports etc.

V Bringing the Threads Together: Independence, Control and Accountability—Three Scenarios

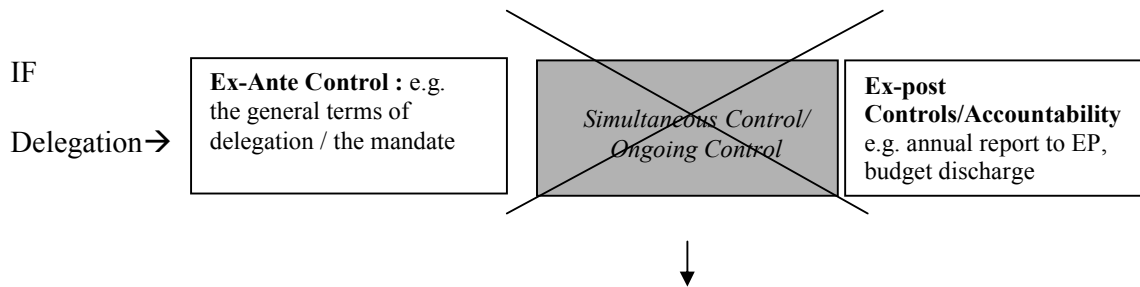
As mentioned before, independence has two basic dimensions: the degree of separation and the actual, real degree of decision-making powers. If and only when an agency satisfies both these conditions, accountability becomes a stringent issue in order to ensure that the agency complies with its mandated obligations. However, this is not necessarily always the case. In fact, using the temporal framework outlined above, we can identify three different possible situations, once the delegation has taken place. Given the fact that all agencies have a basic mandate, that ex ante controls are in place for all agencies, the various scenarios identified below are the result of variation in the last two dimensions of control: the ongoing control and ex post control (ie accountability). By distinguishing between situations where ongoing control is present and situations where it is absent as well as situations where proper

³⁶ J. Tallberg, ‘Delegation to Supranational Institutions: Why, How, and with What Consequences?’ (2002) 25 (1) *West European Politics* 23-46, 29

³⁷ C. Zilioli, *op cit*, note 29 *supra*, 399

accountability mechanisms are in place and those where the necessary accountability mechanisms are lacking, the following scenarios can be identified.

A Scenario 1: Independent (Little or No Ongoing Control) and Accountable



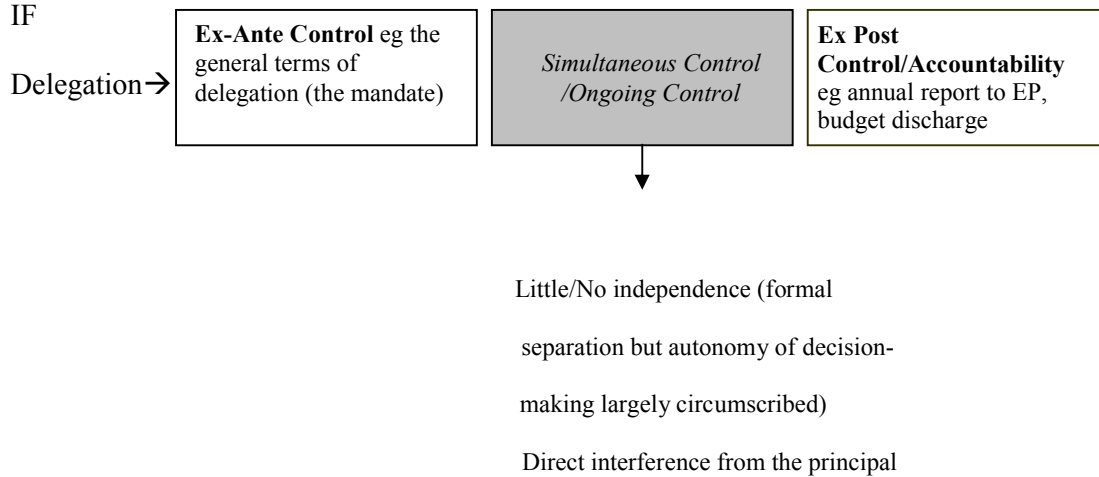
Agency independence (separation & decision-making autonomy) within the boundaries of its mandate. Little/no interference from the principal

In this situation, powers are delegated to an actor which can exercise the powers delegated to him or her independently within the boundaries laid out by the contract design. The principle does not intervene in an ongoing manner after the delegation to restrict the agent's discretion. Accountability mechanisms are indispensable. They are necessary to avoid abuse of powers, drift of the agent outside its mandated powers, self-serving behavior etc.

