REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 5, NR. 2, 61-91, PARIS LEGAL PUBLISHERS © 2012

The Influence of 'Regulatory Agencies' on Pluralism in European Administrative Law

Merijn Chamon*

Academic Assistant, European Institute, Ghent University (Jean Monnet Centre of Excellence)

Abstract

The pluralism in European administrative law is the result of the rule of indirect (rather than direct) administration in the execution of EU law. However, it has already been acknowledged for some time that the classic dichotomy between direct and indirect administration in the execution of European law no longer adequately describes the current factual and legal situation. Today, the EU increasingly relies on 'hybrid' forms of 'shared' and 'mixed' administrations to deliver its policies in the field. European agencies are such a form of 'hybrid' administration where the EU legislator sought a more uniform application of its legislation but, at the same time, did not find it expedient to rely on the classic solution of direct administration. Different EU agencies have been granted varying powers to 'help implement' EU law. Often they are empowered to 'help' the Member States in this way. At the same time the Boards of the EU agencies are dominated by the Member States' administrations, bringing these national actors together in an EU forum, begging the question of what effect different types of EU agencies have on the pluralism in European administrative law.

1 Introduction

Because the European Union has adopted the German model of *Vollzugsföderalismus* in the execution of EU policies, EU harmonisation has not been as pervasive in national administrative law as it has been in other fields of law. Apart from the 'semi-harmonised' general rules and principles of administrative law there remains an important procedural autonomy for Member States, resulting in pluralism in the indirect administration of EU law. Yet, in recent years the implementation of EU policy cannot be simply classified as direct or indirect administration anymore, since forms of joint administration are emerging as well. One of these forms may be witnessed in the increasing *agencification* of the EU administration. So far, thirty so called 'regulatory agencies' have been established (excluding those in the CFSP and JHA), formalising and institutionalising the cooperation between national administrators

* This paper was originally presented at the Second REALaw Research Forum: Pluralism in European Administrative Law on 3 February 2012 in Groningen. I would like to thank the discussant and the participants for their valuable comments. The usual disclaimer applies.

and regulators. Because of the important role of national administrations within agencies, the European Commission presents agencies as a form of decentralised governance. At the same time, agencies also introduce a strengthened notion of hierarchy in the EU's relations with national administrations, begging the question how agencies influence pluralism, specifically the objectives sought by it, in the European administrative sphere. Are agencies, given their 'European' status, a threat to this pluralism? Or are they, given the important position of national administrations within these bodies, an instrument of the administrations and a means of joint problem-solving in a pluralistic setting? A first step towards answering these questions will be taken by looking at the different roles EU agencies fulfil, with special attention to the recently established agencies.

2 The Notion of Pluralism

Since this contribution deals with the question how the 'Pluralism in European Administrative Law' is influenced by the existence and functioning of EU agencies it is useful to first share some thoughts on the notion of pluralism, although the debate of the study of legal pluralism as such will not be entered into.[1] Pluralism obviously refers to a multiplicity and seems to carry in it a positive connotation. Furthermore, the existing pluralism in European administrative law is a logical result of the development of national administrative law predating an ever increasingly pervasive European integration combined with the adopted model of *Vollzugsföderalismus*.[2] This also explains why the 'pluralism in administrative law' should be understood in the broadest sense possible as it encompasses the plurality in procedural, material and organisational law. Notwithstanding the above noted positive connotation and the 'naturalness' of the administrative diversity in the EU, the question whether this plurality should at all be maintained seems a valid one.

---

1 On this debate see M. Davies, 'Legal Pluralism', in: Cane and Kritzer (eds), *The Oxford handbook of empirical legal research* (New York: Oxford University Press 2010); B. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' [2008 30/3] *Sydney Law Review*.

2 As regard the issue of pluralism, the German experience cannot be used as a guide since the administrative law of the *Länder* and the *Bund* is largely unified. For instance, the Law of Administrative Procedure (*Verwaltungsverfahrensgesetz*) applies to the administration of both levels of government, unless the *Länder* have adopted specific laws of administrative procedure. The *Länder* have indeed used this option but their own laws on procedure replicate the general *Verwaltungsverfahrensgesetz*. See H. Maurer, *Allgemeines Verwaltungsrecht* (München: Beck 2006), 104-13. The Law on Administrative Courts (*Verwaltungsgerichtordnung*) also applies to both the *Länder* courts (*Verwaltungsgerichte* and *Oberverwaltungsgerichte*) and the Federal Administrative Court (*Bundesverwaltungsgericht*). Furthermore, procedures for revision of judgments of the *Oberverwaltungsgericht* are possible before the *Bundesverwaltungsgericht*, also linking both jurisdictions.

It should be noted that no position is taken on the intrinsic value of any kind of pluralism, in fact it is assumed pluralism is neither intrinsically recommendable nor should it be repudiated. Pluralism may be the former if it serves a higher good but neither should it be forcefully upheld if no such greater good results. In the present case, such pluralism may even be a threat to a greater good. As EU law aims to establish a level playing field and national administrations are made responsible for implementing the common rules and securing the level playing field in practice, the risk of the higher objective not being achieved as a result of divergent approaches at the national level does not seem too speculative. Indeed, this is also the reason why, in the absence of full harmonisation of administrative law, there still is a framework of 'semi-harmonised' general rules and principles of administrative law. The reason why further harmonisation in this field has not come about is probably a political issue, yet pluralism under review here may also be justified under EU law from a legal perspective.

First, pluralism is an expression of the internal diversity of the EU which the Treaties mandate the EU to take account of and respect when it develops policies in the social,[3] educational,[4] cultural (including the trade in cultural products)[5] and environmental[6] spheres. In a general sense this diversity is also protected by the principle of subsidiarity, but of course only in so far as the competences in question are not exclusive competences under Article 3 TFEU. The pluralism of European administrative law may be also furthermore justified from an economic perspective in so far as there is a dialogue between the different national actors from which learning processes on best practices may grow. If such experiences on best practices are exchanged and later adopted and implemented by the other national actors, there is no doubt that existing pluralism in European administrative law should be valued, since it would enable the EU to better achieve its objectives as that pluralism offers a means with which to select the most successful or efficient solution to common problems.[7]

Looking at this pluralism from the perspective of subsidiarity also shows how far such a justification goes. As Barents noted,[8] the subsidiarity principle entails two tests following the Treaty of Lisbon, firstly the EU may only act when 'the objectives of the proposed action cannot be sufficiently achieved by the Member States' and when 'by reason of the scale or effects of the proposed ac-

3 See Article 152 TFEU.
4 See Article 165 TFEU.
5 See Article 167 TFEU & Article 207 (4) a TFEU.
6 See Article 191 TFEU.
7 From an economic perspective, pluralism also allows for regulatory competition, if such competition leads to a 'race to the top' rather than a 'race to the bottom' it would also justify pluralism.
8 R. Barents, *Het Verdrag van Lissabon, Achtergronden en commentaar* (Deventer: Kluwer 2008), 388.

tion, [its objectives may] be better achieved at Union level'.[9] This would seem to suggest that as the process of EU integration goes forward and the objectives of EU policies become more ambitious, the scope remaining for meaningful pluralism between the Member States could diminish. At the same time this is not an inevitability either, as long as pluralism does not stand in the way of sufficiently achieving the objectives. Furthermore, the advantages pluralism may unlock through learning processes may also be taken into account in what is essentially an economic efficiency test.

3 The Regulatory Agency[10]

Before entering the debate of pluralism in European administrative law it is necessary to make a short remark on the concept of the regulatory agency as used in the title of this contribution. The term regulatory agency is used here because it is the term used by the Commission to denote the bodies currently under review. The Commission has used this term to differentiate these bodies from the executive agencies,[11] which therefore fall outside the scope of this contribution. The reason for this is quite evident, EU executive agencies are established by the Commission itself to assist in the direct administration of EU programmes, whereas pluralism in European administrative law is the result of the EU's *Vollzugsföderalismus* and the rule of indirect administration.

