

Robert Schuman Centre
for Advanced Studies

European Administrative
Reform and Agencies

ELLEN VOS

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Vos: European Administrative Reform and Agencies

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**ROBERT SCHUMAN CENTRE
FOR ADVANCED STUDIES**

**European Administrative Reform
and Agencies**

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In the debate on the reform of the European Commission particular attention is given to agencies set up within the Community's institutional structure. Agencies are considered to be important as they could carry out specific administrative functions, thus enabling the Commission to concentrate on policy-making. In various documents on the reform of the Commission, functional decentralisation to agencies appears indeed to be very attractive to the Commission itself too. This paper aims to examine how EU agencies could be of significance in the process of reform of the Commission.* It discusses advantages and disadvantages of agencies. Hereby it particularly focuses on the legality and legitimacy concerns expressed in relation to agencies and investigates problems relating to the institutional balance, transparency, accountability, language regimes and technocracy.

1. Problematic EU Administration

Over the years, it has become apparent that the internal market is not achieved and maintained without the creation of a coherent body of administrative rules. The deepening of Community activities in various areas sees particularly to the implementation of Community rules and the corresponding design and approximation of administrative rules, and the management of the existing regulatory framework. The spillover effect of market integration, for instance, has involved the Community into developing an active policy on product safety regulation and the management of risks. 'Post-Maastricht', greater Community activity in various areas entails therefore a fundamental shift of powers from national to Community level. For reasons of efficiency and the need to reduce the workload of the Community legislature, this has in turn led to delegation of greater (implementing) powers to the Commission. The growing Community and Commission activities in this third phase of integration have however generally been received with great scepticism. In the 'post-1992' era, public alertness to Community and particularly Commission activities has grown, fuelled by the growing significance of the Community and its achievements during the 1980s. As a result increasing attention is paid to the legitimacy and accountability of Community activity and the Community's 'democratic deficit'. The Maastricht and Amsterdam treaties and secondary legislation have attempted to remedy these issues, in particular by enhancing the role of the Parliament in the EU's legislative process. Democratic representation at the formal legislative stage of the policy process is however inadequate where the earlier and later stages of the decision-making process are increasingly recognised as determinant for the final outcomes

* I am very grateful to Prof. Yves Mény, Renaud Dehousse and Bruno de Witte for their valuable comments. I alone am responsible for any shortcomings.

(also N. Lebessis / J. Paterson 1999). Therefore legitimacy and accountability concerns cannot be remedied by focussing on the powers of the Parliament alone, as increasing Community activities generally lead to enhanced decision-making by the Commission which is delegated broad discretionary powers. The exercise of broad discretionary powers by the Commission results in turn in a loosening of the relationship with the Community legislature and herewith its claims as source of legitimation. In this way, it is no longer sufficient to holding the Community to the yardstick of the system of representative parliamentary democracy (e.g. D. Curtin 1999),¹ but is it necessary to consider models based on participation to enhance legitimacy of EU governance.² These developments all emphasise the need to look for additional means of administrative legitimacy, such as greater democratic and judicial control, increased transparency, greater expertise and stronger participation of civil society in the decision-making process, open hearings and public debate.

The search for such means has gained in importance against the background of the recent episodes surrounding the Commission, which put the legitimacy of Community activity heavily to trial. First, the outbreak of the BSE crisis in March of 1996 clearly demonstrated severe shortcomings in the Commission's management in this area.³ Not surprisingly, the institutional failures of the BSE crisis resulted in a general public distrust in Commission action. Criticism about the Commission's functioning was further exacerbated by the recent corruption scandals regarding the Commission, which revealed both unacceptable conduct of certain Commissioners and serious managerial inadequacies of the Commission.⁴ In the latter context, the Commission itself recently pointed to communication problems between the Commission's directorates-general, an uneven distribution of the workload, a fragmented responsibility, unexploited management skills and outdated systems and procedures.⁵

¹ See also, the European Parliament Resolution on the democratic deficit, (1988) OJ C 187/229.

² See, for instance, the call for more participation of civil society by the Parliament, Report of the Parliament's Institutional Committee on the participation of citizens and social players in the Union's institutional system, A4-0338/96 (rapporteur Herzog).

³ Report of the Temporary Committee of Inquiry into BSE, set up by the Parliament in July 1996, on the alleged contraventions or maladministration in the implementation of Community law in relation to BSE, without prejudice to the jurisdiction of the Community and the national courts of 7 February 1997, A4-0020/97/A, PE 220.544/fin/A. See further below, section 5.3.

⁴ See Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission of 15 March 1999, << <http://www.europarl.eu.int/experts/en/default.htm> >>.

⁵ CG3(2000) 1/17. Reforming the Commission. Consultative document, Communication from Mr Kinnock in agreement with Ms Schreyer, of 18 January 2000.

These episodes have made plain that decision-making by the Commission (and more generally, the Community) too frequently still is ambiguous and obscure, is little effective and efficient and is far away from public perception, whilst the possibility for civil society to participate in the decision-making remains problematic (Lebessis/Paterson 1999). These events, together with the increasing functions which the Commission needs to carry out, for which it was not designed originally and which reveal its limits in relation to capacity and supply of expertise and information, have inevitably amplified legitimacy concerns and put the current structure and functioning of the Commission into question.

