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Third-country participation in EU agencies

Towards “condominio”?¹

Sandra Lavenex

Introduction

This chapter complements intergovernmental and supranational perspectives on differentiated integration by investigating the transgovernmental dynamics and shape of differentiated integration in European Union (EU) decentralised agencies. These secondary institutions in the EU system occupy a particular space that is relatively shielded from both the dividing dynamics of intergovernmental politics and from the unifying ambit of the supranational polity. As will be developed further below, the sector-specific scope of EU decentralised agencies, their specialisation in specific regulatory tasks and their technocratic composition as hubs of national regulators have turned decentralised agencies into privileged fora for external differentiated integration vis-à-vis associated countries and beyond. The result is a varied polycentric patchwork of memberships and associations in EU secondary institutions with frequent ramifications to overarching international regimes. In sum, this transgovernmental web of differentiated integration echoes Philippe Schmitter’s vision of a “condominio” in which “instead of a Eurocracy accumulating organizationally distinct but politically coordinated tasks around a single centre, there could be multiple regional institutions acting autonomously to solve common problems and produce different public goods” (Schmitter 1996: 136).

This chapter conceptualises and illustrates the transgovernmental layer of (external) differentiated integration in the multilayered EU polity. It first introduces the distinct modes of governance applying to transgovernmental bodies and EU agencies more specifically and identifies the formal and informal institutional features that make these transgovernmental bodies particularly permeable for flexible forms of differentiated integration. Section three on third-country participation in EU agencies documents this flexibility zooming into concrete examples of differentiated integration. It will be shown that third-country participation in EU agencies has mostly developed incrementally and on a case-by-case basis driven by the mutual interest and interdependence between peer regulators, and that supranational actor’s efforts to guide and harmonise decentralised agencies’ external relations have rarely imposed limits on this functionalist outreach. Political limits have, however, been imposed when sector-specific cooperation has become politicised in the context of overarching intergovernmental relations between the

EU and a third-country, as, most recently, in the cases of Switzerland and the United Kingdom. Section four therefore explores the scope and limits of “condominio” between supranational control and national sovereignty, before we conclude.

Modes of governance and the flexibility of decentralised agencies

As specialised organisations focused on the coordination of national regulators in a given policy area, EU agencies are typical instances of what Liesbet Hooghe and Gary Marks (2003) have referred to as “type II” institutions in the EU’s multilevel polity. Task-specific governance in type II organisations contrasts with politically encompassing “type I” systems of governance that are based on territorial demarcations and cover a variety of policy areas, i.e. typically nation states but also the overarching EU polity (*ibid.*). While having their own structures and modes of operation, “type II” institutions are always embedded in overarching “type I” structures, with different degrees of flexibility and independence.

The delegation of regulatory functions to technocratic executive bodies is a ubiquitous phenomenon in modern democracies and is at the centre of the notion of the regulatory state (Levi-Faur 2011). This phenomenon has been found to be typical of the European multilevel and polycentric system (Majone 1996; Hooghe and Marks 2003), it, however, also exists at local (e.g. Ostrom 1990), national (e.g. Gilardi 2008) and international levels of governance (e.g. Keohane and Nye 1974; Slaughter 2004). While associated with particular modes of governance that are spelled out below, it should be noted that “type II” or technocratic, non-majoritarian executive bodies are always embedded in overarching “type I” political structures – therefore denoting compound rather than mutually exclusive modes of governance (see also Trondal and Jeppesen 2008).

The modes of governance associated with “type II” institutions make them particularly interesting as venues for differentiated integration within a wider encompassing system such as the EU. In contrast to “type I” polities, “type II” jurisdictions are organised along functional lines resulting from the structure of interdependence of a particular problem; they are limited to specific tasks and sectors; they have intersecting, “polycentric” memberships across a large number of levels – sometimes public and private –, and they have flexible designs allowing them to adapt to changing situations (Hooghe and Marks 2003).

The permeability of transgovernmental structures stems from their organisational features. They are based on horizontal ties between their members and have been described as hubs in a network of national experts (Eberlein and Newman 2008: 29). Integration does not consist in “vertical” transfers of competences to a higher, encompassing unit, but advances “horizontally” by linking competent bodies in national administrations in common regulatory activities. Policy-making usually consists in the coordination of national regulations and practices. While an increasing number of agencies have been granted decision-making authority, “soft law” is normally favoured over “hard law”, and integration also occurs through non-legal means including the sharing of information, the development of shared curricula and operational cooperation in policy implementation.

