



## Governance of the EU: The Reform Debate on European Agencies Reignited

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Agencies of the European Union have been developed in response to the deepening of the internal market, which caused a significant expansion of tasks in various policy areas and engendered strain on the functioning of the Commission as the engine of the integration process. The delegation of powers to European agencies freed the Commission from a number of regulatory and/or executive tasks that are predominantly of a technical or scientific nature, which in turn require specific expertise. Currently there are 35 European agencies, the majority of which have been set up in the last decade.

The system of European agencies is ambiguous and lacks a common framework. Instead, the system has been developed on a case by case basis. The result is a very heterogeneous situation concerning, *inter alia* European agencies' functions, decision-making powers and structures. Delegating powers to agencies also raises questions about their accountability and the legitimacy of their actions. The Commission, being aware of these problems, made reform proposals, but to no avail.

The objective of this paper is to outline the situation of European agencies and its inherent problems. The first part provides an overview of the different stages in the development of European agencies, while the second part looks more closely at the agencies' characteristics and how they can be defined. The following section addresses the main issues related to European agencies and the final part offers proposals for reform that are now being scrutinised.

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# GOVERNANCE OF THE EU: THE REFORM DEBATE ON EUROPEAN AGENCIES REIGNITED

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## Introduction

The emergence of autonomous, decentralised bodies, grouped under the umbrella of European agencies, constitutes one of the most remarkable institutional developments of the European Union (EU). European agencies have been developed in response to the deepening of the internal market, which caused a significant expansion of tasks in various policy areas and engendered strain on the functioning of the Commission as the engine of the integration process. The delegation of powers to European agencies freed the Commission from a number of regulatory and/or executive tasks that are predominantly of a technical or scientific nature, which in turn require specific expertise.

The delegation of powers to European agencies is a relatively recent phenomenon. Currently there are 35 European agencies operating, the majority of which have been set up in the last decade. The increased number and importance of European agencies has not grown at a steady or constant pace, however.

The system of European agencies is ambiguous and confusing, due to the lack of a common framework. Instead, the development of European agencies has been based on a case by case situation. The result is a very heterogeneous situation concerning, *inter alia* European agencies' functions, decision-making powers and structures. The delegation of powers to European agencies also raises questions about the accountability of European agencies and the legitimacy of their actions. The Commission, being aware of these problems, made reform proposals, but to no avail.

The aim of this paper is to outline the situation of European agencies and its inherent problems. The first part will provide an overview of the different stages in the development of European agencies, while the second part looks more closely at the agencies' characteristics and how they can be defined. The following part addresses the main issues related to European agencies and the final section offers proposals for reform that are now being scrutinised.

## 1. The explosive evolution of European agencies

### 1.1 Three generations of agencies<sup>1</sup>

Since the EU began to function, the delegation and decentralisation of powers have been applied by the institutions by means of seeking assistance from various committees and agencies to carry out specific tasks.<sup>2</sup>

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<sup>1</sup> See Annex for a comprehensive overview of the agencies, which contains information regarding their date of creation, location of the head office, reference to the constituent legislative act and their principal tasks.

The increase in the number of European agencies has not seen a steady and constant growth. Because a single legal framework was lacking, agencies were created on a case by case basis and followed the evolution of the growth of European policy competencies. Three successive waves of agency creation can be distinguished:

**The first wave** dates back to the mid-70s, when two agencies were created in the domain of social policy: the European Centre for the Development of Vocational Training (CEDEFOP) and the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND). Although agencies represented a new type of governance at European level, such autonomous bodies had previously been created at national level in numerous countries in- and outside of Europe.

**The second wave** dates back to the 90s, when the completion of the internal market made administrative regulation (such as technical product requirements) necessary in new policy areas, with the idea that regulation at EU level could help overcome obstacles to the single market. Moreover, as the complexity and extent of the European competences increased in the late eighties, it became apparent that the exclusively legislative approach to integration was somewhat imperfect. For the EC/EU to achieve full market integration through harmonising national legislations required the transposition of European legislation into national legislation. Either it led to bottlenecks at national level, resulting from the transposition and implementation process, or in overregulation at Community level, specifically aimed at excluding this differential national implementation.

Given the growing need for administrative regulation at the European level and because some of those new policy areas were highly technical in nature, specific knowledge and expertise were required. This led to the creation of new specialised agencies in the early nineties.<sup>3</sup> This internal market argument is particularly the case for the Office for Harmonisation in the Internal Market (OHIM), the Community Plant Variety Office (CPVO) and the European Medicines Agency (EMA), which are active in the context of the free movement of goods in the entire Community. However, several of these agencies also have a social dimension attached to them. The most outspoken is the European Agency for Safety and Health at Work (EU-OSHA), but also EMA, the European Environment Agency (EEA) or the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) address health or safety aspects. Rather than categorising these agencies as outspoken social or market economy driven, they can be classified as market corrective.<sup>4</sup>

This second generation accounted for **11 more agencies**: the European Training Foundation (ETF), EEA, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), EMA, OHIM, EU-OSHA, CPVO, the Translation Centre for the Bodies of the European Union (CdT), the European Police Office (EUROPOL), the European Monitoring Centre on Racism and Xenophobia (EUMC)<sup>5</sup> and the European Agency for Reconstruction (EAR).

**A third generation of agencies** has been set up since 2001. This third wave of European agencies can partly be explained by the desire of the Commission to refocus on its principal tasks at the time. In the aftermath of the resignation of the Santer Commission in 1999, due to

<sup>2</sup> E. Vos, "Reforming the European Commission: What Role to Play for EU Agencies?", *Common Market Law Review*, 37, 2000, pp. 1116-1117.

<sup>3</sup> G. Majone, "The new European Agencies: regulation by information", *Journal of European Public Policy*, 4, 2, June 1997, pp. 263, 268.

<sup>4</sup> E. Chiti, "The emergence of a Community administration: The case of European agencies", *Common Market Law Review*, 37, 2000, pp 312-314.

<sup>5</sup> EUMC was in 2007 transformed into the European Union Agency for Fundamental Rights (FRA).

fraud, mismanagement and nepotism, the new Prodi Commission launched an institutional audit to restore faith in the Commission.<sup>6</sup> One of the main findings regarded the need for the Commission to concentrate on core functions such as policy conception. Delegation to other bodies – namely the agencies – would thus enable the Commission to concentrate more on its core tasks and activities by removing some of its administrative burden.<sup>7</sup>

This third generation accounts for no less than **22 new agencies created**: the European Union Institute for Security Studies (ISS), the European Union Satellite Centre (EUSC), the European Food Safety Authority (EFSA), the European Union’s Judicial Cooperation Unit (EUROJUST), the European Maritime Safety Agency (EMSA), the European Aviation Safety Agency (EASA), the European Network and Information Security Agency (ENISA), the European Centre for Disease Prevention and Control (ECDC), the European Railway Agency (ERA), the European GNSS Supervisory Authority (GSA), the European Defence Agency (EDA), the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), the Executive Agency for the Public Health Programme (PHEA), the Education, Audiovisual and Culture Executive Agency (EACEA), the Community Fisheries Control Agency (CFCA), the Trans-European Transport Network Executive Agency (TEN-TEA), the European Police College (CEPOL), the European Chemicals Agency (ECHA), the European Institute for Gender Equality (EIGE), the Executive Agency for Competitiveness and Innovation (EACI), the European Research Council Executive Agency (ERC) and the Research Executive Agency (REA).

In the meantime, the ‘**agencification frenzy**’ has even reached the European Parliament, where certain potential new European agencies have recently been proposed. However, the proposal for an agency to promote Europe’s linguistic diversity<sup>8</sup> or to address the specific problems of the islands<sup>9</sup> did not make it.

## 1.2 Evolution of the debate in the EU

Because of the increasing scope of the Commission’s activities in the 80s, public alertness concerning the legitimacy and accountability of the Commission’s activities grew throughout the 90s. The Maastricht and Amsterdam Treaties tried to address these issues. But they only managed to partially allay public concerns. By the end of the 90s, several crises and the outburst of a corruption scandal in the Commission discredited the trust in the functioning of the Community.<sup>10</sup> After the resignation of the Santer Commission in 1999, the Prodi Commission initiated the project of ‘**Good Governance**’ and ‘**Better Lawmaking**’.<sup>11</sup> It decided to refocus on its core tasks and use decentralised agencies to supervise the implementation process of

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<sup>6</sup> P. Craig, *The Constitutionalization of Community Administration*, New York University School of Law, New York, Jean Monnet Working Paper 3/03, 2003, pp. 6-8 (accessed on 10 April 2008, <http://www.jeanmonnetprogram.org/papers/03/030301.pdf>).

<sup>7</sup> Reforming the Commission – A White Paper – Part I, European Commission, 5 April 2000, p. 5, COM (2000) 200 final/2.

<sup>8</sup> Written Question E-0604/03 by Bárbara Dührkop (PSE) to the Council, 3 March 2003 (OJ 2003 C 280E/70).

<sup>9</sup> Written Question E-0331/03 by Joan Vallvé (ELDR) to the Commission, 10 February 2003 (OJ 2003 C 222E/185).

<sup>10</sup> E. Vos, op. cit., pp. 1113-1115.

<sup>11</sup> See *European Governance, A White Paper*, European Commission, 25 July 2001, 35 p. COM (2001) 428 final and *European Governance: Better Lawmaking*, European Commission, 5 June 2002, 6 p. COM (2002) 275 final.

Community legislation.<sup>12</sup> As the number of agencies increased, the Commission realised that this would not alleviate citizens' legitimacy concerns. Therefore, in 2002 it proposed the definition of an operational framework for European regulatory agencies.<sup>13</sup> A 2005 proposal for an inter-institutional agreement on such a framework<sup>14</sup> got bogged down and in 2008 the Commission signalled that it would withdraw its proposal and try to reopen the debate on an operating framework.<sup>15</sup> In the meantime, a framework for the statute of executive agencies was adopted in 2003.<sup>16</sup>

For a long time, there has been no explicit mention in the **EC/EU Treaties** of European agencies as independent decentralised Community bodies. This would be remedied by the Lisbon Treaty, which integrates the agencies into the Treaties. First, the Lisbon Treaty would introduce a horizontal amendment, replacing “institutions (and/or bodies)” with “institutions, bodies, offices or agencies”.<sup>17</sup> With this amendment, some general principles (e.g. the right of access of EU citizens to documents or the right to file complaints to the European Ombudsman) would apply explicitly to European agencies as well. Second, a number of specific amendments would be introduced, making general principles such as transparency, the protection of personal data and anti-fraud measures also applicable to agencies.<sup>18</sup> The most important of these specific amendments would formally empower the Court of Justice to review the legality of acts of agencies.<sup>19</sup> Finally, one agency, the EDA, would be specifically acknowledged by the Lisbon Treaty.<sup>20</sup>

## 2. Defining European agencies

### 2.1 What is a European agency: The lack of definition

If all agencies are organs under European public law, there is no formal definition of what a European agency exactly is, nor is there any single legal framework on which all agencies are modelled. In general, the term ‘agency’ can be used to describe a variety of organisations that

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<sup>12</sup> European Governance, A White Paper, op. cit., pp. 23-24 (COM (2001) 428 final).

<sup>13</sup> Communication from the Commission. The Operating framework for the European Regulatory Agencies. European Commission, 11 December 2002, 14 p. (Hereafter: Communication: The Operating framework) (COM (2002) 718 final).

<sup>14</sup> Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies. European Commission, 25 February 2005, 24 p. (Hereafter: Draft Institutional Agreement) (COM (2005) 59 final).

<sup>15</sup> Communication from the Commission to the European Parliament and the Council: European Agencies – The Way Forward. European Commission, 11 March 2008, pp. 9-10. (Hereafter: Communication: European Agencies – The way Forward) (COM (2008) 135 final).

<sup>16</sup> Regulation (EC) 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (OJ 2003 L 11/2-3).

