

Le Agenzie dell'Unione Europea

Profili istituzionali
e tendenze evolutive

a cura di
Vincenzo Salvatore





Polo Interregionale di Eccellenza Jean Monnet - Pavia
Jean Monnet Interregional Centre of Excellence - Pavia

Le Agenzie dell'Unione Europea

Profili istituzionali e tendenze evolutive

**a cura di
Vincenzo Salvatore**

giugno 2011

This project has been funded with support from the
European Commission.

This publication reflects the views only of the authors, and the Commission
cannot be held responsible for any use which may be made of the information
contained therein.

© Polo Interregionale di Eccellenza Jean Monnet
Università degli Studi di Pavia
Via San Felice, 5 – 27100 PAVIA - ITALY

Sito Internet: www.jeanmonnet-pv.it
Contatti: info@jeanmonnet-pv.it

Le Agenzie dell'Unione Europea. Profili istituzionali e tendenze evolutive. A cura
di Vincenzo Salvatore

ISBN: 978-88-96890-02 -8

Editore:
Jean Monnet Centre of Pavia
Università degli Studi di Pavia
Anno 2011 - Pavia - IT

Stampato nel mese di Giugno 2011
presso Studio Pixart srl - Quarto d'Altino VE – IT

Immagine di copertina:
Bernardino Lanzani (1522), *Veduta di Pavia*. Elaborazione su particolare.
Affresco. Basilica di S. Teodoro, Pavia

This publication may only be reproduced stored or transmitted in any form or by any
means, with the prior permission in writing of the publisher. Enquires concerning re-
production outside these terms should be sent to the Jean Monnet Centre of Pavia.

Index

| | |
|--|--------|
| Foreword | p. 5 |
| Summaries | p. 9 |
| | |
| Le Agenzie tra Unione Europea e Stati membri. Oltre la sussidiarietà | |
| Vincenzo Salvatore | p. 17 |
| | |
| La partecipazione delle Agenzie al procedimento decisionale | |
| Lucia Musselli | p. 37 |
| | |
| Le Agenzie per l'ambiente tra diritto comunitario e diritti interni | |
| Lorenzo Cuocolo | p. 67 |
| | |
| Il ruolo delle Agenzie nella regolazione del settore energetico | |
| Laura Ammannati | p. 99 |
| | |
| Consulenza scientifica istituzionale e indipendenza: è possibile la quadratura del cerchio? | |
| Simone Gabbi | p. 129 |

| | |
|--|--------|
| Agenzie Web 2.0: le Agenzie europee e le nuove forme di comunicazione elettronica | |
| Alessandro Spina | p. 161 |
| L'Autorità bancaria europea. Prime riflessioni intorno ad un modello "europeo" di vigilanza | |
| Davide Diverio | p. 175 |
| Economia sociale di mercato e nuovi rapporti di partenariato pubblico-privato: l'esperienza dell'iniziativa per le medicine innovative (IMI) ed il coinvolgimento dell'Agenzia Europea dei Medicinali | |
| Enrica Pavione | p. 193 |
| Oltre il dibattito attuale: appunti per un'agenda di ricerca sul processo di <i>agencification</i> nell'Unione Europea | |
| Edoardo Chiti | p. 213 |
| | |
| Note sugli Autori | p. 225 |

Foreword

Agencies are an innovative tool of governance whose diffusion as an institutional model in Europe has been remarkable over recent years. The increasing number of established agencies has gone in parallel with a gradual shift in their role: even their own legal nature is going to be re-considered.

Agencies, in their current features, have typically been developed within federal States, US *in primis*.

However, the fertile adaptation in Europe is evident, especially taking into account their fast recent expansion.

The establishment of agencies by the European Union has a specific *raison d'être* which can be related to the characteristic of the European constitutional process. At the time of their foundation, the United States had a constitution, a government, a currency and an army; agencies played a complementary role to the government since they were established because they were assigned with specific tasks to be performed with a certain degree of autonomy. The European experience is significantly different from the American one; the old continent has identified the Constitution as its goal after a long process and it has gradually built its governmental structure on top of this experience. This process is still ongoing. This has had a lot of implications both of constitutional and of social and economic nature. The establishment of agencies has not necessarily complemented the governance of the system but, in many cases, it has represented the only tool to govern specific areas.