2. The Promise of Reform

Put under strong pressure, the Commission's new President, Mr. Prodi, expressed on several occasions his commitment to reform and promised to 'transform the Commission into a modern, efficient administration' (Prodi 1999c), 'to face new challenges in the 21st century' (Prodi 1999d). The importance of internal reform of the Commission and of the European civil service was once more emphasised by the Cologne European Council which highly ranked the institutional reform on its agenda⁶ and encouraged Mr Prodi to proceed with his reform proposals (Prodi 1999b). In line with the Amsterdam Treaty, the latter clearly visioned a more political role of the Commission and assured 'greater efficiency, absolute transparency and full accountability' (Prodi 1999a), all of which form the basis of the Commission's agenda for administrative reform.⁷ In this context, new modes of EU governance gain in importance, in particular reliance on independent agencies. Agencies could, for instance, relieve the Commission from specific administrative tasks, which would leave the Commission greater room to concentrate on the giving of more political direction. In its Strategic Option Paper of October 1999, the Commission indeed considered the adoption of, what it calls, 'an externalisation policy', by means of which responsibilities would be devolved to public service bodies (being either existing agencies and new bodies or national/transnational public bodies) ('devolution') or to private sector entities ('outsourcing'),⁸ as was already recommended by the Committee of Independent Experts.⁹ This strategy of delegation by the Commission of all or part of its tasks

⁶ In particular in relation to the size and composition of the Commission, the weighting votes in the Council and the possible extension of qualified majority voting in the Council.

⁷ Administrative Reform of the European Commission: Statement of Purpose and Structure, CG3(1999) 1/4.

⁸ G3(1999) 10/6.

⁹ See the Committee of Independent Experts in its Second Report on 'Reform of the Commission, Analysis of current practice and proposals for tackling mismanagement,

or activities as a means to implement its strategy to re-centre the Commission on its core-tasks and policy priorities is confirmed in the March 2000 White Paper 'Reforming the Commission'.¹⁰ For the purpose of this paper we shall therefore discuss what role EU agencies could play in the process of reform.

3. Functional Decentralisation and EU Agencies

Ever since the Community began to function the Community institutions have used some kind of functional decentralisation by seeking the assistance of various bodies in the carrying out of specific Community activities, foremost committees and agencies. Committees have generally been created in response to the need to achieve effective and efficient Community decision-making, to guarantee a sound scientific basis, to ensure the continuing presence of the Member States within the Community decision-making process¹¹ and to include the views of socio-economic parties. Accordingly, committees have been entrusted with particular functions: ranging from the collection and assessment of technical and scientific data and the giving of scientific advice, informing the Commission of the opinions of the various interests involved, and the ensurance of political approval of the Member States in the implementing phase (see Joerges & Vos (eds.) 1999 and Joerges & Falke 2000). Agencies have generally been created in response to the increased requirement for information and co-ordination at the Community level as well as by the need to lighten the Commission's workload in various policy areas. These agencies, which are sited all over the Community¹² and often based on existing committees, support the Community institutions and national authorities in identifying, preparing and evaluating specific policy measures and guidelines (see in general Everson 1995) and currently operate in a broad range of fields, viz.: vocational training,¹³ living and working conditions,¹⁴ environment,¹⁵ training,¹⁶ drugs and drug addiction,¹⁷ pharmaceuticals,¹⁸ trade marks, designs

irregularities and fraud' of 10-9-1999, (recommendation 15 and section 2.3 of the Report), << <http://www.europarl.eu.int/experts/en/default.htm> >>.

¹⁰ COM (2000) 200.

¹¹ See Council Decision 1999/468/EC on comitology, (1999) OJ L 184/23.

¹² After a heated political struggle, political agreement on the seat of these bodies was finally reached in 1993, see (1993) OJ C 323/1.

¹³ Council Regulation 337/75, (1975) OJ L 39/1.

¹⁴ Council Regulation 1365/75, (1975) OJ L 139/1.

¹⁵ Council Regulation (EEC) 1210/90, (1990) OJ L 120/1.

¹⁶ Council Regulation (EEC) 1360/90, (1990) OJ L 131/1, amended by Council Regulation (EC) 2063/94, (1994) OJ L 216/9.

¹⁷ Council Regulation (EEC) 302/93, (1993) OJ L 36/1.

¹⁸ Council Regulation (EEC) 2309/93, (1993) OJ L 214/1.

and models,¹⁹ safety and health at work,²⁰ plant variety,²¹ and racism and xenophobia.²² Very recently, a special agency was created which has specific powers to assist in the reconstruction programmes for Kosovo.²³ The setting up of agencies for human rights and democracy,²⁴ food safety²⁵ and aviation safety²⁶ is currently under consideration.

Without specifying a precise institutional frame, the Commission recently confirmed the importance of delegation and decentralisation of day-to-day executive tasks, whilst highlighting the need of an open government and accountability, to be build on new forms of partnerships between the different levels of European governance.²⁷ This view largely coincides with the plea made by Dehousse and Majone for more decentralisation and delegation of implementing powers. In view of the increasing politicisation of the European integration process and the lack of both competences and resources of the Commission to adopt measures to ensure uniform implementation of EU policies, the latter specifically called for a greater role of autonomous agencies. In their opinion the Commission's tasks should be divided into policy-making and technical/administrative functions (Dehousse & Majone 1999; Mény 1999). The Commission should so primarily act as an '*administration de mission*' and identify the areas in which action by the Community is necessary and would not be entangled in the daily management of EU policies; agencies, bringing together technical and economic expertise should deal with the latter (Majone 1996).

In general, decentralising government to independent agencies is indeed considered advantageous in that they facilitate the use of scientific and/or technical experts who are not part of the normal bureaucratic structure, offer greater staffing flexibility, reduce the workload of the administration so as to

¹⁹ Council Regulation (EC) 40/94, (1994) OJ L 11/1.

²⁰ Council Regulation (EC) 2062/94, (1994) OJ L 216/1.

²¹ Council Regulation (EC) 2100/94, (1994) OJ L 227/1.