The use by the Commission of the concepts of regulatory and executive agencies is however quite misleading, as the notion of 'regulatory' invokes the suggestion of a body which has been granted 'rule-making' powers. This is of course not the case. Although important powers have been granted to agencies which *i.a.* has them participate in rule making, the formal power to adopt generally binding norms has not yet been attributed to any agency. Apart from being misleading, the Commission's representation of agencies is also inconsistent. Thus, after having distinguished the regulatory agencies from the executive agencies, the Commission makes a further distinction in the former category between decision-making regulatory agencies and executive regulatory agencies.[12] For the remainder of this contribution reference will therefore be made to EU agencies to denote these bodies. These EU agencies are permanent independent bodies under EU law, established by the EU legislator, which have been endowed

9 See Article 5 TFEU.

10 For an overview of all EU agencies under review here see the list in annex.

11 European Commission, *The operating framework for the European Regulatory Agencies*, COM (2002) 718 final, p. 3.

12 *Ibid.*, p. 8.

with their own legal personality.[13] Because the CFSP is still a distinct 'pillar' in the EU's legal architecture, the agencies active in this field are excluded.[14] Although the former third pillar has been completely absorbed by the former first pillar, the EU agencies in police and judicial cooperation will also be excluded, again because of their distinct character.[15]

The EU agencies are then at first sight an anomaly in executive federalism[16] (or *Vollzugföderalismus*) in the EU. They are undoubtedly EU bodies but cannot simply be considered as direct administration since the Treaties provide that direct administration is done through either the Commission or the Council. Furthermore, the administrative boards of these agencies are dominated by representatives of the national member states[17] making them an advanced form of cooperation between the national administrations.[18] This is also why the question of the effect of these agencies on pluralism in European administrative law is relevant, EU agencies are not just bodies at European level in which a supranational logic is dominant.

An important part of the rationale for their creation is the need for administrative integration, as the Internal Market came about through legislative harmonisation, the question on the implementation of this legislation also arose.[19] Because the EU relies on the Member States for the implementation of EU policies, controlling the (sufficiently) uniform implementation of common legislation is not evident. This is different from other federal polities, such as the United States or Belgium where the federal government uses its own ad-

---

13 S. Griller & A. Orator, 'Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine' [2010 35/1] 35 *ELR* 1, 7.

14 These are the following agencies: the European Union Satellite Centre, the European Union Institute for Security Studies and the European Defence Agency.

15 These are the following agencies: Europol, Eurojust and the European Police College. The distinctive character of these agencies lies in the distinctive character of the actors they bring together: law enforcers and the judiciary are quite atypical compared to national ministries and agencies.

16 K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community' [1991 28/1] *CML Rev.*, 15.

17 Only in the Boards of EFSA and EIGE does not every Member State have its own representative. In the EFSA the Board is composed of 14 members appointed by the Council in consultation with the Parliament following a proposal by the Commission (see Article 25 of Regulation (EC) 178/2002, [2002] *OJ* L 31/1). In the EIGE the Board is composed of 19 members, 18 of which are appointed by the Council following proposals from the Member States and one member by the Commission (see Article 10 of Regulation (EC) 1922/2006, [2006] *OJ* L 403/9). In the Administrative/Management Boards of the ACER, EBA, ESMA, EIOPA, a same observation may be made but within these agencies the task of setting out the work of the agency is granted to a Board of Regulators (ACER) or Board of Supervisors, where every Member State does have its representative.

18 A. de Moor-van Vugt, 'Netwerken en de europeanisering van het toezicht' [2011/3] SEW. *Tijdschrift voor Europees en economisch recht*, 100-2.

19 M. Shapiro, 'The Institutionalization of European Administrative Space', in: Stone Sweet, Sandholtz & Fligstein (eds), *The Institutionalization of Europe* (Oxford: Oxford University Press 2001), 95.

ministration, responsible for the execution of federal legislation.[20] Obviously in such polities, the risk of federal legislation not being implemented uniformly across the federation's component members is much lower. Because this risk is more real for instance in the German Federal Republic, the German Basic Law, or *Grundgesetz* (GG), itself provides for different mechanisms to ensure a proper implementation of federal law by the *Länder*.[21] The GG also foresees a number of ways in which federal legislation may be implemented, notwithstanding that federal legislation will normally be implemented by the *Länder* in their own right.[22] Implementation of federal legislation can also be done by the *Länder* on federal commission[23] or by the federal administration itself.[24]

Ziller notes that the rules on administrative oversight by the federal authorities are much more detailed in the GG than they are in the EU Treaties, the latter only containing a general obligation for the Member States to respect their obligations under the Treaties.[25] What is more, there is no equivalent in the EU Treaties to the implementation on federal commission or assignment as there is in the GG.[26] Because the EU Treaties lack such rules the choice on how to implement legislation becomes dichotomic without many formal options in between the two extremes: implementation by the Commission (or Council) or the Member States themselves. EU agencies then become pragmatic solutions, striking a delicate balance between the exigency of the *effet utile* of EU law and the respect for the sovereignty of the Member States in line with the principle of executive federalism, which may be regarded as a specific application of the principle of subsidiarity. Lafarge noted in relation to the development of the four freedoms, but there is no reason to restrict this insight on EU legislation on the four freedoms, that each time an EU regime is upgraded, administrative cooperation is revised in order to become more effective and bring national administrations closer together.[27] Still, according to Lafarge this means the higher the development of an EU regime, the higher administrative cooperation between Member States should be. Of course this is phrased rather vaguely, the important question in relation to pluralism in European administrative law

---

20 In the case of Belgium this was no conscious choice but the logical result of a devolution process turning the unitary Belgian state into a federal state.

21 See Article 84 GG.

22 See Article 83 GG.

23 See Article 85 GG.

24 See Article 86 GG.

25 J. Ziller, 'Multilevel governance and executive federalism: comparing Germany and the European Union', in: Birkinshaw & Varney (eds), *The European Union Legal Order after Lisbon* (Alphen Aan Den Rijn: Wolters Kluwer 2010), 270-1.

26 *Ibid.*, 272-4.

27 F. Lafarge, 'Administrative Cooperation between Member States and Implementation of EU Law' [2010 16/4] *European Public Law*, 600.

being when the increasingly 'greater cooperation' between Member States ceases to be simple 'cooperation'.

Although EU agencies, when seen as a form of administrative integration, primarily bring together national Member State administrations it should be noted, for the sake of completeness since this will not further touched upon in this contribution, they may also affect the national administrations of third states. First, third states may participate in a number of EU agencies, subject to the conclusion of an agreement to this end with the EU, if they apply the *acquis* relevant to the agency. This applies to the states that are parties to the European Economic Area, but also to candidate countries which further helps the latter in adapting their administrations to the exigencies of EU membership. Second, there are those EU agencies with operational tasks, which also has them cooperate with third countries. A good example of such an agency is FRONTEX, which has concluded a series of working arrangements with the border authorities of a number of third states. These working arrangements typically provide a structured dialogue between both parties, but the content depend on the third state in question. For instance, typical for the working arrangements with the countries at the eastern border of the Schengen area are provisions on the possibility for those countries to participate in Frontex training programmes, allowing the EU to export its approach to border security (including its emphasis on human rights). On the other hand, the emphasis in the working arrangements with the North American countries is on the exchange of information, best practices, etc. In the following parts however, the focus will only be on the EU agencies' possible effects on Member States' administrations.

4 Basic Functions of EU Agencies

Looking at the basic functions of EU agencies from the perspective of pluralism then reveals a seemingly inherent tension: since the establishment of agencies has been defined as a form of administrative integration it seems they are a potential threat to pluralism. This process of how national autonomy could be increasingly restricted has been described by De Moor-van Vugt.[28] Paraphrasing briefly, the first stage of restricting national autonomy, according to De Moor-van Vugt, is the adoption of EU legislation in a certain sector. This harmonisation will normally be done through the adoption of directives. As was also noted above, a more or less uniform legislation may be

[28] See note 18. Chiti noted in 2000 that The increasing involvement of the EC authorities in the administrativeaction, however, has not weakened the role of national administrations.' The process of *agencification* has in the meantime however taken further qualitative steps, so that it may be doubted Chiti would still defend this position. See E. Chiti, 'The Emergence of a Community Administration: The Case of European Agencies' [2000 37/2] *CML Rev.*, 342.

subverted if the Member States take on too diverging positions when they implement these directives. In the second stage therefore, the Commission will 'weave a web' bringing different actors together in an informal manner, supporting this process financially and setting up an information strategy. In the third stage the information strategy is replaced by a more formal network strategy, which often includes the establishment of an agency which is put 'on top' of the network. The best practices, which were already identified in the second stage are also adopted in new sectoral legislation. In the fourth stage the procedural and institutional autonomy of the Member States is further curtailed, uniform requirements are imposed by and at the EU level and the role of the EU agencies is enhanced.[29] The fifth stage, De Moor-van Vugt speculates, could then see an almost complete centralisation of competences at the EU level, which will then under strict conditions be delegated back to the authorities and structures at the national level, which will execute their tasks 'in subcontraction' for the EU. Although De Moor-van Vugt constructed her argument in terms of national autonomy, it also applies to pluralism, as the latter may be seen as the result of national autonomy.