<sup>17</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ 2007 C 306/42, 44).

<sup>18</sup> Ibid. (OJ 2007 C 306/50, 51, 127).

<sup>19</sup> Ibid. (OJ 2007 C 306/109).

<sup>20</sup> Ibid. (OJ 2007 C 306/34).

perform tasks of a governmental nature and that often exist outside the institutional framework.<sup>21</sup> The official website of the EU<sup>22</sup> states only that:

A number of specialised and decentralised EU agencies have been established to support the EU Member States and their citizens. These agencies are an answer to a desire for geographical devolution and the need to cope with new tasks of a legal, technical and/or scientific nature.

Based on some of the common features of agencies, a distinction can be made with other Community institutions and bodies, which in practice perform similar agency-like activities, act considerably autonomously, are situated outside the institutional structure but are not considered as agencies.

Set up by means of secondary legislation, European agencies are fundamentally **different from the Treaty-based institutions** such as the European Central Bank (ECB) or the European Investment Bank (EIB). This is also the case for the oldest European agency, the Euratom Supply Agency, which originates directly from the Euratom Treaty.<sup>23</sup> This also means that a ‘European’ international organisation such as the European Patent Office cannot be considered as a European agency, because it is not set up by secondary legislation.<sup>24</sup>

The fact that European agencies are **endowed with a proper legal personality**, meaning that the agency can enjoy all the legal capacities in a member state accorded to legal persons under that member state’s laws, excludes several other entities that do not have the same legal quality. An inter-institutional office such as European Personnel Selection Office, or a special office of the Commission such as the Joint Research Centre are thus not considered as being agencies.<sup>25</sup>

In recent years, the EU has set up **several special partnership bodies**, in which public and private sectors work together to stimulate research and economic development. These partnership bodies are not considered European agencies, because of their particular nature. European Joint Undertakings like the one for ITER and the Development of Fusion Energy and the Single European Sky ATM Research for air traffic management (SESAR Programme) and the European Institute of Innovation and Technology are examples of such partnership bodies.<sup>26</sup>

However, it is important to note here that the European Parliament considers agencies as bodies that are set up by the Communities and thus as having a legal personality.<sup>27</sup> This in turn implies that the European Parliament does recognise bodies like the Joint Undertakings as agencies.

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<sup>21</sup> M. Everson and G. Majone, “Réforme institutionnelle: agences indépendantes, surveillance, coordination et contrôle procédural”, in O. De Schutter (ed.), *La gouvernance dans l’Union européenne*, Luxembourg, Commission européenne, 2001, p. 162.

<sup>22</sup> “Agencies of the EU” (accessed on 13 April 2008, [http://europa.eu/agencies/index\\_en.htm](http://europa.eu/agencies/index_en.htm)).

<sup>23</sup> Article 52 of the Treaty Establishing the European Atomic Energy Community (Euratom). Operational since 1960 until this day, the agency has as its task to ensure a regular and equitable supply of ores, source materials and special fissile materials to the member states.

<sup>24</sup> S. Griller and A. Orator, *Empowering European Agencies – Or How to Tame the Sorcerer’s Apprentice*, European University Institute, New Modes of Governance Policy Brief 22, Spring 2008, p. 2 (accessed on 22 April 2008, [http://www.eu-newgov.org/database/PUBLIC/Policy\\_Briefs/NEWGOV\\_Policy\\_Brief\\_no22.pdf](http://www.eu-newgov.org/database/PUBLIC/Policy_Briefs/NEWGOV_Policy_Brief_no22.pdf)).

<sup>25</sup> *Ibid.*, p. 2.

<sup>26</sup> Communication: European Agencies – The Way Forward, op. cit., p. 3 (COM (2008) 135 final).

<sup>27</sup> Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L248/13, 41).

## 2.2 Motives for the creation of European agencies

The gradual expansion of policy competences of the EU has increased the need for **specialised expertise** in different policy areas. As the technical or scientific dimension is increasingly integrated into political decisions, a larger and systematic mobilisation of expertise and knowledge is required. The development of independent agencies indeed facilitates the use of scientific or technical experts outside the normal bureaucratic structure.

Decentralised agencies **remove some of the workload** of the Commission as they take over some of its operational functions. This would give the Commission the possibility to concentrate more on its core functions and intensify the Commission's political profile.<sup>28</sup> The division of labour between the Commission and the different agencies can also contribute to a **better understanding of the EU**. While the Commission remains responsible for the political and strategic guidelines, an agency responds to specific technical tasks. In addition, the presence of agencies in different member states can make 'Europe' more concrete and visible for the citizens.<sup>29</sup> A clearly identifiable agency that executes well-defined tasks, rather than a Commission unit or committee operating far away from the spotlights, contributes also to an **enhanced transparency of the system**.<sup>30</sup>

Greater policy **consistency** in the implementation of policies is achieved in two ways. First, agencies circumvent the increasing politicisation of the Commission and do not have to deal with political considerations.<sup>31</sup> Second, the permanent nature of agencies allows greater consistency than the often ad hoc nature of committees.<sup>32</sup> In turn, this increased policy consistency benefits the **credibility** of European regulatory policies.

The institutionalised cooperation in networks set up by European agencies enhances trust and cooperation between the different national entities. These networks **reduce the transaction costs** compared to a situation whereby similar entities would operate at national level.<sup>33</sup> Another result of the networking with national administrations is the contribution to a **uniform interpretation and implementation** of Community law<sup>34</sup> and leads to administrative integration.<sup>35</sup>

Agencies can also provide an **alternative to political integration** if more direct routes towards integration are unacceptable. As a small discrete institution of a technical nature, well distinct from the Commission and often not situated in Brussels, an agency has several advantages in this sense. This reasoning stems from the neo-functional theory on integration.<sup>36</sup>

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<sup>28</sup> E. Vos, op. cit., p. 1119.

<sup>29</sup> D. Gerardin and N. Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, New York University School of Law, New York, Jean Monnet Working Paper 1/04, 2004, pp. 36-37 (accessed on 10 April 2008, <http://www.jeanmonnetprogram.org/papers/04/040101.pdf>).

<sup>30</sup> E. Vos, op. cit., p. 1119.

<sup>31</sup> M. Everson and G. Majone, op. cit., pp. 140-142.

<sup>32</sup> R. Dehousse, "Regulation by Networks in the European Community: the Role of European agencies", *Journal of European Public Policy*, 4, 2, June 1997, pp. 254-255, hereafter: Regulation by Networks.

<sup>33</sup> M. Everson and G. Majone, op. cit., p. 167.

<sup>34</sup> R. Dehousse, op. cit., pp. 255-257.

<sup>35</sup> A. Kreher, "Agencies in the European Community – a step towards administrative integration in Europe", *Journal of European Public Policy*, 4, 2, June 1997, pp. 239-240.

<sup>36</sup> M. Shapiro, "The problems of independent agencies in the United States and the European Union", *Journal of European Public Policy*, 4, 2, June 1997, p. 281.



Finally, the creation of agencies has proven to be useful in times of **crisis**. Examples such as the European Food Safety Authority (EFSA), which was set up in response to the BSE crisis and EMSA, which was created to enhance maritime safety in the aftermath of the sinking of the oil tanker Erika off the French coast in 1999, showed that crises can prove to be very fruitful moments for agencies. Besides the fact that specialised agencies help fill a void in the public administration, the (proposed) launch of a new agency provides Brussels with an instrument to show to European citizens that it is not just standing by doing nothing.<sup>37</sup>

### 2.3 What legal basis for the creation of European agencies?

As mentioned above, the Treaty does not provide any specific legal basis to create agencies. In Article 4 of the Treaty of Rome, the four institutions are listed and it is stated that “each Institution shall act within the limits of the powers conferred upon it by this Treaty”.<sup>38</sup> This has been read and interpreted by some as a prohibition to create additional bodies.<sup>39</sup>

However, this has not prevented the delegation of powers to autonomous agencies. Twelve of the twenty-three agencies<sup>40</sup> under the EC Treaty have the same legal basis, namely **Article 308 of the EC Treaty**,<sup>41</sup> which states:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Since the third wave of agencies, new agencies are predominantly created on the basis of a **specific Treaty provision** instead of Article 308 EC. For example, the legal basis of EEA was Article 130s EC<sup>42</sup> which contains the aims of environmental protection, and ECHA is based on Article 95 EC, which relates to the internal market. The Commission has argued that this should logically be so “since the regulatory agency is an instrument of implementation of a specific Community policy”.<sup>43</sup> However, this vision does not go unchallenged. In 2004, the UK challenged the choice of Article 95 EC as the legal basis of the European Network and Information Security Agency (ENISA) before the European Court of Justice<sup>44</sup> and stated that Article 308 EC was the only possible legal basis. The Court ruled that the use of Article 95 EC was appropriate for ENISA, as it constituted a part of the normative context directed at completing the internal market in the area of electronic communications.

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<sup>37</sup> R.H. Van Ooik and W.T. Eijsbouts, “De wonderbaarlijke vermenigvuldiging van Europese agentschappen. Verklaring, Analyse, Perspectief”, *SEW Tijdschrift voor Europees en Economisch Recht*, 54, 3, March 2006, p. 104.

<sup>38</sup> Article 4 of the Treaty establishing the European Economic Community, p. 16.

<sup>39</sup> K. Lenaerts, “Regulating the regulatory process: ‘delegation of powers’ in the European Community”, *European Law Review*, 18, 1993, p. 23.

<sup>40</sup> CEDEFOP, EUROFOUND, ETF, EMCFDA, EMEA, OHIM, EU-OSHA, CPVO, CdT, FRA, EAR and GSA.

<sup>41</sup> See article 308 of the Consolidated Version of the Treaty Establishing the European Community (OJ 2006 C321 E/179).

<sup>42</sup> This is currently Article 175 of the Consolidated Version of the Treaty Establishing the European Community (OJ 2006 C321 E/124-125).

<sup>43</sup> Communication: The Operating framework, op. cit., p. 7 (COM (2002) 718 final).

<sup>44</sup> Case C-217/04, United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union, 2 May 2006, par 60.

Agency creation based on specific Treaty provisions has three **consequences** that have a bearing on institutional relations. First, creating an agency based on a specific legal Treaty basis results in a more flexible legislative procedure in the Council, because the **majority voting** procedure replaces the unanimity voting process. Second, the proposed **agency's range of activities** will probably become **narrower** in the case of a specific Treaty provision than in the case of Article 308 EC. This is because in the latter case the Council has a large margin of discretion over the nature of the Community action it will adopt.<sup>45</sup> Third, the creation of an agency based on a specific legal basis requires the **co-decision procedure**, whereas Article 308 EC only requires parliamentary consultation. The power of the European Parliament has thus increased since 2000, because it must come to an agreement with the Council on the creation of an agency.<sup>46</sup>

## 2.4 What typology: Executive and regulatory agencies

The overview of the different phases in the creation of European agencies demonstrates that there has been a remarkable multiplication of the number of European agencies in recent years. The lack of a clear and uniform legal framework for European agencies has caused a large heterogeneity in appellations, tasks, organisational structure, relations with the other institutions, funding, etc. This makes it difficult to design a clear typology in which all agencies would fit. In EC law, distinction is only made between two broad types of agencies: executive and regulatory agencies.

### 2.4.1 Executive agencies

In the aftermath of the resignation of the Santer Commission in 1999, Prodi wanted the Commission to refocus on its core functions. Delegating tasks to other bodies such as executive agencies therefore seemed to provide the solution. The management of Community programmes<sup>47</sup> was the first area to be subjected to this new approach. The externalisation of management tasks was envisaged by delegating executive responsibilities either to Community public bodies (devolution) or to national public bodies (decentralisation).<sup>48</sup> Those Community public bodies that became responsible for the **management of Community programmes** were the executive agencies. Those last are created by the Commission to perform the tasks of implementing and managing Community programmes.

