Participation in European agencies: Keeping promises in institutional practice
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Imagine that the agency would close itself in an ivory tower, where one would not see what they are doing, and at the end of the process they would say “ta-ta, here is a rule that we drafted.” And then people would say “ah, but this cannot work because you forgot this and that.” If you leave it too much to the administrators, you know what they say? “If the authorities were there before the first aircraft was invented, we never would have flown.” If you want things to work and flourish, you should consult with interested parties within boundaries. Otherwise, the agency risks losing the sight of reality, it turns into this big Moloch and loses its credibility.1

Why does the participation of interested parties in European agencies matter? As the extract demonstrates, the knowledge and experience of interested parties, their understanding of the issues at stake, their confidence in the work of the agencies, and their acceptance of and compliance with the agencies’ outcomes, might have a significant effect on the “success” of agencies’ objectives. European agencies, as such, represent “the most novel and proliferating institutional entities at the EU level.”2 Central to their mission is the perceived need to increase the effectiveness and credibility of policy-making in specific areas or sectors. Today, European agencies operate in a number of fast-paced, very scientific and highly contentious areas, such as aviation safety, food and feed safety, disease prevention, medicines, chemicals, and financial supervision. Given their often far-reaching functions, which may include the drafting of rules that may be adopted by the Commission as well as regulation by soft law, it is crucial that European agencies meet the concurrent expectations of effectiveness and credibility bestowed upon them. In other words, the overall success of the agencies’ operation is measured in terms of the attainment of the objectives for their creation. Although the in-house scientific excellence and expertise that agencies ought to possess provides a reasonable basis for the discharge of their tasks and responsibilities, in the end it is those interested that decide how feasible or (socially or scientifically) acceptable the agencies’ outcomes are. To this end, it becomes increasingly important that European agencies “establish participatory [structures] in order to make their scientific assumptions socially and politically robust.”3 Indeed, participation is often heralded as one of the constitutive features of European agencies and in many cases, the creation of participatory structures that involve interested parties is envisaged in the agencies’ founding regulations; further, beyond these provisions, several European agencies have developed additional more or less informal avenues of participation.

In this book, the suitability of involving interested parties, and the reason why some agencies are particularly keen to develop participatory structures even in the absence of legal provisions, rests on the idea that participation may fulfil one or more of the following central promises (i.e. claimed functions):4 (i) ensure better and more informed agency outcomes, (ii) promote inclusiveness and responsiveness of agency operation, (iii) advance compliance and implementation, and (iv) enhance transparency and monitoring of agency activities and build trust. In line with these promises, the extent and impact of participation in the context of European agencies can be crucial to the latter’s ability to perform their tasks effectively, as well as to their credibility. At the

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1 Interview with a member of the Advisory Board of the European Aviation Safety Agency.
4 See Chapter 2, Section 2.1.
same time, however, participation may pose a challenge to the very reason for the establishment of agencies, given the risk of “capture”. Agencies entrusted with the regulation of a specific sector or industry may eventually come to be influenced or controlled by the businesses or industries that they are intended to regulate. Thus, the balance to be struck is a fine one: ensuring participation of the various interested parties while at the same time avoiding agency capture.

Although both European agencies and participation in European governance are much discussed topics in the academic literature, they have, thus far, never been *systematically* examined together. The earlier studies on European agencies suggest that the agencies “may be breeding grounds and learning sites for state-of-the-art participatory practices that ultimately may be generalized across the wider spectrum of Union administration,” but such assumptions about the significance of participation in European agencies have not obtained empirical or normative support. The aim of this research is to remedy this gap by conceptualising participation in European agencies and providing a thorough assessment of the extent, and the manner, to which agencies have been successful in living up to the central promises of participation. Does participation in European agencies deliver on its promises and, thus, contribute to effective policy-making and agency credibility or is it merely an exercise in window-dressing and an end in itself? The promises of participation are used as an evaluative yardstick against which participation in European agencies will be assessed. We will examine, in particular, what *de jure* and *de facto* constitutes participation in European agencies (i.e. different forms of participation and participatory structures) and determine, empirically, whether and how the promises of participation are fulfilled by reference to two defining components of participation, namely conditions of access and the overall quality of deliberation. This will provide empirical and normative insights into the extent to which agencies’ participatory mechanisms have sought to accommodate the competing aims of inclusiveness, independence, and effective and credible operation, and whether they have struck a successful balance in this regard. This relates to our overarching research question, namely: “Have European agencies lived up to the central promises of participation and, if so, in what manner?”

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6 See Section 1.3 and Chapter 2.

7 See in particular Chapter 2, Section 2.3.
1.1 European Agencies: Setting the Scene

The central question as to the extent and the manner in which European agencies have fulfilled the central promises of participation cannot be separated from an understanding of the role of agencies within the EU. The purpose of this section is to provide an account of European agencies, focusing on their main characteristics, the underlying reasons for their creation, as well as their functions, thus, providing the context for the subsequent empirical inquiry and an evaluation of participation. It is expected that the nature of the promises of participation - and their fulfilment - relates to the rationale for the establishment of European agencies and, indeed, depends on the responsibilities and tasks that they are meant to accomplish. In other words, it is suggested that the reasons for the creation of agencies inform the contours of the promises of participation.

1.1.1 A Permanent Feature of the EU’s Institutional Landscape

Agencies are regarded as one of the most prominent features of the EU governance architecture. They have been perceived as “the next mode of growth for the Union” and as “key elements of a new mode of governance.” The process of European agencification, which started in the 1975 and gained momentum in the 1990s, may be seen as a phenomenon of “administrative integration” and Europeanization at the administrative level. Indeed, most agencies were established as entirely new bodies, often together with a new policy instrument at the EU level (i.e. at the same time as the EU was given a new competency or established a new instrument), in order to help implement such policies. For example, the European Aviation Safety Agency (EASA) was created at the same time as the European Commission’s Single European Sky initiative. Preceding this initiative, “harmonisation of rules and safety standards was a result of a voluntary-based coordination of national agencies’ directors, with no enforcement strength.” In the case of the European Chemicals Agency (ECHA), “the same regulation establishes both the new policy instrument and the agency, and seems to take for granted that the regulation has to be...
applied by an agency.”  

16 Ibid, pp. 73-74.

Another example is the creation of the Office for Harmonisation of the Internal Market (OHIM), which was entrusted with administrating the Community Trade Mark (CTM).  

17 Prior to the founding of the OHIM, trade marks were granted by national trade mark registration offices. The Commission has stated that “agencies have proved particularly relevant in the field of shared competences, when the implementation of new policies at Community level needs to be accompanied by close cooperation between the Member States and the EU. The establishment of agencies can make possible a pooling of powers at EU level which would be resisted if centred on the institutions themselves.”  

18 See also, D. Curtin (2009), p. 164.

19 With 36 European agencies in existence, covering various fields of EU law, such as gender equality, medicines, financial supervision, food safety, electronic communication and aviation safety, it can be argued that agencies have become an “established part” of the EU’s “institutional landscape.”  


