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The Netherlands

## **The autonomy of European Union Agencies. A comparative study of institutional development.**

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### **Citation**

Groenleer, M. L. P. (2009, December 17). *The autonomy of European Union Agencies. A comparative study of institutional development*. Eburon, Delft. Retrieved from <https://hdl.handle.net/1887/14519>

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**Note:** To cite this publication please use the final published version (if applicable).

# **The Autonomy of European Union Agencies**



# The Autonomy of European Union Agencies

A Comparative Study of Institutional Development

PROEFSCHRIFT

ter verkrijging van  
de graad van Doctor aan de Universiteit Leiden,  
op gezag van Rector Magnificus prof.mr. P.F. van der Heijden,  
volgens besluit van het College voor Promoties  
te verdedigen op donderdag 17 december 2009  
klokke 15.00 uur

door

Marinus Leendert Pieter Groenleer

geboren te Boskoop  
in 1978

## **Promotiecommissie**

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ISBN 978-90-5972-346-7

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Editing: Maureen Donnelley

Cover design: Textcetera, The Hague

The research for this dissertation was made possible by a financial grant from the Netherlands Organisation for Scientific Research (NWO) within the framework of 'The early years of public institutions. Towards a comparative study of organizational birth and institutionalization' research project.

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# ABBREVIATIONS

|          |  |
|----------|--|
| AASC     | Assembly of Agency Staff Committees  |
| AF       | Advisory Forum   |
| AHWGE    | Ad Hoc Working Group on Europol  |
| AR       | Annual Report  |
| AWF      | Analysis Work File   |
| AWP      | Annual Work Programme  |
| BAK      | German Federal Criminal Police Office ( <i>Bundes Kriminal Amt</i> )           |
| BSE      | Bovine Spongiform Encephalopathy   |
| CERD     | United Nations Committee on the Elimination of Racial Discrimination           |
| CFSP     | Common Foreign and Security Policy   |
| CHMP     | Committee for Human Medicinal Products   |
| CIA      | United States Central Intelligence Agency                                      |
| CMS      | Case Management System   |
| COBU     | Committee on Budgets   |
| COCUBU   | Committee on Budgetary Control   |
| CoE      | Council of Europe  |
| COMP     | Committee on Orphan Medicinal Products   |
| CORINE   | Coordination of Information on the Environment programme                       |
| CPMP     | Committee for Proprietary Medicinal Products                                   |
| CRI      | Dutch Central Intelligence Agency ( <i>Centrale Informatiedienst</i> )         |
| CTTF     | Counterterrorism Task Force  |
| CVMP     | Committee for Veterinary Medicinal Products                                    |
| DG       | Director(ate)-General  |
| DG ENV   | Directorate-General Environment, European Commission                           |
| DG JLS   | Directorate-General Justice, Liberty and Security, European Commission         |
| DG SANCO | Directorate-General Public Health and Consumer Protection, European Commission |
| DLO      | Drugs Liaison Officer  |
| EC       | European Community   |
| ECA      | European Court of Auditors   |
| ECB      | European Central Bank  |
| ECJ      | European Court of Justice  |
| ECRI     | Commission against Racism and Intolerance                                      |
| ECSC     | European Coal and Steel Community  |
| EDIU     | European Drugs Intelligence Unit   |
| EDU      | Europol Drugs Unit   |
| EEC      | European Economic Community  |
| EFPIA    | European Federation of Pharmaceutical Industries' Associations                 |
| EGE      | European Group on Ethics in Science and New Technology                         |
| EIB      | European Investment Bank   |
| EIONET   | European Environment Information and Observation Network                       |
| EIS      | Europol Information System   |
| EJN      | European Judicial Network  |
| ELO      | Europol Liaison Officer  |
| EMCF     | European Monetary Cooperation Fund   |
| EMI      | European Monetary Institute  |
| ENAR     | European Network Against Racism  |
| ENU      | Europol National Unit  |
| ENVI     | Committee on Environment, Public Health and Food Safety                        |
| EP       | European Parliament  |
| EPAR     | European Public Assessment Report  |

|        |  |
|--------|--|
| EPO    | European Patent Office   |
| EPP    | European Public Prosecutor   |
| EPSO   | European Personnel Selection Office  |
| ESA    | European Space Agency  |
| ETC    | European Topic Centre  |
| EU     | European Union   |
| FBI    | United States Federal Bureau of Investigation  |
| FDA    | United States Food and Drug Administration   |
| FoE    | Friends of the Earth   |
| FPÖ    | Austrian Freedom Party   |
| FSA    | United Kingdom Food Standards Agency   |
| FVO    | Food and Veterinary Office   |
| GM(O)  | Genetically Modified (Organism)  |
| HMA    | Heads of Medicines Agencies  |
| HMPC   | Committee on Herbal Medicinal Products   |
| JHA    | Justice and Home Affairs   |
| JIT    | Joint Investigation Team   |
| JRC    | Joint Research Centre  |
| JSB    | Joint Supervisory Board  |
| LIBE   | Committee on Civil Liberties, Justice and Home Affairs   |
| MAWP   | Multi-annual Work Programme  |
| MEP    | Member of European Parliament  |
| NDIU   | National Drugs Intelligence Units  |
| NFP    | National Focal Point   |
| NGO    | Non-governmental organisation  |
| NRC    | National Reference Centre  |
| OCSR   | Organised Crime Situation Report   |
| OCTA   | Organised Crime Threat Assessment  |
| ODIHR  | Office for Democratic Institutions and Human Rights  |
| OLAF   | European Anti-Fraud Office   |
| ÖVP    | Austrian People's Party  |
| OVPIC  | Office of Veterinary and Phytosanitary Inspection and Control                                  |
| PCTF   | Police Chief Task Force  |
| PDB    | Preliminary Draft Budget   |
| PDCO   | Paediatric Committee   |
| PGE    | Project Group Europol  |
| RAXEN  | Racism and Xenophobia Information Network  |
| REACH  | Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals |
| SEIS   | Shared Environmental Information System  |
| SES    | Scientific Expert Services   |
| SIS    | Schengen Information System  |
| SitCen | Joint Situation Centre   |
| SME    | Small and medium enterprise  |
| SOCA   | United Kingdom Serious Organised Crime Agency  |
| SoE    | State of the Environment and Outlook report  |
| TEC    | Treaty establishing the European Community   |
| TECS   | Europol Computer System  |
| TE-SAT | Terrorism Situation and Trends Report  |
| UNEP   | United Nations Environment Programme   |
| VWA    | Dutch Food and Consumer Product Safety Authority ( <i>Voedsel en Waren Autoriteit</i> )        |
| WEU    | Western European Union   |
| WISE   | Water Information System for Europe  |
| WTO    | World Trade Organization   |

# PREFACE

Five years ago I could not have imagined writing a book on agencies. From my studies I remembered the topic of agencies as being just as about the most boring subjects one could think of. However, throughout the last five years I became intrigued by the phenomenon of agencification at the EU level, now a heavily debated topic. This book is neither aimed at inflating nor at downplaying the problems that come with agency creation, design and development. On the contrary, it seeks to assist in understanding the challenges that EU agencies grapple with on a daily basis and explain how agencies are managing these challenges, particularly in their early years.

I am grateful for the contribution of a wide range of individuals to the writing of this book. First of all, those interviewed during the empirical research for this book, without whose contribution this book would not have been possible. Most of their names (some did not want to be mentioned) can be found in the annex. I found it inspiring and rewarding to talk to so many national, European and international scientists, professionals, bureaucrats and politicians that candidly told me about their experiences working for or with agencies. I hope this research is of use to them in further developing not only the theory but also the practice of EU agencies. I thank Beate Winkler and Geoffrey Podger for last-minute comments on the EUMC and EFSA case studies.

The assistance and advice of a large group of people has been extremely helpful. I can only mention a few: Ellen Vos and Adriaan Schout were the first to explain the workings of EU agencies to me; Sandra van Thiel and Kutsal Yesilkagit followed my research from the beginning and introduced me to their network of agency researchers; Jan Bloemendal, Jaap van Donselaar, Raymond IJsselstijn, and Pim van der Giesen helped me to gain access to several EU agencies; David Spence offered me the opportunity to contribute a chapter on agencies to his volume on the European Commission; Manuel Szapiro regularly updated me on the Commission's efforts with regard to EU agencies; Paul 't Hart and Rick Lawson have been sources of inspiration throughout the research; Sebastiaan Princen, Markus Haverland, Tereza Capelos, Monica den Boer, Jaap de Wilde, Per Laegreid, Bertjan Verbeek, Benoit Rihoux, Michelle Cini, Hussein Kassim, Jarle Trondal, Morten Egeberg, Koen Verhoest, Les Metcalfe, and Anchrit Wille commented on various parts of this book.

I also kindly acknowledge the comments of the participants of the various ECPR, EGOS, NIG and UACES conferences that I attended during my research and the workshops in which I participated at SCORE, LSE/CARR and ARENA as well as the summer and winter schools in which I took part in the Netherlands and abroad. Whilst doing research in Stockholm, Dan kindly allowed me to stay in his apartment. He and my other Swedish colleagues and friends Eva-Karin, Annika, Fredrik, Magnus, Monica, Nina, Malena and 'American in Stockholm' Mark helped me through the cold Swedish winter.

At Leiden University I am particularly indebted to Celesta Kofman-Bos and Sanneke Kuipers, both colleagues and friends in the NWO funded 'Early Years of Public Institutions' project, who meticulously scrutinised many drafts of this book and provided me with their critical yet constructive comments. I also owe much to my former colleagues of the Department of Public Administration and the Crisis Research Center. The discussions with fellow Ph.D. students from Leiden and other universities have been helpful in shaping my perspective on organisations, the EU and research in general. I particularly mention Semin, Martijn, Madalina, Dimiter, Michael, Frank, Patrick, Sebas-

tiaan, Joost, Caspar, Caelesta, Niels, Sara, Louise, David, and Marlies. At Delft University, I especially express thanks to Hans de Bruijn and Ernst ten Heuvelhof who allowed me to finish this book. And all the others who made me feel welcome, in particular my roommate Haiko, and ensured that moving from Leiden to Delft was not as much of a transition as I expected.

Several other people have contributed to this book. Wieteke, Noortje and Coen assisted in gathering the first data as part of a preliminary investigation into the autonomy of EU agencies. Anne Walraven and Thea de Graaff assisted in transcribing the interviews. Maureen Donnelley edited the entire manuscript with great skill.

Many thanks go to my brothers for always standing right beside me, also during the defence. Lennie, I am looking forward to many more eventful years with you, for together is just so much more fun than alone! This book is dedicated to my parents, who taught me about life and encouraged me to discover the world.

Amsterdam/Delft/Leiden, September 2009

# ***PART 1***

## ***CONCEPTS, THEORIES AND METHODS***



# CHAPTER 1

## INTRODUCTION

### 1.1 Introduction: the agencification of Europe?

The creation of European Union (EU) agencies is arguably one of the most prominent institutional innovations at the EU level in recent history. The rapid proliferation of EU agencies has led some to refer to it as a genuine process of ‘agencification’, comparable to agency creation at the national level (Geradin and Petit, 2004; Geradin *et al.*, 2005).<sup>1</sup>

Especially since the early 1990s, the EU and its member states have delegated a wide range of (semi-)regulatory, monitoring, and coordination tasks to a quickly growing number of agencies. To date, depending on the definition, more than thirty agencies of the European Union exist.<sup>2</sup> Their responsibilities include the registration of Community trade marks and designs, the collection and analysis of information on drugs and drug addiction in the EU and on occupational safety and health in Europe, the prevention and control of communicable diseases, the management of the EU’s chemical policy, the improvement of the defence capabilities of the EU member states, and the coordination of the management of the EU’s external borders.

EU agencies have become pervasive features of an emerging European administrative system (*cf.* Olsen, 2003; Egeberg, 2006; Hofmann and Türk, 2006; Trondal, 2007; Egeberg and Curtin, 2008; Trondal and Jeppesen, 2008). They have an important role in implementing EU legislation and in regulating European policy sectors. To fulfil this role, they in total spend over one billion Euros per year, and have nearly 4000 employees. EU agencies are geographically dispersed throughout the EU: from Dublin to Warsaw, and from Lisbon to Helsinki. Commission President José Manuel Barroso has referred to them as the EU’s “satellites – picking up signals on the ground, processing them, and beaming them back and forth.”<sup>3</sup> As such, they have to bring ‘Europe’ closer to its citizens.

Not much is known about how EU agencies work in practice. When the EU and its member states proposed the creation of autonomous agencies, it was, as Kelemen (2005: 94) remarks, not clear from which actors agencies were meant to be autonomous: only from political actors, such as the European Commission and the member states, or also from stakeholders such as the industry? Moreover, when agencies were created, they were endowed with different degrees of autonomy: some were only bestowed with legal autonomy, whereas others were also given policy autonomy. The extent to which their formal autonomy accords with reality is unclear. Consider the development of three EU agencies that were all granted a degree of formal autonomy upon their creation:

In 1993, the *European Agency for the Evaluation of Medicinal Products* (EMA) was created. The London-based agency was set up as part of the introduction of a new European system for the authorisation of medicinal products for human and veterinary use. To guarantee the scientific character of its work, it was granted autonomy from economic interests and political interference. Formally, the European Commission still grants authorisation on the basis of the EMA’s opinions on the applications for authorisation of medicinal products, but in real-



ity it usually adopts the agency's opinions without much discussion. The agency's opinions have thus received a *de facto* binding status. In 2004, the EMEA's mandate was significantly expanded, at least, on paper; in practice, the agency had already gone beyond evaluating medicinal products only. The broader scope of its mandate is reflected by its changed name, from 'European Agency for the Evaluation of Medicinal Products' to 'European Medicines Agency'.

Another agency is the *European Monitoring Centre on Racism and Xenophobia* (EUMC) that was established in Vienna in 1997. It carried out its tasks autonomously from national governments to ensure the objectivity of data collected. The agency went through a different process of development than the Medicines Agency. Once created, the EUMC developed and pursued priorities different from the needs of the European Commission and the member states. Establishing itself as an autonomous entity did not particularly help it gain acceptance and support from these actors. Particularly, the Commission believed that in its early years, the EUMC had given too much attention to profiling itself as a campaigning organisation instead of concentrating on its role as a data collection body. The Commission proposed a recasted version of the centre's founding regulation. However, before the regulation could be changed, the EU member states decided to transform the centre into a Fundamental Rights Agency (FRA) that would not only collect data on racism and xenophobia, but also on fundamental rights more broadly. In spite of the opposition of the Council of Europe, a pan-European body also active in the field of human rights, and several national parliaments because of concerns over duplication, the agency was transformed into an FRA in 2007.

Yet another agency is the *European Police Office* (Europol), located in The Hague and created in 1995. As an autonomous entity, it aims to improve cooperation and thus effectiveness among member states with regard to preventing and combating serious international organised crime. The agency's development contrasts with that of both the EMEA and the EUMC. Europol initially faced a lack of cooperation from national police authorities, reluctant to share information with a European body of which the added value was unclear. A case of fraud concerning a Europol official and huge delays in the completion of a computer system diminished the already limited trust in the agency. Especially after the September 11, 2001 terrorist attacks on the US and the designation of Europol as central office for Euro counterfeiting, this has slowly changed, particularly because the Office's activities are now more closely linked to ongoing investigations at the national level, making cooperation with Europol more attractive for national police authorities.

EU agencies apparently do not always enjoy the degree of autonomy they were formally granted. The examples of the EMEA, the EUMC and Europol show considerable variation in the scope and extent of autonomy that agencies hold with respect to the EU institutions and the member states, compared with the different degrees of formal autonomy with which they had been created. Whereas some agencies, such as the EMEA, have achieved a relatively autonomous status, others, such as the EUMC and Europol, have attained significantly less autonomy.

Yet other agencies not mentioned above, such as the European Environment Agency (EEA), have started with hardly any autonomy and have nevertheless achieved a considerable degree of autonomy, whereas others, such as the European Food Safety Authority (EFSA), commenced with a high level of autonomy but experienced declining levels of autonomy throughout their existence. The question, then, is how the variation in autonomy between EU agencies can be explained and what consequences it has for the role these agencies play in the multi-level system of European governance.

It is often implicitly assumed that EU agencies, like other bureaucratic organisations, have a tendency to pursue their own agendas and follow their own priorities, without taking into account the needs and interests of their paymasters and consti-

cies. Scholars point to the potential consequences of placing too much power in the hands of appointed ‘Eurocrats’ within the agencies who cannot easily be held accountable for their actions. Their founders may delegate tasks for particular reasons, but what prevents agencies from developing in ways not intended by their founders? The proliferation of EU agencies has thus raised questions regarding accountability and control (Everson, 1995; Shapiro, 1997; Vos, 2000a; Flinders, 2004; Curtin, 2005; 2007; Williams, 2005).

Yet, the literature on EU agencies is missing a systematic description and explanation of the actual behaviour of EU agencies once they have been established. In contrast to their creation and design, as Tallberg (2006: 207) observes, “the operation of the agencies, including questions of autonomy and influence, has received more limited attention.” To fill this gap in the literature, empirical evidence is needed on the behaviour of agencies, based on positive analysis instead of *a priori* normative assumptions on their accountability and control (see also Busuioc, 2009; 2010; *cf.* Goodin, 1996; Boin and Goodin, 2007). Can EU agencies really take autonomous action? Are there differences between agencies with regard to their autonomy? If so, how can these be explained?

This study explores the development of EU agencies in order to understand the differences in autonomy and the resulting consequences for the multi-level system of European governance. What follows is an introduction to the empirical research on which this book reports. First, semi-autonomous public organisations in general and EU agencies in particular are introduced and set apart from other types of organisations (Section 1.2). Subsequently, the puzzles giving rise to this study, the research question derived thereof and the objectives of this study are presented (Section 1.3). In Section 1.4, the strategy applied to answer the research question, including both theory and methods, is set out. Section 1.5 offers a brief outline of the book.

## 1.2 Organising across borders: introducing EU agencies

### *At arm’s length from government*

Most government work is done through semi-autonomous public organisations, often called *agencies*.<sup>4</sup> Historically, western governments have made use of agencies to, for instance, collect taxes or build infrastructures. Modern government continues to rely on them to devise programs, administer policies, implement legislation, and regulate activities in a wide range of sectors.