The statute of all executive agencies is defined by the **same legal framework**, notably Regulation (EC) 58/2003.<sup>49</sup> The Commission plays a central role in the creation, organisation and structure of executive agencies, because they are charged with tasks that enter into the sphere of the Commission's competences, notably on the implementation of rules and the budget.<sup>50</sup>

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<sup>45</sup> D. Gerardin and N. Petit, op. cit., pp. 42-43.

<sup>46</sup> Eight agencies have been set up under co-decision: EFSA, EMSA, EASA, ENISA, ECDC, ERA, ECHA and EIGE.

<sup>47</sup> Some examples of Community programmes are Erasmus, Leonardo da Vinci, Media and Europe for Citizens (managed by EACEA), Marco Polo (EACI) and Public Health Programme (PHEA).

<sup>48</sup> Communication from the Commission on the *Externalisation of the management of Community programmes including presentation of a framework regulation for a new type of executive agency*, European Commission, 13 December 2000, p. 4 (COM (2000) 337 final).

<sup>49</sup> Regulation (EC) 58/2003 (OJ 2003 L 11/2-3).

<sup>50</sup> See articles 202 and 274 of the Consolidated Versions of the Treaty Establishing the European Community (OJ 2006 C321 E/135, 168).

No discretionary powers can be delegated to an executive agency, meaning that agencies cannot take any political choice in their actions. The agency must be located in the same place as the Commission, so in practice, all executive agencies are to be found in Brussels. The lifetime of an executive agency is limited but extension of the mandate is possible. In 2008, 6 executive agencies were operative: Executive Agency for the Public Health Programme (PHEA), Education, Audiovisual and Culture Executive Agency (EACEA), Trans-European Transport Network Executive Agency (TEN-TEA), Executive Agency for Competitiveness and Innovation (EACI), European Research Council Executive Agency (ERC) and Research Executive Agency (REA).

### 2.4.2 Regulatory agencies

Regulatory agencies constitute the largest group of agencies,<sup>51</sup> operating in a wide variety of fields and are to a certain extent actively involved in the regulation of a specific sector.

Regulatory agencies are operational under the three different pillars of the European Union. With 23 out of 29 regulatory agencies created under the EC legal framework, the first pillar accounts for the bulk of the regulatory agencies. The European Union's Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters, the two other pillars of the EU, comprise three regulatory agencies each.<sup>52</sup>

Contrary to executive agencies, there are no general rules governing the creation and operation of regulatory agencies. They were set up on an ad hoc basis, rather than via a coherent administrative and/or regulatory method. Consequently, large differences exist between them when it comes to their functions, organisational structure and funding provisions.

Being 'regulatory' does not mean that every agency of this kind can automatically adopt binding legal rules or decisions. In 2005 the Commission specified:<sup>53</sup>

Regulatory activities do not necessarily involve the adoption of legal acts. They may also involve measures of a more incentive nature, such as co-regulation, self-regulation, recommendations, referral to the scientific authority, networking and pooling good practice, evaluating the application and implementation of rules, etc. It therefore follows that a European 'regulatory' agency does not necessarily have the power to enact binding legal norms.

## 2.5 Constitutive elements of European agencies

### 2.5.1 Mandate

Agencies are generally provided with a **limited mandate** that defines tasks that are technical, scientific or managerial in nature. This limited mandate results from the anti-delegation bias following the strict application of the Meroni doctrine (cf. 2.5.4).

Most agencies have also been given a permanent character. Exceptions are ENISA and the agencies classified as executive agencies by the Commission. In some cases, an evaluation by the Commission of an agency's activities can lead to a proposal to adapt or even close down the agency.

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<sup>51</sup> Currently there are 28 regulatory agencies functioning, 1 in preparation and proposals for 2 more, see Annex.

<sup>52</sup> For a comprehensive overview: see annex.

<sup>53</sup> Draft Interinstitutional Agreement, op. cit., p. 4 (COM (2005) 59 final).

### 2.5.2 Tasks attributed to agencies

European agencies assume a **wide range of different functions**. In order to shed some more light on the issue, it is interesting to categorise the agencies according to the tasks that have been attributed to them. **Four categories** can be distinguished.

The first type of agency can be referred to as the **regulatory model**. All these agencies served for the completion of the internal market. A first group, constituted by OHIM, CPVO, EMEA and ECHA, acts as an administrative regulator and provides certificates and licences. A second group of agencies is predominantly active in the promotion of interoperability and the guarantee of minimal safety. The EASA, EFSA, ERA and EMSA can be distinguished as such. The two agencies currently proposed, the European Electronic Communications Market Authority and the Agency for the Cooperation of Energy Regulators also belong to this subcategory, since the promotion of interoperability is one of their tasks.

The second category is composed of agencies entrusted with an **observatory role**. They have to collect, analyse, process and distribute reliable information to the Community institutions, the member states and the general public. Agencies of this type are EEA, EMCDDA, ECDC, ENISA, European Union Fundamental Rights Agency (FRA) and the EIGE. A common feature of these agencies is that they rely on expert committees, in order to assure the scientific or technical accuracy of their advice or opinions.

The third category is referred to as the **cooperative model**. It is composed of agencies operating in the area of social policy, aiming to promote social dialogue at the EU level. Three agencies belong to this group: EUROFOUND, CEDEFOP and EU-OSHA. A particular characteristic of these agencies is the tripartite management board, in which the social partners are represented besides representatives of the member states and the Commission.

Finally, the agencies in charge of operational activities constitute the **executive model**. They perform strictly technical tasks and are therefore sometimes considered as subcontractors or service providers for the Commission.<sup>54</sup> They are therefore entrusted by the Commission with limited non-discretionary powers for the management of Community programmes. The ETF, CdT, EUROPOL, EAR, EUROJUST, GSA, FRONTEX, CFCA, CEPOL, PHEA, EACEA, TEN-TEA, Intelligent Energy Executive Agency (IEEA), ERC and REA belong to this category.

It should be clear that this typology is not absolute. The tasks attributed to an agency are often diverse, including both an observatory or informative role and a regulatory role. Therefore, it is possible to place some agencies in different categories, e.g. EFSA and EMSA would also fit in the category of agencies with an observatory role, while ENISA not only has an observatory role, but can also be classified as regulatory because it contributes to the improvement of interoperability.

### 2.5.3 Organisational structure

Agencies are characterised by a **dual organisational structure**. On the one hand, a director<sup>55</sup> is responsible for the day-to-day management, budgetary and staff matters and he is the legal representative of the agency. On the other hand, the administrative board<sup>56</sup> is responsible for the oversight of the director, lays down the general guidelines and adopts the (annual) work

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<sup>54</sup> D. Gerardin and N. Petit, op. cit., p. 45.

<sup>55</sup> Also referred to as executive director or president in other agencies.

<sup>56</sup> Also referred to as management or governing board, governing council or steering board in other agencies.

programme and final budget. But there are large differences between agencies in the way in which this structure is operating. The size of administrative boards varies substantially.<sup>57</sup> This raises questions about whether optimal conditions are created to allow the performance of tasks. Coherence is also lacking when it comes to the duration of the mandates of both the members of the administrative boards and the directors.<sup>58</sup>

The **linguistic regime** is another source of incoherence between the European agencies.<sup>59</sup> For reasons of efficiency, agencies have generally been using a limited number of languages. The limitation on the number of languages impinges on the right of citizens to express themselves in one of the official languages of the institutions.<sup>60</sup> But member states also have the right to correspond with the institutions in their own language. Some member states may be negatively affected if they have to use technical documents produced by agencies, which are only available in a few languages.<sup>61</sup>

Agencies are often assisted by **scientific or technical committees**<sup>62</sup> and operate within an expert network<sup>63</sup> to ensure that the measures taken or proposed by the agency are objective and relevant.<sup>64</sup> For some agencies, the constituent regulation explicitly provides for the creation of a specific network (e.g. European Environment Information and Observation Network), while for others there is only a more general task put upon the agency to promote European networking in the field of its activities. Some agencies also comprise **coordinating bodies** composed of representatives from national competent authorities to assist the directors.<sup>65</sup>

With regard to **human resources**, each agency enjoys managerial autonomy. All European agencies combined employ between 4,000 and 7,000 staff. Nevertheless, in terms of human resources, there are huge differences between one agency and another. The average size of an agency is 157 staff members, but OHIM employs some 650 persons, while there are only 20

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<sup>57</sup> The number of members ranges between 14 in EFSA and 84 in CEDEFOP and EUROFOUND. This high number is due to the fact that these 2 agencies are active in social policy, requiring representation of the social partners of every member state in the governing board, besides representatives of the member states themselves and the Commission.

<sup>58</sup> Depending on the agency, a mandate varies between 30 months (e.g. EAR) and 5 years. To complicate matters further, the duration of the mandate of an agency's director and its members of the administrative boards sometimes diverge (e.g. ECHA, where a director has a 5 year mandate and the members of the administrative board a 4 year mandate).

<sup>59</sup> In some cases, no mention at all is made of what languages are to be used (e.g. EFSA). In others, a simple reference is made to the fact that the rules governing the languages of the European Communities shall apply (e.g. EUROFOUND). It can be left to the administrative board to determine the language arrangements, provided that a unanimous agreement is reached on the issue (e.g. EAR). The legislator defined the linguistic regime in some cases himself (e.g. OHIM: English, French, German, Italian and Spanish).

<sup>60</sup> See Article 21 of the Consolidated Versions of the Treaty Establishing the European Community (OJ 2006 C321 E/51).

<sup>61</sup> E. Vos, *op. cit.*, pp. 1128-1129.

<sup>62</sup> Examples of such committees are the Committee for Orphan Medicinal Products (COMP) for the EMEA, the Advisory Forum of the ECDC or the Scientific Committee of the EEA.

<sup>63</sup> Examples of such expert networks are the European Environment Information and Observation Network (Eionet) for the EEA, the European Information Network on Drugs and Drug Addiction (Reitox) for the EMCDDA, and the Fundamental Rights Platform for the FRA.

<sup>64</sup> D. Gerardin and N. Petit, *op. cit.*, pp. 41-42.

<sup>65</sup> For example the Advisory Forum in the EFSA.

persons working at EIGE.<sup>66</sup> A breakdown by nationality showed similar proportionality as in the Commission, including a general over-representation of nationals from the host country.<sup>67</sup> An overview of the staff statutes revealed that more than three quarters of agency personnel are temporary and contract agents. The Commission on the other hand employs over 80% officials and very few temporary agents compared to the agencies. The reason for this inconsistency is that agencies can eventually be wound up and the statute of a temporary agent is more flexible than that of an official when it comes to dismissal.<sup>68</sup>

In order to ensure consistent staff policy and to avoid differences regarding the recruitment methodology and the career prospects amongst the agencies, the staff policy has to correspond with the Staff Regulations of Officials and Conditions of Employment of other Servants of the European Communities. However, the requirement to comply with all the rules and procedures is very burdensome to agencies, particularly for small ones.<sup>69</sup>

## 2.5.4 Decision-making power and procedures

### *Decision-making power*

There is a considerable **asymmetry in the decision-making powers attributed** to the different agencies. The majority of agencies only have a supportive role towards the institutions and the member states and lack genuine power.

Four agencies have the capability to take decisions that are **legally binding to third parties**. This concerns OHIM for the registration of Community trade marks, CPVO for plant variety rights, EASA in aviation and ECHA for chemical substances.

Four agencies have **quasi decision-making power**: EMEA, EFSA, EMSA and ERA. They assist the Commission on highly technical or scientific matters by providing it with advice and recommendations or by performing inspections. The Commission leans heavily on the agency's expertise when it has to make a decision. In practice, these agencies have quasi decision-making power, because the Commission is almost always inclined to follow the agency's conclusions.<sup>70</sup>

The **delegation of power to agencies** has been subject to strict conditions, which stem from case law of the European Court of Justice. In 1958, the Court ruled in the **Meroni-case**<sup>71</sup> that the delegation of power could only be allowed if a strict set of conditions was met. First, the Court stated that a delegating authority "could not confer upon the authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty". Second, the Court stated that "a delegation of powers cannot be presumed (...) the delegating authority must take an express decision transferring them".<sup>72</sup> Third, delegation is only permissible if it "involves clearly defined executive powers the exercise of which can, therefore,

<sup>66</sup> F. Pereyra, "Human Resources Management: the Bureaucratic Constraints", contribution at the European Agencies seminar: Fashion or Necessity? EU agencies in between EU institutions and member states, Maastricht, European Institute of Public Administration, 26 May 2008.