This specific nature of the agencies corresponds to the way in which the integration process has experienced transfer of powers from national to European level.

In the lack of a formal constitution and of a traditional government, in the course of the integration process we have witnessed the transfer of responsibilities from national level to the integration process itself, and not to the remit of a pre-existing European institution.

The transfer of powers, when it has been relevant, has represented a part of the future constitution which therefore has characterised itself as a sequence of partial achievements. You can consider the European Monetary Union as the best example of this process. The European Central Bank can be seen as a *sui generis* European agency of new generation.

This has made it clear one of the specific difficulties that the integration process had to face.

The integration process aimed at creating, gradually, a consistent constitution, not yet defined in its building process. The single constitutional elements have relied, in search of consistency, upon the specific features of the integration process, following their shaping and fine tuning without being based on the certainty from which the US legislator has benefited as he could make reference to a consolidated constitutional text.

The same reasoning may be used to illustrate the relevance that in the European experience is assigned to the living constitution vis-à-vis the formal constitution.

The integration process has identified its long term perspective relying upon some fundamental values: freedom, solidarity and subsidiarity. These same values have driven the specific choice to forge the agencies. These values identify a “wide mesh” network which provides on a case by case basis relative big room to the projects that have to be implemented.

This relative vagueness can be seen as a point of weakness or of strength of the integration process, in relation to the different notion of State you can have. This wide mesh represents a point of weakness for those who rely on the traditional model of State, being it strong and

centralised, which Europe should mirror. On the other hand, the same wide mesh represents a point of strength for those who look at the integration process as if they were looking at a laboratory in which you can experiment a new model of State, closer to people and far from power ambition. A new kind of State based on establishment of a new social and economic model, the market social economy and a new humanism open to the world.

For those who share this innovative vision of the European State model, the European Union poses the historic challenge in order to affirm the rule of law to a greater and larger extent than ever before. A model which might be duplicated in other continents and which might inspire the features of a new institutional world order.

The innovative role that agencies have played in the European Union represents an important milestone of this process. This explains the timeliness and the relevance of the workshop organized by the *Università dell'Insubria* in Varese in November 2010, whose contributions are hereby collected, under the accurate coordination and expert supervision of Prof. Vincenzo Salvatore.

* * *

The reflections contained in these contributions would like hopefully to contribute to regenerate the debate on the role and nature of this institutional model.

Historically, agencies have attracted attention from legal scholars who have examined the peculiar functions and features of EU agencies through the lens of their expertise and scholarly background. Hence, EU agencies have been looked and analysed as if they were similar to established legal institutions such as public administrations established under national law, executive bodies of international organizations, regulatory bodies of foreign legal systems, representatives of a process of transnational convergence of Member States' institutions and the like.

The resulting analysis are certainly of great value and of great scientific interest but they are also somewhat incomplete.

The original idea of the workshop was to bring around the table legal and economic scholars and experts of EU institutions and let them present, with a substantial degree of freedom, problems and future challenges related to the activities of EU agencies from their own perspective. The “space to think” that the initiative wanted to create was able to stimulate among the participants a “polyphonic” platform to discuss and served as a fertile ground for future research, and we do hope that this book fully reflects if not the form at least the spirit of the engaging open atmosphere of Villa Toeplitz and offers to its readers a valuable and original set of reflections dealing with the crucial legal aspects of EU Agencies and the possible regeneration and future challenges of this institutional model.

Pavia, 10th June 2011

Dario Velo

Summaries

Le Agenzie tra Unione Europea e Stati membri. Oltre la sussidiarietà

Vincenzo Salvatore

Role and responsibilities of the European agencies have significantly evolved since the first ones were established more than thirty years ago. In this article, the Author analyzes the features of European Agencies and underlines how their core mission resembles that of bridging entities in a multilevel governance legal environment. Member States are increasingly inclined to consider the European agencies as a vehicle to jointly pursue the implementation of the EU policies. This approach allows them to go far beyond the subsidiarity principle in the exercise of shared responsibilities relying upon the Agencies networking. Despite being still far from a single model, some agencies' common characteristics may be usefully identified, in an attempt to provide a horizontal and critical analysis of, inter alia, aspects related to corporate governance, funding, internal and external control mechanisms, locus standi and judicial remedies, transparency obligations, relationship with Member States and participation of stakeholders.