²² Council Regulation (EC) 1035/97, (1997) OJ L 151/1. A Translation Centre was created to meet the translation needs of these bodies, Council Regulation (EC) 2965/94, (1994) OJ L 314/1, as amended by Council Regulation (EC) 2610/95, (1995) OJ L 268/1.

²³ Council Regulation (EC) No. 2454/1999, (1999) OJ L 299/1.

²⁴ As proposed by the Cologne European Council of June 1999 (point 46 of the Presidency conclusions).

²⁵ As proposed by the Commission in its White Paper on Food Safety, COM(1999) 719 final. See below section 5.3.

²⁶ See Commission working document - In view of the discussions within the Council on the creation of the European aviation safety authority in the Community framework, COM(2000) 144 final

²⁷ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions, 'Strategic Objectives 2000-2005, "Shaping the New Europe", COM(2000) 154 final.

enable it to concentrate on strategic policy, insulate the resolution of technical regulatory issues from the day-to-day political change and contribute to greater transparency and accountability (see Baldwin & McCrudden 1987: 4-7; Baldwin 1995; Craig 1999: 45-50). The very fact that a clearly identifiable agency, instead of an obscure Commission division or an equally opaque committee, would carry out clearly defined tasks should so, in principle, create greater transparency. Importantly, agencies are also argued to provide greater consistency in implementing policies because they operate at arm's length from the political institutions; being 'non-majoritarian' they are not part of the political game (Dehousse & Majone 1999). In this respect, agencies would certainly respond to the desire to intensify the Commission's political profile, and add to the credibility of the achievement of regulatory goals. Decentralisation to clearly identifiable agencies could furthermore be advantageous in that they could encourage uniform interpretation and implementation of Community law where they form the nucleus in networks of national authorities (Dehousse 1997), and further administrative integration (Kreher 1997: 238), whilst they could play an important role in the international arena too. The creation of agency networks involving all interested parties could in principle also contribute to 'a Europe closer to the citizen' and foster a better understanding and public confidence in EU action.

Leaving governmental tasks to be carried out by independent agencies, however, has encountered also strong critiques that point in particular to concerns of agencies' legitimacy and legality. In general, legitimacy concerns are forwarded in relation to the place of agencies as a fourth branch of government within the system of separation of powers and to the carrying out of tasks by agencies which do not have a constitutional basis and would not be subject to the constitutional guarantees. In the non-majoritarian (American) agency model, independent agencies generally perform both legislative and executive tasks and to some extent carry out a judicial function (Majone 1996). As a result, they have been accused of concentrating too much power in the same authority. Closely linked herewith are legality concerns which generally relate to the delegation of decision-making powers to agencies and the worry about the legal basis for this. In addition, delegation of greater decisional powers to agencies gives rise to fears they are easily influenced and subverted to the ends of those whom they are supposed to regulate (e.g. Baldwin & McCrudden: 9-10; Majone 1996). Equally the independence of agencies has argued to be not well enough inserted in the system of public scrutiny (Everson 1995: 181). For instance, resort to agencies could arguably lead to more fragmentation and in turn erosion of accountability as sheer institutional complexity would conceal which institution is accountable for a specific issue (Rhodes 1996). Furthermore, agencies' transparency and accountability are regarded rather doubtful, pointing in particular to the

problematic disentanglement of expert findings from political strategies (Shapiro 1997), whilst their languages regimes may interfere with citizen's rights. Below it will be examined if and how these concerns can be remedied.

4. EU Agencies, Delegation of Powers and Institutional Balance

4.1. The Existing EU Agencies

At present, the existing agencies do not (yet) have autonomous regulatory functions. Many of them are based on (scientific) committees and provide an administrative frame in which these committees operate. Following a functional approach, these agencies can broadly be classified into: 1) agencies which have as their main function to provide information and are generally charged with the co-ordination and supervision of this information and the creation of networks; 2) agencies which need to provide specific services and specific measures to implement Community regimes and 3) agencies which provide specific information, expertise and services, and are the compulsory basis for decision-making but do not have decision-making powers of their own (Kreher 1997: 236-238).

The first category of agencies can be subdivided into two sub-categories. The first sub-category needs to collect, analyse and disseminate information relating to their specific policy areas. This group comprises the European Centre for the Development of Vocational Training and the European Foundation for the Improvement of Living and Working Conditions (the two 'older' agencies) and the European Training Foundation. The second sub-category of agencies are those agencies which, in addition to the general information function, need to create and co-ordinate networks of experts. These networks comprise National Focal or Reference Points which need to co-operate with the agencies and co-ordinate at national level the activities in relation to the agencies' work programmes. They offer Member States greater influence than they would have otherwise had under an alternative approach of centralised information and planning within the Commission (Ladeur 1996). The agencies charged with these tasks are the European Environment Agency (EEA), the European Agency for Safety and Health at Work and the European Monitoring Centre for Drugs and Drug Addiction.

The second category of agencies includes the Office for Harmonisation in the Internal Market (trademarks and designs) (OHIM) and the Community Plant Variety Office. These agencies sees to the provision of services and the implementation of the newly created Community regimes on trade marks and

plant variety rights through specific registration procedures and are empowered to take decisions on the registration of applications for a Community trademark or plant variety right.

The third category is a mixture between the first and the second category. The European Agency for the Evaluation of Medicinal Products (EMA) is an example hereof. Although formally providing solely information and specific expertise, this Agency bears a strong resemblance with the second category in that it has been allotted a specific role in the new Community authorisation system of pharmaceuticals but does not have formal decision-making powers.