On the other hand, since agencies are permanent bodies bringing together administrations of the Member States, they may provide durable forums which may serve to exchange best practices, as was also noted by De Moor-van Vugt. Since this function has been identified as an important economic motive justifying pluralism, agencies may also allow pluralism to fulfil its economic function. After all, pluralism is of little economic use if it does not unlock greater efficiencies. Looking back at the model of De Moor-van Vugt, it seems that if agencies are to fulfil this function, the Europeanisation of supervision should ideally halt in the third phase, since beyond that phase 'dialogue' is replaced more and more by 'imperium'.[30] A lot will depend on the 'intensity' of the interaction between the agency and the national actors and between the latter themselves. This will have to be verified 'on the ground', by checking the specific activities of the agencies. This is because the notion of the agency, an EU body bringing together different national actors, is only conducive to such interaction but is in itself not sufficient. The administrative boards of the different agencies for instance, usually bring together a representative from each national administration,[31] but these boards only meet a few times a year at the most, the effect on pluralism then being minimal.

---

29 De Moor-van Vugt also sees an enhanced role for the Commission because of this process, but a legitimate question here seems whether in reality not only national administrations but also the Commission loses out in the process of *agencification*.

30 Imperium is used here to describe the use of the command of law to achieve policy objectives. See also T. Daintith, 'The Techniques of Government', in: Jowell and Oliver (eds), *The Changing Constitution* (Oxford: Clarendon Press 1994), 213.

31 See *supra* n. 17.

It should be noted that other authors are less gloomy than De Moor-van Vugt. Egeberg for instance, sees EU agencies as controlled by national agencies and the Commission[32] and their main function as the homogenous implementation of EU law.[33] Egeberg's optimistic stance may be explained from his bottom-up perspective, since he sees the rise of EU agencies also as a result of the *agencification* at national level, representing EU agencies as the meeting place of these national bodies. In reality however, the national representatives within EU agencies do not all come from 'independent national agencies' but also from the ministries. Furthermore one could wonder whether EU legislation itself is not a driving force behind national *agencification* instead of vice versa.[34] As De Moor-van Vugt showed, the trigger of the creation of an EU agency may be a bottom up process, as in the case of the European Environmental Agency (EEA) where the Member States' authorities had first set up a network on a completely voluntary basis. That network and the initiative was later taken over by the Commission and then imposed top down, fundamentally changing the position of the national authorities in this 'European cooperation'.

Translating the abstract framework worked out by De Moor-van Vugt to the concrete practice of EU agencies raises a typical issue in the doctrine on these bodies: because agencies are not foreseen in the Treaties and because a horizontal framework for these bodies is also still lacking in secondary law,[35] EU agencies are established 'ad hoc'. This means that they vary widely with regard to tasks, competences and therefore also the possible effect they have on national administrations and pluralism under review here. The precise impact of agencies on administrative pluralism will hence have to be verified for each agency individually. The next hurdle in this regard is that the regulation establishing an agency does not give a proper account of its powers and the role it fulfils in its specific sector. For this, attention needs to be paid to the entire sectoral legislation, since the different regulations and directives adopted to regulate that sector may also refer back to the regulation establishing the agency and grant it addi-

32 M. Egeberg, 'L'Administration de l'Union Européenne: Niveaux Multiples et Construction d'un Centre' [2010/133] *Revue française d'administration publique*, 25. Egeberg also speaks of the greater autonomy and the strengthening of the Commission, but a review of the competences granted to the recent agencies in the financial sector (cf. *infra*) would cast doubt on this observation.

33 *Ibid*., 24.

34 See for instance the obligation to establish independent national regulatory authorities in the gas and electricity sector imposed on Member States by Article 39 of Directive (EC) 2009/73 of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJ* 2009 L 211/94.

35 The Commission had announced such a horizontal framework in its White Paper on Governance in 2001. See also M. Chamon, 'EU Agencies: Does the Meroni Doctrine Make Sense?' [2010 17/3] *MJECL*, 298-304; F. Comte, '2008 Commission Communication "European Agencies – The Way Forward": What is the Follow-Up Since Then?' [2010 3/1] *REALaw*, 65-110. The (provisional?) endresult of the negotiations between the Institutions is the non-binding Common Approach on decentralised agencies, concluded in June 2012.

tional powers or tasks. On top of this, the wording of the provisions in a regulation establishing an agency may be quite vague, containing no more than the proverbial 'seeds' from which an influential role may grow.

One way of overcoming the 'ad hoc' problem is trying to identify the most invasive agency functions based on a specific typology of agencies. The hurdle here then is that a traditional typology of agencies based on the extent of their prerogatives, such as the Commission distinction between executive and decision-making agencies,[36] does not help us identify those agencies which have the greatest impact on administrative pluralism. For instance, one of the first agencies that had been granted the power to take individually binding decisions was the Office for Harmonisation in the Internal Market (OHIM). Market operators may apply for a Union Trademark or Design at this agency, which will then review the application and check whether it meets the conditions laid down in legislation before registering the trademark or design. The OHIM undoubtedly is one of the most important agencies in size and workload,[37] but its effect on the pluralism of administrative law is minimal.[38] The establishment of the OHIM has not done away with the national intellectual property regimes and offices. Of course the directive harmonising the trademarks and designs legislation of the Member States[39] is identical in content to the rules which the OHIM follows and which are laid down in its establishing regulation,[40] but this harmonisation is distinct from the establishment of the OHIM. The agency as such does not therefore affect the national administrations or their functioning.

A starting point for identifying the most interesting agencies from the perspective of administrative pluralism, is Chiti's functional classification. He remarks that agencies have mainly been granted administrative powers, which are instrumental to the decision-making of national and European authorities,[41] although calling EU agencies instrumental to the functioning of national authorities suggests that they merely 'assist' national authorities. Chiti further sets out three types of agencies, based on a functional classification. The first type are information agencies, 'responsible for the production and dissemination

36 See text at note 12. For a more elaborate typology of this kind see S. Griller & A. Orator, *ELR*, o.c.

37 The OHIM has a total staff of 705 and in 2010 received 189 984 applications. See Office for Harmonization in the Internal Market (Trade Marks and Designs), *Annual Report 2010*, 2011, 4-5.

38 But even the OHIM, which operates autonomously from national IP offices, does have well-established contacts with its national counterparts, see *ibid.*, 13.

39 Directive (EC) 2008/95 of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks, *OJ* L 299/25.

40 See Regulation (EC) 207/2009 of the Council on the Community Trade Mark, *OJ* 2009 L 78/1; Directive (EC) 2008/95 of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks, *OJ* L 299/25.

41 E. Chiti, 'An important part of the Eu's institutional machinery: Features, problems and perspectives of European agencies' [2009 46/5] *CML Rev.*, 1403.

of high quality information in certain specific sectors.' The second type have advisory or technical assistance functions towards national and European authorities. The third have 'genuinely final, decision-making administrative powers.'[42]

As mentioned, this kind of classification as such does not say much about the impact of agencies on national authorities. Therefore, for Chiti's first type of agencies it should be verified whether the 'high quality information' is produced without any resulting obligations, or whether it results in some kind of standard, which is then set for the national authorities. For the second type, whether their 'assistance' is again noncommittal or whether it sets up a straitjacket for national authorities should be verified. Last, the question for the third types of agencies is to which actors their decisions may be addressed, private parties or national authorities. In the former case the next question will be whether the European agency has a concurrent power to that of the power of the national authorities, *i.e.* whether the agencies may take decisions which could have been taken by the national authorities or whether the powers of the agency and national authorities do not compete directly, as is the case with the OHIM. In case the agency has been granted the power to issue decisions *vis-à-vis* national authorities, the impact on the autonomy of these authorities is of course evident. This exercise will not be undertaken for every agency, but in each category some interesting aspects of existing agencies will be highlighted, with a predominant focus on the most recent agencies of the 'third wave'.[43]

Before commenting further on these issues, two general remarks must be made. First, the three main categories of agencies which will be dealt with should not be seen as distinct, but should rather be seen as pyramid structured with the information agencies at its base and the decision-making agencies at the top. This implies that, generally, as one goes up the pyramid the different functions add up to each other, meaning a decision-making agency, in general, will also have information and assistance tasks. Normally then, observations on the first type of agencies will also be relevant to the other types of agencies. A second observation is on the qualitative dimension of *agencification*, recently this process has not only seen the establishment of decision-making agencies in economically important sectors,[44] but even the recent 'assistance' agencies hold more far reaching powers than their older counterparts and when existing agencies' regulations are being reviewed this often entails extending the agency's mandate. With this in mind a closer look will be taken in the next section at

---

42 *Ibid.*, 1403-4.

43 From a chronological perspective, three waves of agency creation may be observed. The first in the 1970's which only produced two 'information agencies' and then the second and third waves in the 1990's and 2000's respectively.

44 M. Chamon, 'EU agencies between "Meroni" and "Romano" or the devil and the deep blue sea' [2011 48/4] *CML Rev.*, 1056.

the different types of agencies and their effect on administrative pluralism within the EU.