This also helps to show that there can be a way around the traditional agency dilemma of keeping agencies independent yet controlled. Instead of 'independence' and 'control', 'independence' and 'accountability', as can be seen above, can co-exist. The main premise

here is, paraphrasing Moe “No one controls the agency, and yet the agency is under control.”³⁸ Or to rephrase, “No one controls the agency, and yet the *agency is accountable.*’

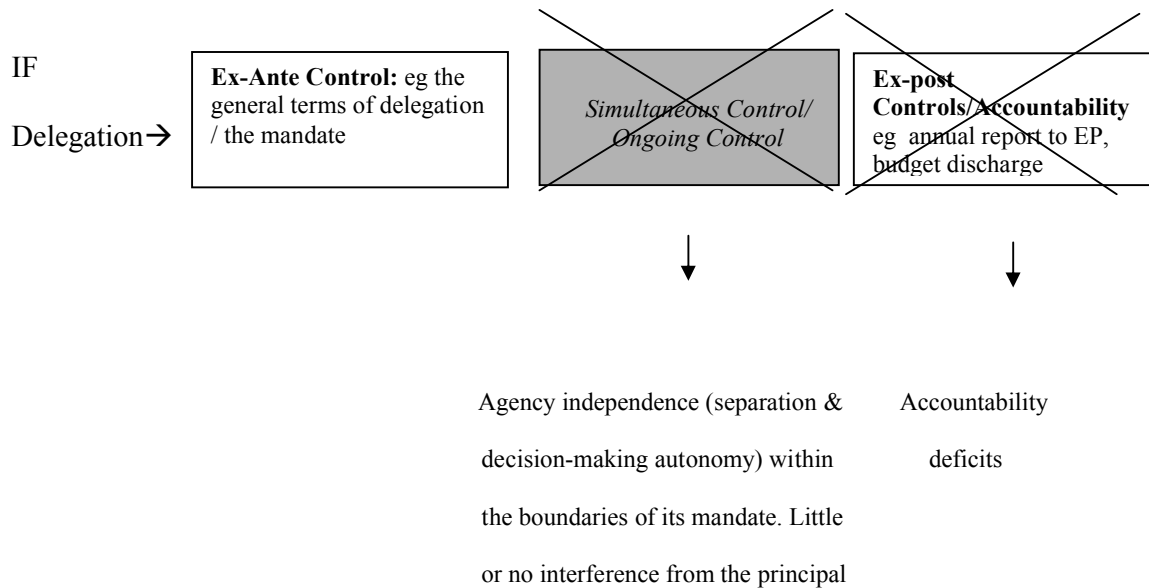
B Scenario 2: Controlled, Little or No Independence



If powers are delegated to an agent within clear parameters laid out by the basic regulation (*i.e.* ex ante controls) but the principal or ‘parent body’ informally exercises ongoing control on the actions of the agent in the form of steering, directing, issuing orders, the agent’s decision-making autonomy and implicitly its independence are significantly restricted or even nullified. The need for accountability mechanisms and the risks of deficits will be diminished in this case given that the agent enjoyed little discretion. Ongoing control brings the principal in through the back door. It amounts to a reversal of the original delegation. In this situation, the agency is controlled and by default also *under control* given its decreased decision-making autonomy and independence.

³⁸ T. Moe ‘Interests, Institutions and Positive Theory: The Politics of NLBM’, (1987) 2 *Studies in American Development* 236- 299

C Scenario 3: Independent (Little or No Ongoing Control) and Not Accountable



In this scenario, powers are delegated to an agent and there is a match between the mandated independence granted to the agent and the real independence the agent is able to exercise in practice. The principal does not exercise ongoing direct control on the agent. At the same time, the agent is not subject to adequate accountability mechanisms and as a result, it suffers from accountability deficits. This is where the problem lies from the perspective of agency accountability. To the extent that an agent can exercise real independence in decision-making and it is not subject to accountability arrangements proportionate to its powers, there is a real danger of shirking on the part of the agency.

Although as seen above, there are several possible scenarios³⁹ this is the scenario on which most of the academic debate on the accountability of European agencies has focused.

³⁹ Theoretically, there is a fourth scenario in which an agency is controlled but suffers from accountability deficits. This situation was not presented as a separate scenario given that, as explained in Scenario 2, once an agency is controlled, accountability deficits of the agent become less problematic given the fact that ongoing control restricts or nullifies the level of originally mandated discretion

However, as shown above, this is only one of the possible scenarios. While this is indeed the most problematic case as far as the oversight of agencies is concerned, concentrating exclusively on this scenario can lead to a distorted image of agency reality. It creates a misleading perception of agencies as unruly agents with intention and opportunity for shirking. In fact, tentative research on this topic at the EU level reveals that the second scenario, characterized by the presence of ongoing control, is encountered in the case of some of the European agencies. This is not meant as a claim that this is always the case but as an argument for the need to adopt a more comprehensive conceptualization, which affords for the examination of additional scenarios. This might provide a more realistic and balanced picture of agencies' independence and accountability.

