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Informal Rules and Institutional Balances on the Boards of EU Agencies¹

Nuria Font

Universitat Autònoma de Barcelona

1. INTRODUCTION

Recent research has paid increasing attention to the institutional dynamics of EU agencies in the post-delegation phase (Busuioc *et al.* 2012, Busuioc 2013, Egeberg and Trondal 2011, Groenleer 2009, Wonka and Rittberger 2011). However, studies that explore the main conditions under which patterns of informality shift institutional power balances on the boards of EU agencies are absent in the specialized literature. Boards require particular attention in the context of impetuous agencification. With 35 stable agencies currently operating, their governing bodies, which globally encompass more than 900 national delegates and roughly 70 Commission representatives, constitute significant segments of the EU administrative system. In addition, boards are an under-explored case of a nexus between informal rule creation and institutional balances within the EU administrative structure. As has been observed, EU agencies were structured with management boards securing Member States' control during post-delegation (Kelemen 2002, Kelemen and Tarrant 2011). However, recent contributions suggest that the Commission has attempted to exert a greater influence over certain agencies and their boards than was originally mandated (Busuioc 2013, Egeberg and Trondal 2011, Martens 2010). In light of this discrepancy, this paper addresses the question of why rules informally empowering the Commission emerge on some agency boards and not on others. More specifically, the paper extends Kelemen's argument beyond agency design and assesses the

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extent to which the creation of informal rules propitious to the Commission in post-delegation is triggered by strategic motivations.

The study is rooted in a rationalist institutionalist framework. Based on the assumption that informal rules are the outcome of strategic motivations (Farrell and Héritier 2003, Heisenberg 2005, Héritier 2007, Knight 1992), the analysis assesses both the functional and distributional determinants of informal rule creation. To this end, the paper argues that functional motivations are present in the emergence of informal rules that shift institutional balances, but those rationales are conditional upon distributional considerations. The argument suggests the Commission, while formally in a minority, may be able to extensively use its organizational and legal resources to bypass formal rules of decision-making with the purpose of enhancing its position over agencies. The ascendancy of the Commission may be recognized by the Member States on those boards when informal rules provide functional advantages to national representatives. However, the argument put forward is that functional rationales leading to the creation of such informal rules are conditional to distributive motivations. This idea would be consistent with Kelemen's distributional argument, which suggests that the motivation underlying the establishment of agencies was to avoid expanding the Commission's executive powers.

Based on documentary analysis, 60 semi-structured interviews and procedural data, the study bridges written and unwritten norms surrounding decision-making on the boards of a set of 22 former first-pillar agencies, covering practically the whole universe of the of agencies that were operating at the time this research began.¹ In this study, EU agencies are defined as "EU level public authorities with a legal personality and a certain degree of organisational and financial autonomy that are created by acts of secondary legislation in order to perform clearly specified tasks" (Kelemen 2002). The paper is organized as follows. The first section introduces the theoretical discussion in which the research is grounded. This is followed by the methodological

section. After a brief description of the formal rules of decision-making by agencies' management boards, the main informal rules elevating the status of the Commission are identified. This is followed by an analysis of the triggers of informal rule creation. The conclusion discusses the theoretical implications of this investigation.

2. WHY DO INFORMAL RULES EMERGE?

The institutionalist literature has emphasized the importance of informal rules in political processes. Informal rules are unwritten norms, routines and operational procedures that constrain the choices of political actors and frame decision-making processes (Helmke and Levitsky 2004, Knight 1992, Ostrom 2005). Informal rules may complement or supersede formal rules (Helmke and Levitsky 2004, Lauth 2000) and often constitute pre-stages of rule formalization (Héritier 2007, Knight 1992). In the EU context, informal rules have attracted greater scholarly attention. Previous studies have demonstrated that the informal rule of consensus is the norm for decision-making in the Council (Hayes-Renshaw *et al.* 2006, Heisenberg 2005, Lewis 2003) and have explored the political context in which several informal rules have emerged around the codecision process (e.g. Farrell and Héritier 2003, Reh *et al.* 2013). With regard to EU agencies, Groenleer (2009) notes the importance of the activity arising outside the formal architecture of boards and Busuioc (2013) detects ongoing informal controls before and during board meetings. Moreover, the Commission itself has pointed out that its weight on management boards often takes place informally, beyond its formal powers (Analytical Fiches 13, 31). However, comprehensive studies that identify the drivers of informal practice which alter formal decision-making balances at board level are missing in the specialized literature. Investigating this topic is particularly pertinent as delegation in the EU involves multiple principals who may engage in competitive struggles to exert political control once agencies have been established (Dehousse 2008, Thatcher and Stone Sweet 2002).

This study adopts a narrow conceptualization of informal rules by focusing on informal practice in relation to the institutional framework of formal decision-making, while leaving routines and interactions between public and private actors outside the conceptualization (Reh *et al.* 2013). The analysis observes informal rules along two dimensions: the participant's position in relation to decision-making, and the decision procedure. The former is particularly focused on whether actors with a weaker formal position informally enjoy greater centrality in decision-making. The latter refers to whether decisions are adopted according to the informal rule of consensus, as opposed to formal voting. These two dimensions are helpful in visualizing informal rules. On the one hand, as rules are used by a set of participants who are assigned differentiated positions (Ostrom 2005), participants in a weaker formal position may have incentives to push for informal practice with the aim of improving its relative powers (Héritier 2007). On the other hand, different decision-making procedures provide diverse advantages and disadvantages to the participant actors (Héritier 2007). For example, decisions adopted through voting procedures may favour blocks of actors holding a majority to the detriment of minority actors, whereas the informal rule of consensus is more integrative of minority actors. With this in mind, this paper poses two questions: are the positions of participants and decision-making procedures on agency boards informally altered in post-delegation? And if so, what are the drivers of informal rule creation?