4.1 Information Agencies[45] and Pluralism

Information agencies only have modest powers. In a nutshell, they gather, analyse and disseminate information. For this, they rely for a large part on the national administrations, but some also have their own scientific committees. It is clear that this information function itself creates a new situation, which national administrations will have to take into account.[46] Apart from this, the agencies also function as a centre of expertise for the European institutions, in the first place the Commission. The European Network and Information Security Agency (ENISA) for instance has been mandated to 'assist the Commission, where called upon, in the technical preparatory work for updating and developing legislation in the field of network and information security.'[47] The subsequent harmonisation measures may then further restrict the autonomy of the national administrations, although it is clear the agencies as such will not have this effect, they are merely being involved in the classic process of harmonisation.

Some information agencies have also been given the task of setting up or coordinating a network, bringing national administrations together. It will be these information agencies which, through the activities of their network, will have the greatest impact on national administrations. This is so because their institutionalised network offers the most durable forum for dialogue between

---

45 Apart from the agencies mentioned below, other information agencies are the European Centre for the Development of Vocational Training (CEDEFOP), the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) and the European Training Foundation (ETF).

46 When national authorities retain the right under EU law to adopt (emergency) measures on grounds of public health or for the protection of the environment, this is made subject to the condition that the Member State concerned adduces new (scientific) information. The Court of Justice has clarified that the Member State should rely for this on the most reliable scientific evidence available and the most recent results of international research. See e.g. Case C-236/01 *Monsanto Agricoltura Italia SpA and Others* [2003] ECR I-8105, para. 113. If EU agencies live up to their tasks of bodies of expertise, their scientific position should be granted significant weight both by national authorities and by the Court. Interesting in this regard is the current conflict between the European Food Safety Authority (EFSA) and the French *Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail* (ANSES) on the effects of Bisphenol A (BPA). The French legislature has voted a total ban on the use of this monomer in products for infants, based on an opinion of the ANSES. The EFSA however believes 0.05mg/kg body weight is an acceptable dose of BPA, meaning its scientific opinion does not support such a total ban. The EFSA then announced it could reconsider its position in 2012 following the publication of new data from studies which are being carried out in the USA. The Commission for its part announced that it would reconsider its position on BPA following the EFSA report.

47 Article 2 (4) of Regulation (EC) 460/2004 of the European Parliament and of the Council establishing the European Network and Information Security Agency, *OJ* 2004 L 77/1.

national administrations. In this regard, De Moor-van Vugt described how an information agency with only modest powers, *in casu* the EEA, may contribute to further administrative integration. She described how the Commission initially undertook various initiatives to secure the enforcement of EU environmental law, one of which was the establishment of the agency. This agency has been granted the task of establishing and coordinating a network, EIONET, which serves to collect, process and analyse data.[48] De Moor-van Vugt further explained how this network then allows the most pressing shortcomings in the existing framework of environmental regulation to be identified and how best solutions to these problems may then be proposed. In some cases this even involves specific guidelines on enforcement measures, which can then be taken up by the Commission or the legislator and be put into binding obligations.

Two points should be raised here, first, it is clear the impact of an agency may only be indirect, as it itself will not have the power to impose such binding requirements. Second, the line between exchanging ideas and adopting a standard may be very thin. It will not be possible therefore to ascertain the precise impact of information agencies on administrative pluralism from a reading of the establishing regulations. What may be ascertained from the establishing regulations are certain preconditions: if the regulations provide for durable forums in which national experts can meet and attach some 'meaning' to the dialogue within these forums, then the regulations will have established agencies which may have the impact described by De Moor-van Vugt, but this effect will not be predetermined. This also has to do with what Martens has called the multi-interpretability of regulations setting up agencies.[49] Specifically for the EEA, Martens noted that an information agency may serve different purposes within a political system and that the EEA Regulation itself provides little answer to the question of what role the EEA is to play within the EU system.[50] Obviously this observation goes for other information agencies as well.

Taking a closer look at the provisions on EIONET in the EEA Regulation, one does see the regulation imposes a number of obligations on the Member States. Thus the Member States need to keep the EEA informed of their own national environmental networks but also other national institutions which could contribute to the work of the EEA, since their entire territory should be covered to the fullest extent possible. This provision indirectly imposes an obligation on the Member States to establish a network that covers their entire territory, since this will be the means to achieve the obligation laid down in the

48 Article 2 (a) of Regulation (EC) 401/2009 of the European Parliament and of the Council on the European Environment Agency and the European Environment Information and Observation Network, *OJ* 2009 L 126/13.

49 M. Martens, 'Voice or Loyalty: The Evolution of the European Environment Agency (EEA)', [2010 48/4] *JCMS*, 884.

50 *Ibid*.

regulation. Second, the Member States are under an obligation to cooperate with and assist the agency to achieve the objectives set out in the agency's work programme. The Member States are also encouraged to set up general focal points, which act as a national point of contact for the EEA and specific topic centres, but these are no concrete obligations.

The data, which are brought together within EIONET then serve as a basis for the reports drawn up by the EEA. It is important to note these are not only reports on specific issues in environmental policy (e.g. waste, water, chemicals, etc.) but may also focus specifically on (national) policy measures and instruments.[51] These reports will inspire the Commission not only to propose environmental policy objectives, which the Member States will have to meet, but also further define the policy measures which should be used to achieve the objectives.

Another information agency is the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), which has five main tasks according to Article 2 of its establishing regulation.[52] The agency has to collect and analyse data, improve data-comparison methods, disseminate data, cooperate with European and international bodies and third countries and inform Member States if it identifies new developments or trends. To this end Article 5 of the Regulation provides the Agency shall have the European Information Network on Drugs and Drug Addiction (Reitox) at its disposal. That Article also provides the Member States have to designate a focal point, unlike in the EEA Regulation where there is no such formal obligation, and that each Member State has to bring together the different national organisations active in the field of drug policy in order to bring together all relevant data. This innocuous provision will of course compel the Member State in question to set up some national structures linking these different national organisations. Furthermore, to achieve comparable data the EMCDDA and the network have worked out five key indicators and the network is mandated to work out guidelines for the implementation of these indicators. The focal points of the Member States will then have to adhere to these guidelines. With regard to the key indicators, the eighth recital of the preamble to the Regulation provides that 'The implementation by Member States of those indicators is a precondition for the Centre to perform its tasks as set out in this Regulation.' If this provision is read together with the general principle of sincere cooperation as laid down in Article 4 (3) TEU, it might be argued the *soft law* of the key indicators is rather *hard*. Member States also have to provide the network with information in accordance with Article 4 (1) of Council Decision 2005/387/JHA which foresees in a standard reporting

51 See for instance European Environmental Agency, Market-based instruments for environmental policy in Europe, Technical Report 8/2005.

52 Regulation (EC) 1920/2006 of the European Parliament and of the Council on the European Monitoring Centre for Drugs and Drug Addiction, *OJ* 2006 L 376/1.

form. Although most requirements imposed on the Member States by the revised EMCDDA regulation, following the review of the agency's mandate, may be modest overall, it is important to note they are much more restrictive than the requirements set out in the original EMCDDA regulation.[53]

The establishing regulation of EU-OSHA also provides that the agency has an information role in that it collects, analyses and disseminates information to *i.a.* identify good practices and that it brings together national administrations.[54] The provisions on the territorial coverage of the network established by EU-OSHA for this purpose are identical to those that may be found in the EEA Regulation. And just like in the EMCDDA Regulation, the Member States are under an obligation to designate focal points and should inform EU-OSHA of those national institutions which could serve as topic centres. Unlike in the case of the EMCDDA, the EU-OSHA Regulation does not explicitly foresee its network adopting guidelines that could bind the Member States.

The European Institute on Gender Equality (EIGE) also has an information role to fulfil and also has the duty to set up and coordinate a network on Gender Equality to foster the exchange and dissemination of information including between non-governmental organisations.[55] The Fundamental Rights Agency (FRA) established a network, the Fundamental Rights Platform, bringing non-governmental actors together.[56] These two agencies show that it is not whether it is an agency established or coordinated by the EU but the type of actors which are brought together in those networks that is important.

4.1.1 Conclusion

Although all information agencies will have some effect on national administrations those that coordinate a network of national authorities (rather than national civil society organisations) have been identified as the most interesting agencies when it comes to pluralism in EU administrative law. Still, even within this specific category of information agencies substantial differences on the role and purpose of these networks as defined in legislation may be noted. Some agencies have a clear mandate to draw up certain guidelines *vis-à-vis* national actors, but even without such a clear mandate this possibility should not be excluded, although in the latter case this will be more dependent upon the positive interaction between national and European actors (cf. *infra*).