In recent decades, agencies have proliferated in most western and industrialised countries (Majone, 1996; Thatcher, 2002a; OECD, 2002; Pollitt *et al.*, 2004; Pollitt and Talbot, 2004). Their creation has been described as part of a fashion or trend (Pollitt *et al.*, 2001; Van Thiel, 2004), usually accompanying the administrative reforms that swept these countries from the early 1980s onwards (Pollitt and Bouckaert, 2004). Often under the banner of New Public Management, a large number of countries delegated public tasks in a great variety of policy domains<sup>5</sup> to so-called ‘non-majoritarian institutions’ headed by appointed bureaucrats (Majone, 1996: 4-5; Thatcher, 2002a; Thatcher and Stone Sweet, 2002: 2-3; Coen and Thatcher, 2005).

Although a variety of definitions of an agency exist, the definition adopted here follows the one provided by Pollitt *et al.* (2004: 10). Their working definition of an agency is an organisation which:

- has its status defined principally or exclusively in public law (though the nature of that law may vary greatly between different national systems);
- is functionally disaggregated from the core of its ministry or department of state;
- enjoys *some* degree of autonomy that is not enjoyed by the core ministry;
- is nevertheless linked to the ministry/department of state in ways close enough to permit ministers/secretaries of state to alter the budgets and main operational goals of the organisation;
- is therefore not statutorily fully independent of its ministry/department of state; and
- is not a commercial corporation.

Key criterion for the classification of agencies is the degree of formal autonomy they enjoy from the core ministry or parent department. That is, they are unbundled from central government institutions, which gives them freedom to manage their own affairs (Rhodes, 1996a; Pollitt and Talbot, 2004). This means that agencies have an “identifiable, separate, organisational structure with [their] own name”, and they have “a single, or small set, of functions” that involves administering programs or executing policies (instead of policy-making tasks) (Talbot, 2004: 8). Agencies have a constituent document or founding regulation in which their mandate, objectives and tasks, and organisational structure are set out. They are headed by a single individual, typically called the (executive) director, who is responsible for managing the agency. Agency staff usually has a formal employment status differing from civil servants employed with ministers or departments of state (Pollitt *et al.*, 2004).

A wide variety of motives for agency creation has been identified (Majone, 1996; Van Thiel, 2001; 2006; James, 2003; Pollitt *et al.*, 2004: 19-20). Agencies are created in order to lessen political interference, achieve higher efficiency, put public services closer to citizens, enhance scientific or technical expertise, improve flexibility, facilitate partnerships with other public or private bodies, or demonstrate credible commitment. In addition, agencies are set up to pay-off political allies, create a power base for some group or faction, hive off unpopular activities or complex tasks, avoid political responsibility, or manipulate civil service numbers (i.e. to make it look like budget cuts are made or government personnel is reduced).

In many countries, governments have become increasingly wary of creating new agencies, weighing the potential added value against possible disadvantages of agencies, primarily demonstrated by the ongoing tension between the autonomy and accountability and control of agencies (Christensen and Laegreid, 2001; 2006; 2007).<sup>6</sup> Interestingly, at the EU level, this trend (at least until recently) appears to be quite the opposite, and the agency option is used extensively (Vos, 2004).

### *Agencies of the European Union*

A series of so-called independent agencies was set up at the EU level during the 1990s, complementing long-established EU institutions such as the European Commission, the European Parliament, and the European Court of Justice. These agencies are, like the EU institutions themselves, ‘supranational’ organisations, but they are generally not established by agreement among the EU member states. Instead, EU agencies often emanate from the EU itself. The Commission typically proposes the creation of an agency, which is then established following an agreement between the Council and the Parliament.

No common definition exists of an agency created at the EU level.<sup>7</sup> On its website, the EU offers the following definition of a Community (or ‘first pillar’)<sup>8</sup> agency. A Community agency:

- is a body governed by European public law;
- is distinct from the Community institutions (Council, Parliament, Commission, etc.);
- has its own legal personality;
- is set up by an act of secondary legislation;
- in order to accomplish a very specific technical, scientific or managerial task;
- which is specified in the relevant Community act.<sup>9</sup>

This definition does not entirely hold for Union (or ‘second’ and ‘third pillar’) agencies, as they can also be set up by an act of primary legislation (see Chapter 6). In this study, Community and Union agencies are referred to as ‘European Union’ agencies, distinct from what has been referred to as ‘national’ agencies and other public organisations operating on the supranational level.

EU agencies share a number of characteristic features. First of all, their legal status enables them to function autonomously, apart from Community institutions. It allows them to rent offices, procure supplies and hire personnel (Bergström and Rotkirch, 2003; Vos, 2003; Chiti, 2004). This contrasts with bodies that work within the Commission structure, such as the Joint Research Centre (JRC), the Statistical Office of the EU (Eurostat), the EU Anti-Fraud Office (OLAF) or the European Community Humanitarian Aid Office (ECHO) (*cf.* Kreher, 1997).<sup>10</sup> These entities are all relatively autonomous within the Commission structure, in that they perform tasks that by their nature entail some distance from outside interference. However, these bodies are not endowed with their own legal personality – formally (and in terms of their personnel and budget) they are all Directorates-General (DGs) of the Commission.

As opposed to bodies that work within the Commission infrastructure, EU agencies are geographically dispersed throughout the European Union and referred to as ‘decentralised bodies of the European Union’. They are now located in all fifteen ‘old’ member states and are being established in member states that have joined the EU in 2004 as well (see Chapter 5). Bodies that work within the Commission infrastructure are usually located near the EU’s main institutions. An exception is the Food and Veterinary Office (FVO), a decentralised Commission directorate. While the FVO is located in Ireland, it is integral part of the Commission’s services acting under the Directorate-General for Health and Consumer Protection.<sup>11</sup>

EU agencies are established for an indeterminate period of time.<sup>12</sup> They are not easily abolished, even though their tasks may become obsolete.<sup>13</sup> Their constituent acts typically do not contain sunset clauses.<sup>14</sup> This characteristic distinguishes the EU agencies under study here from so-called ‘executive agencies’ that assist the Commission in the implementation and management of Community programmes.<sup>15</sup> Executive agencies only have a temporary mandate.<sup>16</sup> Examples of executive agencies are the Executive Agency for Competitiveness and Innovation (EACI), Trans-European Transport Network Executive Agency (TEN-T EA), and European Research Council Executive Agency (ERC). While they are legally autonomous, executive agencies are subject to strict supervision by the Commission.<sup>17</sup>

In contrast to executive agencies, so-called ‘joint undertakings’ are included under the EU agency umbrella. A joint undertaking is a legal entity established under the EU Treaty. These are different from ‘traditional’ EU agencies in that they are set up for the “efficient execution of Community research, technological development and demon-

stration programmes".<sup>18</sup> Examples are the Joint Undertaking for ITER and the Development of Fusion Energy, an international fusion research project, and the Joint Undertaking to develop the new generation European air traffic management system, both established in 2007. The European Institute for Innovation and Technology (EIT), created in April 2008, is neither a traditional EU agency nor an executive agency or a joint undertaking and, as such, the only one of its kind. Its resources not only come from the Community, but also from education, research and business.

EU agencies are also different from European organisations created on an intergovernmental basis, such as the European Space Agency (ESA), the European Patent Office (EPO) and the European Investment Bank (EIB).<sup>19</sup> In contrast to these intergovernmental organisations, EU agencies are part of the broader EU legal framework. Yet, EU agencies are different from the European institutions that are explicitly mentioned in the European Community (EC) Treaty – the European Commission, the Council, the Parliament, the Court, and the Central Bank (*cf.* Kreher, 1997: 228).

Whereas agencification at the national level has already evoked considerable critique, the delegation of tasks to so-called independent EU agencies has only recently come under attack from scholars and politicians at both the national<sup>20</sup> and European level.<sup>21</sup> Scholars and politicians alike do not have much confidence in the idea that agencies can operate with high levels of autonomy. In the absence of proper accountability and control mechanisms, critics claim that EU agencies would turn into self-aggrandising bureaucratic organisations, adding to the inefficiency of EU policy-making and contributing to the democratic deficit at the EU level. At this point, the empirical evidence for these claims is lacking. How EU agencies actually behave and why they behave as they do, has not been systematically studied.

### **1.3 Research problem: explaining variation in EU agency autonomy**

#### *Puzzle and question*

Hence, the approach adopted in this study is different from the existing work on the creation and design of agencies in that it instead focuses on their development. Most EU agencies start with a relatively limited degree of autonomy (especially, for instance, when compared to US or national agencies, see Yataganas, 2001; Barbieri and Ongaro, 2008). They are constrained by the dominant position of the EU member states in their management boards, and they depend on EU funding. Essentially, they are instrumental solutions to specific scientific or technical problems.<sup>22</sup>

Some agencies, however, seem to achieve relatively high levels of autonomy with regard to the European institutions, the EU member states, and other stakeholders. They become more than formal organisations with an easy acronym, physical premises, specialised staffs and technical tasks. They develop into more than just technical instruments for implementing legislation and regulating policy sectors: they acquire a distinctive character and become valued in their own right (*cf.* Selznick, 1957).

The development process of EU agencies raises two puzzles. The first is theoretical: Why are public organisations created on the European level that apparently can develop a 'life of their own'? On the basis of realist, intergovernmental and rational-choice perspectives in International Relations (IR) and EU integration theory, one would expect such organisations only to be created when they execute the wishes and fulfil the demands of their principals. The examples above evoke a second, empirical puzzle: Given

the general determinants of agency autonomy, why is it that differences in the degree of autonomy of individual EU agencies seem to have developed? On the basis of their (at first sight) rather similar structural features and formal characteristics, one would expect EU agencies to achieve relatively comparable (mostly low) levels of autonomy.

This study provides an account of the development of EU agencies, identifying the mechanisms by which agencies develop into relatively autonomous entities and specifying the conditions under which these mechanisms operate (*cf.* Merton, 1957; Elster, 1989; Hedström and Swedberg, 1998). It asks how agencies acquire a distinct organisational character and how they generate acceptance and support from actors in their environment and, in particular, how differences among agencies in terms of autonomy development can be explained. Hence, the central questions of this study are: *Why* have agencies been created at the EU level that can develop a degree of autonomy, and why have some of these agencies developed into relatively autonomous entities, whereas others have not or to a much lesser degree?

Legal scholars studying EU agencies examine their formal goals, resources and structures. They stress the constitutive rules on which agencies are based and the legal framework in which they operate (Fischer-Appelt, 1999; Vos, 2000a; Chiti, 2000; 2004; Dehousse, 2002; Bergström and Rotkirch, 2003; Frank, 2004; Curtin, 2005; 2007). The focus is on the legal creation and the structural design of agencies. Other students of agencies look into the political dominance of its principals on the agency. They emphasise that agencies operate under a set of political constraints. Agencies are considered functional solutions addressing a perceived need by these actors or political instruments through which the European institutions and the member states act (Kreher, 1997; Majone, 1997a; 2002a; Dehousse, 1997; 2008; Yataganas, 2001; Kelemen, 2002; 2005).

In both legal and political perspectives, the underlying assumption is that agencies do what their creators want them to do; agencies, held under tight control, are expected to develop only in ways intended by their creators. In these perspectives, agencification at the EU level has been reduced to legislative and political processes, neglecting the potential effects of organisational dynamics on the development of agencies. Of course, the reasons underlying agency creation and their design are likely to have a significant effect on the development of agencies and must be taken into account. But factors that explain the creation and design of agencies do not *automatically* explain their development.

Instead of looking at the behaviour of EU agencies, current studies of EU agencies focus on the behaviour of the European institutions and the EU member states, often applying Principal-Agent (P-A) models. These models postulate that principals endow agents with a minimal level of autonomy so they can perform delegated tasks. Endowed with autonomy, agents may diverge from the interests of their creators (Pollack, 1997; Tallberg, 2000; Hawkins *et al.*, 2006). While P-A models offer a helpful analytical framework to explain the logic of delegating tasks to independent agencies, the question of why some agencies develop into more autonomous entities than others once they have formally been delegated tasks is usually not explicitly addressed by these models (Reinalda and Verbeek, 1998; Barnett and Finnemore, 1999; 2004; Thatcher and Stone Sweet, 2002; Thatcher, 2002b).

Moreover, agency autonomy is mostly discussed in a normative way, emphasising the phenomenon of 'bureaucratic drift' or the lack of accountability and control. Conventional wisdom suggests that the behaviour of public organisations can be explained by assuming that agencies, like firms, try to maximise their utility (Tullock, 1965; Downs, 1967; Niskanen, 1971). Delegation to semi-autonomous organisations, it is

suggested, typically comes with bureaucratic pathologies such as mission creep. This might often be true, but in some cases agencies actually refuse to take on new tasks or they try to abandon tasks they perform, and sometimes do not want to see increases in their budget or staff (Halperin, 1974; Wilson, 1978). Senior officials and staff of public organisations have a variety of interests and preferences, and are not always rationally seeking to maximise their utility (*cf.* Wilson, 1989; March and Simon, 1993; DiIulio, 1994; Simon, 1997).

What is missing in the existing literature, then, is an even-handed assessment of the actual behaviour EU agencies display once they have formally been created. This study will adopt just such an approach.

### *Objectives and relevance*

The objectives of this research are both theoretical and empirical. This study examines organisational behaviour at the international and European level. Organisations as more or less autonomous entities have been largely neglected in the study of international<sup>23</sup> and European governance,<sup>24</sup> because most attention is paid to states, as the founders of international and European organisations, State-centric perspectives in International Relations (IR) and European integration studies tend to view supranational or intergovernmental organisations as intervening variables. Organisations operating at the international level are often considered to be tools of states (see Waltz, 1979; Strange, 1983; Keohane, 1984; Axelrod and Keohane, 1985; Mearsheimer, 1994/1995; Hawkins *et al.*, 2006). As a consequence of most attention being paid to states, not much is known about the autonomy of such supranational organisations.

IR and EU scholars have traditionally paid little attention to differences between organisations in terms of their goals, structure, technology, participants, and environments. In turn, students of organisations have often limited their research to government agencies at the national level. In recent years, however, students of IR and European integration have come to realise that organisations at the international and European level may also matter for social and political outcomes. For a sound understanding of the EU, one must consider the organisations that compose, structure and define it. In this study, EU organisations are thus treated as complex social entities that may develop a level of autonomy over time.

This study offers a detailed account of the formative years of EU agencies. These agencies have assumed important functions previously performed by the Commission or the member states and often operate in areas directly affecting EU citizens (hence their slogan, 'whatever you do, we work for you'). EU agencies have now become characteristic features of Europe's administrative space. As such, they deserve to be studied in their own right.

A newly created EU agency faces considerable challenges in becoming a legitimate organisation with a distinct identity (*cf.* Stinchcombe, 1965; Downs, 1967; Wilson, 1989; Boin, 2001). Upon their creation, agencies are typically expected to devise effective solutions to complex problems. They must build or access expertise on a problem that is often ill-defined, changing in a rapid fashion in unforeseen directions. Solving such complex problems is difficult even for long-standing organisations that can rely on proven and accepted solutions, command large budgets and harbour recognised expertise.

This study explores the problems EU agencies face and the obstacles they encounter in the formative period. The initial stages of a newly created EU agency's development are the point of departure, as it is assumed that these stages are of crucial importance

for their further development: “As with people, so with organisations: Childhood experiences affect adult conduct” (Wilson, 1989: 68).<sup>25</sup>

## 1.4 Research strategy: an institutional perspective on the development EU agency autonomy

### *EU agencies as organisations*

The differences between EU agencies can be explained by looking at EU agencies as *organisations*. EU agencies are complex social entities that develop preferences and interests (*cf.* Selznick, 1949; 1957; Perrow, 1986; Scott, 2001; 2003). By adopting an organisational perspective it may be possible to explain (the variation in) the development of agency autonomy that otherwise seems puzzling or eludes us all together. Differences among EU agencies in terms of autonomy development, it is argued here, have to do not only with legal or political factors but also with organisational conditions.

Whilst acknowledging that the European Commission and the EU member states are the dominant actors when it comes to the creation of EU agencies, their primacy concerning the development of EU agencies is much less clear. It is not sufficient to look into the formal rules and procedures in the constituent acts of EU agencies along with the interests and preferences of the Commission and the member states with regard to their functioning. Investigating the degree of control exercised by the Commission and the member states does not offer much insight into the preferences and interests of the agency itself and its development over time.

This research is therefore concerned with the behaviour of EU agencies and the extent to which their behaviour is constrained by the interests and preferences of other actors, such as their political superiors, organised interests, the media and bureaucratic rivals, and the extent to which they can, through their behaviour, shape the interests and preferences of others (*cf.* Rourke, 1984; Wilson, 1989; Krause, 1999; Carpenter, 2001; Meier and Bohte, 2006).

Of course, the ‘organisational’ argument should not be carried too far. The legal documents on which agencies are based and the political choices of the European institutions and member states are important aspects to take into account when studying EU agencies. What senior officials and staff members of EU agencies can do is often constrained, and sometimes wholly determined, by the formal rules and procedures put on paper and the decisions of their political superiors.

### *Institutions and institutionalisation*

To understand the behaviour of EU agencies, the study draws on institutional theories of public organisations and applies them to the European level (see also Metcalfe, 2000; Egeberg, 2004). These theories focus on organisations as *institutions*, i.e. adaptive systems shaped by the pressures and demands from the environments in which they are embedded (Meyer and Rowan, 1977; DiMaggio and Powell, 1983; 1991). The behaviour of (bureaucratic) organisations is not only regulated by formal rules, it is also constituted by normative understandings and cultural beliefs prevailing in their environments (Zucker, 1977; 1987; 1988). As a result of interactions within the organisation and between the organisation and its environment, informal structures arise out of the



formal organisational structure (Selznick, 1949; 1957; Tolbert and Zucker, 1983; 1996), which, in turn, may have an impact on other actors within the environment.

Moreover, the approach focuses on the development of organisations over time. Organisations are influenced by their histories. And even when they do not build on their past, organisations, once created, become subject to effects that constrain their behaviour over time (Thelen, 2003; Pierson, 2000a; 2000b; 2004). Organisations that have achieved relatively high levels of autonomy are suggested to have undergone a process of *institutionalisation*; they have developed from technical instruments into social institutions (Selznick, 1949; 1957; Merton, 1957; Scott, 2001). Institutionalisation is the emergence over time of a distinct organisational identity that is considered legitimate by the agency's staff, supranational EU institutions, member states and external stakeholders. Some agencies may become relatively 'institutionalised', whereas others do not or do to a lesser degree.

