László Szegedi

The Crisis Management of the "Dieselgate" – Transboundary (and) Crisis Driven Evolution of EU Executive Governance with or without Agencies?[1]

The so-called "Dieselgate" was one of the major scandals of recent years, in which it has been revealed that several car manufacturers (and primarily the Volkswagen Group) manipulated with computers certain diesel-engine models. As a result, the software of the cars could detect when the models concerned were being tested and adjust the car's emissions to minimum requirements under laboratory circumstances. The starting point of the scandal was the notice of the US Environmental Protection Agency issued in September 2015, which obviously leads us to the dilemma, whether the EU would also need such supranational level watchdog instead of the current system of mainly national level-enforcement and supervision. The European Parliament's Inquiry Report and some MEP revealed several shortcomings and the need for an EU Road Transport Agency, though this option has not been followed by the Commission in related amendments. The article focuses on the different ways of EU "agencification" with emphasis on the relevant factors such as major crisis events or transboundary effects (standardisation requirements) which clearly resulted in creating EU agencies. This has been the relevant factors in establishing the three (other) EU transport agencies just like in case of the EU's environmental agency. Therefore, it is the question of the future, whether the reluctance mentioned, combined with the partly reformed enforcement framework with some increased powers given to the Commission (also to the newly created Forum inside the Commission), and the new

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requirements towards national authorities could adequately address the concerns revealed by the Dieselgate.

Keywords: Dieselgate, EU agencies, agencification, Meroni doctrine, EU Executive

The Short Story of the 'Dieselgate' and the Responses Given by the European Union

How the scandal escalated

The starting point of the so-called "Dieselgate" was the notice of the United States Environmental Protection Agency (EPA), which was issued in September 2015 to car manufacturer Volkswagen (VW) Group. Several Volkswagen and Audi models had been launched to the US market with "clean" diesel engines without further equipment of selective catalytic reduction such as AdBlue tank or urea to reduce its NOx (nitrogen-oxide and nitrogen-dioxide) emission and to meet the US requirements in this regard. However, it has been cleared, that the software of the cars could detect when the models concerned were being tested and the software could adjust the car's emissions to minimum requirements under laboratory circumstances. (Bovens, 2016: 262)

In the wake of the scandal senior officials of the VW Group were forced to resign, the company must face fines that could reach billions of dollars, class action and other lawsuits that could add billions of dollars more in liability. (Gardner et al., 2015) Regardless of the consequences related to the US market, this article intends to reflect the reactions and responses given by the European Union considering that neither the EU nor its Member States were able to identify the default devices of such models, while the diesel engines have always been much more popular in Europe compared to their popularity on the American continent.[2]

The EU Member States started to take their own measures, while the EU had not given coordinated response in the wake of the scandal, the main event in this regard was the creation of the European Parliament's Inquiry Committee, which has published its conclusions in March 2017 as a basis for further legislative steps due to be taken by the EU legislator. Nevertheless, some factors of the maladministration have already been revealed in the Joint Research Centre's (JRC) 2013 report[3] entitled *A complementary emissions test for light-duty vehicles*.

[2] Based on figures US rate of diesel engines remained marginal over the last decades, there was a clear decrease in Japan, while the share of diesel cars in Europe reached its peak by 50–53% in 2012–15. (Cames–Helmers, 2013: 3)

[3] Joint Research Centre's 2013 report entitled *A complementary emissions test for light-duty vehicles*. (JRC Report)

The Report of the European Parliament's Inquiry Committee

The Report of the European Parliament Committee (Report) dealt with diverse aspects of the root causes, namely the failures in testing procedures, the defeat devices, as well as with the concerns over European type-approval, and finally the concern of enforcement and penalties.

1. As for the main failures in *testing procedures* it has been identified long ago that there were substantial discrepancies between laboratory tests and real world emission measures of the New European Driving Cycle (NEDC), which affected the vast majority of diesel cars and are not limited to the VW vehicles equipped with prohibited defeat devices.[4] Before September 2015 the discrepancies were generally attributed to the inadequacy of the NEDC test with conformity factor, which was not representative of real-world emissions, but not to the use of prohibited defeat devices. The introduction of new techniques with real driving emission (RDE) and the Worldwide Harmonised Light Vehicles Test Procedure (WLTP), due to replace the obsolete NEDC, has only been decided as of 2017.[5]

   Some *Member States* clearly prevented the formation of a qualified majority in the Real Driving Emissions – Light Duty Vehicles (RDE–LDV) working group, resulting in a delay to introduce more ambitious Commission proposals for conformity factors in case of NO_x limits.[6]

