

2008 Commission Communication ‘European Agencies – the Way Forward’: What is the Follow-Up Since Then?

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Abstract

On 17th February 2010, the Heads of the European Union agencies met with the European Commission President, Barroso. President Barroso stressed in his speech that European agencies play a significant role in European Union governance today and recalled the necessity of European Union institutions addressing important issues raised by these agencies, as had been stressed in the Commission’s 2008 Communication to the European Parliament and the Council entitled ‘European Agencies – The Way Forward’. This article is aimed at assessing the follow-up given to this 2008 Communication, by first of all describing the genesis of the 2008 Commission’s Communication, then by studying which type of decentralized organization – ‘European regulatory agency’ – the Commission has concentrated on in its Communication and, finally, by analyzing on which bases the Commission has intended to relaunch the inter-institutional debate in order to assess whether an effective follow-up was given to it. More than two years have elapsed since the Commission adopted the Communication. The Commission had at that time announced that the first results could be envisaged for the end of 2009.

Introduction

On 17th February 2010, the Heads of the European Union (EU) agencies met with the European Commission President, Barroso.² President Barroso stressed in his speech³ that European agencies play a significant role in EU governance today. He also recalled the necessity of EU institutions addressing important issues raised by these agencies. For instance, he underlined the ‘need to strike a balance between the need for a global and coherent approach to regulatory agencies’ and the need to respect agencies’ specific characteristics – taking into account their different sizes,

¹ The opinions expressed are entirely personal to the author and do not represent the European Commission. This article reflects the law and policy as of 30/03/2010.

² This is the second time, after 2006, that such a meeting has taken place.

³ Speech of President of the European Commission, 17/02/2010: ‘A New Treaty, a New Commission: A Revised Framework for EU Regulatory Agencies’, see in Commission DORIE databasis (DOcumentation et Recherche sur les questions Institutionnelles Européennes) under <http://ec.europa.eu/dorie/>.

functions, maturity and the ways in which they work. President Barroso was referring to the 2008 Commission Communication to the European Parliament (EP) and the Council entitled '*European Agencies – The Way Forward*'⁴ and the follow-up that has proceeded ever since. The title of the 2008 Communication indicated the will of the Commission to re-launch an inter-institutional discussion on the subject of European agencies.

This Communication, centred on a particular type of agency, the regulatory agencies, followed a number of Commission initiatives on the matter. At the time of the drafting of the White Paper on governance in 2001,⁵ the subject gave rise to lively debate. Following the extensive consideration of ideas emerging from the discussion carried out within the framework of the White Paper, the Commission adopted in 2002 a Communication relating to the operating framework of the European regulatory agencies. This Communication was aimed at providing (some elements of) definitions for the concept of the regulatory agency and to launch some avenues for reflection with a view to adopting a coherent approach, in institutional terms, to the creation and operation of these agencies, on the basis of criteria being defined and applied to any new creation of a European agency. This Communication had received a favourable welcome from the EP⁶ and, though perhaps more reluctantly, also from the Council.⁷ Following these positive signs from the co-legislators, the Commission then commenced a titanic inventory exercise and examination of the rules and criteria which could be applicable in a general way to future regulatory agencies established under the (former) first pillar from their creation and during their operation. This led in 2005 to the adoption by the Commission of the draft inter-institutional agreement on the operating framework for the European regulatory agencies.

This project received a positive welcome from the EP, which saw in it a major institutional headway. The Council, on the other hand, did not wish to discuss the project and discouraged the Commission from moving towards an in-depth negotiation on the project. Taking this into consideration, the Commission, in the 2008 Communication, attempted to smooth the discussion on the European agencies and to re-launch the inter-institutional debate on a new basis by inviting the Council and the EP to join in a new dialogue

⁴ Com(2008)135 final.

⁵ See Com(2001)428 final, White paper on governance and report by the working group 3a (Improving the exercise of executive responsibilities): '*Establishing a framework for decision-making regulatory agencies*' – June 2001; See also: Michelle Everson, Giandomenico Majone, Les Metcalfe and Adriaan Schout, '*The role of specialised Agencies in decentralising EU Governance*' (1999).

⁶ EP Resolution about '*Communication from the Commission – The operating framework for the European Regulatory Agencies*' (Com(2002) 718), P5 TA(2004)0015, OJ C 92/E/119, 16/04/2004.

⁷ EU Council conclusions (environment), June 2004, document 10442/04 INST 174 JUR 285.

on the place of European agencies in European governance. To do so, the Commission suggested the creation of an inter-institutional working group, which would be in charge of working on and defining the basic rules applicable to all the agencies, while taking into account the challenges that they would have to face.

This article is aimed at assessing the follow-up given to this 2008 Communication, by first of all describing the genesis of the 2008 Commission Communication (Section I), then by studying which type of decentralized organization – ‘European regulatory agency’ – the Commission has concentrated on in its Communication (Section II) and finally, by analyzing on which bases the Commission has intended to relaunch the inter-institutional debate in order to assess whether an effective follow-up was given to it. More than two years have elapsed since the Commission adopted the Communication. The Commission had at that time announced that the first results could be envisaged for the end of 2009 (Section III).

I The Genesis of the 2008 Communication of the European Commission: ‘European Agencies – The Way Forward’⁸

The agencies aimed at by the Communication of March 2008 are sometimes called ‘*decentralized agencies*’ because their seat is based in various countries in the European Union and not in Brussels, Strasbourg or Luxembourg, which are the official headquarters of the institutions created according to the primary law of the European Union (European Commission, Council, EP and Court of Justice). They are also sometimes called ‘*traditional agencies*’ because historically, they were the first ones to be created as of 1975, the first agency being the European Centre for the Development of Vocational Training (CEDEFOP).⁹ Reflection carried out on these agencies, and in particular, the way they should operate and the scope of their mandate, is thus not recent.

With regard to the mandate and definition of the competencies of a Union agency (at the time of the European Community), the European Commission and the European legislator traditionally refer to the *Meroni* jurisprudence, dating back to 1958.¹⁰ This jurisprudence, which is supposed to have been confirmed by the *Romano* judgment,¹¹ referred to a body created by secondary law, which was, however, not an agency, since the concept did not yet exist at the time. According to the Court of Justice, these bodies

⁸ Com(2008)135 final, March 2008.

⁹ Regulation (EEC) No 337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training, OJ L 39, 13.2.1975, p. 1.

¹⁰ Case 9-56 *Meroni* [13 June 1958] ECR, English special edition, p. 133.

¹¹ Case 98/80 *Romano* [14 May 1981] ECR, p. 1241.

have strictly limited decision-making powers. They are not entitled to take measures of a general scope (having *erga omnes* effects) and do not have any discretionary power. They make their decisions (if their founding regulation entitles them to do so – which is not always the case) on the basis of criteria precisely defined by the legislator in their founding regulation. In other words, the scope of their powers is strictly limited; they do not have a discretionary margin of appreciation and, when they make a decision, it is because the implementation of applicable technical and scientific criteria, defined in secondary and/or primary law, allows them to do so directly. The *Meroni* jurisprudence is therefore based on a strict conception of the institutional balance of the powers and competencies between, on the one hand, the institutions, as defined in the Treaties' primary law and, on the other hand, the other bodies, as created by secondary law on the basis of a founding regulation defining their statutes.

Since the creation of the CEDEFOP, many agencies have been set up by the legislator. These agencies were created on a case-by-case basis, while not complying with unified rules of governance, responsibility or control. The legislator therefore showed an extraordinary creativity in the variety of the agencies created, resulting in a true 'administrative zoo'.¹² It could also be said that each agency follows its own model.

The concept of an agency gave birth to interesting and controversial debates, in particular during the drafting of the 2001 White Paper on Governance.¹³ Further to these debates, in 2002, the Commission adopted a Communication relating to the operating framework of regulatory agencies.¹⁴ In this 2002 Communication, the Commission expressed the need to focus its own work on its essential core missions. In this perspective it seemed crucial to frame the role and functions of the regulatory agencies, which by their nature and their tasks, take part in exercising the executive function at EU level. The 2002 Communication consequently insisted on the need for a regulatory agencies framework in order to avoid institutional chaos resulting from the creation of numerous agencies, without any global vision or precise idea of their operating and control system.

The EP showed its interest for such an initiative in a resolution adopted in 2004.¹⁵ In more measured terms, the Council had also shown its interest in its conclusions in 2004.¹⁶ Taking into account these positive reactions,

¹² See Jan Werner, Tobias Bach, Julia Fleischer, Thurid Hustedt (University of Potsdam), '*Best practice in governance of agencies – A comparative study in view of identifying best practice for governing agencies carrying activities on behalf of the European Union*', Study requested by the European Parliament's Committee on Budgetary Control, (European Parliament, 2008).

¹³ Com(2001) 428 final, White paper on governance.

¹⁴ Com(2002) 718 final.

¹⁵ EP Resolution about 'Communication from the Commission – The operating framework for the European Regulatory Agencies', P5 TA(2004)0015, OJ C 92/E/119, 16/04/2004.

¹⁶ EU Council conclusions (environment), June 2004, document 10442/04 INST 174 JUR 285.

the Commission committed itself to prepare a framework for the regulatory agencies. This titanic exercise led to the drafting of an inter-institutional agreement for a framework of regulatory agencies that was adopted by the Commission in 2005.¹⁷ The preparation of the 2005 draft inter-institutional agreement allowed the Commission, among other things, to offer a definition of the regulatory agency, to define which would be the bodies designated for the management and direction of such an agency, as well as their operating rules, and to define what the financing and control mechanisms would be.

In December 2005, an EP resolution¹⁸ welcomed the Commission's presentation of the draft text. However, the negotiation of the project encountered hostility from the Council, which refused any discussion on the project's content. The Council argued that the legal instrument of the inter-institutional agreement was inappropriate for the intended objective. Indeed, the draft inter-institutional agreement would have contained rules binding the legislator for the future, insofar as it included indications on the content of the regulations establishing future agencies. However, it must be noted that the legal technique of the inter-institutional agreement is not new and that the existing inter-institutional agreements contain rules allowing the institutions to give a defined framework for future action.¹⁹

In spite of the Commission's openness concerning the nature of the legal instrument to be used, the Council refused any discussion on the content of the draft inter-institutional agreement. The EP, in the 2005 resolution, 'regretted the fact that the Council is not prepared to begin negotiations to conclude an agreement on the basis of the Commission's draft text' and 'called on the Commission to continue its efforts to prevail upon the Council to change its mind'.

In its answer to an oral question asked at the end of 2005 by the EP to the Council and the Commission,²⁰ the Council had taken the same ambiguous position. It is likely that the Council did not wish to bind itself with a horizontal framework while important negotiations were at the time ongoing on a number of agencies then being proposed (in particular on the future European Chemical Agency²¹ or the Agency for Fundamental Rights)

¹⁷ Com (2005) 59 final, For comments about the draft inter-institutional agreement, see the enlightened article of Manuel Szapiro, '*The Framework for European Regulatory Agencies: a Balance between Accountability and Autonomy*', 3rd European Consortium for Political Research (ECPR) 2005 conference (Budapest, 8-11 Sept. 2005). See also Françoise Comte '*Agences européennes: relance d'une réflexion interinstitutionnelle européenne?*', *Revue du Droit de l'Union européenne* 3-2008, pp. 461-506.

¹⁸ EP Resolution, 01/12/2005, P6 TA(2005)0460.

¹⁹ E.g.: Inter-institutional agreement 'Better regulation', OJ C 321, 31/12/2003, p. 1.

²⁰ Oral question with debate, European Parliament, OQ 93/05, 12/10/2005.

²¹ For a complete list of regulatory agencies, with their founding regulation and legal basis, see annex following this article.

or revised. In its answer to the oral question the Commission reiterated its position, namely that the choice of the legal instrument of the inter-institutional agreement seemed to be the most suitable for the framework, and called on the Council not to focus on the legal nature of the instrument but to consider the content of the rules to be applied to agencies. The Commission thus concluded by indicating that ‘the essential thing is to examine the content of a possible agreement between the three institutions. Once the content of the instrument has been defined, it will be easier to decide on its form’.

Facing a lack of support from the Council to move forward – in spite of the combined efforts of the EP and the Commission since 2005 – the Commission concluded that relaunching the inter-institutional process for the framework of regulatory agencies was urgent. Indeed, after three years of unfruitful attempts to start negotiations on the 2005 inter-institutional draft agreement, and being faced with a growing number of existing agencies, an operating framework for the agencies had become more necessary than ever.

