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THE GROWING IMPORTANCE OF AGENCIES IN THE EU: SHIFTING GOVERNANCE AND THE INSTITUTIONAL BALANCE

1. Introduction

In the United States of America important parts of the state's executive functions have been delegated from the general executive to a number of specialized independent agencies. Most of them perform important functions and exercise genuine powers of decision making in specific fields such as food safety (Food and Drug Administration, FDA) and air safety (Federal Aviation Administration, FAA). This division of executive powers and responsibilities between the federal government and the specialized agencies originates from the period of the so-called New Deal: in return for a significant expansion of federal executive powers, the US Congress (and the US Supreme Court) demanded from President Roosevelt a 'farming out' of a number of technical, specialized tasks to independent bodies, thus putting a significant part of US administrative tasks at a safe distance from the general executive.¹

In the European Union such an intensive 'agencification' of executive functions has, up until now, not taken place. A large number of independent agencies exist which function within the Union's constitutional set-up, such as monitoring centres on drugs or racism, an agency for translating EU documents, independent bodies in the social sphere, et cetera² However, upon closer consideration, it appears that their tasks and responsibilities are rather modest. Often the mandate of European agencies does not extend beyond the gathering of (technical) information, processing data, producing annual reports, organizing conferences, et cetera.

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¹ See, e.g., the interesting work by G. Majone, 'The Agency model: the growth of regulation and regulatory institutions in the European Union', *Eipascope*, 1997, p. 9-14. See also X.A. Yataganas, *Delegation of Regulatory Authority in the European Union. The relevance of the American model of independent agencies*, Harvard Jean Monnet Working Paper 03/01, 2001.

² Discussed in more detail in section 3, *infra*.

Therefore the basic rule in the EU is still very much that the European Commission performs the really important executive functions, not independent agencies. For example, it is the Commission that applies the general rules on competition policy to individual cases, not some independent 'European Cartel Agency';³ and it is the Commission that decides on the amount of money to be granted in individual cases from the various structural funds. The role of Agencies in this consists of *assisting* the Commission in performing its executive functions. The Commission adopts implementing decisions in the field of agricultural policy, including those on food safety; it can however ask for the opinion of the food specialists from the European Food and Safety Authority (EFSA).⁴ And in setting the most appropriate standards for emission, in the framework of EU environmental policy, the European Commission can, if necessary, use the help of the environmental specialists from Copenhagen.⁵

In recent years, however, we can clearly see a strong tendency towards equipping EU agencies with more 'impressive' powers. The Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) may be considered as the first of this 'new generation' of European agencies, since it has been given the power to determine, in a legally binding manner, whether or not applications for trademarks will be registered.⁶ A similar power to decide in individual cases has been given to the more recently established European Aviation Safety Agency (EASA) which is responsible, *inter alia*, for granting certain type certificates.⁷ These new types of European agencies are often referred to as the *regulatory* agencies, as opposed to the more 'traditional' information-collecting agencies.⁸

In the Commission's White Paper on European Governance (from 2001)⁹ the importance of agencies, especially the regulatory agencies, is emphasized as well. Due to capacity problems within the Commission, in the future technical functions

³ Although, as from 1 May 2004, the national competition authorities (NCAs) and the national courts will have to play a much more important role, given the wish/need to decentralize the application of the competition rules. See Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*OJ* 2003 L 1/1). See also C.D. Ehlermann, 'Reflections on a European Cartel Office', *Common Market Law Review*, 1995, p. 471-486.

⁴ See Articles 22 and 23 of Regulation 178/2002/EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority (EFSA) and laying down procedures in matters of food safety (*OJ* 2002 L 31, p. 1, amended by Regulation 1642/2003, *OJ* 2003 L 245/4).

⁵ Where the European Environment Agency has its seat. See Council Regulation 1210/90/EEC of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network (*OJ* 1990 L 120/1).

⁶ See Title III, section 1 of Regulation 40/94/EC on the Community Trade Mark (*OJ* 1994 L 11/1). On the OHIM, see also sections 3.2, 4.2 and 5.2.

⁷ Regulation 1592/2002/EC of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (*OJ* 2002 L 240, p. 1). See also section 3.2.

⁸ In section 3.3 a third type of agency (the operational/executive agency) will be discerned.

⁹ 'European Governance - A White Paper', COM(2001) 428 final (*OJ* 2001, C 287/1).

should be more often delegated to independent bodies. In the Commission's view, the creation of autonomous EU regulatory agencies in clearly defined areas will improve the way in which rules are applied and enforced across the Union. Such agencies should be granted the power to take individual decisions in the application of regulatory measures.¹⁰ They should operate with a degree of independence and within a clear framework established by the legislature.¹¹ The regulation creating each agency should set out the limits of their activities and powers, their responsibilities and requirements for openness. The main advantages of agencies are, in the Commission's view, their ability to draw on highly technical, sectoral know-how, the increased visibility they give for the sectors concerned (and sometimes the public) and the cost savings that they offer to business. The creation of agencies is also a useful way of ensuring that the Commission focuses its resources on core tasks.¹²

More recently, after the Commission submitted its White Paper, one could even get the impression that for each and every new threat that the European Union is faced with (fraud; bio terrorism; unsafe food; planes falling from the sky; chemical attacks; unsafe trains; diseases; illegal fishing; violations of human rights; etc.) the first reaction is to set up yet another Agency.¹³

It is not the purpose of this contribution to describe the major features of all present and future European agencies separately (their aims, tasks, institutional set-up, etc.).¹⁴ Rather the focus is on some – what might be called – *horizontal legal* issues of the 'agencification' process now going on in the European Union.

First, how and where can we situate the many European agencies within the broader context of the institutional set-up of the European Union? (section 2). Next, their functions and purposes are analysed in order to categorize the European agencies. A distinction is made between information-gathering, regulatory and operative agencies (section 3). Do judicial and/or non-judicial means for supervising the acts and actions of European agencies exist? In other words, how independent is an 'independent' or 'autonomous' agency after all? (section 4). These analyses will allow one of the core issues to be addressed: do agencies constitute a serious threat to the principle of institutional balance? Agencies are not mentioned at all in the Treaties,

¹⁰ See also section 3.2.

¹¹ On the 'degree of independence' of agencies, see further section 4 (dealing with administrative and judicial supervision).

¹² White Paper on European Governance, *OJ* 2001 C 287/1, at p. 19-20

¹³ See, e.g., Decision of 13 December 2003 on the location of the seats of some new offices and agencies of the European Union (*OJ* 2004 L 29/15). It already determines the seat of the following new agencies: European Railway Agency (Lille-Valenciennes); European Network and Information Security Agency, ENISA (Greek town); European Centre for Disease Prevention and Control (Swedish town); and the European Chemicals Agency (Helsinki). A Community Fisheries Control Agency (CFCA) would have its seat in Vigo, Spain; and the Human Rights Agency (HRA) would settle in Vienna. On fighting fraud through 'agencification', see J. Vervaele, 'Towards an Independent European Agency to Fight Fraud and Corruption in the EU?', *European Journal of Crime, Criminal Law and Criminal Studies*, 1999, p. 331-346.

¹⁴ For such a more detailed overview of their tasks and functions, see, e.g., E. Chiti, 'The Emergence of a Community Administration: The Case of European Agencies', *Common Market Law Review*, 2000, p. 309-343.

so that delegating too many powers to them may have a negative effect on the way in which the main political institutions (Commission, EP, Council of Ministers) are able to perform their duties and undertake their responsibilities. This issue of institutional balance was already raised before the European Court of Justice (ECJ) in the 1958 *Meroni* cases (section 5).

2. The Place of Agencies in the Union's Legal Order

First the way in which agencies are established will be discussed and, closely related to this aspect, the issue of how to select the correct legal basis for decisions setting up European agencies (section 2.1). Next, we will take a look at the internal structure of agencies; most of them have been given a similar three-organ structure (section 2.2). After that, it is possible to try and give a more precise definition of an independent agency, functioning within the context of the European Union (section 2.3). Finally, some attention is given to the sensitive issue of Agencies' language regimes (section 2.4).

2.1. Establishment and Legal Basis

The independent agencies discussed in this article are by definition established on the basis of an act (very often a Regulation) of the EC institutions. The birth, life and (unlikely) death of European agencies are therefore a matter of *secondary* Community law; from the text of the EC/EU Treaties, one cannot infer their existence, their tasks, nor their competences/responsibilities.¹⁵

This is the reason why almost all (older) agencies were set up under the general legal basis of Article 308 (ex 235) of the EC Treaty. This provision gives the Council the power to act if it proves 'necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers'.¹⁶ It was thus assumed that nowhere else in

¹⁵ See also *infra*, section 2.3 (the third characteristic feature of EU agencies).