Two closely related (sub-)processes help to explain the scope and extent of public organisations' autonomy. The first concerns the internal dimension of institutionalisation and relates to the degree of consensus on the interpretation of the organisation's mission and its tasks. When the organisation has a distinct identity, there is "a widely shared and approved understanding of the central tasks [...]" (Selznick, 1957; Wilson, 1989: 182; Carpenter, 2001). The dominant group in the organisation has a clear view of what the organisation's essence is or should be (Halperin, 1974: 28, 51). The norms and beliefs that have developed inside the organisation not only bind the members of the organisation, but also guide the organisation in dealing with complex problems and conflicting demands emanating from its environment. Thereby, they distinguish the organisation from (the actors in) its environment, providing the organisation with a certain level of autonomy.

The second process relates to the external dimension of institutionalisation and concerns the level of acceptance, or legitimacy, of the organisation by actors in its environment. When the organisation is legitimate, there is "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed systems of norms, values, beliefs and definitions" (Suchman, 1995: 574). The norms and beliefs that have developed inside the organisation do not only guide the organisation in dealing with complex issues and conflicting demands emanating from its environment, they also engender acceptance among external actors such as clients and stakeholders and provide the organization with a certain level of autonomy towards outside actors. These two processes appear to be closely related. Taken together, they have an effect on the scope and extent of an agency's autonomy.

As one dominant characteristic of a highly institutionalised organisation is its high degree of autonomy in practice, the process by which EU agencies develop such a level of autonomy can be measured on a continuous scale if indicators are developed for the two sub-process of institutionalisation mentioned above. Examples of indicators are the availability of technical or scientific capacity (either or not 'in-house') that others do not have, training on the job of staff by peers, immediate supervisors and others, as well as the Commission or the members states asking the agency for advice, regardless of whether they are obliged thereto, and the public opinion on increased spending for the agency or the field or sector in which it is performing its tasks (see further Chapter 4).

As there may appear to be a certain overlap of the outcome (autonomy) and the process leading to the outcome (institutionalisation), the conceptual, theoretical and methodological parts of this study distinguish as clearly as possible between outcome and process.

This research uses institutional theories to explain the development of public organisations establishing whether these theories also apply to EU agencies. Additionally, it identifies organisational conditions on which the level of autonomy of EU agencies is likely to depend. The research is thus both explanatory and exploratory.

### *Comparative case study*

The empirical portion of this research consists of a comparative study of EU agencies. The entire population of agencies, currently thirty in total, is studied describing and explaining their creation and design in general. Subsequently, three 'matched pairs' of cases are selected and investigated in depth: the European Medicines Agency (EMA) and the European Food Safety Authority (EFSA); the European Environment Agency (EEA) and the European Monitoring Centre for Racism and Xenophobia (EUMC); and the European Police Office (Europol) and the European judicial cooperation unit (Eurojust). These pairs of agencies are matched because they are similar in most respects, while they differ in the condition or conditions under consideration.

The three pairs are similar with regard to their formal-legal status; they also have comparable mandates and tasks (as far as possible, of course). Two of the pairs are made up of agencies falling under the Commission's responsibility, while one pair comprises agencies that are accountable to the Council. The former are therefore expected to develop a higher degree of autonomy from the Council and the member states than the latter, whereas the latter are expected to develop a higher degree of autonomy from the Commission than the former. The first pair consists of semi-regulatory agencies, the second pair comprises monitoring or information agencies, and the third pair involves cooperation or coordination agencies. On the basis of the reasons underlying creation and their design, I expect semi-regulatory agencies to develop a higher level of autonomy than monitoring or information agencies, and cooperation or coordination agencies.

The pairs are different, however, with regard to other conditions, such as the sources of their funding, the way they are governed, and the circumstances under which they were created. The two semi-regulatory agencies, for instance, have different sources of funding. The two monitoring agencies were created under different socio-political circumstances, and the two cooperation agencies are governed differently. While the selected pairs may be relatively similar, the differences between them are likely to overshadow their similarities. This makes it difficult if not impossible to determine the impact of a certain factor or constellation of factors on the autonomy of EU agencies. I simply cannot (and do not want to) control for possible other factors that may have an influence on agency development.

As this study seeks to identify the mechanisms by which agencies develop into relatively autonomous entities and specify the conditions under which these mechanisms operate, data on the development of the selected agencies has been collected through mostly qualitative methods and techniques. The research traces the process by which various initial conditions are translated into outcomes (George, 1979; George and McKeown, 1985; George and Bennett, 2005). It does so by relying on a large amount of primary and secondary documents, over eighty semi-structured interviews with key actors in the creation, design and development of EU agencies, and (limited) non-participatory observation. Document analysis, interviewing and observation were structured by means of a set of broad topics and general questions reflecting the theoretical focus of the study.

## 1.5 Book outline

The book is divided into six parts. The first deals with the conceptual, theoretical and methodological issues of the research. Chapters 2 and 3 provide a conceptual and theoretical framework for explaining the development of EU agencies. The chapters define organisational autonomy and describe how the autonomy of EU agencies is conceived in this research. Moreover, a theoretical framework that guides my empirical research is constructed and possible explanations for autonomy development are put forward. Chapter 4 outlines the methods and techniques applied to investigate EU agencies.

Part two introduces the phenomenon of EU agencies in general. Chapter 5 discusses agencification at the EU level. It gives a historical analysis of agency creation and asks the question: How can the process of agencification at the EU level be explained? The chapter concentrates on the combination of functional needs and political interests underlying agency creation and design. It argues, however, that to understand the creation of EU agencies, institutional logics need to be taken into account as well. In Chapter 6, the focus is on the formal autonomy of EU agencies. The chapter makes a comparison of all agencies for a limited number of conditions and asks: How can the design of agencies at the EU level be described and explained? The chapter looks at formal conditions such as mandates and tasks, appointment procedure and sources of funding. Both the reasons underlying the creation of agencies and the features of their design are taken into account as factors possibly affecting the development of the selected agencies.

Part three, four and five of the study investigate three matched pairs of EU agencies. Each of the six case chapters asks: How can the different processes of institutional development in relatively similar types of agencies be explained? In Chapters 7 and 8, two cases of semi-regulatory agencies are studied. I investigate the EMEA (as briefly described above) and the European Food Safety Authority (EFSA) that respectively regulate medicinal products and food safety in Europe. The nature of their regulatory tasks and the sources of funding, but also the role of the director, the relation with the Commission and member states' national authorities, are considered as possible answers to the question.

Chapters 9 and 10 concentrate on two cases of monitoring agencies. They examine the European Environment Agency (EEA) and the EUMC (now transformed into the Fundamental Rights Agency, FRA) that respectively gather information on the environment and racism in Europe. The chapters focus on the nature of the information they collect and analyse and the networks they create and coordinate, but also look at the role of the director, and the relationships with the Commission, the member states, and with international organisations. Chapter 11 and 12 discuss two cases of agencies that coordinate police and judicial cooperation in Europe. The focus is on the mandates and tasks and composition and structure of these organisations, but also on the relationships with the Council and member states' national authorities, and other EU bodies and international organisations.

In part six, this study comes full circle. In Chapter 13, the matched pairs of cases investigated in part three are compared and analysed for differences and similarities. The chapter highlights the most important findings of the study and answers the central question of this research. Chapter 14 reflects on the development of EU agencies at the EU level, both from a theoretical and a practical point of view. It also outlines the limitations of this study and suggests some avenues for further research on the autonomy of public organisations in general and EU agencies in particular.

## Notes

<sup>1</sup> See also the report of the Assemblée Nationale, Rapport d'Information Déposé par la Délégation de L'Assemblée Nationale Pour l'Union Européenne (1), sur les agences européennes (COM [2005] 59 final / E 2910, COM [2005] 190 final / E 2903 et COM [2005] 280 final / E 2918), No. 3069, 3 May 2006, p. 7.

<sup>2</sup> See Appendix I for a list of agencies of the EU. Whereas this study focuses on 'external' Community and Council agencies, the overview also includes 'internal' executive agencies.

<sup>3</sup> See European Union, available at [http://ec.europa.eu/news/eu\\_explained/061201\\_1\\_en.htm](http://ec.europa.eu/news/eu_explained/061201_1_en.htm). By contrast, a Dutch newspaper, commenting on the proliferation of EU agencies, referred to them as "the long tentacles of Brussels", *NRC Handelsblad*, De lange tentakels van Brussel. Agentschappen van Europese Unie breiden uit van Parma tot Stockholm, 26 September 2004, p. 1, 6.

<sup>4</sup> In the remainder of this study, I will use the term '(public) organisation' when referring to (public) organisations in general, and the term '(government/bureaucratic) agency' when referring to a sub-species of (public) organisation that enjoys a semi-autonomous status.

<sup>5</sup> Such as utilities (Coen and Thatcher, 2001), telecommunications (Thatcher, 1999), and antitrust (Doern and Wilks, 1996; Wilks and Bartle, 2002).

<sup>6</sup> See, for the Dutch case, Algemene Rekenkamer, Verslag 1994, Deel 3: *Zelfstandige Bestuursorganen en ministeriële verantwoordelijkheid*, 's-Gravenhage, 1995, Tweede Kamer vergaderjaar 1994-1995, 24 130, nr. 3; Werkgroep Verzelfstandigde Organisaties op Rijksniveau, *Een Herkenbare Staat: Investeren in de Overheid*, Interdepartementaal Beleidsonderzoek 2003-2004, nr. 1.

<sup>7</sup> The agencies examined in this study are designated by different terms (such as centre, foundation, institute, office, authority, and agency). This may lead to some confusion, particularly as the same terms may be used to designate other bodies that do not conform to the definition of an agency.

<sup>8</sup> Since the Maastricht Treaty, the EU institutional structure has been made up of three so-called 'pillars'. The first pillar included supranational Community policies such as agriculture, trade, competition, environment, food safety, public health, whereas the second and third pillars are more intergovernmental. Foreign, security and defence policies fell under the second pillar, while policies concerning police and judicial cooperation in criminal matters were part of the third pillar. The (vertical) pillar system, however, has been subject to a process of 'horizontalisation', with issues increasingly cutting across the different pillars, and will disappear under the Lisbon Treaty.

<sup>9</sup> See EU website devoted to agencies, available at [http://europa.eu/agencies/index\\_en.htm](http://europa.eu/agencies/index_en.htm).

<sup>10</sup> On Eurostat, see Schout (1999) and Sverdrup (2006); on OLAF, see Pujas (2003); on ECHO, see Mowjee (1998).

<sup>11</sup> In 1993, it was decided that the Office would be established in Ireland in order to enhance its independent position. Its location was apparently the preferred choice of the then Irish Commissioner for Agriculture (Chambers, 1999: 103). Since 2002, the Office has been housed in buildings in Grange, 40 kilometres from Dublin. Especially in its early years the remote location of the Office has given rise to difficulties, notably with regard to the recruitment of personnel, but these appear to have been resolved now. Interview #5

<sup>12</sup> Exception is the European Network and Information Security Agency (ENISA) that was created for a period of five years (starting 14 March 2004). The ENISA's mandate was extended in 2008.

<sup>13</sup> Consider, for example, the European Training Foundation (ETF) that was set up to contribute to the development of the education and training systems in the EU accession and candidate countries, but still exists, now concentrating on 'partner countries' of the EU.

<sup>14</sup> A 'sunset clause' is a provision in the regulation that terminates or repeals all or portions of the regulation after a specific date, unless further legislative action is taken to extend it.

<sup>15</sup> The Regulation of the European Agency for Reconstruction (EAR) also contains a sunset clause. This agency, at the time created as a Community agency, would probably now be created as an executive agency.

<sup>16</sup> See Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.

<sup>17</sup> The term 'agency' in this context is therefore confusing. Another term, such as the one proposed by the Parliament, 'decentralised implementation units', would have been more appropriate. See European Parliament, *Report on the proposal for a Council regulation laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (COM(2000) 788 – C5-0036/2001 – 2000/0337 (CNS))*, Committee on Budgetary Control, Rapporteur: Jean-Louis Boulranges, 20 June 2001, A5-0216/2001, p. 25. See also Frank (2004: 199).

<sup>18</sup> Article 171 of the EC Treaty.

<sup>19</sup> Although ESA is an independent organisation, it maintains close ties with the EU through an ESA/EC Framework/Agreement. ESA and the EU pursue a joint European strategy for space and are developing a European space policy together. See Commission of the European Communities, *White Paper - Space: A New European Frontier for an Expanding Union. An Action Plan for Implementing the European Space Policy*, COM(2003) 673, Brussels, 11 November 2003. EPO is an independent organisation, but the Commission participates in the EPO Administrative Council as an observer. The precise position of the EIB in the EU legal framework is not entirely clear. While it was created in 1958 under the EEC Treaty, the Bank is an independent organisation owned by the EU member states.

<sup>20</sup> See, for instance, the critique of the Dutch Council of State on the creation of new EU agencies and the Dutch Senate specifically on the creation of the fundamental rights agency, available at <http://europaport.eerstekamer.nl>. For more general information, see Raad van State, *Voorlichting overeenkomstig artikel 18, tweede lid, van de Wet op de Raad van State inzake Europese regelgevende agentschappen* (no. W02.05.0429/II/A); Ministerie van Buitenlandse Zaken, *Reactie op voorlichting van Raad van State inzake Europese regelgevende agentschappen*, DIE-844/06, Den Haag, 2 juni 2006; Eerste Kamer de Staten-Generaal, *Ambtelijke analyse betreffende Europese regelgevende agentschappen: het advies van de Raad van State en de kabinetsappreciatie*, Memo, Nr. 313, Den Haag, 7 september 2006. See also the report of the Assemblée Nationale, Rapport d'Information Déposé par la Délégation de L'Assemblée Nationale Pour l'Union Européenne (1), sur les agences européennes (COM [2005] 59 final / E 2910, COM [2005] 190 final / E 2903 et COM [2005] 280 final / E 2918), No. 3069, 3 mai 2006.

<sup>21</sup> See, amongst others, European Parliament, *Working document on a meeting with the decentralised agencies on the PDB for 2007*, Committee on Budgets, PE 367.332v02-00, Brussels, 29 June 2006, p. 3.

<sup>22</sup> See Commission of the European Communities (2001), *European Governance: A White Paper*, COM(2001) 428 final, Brussels, 25 July, pp. 23-24; Commission of the European Communities (2002), Communication from the Commission, *The Operating Framework for the European Regulatory Agencies*, COM(2002) 718 final, Brussels, 11 December, p. 5.

<sup>23</sup> But see, for example, Claude (1984), Cox and Jacobsen (1972), Haas (1964; 1990), Jacobsen (1984), Ness en Brechin (1988), Reinalda en Verbeek (1998; 2004), Abbott and Snidal (1998), Barnett en Finnemore, (1999; 2004), Koremenos *et al.* (2004) and Hawkins *et al.* (2006).

<sup>24</sup> But see, for instance, Cini (1996), Laffan (1997; 1999), Sandholtz and Stone Sweet (1998), Stone Sweet *et al.* (2001), Thatcher and Stone Sweet (2002), Mörtz (2003), Mörtz and Britz (2004), Beach (2004; 2005), Egeberg (2006) and Bauer (2008).

<sup>25</sup> Of course, agencies, like adults, learn from experience (or at least one would hope they do), and so the early years are only part of the story. See also Selznick (1957), Stinchcombe (1965), Downs (1967) and Kimberly (1980).

# CHAPTER 2

## THE CONCEPT OF AUTONOMY

One of the perennial problems confronting the architecture of organizations is [...] autonomy.

– Philip Selznick (1957: 126)

### 2.1 Introduction: a law to itself?

Autonomy is commonly understood as a form of self-governance, self-regulation, or self-direction belonging to either individual agents or political (or other organisational) communities of agents (Paul, Miller and Paul, 2003). Kant sees autonomy as “the property of the will by which it is a law to itself”, rather than being determined externally (Kant, 1998 [1785]). According to Dworkin (1988: 12-13), the concept of autonomy has its origins in the self-rule or independence of Greek city-states. Literally translated from classical Greek, autonomy refers to the capacity of an entity to give itself (*autos*) its own law (*nomos*). As governing on the basis of laws is closely connected to the classical notion of freedom, autonomy is often referred to as freedom in the sense of (political) independence, which is an important aspect of (state) sovereignty.

In his study of the autonomy of the democratic state, Nordlinger (1981: 8) argues that “the autonomy of any social entity refers to the correspondence between its preferences and actions.” An autonomous actor will try to achieve his preferences by acting as he chooses, regardless of the preferences of other actors. This does not mean that he necessarily does as he pleases, but he is at least not forced to follow someone else’s laws. In that sense, the actor is independent, that is, as defined by the Oxford English Dictionary, “not depending on the authority of another, not in a position of subordination or subjection; not subject to external control or rule, self governing, autonomous, free.”

The terms ‘autonomy’ and ‘independence’ are often used interchangeably, as synonyms for the same concept. This study makes a distinction between the two terms. The term ‘independence’ stresses the condition of being politically free. A state, for instance, is referred to as independent when it retains ultimate authority over its territory. In (slight) contrast, the term ‘autonomy’ emphasises the capacity to manage one’s own affairs. Regions sometimes are granted a level of autonomy by an overseeing authority that itself retains ultimate authority over that territory. One could in this regard think of Quebec and Scotland that have significant autonomy but remain part of and dependent on Canada and the United Kingdom.

This study uses the term autonomy instead of independence. An autonomous actor is granted a level of autonomy by other actors or will attempt to ascertain a degree of control over his or her own affairs, but this does not mean that he or she is completely free, without restrictions, independent. Indeed, ultimate control over EU agencies is retained by more powerful (political) authorities who can restrict their ability to act or decide. The concept of autonomy as it is used here thus only has meaning when used to describe an agency’s relationship with other actors, usually political principals but also organised interests.