The 2008 Communication conveyed this urgency by deploring the attitude of the Council and by reaffirming the need for the Union’s institutions to agree on a certain number of basic rules setting a framework for regulatory agencies:

‘Despite general support from the European Parliament, negotiations on this draft agreement unfortunately stalled during 2006, with the Council not ready to give attention to the issue and with doubts raised over the use of an inter-institutional agreement as a vehicle. However, the issues, which the inter-institutional agreement sought to address, remain. The varied role, structure and profile of regulatory agencies make the system untransparent, and raise doubts about their accountability and legitimacy. The diverse role of agencies fuels concern that they might stray into areas more properly the domain of the policy-making branches of the EU. The responsibilities of other institutions toward agencies and of the Commission in particular, suffer from the lack of a clear framework and defined lines of responsibility’.

The Commission’s objective in the 2008 Communication was then clear: regulatory agencies (within the meaning of the Communication) are now a full part of the institutional landscape of the Union. They perform various tasks, often high in quality and reliability. However, in the absence of a clear and transparent framework, there is a political need for all the institutional actors – Council, EP and Commission – to reflect on the role and on the place of the agencies in the EU system of governance in order to improve their transparency, effectiveness and legitimacy. This was the aim of the inter-institutional relaunch, which the Commission hoped for in the 2008 Communication.

2 The 'Regulatory Agency' Within the Meaning of the 2008 Communication

2.1 Diversity of European 'Agencies'

Many European institutional bodies are called 'agencies', despite covering quite different legal realities. For example, the European Space Agency²² is an international organization. The Euratom Supply Agency²³ is a service in the Commission presenting specific institutional features.²⁴ The decentralized European Environment Agency, (whose headquarters are in Copenhagen), with an operating experience of 20 years, has a mandate focused on functions of analysis and dissemination of quality information in the environmental field. The European chemical agency is another important decentralized agency (based in Helsinki), in charge primarily of the evaluation and recording of chemical products and having decision-making powers. Other European organizations also bear the name 'agency', such as the so-called 'executive agencies', e.g. the European Research Council Executive Agency.²⁵

2.2 'Summa Divisio' of the 2008 Communication: Regulatory Agency / Executive Agency

The Communication focuses on a particular type of European agency: the European agency known as a 'regulatory agency'. Within this meaning, it excludes any other kind of agency, in particular any international or national agencies.

The Summa Divisio is based on the traditional division between an 'executive agency' and a 'regulatory agency'. It lists – without going into details – other decentralized bodies of the Union and simply indicates at the end of the introduction that it does not include these bodies. These European bodies are quickly described in the text as being '*special partnership bodies*'. The Communication indicates that these are not agencies but does not

²² <http://www.esa.int/esaCP/index.html>.

²³ 2008/114/EC, Euratom: Council Decision of 12 February 2008 establishing Statutes for the Euratom Supply Agency – OJ L 41, 15.2.2008, p. 15 (abrogation and replacement of the Statutes of the Euratom Supply Agency, English special edition: Series I Chapter 1952-1958, p. 78.

²⁴ Euratom Supply Agency is founded on the Euratom Treaty, Article 54§2. The Euratom Treaty remains unchanged on this point following the entry into force of the Treaty of Lisbon.

²⁵ 2008/37/EC: Commission Decision of 14 December 2007 setting up the European Research Council Executive Agency for the management of the specific Community programme Ideas in the field of frontier research in application of Council Regulation (EC) No 58/2003 – OJ L 9, 12.1.2008, p. 15.

specify their exact legal status. The Communication gives examples of these *special partnership bodies* such as joint undertakings²⁶, common technological initiatives included within the 7th research framework programme²⁷ or the European Institute of innovation and technology.²⁸ It indicates that these bodies benefit from certain adjustments of the Financial Regulation as well as regarding administrative matters (staff regulations) because of their specificities which make of them organizations related to the private sector: 'It has been recognised that to achieve goals, the public sector needs to work in partnership with the private sector'.²⁹ The reasons which justify their exclusion from the general description of agencies are little detailed in the 2008 Communication. These decentralized bodies, however, have in many cases, features in common with or very close to the agencies: creation by secondary law, legal personality, autonomous decision-making bodies, financial autonomy, staff widely subjected to the regulations applicable to EU officials and other agents, and clearly specified missions and tasks (see below). The EP, for example, considers that these bodies should be regarded as agencies.³⁰

2.2.1 Executive Agency

The Communication gives a brief definition of the concept of an executive agency and some explanations concerning the way in which it functions and its mandate.

An executive agency is created by the Commission alone, on the basis of Regulation 58/2003 as of 19th December 2002, laying down the statute for

²⁶ The Communication mentions examples of ITER and SESAR. ITER, 2007/198/Euratom: Council Decision of 27 March 2007 establishing the European Joint Undertaking for ITER and the Development of Fusion Energy and conferring advantages upon it, OJ L 90, 30.3.2007, p. 58. See also <http://www.iter.org/index.htm>. SESAR, Council Regulation (EC) No 219/2007 of 27 February 2007 on the establishment of a Joint Undertaking to develop the new generation European air traffic management system (SESAR), OJ L 64, 2.3.2007, p. 1; See also http://www.eurocontrol.int/sesar/public/subsite_homepage/homepage.html.

²⁷ E.g. see Council Regulation (EC) No 72/2008 of 20 December 2007 setting up the ENIAC Joint Undertaking, OJ L 30, 4.2.2008, p. 21 (field of nanoelectronics) and Council Regulation (EC) No 74/2008 of 20 December 2007 on the establishment of the ARTEMIS Joint Undertaking to implement a Joint Technology Initiative in Embedded Computing Systems, OJ L 30, 4.2.2008, p. 52.

²⁸ Regulation (EC) No 294/2008 of the European Parliament and of the Council of 11 March 2008 establishing the European Institute of Innovation and Technology, OJ L 97, 9.4.2008, p. 1.

²⁹ See Communication p. 4.

³⁰ 'Working document n°1 on the European Union and its agencies, Decentralised agencies and other bodies according to Article 185 of the Financial Regulation – first reflections and future prospects' – Committee on Budgets, 10.4.2007 – European Parliament.

executive agencies to be entrusted with certain tasks for the management of EU programs,³¹ creating a rigorous and transparent framework for these agencies. These kinds of bodies were then named 'executive agencies', in reference to their role of *execution of the programs* which they manage on the Commission's behalf. The term '*executive*' does not refer to the powers that the Commission is invested with by the treaties, a part of which are regarded as being of an executive nature³² and which include a discretionary margin of political appreciation that an executive agency does not have. An executive agency is only in charge of managing a program, as defined and adopted beforehand by the EU legislator, on the basis of precise technical criteria, not allowing any margin of appreciation. Its lifespan is limited in time and linked to the programs duration which is determined by the decision of the Commission setting up the executive agency.³³ It is always located either in Luxembourg or in Brussels, as this enables constant, easy and close links between the agency and the Commission.

Regulation 58/2003 was adopted following the dissolution of the Offices of Technical Assistance (OTA) whose mal functioning and financing had been called into question by the Court of Auditors, in particular in its report concerning the financial year 1996.³⁴

For the time being, 6 executive agencies have been created on this basis:

- *Executive Agency for Competitiveness and Innovation*, EACI, (located in Brussels, deadline 31 December 2015);³⁵
- *Executive Agency for the Public Health Programme*,³⁶ PHEA, (located in Luxembourg, deadline 31 December 2010);
- *Education, Audiovisual and Culture Executive Agency*,³⁷ EACEA, (located

³¹ Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 11, 16.1.2003, p. 1.

³² By analogy with a national institutional system founded on the separation of the powers, Legislative / Executive / Legal.

³³ If the program is extended, the lifetime of the agency can be prolonged also as much. See for example the cases of the agencies EACEA and TEN-TEA, whose deadlines were initially set for 31/12/2008 and which were extended to 31/12/2015.

³⁴ Annual Report concerning the financial year 1996, European Court of Auditors, OJ C 348, 18/11/1997.

³⁵ 2007/372/EC: Commission Decision of 31 May 2007 amending Decision 2004/20/EC in order to transform the Intelligent Energy Executive Agency into the Executive Agency for Competitiveness and Innovation, OJ L 140, 1.6.2007, p. 52.

³⁶ 2004/858/EC: Commission Decision of 15 December 2004 setting up an executive agency, the 'Executive Agency for the Public Health Programme', for the management of Community action in the field of public health – pursuant to Council Regulation (EC) No 58/2003, OJ L 369, 16.12.2004, p. 73.

³⁷ 2007/114/EC: Commission Decision of 8 February 2007 amending Commission Decision 2005/56/EC setting up the Education, Audio-visual and Culture Executive Agency for the

- in Brussels, deadline 31 December 2015);
- *Trans-European Transport Network Executive Agency*,³⁸ TEN-TEA, (located in Brussels, deadline 31 December 2015);
- *European Research Council Executive Agency*, ERCEA,³⁹ (located in Brussels, deadline 31 December 2017);
- *Research Executive Agency*, REA,⁴⁰ (located in Brussels, deadline 31 December 2017).

Each executive agency is in charge of the implementation of a program and works under the Commission's tight control. Using business law terminology, the executive agency could be described as a subsidiary company of the Commission. The links between the executive agency and the Commission are very close. The Commission creates the agency, following a cost-benefit analysis showing that the agency will be the best solution to ensure the best implementation at the best price of the program. The Commission defines its mandate in a founding decision. The Commission appoints key-members of its staff, including the director. The management board of the agency includes representatives from the Commission's services, who control the activity of the agency. The activity report of the agency is attached to that of the Commission Directorate General to which the agency is closely linked. Its budget is consolidated with that of the Commission.

The executive agency is in fact a '*creature*' of the Commission, whose unified legal status is transparent and completely framed. The 2008 Communication recalls that following the assessment of staff needs carried out by the Commission in 2007,⁴¹ the creation of new executive agencies is not on the agenda for the moment, at least not until the end of the current financial framework that runs up until 2013.

This is the reason why the 2008 Communication centred on decentralized agencies which do not benefit from the unified statute of executive

management of Community action in the fields of education, audio-visual and culture, OJ L 49, 17.2.2007, p. 21.

³⁸ Commission Decision of 26 October 2006 establishing the Trans-European Transport Network Executive Agency pursuant to Council Regulation (EC) No 58/2003, OJ L 32, 6.2.2007, p. 88.

³⁹ 2008/37/EC: Commission Decision of 14 December 2007 setting up the European Research Council Executive Agency for the management of specific community program ideas in the field of frontier research in application of Council Regulation (EC) No 58/2003, OJ L 9, 12.1.2008, p. 15.

⁴⁰ 2008/46/EC: Commission Decision of 14 December 2007 setting up the Research Executive Agency for the management of certain areas of specific community programs, 'People, Capacities and Cooperation' in the field of research in application of Council Regulation (EC) No 58/2003, OJ L 11, 15.1.2008, p. 9.

⁴¹ SEC(2007)530 Report from the Commission '*Planning & optimising Commission human resources to serve EU priorities*'. See para. 2.1.

agencies and which consequently raise problems and questions regarding their statute, functioning and relations with the European institutions (Commission, Council and EP).

2.2.2 Regulatory Agency

As already mentioned, these agencies were historically created on a case-by-case basis, without any overall vision of their legal and institutional framework. For the time being, there is still no legal definition of what constitutes a regulatory agency, neither in primary nor in secondary law. The EP mentioned this for example in a working paper in 2007⁴² and reiterated its position in a resolution adopted in 2009 as follows: '*Community law does not contain a definition of an agency*'.⁴³ In very general terms, it can be defined as an autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy (see below in this article).

It should be underlined that in a certain number of fields, particularly in financial and staff matters, the legal rules of regulatory agencies are already very widely unified. With regard to certain horizontal fields, such as access to documents⁴⁴ or data protection,⁴⁵ their legal statute is totally unified. For example, with regard to access to documents, an 'omnibus' operation was carried out by the Commission on all the regulations founding the agencies that were adopted prior to 2001 (adoption date of the regulation accessing documents) in order to incorporate into these regulations a standard provision, thus submitting the agencies to the regulation regarding public access to documents.⁴⁶ Since then, all the founding regulations of the agencies include this standard clause, including those established under the former third pillar. It can thus be said that even in the absence of a framework for the regulatory agencies, a certain number of horizontal rules are already applicable to these agencies. This is certainly due to the Commission's efforts to implement since 2005 – on an internal basis as well as in inter-

⁴² Working document n°1 on the European Union and its agencies, Decentralised agencies and other bodies according to Article 185 of the Financial Regulation – First reflections and future prospects, 10.4.2007, p. 2.