4.2. EU Agencies, Legal Basis and Decision-making Powers

The Treaty does not provide for a specific legal basis for the creation of agencies. However, the creation of new agencies by the Community is generally not troublesome (Lauwaars 1979). Virtually all the existing agencies have been based on the general Treaty clause of Article 308. The only exception hereto is the Environment Agency, having been founded on Article 175 EC. There are however two important limits to the scope of Article 308 EC: first, Article 308 EC cannot be used to change the institutional structure of the Community and alter its balance of powers; and secondly, Article 308 EC may not be applied if other Treaty provisions are available. The former limit is of particular importance in relation to the powers to be conferred upon agencies. It sees to the nature of powers delegated to agencies and determines that agency powers must not encroach upon those of the Treaty institutions (see below). The second limit refers to the generally residual character of Article 308 EC. In this context particular account should be taken of the general harmonisation provision, Article 95 EC.²⁸ This Article, the use of which is favoured in particular by the Parliament to the use of Article 308 EC for reasons of parliamentary participation (Brinkhorst 1996: 81), requires that measures be adopted for the 'approximation' of national provisions. Measures other than harmonisation measures may not be based on Article 95 EC, notwithstanding their close connection to the achievement and functioning of the internal market (Pipkorn 1991: 2844). Article 95 EC could therefore be a valid legal basis only where it can be shown that the creation of a Community system or agency might be considered to be a harmonisation measure, necessary for the completion of the internal market (Pipkorn 1992: 114). Hereby, harmonisation requires the changing and supplementing of national legislation. This means that Community measures of a

²⁸ Article 95 EC has been regularly discussed by the Commission as a valid legal basis for the creation of agencies. The Commission, for example, initially proposed Article 95 EC as the legal basis for the EMA, which was however rejected by the Council.

mere institutional character do not constitute harmonisation measures in the sense of Article 95 EC. The creation of an agency as such by virtue of Article 95 EC thus seems to be excluded. However, where this is secondary to the main purpose of a specific measure, i.e. harmonisation, Article 95 EC may still offer a valid legal basis for an agency. The question as to whether an agency might be based on Article 95 EC must therefore be examined in the light of the 'centre of gravity' of the proposed measure (Barents 1993): does it seek to eliminate existing or future differences between national legislative provisions, and is the agency dependent upon such harmonisation measures (Pipkorn 1991: 2847). The choice of the legal basis for these agencies, particularly between Articles 308 and 95, depends, in the final analysis, upon the nature of the powers delegated to these bodies.

The question thus arises whether regulatory powers can be delegated to independent agencies. The transferral of only very limited and circumscribed powers to the existing agencies is not without accident but stems from the case-law of the Court of Justice, in particular its *Meroni* case-law. In the *Meroni* cases, the Court rejected the transfer of sovereign powers to subordinate authorities outside of the EC institutions and ruled that only 'clearly defined executive powers' could be delegated, the use of which must always remain subject to the supervision of the Commission. The Court justified its reasoning by referring to the balance of powers, 'which is characteristic of the institutional structure of the Community', and which would be distorted if discretionary powers were delegated to bodies other than those established by the Treaty.²⁹ The underlying concern of this distinction between 'clearly defined executive powers' and 'discretionary powers and the prohibition to delegate the latter to 'outside structures' seems to lie in its understanding of democratic legitimacy in which the powers of any rule-making body eventually should be traced back to the authority of a democratically elected parliament (Joerges, Schepel & Vos 1999). However, as I indicated earlier, the requirements of the modern welfare state have inexorably led to a general withdrawal of the legislature in favour of the administration and to non-governmental actors. Many 'discretionary' powers are at present generally delegated to the administration. This wide degree of discretion may accordingly be argued to have weakened the administration's claim to be acting solely on the basis of the legislature's duly enacted laws and, thus, to have undermined administrative legitimacy. The move away from this 'transmission belt' model of administrative law (Stewart 1975),³⁰ therefore, underlines the importance of searching for additional means to enhance

²⁹ Case 9/56, *Meroni & Co., Industrie Metallurgiche S.p.A. v High Authority* [1957-58] ECR 133 and Case 10/56, *Meroni & Co., Industrie Metallurgiche S.p.A. v High Authority* [1957-58] ECR 157.

³⁰ This applies also the European Community.

administrative legitimacy (see also Everson 1998). Modern administrative law is therefore more concerned with procedural requirements of decision-making processes (such as greater democratic and judicial control, increased transparency, greater expertise and stronger participation of civil society), than with the hierarchical legitimation of rules.

Doubts may therefore be expressed whether the *Meroni* rulings should still be strictly applied to the Community's current system of checks and balances. Arguably, the institutional balance of powers principle which underlies the Community's constitutional structure will not be upset as long as the shift of powers is accompanied by a reinforcement or re-balancing of the existing institutions and constitutional guarantees for decision-making are safeguarded. Recent developments seem moreover to indicate that the Court would be prepared to loosen the strict *Meroni* requirements, in particular in relation to judicial review.³¹ So, although not being formally competent according to the Treaty, in 1995 the Court of First Instance (CFI) explicitly accepted competence for the decisions of the OHIM and changed its Rules of Procedure to this end.³² In view of the expected workload especially stemming from litigation on these decisions, the Council has additionally allowed the CFI to give judgment by a single judge.³³ Hence, recently, the CFI annulled a decision of the OHIM in which it had refused to examine specific arguments submitted by the applicants in the appeal procedure, placing on the OHIM the duty to take the necessary measures to comply with the judgment.³⁴

Therefore, under the current Treaty provisions, agencies could be delegated discretionary powers provided that this is accompanied by a reinforcement or re-balancing of the existing institutions. Hereby, the insertion of controlling mechanisms in relation to the agencies is of great importance (see also section 5). The attitudes of both the CFI and the Council allowing the CFI to exercise direct

³¹ In *Les Verts*, the Court had already elucidated, the Community is based on the Rule of Law, permitting the Court to review the legality of all acts adopted by the institutions, Case 294/83, *Parti Écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, at 1365. From this reasoning, it has been deduced that no decisional act, including those emanating from bodies other than institutions, might escape judicial review, any Community act whatsoever being subject to the Community Rule of Law; and could be applied *mutatis mutandis* to agency decisions, even though agencies do not qualify as 'institutions'. See K. Lenaerts 1993: 46.