   The *Commission* failed to use the means at its disposal, at the level of the RDE–LDV working group, to advance the decision-making process and ensure a timely adaptation of the type-approval tests to reflect real-world conditions. Moreover better coordination between the different Commission services involved (including the JRC) could have been instrumental in accelerating the process of adapting the tests.[7] Additionally there was a clear conflict of interest in representation of RDE–LDV working group consisting mainly of experts from car manufacturers and other automotive industries without ensuring balanced representation of the policy area.[8]
2. Regarding *defeat devices* neither the EU nor the Member State authorities searched for such devices or proved the illegal use of defeat devices before September 2015 – even if the JRC Report mentioned their potential use, while formulating the general policy goal to decrease their use as far as possible.[9] On 26 January 2017, the Commission published a Notice on Guidance on the evaluation of Auxiliary Emission Strategies and the presence of such devices. It suggested a testing protocol for defeat devices to assist Member States in detecting potential

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4 European Parliament (2017): *Report on the inquiry into emission measurements in the automotive sector.* (2016/2215[INI]), (EP Report) 4. The JRC Report has identified the problem years before the Dieselgate, which also led to the establishment of RDE–LDV working group. (JRC Report, 1.)

5 EP Report, 5.

6 EP Report 6–7. The JRC Report has proposed the finalization of new test procedure until December 2013. (JRC Report, 2.)

7 EP Report 7.

8 Ibid. 8.

9 JRC Report 31.

defeat devices by testing vehicles under non-predictable variations of the standard testing conditions.[10]

On the side of the *Member States* there was no consistent application of EU law as regards exemptions on defeat devices. Moreover, none of them could find the defeat devices installed in the VW vehicles, in particular those Member States whose authorities type-approved those vehicles.[11]

Even if the *Commission* had the legal obligation to oversee the Member States' enforcement of the ban on defeat devices, it neither undertook any further technical or legal research or investigation, either on its own or by mandating the JRC, nor requested any information or further action from the Member States to verify whether the law may have been infringed. The Commission never made use of the provision, which entitles it to request the Member States' type-approval authorities to provide information on the functioning of emission technology under special circumstances (e.g. at low temperatures).[12]

3. Concerning the *type-approval and in-service conformity* serious systematic concerns have been identified by the Report. 28 national type-approval authorities were functioning with diverse technical expertise and human and financial resources in order to obtain a vehicle type-approval, while there is neither specific EU oversight over national authorities, nor uniform interpretation in this regard. As a result manufacturers potentially addressed the national authority with least stringent interpretation of the rules, as well as the lowest fees.[13] Notification due to be submitted to the Commission by national authorities in case of rejection of approval request was unclear in general, while the car manufacturers could also submit the request. Nevertheless, the life-cycle surveillance competences remained also unclear in practice due to the clear distinction of national competences and in lack of physical tests.[14]

   The *Member States* relied heavily on the tests performed in the car manufacturers' certified laboratories under the supervision of technical services. This also included consultancy services to car manufacturers on obtaining type-approval. There was an obvious conflict of interest due to the existence of an additional financial link, while the national authorities were only kept responsible to validate the procedure at the end.[15]

   The *Commission* should have taken a more prominent coordinating role to ensure the uniform application of the EU legislation on type-approval, while requesting more information from the Member States on how they dealt with those vehicles in the existing fleet that do not comply with the legal emission limits under real driving conditions.[16]

10 EP Report 8–9.
11 Ibid. 9.
12 Ibid. 10.
13 Ibid. 11.
14 Ibid. 12.
15 Ibid. 12.
16 Ibid. 12.

4. *As for the enforcement side and penalties* the EU merely had regulatory power and the responsibility to implement EU law on car emission measurement lied primarily with the Member States, while the enforcement powers of the Commission are limited to initiating infringement procedures against Member States. There is no unified practice in the EU for transparent access by consumers to information on recalls, nor is there a unified EU legal framework to compensate consumers, while only the type-approval authority that granted a type-approval to a given vehicle can effectively withdraw the certificate.[17]

   The *Member States* started to enforce the EU law on emissions from light-duty vehicles as required only after the Volkswagen emissions case broke out in September 2015 by following diverse approaches and legal consequences. Member States did not monitor and enforce appropriately the application of Regulation (EC) No 715/2007, notably in contravention of Article 5(1) on the obligation for manufacturers to design, construct and assemble cars so as to enable them to comply with the regulation in normal use (non-laboratory conditions).[18] Most Member States did not adopt an effective, proportionate and dissuasive penalty system, notably in relation to the illegal use of defeat devices, several of them did not notify the Commission in time about the penalty regime in place to enforce the ban on defeat devices.[19]

