Compliance Problems in the European Union – a Potential Role for Agencies in Securing Compliance?

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Introduction

Both in the regulatory practice and the scholarly literature, the success of regulation is often attributed to compliance (e.g. Majone, 1996; COM(2001) 428; Tweede Kamer, 2003). While non-compliance – non-conformity between the specified rules and actor's behavior – is a potential problem for all levels of government, international regimes in particular are thought to be vulnerable, due to the absence of a 'legitimate monopoly of force to bring about compliance' (Börzel, 2002: 1). Especially in view of declining national sovereignty (e.g. Chayes & Chayes, 1995; Koh, 1997) and the variety in regulatory cultures involved (Van Waarden, 1995), international rule compliance becomes critical.

The European Union (EU) is increasingly confronted with compliance problems. Numerous examples of member states only partly or incorrectly conforming to European legislation are reported (e.g. Mendrinou, 1996; Jordan, 1999; Versluis, 2003; Falkner et al, 2005). The European Commission explicitly states that compliance with European law is a necessity, 'not only for the sake of efficiency of the internal market but also to strengthen the credibility of the Union' (COM(2001) 428:5). Or as Williams states, 'the EU is liable to appear as a travesty of governance, regulation without implementation' (Williams, 2005: 88).

The European Commission and scholars alike suggest European agencies as a solution to compliance problems. This suggestion is in line with the recent 'policy fashion' of 'agencification' (Pollitt et al, 2001). Currently there are 19 Community agencies – such as the 'European Environment Agency' and the 'European Food Safety Agency' – with many more in preparation (e.g. in the fields of fisheries control and chemicals). The EU's 'appetite for creating new agencies seems limitless' (Geradin & Petit, 2004:4). The European Commission expects that agencies 'will improve the way rules are applied and enforced across the Union' (COM(2001) 428:24). Scholars also assume the added value of agencies in securing compliance (e.g. Kreher, 1997; Vos, 2000; Kelemen, 2002; Faure, 2004; Williams, 2005). Majone argues that agencies 'should be seen as key elements of a new mode of governance that relies less on the power of taxing and spending (…) and more on the power of making and enforcing rules' (Majone, 1997b:1).

It is thus expected that European agencies can provide a (part of the) solution to compliance problems; however, these expectations are not grounded. While theoretical and normative analyses regarding the accountability and legitimacy of agencies are widespread (e.g. Dehousse, 1997; Majone, 1997a; Shapiro, 1997; Geradin, Muñoz & Petit, 2005), empirical evidence of the presumably positive impact of agencies on compliance is lacking. What is more, the entire fashion of agency-building is not preceded by proper analysis: '[t]he decision to grant regulatory duties to EC-wide regulatory agencies (…) has often been based on ad-hoc political considerations rather than on any coherent reflection' (Geradin & Petit, 2004: 6). Vision and strategy on how European agencies improve compliance in practice are lacking (compare COM(2005) 59). In a political constellation such as the EU, with different regulatory cultures and where different 'worlds' of compliance (Falkner et al, 2005) are identified, it is questionable whether it goes without saying that agencies will improve compliance.

Scholars and policy-makers alike require an evaluation of this assumption. By linking the, so far separated, schools of compliance and agency literature, this article will analyze the validity of the often-heard hypothesis that agencies will lead to improved compliance within the EU. This article first presents the state of the art in compliance theories, followed by an analysis of the trend of 'agencification' within the EU. The last part of the article brings the different traditions together and pleas for a new research agenda. While, both practically and theoretically, it is not unthinkable for agencies to play a positive role in securing compliance, the 'improved-compliance' legitimation for agency-establishment is still to be empirically tested.

1. Why Comply? The State of the Art in Theorizing Compliance

1.1 Theorizing compliance

Compliance refers to the extent to which 'agents act in accordance with and fulfillment of the prescriptions contained in (…) rules and norms' (Checkel, 1999: 3). In the example of the European Union compliance refers to the extent to which the member states conform to the provisions of the Treaties and all regulatory measures that spring from them. Compliance is not the same as effectiveness or as implementation. Effectiveness refers to 'the efficacy of a given regulation in solving the political problem' (Neyer & Zürn, 2001: 4). Member states can perfectly comply with regulations, without this being effective; i.e. without compliance solving the problem at stake. Implementation refers to 'the process of putting international commitments into practice' (Raustiala & Slaughter, 2002: 539). Compliance can also occur without implementation, for example when there is a complete 'fit' between the domestic practice and the accord.

Attention for compliance with European legislation is increasing the last decade. The first real empirical study of European legislation in practice by Siedentopf and Ziller (1988) set the scene for a wide range of EU compliance research. Mastenbroek (2005) mapped this field of research and identifies three waves, starting with a highly variegated eclectic start, via 'Europeanization' literature, to a recent trend to bring domestic politics back in. Thinking about compliance within the EU shows several commonalities. Most studies are empirical and qualitative in character, they show a strong emphasis on explaining variation between member states, they are not very well grounded in theory, and they tend – despite some exceptions – to concentrate on the phase of legal transposition of EU directives into national legislation.