The horizontal structures also reflect in the composition of decentralised agencies. The management boards and subunits are normally composed of representatives of competent divisions in national ministries or of independent executive bodies which enjoy a certain degree of independence from central government and own expertise over the matter at hand. They are thus also those actors who not only contribute to the development of new policies but also those who will then implement agreed policies on the ground. In the case of the European Food Safety Authority (EFSA), the management board is not composed of representatives from national

administrations but by independent experts who are recruited on the basis of an open call and then appointed by the Council after consultation of the European Parliament, which gives this agency an even greater degree of independence from political actors.

The emphasis on coordination, consensus and mutual learning lowers the hurdles for the participation of public officials from different “type I” jurisdictions and reduces the pressure for congruence. The experts and public officials involved enjoy a considerable degree of independence from their states’ central administration and are less subject to bureaucratic chains of command (Eberlein and Newman 2008: 32). While internally, these properties of “type II” governance relativise the importance of territorial boundaries, externally they allow member regulators to “follow function” and develop webs of foreign relations that blur the distinction between insiders and outsiders (Lavenex 2014; 2015a).

These three characteristics (limited functional scope; the emphasis on task-specific interdependence as rationale for inclusion; and the technocratic emphasis on expert-led problem-solving rather than political representation) resonate with a functionalist vision of integration. According to David Mitrany (Mitrany 1965: 141), functionalist, task-specific integration avoids the exclusivist tendencies of territorially based, encompassing political systems: “a federal system is bound to be closed and exclusive; a functional system is naturally open, as changes in membership can be absorbed without doing violence to policy and administration”.

How does the transgovernmental layer of “type II” institutions such as decentralised agencies contribute to the wider edifice of European integration, and how far is this functionalist promise reflected in the differentiated inclusion of non-member states?

Decentralised agencies as venues for external differentiated integration

Interestingly, the progressive supranationalisation of decision-making processes and the EU’s transformation from a primarily market-related regulatory policy towards political system with “core state powers” (Genschel and Jachtenfuchs 2013) has gone hand in hands with a steep proliferation of decentralised agencies in all sectors of EU policy-making. Egeberg and Trondal (2017) document an acceleration in the creation of new decentralised agencies over the last 15 years in terms of numbers but also in terms of powers and quality (ibid.: 679f., see also Ossenge 2016). Today, the EU counts a total of 36 agencies across market-related and non-market-related policy areas, including air safety, banking, border control, disease prevention, electricity, environment, food safety, medicines, migration, telecommunications, trademarks or external security. Decentralised agencies herewith form a constitutive layer of the EU’s institutional architecture. Broadly speaking, these networks of national regulators assist in the implementation but also in the development and specification of EU law and policy. Their tasks range from providing scientific advice for upcoming legislation and policy implementation, collecting and exchanging information, providing specific services, training national officials according to agreed curricula, offering capacity-building and technical support to national authorities, carry out joint operations, and more generally coordinating national authorities. A good number of agencies have, however, also a regulatory mandate and define common standards and rules that are then valid (if not necessary always legally binding) for national authorities.

If we apply the notion of “integration” proposed in this volume (Leruth et al. Introduction this volume), EU agencies make a significant contribution to European integration. They increase the “density” of interactions among national executives, deepen the “intensity” of these interaction based on commonly defined curricula, data, practices and regulations and modify the “character” of the relations among the participating countries by establishing a densely connected layer of transgovernmental cooperation. In consequence, participation in decentralised agencies increases

“consistency”, “interdependence” and “structural connectedness among the parts” – and hence integration (Leruth, et al. this volume).

Importantly, the type of integration promoted in decentralised agencies is complementary and to some extent also independent from the classic understanding of European integration “through law” (Dehousse and Weiler 1990; Weiler 1999). While the latter presupposes the vertical devolution of legal authority to common supranational institutions setting hierarchically binding legal standards which enjoy primacy over national law, integration through transgovernmental cooperation in EU agencies (as well as other EU secondary bodies such as committees or policy networks) works through the horizontal coordination of national regulations and practices (Mastenbroek and Martinsen 2018). At least formally speaking, transgovernmental integration is thus more protective of state sovereignty than the classic model based on supranational law. In other words

Agencification’ of the EU administration may be regarded as a compromise between functional needs for the supply of more regulatory capacity at the European level, on one hand, and Member States’ reluctance to transfer executive authority to the European Commission, on the other

Egeberg and Trondal (2017: 675), see also Kelemen (2002)

Hofmann et al. (2019: 1) define agencies from a legal point of view “as bodies governed by European public law that are institutionally separate from the EU institutions, that have their own legal personality, that enjoy a certain degree of administrative and financial autonomy and that have clearly specified tasks”.

As technocratic bodies set up with the task to promote effective solutions to genuinely transboundary problems such as consumer safety, environmental protection or migration, EU agencies depend on cooperation with interdependent states and organisations in order to fulfil their mandate. This functional need is recognised in the founding regulations of the vast majority of EU agencies. The importance of EU agencies’ external relations is reflected not only in increasing scholarly attention (Coman-Kund 2018; Hoffman et al. 2019; Lavenex 2011; 2015a; Lavenex et al. 2021; Rimkute and Shyrokykh 2019) but also in manifest attempts by the EU central bodies, the Commission, Council and Parliament, to retain some control over these developments.