This chapter looks into the concept of autonomy, notably the autonomy of public organisations (Section 2.2). The four most important dimensions of autonomy are distinguished in Section 2.3. This section also sets apart formal autonomy, or discretion, from actual autonomy. The subsequent section (2.4) identifies two main groups of actors vis-à-vis which organisations, in particular supranational organisations, can be autonomous and discusses the mechanisms these groups of actors have at their disposal to exert control over organisations. The concluding section (2.5) focuses on the relevance of using autonomy as a key concept in studying the development of EU agencies (Section 2.5).

## 2.2 Organisational autonomy

### *Autonomy as a dominant motive*

Most public organisations try to gain, or maintain, as much autonomy as possible over their tasks (Wilson, 1989: 183; Kaufman, 1981: 161-164). Contrary to what is often thought, they are not constantly striving to expand their budgets and staff (Downs, 1967; Niskanen, 1971; Tullock, 1965) or their policy work (Dunleavy, 1991). Most public organisations actually prefer to have appropriated less money that they can spend as they wish, rather than more money with increased control from external actors: “It is the desire for autonomy, and not for large budgets, new powers, or additional employees, that is the dominant motive of [bureaucratic organisations]” (Halperin, 1974: 51; Wilson, 1978: 165; Kaufman, 1981: 163).

Highly autonomous organisations even to some extent control the demands placed on them.<sup>1</sup> Actors with authority to limit the organisation’s decisions and actions may defer to the wishes of the organisation “even though they would prefer that other actions (or no action at all) be taken” (Carpenter, 2001: 4).<sup>2</sup> In that sense, public organisations can change the preferences of their political superiors, or at least make them not pursue their own interests with regard to the decisions and actions of the organisation.

A public organisation is said to be fully autonomous when it is able “to act independently of some or all of the groups that have authority to constrain it” (Wilson, 1978: 165; 1989; Selznick, 1949; 1957). Fully autonomous (or independent) organisations can decide for themselves what to do instead of doing what politicians and organised interests tell them to do; they are not constrained by these actor’s demands (*cf.* Pfeffer and Salancik, 1978: 95-97).

Autonomy therefore is a controversial topic for academics. Political scientists such as Finer (1940), Wolin (1969), Lowi (1979), and Kaufman (1981), legal scholars such as Davis (1969) and Shapiro (1988), and organisational sociologists such as Perrow (1986) are wary of public organisations having autonomy in the literal (or absolute) sense of the word – not being subject to any external control, enjoying complete freedom, in fact being independent – and therefore stress the importance of control mechanisms and oversight procedures: “Politics requires accountability, and democratic politics implies a particularly complex and all-encompassing pattern of accountability” (Wilson, 1989: 188; Bovens, 1998; but see Boin and Goodin, 2007).

In reality, fully autonomous public organisations do not exist. Public organisations can never do exactly what they want. In systems of representative government, they are controlled in both formal and informal ways (Kaufman, 1981: 161-172). Public organisations are bound by what parliamentarians, judges and elected executives allow (or

forbid) them to do. Moreover, government agencies, in order to reach a level of autonomy, cannot act without considering the wishes and demands of their political superiors. On the contrary, part of the reason organisations achieve a substantial degree of autonomy – as will be proposed in Chapter 3 – is by anticipating the needs and by cultivating the support of politicians and organised interests (Wilson, 1978: 166; 1989; *cf.* Pfeffer and Salancik, 1978: 97-104).

Therefore autonomy, as most concepts in the social sciences, is a continuous concept, that is, organisations are more or less autonomous (instead of completely autonomous or not at all). Autonomy, in other words, is a matter of degree.

### *Autonomy as a perennial problem*

There is no reason to expect that all public organisations achieve a similarly high degree of autonomy in practice. In fact, achieving even a minimal level of autonomy is difficult for most government agencies. They have to perform tasks that are complex, ambiguous and conflicting; they often lack the resources to perform tasks in a satisfactory manner; they experience competition from other organisations performing similar tasks; and they are closely watched by parliament, interest groups, and the media (Wilson, 1989; Boin, 2001). Most public organisations are therefore restricted in the level of autonomy they can develop, not to mention in the effects they can have on other actors.

Some public organisations manage to obtain a fair degree of autonomy from political actors. Consider, for example, the Dutch Safety Board, which under the chairmanship of Royal Family member Pieter van Vollenhoven has achieved virtually complete autonomy vis-à-vis political actors regarding the investigation of the causes and consequences of disasters in an increasingly broad range of sectors; or the Federal Bureau of Prisons (see Boin, 2001: 175), which, by staying close to political, judicial and social preferences, was able “to maintain a relatively high degree of autonomy without sacrificing [its] mission to outside forces”.

The restrictions on autonomy certainly apply to European and international organisations (Jacobsen, 1984: 77-78). The policies of such organisations are subject to the political will of states, while their decisions are usually not enforceable upon states. In spite of the growing erosion of national sovereignty, states continue to be the predominant actors in the international system. Also within the EU the member states remain in control, even though supranational EU organisations increasingly escape member state authority and compromise national sovereignty.

Yet, international or supranational EU organisations do not necessarily develop in the direction foreseen by their founders. Some stand out, not because they display dysfunctional behaviour, but because they manage to achieve a relatively high degree of autonomy (Finnemore, 1996; Barnett and Finnemore, 1999; 2004; Barnett and Coleman, 2005). Consider the European Central Bank, which operates with a high level of autonomy from state actors, and, through, defining and implementing monetary policy in the ‘Eurozone’ has a significant impact on the economies of the member states (Elgie, 2002; McNamara, 2002; Howarth and Loedel, 2005).

Whether public organisations are seen as autonomous highly depends on the environment in which they operate (Terry, 2002). Autonomy is a situational concept. It has different meanings within different social and political settings and historical contexts; no objective criteria exist to qualify an organisation as autonomous. Given the numerous constraints on autonomy in the supranational setting, organisations such as EU agencies may be considered relatively autonomous under circumstances in which national agencies (and especially US agencies) would perhaps not be seen as such. For



example, whereas the European Food Safety Authority is considered to be relatively autonomous in the EU setting and in comparison with previous arrangements, the agency would probably not be seen as such when created in the American context, with its powerful Food and Drug Agency and its long history of agency creation.

Several additional analytical distinctions have to be made to fully grasp the notion of autonomy as used in this research. The first distinction is that between autonomy and mere formal-legal autonomy or discretion; the second is between autonomy and control by actors in the organisation's environment.

## 2.3 Beyond formal autonomy

### *A multi-dimensional concept*

Organisations can be autonomous on different dimensions. For the purpose of this study, four dimensions of autonomy are distinguished: legal, financial, personnel and policy autonomy (*cf.* Verhoest *et al.*, 2004; Bouckaert and Peters, 2004; Christensen, 2001; Gilardi, 2002).

The first dimension of autonomy is legal autonomy. Legal autonomy is based on the legal status of the organisation. When an agency has a legal personality, it can formally operate as an autonomous actor. This for instance implies that it can enter into agreements with or procure goods or services from other organisations. For organisations operating on the international or European level, this often implies that they can maintain diplomatic relations and become a member of other international or European organisations (Schermers and Blokker, 1995). Without a formally autonomous position, agencies may easily be terminated or abolished when the political tide changes (Lewis, 2002; 2003). Once an organisation's founders have endowed it with legal personality, it is difficult to alter this status (Verhoest *et al.*, 2004: 106).

A second dimension of autonomy is financial autonomy. Financial autonomy concerns the extent to which organisations are financially autonomous from external actors. What organisations can do is restricted by the financial resources at their disposal and the way they can use these resources. Agencies that generate their own resources are less dependent on their political principals than agencies that rely on them for funding (Pfeffer and Salancik, 1978). Organisations that can decide how they spend their financial resources have a high level of financial autonomy. If organisations are restrained or restricted in regard to expenditures, for instance by limiting the possibility of transferring money from one budget item to the other, they have a low level of financial autonomy.

The third type of autonomy relates to the extent to which organisations have a say over personnel matters. Structural features such as the appointment procedure and term of their senior officials affect autonomy. If agency directors serve for fixed terms, they may not be easily ousted by their political masters (Lewis, 2003); a manifestation of autonomy is an organisation's ability to recruit and select as well as fire their own staff and senior officials (Keohane, 1969: 868; McNamara, 2002: 52). Also the freedom to train, promote and pay their own staff and senior officials indicates a high degree of autonomy. Finally, international organisations are relatively autonomous when staff and senior officials do not have to render account to their national governments (Keohane, 1969: 868).

The fourth – and for this study, most important – type of autonomy is policy autonomy (Verhoest *et al.*, 2004: 105; Verschuere, 2006). Policy autonomy pertains to the extent to which the organisation can make decisions about policy goals, about policy instruments to be used, or about the policy's target audience without the direct intervention of its principals or external stakeholders (Verhoest *et al.*, 2004; Verschuere, 2006; McNamara, 2002: 52; Thatcher and Stone Sweet, 2002: 14). The level of detail by which tasks are defined and policies are stated strongly influences an organisation's autonomy in the implementation phase (Pressman and Wildavsky, 1973; Lipsky, 1980). Policy autonomy corresponds to agencies' room to manoeuvre in executing their tasks in the policy-making process. Hence, Thatcher (2005: 369) remarks that: "Ultimately, agency autonomy is seen in policymaking and implementation."

### Discretion

When students of political science and law talk about (policy) autonomy, it is usually in terms of discretion, also referred to as formal or *de jure* autonomy. Discretion is the latitude officially granted to public agencies in order to implement policies (Davis, 1969; Baldwin and Hawkins, 1984; Hawkins, 1992). A general distinction can be made between two kinds of discretion: "to make legislative-like policy decisions", such as when an agency authorises a product to be sold on the market, and "to decide how general policies apply to specific cases", including police officers having the opportunity to choose among different behaviours when enforcing traffic regulations (Bryner, 1987: 6; Ringeling, 1978; Lipsky, 1980; Bakker and Van Waarden, 1999).

Discretion (or formal autonomy) is designed into the relationship that the political superior (also referred to as the 'principal') and the organisation (also known as the 'agent') have with each other (Jensen and Meckling, 1976). It is often laid down in the constituent document (or founding legislation) and the provisions therein that specify the organisation's legal mandate and formal tasks (Huber and Shipan, 2002). The constituent document stipulates the formal relations among an organisation and its principals and external stakeholders and may give the organisation leeway to implement laws or execute policy decisions made by its political superiors (Kiewiet and McCubbins, 1991).

Political principals might invest a bureaucratic agent with a level of discretion for a wide variety of reasons. I point out three such reasons often mentioned in the literature on delegation and that are – as Chapter 5 will demonstrate – also significant in the creation of EU agencies. First, organisations are delegated discretion when they operate in highly uncertain and complex policy domains and must be flexible to respond to unforeseen events (Epstein and O'Halloran, 1994; 1999; Bawn, 1995; Potoski, 1999). The uncertainty and complexity make it impossible for principals to determine all possible courses of action before the delegation stage and prescribe all policy actions in detail by formal rules or legal procedures (Bryner, 1987: 1-3; Ringquist, 1995: 339; Majone, 1996: 70; Pollack, 2003: 21).

Second, a level of discretion is often built into an organisation when the execution of the organisation's tasks requires it to be independent from its political masters and day-to-day politics, as is notably the case with courts or central banks (Kydland and Prescott, 1977; Majone, 1996; 2000; 2002b; Pollack, 1997; 2003: 21; Elgie, 1998; Franchino, 2000; 2002; Gilardi, 2002; 2008; but see McNamara, 2002). Politicians endow agencies with a degree of formal autonomy or discretion through "hardwiring," essentially fencing them off from political interference (Moe, 1989; McCubbins, 1985). The

formal autonomy of such organisations is granted to enhance the confidence in and credibility of policy commitments.

Third, organisations are delegated a level of discretion in order for their political principals to avoid blame (Fiorina, 1977; Weaver, 1986; Hood, 2002; Thatcher and Stone Sweet, 2002: 4). Politicians formally distance themselves from agencies whilst shifting the responsibility for difficult decisions or unpopular policies that they designate necessary or desirable. “Credit can be claimed for legislative action, blame can be deflected when specific efforts clash with politically powerful interests, and constituents can be cultivated by intervening in unpopular agency actions” (Bryner, 1987: 6).

As laid down in its constituent document or founding legislation, discretion (or formal autonomy), as will be shown in Chapter 6 of this book, is pretty much set from the start of the organisation through its formal design and organisational structure (Hammond, 1996; Hammond and Knott, 1996; Potoski, 1999; Potoski and Woods, 2001; Lewis, 2003; Christensen, 2001; Yesilkagit and Christensen, 2009). The exact amount of discretion is determined by the scope and extent of the formal rules, legal competences, and decision-making procedures that govern the organisation’s behaviour and that structure its role in policy making, that is, the policy decisions an organisation can make on its own (*cf.* Verhoest *et al.*, 2004).

Organisations are endowed with various levels of discretion when they are created. They thus have different starting points; some begin their life with more discretion than others. An organisation may try to get its formal decision-making competencies expanded or adjusted but it usually cannot do so itself. For an amendment of its mandate or tasks, it relies on its principals who decided to create the organisation as they did, with more or less discretion. Design characteristics may very well influence the development of the agency after its creation. For that reason, Chapter 6 of this study examines the design features of EU agencies.

### *Actual autonomy*

The level of autonomy that an organisation has by design does not necessarily tell us all about the degree of autonomy that it develops over time (Thatcher and Stone Sweet, 2002: 8; Yesilkagit and van Thiel, 2008). A distinction can be made between the formal and the *actual* autonomy of an organisation (Bouckaert and Peters, 2004; Yesilkagit, 2004; Maggetti, 2007). Autonomy as it is conceptualised in the case chapters refers to the actual level of autonomy of an organisation, also known as informal or *de facto* autonomy.

This notion of autonomy “is external to a contract and cannot be captured in a principal-agent relationship” (Carpenter, 2001: 17). Whereas Principal-Agent models assume that the relations between principals and agencies tend towards stability, it appears that these relations are characterised by disequilibrium and adaptation, thus reflecting change instead of stability (Krause, 1996: 1084; 1999; Eisner *et al.*, 1996; Waterman and Meier, 1998; Thatcher and Stone Sweet, 2002; Tallberg, 2002). So while some agencies may have been created more or less autonomous than others, i.e. they have different starting points in terms of their level of autonomy, this does not imply that these formally autonomous organisations develop more or less actual autonomy as well.

Thus, the degree of autonomy public organisations achieve once they are operational is not fixed. Constituent documents are often vague and imprecise regarding the mission and purpose. They do not always clearly define the organisation’s objectives, often do not specify its tasks in detail, and rarely spell out its policy priorities (Wilson,

1978; 1989; Lowi, 1979; Chun and Rainey, 2005). Furthermore, a great deal of interactions is not explicitly specified in the constituent document. On a day-to-day basis, individuals within the organisation relate to others either within or outside the organisation, often in ways that had not been foreseen when drawing up the constituent document (Barnard, 2002 [1938]; Blau, 1955; Selznick, 1957). Constituent documents thus usually leave ample room for interpretation by the organisation's staff (Wilson, 1989; Khademian, 1996).

Indeed, principals may have kept constituent documents deliberately vague and imprecise in awareness of the need for political compromise among multiple constituencies and their competing interests (Lowi, 1972: 92; Wilson, 1980). It may also have been the case that political superiors, given the uncertain or complex nature of the policy problem, have left it up to the organisation's first officials to shape its tasks (Mazmanian and Sabatier, 1983; Wilson, 1989). High levels of uncertainty and political conflict make it difficult to adopt precise legislation and thus tend to lead to vague and imprecise statutes (Moe, 1990; Lewis, 2003; but see Huber and Shipan, 2002).

This feature of constituent documents provides organisations with the opportunity to perform what they believe their tasks are or should be (Wilson, 1989: 330). Vague and imprecise constituent documents provide the organisation with a potential for actual autonomy, beyond what is formally written down. It also makes it necessary for organisations to translate their broad mandates and ambiguous goals into norms, practices and routines (Cyert and March, 1963; March and Olsen, 1976. Once a public organisation has been created, it has to develop its own behaviours in relation to its critical tasks, that is, the tasks it has to perform to accomplish its primary function, its fundamental purpose (Wilson, 1978; 1989).

Such non-codified behaviour can, of course, be formalised through amendments of the constituent document. Whereas initial legislation is usually ambiguous, an organisation's tasks are often amended over time to make them more clear and specific (Browne and Wildavsky, 1984; Majone and Wildavsky, 1984; Chun and Rainey, 2005). Amendments may be made as a result of periodic review conferences or on the basis of evaluations of the organisation. Once formalised, the organisation may again develop norms, practices and routines to fulfil its mandate or execute its tasks (Barnard, 2002 [1938]). Conversely, informal expansions and adjustments of the organisation's autonomy can also explicitly be curtailed or annulled by its principals through formalisation.

But informal norms, practices and routines do not necessarily have to be formalised in order for principals or external stakeholders to accept them. Actors in the organisation's environment may allow the organisation to expand or adjust its mandate or tasks, while on paper nothing changes. Hence, it is not enough to look at an organisation's formal autonomy only, as, in that way, important informal expansions or adjustments of its formal autonomy might be overlooked (Thatcher and Stone Sweet, 2002; Thatcher, 2002b; McNamara, 2002; Döhler, 2002). An organisation may very well develop views that are not those of its political masters, or build up capacities of its own that affect relations with other actors (Majone, 1996: 72; Moe, 1989: 282). Instead of merely focusing on the autonomy that an organisation has by design, this study therefore also concentrates on the autonomy that an organisation acquires by evolution (Carpenter, 2001: 17).

## 2.4 Autonomy from the environment

### *A multi-relational concept*

Public organisations can be autonomous from a wide range of groups, both governmental and non-governmental, in their environments (Peres, 1968; Ellison, 1995; Bouckaert and Peters, 2004: 23). For the purpose of this research, a distinction can be made between two main groups of actors: stakeholders or clients and, most importantly, political actors.

First of all, organisations, both national and supranational, can be autonomous from stakeholders and clients, that is, actors that have a particular interest in the organisation. Such stakeholders can be third states, non-governmental organisations (NGOs) or interest groups, other national or international agencies, or private companies. Autonomy from clients or stakeholders is often negatively formulated, as the absence of their interference with the agency's activities. When clientele or interest groups dominate the agency's major decisions, this is referred to as 'agency capture' (Bernstein, 1955; Levine and Forrence, 1990). Agencies that are captured by client or stakeholder groups have a low level of actual autonomy.