Despite attempts by Europeanization scholars to identify a more established theoretical framework departing from the 'goodness of fit' hypothesis and a (rational or sociological) institutionalist perspective (e.g. Cowles et al, 2001; Héritier et al, 2001), theorizing compliance with European legislation is not as developed as thinking about international rule compliance in the International Relations (IR) tradition. 'Unlike implementation research in the field of (European) public policy, IR scholars have not given up on developing generalizable claims about (non-)compliance' (Börzel, 2002: 15). IR compliance theories are more inclined to locate solutions to compliance problems compared to EU studies. Strangely enough, EU scholars only marginally take IR compliance theories into consideration when analyzing the European situation.[i] Following the three main schools of thinking about compliance in the IR debate – rationalism, management and constructivism – this article analyzes the various perspectives in perceiving compliance problems and in identifying solutions for addressing non-compliance in order to come to grips with the hypothesis that agencies will lead to improved compliance within the EU.

1.2 Rationalist Perspective

Rationalism dominated IR thinking about compliance in the 1980s and is anchored in the political economy tradition of game theory and collective action theory (Koh, 1997). Bargaining agents, in this example EU member states, make rational choices – decide whether or not to comply –

on the basis of cost/benefit calculations. Non-compliance may be preferred simply because the costs of compliance outweigh the benefits. States make strategic cost/benefit calculations, either in response to putative regime benefits or in response to the threat of sanctions (Checkel, 1999).[ii] Besides non-compliance as a preference, non-compliance can also occur out of opposition. Liberal intergovernmentalists (see especially Moravcsik, 1993) argue that non-compliance can occur as protest against being outvoted within the EU. As intergovernmental bargaining is the key to understanding compliance, votes in the Council of Ministers and a country's relative (economic) importance are crucial. Countries that are not able to 'upload' their preferences at the EU level are expected not to comply out of opposition (Falkner et al, 2004).[iii] The rationalist perspective thus departs from the logic of consequentialism and sees 'political order as arising from negotiation among rational actors pursuing personal preferences or interests in circumstances in which there may be gains to coordinated action' (March & Olsen, 1998:949).

What options does the European Union have to address compliance problems according to a rationalist account? The answer is straightforward: compliance requires enforcement. International law will only be complied with when there is an effective enforcement system; i.e. when there is coercive leadership provided within the regime (Underdal, 1998). When there is no effective system to detect and respond to violations or infringements, actors will not comply. Monitoring increases transparency and exposes possible defectors. The more an international organization actually has capabilities to monitor implementation, and the more financial and legal tools this organization has at its disposal, the more likely it is that compliance will take place (Sverdrup, 2003).

Only a coercive strategy of monitoring and sanctioning will induce compliance.[iv] 'Naming and shaming' instruments, such as press releases and scoreboards, are considered to have an impact on compliance. 'Harder' instruments are (economic) sanctions and fines, withholding military or financial assistance or charging higher interest rates for loans (Downs & Trento, 2004). Sanctions 'raise the costs of shirking and make non-compliance a less attractive option' (Tallberg, 2002:612). In order for sanctions to be effective they must be both credible and potent. Reluctant actors must be convinced that the likelihood that an infringement will be detected and sanctioned exceeds the costs of compliance (Mitchell, 1996).

1.3 Management Perspective

Especially induced by several publications by Chayes and Chayes (1991, 1993, 1995), the beginning of the 1990s showed a boost in an alternative way of thinking about compliance. Opposed to rationalism, the managerial perspective departs from the idea that states are generally willing to comply with international rules and that overall compliance rates are relatively good. To this end, a quote from Henkin's *How Nations Behave* (1968) is often repeated: 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time' (amongst others quoted in Chayes & Chayes, 1993:177). According to the 'originators' of the management perspective, '[n]on-compliance is not necessarily, perhaps not even usually, the result of *deliberate* defiance of the legal standard' (Chayes & Chayes, 1991: 280; emphasis added). Non-compliance may be inadvertent; actors may take sincerely intended actions and expect to achieve compliance, but nonetheless fail to meet the requirements (Mitchell, 1996). When states do not comply with international legislation, this is rather the result of capacity limitations or rule ambiguity.

Capacity limitations can be observed in the form of a lack of necessary resources, e.g. financial, administrative, scientific or technological incapacities, poverty in general, governmental inefficiency or corruption. Examples of non-compliance due to incapacity are numerous.[v] Especially the member states in Central and Eastern Europe are thought to be vulnerable to incapacity: 'Many developing countries and formerly centrally planned economies have greater difficulties in complying with international obligations than industrialized countries owing to less developed administrative systems and fewer monitoring and financial resources which can be devoted to enforcement' (Haas, 1998: 20).