Third-country participation in EU agencies

The patterns of third-country participation in EU agencies have been shaped by two distinct dynamics. The majority of decentralised agencies have developed international relations as a response to patterns of interdependence and have sought to formalise cooperation relations with their counterparts in those third countries with which they most closely interact in their daily functions. The second dynamic spurring the association of third-country regulators is the EU’s overall foreign policy and the circles of association the EU has developed with its proximate neighbourhood. As a result, the external cooperation relations by EU agencies reflect a mix of highly diverse, sector-specific patterns of functionalist interdependence on the one hand, and more territorially based political priorities on the other (Lavenex 2015a). While functionalist patterns of regulatory outreach predate the political guidance, the latter has intensified in the context of EU enlargement and the development of the European Neighbourhood Policy (ENP) from 2004 onwards. Today, the EU has adopted a number of policies guiding agencies’ external relations with priority countries under the common foreign policy, promoting

differentiated integration in particular of European Economic Area (EEA), candidate and ENP countries. Sector-specific agreements granting access to EU agencies have been concluded with Switzerland as part of its bilateral agreements. Agencies' external relations, however, also reach beyond the EU's neighbours and include significant ties with peer regulators in countries such as Japan or the United States.

Openness to third-country cooperation is usually provided in the founding acts of EU agencies. The standard provision found in EU agencies' constituent acts is that third countries shall be given the possibility of participating in these bodies if they "have concluded agreements... which provide for the adoption and application by these countries of Community law in the area covered by the basic act". However, not all EU agencies are open to third state participation under their founding regulations, notable exceptions being the European Medicines Agency (EMA) and the European Union Intellectual Property Office (EUIPO).

Specific provisions apply Iceland, Liechtenstein and Norway under the **EEA agreement** from 1992 and have been spelled out in subsequent years with the mushrooming of EU agencies from 1993 (see Table 16.1). EEA/EFTA countries have been granted on a general basis participation "in the Administrative Board ... [with] the same rights and obligations as EU Member States, except for the right to vote" in EU agencies (EEA 2012: §4.3). Considering that voting is not frequent in these boards, differentiated integration of EEA/EFTA countries is thus far-reaching at this transgovernmental level (and similar provisions apply to membership in EU programmes and committees). There is also one exception to this standard of full membership without voting rights which is the EFSA Advisory Forum in which EEA EFTA countries enjoy the same voting rights as the EU member states (Öberg 2019: 210). This far-reaching integration is in line with these countries' commitment towards the *acquis communautaire* under the EEA, including its dynamic development.

The opening up of Eastern Europe in 1989 and the unfolding **enlargement** strategy brought a new group of countries in connection to the *acquis communautaire*. Candidate countries' socialisation into EU policies and networks started with the opening-up of certain EU programmes in the association agreements concluded with the Central and Eastern European countries in the beginning of the 1990s. Candidate countries' participation in EU programmes was formally endorsed with the Copenhagen European Council Decisions in 1993. These provided that candidate countries should have access to the same programmes that had been opened EFTA states before (European Council 1993: 15). EU agencies came later onto the radar of the architects of EU enlargement in the Commission and the Council. The Commission included agencies with community programmes and committees into the pre-accession strategy in 1999 with the proposal of a "framework approach" streamlining the Community procedures required to agree the conditions and modalities of the participation (European Commission 1999). Like for EU programmes and committees, participation in EU agencies is seen as a means to familiarise candidate countries with EU policies and to support the development of the legislative and administrative capacities required for adopting the EU *acquis communautaire*. Agencies are encouraged to offer participation possibilities, including observer status, to candidate countries in Management Board and expert group meetings. In other words, the differentiated integration of candidate countries in EU agencies is one instrument in the EU's tool-box of policy transfer based on learning, socialisation and capacity-building in the context of EU enlargement. This is also supported by the EU Instrument for Pre-Accession Assistance providing funding to EU agencies to help prepare candidate states for participation in certain agencies.

