

The issues of the agencies

With Professor Majone,
Professor of political Sciences, Emeritus,
European University Institute, Florence.

Chairman: Mr Jérôme Vignon,
Principal adviser to the President on Governance.

Jérôme Vignon stressed it was a privilege to receive professor Majone who taught in the European University Institute in Florence and contributed, by his numerous studies, to clarifying the work on governance. He wished to thank him for guiding the research on governance. He also appreciated any further criticism from him regarding existing work already completed on the agencies.

Jérôme Vignon then explained that prof. Majone's writings helped him to understand that non-elected bodies could have a positive role for democracy. Finally, he asked everyone to introduce themselves openly and in a friendly manner.

Professor Majone noted that the constitutional architecture of the Union is based on the principle of representation of interests (national and supranational), rather than the principle of separation of powers. In this model, all the political institutions—Council, European Parliament and Commission—take part in the legislative process. This is the reason why the Commission has the monopoly of legislative initiative—perhaps the Commission's most essential power. This situation however is evolving and the problems must be looked at in the historical context. Over the last few years **three changes** can be noticed from which several consequences follow.

- ◆ Firstly, as already noted, the system created by the treaties does not introduce a clear separation of powers. Indeed, each institution has powers and functions that to some extent overlap with those of the other institutions. This complicates the task of assigning clear responsibilities for policy results. Hence the tendency to define a clearer separation of the legislative and the executive functions, as suggested by the last pages of the White Paper on Governance.
- ◆ Additionally, Professor Majone noted that the Commission has changed from a super-agency with mainly regulatory functions, to an executive with a broad variety of administrative functions. At the same time, its role as central coordinator and “honest broker” has become less significant since Member States tend increasingly to coordinate their positions among themselves.
- ◆ Finally, Professor Majone noted that the Commission has transformed from a technocratic organisation towards a more political body. This transformation may

have positive consequences from the point of view of democratic legitimacy, but poses certain risks for the credibility of European regulatory policies. Independent European agencies represent a possible solution to this dilemma.

These three changes entail some significant **consequences**.

1. First, it is becoming increasingly necessary to better identify the role of the legislator and of the executive. As already noted, this facilitates the task of assigning clear responsibilities, but it may also increase the transparency of the system.
2. The politicisation, and more precisely the increasing parliamentarisation, of the Commission raises serious problems of policy consistency over time. As the experience at the national level shows, a new parliamentary majority can undo the work of the previous majority. Because consistency is so important to policy credibility, governments increasingly delegate monetary and regulatory policies to non-elected institutions. In the EU this has already happened in the case of the independent ECB. The same logic applies also to the case of the European agencies, although these agencies will never be as independent as the ECB.
3. Then Professor Majone stressed the need for a better integration of the regulatory functions at the European level and at national levels. If the principle of separation of the powers is recognised also at the European level, it becomes important to identify a specific regulatory function within the broad category of the executive function. This move towards functional differentiation is already quite clear in the Member States and the same logic applies also to the European level.

4. Finally, Professor Majone insisted on the need to achieve better "accountability" in order to have better legitimacy. Since agencies are not directly accountable to the voters, they must accept accountability by results. This means that a specific agency, and a specific person within the agency—typically the agency director—must be held responsible for eventual mistakes. However, this principle is often violated in practice. Professor Majone gave the example of food security and risk management. In the case of the European Food Safety Authority, the agency is supposed to do only the risk analysis, while the Commission does the risk management. However, risk analysis involves a good deal of scientific discretion in the choice, for example, of the appropriate dose-response model, and these methodological choices to a large extent determine the subsequent stage of risk analysis. Unfortunately, the Commission does not have *sufficient* expertise to judge the appropriateness of the discretionary choices of the scientists. Consequently, if something goes wrong it is not clear who would assume the final responsibility. A better system from the point of view of accountability is one where the head of the agency—typically a former scientist—assumes full responsibility for the entire process of risk analysis *and* risk management.

Jérôme Vignon thanked Professor Majone and stated that he would take account of the comments to improve the relations between the Commission and the other institutions with the agencies.

Several questions were addressed to Professor Majone.