---

53 See Article 5 of Regulation (EEC) 302/93 of the Council on the establishment of a European Monitoring Centre for Drugs and Drug Addiction, *OJ* 1993 L 36/1.

54 Regulation (EC) 2062/94 of the Council establishing a European Agency for Safety and Health at Work, *OJ* 1994 L 216/1.

55 Article 3 (1) e of Regulation (EC) 1922/2006 of the European Parliament and of the Council on establishing a European Institute for Gender Equality, *OJ* 2006 L 403/9.

56 Article 10 of Regulation (EC) 168/2007 of the European Parliament and of the Council establishing a European Union Agency for Fundamental Rights, *OJ* 2007 L 53/1.

4.2 Assistance Agencies[57] and Pluralism

As regards the assistance agencies, a major distinction may be made between those agencies established to assist the Commission and other EU institutions and those that mainly or additionally assist the Member States. Thus, the European Medicines Agency (EMA)[58] and the European Food Safety Authority (EFSA)[59] are engaged primarily in providing the Commission with scientific opinions. Griller and Orator also call them pre-decision-making agencies as they are responsible for the risk assessment, preceding the Commission risk management function.[60] Although these agencies will also have some impact on national authorities, they are closer to the Commission than the national authorities. The focus should therefore be on those agencies assisting national authorities and their impact on administrative pluralism depending on what 'assisting' entails.

Article 1 (2) of the Regulation establishing the European Maritime Safety Agency (EMSA) already gives a hint as to how agencies might 'assist' the Member States since the EMSA will provide the latter 'with the technical and scientific assistance needed, in order to help them to apply the Community legislation properly, [and will]monitor its implementation and to evaluate the effectiveness of the measures in place.'[61] The agency has also been granted inspection powers as regards the effective implementation of maritime legislation by the national authorities under Article 3 of the Regulation. However, here again the establishing Regulation does not give a full account of the inspection powers of the agency, since it also fulfils an inspection function under the Regulation on ship and port facility security.[62] Article 8 of that Regulation provides the Commission may undertake inspection visits to check compliance with the relevant rules. Although the EMSA is not even mentioned in this Regulation, in reality it will be EMSA officials that are mandated by the Com-

57 Apart from the agencies mentioned below, other assistance agencies include: the European GNSS Agency (GSA), the European Railway Agency (ERA), the Translation Centre for the Bodies of the European Union (CdT), the European Centre for Disease Prevention and Control (ECDC), the Office of the Body of European Regulators for Electronic Communications (BEREC Office), European Network and Information Security Agency (ENISA) and the Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

58 Regulation (EC) 726/2004 of the European Parliament and of the Council laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, *OJ* 2004 L 136/1.

59 Regulation (EC) 178/2002 of the European Parliament and of the Council 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, *OJ* 2002 L 31/1.

60 S. Griller & A. Orator, *ELR*, o.c., 13.

61 Regulation (EC) 1406/2002 of the European Parliament and of the Council establishing a European Maritime Safety Agency, *OJ* 2002 L 208/1.

62 Regulation (EC) 725/2004 of the European Parliament and of the Council on enhancing ship and port facility security, *OJ* 2004 L 129/6.

mission to do these security checks.[63] A similar (partial) outsourcing of tasks by the Commission may be noted in relation to inspection visits relating to other EU maritime legislation.[64] The EMSA's role is however not confined to assistance and inspection, as it also monitors Member State compliance with EU legislation. This is specifically the case for compliance with Directive on the minimum level of training of seafarers, which explicitly foresees this role for the EMSA.[65]

To support its training function, the EMSA has also set up a Consultative Network for Technical Assistance and cooperation (CNTA). In this network the national administrations meet once a year to discuss the training opportunities with the EMSA. Within the CNTA it will then be determined where the needs of the national administrations lie and which training courses will be organised. Here it should be noted these training courses need not necessarily be restricted to the exchange of best practices but may also relate to common procedures or enforcement practices. Groenleer and others have noted that the constructive position taken by the EMSA towards the national authorities differs from the position originally taken by the European Aviation Safety Agency (EASA). The latter agency initially engaged in a more top down approach, which led to resentment at the national level.[66] What will therefore matter more generally is not only which formal powers have been conferred on an agency and the agency's ability to establish itself as a centre of expertise but also the way in which it engages with the national authorities. Despite its more modest powers, the EMSA had a far prompter impact on national administrations compared to the EASA.

The Community Fisheries Control Agency (CFCA) is another assistance agency and is a good illustration of the argument developed by De Moor-van Vugt. The CFCA's original establishing Regulation only provided the agency with coordination and research tasks to help the Member States better implement the Common Fisheries Policy (CFP).[67] As a result of its bad performance the CFP is continuously under reform and the CFCA's mandate was therefore extended in 2009 when the Council adopted a new regulation amending the existing control system so that the CFCA could 'support the uniform implementation of the control system of the common fisheries policy, ensure the organ-

63 European Maritime Safety Agency, Work Programme 2011, 34.
64 *Ibid.*, 36-8.
65 Article 25 of Directive (EC) 2008/106 of the European Parliament and of the Council on the minimum level of training of seafarers, *OJ* 2008 L 323/33.
66 M. Groenleer, M. Kaeding & E. Versluis, 'Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation', [2010 17/8] *JEPP*, 1225-6.
67 Article 3 of Regulation (EC) 768/2005 of the Council establishing a Community Fisheries Control Agency and amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy, *OJ* 2005 L 128/1.

isation of operational cooperation [and]provide assistance to Member States.'[68] For this the CFCA may now issue manuals on harmonised standards of inspection and develop guidance material on the best practices on the control of the CFP. The CFCA's role was thus extended from simply coordinating national efforts to issuing *soft law* instruments directed at the national control authorities. Apart from these changes the CFCA was also granted the power to acquire equipment necessary to implement its joint deployment plans which it draws up under its coordination function. Although this does not affect national authorities as such, it does make the CFCA less dependent on the national authorities goodwill in fulfilling its operational tasks. A similar observation may be made concerning the latest amendment in 2011 of the Regulation establishing Frontex, an agency with mainly operational powers.[69] In the past, Frontex had to rely on the goodwill of the national authorities to have sufficient personnel and material for its operational missions. This cooperation did not always run smoothly as Member States were not under a binding obligation to put personnel and equipment at the agency's disposal even if they had committed themselves to do so. Although Frontex still does not have its own 'European Border Guards' the obligation on Member States to honour their commitments has been strengthened[70] and Frontex has received the power to acquire or lease its own equipment,[71] reducing its dependence on the Member States.

At first glance a last interesting addition to the CFCA Regulation from this contribution's perspective is the new Article 17c (2) on the agency's role of facilitating cooperation between Member States and the Commission so as to come to harmonised standards for control. According to the Regulation this should be achieved '[w]ith due regard to the different legal systems in the individual Member States.' Such a clause may also be found in Article 2 (e) of the EMSA Regulation on a common methodology for investigating maritime accidents, a clause inserted by the Council in its common position on the Commission's redrafted proposal.[72] These clauses therefore seem to protect the existing pluralism between national legal systems, although this is quite out of place in a 'harmonisation-provision'. Notwithstanding the general wording of these pro-

68 Paragraph 41 of the Preamble to Regulation (EC) 1224/2009 of the Council establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, *OJ* 2009 L 343/1.

69 Regulation (EU) 1168/2011 of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2011 L 304/1.

70 See Article 3b Regulation (EC) 2007/2004 of the Council establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004 L 349/1.

71 See Article 7 of the Frontex Regulation.

72 See Common Position (EC) 33/2002 of the Council of the European Union, *OJ* 2002 C 119/E27.

vision they should, given the subject matter, be interpreted as shielding the Member States' criminal law from the reach of the agencies, rather than protecting administrative pluralism.