¹⁶ In general on this legal basis, see in particular the German literature, M. Bungenberg, *Art. 235 EGV nach Maastricht. Die Auswirkungen der Einheitlichen Europäischen Akte und des Vertrages über die Europäische Union auf die Handlungsbefugnis des Art. 235 EGV (Art. 308 EGV n.F.)*, Baden-Baden, Nomos, 1999, 315 p.; D. Dorn, *Art. 235 EWGV – Prinzipien der Auslegung. Die Generalermächtigung zur Rechtsetzung im Verfassungssystem der Gemeinschaften*, Kehl, Engel, 1986, 186 p.; U. Häde and A. Puttler, 'Zur Abgrenzung der Art. 235 EGV von der Vertragsänderung', *Europäische Zeitschrift für Wissenschaftsrecht*, 1997, p. 13; G. Henckel von Donnersmarck, *Planimmanente Krisensteuerung in der Europäischen Wirtschaftsgemeinschaft. Funktion und Bedeutung des Art. 235 EWG-Vertrag*, Frankfurt/M., Metzner, 1971, 113 p. See also I.E. Schwartz, 'Article 235 and the law-making powers in the European Community', *International and Comparative Law Quarterly*, 1978, p. 614; P. Ferraiuolo, *Le pouvoir normatif de la Communauté européenne en vertu de l'article 235: possibilités et limites*, Aix-en-Provence, Université d'Aix-Marseille, 1999, 854 p. In the Constitution, Article 308 EC returns as the 'flexibility clause' of Article I-18: 'If action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on →

the EC Treaty could more specific competences – provisions explicitly empowering the institutions to set up auxiliary bodies or organs – be found.¹⁷

The (alleged) absence of a *lex specialis* provision does not mean that Article 308 EC can be used automatically. The Court in its ECHR opinion, concerning the competence of the Community to accede to the Human Rights Convention, made this clear.¹⁸ This general legal basis should *itself* confer the requisite powers on the Council to create independent bodies, having legal personality, and a life of their own. This question has not been discussed very thoroughly in the legal literature.¹⁹ Usually it is simply assumed that Article 308 EC may be used because a more specific Treaty basis does not exist, and the primary purpose of the agency in question is, one way or the other, related to one or more of the objectives/activities of the Community, these days listed in Articles 2 and 3 of the EC Treaty. This is in line with the idea that Article 308 EC can be used for all ‘unforeseen cases’, despite the Court’s ‘warnings’ in Opinion 2/94.

Sometimes, in addition to Article 308 EC, other legal bases are also used for setting up independent agencies. Article 284 EC deals with the collection of information, and it is cited in the Regulation establishing the European Monitoring Centre for Racism and Xenophobia (in Vienna). The preamble justifies the use of this dual legal basis as follows:

‘Whereas the powers provided for in Article 213 of the Treaty (now art. 284 EC) to collect and analyse information on several of the Community’s areas of activity do not permit such information to be collected through a specialized, autonomous body with its own legal personality. Whereas Article 235 (now art. 308 EC) must therefore also be used as the legal basis for the establishment of such a body’.²⁰

Quite remarkably, the Monitoring Centre for Drugs (Lisbon) was established on the basis of Article 308 alone.²¹

Until recently, only few exceptions existed to the practice of using Article 308 EC as a legal basis for establishing independent agencies, alone or together with other Treaty bases. But already in 1990 the European Environment Agency (EEA, seated in Copenhagen) was set up on the basis of, solely, the Treaty provisions on

a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures’.

¹⁷ See however *infra*, on the establishment of the European Environment Agency, which was set up on the basis of Article 130 S of the EEC Treaty.

¹⁸ Opinion 2/94 [1996] ECR I-1759, in particular at points 34-36.

¹⁹ See, however, the pioneer work by R.H. Lauwaars, ‘Auxiliary Organs and Agencies in the EEC’, *Common Market Law Review*, 1979, p. 365 and R.H. Lauwaars, ‘Art. 235 EEG als grondslag voor de schepping van een Europees merkenrecht’, *Sociaal-Economische Wetgeving*, 1981, p. 533-548.

²⁰ See the 26th consideration in the preamble to Council Regulation 1035/97/EC of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (OJ L 151/1).

²¹ Council Regulation 302/93/EEC on the establishment of a European Monitoring Centre for Drugs and Drug Addiction (OJ 1993 L 36/1, Regulation last amended by Regulation 1651/2003, OJ 2003 L 245/30).

environmental protection (Art. 130 S of the EEC Treaty, now Art. 175 EC).²² The importance of the choice of this legal basis is, of course, that the *lex specialis* of (now) Article 175 EC provides for a different decision making procedure (co-decision and hence, in principle, qualified majority voting in the Council) than the one that applies under Article 308 EC (Commission proposal, unanimous voting in the Council and EP consultation). And the procedure followed may in turn have an important influence on the final *content* of the act establishing the Agency in question.²³

This early example of the EEA illustrates that, apparently, it is not that clear that more specific EC Treaty bases (than Art. 308) are lacking. In the European Parliament the issue was raised as well. It was asked whether the Regulation on the European Agency for the Evaluation of Medicinal Products (EMEA) could be amended on the basis of Article 95 EC (internal market) instead of Article 308 EC.²⁴ And the Commission, within the framework of the IGC 2000 on institutional reforms, came up with a note on inserting specific legal bases into the EC Treaty for establishing ‘decentralized agencies forming a separate legal entity’, thus implying that before Treaty amendment only the *lex generalis* of Article 308 EC conferred the requisite powers on the Council.²⁵

More recently, however, there is clearly less hesitation in using only specific legal bases. With regard to the European Aviation Safety Agency (EASA), the Commission stated that ‘the legal basis of the proposed Regulation is Article 80 paragraph 2 (transport), which is consistent with the objective of the proposal and all the legislation adopted so far in the field of aviation, particularly where safety and environmental protection are concerned’.²⁶ Subsequently, the Council adopted the EASA Regulation on the basis of the provisions on transport only (Article 80 EC), without using Article 308 EC as an additional legal basis. Both the Council and the

²² Council Regulation 1210/90/EEC of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network (*OJ* 1990 L 120/1). In general on this Agency, see P. Davis, ‘The European Environment Agency’, *Yearbook of European Law*, 1994, p. 313-349.

²³ See, e.g., Case 165/87 *Commission v. Council* [1988] ECR 5545. Using a large number of legal bases at the same time for setting up agencies, however, brings the risk of encountering so-called Titanium Dioxide problems: in the ECJ’s view, co-decision cannot be combined with unanimous voting in the Council. See Case C-300/89 *Commission v. Council* [1991] ECR I-2867 and, more recently, Joined Cases C-164/97 and C-165/97, *EP v. Council* [1999] ECR I-1153 (‘Protection of Forests’), at paragraph 14. In the case of the EFSA Regulation such problems of procedural incompatibility did not arise since *all* the legal bases used (mentioned in the text *infra*) provide for qualified majority voting.

²⁴ See the MEP question in *OJ* 1998 C 310/91. The EMEA was set up by Council Regulation 2309/93/EEC of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products (*OJ* 1993 L 214/ 1).

²⁵ See the ‘Note on Article 309 EC’ (Brussels, 22 February 2000, Confer 4711/00). In the Treaty of Nice, however, such a legal basis for setting up ‘decentralized agencies’ cannot be found.

²⁶ See the Explanatory Memorandum to the Commission’s proposal for a Regulation on establishing common rules in the field of civil aviation and creating a European Aviation Safety Agency (*OJ* 2001 C 154 E/1).

European Parliament thus established the EASA, in accordance with the co-decision procedure.²⁷

The same choice of legal basis was made in respect of other agencies in the field of transport policy, namely the European Maritime Safety Agency (EMSA) and the European Railway Agency (ERA).²⁸ The Regulation establishing the European Food Safety Authority (EFSA) refers to the provisions on agricultural policy (Article 37 EC), the internal market (Article 95 EC), common commercial policy (Article 133 EC) and public health (Article 152(4)(b) EC), but not to Article 308 EC, so that the EFSA Regulation was adopted in accordance with the co-decision procedure as well.²⁹

Who is right and who is wrong in this legal basis discussion? The answer depends on whether one emphasizes the fact that a new *institutional entity* was established within the context of the EU or, on the other hand, whether the *primary objectives and tasks* of the agency in question are taken as the main criterion.

A 'centre of gravity' theory which emphasizes the importance of creating a new, independent legal person for which the EC Treaty does not contain specific powers, will easily lead to Article 308 EC. If one takes the (substantive) objectives and tasks of the European agency as the main criterion (for choosing the legal basis of the founding measure), then this will often lead to a *lex specialis* (legal basis for transport, the internal market, etc.), and so often to the co-decision procedure. For example, under the 'institutional' approach the regulation on the European Agency for Safety and Health at Work (seated in Bilbao)³⁰ was correctly based on Article 308 (ex 235) EC, since nowhere else in the EC Treaty is it said that the Council may create an independent agency with executive tasks in the sphere of social policy/the working environment. The 'objectives and tasks' theory would however lead to the *lex specialis* of Article 137 (ex 118 A) EC, because the primary objectives and tasks of this agency lie in the sphere of social policy/working environment, aspects of European social policy that are mentioned in Article 137 EC.³¹

²⁷ See the Preamble to Regulation 1592/2002/EC of the European Parliament and of the Council establishing a European Aviation Safety Agency (OJ 2002 L 240, p. 1; last amended by Commission Regulation 1701/2003/EC, OJ 2003 L 243/5).

²⁸ See, respectively, Regulation 1406/2002/EC of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (OJ 2002 L 208/1; amended by Regulation 1644/2003, OJ 2003 L 245, p. 10) and Regulation 881/2004/EC of the European Parliament and of the Council establishing a European Railway Agency (OJ 2004 L 164/1).

²⁹ See the preamble to Regulation 178/2002/EC 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, p. 1). Article 152(4)(b) EC was inserted by the Amsterdam Treaty and confers on the Council/EP the power to adopt measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health.