<sup>67</sup> F. Jones, *Agencies: Origin of Tasks, Local Conditions and Staffing*, European Parliament, Budgetary Affairs Committee, 17 October 2007, pp. 11-13 (PE 381.092).

<sup>68</sup> F. Pereyra, op. cit.

<sup>69</sup> Ibid.

<sup>70</sup> M.-Th. Hermagne, "Rapport d'Information fait au nom de la delegation pour l'Union européenne sur les agences européennes", *Sénat*, No. 58, 27 October 2005, p. 8.

<sup>71</sup> Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*, 1958, p. 150.

<sup>72</sup> Ibid., p. 151.

be subject to strict review in the light of objective criteria determined by the delegating authority”.<sup>73</sup> Finally, the Court ruled against the delegation of discretionary powers<sup>74</sup> and referred to the balance of power between European institutions as “a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies” to justify this restrictive position.<sup>75</sup>

Although given in the framework of the ECSC Treaty, this ruling is generally considered to remain valid within the wider Community legal order.<sup>76</sup> The Community Case Law confirmed that the fundamental principles of the Meroni Case Law continue to apply.<sup>77</sup>

This was also confirmed in the approach taken by the Commission regarding the creation of an agency. In the White Paper on European Governance,<sup>78</sup> **a list of conditions** was given to ensure that the balance of power between the institutions would be guaranteed. According to the Commission:

Agencies can be granted the power to take individual decisions in specific areas but cannot adopt general regulatory measures. In particular, they can be granted decision-making power in areas where a single public interest predominates and the tasks to be carried out require particular technical expertise (e.g. air safety); Agencies cannot be given responsibilities for which the Treaty has conferred a direct power of decision on the Commission (e.g., in the area of competition policy); Agencies cannot be granted decision-making power in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments; Agencies must be subject to an effective system of supervision and control.

This Commission approach in correspondence with the Meroni ruling, was confirmed in various other documents<sup>79</sup> and is still valid up to this day. In 2008, the Commission<sup>80</sup> noted:

There are clear and strict limits to the autonomous power of regulatory agencies in the current Community legal order. Agencies cannot be given the power to adopt general regulatory measures. They are limited to taking individual decisions in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions and without genuine discretionary power. In addition, the agencies cannot be entrusted with powers which may affect the responsibilities which the Treaty has explicitly conferred on the Commission.

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<sup>73</sup> Ibid., p. 152.

<sup>74</sup> R. Dehousse, *Misfits: EU Law and the Transformation of European Governance*, New York University School of Law, New York, Jean Monnet Working Paper 2/02, 2002, pp. 11-12 (accessed on 10 April 2008, <http://www.jeanmonnetprogram.org/papers/02/020201.rtf>).

<sup>75</sup> Case 9/56, Meroni v. High Authority, op. cit., p. 152.

<sup>76</sup> K. Lenaerts, op. cit., p. 41.

<sup>77</sup> S. Griller and A. Orator, *Meroni Revisited – Empowering European Agencies between Efficiency and Legitimacy*, Vienna, Europainstitut, 31 May 2007, pp. 6-8, hereafter: Meroni Revisited – Empowering European Agencies (accessed on 16 April 2008, [http://www.eu-newgov.org/database/DELIV/D04D40\\_WP\\_Meroni\\_Revisited.pdf](http://www.eu-newgov.org/database/DELIV/D04D40_WP_Meroni_Revisited.pdf)).

<sup>78</sup> European Governance. A White Paper, op. cit., p. 24 (COM (2001) 428 final).

<sup>79</sup> See Communication: The Operating framework, op. cit., p. 8. (COM (2002) 718 final) and the Draft Interinstitutional Agreement, op. cit., p. 5 (COM (2005) 59 final).

<sup>80</sup> Communication: European Agencies – The Way Forward, op. cit., p. 5 (COM (2008) 135 final).

## Procedures

In order to guarantee an agency's independence, the director is responsible for the operational decisions related to the day-to-day functioning of the agency. The director is supervised by the administrative board, which also adopts the work programme and final budget and decides on the rules of procedure. Decisions are taken by a two-thirds majority in the administrative board, although simple or absolute majority applies in some agencies, while qualified majority is the rule in agencies active in the field of Common Foreign and Security Policy (ISS, EUSC and EDA).

### 2.5.5 Funding

The **majority of agencies are wholly or partly financed by Community funds**. The European regulatory agencies operate an annual budget of more or less €1.1 billion, of which some €59 million is contributed by the Community budget.<sup>81</sup> The general Financial Regulation applies to all agencies that receive Community funding. It contains rules concerning the establishment plan of agencies, the application of the framework financial regulation for agencies, the consolidation of accounts with those of the Commission, and the discharge by the European Parliament.<sup>82</sup> The framework financial regulation lays down common rules for the establishment and implementation of agencies' budgets, including control aspects.<sup>83</sup>

**Only five agencies are to some extent self-financing**, because they generate revenue through fees paid for services rendered. The OHIM and the CPVO rely completely on self-financing. The EMEA and EASA receive financial contributions from both the Community and the industry. The operation of CdT is funded by payments from its clients, which are in fact the Community institutions and other agencies. Finally there are four agencies funded by the member states only, notably those in the field of Common Foreign and Security Policy and EUROPOL.

## 2.6 Control of agencies

The question of the **accountability** of agencies can be subdivided into five elements: political, judicial, financial, administrative and public accountability.

European agencies have only a limited **political accountability**. Only in a few cases, the constituent regulations provide the European Parliament with the possibility to invite the director for a hearing before his appointment or to report on the agency's activities.<sup>84</sup> Given this evolving trend, the influence of the European Parliament seems to be growing. However, the European Parliament has no formal means of blocking the appointment. It can only give negative advice after which the decision is left to the administrative board. More systematic parliamentary scrutiny could prove useful, because it would oblige agencies to give insight into and reasoned explanations of their work and decisions.<sup>85</sup>

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<sup>81</sup> Figures are only for agencies created under the EC Treaty and under Police and Judicial Cooperation in Criminal Matters excluding EUROPOL (Communication: European Agencies – The Way Forward, op. cit., p. 4, COM (2008) 135 final).

<sup>82</sup> Regulation (EC, Euratom) 1605/2002 (OJ 2002 L248/13, 41).

<sup>83</sup> Regulation (EC, Euratom) 2343/2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357/72-90).

<sup>84</sup> This is the case for: EASA, ENISA, ERA, FRONTEX and ECHA.

<sup>85</sup> D. Gerardin and N. Petit, op. cit., p. 55.



The principal mechanism to guarantee **judicial accountability** of agencies is a review of legality of the agencies' acts. All acts taken by European agencies, capable of producing binding legal effects, are challengeable before the Court of Justice of the European Communities on the basis of Article 230 of the EC Treaty.<sup>86</sup> Some agencies are provided with an internal chamber for the review of legality of the adopted acts. Decisions of such an internal Board of Appeal can be challenged before the Court of Justice. This procedure applies for OHIM, CPVO, ECHA and EASA, which are the agencies with decision-making powers. Regarding executive agencies, administrative appeal is treated by the Commission before a possible infringement action is filed at the Court of Justice. If the Commission concludes that an act is unlawful, it can demand a revision or annulment.

Several control mechanisms exist to make agencies **financially accountable**. First, the European Parliament has significant power over agencies through its budget and budgetary discharge procedure as many agencies depend completely or partly on Community funding. Since 2006, the inter-institutional agreement on budgetary discipline and sound financial management offers some potential influence for the Parliament on the creation of new agencies which are under the budgetary influence and control of the budgetary authority.<sup>87</sup> Second, the Court of Auditors is empowered to examine the revenues of agencies in order to determine whether the annual accounts are reliable and if the transactions are legal and regular.<sup>88</sup> Third, agencies are increasingly submitted to the control of the European Anti-Fraud Office and the financial controller of the Commission.

The **administrative accountability** is increasingly safeguarded by the European Ombudsman, who has the power to investigate complaints of maladministration in agencies. Another way in which agencies subject themselves to administrative control is by agreeing on a code of conduct (e.g. EDA's Code of Conduct on Defence Procurement).<sup>89</sup>

Direct public control is carried out by the stakeholders who operate in the network set up to assist agencies. In some cases, stakeholders have been given a seat in the administrative board (e.g. ERA).<sup>90</sup>

**Transparency** of the functioning of public institutions is also an important factor that contributes to its accountability. In order to ensure openness, a general right of access to documents of the Commission, the Council and the European Parliament was provided in the

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<sup>86</sup> See Article 230 of the Consolidated Version of the Treaty Establishing the European Community (OJ 2006 C321 E/146). Despite the fact that acts of agencies are not explicitly mentioned, the Court applied a broad interpretation of the acts reviewable under the article by stating that all acts adopted by institutions may be reviewed by the Court. (Case 294/83, Parti Ecologiste 'Les Verts' v. European Parliament, 1986) The Lisbon Treaty would remedy this formal issue and introduce an explicit reference to agencies acts (Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (OJ 2007 C 306/109). However, it is impossible to challenge the opinion of an agency, because this is only a preparatory act and not a final decision, which is capable of producing a binding legal effect (Case T-326/99 Fern Oliviere v. Commission of the European Communities and European Agency for the Evaluation of Medicinal Products, 18 December 2003, par. 53).

<sup>87</sup> See Article 47 of the Interinstitutional Agreement between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management (OJ 2006 C 139/8).

<sup>88</sup> See Article 248 of the Consolidated Version of the Treaty Establishing the European Community (OJ 2006 C321 E/151).

<sup>89</sup> E. Vos, "European agencies: Delegation of Powers and Control", contribution at the European Agencies seminar: Fashion or Necessity? EU agencies in between EU institutions and member states, Maastricht, European Institute of Public Administration, 26 May 2008.

<sup>90</sup> Ibid.

EC Treaty.<sup>91</sup> The lack of explicit reference to the obligation of European agencies to communicate their documents was resolved by Regulation (EC) 1049/2001.<sup>92</sup> An explicit reference was inserted in the Lisbon Treaty, which extends the general right of access to documents to agencies as well.<sup>93</sup> The degree of transparency of European agencies is not always ideal, particularly where committees play a major role in the functioning of the agency.

## 2.7 Relations with EU Institutions, member states and other actors

### 2.7.1 Relations with EU Institutions

Agencies have a particular position in the institutional triangle between the Council, Commission and European Parliament. The position of European agencies towards the institutions reflects the institutional equilibrium between the Community interests (Commission and Parliament) and the national interest (Council), but neither has direct influence on the day-to-day functioning of an agency.

The **Council's** influence is embodied by the administrative board, in which every member state has generally one representative.<sup>94</sup> The Council is overrepresented in the administrative board compared to the limited Commission representation<sup>95</sup> and the quasi-inexistent Parliamentary representation.<sup>96</sup> Through the administrative board, the Council can thus keep a general oversight over the agency, given that the appointment of the director, the approval of the work programme and adoption of the final budget go through the administrative board.

However, the **Commission** can counterbalance the Council to some extent. For the nomination of the director, the Commission can propose candidates or select a director from a shortlist composed by the administrative board. In most agencies, the Commission has an advisory role on the work programme.