In addition, public organisations at the national level are considered to have a high degree of autonomy when they are relatively free of political pressures. Agencies are invested with a degree of autonomy from political actors to avoid what has been referred to as 'coalitional drift', i.e. the possibility that future political officeholders with different preferences and interests than those of the enacting political coalition gain control over the agency (Shepsle, 1992; Shepsle and Bonchek, 1997: 375). To prevent political opponents from gaining control over the agency and reversing its decisions (or abolishing the agency completely), incumbent governments try to build agencies that are insulated from their political opponents, and, in effect, also from themselves (Moe, 1990: 124).

The environment of supranational organisations is different from public organisations in the national context as it is usually made up of states. States play an important role as both principals and clients or stakeholders of the organisation: their representatives take a position on the organisation's decisions, and their nationals depend on the organisation's products or services and are affected by its decisions and policies. Supranational organisations are considered autonomous when their policies and decisions are not merely the result of a compromise among the most powerful member states (Keohane, 1969: 862; Cox and Jacobsen, 1972; Reinalda and Verbeek, 1998). States are usually also members of supranational organisations: their officials are part of negotiating the constituent act that creates the organisation and participate in the decision making, and their nationals are recruited as staff members. So, for supranational organisations, states are members, stakeholders and clients, as well as paymasters (Haas, 1990: 30; Schermers and Blokker, 1995).

But states are not the only actors in supranational organisations' environments. The organisations from which supranational organisations have emanated, such as the EU institutions, are also part of the environment. At the EU level, the Council and the Parliament share legislative power, while executive power belongs to the Commission and its services. Autonomy in the EU context thus not only pertains to autonomy from the member states, it also refers to autonomy from the Commission, the Council, and, to a lesser extent, the European Parliament (Geradin, 2005; Vos, 2005).

## Control

Realist, intergovernmental, and rational-choice scholars in International Relations and EU integration theory tend to assume the dominance of political principals, and then look at how they control what supranational organisations do (Hawkins *et al.*, 2006). The degree of supranational autonomy is explained as the result of the level of control exerted by the member states and the organisations from which supranational organisations have emanated. Pollack (1997: 101) argues that the

...autonomy of a given supranational institution depends crucially on the efficacy and credibility of control mechanisms established by member state principals, and that these vary from institution to institution – as well as from issue-area to issue-area and over time – leading to varying patterns of supranational autonomy.

As their founders, member states devise control mechanisms that constrain agencies in their behaviours, thereby curbing their autonomy (McCubbins and Schwartz, 1984; McCubbins *et al.*, 1987; 1989; Moe, 1989). Control is generally understood to be the inverse of autonomy; if an agency is controlled, it cannot logically be autonomous. It refers to constraints, placed by the organisation's principals and external actors, on the agency's decision-making abilities (Verhoest *et al.*, 2004). These constraints are placed on an agency's behaviour to prevent it from opportunistically pursuing its own rather than their principals' interests, a phenomenon known as 'bureaucratic drift' (Calvert *et al.*, 1989; Kiewiet and McCubbins, 1991).

The problem inherent to delegation is that agents have expert knowledge that principals do not have (which is why the principals delegated certain tasks to the agents in the first place). This so-called 'information asymmetry' makes it difficult for principals to control the behaviour of agents by monitoring and sanctioning (Bendor *et al.*, 1987; Miller and Moe, 1983; Moe, 1984; Miller, 2005). It gives agencies the opportunity to influence the political agenda by selectively providing or withholding information, therewith reinforcing the autonomy from their principals (Kiewiet and McCubbins, 1991). Moreover, because their behaviour cannot be constantly observed, organisations are said to have an incentive to 'shirk', i.e. failing to perform the tasks expected of them by their principles. So the very structure of delegation makes it possible for agents to develop their own preferences and interests, so-called 'agency slippage' (Jensen and Meckling, 1976; Weingast and Moran, 1983; Pollack, 1997: 108).

Scholars studying control – usually in the American context – have mostly focused on whether politicians can control agencies and, if so, how they can effectively do so. Two main types of control mechanisms can be distinguished. First of all, administrative procedures adopted *ex ante*, as stipulated in the constituent document (or founding legislation) and concerning the way by which the agency should fulfil its mandate and execute tasks (Pollack, 1997: 108). Control takes place by imposing procedures in advance that, for example, confer only restrictive powers to an agency or incorporate politicians' favoured constituents into agency decisions and policies, so-called 'deck-stacking' (e.g. McCubbins, 1985; McCubbins *et al.*, 1987; 1989; Potoski and Woods, 2001; but see Balla, 1998; Spence, 1999).

This type of control is relatively inexpensive for principals as they are not directly involved in exercising control. A disadvantage mentioned by Moe (1987: 485) is that these kind of controls only cover those agency decisions and policies that are of interest to outside groups, leaving a great deal of agency behaviour uncontrolled. Moreover, administrative procedures come at the expense of the agency's operational flexibility,

often one of the reasons to delegate tasks to agencies in the first place, thus undermining their effectiveness.

The second type of control mechanism concerns oversight applied *ex post*, through incentives for the agency to serve its political masters. These incentives are created by the promise of rewards, such as program expansions, budget appropriations (e.g. Wood, 1990; Wood and Anderson, 1993; Carpenter, 1996), the appointment of top officials (e.g. Moe, 1985; Wood and Waterman, 1991; 1994), and the threat of sanctions, including hearings (on the basis of, for instance, annual reports), investigations into its operation and functioning (through, for example, external evaluations), and the reversal of its actions and decisions (e.g. Weingast and Moran, 1983; McCubbins and Schwartz, 1984; but see Wood, 1988; Whitford, 2002b).

This type of control is relatively costly for principals, involving extensive monitoring of agency behaviour. Apart from the costs involved in using controls, it is not always beneficial or necessary to apply controls. As Moe (1987: 487) points out, budget cuts to punish an organisation for underperformance may lead an organisation to perform even worse because of the lack of sufficient resources. In addition, agencies may have similar preferences as their principals and 'agency losses' might therefore already be limited (Kiewiet and McCubbins, 1991: 27).

What is more, the availability of formal control mechanisms does not guarantee their use. The capacity to control has to be distinguished from the *actual* use of control mechanisms (Hood, 1976; Dunsire, 1978; Moe, 1985). If compliance with rules and procedures is not strictly monitored and enforced by the agency's principals, then the agency, while formally under control, is in fact not being controlled. Indeed, findings from the European context suggest that national politicians do not make much use of the formal mechanisms at their disposal to control agencies (Thatcher, 2002a; 2005). As politicians do not seem to care about many (if not most) decisions made by agencies, formal control can thus easily coincide with actual autonomy (Moe, 1984: 771; Carpenter, 2001).

At the same time, reducing formal control does not necessarily mean making the organisation more autonomous. Political actors and external stakeholders can also influence the actual behaviour of organisations by means other than formal rules and legal procedures; they may control them in more subtle or informal ways (Thatcher, 2002a; 2005). This type of control can be referred to as simultaneous or ongoing control (Busuioc, 2009; 2010). Moreover, the degree of formal control only points to the potential for actual autonomy of an organisation. The organisation still has to realise this potential in order to actually become more autonomous (Peres, 1968).

Rather than concentrating on their political principals, this study therefore looks at the development of autonomy from the perspective of the bureaucratic agencies, (pro)actively shaping the social and political environments in which they operate.<sup>3</sup> It thus is concerned not so much with the rational-functional notion of organisations as instruments through which political principals implement laws and execute policies, but with the sociological and historical notion of organisations as evolving institutions potentially influencing the behaviour of other actors in their environments (Selznick, 1957; Scott, 2001).

## 2.5 Conclusion: EU agency autonomy as a key concept

This chapter discussed autonomy, a key concept in the creation, design and development of most public organisations, including European Union agencies. Indeed, Chapter 5 will show that the autonomy of EU agencies has in many ways been the rationale for their creation. By design, EU agencies are allowed a certain amount of leeway in executing policies and implementing legislation, as is demonstrated in Chapter 6. In practice, it appears that achieving a degree of autonomy is difficult, even for agencies that have been granted a high degree of autonomy on paper. Moreover, when agencies do operate in an autonomous way, they are typically said to display dysfunctional behaviour.

The concept of autonomy, as used in Chapters 7 through 12, therefore goes beyond mere formal autonomy or discretion; it denotes the actual level of autonomy of an EU agency. The concept of *actual* autonomy refers to an EU agency's ability to choose among different behaviours pertaining to what its critical tasks are, and how and with what resources it performs these tasks, and how the agency, in the performance of its tasks, relates to other actors in its environment. As such, the policy dimension of autonomy is considered the most important, for it is in the agency's role in the policy-making process that its actual autonomy becomes clear. Whereas this research takes the agency's constituent document as a starting point, it concentrates on the period after the formal creation of an agency.

Moreover, the focus of this research is on the autonomy that EU agencies realise with respect to different actors in their environments, particularly vis-à-vis their political principals but also other stakeholders. The study clearly adopts the perspective of the agency, without neglecting the constraints placed by the agency's principals and external actors on its choice among different behaviours pertaining to what its critical tasks are, and how and with what resources it performs these tasks. The concept of actual autonomy thus also refers to how the agency, in the performance of its tasks, relates to the EU institutions, the member states and other actors in its environment.

As illustrated in Chapter 1, EU agencies, like other public organisations, seem to vary in the extent to which they develop a degree of actual autonomy. The reasons for creating more or less autonomous agencies as well as the autonomy that agencies are granted by design may have a significant effect on the autonomy that agencies acquire over time. Thus creation and design influence development and evolution and vice versa. But creation and design are only two of the many potential conditions that may influence an agency's development. Chapter 3 therefore picks up where this chapter ends. It constructs a framework to investigate the mechanisms through which actual EU agency autonomy develops and the conditions under which these mechanisms operate.

### Notes

<sup>1</sup> As is discussed in Chapter 14, greater autonomy does not automatically signify more power.

<sup>2</sup> Some would perhaps say that autonomy thus comes close to what could be referred to as 'authority'. The concept of authority however is closely related to legitimacy, which in this study is proposed as a source of autonomy (see Chapter 3).

<sup>3</sup> See also Eisner and Meier (1990), Eisner (1991), Ringquist (1995), Krause (1996; 1999; 2003), Khademian (1992; 1996), Balla (1998), Spence (1999), Carpenter, (2001), Yesilkagit (2004) and Moe (2005).





## CHAPTER 3

# WHY AUTONOMY DEVELOPS (OR NOT):

## AN INSTITUTIONAL ACCOUNT

Once an agency is created, the political world becomes a different place. Agency bureaucrats are now political actors in their own right: they have career and institutional interests that may not be entirely congruent with their formal missions, and they have powerful resources – expertise and delegated authority – that might be employed toward these ‘selfish’ ends. They are players whose interests and resources alter the political game.

– Terry Moe (1989: 282)

It is certainly true that at the delegation stage political principals have the freedom to select their agents and impose an incentive structure on their behaviour. Over time, however, bureaucrats accumulate several advantages, including institutionalization and job-specific expertise, which alter the original relationships.

– Giandomenico Majone (1996: 72)

### 3.1 Introduction: bringing (supranational) organisations back in

To understand the development of EU agencies, this study draws on several strands of literature. The literature on International Relations (IR) and European integration is used to explain the autonomy of supranational organisations in general. Whereas this literature is useful in identifying the factors that could explain why, in general, EU agencies may develop into relatively autonomous entities, it tends to overlook organisational aspects of supranational organisations. To explain the variation in the autonomy of individual EU agencies, the literature on organisations is applied. This literature is often concerned with private organisations or bureaucratic organisations operating on the national level and not so much with organisations in the international or the European realm.

In both the study of IR and European integration and the analysis of organisations, institutionalist approaches are used that stress the importance of institutions to explain social and political outcomes. This research combines both ‘old’ and ‘new’ institutionalism<sup>1</sup> and uses different new institutionalist approaches<sup>2</sup> in a complementary manner. The framework set out in this chapter explains the autonomy development of supranational organisations, notably EU agencies, as a function of an institutionalisation process. Besides stressing development, the framework also emphasises the intervening role of agency leaders and the conscious efforts they can make to enhance the institutionalisation process.

The chapter proceeds as follows. Section 3.2 proposes that the autonomy of (supranational) organisations can be seen as function of an institutionalisation process. In order to guide empirical research, Section 3.3 puts forward contextual factors that help explain institutionalisation at the system level. Section 3.4 and 3.5 advance mechanisms driving institutionalisation at the organisational level and factors upon which these

mechanisms are conditional. These sections are linked in Section 3.6 resulting in a typology of organisations along the dimensions of institutionalisation. In Section 3.7, leadership is introduced as an intervening factor. Finally, Section 3.8 presents a process model that summarises the analytical framework of this study.

### 3.2 Autonomy development as institutionalisation

#### *Institutionalisation*

The definition of institutionalisation depends on the theoretical perspective adopted, resulting in a wide variety of definitions. Here institutionalisation refers to the *process* by which social or political systems “acquire value and stability” (Huntington, 1965: 394; Eisenstadt, 1964; Polsby, 1968; Goodin, 1996), or, more specifically, the process by which organisations become “infused with value beyond the technical requirements at hand” (Selznick, 1957: 17; Stinchcombe, 1968; Perrow, 1986; Boin, 2001). Organisations do not become infused with value overnight; institutionalisation takes time (Merton, 1957; Scott, 2001; Zucker, 1987; Zijdeveld, 2000).<sup>3</sup>

Following Haas (1964), who applied Selznick’s work to international organisations, Keohane (1969: 861) conceptualises institutionalisation as “the process by which the international organisation becomes differentiated, durable and *autonomous* [italics added – MG]”. The process of institutionalisation differentiates the organisation from its environment, makes it robust in the face of changing (and adverse) conditions, and gives it an autonomous status beyond the assigned legal mandates and formal tasks. The institutionalisation process thus depends on the interaction between organisations and (actors in) their environments, that is, organisations evolve over time in relation to their environments (Meyer and Scott, 1983; Aldrich, 1999; Scott, 2001; Pierre and Peters, 2009; *cf.* Parsons, 1956).

But organisations do not follow slavishly whatever their environments demand; they may develop “a life of their own” (Berger and Luckmann, 1966: 75; Zucker, 1987). They may adopt a distinctive set of values and a strong organisational culture, and they may foster the commitment of member states and the support of clients and external stakeholders. As a result, they transform from rational tools into social *institutions*, i.e. adaptive systems, shaped – but not determined – by pressure from their environments (Selznick, 1957: 15; Scott, 2001: 49).

According to Selznick (1949; 1957), organisations that have become institutionalised are valued in their own right, apart from their effectiveness or efficiency. Even if they are ineffective or inefficient, they have a strong tendency to persist; institutionalised organisations are not easily replaced by other arrangements or structures, or abandoned completely (*cf.* Meyer and Zucker, 1989; Strange, 1998; Pierson, 2000a).<sup>4</sup> The fact that they are structural features of society does not mean that institutionalised organisations do not change, that they remain static (*cf.* Steunenberg, 2001).<sup>5</sup> On the contrary, change is rooted in the very process of institutionalisation as no organisation is ever valued to the same degree by all those involved in its operations (both staff and external actors) at all moments in time, thus allowing for the possibility of instability and creating the necessity to adapt (Eisenstadt, 1964; *cf.* Greenwood and Hinings, 1996; Dacin *et al.*, 2002).

In order to understand the perspective on institutionalisation adopted here it is necessary to make two analytical distinctions. The first distinction is between institution-

alisation at the system level and at the organisational level; the second is between structure and agency as forces driving institutionalisation.

### *System and organisation*

Two distinct (yet closely related) processes of institutionalisation can be distinguished: institutionalisation on the system level and on the organisational level (Scott, 2001). The institutionalisation process occurring on the system level, as it is usually studied by International Relations scholars (*cf.* Keohane, 1989; Martin and Simmons, 2001) and students of European integration (*cf.* Sandholtz and Stone Sweet, 1998; Stone Sweet *et al.*, 2001), refers to the gradual formalisation of international relations by means of international institutions. Internal norms and rules become institutionalised (or rather, formalised) in conventions, treaties and, ultimately, in formal international organisations.

Institutionalisation as it is referred to in organisational studies denotes an organisational level process that results in the organisation adopting certain institutional characteristics. Whereas IR scholars and students of the EU consider the creation of a supranational organisation an indication of a high degree of institutionalisation – since they define a formal international organisation as a highly institutionalised form of international cooperation (Keohane, 1989) – students of organisations consider “getting an organisation off the ground” distinct from the process by which it “outgrows” its instrumental status and takes on institutional characteristics (Kimberly, 1980: 23; Boin, 2001: 23).

Here an attempt is made to bridge the gap between the two different strands of literature by considering the institutionalisation of supranational organisations as the result of the dynamic interaction between the system and the organisational level.

### *Structure and agency*

Institutionalisation as referred to in this study can be thought of as a two-step (yet recursive) process: the first step consists of a conscious decision to create an organisation for a specific purpose and designing it in such a way that it may achieve that purpose; the second step is “to fashion the institution over time, and to imbue it with certain values” (Peters, 1999: 32). Thus conceived, institutionalisation does not occur by itself; it involves agents (Stinchcombe, 1968: 181-184; Stone Sweet *et al.*, 2001).

As a result of interaction between agents, informal structures develop that arise from the formal organisational structure, but are not part of it (Selznick, 1949; 1957; Barnard, 2002 [1938]). The process of institutionalisation may well begin before the organisational structure has formally been established. A certain degree of stability of the relations between individual or collective actors, especially at the international level, may even be necessary for the organisation to be formally established in the first place, the preferences and capabilities of such actors being constrained by pre-existing institutional structures (Krasner, 1988). As a result, particular values and norms may already be reflected in the formal structure of the new organisation (Meyer and Rowan, 1977; DiMaggio and Powell, 1983; *cf.* Tolbert and Zucker, 1996).