³⁰ Council Regulation 2062/94/EC of 18 July 1994 establishing a European Agency for Safety and Health at Work (OJ 1994 L 216/1, amended by Council Regulation 1643/95/EC of 29 June 1995, OJ L156/1).

³¹ See Article 2 of Regulation 2062/94/EC: 'In order to encourage improvements, especially in the working environment, as regards the protection of the safety and health of workers as provided for in the Treaty and successive action programmes concerning health and safety at →

Given this lack of clarity regarding the legal basis for acts establishing EU agencies, several proposals for improvements have been presented. For example, the Dutch Scientific Council for Government Policy, in a report on the enlargement of the EU, proposed to insert a general provision on the establishment of agencies into the EC/EU Treaties. This would create greater legal certainty as to the choice of legal basis, and hence the decision making procedure that must be followed.³²

2.2. *Legal Personality and Internal Structure*

Almost all EU agencies have explicitly been given 'legal personality'. In their constituent acts, an additional provision concerning legal personality within the sphere of *national* law is often added. The trade mark office OHIM, for example, 'is a body of the Community, and it has legal personality. In each of the Member States, this Office shall enjoy the most extensive legal capacity accorded to legal persons under their laws'. The OHIM may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.³³ The Agency for Safety and Health at Work 'shall have legal personality' and 'it shall enjoy in all the Member States the most extensive legal capacity accorded to legal persons under their laws'.³⁴

The emphasis is thus clearly on the legal capacity of agencies to act on the *national* plane, more specifically, under national *civil* law. But because a more general provision exists ('the agency shall have legal personality', without further specification) it must, probably, be assumed that they are meant to be able to act in the international public sphere as well.³⁵

Regarding the *internal structure* of agencies, it turns out that almost all of them have been given a similar structure. Usually three main organs can be distinguished: (1) a *plenary* body which is the policy-making organ and, therefore, the highest organ within the agency (usually called the Management Board, or Administrative Board, or Governing Board); (2) an *executive* body of limited composition

the workplace, the aim of the Agency shall be to provide the Community bodies, the Member States and those involved in the field with the technical, scientific and economic information of use in the field of safety and health at work'.

³² *Naar een Europabrede Unie*, WRR, report no. 59, 2001, p. 272-273. The ECJ is now explicitly asked to rule on the issue, see Case C-217/04, *UK v. EP and Council*, case pending (*OJ* 2004 C 201/8). The UK argues that the Regulation establishing the European Network and Information Security Agency (ENISA) falls outside the scope of Article 95 EC and the only appropriate legal basis for such a measure could be Article 308 EC.

³³ See Article 111 (1) and (2) of Regulation 40/94/EC on the Community trade mark (*OJ* 1994 L 11/1).

³⁴ Article 7 of Council Regulation 2062/94/EC of 18 July 1994 establishing a European Agency for Safety and Health at Work (*OJ* 1994 L 216/1). See, e.g., also Article 3 of Regulation 2667/2000/EC (European Agency for Reconstruction).

³⁵ The Dublin-based Foundation for Living and Working Conditions has, exceptionally, only been given legal personality in the national sphere. See Article 4 of Regulation 1365/75/EEC of the Council of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions (*OJ* 1975 L 139/1).

which is responsible for day-to-day management (the Director, the Executive Director); (3) an organ which is composed of technical *experts* in the area in which the agency is working (the Scientific Committee, the Experts, the Advisory Forum).

The plenary organ is composed of persons who are appointed by the governments of the Member States and by the EU institutions (the Council and/or European Commission). The central organ of agencies is therefore of a dual nature, partly 'intergovernmental'/partly 'supranational', but it is usually chaired by a Commission representative.³⁶ All members have one vote and a majority, usually a two-thirds majority, adopts the decisions.³⁷ In the 'social' agencies, a certain number of the members of the plenary organ are appointed by organizations of employers and employees' trade unions.³⁸

The executive body (Director, Executive Director) is responsible for daily business, the Director represents the agency externally, he or she is responsible for the proper preparation and execution of the decisions adopted by the plenary organ, the Director prepares and publishes the agency's yearly report, et cetera. The Director is accountable to the plenary body (Administrative Board) for his/her activities.³⁹

Finally, the specialized organ brings together the real experts, the scientists, who are ultimately responsible for the technical quality of the agency's opinions and reports. Within the EFSA, for example, a Scientific Committee and permanent Scientific Panels are responsible for providing the scientific opinions of the Food Authority. They have the possibility, where necessary, of organizing public hearings. The Scientific Committee is composed of the Chairs of the Scientific Panels and six independent scientific experts who do not belong to any of the Scientific Panels.⁴⁰ The European Training Foundation has an advisory forum appointed by the governing board. The members of the forum are selected from experts among training and other circles concerned in the work of the Foundation, taking into account the need to ensure the presence of representatives of the social partners, of those in-

³⁶ See, e.g., Article 4 of the Regulation on the European Agency for Reconstruction (*OJ* 2000 L 306/7).

³⁷ See, e.g., Article 4(7) of Regulation 2667/2000/EC (regarding decisions of the Governing Board of the European Agency for Reconstruction) and Article 14 of Regulation 1406/2002/EC (which stipulates that the Administrative Board of EMSA takes its decisions by a two-thirds majority). The Management Board of EFSA/the Food Authority decides by a simple majority, see Article 25(5) of Regulation 178/2002/EC.

³⁸ See Article 4 of the CEDEFOP Regulation (*OJ* 1975 L 39/1), and Article 8 of the Regulation on the European Agency for Safety and Health at Work (*OJ* 1994 L 216/1).

³⁹ See, e.g., Article 11 of Regulation 2062/94/EC on the European Agency for Safety and Health at Work (*OJ* 1994 L 216/1) and Article 55 of the EMEA Regulation (*OJ* 1993 L 214/1).

⁴⁰ See Article 28 of Regulation 178/2002/EC. On this, see L. Buonanno, S. Zabloutney and R. Keefer, 'Politics versus Science in the Making of a New Regulatory Regime for Food in Europe', 5 (12) *European Integration online Papers*, 2001 (<<http://eiop.or.at/eiop/texte/2001-012a.htm>>).

ternational organizations active in the provision of training assistance, and of the eligible countries.⁴¹

2.3. *The Definition of an Agency in the Context of the European Union*

According to the US Administrative Procedures Act, an ‘agency’ means ‘each authority of the Government of the United States, whether or not it is within or subject to review by another agency’. It is however added that a number of specified bodies, such as the US Congress, the courts of the United States and courts martial and military commissions, do not fall under this concept of (American) agency.⁴²

Within the EU context, such a general definition does not exist. As a result, there exists some confusion as to what exactly makes a certain organizational entity an ‘agency’ and not a ‘body’, ‘organ’, ‘office’ or ‘committee’ of the EC/EU. Still, for several reasons the exact institutional qualification of the many bodies/organs/agencies in the European Union is of great practical importance. For example, some provisions of the EU Charter on Fundamental Rights offer protection against acts of ‘institutions’ only, others apply to acts of ‘bodies’ and/or ‘agencies’ as well.⁴³ Taking into account what has been said in the previous sections, the following elements should, in my view, be considered as the main characteristics of agencies.

1. The body/organ must enjoy a *certain degree of independence* from the main EU Institutions, in particular from the European Commission. This (more or less) autonomous position is proclaimed to the outside world by explicitly stating that the body in question has legal personality.⁴⁴

The independent status of the Agency is the main difference between it and ‘ordinary’ *committees* – they are not (sufficiently) independent but simply assist the Commission in conducting its various executive/delegated tasks. The Committee on Excise Duties, for example, forms part and parcel of the Commission’s internal organization. As the Court of First Instance pointed out:

‘It must be emphasized that the deliberations of the Committee on Excise Duties, and the documents of that committee, are to be regarded as being the deliberations and documents of the Commission. The main task of the committee, which was constituted in pursuance of a Community act, is to *assist* the Commission, which presides over it and provides its secretariat. The Commission thus draws up the minutes which the committee adopts. In addition, it appears that this committee does not have its own administration, budget, archives or premises, still less an address of its own. Consequently, the committee is not a natural or legal person, nor a Member State or any other na-

⁴¹ See Article 6 of Regulation 1360/90 on the European Training Foundation (*OJ* 1990 L 131/1).

⁴² See § 551 of the US Administrative Procedures Act.

⁴³ See, for example, the Charter provision on good administration, in the future to be found in Article II-101 of the EU Constitution: paragraph 1 applies to ‘the Institutions, bodies and agencies of the Union’, whereas paragraph 4 applies to the Institutions of the Union only. See also D.M. Curtin and R.H. van Ooik, ‘The Sting is Always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights’, *Maastricht Journal of European and Comparative Law*, 2001, p. 102 and p. 106-108.

⁴⁴ See *supra*, section 2.2.

tional or international body, and cannot be regarded as ‘another Community institution or body’ within the meaning of the code of conduct’.⁴⁵

Absolute independence is however not a precondition for being an EU agency. As will be discussed *infra*, apart from judicial review, agencies’ acts are often subject to review by the European Commission.⁴⁶ This does not detract from the fact that supervision will only be exercised exceptionally and that to a large extent agencies, in their daily functioning, remain independent from Commission interference. Of course, this still leaves quite some room for doubt: how much independence is actually needed in order for a body to be qualified as a (sufficiently independent/autonomous) agency? A body such as Eurostat, for example, cannot, in my view, be qualified as such an independent agency. In its basic act it is explicitly stated that Eurostat forms an integral part of the European Commission’s organization.⁴⁷ Agencies therefore lie somewhere in between the ‘ordinary’ *committees* (with hardly any independent status) and the official *Institutions* of the Communities/Union under Article 7 EC and Article 5 EU.