Several institutionalist theories provide plausible accounts of the creation of informal rules in EU processes. Based on rational, historical and sociological assumptions, these approaches suggest that informal rules are created as a result of strategic interactions (Stacey 2003, Farrell and Héritier 2003, Heisenberg 2005), that they derive from the unintended consequences of previous sequenced decisions (Lindner and Rittberger 2003), or result from a collective interpretation of existing formal rules (Stacey and Rittberger 2003, Lewis 2003, Martens 2010). While informal rules often constitute the focus of sociological and historical approaches, this

study is in line with the rational choice institutionalism assumption that the creation of certain informal practice is to a large extent incentive-driven (Knight 1992). Explanations based on inertia and the logics of appropriateness may be adequate to account for the perpetuation of routines and meaning generation, but provide less-convincing arguments for institutional change (Héritier 2007). On the other hand, if the establishment of EU agencies can be conceived as having resulted from strategic interactions between EU legislators (Kelemen 2002), it is debatable that, following agency establishment, goal-oriented behaviour is thereafter absent.

Drawing on rational institutionalism assumptions, this study is guided by the theoretical question of whether the logic behind informal rule creation is based on functional or on distributional considerations (Héritier 2007, Reh *et al.* 2013, Stacey and Rittberger 2003). According to the functional approach, informal rule creation is the outcome of repeated interaction between actors trying to save transaction costs and reach efficiency-enhancing solutions for collective action problems (Stacey and Rittberger 2003, Héritier 2007). When existing rules are dysfunctional (Helmke and Levitsky 2004), one or several of the actors involved may have incentives to create new rules in order to generate efficient solutions (Héritier 2007). In the context of EU agencies, studies document asymmetric knowledge between national and Commission representatives on these boards (Busuioc 2013, Egeberg and Trondal 2011). Hence, under conditions of asymmetric information, it is reasonable to expect that the Commission informally mobilizes resources if it has the motivation to improve agency effectiveness. On this basis, Proposition 1a states that the Commission is likely to mobilize its organizational and legal capacities, resulting in the emergence of informal rules with the purpose of dealing with information asymmetries and improving boards' efficiency. In order to confirm this proposition, one would observe the Commission as having an explicit motivation for enhancing its leadership as well as for mobilizing organizational, informational and legal resources across boards, with the purpose of seeking consensus and improving board decision-making.

However, functional explanations underestimate the idea that informal rules result from changes in power and resource relationships amongst actors seeking distributional advantages (Héritier 2007, Knight 1992). Insofar as the Commission has an institutional self-interest in increasing its own powers (Kelemen and Tarrant 2011), becoming the pivotal actor in agency governance (Egeberg and Trondal 2011) and improving its overall institutional position (Héritier 2007, Thatcher 2011), it is reasonable to expect that this actor disagrees over the power balance inherent in boards' formal configurations and attempts to informally reshape decision-making rules. Previous research indicates that the Commission employs its institutional resources and organizational capacities strategically in order to enhance its *de facto* position in a variety of agency-related processes. Curtin (2009) observes that the Commission employs its powers as guardian of the Treaty in order to keep executive agencies under direct control. Busuioc (2013) suggests that the Commission's power of budget proposal can be used as a basis for on-going informal control over agencies. In a similar line, Egeberg and Trondal (2011) find an association between organizational capacities within the Commission and its actual power over agencies. Drawing on these ideas, Proposition 1b states that the Commission strategically administrates both its organizational and legal resources with the objective of informally enhancing its influence over agencies' boards. In order to confirm this proposition, one would observe the Commission explicitly expressing a preference for increasing its position on agencies' boards and displaying strategies optimizing the organizational, legal and budgetary capacities of Directorates-General (DGs).

Let us turn to the Member States. Functional explanations would suggest that the Member States have agreed to establish agencies in order to deal with policy complexity (Pollitt *et al.* 2001) and credible commitments (Majone 2000). However, once agencies have been created, information asymmetries among the members of governing boards (Busuioc 2013) tend to render decision-making rules dysfunctional. If this holds true, national members would

reasonably be expected to informally recognize and yield to the leadership of the Commission. Informal rules would help them avoid the costs associated with an increasing workload, collecting and processing information on complex policy issues and bargaining with the Commission and other national delegates. Proposition 2a posits that the Member States reduce transaction costs and secure agency efficiency by informally relinquishing decision-making powers to the Commission. To verify this proposition one would observe national representatives accepting the Commission leadership and adopting decisions by consensus as a way of ensuring boards' efficient decision-making. By contrast, a distributional argument would suggest that member governments have incentives to tolerate informal rules that empower the Commission only as long as their distributional stakes are not under threat. Studies on delegation reveal that political control of agencies is often associated with the salience of the policy issues, that is, to the interest and attention legislators attach to agencies' policy areas (Calvert *et al.* 1989, Dudley 1994, Koop 2011, Ringquist *et al.* 2003). In the EU context, Egeberg and Trondal (2011) find that EU political institutions are likely to strengthen their position in agencies dealing with highly relevant and politicized issues, and Busuioc (2013) finds that the Member States prefer to wield leverage over those agencies whose sphere of activity concerns areas that are most sensitive to national concerns. Hence, Proposition 2b suggests that the Member States would resort to voting rules or credibly threaten to do so in agencies to which they attach higher political salience, thus preventing the emergence of informal rules that would upgrade the status of the Commission. To verify this proposition, one would observe national delegates expressing a general preference for preserving the intergovernmental composition of agencies' boards as well as resorting to formal voting, with the possible outcome of outvoting the Commission, in the most salient agencies.