   Despite the 2013 JRC report concerning the possible use of defeat devices, the *Commission* did not undertake further technical research, did not request additional information from the Member States and did not ask the responsible national type-approval authorities to undertake further investigative and corrective actions. There was a lack of coordinated recall programme in case of Dieselgate, while formal infringement proceedings had also not been initiated before to meet related legislative requirements.[20]

As a result of the inquiry report and further discussions, the related EU legislation has been modified, however no new EU agency would be created, even if this had been mentioned by various parties during the investigations and in preparation of legislative steps.[21] Though, the amendments are not finalized yet, the institutional changes can be summarized as follows, based on the first reading provisions:

1. The Forum for Exchange of Information on Enforcement (Forum) shall be created with representatives of national authorities as well as of wider circle of interested parties (economic operators, safety and environmental stakeholders) in order to facilitate the uniform interpretation and implementation of the related

17 Ibid. 13.
18 Ibid. 13.
19 Ibid. 14.
20 Ibid. 14.
21 Euractive: MEPs reject EU road agency in vote for new post-Dieselgate car approval rules, 4 April 2017. https://www.euractiv.com/section/transport/news/meps-reject-eu-road-agency-in-vote-for-new-post-dieselgate-car-approval-rules/ (Accessed: 01.04.2018)

Regulation. Within its advisory capacity the Forum may issue (with consensus or simple majority as a second option) soft law opinions and recommendations.[22]

2. The Commission shall conduct compliance verifications with on-road test and laboratory tests, and also perform inspections and assessment of approval authorities.[23]
3. Several requirements have been formulated related to national authorities concerning their administrative capacities, type-approval and market surveillance functions.

The EU Agencies and the Threats of "Agencification"

The "agencification" process

The implementation concerns of EU law have been discussed by the literature since long ago. (Alter, 1996: 458–87; Duina, 1997: 155–79; Mabbett, 2005: 97–120; Börzel, 2006: 128–152) Based on the Report, the EU's composite administration consisting of the Commission, as well as national authorities constituted maladministration in several different ways. The type-approval procedure and the related laboratory testing relied heavily on national authorities, however, neither the Commission nor the national authorities could act effectively in order to ensure the compliance of car industry with related EU obligations. Nevertheless, the obligations and the procedural duties were not sufficiently designed to tackle the potential concerns related to car type-approval, conflicts of interests occurred in laboratory testing. The whole policy area seems of not having a real "owner", which led us to the issue of "agencification" as the EU decided several times in the last decades to address transboundary (and) crisis-related administrative malfunctions of the Single Market by creating EU agencies. These agencies as "inbetweeners" have their potential inside a triangle consisting of EU institutions, national authorities as well as market participants. (Everson et al., 2014: 4)

The so-called mushrooming of EU agencies refers not only to the phenomenon that the number of such bodies expanded tremendously in recent decades, but to the fact, that substantial powers have been conferred upon them by acquiring direct powers over market participants/citizens just like powers over national authorities (responsible for indirect implementation of EU law), as well.

The concerns and threats of the "agencification" process

One of the main concerns of agencification is the shift of *powers* to EU agencies. These agencies are non-Treaty bodies as they still lack today the proper (sector-neutral) primary

22 European Parliament legislative resolution of 19 April 2018 (P8_TA-PROV[2018]0179) Art. 11.
23 Ibid. Art. 9–10.

legal basis[24] on their creation and functioning.[25] Therefore, their definition was also laid down by the scholars with the formulation of their main characteristics: relative independence, non-terminated mandate, own legal personality, creation by Union law for specific purposes (competences). Due to their "non-Treaty" status some common rules on their establishment and functioning in form of the soft law Joint Statement and Common Approach of the European Parliament, the Council and the European Commission on decentralised agencies (Common Approach) have been enacted in 2012. However, the Court of Justice of the EU (CJEU) mainly kept the delegation model of powers to the agencies dated back to the 1950s case-law called Meroni doctrine in its recent judgment,[26] primarily based on the restricted delegation due to the "non-Treaty" nature of such bodies. This new model of reshaped Meroni doctrine partly recognizes the recently increased role of agencies, however still treating them as "supporters" of the EU's policy-making, denying the prerogative of making their own policy choices without the involvement of further EU/national counterparties.