2. A rather sophisticated (new) *organizational structure* must be created, in which several organs/persons work together. As we have noticed above, most agencies have three organs within their outside shell – the plenary body, the executive organ, and the experts committee. Where the internal organization is too simplistic, we cannot speak of an ‘agency’. The European Data Protection Supervisor, for example, turns out to be just one independent (natural) person, and therefore cannot be seen as an EU Agency, even though he is independent from the other institutions.⁴⁸

3. The agency was *established* on the basis of an act (Regulation) of the EC institutions. This third element emphasizes that a formal link between the EC and the body/entity in question should exist and, at the same time, that this link was created at the secondary level (not in the EC/EU Treaty itself). Only if the EC/EU institutions have set up the agency, acting under one or more legal bases of the EC Treaty, it should be considered as a *Community* agency. In a number of founding acts it is explicitly stated that the agency concerned is a ‘Community body’, for ex-

⁴⁵ Case Case T-111/00, *British American Tobacco v. Commission* [2001] ECR II-2997, at para. 37. See also Case T-188/97 *Rothmans v. Commission* [1999] ECR II-2463 (paras. 58 and 59).

⁴⁶ See section 4.1.

⁴⁷ See Regulation 322/97/EC of the Council on the Community Statistics (*OJ* 1997 L 52/22): ‘“Community authority” shall mean the *Commission department* responsible for carrying out the tasks devolving on the Commission as regards the production of Community statistics (Eurostat)’.

⁴⁸ See the Commission proposal for a Decision of the European Parliament, of the Council and of the Commission on the regulations and general conditions for the performance of the duties of the European Data Protection Supervisor (*OJ* 2001 C 304 E, p. 178). According to the preamble this Supervisor is the ‘independent supervisory body entrusted with monitoring the application to the Community institutions and bodies of the Community instruments relating to the protection of natural persons as regards the processing of personal data and the free movement of such data’.

ample the Community Plant Variety Office (CPVO).⁴⁹ If this requirement has not been met, as in the case of the European Patent Office (see further below), the body in question does not belong to the Community legal order.

If the entity was formally set up at secondary level but under the legal bases of the second pillar (CFSP) or the third pillar (PJCC), the body can be qualified as a body of the *Union*. However, such bodies are usually not considered to be ‘agencies’ (of the Union). Instead, they are called ‘organization’, ‘institute’, ‘centre’, ‘unit’, et cetera. Examples in the sphere of foreign policy are the EU Satellite Centre (Torrejón de Ardoz, Spain)⁵⁰ and the EU Institute for Security Studies.⁵¹ In the field of criminal law/third pillar one can think of Eurojust⁵² and the European Police College.⁵³ These are all organs/bodies of the European *Union*, but the term ‘agency’ (of the EU) is carefully avoided.⁵⁴

The existing bodies, which are officially called ‘agencies’, were thus all set up under *EC Treaty* provisions, and hence they perform certain tasks in the sphere of Community policies, not in the sphere of the second and third pillar. They should in my view be regarded as *Community* organs; they can be qualified as *Union* organs as well, at least if one understands the Communities to be a kind of ‘sub-legal order’ of the broader Union’s legal order. They therefore belong to the *Union’s* constitutional polity in a broader sense as well.⁵⁵

⁴⁹ See Article 30 of Council Regulation 2100/94/EC of 27 July 1994 on Community plant variety rights (*OJ* 1994 L 227/1): the CPVO ‘shall be a body of the Community’.

⁵⁰ Council Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre (*OJ* 2001 L 200/5). Its ‘mission’ is to provide material resulting from the analysis of satellite imagery and collateral data, including aerial imagery (see Art. 2(1) of this Joint Action).

⁵¹ Council Joint Action 2001/554/CFSP on the establishment of a European Union Institute for Security Studies (*OJ* 2001 L 200/1). The Institute is to conduct academic research, produce research papers, arrange seminars, ‘enrich the transatlantic dialogue’ by organizing activities similar to those of the WEU Transatlantic Forum and maintain a network of exchanges with other research institutes and think-tanks both inside and outside the European Union (Article 2 of the Joint Action).

⁵² Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (*OJ* 2002 L 63/1, amended by Decision 2003/659/JHA, *OJ* L 2003 L 245/44). Eurojust was thus established on the basis of secondary PJC law, even before the entry into force of the Treaty of Nice (which for the first time explicitly mentioned this body, see Artt. 29 and 31 EU).

⁵³ Council Decision 2000/820/JHA of 22 December 2000 establishing a European Police College (CEPOL), *OJ* 2000 L 336/1.

⁵⁴ See, e.g. the fourth recital in the preamble to the Eurojust Decision (2002/187/JHA), where it is said that ‘this Eurojust unit is set up by this Decision as a body of the European Union with legal personality’. CEPOL, on the other hand, does not even seem to qualify as a body/organ, since the *Collège européen de Police* was set up as a *network*, by bringing together the national training institutes for senior police officers in the Member States (Article 1(2) of the CEPOL decision). The recently established ‘European Defence Agency’ constitutes the exception; in July 2004, it was set up on the basis of Article 14 EU (see *OJ* 2004 L 245/17).

⁵⁵ After the entry into force of the *Constitution* this will, of course, change and we will have to speak of ‘Agencies of the Union’ because the three-pillar structure and the EC will no longer exist.

If a certain agency/body was *not* established on the basis of the EC Treaty, and therefore was not created by the Council (and the EP), this entity cannot be qualified as an agency of the European Community (nor: of the European Union). For this reason the European Patent Office (EPO), for example, cannot be qualified as an EC (or EU) agency. It was established under a conventional Treaty, namely the European Patent Convention.⁵⁶ Membership of this organization is also not identical to that of the EU: the European Patent Organisation, for which the EPO acts as the executive arm, has twenty members.⁵⁷ For the same reason, the European Bank for Reconstruction and Development (EBRD) cannot be regarded as a body/organ/agency of the Communities (or Union). It was established on the basis of a conventional treaty and the European Community is just one of the forty parties to the founding Treaty.⁵⁸

2.4. *Language Regime*

Most agencies only use a few of the (after enlargement) twenty official EU languages as their daily working language.⁵⁹ The OHIM, for example, has five working languages: English, French, Spanish, German and Italian.⁶⁰ In its proposal for establishing a European Railway Agency, the Commission indicates that three internal working languages are sufficient (English, French, German).⁶¹ And in an explanation for its proposal regarding the European Air Safety Agency, the Commission wrote that 'the language regime should allow the Agency to work in an efficient and swift manner. Hence, all acceptable means of compliance and guidance material adopted by the Agency will be available only in English as it is the language commonly, if not exclusively, used for all technical documentation in the aeronautical industry'.⁶² The Council and the European Parliament, however, ruled that at

⁵⁶ On the EPO's official website, this is explicitly confirmed: 'The EPO is not an EU institution. It is completely self-financing and has a large degree of administrative autonomy'.

⁵⁷ All the EU countries plus Cyprus, Liechtenstein, Monaco, Switzerland and Turkey.

⁵⁸ See Council Decision 90/674/EEC of 19 November 1990 on the conclusion of the Agreement establishing the European Bank for Reconstruction and Development (*OJ* 1990 L 372/1). Its status as a non-EU body also clearly emerges from the preamble to this act of approval: 'Whereas 40 countries, together with the European Economic Community and the European Investment Bank, have signified their intention of becoming members of a European Bank for Reconstruction and Development which is European in its basic character and broadly international in its membership'.

⁵⁹ As from May 1, 2004, the official EU languages are: Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish, Czech, Estonian, Latvian, Lithuanian, Hungarian, Maltese, Polish, Slovak and Slovenian. Irish is not an official language. See also Article IV-448 Constitution.

⁶⁰ See Article 115 of Regulation 40/94/EC on the Community trade mark (*OJ* 1994 L 11, p. 1).

⁶¹ See Article 35 of the Commission Proposal for a Regulation of the European Parliament and of the Council establishing a European Railway Agency (*OJ* 2002 C 126E, p. 323). In the final version (Article 35 of Regulation 881/2004) it is however merely stated that 'the Administrative Board shall decide on the linguistic arrangements for the Agency'.

⁶² See the Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on establishing common rules in the field of civil aviation and creat-

least the most important EASA documents (annual safety review; opinions addressed to the Commission; annual general report; programme of work) should be available in all the official languages.⁶³

It goes without saying that these language regimes are controversial, to say the least, especially when the Agency has the power to take individual decisions vis-à-vis private parties (the regulatory agencies).⁶⁴ And so it occurred that a brave Dutch national, Ms Kik, forcefully contested the language regime of the OHIM. Initially the Court of First Instance could circumvent the thorny issue by declaring her action for annulment to be inadmissible: the rules regarding working languages were laid down in the Trade Mark *Regulation*.⁶⁵ Later, however, she managed to obtain an answer on the substance of the matter, using the plea of illegality as the procedural tool: does the OHIM's language regime breach 'the principle of Community law of non-discrimination between the official languages of the European Communities'?⁶⁶

In the CFI's view, such a fundamental principle does not exist at all, so that it also cannot be breached. The idea that all EC languages are equal cannot be found in the Treaty itself; the relevant Treaty basis (Article 290 EC) is completely neutral in this regard: 'The rules governing the languages of the institutions of the Community shall [...] be determined by the Council, acting unanimously'. The non-discrimination principle is only to be found in Regulation No. 1, but the CFI underlined that this is merely an act of secondary law: 'To claim that Regulation No. 1 sets out a specific Community law principle of equality between languages, which may not be derogated from even by a subsequent regulation of the Council, is tantamount to disregarding its character as secondary law'. Moreover, Article 290 EC merely relates to the language regimes of 'the institutions' of the Community, not to that of the other organs/bodies. The rules governing languages laid down by Regulation No. 1 therefore cannot be deemed to amount to a general principle of Community law.⁶⁷

On appeal, the ECJ confirmed this finding of the Court of First Instance. The Treaty contains several references to the use of languages in the European Union. Nonetheless, according to the ECJ, those references cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to

ing a European Aviation Safety Agency (*OJ* 2001 C 154 E/1). In the final version see also Article 23 of this draft Regulation.