Problems with compliance with Community law are often attributed to the complex policy-making structure of the EU and the vague and poorly drafted policies that spring from it (e.g. Mendrinou, 1996; Jordan, 1999; Neyer & Zürn, 2001). Directives are often loosely worded in order to accommodate differences in the decision-making process. As a consequence, the resulting European policies are often open for different (possibly even equally plausible) interpretations (Falkner et al, 2004).

In order to reduce problems, non-compliance should be 'managed' instead of sanctioned. Managerialists do not belief in an exclusive reliance on enforcement: 'sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used' (Chayes & Chayes, 1995:32-33). Managerialism is rather explicit in providing solutions to the compliance puzzle; solutions are to have a cooperative and problem-solving approach based on capacity building (e.g. funding or sharing of best practices) and rule interpretation (e.g. guidelines, EU-wide inspection criteria).

1.4 Constructivist Perspective

While the rationalist and management perspectives are often presented as the two main ends of the spectrum when theorizing compliance, recent years – especially since the late 1990s – see the rise of an alternative approach that is less concerned with thinking in terms of intentional or unintentional mechanisms, but that is more concentrated on a normative analysis of compliance (Raustiala & Slaughter, 2002). According to constructivists, states are persuaded into compliance with international law as their preferences change as a result of socialization or internalization of shared norms (e.g. Underdal, 1998; Checkel, 1999).[vi] As constructivists see principles, identities, norms, etc. as socially constructed, processes of social learning can lead to a redefinition of preferences. Nations comply with international law because of an internalization of these new preferences. The main mechanism through with this socialization or internalization takes place is persuasion. Checkel defines argumentative persuasion as 'an activity or process in which a communicator attempts to induce a change in the belief, attitude, or behavior of another person' (Checkel, 2001:562). Actors are considered to be most 'open' to be persuaded, and thus most open to learn, when they have little historical and cognitive baggage and act in an insulated institutional setting.

Departing from the logic of appropriateness (March & Olsen, 1998), states are thought to be persuaded to internalize socially accepted norms of behavior. 'Nations thus obey international rules not just because of sophisticated calculations about how compliance or non-compliance will affect their interests, but because a repeated habit of obedience remakes their interests so that they come to value rule compliance' (Koh, 1997:2634). Such social learning is most likely to take place between countries with similar ideological or cultural worldviews (Underdal, 1998). Especially non-state actors – e.g. NGOs, epistemic communities, churches, universities or research centers, media, trade unions – are considered to play an important, catalytic, role in generating pressure and thus stimulating social learning (Checkel, 2001; Luck, 2004; Dai, 2005).

Non-compliance exists because 'actors have not internalized the norm (yet), i.e. they do not accept the norm as a standard for appropriate behavior' (Börzel, 2002: 16). Of the three perspectives, constructivism is the most optimistic about future prospects for compliance. Compliance will occur as long-term exposure to, or participation in, a 'norm-governed process' will always lead to socialization (Raustiala & Slaughter, 2002). An illustration of this is the long-term exposure to EU legislation which led to an embeddedness of EU law in national legal systems; EU law is more and more perceived as national law, which makes 'actors feel 'compelled' to follow ECJ rulings' (Beach, 2005:113).[vii] Constructivism does not provide clear-cut short-term solutions to solve compliance problems.

1.5 Conclusion

The oversimplified representation of the three perspectives does no justice to the regulatory complexity. Non-compliance can hardly ever be attributed to a single factor or explained by a single perspective (Neyer & Zürn, 2001). Falkner et al (2004), in a study of 29 infringement cases, showed that many different explanations – e.g. deliberate opposition, administrative shortcomings, interpretation problems – are in place at the same time. The different compliance theories are not competing; the mechanisms are most effective when combined (Checkel, 1999; Börzel, 2002; Raustiala & Slaughter, 2002). As Underdal argues, the question is not which model is 'true', but more how much of the variance in compliance each model can explain (Underdal, 1998). Or, as Coleman and Doyle state, the question is not whether the various models on compliance are true, 'but *when* they are true' (Coleman & Doyle, 2004:10; emphasis in original).

Despite the differences in argumentation why non-compliance takes place, there is overlap in the solutions offered to address compliance problems, but the emphasis differs per school (Downs & Trento, 2004). When reducing the three perspectives to bare bones, the emphasis in the solutions offered by rationalists are mostly found in 'stick' terminology (and to a lesser extent 'persuasion'), while managerialists more often think in terms of 'carrots' (and partly 'learning'). Constructivists are less concerned with carrots and sticks and prefer to seek their solutions in terms of 'persuasion' and 'socialization'.