Table 1.1 A List of European Agencies and the Year of Establishment

<table>
<thead>
<tr>
<th>European Agencies</th>
<th>Year of Establishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>European Centre for the Development of Vocational Training (CEDEFOP)</td>
<td>1975</td>
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<tr>
<td>European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)</td>
<td>1975</td>
</tr>
<tr>
<td>European Environment Agency (EEA)</td>
<td>1990</td>
</tr>
<tr>
<td>European Training Foundation (ETF)</td>
<td>1990</td>
</tr>
<tr>
<td>European Medicines Agency (EMA)</td>
<td>1993</td>
</tr>
<tr>
<td>European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)</td>
<td>1993</td>
</tr>
<tr>
<td>Office for Harmonisation in the Internal Market (OHIM)</td>
<td>1993</td>
</tr>
<tr>
<td>Community Plant Variety Office (CPVO)</td>
<td>1994</td>
</tr>
<tr>
<td>European Agency for Safety and Health at Work (EU-OSHA)</td>
<td>1994</td>
</tr>
<tr>
<td>Translation Centre for the Bodies of the European Union (CdT)</td>
<td>1994</td>
</tr>
<tr>
<td>European Police Office (EUROPOL)</td>
<td>1995</td>
</tr>
<tr>
<td>European Agency for Reconstruction (EAR)</td>
<td>2000 (mandate expired in 2008)</td>
</tr>
<tr>
<td>European Aviation Safety Agency (EASA)</td>
<td>2002</td>
</tr>
<tr>
<td>European Food Safety Authority (EFSA)</td>
<td>2002</td>
</tr>
<tr>
<td>European Maritime Safety Agency (EMSA)</td>
<td>2002</td>
</tr>
<tr>
<td>European Union’s Judicial Cooperation Unit (EUROJUST)</td>
<td>2002</td>
</tr>
<tr>
<td>European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)</td>
<td>2004</td>
</tr>
<tr>
<td>European Centre for Disease Prevention and Control (ECDC)</td>
<td>2004</td>
</tr>
<tr>
<td>European GNSS Agency (GSA)</td>
<td>2004</td>
</tr>
<tr>
<td>European Network and Information Security Agency (ENISA)</td>
<td>2004</td>
</tr>
<tr>
<td>European Railway Agency (ERA)</td>
<td>2004</td>
</tr>
</tbody>
</table>
- European Fisheries Control Agency (EFCA) – 2005
- European Police College (CEPOL) - 2005
- European Chemicals Agency (ECHA) – 2006
- European Institute for Gender Equality (EIGE) – 2006
- European Union Agency for Fundamental Rights (FRA) - 2007
- Agency for the Cooperation of Energy Regulators (ACER) - 2009
- Office of the Body of European Regulators of Electronic Communications (BEREC Office) - 2009
- European Asylum Support Office (EASO) – 2010
- European Banking Authority (EBA) - 2010
- European Insurance and Occupational Pensions Authority (EIOPA) - 2010
- European Securities and Markets Authority (ESMA) - 2010
- European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) – 2011
- Single Resolution Board (SRB) – 2014

Agencies under Common Security and Defence Policy:
- European Union Satellite Centre (EUSC) – 2001
- European Defence Agency (EDA) – 2004

Despite the fact that there is no official definition of what constitutes a European agency under the current European legal framework, there is a common understanding of what they are. The characterisation, below, contributes to delimiting European agencies from certain agency-like bodies; in particular, other independent authorities, such as the European Central Bank (ECB) and the European Investment Bank (EIB) - both created by the Treaty, the European Institute of Innovation and Technology (EIT), established for a limited time period to contribute to the objectives of the Horizon 2020 – The Framework Programme for Research and Innovation, as well as executive agencies, created by the Commission for a limited period of time to help managing EU programmes.

21 Whereas the Joint Statement on Decentralised Agencies and the annexed Common Approach acknowledge that European agencies have become an “established part of the way the EU operates”, and to a certain degree conceptualise the establishment of future agencies, they, however, do not explicitly resolve the question of agency definition. See, Joint Statement (2012), ‘Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies’, 19.7.2012.
24 All executive agencies are based on the Council Regulation (EC) No 58/2003. Currently, the following six executive agencies are in existence: Education, Audiovisual and Culture Executive Agency (EACEA), Executive Agency for Small and Medium-Sized Enterprises (EASME), European Research Council Executive Agency (ERC Executive Agency), Consumers, Health and Food Executive Agency (CHAFAEA), Research Executive Agency (REA), and Innovation and Networks Executive Agency (INEA).
According to their particular features, European agencies may be characterised as (i) non-majoritarian bodies governed by European law, which are distinct from the EU institutions, (ii) established by an act of secondary legislation for an indefinite period of time in order to accomplish specific technical, scientific or managerial tasks, (iii) possessing legal personality, and (iv) exercising a certain degree of independence. Independence is a contested and ambiguous concept but it is generally perceived as the absence of direct influence from political and industry interests. This was also recognised in the Operating Framework for the European Regulatory Agencies, in which the Commission held that it is “particularly important that [European agencies] should have genuine autonomy in their internal organisation and functioning if their contribution is to be effective and credible. The independence of their technical and/or scientific assessments is, in fact, their real raison d’être.”

Regarding agencies’ political independence, it has been argued that while “European agencies are indeed legally separate institutions from the Council and the European Commission, it does not necessarily follow that agencies are independent from these bodies and able to exercise decision-making autonomy within their mandate.” Concerning their organisational structure, it has been observed that the Commission, the Parliament and the Member States might “to a certain extent, through their representatives on the [management boards], keep an eye on the agencies’ activities.”

The degree of agency independence should be measured also in terms of the absence of influence of industry or any other interest group. The very “raison d’être” of European agencies should not be compromised by their partiality towards such interests. This consideration is relevant with regard to the participation of interested parties, especially given the risk of capture. In essence, agencies should not be “influenced or subverted to the ends of those whom they are supposed to regulate.” One of the main challenges is thus a question of finding the right balance between ensuring the participation of interested parties and preserving agency independence. It has been pointed out that in cases where agencies provide for interested parties’ participation, “there is an increased need for fine-tuning in the matter of agency design. Therefore, the spectre of agency capture must be combated through such mechanisms as a rapid turnover in interest group representatives.” In other words, the participatory arrangements should be created in a manner that furthers agencies’ effectiveness and credibility, while maintaining their independence.
1.1.2 Rationales for *Agencification*

European agencies are created, for the most part, as entirely new entities with the aim of administrative integration in the areas or sectors within which they operate.\(^{32}\) The “meta-evaluation” of European agencies conducted in 2009 shows that one of the implicit rationales for agency creation is that they further the development of EU policies.\(^{33}\) However, European agencies aim at accomplishing a number of other, more explicit aims. The following rationales for setting up an agency were commonly discussed by academics who inquired into the European agency phenomenon or were suggested by the Commission.