⁶³ Article 23 of Regulation 1592/2002/EC (*OJ* 2002 L 240/1).

⁶⁴ On the language regime of agencies, see also E. Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?', *Common Market Law Review*, 2000, p. 1113 and p. 1128-1130 and the Commission's answer to a MEP question in *OJ* 1999 C 182/39.

⁶⁵ Case T-107/94, *Kik v. Council and Commission* [1995] ECR II-1717 ('Kik I'). Judgment confirmed by the ECJ in Case C-270/95 P [1996] ECR I-1987.

⁶⁶ Case T-120/99, *Kik v. OHIM* [2001] ECR II-2235 ('Kik II'). This case illustrates the great practical importance of the plea of illegality (Article 241 EC) for the judicial protection of private individuals. Cf. D. Sinaniotis, 'The Plea of Illegality in EC Law', *European Public Law*, 2001, p. 103-125.

⁶⁷ *Kik II*, at paras. 57 and 58.

have a version of anything that might affect his own interests drawn up in his language in all circumstances.⁶⁸

3. Functions and Tasks of European Agencies

The purpose of this section is to analyse the tasks, purposes and activities of the many EU agencies, in order to be able to divide them into different categories. In doing so, we can get an impression of what these relatively unknown bodies, located in far-away places like Thessalonica, Alicante or Angers, are actually doing with the European taxpayers' money.

Having regard to the primary objectives and tasks, mentioned in the constituent acts, it appears that, *grosso modo*, they can be divided, in my view, into *three* different groups. First, the agencies whose main or exclusive task is to collect and produce technical information in a certain field of human/political activity. These will be called the information-collecting agencies (section 3.1). Secondly, the agencies whose primary task is to apply rules of general application to specific cases in certain fields of EC policy, including the application of EC law to private individuals in a legally binding manner. These are the regulatory agencies (section 3.2). And, thirdly, the agencies that are responsible for carrying out specific EU programmes, thereby assisting the European Commission in an operational manner. They will be called the operational or executive agencies (section 3.3). It goes without saying that the dividing lines are not very sharp and that different classifications may be made.⁶⁹

3.1. Information-Collecting Agencies

Up until now, the primary task of the majority of the independent agencies consists of gathering and processing information with respect to the subject-matter for which the agency was created. The main 'output' of this type of agency consists of reports, statistical data, et cetera, with mainly *technical* information. Essentially, the biologists, the veterinarians, and the food safety specialists are in charge. Ancillary activities may include things like organizing conferences and offering training courses.

The Community institutions and/or the Member States can use the technical information thus produced as a reliable, objective résumé of the (technical) *facts*. This is indispensable for subsequent policy-making in many areas, in particular in technical fields such as food safety, environmental protection and public health policy. The function of providing objective and reliable technical information as a basis

⁶⁸ Case C-361/01P, *Kik v. OHIM*, judgment of 9 September 2003 (especially paras. 81-87).

⁶⁹ See, e.g., the report by M. Everson, G. Majone, L. Metcalfe and A. Schoutatanag, *The Role of Specialised Agencies in Decentralising EU Governance*, 2001. They make a distinction between Regulatory Agencies, Independent Information Collection Agencies, Adjudicational Agencies, and Agencies charged with the pursuit of distinct 'Constitutional-Type' Normative Goals. See also J. Shaw, *Law of the European Union*, 3rd ed., Hampshire, Palgrave, 2000, p. 147-148.

for (subsequent) policy making is clearly expressed in, for example, the regulation on the Lisbon Drug Centre. Its prime objective is to provide the Community institutions and its Member States with objective, reliable and comparable information at the European level concerning drugs and drug addiction and their consequences. The statistical, documentary and technical information processed or produced is intended to help provide the Community and the Member States with an overall view of the drug and drug addiction situation when *they* take measures or decide on action. It is emphasized that the Drug Centre may not take any measure, 'which in any way goes beyond the sphere of information and the processing thereof'.⁷⁰ The task of the Monitoring Centre on Racism (Vienna) is similar, namely to provide the Community and its Member States with objective, reliable and comparable data at the European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence.⁷¹

Adding to these the other agencies with similar information-gathering tasks – but without more far-reaching powers – I come to the following list of Information-Collecting Agencies:

- European Monitoring Centre for Drugs and Drug Addiction (Lisbon);
- European Monitoring Centre on Racism and Xenophobia (Vienna);
- European Centre for Development of Vocational Training, or CEDEFOP (Thessalonica);⁷²
- European Foundation for the Improvement of Living and Working Conditions (Dublin);⁷³
- European Agency for Health and Safety at Work (Bilbao);⁷⁴
- European Environment Agency (Copenhagen);⁷⁵

⁷⁰ See Article 1 of Council Regulation 302/93/EEC of 8 February 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction (*OJ* 1993 L 36/1).

⁷¹ See Article 2(1) of Regulation 1035/97/EC of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (*OJ* 1997 L 151/1). For the determination of its seat (Vienna), see the Decision of the representatives of the governments of the Member States of 2 June 1997 determining the seat of the European Monitoring Centre on Racism and Xenophobia (*OJ* 1997 C 194/4).

⁷² Regulation 337/75/EEC of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training (*OJ* 1975 L 39/1, amended several times). The abbreviation CEDEFOP stands for *Centre Européen pour le Développement de la Formation Professionnelle*. Due to the Edinburgh Decision, this Agency moved its seat from Berlin to Thessalonica (see Regulation 1131/94/EC, *OJ* 1994 L 127/1).

⁷³ Regulation 1365/75/EEC of the Council of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions (*OJ* 1975 L 139/1, amended by Regulation 1947/93, *OJ* 1993 L 181/26).

⁷⁴ Council Regulation 2062/94/EC of 18 July 1994 establishing a European Agency for Safety and Health at Work (*OJ* 1994 L 216/1, amended by Council Regulation 1643/95/EC of 29 June 1995, *OJ* L 156/1).

⁷⁵ Council Regulation 1210/90/EEC of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network (*OJ* 1990 L 120/1, amended by Council Regulation 933/1999/EC, *OJ* 1999 L 117/1).

- European Food Safety Authority (Parma);⁷⁶
- European Maritime Safety Agency (Lisbon);⁷⁷
- European Network and Information Security Agency (Greece);⁷⁸
- European Centre for Disease Prevention and Control (Stockholm);⁷⁹
- European Railway Agency (Lille-Valenciennes, France).⁸⁰

At first glance it may seem controversial to mention the Food Authority among the ‘traditional’ information-gathering agencies, given its important and politically sensitive task of making sure that our food is safe. However, if one categorizes on the basis of the tasks and responsibilities, mentioned in the constituent document, then it cannot be said that the EFSA’s tasks go far beyond the traditional gathering of information: ‘The Authority shall provide scientific advice and scientific and technical support for the Community’s legislation and policies in all fields which have a direct or indirect impact on food and feed safety. It shall provide independent information on all matters within these fields and communicate on risks’.⁸¹

Another recently established agency, the European Maritime Safety Agency (EMSA), should, in my view, be mentioned here as well. Its main objective is to ensure a high, uniform and effective level of maritime safety and the prevention of pollution by ships within the Community; EMSA shall provide the Member States and the Commission with the technical and scientific assistance needed and with a high level of expertise, in order to help them to apply Community legislation properly in the field of maritime safety, to monitor its implementation and to evaluate the effectiveness of the measures in place. In order to achieve these objectives, EMSA has however not been given powers of decision making which clearly go beyond information-gathering, processing data, organizing training activities, et cetera⁸²

The outcome (reports, opinions, conferences) may, and sometimes will, serve as an important and influential basis for policy-making by the EU institutions, in particular by the European Commission. The more technical and complicated the matter becomes (standards for emission of carbon dioxide, a causal link between

⁷⁶ Regulation 178/2002/EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (*OJ* 2002 L 31, p. 1, amended by Regulation 1642/2003, *OJ* 2003 L 245/4).

⁷⁷ Regulation 1406/2002/EC of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (*OJ* 2002 L 208/1; amended by Regulation 1644/2003, *OJ* 2003 L 245, p. 10).

⁷⁸ Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency (*OJ* 2004 L 77/1).

⁷⁹ Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control (*OJ* 2004 L 142/1).

⁸⁰ Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency (*OJ* 2004 L 164/1).

⁸¹ Article 22(2) of the EFSA Regulation.

⁸² See in particular Articles 1 and 2 of Regulation 1406/2002/EC. According to Article 3 of this Regulation, EMSA may carry out ‘visits’ (not: inspections) to the Member States, which does not alter my classification.