⁴³ EP resolution on financial management and control of EU agencies, 23.4.2009, P6-TA(2009)0274, para. 5.

⁴⁴ Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to documents from the European Parliament, Council and Commission, OJ L 145, 31.5.2001, p. 43.

⁴⁵ Regulation (EC) No 45/2001 of the European Parliament and the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.

⁴⁶ See Regulations 1641/2003 to 1655/2003, OJ L 245, 29.9.2003.

institutional negotiations – the rules contained in the 2005 inter-institutional draft agreement (see above in this article). This article, dedicated to the Communication of March 2008 and its follow-up, does not address these questions in detail.

The founding regulations of regulatory agencies however contain rules which differ from one agency to another, in particular regarding the governance of the agencies. This is probably their major disadvantage, leading to the observation that the agencies have a non-unified and non-transparent system.

For example, the composition of *management boards* can differ from one agency to another. Most agency management boards comprise 28 members, one representative of the Member State and one representative of the Commission. These management boards are considered as heavy instruments of management because of the significant number of their members. Many other variants in the composition of the management board can be pointed to, such as agencies where the Commission is not represented at all.⁴⁷ In two cases only, the agency management board is of a limited size.⁴⁸ In certain cases, the EP has one or more representatives in the management board, with various statuses: representatives without the right to vote, independent expert, etc.⁴⁹

The rules for *appointing the director* of the agency are also varied: appointment by the Commission⁵⁰, appointment by the management board⁵¹ or appointment by the Council.⁵² In some cases, the selected candidate can be subjected to a hearing in front of the EP.⁵³ In the case of the European Asylum Support Office, the involvement of the EP in the appointment procedure of the agency's Director by the management board becomes increas-

⁴⁷ (Ex) first pillar agencies, OHIM (Office of Harmonization for the Internal Market) and CVPO (Community Plant Variety Office); (ex) third pillar agencies, EUROJUST (European Union's Judicial Cooperation Unit), EUROPOL (European Police Office) and CEPOL (European Police College).

⁴⁸ This is the case for EFSA (European Food Safety Authority) and the Gender Institute.

⁴⁹ E.g.: EEA (European Environment Agency), 'the European Parliament shall designate, as members of the management board, two scientific personalities particularly qualified in the field of environmental protection, who shall be chosen on the basis of the personal contribution they are likely to make to the Agency's work.'; EMEA (European Medicines Agency), 'two representatives of the European Parliament', ECHA (European Chemical Agency): 'two independent persons appointed by the European Parliament'.

⁵⁰ Example: CEDEFOP (European Centre for the Development of Vocational Training).

⁵¹ Example: EEA (European Environmental Agency).

⁵² Examples: OHIM (Office for Harmonisation in the Internal Market): the appointment is made on the basis of a list submitted by the management board; CVPO (Community Plant Variety Office): the appointment is made on the basis of a list submitted by the Commission after the opinion of the management board.

⁵³ Example: ENISA (European Network and Information Security Agency).

ingly important. The formula accorded for the nomination of the Director⁵⁴ included the following elements in the selection procedure:

'Before appointment (by the Management Board of the Office), the candidate selected by the Management Board shall be invited to make a statement before the competent committee or committees of the European Parliament and answer questions put by its or their members. After this statement, the European Parliament may adopt an opinion setting out its view of the selected candidate. The Management Board shall inform the European Parliament of the manner in which this opinion has been taken into account'.

This formula is new in the founding regulation of an agency and could usefully serve as a precedent. This can be considered as a natural institutional evolution and will allow making the director of the agency responsible to the budget authority, which delivers him/her the annual discharge on the agency budget.

The *work program* of the agency is also subject to varied rules. In some cases, it is adopted by the management board after the Commission's *opinion*,⁵⁵ *following consultation* with the Commission⁵⁶ or *with the agreement* of the Commission,⁵⁷ each one of these cases exhibiting specific procedural subtleties, which distinguishes them apart. In certain cases, the Commission is not consulted for matters concerning the work program.⁵⁸ In other cases, the founding regulation of the agency does not foresee a work program at all.⁵⁹

For the time being, there is no legal definition of what constitutes a regulatory agency, neither in primary nor in secondary law. The Commission had however put forward one definition in its 2005 inter-institutional draft agreement for a framework of the regulatory agencies.⁶⁰ For the first time, the Commission made an effort to define this concept as follows:

⁵⁴ See inter-institutional declaration, Position of the Council at first reading with a view to the adoption a Regulation of the European Parliament and the Council establishing a European Asylum Support Office, Statement of the Council's reasons, 25/02/2010, Document 16626/2/09 REV 2 ADD 1, annex 1: '(...) The formula agreed for the nomination of the Director of the future European Asylum Support Office (Article 28 of the basic regulation) (...) should be seen in the context of inter-institutional efforts to improve the governance and accountability of agencies.'

⁵⁵ Example: EASA (European Aviation Safety Agency).

⁵⁶ Example: European Institute for Gender Equality.

⁵⁷ Example: EUROFOUND (European Foundation for the Improvement of Living and Working Conditions).

⁵⁸ Example: ECDC (European Centre for Disease Prevention and Control).

⁵⁹ Example: OHIM (Office for Harmonisation in the Internal Market).

⁶⁰ See above, Com(2005)59 final.

'(...) the term 'European regulatory agency' (...) shall mean any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at a European level and help implement a Community policy. The agency shall be invested with a public service role. It shall help to improve the way in which Community legislation is implemented and applied throughout the European Union'.⁶¹

This definition included the following components:

- A legal personality
- An autonomous entity (*i.e.* it is managed by autonomous management bodies: a management board and director)
- An entity created by the legislator (secondary law)
- An entity taking part in the regulation of a European sector of activity
- An entity in charge of a public service mission.

'*In order to establish a working definition of regulatory agencies*',⁶² the 2005 draft inter-institutional agreement interestingly put forward two concepts, that of '*regulation*' and that of '*tasks to be devolved to the agencies*'. The concept of regulation was defined as follows:

'A distinction must be made between 'regulatory' activities and the adoption of legal rules or binding legal norms which are applicable across the board. 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 of 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.'

This definition was based on the distinction between the concepts of '*regulatory activities*' (or '*regulation*') and of '*adoption of legal rules or binding legal norms which are applicable across the board*' (or '*binding legal norms*'). The 'binding legal norms' would be the legal activity aimed at the adoption of general normative rules (*erga omnes*) with binding force. In contrast, the 'regulation' or 'regulatory activities' would be an activity with broader scope, the extent of which remains to be more precisely defined, and which would cover, besides the 'legal binding norms' in a strict sense, various measures, including those of an incentive nature such as those quoted in the definition of the draft of the inter-institutional agreement: co-regulation, self-regulation, recommendations, referral to the scientific authority, networking and pooling of good practices, evaluation of the application and implementation of the rules, etc. It can be noted that whilst the English text only uses the

⁶¹ Draft inter-institutional agreement, Article 3.

⁶² Draft inter-institutional agreement, para. 7.

term 'regulation' and ignores a second (different) wording for the second concept, the French and German versions use two different terms '*régulation/Regulierung*' and '*réglementation/Regelung*',⁶³ probably in order to be more precise and to account of two fully distinct concepts. It is likely that the terms '*régulation*' in French and '*Regulierung*' in German come from the English language '*regulation*'.

With a pragmatic intention, the project also gave a definition of the various tasks, which a regulatory agency can be in charge of:

'In keeping with the regulatory concept defined above, these agencies may be assigned one or more of the following tasks:

- a. adopting individual decisions which are legally binding on third parties;
- b. 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;
- c. creating a network of national competent authorities and organising cooperation between them in the interests of the Community with a view to gather, exchange and compare information and good practice.

Each European regulatory agency will also be responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information concerning its area of activity.'⁶⁴

It thus appears that each regulatory agency can be in charge of several different missions. An agency could, for example, have decision-making competences, provide scientific assistance to the Commission in the form of opinions, create a network of national authorities in order to facilitate their co-operation, and carry out – at a European level – the collection and analysis of information related to its field of action. This is why any classification of agencies based on their activity can be misleading or simplistic.

Concerning the nature of the decision-making powers devolved – when necessary – to a regulatory agency, the draft inter-institutional agreement carefully specified the limited nature of these powers and the essential function of support to the Commission regarding technical and scientific opinions:

'By accomplishing these tasks, the agencies will take an active part in exercising executive powers at Community level. Agencies which adopt individual decisions will be given the power to implement laws. However, this power

⁶³ See draft inter-institutional agreement 2005, para. 7.1. French version: '*La "régulation" doit être distinguée de la "réglementation" ou adoption de normes juridiques contraignantes de portée générale.*' German version: '*"Regulierung" ist zu unterscheiden von "Regelung" bzw. von der Annahme rechtlich bindender Normen mit allgemeiner Tragweite.*' Same distinction in other language versions.

⁶⁴ See draft inter-institutional agreement 2005, para. 7.2.

will be limited to applying the rules of secondary legislation to specific cases, in accordance with the institutional system and the case law of the Court of Justice⁶⁵ The other tasks allocated to the agencies must allow them to provide the Commission, in particular, with the experience and expertise it needs so that it can fully meet its responsibilities as the Community executive.⁶⁶

The 2008 Commission Communication does not give a new definition insofar as it uses already known (basic) principles. It provides a ‘negative’ legal definition, or in other words, a definition by exclusion, in indicating that the regulatory agency must be clearly distinguished from the executive agency and that certain public bodies created on the basis of secondary law are not agencies. The EP supports a much wider definition. The ‘agencies’ would be ‘*bodies set up by the Communities having legal personality*’ and moreover the EP adds that this covers ‘*the three categories of agency that fit this definition, namely decentralised agencies, executive agencies and other bodies*’.⁶⁷

The 2008 Commission’s Communication provides some elements which characterise the regulatory agency, by broadly referring to the conditions already defined in the 2005 draft inter-institutional agreement: sectoral statute, legal personality, financial autonomy and staff regulations, autonomous decision-making bodies, the various mandates of the agencies. These elements are studied below.

Sectoral regulation

The so-called regulatory agency is set up by a *sectoral regulation* defining its mandate and operating rules. For example, the European Environment Agency is based on Article 175 of the EC Treaty (new 192 Treaty on the Functioning of the European Union – TFEU), the legal basis of the European environmental policy. The European Food and Safety Authority is based on several legal bases of the Treaty, including Article 37 of the EC Treaty (new 43 TFEU – agricultural policy), Article 95 of the EC Treaty (new 114 TFEU – Internal market), Article 133 of the EC Treaty (new 207 TFEU – Common Trade policy) and finally Article 152§4b of the EC Treaty (new 168 TFEU – Public health). The European Maritime Safety Agency is based on Article 80§2 of the EC Treaty (new 100 TFEU – Transport). The European Chemical Agency is based on Article 95 of the EC Treaty (new 114 TFEU – Internal market). A certain number of European regulatory agencies are based on Article 308 of the EC Treaty (new 352 TFEU – Implicit competences), such as the European Centre for the Development of Vocational Training or the Translation Centre for the bodies of the European Union. Some recently

⁶⁵ Case 9-56 *Meroni* [13 June 1958] ECR1958, p. 11; Case 98/80 *Romano* [14 May 1981] ECR1981, p. 1241.

⁶⁶ See draft inter-institutional agreement 2005, para. 7.3.

⁶⁷ EP resolution on financial management and control of EU agencies, 23/04/2009, P6_TA(2009)0274, para 5.

created agencies – like the European Union Agency for Fundamental Rights – are also based on Article 308 of the EC Treaty (new 352 TFEU – Implicit competences). The great variety of agencies can therefore be noticed.