La partecipazione delle Agenzie al procedimento decisionale

Lucia Musselli

The creation of European Agencies represents one of the most relevant developments in the administrative structure of the EU. The setting up of European Agencies in different "waves", from the 1970s, raises indeed problematic legal issues, regarding, in particular, the del-

agation of powers and the lack of homogeneity of the model. The actual framework, where the agencies are entrusted with powers, mainly instrumental and not discretionary, can be seen as a result of the restrictive interpretation of the Meroni doctrine. Despite Regulation terms, the distinction between instrumental functions and decisional ones is not so clear in practice, as we can see from different fields of their activity.

In this context a focus on the role of agencies in the decision-making can be stressed in three main directions.

Firstly, the participation in the decision-making can be found on procedural rules with particular regard to the advisory function.

Secondly, a rule-making role lays down in soft-law acts (like recommendations, non-binding framework guidelines, guidelines ...) which agencies can issue.

Thirdly, European agencies can exert great influences on European Institutions gathering information on an EU-wide basis. This aspect is strictly linked with the so called "regulation by information".

In conclusion, the growing trends to decentralize administrative functions to specialized agencies emphasizes the difficulties in distinguishing law-making and implementation, with particular regard to the area of the risk-regulation. In this perspective, seems interesting the reading of European agencies, as recently proposed, not in the light of the (non) delegation-principle but in that of "political administration".

Le Agenzie per l'ambiente tra diritto comunitario e diritti interni

Lorenzo Cuocolo

Along with many others, the environmental field is concerned by the proliferation of executive agencies. However, unlike other sectors, the environment is characterized by the presence of a unique system of agencies, both at the European and at the national level, which largely differs from other European networks. This essay aims at studying the

different characters between different environment protection agencies – the European one and the national ones – as well as comparing them. A special importance will be attached to the European environment network, the so-called EIONET: the conclusion will be that it is not a real network, but rather a complex system led by the European Environment Agency (EEA). The essay will finally concentrate on the relevance of gathering and managing information for the environmental protection system, discussing whether it would be possible to consider information as a “neutral issue”, or it should be taken as a political issue, thus needing more appropriate management and control tools.

Il ruolo delle Agenzie nella regolazione del settore energetico

Laura Ammannati

In this article, the Author highlights the main goals of the process of EU energy liberalization resulted in the ‘third energy package’: strengthening regulatory convergence and harmonizing practices among member states; enhancing cross-border cooperation. In this light the creation of ACER (Agency for the Cooperation of Energy Regulators) aims at improving regulation at European level through a new cooperation pattern among national regulators. Therefore, on one side, ACER represents a ‘developed form’ of ‘cooperative’ regulation based on the evolution of the European ‘networks’. However, from the point of view of the changes of the ‘agency’ model, ACER shows some original features. Its construction as ‘network agency’ and its position within the system of energy governance qualified by an unquestionable independence from the national governments and the Commission are the most remarkable differences.

Moreover in the paper the author aims at analyzing whether the current re-framing of the energy governance will achieve the main goals of the ‘third package’. The formalization of the network ERGEG within ACER is a result of the need of the Commission to gather technical ex-

expertise. Hence, ACER could function as the principal player in the system. Nonetheless, at the same time, ACER represents a linkage between the Commission and national regulators, that could be brought within the sphere of influence of the Commission. Some scholars have suggested that the final result could be a complete 'europeanisation' of energy policy. In the conclusions, the A. brings forward some arguments that dispute this claim.

**Consulenza scientifica istituzionale e indipendenza:
è possibile la quadratura del cerchio?**

Simone Gabbi

This article highlights the importance of unbiased scientific advice in the European Union legal system. It then analyses and compares the policies in force throughout the European Food Safety Authority, European Medicines Agency and European Commission's Scientific Committees with that implemented by the US Food and Drugs Administration. The Author argues that, currently, the framework adopted and implemented by the European Food Safety Authority seems to be the most complete and stringent among those taken into account in the article and he advances some proposals aimed at further improving the policies regulating conflicts of interests.