Comparison of three compliance perspectives

Table 1

Perspective	**Compliance mechanisms**	**Strategy and solutions**
Rationalism	*intentional mechanisms* Non-compliance as a preference Non-compliance as opposition	*Coercive* strategy of monitoring and sanctioning, e.g. fines, trade restrictions, military actions, scoreboards and blacklisting.
Management	*unintentional mechanisms* Non-compliance due to inadvertence Non-compliance due to incapacity Non-compliance due to rule ambiguity	*Cooperative* and *problem-solving* strategy of capacity building and rule interpretation, e.g. subsidies, funding, knowledge or technology transfer and benchmarking.
Constructivism	*normative mechanisms* Non-compliance due to a lack of internalization of the norms of appropriate behavior	*Persuasive* strategy of changing states' preferences via the catalytic role of non-state actors, e.g. letter writing campaigns, consumer boycotts, press releases and research.

Linked to the overall theme of this article, solutions identified to address compliance problems are numerous, yet the option of using agencies in securing compliance is not explicitly mentioned in any of the perspectives. From a theoretical point of view, the potential of agencies as a solution to overcome compliance problems does not stand at the foreground. In order to analyze the validity of the hypothesis that agencies will lead to improved compliance, it is essential to provide an insight into the trend of 'agencification' in the European Union.

2. EU Agencies: a New "Policy Fashion"

From the creation of the 'European Centre for the Development of Vocational Training' in 1975 onwards, but especially since the 1990s, we see an increasing trend of delegation of specific

tasks to independent agencies within the European Union. Today there are 19 Community agencies, and this number will soon be outdated.[viii] Delegation – or 'distributed public governance' as Flinders (2004) refers to it – is a common phenomenon in modern society. According to Majone the growing use of agencies indicates the transition from the 'interventionist state of the past to the regulatory state of the future' (Majone, 1997b:1). Pollitt et al go as far as to identify a trend of 'agencification'; they even typify agencies as a 'kind of administrative fashion accessory' (Pollitt et al, 2001:286).

2.1 EU Agencies: an Overview

Agencies can be referred to as a 'variety of organizations (…) that perform functions of a governmental nature, and which often exist outside the normal departmental framework of government' (Majone, 2000:290). The creation of EU agencies took place in three waves. The first two agencies were already created in 1975: the 'European Centre for the Development of Vocational Training' and the 'European Foundation for the Improvement of Living and Working Conditions'. After a period of 'silence' of 15 years, the 'second generation agencies' were created in the 1990s, ranging from the 'European Environment Agency' in 1990 to the 'European Agency for Reconstruction' in 1999, with eight others in between. Recently, in the first few years of the 21st century, we see a third wave of agency creation. These latest agencies have two elements in common that separate them from the twelve earlier established agencies. Firstly, their tasks relate to safety or security; varying from food, maritime and aviation safety, to disease prevention and network and information security. Secondly, while the first twelve agencies were all created under the consultation procedure (and via unanimity in the Council of Ministers), the most recent agencies are adopted under the co-decision procedure and via qualified majority voting, thus allowing more parliamentarian influence.[ix]

Even though the 19 Community agencies differ considerably in tasks and set-up, they do have some common characteristics (e.g. Kreher, 1997; Yataganas, 2001; Vos, 2003; Flinders, 2004; Geradin & Petit, 2004). First of all, they are all created by a regulation that clearly identifies their aims and tasks. Secondly, they have legal personality and enjoy (within their defined mandate) a certain degree of organizational and financial autonomy. Thirdly, they have in common that a management board composed of member state and Commission representatives governs them. And finally, they are not mentioned directly in the EC Treaty.[x] As the concept of delegation is not laid down in the Treaties, agency creation has been based on the Meroni case law from the late 1950s.[xi] It stipulates that only 'clearly defined executive powers' can be delegated.

Despite these very general commonalities, a further generalization about the Community agencies and their functioning is difficult. The agencies can, albeit artificially, be classified in four different types.[xii] A first category consists of agencies that aim to *promote the social dialogue*.[xiii] In order to stimulate such dialogue – in different areas such as vocational training and living and working conditions – these agencies have a quadripartite management board with representatives of employers and trade unions as well as member state and Commission representatives. This category is therefore also sometimes referred to as the 'cooperation model' (Yataganas, 2001). The second category consists of the *observatory* agencies, or 'monitoring model' (Yataganas, 2001), with the main task to collect and disseminate information in diverse areas such as the environment, drug addiction, racism and infectious diseases.[xiv] An additional commonality is their responsibility to coordinate networks of national experts. The third category of *executive* agencies is the most diverse group of agencies with the similarity that they operate as 'subcontractors' to the European public service (Geradin & Petit, 2004).[xv] The last and largest category is composed of the *regulatory* agencies that facilitate the operation of the internal market, with the main common characteristic that they exercise (quasi-)regulatory functions.[xvi]

The history of agencification in the EU shows that one can rightly speak about a new 'policy fashion'. The last decade showed a steady increase of agencies and this trend is not likely to come to a halt soon. Over time it became easier to set up agencies, especially since the use of the co-decision

procedure and qualified majority voting, and more and more powers are transferred to agencies. While the first agencies mainly had tasks to promote the social dialogue and to collect and disseminate information, some of the latest regulatory agencies have far-reaching powers such as the registration of Community trade marks ('Office for Harmonization in the Internal Market') or the authority to decide on applications for plant variety rights ('Community Plant Variety Office').