First of all, European agencies are intended to respond to the constant demand for regulatory activity at the European level. Given the expansion and the complexity of issues, the alternative supranational option could pose manifold difficulties, particularly due to the limited human resources and expertise at the EU institutions’ disposal.\(^{34}\) In other words, considering the serious discrepancy in the European Union between the need for specialised functions and the available administrative instruments, European agencies may help ameliorate such shortcomings and contribute to establishing effective administration.\(^{35}\) Thus, the enhanced need for administrative capacity at the EU level provides a rationale for European agencies.\(^{36}\) The establishment of agencies, which deal with specialised technical tasks and incorporate a considerable number of scientific personnel, may further the creation of “Europe-wide epistemic communities whose technical truths transcend [...] politics.”\(^{37}\) In addition, this rationale can be found in the White Paper on European Governance, where the Commission stated that “[t]he advantage of agencies is often their ability to draw on highly sectoral know-how, the increased visibility they give for the sectors concerned (and sometimes the public) and the cost-savings that they offer to business. For the Commission, the creation of agencies is also a useful way of ensuring it focuses resources on core tasks.”\(^{38}\) It follows, therefore, that according to the Commission, the rationale for the establishment of European agencies is threefold: provision of technical expert knowledge, unburdening of the Commission, and increasing the effectiveness of the executive at the EU level.

Technical excellence and effectiveness are not, however, the sole reasons why the agency option is attractive. The second motive for the creation of European agencies is to promote the credibility of European regulation.\(^{39}\) To give an illustration, the impetus for the setting up of the European Food Safety Authority (EFSA) was the loss of confidence in regulatory institutions, both national and European, following a series of crises in the food sector, most notably the threat posed by “mad

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\(^{37}\) Ibid, pp. 282-283.


cow disease”. As Majone observed, this crisis “not only revealed the failure to establish a stable and internationally credible community of scientific experts on food safety, but also exposed serious shortcomings in the overall co-ordination of European policies on agriculture, the internal market and human health.”40 Thus, the executive in an attempt to gain long-term credibility vis-à-vis regulated industries and consumers, delegate (a certain degree of) their executive authority to politically independent bodies beyond their direct control.41 Such commitment is understood to be credible because by entrusting “an expert body to make the right decisions at the right time, politicians credibly signal that they will not give in to political pressure”,42 and consequently provide a “visible proof” that they are dealing with the emerging problems.43 This view was also endorsed in the Communication on European Agencies, where the Commission stated that “the main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations.”44 Thus, the employment of agencies insulates the management of technical regulatory questions from day-to-day political change,45 which in turn advances continuity and credibility.

A third rationale for the creation of European agencies is to implement tasks in a framework of networks. Indeed, it has been observed that one of the primary aims of agencies “is to run networks of national administrators which come into play in the implementation of Community policies.”46 After all, it was never the intention that European agencies would substitute national regulators and perform their tasks in complete isolation.47 Furthermore, it has been argued that in the areas “such as environmental protection, food security, drug addiction, chemical products and the like, national administrators’ expertise and experience are extremely useful in making the agency policy operational on the ground.”48 Networking in European agencies can take a variety of forms, including appointing representatives of national authorities to agencies’ management boards, and establishing and coordinating informational networks comprising national, European and at times international bodies. It has been pointed out that “networking makes a good deal of practical sense. It fosters co-operation between national and Union authorities dealing with the same terrain, avoids duplication of effort, and facilitates exchange of information, expertise, and best practice.”49

The fourth reason for the establishment of European agencies is to implement tasks of an intergovernmental nature. The core aim of certain agencies operating in the Area of Freedom,
Security and Justice (AFSJ) and the Common Security and Defence Policy (CSDP), such as Europol, Eurojust and the European Defence Agency (EDA), is to promote Member State cooperation and collaboration at the EU level. It has been observed that “[f]aced with growing challenges of [a] transnational character, loose cooperation efforts among member states were no longer sufficient and the need for more permanent structures of cooperation became apparent.” The creation of such “intergovernmental” European agencies supports Member States in their endeavour to counter transnational crimes and threats such as terrorism, and improves defence capabilities at the EU level.

The various rationales for agency creation presented above are also pertinent when considering the participation of interested parties. First of all, it can be observed that in certain cases a direct relation between the rationales for agency creation and the relevance of participation is more prominent. It was shown that European agencies are entrusted with complex technical and scientific tasks and are aimed to contribute to an effective administration. In this case, interested parties’ participation might contribute to better and more informed agency outcomes and advance compliance and implementation, which, in turn, may render agency operation more effective. Moreover, in instances where the primary reason for the creation of agencies is to improve credibility of European regulation, participation may be appropriate in order to insure responsiveness, enhance transparency and help build trust in the work of agencies. Second, the link between the establishment of European agencies in order to increase networking between national authorities and the relevance of interested parties’ participation is less pronounced or implicit. Nevertheless, it can be assumed that in such cases the participation of interested parties could again contribute to the effectiveness of agency operation, especially by securing that their outcomes are more informed. Third, it can be argued that there is no immediate link between the need for participation and the reasoning behind the creation of “intergovernmental” agencies (e.g. Europol, Eurojust and EDA). In fact, the preliminary mapping of participation in European agencies showed that none of these agencies have established participatory arrangements involving interested parties. In this case, especially “given the sensitivity of these fields and their close association with the issue of sovereignty”, it may be assumed that the risks of interested parties’ participation would significantly outweigh the benefits and thus participation is entirely omitted. Finally, all these rationales for the creation of European agencies, especially if the guiding motive is to ensure credible commitment, also demonstrate why preserving agencies’ independence is an important issue and why it is necessary to omit risks of capture. One may argue that some of the (underlying) reasons for the existence of agencies may have guided the choices for (or against) the establishment of particular forms of participation in European agencies and the promises they are intended to fulfil.

50 M. Busuioc (2013a), pp. 29-31; See also, P. Craig (2012), p. 147.
51 M. Busuioc (2013a), p. 29.
52 Ibid.
53 See Chapter 2, Section 2.2 and Chapter 3, Section 3.2.
54 M. Busuioc (2013a), p. 29.
European agencies have been established in various sectors in order to perform manifold tasks, ranging from risk assessment of food and feed (EFSA), granting trademark rights (OHIM) and plant variety rights (CPVO), developing draft regulatory technical standards (e.g. ESMA, EIOPA, EBA and EASA) and exchange of information (e.g. EEA, EU-OSHA and ENISA).