VI Practical relevance of the Framework: Plausibility Probe

Other than attempting to differentiate between some of the central concepts of the agency debate, the framework proposed above is also of practical relevance because it captures emerging practices of agency accountability and control. As mentioned above, in the case of Community agencies, the second scenario, characterized by direct interference from the principal after delegation, is encountered in practice, with varying degrees of ongoing control exercised by the European Commission. Due to the fact that agencies were regarded as largely independent within the boundaries of their formal mandate, the possibility for ongoing control by the Commission has been ignored in the literature. In the section below, some empirical information will be put forward.

The information was obtained from semi-structured interviews I conducted with key informants: agency directors and/or Member State representatives in the Management Boards

of various European agencies.⁴⁰ The aim of this section is *not* to demonstrate that agencies are always subject to ongoing control but instead to show that in some cases, a strong ongoing control is exercised by one of the principals and that consequently, a conceptualization of control including this dimension is relevant.

The agencies' status clearly sets out their independence and while representatives of the Commission are present in the meetings of the Management Board, the main governing body of an agency, they formally generally tend to have only one vote.⁴¹ However, interviews conducted with practitioners show that ongoing control from the principal does occur and is manifested through interference in the agency decision-making at two stages: informally (in preparatory meetings) or formally (in the Management Board meetings) being equally binding in both cases.

With regards to the informal influence of the Commission, the following was reported by a Management Board representative: 'if you would like to propose certain things which are contrary to the Brussels policy then representatives of Brussels in the board normally give a warning. Then you better not pursue that particular scheme for in the end it turns out to be negative. So it is not a direct influence but the indirect influence is rather unlimited.'⁴²

⁴⁰ This research is part of a broader research on the 'Accountability of European Agencies' fully funded by the NWO, the Netherlands Organization for Scientific Research, under the Shifts in Governance program.

Interviews were conducted in several agencies with high level officials

⁴¹ There are some exceptions where in some cases the Commission has more votes. eg European Agency for the Evaluation of Medicinal Products (EMA), the Commission has two representatives but in such cases the Board itself tends to be larger than usually (ie in this case 36 members)

⁴² Respondent 1 (MB representative) of Agency 1 (R1 A1) of the 1st Pillar

With regards to both formal and informal influence and directing by the Commission, a Management Board representative from a different 1st pillar agency very aptly summarized the situation of follows:

‘The Commission says “this is what we think” and the rest is dead. If the Commission is strong, it will make everything dead. That is what happened few times in the meetings. (...) The informal powers of the Commission are very big. That is because the Governing Board formally decides on all the topics but almost all the time the funding comes from the Commission. So there are two steps in it. First of all, the Governing Board can decide something, that’s what we want. But then the Commission can still say this is not what we are going to give any money for. This is not our priority. So they steer a lot with money to get things through or to hold it up. (...) The Commission can steer it very well. *Sometimes they do it very subtle during the preparatory meetings and sometimes when there is a connection with funding, they more openly show their power.* “You can decide this, of course you can. But how will you do that without any money or if we draw our money away from it?”’⁴³

A similar situation was described during another interview, where it was reported that the Commission although *de jure* having only one vote in the Management Board on a par with each individual MS, *de facto* it has veto power over decisions of the Management Board.⁴⁴ Moreover, in the case of one of the most powerful EU agency, there has actually been an instance where in the absence of the Commission’s formal opinion, the work program was adopted only provisionally; once the Commission’s view was received, it was simply translated into a new work program without any additional reconvening and re-voting from

⁴³ R2 (MB representative) of A2 of the 1st Pillar

⁴⁴ R3 (Director) of A3 of the 1st Pillar

the agency's Management Board.⁴⁵ Also, even when the Management Board reconvenes and re-votes it is occasionally a mere formality given that the opinion of the Commission is unanimously adopted and incorporated in the work program.⁴⁶ Additionally, there are cases of specific agency projects/initiatives, which were abandoned as a result of Commission's subsequent disapproval.⁴⁷

One notable exception seems to be an agency funded from the EU budget but where the Commission does not have any voting rights in the Management Board. In this connection, one of the national members in the Board of such an agency reported, 'in terms of influencing policies, I think we are much more independent than other organizations where the Commission is in the Management Board. They can say it here also, the Commission is free to express that they will not give money for certain projects but it is up to us to take it to the Board or not and we take it to the Board if it's in line with our strategies and we don't take it to the board if it's not.'⁴⁸