³² (1995) OJ L 172/3. See Articles 130 – 136 of the CFI's Rules of Procedure as lastly amended (1999) OJ L 135/92.

³³ Council Decision 1999/291/EC, ECSC, Euratom, (1999) OJ L 114/52.

³⁴ Case T-163/98, *Procter and Gamble v OHIM*, Judgment of 8 July 1999, nyr.

judicial control over the OHIM give expression hereto.³⁵ For reasons of legal certainty and coherency, a legal basis for the creation of agencies and the delegation of authority should nonetheless be introduced in the Treaty. Regarding the fears that greater decisional independence for agencies would lead to agency capture, it should be remarked that the problem of capture is a general problem for all regulators and there is little reason to assume why agencies would be more vulnerable to capture than the Commission would be.³⁶ This is clearly illustrated by the BSE crisis. The problem of capture could, for example, be addressed by (network) mechanisms ensuring transparency, political supervision and deliberative interaction with civil society rather than by preventing agencies from becoming more 'independent'.

5. EU Agencies and Other Legitimacy Concerns

5.1. EU Agencies, Transparency and Accountability

In principle clearly identifiable agencies promote transparency which in turn fosters accountability. Of particular importance hereby is certainly the right of access to information. In this context it should be noted however that the new right of access to documents as introduced in Article 255 EC by the Amsterdam Treaty is limited to the documents of three institutions: the Council, the Commission and the Parliament and hence does not seem to cover documents of the Court of Justice and the Court of Auditors, the other organs provided for in the Treaty itself such as the Committee of Regions and the heap of other bodies and agencies set up under secondary Community legislation. Scrutiny of the regulations governing the existing agencies and their actual operation reveals however that the Community has subjected also the agencies to specific rules on transparency and accountability. Encouraged by the Code of Conduct on Access to Documents adopted by the Council and the Commission and the recommendation of the European Ombudsman that agencies, too, should adopt rules on access to documents,³⁷ most agencies have adopted decisions on access

³⁵ The importance of controlling mechanisms was emphasised by the Court in *Reiff* concerning competition law as well. Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff* [1993] ECR I-5801.

³⁶ It is, for instance, true that, at present, the pharmaceutical industry's attention is increasingly focused on the EMEA and that there is a certain risk of the EMEA being captured. See for empirical research on the views of the pharmaceutical industry on the EU Licensing procedures and the EMEA, Vos & Hagemester, 2000.

³⁷ Special Report from the European Ombudsman to the European Parliament following its own-initiative inquiry into public access to documents, (1998) OJ C 44/9.

to their documents.³⁸ These decisions are all based on the Commission's rules on access to documents. However, since access to documents of the Commission and the other institutions consists 'of a long and obscure list of possible reasons to deny access to documents'³⁹ revision would be necessary so as to truly guarantee the public the widest possible access to documents and information in general.⁴⁰ Here it should be acknowledged that as a matter of general principle (and not merely of practice and self-regulation) the agencies too (as well as the other institutions and bodies not mentioned in Article 255 EC) should be covered by the general obligation to provide extensive access to their documents. Awaiting Treaty amendment, specific rules on these issues could be adopted by the Council under its general powers of Article 308 EC (Curtin 2000: 27-28).

In addition, in creating greater openness and giving herewith expression to the general principle of transparency, which is explicitly laid down in Article 1 EU by the Amsterdam Treaty, some agencies (in particular, the EMEA, the EEA, the OHIM and the Drug Monitoring Centre) make extensive use of the Internet. EMEA's Internetsite, for instance, is impressive for the amount of detailed information, including *inter alia*, its annual activity reports, its Management Board (press releases), its committees (calendar of meetings, press releases), and the addresses of the national authorities competent in the authorisation of medicines, standard operational procedures, guidelines and, to some anxiety of the pharmaceutical industry, detailed European public assessment reports.⁴¹

Transparency is equally significant for the accountability of agencies. It is clear that the more active agencies will become, the more important becomes the design of mechanisms to keep agencies under control and make them accountable. In general the agencies' independent administrative structure facilitates their control. Because of their visibility, agencies may attract greater

³⁸ See Decision on public access to European Environment Agency documents, (1997) OJ C 282/5; Rules on public access to documents adopted by the Bank's Management Committee, (1997) C 243/13; Decision of the Governing Board on Public Access to European Training Foundation Documents, (1997) OJ C 369/10; Decision of the Committee of the Regions concerning public access to documents of the Committee of the Regions, (1997) OJ L 351/70; Rules for access to Translation Centre documents, (1998) OJ C 46/5; Decision 9/97 concerning public access to administrative documents of the European Monetary Institute, (1998) OJ L 90/43.

³⁹ Ombudsman J. Söderman, calling for a fundamental right to an open accountable and service-minded administration, Press release 3/2000 of 2 February 2000.

⁴⁰ See recently, the Commission's proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM(2000) 30 final. This proposal however still is limited to access to documents (and not information in general) and provides for broad exceptions.