While different scholars propose a variety of possible classifications, there is, however, no generally accepted taxonomy of European agencies. As noted by Chamon, “every author contributing to the topic also has his or her own classification scheme of agencies.”55 This is not particularly astonishing, however, given that the classification of agencies is “not an end in itself.”56 Indeed, different approaches to classification highlight distinct features of European agencies and are thus of “instrumental value”57 to the purposes of each study. For example, when delving into the question of accountability of European agencies, Busuioc recognised a strong link between accountability and agency power, and thus applied a power-oriented agency classification.58 Another approach was proposed by Chiti, who, when inquiring into European agencies’ rulemaking, classified agencies according to their administrative powers but in a different manner to Busuioc.59 By comparison, in their examination of the delegation of powers to European agencies, Griller and Orator concentrated on “the intensity of the prerogatives entrusted for carrying out their missions.”60

Considering the aim of the present study, the definition of participation that will be proposed later in this chapter,61 and the evaluative framework building on the central promises of participation,62 the most suitable classification scheme is one that reflects on the nature of the functions that

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57 Ibid.
59 Chiti classifies agencies into three groups according to their administrative powers, thus including information agencies (i.e. agencies responsible for the production and dissemination of high quality information), agencies provided with instrumental powers (i.e. agencies engaged in administrative rulemaking by participating in the procedures leading to the adoption of binding implementing rules, either by assisting the Commission or by directly adopting technical rules), and agencies entrusted with decision-making powers. See, E. Chiti (2013), ‘European Agencies’ Rulemaking: Powers, Procedures and Assessment’, *European Law Journal, 19*(1), 93-110, pp. 94-99.
60 The authors draw distinction between agencies according to the mode and scope of instruments they deal with and propose four possible types: ordinary agencies without decision-making powers, pre-decision-making agencies with *de facto* influence over the Commission’s decision-making, genuine decision-making agencies with the capacity to adopt legal instruments binding on third parties and, as a purely technical type, rulemaking agencies entitled to adopt legal acts of general application. See, S. Griller and A. Orator (2010), pp. 12-15. Other classifications have been put forward in the literature. See for example, D. Geradin and N. Petit (2004), pp. 43-46.
61 See Sections 1.3 and 1.4.
62 See Chapter 2, Section 2.1.
European agencies are entrusted. It is argued that the motivation for creating participatory arrangements and the relevance of the participation of interested parties depend on the exercise of agency function. After all, it has been observed that the “political clout of [European agencies] to fulfill their mandate cannot be narrowly derived from their formal mandate or critical junctures in the agencies operation, but is at least partly dependant on the interaction with their regulatory environment and relevant social actors. The ability of [interested parties] to provide essential resources such as technical knowledge and engineer consensual policy making are crucial factors determining post-delegation efficiency and effectiveness of [agencies].”63 The “greater” the functions the agencies possess, the more important it becomes that they provide for participatory arrangements, in order to ensure better and more informed outcomes, foster implementation and acceptance, ensure inclusiveness and responsiveness of their operation, and promote transparency and monitoring over their activities and generate trust.

Before delving into agency classification, however, the matter of legal constraints regarding the delegation of powers to European agencies needs to be addressed to demonstrate how far the scope of an agency’s function may extend. The limits to delegation originate from the 1958 Meroni64 and 1981 Romano65 rulings, which are still considered good law. In the Meroni judgment, the Court delimited the delegation of discretionary powers in the EU political system. To preserve the delicate balance of powers between European institutions, the delegating authority needs to act in line with the principle of nemo plus iuris transferre potest quam ipse habet. Also, it is only permitted to delegate “clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of criteria determined by the delegating authority”, while delegation of “a discretionary power, implying a wide margin of discretion” would mean a breach of the institutional balance and is thus not possible. Equally important to the question of delegation is the Romano case, where, without turning to Meroni, the Court made clear that the delegation of powers to adopt acts having the force of law on bodies, other than those for which the Treaty explicitly foresees such powers, is not permitted. Although this jurisprudence does not expressly concern the delegation of powers to European agencies, both the EU institutions66 and academic scholars67 have “often implicitly assumed that the notion of delegation applies to the empowerment of these bodies.”68 Applying these two cases to European agencies sensu

66 The legal constraints of the Meroni doctrine have also had political implications. The Commission, in particular, has often turned to Meroni in its policy documents regarding the establishment and operation of European agencies. See, European Commission (2001), p. 8; European Commission (2005), pp. 11-12; European Commission (2008), p. 5.
stricto means that they cannot be entrusted with potentially final legislative powers. Nevertheless, it may be argued that, because of their far-reaching quasi-regulatory powers, some agencies, particularly the European Financial Supervisory Authorities (ESAs), may be “walking a tight rope” considering the Meroni and Romano constraints.69

The question of delegation to European agencies was also addressed by the Court of Justice of the European Union (CJEU) in the 2014 Short-Selling case,70 where, for the first time, Meroni and Romano were explicitly applied to an agency – the European Securities and Markets Authority (ESMA). In this case, the UK contested the powers delegated to the ESMA in Article 28 of Regulation 236/2012 (i.e. the power to prohibit or impose conditions on short-selling). The Short-Selling case is important because it clarifies a number of issues pertaining to the delegation of powers to European agencies.71 The CJEU, in particular, made three important distinctions regarding delegation to agencies. First of all, the Meroni doctrine does not prevent delegation of executive powers to European agencies, as long as such powers are precisely delineated, non-discretionary and amenable to judicial review in view of the objectives set by the delegating authority.72 Second, the CJEU stated that the institutional framework established by the TFEU, in particular Articles 263 and 277 TFEU, expressly permits agencies to adopt acts of general application. Therefore, it cannot be inferred from Romano that the delegation of powers to an agency is governed by requirements other than those established in Meroni.73 Third, the CJEU held that Articles 290 and 291 TFEU do not constitute a single legal framework for the attribution of delegated and executive powers, and that powers to adopt binding acts may be delegated to an agency, at least where the delegating provision can be perceived as forming part of a series of rules designated to endow an agency with such powers.74 On the whole, it is argued that in the Short-Selling case, the CJEU reinterpreted (“rejuvenated”) the Meroni doctrine, in a manner that fits the new reality of agency functions.75

The function-oriented taxonomy of European agencies takes into account the objectives and limitations for agency creation, their mandates and the nature of tasks as enshrined in the agencies’ founding regulation. On this basis, one can distinguish between the following groups of agencies: (i) information and co-ordination agencies, (ii) agencies that provide services to other agencies and institutions, (iii) decision-making agencies, and (iv) quasi-regulatory agencies. For a better visualisation, an overview of the function-oriented classification of European agencies is provided below.

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70 Case C-270/12, United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union [2014], not yet reported.