Last, a very recent assistance agency is the European Asylum Support Office (EASO)[73] established to reduce the disparities between the Member States on the implementation of the Common European Asylum System (CEAS).[74] EASO's Regulation states that it has three main duties, the first one being an information function in part comparable to that of the agencies noted above. Part of its assistance function centers around training provided to national functionaries, not only civil servants, but also national judges. Here it is interesting to note that the possible harmonisation effect of these training activities was recognised by the Council, which inserted the following clause in Article 6 (1): 'Participation in training is without prejudice to national systems and procedures.' Such a clause only works pre-emptively however to the extent that it rules out that training activities would result in any legally binding obligations, but does not prevent training activities from resulting in a *de facto* new standard. Furthermore Article 6 (2) provides the EASO will not only manage, but also develop the European asylum curriculum.[75] A second main duty is the support for Member States subject to particular pressures, which is more of an operational task. The third main duty then is its contribution to the CEAS for which the EASO will draw up reports 'with the aim of improving the quality, consistency and effectiveness of the CEAS.'[76] Apart from these reports it will also adopt technical documents on the implementation of the asylum instruments of the Union, which includes guidelines and operating manuals. The Regulation clarifies that these technical documents will not 'give instructions to Member States about the grant or refusal of applications for international protection',[77] implying all other possible instructions are not excluded per se. On this power, Comte also cautiously predicts that it 'permet probablement d'envisager à terme une certaine influence d'EASO sur les systèmes d'asile des États membres.'[78] According to Comte, the weight these technical documents carry will ultimately result in a certain 'valeur juridique', where they will inspire many Member States in the implementation of their asylum policies.[79] Finally, it is under this third duty that the possibility for the EASO to set up factual, legal and case law databases

73 Regulation (EU) 439/2010 of the European Parliament and of the Council establishing a European Asylum Support Office, *OJ* 2010 L 132/11.
74 See paragraphs 1-2 of the Preamble to the EASO Regulation.
75 For this the EASO will build further on the work already undertaken in the Odysseus network. See F. Comte, 'Une nouvelle agence dans le paysage institutionel européen: le Bureau européen d'appui en matière d'asil', [2010/2] *Revue du Droit de l'Union Européenne*, 313-4.
76 Article 12 (1) of the EASO Regulation.
77 Article 12 (2) of the EASO Regulation.
78 F. Comte, *Revue du Droit de l'Union Européenne*, o.c., 318.
79 *Ibid.*, 319.

on asylum instruments is found. This would *i.a.* allow judges from different Member States to keep track of legal developments (including case law) in other Member States. As such this would open up the possibility of real 'national European law precedents' to which Van Harten has alluded.[80] To illustrate the rapid evolution of *agencification*, attention may be drawn to Comte's remark in that the creation of an agency for the EU's asylum policy would have been unimaginable only ten years ago.[81] Indeed, when the Commission proposed its communication on an Open Method of Coordination (OMC) for the Common immigration policy in 2001,[82] Barbou des Places noted that such an OMC initiative would not be sufficient, but could be a starting point for institutionalised competition (*i.e.* learning and best practices) and cooperation between Member States.[83] From this perspective the EASO is indeed a giant leap forward, and away from non-committal means of cooperation and a much more institutionalised approach than an OMC.

4.2.1 Conclusion

Although the agencies whose function it is to assist other European bodies or institutions may also influence the functioning of national authorities, it will be the agencies established to secure a more uniform implementation by the Member States of existing legislation, that merit special attention. From a first reading of their establishing regulations, their role seems quite innocuous. After all, they are established to secure a level of implementation the legal obligation of which already flows from the legislation in place. If they restrict existing pluralism it is only because the existing body of legislation preempts such pluralism. Furthermore, the example of EMSA seems to indicate that for agencies to have any meaningful impact or influence it is necessary they engage with national authorities on an equal footing. In this way the national authorities and the agency engage in a problem-solving exercise in which best practices are identified and promoted. The existing pluralism therefore fulfills its economic function, resulting in less pluralism.

The noted trend of establishing an agency and afterwards amending its mandate by extending it and providing the agency with more far-reaching powers, *i.a.* making it more independent from national authorities, is a different

---

80 H. van Harten, 'National Judicial Autonomy: The Example of National European Law Precedents in the Dutch Case-Law on the Free Movement of Services and the Freedom of Establishment', [2009 2/2] *REALaw*, 139-40.

81 F.Comte, *Revue du Droit de l'Union Européenne*, o.c., 320.

82 European Commission, 'Communication from the Commission to the Council and the European Parliament on an Open Method of Coordination for the Community Immigration Policy', COM (2001) 387 final.

83 S. Barbou des Places, 'Evolution of Asylum Legislation in the EU: Insights from Regulatory Competition Theory', [2003/16] *EUI Working Paper*, 29-30.

matter however. Of course, it is hard to make a case against this based on a subsidiarity argument, which may be seen as a pluralism-safeguard, since whenever the mandate of an agency is amended this is done through secondary legislation and in the preamble of such legislation, the justification of the Union's action in light of the principle of subsidiarity is given. This justification will then be analogous to the justification initially given when the agency was first established: deficiencies in the implementation of a given body of legislation have remained and in order to remedy this, the agency requires new or extended powers and capabilities. This may then alter the relationship between national authorities and the agency and further curtail the remaining pluralism at national level. Recent developments in the establishment of new agencies and the review of existing ones seem to suggest that the Member States are increasingly wary of the impact of the agencies in the field of criminal law and on the national judicial function, but a similar concern regarding the impact of agencies on national administrations does not seem to exist. Agencies' mandates for instance are still being drawn up in general, multi-interpretable, wording. This would seem to suggest that, on a political level, the agencies' effects are seen as the necessary consequence (or byproduct) of the legislation, which they help implement.

What should be noted is that an assistance agency may fulfill a number of distinct 'assistance tasks', unlike the information agencies whose tasks are potentially not as diverse. The example of EASO shows how one agency may combine the tasks of providing training, drawing up authorative *soft law* and giving operational support to Member States and this in a sensitive policy field. The accumulation of these different tasks may create interesting synergy effects. This aspect of synergy effects will be even more important for the decision-making agencies of the following section, since they have potentially the broadest scope of tasks.

4.3 Decision-making Agencies and Pluralism

As was mentioned above, the first question for the last category of agencies is on who they interact with. Agencies such as the OHIM or the Community Plant Variety Office (CPVO) mainly interact with private parties applying for IPR protection under EU rules. As they only interact indirectly or incidentally with national authorities they are less relevant from the perspective of this contribution. The European Chemicals Agency (ECHA) is similar in this regard since its main function is to help implement the ambitious REACH project. Still, in its assistance role[84] the Forum for Exchange of Information on

84 See the remark *supra* on the pyramidal nature of the categorization of agencies used.

Enforcement (Forum), one of ECHA's bodies,[85] is worth mentioning. This forum again brings together the different national administrations responsible for the enforcement of EU chemicals' legislation. According to Article 77 (4) of the REACH Regulation this forum is *i.a.* responsible for spreading good practices; proposing, coordinating and evaluating harmonised enforcement projects and joint inspections; coordinating exchange of inspectors; developing working methods for local inspectors; developing an electronic information exchange procedure; etc. It is clear that if the forum fulfils these functions to the fullest this could result in a further *de facto* harmonisation of the enforcement practices of national administrations, working on the basis of the same information, through the same procedures, evaluated against equal standards. The forum meets a number of times a year and has adopted its own Rules of Procedures (RoP),[86] which prescribes that it should establish for itself a work programme.[87] In its work programme,[88] the forum has identified a number of work packages on which working groups are active, allowing interested parties to keep track of the Forum's work.

Because the REACH project is quite ambitious and to allow the ECHA to focus on its main function the Member States have been charged with establishing national helpdesks to provide private parties, which need to comply with the REACH legislation, with the necessary information.[89] Here the establishment of an agency is accompanied by an obligation on the Member States to establish supporting bodies for that agency, imposing institutional changes to the national administrative system.

The case of the EASA is comparable to that of the ECHA, albeit that it is more complex. Just like ECHA its main decision-making function is directed at private parties. This is the agency's certification power, which extends over airworthiness and environmental certification. Following the extension of its mandate, EASA has acquired (limited) powers on pilot certification, air operation certification and air traffic controller certification.[90] In this, EASA's competences

---

85 The Forum is established in Article 86 of Regulation (EC) 1907/2006 of the European Parliament and of the Council 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, *OJ* 2006 L 396/1.

86 These Rules of Procedure are formally adopted by the Management Board. See ECHA Management Board, Rules of Procedure for the Forum for Exchange of Information on Enforcement, MB/35/2011 final.

87 See Article 2 (4) of the RoP.

88 ECHA Management Board, Forum Work Programme 2011-2013, MB/36/2011 final.

89 See Article 124 of the REACH Regulation.

90 For these competences to materialise the Commission still needs to adopt the necessary implementing Regulations.

are mainly non-concurrent with those of the national authorities.[91] Two main exceptions exist in this regard. First, under Article 14 of the EASA regulation Member States remain competent to adopt emergency measures. Second, apart from its certification function, the EASA also holds 'quasi-regulatory'[92] powers. As was noted above, 'regulatory power' implies the agency has some competence to adopt generally binding measures, although this is still not the case for EASA, the agency does have competence to issue opinions which may be deemed to be *de facto* binding. First, according to Article 19 of the EASA Regulation the EASA will prepare draft measures for the Commission if the latter wishes to make a legislative proposal or if it wishes to adopt delegated or implementing acts. When the latter develop technical rules, the Commission may not change their content without prior coordination with the agency.[93] Thus those subsequent measures that implement parts of the Regulation for which national administrations have remained competent, will be drafted by the EASA itself.