2.2 Agencification in the European Union: An Analysis of the Phenomenon

Since the publication of the White Paper on European Governance (COM(2001) 428), the Commission during several occasions affirmed that 'one possibility envisaged for improving the way rules and policy are applied across the Union was to use regulatory agencies' (COM(2002) 718:2). While the above gives an overview of the different types of EU Community agencies, this does not yet address the issue why the Commission and several scholars assume that agencies will lead to improved compliance. To understand this assumption it is necessary to explore the rationale behind agency establishment.

A first complication in such an analysis is an absence of common establishment procedures. As stated, agencies are not mentioned in the Treaties and therefore lack a clear legal basis. While most of the earlier agencies spring from comitology committees (Kreher, 1997; Vos, 2003), there is no single answer to the question who or what promoted the creation of Community agencies in general. Agency creation did not follow a coherent administrative method, '[i]t has responded to ad hoc circumstances, instead of having been based upon a carefully reflected approach' (Geradin & Petit, 2004: 40). The Commission recognizes this: 'The European agencies have been set up in successive waves in order to meet specific needs on a case-by-case basis' (COM(2005) 59:2). Only recently, the Commission drafted an interinstitutional agreement in which it identifies an operating framework for European regulatory agencies (COM(2005) 59).

The growing scholarly body of literature on European agencies provides many potential explanations for agencification in the EU. When analyzing the wide variety in explanations, a distinction between 'intrinsic' and 'extrinsic' reasons for agency creation is noticeable. Intrinsic, in this respect, refers to reasons that are inherent in agencies, i.e. reasons that relate to (supposed) qualities or characteristics of agencies. Extrinsic refers to reasons for agency creation that lie outside (the solution of) agencies as such.

Intrinsic reasons for agency creation are numerous and can be found in the 'principal-agent' approach of analyzing delegation of authority. In the spirit of New Public Management, delegation is to reduce political transaction costs, to stimulate a more efficient use of knowledge and expertise in the complex regulatory constellation, and thereby to increase the efficiency of the political system. As many European agencies take their rise from rather invisible comitology committees (e.g. the 'European Agency for the Evaluation of Medicinal Products'), they are considered to contribute to more transparency, which in turn improves legitimacy (e.g. Kreher, 1997; Vos, 2000). Also improved credibility is an often heard 'justification' for agency creation. Especially Majone is a fierce 'promoter' of agencies along this line of reasoning: he stresses the need to segregate certain elements from political influence in order to strengthen policy credibility and to allow for greater policy consistency (in Everson et al, 1999; see also Flinders, 2004). Both Dehousse (1997) and Kelemen (2002) argue that the setting up of European agencies is a response to the crisis in the harmonization model. EU decision-making is slow and inflexible and therefore does not easily take account of the rapid changing technology. Agencies form a logical 'functional' response to this 'crisis', as they are better equipped to deal with the complex problems in today's society. Dehousse links this to the topic of implementation: 'The bodies must be seen as an attempt to reconcile a functional need for greater uniformity in the implementation of Community law' (Dehousse, 1997: 257).

In addition to these reasons that relate to characteristics of agencies as such, several scholars identify more extrinsic arguments. Kelemen (2002), for example, is of the impression that a functionalist account alone is insufficient to explain the creation of the (then) latest agencies. Agency

creation must also be seen in light of, on the one hand, a wish for greater cooperation between member states in some (internal market) sectors, and, on the other hand, an increasing unwillingness of the member state governments to transfer more powers to the Commission (see also Shapiro, 1997; Flinders, 2004). Especially after the fall of the Santer Commission in 1999 – which fed the growing hostility towards the Commission – possibilities for a step forward seemed to lie in the creation of independent agencies (Vos, 2003). The agencies are thought to be set up as a 'smoke screen': 'because Europeans don't like the technocrats in Brussels and fear concentrating even more governance there, if we want more EU technocrats, we need to split them up and scatter them about Europe' (Shapiro, 1997:281).