Further dilemma in case of EU agencies occurs related to the *internal structure* and to the *decision-making* of their internal bodies. The management boards, consisting primarily of the representatives of Member States are the main decision-making bodies with further involvement of representatives of the Commission, the European Parliament, as well as of the stakeholders.[27] Even if the national representatives have various integrity requirements related to their tasks based on the Treaties, the EU Staff Regulation and the related requirements of sector-specific laws to prioritize EU interest, in practice the national interests might overrule that of the Union's. As a result, the lowest common denominator solutions would be easier agreed, which prevents to effectively represent the EU interest in Union acts. (Vos, 2014: 26) Therefore, some EU agencies already follow modified internal structure and decision-making procedures in this regard.[28] Nevertheless, this factor should not be overestimated. According to some scholars, what matters mostly is the independence and impartiality of the scientific internal bodies, which has already been enacted to the Common Approach.[29] (Vos, 2014: 37)

As for *independence,* the Dieselgate demonstrated the general importance of the relationship with the Commission, as well as with national authorities. The European composite administration is far from having DGs and commissioners as heads of ministerial administration with its classical centralistic organisation as Member States have autonomy in creation of their own administrative systems even if the principle

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24 EEA has sector-specific primary legal basis in form of Art. 192 TFEU (EC-Treaty Art. 175). Art. 100(2) TFEU (EC-Treaty Art. 80[2]) applies in case of EMSA and of EASA and Art 91(1) TFEU in case of EUAR.

25 Article 263.1 of the Treaty on the Functioning of the European Union as almost the single reference to agencies guarantees the judicial review against their acts for third parties before the Court of Justice of the European Union.

26 C-270/12, United Kingdom v. Parliament and Council, EU:C:2014:18, paras. 46–50 and 67.

27 Common Approach Point 10.

28 European Food Safety Authority has a smaller management board of 14 members appointed by the Council in consultation with the European Parliament from a list drawn up by the Commission, from whom four members shall have their background in organisations representing consumers and other interests in the food chain. (Regulation 178/2002 Art. 25.)

29 Common Approach Point 20.

of loyalty has a binding force upon them.[30] The EU agencies recently started to refer to certain DGs as "partners" in their reports, (Egeberg et al., 2014: 620–24) while some of them could also acquire inspection powers over national authorities. I would also like to reveal the role of informal relationships between the different actors in EU composite administration as the recent evolution of agencies could serve as a proper example, how the law in books can be overruled by the daily practice in order to keep the institutional status quo or to avoid the repositioning of an EU agency. Nevertheless, the independence in this regard also refers to the opportunity of agencies to be more proactive, act without pre-established procedures, which are crucial elements of transboundary crisis management according to related studies. (Jordana–Trivino-Salazar, 2017: 9–10)

The Different Paths of "Agencification"

The European Environmental Agency

Considering the role of the US EPA in the Dieselgate, it would seem obvious to confer further competences on the European Environmental Agency (EEA) as increased emission levels clearly endanger the environment, as well as human health.

However, the political considerations between EU as well as national level actors clearly influenced that limited powers have been conferred upon EEA. In 1994 each of the tasks mentioned during the EEA establishing negotiations have been guaranteed for the EEA without the required staff and budget to perform adequately. (Schout, 2008: 265) Its creation was not necessarily a reaction to a transboundary and/or crisis situation, however clearly signalized the commitment of the EU to take care of the environment in light of the substantial amount of EU legislation issued in this policy area. (Chatzopoulou, 2018: 7)

The EEA's main *competences* still include today the collection, processing and analysis of data, providing information for further policy-making, processing of questionnaires, support and stimulation of exchange of information as well as further stimulation in this regard. Nevertheless, the focus point of its responsibilities also refers to the coordination of the network consisting of national focal points, topic centres and national information networks (European Environment Information and Observation Network – EIONET).[31] In course of its creation process, however, some even wanted to give inspection powers to the EEA, which remained unfulfilled. (Martens, 210: 884) The EEA competences as a so-called information agency clearly reflects the logic of the Meroni doctrine treating agencies as mere supporters of policy-making without having real influence on policy-decisions, even if the share of competences was not that clear at the beginning of the EEA's history.

30 Treaty on the Functioning of the European Union Art. 4.2–4.3.

31 Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network (EEA Regulation) Art. 4.