The relationship between the **European Parliament** and the European agencies is one of growing mutual interaction. On the one hand, there are the aspects of political and financial control from the European Parliament over an agency and the powers deriving from the co-decision procedure on the creation of a new agency. On the other hand, closer ties are mutually beneficial. The European Parliament generates more insight into the functioning of agencies through the regular visits on site, the reporting by the directors in the specialised parliamentary committees and in some cases, through the feedback of its representative in the administrative board. It should be noted that although appointed by the European Parliament, this person is chosen on the basis of expertise and is never an active member of the European Parliament. So as a member of the administrative board, he does not formally represent the European

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<sup>91</sup> See Article 255 of the Consolidated Version of the Treaty Establishing the European Community (OJ 2006 C321 E/157).

<sup>92</sup> Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145/43).

<sup>93</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (OJ 2007 C 306/43, 50).

<sup>94</sup> In the case of EFSA (14 members) and the EIGE (19 members) the board consists of a fixed and limited number of members. In the case of FRA, and previously EUMC, it is explicitly stated that the member state's representative should be independent from that member state.

<sup>95</sup> The Commission's representation varies between one member without the voting rights to 6 members.

<sup>96</sup> In some cases, Parliament can assign some independent experts, who are not formally representing the European Parliament, but have to report back on the functioning of the agency in the European Parliament.

Parliament. Furthermore, agencies can provide the European Parliament with technical knowledge which the small parliamentary staff is unable to deliver. For an agency, closer contacts with the European Parliament are beneficial because it means becoming less dependent on the other institutions, particularly in budgetary matters.<sup>97</sup>

### **2.7.2 Relations with member states**

Because of the regulatory nature of some agencies, member states have tried to keep a margin of control over those agencies through their overrepresentation in the administrative boards to the detriment of the Commission. Besides providing assistance to the Commission, a large number of agencies have the explicit task to do so to the member states as well.

The creation of a European regulatory agency does not necessarily lead to a **transfer of competences** at European level. Rather than replacing equivalent national authorities, most European agencies have to create and coordinate an expert network comprising the relevant national entities. Agencies have thus become the pivotal element in a network of national bodies (e.g. ERA).<sup>98</sup> Only in the case of EASA, a number of tasks is withdrawn from member state level and are executed at Community level. The agency issues, on behalf of member states, a number of certificates related to airworthiness and environmental compliance.

### **2.7.3 Relations with third actors**

The task of most agencies is to enhance the **networking** of the different national bodies that operate in the same field. But these networks are sometimes open to third actors as well. Non governmental organisations, international organisations or national bodies from non-member states can all be included in such networks. For instance, the regulation establishing EEA provides for the set-up of a European Environment Information and Observation Network, in which it should cooperate with the main component elements of national information networks, specialised European institutions (Joint Research Centre and Eurostat) and with international organisations (the Organisation for Economic Cooperation and Development, the European Space Agency, the Council of Europe, the United Nations Environment Programme, the International Energy Agency, the World Meteorological Organisation and the International Atomic Energy Agency).

In some cases, third countries can also join the agency itself, rather than participate only in the network constructed and supported by the agency. In particular, participation of candidate member states in agencies has been developed as an instrument to help them familiarise themselves with the Community acquis.<sup>99</sup> At the Luxembourg European Council in 1997, participation of candidate member states in European agencies and Community programmes was made part of a pre-accession strategy, to contribute to the symbolic, practical and operational integration of the candidate member states.<sup>100</sup> Participation of third countries has different consequences for the decision-making of agencies. In some agencies, third countries

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<sup>97</sup> F. Jacobs, "The European Parliament and the Role of the European agencies: Perspectives & Experiences", contribution at the European Agencies seminar: Fashion or Necessity? EU agencies in between EU institutions and member states, Maastricht, European Institute of Public Administration, 27 May 2008.

<sup>98</sup> M. Everson and G. Majone, *op. cit.*, pp. 162-163.

<sup>99</sup> Communication: European Agencies – The Way Forward, *op. cit.*, p. 5 (COM (2008) 135 final).

<sup>100</sup> Presidency Conclusions, Luxembourg European Council of 12 and 13 December 1997. Council of the European Union, Brussels (accessed on 6 May 2008, [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm)).

can have membership with the full or partial voting rights, while in others they are only given the status of observer without the right to vote.

The ETF has a particular relationship with third countries, since one of its tasks is to promote and support the reforms in the field of vocational training in EU partner countries.

The social partners play an important role in CEDEFOP, EUROFOUND and EU-OSHA. These agencies have a tripartite management board, which means that the social partners are represented alongside representatives of the member states and the Commission.

### 3. Main Issues

Delegating certain tasks and powers from the European treaty-based institutions in general and the Commission in particular to autonomous decentralised bodies – the EU agencies - evokes a number of contentious issues. Concerns are being raised with regard to the legitimacy and accountability of their actions, but also the anarchic process in which these agencies were created, which has led to a counterproductive heterogeneity of the whole system.

#### 3.1 Accountability

Several European agencies, particularly regulatory agencies, can take decisions that have substantial consequences. In light of their autonomous status, the question of accountability arises; to whom are they answerable? It is in fact difficult to find the right balance between the necessary independence that agencies should enjoy in executing their tasks on the one hand and the required democratic control over their activities on the other hand.

European regulatory agencies are not directly accountable to the general public. Therefore it is important that there is a solid **system of control** in place that prevents an agency from sidestepping the tasks assigned to it. The oversight mechanisms in place for European agencies are numerous and have evolved over time. As mentioned above, the Commission, Council, European Parliament and European Court of Justice are empowered to keep European agencies politically, financially and judicially accountable for their activities. Throughout the years, other bodies have been involved in the oversight activities as well, such as the Court of Auditors, the European Anti-Fraud Office and the financial controller of the Commission. This is a positive evolution, which guarantees that European agencies are performing the tasks attributed to them in the interest of the Community.

On the other hand, **operational independence** is an important prerequisite in the functioning of European agencies, because it allows them to perform their tasks free from external pressures and to operate in the general interest. Some argue that the problem-solving capacity of independent regulatory agencies is better than that of a public authority, because agencies are freed from political bias and are concerned only with issues of technical nature.<sup>101</sup> In practice, the member states and the Commission directly or indirectly influence the functioning of agencies, e.g. by the powers granted to them in the nomination process for the administrative board and the directors.<sup>102</sup> Agencies are also exposed to private interests of industry or other stakeholders, but this problem of capture is a general phenomenon to regulatory bodies and there seems little reason to assume that agencies would be more vulnerable to it than the Commission.<sup>103</sup>

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<sup>101</sup> S. Griller and A. Orator, *Meroni Revisited – Empowering European Agencies*, op. cit., pp 9-11.

<sup>102</sup> D. Gerardin and N. Petit, op. cit., pp. 50-51.

<sup>103</sup> E. Vos, op. cit., p. 1124.

A way to remedy this conundrum is to provide an agency with an **internal structure and a set of procedures that clearly limit its functions and powers**. Such a clear mandate forces the agency to focus on its principal task of technical or scientific nature and makes external pressure less effective. Because political or private interests are excluded as much as possible in this way, the only way the Commission, member states or pressure groups can influence the decision-making process is by presenting information and convincing arguments.<sup>104</sup> Together with the oversight mechanisms, these are the best guarantees of control over and independence of those decentralised bodies.

### 3.2 Legitimacy

From a democratic point of view, the autonomous status of European agencies raises questions about the legitimacy of their action, particularly in the case of independent European regulatory agencies.

Too much independence evokes the critique of **technocracy**, the situation whereby experts rather than elected representatives take the upper hand in the decision-making process. The issue of technocracy is particularly relevant as regards the agencies with quasi decision-making power. Although these agencies formally operate in support of the Commission, they have substantial powers. The problem is that they are not responsible at all for the final decision, because the formal decision and responsibility rest with the Commission. The Commission is in practice almost always inclined to follow the agency's proposal, because of the technical or scientific content of the matter. For instance, an agency like EMEA *de facto* dominates the decision-making process, because a producer applying for a marketing authorisation has to go directly to EMEA, and not to the Commission, leaving EMEA inevitably in a strong position to set the stage in the decision-making process.<sup>105</sup>

The **insufficient participation of external stakeholders** in the decision-making process of European agencies is another important issue of legitimacy. A more systematic participation of representatives from the civil society, professional bodies and economic operators would enhance the legitimacy of an agency's acts. Furthermore, increased participation would reduce the asymmetry of information between the regulatory agencies and economic operators, guarantee a better evaluation of the potential consequences and thus improve the acceptance of decisions.<sup>106</sup>

### 3.3 Heterogeneity

Every regulatory agency was based on an ad hoc approach, resulting in a subsequent lack of coherence. This situation suggests that a well-considered approach has never been developed. The consequence thereof regards the large divergences between agencies when it comes to organisational structure, tasks, decision-making powers and procedures, funding, and relations with the EU Institutions. The lack of a common framework for regulatory agencies causes confusion and hampers the understanding of the entire system of agencies.

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<sup>104</sup> T. Gehring and S. Krapohl, "Supranational regulatory agencies between independence and control: the EMEA and the authorization of pharmaceuticals in the European Single Market", *Journal of European Public Policy*, 14, 2, March 2007, p. 223.

<sup>105</sup> *Ibid.*, p. 215.

<sup>106</sup> D. Gerardin and N. Petit, *op. cit.*, p. 58.

Despite the numerous Commission statements and attempts to bring about a common framework for regulatory agencies,<sup>107</sup> the reality is such that the **Commission has not been coherent on the issue itself**. In particular, the ‘regulatory concept’ is misleading and confusing, because in reality only a limited number of regulatory agencies have the power to adopt legally binding regulatory measures, while some other so-called ‘regulatory agencies’ only perform observatory or executive tasks. Since 2001, there has been a doubling in the number of European agencies and the Commission now finds itself confronted with this inadequate differentiation. By holding on to it, the distinction between executive and regulatory agencies has become a source of confusion rather than a help to interpret the system of European agencies.

In 2002, the Commission tried to clarify the situation,<sup>108</sup> explaining that “regulatory agencies are required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector”. This formulation implied that regulatory agencies do not necessarily need to adopt binding decisions. In 2005, a more elaborate explanation of the ‘regulatory concept’ stated explicitly that:

Regulatory activities do not necessary involve the adoption of legal acts. They may also involve measures of a more incentive nature, such as co-regulation, self-regulation, recommendations, referral to the scientific authority, networking and pooling good practice, evaluating the application and implementation of rules.<sup>109</sup>

Despite such clarifications about the regulatory concept, it remains, certainly at first sight, an ‘easy-to-misinterpret’ concept.

Neither has the Commission been communicating coherently on European agencies. The unclear and confusing terminology used by the Commission to distinguish the main regulatory agencies from the executive agencies has aggravated the situation. In particular, the Commission has been very inconsistent when it attempted to make a functional typology of the existing regulatory agencies. Both in 2002 and 2005, it discerned three categories,<sup>110</sup> however slightly different, while in 2008 it distinguished five different types of regulatory agencies.<sup>111</sup>

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<sup>107</sup> See European Governance. A White Paper, op. cit., p. 24. COM (2001) 428 final, Communication: The Operating framework, op. cit., p. 5. (COM (2002) 718 final), the Draft Interinstitutional Agreement, op. cit., p. 2 (COM (2005) 59 final) and Communication: European Agencies – The Way Forward, op. cit., p. 6 (COM (2008) 135 final).

<sup>108</sup> Communication: The Operating framework, op. cit., p. 4 (COM (2002) 718 final).

<sup>109</sup> Draft Interinstitutional Agreement, op. cit., p. 4 (COM (2005) 59 final).

<sup>110</sup> In 2002, the Commission distinguished between agencies that provided assistance in the form of opinions and recommendations, agencies that provided assistance in the form of inspection reports and agencies that were empowered to adopt decisions legally binding on third parties. (Communication: The Operating framework, op. cit., p. 4. (COM (2002) 718 final)) In 2005, the Commission distinguished between agencies that provided assistance in the form of technical or scientific advice and/or inspection reports, agencies whose main task was the creation of networks of national competent authorities and the organisation of cooperation between them and agencies that were empowered to adopt decisions legally binding on third parties. (Draft Interinstitutional Agreement, op. cit., pp. 4-5 (COM (2005) 59 final)).