BSE and Creutzfeldt-Jacobs disease?), the less politicians and lawyers will dare to contest the Agency's opinion. One could therefore speak of a 'sourcing out' of one of the basic tasks on any public administration, namely the gathering of sound, and scientifically reliable information as an indispensable precondition for proper administration and 'good governance'.

The annual reports produced by the Lisbon Drug Centre, for example, serve as a useful informational guide on the drug issue, and reference to them is sometimes made in Community and Member States' acts and policies.⁸³ And the EFSA Regulation expressly stipulates that the Authority's opinions and information have to serve as the scientific basis for the drafting and adoption of Community measures in the field of foodstuffs. The tasks of the Authority include providing the Community institutions and the Member States with the best possible scientific opinions in all cases provided for by Community legislation and on any question within its mission.⁸⁴

In conclusion, depending on the circumstances, and in particular on the quality of their work, Agencies of type I may de facto have a strong influence on the Institutions and/or the Member States, despite their limited 'official' competences.

3.2. *Regulatory Agencies: Application of Community Rules in Specific Cases*

More interesting, at least from this legal point of view, are the agencies which have been given more intense powers of decision making. They do more than just collecting and spreading (technical) information. If an agency has been given the power to adopt certain *legally binding* decisions, it is often referred to as a regulatory agency.⁸⁵ The use of this term is not problematic, as long as it is realized that the decision making powers of this type of agency are limited to *applying* general rules to individual cases, without, moreover, possessing really discretionary powers. Being a 'regulatory' agency therefore does not automatically mean to have the power to adopt (legally binding) rules of general application or to have the power to enforce Community rules within its area of activity.

In its White Paper on European Governance, the Commission confirms this by stating that regulatory agencies 'should be granted the power to take *individual* decisions in application of regulatory measures' In its view, at present three such regulatory agencies exist at the EU level. The Office for Harmonisation in the Internal Market (OHIM) and the Community Plant Variety Office (CPVO) are regulatory agencies because they take individual decisions on the granting of European trademarks and plant variety rights. The European Agency for the Evaluation of Medicinal Products (EMA) also belongs to the category of regulatory agencies because it

⁸³ For these 'Annual Reports on the state of the drugs problem in the European Union', see the Centre's website: <<http://www.emcdda.eu.int>>.

⁸⁴ See Article 22(5) and 22(6) of the EFSA Regulation.

⁸⁵ For example in the Commission's own White Paper on European Governance, see *supra*, section 1.

undertakes a technical assessment of applications for the approval of new medicines prior to a Commission decision.⁸⁶

The OHIM certainly belongs to the category of regulatory agencies, given its power to adopt legally binding acts vis-à-vis private companies for the implementation of the regime established by the Trade Mark Regulation.⁸⁷ The CPVO is no problem, since 'if the Office is of the opinion that the findings of the examination are sufficient to decide on the application and there are no impediments pursuant to Articles 59 and 61, it shall grant the Community plant variety right. The decision shall include an official description of the variety'.⁸⁸ The European Agency for the Evaluation of Medicinal Products (EMEA, with its seat in London) raises some more doubts. This agency has important tasks regarding applications for the registration of medical products, with a view to releasing them into the entire Union/Community, but this agency does not have the power to take decisions regarding the *authorization* of medical products. This power rests with the European Commission.⁸⁹

Despite these doubts, the following agencies could, in my view, be regarded as belonging to the second category of regulatory agencies:

- Office for Harmonisation in the Internal Market, Trade Marks and Designs (Alicante);⁹⁰
- Community Plant Variety Office (Angers, France);⁹¹
- European Agency for the Evaluation of Medicinal Products (London);⁹²
- European Aviation Safety Agency (Cologne).⁹³

⁸⁶ White Paper on European Governance, p. 21.

⁸⁷ See Regulation 40/94/EC of 20 December 1993 on the Community trade mark (*OJ* 1994 L 11, p. 1).

⁸⁸ See Article 62 of Council Regulation 2100/94/EC of 27 July 1994 on Community plant variety rights (*OJ* 1994 L 227/1). On this specific agency, see T. Millet, 'The Community system of plant variety rights', *European Law Review*, 1999, p. 231.

⁸⁹ See, in particular, Articles 4 and 51 of Council Regulation 2309/93/EEC of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products (*OJ* 1993 L 214/ 1). From these provisions it follows that in order to obtain the authorization for release, the company responsible for placing a medicinal product on the market must submit an *application* to the EMEA. It is then for the *Commission* to issue and supervise marketing authorizations for medicinal products for human and veterinary use.

⁹⁰ Regulation 40/94/EC of 20 December 1993 on the Community trade mark (*OJ* 1994 L 11, p. 1).

⁹¹ Council Regulation 2100/94/EC of 27 July 1994 on Community plant variety rights (*OJ* 1994 L 227/1).

⁹² Council Regulation 2309/93/EEC of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products (*OJ* 1993 L 214/1).

⁹³ Regulation 1592/2002/EC of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (*OJ* 2002 L 240, p. 1).

The EASA should be mentioned here because its tasks clearly go beyond the collection of technical information.⁹⁴ The Agency may take binding individual decisions by granting type certificates, and it may conduct inspections and investigations. In order to exercise its core function, namely the granting of type approval for products and appliances, the agency is authorized to issue, modify, suspend or revoke type certificates.⁹⁵

3.3. *Operational or Executive Agencies*

This type of agency is created, essentially, to assist the European Commission in implementing specific EU programmes and policies. Operational/executive agencies do so by carrying out political decisions in an operative manner. The agency 'stands in the mud', so to speak, as its servants go out on to the streets.

Examples of operational activities are the organization of training courses for officials in the Central and Eastern European Countries (by the European Training Foundation, ETF), the carrying out (on the spot) of the EU reconstruction programme for Kosovo (by the European Agency for Reconstruction, EAR), and also, in my view, providing translation services for a large number of EU institutions and organs/bodies (Translation Centre). The list of operational/executive agencies is as follows:

- European Training Foundation (Turin);⁹⁶
- European Agency for Reconstruction (Thessalonica);⁹⁷
- Translation Centre for Bodies of the European Union.⁹⁸

It must be added that at the end of 2002 the Council adopted, on the basis of Article 308 EC, a Regulation on executive agencies that are responsible for managing one or more Community programmes.⁹⁹ This Regulation contains rules on the internal structure, supervision, relation to the Commission, et cetera for *all* (future) agencies responsible for managing Community programmes. It is therefore, remarkably enough, the *Commission* alone which may decide, at a tertiary level, to set up these kinds of executive agencies, and it can also determine the lifetime of the executive agency. A restriction, however, is that the Commission may not entrust the execu-

⁹⁴ As opposed to the tasks of the European *Maritime Safety Agency*, which was classified as a Category I Agency, see *supra*, section 3.1.

⁹⁵ See Articles 12, 13, 15, 45 and 46 of the EASA Regulation.

⁹⁶ Council Regulation 1360/90/EEC of 7 May 1990 establishing a European Training Foundation (*OJ* 1990, L 131/1), amended by Regulation 2063/94/EC (*OJ* 1994 L 216/9) and Regulation 1572/98/EC (*OJ* 1998 L 206/1).

⁹⁷ Council Regulation 2667/2000/EC of 5 December 2000 on the European Agency for Reconstruction (*OJ* 2000 L 306/7).

⁹⁸ Council Regulation 2965/94/EC of 28 November 1994 setting up a Translation Centre for bodies of the European Union (*OJ* 1994 L 314/1).

⁹⁹ Council Regulation 58/2003/EC of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (*OJ* 2003 L 11/1).

tive agency with tasks 'requiring discretionary powers in translating political choices into action'.¹⁰⁰ Recent examples of these types of agencies are the 'Intelligent Energy Executive Agency' and the 'Education and Culture Executive Agency'.

4. Supervising the Acts and Measures of the Agencies

In the Treaty texts on judicial protection/supervision not one of the European agencies is explicitly mentioned. This does not however imply that their acts and measures are immune from any 'external' control; in fact both the Commission (section 4.1) and the Court of Justice (section 4.2) perform important supervisory tasks. The power to do so is created at secondary level: in almost all measures establishing agencies certain heads of jurisdiction have been conferred upon the Courts, in addition to the – more politically-orientated – powers conferred on the European Commission.

4.1. Non-Judicial Supervision

Most founding acts expressly stipulate that the agency concerned will be completely independent from the makers of law and politics. The Agency's output may and should not be influenced by political considerations. It may be queried, however, whether such bold statements are really correct, since very often the European Commission has been given the power to *review the legality* of an Agency's act and decisions, without indicating on what grounds, for what reasons, the Commission can annul that Agency's act.

The Regulation on the European Centre for Development of Vocational Training (CEDEFOP), for example, stipulates that Member States, members of the management board of this centre and third parties 'directly and personally involved' may refer to the Commission any act of the centre for the Commission to examine the legality of that act.¹⁰¹ A similar power of review has been given to the Commission in relation to acts of the European Agency for Cooperation, an auxiliary body operating in the field of development cooperation.¹⁰² The reasons for the Commission to annul these acts are not mentioned at all, and so it seems that the Commission enjoys a very wide discretion when deciding whether or not to annul an Agency's act.