In practice, this instrumentalisation of decentralised agencies as venues for pre-accession policies has been less encompassing or coherent than Commission or Council documents suggest. Access by candidate countries to EU agencies' management boards or secondary bodies has

Table 16.1 EU Agencies, year of creation, function and legislative power

<i>Abbr.</i>	<i>Name</i>	<i>Year creation</i>	<i>Function</i>	<i>Legally binding acts?</i>
ACER	Agency for the Cooperation of Energy Regulators	2011	Supervision	Yes
BEREC	Office of the Body of European Regulators for Electronic Communications	2010	Cooperation	No
CdT	Translation Centre for the Bodies of the European Union	1994	Operational activities	No
Cedefop	European Centre for the Development of Vocational Training	1975	Information	No
CEPOL	European Union Agency for Law Enforcement Training	2005	Information	No
CPVO	Community Plant Variety Office	1994	Certification	Yes
EASA	European Aviation Safety Agency	2003	Certification + Scientific/ technical expertise	Yes
EASO	European Asylum Support Office	2011	Information + Cooperation + operational activities + scientific/technical expertise	No
EBA	European Banking Authority	2011	Supervision	Yes
ECDC	European Centre for Disease Prevention and Control	2005	Information + Cooperation	No
ECHA	European Chemicals Agency	2007	Scientific/technical expertise + Registration	Yes
EDPB	European Data Protection Board	2018	Supervision	No
EEA	European Environment Agency	1994	Information + Scientific/ technical expertise	No
EFCA	European Fisheries Control Agency	2005	Operational activities + Cooperation + inspection	No
EFSA	European Food Safety Authority	2002	Scientific/technical expertise	No
EIGE	European Institute for Gender Equality	2007	Information + Cooperation	No
EIOPA	European Insurance and Occupational Pensions Authority	2011	Supervision + cooperation	Yes
ELA	European Labour Authority	2019	Information + inspection + cooperation	No
EMA	European Medicines Agency	1995	Scientific/technical expertise	No
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction	1993	Information	No
EMSA	European Maritime Safety Agency	2002	Cooperation + Supervision	No
ENISA	European Union Agency for Network and Information Security	2005	Information	No
EPPO	European Public Prosecutors' Office	2017	Operational activities	Yes
ERA	European Union Agency for Railways	2004	Cooperation + Supervision	Yes
ESMA	European Securities and Markets Authority	2011	Supervision	Yes
ETF	European Training Foundation	1994	Information + Cooperation	No

(continued)

Table 16.1 Cont.

<i>Abbr.</i>	<i>Name</i>	<i>Year creation</i>	<i>Function</i>	<i>Legally binding acts?</i>
EUIPO	European Union Intellectual Property Office	1999	Registration	Yes
EU-LISA	European Agency for the Operational Management	2012	Operational activities	No
EU-OSHA	European Agency for Safety and Health at Work	1994	Information + Cooperation	No
Eurofound	European- Foundation for the Improvement of Living and Working Conditions	1975	Information	No
Eurojust	Eurojust	2002	Cooperation + Operational activities	Yes
Europol	European Union Agency for Law Enforcement Cooperation	1999	Cooperation + Operational activities	No
FRA	European Union agency for Fundamental Rights	2007	Information	No
FRONTEX	European Boarder and Coast Guard	2016	Operational activities	No
GSA	European GNSS Agency	2004	Information	No

Source: Own compilation, function and legally binding acts taken from Vos (2018).

remained exceptional. The European Aviation Safety Agency (EASA) is among the most open ones and has provided for candidates to join the management board as observers from its establishment in 2002 (Lavenex 2015a; Lavenex et al. 2021). However, most other agencies either provide no access at all or only observer status in selected secondary bodies or advisory forums (such as, from 2011, the European Centre for Disease Prevention and Control [ECDC] advisory forum or, for the European Medicinal Agency EMA, in scientific and technical non-product-related meetings). Some exceptions apply to Turkey which has joined the European Environmental Agency EEA as member and invited to participate fully but without voting rights in the management board of the European Monitoring Centre for Drugs and Drug Addiction EMCDDA.

In sum, candidate countries' participation in EU agencies is therefore limited. Instead, candidate countries' interaction with EU agencies is mainly based on concrete capacity-building programmes and operational activities. These can, however, be quite substantive. An eminent example of far-reaching differentiated integration in agencies' operational activities is Frontex. The first working arrangements signed between Frontex and candidate countries regulated only exchange of information between the Frontex Risk Analysis Unit and the Border and Migration Departments of these countries. From 2019 onwards, the EU has been negotiating status agreements with the candidate countries of the Western Balkans that provide for joint border control teams composed of Frontex (member state) and third-country officials sharing executive powers for border control and return operations on the territory of the third country.