The agencies are very often created following a political initiative coming from either the Council or the EP. The creation of an agency could, for example, have met a need expressed with a view to achieving the internal market. This was the case for the Office for Harmonisation in the Internal Market and the Community Plant Variety Office. It might have been the result of crises. This was the case for the European Food and Safety Authority (EFSA) which was set up after the sanitary crisis involving *bovine spongiform encephalopathy* (BSE, or 'mad cow' disease).⁶⁸

The European Asylum Support Office, the new agency to be created in the field of justice and home affairs, is a recent example of such a request from the Council.⁶⁹ Other recent examples are the agencies under proposal, as a follow-up to the 2009 Commission's Communication about changes to the architecture of European financial supervision,⁷⁰ prepared by the Commission in order to remedy shortcomings in the area of financial supervision revealed by the financial crisis of 2008-2009. The impact assessment accompanying the proposals of regulations establishing these three agencies indicates that

'the Conclusions of the European Council of 18-19 June 2009 supported (...) the creation of a European Systemic Risk Board (...) and (recommended) a European System of Financial Supervisors, comprising of *three new European Supervisory Authorities*,⁷¹ be established (aimed at) upgrading the quality and consistency of national supervision, strengthening oversight of cross border groups through the setting up of supervisory colleges and establishing a

⁶⁸ The idea of creating an EC regulatory agency in the food sector had already been launched before the major food crises, in particular with references to the American model, the powerful *Food and Drug Administration*. See e.g. Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis' [2000] *Journal of Consumer Policy*, Kluwer, 23:227-255.

⁶⁹ See Com(2009)66 final Proposal for a regulation of the European Parliament and the Council establishing a European Asylum Support Office, explanatory memorandum of the proposal, p. 3: 'In the conclusions of its meeting in April 2008 the Justice and Home Affairs Council specifically asked the Commission to present proposals on this matter. (...) In late September 2008 the European Council adopted the European Pact on Immigration and Asylum and expressly agreed, 'to establish in 2009 a European support office with the task of facilitating the exchange of information, analyses and experience among Member States, and developing practical cooperation between the administrations in charge of examining asylum applications.' *This proposal seeks to respond to these requests from the Council and the European Council.*' (italics added by the author).

⁷⁰ Com(2009) 252 final.

⁷¹ Emphasis by the author.

single European rule book applicable to all financial institutions in the Single Market.⁷²

Legal personality

The Communication states that regulatory agencies have legal personality. As a result of this, in each Member State, they can exercise the widest possible legal powers accorded to legal persons under national legislation. In particular they may, among other things, acquire or dispose of immovable or movable property and be a party to legal proceedings.

Financial autonomy and staff regulations

The Communication states that regulatory agencies are financed by the Union's budget,⁷³ as well as in some cases, by receiving directly fees or payments.⁷⁴ The staff regulations of the European institutions are applicable *mutatis mutandis* to the staff employed in the agencies.

When the agencies are financed by the Union's budget, they comply with Article 185 of the Financial Regulation,⁷⁵ and the EP is responsible for the annual discharge of the budget. Within this framework, every year, the EP invites the directors of the agencies (or a certain number of them) to a specific budgetary hearing before making its decision.

Autonomous decision-making bodies of the agency

The Communication states that the agency is managed by its *management board* and a director. That makes it *an institutional entity independent* from the Commission and the other European institutions.

The Management Board makes sure that the agency implements the tasks that have been entrusted upon it in its founding regulation. It is the programming and monitoring body of the agency, *inter alia*, in charge of appointing and, if necessary, dismissing the director of the agency. This Board adopts the annual work program of the agency, the budget of the agency and defines its staff policy. It also adopts the annual activity report of the agency.

⁷² SEC(2009)1234 Commission Staff Working document, Impact assessment, p. 6.

⁷³ E.g., the European Training Foundation, the European Centre for Disease Prevention and Control or the European Railway Agency are 100% financed on the budget of the Union. See Preliminary Draft General Budget of the European Commission for the Financial Year 2010, eur-lex.europa.eu/budget/www/index-en.htm.

⁷⁴ E.g., OHIM, (*Office for Harmonisation in the Internal Market*) is auto-financed at 100%. See Preliminary Draft General Budget of the European Commission for the Financial Year 2010, eur-lex.europa.eu/budget/www/index-en.htm.

⁷⁵ Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 390, 30.12.2006, p. 1.

The director takes on the responsibility for the operational tasks assigned to the agency. He/She is *inter alia* in charge of preparing the annual work program, drafting the estimates of the agency's income and expenditure, its internal rules and those of the Management Board, its financial regulation and the deliberations of the Management Board.

The various mandates of the agencies

The Communication finally mentions that *the mandates of these agencies are widely diversified*. The examples of agencies mentioned above show that the agency's name does not have a direct connection with its mandate. A European regulatory agency can either be called 'agency',⁷⁶ 'office',⁷⁷ 'centre',⁷⁸ 'authority',⁷⁹ 'foundation',⁸⁰ 'observatory',⁸¹ 'institute',⁸² or 'college'⁸³ without that having any influence on its institutional nature and functions.

The Communication stresses the distinction between the decision-making agencies whose purpose, under their mandate, is to make individual decisions, and the non-decision-making agencies, that is to say, the others, which may perform different types of functions. In order to clarify the situation, the Communication proposes a classification of the agencies based on their key functions as defined in their founding regulations. This classification, based on the 'centre of gravity' of the agency's activity, allows the Commission to define five categories of agencies.

The Commission, by suggesting a classification in the 2008 Communication, draws on a previous discussion. Theoretical classifications of the agencies were already put forward according to different criteria. A classification had for example been provided in the report of the working group on the White Paper on Governance.⁸⁴

The Communication, with a clear pedagogical purpose, carries out a simplified classification of the agencies. Like any classification, the one proposed by the Commission in the Communication is to some extent, artificial or arbitrary in character. This is confirmed by the fact that certain agencies appear in several categories. However, the will of the Commission seems to be that of giving an overall picture of the agencies by grouping them according to an easily identifiable criterion, as follows:

⁷⁶ E.g. European Railway Agency.

⁷⁷ E.g. Community Plant Variety Office or European Asylum Support Office.

⁷⁸ E.g. European Centre for Disease Prevention and Control.

⁷⁹ E.g. European Food Safety Authority.

⁸⁰ E.g. European Centre for the Development of Vocational Training.

⁸¹ E.g. European Monitoring Centre for Drugs and Drug Addiction.

⁸² E.g. Gender Institute.

⁸³ E.g. European College of Police.

⁸⁴ See report by the working group 3a (Improving the exercise of executive responsibilities):

'Establishing a framework for decision-making regulatory agencies' June 2001, p. 7.

Agencies	Centre of gravity of agencies' activities
OHIM (Office for Harmonisation in the Internal Market), CVPO (Community Plant Variety Office) EASA (European Aviation Safety Agency) ECHA (European Chemical Agency)	Decision-making agencies (4 agencies)
EMSA (European Maritime Safety Agency) EFSA (European Food and Safety Authority) ERA (European Railway Agency)) EMA (European Medicines Agency)	Agencies providing direct assistance to the Commission and, where necessary, to the Member States, in the form of technical or scientific advice and/or inspection reports (4 agencies)
EAR (European Agency for Reconstruction) GSA (GALILEO – European satellite radio-navigation programmes) CFCA (Community Fisheries Control Agency) FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) EUROJUST (European Union's Judicial Cooperation Unit) EUROPOL (European Police Office) CEPOL (European Police College)	Agencies in charge of operational activities (6 agencies)
CEDEFOP (European Centre for the Development of Vocational Training) EUROFOUND (European Foundation for the Improvement of Living and Working Conditions) EEA (European Environment Agency) ETF (European Training Foundation) EMCDDA (European Monitoring Centre for Drugs and Drug Addiction) EU-OSHA (European Agency for Safety and Health at Work) ENISA (European Network and Information Security Agency) ECDC (European Centre for Disease Prevention and Control) FRA (European Union Agency for Fundamental Rights) European Institute for Gender Equality	Information agencies (10 agencies)
CDT (Translation Centre for the Bodies of the European Union)	Services to other agencies and institutions (1 agency)

The 2008 Communication makes it clear that certain agencies cover important activities in other fields, other than their 'centre of gravity' as indicated in the table drawn up by the Commission. This is the case for EASA (European Aviation Safety Agency), ECHA (European Chemical Agency), which have important activities regarding scientific opinions, and for EMSA (European Maritime Safety Agency), which carries out important operational activities, in particular concerning the fight against maritime

pollution. This is normal, taking into account the fact that almost all the agencies have various activities foreseen in their mandate. The discussion is still open to the possibility of finding an appropriate classification for agencies. Some proposals for classifications of the agencies under different criteria have appeared in a recent report dealing with the evaluation of the EU decentralised agencies (see below in this article). This report points out the difficulties of clustering agencies in homogeneous groups. As many agencies implement a wide range of distinct activities, the report considers it easier to compare homogeneous *clusters of activities*, instead of homogeneous *clusters of agencies*.⁸⁵

The Commission qualifies all the agencies referred to in the 2008 Communication as being a 'regulatory agency'. In this sense, the term 'regulatory' (not defined in the text except by the indirect reference to the various mandates of these different agencies) acquires in this context a very broad meaning, covering several different activities: decision-making activities, activities involving the provision of scientific and technical assistance to the Commission and/or to the Member States, as well as operational and information activities. Until the 2008 Communication, the term 'regulatory agency' did not have such a broad meaning. The agencies of the (former) second pillar were traditionally excluded from the group of other agencies based on the (former) first pillar of the EC Treaty because they depended entirely on the Council. The agencies included in the (former) third pillar of the EC Treaty were never qualified as 'agencies', nor as 'regulatory agencies'.⁸⁶

The EP expressed recently that it does not agree with this new meaning given by the Commission of the terms 'regulatory agencies' and 'considers the term 'regulatory agency', which is increasingly used as a generic term, misleading, as not all decentralised agencies have regulatory tasks'. The EP therefore prefers the term 'decentralised agencies' as a general term for the traditional agencies, because they 'are set up by the European legislator for a variety of reasons such as the provision of certain services, the employment of specialist expertise and the carrying-out of regulatory and monitoring tasks'.⁸⁷

⁸⁵ See Ramboll, Euréval, '*Matrix Evaluation of the EU decentralised agencies in 2009*', (December 2009, volumes 1 and 3, Report for the European Commission). See e.g. 'agencies having comparable activities', volume I, p. 31.

⁸⁶ The 3 agencies of the (former) third pillar deliberately bear names, which do not include the term of 'agency'. See the most recent example with the new European Asylum Support *Office*. In the text of the founding regulations of the Justice and Home Affairs agencies (EUROPOL, European Police Office, EUROJUST, European Union's Judicial Cooperation Unit and CEPOL, European Police College), they are qualified as 'bodies' (instead of 'agencies').

⁸⁷ EP resolution on financial management and control of EU agencies, 23/04/2009, P6_TA(2009)0274, para 6.

The classification proposed by the Commission calls for some examination.

- Decision-making agencies in charge of adopting individual decisions having legal effects on third parties.

These agencies, all belonging to the (former) first pillar of the Treaty, are regarded as the most powerful in terms of mandate. Indeed, they may make decisions upon requests from companies with a view to obtain *e.g.* a Community trademark (OHIM), a navigability certificate (EASA) or an authorization for a chemical product (ECHA). However these agencies have limited decision-making powers in legal terms. They are not entitled to take measures of a general scope (having *erga omnes* effects) and do not have any discretionary power. They make their decisions on the basis of criteria precisely defined by the legislator in their founding regulations. The 2002 Communication had given suggestions on this subject by specifying that:

‘In view of the considerations in connection with both the purely technical nature of the agencies and, more generally, the principles on which the Community legal order is based, the White Paper on European Governance has placed further restrictions on the decision-making agencies’ scope for action, authorising them to intervene only in areas where a single public interest predominates and in areas where the agencies are not called upon to arbitrate on conflicting public interests, exercise any powers of political appraisal or conduct any complex economic assessments. Neither can they be delegated responsibilities for which the EC Treaty has conferred direct power of decision on the Commission (for example in the field of competition or, *mutatis mutandis*, infringement proceedings under Articles 226 to 228 of the EC Treaty).’⁸⁸

The same concern had been expressed in a President Barroso’s Communication⁸⁹ to the college, at the time of the policy debate on agencies which took place in August 2007.

⁸⁸ Com(2002)718 final, p. 9.