3. DATA AND METHODS

The dataset combines a large body of documents, 60 semi-structured interviews as well as procedural data. Agencies' founding regulations and updated amendments served to summarize

boards' formal rules. Documents produced following the launch of the Inter-Institutional dialogue on regulatory agencies in 2008 were analyzed to characterize the position of the Commission and the Member States on the governance of EU agencies. Documents include the Commission Communication 'European agencies: the way forward' (Commission 2008); the Analytical Fiches produced by the Commission; the Commission 'Roadmap on the follow-up to the Common Approach on EU decentralized agencies' (Commission 2012) and the 2013 progress report on the implementation of the Roadmap (Commission 2013). The general position of the Member States is mostly drawn from Council Notes issued during the Inter-Institutional Working Group (IIWG) negotiations. For the identification of actual strategies adopted by the Commission and Member States' across boards, we combined documentary sources and interviews. Documents include the minutes of board meetings from 2010 to 2012 corresponding to the 11 agencies in our set that published these documents on their websites at the time the study was conducted. Minutes provided information on discussions held and agreements reached at the meetings but, as they rarely report vote distributions, we relied on information provided by respondents.

We conducted 60 interviews from December 2010 to June 2011. Given that a key aim of the research was to map out the informal rules that privilege the Commission, rather than to produce rich case-study narratives, the criterion for selecting informants was the need for a sample of individuals covering the widest possible spectrum of boards. They involved 23 Commission members, some of which provided extensive cross-agency information. We also interviewed 32 representatives from ten Member States, ensuring that the sample included delegates from large and small countries from different geographical areas. Five interviews with European Parliament (EP) representatives and social partners were also conducted. Since the EP is represented through independent experts and in only seven of the 22 agencies in our set, this actor was excluded from the study. The research did not target senior staff, as previous research has done (e.g. Egeberg and Trondal 2011, Wonka and Rittberger 2011). While we do not

neglect the importance of agency staff in board politics, the study focuses on boards' representatives, since they participate in decision-making and are best situated to evaluate principals' behaviour (Yesilkagit and Thiel 2011). The questions addressed the fundamental issues of analytical interest. In brief, to map out patterns of informal practice that assign greater centrality to the Commission and to identify triggers of informal rules. Some of the questions were: Could you describe the norms, including unwritten ones, governing the functioning and decision-making process at the management board? Could you describe the role that the representatives of the Commission/Member States play during board meetings? Do the representatives of the Commission/Member States have the means to prevent decisions from being made on the management board? Given the informal nature of the process observed, the questionnaire was used flexibly. To reduce the risk of obtaining socially desirable answers, informants were granted anonymity. No major disagreements among representatives active on the same boards were detected. A limited number of respondents were hesitant to report openly on informal practice, but fortunately this number was not sufficient to bias the findings. Interview data was systematically analyzed in order to identify patterns of informal practice. A few quotations have been included in the text for illustrative purposes.

Procedural data were used for the operationalization of agency salience. Based on Koop (2011), we employed two proxy measures –parliamentary and media attention– for political salience. For the former, and based on the data available at the Legislative Observatory website, we counted the number of written questions containing the names of the agencies that were asked by MEPs during the 7th Legislature. Based on previous operationalizations of media salience (e.g. Reh *et al.* 2013), we counted the number of newspapers articles published in English, French, German, Italian and Spanish –24 newspapers covering eight Member States– that contained the name of the agencies during the 2010–2013 period. As both measures had a strong correlation (Pearson's $r = 0.82$), we rescaled them and calculated the mean score on a 0–1 scale.

4. MANAGEMENT BOARDS AND FORMAL RULES

Management boards are usually composed of a member designated by each Member State and one or two members representing the Commission, with outstanding cross-board differences involving participation and decision-making procedures (see Annex). There are a few boards that include two or three EP representatives and a varying number of stakeholders. The largest boards have about 90 members and have sizeable representations of social partners (CEDEFOP, EUROFOUND), while the smallest ones are composed of 14 (EFSA) and 18 (EIGE) members, plus the Commission representation. In some agencies the board members are independent professionals not representing the Member States (EFSA, FRA), yet in the majority they are typically national agency directors or ministry officials. Boards normally elect a chairperson from among the national members, although in some of these bodies the chairperson (EFCA and ETF) or the vice-chairperson (EUROFOUND) is elected from among the Commission members. The representatives of the Member States and the Commission normally have one vote each, while experts designated by the EP do not always have voting rights (ETF, GSA). Stakeholders normally have no voting rights (except in CEDEFOP and EUROFOUND). Strong majorities are often needed for the appointment, renewal or dismissal of directors, as well as for the adoption of budgets, work plans and rules on procedure. Beyond differences, board composition and voting rules would normally allow the Member States to outvote the Commission.

5. INFORMAL RULES: PARTICIPANTS' POSITION AND PROCEDURES

Based on the conceptualization employed in this analysis, this section examines informal rules on agencies' boards along two dimensions: participant's position in decision-making and decision procedure.

Duos, trios and parallel structures

The interviews reveal that a variety of informal practices reinforce the position of the Commission on certain boards, where this actor frequently behaves as the *de facto* ruling actor by leading informal mini-configurations of decision-making. A typical unwritten but broadly accepted rule is that the Commission and the director—and on occasion also the chairperson—form an informal ruling duo or a trio, with the Commission acting as the dominant actor (e.g. CEDEFOP, ECHA, EEA, EFSA, EMSA, ERA, ETF and GSA) (Respondents 7, 8, 10, 14, 41, 43, 44, 45, 48, 56). This phenomenon was described by a Commission representative with a seat at several agencies, as follows:

‘We play our role as a full member of the board, but in a special way, given that we sit in a kind of triumvirate with the director and the chairperson. In front of us, we have all the Member States and the EP nominates. The seating is different because we are a different actor’ (Respondent 7).