Because of EASA's role in the legislative process, it will also influence to a large extent any further legislative harmonisation and will therefore have an impact on the national administrations. The second 'quasi-regulatory' power is the competence to issue certification specifications and guidance material for the application and implementation of the Regulation, according to Article 18. These codes do not formally have force of law, but are regarded as binding by the industry.[94] However, since the Regulation not only sets out the mandate of the EASA, but also includes provisions applicable to the national authorities, as regards those tasks for which they are still responsible, the EASA also has the power to adopt guidance material applicable to the implementation of EU law by the national authorities.[95]

Article 24 of the EASA Regulation provides that the agency will conduct standardisation inspections to monitor the application of the Regulation and all further implementing measures. Unlike in the case of EMSA, the Commission has adopted an implementing regulation further setting out the modalities

---

91 See for instance Annex II to the EASA Regulation which lists the types of aircraft which fall outside the scope of the Regulation and for which, as a consequence, the national authorities are still competent.

92 T. Tridimas, 'Community Agencies, Competition Law, and ECSB Iniatiatives on Securities Clearing and Settlement' [2010/28] *Yearbook of European law*, 236.

93 See Article 17 (2) b of the EASA Regulation.

94 P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2006), 157.

95 See for instance Regulation (EU) 805/2011 of the Commission laying down detailed rules for air traffic controllers' licences and certain certificates pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council *OJ* 2011 L 206/21. This Regulation further provides for a harmonised regime for licensing in air traffic controllers. Although there is one common regime, the Member States are still competent on the licensing of their own controllers, whereas the EASA is the competent authority for those organisations located outside the EU's territory. Because both apply the same rules, EASA's guidance material also applies vis-à-vis the national authorities.

that apply to this inspection function.[96] This implementing Regulation further reveals how the EASA may have a significant impact upon the national authorities, even when it is not exercising any 'decision-making powers'. The EASA will inspect how the competent national authorities have implemented the applicable rules. It will make a report of its findings and send this to the Commission, the Member State concerned and to its competent authority. The Commission then may, but does not have to, forward this report to the other authorities.[97] As Groenleer and others noted,[98] the fact that this information is not automatically shared between all national authorities curiously goes against one of the basic tenets of *agencification*, *i.e.* information and best-practices sharing.[99] Following the inspection, the EASA will agree with the national authority concerned on an action plan to remedy the deficiencies found during the inspection. If no action plan may be agreed upon or the deficiencies are not remedied in a timely manner, the EASA will forward the issue to the Commission.

The case of EASA shows the extent of the synergy effects that may result from the combination of multiple tasks. The EASA has been granted the power to propose new (legislative or implementing) rules to the Commission. Once such rules are adopted, the EASA has the power to adopt soft law, interpreting those rules. EASA then also has the power to inspect the Member States' authorities' implementation of EU rules. Following its inspection it will draw up a plan (together with the national authority) to remedy the deficiencies in implementation that the inspection revealed.

As was mentioned above the most interesting decision-making agencies, in their decision-making function, are those that have powers concurrent to those of the national authorities. These agencies are the latest addition to the EU's agency arsenal and combine pervasive decision-making powers with activities in sensitive economic sectors, marking a qualitative leap in the process of *agencification*.[100] Thus, in 2009 the EU legislator established the Agency for the Cooperation of Energy Regulators (ACER) and in 2010 it established the three European Supervising Authorities (ESA's) in the financial sector, which only

96 Regulation (EC) 736/2006 of the Commission on working methods of the European Aviation Safety Agency for conducting standardisation inspections, *OJ* 2006 L 129/10.

97 See Article 10 of Regulation (EC) 736/2006.

98 M. Groenleer, M. Kaeding & E. Versluis, *JEPP*, o.c., 1225.

99 Another curious element, although this falls out of the scope of the present contribution, is the role of the Commission, which is alien to the inspection process up until the decision to forward inspection reports to other national authorities. The exception here are the 'ad hoc inspections' provided for under Article 16 of the implementing Regulation, which are conducted upon request of the Commission.

100 See M. Chamon, *supra* at n. 44, 1056.

started their work last year.[101] The following part will focus on the three financial agencies.

The Regulations establishing these agencies have been adopted simultaneously since the agencies make up an important part of the new regime of financial supervision in the EU following the financial crisis. Furthermore, the provisions of the three Regulations are also parallel to each other. In the next part, reference will therefore be made to the generic European Supervising Authority (ESA) since the observations will apply for both the EBA, EIOPA and ESMA.

A closer look at the powers of the ESA's reveals they have similar functions to those of the EASA, although an inspection function is lacking. This is compensated by a reinforced 'quasi-regulatory' and decision-making function. As regards the latter it should be noted the ESA may not only adopt decisions *vis-à-vis* private parties, *in casu* financial institutions, but also *vis-à-vis* the national authorities. Such a power distinguishes them from the other agencies.[102] The three situations in which the ESA will have the power to take binding decisions are a breach of EU law by a national authority,[103] in emergency situations[104] and when national authorities disagree in cross-border situations.[105] If there is a breach or a non-application of relevant EU legislation, the ESA may, of its own motion, start an investigation and afterwards provide a recommendation to the national authority. If the national authority does not act upon this recommendation, the Commission may issue a formal opinion addressed to the national authority, taking account of the agency's original recommendation. If the national authority does not comply with the Commission's formal opinion, the ESA itself may adopt necessary decisions *vis-à-vis* those financial institutions under the supervision of the non-compliant national authority, thereby circumventing the latter's competence.

In the case of an emergency situation, the ESA's will receive the same powers, but they will not need to rely on a formal opinion from the Commission.

---

101 The three ESA's are the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). Their establishing Regulations are Regulation (EU) 1093/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, *OJ* 2010 L 331/12; Regulation (EU) 1094/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, *OJ* 2010 L 331/48; Regulation (EU) 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, *OJ* 2010 L 331/84.

102 With the exception of course of the ACER.

103 See Article 17 of the ESA Regulations.

104 See Article 18 of the ESA Regulations.

105 See Article 19 of the ESA Regulations.

Instead, the Council will need to declare the existence of an emergency situation and up until it revokes that declaration, the ESA's will be able to exercise the powers of addressing decisions to national authorities or directly to financial institutions under their supervision if the former do not comply with the ESA's decisions. The procedures are similar in the last case when disagreement exists between national authorities. In such a case they may request the competent ESA, or in some specific cases that ESA may act upon its own motion,[106] to act as a mediator in a 'conciliation phase'. If no agreement may be found between the national authorities, the ESA will be able to step in and apply binding decisions upon them. Should the national authorities not comply with this decision, the ESA may again direct decisions directly to the financial institutions. It should be noted that this latter power in the three situations described, is without prejudice to the possibility for the Commission to start infringement proceedings and to take the Member State concerned to the Court of Justice.

Quite evidently such a power which directly interferes with the competences of the national authorities is very invasive and would have been unthinkable some years ago. At first glance, the national authorities do seem protected from the ESA, since in the case of an alleged breach of EU law, it will need to rely on the Commission's formal opinion and the existence of an emergency situation that is determined by the Council,[107] while national authorities themselves have to invite the ESA to mediate when disagreements arise. However, as was noted, in some specific cases the ESA may also 'mediate' out of its own motion. This will be so in two cases, firstly when specific EU rules grant such a power to the ESA and 'where on the basis of objective criteria, disagreement between competent authorities from different Member States can be determined.' The last condition seems to leave a lot of discretion to the ESA, since objective criteria may be quite subjective. For the first condition, Article 19 (1) refers back to Article 1 (2) which lists the relevant legislation, but which also provides 'all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority.'

In the light of the quasi-regulatory powers of the ESA, the meaning of that provision becomes clear: Following the entry into force of the Treaty of Lisbon and the new comitology regulation,[108] the old comitology system has been replaced by the system of delegated acts and implementing acts under Articles

106 See Article 19 (1) second sentence of the ESA Regulations.

107 Note that in the original Commission proposal the power to declare the existence of an emergency situation was also granted to the Commission. See Article 10 in the original proposal in: European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Banking Authority', COM (2009) 501 final.

108 Regulation (EU) 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ* 2011 L 55/13.

290 and 291 TFEU.[109] These Treaty provisions foresee a central role for the Commission to adopt these acts, whereby a formal role is foreseen for the Parliament and Council in the adoption of delegated acts and a formal role for the national administrations is foreseen in the adoption of implementing acts. The Regulations of the ESA's restrict the role of the Commission in the adoption of these delegated and implementing acts and give a central role to these agencies, of course only for those acts falling within the scope of the legislation as defined in Article 1 of the ESA's Regulations. The Regulations prescribe the procedure to adopt 'regulatory technical standards' (delegated acts) and 'implementing technical standards' (implementing acts). In short these are simply drafted by the ESA's, although the Treaties grant this power to the Commission. Pursuant to the Treaty provisions, these standards still have to be formally adopted by the Commission however the Commission may not change the content of these drafts 'without prior coordination' with the agency. Paragraph 23 of the preamble to the Regulations even provides:

'The Commission should endorse those draft regulatory technical standards [...] [t]hey should be subject to amendment only in very restricted and extraordinary circumstances [this would be so] if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation.'