⁴¹ See << <http://www.eudra.org> >> (home page).

attention and feed the policy debate in their field. Their actions are likely to be identified with Community action and as such they will be held responsible (Dehousse 1997: 258). In this respect it is above all important that the Member States, the Commission and the Parliament, through their representatives on the Management or Administrative Boards, can control the agencies' activities. Management or Administrative Boards are in fact the steering bodies of the agencies and generally are responsible for budgetary matters, the appointment of the executive directors and the monitoring of the agencies' performance. Further control can be exercised on the basis of the annual activity reports of the agencies. In addition to these instruments of control, the Parliament has significant power as regards the budget of most of the agencies. The importance of this instrument cannot be underestimated as many agencies depend partly or entirely for their revenues on Community subsidies. Being non-compulsory expenditure, these subsidies are finally determined by the Parliament, which can use its powers, in a certain sense, to 're-orient the budget' (Brinkhorst 1996: 77). Parliament's readiness to invoke this power 'in the name of transparency and accountability' has been underlined several times (Brinkhorst 1996). This supervisory power would be lost when agencies become completely financially independent. The Commission has therefore indicated its desire to control the agencies' expenditure by subjecting them to the supervision of the Commission's financial controller, which would, in the view of the Commission, ensure a maximum of transparency and harmonisation between the agencies, whilst any surplus of revenues by agencies would be deposited in the general Community budget.⁴² These proposals have not been received with great enthusiasm by the agencies. For example, the OHIM has strongly opposed against in particular the proposed deposition of revenue surplus in the general Community budget. This strong resistance can be explained by the fact that the OHIM obtains great part of its revenues from the fees paid by undertakings in return for filing and registering their trademarks with the Office and that it anxiously aspires complete financial independence.

Accountability of agencies and legitimacy of agency regulation can also be fostered through their inclusion in networks. All the existing agencies have so created networks by means of which they structure their relationship with the 'external world', with their 'stakeholders'. Through these networks, the agencies build on the work of the existing institutions and collaborate with them. These networks often promote the interaction with both governmental actors and all other actors concerned in a specific policy area, although the practical operation of these networks and their legitimacy as European governance structures still

⁴² See amended proposals for Council regulations (EC) amending the basic regulations of certain decentralised community agencies, (1998) OJ C 194/5.

needs to be scrutinised.⁴³ A first step towards the institutional opening up of agencies to interested parties has been made by the EMEA which recently embraced within its organisational structure a Committee on Orphan Medicinal Drugs which includes also representatives of interested parties.⁴⁴

Important instruments of control are further in the hands of the Court of Auditors, which examines the revenue of bodies established by the Community⁴⁵ and the European Ombudsman, who guards against instances of maladministration of the agencies. For example, the influence and control of the European Ombudsman on the behaviour of the agencies is visible where on his recommendation some agencies have adopted their own codes of conduct. The EMEA, for instance, has committed itself to respect the principles laid down in its code, such as equality, proportionality, no abuse of powers, impartiality, independence and objectivity, whilst providing guidance on situations of conflicts of interests (which have to be declared in advance), confidentiality and discretion as well as on invitations and gifts.⁴⁶ Clearly, the new European Anti-Fraud Office, OLAF, may exercise its investigative powers to combat fraud or corruption in relation to agencies too. The role which the Court of First Instance currently plays in reviewing the legality of the agencies' decisions has already been alluded to above.

5.2. *EU Agencies and Languages*

From the perspective of legitimacy, the language regimes adopted by agencies are a thorny issue.⁴⁷ Considerations of efficiency have generally led to a reduction in the use of the number of languages by the agencies. This however severely touches upon the right of citizens to express themselves in one of the official languages of the Community at their choice in their contacts with the Community institutions.⁴⁸ This right is explicitly laid down in Article 21 (3) EC, recently

⁴³ Within the framework of the Robert Schuman Centre Project on EU Agency Networks empirical research will be carried out in relation to the operation of four agency networks (of the EEA, the Drugs Monitoring Centre, the EMEA and the OHIM).

⁴⁴ Regulation 141/2000 of the EP and Council on orphan medicinal products, (2000) OJ L 18/1.

⁴⁵ See, for example, its Report on the financial statements of the European Agency for the Evaluation of Medicinal Products (EMEA, London) (Financial Year 1996), together with the Agency's replies, (1997) OJ C 393/18.

⁴⁶ The EMEA Code of Conduct of 3 December 1999, published on its Internet site, << <http://www.eudra.org/emea.html> >>.

⁴⁷ I am very grateful to Bruno de Witte for pointing me to this issue.

⁴⁸ See, e.g. Resolution of the European Parliament on the use of the official languages in the institutions of the European Union, (1995) OJ C43/91.

introduced by the Amsterdam Treaty, which stipulates that:

'Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language'.

The language regimes operated by the agencies have indeed been criticised. Complaints have, for instance, arisen about the fact that the publications of the EEA are available mainly in English, although this agency was set up to facilitate the provision of information on the environment and to ensure that this information was publicly available.⁴⁹ Likewise, the reduction in the number of languages in which the vocational training magazine of the European Centre for the Development of Vocational Training is published has been questioned.⁵⁰ The language regime of the OHIM has been opposed more fiercely by a Dutch trademark agent who brought this issue before the CFI.⁵¹ In this context, it is noted that Council Regulation 40/94 on trademarks⁵² restricts the languages of the OHIM to five languages: English, French, German, Italian and Spanish. Whilst applicants for a Community trade mark may be filed with the OHIM in any of the official language of the European Community, they are obliged to choose one of the five languages of the OHIM as their a second language. The OHIM may send its observations in the second language and the applicant is to be deemed to accept that language as a language of proceedings for opposition, revocation or invalidity proceedings.⁵³ Although the Dutch trade mark agent's appeal for annulment of this language regime failed for obvious reasons of being not of direct and individual concern,⁵⁴ she has persisted in her objections. Recently, she filed a new case before the CFI, this time attacking a decision by OHIM's Board of Appeal for refusing an application for registration of a trade mark on the ground of its choice of language (Dutch).⁵⁵

The reduction in the use of languages by the agencies may not only interfere with citizens' rights, it may also impinge on the right of Member States, laid down in Article 3 of Council Regulation no. 1 on the languages to be used by the Community,⁵⁶ according to which documents which are sent by a Community

⁴⁹ Written Question no. 3854/97 by C. Diez de Rivera Icaza to the Commission, (1998) OJ C 174/144.