<sup>111</sup> The Commission distinguished between agencies adopting individual decisions which are legally binding on third parties, agencies providing direct assistance in the form of technical or scientific advice and/or inspection reports, agencies in charge of operational activities, agencies responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information/networking, and agencies that provide services to other agencies and institutions, Communication: European Agencies – The Way Forward, op. cit., p. 7 (COM (2008) 135 final).

Another confusing illustration of such incoherent communication was given in 2005, when the Commission published, with only months of interval between them, contradictory reform proposals on the regulatory agency system. What is the logic of proposing a five-year mandate for a director in newly created agencies, while proposing to change the mandate of the director of the EUMC to four years?<sup>112</sup> And what about parity between the Commission and Council representatives in administrative boards, and the idea that there should be no representative of the European Parliament on the board, two principles advocated in one document and neglected in another.<sup>113</sup>

Finally, there is even inconsistency regarding the status of an agency. For instance: according to the EU *Europa* official website,<sup>114</sup> the Joint Undertaking for ITER and the Development of Fusion Energy is a European regulatory agency in the framework of the first pillar of the EU. However, according to the last 2008 Commission communication, Joint Undertakings are not considered as agencies.<sup>115</sup>

These various illustrations show that the time has come to bring some order and clarity to the current situation of European agencies.

### 3.4 Decentralisation

Agencies are **decentralised** organisations enjoying considerable operational independence. They fulfil tasks that have been delegated to them from the centralised responsibility of the Commission. The decentralisation of the agencies can also be considered in a geographical sense, since a majority of agencies is scattered throughout the EU instead of being centred in Brussels or Luxembourg. This should add to the visibility of the EU and mitigate criticism against Brussels-based bureaucracy.

However, linked to this decentralisation process is the issue regarding the location of **agencies' seat**. The dispersion of European agencies throughout the EU is a symbolic gesture to bring the Community and its activities closer to the citizens. However, this idea of Community interest is not reflected in the way member states approach the issue of allocating an agency seat. For every member state, it has become of the utmost importance to have its 'own' agency.

Contrary to the institutions and certain other bodies, the treaties do not provide any procedure or rule on how to allocate agency seats.<sup>116</sup> Since the 90s, unanimity is required to decide on the seat of agencies, as has always been the case for the seat of institutions.<sup>117</sup> The decision is taken at the highest level, at the European Council in order to reach a package deal compromise. In practice, the member states' inability to agree has caused several agencies to start up only

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<sup>112</sup> See Draft Interinstitutional Agreement, op. cit., p. 16. (COM (2005) 59 final) and the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, European Commission, 30 June 2005 (COM (2005) 280 final).

<sup>113</sup> See Draft Interinstitutional Agreement, op. cit., p. 7. (COM (2005) 59 final) and Proposal for a Council Regulation amending Regulation (EC) No 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia as regards the Director's term of office (COM (2005) 190 final).

<sup>114</sup> Agencies of the EU (accessed on 14 May 2008, [http://europa.eu/agencies/index\\_en.htm](http://europa.eu/agencies/index_en.htm)).

<sup>115</sup> Communication: European Agencies – The Way Forward, op. cit., pp. 3-4 (COM (2008) 135 final).

<sup>116</sup> The only exception is EUROPOL, for which, due to its uncharacteristic evolution, the seat in The Hague was fixed in a Protocol to the Treaty. (See Protocol (No 8) on the location of the seats of the institutions and of certain bodies and departments of the European Communities and of Europol (1997) of the Consolidated Version of the Treaty Establishing the European Community (OJ 2006 C321 E/226)).

<sup>117</sup> See article 289 of the Consolidated Version of the Treaty Establishing the European Community. (OJ 2006 C321 E/171).

provisionally. For instance, EMSA has been operational since 2003, but was only installed in Lisbon in 2006.

Finally, questions can be asked about the rationality and administrative efficiency of locating European agencies in cities such as Heraklion, Parma or Angers. In the case of ERA, there are even two head offices due to internal national discord: the administrative seat is in Valenciennes and the conference centre is in Lille. Some practical disadvantages attached to such locations, such as difficult transport connections, unavailability of European schools, insufficient childcare and a lack of job opportunities for spouses create a barrier to the recruitment of the required experts.<sup>118</sup>

### 3.5 Subsidiarity & proportionality

An issue linked to the decentralisation of EU governance to autonomous agencies is the question of subsidiarity. The **principle of subsidiarity** is contained in Article 5 of the Treaty establishing the European Communities, which states that:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.<sup>119</sup>

The question regarding whether all European agencies address issues that cannot be addressed satisfactorily at member state level but are rather achievable at Community level, remains to be seen. There are certainly no questions about this when it comes to agencies created to improve the functioning of the internal market, but what about EMCDDA, FRA and EIGE? Do the problems addressed by these agencies really have EU-wide scope?

Related to subsidiarity is the **principle of proportionality**, as the Treaty states that “[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”.<sup>120</sup> Even if there is justification to act on Community level, limits remain to the extent and form of this action. Is the creation of a specific European agency the best way to deal with an issue such as gender equality?

## 4. Last Reform proposals

### 4.1 The European Commission’s proposal

As a response to the existing heterogeneity between European agencies and the questions related to accountability and control of agencies, the Commission took the initiative in 2005 **to propose a general framework for regulatory agencies**,<sup>121</sup> similar to the framework established for European executive agencies contained in Regulation (EC) 58/2003. The proposed single legal framework for regulatory agencies would have to contribute to four

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<sup>118</sup> F. Jones, op. cit., p. 9.

<sup>119</sup> See article 5 of the Consolidated Version of the Treaty Establishing the European Community (OJ 2006 C321 E/46).

<sup>120</sup> See article 5 of the Consolidated Version of the Treaty Establishing the European Community (OJ 2006 C321 E/46).

<sup>121</sup> Draft Interinstitutional Agreement, op. cit., 24 p. (COM (2005) 59 final).



objectives: enhanced coherence, effectiveness, accountability and participation and openness of European regulatory agencies.

However, institutional deadlock on the issue has prevented any progress so far. In 2008 the Commission announced that it would withdraw its 2005 proposal and try to reignite the debate, although the 2005 proposal remains a blueprint for the reopened discussions.<sup>122</sup> Despite the **withdrawal of the proposal for a single legal framework** for European regulatory agencies, the lines of thought in the proposal remain interesting and give insight into the way in which the Commission is willing to move on the issue.

#### **4.1.1 The proposal for an Inter-Institutional Agreement<sup>123</sup>**

In the communication a **regulatory agency is defined** as:

an independent legal entity created by the legislator in order to help regulate a particular sector at European level and help implement a particular Community policy. By performing its tasks, it helps to improve the way in which the rules are implemented and applied throughout the EU. It thus plays an active role in exercising executive powers at Community level.

#### *Tasks of regulatory agencies*

Regarding the **tasks of regulatory agencies**, the Commission went into further detail and listed 3 types, of which regulatory agencies should perform one or more: (1) adopting individual decisions which are legally binding on third parties; (2) providing direct assistance to the Commission and, where necessary, to the member states in the interests of the Community, in the form of technical or scientific advice and/or inspection reports; (3) creating a network of national competent authorities and organising cooperation between them in the interests of the Community with a view to gathering, exchanging and comparing information and good practices. Each regulatory agency has the duty to gather, analyse and forward its objectives, in reliable and easy-to-understand information concerning its field of activity. Apart from these ‘regulatory’ tasks, agencies also have executive responsibilities, because they take an active part in the execution of the EU’s executive powers.

#### *Agency creation*

Regarding the **creation of an agency**, the Commission puts forward three provisions. First, any proposal to create a new agency would be subjected to an impact assessment by the Commission. This would constitute a comprehensive evaluation in order to verify the necessity of a new agency being created. Second, an agency would preferably be based on a specific provision of the EC Treaty, rather than using Article 308 of the EC Treaty as the standard legal basis. However, in exceptional cases, it would remain possible to use Article 308 EC. Third, the decision regarding the seat of the agency should be integrated into the basic act, or if this is not possible, a decision should be taken within six months.

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<sup>122</sup> M. Szapiro, “The European Commission – Perspectives and Experience”, contribution at the European Agencies seminar: Fashion or Necessity? EU agencies in between EU institutions and member states, Maastricht, European Institute of Public Administration, 27 May 2008.

<sup>123</sup> Unless otherwise mentioned, the following is based on the Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies.

### *Internal organisation and structure*

The Commission recognised that there could be **no one-size-fits-all model for administrative boards**. This is an evolution in the Commission's point of view, because in 2002 it did contend that there should be a single model of administrative boards consisting of 15 members in total.<sup>124</sup> However, it did indicate three general principles that should be applied to all administrative boards: (1) the composition should reflect the agency's position with regard to the distribution of powers between the executives at Community and national levels; (2) there should only be a limited number of members and (3) interested parties should be involved in the work.

The proposal introduced a **different organisation of the representation in administrative boards**, which would in practice considerably reduce member states' influence in agencies, while reciprocally enhancing the Commission's role. For starters, the Commission pleaded for the creation of parity between the Commission and the Council in the composition of administrative boards. Besides, it also proposed limited representation, arguing that not all member states should always be represented on the administrative boards. However, in the cases where it would be justified for every member state to have its own representative, then an equal number of votes should be granted to the members designated by the Council and to those designated by the Commission. Whereas for the European Parliament, it should no longer have any representatives on the administrative boards, in order to guarantee its capacity to perform solid external controls.

In cases where the size of the administrative board prevents effective management, an executive board could be created. Here again, the Commission envisaged the equal representation of both 2 branches of the Community Executive.

A **single procedure for the appointment and dismissal of the director** is proposed. The administrative board would appoint the director on the basis of a list of candidates proposed by the Commission. Before being appointed, the candidate may be asked to make a statement before the European Parliament. The general term of office for a director would be five years, extendable once based on the proposal of the Commission and after an evaluation. The administrative board would have the possibility to dismiss the director before the end of that term, again on the proposal of the Commission. Previously, the Commission still wanted to retain the right to appoint the director of agencies with decision-making power legally binding to third persons, for which it would base itself on a list of candidates proposed by the administrative board.<sup>125</sup>

Some general provisions regarding the tasks and composition of scientific committees and boards of appeal were also incorporated. A distinction was also made between the internal and external linguistic regime.

### *Accountability*

Because of the autonomous nature of agencies, the Commission was of the opinion that both **ex ante and ex post evaluations** and control mechanisms should be put in place. Any proposal to create a new agency would be subjected to a preliminary impact assessment by the Commission. Once the agency is set up and running, the Commission and the agency itself should have to

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<sup>124</sup> This administrative board of 15 members would include 6 representatives appointed by the Commission, another 6 appointed by the Council and three, without the right to vote, representing the interested parties, Communication: The Operating framework, op. cit., p. 9 (COM (2002) 718 final).

<sup>125</sup> Communication: The Operating framework, op. cit., p. 10 (COM (2002) 718 final).

carry out regular evaluations. If the results of an evaluation indicate any problems or shortcomings, it would be up to the Commission to propose changes to the constituent act.

A **wide range of control mechanisms** are envisaged by the Commission in order to ensure the proper functioning of the agency. Budgetary control should be guaranteed by internal audits, annual reports by the Court of Auditors, the annual discharge for the execution of the Community budget and the investigations conducted by OLAF. Political control will be exercised both by the Commission and the legislative authority. In particular, the European Parliament and the Council would have the right to ask the director to inform them about the agency's activities. Judicial control would be the task of the Court of Justice once all internal appeal procedures have been exhausted.