As for its *internal structure* and *scientific bodies,* the rules on the EEA's Management Board, even if established long before the Common Approach, are in line with its requirements, while the adaptation of the decisions mainly requires a 2/3 majority. Draft versions of the multiannual and annual work programmes are to be consulted with the Commission, as well as with its scientific committee.[32] The committee is to be designated by the Management Board for a term of four years renewable once as a guarantee of some independence.[33]

In relation to its *independence,* the brief institutional history of EEA should be taken into account, which clearly demonstrates how the daily practice and inter-institutional relations can influence the mandate of EU agencies. The first decade of its history (1994–2003) has been summarized by Martens as the era of *inter-institutional tensions* of the EEA due to the political vision of its first director Mr. Jiménez-Beltrán. He had put much emphasis on producing policy analyses by the EEA rather than gathering facts. (Martens, 2010: 888–89) What refers to inspection power over national authorities, the EEA also made its analysis regarding the institutional performance of DG Environment, as well as of national authorities, which led to the budget freeze proposals from the side of the Commission. The Commission has expressed its position clearly with means related to the staffing and budget so that the EEA should focus on its core tasks of data-gathering, while criticized the EEA for putting too much emphasis on general analyses without providing hard data for further policy-making. (EIPA–IEEP, 2003: 31–39; Martens, 2010: 888)

The next chapter of the relationship between the Commission and the EEA can be considered as a rather *inter-institutional partnership,* (from 2004) as more emphasis has been given to the DG Environment's priorities by the EEA, while the EP clearly positioned itself as an ally for EEA in the budget-proposal process, and the network of EIONET could also acquire substantial position in data gathering. (Martens, 2010: 890–92) Additionally, it seems the EEA tends to keep its less-confrontative attitude as its 2016 report already revealed the shortcomings of the diesel cars' default devices without using the term "exploitation" and described the automakers' behaviour as rather optimising testing procedures. (Skeete, 2017: 379)

The European Transport Agencies

Considering the sector concerned the choice is obvious to further elaborate the EU's transport policy and the ways, which led to establish agencies in this sector. The creation of the European Aviation Safety Authority (EASA), of the European Maritime Safety Agency (EMSA) and of the European Union Agency for Railways (EUAR) relied mainly on transboundary and in certain cases crisis-related factors, which were also given in case of the Dieselgate. The driving force behind the creation of EASA established in 2002 was to give a strong EU solution instead of the pan-European Joint Aviation Authority (JAA), which substantially contributed to the development of the Single Market in the field of aviation and aviation safety by establishing a single authorisation and inspection

32 EEA Regulation Art. 8.
33 EEA Regulation Art. 11.2.

body with unified approval, authorisation and safety standardisation requirements. (Schout, 2008: 267) Similar factors were relevant during the establishment of the EUAR – previously known as the European Railway Agency, however this agency acquired substantial powers only in course of the 2016 reform package.[34] (Versluis–Tarr, 2013: 324–25) The establishment of EMSA in 2002 was a reaction to the catastrophe of Erika tanker off the French coast in 1999, which shed light on the need of common ship safety standards and that of the prevention of such crisis situations. (Groenleer et al., 2010: 1219)

As for the *powers,* the three transport agencies acquired substantial inspection competences over national authorities and further direct powers over market participants. Based on the shortcomings revealed during Dieselgate, I would mainly deal with the inspection powers.

The cornerstone of safety standardisation was the work of the International Civil Aviation Organisation from 1944, while the related inspection tasks were organised by the JAA. (Schout, 2008: 267) The EASA took over the coordination of standardisation activities previously carried out by the JAA in Air Operations, Synthetic Training Devices and Flight Crew Licensing in 2007.[35] In the course of the last years, the related Regulation on standardisation inspections has been renewed, while the policy areas covered by standardisation inspections have also been expanded.[36] Similar inspection competences have been given to EMSA concerning safety standardisation (similar to aviation developed on international level by the International Maritime Organisation)[37] as well as to EUAR concerning interoperability and performance of national authorities.[38] The outcome of such inspections involves the issue of a report, however, the formal enforcement power lies at the Commission just like before to initiate infringement proceedings. The inspection cycle cannot be merely considered as objective fact-finding missions as there is some dialogue between the inspector and the inspected party involving the EUAR's right to issue recommendations or at least horizontal findings by the other two agencies. Related to the enforcement of inspection power, the lack of transparency of individual inspections reports towards the general public still creates a clear concern. (Schout, 2008: 284; Scholten, 2014: 106–110)

As for the *internal structure,* the composition of the EU's transport agencies management boards are similar to that of the EEA and to the requirements of the

34 Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing the Regulation (EC) No. 881/2004, (EUAR Regulation) Chapter 7.

35 Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (EASA Regulation) Art. 24.1. 54–55.