The Commission often links up with agency directors and/or chairpersons. More than a few Commission respondents firmly stated that ‘the director is ours’, thus underlying the fact that the Commission provides guidance to directors and expects them to conceive the agency as serving the needs of the Commission. Along with directors, chairpersons often display operational procedures that reflect the dominance of the Commission. They may, for example, place, promote or even totally remove issues on the agenda before circulating it, or else not bring issues to the table at all. Likewise, they may display a variety of informal procedural norms at board meetings: conceding a number of interventions between national representatives and the Commission in order for the latter not to remain isolated; limiting or putting an end to discussions; or playing the role as a national member and informally conceding the Commission a chairing role (Respondents 4, 10, 12, 14, 17, 18, 31, 41).

Informal interactions between the Commission, directors and chairpersons often occur in parallel settings, where the preparatory work of the meetings is crafted and agreements are reached. It should be noted that some agencies include bureaus in their formal architecture (e.g. CECEFOP, EEA, EMCDDA, EUROFOUND, FRA, FRONTEX and EU-OSHA), while others have set up mini-boards or created *ad hoc* small-table meetings outside the formal structure. The composition of these arrangements is flexible, but they normally involve the Commission, the director, the chairperson and a limited number of national delegates. It is in these arenas that the agenda is usually fixed and where as many differences as possible are solved and pre-commitments are expected to be reached prior to board meetings (e.g. CdT, EASA, ECDC, ECHA, EEA, EFSA, EIGE, EMSA, EUROFOUND and FRA) (Respondents 4, 5, 8, 11, 15, 16, 30, 33, 35, 41, 52, 58). Thus, *de facto* (pre-) decision-making often occurs in parallel structures, where national representation is incomplete, with boards often limiting themselves to endorse what has informally been agreed. Moreover, in some agencies, a commonly accepted informal practice is that if the Commission disagrees on some point during the preparatory meetings, it is almost impossible to reach a global agreement within the board.

Bypassing voting

When it comes to the adoption of decisions, most boards tend to rely on the informal rule of consensus, whereas voting is usually limited to the election of directors and chairpersons or on issues where consensus has not been reached beforehand. While the Member States, if acting jointly, formally have veto power over decisions, consensus is mostly observed on the boards of information-gathering agencies (CEDEFOP, EEA, EIGE, ECDC, ETF, EU-OSHA, EUROFOUND); on certain agencies endowed with (quasi) regulatory activities (ECHA, EFSA, EMSA, ERA, OHIM); on one conducting operations (GSA); and on the one providing services (CdT). The members of these boards (with the exception of OHIM, where the Commission has no votes) tend to accept the informal rule that the Commission is the leading actor (Respondents 1, 6, 11, 13, 14, 15, 28, 29, 34, 35, 48, 49). In this respect, several Commission informants

expressed opinions comparable to the one expressed by a Commission Director General who indicated that voting rights ‘do not make any difference since the board has no role at all because we never vote, we always find consensus’ (Respondent 13). In contrast with such a view, informants from other agencies recognized that voting provisions have an impact on power balances. In particular, boards calling for votes more than occasionally pertain to some of those agencies endowed with (quasi) regulatory tasks (CPVO, EASA and EMA); three agencies dealing with information-gathering activities (EMCDDA, ENISA and FRA); and two agencies in charge of coordinating operations (EFCA, FRONTEX) (Respondents 4, 11, 18, 26, 30, 51, 52, 53).ⁱⁱ On most of the boards that are disposed to vote, informants reported that the influence of the Commission is diminished as a result. Evidence of voting that results in the isolation of the Commission is reported in EASA, CVPO, EMCDDA, EMA, FRA and FRONTEX (Respondents 4, 17, 27, 28, 37, 38, 51, 52, 53).ⁱⁱⁱ

Variations in voting practices expose a series of differences in how national appointees perceive board dynamics. On some boards, national members indicate that the main objective is to reach a consensus in order for the board not to remain in a win-lose situation (e.g. EU-OSHA, EUROFOUND), whereas on others voting is a regular practice of decision-making (e.g. EFCA, FRONTEX). Voting, however, does not necessarily result in overruling the Commission, particularly on the boards where the informal rules of not isolating the Commission and, more generally, of agencies working for the Commission are unquestionable. In addition, on boards with tripartite representation, divisions normally reflect conflicts between employers and employees, rather than between the Member States and the Commission (Respondent 47). Apart from these differences, voting outcomes are also often affected by the nature of voting systems. For example, the informal show of hands is not only more transparent, but also a more strategic procedure, as it often involves many members voting in accordance with the way in which a key representative, being the Commission or a key national member, is doing. In contrast, a system

of secret votes allows for a higher expression of national interest, and thus is more likely to reduce the chances of consensus (Respondent 53).

6. DRIVERS OF INFORMALITY

Once informal rules have been identified, this section explores the drivers of informal rule creation. To do so, it analyzes the general position of the Commission and the Member States on the governance of agencies as well as their respective strategies across agency boards.