⁸⁹ SEC(2007)1049/2, The Agencies of the European Union (Orientation debate) ‘The roles of the regulatory agencies are very diverse – the result of setting them up to meet specific needs on a case-by-case basis. Some can adopt individual decisions with a direct effect; some provide technical expertise on which the Commission can then base a decision; some focus rather on networking between national authorities. The European Court of Justice has confirmed limits to the ‘decision-taking’ end of this spectrum – agencies cannot be granted with the power to adopt general regulatory measures, but only that of taking individual decisions in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions and without a genuine discretionary power. Moreover the agencies cannot be entrusted with powers which may affect the responsibili-

•Agencies providing direct assistance to the Commission and if necessary, to the Member States, in the form of technical or scientific advice, the best known example probably being that of the EFSA. All these agencies fall into the (former) first pillar. The agencies included in this category have significant powers although they are not decision-making agencies within the meaning of the first category (see above). Indeed, in certain cases, the Commission is obliged to seek the opinion of the agency before making its decision. This is the case, for example, for decisions concerning the marketing of food products containing genetically modified organisms, for which the opinion of the EFSA must be sought beforehand by the Commission. The Commission remains in this case the political decision-making authority, as the decision to be made has implications going beyond a mere appreciation of a technical or scientific nature, such as is carried out by the agency.⁹⁰

•Agencies in charge of operational activities. The 2008 Communication does not give a definition of the term 'operational activities'. Nevertheless, it should probably be understood, in view of the agencies included in this category, as referring to bodies which are in charge of carrying out and managing activities and field operations. For example, the case of FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union), or that of EAR (European Agency for Reconstruction) could be pointed out. Under this category, the Commission also includes three agencies of the (former) third pillar, EUROPOL (European Police Office), EUROJUST (European Union's Judicial Cooperation Unit) and CEPOL (European Police College).

•Agencies in charge of the collection and dissemination of information. Many agencies, all from the (former) first pillar, fall into this category. These

ties which the Treaty has explicitly conferred on the Commission (for example, acting as the guardian of Community law).

⁹⁰ See e.g. recent Commission decision about the Genetically Modified Amflora potato. Health and Consumer Policy Commissioner Dalli noted: '(...) These decisions are based on a series of favourable safety assessments carried out over the years by the European Food Safety Authority (EFSA)'. Commission press release IP/10/222 (2/3/2010) and EFSA favourable opinion of 11/06/2009. See also case-law on opinions adopted by EFSA as part of the assessment procedure of GMO's, e.g. cases 397/06, 312/06, 311/06 of 17/06/2008 (EFSA opinion non-actionable measure). See, in contrast to the Commission's positive assessment of the EFSA's procedure, the opinion of Advocate general Geelhoed, in case C-154/04 *Alliance for Natural Health*, e.g. para. 85: 'In short, this procedure, in so far as it may exist and in so far as it may deserve this title, has the transparency of a black box: no provision is made for parties to be heard, no time-limits apply in respect of decision-making; nor, indeed, is there any certainty that a final decision will be taken. The procedure therefore lacks essential guarantees for the protection of the interests of private applicants'.

agencies carry out important work of data collection at a European level and publish information reports on various subjects falling into their area of activity. However they probably have a lower visibility level than some of the other agencies included in the above mentioned categories, which are regularly the subject of media attention.

•A last category only includes one agency, the CDT (Translation Centre for the Bodies of the European Union). This agency is a very specific one, as it was especially created to offer its translation services to the European institutions and bodies.

2.3 European Regulatory Agencies vs. National Agencies

It may be tempting to compare European regulatory agencies with agencies created at a national level.⁹¹ Despite the likelihood of bringing some elements of reflection, there is a risk attached to this exercise. At an institutional level, national agencies can take various forms from one Member State to another and this can cause confusion when comparing these agencies. Their modes of creation, operation and control differ from one Member State to another, as well as from one sector of activity to another within the same Member State, with some exceptions in (rare) countries where a unified status for agencies does exist (*e.g.* in UK). The ways in which these national agencies are independent or subordinate, with respect to official national authorities, and in particular ministries, can appear to be of very varied nature. In addition, the scope of these national agencies' mandate can be limited or, on the contrary, very large according to the nature of the responsibilities that the national legislator wishes to allocate to them.

The best that could be done is probably to compare some national agencies of several countries in a given sector of activity, in order to illustrate the important differences with the agency created in the same sector at European level. Within the limited framework of this article, the example of the protection of the environment is briefly studied hereunder at a European level and in certain Member States. From these examples, it is important to highlight that the mandates and the institutional features of the national agencies are very different from those of the European agencies. In particular, the national agencies appear very often to be subordinated to governmental authorities. In contrast, the European agencies are fully independent bodies from the EU institutions, this being probably one of their main features, having originally been intended to be independent centres of European expertise offering external, independent and reliable expertise to EU institutions. The national agencies often have large and far-reaching

⁹¹ See *e.g.* Werner Jann, Tobias Bach, Julia Fleischer, Thurid Husted, *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*. (Study European Parliament, 25/01/2008).

mandates, sometimes including implementation and enforcement powers, which could never be the case for a European agency in view of the *Meroni* doctrine (see above). Another striking feature is that the number of staff in the national agencies is very high compared to the limited number of staff in the European agencies.

- *The European Environment Agency (EEA)* was created in 1990.⁹² It provides independent information on the environment that feeds into EU and national policymaking. It provides in particular a wide range of information and assessments on the state of the environment and environmental trends, including assessments of economic and social factors putting pressure on the environment, policies and their effectiveness, and possible future trends and problems. The EEA is also responsible for development and coordination of the European environment information and observation network (Eionet), composed mostly of national environmental agencies and ministries, though it involves also some 300 lower-level institutions. Currently, the EEA has 32 member countries. The revision, in 2009, of the founding regulation of this agency did not bring any changes to its mandate nor to its operating process. The agency remains an information agency without being entrusted with new functions.⁹³ EEA has a staff of 185 people (2010).

- A few examples of national environmental agencies are studied here below. It is however interesting to point out that the existence of national agencies in the field of environment is not a rule, but rather an exception. *E.g.* there is no national environmental agency in Italy, Spain, Portugal (except for waste), Greece, Netherlands, Belgium, Luxemburg and Poland.

- *United Kingdom: the Environment Agency for England and Wales*⁹⁴ is an executive non-departmental Public Body responsible to the Secretary of State for Environment, Food and Rural Affairs and an Assembly Sponsored Public Body responsible to the National Assembly for Wales. Similar authorities exist in Scotland and Northern Ireland (*e.g.* SEPA: Scottish Environmental Protection Agency). The Environment Agency for England and Wales is built on a decentralised organisation. It is divided into 22 national services and

⁹² Regulation (EC) No 401/2009 of the European Parliament and the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network (Codified version) – OJ L 126, 21.5.2009, p. 13.

⁹³ The EEA founding regulation is now, from a technical point of view, codified. Codification at the European level is a (consolidation) procedure that consists of repealing the acts concerned and replacing them with a single act containing the unchanged substance of those acts. Codification does therefore not involve any substantive amendment of the acts concerned. See Inter-institutional Agreement of 20/12/1994 on an accelerated working method for official codification of legislative texts, OJ C 102, 4.4.1996, p. 2.

⁹⁴ See <http://www.environment-agency.gov.uk>.

into 8 regions, each of which has a regional office. The agency has 13,500 employees (2010). The agency is the main adviser to the Government in the field of environment. It has important competencies in the implementation and enforcement of the national and regional environmental legislation and it is responsible for regulating businesses that would potentially pollute the environment in England and Wales. In particular, it has competencies in criminal matters, which is rather unique in Europe. The agency regularly produces a report entitled *Spotlight on Business*, and has in that regard an interesting policy with respect to the environmental performance of businesses and the scale of environmental crimes and the penalties for successful prosecutions. The report underlines the main trends regarding environmental performance and follows a 'name and shame' policy by quoting the name of the businesses involved in environmental offences. Furthermore, the agency encompasses a wide range of environmental competences by, *inter alia*, controlling energy intensive industries such as power generation and steel production, oil refining, major chemical works, control of effluents to rivers and groundwater, waste management processes involving treatment, disposal and recovery of waste and hazardous waste, and illegal fish movements. The agency is also the competent authority for the implementation of the important Council Regulation on the supervision and control of shipment of waste.⁹⁵ Links between the agency and the Minister for the environment are strong: the Minister for the environment appoints all the members of the management board, its chairman as well as its chief executive, who is in charge of the daily management of the agency.

•*Germany: Umweltbundesamt (Federal Environment Agency – UBA)*⁹⁶ was founded in 1974. 'For man and the environment' is the mission statement of the UBA. The UBA is Germany's central federal authority on environmental matters and is divided into five divisions plus a central division (administration). It has a staff total of around 1430 persons, working on 13 sites, of which seven are measuring stations of the UBA's own air monitoring network. It has important competencies in scientific support and information, working on this subject in an interdisciplinary way. The UBA also plays a role in the implementation of national environmental legislation. It has however no enforcement competencies. Its key statutory mandates are to provide scientific support to the Federal Government (*e.g.* the Federal Ministries for Environment, Health, Research, Transport, Building and Urban Affairs), implementation of environmental laws (*e.g.* emissions trading, authorisation of chemicals, pharmaceuticals, and plant protection agents) and information to the public about environmental protection. The

⁹⁵ Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, OJ L 30, 6.2.1993, p. 1.

⁹⁶ See <http://www.umweltbundesamt.de>.

president of the UBA is appointed by the President of FRG, who does not have important constitutional powers, but has a representative role. This is why the independence of the UBA, with respect to the political parties, can be guaranteed. Germany is a federal state that is made up of 16 *Länder* (states belonging to the federation). The *Länder* have important environmental competencies and there are environmental agencies in each *Land*, whose competencies are essentially concentrated on the implementation of the environmental legislation, contrary to the UBA, which has powerful scientific services. These agencies have no enforcement competences.

• *France: Agence de l'Environnement et de la Maîtrise de l'Energie (Environment and Energy Management Agency – ADEME⁹⁷)*. ADEME is an industrial and commercial public agency, working under the joint supervision of the French Ministry for Ecology, Energy, Sustainable Development and Spatial Planning, and the Ministry for Higher Education and Research. It has three central departments in Angers, Paris and Valbonne, 26 regional branches, three representative offices in France's overseas territories and one office in Brussels. It has 820 employees. The ADEME does not have implementation nor enforcement competencies of the national environmental legislation. It has scientific and technical competences as well as expertise and advice solutions. In this regard, it plays an important role supporting small and medium-size businesses. Finally, it gathers the results of experiments on site in order to stimulate the dissemination of good practices. It works in various environmental areas such as in air pollution prevention, limitation of waste production, energy control, promotion of renewable energies, treatment of polluted soil, reducing noise pollution and environmental management.

• *Romania: Agenția Națională pentru Protecția Mediului (National Environmental Protection Agency – ANPM⁹⁸)*. The ANPM was founded in 2003, before Romania joined the EU. It is a specialised authority of the public central national administration, which falls under the responsibility of the Ministry of Environment and Forests. It has important competencies in scientific support and coordinates the implementation (e.g. authorisations and permits) of environmental strategies and policies at a national, regional and local level. It has no enforcement competencies. It is responsible for the management of the national reference laboratories for air, waste, noise, vibrations and radioactivity. 8 regional environmental protection agencies also exist, working under the close supervision of the national agency, with a view to improving the implementation of environmental legislation. These agencies have no enforcement competence. The agency is run by a president who has the rank of Secretary of State, together with a vice-president who

⁹⁷ See <http://www2.ademe.fr>.

⁹⁸ See <http://www.anpm.ro/>.

has the rank of Subsecretary of State. It has some 2000 employees (national agency including regional agencies).

3 Aspects of the Relaunch of an Inter-Institutional Reflection Relating to the Agencies: Results Obtained Since 2008

Now, two years after the Commission's 2008 Communication, it is interesting to see whether the Commission succeeded in relaunching the inter-institutional dialogue. The inter-institutional working group was set up one year after the Communication, in March 2009 but with regards to other aspects, the results look quite poor.

3.1 Constitution of an Inter-Institutional Working Group

The 2008 Communication called for the creation of a suitable forum to restart the discussion on the rules aimed at providing a global framework for regulatory agencies. As it was not possible to negotiate the 2005 draft inter-institutional agreement, new solutions had to be found. The Commission therefore invited the EP and the Council to join in the debate discussing the agencies' position in European governance. An inter-institutional working group (IIWG) would allow the identification of concrete solutions to be implemented in order to improve the governance of the agencies and to bring more transparency and coherence into the system, which would be applicable to them.

Following the adoption of the 2008 Communication, the Commission's President, Barroso sent a letter to the Presidents of the Council and Parliament⁹⁹ in order to draw their attention to the Communication, the need for an inter-institutional relaunch relating to the agencies and the urgency with which the IIWG needed to be created.