72 Case C-270/12, Para. 53.

73 Ibid. Paras. 65-66.

74 Ibid. Paras. 78-85.

75 See also, P. Craig (2015), p. 539.
Table 1.2 A Function-Oriented Taxonomy of European Agencies

<table>
<thead>
<tr>
<th>Category</th>
<th>European Agencies</th>
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<tbody>
<tr>
<td>Information and Co-ordination</td>
<td>CEDEFOP, CEPOL, EASA, EASO, ECDC, EDA, EEA, EFCA, EIGE, EMCDDA, EMSA, ENISA, EUISS, eu-LISA, EU-OSHA, EUROFOUND, Eurojust, Europol, EUSC, FRA, FRONTEX, GSA</td>
</tr>
<tr>
<td>Service Providing</td>
<td>BEREC Office, CdT</td>
</tr>
<tr>
<td>Decision-Making</td>
<td>ACER, CPVO, EASA, EBA, ECHA, EIOPA, EMA, ESMA, OHIM</td>
</tr>
<tr>
<td>Quasi-Regulatory</td>
<td>EASA, EBA, EFSA, EIOPA, EMA, EMSA, ERA, ESMA</td>
</tr>
</tbody>
</table>

(i) *Information and Co-ordination Agencies* are agencies that are in charge of the provision of information and co-ordination in their respective fields of operation. As it can be seen from the table provided above, a majority of European agencies falls into this category. This type of agencies will normally perform the following tasks: (i) engage in the collection, treatment and processing of detailed, reliable, and comparative scientific, technical and economic information, which serves both the EU and the national competent authorities, (ii) set up systems of information and documentation that help to analyse current and emerging risks and can be used as the basis for the subsequent policy making, and (iii) promote effectiveness and co-ordination of the Member States’ activities and ensure cooperation between the national competent bodies and the European Union. Prominent examples of European agencies involved in tasks of this nature are the European Environment Agency (EEA), the European Agency for Safety and Health at Work (EU-OSHA), the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), the European Police Office (Europol) and the European Union’s Judicial Cooperation Unit (Eurojust).

(ii) *Service Providing Agencies* are primarily concerned with the provision of particular services, solutions or skills necessary for the operation of a given field. Currently, there are two European agencies which belong to this category. One is the Translation Centre for Bodies of European Union (CdT), which is in charge of providing translation services to other European agencies and to those EU institutions and bodies that already have their own translation services, but need assistance in order to deal with surpluses in their workload. The other service providing agency is the BEREC Office, whose primary task is the provision of professional and administrative support to the Body of European Regulators for Electronic Communications (BEREC), and is concerned with contributing to the development and better functioning of the internal market for electronic communications.

(iii) *Decision-Making Agencies* are all those European agencies that have the power to adopt legally binding individual decisions. There are, however, certain limits imposed on agency decision-making discretion. Namely, agencies are authorised to intervene only “in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions and without a genuine discretionary power.” Such constraints are in line with the (“rejuvenated”)

76 The Body of European Regulators for Electronic Communications (BEREC) is not a European agency as it does not have legal personality. The BEREC Office, which provides support services to BEREC, however, is a European body with legal personality. See, Art. 6(1) of Regulation (EC) No 1211/2009.
Meroni doctrine presented above. A number of agencies currently belong to this category. For example, the Community Plant Variety Office (CPVO) decides on applications for plant variety rights and the Office for Harmonisation in the Internal Market (OHIM) provides exclusive rights and design protection throughout the European Union. A further example is the European Aviation Safety Agency (EASA), which is, *inter alia*, responsible for issuing decisions regarding airworthiness specifications and the definition of environmental requirements for products, parts or appliances of aircraft, certificates of pilot training organisations, flight simulation training devices used by training organisations, and air traffic controller training organisations, as well as decisions pertaining to flight time limitation specification. The European Chemicals Agency (ECHA), the Agency for the Cooperation of Energy Regulators (ACER), the European Financial Supervisory Authorities (ESAs), including the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), also belong to this group of agencies.

(iv) Quasi-Regulatory Agencies comprise a group of European agencies which are “engaged in administrative rulemaking by participating in the procedures leading to the adoption of implementing rules, either by assisting the Commission or by directly adopting technical rules [i.e. soft law measures].”78 Even though such agencies, in line with the Meroni and Romano and Short-Selling case law, do not enjoy “truly regulatory competences”, they possess “a crucial normative authority for the subsequent stages of decision making.”79 As Craig states, “the Commission is not bound by the recommendations thus made, but the views proffered by the relevant agency will nonetheless carry considerable weight, more particularly because they will commonly be concerned with technical and scientific matters.”80 Agencies, belonging to this category, comprise the European Maritime Safety Agency (EMSA), the European Railway Agency (ERA), the European Medicines Agency (EMA), the European Aviation Safety Agency (EASA) and the three ESAs. The EASA and the ESAs are the agencies with the strongest quasi-regulatory functions.81 They assist the Commission, respectively, in the drafting implementing rules of general application pertaining to aviation safety, and developing draft regulatory and implementing technical standards in the field of financial supervision. In addition, these agencies also engage in regulation by soft law: the EASA publishes certification specifications, including airworthiness codes and acceptable means of compliance, whereas the ESAs publish guidelines and recommendations addressed to competent authorities or financial institutions.

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79 S. Borrás, C. Koutalakis and F. Wendler (2007), p. 584. However, as pointed out by Craig, “[t]he legal reality is that the ESAs have been accorded power greater that other agencies, and come closest to having regulatory autonomy in their assigned fields.” See, P. Craig (2015), p. 539.
81 The EASA and the EBA quasi-regulatory functions are in more detail presented in Chapters 6 and 7.
1.2 Participation in European Governance: Key Issues

Over the last decade, participation has become a buzzword in academic debate about the quality of European governance. However, as observed by Keim, “[a] major obstacle to any rational discussion about participation is the ambiguity the subject matter breeds.”82 Indeed, participation in European governance has become “ubiquitous”83; it has adopted manifold meanings, been attributed various functions and qualities, and has been linked to “different images of the nature of European polity”84 and to a broad range of actors (civil society organisations, citizens, interest representatives, affected parties).85 The conceptual breadth of the term is reflected in different approaches to analysing participation in European governance: participation as a principle of good governance, inquiry into democratic quality of the Commission’s participatory structures, and a rights-based approach to participation in EU administrative law. A brief review of studies related to these approaches is relevant as they show the limits and the potential of what participation in the EU is capable of accomplishing from a normative point of view.