Another set of explanations is even more extrinsic, and relates to personal preferences of political leaders or crises. The then French president Mitterrand promoted the establishment of the 'European Monitoring Centre for Drugs and Drug Addiction' and the 'European Environment Agency' was pushed for by former Commission president Delors (Kelemen, 2002). Some of the latest agencies have in common that their establishment was triggered by a crisis of some sort. The 'European Agency for Reconstruction' is linked to the Kosovo crisis, the 'European Maritime Safety Agency' was created after the Erika oil tanker disaster and the BSE crisis led to the setting up of the 'European Food Safety Authority'.

3. Bringing the Two Together: What Role for Agencies in Securing Compliance?

3.1 What Role for Agencies from a Legal and Practical Perspective?

The European Commission legitimizes the new 'policy fashion' of EU agencies partly with claims about the positive role these agencies will play in improving compliance. The above analysis of the phenomenon of agencification shows that this legitimation is not obvious. Agencies are not generally established with the explicit aim of improving compliance; they are rather created on an ad-hoc basis without clear procedural requirements.

When analyzing the validity of the assumption that agencies will improve compliance, first it needs to be assured that they are legally able to play this role. The Treaty does not explicitly provide for agency creation, but the Meroni ruling set the standards under which delegation is accepted. Here it is clearly stated that institutions cannot 'confer upon the authority [i.e. agency], powers different from those which the delegating authority itself received under the Treaty' (Geradin & Petit, 2004:12). As implementation powers lie with the member states (with the exception of competition policy), the decision on delegation thus needs to be taken by the member states in the Council of Ministers. From a legal perspective, agencies can thus play a role in improving compliance when member states are willing to delegate compliance-related tasks. Several scholars question the willingness of member states to do so (Dehousse, 1997; Kelemen, 2002; Magnette, 2005). National governments generally are unwilling to delegate, and if delegation is accepted, they will prefer a weak agency. The fact that the management boards of agencies are composed of member state representatives shows that delegation is only allowed under firm intergovernmental control. Compared to agencies in the United States, EU agencies have far less implementing tasks as these are not allowed by reluctant member states and a protectionist Commission (Yataganas, 2001; Geradin, 2005).

Two of the latest agencies – the 'European Maritime Safety Agency' (EMSA) and the 'European Aviation Safety Agency' (EASA) – are the first with more explicit compliance-related tasks. EMSA has the task to 'monitor the overall functioning of the Community port State control regime, which may include visits to the Member States' (article 2, regulation 1406/2002) and EASA shall 'conduct inspections and investigations as necessary to fulfil its tasks' (article 12, regulation 1592/2002). Previous attempts to establish agencies with such enforcement tasks failed. The Commission suggested a rather powerful 'European Environment Agency' with extensive decision-making and enforcement powers, but notorious 'environmental laggards' opposed this idea in the Council of Ministers, thereby 'reducing' the tasks to information gathering (Kelemen, 2002).

As well, attempts to create an electronic communications agency with enforcement tasks never succeeded due to a lack of political will in the member states (Larouche, 2005). The inspection competences of EMSA and EASA can first of all be explained by the use of co-decision and qualified majority voting to create agencies since 2002, as unwilling member states can be outvoted. Besides, the recent trend in agency creation seems to indicate that member states are influenced by crises and are more willing to hand over sovereignty in areas relating to safety and security.

Problematic from a practical perspective is that the inspection competences granted so far are not explicitly labeled as 'compliance tasks' and a clear 'compliance strategy' is lacking. The founding regulations of EMSA and EASA do not indicate *how* these agencies are to influence compliance. Nor does the recently developed framework for agencies indicate how the Commission sees the link between agencies and improved rule application. This lacking vision is problematic when considering the relationship between agencies and the Commission in its role as 'guardian of the Treaties'. According to article 211 (TEC), the Commission is, together with the European Court of Justice and via the infringement procedure (article 226, TEC), responsible for ensuring the proper application of EU legislation in all member states. The Commission realizes the need for consistency between the agencies' tasks and the Commission's executive function (COM(2002) 718: 13), but does not provide answers as to how to manage this. Many agencies have information-gathering tasks; how are they expected to deal with obtained information on non-compliance in the member states? Are the agencies to inform the Commission as the guardian of the Treaties; if so, what will happen when agency and Commission disagree? Williams argues that precisely this issue can undermine the power of the Commission as the guardian of the Treaties: 'Creating information-based agencies means removing the Commission's own information-gathering capacities. This inevitably hampers whatever enforcement capacity the Commission had' (Williams, 2005: 92). One could question whether some of the 'meta-regulatory functions' of the Commission would be better executed by agencies (Scott, 2005).