This means the ESA's take up the central role in the adoption of the rules, which also define their own mandate, including *i.a.* the situations in which it may impose decisions on national authorities of its own motion. As centres of expertise, the ESA's will of course also assist the Commission when it is drafting new legislative proposals for the financial sector, although this role is less formalised.

Article 16 further provides that the ESA's will issue guidelines and recommendations to national authorities. A novelty in this compared to the *soft law*, which other agencies may adopt is the implicit confirmation in the Regulations themselves that this soft law is binding on national authorities, since the Regulations also provide for follow up procedures. The national authorities not only have to 'make every effort to comply with these guidelines and recommendations' but also have to report back to the ESA on whether and how they intend to comply with the guideline or recommendation. The ESA will keep track of this and forward the information on non-compliant authorities to the Commission, Council and Parliament, at the same time outlining how it intends to ensure future compliance by the national authorities. The fact that it has been recognised so clearly in the Regulations that such *soft law* is only relevant if it

109 P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' [2011 36/5] *ELR*, 671-86.

is *de facto* binding, is remarkable. Again these guidelines and recommendations may relate to all relevant EU legislation on the financial sector, including the delegated and implementing acts which the ESA's themselves draft.

The reason why such far-reaching powers could be granted to the ESA's may be partly explained by the Regulations' provisions on the decision making within the ESA's. The competent body in the powers reviewed above is the Board of Supervisors, which is composed of representatives of the national authorities themselves. As a rule however they decide by simple majority, but when the Board exercises a 'quasi-regulatory' function it has to decide using QMV.[110] Powers are therefore taken away from the national authorities at national level and given back to them at the EU level, albeit in a mixed setting with supranational and intergovernmental characteristics.

Again one may note the synergy effects which are created because of the ESA's combination of tasks. Although the ESA's do not have inspection functions, they do propose new financial regulation to the Commission. As regards the ESA's proposal for delegated acts, the Commission's discretion in accepting the ESA's drafts is even formally restricted. The ESA's further adopt soft law for the Member States authorities, who are instructed to make every effort to comply with the soft law. Lastly, the ESA's may not only step in and take decision in lieu of the national authorities, but through their quasi-regulatory function the ESA's are also competent to further define the situations in which they may exercise these exceptional powers.

4.3.1 Conclusion

Taking a closer look at the decision-making agencies has revealed they do not necessarily have a greater impact on national administrations than 'less-powerful' assistance agencies, notwithstanding the fact that they are generally deemed to be the more significant type of agency. From the perspective of the pluralism in European administrative law the 'quasi-regulatory' powers seem more relevant, since through this function the agencies will not simply help national authorities to implement EU rules, but will also influence the content of these rules. In the case of the EASA this is reinforced by its inspection power, granting it not only influence over the adoption of relevant rules and assisting Member States on implementing them, but also checking up on this implementation afterwards. An inspection function has not been granted to the ESA's, but instead all inter-institutional niceties have been abandoned and the Regulations now clearly provide the Commission should follow the expert opinion of the ESA's when it adopts delegated and implementing acts. Likewise it has been made clear to the national authorities that the *soft law* adopted by

[110] See Article 44 of the ESA Regulations.

the ESA's is far from noncommittal. As regards the decision-making function itself, the possibility for the ESA's to adopt decisions vis-à-vis the national authorities or circumvent the latter and addressing decisions directly to financial institutions is a serious blow to the autonomy of these authorities, especially if the ESA's can do so out of their own motion or when they may rely on a supranational institution such as the Commission to trigger such a competence. The combination of these powers is indeed a threat to pluralism in the administrative sphere. The actual functioning of the ESA's will determine whether this risk will also materialise. If so, a next question would then be whether the ESA's functioning is still in line with the principle of subsidiarity. Attention was also drawn the synergy effects which result from the accumulation of different tasks and greatly strengthen European agencies *vis-à-vis* national authorities and therefore further put pressure on the existing pluralism in European administrative law.

5 Conclusion

The question of how EU agencies may influence existing pluralism in European administrative law is not a straightforward one to answer.

Agencies have diverse roles and their formal powers enumerated in the establishing regulations give only a partial account of their actual functioning. This is because these provisions are often multi-interpretable and because informal powers or conventions also play a role, determining the impact of agencies on other actors at the European and national levels.

The basic function of most agencies is to ensure a more homogenous implementation of EU law. Even if this affects pluralism in European administrative law, it might be argued that this pluralism is not affected by the agency as such but only by the legislation which it helps implement. The networks coordinated by these agencies even help unlock the efficiencies of pluralism which would otherwise remain mere potentialities. Information agencies will then only affect administrative pluralism if they act as a catalyst for the Commission, driving the Commission's programme of further and deeper integration, including greater obligations being imposed on national administrations.

The same might be said of assistance agencies, which do no more than help Member States implement EU obligations already imposed upon them. Although these agencies do have a greater impact on national authorities, it can still be said these agencies engage in concert with the national authorities in problem-solving exercises. This would mean the latter still have control over the output and impact of the EU agency. Here it should nevertheless be noted that following the review of the establishing regulation, the agency's mandate is often amended and thus far, to the benefit of the agency's powers and independence. The relation between the EU agency and its national counterparts then changes fundamentally if the former becomes ever less dependent on the

latter. The role of the agency will be furthermore strengthened if synergy effects are produced from the combination of different 'assistance' tasks by the agency. These effects enable the agency to not just merely 'assist' national administrations in implementing EU law but also to become a further driving force of integration in its own right.

Last, the old decision-making agencies as such only have a marginal impact on the noted administrative pluralism since their decision-making power is only directed towards private parties and in a non-concurrent way to the competences of national authorities. The experiment of EASA in which an agency was endowed with quasi-regulatory powers was further elaborated with the establishment of the ESA's. These latter agencies combine unseen 'assistance' powers *vis-à-vis* the Commission and assistance powers *vis-à-vis* the national administrations with unseen decision-making powers enabling them to issue recommendations to national authorities and bypassing them if need be. In particular, the combination of these powers, and the synergies that result from it will see these authorities becoming the real centerpiece of the EU system of financial supervision. Apart from their questionable effect on the EU institutions themselves, notably the Commission, it could be said these powers also are a genuine threat to existing administrative pluralism. From a legal point of view the question would then be whether the ESA's functioning passes the subsidiarity test. Taking a broader perspective, another question is whether the ESA's have set the standard for a new type of agency or whether the exceptional circumstances for which and in which they were established has resulted in three unique agencies which will not serve as a template for future agencies.

Common Foreign and Security Policy and Justice and Home Affairs Agencies	
Eurojust	European Union's Judicial Cooperation Unit
EUROPOL	European Police Office
CEPOL	European Police College
EUSC	European Union Satellite Centre
EUISS	European Union Institute for Security Studies
EDA	European Defence Agency
Information Agencies	
EU-OSHA	European Agency for Safety and Health at Work
EUROFOUND	European Foundation for the Improvement of Living and Working Conditions
EEA	European Environment Agency
CEDEFOP	European Centre for the Development of Vocational Training
EIGE	European Institute for Gender Equality
FRA	Fundamental Rights Agency

Assistance Agencies

Mainly assisting EU institutions and bodies

EMA	European Medicines Agency
ETF	European Training Foundation
EFSA	European Food Safety Authority
CdT	Translation Centre for the Bodies of the European Union
GSA	European GNSS Agency
IT Agency	Agency for the operational management of large-scale IT systems in the area of freedom, security and justice
EIT	European Institute of Innovation and Technology

Mainly assisting Member States

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
BEREC Office	Office of the Body of European Regulators for Electronic Communications
EASO	European Asylum Support Office
ECDC	European Centre for Disease Prevention and Control
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMSA	European Maritime Safety Agency
ENISA	European Network and Information Security Agency
ERA	European Railway Agency

Decision-making Agencies

Agencies with non-rivalling competences

OHIM	Office for Harmonisation in the Internal Market
CPVO	Community Plant Variety Office
ECHA	European Chemicals Agency

Agencies with rivalling competences and/or quasi-regulatory competences

EIOPA	European Insurance and Occupational Pensions Authority
EBA	European Banking Authority
ESMA	European Securities and Markets Authority
ACER	Agency for the Cooperation of Energy Regulators
EASA	European Aviation Safety Agency