**Agenzie Web 2.0: le Agenzie europee e le nuove forme
di comunicazione elettronica**

Alessandro Spina

Diffusion of new data-processing technologies enabling interactive and collective use of Internet Web 2.0 applications – social networks or wiki-based platforms – sees the emergence of the power of information. In this note, the Author discusses how "information" can be harnessed by European agencies in order to perform their activities. By drawing from the example of the "Open Government" of the Obama

Administration, agencies may consider to leverage their unique network-based nature and the amount of EU-wide data they process, in order to promote innovative forms of communication and to engage the public in collaborative projects. The Web 2.0 offers an opportunity for these administrative bodies to decline under a new dynamic framework the principle of an “open, efficient and independent European administration” of Article 298 of the TFUE.

**L’Autorità bancaria europea.
Prime riflessioni intorno ad un modello “europeo” di vigilanza**

Davide Diverio

In this note the Author aims to illustrate a first analysis of the legislation regulating the new European Banking Authority established by the Regulation (EU) n. 1093/2010. In particular, he aims to draw attention to the tasks and powers of the Authority (and its Board of Supervisors) and explains that when it adopts an individual decision addressed to a financial institution, in the case of breach of the EU law and especially in emergency situations, it shall act without the Commission control. Finally the A. expresses some doubts about the effectiveness and the nature of the Authority as a real European institution.

Economia sociale di mercato e nuovi rapporti di partenariato pubblico-privato: l’esperienza dell’iniziativa per le medicine innovative (IMI) ed il coinvolgimento dell’Agenzia Europea dei Medicinali

Enrica Pavione

The economic and financial crisis that has affected all developed countries have introduced elements of a strong break with the more recent past, questioning the fundamentals of the process of globalization. The globalization marked a break point in the relations between state and market, leading to the superiority of market mechanisms for public institutions. This led to a marginalization of the state in managing the economy, giving a role of supplementing the economic actors with

greater market power, typically large enterprises. These phenomena have accelerated the debate around the theme of globalization and the need for redefining the public-private relationships.

Europe is now building a new model of public-private relationships, founded on the principle of subsidiarity. The Lisbon Treaty aims to achieve a new stage of European unification, the economic union, through a constitutional order based on subsidiarity and the explicit reference to the social market economy. In this sense, the lessons derived from the historical model of social market economy can be generalized to understand the importance of institutions in establishing a new socio-economic model and a new global order.

This paper aims at contributing to the debate on the future prospects of the European socio-economic model. Starting from the theme of social market economy in a historical perspective, in order to understand the relevance today, the study aims at highlighting the examples of concrete achievements which are currently affecting the core Europe. The reference is, in particular, to innovative cluster, innovative business models, which are emerging original public-private relations, in which the public actor plays a central role in strategic planning. In this light, the paper examines the experience of the Initiative for Innovative Medicine (IMI) and the role played by the European Medicines Agency. In this sense, it is interesting to understand whether these phenomena can be given a contribution to the construction of a new social market economy and therefore to serve as interpretive key to understanding the changes taking place.

**Oltre il dibattito attuale: appunti per un'agenda di ricerca
sul processo di *agencification* nell'Unione Europea**

Edoardo Chiti

In this contribution, the Author briefly sketches a research agenda on the agencification process in the EU legal order. Taking the achievements of legal and political science as a starting point, it suggests that

three main aspects of the agencification process should be further investigated. Firstly, a systematic inquiry of the empirical dimension of the European agencies' system would allow a more accurate and less formal understanding of the agencification process. Secondly, a reconstruction of the instruments of control to which the various agencies are subject could shed light on their normative foundations and capacity to develop good administrative practices. Thirdly, scientific reflection should focus on the current remarkable transformations of the consolidated model, giving account of the constant evolution of legal and institutional reality.

ISBN
978-88-96890-02-8

Jean Monnet Centre of Pavia
Università degli Studi di Pavia



Education and Culture DG

Lifelong Learning Programme