6.1.1. Commission motivations

When the Commission launched an interinstitutional dialogue in 2008, it avoided calling for boards' parity representation between the two executive branches –as it did in the 2005 Draft Interinstitutional Agreement on the operating framework for European regulatory agencies– but expressed concerns about the Commission's minority representation (Commission 2005, 2008). Then, the Commission proposed reducing the size and composition of management boards so as to reflect this actor's responsibilities and weight (Commission 2008, Analytical Fiches 13, 31). The Commission also called for the establishment of small-size executive boards, with the Commission presence and a reduced number of States, as a means both to improving decision-making and allowing the Commission to be more closely involved in the monitoring and supervision of agencies' activities (Analytical Fiches 5, 6, 31; Commission 2012). In addition, the Commission repeatedly recalled that boards are expected to supervise and counterbalance the powers of directors (Analytical Fiches 5, 6; Commission 2012). In relation therewith, it raised concerns regarding the varying appointing authorities and proposed that the responsibility for developing models for director nomination and dismissal should be attributed to the Commission (Analytical Fiche 7; Commission 2012). This actor would also gain centrality in agency governance by developing guidelines for the elaboration of work programs and reports, preventing conflicts of interest of board members and directors and ensuring that agencies coordinate their international strategies with partner DGs (Commission 2012). Moreover, an

‘alert-warning system’ that secures the effective compliance of agency mandates would provide the Commission with a ‘last resort’ to exert control over boards. More generally, the Roadmap also reflects the Commission’s wishes to enhance its centrality on the governance of agencies: out of the 88 activities proposed, 28 were exclusively assigned to the Commission, compared with only five and one to the Council and the EP respectively.^{iv} In the 2013 progress report on the implementation of the Common Approach, the Commission emphasized the central role of its representatives on agencies’ boards in the follow-up of the implementation of the Roadmap by means of reviewing agency progress and alerting central services in case of difficulties (Commission 2013). The Commission’s expectations to gain a more central position on agency governance were also revealed in our interview data: 20 out of the 23 Commission respondents explicitly recognized that increasing this actor’s control of agencies was a major objective. Statements such as ‘having control over the agency is one of the purposes of the Commission’ or ‘the Commission is not only dedicated to appointing and supporting the director, but it also wants to control the agency’ (Respondents 5, 8, respectively) exemplify this trend.

6.1.2. Commission strategic behaviour

When observing the Commission’s strategies across boards, it appears that functional considerations are not absent (to a degree in line with Proposition 1a). Yet these motives seem to be less powerful than distributional ones (in line with Proposition 1b). The empirical evidence suggests that that the Commission strategically mobilizes a wide array of resources with the expectation of improving its own position on boards.

Seeking alignment with directors and chairpersons

The Commission tends to seek alignment with directors and/or chairpersons through appointments, favouring cohesive duos/trios and, on occasion, threatening not to renovate the director mandate. To begin with, most Commission respondents acknowledged that this actor is willing to keep control of the appointment procedures. One possible strategy consists of

proposing or appointing candidates who come from the ranks of the Commission, as observed in four of the 22 agencies under study (CEDEFOP, ECHA, ERA and GSA), as they foster a kind of in-house feeling in the respective parent DGs and reinforce the idea that the relationships between DGs and the board are almost internal (Respondents 2, 16). Nonetheless, the prior professional background outside the Commission services is not necessarily associated with informal rules favouring this actor. Indeed, some of the national informers who highlighted the standing of a ruling duo/trio, led by the Commission, operate in agencies whose directors had previously occupied positions at national ministries or agencies (EFSA), or in nationwide public organizations (EMSA, ERA). Another strategy may consist of elaborating shortlists with a limited number of candidates. It is suggestive that, in relation to EFSA, in 2012 the Council Presidency reminded the Commission to propose shortlists with a number of candidates considerably higher than the number of members to be appointed.^v The Commission also favours small-table meetings as a means of gaining a stronger bargaining position. In this way, it ensures that no major clashes of interests appear during the board meetings and that boards are often limited to acting as a 'rubber-stamp' (Respondents 5, 6, 8, 12, 13, 14, 16, 18, 21, 28). Finally, the Commission is often unenthusiastic about directors liaising with the EP or the Council Presidency, displaying an overactive communication policy or deviating from the Commission's own guidelines. The main reason is that this type of practice may potentially redefine institutional weights and result in the Commission losing steering capacities (Respondents 9, 16, 33; Analytical Fiche 19). In certain cases, the Commission may implicitly threaten not to renew directors' mandates (Respondents 21, 45). To illustrate, one of the Commission respondents referred to a former director in the following terms:

'We had a problem with the previous executive director; he did not want the Commission to be important. He treated us as the 28th member of the board. That was fine, he was nice, but it cost him his job (...). We have manoeuvred behind the scenes to have a new director, of course unofficially' (Respondent 21).

Mobilizing organizational capacities

The Commission is also inclined to mobilize a wide range of organizational resources in the expectation of improving its institutional position over agencies. First, since basic regulations do not establish which DG should represent the Commission, this actor often takes advantage of leaving open the allocation of DG members who participate in board meetings. The minutes of board meetings reveal that a single Commission representative can attend the meetings of an unspecified number of boards. For example, as the Health and Consumers DG *tutelles* EFSA, EMA, ECDC and CPVO, the same DG representative may sit on the boards of all four agencies, as well as on the board of EMCDDA. Likewise, members of different DGs often attend the same board meetings. For instance, EMCDDA reunites representatives of Home Affairs and Justice DGs; DG Enterprise and Industry are regularly present on the boards of ECHA, EMA and EFSA, whereas a representative DG Environment may occasionally attend the board meetings of transport agencies. Similarly, the representatives of the Commission who attend the meetings of the ETF board may come from DG Education and Culture, Development and Cooperation, or Enlargement. Likewise, Climate, Environment, and Research as well as Development DGs, together with Eurostat, are usually present at EEA board meetings.^{vi} One possible explanation is that since the Commission often displays higher levels of expertise and knowledge than national delegates (Busuioc 2013), the flexible allocation of DG members is in part intended to seek functional specialization and satisfy the need for expertise, thus securing agencies' fulfilment of their mandates (in line with Proposition 1a). However, the interviews reveal that leaving open the allocation of Commission representatives is mostly governed by distributional motivations. Several informants reported that this practice ensures as few policy issues as possible are dealt with by the agency escaping from the Commission's own control (Respondents 11, 13, 17, 33, 34). Illustratively enough, a Commission informant commented upon the underlying motives of this form of allocation of representatives, saying that 'we have to ensure that agencies do not have autonomous power, and for that reason one of the Directors [*name*] sits on the management boards of three agencies' (Respondent 13). Second, the