⁵⁰ Written Question no. 3398/96 by A. Alavanos to the Commission (1997) OJ C 91/81.

⁵¹ Case T-107/94, *Kik v Council and Commission* [1995] ECR II-1717.

⁵² Above n. 19.

⁵³ Article 115 of Council Regulation 40/94, above n. 19.

⁵⁴ Which was confirmed in appeal by the ECJ: Case C-270/95 P [1996] ECR I-1987.

⁵⁵ Case T-120/99, *Christina Kik v Office for Harmonization in the Internal Market*, pending (1999) OJ C 246/35.

⁵⁶ Special Edition (1952-1958) OJ 59.

institution to a Member State need to be drafted in the language of that State. In this way, Member States of 'minority' languages may have greater difficulty in using very technical documents produced by the agencies in only a few languages.⁵⁷

Clearly, in these situations the risk is incurred that through decentralisation of specific functions to agencies complex procedural rules as regards language requirements which are applicable to the Community institutions will be circumvented and that the constitutional guarantee of equal treatment of languages is eroded. The balancing between efficiency and legitimacy of the language regimes of agencies needs therefore careful reconsideration in the light of Article 21 EC⁵⁸

5.3. *EU Agencies, Information, Technocracy and Politics*

More problematic is the functioning of agencies in the 'grey zone' between 'pure' administration and politics. Arguments to uphold agencies' legitimacy are based on the thesis that agencies could develop indirect information-based modes of regulation which are more in line with current economic, technological and political conditions than the coercive instruments of command and control which have been used in many Community policies (Dehousse & Majone 1999). Yet, in many cases, it is difficult to determine where the carrying out of mere managerial, technical and information gathering tasks stops and policy-making begins. For instance, the significance of the information produced by agencies is evident as it forms the basis of regulatory decision-making within the Community. The provision of information and evidence by agencies clearly influences decision-making and could be considered as a kind of 'regulation by information' (Majone 1997). In this way, 'contemporary politics is a politics of information' (Shapiro 1997: 285).

Health and safety regulation and environmental regulation can be considered as such 'arenas in which scientific and technological information battles are central to political outcomes' (Shapiro 1997: 285). This is evidently demonstrated by the BSE episode which rightly put public confidence in the Commission's handling of BSE into severe crisis. The Temporary Committee of Inquiry into

⁵⁷ See e.g. in relation to the language used by documents in committee procedures the complaint by Germany, Case C-263/95, *Germany v Commission* [1998] ECR I-441, para. 27. In practice, it occurs that representatives of Member States of a less frequently used language express their dissatisfaction as regards the impossibility to use their own language in meetings of the agencies' management boards.

⁵⁸ See on language rights and European integration in general, De Witte 1992.

BSE, set up by the Parliament in July 1996,⁵⁹ revealed that during 1990-1994 when the disease had reached crisis levels, the Commission had followed a true policy of 'disinformation'.⁶⁰ The latter policy had not been confined to misleading public opinion, but had played a major role in relations both between the Community institutions themselves (legislative activity on BSE by the Community had been suspended and no debates on BSE were held in the Council) and with the Member States (the then Commissioner on Agriculture, MacSharry, had prevented both France and Germany who wanted in 1990 to restrict the import of British beef from doing so by threatening them with Court proceedings). The Committee moreover observed that the Commission had been very much influenced by the 'British thinking' which had been increased by the presence of many persons of British nationality on the two committees operating in this field: the Scientific Veterinary Committee (composed of scientists with a high-standing reputation) and the Standing Veterinary Committee (composed of national representatives). In addition, the operation of the Standing Veterinary Committee during this period had been put under political pressure, whilst also the information diffused by the Scientific Veterinary Committee had not been free from political influence either.⁶¹ It was clear that this reconstruction and evidence of the regulatory policy of the Commission necessitated a change in the Community's approach to risk regulation. The Inquiry Committee accordingly emphasised the need for greater transparency as regards action on BSE, particularly in relation to the conditions of the functioning and work of the scientists on the scientific committees; foremost advocating transparency and reform of the rules governing the work of these committees to ensure independence and appropriate funding of the scientists and the publication of debates and dissenting opinions.⁶²

In response to these findings, the Commission hastily prepared a re-organisation, putting the responsibility for its scientific committees under the umbrella of DG 24, rebaptised into Health and Consumer Protection and introduced the principles of 'excellence', 'independence' and 'transparency' to govern the production of scientific expertise by the Community's scientific committees.⁶³ However this has proved insufficient to restore public confidence.

⁵⁹ (1996) OJ C 261/132. See also European Parliament Resolution on the Commission's information policy on BSE since 1988 and the measures it has taken to ensure compliance with the export ban and eradicate the disease, (1996) OJ C 261/75.

⁶⁰ Report on the alleged contraventions or maladministration in the implementation of Community law in relation to BSE, without prejudice to the jurisdiction of the Community and the national courts of 7 February 1997, A4-0020/97/A, PE 220.544/fin/A.

⁶¹ *Ibid.*, at 10.

⁶² *Ibid.*, at 38-40.