With the accession of the CEEC countries in 2004 and 2007, EU foreign policy attention has shifted to the neighbouring countries which would not be given a clear membership perspective. In the famous words by former EU Commission President Romano Prodi, the **ENP** launched in 2003 was to offer "everything but institutions". Although membership in EU core decision-making institutions such as the Commission, Council and Parliament was thus ruled

out, the offer of less encompassing forms of association did foresee access to EU secondary bodies, including agencies. The ENP has its legal basis in Article 8 of the Treaty on EU which provides that the EU “shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation”. Article 8 also provides that the EU “may conclude specific agreements” with ENP countries, which “may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly”. Opening up EU agencies to the participation of ENP countries was envisaged as early as 2006 with the Commission’s Communication “on the general approach to enable ENP partner countries to participate in Community agencies and Community programmes” (European Commission 2006). This Communication emulated many elements of the enlargement policy, including the idea that “the participation of neighbouring countries [in EU agencies] may be in the interests of the enlarged EU and of the neighbouring countries” (European Commission 2006: 3). It also stressed that ENP countries’ participation in agencies would serve “the EU’s overarching goal of encouraging and supporting regulatory and administrative reform and institution building in neighbouring countries...in the overarching Community interest” (ibid.: 3).

Notwithstanding these references to the role of decentralised agencies in foreign policy, the decision to open up towards a particular country rests with the EU agencies and not with the EU foreign policy apparatus. In practice, participation of ENP countries has evolved very little beyond cooperation targeted at promoting alignment with EU standards. The agency that has developed most meaningful cooperation with ENP countries is EASA. This is based on comprehensive air transport agreements with candidate and neighbourhood countries in view of a wider Common Aviation Area based on a parallel process of gradual market opening and regulatory convergence towards EU rules. Neighbourhood country regulators are associated to EASA and its information system on air safety of aircraft and of air operators (SAFA) through a harmonised system of inspections, information-sharing database, standardisation visits, training programmes, joint inspection operations and coordination on intended regulatory changes. Partner countries partake in the coordination meetings of the SAFA programme and have a (technical) advisory role therein. With all other EU agencies, ENP countries’ participation is more ad hoc and targeted at specific capacity-building and technical cooperation programmes. The exception to this rule is Israel, which has developed stronger ties with a number of EU agencies. A case in point is its cooperation agreement with the EMA which allows for mutual recognition agreements in relation to conformity assessment of medicinal products. Israel’s privileged position vis-à-vis other ENP countries underlines the importance of market integration and comparable levels of administrative capacity and regulatory expertise for stronger transgovernmental integration. For instance, EMA’s agreement with Israel recognises the country’s industrial standards as equivalent to European standards. The agreement also presupposes Israel’s capacity to implement EU legislation and to align so-called good manufacturing practice standards, thus providing the basis for mutual recognition (Lavenex 2015a: 846).

The discussion of the candidate and ENP countries shows that EU agencies primarily play a role as agents of EU external governance, i.e. “the projection of EU rules beyond its borders” (Lavenex 2004; Lavenex and Schimmelfennig 2009), including capacity-building for implementing those rules. In so far as EU agencies establish links with peer regulators in these countries they do contribute to differentiated integration in the sense defined by Leruth et al. (Introduction, this volume). They increase the “density” of interactions among national executives and deepen the “intensity” of these interaction based on commonly defined curricula, data, practices and regulations deriving from the EU *acquis*. While the “character” of the relations among the participating countries is more a one-way street than technocratic cooperation

within the EU or with more similar highly developed regulators, one can also say that outreach by EU agencies contributes to an emerging layer of transgovernmental cooperation with public authorities in ENP countries. The fact that this layer has not led to more participation in the organisational structures of EU agencies, however, also points at important preconditions for transgovernmental integration. These include not only functional interdependence but also the existence of compatible bureaucratic structures, including competent authorities to liaise with EU counterparts, as well as the administrative capacity and capability to follow up on common action (Lavenex 2015b).

The differentiated integration of candidate and ENP countries in EU agencies thus follows a primarily political logic driven by EU's institutions overarching foreign policy ambition of avoiding "sharp edges" (Grabbe 2000) in and around Europe. While contributing to the density and intensity of interaction between these countries' public administrations and the EU's multilayered executive order, this integration operates one-way based on the projection of EU rules and practices and finds its limits in the weakness of functional ties and interdependencies, including differences of administrative structures and capabilities.

This situation contrasts with that of the EEA/EFTA countries that have been fully associated with EU agencies as well as other Western countries that share stronger economic and regulatory ties with the EU, even if this does not always imply adaptation to the EU's *acquis communautaire*.

Switzerland occupies a special place in this context. On the one hand, Swiss authorities had developed transgovernmental links too peer regulators neighbouring EU countries in many policy areas already before the establishment of EU agencies (Lavenex 2009). On the other hand, Switzerland has progressively deepened its commitment to alignment with the EU *acquis communautaire* under its sectoral bilateral agreements with the EU (Lavenex and Schwok 2015). This creates a double, functionalist and political impetus for association to EU agencies. Contrary to the EEA/EFTA countries however, which by way of their encompassing association to EU legislative integration have been granted generalised access, Switzerland's bilateral exceptionalism necessitates negotiating separately each association to an EU agency. In recent year, Swiss-EU relations have become increasingly politicised due to contrasting visions of the future of bilateral relations and the institutional architecture of an overarching institutional association agreement (Veuthey 2020). This has had repercussions on the functionalist drivers of differentiated integration in EU agencies.