The IIWG was created in March 2009 and began its work at high-level meetings bringing together representatives of the Council, the EP and the Commission. A press release¹⁰⁰ reported the launch of this initiative by recognizing the need to move on in reflection, particularly on the 'horizontal' element of the agencies' structure:

'On March 10, representatives of the three institutions met for the first time as an inter-institutional Working Group on regulatory agencies. The group agreed that the objective should be to agree on a common approach on agen-

⁹⁹ Letter of President Barroso to President Pottering, European Parliament and to President Janša, Council, 07/05/2008.

¹⁰⁰ Commission's press release IP/09/413, 18/03/2009, EU starts discussions on European Agencies.

cies between the three Institutions. Participants were committed to deliver its conclusions as soon as possible. The group will address issues such as funding, budget, supervision and management. In its upcoming discussions, the group will take into account the results of the ongoing evaluation of the European decentralised agencies commissioned by the Commission. The evaluation findings are expected by the end of this year (2009)'.

The EP referred to the creation of the IIWG in its resolution of 19/03/2009.¹⁰¹

A short inter-institutional statement was adopted showing the agreement of the Council, the EP and the Commission to launch the IIWG as a follow-up to the Commission's 2008 Communication, recognising the important role of Regulatory Agencies in implementing the EU policies and the need to make them a more effective tool in this respect. Since then the IIWG has met several times at a technical level, with its secretariat being operated by the Commission. The results were not made public. Delays were probably encountered due to the appointment of the new EP representatives for the group.¹⁰² The Commission's Vice-President, Ševčovič will take the lead on behalf of the new Commission, appointed in February 2010.¹⁰³ A new meeting at a political level is due to take place in 2010 and a report on the results would then be published shortly after. It is possible that the final results of the work carried out by the IIWG will be made available in 2011 or 2012.

It is unfortunate that the first results of the IIWG were not made public. In the 2009 resolution, adopted in the specific context of the budgetary discharge exercise, the EP requested specific technical aspects to be dealt with by the IIWG, especially to:

'consider the reasons behind budget implementation problems, in particular the lack of a top-down approach concerning the agencies' budgets and staffing, (the question) why compliance with recruitment and procurement rules is a recurrent problem in many agencies, lessons learned from the specific experiences of the European Anti-Fraud Office related to agencies, how the implementation of policies by agencies can be made more cost efficient, for example by grouping the administrative functions of various agencies together, how the Commission's different support functions and services could be made more reactive in order to respond quicker to the agencies' needs.'

¹⁰¹ EP resolution, 19/03/2009, A6-0148/2009, para.B.

¹⁰² EP delegation to the IIWG at political level: Ms Grässle (EPP), Ms Haug (S&D), Ms Jensen (ALDE), Ms. Lambert (GREENS), Mr. Chichester (ECR) and Mr. Messerschmidt (EFD).

¹⁰³ See Speech of President of the European Commission, 17/02/2010: 'A New Treaty, a New Commission: A Revised Framework for EU Regulatory Agencies', Commission DORIE database.

The work of the IIWG could be focused on more broadly, in a bid to consolidate the horizontal aspects that are already included in various founding regulations, considering them as standard clauses in these regulations, in financial matters for example, and provisions concerning staff, access to documents and data protection – just to quote a few.

This work might also relate to an inter-institutional definition of the regulatory agency, which is necessary if the institutions want to agree on a general system to be designated for these European bodies. Various elements could be taken into account. For instance, in its 2008 Communication, the Commission maintained its traditional stance, in particular with regard to the mandate and definition of the powers of a decision-making EU agency (see above in this article). However, it could be deliberated upon as to what extent the current decision-making agencies can – in certain cases – carry out difficult technical arbitrations, implying a certain discretionary margin in making a decision. More generally, during the discussions on the White Paper on governance, it was asked whether it could be envisaged taking on US agencies, who have regulatory and binding powers, as a model for creating European agencies. The question was addressed by taking into account the *Meroni* jurisprudence and the balance of power between the institutions defined in the Treaties and other bodies created by secondary law. It will be interesting to see whether the debates within the IIWG will raise the question again.¹⁰⁴

It could also be interesting to evaluate the influence that certain agencies, who do not have decision-making powers but who share opinions to the Commission, exert in the decision-making process of the Commission. For example, the EFSA (European Food and Safety Authority) gives opinions in a consultative manner, but the Commission cannot rule if it does not seek the opinion. Moreover, if the Commission wants to depart from this opinion, it must motivate its decision. Insofar as the creation of the agency largely transferred the expertise on the subject from the Commission to the agency, it may be difficult – for scientific reasons – for the Commission to act contrary to the opinion expressed by the EFSA. Other examples of agencies contributing their opinions could be studied. It would be useful, for example, to assess how the young decision-making agency ECHA (European Chemical Agency) carries out the arbitration between possible divergent scientific reports evaluating a chemical substance.

It could also, for example, be useful to assess the evolution towards powers that may be considered as important, to be found now with some

¹⁰⁴ See e.g. Damien Geradin, 'The Development of European Regulatory Agencies: What the EU should learn from American experience', *Columbia Journal of European Law* 2006; G. Cananea (dir.), *European Regulatory Agencies* (Groupe d'Etudes Politiques européennes (SEP-GEPE), Collection ISUPE, 2004); Xenophon Yatanagas, 'Delegation of Regulatory Authority in the EU, the Relevance of the American Model of Independent Agencies' (Jean Monnet Working paper 3/01 2001).

newly created agencies, such as the Agency for Co-operation among Energy Regulators (ACER), the Body of European Regulators for Electronic Communications (BEREC) and the European Asylum Support Office (EASO).¹⁰⁵ These new agencies are now far from the agencies that were meant to be 'mere' European expertise centres, created in order to gather information at EU level and to then on advise the Commission and the European institutions. These agencies, even if they conform to the traditional definition within the meaning of the *Meroni* jurisprudence, are entrusted with powers enabling them to make the Member States move towards better implementation of their national legislation. ACER will be a new advisory and decision-making agency, which will ensure that regulatory functions are performed by national regulatory authorities in accordance with the *acquis* concerning common rules for the internal market in electricity and in natural gas, and making sure that these rules are properly coordinated and, where necessary, completed at European level. BEREC was created within the reform of the EU telecom rules. The primary role of BEREC will be coordination. But it will also be in a strong position to assist the Commission, as it will for example give opinions on cross-border disputes and will have a right of veto over certain important decisions made by national authorities. The future EASO will have a large mandate that will aim to facilitate and strengthen practical cooperation between Member States on asylum and help to improve the implementation of a common European asylum system. Moreover, in the Justice field of European action, other interesting evolutions have recently occurred. The competencies of Europol and Eurojust were reinforced in 2009. The new Eurojust Decision¹⁰⁶ has been adopted to further enhance the operational effectiveness of Eurojust and to ensure that it becomes more operational. The same trend can be observed with the new Europol Decision which aims at improving Europol's functioning and enlarging its mandate, in particular, for Europol to assist the competent authorities of the Member States in combating new forms of serious crime. The Commission has also recently made a proposal aimed at the reinforcement of the FRONTEX competences, by, *inter alia*, ensuring more efficient coordination, implementation and evaluation of joint operations made by Frontex.¹⁰⁷

¹⁰⁵ Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, 25/02/2010, Document 16626/2/09 REV 2. The founding regulation is due to be formally adopted during spring 2010.

¹⁰⁶ Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4.6.2009, p. 14-32.

¹⁰⁷ Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union – Com(2010)61 final.

These trends and evolutions towards enlarged mandates and competencies for regulatory agencies have been reinforced since the financial crisis of 2008 – which led to the Commission’s proposal to create three European supervisory authorities¹⁰⁸ to replace the existing European supervisory committees.¹⁰⁹ Symbolically speaking, the term ‘authority’ is used to denote these future agencies. This term is new in the world of regulatory agencies. Up until now, this term had been avoided,¹¹⁰ as it was regarded by the Member States as implying a much too important transfer of competence to the European level. The three supervisory authorities will have to contribute to improving the internal market’s operating framework, in particular by means of a high level of regulation and supervision. Certain aspects of the new authorities’ mandate can be regarded as being very innovative. In particular they foresee the setting-up of mechanisms allowing pressure to be brought to a national supervisory authority which behaves in a manner considered to be contrary to EU law. These mechanisms, foreseen in the Commission’s proposals, include the adoption – by the ‘authority’ – of a decision, binding the national authority which it supervises.

3.2 Withdrawal of the Draft Inter-Institutional Agreement

With the negotiations turning out to be unfruitful, and faced with the need for progress on the file, the Commission, while regretting this failure, had announced in the 2008 Communication the withdrawal of the draft inter-institutional agreement in order to allow the inter-institutional discussions to start again. The Commission hoped that a discussion would finally take place. It indicated its open-mindedness regarding the nature of the future instrument:

¹⁰⁸ Com(2009) 501 final, Proposal for a Regulation of the European Parliament and of the Council establishing a European Banking Authority, Com(2009) 502 final, Proposal for a Regulation of the European Parliament and of the Council establishing a European Insurance and Occupational Pensions Authority and Com(2009) 503 final, Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority.

¹⁰⁹ See Speech of the President of the European Commission, 17/02/2010: ‘*A New Treaty, a New Commission: A Revised Framework for EU Regulatory Agencies*’, see in Commission DORIE databases. ‘The crisis has clearly demonstrated the weaknesses of the current regulatory framework and supervisory arrangements for financial institutions. In this context, the need for a fundamentally new structure for financial supervision in Europe has proved to be more than apparent. The Commission proposed such a structure (...) with the creation of the three supervisory authorities for banks, insurance and securities markets’.

¹¹⁰ Exception: EFSA (European Food and Safety Authority) but this agency has no decision-making power.

'The Commission remains open to alternatives to the route of an inter-institutional agreement, whether legally binding or not. The overriding objective should be a political understanding'.¹¹¹

Nevertheless, the Commission states that the principles included in the project are still valid and that, for the moment, they will be continued to be used as rules of reference in its internal policy regarding agencies. Until the adoption of rules relating to the agencies, defined jointly in an inter-institutional way, '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.'

In its 2009 'Legislative and Work Program', the Commission withdrew the draft inter-institutional agreement by indicating that

'In a Communication adopted in March, the Commission announced its intention to withdraw this proposal (i.e. the draft inter-institutional agreement) and presented the steps it plans to take in order to make progress towards a common framework. The Commission considers that an invitation to an inter-institutional working group should lead to a common approach for agencies, as an alternative to proposing an inter-institutional agreement. The present proposal therefore serves no purpose and has become obsolete.'¹¹²

3.3 Launching of a 'Meta-Evaluation'

The Commission announced in the 2008 Communication that it intends to launch a thorough analysis of the regulatory agencies. This large-scale exercise will enable it to make a comparison of the different agencies and to evaluate the various aspects of the agencies that were envisaged as an institutional system. This is why this kind of exercise is sometimes described as a *meta-evaluation*, consisting of an evaluation of the *raison d'être* of the agencies and the use of these decentralized bodies as institutional instruments of Union policy.

A first meta-evaluation had already been carried out in 2003.¹¹³ This exercise turned out to be useful and resulted in a certain number of recommendations aimed at improving the system. However this exercise had been of a relatively limited nature, to the extent that it was restricted to the study of the evaluation reports of the existing agencies. Moreover, it is not certain

¹¹¹ Communication, p. 10.

¹¹² Com(2008)712 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Legislative and Work Programme 2009, Acting now for a better Europe (Volume 1), p. 24.

¹¹³ 'Meta-evaluation on the Community Agency system', Budget Directorate General Evaluation Unit, Final Report, 15/09/2003.

that all the recommendations of this meta-evaluation were followed, as noted in a report by the Court of Auditors in 2008.¹¹⁴

At the time the 2008 Communication was adopted, the Commission was carrying out an evaluation – of a limited nature – of the agencies, following the joint statement of July 2007¹¹⁵ adopted during the budget discharge procedure. The Commission then provided the EP with information, based on the results of the existing evaluations of several agencies. It showed that the agencies generally functioned in a satisfactory manner.¹¹⁶

Another limited evaluation, also in progress at the time of the adoption of the 2008 Communication, conducted by an external consultant, was made public at the end of 2008.¹¹⁷ This exercise was carried out on the basis of the evaluation reports available for 26 agencies. The exercise did not really bring new elements to the discussion regarding the place of regulatory agencies in the European institutional landscape. The report itself underlined that the results obtained were unequal because ‘not all agencies have been evaluated, and the reviewed evaluations do not cover all sub-questions (according to the Commission’s terms of reference) and the agencies are quite diverse in nature, purpose and organization, which makes it difficult to draw cross-cutting conclusions’. The study was thus restricted, once again touching on very general terms, as many other documents had done before, general questions such as ‘questioning the rationale of creating and maintaining agencies’, ‘ensuring an adequate level of coherence within EU policies’, ‘dealing with the inconvenience of remote location’, ‘assessing productivity’ and ‘governing agencies on the basis of achieved results and impacts’.