Both structuralist theories, pointing to opportunities and chances for institutionalisation to take off, and actor-oriented theories, emphasising individual and collective actors making use of these opportunities and chances, are necessary to explain organisational behaviour. Organisations are not only affected by their environments; they

also give shape to them, or at least that is argued (DiMaggio and Powell, 1991; Friedland and Alford, 1991; Holm, 1995). They may become active entrepreneurs, enabling as well as constraining the behaviour of other actors in both informal (e.g. values, norms) and formal (e.g. rules, procedures) ways (Goodin, 1996: 20; *cf.* DiMaggio, 1988; Zilber, 2002; Garud *et al.*, 2007).<sup>6</sup> Hence, the relationship between organisations (and the individuals and groups that make up any organisation) and their environments is two sided; they relate to each other in a more or less reciprocal way (Jepperson, 1991; Jepperson *et al.*, 1996: 40; *cf.* Greenwood and Hinings, 1996).<sup>7</sup>

This study therefore adopts an approach in which the outcome of the dynamic interaction between the institutional structure and human agency drives or, at least, influences the development of organisational autonomy.

### *Institutionalisation of EU agencies*

To reveal the mechanisms driving autonomy development and to identify the factors upon which these mechanisms are conditional, a framework for the study of EU agency autonomy must be constructed that encompasses a variety of political and social factors (Simon *et al.*, 1950; March and Olsen, 1984; 1989; 1998; Moe, 1985; Meier and Bohte, 2006; Verschuere, 2006). A distinction is made between general determinants of institutionalisation at the system (or macro-)level and specific determinants of institutionalisation at the organisational (or meso-)level.

In this study, the creation and design of a supranational organisation, implying that sovereign governments transfer powers to another level of governance, is seen as the institutionalisation of interactions at the system level (*cf.* Stone Sweet *et al.*, 2001). From the literature on international relations and European integration, I derive three factors upon which system-level institutionalisation is conditional: (a) the functional need underlying cooperation (b) the distribution of political power and the institutional interactions as a result thereof, and (c) the pervasiveness of values and ideas in the institutional environment.

Underlying cooperation through formal organisations is primarily a generally perceived functional need for independent organisational capacity, as a result of so-called 'spill-overs'. In addition, the creation of supranational organisations and their formal autonomy is a 'by-product' of the distribution of political power at the system level and the resulting complex interactions among political actors. Moreover, the values and ideas pervasive in the institutional environments in which supranational organisations come about may explain why these organisations are created and designed the way they are.

Institutionalisation at the organisational level is defined here as the emergence over time of a distinct organisational identity that is considered legitimate by the organisation's staff, member states, supranational organisations, clients and external stakeholders (*cf.* Merton, 1957; Selznick, 1957; Scott, 2001; *cf.* Greenwood *et al.*, 2002; Zilber, 2002). Defined as such, institutionalisation has two dimensions (which can be viewed as sub-processes), an internal and an external one, that together help to explain the scope and extent of autonomy of supranational organisations: (a) the formation of a distinct organisational identity and (b) the acquisition of a substantial level of organisational legitimacy.

The first (internal) dimension pertains to the emergence of a distinct organisational identity, as a result of the interpretation that employees and their professional groups give to the organisation's goals and programs. The formation of an organisational identity may involve a number of concurrently operating mechanisms, including specialisa-

tion, professionalisation, socialisation, and identification. The second (external) dimension refers to the acquisition of a substantial level of organisational legitimacy as a result of the organisation's efforts to secure the support of outside groups for their specialist knowledge. The generation of organisational legitimacy may entail the following mechanisms: differentiation, moderation, (selective or sequential) attention, cooperation and cooptation.

It is expected that different mechanisms operate in different phases of the agency's development and under different conditions. From the literature on organisations I derive four main factors upon which the sub-processes of institutionalisation are conditional: (1) the agency's special knowledge or expertise, (2) the cohesion of the agency's staff, and (3) the political and (4) public support for the agency. In the next sections, the general and specific determinants of institutionalisation at the system and organisational level are discussed in more detail.<sup>8</sup>

### 3.3 General determinants of autonomy development: institutionalisation at the system level

#### *Functional spill-overs*

Supranational organisations may be created by states to solve problems of collective action in a particular area, usually as a result of rising cross border exchange. Once created, these organisations often also drive the cooperation between states in other, functionally related areas. These effects of cooperation are referred to as "spill-overs" (Deutsch, 1957; Haas, 1958; 1964). Sandholtz and Zysman (1989; see also Sandholtz and Stone Sweet, 1998) explain exactly how these spill-overs occur. Supranational organisations are supported by coalitions of transnational and sub-national actors, such as business elites, national courts and central banks, which perceive the need for cooperation through these supranational organisations. By using these organisations to enhance further cooperation and lobbying governments to abandon national structures, these actors effectively promote institutionalisation.

Supranational organisations can thus be granted a level of autonomy under conditions where actors see a functional necessity for their creation. But the development of supranational organisations does not necessarily have to reflect the need these actors saw for their creation. As we will see, the functions that an organisation performs at a certain point in time do not so much reflect the preferences and interests of its founders, but rather the preferences and interests of the organisation itself, after creation (*cf.* Keohane, 1984: 8; Pollack, 1997: 107).

#### *By-products of power politics*

The institutional configuration of political power divided between the actors involved in the creation of new supranational organisations (mainly states but also existing supranational organisations) is an important condition for the autonomy of supranational organisations. As part of their struggle for power, these actors make cost/benefit calculations with regard to the delegation of tasks to supranational organisations (e.g. Koremenos *et al.*, 2001; Hawkins *et al.*, 2006). When the benefits of delegation outweigh the costs, that is, when all actors involved in creation somehow gain, the creation of a supranational organisation performing the delegated tasks with a certain level of formal

autonomy becomes an option (Pollack, 1997; 2003; Tallberg, 2000; 2002). Institutionalisation can thus be considered a by-product of power politics.

Supranational organisations will not be able to develop more than a minimum level of autonomy – not more than necessary to perform their tasks. They may diverge from the preferences of their creators, sometimes even going against the interests of their creators (be it states or other international organisations). However, that these organisations have an opportunity to pursue their own interests, does not mean that they will automatically do so by going against the interests of their founders once they are created. The interests of organisations and their founders may coincide. It is possible that organisations do what they are supposed to do, even when (or perhaps, for the very reason that) they are not under the constant control of those who created them in the first place (DiIulio, 1994; see also Waterman and Meier, 1998).

### *Institutional fashions and legacies*

Institutionalisation is not only driven by the rational-functional arguments of national governments and existing supranational organisations. Environments induce the creation of certain organisations when such organisations ‘fit’ the political and social circumstances, when they are ‘fashionable’. Their creation is influenced by forces that “differently select or selectively eliminate” certain organisational forms (Aldrich, 1999: 26; *cf.* Nelson and Winter, 1982; Carroll, 1984; Baum, 1996; Baum and Oliver, 1996; Hannan and Freeman, 1989). The selection process, however, is not driven by an environment dominated by competition and efficiency, but by values and ideas, and practices and rules based thereon (Meyer and Rowan, 1977; DiMaggio and Powell, 1983; Meyer and Scott, 1983). Supranational organisations are thus often modelled after similar organisations in their field that are perceived to be legitimate. This is referred to as institutional isomorphism (DiMaggio and Powell, 1983; 1991: 70; *cf.* McNamara, 2002).<sup>9</sup>

In addition to being the result of institutional fashions, legacies of the past affect the creation and design of new supranational organisations. Over time, gaps can emerge between existing supranational structures and the intentions of their creators, with an effect on social and political outcomes. All kinds of institutional constraints, including high sunk costs and vested interests, as well as strong path dependence, make it difficult for founders to regain control over such structures and arrangements previously invested with a level of formal autonomy (Pierson, 2000a; 2000b; 2004). Indeed, these supranational organisations form the basis for a further build-up of supranational structures and arrangements. So the existence of structures and arrangements deepens interaction and socialisation, which in turn leads to increased cooperation through new organisations. The more institutionalised the political space, the harder it becomes to reverse cooperation.

Still, the question why some individual supranational organisations, once created, develop into more autonomous entities cannot be answered. The institutional environments in which supranational organisations are embedded do not automatically influence autonomy development nor can autonomy development simply be relegated to past epochal moments; agencies act as mediators. This research therefore takes into account the above-mentioned general factors, but not without examining the organisational characteristics of specific EU agencies. For it is these characteristics, to which I turn now, that may explain variation across agencies and over time.

### 3.4 Specific determinants of autonomy development: forming a distinct organisational identity

Every organisation has an identity or character.<sup>10</sup> Organisational identity or character emerges from the interaction of participants in the organisation and affects the attitudes of people who join the organisation anew (Wilson, 1989: 68; Selznick, 1957; Schein, 1996; 2004). Some organisations are characterised by an identity that differentiates them from other actors – politicians, stakeholders, clientele, organised interests and other agencies. Their distinct identity enhances these organisations' autonomy with respect to their environments.<sup>11</sup>

When an organisation has a distinct identity, this does not mean that it should be considered a culturally homogeneous or fully integrated entity (Martin, 1992; Hatch and Schulz, 2002). Often, different (sub-)cultures exist in one and the same organisation. The organisation is made up of a great variety of individuals with different personal and professional histories, competences, loyalties, attitudes, and opinions (Parker, 2000). Moreover, an organisation's identity may change over time (Alvesson, 1996). Especially young organisations, "under the pressure of the day-to-day problems of managing growth", may unconsciously take on an identity different from what their founders originally envisioned (Albert and Whetten, 1985: 102).<sup>12</sup>

Through a process of interpreting the organisation's mandate, the first staff members bring the organisation to life.<sup>13</sup> They have to translate the organisation's objectives and tasks into working practices and routines.<sup>14</sup> These practices and routines evolve from efforts "to integrate external political expectations for performance with internal needs to motivate employees" (Khademian, 1996: 142; cf. Zilber, 2002).<sup>15</sup> The way by which a public organisation's first staff members seek to combine external expectations with internal demands is largely shaped by (1) their expertise and (2) the cohesion of the organisation.

#### *Expertise*

The first condition for the formation of a distinct organisational identity is accepted expertise (Rourke, 1984: 15-47; Ellison, 1995; Khademian, 1996; Meier and Bohte, 2006: 64-67).<sup>16</sup> Expertise enhances the development of a distinct organisational identity in two particular ways: (1) through control over information, and (2) the possession of a dominant profession (Rourke, 1984; Ellison, 1995).

*Control over information* Expertise enables public organisations (especially the ones being structured in a bureaucratic way) to collect information on complex societal problems and gives them control over the solutions to these problems, even if these solutions are formally decided on elsewhere, in the political arena (Weber, in Gerth and Mills, 1958; Crozier, 1964). By gathering information and giving advice, organisations may shape politicians' decisions. In other words, they can 'regulate by information' rather than by formal authority (Majone, 1997a). The informational capacity of government organisations, and the resulting asymmetry of knowledge, is therefore one of the most important sources for organisational autonomy:

Even successful increases in administrative power have had as their basis less the ability to issue authoritative commands than the capacity to draw upon administrative resources of information, analysis and expertise for new policy lessons and appropriate conclusions on increasingly complex issues (Hecl, 1974, as quoted in Carpenter, 2001: 28).



Bureaucratic agencies have an extraordinary potential to collect information, devise programs and execute policies. Their special competence regarding certain technical aspects of their fields gives them a "rightful policy initiative" (Long, 1949: 205).

In practice, agencies differ in the control over information they are capable of exercising (Rourke, 1984: 92). Of course, the function of an agency is an important factor here. Some agencies, such as statistical offices, are designed to collect information or gather data, or offer advice and conduct research, whereas others, such as social security administrations, have been created to deliver services or distribute benefits to citizens (Selznick, 1957; Wilson, 1989; Hood *et al.*, 1999; Bouckaert and Peters, 2004). If agencies have a greater access to information, whereas their political masters possess limited information, this provides agencies with a level of autonomy.

The function of an agency, although an important factor, cannot alone account for differences in informational capacity. "There are limits [...] to the ability of elected authorities to hard-wire capacity into an agency. Bureaucratic capacity is first and foremost a function of organisational evolution" (Carpenter, 2001: 28; Waterman and Meier, 1998; Meier and Bohte, 2006). Or, as Rourke (1984: 17) puts it, "an organization is itself a source of expertise, quite apart from the skills that its members initially bring to the job". Through specialisation, that is, "the ability to break down complex problems into manageable tasks," and concentrated attention, that is, "the subsequent skills and knowledge that come with experience" (Ellison 1995: 169), public organisations over time learn to make more effective policies and avoid mistakes or failure (Meier and Bohte, 2006: 64; Levitt and March, 1988; Sabatier, 1988; Haas, 1990; Sabatier and Jenkins-Smith, 1993).

Organisations gain experience in approaching problems and often develop routines in dealing with these problems through trial-and-error experimentation and incremental search (Nelson and Winter, 1982: 99; Cyert and March, 1963; Pentland and Feldman, 2005) or standard operating procedures (Allison, 1971). Past actions that result in effective policies generate acceptance and credibility for the agency, and may even result in changing formal objectives and tasks (Maynard-Moody, 1989: 141; Waterman and Meier, 1998). Apart from their informational capacity, demonstrated competence to solve complex problems in a particular field or sector can therefore also help agencies to achieve greater autonomy vis-à-vis external actors (Sapolsky, 1972: 42; Khademian, 1996; Carpenter, 2001).

Bureaucratic agencies can only have influence if they manage to persuade politicians through knowledge. This means that, in the case of multiple and competing principals, pure information asymmetries rarely exist because agencies have an incentive to liaise with those principals closest to their own preferences and interests (Waterman and Meier, 1998: 180) (see also below).

*A dominant profession* Public organisations are shaped by the professionals that inhabit them and the networks of which they are members (Mosher, 1968; Rourke, 1984; Wilson, 1989; Eisner and Meier, 1990; Eisner, 1991; Golden, 2000; Meier and Bohte, 2006). Professionals have specialised knowledge and recognised competences. On the basis of their expertise and skills they claim authority in a certain area or field (see e.g. Abbott, 1988; Brint, 1994; Freidson, 1994). Therefore they are allowed to perform tasks with a certain level of autonomy from outside interference (Rourke, 1984: 18). In turn, because professionals share normative standards and cognitive beliefs derived from their professional community, they have incentives to defy outside interference (Moe, 1987: 2). A high percentage of professionals, especially if they occupy key decision-making or management positions, thus increases the ability of an agency to achieve a degree of autonomy (Meier and Bohte, 2006: 65).

Not all occupations are professions, and not all professions are held in high esteem (Wilson, 1980; Meier and Bohte, 2006: 65). For example, natural scientists are usually trusted more than lawyers and social scientists. The more prestige a profession has, the more those professionals are allowed to regulate their own affairs and the more room they are usually given for manoeuvre in the policy-making process (Meier and Bohte, 2006: 65; Hargrove and Glidewell, 1990). Moreover, not all professional knowledge helps agencies achieve autonomy, as there are differences in the extent of technical obscurity of the knowledge (Meier and Bohte, 2006: 66; Rourke, 1984). The more obscure the knowledge in terms of how it is generated and presented, the less laypersons will be able to master it, the more autonomy professionals will have.

For the purpose of this research, transnational networks of knowledge-based professionals, so-called “epistemic communities”, are of particular interest. These communities play an important role in generating authority, reputation and credibility on the basis of their expertise (Haas, 1992; Barnett and Finnemore, 1999; 2004; Slaughter, 2004; Djelic and Sahlin-Andersson, 2006). Supranational organisations often are not more (and not less) than secretariats. They enable these communities of experts to act beyond national borders in more or less formally coordinated networks, thereby in some cases bypassing the central government hierarchy (Dehousse, 1997; Egeberg, 2006).

### *Cohesion*

The second condition for the formation of a distinct organisational identity is the level of cohesion. The term cohesion refers to “the strength of the ties between individual elements of a system and the system as a whole” (Boin, 1998: 72). In the literature on public organisations, cohesion is often equated with the sense of belonging or the *esprit de corps* that an organisation’s staff displays and that integrates their different behaviours (Rourke, 1984; Clarke and McCool, 1985: 8, as referred to in Ellison, 1995: 175; Meier and Bohte, 2006: 67-70).<sup>17</sup> Cohesion enhances the development of a distinct organisational identity in two related ways: (1) through the commitment of staff, and (2) through shared values and ideas.

*Commitment* A high level of commitment or loyalty to the organisation, very much depends on the creation of a persuasive ideology, a strong “sense of mission”, or a clear view of what the organisation’s “essence” is, or at least that is claimed (Wilson, 1978: 13-15; 1989: 25-26; Halperin 1974: 28, 51; Rourke, 1984: 106-107; Selznick, 1957; Romzek, 1990: 377; Peters, 2001: 222). “An organizational ideology serves as a perceptual screen on the outside world and ties the members closely to the organization and its goals” (Meier and Bohte, 2006: 70). Hargrove and Glidewell (1990) refer to the “agency myth” or the long-term idealistic goal of an organisation. Notably organisations with a ‘normative’ or ‘utilitarian’ character, such as humanitarian or environmental agencies, are able to generate zeal for their functions from their employees, despite the often meagre remuneration they receive (Rourke, 1984: 103-104; Etzioni, 1961). For organisations that do not have very appealing functions, even an effective public relations department is insufficient (Rourke, 1984: 107; Meier and Bohte, 2006: 70; but see Boin, 1998).

According to Selznick (1957; 1992), the best time to achieve a sense of mission is when the organisation is in its early years. He posits that in the early years – during what he calls periods of incubation and maturation – isolation of the organisation from its environment is necessary to instil the organisation with value. Once this has happened, the level of isolation may be modified. However, “[t]he more readily subject to

outside pressure a given value is, the more necessary is this isolation" (Selznick, 1957: 127). When an organisation has a highly technical or scientific function, organisational isolation is less necessary. By the nature of its tasks, the organisation already has a large degree of isolation from other actors.

Organisations have a tendency to move from an initial stage characterised by enthusiasm and energy to a subsequent stage "when the organization becomes routine and gradually loses a good deal of its original *élan*" (Rourke, 1984: 105). The assumption is that staff recruited in the early years must be enthusiastic for the organisation's tasks and full of energy to attain its goals, because they do not know whether the organisation will become (perceived as) a success or not. Furthermore, the amount of staff organisations start off with is usually small, meaning most employees will know each other and can maintain personal relations (*cf.* Greiner, 1972; Kimberly, 1980; Quinn and Cameron, 1983). When the organisation grows in size and becomes increasingly 'impersonal', the enthusiasm and energy of the early years disappears and staff motivation decreases.