In the early years of "agencification", Switzerland gained access in a relatively informal and permissive manner to EU agencies, based on the existing links between national authorities. For instance, and according to Swiss government sources, cooperation with the EEA started already in 1993 – even before the agency was officially installed in 1994. Cooperation was informal and concentrated on technical and scientific cooperation in concrete projects. This cooperation became more formal in the context of the first round of bilateral negotiations in 2002 when Switzerland obtained the status of an associated country. This allowed Switzerland to send an expert to the EEA, including access to the management board. In 2006, Switzerland became a full member like the EEA/EFTA countries and Turkey (Eidgenossenschaft 2010).

Today, Switzerland is a formal member in two agencies dealing with the environment and air traffic (the EEA and EASA) and, in line with its encompassing association to the Schengen/Dublin *acquis*, three justice and home affairs agencies: Frontex, the European Asylum Support Office (EASO) and the European Union Agency for Law Enforcement Training (CEPOL). Moreover, it has comprehensive cooperation agreements with Europol and Eurojust (these two agencies do not foresee for third-country membership). The wave of "agencification" in the EU has, however, motivated demand for accession to more agencies. De facto, Swiss authorities do participate in a variety of other transgovernmental networks operating under the ambit of EU

agencies, and in some agencies, it cooperates on an informal basis. For instance, Switzerland has enjoyed observer status in the EFSA Advisory body for several years, without having concluded a formal agreement (Ibid.: 69). Swiss experts have been cooperating in EFSA's scientific panels and in ad hoc expert groups based on mutual interests and informal, often personal contacts. With the formalisation of transgovernmental cooperation in EFSA and the creation of new instruments such as the early warning systems RAPEX and RASFF, however, Switzerland has been gradually lost access to relevant fora and information. This has motivated a formal demand to conclude an association agreement with EFSA. Yet, this demand has been blocked due to overarching political controversies between EU central bodies and the Swiss government over the conclusion of an encompassing framework agreement which would put the various bilateral agreements under a common institutional framework, including commitment to progressive approximation to the EU *acquis* and formal supervision mechanisms (Lavenex and Schwok 2015; Veuthey 2020).

A similar situation of informal functionalist integration constrained by overarching political contestations also applies to the field of health cooperation against infectious diseases. Switzerland has been an active player in transgovernmental health networks in Europe, including those dealing with epidemiological data or the exchange of best practices. It has also participated in the Early Warning and Response System (EWRS) integrated under the ECDC. With increasing formalisation of transgovernmental cooperation in the ECDC, however, Switzerland as feared becoming gradually disconnected from these networks, motivating the Swiss government to ask for formal association (Eidgenossenschaft 2010: 72).

The case of Switzerland is illustrative of the tensions between encompassing political integration in Europe and decentralised, functionalist and transgovernmental integration à la "condominio". While the "Swiss way" (Lavenex and Schwok 2015) has increasingly come under the focus of political integration, functionalist outreach persists with third countries that share high levels of functional interdependence and regulatory capacity but haven't negotiated encompassing associations to the EU. A case in point are Australia, Canada, Japan and the United States which enjoy far-reaching participation rights in several EU agencies based on bilateral agreements concluded with these agencies. Again, EASA provides for the most far-reaching cooperation with these more remote Western partners. Contrary to the arrangements concluded with candidate or ENP countries, EASA's comprehensive bilateral agreements with the United States, Canada, Brazil, China and Japan allow for eye-level cooperation based on the principle of mutual recognition, including for safety certificates (Hoekman and Sabel 2019; Lavenex et al. 2021). In some agencies, the United States has been granted access to secondary bodies, such as the possibility for US FDA staff members to participate as observers the EMA's Pharmacovigilance Risk Assessment Committee (PRAC), the Committee on Human Medicinal Products (CHMP) on product-related safety concerns or the Pediatric Committee meetings. Similarly, the United States, Canada and Australia cooperate with the EMA and competent subcommittees in joint training activities or in the mutual recognition of conformity assessments. Another agency which has traditionally had strong ties with the United States is the European Securities and Markets Authority (ESMA). Already its predecessor, the Committee of European Securities Regulators (CESR) enjoyed close regulatory cooperation with the US Securities and Exchange Commission (SEC). Created in the aftermath of the 2007/2008 financial crisis, ESMA has concluded administrative arrangements with 32 important financial centres around the world, including the United States, Japan, Canada, Australia and Singapore (Lavenex et al. 2021: 8f.).