The inquiry into participation as a principle of good governance was triggered by the Commission’s White Paper on European Governance published in 2001.86 Concerned with the deepening legitimacy crisis of European governance, the Commission put forward a set of “proposals for change”, aimed at, among other things, ensuring better involvement of civil society in shaping and implementing EU policy.87 Participation, presented as one of five principles of good governance (the others being openness, accountability, effectiveness and coherence), would promote inclusiveness, enhance quality, relevance and effectiveness of EU policy, and create more confidence in the policy outcomes and in the EU institutions.88

Scholars commenting on the White Paper were, however, somewhat critical of the proposed reforms regarding participation. Magnette argued, for example, that the reforms proposed in this document focus on a “limited” or “élitist” conception of participation, which “will probably remain the monopoly of already organised groups, while ordinary citizens will not be encouraged to become more active.”89 In his view, the emphasis laid upon civil society in the White Paper suggests that the conception of participation is “universalistic”; however, most of the proposals

87 Ibid, pp. 11-18.
88 The Commission argued that “[T]he quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely [to] create more confidence in the end result and in the Institutions which deliver policies. Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies.” See European Commission (2001), p. 10.
for change (e.g. the promotion of consultations) concern stakeholders and interested parties.\textsuperscript{90} As Magnette observed, “these participatory mechanisms constitute extensions of existing practices and are underpinned by the same philosophy.”\textsuperscript{91} This perspective was shared by Armstrong, who stated that the White Paper was more concerned with “the need to better structure existing relationships between the Commission and organised civil society”, rather than “seeking to provide new forms of access for civil society actors.”\textsuperscript{92} In line with this notion, Armstrong’s observations regarding the democratic potential of participation were rather pessimistic.\textsuperscript{93} The White Paper approach to participation was further contested by Kohler-Koch, who pointed out that the Commission’s proposals for change did not sufficiently address the existing deficiencies of participation (e.g. the unbalanced representation of societal interests, the question about yardstick of representativeness, and selective interaction between the EU institutions and interest representatives).\textsuperscript{94} She argued that, despite their obvious potential, the proposals for change regarding participation were “disappointing with respect to practicability.”\textsuperscript{95} Others, however, such as Curtin and De Schutter, shared a more positive outlook on the conception of participation in the Commission’s White Paper.\textsuperscript{96} Rather than focus on its limitations, they highlighted the need, and considered the potential, for a further development of civil society involvement in European governance.\textsuperscript{97}

A further dimension was demonstrated by numerous authors who investigated whether the Commission’s participatory practice “holds its promises”\textsuperscript{98} of democratising the EU. There is a considerable body of literature, comprising (theoretic and empirical) sector specific\textsuperscript{99} and general

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\begin{itemize}
\item \textsuperscript{90} Ibid, p. 149.
\item \textsuperscript{91} Ibid, p. 148.
\item \textsuperscript{93} Ibid, pp. 128-132.
\item \textsuperscript{95} Ibid, p. 8.
\item \textsuperscript{97} For example, Curtin explored the opportunities of “creating spaces” for civil society deliberation, in particular through “the introduction of a formal procedural framework, within which participation can be exercised.” See, D. Curtin (2003), pp. 68-69. De Schutter, building on the Commission’s White Paper recommendations, put forward proposals for better “structuration” of civil society organisations and favoured the granting of procedural rights to such organisations. See, O. De Schutter (2002), pp. 213-217.
\item \textsuperscript{98} The expression is Kohler-Koch’s. See, B. Kohler-Koch (2008), ‘Does Participatory Governance Hold its Promises?’, in B. Kohler-Koch and F. Larat (eds), Efficient and Democratic Governance in the European Union, Mannheim: CONNEX Report Series No. 9, 265-295.
\end{itemize}
analyses of the Commission’s participatory arrangements. These studies point to the development and materialisation of different participatory practices, such as Commission consultations. Their general prognosis is that even after the introduction of the “principle of participatory democracy” in the draft EU Constitutional Treaty and its subsequent inclusion in the post-Lisbon Treaty (Article 11 TEU), the Commission’s participatory mechanisms are “misbalanced,” “insufficiently representative,” “selective,” and have not been “homogenously implemented.” While the empirical studies demonstrated that by improving inclusiveness, and enhancing transparency and responsiveness, the Commission was rather successful in widening participation, they also pointed out deficiencies regarding its “participatory quality.” Thus, it has been argued that Commission participatory practices do not amount to “participatory democracy”, but rather to “participatory governance.” It has been further maintained that in order to consider them “democratic”, participatory structures should be formed in a manner that ensures equal access, equal treatment and provides for effective involvement in decision-making.

The third way of treating participation is through the lens of participation rights in EU administrative law. A rights-based approach to analysing participation, which has received only limited attention in the academic literature, is narrower from the ones presented above. It scrutinises procedural rules that determine “who is entitled to be heard or intervene before the initial decision is made, or who is entitled to be consulted before a legislative-type norm is enacted.” This qualitatively different perspective of participation, provided by Craig and Mendes, unveils the discrepancy in the legislator’s and the EU courts’ stance between, on the one hand, recognition of procedural guarantees to those affected by administrative action premised on the right to be heard in adjudicatory procedures and, on the other hand, resistance to granting participation rights with respect to European regulatory measures. While Craig weighs the advantages and disadvantages

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of a rights-based regime, Mendes argues that, given regulatory developments, the extent of participation rights in EU administrative law is inadequate. She makes a convincing case for the extension of participation rights in EU law to new situations and new types of procedures, such as rulemaking, to enhance the protection of persons whose legally protected interests are affected by European regulation.

1.3 Participation and Agencies: Treading Unexplored Paths

Notwithstanding the fact that participation has become a prominent and highly researched feature of European governance, as the review of different approaches above demonstrates, the extent to which European agencies have lived up to the central promises of participation remains a rather blind spot in the literature. Systematic assessments of the participation of interested parties in the context of European agencies have not been conducted thus far. Given the growing importance and relevance of European agencies as a new mode of governance (especially considering the rationales for their establishment and their functions), this issue is highly relevant and deserves thorough investigation.

Clearly, the inquiry into participation through a particular lens would produce distinctive results. The different perspectives of analysing participation described above are valuable because they demonstrate distinctive meanings and challenges of participation from different normative perspectives (i.e. good governance, participatory democracy and participation rights). While the present research is informed by various approaches to participation its focus is notably different. Considering the specific characteristics of participation in European agencies (e.g. formalisation of participatory arrangements, the audiences and functions of participation), it is argued that an inquiry into participation cannot be decoupled from the real world of agencies. In other words, while different theories of participation can help us frame our understanding of what agencies do, without an investigation of how agencies operate in law and practice, they may misled or overlook otherwise important aspects of participation in European agencies. After all, European agencies are often meant to ensure a “better involvement of affected social and economic actors in the segments of regulation of which agencies and in charge” and in many cases provisions are made in the agencies’ founding regulations or in the agencies’ internal policy documents for the inclusion of such participants in the various aspects of agency operation (e.g. managerial or rulemaking) through different participatory structures. Participation acquires a positive connotation because of one or more promises it may fulfil. While taking into account the challenges of participation, particularly the risk of capture, I argue that participation may be relevant for the fulfilment of agencies’ objectives (especially effectiveness and credibility) and the functions of agencies because (i) it can increase the range of information available to agencies leading to better outcomes, (ii) ensure inclusiveness and improve responsiveness of agency operation,

110 Ibid, pp. 302-305.
111 M. Busuioc (2013a), p. 34.
(iii) foster implementation and compliance, and (iv) enhance transparency and increase monitoring over agency activities and help build trust. These central promises of participation, which ground the evaluative framework of the present research, are derived from the claims about the function of participation as stated in the legal texts and internal policy documents of agencies, legal and political science literature, and good governance documents, and as supported by empirical evidence. For the purpose of the empirical and evaluative assessment, I assume the validity of the formal logic "ab esse ad posse valet consequentia, a posse ad esse non valet consequentia" (it is valid to conclude from actuality to possibility, but not from possibility to actuality). Given that rules that envisage participation are in place, it is possible to expect that participation will accomplish a certain function (i.e. fulfil the intended promise).