Commission often sends representatives in excess of the number of formal representatives to participate in board meetings, with the expectation of gaining greater visibility and leadership during the meetings. In this respect, the minutes reveal that three or four Commission members may attend the board meetings of EMA, five do so at EMCDDA, between four and six at EEA, about five at ETF and sometimes two at EASA.^{vii} Finally, the Commission may on occasion strategically change the DGs under which agencies operate, hoping to increase its influence over them and their boards. For example, EMA's move from DG Enterprise and Industry to DG Health and Consumers has resulted in that agency working under much stricter control by the Commission (Respondents 16, 37).

Exhausting legal resources

The findings also exhibit how the Commission is predisposed towards making not only a functional but a strategic use of its legal powers as guardian of the Treaties on many boards. Legal powers would generate functional benefits to the Commission by ensuring that these entities accomplish their mandates and comply with financial and staff regulations. However, distributional considerations are also behind the Commission's wish to informally reinforce its position vis-à-vis the Member States. As observed in a number of boards, DG participants continually raise legal points, arguing that certain proposals do not comply with EU legislation, with the likely consequence of suspending or postponing decision-making (e.g. EFSA, EMSA, ERA, ETF and EUROFOUND) (Respondents 7, 31, 35, 40, 48). Informants also reported that the Commission is often inclined to overact itself in terms of rules and procedures as a means to lock-in the range of possible outcomes (Respondent 31, 34). To illustrate, the analysis of ERA board minutes suggests that there is hardly any discussion that does not involve intervention by the Commission as watchman over the agency and its board.^{viii}

Likewise, different types of informants commonly report on the wielding of influence by the Commission through its budgetary powers, including budget proposal and supervision of budget

implementation, especially in EU-financed agencies (Respondents 11, 27, 37, 54). In budgetary discussions, the Commission often requests the Member States to revisit agency activities in order to adhere to the budget, and issues reminders stating that budget increases are to be discussed at the Council and the EP. In some instances, DG attendants blame the DG Budget for budget cuts, yet in others they may implicitly threaten to decrease agency revenues or withhold approving agencies' accounts in the future if the Commission perceives that the board is reluctant to take over the Commission's directions (Respondents 4, 10, 13). With budget issues being the main source of disputes among these actors, the Commission's budgetary powers are frequently associated with an underlying rule of recommending national delegates to avoid opposing the Commission. Consequently, this actor may come to be perceived as more important than any other members (Respondents 4, 13). Furthermore, this informal rule is often pre-empted by national representatives on boards where the scenario of outvoting the Commission is almost inconceivable.

However, voting sometimes results in the isolation of the Commission, this perhaps being one of the least-desirable preferences of this actor. To illustrate, when the Commission anticipates that it is likely to be outvoted, it may strategically change its position or even self-censure (Respondents 25, 40). A national respondent from EFCA provided a view on the Commission's attitude on voting:

'The Member States are used to being in a minority, to bargaining for every single vote, to looking for alliances when they know a vote is coming, but the Commission is not. We accept that today you are outvoted but tomorrow you might win a vote, but not the Commission, it does not like to be in the minority' (Respondent 25).

6.2.1. Member States' motivations

Following the 2008 Commission's invitation to re-launch discussions on EU agencies, the Council participated in the inter-institutional working group with the purpose of assessing the

adoption of a non-legally binding framework. One of the most disputed issues during the negotiations was the composition of management boards (Council 2012, Respondent 20). The Council's position, as established in the framework of the COREPER Working Party on General Affairs, was that in order to improve the performance of boards and reinforce their supervisory capacities, boards should be composed of one representative from each of the Member States and two representatives from the Commission (Council 2012). The Council also highlighted that there would continue to be variations across agencies and that there should not be an automatic increase in the number of Commission members (Council 2012). Thus, whereas the Council expressed the need to improve boards' performance, its preference for 'guaranteeing full participation of the Member States' (Council 2012) is suggestive of national governments' reluctance to give up potential control over boards.

6.2.2. Member States strategic behaviour

The Member States position regarding agencies' governance suggests that both functional and distributive considerations are behind national behaviour. While the preference of the Council regarding boards' composition favours an intergovernmental approach, the findings indicate that national members on certain boards would accept the informal delegation of decision-making powers to the Commission in order to deal with information asymmetries and reduce the transaction costs associated with decision-making (partly in line with Proposition 2a). However, the evidence reveals that the acceptance of such rules is conditional on distributional considerations (in line with Proposition 2b).

Selective acceptance of informal rules

National representatives are unevenly equipped to play an active role within boards (Respondents 6, 10, 40; Commission 2012). In many of these settings, board discussions normally involve the Commission and a handful of countries, routinely the largest and oldest members. Delegates from small, Baltic and Eastern countries rarely, if ever, speak and often

follow the Commission (Respondents 30, 31, 36). The most actively involved national representatives may be acquiescent about informal rules upgrading the Commission when their preferences are coincident, although such behaviour is arguably not equivalent to accepting its leadership. On the other hand, underperforming national delegates are saved the effort of gathering and processing information on complex policy fields and agency functioning, participating in the preparatory works of board meetings and bargaining with the Commission and other national delegates (Respondents 11, 31, 42). The results hint that, on some boards, functional considerations are present in the behaviour of national representatives consenting to informal rules. However, efficiency-seeking arguments alone do not adequately address the question of why such rules emerge on some boards and not on others. Rather, in line with Proposition 2b, the observed informal practices emerge more easily on the boards of the least salient agencies. When looking at agency salience, 17 out of 22 of these bodies have scores lower than 0.09 (scale 0–1) whereas the remaining 5 have scores higher than 0.2 (see Annex). Of our set of 22 agencies, 14 are consistent with Proposition 2b, whereas 8 do not follow such a pattern.^{ix} In particular, informal rules that empower the Commission are reported in 11 of the 17 least relevant agencies (salience score < 0.09),^x whereas voting outcomes that result in outvoting the Commission are reported in 3 out of the 5 salient ones (salience score > 0.20).^{xi}