With Brexit, the question of differentiated integration in EU agencies has also become pertinent for the United Kingdom. Seeking a closer association with the EU, the Brexit arrangement negotiated under Prime Minister Theresa May foresaw continued UK membership in most EU

agencies (UK 2018). With the choice for a looser EU-UK Trade and Cooperation Agreement, the Johnston Government has decided against regulatory association to EU standards and has ordered resignation from all EU agencies. However, given the UK's functional interdependence with the single market and also adjacent policies such as justice and home affairs or defence cooperation, the question of UK's integration in the wider European transgovernmental networks, including their integration in EU agencies, is likely to stay on the agenda. For instance, the UK's aerospace sector is the second largest in Europe and the third largest in the world. The UK government's announcement in March 2020 that it would be withdrawing from EASA end of 2020 immediately raised wide criticisms on part of the aviation industry for fear of significant costs, diminished attractiveness for foreign investment and loss of influence in the EU agency as one of the world's major regulators (Senior European Experts 2020). Similar concerns have been raised across sectors, including from the chemical industry regarding the European Chemicals Agency (ECHA), the financial sector regarding the European Banking Authority (EBA) and ESMA, pharmaceuticals regarding the EMA or the fisheries sector concerning the European Maritime Safety Agency (EMSA), energy regulators regarding the Agency for the Cooperation of Energy Regulators (ACER) or justice and home affairs officials regarding participation in Europol and Eurojust. In sum, a recent report concludes that

The costs of the UK's withdrawal from EU regulatory bodies include the direct costs of setting up and skilling new UK regulatory functions, ... and the direct costs to UK exporting businesses of obtaining dual authorisations. But there will also be indirect costs in terms of increased trade friction and duplication, possible transfer of operations from the UK to the EU, loss of influence in pan-European (and sometimes global) standard setting and the potential loss of regulatory expertise

idem: 6

For all these reasons, UK regulators are most likely to seek to maintain close links with their peers in EU member states and pertinent EU agencies, thereby sustaining the drivers for external differentiated integration.

Scope and limits of condominium

The review of external differentiated integration in EU agencies above gives support to a functionalist vision of a decentred multi-sited web of transgovernmental "type II" institutions that comes close to Philippe Schmitter's notion of "condominio". However, these institutions do not "float freely" and are to variable extents enmeshed in the wider system of territorially based, encompassing "type I" governance in the EU. The scope and limits of this "condominio" is circumscribed by the interplay between this layer of integration and the more federal mix of intergovernmental and supranational architectures in Europe.

The case of Switzerland discussed above has indicated that when overarching diplomatic relations become politicised, supranational actors can seriously circumscribe the scope for flexible transgovernmental arrangements. The case of the United Kingdom is indicative of the incisive role national governments can play, and also of the "shadow of hierarchy" looming in the background of more soft law deliberations in decentralised agencies: indeed one of the reasons for the UK's complete withdrawal from these institutions is that most EU agencies come under the jurisdiction of the ECJ, which runs counter the emphasis put on "recovering sovereignty" and "regulatory autonomy" emphasised in electoral politics (UK 2018).

Developments over the last two decades corroborate a tendency of supranational actors to gain stronger control over the decentred web of transgovernmental bodies. Up until the second wave of agencification in the early 2000, EU institutions refrained from interference with the work and evolution of decentralised agencies (Curtin and Dehousse 2012: 194). The impetus for stronger oversight came with the allegations of fraud and mismanagement that led to the fall of the Santer Commission. On the one hand, the Commission's White paper on European Governance of 2001 (European Commission 2001: 24) emphasised the importance of delegating administrative tasks to agencies as non-majoritarian bodies as part of a shift to new modes of more effective and legitimate governance (Curtin and Dehousse 2012: 195). On the other hand, this formal endorsement, coupled with the proliferation of agencies, motivated the desire for stronger supranational guidance of these bodies. In 2005, the Commission presented a draft for an interinstitutional agreement on European regulatory agencies (European Commission 2005). Neither the Parliament nor the Council saw the need for such a framework. Instead, the three EU bodies established a working group which, after lengthy discussions, adopted in 2012 the non-binding Common Approach to EU agencies (Groenleer 2009: 110). The document establishes a number of general principles promoting the "coherence, effectiveness, accountability and transparency" of decentred agencies, including the principle that "agencies international relations should be streamlined" (Council of European Union 2012). In this view, the document provides that agencies which cooperate internationally should have "a clear strategy for those activities" which, together with "appropriate working arrangements with partner DGs in the Commission should ensure that the agencies operate within their mandate...and they are not seen as representing the EU position to an outside audience or as committing the EU to international obligations" (ibid.: §25). The document further stipulates that this strategy must be approved by the agencies' management board. The agencies thus remain in the driving seat and retain to a large extent their autonomy, which is also reflected in the understanding that they do not represent the EU as such. However, closer coordination with the Commission is called for through the working arrangements with partner DGs and the provision that "an early exchange of information should take place on respective international activities between agencies, the Commission and the relevant EU Delegations, to ensure consistency of EU policy" (ibid.). These principles have also trickled down into the establishing acts of EU agencies. As a recent analysis shows, with the reform of their funding regulations, most EU agencies now require stronger coordination with the Commission and sometimes the Council and Parliament for concluding cooperation agreements with third countries, reaching from a looser requirement of "consultation" to the need for "approval" (Lavenex et al. 2021). As a general rule, agencies' functionalist outreach has not relented with these increased coordination requirements. On the contrary, one can say that overarching EU political priorities such as the association of candidate and neighbourhood countries have come to supplement the decentred links to peer regulatory. However, the case of Switzerland also shows that supranational actors can put a brake on transgovernmental differentiated integration. The more the participation in EU agencies and associated subcommittees and networks becomes formalised under EU law, and the more this participation is identified as a stake in political controversies, the less scope there may be for flexible differentiated integration in "condominio".