The first contribution of this research is thus conceptual. This work delimits the concept of participation by reference to the promises of participation in a way that takes into account the complex legal and political reality of European agencies. In this research, participation is defined as a formalised interaction between European agencies and non-institutional actors which is enshrined either in the agencies’ founding regulations or set up by agencies’ acts to enhance the fulfilment of their specific needs and is aimed at delivering one or more promises. Formalised participation is most likely to advance the promises of participation as it cannot easily be modified or omitted when it becomes inconvenient for agencies for reasons other than those underlying their raison d’être. Further, the interaction between agencies and participants is characterised by two defining elements: access to participation and the quality of deliberation. Access is clearly identified as a crucial element of participation. As such, it refers to the opportunity to become part of the participatory structures. Specifically, the rules and practices of access determine who can become a member of a particular participatory forum (whatever form it may take), under what circumstances and subject to what conditions (e.g. according to certain predefined selection and appointment criteria) and what will be the purpose of participation (i.e. the fulfilment of a certain promise of participation). However, this rather static dimension of participation, while fundamental, is not sufficient in and of its own. Considering access to participation, without also considering its actual influence would tell us, at least initially, nothing about the fulfilment of the promises of participation. Therefore, I introduce a second, dynamic and substantive, element of participation, the quality of deliberation, consisting of three interrelated and mutually enforcing facets of participation – the provision of information, commenting and recognition. In particular, the quality of deliberation concerns the influence of participation, i.e. the difference that it makes in the end in terms of the promises of participation.

The second and main contribution of the present research is its interdisciplinary character treading unexplored paths. By examining agencies’ rules and practices of participation through empirical research (interview data), this study combines a legal and a political science approach. Only in this way can we show the effective fulfilment (or the lack of) of the promises of participation as they follow from the legal texts and internal policy documents of agencies. In other words, the participatory arrangements of European agencies will be researched both de jure and de facto in

112 See in particular, J. Mendes (2011a); P. Craig (2012), pp. 289-319.
113 See in detail, Chapter 2, Section 2.3.2.
114 See, Chapters 2 and 3.
order to determine whether and to what extent European agencies have lived up to the central promises of participation.

Third, this research also has a broader normative significance, because it will provide a contextual evaluation of participation in European agencies and an assessment of whether “the agency model” is indeed well-suited as “a framework for institutionalizing the influence of interested parties” at the EU level.\footnote{A. Heringa and L. Verhey (2003), p. 158. See also, M. Busuioc (2013a), p. 34.}

1.4 Participation in European Agencies: Scope

As stated in the previous section, participation refers to a formalised interaction between European agencies and non-institutional actors, characterised by access and the quality of deliberation, which is aimed at fulfilling one or more promises. Thus, “non-institutional actors” are distinguished from “institutional actors”, who are those to whom the agencies have a legal obligation to work with under EU rules, i.e. the European Commission, the European Parliament and the Member States.

It is interesting to observe that such perception of actors resembles the stakeholder approach adopted in the corporate management literature. As explained by Clarkson, “stakeholders are persons or groups that have, or claim, ownership, rights, or interests in a corporation [i.e. an agency] and its activities, past, present, or future. Such claimed rights or interests are the results of transactions with, or actions taken by, the corporation, and may be legal or moral, individual or collective.”\footnote{M. B. E. Clarkson (1995), ‘A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance’, \textit{Academy of Management Review}, 20(1), 92-117, p. 106.} Moreover, Clarkson differentiates between primary and secondary stakeholders. On the one hand, “primary stakeholders” are defined as those “without whose continuing participation the corporation [i.e. an agency] cannot survive as a going concern.”\footnote{Ibid.} In the case of European agencies, “primary stakeholders” can be equated with the aforementioned “institutional actors”. On the other hand, “secondary stakeholders” can be defined as those “who influence or affect or are influenced or affected by, the corporation [the agency], but are not engaged in transactions with the corporation and are not essential for its survival.”\footnote{Ibid, p. 107.} Theoretically, non-institutional actors, whose participation is the primary concern of this study, refer to this second meaning of stakeholders.

Non-institutional actors who may participate within the remit of European agencies are referred to by different names in the agencies’ constitutive documents: depending on a particular agency regulation or agency act opportunities to participate may be directed at interested parties, affected parties, stakeholders, interest or civil society organisations, interest representatives, and at times the public. A distinction between such groups of participants is not easy to establish; often,
different denominations, such as “interested parties”, “stakeholders” or “public consultations”, are used interchangeably within the agencies’ founding regulations,\(^\text{119}\) and who exactly the participants are can only be determined by empirical research.

In the context of this book, whenever participatory arrangements refer to “the public”, for example, with regard to public consultations, this will be explicitly specified. In other cases, and unless otherwise identified, the term “interested parties” will be used broadly to encompass any other group of non-institutional actors. To paraphrase Kohler-Koch, the difficulty in establishing the confines between different groups of participants is, however, not decisive for the application of a broad term of interested parties; rather, it avoids a “reductionist understanding” of the relationship between the agencies and participants, which is intended to accomplish different promises of participation.\(^\text{120}\) For example, the restriction to “affected parties” would presuppose that the promises of participation are contingent on the subjective relation to underlying material situations\(^\text{121}\) and would exclude from analysis those parties with a general interest, or those who have particular knowledge or expertise to contribute to the output of agencies. Accordingly, all groups of “interested parties” (or where applicable “the public”) need to be investigated.

Furthermore, the present scope of participation excludes the involvement of individuals acting as experts or specialists who are intended to provide topic-specific technical or scientific support to the agencies (e.g. in drafting groups or task forces). Indeed, the primary purpose of experts is to remedy the potential lack of in-house expertise and to ensure scientific and technical soundness of agency operation. However, considering that European agencies deal with extremely complex technical matters, interested parties who wish to interact with agencies will often need to possess a certain level of relevant knowledge, experience and expertise in a given field in order to be granted access\(^\text{122}\) and to effectively participate (i.e. to carry out tasks they are entrusted and to voice their interests). Admittedly, in this sense, there is a fine line between experts and interested parties. Nevertheless, it is argued that in this case, what distinguishes the two groups is the nature of their involvement. It may be argued, in particular, that experts work for an agency, whereas the expertise of interested parties is a necessary precondition for the promotion of their interests.