1) The first question concerned the problem of legitimacy. Beyond the question of expertise, one could wonder which democratic debate was organised.

➤ **Professor Majone's answer:**

- ◆ Firstly, the amount of debate and public participation in agency decision-making depend to a large extent on the way agencies are designed, as well as on general procedural requirements, such as the Administrative Procedure Act in the U.S.A.
- ◆ Then, it must be kept in mind that agencies are bodies with fairly narrowly defined objectives. Their task is certainly not to make laws, but only to implement them. It is the task of the statute setting up the agency to specify how the agency should take its decisions, how it should communicate them, and to what extent it is allowed to balance conflicting values.

2) The second question concerned the roles and qualifications of agency directors. They are asked, for example, to be managers or experts and required to have specific qualifications. The speaker considered that it was asking far too much of them.

➤ **Professor Majone's answer:**

These are indeed very demanding jobs which require "high level" candidates. The agency Director must be an expert and a manager at the same time. One of his main responsibilities is the definition of the regulatory priorities of the agency. Hence he or she must be given sufficient powers, and recognition for the achievements of the agency. An agency director is not a faceless bureaucrat, but a policy entrepreneur. This is certainly asking a good deal, but the experience of countries like the U.S.A. but also the U.K. shows that, given the right incentives, it is possible to attract suitable candidates. In time, a "market" for senior regulators will develop also at European level.

3) The third question covered credibility. The Commission had a five-year mandate, which is more than the average. Don't you think we are exposed to a risk with too many agencies?

Professor Majone's answer

. He compared the European situation with the United States where there were many agencies but with very strict procedural controls at the level of the President. These controls are applied by the Office of Management and Budget. In addition the U.S. Supreme Court, the federal courts, and of course the legislature, are exercising important coordinating functions. *Mutatis mutandis* similar mechanisms of coordination and control could be developed also in Europe.

4) The fourth question covered the work of the Convention. What place could agencies take in the European Constitution?

Professor Majone's answer

He welcomed this interesting question. The work of the convention could indeed result in specifying the possibility of establishing independent agencies. This could be achieved in an article in a future European Constitution. However, such an article should not be too specific but only establish the possibility of creating new, independent bodies in general terms. The powers and responsibilities of individual agencies should then be set out in the relevant regulations.

5) The fifth question covered the accountability concept. Agencies appear to be modelled on the American model, i.e. responsible only to the federal administrations. They play, in a sense, the same role as the *comitologie* at European level. The question was: what "*accountability*" do we want?

Professor Majone's answer

He is not in favour of the American model in which federal agencies operate in complete independence of the administrations of the Member States. He prefers the system of the agencies in Europe, that are designed on a network model and must work in close cooperation with the national agencies and with the committees of national experts. In this sense accountability must be both at national and European levels.

6) In view of both Councils (European Council and Council of Ministers), the speaker wondered who is responsible ? To reach greater transparency the functions should be clarified.

Professor Majone's answer

Since agencies only implement existing legislation, it seems clear that the Council of Ministers, together with the Commission and the European Parliament, would have primary responsibility for the oversight of agencies operating in the different policy areas.

7) The origin of the agencies was an ideological choice to limit the influence (« dégraisser ») of the institutions. Decentralisation indeed allowed certain flexibility which was acceptable even if it involved risks. On the other hand, one could wonder who defined the framework of activities. The speaker wondered who was in charge of democratic control.

Professor Majone's answer

In order to answer the question, he made the comparison with the nationalisations in the past. He took the concrete example of telecommunications. Nationalised industries were controlled by small "iron triangles" of public managers, a few politicians and trade union leaders. Privatisation again gave powers to the national Parliaments, which define the terms in which the privatised public utilities are to operate. Democratic control must be a combination of the experts' judgements, of public opinion and of parliamentary control. At any rate, "statutory regulation", based on public laws implemented by independent and accountable agencies, represents a more transparent and democratic form of policy making than more traditional forms of regulation such as public ownership of utilities and other industries.

As a conclusion, Jérôme Vignon said European integration need a clear distinction of powers, we need to clarify the accountability and the hierarchy of norms.