Conclusion

This chapter has introduced cooperation in EU decentralised agencies as a hitherto under investigated space for differentiated integration in Europe. As anticipated by early functionalist

theories of integration and echoed in the literatures on multilevel and new modes of governance, the form and reach of public administrations follow their tasks and functions, leading to a differentiated web of transgovernmental ties and networks taking different territorial shapes across policy areas and sectors. This process of decentred transgovernmental integration has been spurred by the parallel devolution of regulatory authority to more or less independent technocratic bodies in liberal democracies and the EU. The waves of “agencification” in the EU system have built on previously established ties between national regulators, often involving also the cooperation with peers from non-member states.

As the discussion of third-country participation in EU agencies shows, this transgovernmental layer of differentiated integration reflects primarily the patterns of interdependence predominating in the various sectors. The advent of new foreign policy priorities towards candidate countries and the countries of the ENP have added a more political rationale for transgovernmental integration. Supranational actors and in particular the Commission have encourage EU agencies to take an active role in the promotion of the *acquis communautaire* and the socialisation of candidate/ENP countries’ administrations, including capacity building and training. In practice, however, these countries’ participation in EU agencies has remained limited, and only more advanced economies, including Israel and Turkey, have developed a meaningful access to some agencies. This contrasts with the full association (without voting rights) of the EEA/EFTA countries and, in some cases, Switzerland, but also with the deep forms of cooperation based on the principle of mutual recognition that exists with peer regulators from non-associated countries such as Australia, Canada, Japan or the United States in some agencies like the EASA, EMA or ESMA. In line with the definition adopted in this volume, these links amount to a form of differentiated integration. They increase the “density” of interactions among national executives, deepen the “intensity” of these interaction based on commonly defined curricula, data, practices and regulations and modify the “character” of the relations among the participating countries by establishing shared regulatory regimes and blurring the distinction between “insiders” (from EU member states) and “outsiders” (from third countries). In consequence, participation in decentralised agencies increases “consistency”, “interdependence” and “structural connectedness among the parts” – and hence integration (Leruth et al Introduction to this volume). As such, these patterns come close to Philippe Schmitter’s vision of a “condominio” based on functionally and territorially differentiated, sector-specific hubs of regional integration (Schmitter 1996).

That being said, our analysis also highlights supranational actors’ and in particular the Commission’s attempts to gain some control over agencies’ international relations. This reflects in the priorities given to candidate and ENP countries in EU overarching documents, new supranational guidelines and the introduction of new coordination requirements in the agencies’ funding regulations. As a general rule, these altered requirements have not constrained the functionalist patterns of differentiated integration in EU agencies. An exception, however, is Switzerland, for which formal accession to new agencies has been put on hold due to ongoing controversies over an institutional framework agreement. Limits to transgovernmental functionalist integration can, however, also stem from national politics, as shown in the case of the United Kingdom. Yet, whereas the UK government opted for a “hard” Brexit, including resignation from EU agencies, the deep interdependence of markets and societies is likely to demand for new forms of association also at this level of public authorities, and first reactions by affected industries and domestic regulators clearly point in this direction.

To conclude, public administrations in Europe constitute a hitherto under-investigated layer of differentiated transgovernmental integration that operates at arms lengths from centripetal supranational and particularist intergovernmental forces. While particularly salient in the EU’s

architecture, this phenomenon is not limited to the EU and its agencies but speaks to a more general feature of evolving global governance. With the progressive integration of markets and societies, expressed also in the increasing attention put on regulatory cooperation in preferential trade agreements, and, at the same time, the necessity to accommodate increasing diversity in Europe, differentiated integration à la “condominio” is likely to persist, with varied ties to supra-national and national principals.

Note

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