⁶³ Commission Green Paper on the general principles of food law in the European Union, COM(97) 176 final.

Subsequent scares of food safety (in particular concerning dioxin contamination) increased public awareness and even further undermined the confidence of consumers in the capacity of the food industry (in its broadest sense) and the public authorities to ensure that their food is safe (Byrne 1999). This, together with the lack of capacity of the existing committee system, which struggled with the increase in demands placed upon it, has led the Commission to propose the creation of a (long awaited for⁶⁴) European Food Authority.⁶⁵ Although the Commission has not yet disclosed the precise institutional design of the agency, its functions and the proposed network system by means of which the agency should be embedded in the national agencies and institutions bear strong resemblances with the EMEA.⁶⁶ Whilst denying the agency any regulatory powers, the main tasks of this new agency will consist of the giving of scientific advice, the gathering and analysis of information and the communication of risk. According to the Commission, the agency would have to demonstrate the highest level of independence, of scientific excellence and of transparency in its operations. Like the EMEA, the Food Authority would be at the centre of a network of scientific contacts, i.e. the national scientific agencies and institutions. It would not only act as a point of scientific excellence, it would also provide advice to consumers and give them guidance on important safety developments.

The Commission insists on a strict division into risk assessment (scientific advice), to be carried out by the agency and risk management (policy-making), to be carried out by the Commission itself. However, with this the Commission ignores that in many situations of scientific uncertainty and/or controversy, scientific analysis and management are strongly intertwined (Cranor 1993: 132; Rowe 1992: 23) and no 'objective scientific facts' exist. It is for example very likely that scientific evidence relating to a highly sensitive issue such as a request for an EU authorisation of a specific novel food will include some socio-economic elements. In this respect, comparisons can be drawn with the EMEA. Opinions adopted by EMEA's scientific committee CPMP are likely to include not only purely scientific, but also normative (nationally-flavoured) elements. This stems particularly from EMEA's two-tiered manner of formulating a scientific opinion, by means of which national experts, representing their competent authorities, adopt an opinion only after consultation with a pool of national scientific experts (Vos 1999: 228-230). Here, once EMEA's scientific committee CPMP has reached a consensus on the authorisation of a specific medicinal product (including all relevant considerations), the Commission is

⁶⁴ See e.g., the discussions in F. Snyder (ed.) 1994. The proposal for the establishment of a Veterinary Inspection Agency (COM (96) 223 final) was withdrawn by the Commission in 1998 (COM(98) 32 final).

⁶⁵ White Paper on Food Safety, COM(1999) 719 final.

⁶⁶ Ibid.

likely to adhere to this opinion. This seems indeed to be confirmed by the authorisation practice. It should, therefore, be recognised that often, especially in health and safety and environmental regulation, it is illusionary to believe that the managerial and scientific tasks to be carried out by agencies do not embrace political issues. A strict division between mere managerial and scientific tasks by agencies and policy-making by the Commission is difficult to uphold. The non-majoritarian governance model based on independent technocratic agencies clearly fails to recognise the value-laden nature of health and safety and environmental regulation.

Yet, this is not to say that there would be no need for agencies operating 'independently' from the Commission. In this context, it should be observed that to a large extent resort to agencies stems from attempts to encounter deficiencies and sentiments of misgivings towards the Commission. As advantageous characteristics of EU agencies, and rationales for the resort to these agencies, remain their abilities to reduce the Commission's workload so as to enable it to concentrate on policy matters of a more strategic nature, to facilitate the use of outside experts and the production of valuable information and scientific expertise and to foster greater transparency and accountability. Particularly in the aftermath of the BSE crisis, resort to agencies could cultivate credibility, clarity and public confidence and thus enhance EU legitimacy. For example, the European Food Authority should, according to the Commission, play an important role in providing information to consumers on food safety issues and ensure that they can make better-informed choice, herewith enhancing their confidence in food safety. Difficulties to distinguish information and/or scientific evidence from policy-making should therefore not result in a denial of the potential merits of agencies but rather emphasise the need to examine the legitimacy potential of agency networks, escaping from conventional governmental organisation charts (Ladeur 1996), or whether alternatively, there is a need to build in mechanisms putting agencies under greater political control (Shapiro 1997: 287). Such an analysis could serve as a basis to reconsider the theoretical framework in which EU agencies should operate.⁶⁷

⁶⁷ The empirical study carried out within the framework of the RSC project on Agency Networks aims to reveal information in this context.

6. Concluding Remarks

The increasing need for Community action in various areas and the recent scandals surrounding the Commission have questioned the efficiency and legitimacy of Community, and in particular Commission, activities. This together with the complexities of the tasks to be carried out have highlighted the limits of continuous reliance on the Commission and necessitated reform of the Commission. Agencies can play an important role in this reform as they provide greater consistency in implementing policies and encourage uniform interpretation and implementation of Community law where they form the nucleus in networks of national authorities and interested parties. By means of such networks, agencies could also foster the participation of civil society in decision-making. The production of information by agencies potentially leads to more informed and better quality of decision-making. Moreover, agencies are more visible, which facilitates accountability for their activities. Resort to agencies could relieve the Commission from specific administrative tasks, which would leave the Commission greater room to concentrate on the giving of more political direction. It is hereby important to recognise that such technical and managerial administrative functions may also involve policy-making. Difficulties to distinguish information and/or scientific evidence from policy-making should however not discard the potential benefits of agencies. Rather, such difficulties emphasise the need to scrutinise the legitimacy potential of agency networks operating in isolation or under political supervision. On the basis of such an analysis a loose constitutional and administrative framework should be developed which disciplines agencies (and other bodies) operating in the Community's institutional architecture, taking particular account of their language regimes.

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