3.2 What Role for Agencies from a Theoretical Perspective?

A more theoretical analysis of the potential role for agencies in improving rule application could depart from IR compliance theories as well as from the 'agency literature'. In this last body of literature normative analyses regarding the accountability and legitimacy of agencies, and questions of agency creation as such, are widespread. While the deductively obtained assumption that independent regulatory authorities will form a solution to compliance problems is often-heard (e.g. Kreher, 1997; Majone, 1997b; Vos, 2000; Kelemen, 2002; Faure, 2004; Geradin, Muñoz & Petit, 2005; Williams, 2005), less attention is paid to an empirical exploration of the role of agencies in compliance. What do EU agencies do in practice to improve compliance? Under what conditions are they successful in achieving this?

In establishing a clearer vision on *how* agencies (could) improve compliance, compliance theories should play a central role. Within each of the three compliance perspectives, agencies could potentially be integrated as a part of the solution. The role to be played for agencies would differ per perspective, however. Since rationalism stresses the coercive element in solutions to compliance problems, agencies could be expected to play a role in securing compliance when they have clear financial and legal tools at their disposal to coerce actors into compliance. As managerialists argue, however, that sanctioning authority is likely to be ineffective, an agency in the understanding of 'enforcer' is no answer to compliance problems according to them. The role an agency should play rather lies in improving capacity and clarifying the rules. Constructivists would argue that for compliance to occur, agencies should play a role in inducing processes of socialization. In this respect, agencies could be used to voice or express societal demands, i.e. stimulate mobilization or pressure via information gathering or press releases. Compliance theories could be used to establish more concrete hypotheses about the variety of roles agencies potentially could play to increase compliance.[xvii] The

preliminary hypotheses suggested in this article should be further operationalized to fit the specific regulatory framework of the European Union, and they should be empirically tested.

Hypothesizing the Roles for Agencies in Increasing Compliance

Table 2

Perspective	**The agency as a(n)…**	**Hypotheses**
Rationalism	enforcer	• Agencies will positively influence compliance when they monitor and publish compliance rates. • Agencies will positively influence compliance when they issue credible sanctions when confronted with non-compliance.[xviii]
Management	assistant	• Agencies will positively influence compliance when they provide (financial, technical or organizational) resources to improve the capacities of the regulated. • Agencies will positively influence compliance when they explain / provide guidance about the rules.
Constructivism	persuader	• Agencies will positively influence compliance when they ensure (public) support for the rules.

Conclusion

The most important overarching task that EU agencies have so far is to collect, process and disseminate information. Founding regulations of many of the agencies mention tasks such as 'compile selected documentation', 'provide a forum for debate and exchange of ideas', 'provide guidance and advice to policy makers', 'report on developments and trends', 'stimulate the exchange of information', 'organize exchanges of experts', 'organize training activities', etc. An evaluation of such tasks along the lines of the different compliance perspectives shows that agencies could provide the required knowledge on non-compliance necessary for sanctioning according to rationalists, the informational tasks could lead to capacity building and rule interpretation according to managerialists, and they are likely to stimulate social learning according to constructivists. While the founding regulations of the agencies, nor the recently established framework for agencies, express any sign of a clear compliance strategy, it is not clear along what lines the informational tasks of agencies are thought to increase compliance in the member states.

Recent years show a slight shift towards an easier establishment of agencies with enhanced powers, especially illustrated by the monitoring and inspection competences of EMSA and EASA. These types of power might cause problems, however, when it is not more clearly expressed how these agencies are to use them and how they are to interact with the Commission as the guardian of the Treaties. Both EMSA and EASA will have 'European inspectors' of whom it is unclear how to deal with the knowledge acquired in the member states. The agencies will for the time being certainly not have sanctioning powers, but are they expected to inform the Commission about instances of non-compliance? The agencies act in a relationship of interdependence with the Commission, member state governments via the management boards and the national partner agencies, and the regulated. Without a clear compliance vision or strategy, how are these agencies to function in such a complex regulatory constellation in order to improve compliance?

Coleman and Doyle have argued that there is plenty of theorizing on compliance, but that 'it is remarkable how little this plethora of competing hypotheses has been put to an empirical test' (Coleman & Doyle, 2004: 5). While this article shows that it is, both practically and theoretically, not unthinkable for agencies to play a positive role in securing compliance, the 'improved-compliance' legitimation for agency-establishment is still to be empirically tested. The academic and policy discussions so far are in risk of forgetting that this legitimation is based on an assumption. Recent years, numerous studies have clearly demonstrated the huge variety in compliance with EU legislation (e.g. Demmke, 2001; Versluis, 2003; Falkner et al, 2005). For the time being it is unclear how European agencies, without a clear compliance strategy, are to form a solution to this complex problem. Is there a difference between different types of agencies when it comes to strategies to improve compliance? And as different 'worlds' of compliance (Falkner et al, 2005) are identified within the EU, do agencies need to adopt different roles or strategies in different parts of the Union in order to have a positive impact on compliance?