It is often implicitly assumed that organisations operating at the international level are characterised by a high level of commitment from their staff members. In order to be hired by a supranational organisation, individuals face extensive competition and go through lengthy recruitment procedures. And once employed, they have to move to a foreign country, away from family and friends. Hence, they must be committed. According to Strange (1998: 216), however, international officials, with rare exceptions, are not much different from any other kind of employee:

Their first concern is with their jobs – comparatively well paid and lightly taxed, comfortably housed and well served by their administrative service staff. As with people in business or universities or schools, the institutional interest comes second to the personal one: self-serving choices get preference over self-sacrificing ones.

Specifically, the commitment of civil servants working for supranational organisations (or rather, the lack thereof) can be explained by the distinction made between 'cosmopolitans' and 'locals' in the sociology of professions (Merton, 1957; Gouldner, 1958; *cf.* Majone, 2000). The organisation's staff, the cosmopolitans, typically is not so loyal to its institutional interests, whereas they are highly committed to the rules, criteria and standards of the transnational professional group to which they belong. Officials working for national agencies but seconded to the supranational organisation, the locals, may be loyal to the institutional interests of their national agencies, but not the supranational ones with which they are temporarily employed.

Cultivating a distinct loyalty to the organisation (especially when the organisation is characterised by a high level of heterogeneity/diversity among its staff) by introducing career development and permanent contracts may serve as a means of shifting staff's loyalty to the supranational organisation (instead of to their professional group or their national jurisdiction) and thus enhance the agency's autonomy.

*Shared values* A key component of a cohesive organisation is the shared values held by individuals in the organisation. As Meier and Bohte (2006: 68) put it: "Cohesion is a direct product of shared values". In organisations with a high level of cohesion, a common way of thinking about the critical tasks of the organisation is accompanied by a common way of working (Wilson, 1989). Organisations can build and maintain a level of consensus in at least three ways: (a) by recruiting new employees who already hold appropriate values, (b) socialising employees once they have been recruited, and (c)

creating rules and procedures by which decisions have to be made that incorporate certain values.

When individuals enter an organisation, they usually bring with them particular values and ideas, affected by their prior work experience and their training and education. In other words, they are 'pre-socialised'. This pre-socialisation shapes their interpretation of required tasks. Consequently, "[w]hen a government agency is created, it is not assembled out of people who are blank slates on which the organization can write at will" (Wilson, 1989: 55-56; Simon *et al.*, 1950: 77-78; Aldrich, 1999; Schein, 2004). The influence of previous work experience and training and education is particularly strong if a new agency has ambiguous goals and if its tasks are not precisely defined (Wilson, 1989: 70).

In order to avoid that an organisation drifts from their ideas, the organisation's principals often try to influence the selection of the first officials (Etzioni, 1965: 655-658; Peters, 1999). Consensus on the organisation's tasks is increased, and therewith the organisation's cohesion, when new staff is recruited whose professional values are similar to staff members already employed with the organisation (Kaufman, 1960). Apart from intentionally recruiting individuals with the appropriate values, shared values may be the unintentional result of individuals only applying for positions with organisations that match the values they hold. That is, many employees are 'self-selected'. Selection and recruitment thus strengthens the distinct character of an organisation, be it intentional or unintentional (Carpenter, 2001: 25-27; Simon *et al.*, 1950: 79).

In addition, shared values emerge from educational and training systems through which employees learn distinctive ways of thinking (Wilson, 1989). These educational and training systems can be highly effective in transferring not only technical knowledge but also normative patterns, i.e. values and norms on how to go about their job. Employees begin to share learning experiences through which an organisational culture develops (Schein, 1996; 2004; Frost *et al.*, 1985). In *The Forest Ranger*, Kaufman (1960: 175-176) shows how in the US Forest Service new employees are carefully inculcated with the norms of the profession. As a result, they develop a close identification with the organisation, even if they work away from the central office. Socialisation or inculcation thus increases consensus by shifting the values and norms of new members to that of the current staff (Merton, 1957: 287-293; Selznick, 1957; DiMaggio and Powell, 1983; 1991).

Socialisation of staff thus increases cohesion which, in turn, sets an organisation apart from its environment (Carpenter 2001: 26). It helps when individuals meet regularly and there is high density of interaction among them, for example, because they simultaneously operate in only one place, and when the conditions under which they operate are relatively stable, for instance, because they are not directly exposed to political pressure (Checkel, 2003; Lewis, 2005). Also important for cohesion is the nature and scope of the functions assigned to an organisation: the more narrow the scope, the less variety, the more clearly defined, the simpler, and the less divisible the functions, the more likely consensus will develop among employees (Downs, 1967).

Shared values, finally, depend on the internal decision-making structures of an organisation (Simon, 1997: 283-285). Most organisations establish rules and standard operating procedures that shape the individual's decisions, as a result of which the organisation may increasingly reflect a common set of values.<sup>18</sup> Professionals are a particularly character-shaping force through their influence on "the way decisionmaking procedures are structured, the criteria used for decisionmaking, the priorities given to particular matters, and the criteria for advancement and evaluations of performance

within the agency" (Khademian, 1996: 124; Kaufman, 1960; Rourke, 1984; Wilson, 1989; Golden, 2000). Organisations dominated by a single profession from their inception, e.g. economists, lawyers, or doctors, thus have less difficulty in developing shared values.

Even if dominated by a single profession, supranational organisations by their very nature have difficulty in fostering shared values; for a characteristic feature of organisations operating at the supranational level is that they are staffed with employees from different national and cultural backgrounds. Researchers have often argued that at the international level (or European level for that matter), such national and cultural ties would dominate over, for instance, professional backgrounds or organisational affiliations (but see Suvarierol, 2008). For a level of cohesion to emerge, however, international officials do not have to change their identification completely, that is, they can still be affiliated with their national governments, but their identification has to be extended with an affiliation to the organisation: they have to develop multiple identities (Cox, 1969: 215; Egeberg, 2004; Trondal *et al.*, 2005).

Nor does a level of cohesion require homogenisation of the interests of international officials. Instead, there may be contradictions and differences among staff, which, however, are necessary to keep up energy and excitement and thus to be cohesive as an organisation (Zabusky, 1995; 2000).

### 3.5 Specific determinants of institutionalisation: acquiring a substantial level of organisational legitimacy

Most organisations begin with at least a minimal level of legitimacy, or else they would not have been created (Wilson, 1989). But some organisations acquire higher levels of legitimacy than others. Their goals and policies are not questioned; their existence is taken for granted (Clark and Wilson, 1961: 157; DiMaggio and Powell, 1991; Jepperson, 1991: 152; Meyer and Scott, 1983). They are not only accepted for their objectives and the means to accomplish these objectives, but they are *themselves* considered appropriate within the cultural system and normative framework in which they operate (Suchman, 1995: 574; *cf.* Simon *et al.*, 1950: 268; Khademian, 1996: 86).

Legitimacy refers to both the internal organisation and the broader context in which the organisation is embedded. A highly autonomous organisation is considered legitimate by its employees (displayed by the level of their commitment and the extent to which they share the same values, as proposed above), as well as political superiors, other organisations in the field, organised interests and the media (Carpenter, 2001: 4; Randall, 2006). That is, it has "a minimum of political constraints imposed" and "few or no bureaucratic rivals" (Wilson, 1989: 182). Like a distinct organisational identity, a substantial level of legitimacy therefore adds to organisational autonomy.<sup>19</sup>

Although legitimacy implies a widespread perception or assumption of appropriateness, a legitimate organisation does not have to be accepted as appropriate by everyone all the time. They will always be contested by some people or groups affected by the goals and policies, especially so when the organisation's environment is made up of a variety of actors with different preferences and interests, which is common among public organisations. Public organisations thus depend on the relative balance of opposition to both (1) political and (2) public support (Ellison, 1995: 172; Meier and Bohte, 2006: 53).

### Political support

Public organisations depend on governmental actors, including (1) their political principals and (2) other bureaucratic agencies, not only for material (such as money and manpower) but also for immaterial resources (such as legal authority or credibility) (Rourke, 1984: 66; Ellison, 1995: 172; Meier and Bohte, 2006: 61-63).

*Political principals* A prime source of support is the support public organisations receive from their political principals, including legislative actors and elected or appointed executives. Agencies rely on legislative actors for budget appropriations, or, whenever they generate their own funding, for the approval to implement their budgets. As financial resources are usually scarce, organisations seek to cultivate the support of legislative actors, in particular the chairpersons of parliamentary committees that control the organisation's resources (Ellison, 1995: 172; Wilson, 1978; Rourke, 1984).<sup>20</sup> They will especially need to cultivate the support of legislative actors when they do not enjoy strong public support (see below). By contrast, when organisations benefit from strong public support, they can put pressure on legislative actors through these outside groups to increase their financial resources (Rourke, 1984: 68-69; Carpenter, 2001).

Apart from financial appropriations, legislative actors invest the organisation with powers to perform its tasks. Some organisations depend more on formal authority than others. An important factor here is the types of tasks delegated to organisations. Organisations that by the nature of their tasks do not generate much support from their clients rely on the formal powers they have been bestowed with to command compliance with their policies (Rourke, 1984). Moreover, legislative committees must often authorise the organisation's policies and programmes before they can be implemented. By deciding on an organisation's formal tasks, the powers to perform those tasks and the implementation of policies and programmes, legislative actors have an important impact on the scope of an organisation's autonomy.

Indeed, the type of task that agencies perform has an effect on the support of political principals (Wilson, 1989: 158-171). Agencies that perform tasks with tangible and measurable outputs such as the tax office or a food inspection agency usually find it easier to become accepted than agencies that have unobservable and indeterminate outputs, such as a human rights agency or the diplomatic service (Rourke, 1984; Majone, 1996; Pollitt *et al.*, 2004; Meier and Bohte, 2006: 67). Furthermore, politicians' interest in agencies' work depends on the political salience of the agencies' tasks ('t Hart *et al.*, 2002). Most agencies do not perform tasks that can cause politicians to win or lose elections. It is often only when agencies become involved in an incident or crisis for which politicians may be held responsible, that they become interested (Hood, 2002; Boin *et al.*, 2005; Ansell and Vogel, 2006).

The level of political support depends on more than just an agency's tasks. For a newborn agency it is usually relatively easy to acquire support from its political parents, especially if they were the individuals and groups promoting the creation of the agency (*cf.* DiMaggio 1988: 14). But relations may change over time, with members of parliament being replaced, executives leaving office, or with shifts in public attention resulting in the agency's creators to change their attitude (Wilson, 1980: 389; 1989: 67; Moe, 1984: 767). Once founded, organisations therefore must gain (and maintain) support from their political principals. I distinguish three different ways by which they can do so: (1) differentiation from other organisations, (2) moderation towards their political parents, and (3) balancing the demands and wishes of their principals.

Agencies can create a basis of support by demonstrating that they are uniquely capable of providing acceptable solutions to pressing problems (Carpenter, 2001: 4). This

strategy has been referred to as differentiation, that is, “the attempts of organizations to establish unchallengeable claims on valued resources by distinguishing their own products or programs from those of their competitors” (Sapolsky, 1972: 43; 1968: 355-376). Public organisations want their principals to believe that no other organisation can deliver the policies and run the programs as well as they do. They seek to avoid competition from other agencies by creating a unique organisational identity.

Bureaucratic reputation is an important factor in this regard (Rourke, 1984; Wilson, 1989; Carpenter, 2001; Whitford, 2002a; Krause and Douglas, 2005). As Sapolsky (1972: 42) points out in his study of the Polaris programme for the development of fleet ballistic missile submarines, “[o]fficial priority designations alone would not be sufficient to gain necessary organizational autonomy. Proponents of the program recognised that the power of priorities lay in reputation rather than use.” Carpenter (2001: 124-131) found that a reputation for effectiveness granted the US Post Office considerable autonomy over the mail and parcel delivery system. Through the reputation of an agency, politicians can observe and judge whether the agency is competent and whether it deserves their support (Moe, 1984: 767).

Organisations that perform tasks that “depart from expected patterns and established models” have difficulty gaining support (Suchman, 1995: 91; Aldrich and Fiol, 1994; Lounsbury and Glynn, 2001). Many (if not most) organisations are not built from scratch: they are based on earlier organisations, spring from mergers or incorporate lessons learned from comparable contexts (Thelen, 1999; 2003; Pierson, 2000a; 2000b; 2004; Thatcher and Stone Sweet, 2002; Mahoney and Ruesschemeyer, 2003). Yet, sometimes a novel problem occurs (as with biotechnology, climate change or transboundary crime) that requires an ‘untested solution’ in the form of a truly new kind of organisation (’t Hart, 2004). Truly new organisations are not only new, and thus have a higher risk of failure than older ones – referred to as the “liability of newness” (Stinchcombe, 1965: 148; but see Fichman and Levinthal, 1991) – they are also different, and thus regarded with more reluctance by political principals (*cf.* Kimberly, 1980).

In the early stages of an organisation’s life, a minimal level of isolation (as was already pointed out above) may be a necessary condition to work out a distinct organisational identity (Selznick, 1957). Some public organisations thus try to establish a position of “virtually complete autonomy within the executive branch”, indeed even coming to regard themselves as “being a law unto themselves” (Rourke, 1984: 72-73). However, an organisation’s efforts at differentiation can, once matured, alienate it from its environment and may thus come at serious cost for its long-term support. In the case of the Polaris program, Sapolsky (1972: 47) for instance argues that “[t]his isolation from the mainstream naval activities has at times prevented senior naval officers from defending the program because they either lacked the knowledge or the will to do so”.

To ensure long-term support, instead of short-term gains, organisations may follow what Sapolsky (1972: 54-55) refers to as a strategy of moderation, that is, tempering forcible demonstrations of organisational autonomy by adopting a restrained approach towards other actors in their environments.<sup>21</sup> Most public organisations occupy a middle position. They realise that it is important to maintain good relations with their ‘parent’ department, that is, the department from which they originate or under which they are institutionally placed, because they rely on them for the means to perform their critical tasks (Gains, 2003). Their parent departments often approve budget allocations and staff deployment, and initiate legislative proposals bearing on the work of agencies.

But bureaucratic organisations usually have multiple principals with diverging stakes and different perceptions (Waterman and Meier, 1998). “Each principal is effectively in competition with the others in his efforts to exert control, while the bureau, on

the receiving end of all this, finds it must contend with uncoordinated and often conflicting demands, requirements and incentives" (Moe, 1984: 768; 1987; Wood and Waterman, 1991; 1994; Woolley, 1993; Hammond and Knott, 1996; Arnold and Whitford, 2005). While these demands, requirements and incentives might pull organisations into different directions, an organisation does not necessarily have to satisfy each actor all the time; it can manage demands (Pfeffer and Salancik, 1978: 96). Indeed, heterogeneous preferences and contradictory and conflictive demands provide the organisation with room to manoeuvre (Wamsley and Zald, 1973; *cf.* Steunenberg, 1996).

A strategy mentioned by Moe (1985; 1989: 283; *cf.* Eisenstadt, 1964) is "to nurture mutually beneficial relationships with groups and politicians whose political support the agency needs." This is most easily done with its initial supporters in the early years of an agency's existence. "Over time, however, the agency will be driven to broaden its support base, and it may move away from some of its creators [...]." Agencies can pay sequential attention to the demands of some principals, thereby developing a level of autonomy from other principals (Dahl and Lindblom, 1953; Cyert and March, 1963; Bryner, 1987; Wilson, 1989: 237). Because their missions are often multi-interpretable and their mandates are generally broad, and therefore can be used to include the often contradictory demands and wishes of a variety of groups, agencies can also play off one principal against the other (Moe, 1987: 482; Woolley, 1993; Ringquist, 1995).<sup>22</sup>

The multiplicity of principals is particularly apparent in case of supranational organisations (Barnett and Finnemore, 1999; 2004; Nielson and Tierney, 2003) and heightened within the EU setting, as the legislative and executive power is separated not only between the Commission, the Council, and the Parliament, but also among the EU institutions and the EU member states (Pollack, 1997; 2003; Tallberg, 2000; 2002; Wilks, 2005). In fact, all these political actors may be considered principals in their own right. Supranational EU organisations as a result are concurrently agents of different EU or national principals that do not necessarily have the same preferences and interests (Dehousse, 2008). As various principals compete over stakes and perceptions, they are less capable of exercising control (even if there are sufficient control mechanisms), which provides the organisation with a certain amount of leeway.

*Other bureaucratic agencies* Other organisations are often considered sources of conflict and rivalry (see Downs, 1967; Niskanen, 1971; *cf.* Rourke, 1984: 77; Peters, 2001: 226-227). Conflict and rivalry can arise when two organisations are pursuing conflicting goals, but especially when they have comparable functions or perform similar tasks and must compete for the same resources and support.<sup>23</sup> Yet, agencies often cannot set policies without taking into account the positions of other agencies; they rely on other agencies for the execution of their programs.<sup>24</sup> Support, then, also has to come from other organisations with executive tasks, and agencies therefore enter into cooperative relations with one another (*cf.* Rainey, 1991; Meier and Bohte, 2006: 62-63).

Close ties among different government organisations are generally assumed to result in a loss of autonomy for at least some of these organisations (Downs, 1967: 198-199; Thompson, 1967; Aldrich, 1976; Pfeffer and Salancik, 1978). Organisations may divert resources to joint activities or may even relinquish formal decision-making power to others. Hence, the type of relationships that organisations establish, varying from informal contacts to formal contracts, is an important factor upon which autonomy is conditional. Or, as Oliver (1991a: 947) postulates, "the degree to which interorganizational relations reduce an organization's autonomy is a function of the type of relationship that an organization establishes."

Moreover, inter-organisational relationship formation is dependent on several conditions (Oliver, 1990). The need for resources is the most obvious reason to establish



connections with other organisations; inter-organisational relationships are also often formed to reduce environmental uncertainty (Thompson, 1967; Aldrich, 1976; Pfeffer and Salancik, 1978). Institutional theorists mention the need to generate legitimacy as an important reason for public organisations to establish ties with other organisations (Meyer and Rowan, 1977; DiMaggio and Powell, 1983). In order to increase their acceptance and credibility, organisations link up with other organisations in conformity with the prevailing rules, norms and beliefs of the institutional environments in which they are embedded.