Some exceptions also reportedly occur in the case of self-financed agencies where there are instances of the Commission being outvoted.⁴⁹ In relation to this, one respondent from such an agency pointed out:

'If you are leading an agency then you are dependent on Brussels from each penny you have to spend. (...) What we have seen in the last few years is that the volume of applications has increased tremendously. So there was much more money available, and then of course there

⁴⁵ *Ibid*

⁴⁶ *Ibid*

⁴⁷ *Ibid*

⁴⁸ R 5 of A5 of the 1st Pillar

⁴⁹ R3 (Director) of A3 referring to his own experience but to also hearsay information after a meeting with colleagues from other agencies

is more flexibility. Of course. You can do more if you can finance things without additional assistance from Brussels. That of course has a certain impact. But does not change the whole situation principally.’⁵⁰

What the previous interviews suggest is that agency autonomy in practice varies considerably and in some agencies it is far below the level provided for in the formal mandate. In some of the cases reported above, the Commission informally possesses significant powers to intervene, direct and even reverse agency decisions and that this seems to flow primarily from the Commission’s power of the purse—its power of budget proposal. This is an illustration of how certain *ex ante* controls can be used as a basis for new informal controls going far beyond the mandated ones. More specifically, from the examples presented above it becomes apparent how mandated controls (eg budget proposal) are being used by the Commission as power leverage for introducing new informal controls exercised in an ongoing basis, which limit the zone of discretion of some agencies below the mandated one and nullify part of the original delegation. Thus, mandated controls can become channels of influence for the introduction of new constraints. This type of interference amounts to nothing less than a Trojan horse⁵¹ since it brings agency decision-making back under the control of the principal and into the sphere of politics.

This type of non-mandated control does not appear to be exclusively encountered in the case of the EC agencies but also some instances have been reported in the 3rd Pillar. For example, the Management Board of Europol has made an unprecedented formal complaint to the Article 36 Committee concerning informal requests to Europol by the Council working

⁵⁰ R4 A4 of the 3rd Pillar

⁵¹ Zilioli, *op cit*, note 37 *supra*, 408

groups, outside the text of Europol's legislative framework. The Management Board of Europol expressed the 'growing concern (...) that the legislative framework applicable to Europol and its work was not always applied. In particular, on several occasions Council working groups have asked Europol to carry out tasks originally not foreseen by its yearly work programs and budgets, which are approved by the Council upon the recommendation of the Management Board.'⁵² According to Statewatch, the 'Council Working Parties have bypassed the Council of Ministers and the Europol Management Board and sent requests for action directly to Europol itself, not once but on "several occasions"'⁵³ which were both 'irregular' and 'unconstitutional.'⁵⁴

Some of the examples provided above illustrate practices which come into stark contradiction with the public statements of the Commission in support of agency autonomy: 'it is particularly important that they [agencies] should have genuine autonomy in their internal organization and functioning if their contribution is to be effective and credible.'⁵⁵

VII Repercussions for the Agency Debate: Two Potential Types of Accountability Deficits

The approach presented above, incorporating aspects of control and independence alongside accountability, leads to several conclusions of relevance for the agency debate.

⁵² Letter from the Chairman of the Management Board to Article 36 Committee, 12838/03, Brussels, 30 September, 2003

⁵³ Statewatch, 'Unprecedented Complaint by the Europol Management Board about Informal Requests for Action by Council Working Parties By Passing Legislative Process', available at <http://www.statewatch.org/news/2003/oct/03europol.htm>

⁵⁴ *Ibid*

⁵⁵ The European Commission, 'Communication from the Commission. The Operating Framework for European Regulatory Agencies', COM (2002) 718 Final

First of all, at a more general level, it demonstrates that the dilemma of accountable independence is a myth owing its existence to lack of conceptual clarity. Independence and accountability can and actually, should co-exist. Accountability becomes relevant precisely in situations where a body is independent and the delegating body has relinquished direct control. On the contrary, independence and ongoing control are indeed contradictory because ongoing control restricts and in extreme cases, nullifies the decision-making autonomy of the agent, which is an essential dimension of real independence.

Secondly, the framework also implicitly shows the misleading character of the assumption of equating formal separation with actual decision-making autonomy and independence. As some of the examples presented above demonstrate, the Commission exercises significant ongoing control over the decision-making of some of the ‘independent’ European agencies. This does not mean to say that agency independence is a myth in practice. It only points out that in some cases, the level of agency discretion and decision-making autonomy is very different from what an analysis of the legal mandate would suggest. It also points out that in those same cases, the Commission plays a far larger role in agency decision-making than it has so far been believed to be the case. This brings me to my third observation.