While we have to be cautious when interpreting the results, the findings hint that informal rules that empower the Commission emerge more easily on the boards of agencies that are perceived to be less relevant for the Member States. In contrast, when the Member States attach high degrees of salience to agencies, the possibility of national representatives' credibly threatening to call for a vote may serve to protect their distributional advantages and counterbalance the Commission's expectations to informally dominate. Concerns about over-centralization as well as discrepancies among national policy preferences were frequently reported motivations for the Member States' preference for eventually adhering to formal rules. The enhanced presence of national representatives at the meetings of some agency boards might be a reflection of how

important keeping an active and vigilant role on boards decision-making is for some Member States. As Busuioc (2013) has already observed, Member States' delegations on some boards may well be composed of more than one attendant, including alternates and experts. For example, according to the available minutes, some national delegations at EMA, EASA and EMSA are composed of up to four members, while just one attendant per member state is recorded in the minutes of board meetings at CPVO, ECHA, EFSA, EEA, EMCDDA, ETF and EUROFOUND.^{xii}

On the boards of EMA, EASA and FRONTEX^{xiii}, which are among the most salient agencies, the Commission capacities to informally play a leading role are far from clear. At EMA, some member governments are unenthusiastic about having an over-centralized system, in part because scientific resources involved in the market authorization of pharmaceuticals come from the Member States. With the agency drawing on a vast scientific network that involves around 4,000 national experts, the license system is in practice less centralized in the agency and more distributed across the European system (Respondent 38). As regards EASA, the Member States often perceive that the activity of the agency, especially with regard to certification, inspection and enforcement, touches upon national institutional systems and may threaten the domestic aviation industry. EASA's initial difficulties in gaining support from national administrations (Schout 2008, Pierre and Peters 2009) have been reproduced later on insofar as national members are eager to protect their aviation systems against centralization (Respondent 11). Finally, due to the sensitive nature of border-control tasks, FRONTEX is dependent on national governments' willingness to conduct border-management operations for controlling migration flow (Pollak and Slominski 2009). Moreover, differences among the Member States on the role of the agency in migrant events and on the cost of its missions result in the board frequent resorting to voting practice. At the same time, increasing tasks through joint operations and training tools has enhanced the capacities and the powers of the Member States. Interestingly, a national respondent reported that the Commission perceives FRONTEX task expansion,

especially on criminal and security aspects, as a threat to the renationalization of issues tackled by DG Justice (Respondent 53).

That said, the relationship between agency salience and informal rules is not straightforward. On the one hand, discrepancy with formal rules is also observed in a few highly salient agencies. EFSA is the most outstanding example. While food safety constitutes a contested policy area domestically and national concerns about the independence of the agency have been raised, the absence of national representation on the board of EFSA, combined with the narrow relationship between the agency and DG SANCO has hindered national leverage (Groenleer 2009). On the other hand, informal rules that empower the Commission are hardly observed on the boards of a few of the least salient agencies. For example, some Member States dislike the idea that FRA deals with certain fundamental rights issues or are reluctant to take a cooperative approach as a means of expressing their disapproval of the agency publishing reports on human rights or xenophobia that discredit them (Respondents 16, 17). This evidence would hint that factors other than salience should also be explored when investigating informal rule creation.

7. CONCLUSION AND DISCUSSION

This paper describes patterns of informal rules shifting formal power balances on EU agency boards and points at the main drivers of informal rule creation. Based on rational institutionalist assumptions, the paper aims to make an empirical contribution to the literature on informal behaviour in the EU context by identifying how functional and distributional motivations trigger informal practices that elevate the position of the Commission. The analysis shows that functional considerations are not absent in the emergence of informal rules. However, efficiency-gains arguments do not fully capture the rationales behind actors' choices. This study is in line with arguments postulating that informal rule creation is driven by distributional considerations (Héritier 2007, Knight 1992). While the results may not be fully conclusive, they suggest that the Commission often overemploys its organizational and informational advantage

and makes credible threats, through its formal resources, that aim to informally redesign actual decision-making weights and thereby gain monitoring and supervisory powers over boards. A further argument eroding the validity of the efficiency-based explanation is that being outvoted is perhaps one of the Commission's last preferences, thus rendering functional considerations contingent on distributional ones. The results also reveal that informal rules that empower the Commission emerge more easily on the boards to which agencies the Member States assign less relevance. In many of such cases, national delegates are prone to lower their defences and informally recognize the centrality of the Commission as a means of reducing the transaction costs associated with decision-making, namely information gathering and bargaining, while also securing efficient decision-making. However, when agencies are highly salient, the possibility of national representatives' credibly threatening to call for a vote may serve to preserve their national stakes and counterbalance the Commission's expectations to informally dominate. Consequently, and to a certain degree consistent with a well-established scholarly literature on delegation (Calvert et al. 1989, Pollitt 2006), agency salience may operate as a scope condition qualifying informal rules that relax national dominance over boards.