#### 4.1.2 *Reigniting the debate*

The failure to reach an inter-institutional agreement led the Commission to reopen the debate at the beginning of 2008. The **reasons for this failure** are multiple. There was the dispute between the legal services of the Council and of the Commission on whether an inter-institutional agreement was an appropriate instrument. This blocked the debate immediately. Moreover, the draft was not only too detailed, leaving the impression that there was no margin for discussion, but equally too ambitious as it touched on several politically sensitive issues.<sup>126</sup>

In the 2008 document, the Commission withdrew its 2005 draft for a common framework for European regulatory agencies. It invited the institutions to restart the discussion on the topic and announced a moratorium on the creation of new agencies. It proposed a horizontal evaluation of all agencies by 2010 and a review of the Commission's internal systems governing the relations with agencies.<sup>127</sup>

By restricting itself to not making new proposals for the creation of agencies, the Commission made a gesture towards the other institutions. This signalled its willingness to come to an agreement. However, despite the withdrawal of the draft **inter-institutional agreement**, this proposal **remains the blueprint** of the discussion for the Commission.<sup>128</sup> The document states that "in the meantime, the Commission will continue to use the philosophy and core principles of the proposed inter-institutional agreement as a point of reference for its own approach to agencies".<sup>129</sup> This implies that the Commission does not intend to divert much from the initial 2005 proposal.

The fact that the Commission is not putting a new proposal on the table contains both an opportunity and a risk. The other institutions could feel more involved as they can introduce their preferences more easily. However, for agencies themselves it would be easier to respond to a specific proposal.

## 4.2 The European Parliament's proposal

The European Parliament adopted a resolution indicating some general principles regarding the creation and control of European agencies. The resolution called, inter alia, for the generalised use of the co-decision procedure to create new agencies. Furthermore, the resolution called for

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<sup>126</sup> M. Szapiro, op. cit.

<sup>127</sup> Communication: European Agencies – The Way Forward, op. cit., pp. 8-10 (COM (2008) 135 final).

<sup>128</sup> M. Szapiro, op. cit.

<sup>129</sup> Communication: European Agencies – The Way Forward, op. cit., p. 9 (COM (2008) 135 final).

parliamentary hearings of the candidates for the function of director and for the inclusion of an impact assessment and a cost-benefit assessment in the proposal for a new agency.<sup>130</sup>

The Budgetary Control Committee of the European Parliament issued a comparative analysis of the governance of agencies in several different member states and in the EU in 2008.<sup>131</sup> The aim was to distinguish best practices regarding the management of agencies and formulate recommendations for the governance of European agencies. The most important were:

- the number of agency types should be limited, with clearly defined rules on internal and external governance and accountability;
- small management board with a more diversified membership and an advisory role, except for decisions on the agency's budget, the annual work programme and the annual report;
- the driving institution behind the agency creation should provide clear explanations regarding the agency type, objectives, internal governance, budget responsibility, etc.;
- newly established agencies should be located in a member state which does not already have an agency;
- each EU agency should be subject to oversight by only one principal;
- yearly performance agreements should improve assessments;
- performances should be regularly scrutinised by the European Parliament and the Court of Auditors;
- each EU agency should have a well-defined appeal process.

### 4.3 Assessment of the reform proposals

The draft inter-institutional agreement was designed to improve the coherence, effectiveness and accountability of European regulatory agencies. Effectively, it did contain proposals that would improve the situation, such as a more uniform approach to the creation, the structure and the control provisions of European agencies. The proposal supports the basic idea that every new agency should have clearly defined powers, functions and operating procedures, which will allow for the enhanced transparency of an agency's functioning and make control easier.

One positive feature of the draft inter-institutional agreement that is worth mentioning is the intention to set up new agencies on the basis of a **specific Treaty provision**, rather than the general Article 308 EC. This does not only ensure a more flexible procedure in the Council, because majority voting replaces unanimity, but also implies a co-decision of the European Parliament in most policy areas, which would constitute an additional 'necessity check' and would increase the legitimacy of new agencies. Furthermore, the field of application of an agency set up on the basis of a specific Treaty provision is also more restricted than when it is left to the Council to formulate the agency's scope of activities, as is the case in the procedure following the use of Article 308 EC.

For reasons of effectiveness, the Commission's proposal to keep **administrative boards limited in size** makes sense. With 27 member states, the rule that every member state should

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<sup>130</sup> European Parliament resolution on the draft interinstitutional agreement presented by the Commission on the operating framework for the European regulatory agencies (P6\_(2005)0460) (OJ 2006 C285E/123-125).

<sup>131</sup> W. Jann (ed.), *Best practice in governance of agencies – A comparative study in view of identifying best practice for governing agencies carrying out activities on behalf of the European Union*, European Parliament, Committee on Budgetary Control, 30 January 2008, pp. 27-53 (PE 392.953).

have its own representative is no longer workable. A certain rotating system should be designed to address this issue. However, the Commission's intention to introduce parity in the composition of administrative boards seems to contradict its desire to keep the number of board members limited.

The fact that the Commission proposed an **appointment procedure of an agency director** who reflects the interests of all institutions, is to be welcomed. According to the draft, the administrative board should decide on the basis of a shortlist of candidates presented by the Commission after having taken parliamentary advice. However, in the case of a negative parliamentary opinion, a procedure could be envisaged requiring a special majority in the administrative board to counter this negative parliamentary advice. This would add weight to the parliament's opinion, without creating an additional institutional barrier.

Nevertheless, there were some aspects that raised concerns.

The **scope of the proposal** was **limited** in two ways. First, it would only apply to those agencies created in the framework of the European Communities, leaving aside agencies active in the field of Common Foreign and Security Policy and in Police and Judicial Cooperation in Criminal Matters. Second, the existing agencies were not incorporated in the proposal, as it would only apply to new agencies.

With regard to the **creation of agencies**, the proposal did provide for a preliminary impact assessment, but no objective or clearly defined criteria to establish the necessity of a new agency were introduced. Although the impact assessment would have to clarify aspects such as the added value for the Community, the agency's objectives, potential alternatives, etc., the final decision would not be bound to certain basic criteria. In order to guarantee that any new European agency is responding to a genuine necessity and contributes to the improvement of political governance at European level, the proposal should be accompanied by a thorough motivation. This should not substitute impact or cost-benefit assessments, but complement them.

Another regrettable issue is the Commission's reluctance to accept **representatives in administrative boards** that have been **appointed by the European Parliament**. In the Commission's view, having a representative in the agency's decision-making body would conflict with the Parliament's role as the agency's budgetary control entity. Nevertheless, this should not necessarily be the case, since the person appointed by the European Parliament would not be formally representing it in the administrative board. He or she would rather be an intermediary reporting back to Parliament on the agency's activities. An additional missing point, which is linked to administrative boards, regards their functioning. The proposal neglected to set well-established procedures for the administrative board, in particular concerning the voting.

The Commission proposals contain a wide range of control mechanisms for European agencies, many of which are already in effect in the newest agencies. The proposal fails to address the current **inflation of the oversight mechanisms** and procedures for European agencies. It is indeed difficult to obtain a balance between both thorough and comprehensive control of European agencies on the one hand and the need for operational independence on the other. Although the basic premises of the various proposed control mechanisms are justified, in practice this proposal could even add to the overlap between controls, which cause an evaluation fatigue and put a serious administrative burden on agencies. This is particularly the case for small agencies, with questionnaires and control visits conducted by various entities, which are often very similar in substance and create an administrative overload.

Finally, besides elaborating on how to set up new European agencies in a more coherent way, the existing agencies should also be put under question on a regular basis. It would only be a

sign of good governance to **close down the agencies that have fulfilled their role**. For instance, one can wonder for how much longer the mandate of EAR should be extended since it is active in reconstruction efforts in the former Yugoslav republics since 1999. And if an agreement would be reached to set up a European Electronic Communications Market Authority, shouldn't it be useful to merge it with ENISA, because both function in the field of communication technology?

## Conclusions

European agencies have proven to be useful, if not indispensable instruments in European governance. The technical or scientific expertise incorporated and used by European agencies to assist the Commission and member states in the increasingly complicated European regulatory system is the principal argument in favour of such independent decentralised bodies.

Furthermore, European agencies bring some flexibility to EU governance. On the one hand they possess a certain operational flexibility, while on the other the creation of new agencies provides the Commission with a more flexible response capability compared to working out new legislation.

However, the system of European agencies contains a number of problematic aspects that have been addressed in this study. These issues concern the legitimacy and accountability (political, judicial, financial, administrative and public accountability) of the agency's actions, the large diversity between the different agencies in how they relate to decentralisation, subsidiarity and proportionality. Finally, there is the current typology, which is unclear, confusing and internally contradictory.

What can now be expected of the debate that has been reopened on European agencies? Despite the breakthrough of the institutional deadlock and the attempt to reignite the debate on European agencies, **the outcome and timetable are still very unclear**. The Commission has stated its willingness to retain as many elements as possible from its 2005 proposal. Although too far-reaching and ambitious at the time, it did contain a range of elements that addressed the issues at stake regarding agencies. What remains an open question is whether it will not prove to be equally difficult to come to an agreement within the newly launched institutional debate on the same politically sensitive issues as before. The fact that the Commission is not even coming forward with an adapted draft proposal could hamper progress further.

Irrespective of the outcome of the institutional debate and the Commission's self-imposed moratorium on any new agency proposals until after the completion of evaluations in 2010, there seems to be a **tendency towards continued 'agencification' in the EU**. Although the advantages of decentralised, autonomous agencies in European governance are clear, this should not distract us from the issues of accountability, legitimacy, decentralisation, subsidiarity and proportionality linked to the agencification process and the heterogeneity of the current system of European agencies. In order not to lose the benefits of European agencies, continued efforts should be made to address these issues in a proactive manner for new agencies and in a reactive way in order to remedy the current situation.

## Annex: European regulatory agencies

Agency	Date of Creation & Legal Source	Description of activities
<b>CEDEFOP:</b> European Centre for the Development of Vocational Training - Thessaloniki	10 February 1975 - Regulation (EEC) 337/1975	To promote a European area of lifelong learning throughout an enlarged EU, by providing information on and analyses of vocational education and training systems, policies, research and practice.
<b>EUROFOUND:</b> European Foundation for the Improvement of Living and Working Conditions - Dublin	26 May 1975 - Regulation (EEC) 1365/1975	To provide information, advice and expertise – on living and working conditions, industrial relations and managing change in Europe – for key actors in the field of EU social policy on the basis of comparative information, research and analysis.
<b>ETF:</b> European Training Foundation – Torino	7 May 1990 - Regulation (EEC) 1360/1990	To contribute to the development to the vocational training systems in partner countries and to facilitate dialogue amongst stakeholders by developing international, national and local networks.
<b>EEA:</b> European Environment Agency – Copenhagen	7 May 1990 - Regulation (EEC) 1210/1990	To provide sound and independent information on the environment and environmental policies and to develop and coordinate the European environment information and observation network (Eionet).
<b>EMCDDA:</b> European Monitoring Centre for Drugs and Drug Addiction – Lisbon	8 February 1993 - Regulation (EEC) 302/1993	To gather, analyse and disseminate objective, reliable and comparable information on drugs and drug addiction and, in so doing, provide its audiences with a sound and evidence-based picture of the drug phenomenon at European level.
<b>EMA:</b> European Medicines Agency – London	22 July 1993 - Regulation (EEC) 2309/1993	To perform the scientific evaluation of applications for European marketing authorisation for medicinal products for human and veterinary use.
<b>OHIM:</b> Office for Harmonisation in the Internal Market (Trade Marks and Designs) – Alicante	20 December 1993 - Regulation (EC) 40/1994	To register and manage the applications for the Community trade mark and the Community registered design.
<b>EU-OSHA:</b> European Agency for Safety and Health at Work – Bilbao	18 July 1994 - Regulation (EC) 2062/1994	To develop, analyse and disseminate information to improve occupational safety and health in Europe and to develop a comprehensive network with national focal points, European institutions, European social partners, and international organisations.