36 Commission Implementing Regulation (EU) No. 628/2013 of 28 June 2013 on working methods of the European Aviation Safety Agency for conducting standardisation inspections and for monitoring the application of the rules of the Regulation (EC) No. 216/2008 of the European Parliament and of the Council and repealing Commission Regulation (EC) No. 736/2006.

37 Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (EMSA Regulation) Art. 3.

38 EUAR Regulation Chapter 7.

Common Approach with the involvement of one national representatives per each Member State, as well as with the further representation of the Commission and the EP. Voting rules require a 2/3 or absolute majority.[39] The boards decide on the annual work programme after receiving the opinion of the Commission on the inspection plans.[40] As a sign of a more sector-specific approach and the potential to better consider the interests of the Single Market, some interested parties are also involved in the work of the boards. This includes the advisory board of the EASA's which issues opinions and the EMSA's and EUAR's expanded board with the representatives of stakeholders and other parties. In terms of decision-making, however, the advisory board may only issue non-binding opinions, while members of the extended boards have no voting rights.[41]

The *independence* of transport agencies relates to the special nature of inspection power and to the fact, that this kind of competence makes agencies more influential against Member States.

The EUAR acquired inspection power over national authorities only in 2016.[42] Interestingly, it has been revealed by scholars that the EUAR's staff was rather unwilling on acquiring new powers. They considered inspection power as a threat to lose their well-established relationship with market participants, as well as with national regulators, while being more exposed to EU-level political implications. (Kaeding–Versluis, 2014: 84–86) Similar problems occurred in case of EMSA, as the Commission first initiated infringement proceeding on the basis of the EMSA's information, while failed to inform EMSA thereof in advance, which put the agency's relation with the concerned Member State at risk. (Groenleer et al., 2010: 1220)

Due to the labour-intensive and time-consuming nature of inspections, in case of being combined with on-site visits, the EASA made attempts to perform its inspection cycles with involvement of less resources. In course of 2014/2015 the so-called Continuous Monitoring Activities (CMA) were introduced, which resulted in a slight decrease of inspection visits. In this system the National Standardisation Coordinators[43] are responsible for data exchange and providing assistance for on-site inspections as part of the system of CMA.[44] As a result of CMA, the 2015 and 2016 EASA Annual reports acknowledged the decreasing trend in numbers of inspections as CMA contributed to reduce the need to perform on-site visits.[45] Even if the risk based approach of on-site inspections could be streamlined related to this new CMA system, there are no further requirements[46] on the independence of the Coordinators, which might lead to "double-hatedness" problems in the future.

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39 EASA Regulation Art. 37.; EMSA Regulation Art. 14.; EUAR Regulation Art. 50.

40 EASA Regulation Art. 34.; EMSA Regulation Art. 10–11.; EUAR Regulation Art. 47–49.

41 EUAR Regulation Art. 47.1; EMSA Regulation Art. 11.1.

42 EUAR Regulation Art. 33–35.

43 Commission Implementing Regulation (EU) No. 628/2013, Art. 6.

44 The number of the inspection visits available in the EASA's Annual Reports: 2009 (85), 2010 (111), 2011 (107), 2012 (121), 2013 (103), 2014 (107), 2015 (99), 2016 (99).

45 EASA's Annual Activity Report Year 2015, 25.; EASA's Annual Activity Report Year 2016, 33.

46 Article 6.2 of Commissions Implementing Regulation No. 628/2013 only requires from Competent Authorities to ensure clear lines of communication with the Coordinator without stipulating further requirements on the Coordinator's independent functioning as such.

Some agencies have acquired much stronger power *directly addressed to the market participants,* which could have been introduced simultaneously in case of creating a road transport agency by the EU. The EASA gained power to issue type-certificates, certificates for parts and appliances, appropriate environmental certificates in the field of airworthiness, EUAR issues authorisations for the placing on the market of vehicles and vehicle types.[47] This kind of direct power necessarily involves the consideration of policy choices related to market regulation and surveillance. In this regard even the reshaped Meroni doctrine of the CJEU seems to be outdated, especially considering the allocation of powers by ensuring exclusive EU competences for certain agencies (also EASA) without any involvement of national authorities.[48]

In terms of structure of the EU Executive, the creation of a road transport agency would also have a potential by closing the gap and ensuring that each subsector of the transport area (aviation, maritime, railroad, road transport) do have its own dedicated EU body. Further on, these transport agencies could be merged into one EU Transport Agency, which option has already been foreseen by the Common Approach.[49] With this future measure, the whole sector could keep its core functionality, even have a stronger voice by the creation of a general EU Transport Agency, while the elimination of duplicated functions would make it easier to meet the presumably upcoming budget restrictions following the current system of capping of their resources.[50]