The Regulation on executive agencies which are responsible for managing Community programmes, already mentioned earlier, contains a set of rather detailed rules on supervision by the Commission, which are applicable to all (future) executive agencies. Any act of an executive agency which injures a third party may be referred to the Commission by any person directly or individually concerned or

¹⁰⁰ Article 6 of Regulation 58/2003/EC. See also section 5 on the *Meroni* principle.

¹⁰¹ See Article 18 of Regulation 337/75/EEC of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training (*OJ* L 39/1, amended several times).

¹⁰² See Article 19 of Council Regulation 3245/81/EEC of 26 October 1981 setting up a European Agency for Cooperation (*OJ* 1981 L328/1).

by a Member State for a review of its legality. Administrative proceedings shall be referred to the Commission within one month of the day on which the interested party or Member State concerned learnt of the act challenged. On its own initiative the Commission may review any act of an executive agency. It must decide within two months of the day on which that review was completed, after having heard the arguments adduced by the agency. The Commission may also suspend the implementation of the act at issue or prescribe interim measures. In its final decision the Commission may uphold the executive agency's act or decide that the agency must modify that act either in whole or in part.¹⁰³

Thus, in addition to judicial review (to be discussed below) the European Commission may exercise a form of administrative supervision in relation to all the acts and decisions of the various European agencies. The existence of this possibility of non-judicial review, in addition to judicial review, makes it difficult to assess whether the *Commission* can be held *responsible* for damage to individuals as a result of acts and actions of an agency. The reason would be that the Commission may not have exercised its power to 'monitor' the agency properly. But, in my view, only agencies themselves can be held responsible in such a case of inaction on the part of the Commission. They have been set up, not by the Commission, but by the Council (and the EP).¹⁰⁴ And, moreover, private individuals negatively affected by Agencies' actions often have the possibility to bring an action for damages at the CFI against the Agency itself.

4.2. *Judicial Supervision by the European Court of Justice*

The precise powers/jurisdiction of the Court with regard to legal actions by, or against, agencies depends on the specific rules laid down in the various constituent acts; as was pointed out above, the text of the EC/EU Treaty itself does not mention these possibilities at all. The acts establishing agencies must therefore be read in a 'horizontal' manner to be able to draw general conclusions as to the Court's jurisdiction in relation to EU agencies.¹⁰⁵

Very often the ECJ/CFI has been given the power to decide on the *contractual* liability of the agency in question. The Court has jurisdiction to render a judgment pursuant to any arbitration clause contained in contracts concluded by the agency and third parties. The law applicable to the contract thus governs contractual liability. If the agency does not pay for the pencils it has ordered, the pencil-selling company may sue it before the CFI.¹⁰⁶

¹⁰³ See Article 22 of Regulation 58/2003/EC.

¹⁰⁴ See *supra*, section 2.1.

¹⁰⁵ One may, by the way, question whether it is legally acceptable to increase the Court's jurisdiction through secondary measures, especially where at primary level (the EC/EU Treaty) no relevant indications can be found. Cf. E. Vos, 'Agencies and the European Union', in T. Zwart and L. Verhey (eds.), *Agencies in European and Comparative Law*, Antwerpen, Intersentia, 2003, p. 140-141.

¹⁰⁶ See, e.g., Article 16 of Regulation 302/93/EEC (on the Lisbon Drug Centre) and Article 18(1) of Regulation 2965/94 (EU Translation Centre).

More importantly, most founding acts contain rules on the *non-contractual* liability of the agency in question. The wording of such provisions is very similar to the wording of Articles 235/288 of the EC Treaty, dealing with the non-contractual liability of the Community as a whole (represented by the European Commission and/or the Council of the EU).¹⁰⁷ In the Regulation on the European Plant Variety Office, for example, it is said that in the case of non-contractual liability, this agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties. The Court of First Instance and the Court of Justice shall have jurisdiction in these disputes relating to compensation for damages.¹⁰⁸

Where the agency is equipped with more important tasks and powers, in particular the power to adopt decisions which can bind private individuals, we often encounter the possibility to bring an *action for annulment* before the CFI against the Agency's (binding) decisions. The rules on such annulment actions often very much resemble those of the action for the annulment of acts of the main EC institutions, laid down in Article 230 of the EC Treaty.

An important example for business circles is the provision in the Regulation on the Community Trade Mark (Article 63) which gives private individuals – in practice mostly large American and European companies – the right to lodge an action for annulment against acts of the Board of Appeal of the OHIM at the Court of First Instance. The action for annulment may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of the Regulation or of any rule of law relating to their application or misuse of power. In practice, very often the action is brought on the ground that the trademark is not 'devoid of any distinctive character' (Article 7 of the Regulation), whereas the OHIM previously ruled that it is.¹⁰⁹ The action must be brought before the CFI within two months, and the OHIM shall be required to take the necessary measures to comply with the judgment of the Court. Thus, it is clear that the procedural rules governing this specific judicial action are almost identical to those of the 'ordinary' action for the annulment of Article 230 EC.

¹⁰⁷ See on this much better known regime, e.g. F. Capelli and A. Nehls, 'Die außervertragliche Haftung der Europäischen Gemeinschaft und Rechtsbehelfe zur Erlangung von Schadensersatz gemäß Art 215 EGV – Wertung, Kritik und Reformvorschlag', *Europarecht*, 1997, p. 132; T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague/Boston, Kluwer Law International, 1997, 451 p.; S. Detterbeck, 'Haftung der Europäischen Gemeinschaft und gemeinschaftsrechtlicher Haftungsanspruch', *Archiv des Öffentlichen Rechts*, 2000, p. 202.

¹⁰⁸ See Article 33(3) and (4) of Regulation 2100/94/EC on Community plant variety rights (*OJ* 1994 L 227/1).

¹⁰⁹ See, e.g., Case T-163/98, *The Procter & Gamble Company v. OHIM* [1999] ECR II-2383 ('Baby Dry'). The ECJ annulled this CFI judgment as in its view the term 'Baby Dry' was not devoid of any distinctive character. See Case C-383/99 P, *Procter & Gamble Company* [2001] ECR I-6251. See also the New Born Baby Case, T-140/00, *Zapf Creation AG v. OHIM*, [2001] ECR II-2927 and Case T-122/99, *The Procter & Gamble Company v. OHIM* [2000] ECR II-265 (regarding a figurative 3D-shaped piece of soap).

Similar rules on legality review can be found in the Regulation on the European Aviation Safety Agency (EASA). This agency has been given far-reaching powers of decision making in the field of air safety, albeit of a very technical nature.¹¹⁰ Individuals who are negatively affected by measures of the EASA have the right to appeal, at first instance, to a Board of Appeal within the EASA.¹¹¹ Subsequently, an action for annulment is available against the negative decision of the Board of Appeal on the terms and conditions laid down in Article 230 EC. Member States and the Community institutions may also lodge a direct appeal before the Court of Justice against decisions of the Agency.¹¹²

Where the Agency's functions are more technical in nature, a right to bring actions for annulment often cannot be found in the founding act. The regulation on the EU Translation Centre, for example, merely empowers the Court to rule on the contractual and non-contractual liability of this Centre but it does not contain rules on the right to bring annulment actions against the Centre's decisions.¹¹³ In the EFSA Regulation as well only the 'ordinary' legal remedies can be found (contractual liability, non-contractual liability, personal liability of servants),¹¹⁴ which confirms that the Food Authority should be classified as a category I, a traditional, entity. The Regulation on the Drugs Monitoring Centre, however, stipulates that the Court of Justice shall have jurisdiction in actions brought against the Centre under the conditions provided for in Article 230 EC, even though this Agency must be qualified as a traditional, information-collecting agency.¹¹⁵

Finally, the Community courts are competent to rule on disputes between an Agency and its staff. Most CFI cases (and those of the ECJ) deal with these dissatisfied civil servants who have missed promotion or who have been dismissed.¹¹⁶

From the foregoing it follows that the nature and scope of supervision by the Court in relation to acts of Agencies is dealt with in a rather ad hoc fashion. One has to read each constituent act separately to know exactly what the ECJ (and the Commission) can and cannot do subsequently. A completely logical system cannot be discerned; only to a certain extent the Court's powers correspond to the nature and intensity of the powers conferred upon the various agencies. In this respect the US system of judicial review against agencies is more developed:

¹¹⁰ Cf. section 3.2.

¹¹¹ See Article 35 of the Regulation which, however, restricts the right of appeal to the Board of Appeal to EASA decisions regarding airworthiness and environmental certification (art. 15), investigation of undertakings (art. 46) and levying fees and charges (art. 53).

¹¹² See Articles 41 and 42 of Regulation 1592/2002.

¹¹³ See Article 18 of Council Regulation 2965/94/EC of 28 November 1994 setting up a Translation Centre for bodies of the European Union (*OJ* L 314/1).

¹¹⁴ See Article 47 of Regulation 178/2002/EC (*OJ* 2002 L 31/1).

¹¹⁵ See Article 17 of Regulation 302/93. See also section 3.1 where the primary objective of this body was cited.

¹¹⁶ See, e.g., Articles 43 and 44 Regulation 1859/76/EEC, *OJ* 1976 L 214 and Case T-39/91, *Herrmann v. CEDEFOP* [1992] ECR II-233 as well as Case C-184/01 *P. Hirschveldt v. European Environment Agency* [2002] ECR I-0000.