\(^{119}\) For example, the EBA founding regulation stipulates that the agency should consult “interested parties” and in order to facilitate such consultations with “stakeholders”, a Banking Stakeholder Group shall be established. See, Para. 48 of the Preamble and Art. 37 of Regulation (EU) No 1093/2010, as subsequently amended. Similarly, the EFSA founding regulation provides that “there shall be open and public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law” and that the agency “shall develop effective contact with consumer representatives, producer representatives, processors and any other interested parties.” See respectively, Arts. 9 and 42 of Regulation (EC) No 178/2002, as subsequently amended.


\(^{121}\) See, J. Mendes (2011a), pp. 32-43.

\(^{122}\) See also, P. Bouwen (2004), ‘Exchanging Access Goods for Access: A Comparative Study of Business Lobbying in the European Union Institutions’, European Journal of Political Research, 43(3), 337-369, pp. 337-341. Referring to ad hoc lobbying behaviour of business interests in the EU, Bouwen argues that the degree of access to European institutions may be explained in terms of a theory of the supply and demand of access goods – i.e. information that is crucial in the EU policy-making process. Such “access goods” may include, inter alia, expertise and technical know-how, i.e. information which is indispensable in developing effective EU legislation in a particular policy area, and information about the needs and interests of a [regulated] sector.
In addition, specific participatory arrangements in European agencies may encompass the involvement of interested parties who represent their immediate background organisation (i.e. the interests of a particular association)\(^{123}\) or the “broader” interests of a sector affected by an agency’s operation (i.e. the general interests of the sector concerned).\(^{124}\) In the first case, interested parties will participate as representatives (“agents”) on behalf of their background organisations, whereas in the second case, they will likely need to act in their individual capacity\(^{125}\) and “voice” the broader interests concerned to their best personal knowledge.\(^{126}\) It is understood that in certain highly delicate fields of agency operation (e.g. management or rulemaking), participation in an individual capacity might be required in order to diminish the risk of capture, to avoid possible conflicts of interest and/or to ensure professional secrecy.\(^{127}\)

Two final clarifications contribute to defining the scope of participation in this research. First, as stated above, the participation of interested parties is designed to meet specific needs or concerns pertaining to agencies’ operation which are reflected in the central promises of participation (i.e. more informed agency outcomes, fostering of compliance and implementation, ensuring inclusiveness and responsiveness, enhancing transparency, and advancing monitoring and building trust in the work of agencies). The approach to participation, which in this book builds on the promises of participation, is qualitatively distinct from the rights-based approach to participation, which refers to “the intervention during a decision-making procedure of holders of subjective rights or of legally protected interests potentially affected by the outcome of the procedure.”\(^{128}\) This latter approach is “grounded in specific values warranted by the rule of law, which can ultimately be pinned down to a concern for material justice”.\(^{129}\) In other words, the relevance of participation in adjudicatory procedures is detached from the central promises of the participation of interested parties defended in this study and, as such, is intentionally excluded from the present assessment.

Second, any potential informal contacts with interested parties, such as conferences, workshops, open days, and other ad hoc activities also fall outside the purview of the present understanding of participation. While these instruments for interaction with interested parties can be perceived as valuable – they largely focus on the exchange of information and the communication of different perspectives, the idea that such participation advances any of the central promises of participation in the sense of this book may be deceptive. As argued by Quittkat, such interactions with interested parties “facilitate the presentation of diverse arguments to large audience but the plenum discussions are limited to only a few speakers and do not allow for actual discourse. In addition,

\(^{123}\) For example, the interests of a particular consumers’ or patients’ organisation.

\(^{124}\) For example, the general interests of consumers or patients.

\(^{125}\) This, for example, is also the case with regard to interest representation in the European Economic and Social Committee (EESC), where the members “shall not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the Union’s general interest.” See, Art. 300(4) TFEU.


\(^{127}\) Regarding professional secrecy see Chapters 6 and 8.

\(^{128}\) J. Mendes (2011a), p. 76.

\(^{129}\) Ibid, p. 305.
when we consider that determining speakers is often a diplomatically negotiated compromise and that it is organizers [i.e. agencies] who chose their speakers, it quickly becomes clear that [such participation is] input-oriented on a conditional basis [...]."\textsuperscript{130} Taking into consideration these reasons, above all the informality of such interactions, insurmountable difficulties emerge preventing an assessment as to whether, in terms of access and the quality of deliberation, such informal contacts (intend to) fulfil the promises of participation.

1.5 Outline of the Book

The book is structured as follows. \textit{Part I} of this research lays the theoretical and methodological groundwork for the subsequent empirical inquiry into participation in European agencies. \textit{Chapter 2} develops an evaluative framework, based on the central promises of participation. The promises of participation as claimed in the “sources” (i.e. the agencies’ founding regulations and internal policies, “good governance” documents, legal and political science literature and empirical evidence) constitute the yardstick against which participation in European agencies, at both \textit{de jure} level as well as \textit{de facto} level, will be assessed. Moreover, the chapter maps out different internal and external forms of participation (i.e. managerial participation, participation in general matters, quasi-regulatory participation and public consultations) and participatory structures which exist in the realm of European agencies. It is maintained that different participatory arrangements might be characterised by different mandates and different audiences and may, thus, carry forward distinctive promises of participation. At the same time, this chapter defines two components of analysis which follow from the present concept of participation, namely access and the quality of deliberation. These help determine the manner and the extent to which agencies have lived up to the central promises of participation. \textit{Chapter 3} is devoted to clarifying and justifying the methodological approach of this study, particularly the choice of the qualitative research method (case studies), case selection and the main sources of data.

\textit{Part II} of this book investigates different forms of participation that exist in European agencies and critically assesses the accomplishment of the intended promises upon the conditions of access and on the basis of the overall quality of deliberation. As such, \textit{Chapters 4, 5, 6, 7} constitute the core of this study. Based on empirical analysis, they aim to show how different internal and external forms of participation and participatory structures support different central promises (i.e. identification of primary promises) and evaluate the manner and the extent to which these forms and structures have actually enabled the fulfilment those promises. \textit{Chapter 4} delves into the meaning of two variations of the involvement of interested parties in the strategic management of agencies: direct participation in management boards and indirect managerial participation via advisory boards and as observers of management boards. \textit{Chapter 5} examines and evaluates the promises of participation in general matters (i.e. a form of internal participation.

that is not related to a specific decision-making procedure). Chapter 6 deals with internal quasi-regulatory participation. It examines closely the promises of interested parties’ involvement in the rulemaking activities of agencies, which may comprise either the drafting of eventually binding implementing rules adopted by the Commission or regulation by soft law. Chapter 7 focuses on a form of external quasi-regulatory participation, namely public consultations, and again identifies and assesses the fulfilment of promises of consultation upon conditions of access and with regard to the overall quality of deliberation.

The concluding Chapter 8 summarises the main empirical findings regarding the promises of participation from the perspective of each form of participation across agencies and provides a contextual evaluation of participation in European agencies as a whole. Moreover, the chapter also provides theoretical insights for researching participation and considers the added value of the participatory arrangements of agencies.