As mentioned above, accountability deficits become less problematic and accountability itself becomes less relevant if the agent lacks autonomy of action in the first place. In our situation, weaker mechanisms of accountability for certain Community agencies could potentially be justifiable in some cases by pointing out that in practice the Commission exercises a significant degree of control over the respective agencies. To the contrary, agencies may be held accountable for aspects which lie completely outside of their control. After all,

‘Responsibility presupposes, in the first place, that there are persons (those who bear responsibility) who have powers of decision and who also command resources for putting those decisions into effect. Without an ability to effectuate results, the responsibility of such persons would be merely emblematic or dramatic; we should be engaged in maintaining a constitutional myth. Responsibility, should, indeed, be commensurate with the extent of the power possessed.’⁵⁶

On the other hand, the situation outlined above is also an indication that deficits might lie elsewhere. The presence of ongoing control on the part of the principal, exercised behind closed doors entails a different type of accountability deficit than it has been discussed so far in the literature. Ongoing control creates a loophole for the principal to influence and steer the decision-making of the agent without appearing to do so. It helps obscure real responsibilities. In other words, it creates an area of shaded responsibility. In this connection, Gilardi makes a very astute point

‘For blame shifting, independence is a sort of a shield for politicians, who can shift the responsibility of some unfortunate accident, such as the marketing of a lethal drug, or of mad beef, on an agency that is independent from them. However, for this shifting to be possible, the agency does not need to be really independent, but only to be believed to be so. Thus, politicians can probably just create a specialized agency, give it an ‘independent’ label, and then keep all sorts of less visible control mechanisms (...)’⁵⁷

⁵⁶ Turpin, *op cit*, note 27 *supra*, 111

⁵⁷ F. Gilardi, ‘Principal Agent Models Go to Europe: Independent Regulatory Agencies as the Ultimate Step of Delegation’, Paper presented at the *ECPR General Conference*, Canterbury (UK), 6-8 September 200, 22

In such cases, the accountability of the principals exercising these controls (ie the Commission and the Council) becomes relevant and the burden of accountability should have to be shared by them as well. This article should not to be misread as a pronouncement that agencies do not suffer from accountability deficits. It is in fact a pronouncement that there is a possibility for two different, alternate types of deficits in connection with European agencies: deficits at the level of the agency or deficits at the level of the principal. This latter has been completely ignored in the agency literature and it is in my belief, a significant accountability concern. In order to identify the real *locus* of the European agencies' accountability deficits, research into European agencies' accountability also needs to take into accounts aspects pertaining to the *de facto* decision-making autonomy of agencies in order to ascertain who the real power wielders are. It is probable that this will differ from one agency to the next, as demonstrated in this article, with some agencies being subject to significant ongoing controls from the principals and others less so.

In relation to this, another significant point deserves attention: democratic legitimacy. Agencies have been accused of lacking democratic legitimacy by virtue of being granted formal independence from the control of representative institutions such as the European Parliament, the Council and the Commission. Such concerns could be alleviated through the introduction of a comprehensive array of accountability arrangements for agencies, a development which has seen significant progress in recent years and is still ongoing. However, the legitimacy problem might lie elsewhere. To the extent to which, an executive body such as the Commission is able to go beyond the rules agreed by the European Parliament and/or the Council (and implicitly Member State governments) and interfere with the independence granted to agencies by these democratic bodies, a serious issue of democratic legitimacy arises.

In light of the arguments presented above, perhaps the most important message of this article is that accountability, control and independence are very much interrelated and an analysis and evaluation of agency accountability cannot afford to ignore the issues of independence and control. In other words, ‘the degree of autonomy must be associated with the concept of accountability.’⁵⁸ To be more precise, in situations where self-standing institutional agents have been granted real independence, this needs to be matched by thorough mechanisms of accountability to avoid abuse of power. However, in the case of agents that are deprived of real independence due to extensive informal controls employed by the principal, their accountability, commensurate with their responsibility becomes restricted and the accountability of the principal needs to be brought into the limelight. After all, ‘power cannot be divorced from responsibility’⁵⁹ and failing to shed light on these obscured zones of responsibility and to demand corresponding accountability would amount to just that.

⁵⁸ Kreher, *op cit*, note 12 *supra*

⁵⁹ S. Young, ‘Reconceptualising Accountability in the Early Nineteenth Century: How the Tort of Negligence Appeared’, (1989) 21 (2) *Connecticut Law Review*, 202