<b>CPVO:</b> Community Plant Variety Office – Angers	27 July 1994 - Regulation (EC) 2100/1994	To implement and apply a system for the protection of plant variety rights.
<b>CdT:</b> Translation Centre for the Bodies of the European Union – Luxembourg	28 November 1994 - Regulation (EC) 2965/1994	To provide the translation services required by the institutions, bodies and decentralised agencies of the European Union.
<b>EUROPOL:</b> European Police Office – The Hague	18 April 2008 - Regulation not yet published in the Official Journal of the EU. (original: 26 July 1995 – Convention)	To help member states co-operate more closely and effectively in preventing and combating organised international crime by facilitating the exchange of information between Europol and Europol Liaison Officers, providing operational analysis and supporting member states' operations, providing expertise and technical support for investigations and operations carried out within the EU and generating strategic reports and crime analysis on the basis of information and intelligence supplied by member states or gathered from other sources.
<b>FRA:</b> European Union Fundamental Rights Agency – Vienna (Before: EUMC: European Monitoring Centre on Racism and Xenophobia)	15 February 2007 - Regulation (EC) 168/2007 (2 June 1997 - Regulation (EC) 1035/1997)	To provide Community institutions and member states with information, assistance and expertise on fundamental rights when implementing community law, and to support them in taking measures and formulating appropriate courses of action.
<b>EAR:</b> European Agency for Reconstruction – Thessaloniki	15 November 1999 - Regulation (EC) 2454/1999	To manage the main EU assistance programmes in Serbia and Montenegro (Republic of Serbia, Republic of Montenegro, UN-administered Kosovo) and FYR of Macedonia.
<b>ISS:</b> European Union Institute for Security Studies – Paris	20 July 2001 - Council Joint Action 2001/554/CFSP	To help create a common European security culture, to support the strategic debate by organising research and debate on security and defence issues that are of importance to the EU and to create a network of academics, officials, experts and decision-makers in order to provide a forward-looking analysis on security and defence issues.
<b>EUSC:</b> European Union Satellite Centre - Torrejon de Ardoz	20 July 2001 - Council Joint Action 2001/555/CFSP	To support the decision-making of the European Union by providing analysis of satellite imagery and collateral data.
<b>EFSA:</b> European Food Safety Authority – Parma	28 January 2002 - Regulation (EC) 178/2002	To collect and analyse scientific data, identify emerging risks and provide independent scientific advice on all matters with a direct or indirect impact on food safety, including animal health and welfare and plant protection.



<b>EUROJUST:</b> The European Union's Judicial Cooperation Unit - The Hague	28 February 2002 - Council Decision 2002/187/JHA	To enhance the effectiveness of the competent authorities within member states when they are dealing with serious cross-border and organised crime, to stimulate and improve the coordination of investigations and prosecutions and to support the member states in order to render their investigations and prosecutions more effective.
<b>EMSA:</b> European Maritime Safety Agency – Lisbon	27 June 2002 - Regulation (EC) 1406/2002	To assist the Commission and the national authorities in matters of maritime safety, security and the prevention of pollution caused by ships, to control the proper application of EU law in this field and to promote cooperation between national authorities.
<b>EASA:</b> European Aviation Safety Agency – Köln	15 July 2002 - Regulation (EC) 1592/2002	To provide technical expertise to the European Commission by assisting in the drafting of rules for aviation safety and to carry out the certification of aeronautical products and organisations involved in their design, production and maintenance, which help to ensure compliance with airworthiness and environmental protection standards.
<b>ENISA:</b> European Network and Information Security Agency – Heraklion	10 March 2004 - Regulation (EC) 460/2004	To advise and assist the Commission and the member states on information security and to address security-related problems in hardware and software products in dialogue with industry, to collect and analyse data on security incidents in Europe and emerging risks, to promote risk assessment and risk management methods to enhance our capability to deal with information security threats, to exchange best practices and to track the development of standards for products and services on network and information society.
<b>ECDC:</b> European Centre for Disease Prevention and Control – Stockholm	21 April 2004 - Regulation (EC) 851/2004	To enhance the capacity of the Community and the member states to protect human health through the prevention and control of human disease, to act on its own initiative when outbreaks of contagious illnesses of unknown origin threaten the Community and to ensure complementary and coherent action in the field of public health by bringing together the member states, the EU Institutions and the relevant international organisations.
<b>ERA:</b> European Railway Agency – Lille/Valenciennes	29 April 2004 - Regulation (EC) 881/2004	To reinforce safety and interoperability of railways throughout Europe.

<b>GSA:</b> The European Global Navigation Satellite Systems Supervisory Authority – Undecided (provisionally in Brussels)	12 July 2004 - Regulation (EC) 1321/2004	To manage the European satellite navigation programmes.
<b>EDA:</b> European Defence Agency – Brussels	12 July 2004 - Council Joint Action 2004/551/CFSP	To improve the EU's defence capabilities, especially in the field of crisis management, to promote EU armaments cooperation, to assist in the development and overall restructuring of the European defence industry and to promote EU defence-related Research and Technology.
<b>FRONTEX:</b> European Agency for the Management of Operational Cooperation at the External Borders – Warsaw	26 October 2004 - Regulation (EC) 2007/2004	To coordinate operational cooperation between member states in the field of management of external borders, to assist member states in the training of national border guards, to strengthen border security by ensuring the coordination of Member States' actions in the implementation of Community measures relating to the management of the external borders and to promote overall coherency by liaising with other Community and EU partners responsible for the security of the external borders.
<b>CFCA:</b> Community Fisheries Control Agency – Vigo	26 April 2005 - Regulation (EC) 768/2005	To organise operational coordination of fisheries control and inspection activities by the member states and to assist them to cooperate so as to comply with the rules of the Common EU Fisheries Policy in order to ensure its effective and uniform application.
<b>CEPOL:</b> European Police College – Bramshill	20 September 2005 - Council Decision 2005/681/JHA	To encourage cross-border cooperation in the fight against crime, maintenance of public security and law and order by organising courses, seminars and conferences with senior police officers from across Europe.
<b>ECHA:</b> European Chemicals Agency – Helsinki	18 December 2006 - Regulation (EC) 1907/2006	To manage the registration, evaluation, authorisation and restriction processes for chemical substances, to ensure consistency in chemicals management across the EU and to provide technical and scientific advice, guidance and information on chemicals.

**Under preparation:**

<b>EIGE:</b> European Institute for Gender Equality – Vilnius	20 December 2006 - Regulation (EC) 1922/2006	To contribute to and strengthen the promotion of gender equality and the fight against discrimination based on sex, to collect, analyse and disseminate relevant, objective, comparable and reliable information as regards gender equality, to raise EU citizens' awareness of gender equality and to set up and coordinate a European Network on Gender Equality.
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**Proposed Regulatory Agencies:**

- Agency for the Cooperation of Energy Regulators
- European Electronic Communications Market Authority

**European executive agencies**

<b>PHEA:</b> Executive Agency for the Public Health Programme – Brussels	15 December 2004 - Decision 2004/858/EC	To support actions to improve and protect human health in the EU.
<b>EACEA:</b> Education, Audiovisual and Culture Executive Agency – Brussels	14 January 2005 - Decision 2005/56/EC	To implement the Community funded programmes and actions in the fields of education and training, active citizenship, youth, audiovisual and culture.
<b>TEN-TEA:</b> Trans-European Transport Network Executive Agency – Brussels	26 October 2006 - Decision 2007/60/EC	To manage the projects and events for the promotion of the Trans-European Transport Network.
<b>EACI:</b> Executive Agency for Competitiveness and Innovation – Brussels (Before: IEEA: Intelligent Energy Executive Agency)	31 May 2007 - Decision 2007/372/EC	To manage the projects and events funded under Intelligent Energy - Energy Europe programme and to disseminate the resulting know-how and best practices.
<b>ERC:</b> European Research Council Executive Agency - Brussels (Under preparation)	14 December 2007 - Decision 2008/37/EC	To stimulate scientific excellence in Europe by supporting and encouraging the very best, truly creative scientists, scholars and engineers.
<b>REA:</b> Research Executive Agency – Brussels	14 December 2007 - Decision 2008/46/EC	To evaluate the proposals and manage the research projects of the current research framework programme FP7.

Related EPIN Members' Publications:

- ✓ **The European Union's governance ambitions and its administrative capacities**  
Clingendael (The Hague), October 2008  
Authors: Adriaan Schout and Andrew Jordan
- ✓ **European Union Scenarios for 2017**  
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Author: Antonio Estella
- ✓ **Conceptualizing a Differentiated Europe**  
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Authors: Lisbeth Aggestam, Francesco Anesi, Geoffrey Edwards, Christopher Hill and David Rijks
- ✓ **What's Next for the Lisbon Strategy?**  
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CER (London), February 2008  
Authors: Katinka Barysch, Simon Tilford and Philip Whyte
- ✓ **The Treaty of Lisbon: Implementing the Institutional Innovations**  
CEPS, Egmont Institute and the EPC (Brussels), 2007  
Authors: Sebastian Kurpas, Ben Crum, Philippe de Schoutheete, Jacques Keller, Franklin Dehousse, Sami Andoura, Antonio Missiroli, Sara Hagemann, Hervé Bribosia

Previous EPIN Working Paper:

- ✓ **Ratification of the Lisbon Treaty: Problems not only in Ireland**  
EPIN Working Paper No. 18, September 2008  
Authors: Piotr Maciej Kaczyński, Sebastian Kurpas and Peadar ó Broin

Previous EPIN Commentary:

- ✓ **Lisbon Treaty Ratification: Will the Åland Islands become Finland's Greenland?**  
EPIN Commentary, UPI-FIIA (Helsinki)  
Authors: Pia Alilonttinen and Savino Ruà, April 2008

## About EPIN



EPIN is a network of European think tanks and policy institutes with members in most member states and candidate countries of the European Union. It was established in 2002 during the Convention on the Future of Europe, by a consortium of think tanks led by CEPS. Its first role was to follow the work of the Convention. More than 30 conferences in member states and candidate countries were organised in the following year.

With the conclusion of the Convention, CEPS and other participating institutes decided to keep the network in operation. EPIN has continued to follow the constitutional process in all its phases: 1) the intergovernmental conference of 2003-04, 2) the ratification process of the Constitutional Treaty, 3) the period of reflection and 4) the intergovernmental conference of 2007. Currently, EPIN follows: 5) the ratification process of the Lisbon Treaty and – should the treaty enter into force – 6) the implementation of the Treaty.

The EPIN Steering Committee takes the most important decisions. Currently six member institutes sit on the Steering Committee, namely CEPS (Brussels), DIIS (Denmark), ELCANO (Spain), Europeum (Czech Republic), Notre Europe (France) and SIEPS (Sweden).

### Status quo

Currently there are 29 EPIN member institutes from 25 countries, including non-EU member states. The 'hard core' work of the network is based on close cooperation among some 10 active institutes. The member institutes are quite diverse in size and structure, but all are characterised by political independence and the absence of any predetermined point of view or political affiliation.

EPIN organises two major conferences in Brussels per year as well as ad hoc conferences or other activities in member states. The network publishes the EPIN Working Paper series and other papers, which primarily focus on institutional reform of the Union. The network follows the preparations for the European elections, the EU's communication policy, and the political dynamics after enlargement, as well as EU foreign policy and justice and home affairs.

### Achievements

The EPIN network offers its member institutes the opportunity to contribute to the 'European added-value' for researchers, decision-makers and citizens. EPIN provides a unique platform for researchers and policy analysts to establish personal links, exchange knowledge and collaborate on EU-related issues. Members bring their national perspectives to bear on the issues tackled and through collaboration they contribute to establish a 'European added-value' on a wide range of issues, e.g. EU communication policy and flexible integration. By doing so, they strengthen a common European dimension in the national debates on Europe.



Education and Culture DG

'Europe for Citizens' Programme

*With the support of the European Union: Support for organisations active at European level in the field of active European citizenship.*