'A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under colour of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party'.¹¹⁷

The *Constitution* however contains a more structured, horizontal approach to the issue of judicial review of EU Agencies' acts. It quite boldly adds the possibility of bringing an action for annulment against 'acts of (all) bodies and agencies of the Union intended to produce legal effects vis-à-vis third parties'.¹¹⁸ This is still not a complete 'horizontal' solution since acts setting up bodies and agencies may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against any acts of these bodies or agencies intended to produce legal effects. Agencies have, however, not been given the power to bring an action for annulment in order to protect their own prerogatives.¹¹⁹

5. EU Agencies and the *Meroni* Principle of Institutional Balance

The fact of EU Agencies not being mentioned in the text of the EC Treaties not only raises the legal basis/competence issue,¹²⁰ but also the important question to what extent decision making power may be transferred (or: delegated) to these independent bodies.

5.1. *The Court's Task of Safeguarding the EC Institutional Equilibrium*

Regarding the setting up of independent agencies and, in particular, the exercise of genuine decision making powers by them, the *Meroni* case of the Court of Justice may (still) cause some serious legal problems.¹²¹ In this case, from 1958, the Court ruled that it is not possible to delegate discretionary powers, implying a wide margin of discretion, to bodies other than those which the Treaty has established. Otherwise the 'balance of powers which is characteristic of the institutional structure of the Community' would be negatively affected. In contrast, the delegation of 'clearly defined executive powers' to such bodies/agencies is acceptable, since a delegation of this kind would not render the guarantee of *institutional balance* ineffective.¹²²

¹¹⁷ See § 702 of the US Administrative Procedures Act.

¹¹⁸ Article III-365 Constitution.

¹¹⁹ Perhaps the Court will some day opt for a *Les Verts/Chernobyl* type of solution. See Case 294/83, *Les Verts v. European Parliament* [1986] ECR 1339 and Case C-70/88 *European Parliament v. Council* [1002] ECR I-4566.

¹²⁰ See *supra*, section 2.1.

¹²¹ Case 9/56 *Meroni v. High Authority* [1957-1958] ECR 133.

¹²² Case 9/56, at p. 151-152. See also K. Lenaerts, 'Regulating the Regulatory Process: Delegation of Powers in the European Community', *European Law Review*, 1993, p. 23-49.

Although by now this case from 1958 seems rather prehistoric and, moreover, the institutional principle laid down in *Meroni* has never been reiterated by the Court in its more recent case law (at least not explicitly), it nevertheless seems that the underlying rationale of *Meroni* is still relevant today. And that is the idea that the balance of powers between the EC/EU institutions, as it emerges from the text of the Treaties, may not be altered by the institutions (the Commission, EP, Council) as a result of their decision to delegate genuine powers of decision making to independent bodies, which the Treaties themselves have never heard of.

Seen from this vantage point, the *Meroni* case still constitutes a serious obstacle to any 'genuine agencification' on the basis of secondary Community law. In EU decision making circles, as well as among political and social scientists, this case is indeed often cited as placing serious restraints on the possibility of delegating too much power to independent agencies.¹²³ In its White Paper on European Governance, the Commission argues that the Treaties allow some responsibilities to be granted directly to agencies. This should be done in a way that respects the balance of powers between the institutions and does not impinge on their respective roles and powers. This implies, in the Commission's view, that the following conditions have been fulfilled:

- agencies can be granted the power to take individual decisions in specific areas but cannot adopt general regulatory measures. In particular, they can be granted decision making power in areas where a single public interest predominates and the tasks to be carried out require particular technical expertise (for example, air safety);
- agencies cannot be given responsibilities for which the Treaty has conferred a direct power of decision on the Commission (for example, in the area of competition policy);
- agencies cannot be granted decision making powers in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments;
- Agencies must be subject to an effective system of supervision and control.¹²⁴

In this way the Commission gives its own, modern interpretation to the *Meroni* principle – without however mentioning the judgement of the ECJ in this case explicitly.

5.2. *Linking Meroni to Present-Day 'Agencification' Processes*

How can one escape from *Meroni* if it is considered necessary to delegate certain executive powers from the Commission to an independent agency? It seems that there

¹²³ See, e.g., M. Everson, 'Independent Agencies: Hierarchy Beaters?' *European Law Review*, 1995, p. 180-204; G. Majone, 'The Agency model: the growth of regulation and regulatory institutions in the European Union', *Eipascopes*, 1997, p. 9-14. For the Commission's view, set out in its 2001 White Paper on European Governance, see the end of section 5.2.

¹²⁴ White Paper on European Governance, *OJ* 2001 C 287/1, at p. 20.

are several possibilities to ‘source out’ European executive tasks without violating the Court’s *Meroni* principle of institutional balance. These options would therefore be acceptable from the legal point of view.¹²⁵

First, the creation of agencies with a *strict mandate* does seem possible under the Court’s *Meroni* criteria. As was mentioned above, the Court made a clear distinction between the (unacceptable) delegation of discretionary powers, implying a wide margin of discretion, on the one hand, and the (acceptable) delegation of ‘clearly defined executive powers’ on the other. On the basis of this distinction, the powers of the OHIM could, presumably, be ‘explained’. This Agency undoubtedly exercises genuine executive functions and powers, *vis-à-vis* private companies.¹²⁶ But it could be argued that the founding act (the Trade Mark Regulation) very precisely and strictly lays down the OHIM’s powers and the conditions for exercising these powers. In the Court’s wording in the *Meroni* case: the powers of the OHIM are ‘clearly defined’ in nature. In the preamble to the Trade Mark Regulation, the trained eye will discover a *Meroni* struggle as well: ‘It is essential, while retaining the Community’s existing institutional structure and balance of powers, to establish an Office for Harmonization in the Internal Market (trade marks and designs) which is independent in relation to technical matters and has legal, administrative and financial autonomy’.¹²⁷

A second way to avoid any possible ‘*Meroni* objections’ of the Court is to establish bodies *without any real power of decision making* but whose primary purpose is essentially the gathering and processing of (technical) information. The powers of an agency such as the Monitoring Centre on Racism (in Vienna) or the Monitoring Centre on Drugs (Lisbon) do not therefore seem to fall under the type of powers which the Court had in mind in its *Meroni* judgment.¹²⁸

Thirdly, it clearly appears from this case that the Court was concerned with safeguarding the institutional balance as it emerged from the E(E)C Treaty itself. The EU institutions (the Commission, Council, EP) should not disturb the balance introduced by the Treaty legislator by giving up powers through secondary measures. The Treaty legislator itself, however, may change the institutional balance if it so decides, by giving an explicit and clear *Treaty basis* to a certain body. The institutional balance principles of *Meroni* therefore do not seem relevant to bodies such as Europol or the European Central Bank, since these entities function on the basis of clear and explicit Treaty provisions.¹²⁹ Their decision making powers have been ‘authorized’ by the Treaty legislator, and therefore the Court of Justice will (probably) not object to a shifting of institutional balance brought about by the ‘highest’ Union power itself.

¹²⁵ See also D.M. Curtin and R.H. van Ooik, *Revamping the European Union’s Enforcement Systems with a View to Eastern Enlargement*, WRR Working Documents no. W 110, The Hague, October 2000, in particular p. 57-58 and p. 61-62.

¹²⁶ See *supra*, section 3.2.

¹²⁷ See the 11th consideration in the preamble to Regulation 40/94/EC.

¹²⁸ On the tasks of these two agencies, see above, section 3.1.

¹²⁹ For the ECB, see in particular Articles 112-113 EC; regarding Europol, see Articles 29 and 30 EU (and old Art. K.3. EU).

Finally, an effective system of *supervision and control* may mitigate objections against a far-reaching delegation of powers to independent agencies. As we have seen, the possibilities of non-judicial supervision (Commission) and judicial supervision (CFI/ECJ) were indeed created in the Regulations establishing agencies.

6. Final Remarks

To an outsider it seems that European agencies live a quiet life somewhere far away from busy Brussels, in exotic places like Thessalonica, Lisbon, Angers, Turin or Dublin.¹³⁰ Adjudicated on the basis of formal competences, their role in the Union's constitutional set-up and functioning is indeed still very modest. The basic rule in the European Communities is that, at the European level, the European Commission exercises executive powers and functions; legislation is in the hands of the Council and the European Parliament; and above, at the summit, stands the European Council which guides us all by proclaiming 'general political directions and priorities'. In other words, in my view, we should not exaggerate the importance of Agencies in the European Union as it functions today, nor their threat to the institutional balance as laid down in the Treaties.

Their most positive contribution to European administration consists of conducting technical/scientific research; their information of high technical quality can provide an important basis for both EU and national policy making, in particular in technical fields like food safety, the drawing up of environmental standards, or where policy decisions need to be based on sound factual information (concerning phenomena like racism, drug addiction, etc.). A more intense delegation of responsibilities and powers to Agencies, it is true, may pose a threat to the *Meroni* principles of institutional balance and democratic accountability. But, for the time being, I think that it would be better to keep watching them, and to wait and see.

¹³⁰ For the seats of most of the older agencies/bodies, see the so-called *Edinburgh Decision*: Decision taken by common Agreement between the Representatives of the Governments of the Member States, meeting at Head of State and Government level, on the location of the seats of certain bodies and departments of the European Communities and of Europol (OJ C 323/1). For the seat of nine newer agencies and offices – some of which still have to be established – see the Decision taken by common agreement between the Representatives of the Member States, meeting at Head of State or Government level, of 13 December 2003 on the location of the seats of certain offices and agencies of the European Union (OJ 2004 L 29, p. 15).