Lessons to Be Learned

Though the transboundary (and) crisis driven factors were given in case of Dieselgate, it seems that no new agencies will be created or more power will be given to the existing ones. In light of the above analysis, the agencies or more powerful agencies should not be considered as "always-true-solutions" for administrative malfunctions of the Single Market. Theoretically the Commission, the Forum and national authorities can also properly address the concerns identified by the Report, if lessons based on the functioning of the elaborated agencies would be taken into account.

The *legal status* of the Commission and of the national authorities does not need to be analysed. The Forum functioning within the framework of the Commission is similar to that of the comitology committees and regulatory networks without having legal personality. However, the symbolic status of a new road transport agency, even a merged EU Transport Agency could have had a greater impact on the whole transport policy area, just like it could have on the carmakers. On the other hand, the environmental area is among the ones, where regulatory networks are proved to be effective due to their ability to act locally, (Angelov–Cashman, 2015: 350–76) even if the emission related to car

47 EASA Regulation, Art. 20; EUAR Regulation, Art. 20–21.

48 EASA Regulation, Art. 20.

49 Common Approach Point 5.

50 Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union

industry constitutes a different situation based on the single type-approval and huge amount of sold models compared to that of an "ordinary" single pollution.

Considering *competences,* the reshaped Meroni doctrine created a not necessarily clear situation regarding the constraints of the delegation of competences upon agencies, which makes it obvious why the EU legislator remained reluctant to create a new agency with direct market regulatory/surveillance powers or inspection competences. The Forum being responsible to issue opinions/recommendations could also have substantial effect on the related market considering data gathered from other agencies. (Ferran, 2016: 299) Further on, the general requirement to act effectively in crisis situations, just like their emergence at the EU institutional landscape, make it necessary to guarantee sector-neutral primary legal basis for the EU agencies.

The *internal structure* of agencies, as well as of the Forum might have the same concern as the intergovernmental dynamics of decision-making which is given by the representatives of each Member State in both cases. As for the lessons, transport agencies could be relevant in this regard due to the greater involvement of stakeholders, as well as single majority votes might support to overcome the intergovernmental dynamics concerned. Moreover, the impartiality of scientific bodies is more relevant in light of the inner dynamics of the Commission, whether the output of the JRC's work and the test results will be articulated in the decision-making of the Commission. The NGOs and the relationship with other civil society partners might also be decisive, as the original US test results were uncovered by independent scientists at the University of West Virginia, therefore the reliance on such (outsourced) scientific capacities creates a further option to address criticism on the ever-growing bureaucracy of the EU Executive and of agencies.

As for *independence,* the inter-institutional and intra-institutional relations are of utmost importance not just in the day-to-day functioning of policy actors, but also in crisis situations. In the era of permanent crisis, the proactive attitude, the motivation of creating some kind of self-profile and acting regardless of formalities could be decisive. This kind of expansion might be necessary to handle crisis situations or to avoid such events. Assumingly, the Forum functioning inside its institutional framework of the Commission had less opportunities to act regardless of the political implications of the Commission. However, it does not necessarily mean that the Forum or even other policy actors of the EU composite administration cannot make its expertise "voice" heard, especially if the Commission will show more openness to take into consideration the input given by them.

References

Alter, K. J. (1996): The European Court's Political Power. *West European Politics,* Vol. 19, No. 3. 458–487.

Angelov, M. – Cashman, L. (2015): Environmental inspections and environmental compliance assurance networks in the context of European Union environment policy. In Faure, M. – De Smedt, P. – Stas, A. eds.: *Environmental Enforcement Networks: Concepts, Implementation and Effectiveness.* Edward Elgar Publishing. 350–76.