These findings do not contradict Kelemen's theoretical argument regarding the design of EU agencies, insofar as the creation of informal rules propitious to the Commission following agency establishment seems to be highly contingent upon strategic imperatives. Aside from this, the analysis also reveals that formal rules matter. They constitute strategic handles for the member governments and serve as potential pulleys operated by the Commission in order to informally lift certain agencies towards higher stages of supranationalization. Future related research would benefit from addressing the informal bottom-up input of agency staff on management boards and, more broadly, from investigating the informal nodes between national and EU-level agencies in the context of EU executive politics.

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Annex

Table 1. Participation, decision procedures and agency salience in 22 EU agencies

Agency name*	Participation					Decision rule		Salience
	MS	COM	EP	Indep	Stakeholders / other	General	Specific	
CdT, Translation Centre for the bodies of the EU (S)	1xMS	2			EU agencies, institutions	2/3		0.01
CEDEFOP, European Centre for the Development of Vocational Training (I)	1xMS	3			1 employers x MS 1 employees x MS	absolute		0.01
CPVO, Community Plant Variety Office (R)	1xMS	1				simple	3/4	0.01
EASA, European Aviation Safety Agency (R)	1xMS	1				2/3	unanimity if required	0.21
ECDC, European Centre for Disease Prevention and Control (I)	1xMS	3	2			simple	2/3	0.08
ECHA, European Chemicals Agency (R)	1xMS	6	2			2/3		0.07
EEA, European Environment Agency (I)	1xMS	2	2			2/3		0.21
EFCA, European Fisheries Control Agency	1xMS	6				absolute	2/3	0.00
EFSA, European Food Safety Agency (R)		1		14		majority		0.78
EIGE, European Institute for Gender Equality (I)	18	1				majority		0.03
EMA, European Medicines Agency (R)	1xMS	2	2		patients, doctors, veterinarians	2/3		0.35
EMCDDA, European Monitoring Centre for Drugs and Drug Addiction	1xMS	2	2			2/3		0.08
EMSA, European Maritime Safety Agency (R)	1xMS	4			4 professionals	2/3	4/5	0.03
ENISA, European Network and Information Security Agency (I)	1xMS	3			industry, consumer, experts	majority		0.03
ERA, European Railway Agency (R)	1xMS	4			6 railway sector	2/3		0.04
ETF, European Training Foundation (I)	1xMS	3	3			2/3		0.01
EU-OSHA, European Agency for Safety and Health at Work (I)	1xMS	3			1 employers x MS 1 employees x MS	2/3		0.02
EUROFOUND, European Foundation for the Improvement of Living and Working Conditions (I)	1xMS	3			1 employers x MS 1 employees x MS	absolute		0.06
FRA, Fundamental Rights Agency (I)		2		1xMS	1 Council of Europe	simple	2/3	0.06
FRONTEX, European Agency for the	1xMS	2				absolute	3/4, 2/3,	0.78

Management of Operational Cooperation at the External Borders of the Member States of the EU (O)					absolute	
GSA, European GNSS Supervisory Authority (O)	1xMS	5	1	2/3	2/3, 3/4	0.00
OHIM, Office for Harmonization in the Internal Market (R)	1xMS	1		simple	3/4	0.02

* Primary task: (quasi) regulative (R), operations (O), information (I), service (S); Saliency (0-1 scale)

Source: author's own

Notes

ⁱ The sample is composed of former first pillar agencies since we wanted the cases to be similar in terms of supranational dynamics. In addition, studying informal rules empowering the Commission would have resulted difficult in former 3rd pillar agencies, where the Commission did not have representatives as full members of the board (in former 2nd pillar agencies the Commission members had no voting rights). Moreover, obtaining reliable data on boards' dynamics of agencies dealing with issues that raise strong confidentiality concerns would have also been problematic.

ⁱⁱ EMA/MB/465305/2011, EMA/MB/33634/2012, EMCDDA minutes 28/11.

ⁱⁱⁱ EMA/MB/465305/2011, EMCDDA/41/2012, EMCDDA 28/2011.

^{iv} 15 actions are shared and 39 correspond to agencies.

^v <http://www.eumonitor.nl/9353000/1/j9vvik7m1c3gyxp/vj6ipodjqmyq>

^{vi} CPVO February/June 2011; EASA 02/2010 to 01/2012; ECDC 20-22 (2010-2011); ECHA 3-4/2008, 1/2009 2/2011, 1/2012; EEA 57, 58, 60, 63 (2010-2012); EMA 221361, 465305, 33634, 394635 (2011-2012); EMCDDA 11/2011, 28/2011, 20/2012, 41/2012; ERA 19-27 (2010-2012); ETF 11DEC007, 11DEC012, 12DEC001, EEA/MB/57/02-final, EEA/MB/59/02-final, EEA/MB/60/02-final; EMSA 28-34 (2010-2012).

^{vii} EASA 02/2010 to 01/2012; ECDC 20-22 (2010-2011); EEA 57, 58, 60, 63 (2010-2012); EMA 221361, 465305, 33634, 394635 (2011-2012); EMCDDA 11/2011, 28/2011, 20/2012, 41/2012; ETF 11DEC007, 11DEC012, 12DEC001; EEA/MB/57/02-final, EEA/MB/59/02-final, EEA/MB/60/02-final.

^{viii} ERA AB 22/2011-01, ERA AB 23/2011-02.

^{ix} Agencies not confirming the expected results include CPVO, EEA, EFCA, EFSA, FRA, ENISA and EMCDDA and OHIM.

^x CdT, CEDEFOP, ECDC, ECHA, EIGE, EMSA, ERA, ETF, EU-OSHA, EUROFOUND and GSA.

^{xi} EASA, EMA and FRONTEX.

^{xii} See Note ^{iv}.

^{xiii} FRONTEX does not publish the minutes of board meetings.