CHAPTER 5

The Political Accountability of EU Agencies

‘The Way Forward’

The previous chapter offered a comparative analysis of the political accountability of EU and US independent regulatory agencies with a view to learning from the US long-standing experience for the EU jurisdiction. It is now time to use the comparative insights to offer the EU representative institutions recommendations on how they should adjust existing accountability arrangements in the course of the ongoing reform of the operation of EU agencies, thus addressing the second part of the research question. In light of the comparative analysis, Chapter 5 puts forward three recommendations and explains them in the three sub-sections, which offer illustrative examples of how these recommendations could be put in legislative terms. The three recommendations are:

1. The issues concerning the creation of, delegation to, and accountability of EU agencies should be regulated at the treaty level.
2. The Union Legislator should establish a legally binding accountability framework for EU agencies based on a streamlining approach.
3. The EU representative institutions should render account for holding EU agencies to political account by introducing relevant self-enforcement measures and adhering to them.

5.1 The Necessity of a Treaty Provision

The number of EU agencies, including the strength of their powers, has been increasing in the last two decades. Scholars have more and more been pointing out that the formally ‘executive’ but actually ‘discretionary policy-making’ powers have already been delegated to EU agencies. This raises the question of whether agencies remain in line with the Meroni doctrine that governs the delegation of powers in the EU. In addition, the relevance of the Meroni doctrine with respect to delegating to EU agencies is at times questioned because so far

1 In this respect, it is interesting to see what the CJEU decides with respect to the action brought recently by the UK against the Council and the European Parliament concerning the powers delegated to the European Securities and Markets Authority which according to the
it has not been applied in relation to an EU agency. In addition to the existing debate about the legitimacy of EU agencies and the lawfulness of the delegation of various powers to them, their accountability has become one of the matters for concern. Since no formal or political agreement exists in relation to the accountability responsibilities of the EU institutions in relation to EU agencies, it is unclear if and when EU agencies are accountable or not.

Given the fact that EU agencies have become a popular instrument for the implementation of EU policies, and the growing number of agencies suggests this being the case, the time for guessing about the solutions to the mentioned serious issues, such as whether EU agencies fall within the Meroni doctrine and whether they are accountable or not, should end by regulating them in the Treaty. Moreover, considering the principles of conferral and proportionality, which govern the limits of the Union’s competences (Article 5 TEU) and the institutional balance between the EU main institutions (Article 13(1) TEU), the only way to ensure the legitimacy of EU agencies is by means of introducing a treaty provision regulating the creation of, delegation to, and accountability of EU agencies. An explicit treaty provision could also resolve the existing inconsistency in the treaties, which address agencies “in hidden ways” in, for instance, articles on transparency and judicial review (see Chapter 2.1.1.2). Agencies are, however, ‘forgotten’ in Articles 290 and 291 TFEU, which codify the authors of non-legislative acts of the Union, acts that have been passed also by EU agencies. This implies that “the categorization of norms as introduced by the Lisbon Treaty is incomplete” and that “the continuing pluralisation of the EU Executive through agencification may lead to a blurring of responsibilities and holding certain actors to account.”

claimants has received “a large measure of discretion” (Case C-270/12 Action brought on 1 June 2012 – United Kingdom of Great Britain and Northern Ireland v Council of the European Union, European Parliament).

2 Chamon (2010).

3 Interestingly, some prominent experts in the field, e.g., Vos, have also argued for the necessity of a “more coherent approach” in relation to such issues related to EU agencies’ operation as control, transparency, review and languages which is to be achieved by establishing a “legal basis for the creation of agencies, the delegation of powers to these agencies and judicial review be introduced in the Treaty” (Vos (2003) p. 142).

4 Hofmann and Morini (2012) p. 34.

5 “For example, binding legal acts on the registration or refusal of a European Trade Mark adopted by the OHIM are clearly an act of executive nature and comparable with Commission decisions on the approval or refusal of an EU-wide approval of a novel food” (Vos (2014) p. 44).

6 Ibid.

7 Hofmann and Morini (2012) p. 35.