Public organisations are usually not completely free to establish relationships with just any organisation in their environments. Their possibilities are constrained by formal mandates and legal powers, as well as by external circumstances. Some organisations simply have to link up with others because they depend on them for budgets or personnel (Pfeffer and Salancik, 1978). Often, however, there is some room to manoeuvre with regard to the kind of relationship, the density and nature of the interactions and, sometimes even, the type of actors with which organisations develop connections.

Inter-organisational relationships do not necessarily result in autonomy loss. By being embedded in networks of organisations sharing common or complementary interests, the autonomy of agencies may actually be enhanced. In networks, organisations, though interdependent, are not subordinate to these organisations and remain separate from them (Mayntz, 1993; Rhodes, 1996b; Kickert *et al.*, 1997; Börzel, 1998; *cf.* Peterson, 1995; but see Kassim, 1994; O'Toole and Meier, 2004). They coordinate their actions with other actors, thereby for instance increasing informational capacity, gaining efficiency, reducing risk or increasing their competitive advantage towards yet others, while they, at the same time, protect themselves from interference in their policies and decisions (Chisholm, 1989; Provan and Milward, 1995; 2001; *cf.* Schout and Jordan, 2005; Jordan and Schout, 2006).

Everson *et al.* (1999: 60-61) put forward a number of conditions for the viability of a *transnational* network, including mutual trust among actors (*cf.* Ostrom, 1990), a high level of professionalism, and a common (regulatory) philosophy. Even as these conditions will often not be present from the start of the agency – in fact, in many cases, agencies are created to coordinate the activities of other agencies that do not cooperate because they operate on a different basis and therefore distrust each other –

...the very existence of the network provides an environment favourable to their development. A[n] [...] agency that sees itself as part of a transnational network of institutions pursuing similar objectives and facing analogous problems, rather than as a new and often marginal addition to a huge central bureaucracy, is more motivated to defend its professional standards against external influence, and to co-operate with the other members of the network.

Agencies will be keen to resist political pressures, because continued and future cooperation is rendered more difficult when agencies, instead of grounding their actions on objective and neutral scientific findings and technical data, take politically motivated decisions. By politically motivated behaviour agencies compromise their credibility and, in effect, their legitimacy (Everson, 2001; Shapiro, 1997; Majone, 1996).

### *Public support*

Public organisations further depend on support from (1) the broader public, and “attentive publics” such as (2) their clientele and interest groups, which are “groups that have

a salient interest in the agency" (Rourke, 1984: 50; Ellison, 1995: 173; Meier and Bohte, 2006: 54-61).<sup>25</sup>

*The general public* Few public organisations make the front pages of the newspapers. This certainly applies to international organisations that are often both physically and mentally distanced from the public. What is more, it is difficult to define their public in the first place. Yet, some agencies, including international ones, do reach the headlines. They often do so in the early stages of their life, when the attention for the problems they are supposed to tackle is usually still high, and public support can help them gain popularity and prestige (*cf.* Downs, 1972; Jones and Baumgartner, 2005). In addition, events, such as incidents or crises, may arouse the public's attention. In the wake of a crisis there is often general consensus that something needs to be done to prevent another crisis from happening. Agency leaders may seize the moment to firmly position agencies in their environments (Kingdon, 1995; Boin *et al.*, 2005).

Support from the general public, just like support from politicians, is conditional on the salience of an organisation's tasks. Some organisations perform tasks that are higher valued by the public than others (Ellison, 1995: 175; 't Hart *et al.*, 2002; Ringquist *et al.*, 2003; Pollitt *et al.*, 2004). Such organisations can become the "institutionalized embodiment of policy, [...] enduring organization[s] actually or potentially capable of mobilising power behind policy" (Long, 1949: 205). For example, organisations responsible for visible public values such as national defense or public health usually receive more support than agencies dealing with contested values such as criminal punishment or immeasurable values such as cultural expression. Of course, the saliency of a certain task may change over time and may differ according to the context in which an agency is operating. The saliency of national intelligence agencies' tasks, for instance, significantly increased immediately after the terrorist attacks of September 11.

At the same time, a lack of active public support does not have to mean that an agency is not supported by the public. When an agency's existence is threatened, for example, public support may suddenly become apparent. This suggests that the agency's potential public is often larger than the groups typically linked to the organisation's activities. A sudden expansion in the public that takes an interest in its activities does not necessarily have to be an opportunity for an agency to develop more autonomy. Instead, shifts in public opinion may put agencies under pressure to follow priorities and pursue agendas that are not their own. "Great expectations can thus be as threatening to an agency as public indifference. If these expectations are disappointed, they can quickly be converted into hostility" (Rourke, 1984: 53-54).

*Clientele and organised interests* More important for their autonomy, then, is the support organisations receive from the clientele that they are supposed to serve. Ideally, as Rourke (1984: 102-3) argues, an agency has a clientele that is large, geographically dispersed over the country, well-distributed throughout the different layers of society, and, importantly, carries out activities that are highly valued by society (*cf.* Hargrove and Glidewell, 1990). A clientele consisting of doctors, lawyers or engineers may thus help an agency to gain support for its work. The agency's clientele further has to consist of supporters of the agency that rely on the agency for tangible benefits. The more its clientele relies on the agency, the more autonomy an agency has with respect to its clientele.

Wilson (1980: 367-372) argues that the relationship between agencies and their clientele depends on the distributions of costs and benefits. Agencies concerned with distributive policies have a relatively easy job garnering support, for they provide tangible benefits (Wilson, 1980). The same applies to agencies dealing with "efficiency is-

sues," which have the task "to find a solution capable of improving the conditions of all, or almost all individuals and groups in society" (Majone, 1996: 5; Meier, 1985; Wilson, 1980). Regulatory agencies, however, as they commonly perform complex tasks and operate in conflictive environments, and agencies with redistributive programs, because they aim to improve the conditions of one group at the expense of the other, often experience difficulties in generating acceptance for their work (Lowi, 1972; Wilson, 1980; Meier, 1985; Majone, 1996).

When both costs and benefits are distributed among a large group (e.g. consumers), interest groups are not likely to be very active as there is simply not much to gain for such groups (Olson, 1971; Schattschneider, 1960). There will also be limited involvement of interest groups when benefits are concentrated but costs are distributed. By contrast, when costs are concentrated and benefits distributed, interest groups will be particularly active as there is a strong incentive to organise, particularly for opponents of the agency's policies – that is, those groups bearing the costs (e.g. producers). When both costs and benefits are narrowly concentrated, interest groups will have an incentive to organise around an issue as the costs are usually borne by one group while another group receives the benefits.

The values of clientele and organised interests are "often far from uniform" (Long, 1949: 205-206). Hence, meeting the various expectations and demands of its stakeholders without compromising its independence is difficult for an agency (*cf.* Hargrove and Glidewell, 1990). As a result of "the contradictory nature of their support", organisations frequently act in seemingly conflicting ways and are themselves led in diverging directions (Rourke, 1984: 58). Indeed, there is a risk that the agency may become so dependent on an outside group that this group in some instances may take over the agency. If an agency is too easily influenced by those groups, this may eventually threaten its existence as the agency is only able to move in the direction of this group (Downs, 1967; Moe, 1989).

Regulatory agencies are said to be especially vulnerable to capture, that is, they are often controlled by the very groups that they should be controlling (but see Sabatier, 1975; Wilson, 1980). But also other agencies have a tendency for capture by an outside group when they have single-interest constituencies. Agency capture is especially likely to occur following reliance on a single outside group for information or funding and when an agency has nowhere else to turn when this group terminates its support. Even when agencies do not rely on outside groups for information or funding, they may be required to consult them before adopting policies or making decisions, thus enhancing the influence of external groups (Potoski and Woods, 2001).

Maintaining close relations with interest groups and attending to their demands and wishes, can ensure that the agency's decisions and policies are supported. But public organisations are not entirely dependent on the level of organisation of their clientele. In order to increase autonomy from their principals, agencies may even deliberately set out to organise interest groups (Rourke, 1984: 53). For one thing, interest groups are valuable to agencies as they can take positions that an agency cannot publicly take because taking such positions would lead to conflicts with their political principals. Also, as they are usually not supposed to lobby, agencies may provide information to interest groups that can then lobby with legislative actors for policies or legislation that agencies favour (Rourke, 1984; Carpenter, 2001).

Agencies, in order to gain autonomy, have to strike a balance between maintaining close relations with clientele and organised interests, while at the same time avoiding capture by those stakeholders. As with political actors (see above), agencies can play off one interest group against another, such as industry groups against consumer groups

or economic groups against environmentalist groups (Pfeffer and Salancik, 1978; Oliver, 1991b). Hence, the inclusion of groups with different or opposite interests in the work of the agency may give agencies more leeway to pursue the policies they value highly (Ellison, 1995; but see Peres, 1968).

Moreover, by including the various interests in their decision-making process, organisations can manipulate stakeholders' demands. This strategy to become supported has been referred to as cooptation, that is, "the process of absorbing new elements into the leadership or policy-determining structure of an organization as a means of averting threats to its stability or existence" (Selznick, 1949: 13; Sapolsky, 1972: 47; Rourke, 1984: 59-60). In *TVA and the Grass Roots* (1949), Selznick describes how the leadership of the Tennessee Valley Authority, in struggling to co-opt support from its environment, gave in to the interests of local actors. By co-opting external actors, organisations can both secure the resources they require to perform their tasks and build normative consensus about their objectives (Barnett and Coleman, 2005: 602). Thus, cooptation may mean giving external groups actual power over decisions, therewith sacrificing some of the organisation's formal autonomy in return for support.

Cooptation may also come down to symbolic participation by such groups, and not entail a loss of agency autonomy. Even when external groups have no influence on decisions, the impression that they are participating in the organisation's policies and programmes may make them feel responsible for and thus committed to the outcomes. As a result, external groups will not easily question the organisation's policies and programmes. Inclusion of such outside groups thus adds to the organisational legitimacy (Selznick, 1949: 13-16; Sapolsky, 1972: 47-48).

### 3.6 The relation between organisational identity and organisational legitimacy

In reality, organisations may not only vary with regard to the degree of autonomy they develop, but also with regard to the internal and external dimensions of institutionalisation (or autonomy development). This leads us to the typology displayed in Table 3.1.

In the upper left quadrant, organisations are found that score both high on the extent to which they have developed a distinct organisational identity and legitimacy. They will be referred to as highly institutionalised organisations. In the lower right quadrant, the opposite of a highly institutionalised organisation, the instrumental organisation, is found. Such an organisation has not developed a distinct identity nor has it developed a substantial level of legitimacy from outside actors.

In the upper right quadrant are organisations that have developed a distinct organisational identity, but have not developed a substantial level of legitimacy. Using Williams' (2005) terminology, I call them 'monomaniacs' or agencies pursuing their narrow agendas and specific aims without seeking to involve external actors.<sup>26</sup> "They are coherent internally and are able to solicit fierce loyalty by their members, yet are widely misunderstood and/or criticized by the outside world" ('t Hart, 2004: 3).

Finally, organisations that have not developed a distinct organisational identity, but have developed a substantial level of organisational legitimacy are found in the lower left quadrant. They will be referred to a 'schizophrenics' or agencies seeking broad support without being clear on who they are or what they do. Such organisations "are highly valued by the outside world, but those that live and work within them are confused, frustrated, left without discretion" ('t Hart, 2004: 3).

**Table 3.1** – Typology of an agency's institutionalisation

|                         |             | Organisational legitimacy                   |                                 |
|-------------------------|-------------|---|---------------------------------|
|                         |             | <i>High</i>                                 | <i>Low</i>                      |
| Organisational identity | <i>High</i> | The 'highly institutionalised' organisation | The 'monomaniac' organisation   |
|                         | <i>Low</i>  | The 'schizophrenic' organisation            | The 'instrumental' organisation |

*Source:* based on 't Hart (2004)

The typology helps us to shed light on autonomy development in a number of different ways. First, it can be used to decompose autonomy development, as well as the internal and external dimensions of autonomy development. As we have seen in Section 3.4 and 3.5, organisational identity and legitimacy are multi-dimensional concepts that can be further disaggregated (*cf.* Goertz, 2006). Some organisations may thus 'score' high (or low) on expertise, others on cohesion, while some may score high (or low) on political support, others on public support.<sup>27</sup>

Second, through the use of the typology, one can arrive at explanations of why certain organisations end up in particular boxes. Those organisations selected because of their similarity with regard to certain characteristics or features might end up in different boxes, whereas otherwise incomparable organisations end up in the same box. In the next chapters, the population of EU agencies is classified and a number of cases are selected based on expectations of outcomes.

Third, it can be used to "trace the developmental trajectory of [organisations] through time" ('t Hart, 2004: 4). The distinction between a high and low degree of organisational identity and a high and low degree of organisational legitimacy is analytical. The four types of organisations distinguished are ideal-typical. In reality, they do not exist in such a pure form. More importantly, organisations are likely to go through a process of development over time, which is marked with shifts in their expertise, cohesion, political and public support. As a result, agencies move from one box to another throughout their lives. In Sections 3.4 and 3.5 I have pointed to mechanisms that are likely to drive the development of organisations and the conditions or factors under which these mechanisms operate.

That said, the internal and external dimensions of autonomy development (institutionalisation) are not as distinct as it might appear from the typology. Indeed, the dimensions are closely related. The emergence of an organisation's identity is strongly influenced by its efforts to become accepted and supported by the actors in its environment, while the norms and beliefs that have emerged within the organisation heavily determine the generation of legitimacy. Strandgaard Pedersen and Dobbin (2006: 898) argue that this interrelatedness reflects "a wider social process in which organizations create legitimacy by adopting recognizable forms and create identity by touting their uniqueness." Indeed, in their study of the US Port Authority, Dutton and Dukerich (1991), for instance, show that the negative image stakeholders held of the organisation prompted it to question its identity.

The formation of a distinct organisational identity and the acquisition of a substantial level of legitimacy are thus two sides of the same coin. The norms and beliefs that have developed inside the organisation not only bind its members, but also distinguish the organisation from its environment and provide it with a certain level of autonomy towards outside actors. Internally and externally institutionalised organisations are socially and politically differentiated from their environments. They have their own interests, separate from those of their principals and external stakeholders.

### 3.7 Linking the internal and external dimension: leadership as intervening force

Institutionalisation occurs where the internal dimension is linked with the external dimension. Leaders and leadership play an important role in this process. The role of leaders and leadership in agency behaviour is not uncontested, however.

Some scholars studying agency heads ascribe to them a considerable amount of influence on agency decision making (Barnard, 2002 [1938]; Simon *et al.*, 1950; Selznick, 1957; Wilson, 1989). They point out that “bureau chiefs are independent power centers” (Kaufman, 1981: 3) and that “the leadership of an agency is the most frequent mechanism for changing agency behavior” (Wood and Waterman, 1991: 822), or portray bureaucratic leaders that did not only have a lasting impact on the agencies they headed, but also changed the broader politico-administrative landscape (Doig and Hargrove, 1987; Hargrove, 1987; Meier, 1989; Boin, 2001).

Other students of public administration question the potential of leaders’ impact on an agency’s behaviour in the face of a variety of political, legal, administrative and social constraints. They suggest that no one individual can make a difference in the administrative development of an agency or organisation, let alone influence its success.<sup>28</sup> The bureaucracy is simply too large and the environment too constraining for individuals to have an impact.<sup>29</sup> Kaufman (1981: 135) admits that the federal bureau chiefs:

...for all the power and independence attributed to their office and for all their striving, could not make a big difference in what their organizations did during they period in which they served. The chiefs were not as powerful or autonomous as they are sometimes alleged to be. [They] make their marks in inches not miles.

Also in IR and European integration studies the role of leaders and leadership is subject to continuing controversy. As the focus is often on collective entities such as states, and, to a lesser extent, international organisations and non-governmental organisations, “the possibility that the executive head may be the explanatory key to the emergence of a new kind of autonomous actor in the international system” (Cox, 1969: 206; see also Haas, 1964) has not been explored in depth.

Some scholars have tried to bring the role of leaders and leadership back into the development of international institutions (Young, 1991; 1999), but most have remained sceptical, arguing that international organisations are merely instruments of states and that the potential for individuals to wield influence is limited, also (or perhaps, particularly so) in the EU (Moravcsik, 1999). Organisational leaders are considered to be technocratic administrators who at the organisation level implement decisions made at the system level by politicians after arduous deliberations and intense negotiations. Supranational organisations and their leadership merely provide the specialised and technical knowledge on which basis political decisions are made.

Furthermore, some organisational analysts argue that, even when the leadership of national or supranational organisations would matter in the birth stage, the role of leaders is reduced at different sequences in the life cycle of an organisation: "As an organization matures, develops norms, and acquires a history and identity, the importance of the person at the top diminishes in explaining organizational outcomes" (Kimberly, 1980: 27). Others contend that leaders still have important tasks to fulfil but that these tasks vary over time. The task of a founding leader is "an exercise in the creation of meaning" whereas successive leaders "must be good at the institutionalization of myth" (Hargrove, 1994: 281; Hargrove and Glidewell, 1990). Moreover, whereas individual leaders perhaps become less important over time, the execution of leadership tasks by other organisational members than the agency head remains essential for the survival and growth of the organisation (Selznick, 1957; Boin, 2001).

Leadership as it is referred to here therefore does not concern the "personal traits or management styles" of individuals in a certain position or function. It rather refers to certain behaviours these individuals display or activities they undertake (Boin, 2001: 24; Selznick, 1957). So leadership is not simple the formal power that comes with a certain position. "It is the persuasion of individuals and innovativeness in ideas and decision-making that differentiates leadership from the sheer possession of power" (Hall, 1996: 141). Even though leadership may be a crucial factor in achieving agency autonomy, leadership is essentially situational. Not in all circumstances or situations do the behaviours displayed by leaders enhance the development of autonomy (Hall, 1996; Terry, 2002; Meier and Bohte, 2006: 70).

Furthermore, leadership has to be distinguished from mere management. Managers are responsible for the day-to-day operations of the organisation. They coordinate staff policy, implement the budget, and make routine administrative decisions. Using Gulick's (1937) words that form the well-known POSDCORB acronym: they plan, organise, staff, direct, coordinate, report and budget. Leaders, by contrast, build and maintain the organisation, shaping its identity and promoting its legitimacy (Wilson, 1978; 1989: 217; Selznick, 1957; Rourke, 1984; