

# Agencies of the EU: THE Emerging Network of Supranational administrative bodies

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Annotation: The EU agencies represent independent administrative institutions with their own scope of action and competences. Their activities have a significant impact not only on operations of national administrative bodies, but also on natural and legal persons. In his paper the author presents a general overview of EU agencies, analyzes the reasons of their establishment and the scope of their competencies and considers the possibility of the uniform legal framework for the so-called regulatory agencies.

Keywords: agencies, regulatory agencies, executive agencies, European Environmental Agency, Office for Harmonization in the Internal Market, European Medicines Agency, European Food Safety Agency.

## 1. Introduction

The accession of the Czech Republic to the EU caused radical overhaul of her legal system. It is estimated that more than half of national law has its origin in acts agreed on European level. EU accession has not resulted only in changes of written Czech law or broadening of range of acts valid on Czech soil, but the institutional framework of application and enforcement of law has been transformed as well. The role of institutions such as European Commission or Court of Justice cannot be underestimated, maybe it is the reason why these subjects are widely covered by Czech scholars, including their interactions with national counterparts. On the other hand, there are subjects operating in the EU, which activities are vastly ignored in Czech literature. One such group is represented by the so called European agencies that are independent administrative institutions with their own scope of action and competences. Activities of these subjects have impact not only on operations of national administrative bodies, but also legal and natural persons.

Agencies are essential part of proper functioning of each modern state. Their origin could be found in second part of 1940s in the United

States, the term describes sections of executive or bureaucracy, which are generally independent in exercising their functions and which can usually make binding decisions influencing rights and duties of individuals.<sup>1</sup> Traditionally this role can be exercised by other subjects as well, for example by departments of ministries or other institutions of public administration, these subjects are however often under political influence or lack expert background. In lights of these facts it is convenient to delegate certain functions of state to the independent agencies.<sup>2</sup> This assures long-term stability of state's obligations, which are not influenced by fluctuating political priorities. At the same time, the government does not need to solve highly technical issues that burden the bureaucracy without any potential for noticeable political gains.

Although the Union is not yet a state, regulatory activities are inherently tied to her, mainly in sectors such as common market or agricultural policy. Commission is the institution that performs these duties as it is from her nature independent and expertly equipped. The amount of delegated competences has however continually increased over time and the Commission was often not able to fulfil them, not even with the aid of the system of committees called comitology. Moreover, lately the independent status of Commission has become compromised by its deepening politicisation. In this situation it is not surprising that founding of agencies started also in the Union. First agencies were established already in 1970s, the real boom however came with the finalization of Common Market in 1992, 1990s therefore brought the so-called second wave of agencies' establishment, which was followed by the third wave in new millennium. At present there are several dozens agencies operating in the EU with different goals.

The main aim of this contribution it to fill the weak spot in Czech literature and explain to the reader the questions related to European agencies.<sup>3</sup> Text is structured as follows: The first part is more of

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1 See SHAPIRO, M. The Problem of Independent Agencies in the United States and the European Union. *Journal of European Public Policy*, 1997, no. 1, p. 277–285; MAJONE, G. Managing Europeanization – The European Agencies. In: PETERSON, J., SHACKLETON, M. (eds.) *The Institutions of the European Union*. Oxford: OUP, 2006, p. 191–193.

2 In the Czech Republic, the similar subjects are represented e.g. by the Czech Trade Inspection Authority, the Czech Environmental Inspectorate or Energy Regulatory Office.

3 The only Czech text known to me that deals with agencies is a contribution to

a descriptive character and contains the classification of agencies, its quantitative specifications, character and main features of their operations. The most important agencies with independent administrative competences are presented in more detail. Other parts are analytical and deal with main problematic issues tied to the agencies' operations. Article is based predominantly on foreign literature, legal acts and also document of EU institutions.

## 2. Overview of Agencies

The first two agencies were established in the European Communities in 1975. For the long time there were the only one, at the beginning of 1990s a second wave occurred, followed by another expansion in new millennium. Reasons behind this trend are discussed in subsequent chapter. As was already said, contemporarily several dozens such subjects exist, which vary in importance, size of budget, number of employees or competences. The basic division is as follows:

- **Regulatory agencies.**<sup>4</sup> They are often also labelled as decentralized or “traditional” agencies. They are independent legal persons established by acts of secondary law and enjoy autonomy in budgetary sphere and to certain extent also in personal issues. Their financial management is subject to control of the Court of Auditors and is sanctioned by European Parliament. They have always the highest possible legal personality, even including in the legal systems of the Member States, here lies the difference from traditional institutions such as Commission or Council. They are

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the conference proceedings written by Jakub Handrlica in 2008 (HANDRLICA, Jakub. *Evropeizace správního práva prostřednictvím správně relevantního jednání evropských agentur*. In: *Sborník z konference Dny práva 2008*. Brno: Masarykova univerzita, 2008. Available from <http://www.law.muni.cz/edicni/dp08/files/pdf/sprava/handrlica.pdf>). Several articles or part of books were dedicated to concrete agencies, predominantly from second and third pillar (Europol, Eurojust, European Defence Agency). I personally wrote a special chapter describing all agencies in my book *Institucionální rámec Evropské unie: právně-politologický pohled* (Praha: Linde, 2007, p. 171–195). This text partly uses information from that chapter.

- 4 It has to be said that this division is not universally shared. According to some view regulatory agencies are only those that have formal power to decide in individual or general cases, agencies with advisory or coordinating tasks are then called non regulatory. For discussion see THATCHER, M., COEN, D. *Reshaping European Regulatory Space: An Evolutionary Analysis*. *West European Politics*, 2008, no. 4, p. 813–815.

called decentralized because their seats are spread across the EU. Apart from factual differences, regulatory agencies are formally distinguished by the pillars, in which they operate. Agencies of the first pillar (sometimes called Agencies of the Community) have supranational nature, are financed by the EU budget and of course perform their duties under first pillar (communitarian policies). On the other hand, regulatory agencies of second and third pillars are intergovernmental, the Member States retain their influence on operations and budget of these agencies is sometimes covered directly by states.

- **Executive agencies.** Unlike in previous category, their institutional background is unified, because all of them are established on the basis of Council Regulation 58/2003.<sup>5</sup> At the same time they have much more restricted scope of action and competences. They are founded by Commission on limited time period for implementation of her programmes, Commission is responsible for financing of these agencies and selection of employees. Agencies are located in Brussels or Luxembourg. It is clear that despite certain amount of autonomy the main goal of these bodies is to fulfil tasks that are set narrowly and in detail by Commission, under which supervision they work.

In the subsequent table the basic facts of all presently active agencies are displayed sorted by the year of establishment.

*Table 1: Overview of EU agencies*

Name	Founding act	Seat	Budget (2008, mil. €)	Employees (2008)	Role
<b>Regulatory agencies (first pillar)</b>					
European Centre for the Development of Vocational Training (Cedefop)	Council Regulation 337/75 from 10. February 1975	Thessaloniki, Greece	17,1	99	scientific, informative, coordinating

5 Regulation 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in management of Community Programmes. OJ L 11, 16. January 2003, p. 1.

European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)	Council Regulation 1365/75 from 26. May 1975	Dublin, Ireland	21,2	101	informative, coordinating
European Environment Agency (EEA)	Council Regulation 1210/90 from 7. May 1990	Copenhagen, Denmark	36,4	123	informative
European Training Foundation (ETF)	Council Regulation 1360/90 from 7. May 1990	Turin, Italy	18	96	coordinating
European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)	Council Regulation 302/93 from 8. June 1993 (no more valid)	Lisbon, Portugal	14,1	82	informative
European Medicines Agency (EMA)	Council Regulation 2308/93 from 22. June 1993 (no more valid)	London, Great Britain	164,5	475	informative, coordinating
Office for Harmonisation in the Internal Market (OHIM)	Council Regulation 40/94 from 20. December 1993	Alicante, Spain	300,6	643	decision-making
Community Plant Variety Office (CPVO)	Council Regulation 2100/94 from 27. June 1994	Angers, France	12,4	43	decision-making
European Agency for Occupational Safety and Health (EU-OSHA)	Council Regulation 2062/94 from 18. July 1994	Bilbao, Spain	14,7	44	informative, coordinating
Translation Centre for the Bodies of the EU (CDT)	Council Regulation 2965/94 from 28. November 1994	Luxembourg, Luxembourg	42,3	233	subsidiary
European Food Safety Authority (EFSA)	Council Regulation 178/2002 from 28. January 2002	Parma, Italy	63,5	335	scientific, informative
European Maritime Safety Agency (EMSA)	Regulation of Parliament and Council 1406/2002 from 27. June 2002	Lisbon, Portugal	44,4	165	scientific, informative, coordinating
European Aviation Safety Agency (EASA)	Regulation of Parliament and Council 1592/2002 from 15. July 2002	Köln, Germany	85,3	452	scientific, informative, decision-making
European Network and Information Security Agency (ENISA)	Regulation of Parliament and Council 460/2004 from 10. March 2004	Heraklion, Greece	8,2	44	informative, coordinating
European Centre for Disease Prevention and Control (ECDC)	Regulation of Parliament and Council 851/2004 from 21. April 2004	Stockholm, Sweden	39,1	130	scientific, informative

European Railway Agency (ERA)	Regulation of Parliament and Council 881/2004 from 29. April 2004	Lille, France	18	116	informative, coordinating
European GNSS Supervisory Authority (GSA)	Council Regulation 1321/2004 from 12. July 2004	not yet decided	10,6	50	coordinating
European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (FRONTEX)	Council Regulation 2007/2004 from 26. October 2004	Warsaw, Poland	69	69	informative, coordinating
Community Fisheries Control Agency (CFCA)	Council Regulation 768/2005 from 26. April 2005	Vigo, Spain	7,3	49	informative, coordinating
European Chemicals Agency (ECHA)	Regulation of Parliament and Council 1907/2006 from 18. December 2006	Helsinki, Finland	66,4	220	informative, decision-making
European Institute for Gender Equality (EIGE)	Regulation of Parliament and Council 1922/2006 from 20. December 2006	Vilnius, Lithuania	6,4	20	informative
Fundamental Rights Agency (FRA)	Council Regulation 168/2007 from 15. February 2007	Vienna, Austria	15	49	informative
<b>First pillar overall</b>			<b>1074,5</b>	<b>3638</b>	
<b>Regulatory agencies (second pillar)</b>					
European Union Satellite Centre (EUSC)	Council common action 2001/555 from 20. July 2001	Torrejón, Spain	14,5	99	scientific, informative
European Institute for Security Studies (ISS)	Council common action 2001/555 from 20. July 2001	Paris, France	3,8	26	scientific, informative
European Defence Agency (EDA)	Council common action 2004/551 from 12. July 2004.	Brussels, Belgium	27	120	coordinating
<b>Second pillar overall</b>			<b>45,3</b>	<b>245</b>	
<b>Regulatory agencies (second pillar)</b>					
European Body for the Enhancement of Judicial Co-operation (Eurojust)	Council Decision 2002/187 from 28. February 2002.	The Hague, The Netherlands	20	175	coordinating

European Police College (CEPOL)	Council Decision 2005/681 from 20. September 2005	Bramshill, Great Britain	8,7	23	coordinating
European Police Office (Europol)	Council Decision 2009/371 from 6. April 2009	The Hague, The Netherlands	65,7	101	coordinating
<b>Third pillar overall</b>			<b>94,4</b>	<b>299</b>	
<b>Executive agencies</b>					
Executive Agency for Competitiveness and Innovation Programme (EACI)	Commission Decision 2004/20 from 23. December 2003	Brussels, Belgium	15,3	36	subsidiary
Executive Agency for Health and Consumers (EAHC)	Commission Decision 2004/858 from 15. December 2004	Lucemburk, Lucembursko	5,8	9	subsidiary
Education, Audiovisual and Culture Executive Agency (EACEA)	Commission Decision 2005/56 from 14. December 2005	Brussels, Belgium	41,8	91	subsidiary
Trans-European Transport Network Executive Agency (TEN-T EA)	Commission Decision 2007/60 from 26. December 2006	Brussels, Belgium	10,2	40	subsidiary
European Research Council Executive Agency (ERC)	Commission Decision 2008/37 from 14. December 2007	Brussels, Belgium	20	62	subsidiary
Research Executive Agency (REA)	Commission Decision 2008/46 from 14. December 2007	Brussels, Belgium	14,6	42	subsidiary
<b>Executive agencies overall</b>			<b>107,7</b>	<b>280</b>	
<b>Agencies overall</b>			<b>5744,8</b>	<b>4462</b>	

Source: Webpages of agencies; *European Commission*. Commission Staff Working Document accompanying the Communication European Agencies - The Way Forward. SEC(2008) 323, p. 2-22.

Note: EUROPOL will formally become regulatory agency only after 1<sup>st</sup> January 2010, after the Council Decision 2009/371 becomes effective.

Table confirms noticeable boom of agencies in the last couple of years, namely in the area of regulatory agencies of first pillar. Agencies manage considerable resources, their overall annual budget reaches almost six billion euro. In almost all cases is fully covered by the EU budget, but several agencies are more or less financially independent, as they have income from fees for their services. About four thousand

employees currently work in the agencies. It is interesting that while the agencies substitute in many aspects operations of Commission, the number of her employees is not decreasing accordingly, in practice the opposite trend is visible. The development of agencies therefore does not threaten the power position of Commission in light of key bureaucratic power figures (budget, human resources).

All agencies have quite similar internal organisation, the highest governing body is usually called management board, in which representatives of Member States and Commission are seated and which adopts the most important decisions including the budget. Regular operations fall under auspices of executive director, the agencies are further internally divided into specialized departments. Some agencies also have other bodies such as scientific boards. One of the most controversial issues connected to agencies is paradoxically the location of their seats. Each Member State demands to have at least one seat on its soil, usually the agreement is reached only after prolonged negotiations on the highest level of Council meeting at Head of State and Government level, where the compromise is made using a package deal containing location of seats of several subjects.<sup>6</sup>

Generally the competences of European agencies are much lower than of their national level counterparts. The majority of them must be content with subsidiary role, in most cases their duty is to coordinate action in certain area, acquire and disseminate information of good practice or serve as a platform for discussion and exchange of experience. Only several agencies boast real decision-making powers. Reasons for these limitations are discussed in the third chapter. Other non-member states could also participate on agencies' operations. On the following pages we present the most important agencies in more details.

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6 See Decision of 29 October 1993 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, 30. November 1993, p. 1; Decision taken by Common Agreement between the Representatives of the Member States, meeting at Head of State of Government Level of 13 December 2003 on the location of the seats of certain offices and agencies of the European Union. OJ L 29, 3. February 2004, p. 15.



## 2.1 European Environmental Agency

Environment and efforts to protect it have since 1980s become priorities for growing number of Member States and started to reach an agenda of the European Communities. The reason behind it was the interconnection of this topic with issues such as Common Agricultural Policy and internal market, but namely the notion that pollution had transboundary nature and it made sense to fight it jointly. The importance of environment was formally expressed on the European level in the Single European Act. Potential of new policy was well understood by then President of the Commission Jacques Delors, who in 1989 proposed establishment of European Environmental Agency (EEA), which according to him should improve control and exercise of this policy in the EU. Commission, Parliament, Germany and the Netherlands demand establishment of strong independent institution with decision-making and enforcement powers, on the other hand Great Britain and Spain promoted lesser powers. After almost one year long negotiations the first group retreated and in 1990 Council adopted its regulation 1210/90 founding a new agency. It started to work only in 1994, after the Heads of State and Government decided to locate its seat to Copenhagen.<sup>7</sup>

Reflecting the abovementioned concession of supporters of strong independent agency, EEA actions are limited to collection and subsequent dissemination of reliable and independent information on environment, so that other institutions of the EU and Member States can make effective legislative and administrative decisions in this sector.<sup>8</sup> The main information source for EEA is Eionet (European Environment Information and Observation Network), which is managed and developed by EEA. National agencies for environment and environmental ministries are also members of this net. Although the initial

7 For detailed overview of EEA establishment negotiations and first years of activities see LADEUR, K.-H. *The New European Agencies. The European Environment Agency and Prospects for a European Network of Environmental Administrations*. EUI RSC Working Paper, 1996, no. 50, p. 6–16.

8 Detailed information on EEA functioning and evaluation of its effectiveness SCHOUT, A. The European Environment Agency (EEA): Heading Towards Maturity? In: MAJONE, G. (ed.). *The Role of Specialised Agencies in Decentralising EU Governance*. Brussels: European Commission, 2000, p. 80–174; MARTENS, M. Voice or loyalty? The evolution of the European Environmental Agency (EEA). In: *(Re) Regulation in the Wake of Neoliberalism*. Utrecht: ECP, 2008. Available from <http://regulation.upf.edu/utrecht-08-papers/mmartenp.pdf>.

idea was to provide information namely to EU institutions and Member States, almost all information collected by EEA is freely accessible to public, the agency's webpage is full of statistics, graphs, maps on state of environment in all its sectors. Agency publishes very informative annual report.

All EU Member States are automatically members of EEA, but as environment is an issue for all European countries, membership is open also to non-member states (Art. 19 of Regulation 1210/90). Currently this opportunity is enjoyed by Turkey, Iceland, Lichtenstein, Norway and Switzerland (EEA therefore has 32 members), many countries mainly from the Balkans cooperate with EEA. The most important body is Managing Board, each EEA member delegates one person, two representatives are sent by Commission and two by Parliament. Managing Board adopts budget and main programmes of agency, appoints Executive Director and Scientific Board. Executive Director is responsible for day to day operations of EEA and correct exercise of planned programmes, she is appointed for five years and her mandate is renewable. Presently the position is held by British Jacqueline McGlade, she was reappointed in 2008. Expertise needed for effective operation of Managing Board and Executive Director is provided by Scientific Board, consisting of independent experts from EEA members.

## **2.2 Office for Harmonisation in the Internal Market**

The finalization of internal market in 1992 allowed the businesses to freely operate at one of the largest markets in the world, but to guarantee its effective functioning it is not sufficient only to prohibit quantitative and tariff barriers, one of the key question is to enforce intellectual rights including trademarks, under which the producers offer their goods. Traditionally trademarks were registered individually in each country, but this was very demanding administratively and financially. Therefore the Council decided to adopt Regulation 40/94 and establish the Community trademark, which based on one application is valid for all EU countries. With the same regulation the Office for Harmonisation in the Internal Market (OHIM) was founded, its objective is to assess applications, register Community trademarks and look after the database of trademarks. Since 1993 the same

function is performed by OHIM for industrial designs. The activities of OHIM contribute to better enforcement of industrial intellectual rights in the EU, which is confirmed by extraordinary interest of European and non-European firms to register their trademarks and industrial designs. Overall since 1996 to end of July 2009, more than 786 thousand applications was submitted, of which 563 thousand was registered.<sup>9</sup>

The Managing Board consists of one representative per Member State and one from Commission. Executive Director is appointed for five years by the Council, its mandate can be renewed. This happened also in 2005, the position was reclaimed by Wubbo de Boer (the Netherlands). Similarly to other agencies, whose decisions have impact on rights of individual persons, it is possible to file an appeal to Board of Appeal, if the applicant is not content with its decision, it is possible to review the case by the Court of First Instance. OHIM's budget is not only fully covered by fees from registration and prolongation of trademarks, but in practice it produces surpluses, which confirms the effectiveness of the system.

### **2.3 European Medicines Agency**

Medicines are from their nature not regular goods, in spite of this it is necessary to address the impact of Common Market on this area. Historically medicines and other similar items were sanctioned by national bodies to be allowed on markets of each country, but this practice was financially demanding and did not fully reflect the demands of internal market. Thanks to the specificity of medicines it was not conceivable to use usual method of mutual recognition. In light of this already since 1970s there were efforts to coordinate national approaches, a new comitology committee was established and the so called "concert" procedure developed, which required registering new medicines both at national authorities and new committee. This solution was however not very successful, in order to propose new approach to authorizing medicines, new European Agency for Evaluating Medicine Products was established by Council Regulation 2309/93. In 2004 this agency was renamed to European Medicines Agency (EMA).

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<sup>9</sup> OHIM statistics are available from <http://oami.europa.eu/ows/rw/pages/OHIM/statistic.en.do> (visited on 11th September 2009).

Currently there are two procedures how to register medicines. Centralized procedure predicts one application and awarding registration for all EU countries, it is used for medicines produced by biotechnological processes or other modern techniques, for pharmaceuticals for most serious diseases (HIV, cancer etc.) and rare diseases. Centralized procedure is also used for preparations supporting growth of animals. In other cases the centralized application is only voluntary a companies could also apply only in selected countries. EMEA is a body receiving the applications, evaluates the impact of medicines on human health and subsequently awards registration.<sup>10</sup> Agency collects information about safety of already registered medicines and if there is any danger, it takes the necessary measures. At the same time it provides data used in pharmaceutical research and publish standards of quality and safety for testing medicines. It closely cooperates with relevant national authorities in all Member States and Norway, Switzerland and Iceland.

Managing Board consist of representatives of Member States, Commission and Parliament, it adopts budget and main programme of agency. EMEA has four specialized committees (for human medicines, veterinary, for development of medicines for rare diseases, traditional herbal preparations), which evaluates registrations of relevant medicines. Committees are formed by experts from Member States and supported by more than four thousand external experts. General management is performed by Executive Director Thomas Löngrenn (Sweden), reappointed in 2005.

## 2.4 European Food Safety Agency

Safety of food is a sector that is closely tied to EU actions, be it through Common Agricultural Policy or internal market. At the beginning the issue fell within the responsibility of Commission that use the comitology procedures, but after the mad cow (BSE) crisis (see below) and subsequent changes in approaches to food safety a new

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10 For detailed overview of EEA establishment negotiations and first years of activities see METCALFE, L. EMEA: Innovation in European Public Management. In: MAJONE, G., 2000, p. 175-217; GEHRING, T., KRAHPOL, S. Supranational Regulatory Agencies between Independence and Control: The EMEA and the Authorization of Pharmaceuticals in the European Single Market. *Journal of European Public Policy*, 2008, no. 2, p. 208–226.

strategy was formed, which included establishment of European Food Safety Agency (EFSA) in 2002. After its inception the agency provisionally operated from Brussels, because a fierce battle proceeded between Italy and Finland over the location of its seat. The final decision was made only in 2005 by European Council and EFSA was located in Parma. Agency provides independent risk evaluation in all issues with impact on food safety, including the health of animal and plant protection. Collected information is used by other EU institutions (namely Commission) as a basis for legislative and regulative measures required for guaranteeing protection of consumers.<sup>11</sup>

Agency is composed of four bodies, the most important is Managing Board, its 14 members are appointed by the Council after consultation with Parliament from the list proposed by Commission, 15<sup>th</sup> member is appointed by Commission. None of the members represent Member States, on the other hand at least four represent interests of consumers. Therefore EFSA is one of the few agencies, which main body is not controlled by Member States. Managing Board adopts EFSA's budget and programme and appoints Executive Director. She is a legal representative of the agency and is responsible for its general operations. Her five-year mandate is renewable, since 2006 it is held by Catherine Geslain-Lanéelle (France). Director has her own advisory board consisting of heads of bodies from nation states with similar remit. Finally the Scientific Board provides expertise and recommendation and coordinates the activities of nine scientific commissions, responsible for risk evaluation in specialized fields.

### 3. Reasons behind Agencies' Establishment

Perceptible boom of agencies since the beginning of 1990s raises the question what is the driver behind this development and how to explain it theoretically. Why new subjects emerge with delegated

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11 For detailed information on EFSA impact RANDALL, E. Not that soft or informal: a response to Eberlein and Grande's account of regulatory governance in the EU with special reference to the European Food Safety Authority (EFSA). *Journal of European Public Policy*, 2006, no. 3, p. 402-419; for comparison of agencies' operations in the sector of medicine safety (EMEA) and food safety (EFSA) see KRAHPOL, P. Credible Commitment in Non-Independent Regulatory Agencies: A Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffp. *European Law Journal*, 2004, no. 5, p. 518-538.

competences, which logically either directly infringe into activities of Member States or traditional EU institutions? Experts try to offer several opinions that clarify the phenomenon, we shortly present them in this section.<sup>12</sup>

Most often the establishment of agencies is explained with the use of functional thesis. In certain sector the problem-solving is accompanied with high transaction costs and mutual agreement of actors is not easy, for example because their interests are diverse. In such cases in the EU the decision-making was delegated to Commission, which as an independent body shall play the role of impartial broker. However after the finalization of Common Market in 1992 and development of other communitarian policies the number of tasks for Commission grew exponentially, moreover the Commission began to be politicised.

It is thus not surprising that Commission started to consider delegation of certain own competences on autonomous bodies. Especially interesting for her it was in sectors, where the tasks were of highly expert character, but without political impact. In these cases Commission could delegate power on new subjects which will be very burdensome for her own bureaucracy but where the potential for political gains was low. It also could not be ignored that because of politicisation Commission was no longer considered as independent as before, the Member States might have preferred to establish agencies as bodies with no political ambitions.

According to some competing views the emergence of agencies is not so tied to development of EU powers or necessity to solve new problems, but it is simply the result of trend going under way in majority of democratic states, in which since the beginning of 1980s the exercise of public administration was more and more transferred to independent and semi-independent agencies in order to raise legitimacy and effectiveness of governance.<sup>13</sup> In light of this explanation the EU only replicated development in Member States without any serious need of it on its side.<sup>14</sup> I think that the “replication of develo-

12 Compare also EGENBERG, M., MARTENS, M. TRONDAL, J. *Building Executive Power at the European Level: On the role of EU-level agencies*. ARENA Working Paper, 2009, no. 10, p. 12–14.

13 E.g. programme „Next Step“ founded by Margaret Thatcher in Great Britain in 1988.

14 TARRANT, A., KELEMEN, D. *Building the Eurocracy: The Politics of EU Agencies and Networkp*. In: *Biennial European Union Studies Association Convention*. Mon-

ment" theory is not contradicting the functional one, they are rather complimentary.

While it is possible to discuss theoretical background of agencies' establishment (that is why we have theories), in case of several agencies we are even able to find imminent factors leading to their founding. The best examples are represented by EFSA and EMEA.<sup>15</sup> The origins of the former have connection to the consequences of BSE scandal in the middle of 1990s. The Commission of Inquiry of European Parliament that searched for the causes of crisis and responsible culprits informed in its report that both Commission and Council conceded to the pressure of Great Britain and neglected their duties in veterinary controls and block any publishing of alarming results of inspection. Commission reacted to the critique by changing its policy, in its White Paper on Food Safety subsequently proposed establishment of independent agency which will be responsible for risk assessment for food products. A couple of years later several catastrophes happened in the sector of maritime transport (ferry Estonia, tankers Erica and Prestige). The results of investigation referred to messy and uncoordinated approach to maritime transport from Member States authorities and call for adoption of common framework of maritime transport, including regulation and control. EMEA was founded as the overseeing organisation.

#### **4. Role of Agencies and their competences**

National agencies operating in Member States are often very powerful subjects, to noticeable extent independent of political influence, they can adopt not only individual administrative decisions, but also acts of general nature. Similarly EU agencies are independent and have legal personality, but at the same time the amount of their competences is limited and does not reach the level enjoyed by regulatory bodies in Member States. As was clear from previous review, in most cases EU agencies fulfil only advisory, coordinating or preparatory roles and do not have full regulatory powers, be it through authority to issue legally binding decisions or legislative acts. These limitations

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treal: EUSA, 2007. Available from <http://www.unc.edu/euce/eusa2007/papers/kelemen-d-08h.pdf>.

15 See the sources cited at discussed agencies.

emanate from several factors, which could be divided to legal and political.

Legal reasons are to great extent formal.<sup>16</sup> According to Art. 7 TEC the tasks of Communities shall be performed only by institutions mentioned in that article, and agencies are not among them. Seemingly it means, one could argue, that no other bodies could be set up at all, but this interpretation was rejected by the Court of Justice in one of its first judgment, at the same time it however ruled that delegation of executive competences is possible only after certain strict conditions are met (the so called Meroni doctrine).<sup>17</sup> Few agencies are founded on the basis of concrete special articles of TEC or TEU,<sup>18</sup> but majority of them is founded with the aid of Art. 308 TEC, which allows the Council to adopt certain measures, even if the TEC does not provide explicit competences to it. In these instances the precise delimitation of agencies' functions becomes even more important. In this line of argumentation, pursued namely by the Legal Service of Commission, agencies above all could not enjoy broad leeway in their activities, because they do not have any political responsibility.

On the other hand, according to numerous opinions Meroni doctrine is nowadays already outdated.<sup>19</sup> While this view is controversial,<sup>20</sup> one may agree that the main reason for limited competences of EU agencies lies in political arena. EU is complex mechanism often equated to multi-level system of governance, where an important aspect is to keep balance between the interests of Member States and EU institutions as well as horizontally among EU institutions one to another.<sup>21</sup> The abovementioned question of "why institutions agree to

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16 In more detail e.g. CRAIG, P. The Constitutionalisation of Community Administration. *European Law Review*, 2003, no. 6, p. 848-54 or CHITI, E. The Emergence of Community Administration: The Case of European agencies. *Common Market Law Review*, 2000, no. 3, p. 309-343.

17 Case 9/56 Meroni [1958] ECR, p. 35-44.

18 E.g. EASA on the basis of Art. 80 para 2 TEC.

19 E.g. DEHOUSSE, R. *Misfits: EU Law and the Transformation of European Governance*. Jean Monnet Working Paper, 2002, no. 2, p. 12-13.

20 Because Court of Justice has confirmed the doctrine in its newer judgments, we can mention case C-301/02 P Carmine Salvatore Tralli against European Central Bank [2005] ECR I-4071, para 41-44.

21 The principle of institutional balance is firmly established both in Court of Justice jurisprudence and doctrine (for historical development of the term JACQUÉ, J.-P. The Principle of Institutional Balance. *Common Market Law Review*, 2004, no. 3, p. 387-391).



establish bodies which lower their competences” must be perceived with this in mind. Answer is simple: the majority of agencies operate in a manner that does not weaken other institutions.

As was already highlighted several times, institution most affected by spread of agencies is Commission. She at the one side supports the establishment of agencies, taking it as an opportunity to outsource activities of highly technical nature, but at the same time she tries to keep control of delegated powers. This attitude is clearly expressed in numerous documents issued by the Commission. In detail this topic is covered in the White Paper on European Governance, where it is for example written, that “agencies [...] cannot adopt general regulatory measures” nor can they “be given responsibilities for which the TEC confers direct power of decision to the Commission”.<sup>22</sup> Similarly in the 2005 proposal of Interinstitutional agreement the Commission argues that the main task of agencies is to “provide the Commission, in particular, with the experience and expertise it needs so that it can fully meet its responsibilities as the Community executive” and generally emphasize their predominantly subsidiary role.<sup>23</sup> Equally sceptical to any strengthening of agencies and their real independence in decision-making is European Parliament and Member States, the latter is best proved by dominant role of states in managing boards, which they use to actively influence the key decisions.<sup>24</sup>

In this situation it is hardly surprising that majority of agencies is limited to collection and distribution of data and information, eventually coordinating activities. In many cases it was natural outcome of development.<sup>25</sup> In other it was not so expected. Already mentioned were the consequences of EFSA establishment. As the responsibility for BSE scandal fell on both Commission and Member States, new agency should have been completely independent from industrial, agricultural and political interests and open to public control. At the same time it shall enjoy broad decision-making powers. While the

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22 European Commission. European Governance: A White Paper. COM(2001) 428 final, p. 24.

23 European Commission. Draft interinstitutional agreement on the operating framework for the European regulatory agencies. COM(2005) 59 final, p. 5.

24 Active role of management board is described in EGENBERG, M. et al, 2009, p. 17–18.

25 Discussed EEA serves as a clear example. In case of EMCDDA it is even said in the founding act that “The Centre may not take any measure which in any way goes beyond the sphere of information and the processing thereof.” (Art. 1 para 4 of Council Regulation 302/93).

first condition was to certain extent met, the range of competences was curtailed after the interference of Commission. EFSA is entitled to evaluate food safety and potential risks, but it does not decide on risk management and potential solutions to problems, this task is reserved to Commission.<sup>26</sup> Similarly it was planned that EASA acquire important decision-making powers, namely the inspection activities in aviation transport, these ambitions were lowered during negotiations and in the final proposal only traces of them remained.<sup>27</sup>

As the agencies are part of the EU institutional framework and no body could delegate more powers it has on its own, agencies have to follow in their activities the same conditions as other institutions. Firstly they must state on what grounds they base their decisions (Art. 253 TEC) and must inform the concerned addressee (Art. 254 TEC). All decision with legal impact might be reviewed by courts.<sup>28</sup> In some cases there is internal review panel, whose decisions could be appealed at the Court of First Instance.<sup>29</sup>

How big is the practical influence of agencies? Decision-making powers are granted only to few of them and even in these cases only in limited list of cases. Present experience with their operations however confirms that even advisory or coordinating role might have practical impact. EU agencies closely cooperate not only with the Commission, but also with national agencies within the same sectors and therefore directly influence practice on the national level.<sup>30</sup> It also seems that the advisory-expertise character of agencies without decision-making powers brings unexpected results. If the agency proves that its recommendations or results of research are independent and of high-stan-

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26 DEHOUSSE, R. Delegation of Powers in the European Union: The Need for Multi-principals Model. *West European Politics*, 2008, no. 4, p.798.

27 In detail see SCHOUT, A. Inspecting Aviation Safety in the EU: EASA as an Administrative Innovation?. In: VOS, E (ed.). *European Risk Governance: Its Science, its Inclusiveness and its Effectiveness*. Mannheim: MZES, 2008, p. 266–272.

28 In case of many agencies this right is given directly by their founding acts (see the relevant regulations in the table above), generally see the decisions of Court of First Instance T-369/94 a T-85/95 *DIR International Film v Commission* [1998] ECR II-357, para 52–122.

29 It concerns the following agencies: OHIM, EASA, CPVO.

30 According to some views agencies therefore directly participate on the creation of framework of European Law implementation at the national level and cause the Europeanization of national agencies. EGENBERG, M., TRONDAL, J. *National Agencies in the European Administrative Space: Government Driven, Commission Drive nor Networked?* ARENA Working Papers Series, 2007, no. 17, p. 3–17.

dard professionally, the institutions with real decision-making role (mainly Commission) could not do anything else then follow the recommendations and confirm them. In reality it is then the agency that decides. Described development is noticeable for example in EMEA activities in the medicines sector, EFSA in food sector or EEA in case of environment.<sup>31</sup>

## 5. Single Legal Framework for Regulatory Agencies?

Inflated development of agencies and discussed problematic aspects that accompany this trend have already for some time caused need, namely from the side of Commission, to create single framework for the whole system, which will cover legally and substantially all agencies and their operations. Advantages of this solution are in my view clear. Certain exploratory steps were made by Commission already in the mentioned White Book on Governance, she specified her priorities in the Communication published in December 2002.<sup>32</sup> This document was commented by other EU institutions.

Efforts of Commission found their peak in 2005, when she unveiled the draft Interinstitutional agreement of European Parliament, Council and Commission on the operating framework for the European regulatory agencies.<sup>33</sup> The objective of the draft was to create framework, under which the agencies operate, including the conditions for their establishment and control. Reasons, which lead the Commission to issue the proposal, were already discussed, in her own words: "If these agencies are set up in an uncoordinated manner, without a common framework having been defined, this is likely to result in a situation which is rather untransparent, difficult for the public to understand, and, at all events, detrimental to legal certainty."<sup>34</sup>

The content of the proposal will be introduced only briefly.<sup>35</sup> Establishment of agencies shall be constrained by certain basic rules:

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31 Apart from the above cited literature see also BARBIERI, D., ONTARI, E. EU agencies: what is common and what is distinctive compares with national-level public agencies. *International Review of Administrative Sciences*, 2008, no. 3, p. 395–420.

32 European Commission. The operating framework for the European Regulatory Agencies. COM(2002) 718 final.

33 European Commission, 2005.

34 Ibid, p. 2.

35 For more detailed overview viz HANDRLICA, Jakub. 2008.

1) thorough examination, if the agency is really needed for solution of given problems, 2) in order to eradicate the incessant disputes, agencies should be founded only on the basis of concrete substantive articles of TEC, not general Art. 308 TEC, 3) question of seat location shall be solved already in the founding act. Innovations were contained even in the agencies' management. In managing boards Commission should have parity with the Member States, of which not all of them will have to be represented. Parliament is to be exempted from the managing boards altogether, its role is limited to control.

The position of Parliament to the proposed interinstitutional agreement was mixed. On the one hand it did not consider the present state of affairs satisfactory in light of its (un)transparency and (il)legitimacy, on the other it did not agree with the viewpoint of Commission that it should only play role of external controller and not to be included in management.<sup>36</sup> However generally speaking the powers of Parliament to intervene in this phase were limited, its main weapon was to reject budgetary resources to agencies. This was even considered for new agencies in 2006, but in light of the fact that Parliament viewed agencies as useful, potential for coercion was low.

Member States in the Council discussed the proposal in the Working Group for General Affairs on 27<sup>th</sup> May 2005. One of the basis was debate was the opinion of Council Legal Service, which did not recommend adoption of the agreement, according to its analysis the Commission role will be too strengthened and consequently the institutional balance compromised.<sup>37</sup> Adoption of the proposal in the working group was supported only by Slovakia and Hungary, the majority of delegations was openly against,<sup>38</sup> also rejected was an option of regulation adopted on the basis of Art. 308 TEC.<sup>39</sup> The draft

36 Debate from 15<sup>th</sup> November 2006 (Framework for European regulatory agencies). Available from <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20061115&secondRef=ITEM-014&format=XML&language=EN> (visited on 11<sup>th</sup> September 2009).

37 Council of the European Union. Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies – choice of legal act and legal basis. Document no. 7861/05. As it is common in Council Legal Service opinions, it was not publicised and therefore its interpretation could be invoked only from indications in other Council's documents, media and secondary literature.

38 States logically contested mainly those parts of proposal which limited their powers (see above).

39 Council of the European Union. Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies – Outcome of proceedings in

however continued to be negotiated, Finnish Presidency in the second part of 2006 tried to move the whole process forward, these efforts were supported also by the consequent German Presidency. Nonetheless, although the delegations generally agreed that it will be beneficial to accept some horizontal framework for agencies' activities, many contentious points remained and consensus was not reached. The Member States concluded that in light of this there is no chance to initiate negotiations on the proposal with other institutions.<sup>40</sup>

Commission reacted to the blocked interinstitutional agreement in March 2008 with new communication called "European agencies – the way forward",<sup>41</sup> in which she summarised the actual state of affairs in the sector of agencies, again stressed the need for single framework and asked Parliament and Council to negotiate, the best option according to her will be through establishment of interinstitutional working group. Commission decided to pursue complex evaluation of activities of agencies and their effectiveness by the end of 2009, at the same time she promised not to propose founding of new agencies.<sup>42</sup> The Commission of course also formally withdrew at that time already dead draft of discussed interinstitutional agreement.<sup>43</sup>

The future nature of single framework for agencies is not easy to foreseen. Firstly there is a question whether similar proposal is to be accepted at any shape. Although the contemporary situation after hastened development in the last decade it unsatisfactory mainly for the public, it works sufficiently well and suits all EU institutions, because in untransparent constellation each of them retains its possibility to intervene and the institutional balance is guaranteed. Despite verbal calls from Commission and Parliament to adopt single framework some experts believe that the main goal of these actors is to preserve status quo.<sup>44</sup> In my opposite view it is likely that in medium-term time

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the Working Party on General Affairs on 27 May 2005. Document no. 9738/05.

40 Council of the European Union. European regulatory agencies - State of play of the dossier in the Working Party on General Affairs during the German Presidency. Document no. 10675/07.

41 European Commission. European Agencies – The Way Forward. COM(2008) 135 final.

42 Ibid, p. 9. Agencies, which establishment is currently negotiated do not fall under this obligation.

43 OJ C 71, 25<sup>th</sup> March 2009, p. 17.

44 E.g. DEHOUSSE, R., 2006, p. 803; similarly CRAIG, P. *European Administrative Law*. Oxford: OUP, 2007, p. 183.

range the single framework will be agreed, but only of very general kind. This solution could firstly accommodate various functions and goals of different actors, secondly it would provide adequate flexibility for managing and controlling influence of EU institutions. It could be only hoped that it would suffice to make the so far messy and legally incomprehensible environment of European agencies more transparent and effective.