The large-scale exercise announced by the Commission in the 2008 Communication should, hopefully, allow a general horizontal examination of the agencies as a whole. The report ‘*Evaluation of the EU decentralised agencies in 2009*’ is now available.¹¹⁸ Finalised at end of 2009, it was released at the beginning of 2010. No doubt it will usefully feed into the work of the IIWG and provide an important input to the reflection on the future of EU agencies. The meta-evaluation covers extensive work and is based on substantial field work, including visits to 26 agencies. The purpose of the assignment was to evaluate aspects such as: the relevance of the agencies’ creation, the relevance of their activities in relation to the Union’s work, principles of good governance in the supervision of the agencies, coherence

¹¹⁴ See Special Report 5/2008 ‘*The European Union’s agencies: Getting results*’, Court of Auditors

¹¹⁵ Council Common Declaration (ECOFIN), document DS 605/1/07 rev 1, 13/07/2007

¹¹⁶ See letter of 10/10/2007 of Mrs. Grybauskaite, member of the Commission to the President of the EP Budget Committee and its appendices.

¹¹⁷ Meta-study on decentralised agencies: cross-cutting analysis on evaluation findings – Final report – September 2008 – Eureval.

¹¹⁸ ‘*Evaluation of the EU decentralised agencies in 2009*’. Contact for information about the report on the consultant’s website can be found at: <http://www.ramboll-management.com/services.aspx>. The report is unfortunately not yet on-line on the Commission website.

between activities and objectives of the different agencies and within EU policy objectives, efficiency and cost-effectiveness in carrying out activities; and the adequacy of the monitoring mechanisms for assessing performance.

Many areas are explored by this meta-evaluation. It is impossible to review all of them in the limited constraints of this article. Nevertheless, some elements can be highlighted. Interestingly enough, from a general point of view, the report points out that a substantial number of agencies have a mandate centred on the provision of harmonised information and cross-cutting evaluations at a European level. Other agencies however have a mandate centred on the implementation of EU policies, by providing specialised services, dealing with individual applications for registration or certification, and facilitating cooperation between Member States. In this respect, sometimes new tasks, which were not accomplished before the agencies began to be entrusted with them, have been allocated to agencies. More often, a transfer of responsibilities to the agencies occurred from either the Commission or the Member States. The report argues that these transfers do not appear to have relaxed the constraints on the Commission's resources and did not really allow the Commission to concentrate on its core tasks. This was due to its ever-rising scope and amount of work in EU policies. This is an interesting conclusion, in view of the fact that the creation of the agencies was envisioned with a view to, *inter alia*, alleviate the Commission of highly specialised tasks, these being considered as not belonging to its core-tasks centred on political decision-making.

The report refers to the main questions that will be dealt with by the IIWG, relating to the creation of agencies, governance, efficiency and performance, and control and accountability of the agencies. The conclusions present a few elements that can be considered as innovative. In particular,

- The report proposes the creation of an Inter-Agency Audit and Performance Committee that would be responsible, *inter alia*, for discussing internal audit reports and developing comparative performance information. This high level committee would involve a small group of top-level administrators nominated by the chairpersons of the agencies' Boards. Amongst other tasks, the committee would have the responsibility of developing common performance criteria and indicators and undertaking joint benchmarking exercises.¹¹⁹ The report proposes some interesting performance criteria linked to the agencies' activities, such as for example 'dissemination of information', 'inputs in policy-making', 'participation of Member States', 'Member States commitment to take action', 'credibility of delivered advice', 'absence of contested decisions or assessments'.¹²⁰ The quality of performance and evaluation information would be systematically referred to in the

¹¹⁹ See report, volume I, pp. 46 et seq.

¹²⁰ See report, volume I, p. 31.

discharge procedure, with a view to improving the agencies' accountability before the EP and Council, and branches of the budgetary authority.¹²¹

- The report insists on the fact that administrative burdens affect the performance of agencies negatively. In particular, it advocates for more flexibility for agencies in managing their budgetary and staff resources. This would imply more flexibility in applying the Staff Regulation and the Financial Framework Regulation (see above) applicable to the agencies, taking in particular into account the size of the agencies. This additional flexibility would be accompanied by reinforced checks and balances between the director and the board.¹²²
- The report insists on the problems linked to the location of the agencies. It has often been argued from the outset and creation of the very first agencies, that the decentralisation of these agencies in the Member States would bring Europe closer to its citizens. The report accurately points out that, in some cases, less accessible locations for agencies can affect the results and performance of these agencies because of the time and travel costs involved and because of the difficulties for these agencies to attract the best skilled staff in Europe. Moreover the report points out the responsibility of the Member States in choosing the location for the agencies and the need to require full host country support for existing agencies and new agencies to be created. The report suggests that the Council could require detailed proposals from host country candidates, in order to make transparent comparisons between the available proposals and hold host countries accountable for keeping their promises.¹²³

3.4 Moratorium on the Creation of the Agencies

In its 2008 Communication, the Commission committed to not proposing the establishment of new agencies before having the results of the meta-evaluation, which was to be launched further to the Communication. This goes hand in hand with the intention to relaunch – on new bases – the inter-institutional discussion insofar as meta-evaluation would make it possible to consider the challenges of the creation and operation of the agencies.

Nevertheless, the 2008 Communication indicated that the negotiations in progress over proposals for establishing agencies would be brought to a successful conclusion. That was indeed the case for the two agencies which were the subject of existing proposals when the Communication was presented in March 2008: the agency in the telecoms sector and the agency

¹²¹ See report, volume I, p. 49

¹²² See report, Volume I, p. 49 (*inter alia*).

¹²³ See report, volume I, pp. 20 et seq.

in the energy sector, whose founding regulations have since been adopted (BEREC and ACER).

The 2008 Communication also announced that two agencies could be proposed in the area of Justice, Freedom and Security. These two proposals were indeed put forward by the Commission during 2009,¹²⁴ the first being related to the creation of an agency in the field of the right to asylum and the second related to the creation of an agency intended to manage large-scale IT systems within the area of Justice, Freedom and Security (for example, systems related to the 'Schengen area'). The founding regulation of the agency related to the right to asylum is expected to be formally adopted in April 2010.¹²⁵

The self-imposed moratorium was broken after the financial crisis which brought Europe and much of the rest of the world into recession. This led the Commission to rapidly make proposals in order to allow a better control of the operation of the internal market, with particular regards to financial matters.¹²⁶ The Commission pleaded *force majeure* in adopting its proposals, breaking the 2008 moratorium.¹²⁷

Two years after the moratorium was announced in the 2008 Communication, three new regulations setting up agencies (telecoms/energy/asylum) have now been adopted and three new proposals aiming at the creation of new agencies are under negotiation. Moreover, there seems to be on-going discussions within the Commission, and in particular the Directorate General for the Environment, over the establishment of a waste agency to strengthen the implementation of EU waste legislation. As part of this reflection, a feasibility study has been launched to outline the costs and benefits of such 'a dedicated agency at EU level to tackle the underlying problems of poor implementation and enforcement of European waste legislation.'¹²⁸

¹²⁴ Com(2009)66 final, Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office and Com(2009) 293, Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

¹²⁵ Position of the Council at first reading with a view to the adoption of the Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, 25/02/2010, Document 16626/2/09 REV 2.

¹²⁶ See supra, Com(2009) 501 final, Com(2009) 502 final, and Com(2009) 503 final.

¹²⁷ Speech (Feb. 2010) of Commission's President Barroso 'the Commission has persistently reiterated the added value of the agencies' work, and has not shied away from proposing new agencies when circumstances called for it'.

¹²⁸ See Milieu, Ambiendura, FFact 'Study on the feasibility of the establishment of a waste implementation agency', 07/12/2009 under http://www.i4cense.org/sites/default/files/report_waste_dec09.pdf and Commission press release IP/10/113 (1/2/2010) 'Dedicated EU body needed to ensure enforcement of European waste law, says Commission study'.

3.5 Re-examination of the Internal Procedures of the Commission

In the 2008 Communication, the Commission committed itself to re-examine the internal procedures governing its relationships with the agencies. The first initiative of the Commission on the matter was announced in the 2008 report of the Court of Auditors relating to the Union's agencies¹²⁹. The Commission announced its intention to create an internal network of the Commission representatives on the management boards of the Agencies in order to be able to coordinate, in a better way, their positions in various agencies, and in particular that concerning horizontal questions of governance. The possible measures of internal rationalization were however unfortunately not made public by the Commission.

The Commission also announced its intention to re-examine the methodology regarding the impact assessment for agencies. The Commission had already developed a detailed methodology¹³⁰ in terms of general impact assessment, but it seemed in the Communication that it wished to develop specific criteria for the creation of regulatory agencies. The impact assessments for agencies in the Justice, Freedom, Security area, for which proposals were adopted in 2009 and after the Communication had taken place, were carried out according to the traditional methodology of the Commission.¹³¹ This was the same for the impact assessment carried out quickly following the crisis and responding to urgent requests of the European Council, for the adoption of the three proposals aiming at the creation of supervisory authorities for the operation of the internal market (one single impact assessment for the three proposals) by the Commission.¹³²

Conclusion: European Regulatory Agencies and Treaty of Lisbon

The Treaty of Lisbon¹³³ includes several new provisions of relevance for agencies. The new Treaty foresees that the general formula '*institutions, bodies, offices and agencies*' will be present in the Treaty as of now, whereas in the past only words such as '*institutions or bodies*' could be found. The 'agencies' (a term used in the English version of the Treaty) con-

¹²⁹ See Special Report 5/2008 '*The European Union's agencies: Getting results*', Court of Auditors (answers of the Commission).

¹³⁰ See http://ec.europa.eu/governance/impact/key_en.htm.

¹³¹ See Sec(2009)153, Impact assessment 'European Asylum Support Office' and Sec(2009)836, Impact assessment 'Agency for the operational management of large-scale IT systems in the area of freedom, security and justice'.

¹³² See impact assessment for the 3 proposals, SEC(2009)1234.

¹³³ OJ C 115, 09/05/2008.

sequently acquire an existence in primary law. This new formula, putting on an equal footing different legal entities without however defining them, may entail complications in the future when trying to clarify real borders between these concepts, as some of them may be considered as very close and possibly overlapping.

The new Treaty does not give a definition of the concept and only states that the agencies are created by secondary law. Article 263 of the Treaty of Lisbon (ex Article 230 TEC) confirms that agencies are created by secondary law, by making reference in a specific context to secondary law, through references to acts setting up agencies: 'Acts setting up bodies, offices and agencies of the Union, may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them'. This constitutes a simple consolidation of the existing law and case-law but the indirect formulation used in the Article 263 and the absence of a definition of the concept clearly show the difficulties the negotiators of the Lisbon Treaty may have encountered when drafting the new provisions of the Treaty.

Also of interest is the fact that the jurisdictional protection has been extended to the agencies through the revision of Articles 230 TEC¹³⁴ (review of legality of legislative acts), 232 TEC¹³⁵ (failure to act) and 234 TEC¹³⁶ (preliminary rulings). This will allow full control of the agencies' acts, and clearly shows that they are now fully recognised as participating in European governance and belong to the European institutional legal system, as they do not escape jurisdictional control over their acts and activities, in the same way as institutions.

A certain number of horizontal provisions, like access to documents or data protection to name but a few, are expressly extended to agencies. Again, this not only confirms the former practice of secondary law by anchoring it in primary law, but also reinstates how agencies now fully belong to the institutional system of the Union and are thus subjected to the general standards used to govern this system.

Lastly, the third pillar disappears altogether in the new Treaty. This will have consequences on the agencies of the (former) third pillar. These agencies are now intended to have a new status modelled on that of the (former) first pillar agencies, and will no longer operate in an intergovernmental

¹³⁴ See Article 263 TFEU, in particular (the Court of Justice) 'shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'.

¹³⁵ See Article 265 TFEU, in particular 'this article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act'.