Recent developments in compliance theory have focused on the question what compliance perspective holds true in what situation or under what conditions. This increased attention for the institutional context offers good opportunities for applying theoretical compliance insights to a more thorough empirical study of the phenomenon of EU agencification and its presumed impact on compliance. The central question of this new research agenda then will be 'under what circumstances and in which organizational constellation, can agencies with what type of competences, play positive roles in improving compliance with European legislation?'

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[i] Exceptions being, amongst others, Checkel, 2001; Börzel, 2002; Tallberg, 2002; Zürn and Joerges, 2005.

[ii] Whereas *rationalism* claims that nations obey international law only to the extent that it serves national self-interest, the more extreme variant of *realism* goes one step further by arguing that international law is not really law because it cannot be enforced (Koh, 1997). Realists are skeptical about the impact of international treaties on behavior; 'legal constraints beyond the nation-state are non-existent or, at best, very weak' (Neyer and Zürn, 2001: 3).

[iii] Falkner et al (2004) claim that this non-compliance out of opposition can occur in two variants: opposition through the backdoor (governments did not want the legislation and thus do not implement it) and opposition due to the wish to protect national patterns but without any dispute at the prior decision-making stage (i.e. because the country was not yet a member when the decision was taken).

[iv] As compliance is thought to occur when the benefits outweigh the costs, a deviating solution can be found in increasing the benefits of cooperation. For example, the 'strategic' school argues that rational solutions can also be sought in subsidies, technological transfers or aid (Downs and Trento, 2004).

[v] Downs et al (1996) argue that the empirical findings of the managerial school must be treated with care as they suffer from selection problems. They thus dubb the managerial school the 'no-fault' theory of compliance.

[vi] Liberalism also emphasizes social mobilization and the importance of changing preferences, but here the existence of a liberal democracy is seen as crucial. As liberal governments are known to supply policies in response to societal demand, changes in preferences of societal actors can – via social mobilization and pressure – lead to changes in preferences of governments, which in turn may induce greater incentives to comply (e.g. Moravcsik, 1997).

[vii] Beach does state, however, that such normative logics of actions will 'never fully determine choices regarding compliance' (Beach, 2005: 126) and are to be combined with instrumental calculations of actors.

[viii] This article concentrates on the – at this moment – 19 Community agencies that were created under the EC Treaty. It therefore does not include agencies operating under the second or third pillar, internal bodies of the Commission or financial institutions such as the European Central Bank. For further information on EU agencies, see the 'agency website' of the European Union: http://europa.eu.int/agencies/index_en.htm.

[ix] The main reason for this is a change in the Treaty article(s) on which the founding regulations of the agencies are based. While the first agencies were mainly based on article 308 (TEC) which permits Community action in areas not covered by the Treaty, the latest agencies are based on articles referring to specific policy domains.

[x] Would the Constitutional Treaty be ratified, agencies will be named in several articles of the Treaty (e.g. in relation to transparency (I-50) or the right to access documents (II-102)), but nowhere reference is made of more procedural requirements and thus the changes 'essentially remain of a cosmetic nature' (Geradin, 2005: 222).

[xi] Case 9/56, *Meroni & Co., Industrie Metallurgiche S.p.A. v. High Authority*, [1957-58] ECR 133 and Case 10/56, *Meroni & Co., Industrie Metallurgiche S.p.A. v. High Authority*, [1957-58] ECR 157.

[xii] One has to keep in mind that different scholars depart from different classifications. Flinders (2004), for example, distinguishes the two categories of 'executive' and 'regulatory' agencies, Geradin and Petit (2004) identify a third category of 'decision-making' agencies and Vos (2003) refers to four distinct types with 'information', 'management' and two categories of 'regulatory' agencies.

[xiii] (1) European Centre for the Development of Vocational Training, (2) European Foundation for the Improvement of Living and Working Conditions and (3) European Agency for Safety and Health at Work.

[xiv] (1) European Environment Agency, (2) European Monitoring Centre for Drugs and Drug Addiction, (3) European Monitoring Centre on Racism and Xenophobia, (4) European Centre for Disease Prevention and Control and (5) European Agency for the Management of Operational Cooperation at the External Borders.

[xv] (1) European Training Foundation, (2) Translation Centre for the Bodies of the EU and (3) European Agency for Reconstruction.

[xvi] (1) European Agency for the Evaluation of Medicinal Products, (2) Office for Harmonization in the Internal Market, (3) Community Plant Variety Office, (4) European Food Safety Authority, (5) European Maritime

Safety Agency, (6) European Aviation Safety Agency, (7) European Network and Information Security Agency and (8) European Railway Agency.

[xvii] Other examples of hypotheses related to compliance theories (but not linked to agencies) can be found in Börzel, 2002 and Zürn and Joerges, 2005.

[xviii] Both 'rational hypotheses' by definition depart from the assumption that non-compliance is detectable.