Bovens, L. (2016): The Ethics of Dieselgate. *Midwest Studies in Philosophy,* Vol. 40, No. 1. 262–84.
Börzel, T. A. (2006): Participation through Law Enforcement: The Case of the European Union. *Comparative Political Studies,* Vol. 39, No. 1. 128–152.
Cames, M. – Helmers, E. (2013): Critical evaluation of the European diesel car boom – global comparison, environmental effects and various national strategies. *Environmental Sciences Europe,* Vol. 25, No. 15. 1–22.
Chatzopoulou, S. (2018): The EU Agencies' Role in Policy Diffusion Beyond the EU: EEA, EMA and EFSA. *TARN Working Paper,* 1/2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3105894 (Accessed: 01.05.2018)
Duina, F. (1997): Explaining Legal Implementation in the European Union. *International Journal of the Sociology of Law,* Vol. 25, No. 2. 155–79.
Egeberg, M. – Trondal, J. – Vestlund, N. M. (2014): The quest for order: unravelling the relationship between European Commission and European Union agencies. *Journal of European Public Policy,* Vol. 22, No. 5. 609–29.
European Institute of Public Administration (EIPA) – Institute for European Environmental Policy (IEEP) (2003): *European Environmental Agency – Final Report to DG Environment.* August 2003. 1–64.
Everson, M. – Monda, C. – Vos, E. (2014): European Agencies in between Institutions and Member States. In Everson, M. – Monda, C. – Vos, E. eds.: *European Agencies in between Institutions and Member States.* The Netherlands, Wolters Kluwer International BV. 3–9.
Ferran, E. (2016): The Existential Search of the European Banking Authority. *European Business Organization Law Review,* Vol. 17, No. 3. 285–317.
Gardner, T. – Morgan, P. D. (2015): After year of stonewalling, VW stunned US regulators with confession. *Reuters,* September 2015. https://www.reuters.com/article/usa-volkswagen-deception/insight-after-year-of-stonewalling-vw-stunned-us-regulators-with-confession-idUSL1N11U1OB20150924 (Accessed: 31.03.2018)
Groenleer, M. – Kaeding, M. – Versluis, E. (2010): Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation. *Journal of European Public Policy,* Vol. 17, No. 8. 1212–30.
Joint Research Centre (2013): *A complementary emissions test for light-duty vehicles.* Report. https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/complementary-emissions-test-light-duty-vehicles-assessing-technical-feasibility-candidate (Accessed: 25.04.2018)
Jordana, J. – Trivino-Salazar, J. C. (2017): *Transboundary crisis management from the perspectives of four EU agencies: a case study research exercise WP 4.3.* 1–73. Institut Barcelona, September 2017. www.transcrisis.eu/wp-content/uploads/2017/09/D4.5_Papers-based-on-analysis-of-a-dataset-of-European-agencies-heads-and-board-members-on-the-survey-of-agency-heads-and-board-members-and-on-three-case-studies.pdf (Accessed: 01.03.2018)
Kaeding, M. – Versluis, E. (2014): EU Agencies as Solution to Pan-European Implementation Problems. In Everson, M. – Monda, C. – Vos, E. eds.: *European*

Agencies in between Institutions and Member States. The Netherlands, Wolter Kluwer International Bv. 73–87.
Mabbett, D. (2005): The Development of Rights-based Social Policy in the European Union. *Journal of Common Market Studies,* Vol. 43, No. 1. 97–120.
Scholten, M. (2014): *The Political Accountability of EU and US Independent Regulatory Agencies.* Brill Nijhoff.
Schout, A. (2008): Inspecting Aviation Safety in the EU: EASA as an Administrative Innovation? In Vos, E. ed.: *European Risk Governance: Its Science, Its Inclusiveness and Its Effectiveness.* Mannheim, Connex Book Series, Mannheim University Press. 257–94.
Skeete, J-P. (2017): Examining the role of policy design and policy interaction in EU automotive emissions performance gaps. *Energy Policy,* Vol. 104, No. 6. 373–81.
Versluis, E. – Tarr, E. (2013): Improving Compliance with European Union Law via Agencies: The Case of European Railway Agency. *Journal of Common Market Studies,* Vol. 51, No. 2. 316–33.
Vos, E. (2014): European Agencies and the Composite EU Executive. In Everson, M. – Monda, C. – Vos, E. eds.: *European Agencies in between Institutions and Member States.* The Netherlands, Wolters Kluwer International BV. 11–49.

EU legislative and further acts

Treaty on the Functioning of the European Union.
Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network (EEA Regulation).
Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing the Regulation (EC) No 881/2004.
Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC.
Commission Implementing Regulation (EU) No 628/2013 of 28 June 2013 on working methods of the European Aviation Safety Agency for conducting standardisation inspections and for monitoring the application of the rules of the Regulation (EC) No 216/2008 of the European Parliament and of the Council and repealing Commission Regulation (EC) No 736/2006.
Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency.
Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union.

European Parliament (2017): *Report on the inquiry into emission measurements in the automotive sector.* (2016/2215[INI]).
European Parliament legislative resolution of 19 April 2018 (P8_TA-PROV[2018]0179).