¹³⁶ See Article 267 TFEU, in particular (the Court of Justice) 'shall have jurisdiction to give preliminary rulings concerning (...) the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union'.

manner. It is indeed expected that the EP, the Council and the Commission, within the boundaries of their respective competences, will endeavour to adopt legal documents replacing or modifying the existing acts of the third pillar. This is to be conducted in cases where suitable and to be implemented for the duration of five years.

Within the new legal framework of the Treaty of Lisbon, the first results of the works of the inter-institutional group will soon – it is hoped – be available. This should make it possible to finally define a clear and coherent framework for the regulatory agencies in addition to clarifying the real role that the institutions, Commission, Council and the EP have with regard to the way they create and regulate these European bodies. The sheer number of agencies and their various sectors of activity show that these agencies are becoming key players in the European institutional landscape, including in areas where the creation of such agencies could not have been envisaged only 10 or 15 years ago, such as in the asylum sector or in the regulation of the energy sector.

ANNEX; List of European regulatory agencies; Founding Regulations – Ex First Pillar

	Agencies	Seat	Establishing legal acts	Legal basis
1	CEDEFOP (<i>European Centre for the Development of Vocational Training</i>)	Thessaloniki/ Greece	Regulation (EC) 337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training, OJ L 039, 13/02/1975, p. 1 (as subsequently amended)	308 TEC (new 352 TFEU) Implicit powers
2	EUROFOUND (<i>European Foundation for the Improvement of Living and Working Conditions</i>)	Dublin/Eire	Regulation (EEC) 1365/75 of the Council of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions, OJ L 139, 30/05/1975 p. 1 (as subsequently amended)	308 TEC (new 352 TFEU) Implicit powers
3	EEA* (<i>European Environment Agency</i>)	Copenhagen/ Denmark	Regulation (EEC) 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, OJ L 120, 11/05/1990, p. 1 ¹ (as subsequently amended)	175 TEC (new 192 TFEU) Environment

4	ETF (<i>European Training Foundation</i>)	Turin/Italy	Regulation (EEC) 1360/90 Council Regulation (EEC) No 1360/90 of 7 May 1990 establishing a European Training Foundation, <i>OJ L 13, 23/05/1990, p. 1²</i>	308 TEC (new 352 TFEU) Implicit powers
5	EMCDDA (<i>European Monitoring Centre for Drugs and Drug Addiction</i>)	Lisbon/Portugal	Regulation (EEC) 302/93 of 8 February EMCDDA 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction, <i>OJ L 036, 8/02/1993, p. 1³</i>	308 TEC (new 352 TFEU) Implicit powers
6	EMA (<i>European Medicines Agency</i>)	London/UK	Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency <i>OJ L 136, 30.4.2004, p. 1-3⁴</i>	308 TEC (new 352 TFEU) Implicit powers
7	OHIM (<i>Office for Harmonisation in the Internal Market</i>)	Alicante/Spain	Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark <i>OJ L 011, 14/01/1994, p. 1 (as subsequently amended)</i>	308 TEC (new 352 TFEU) Implicit powers
8	EU-OSHA (<i>European Agency for Occupational Safety and Health</i>)	Bilbao/Spain	Regulation (EEC) 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work, <i>OJ L 216, 20/08/1994, p. 1 (as subsequently amended)</i>	308 TEC (new 352 TFEU) Implicit powers
9	CPVO (<i>Community Plant Variety Office</i>)	Angers/France	Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights (see Art. 4), <i>OJ L 227, 01/09/1994, p. 1 (as subsequently amended)</i>	308 TEC (new 352 TFEU) Implicit powers
10	CdT (<i>Translation Centre for the bodies of the EU</i>)	Luxembourg/ Luxemburg	Regulation (EC) No 2965/94 of 28 November 1994 setting up a Translation Centre for bodies of the European Union, <i>OJ L 314, 07/12/1994, p. 1 (as subsequently amended)</i>	308 TEC (new 352 TFEU) Implicit powers

11	EAR (<i>European Agency for Reconstruction</i>) N.B. This agency is now closed.	Thessaloniki/ Greece	Regulation (EC) 2667/2000 of 15 November 1999 amending Regulation (EC) No 1628/96 relating to aid for Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia, in particular by the setting up of a European Agency for Reconstruction, <i>OJ L 299, 20/11/1999, p. 1. 1(as subsequently amended)</i>	308 TEC (new 352 TFEU) Implicit powers
12	EFSA (<i>European Food Safety Authority</i>)	Parma/Italy	Regulation (EC) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, <i>OJ L 031, 01/02/2002, p. 11(as subsequently amended)</i>	37 TEC (new 43 TFEU) Agriculture 95 TEC (new 114 TFEU) Internal Market 133 TEC (new 207 TFEU) Common Commercial Policy
13	EMSA (<i>European Maritime Safety Agency</i>)	Lisbon/Portugal	Regulation (EC) 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, <i>OJ L 208, 05/08/2002, p.1 1(as subsequently amended)</i>	80(2) TEC (new 100 TFEU) Transport
14	EASA (<i>European Aviation Safety Agency</i>)	Colon/Germany	Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, <i>OJ L 79, 19.3.2008, p. 1-49</i>	80(2) TEC (new 100 TFEU) Transport
15	ENISA (<i>European Network and Information Security Agency</i>)	Heraklion/ Greece	Regulation (EC) 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, <i>OJ L 077, 13/03/2004, p. 1⁵</i>	95 TEC (new 114 TFEU) Internal Market ⁶

16	ECDC (<i>European Centre for Disease Prevention and Control</i>)	Stockholm/ Sweden	Regulation (EC) 851/2004 of the Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control, <i>OJ L 142, 30/04/2004, p. 1</i>	152(4) TEC (new 168 TFEU) Public Health
17	ERA (<i>European Railway Agency</i>)	Lille-Valenciennes/France	Regulation (EC) 881/2004 of the European ERA Parliament and of the Council of 29 April 2004 establishing a European railway agency (Agency Regulation), <i>OJ L 164, 30/04/2004, p.1 (as subsequently amended)</i>	71(1) TEC (new 91 TFEU) Transport
18	European GNSS Supervisory Authority GALILEO	Brussels/Belgium	Regulation (EC) 1321/2004 of 12 July 2004 on the establishment of structures for the management of the European satellite radio- navigation programmes, <i>OJ L 246, 20/07/2004, p.1 (as subsequently amended)</i>	308 TEC (new 352 TFEU) Implicit powers
19	FRONTEX (<i>European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU</i>)	Warsaw/Poland	Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, <i>OJ L 349, 25/11/2004, p.1</i>	62(2)a TEC (new 77 TFEU) and 66 TEC (new 74 TFEU) visa, asylum, immigration
20	CFCA (<i>Community Fisheries Control Agency</i>)	Vigo/Spain	Regulation (EC) 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy, <i>OJ L 128, 21/05/2005, p. 1</i>	37 TEC (new 43 TFEU) Common Agricultural Policy
21	ECHA (<i>European Chemicals Agency</i>)	Helsinki/Finland	Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, <i>OJ L 396 30/12/2006, p. 1</i>	95 TEC (new 114 TFEU) Internal Market

22	European Gender Institute	Vilnius/Lithuania	Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, <i>OJ L 403, 30/1/2006, p. 9–17</i>	13(2) TEC (new 19 TFEU) Non-discrimination 141(3) TEC (new 157 TFEU) Equal opportunities and treatment
23	FRA (<i>Fundamental Rights Agency</i>)	Vienna/Austria	Regulation (EC) No 168 /2007 of the Council of 15 February 2007 establishing a European Union Agency for Fundamental Rights, <i>OJ L 53, 22.2.2007, p. 1–14</i>	308 TEC (new 352 TFEU) Implicit powers
24	ACER (<i>Agency for the Cooperation of Energy Regulators</i>)	Ljubljana/Slovenia	Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, <i>OJ L 211, 14.8/2009, p.1-14</i>	95 TEC (new 114 TFEU) Internal market
25	BEREC Office (<i>Office supporting the Body of European Regulators for Electronic Communications</i>)	Awaiting decision	Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, <i>OJ L 337, 18.12.2009</i>	95 TEC (new 114 TFEU) Internal market

Founding Regulation – Ex Second Pillar

	EU Agencies (2d pillar)	Seat	Establishing legal acts	Legal Basis
1	ISS (<i>Institute for Security Studies</i>)	Paris/France	Council Joint Action 2001/554 CFSP of 20 July 2001 on the establishment of a European Union Institute for Security Studies, <i>OJ L 200, 25/07/2001, p.1</i>	14 TEU (new 28) CFSP
2	EUSC (<i>European Union Satellite Centre</i>)	Torrejón de Ardoz/Spain	Council Joint Action 2001/555 CFSP of 20 July 2001 on the establishment of a European Union Satellite Centre, <i>OJ L 200, 25/07/2001, p. 5</i>	14 TEU (new 28) CFSP
3	EDA (<i>European Defence Agency</i>)	Brussels/Belgium	Council Joint Action 2004/551 CFSP of 12 July 2004 on the establishment of the European Defence Agency, <i>OJ L 245, 17/07/2004, p. 17</i>	14 TEU (new 28) CFSP

Founding Regulations – Ex Third Pillar

	EU Agencies (3d pillar)	Seat	Establishing legal acts	Legal Basis
1	EUROPOL (<i>Office européen de police</i>)	The Hague/ Netherlands	Council Decision of 6 April 2009 establishing the European Police Office (Europol), OJ L 121, 15.5.2009, p. 37–66 ⁷	31 TEU (new 82,83,85 TFEU) Police and judicial cooperation in criminal matters
2	EUROJUST (<i>European Body for the Enhancement of Judicial Co-operation</i>)	The Hague/ Netherlands	Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4.6.2009, p. 14–32	31 TEU (new 82,83,85 TFEU) Police and judicial cooperation in criminal matters
3	CEPOL (<i>European Police College</i>)	Bramshill/UK	Council Decision 2005/681 JHA, of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA, OJ L 256 of 01/10/2005, p. 63.	30(1)c TEU (new 87,88 TFEU) Police and judicial cooperation in criminal matters

Proposed Agencies / Under Negotiation

	Proposed agencies	Seat	Commission Proposal
1	EASO (<i>European Asylum Support Office</i>)	Valletta /Malta	Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office – Com(2009)66 final ⁸
2	Agency for the operational management of large-scale IT systems in the area of freedom, security and justice	Awaiting decision	Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice – Com(2009)293 final
3	European Banking Authority	Awaiting decision	Proposal for a Regulation of the European Parliament and of the Council establishing a European Banking Authority – Com(2009)501 final

4	European Insurance and Occupational Pensions Authority	Awaiting decision	Proposal for a Regulation of the European Parliament and of the Council establishing a European Insurance and Occupational Pensions Authority – Com(2009)502 final
5	European Securities and Markets Authority	Awaiting decision	Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority – Com(2009) 503 final

Agencies under revision

	Agency	Commission Proposal
1	FRONTEX (<i>European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU</i>)	Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union – Com(2010)61 final

Annex Footnotes

- 1 Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network (Codified version), OJ L 126, 21.5.2009, p. 13-22.
- 2 Regulation (EC) No 1339/2008 of the European Parliament and of the Council of 16 December 2008 establishing a European Training Foundation (recast), OJ L 354, 31.12.2008, p. 82-93.
- 3 Regulation (EC) No 1920/2006 of the European Parliament and of the Council of 12 December 2006 on the European Monitoring Centre for Drugs and Drug Addiction (recast) OJ L 376, 27.12.2006, p. 1-13.
- 4 The original regulation was repealed.
- 5 Regulation (EC) No 1007/2008 of the European Parliament and of the Council of 24 September 2008 establishing the European Network and Information Security Agency as regards its duration (recast), OJ L 293, 31.10.2008, p. 1-2.
- 6 The legal basis of ENISA was challenged before the Court of Justice by the United Kingdom, and was finally confirmed. See Case 217/04 *United Kingdom of Great Britain and Northern Ireland against the European Parliament and Council of the European Union* ECR.
- 7 Council act based on Article K.3 of the Treaty on European Union of 26 July 1995 drawing up the Convention on the establishment of a European Police Office (Europol Convention), OJ C 316 of 27.11.1995, p. 2.
- 8 This proposal is due to be formally adopted during spring 2010, following the adoption of the position of the Council at first reading with a view to the adoption of a Regulation of the European parliament and of the Council establishing a European Asylum Support Office, 25/02/2010, Document 16626/2/09 REV 2.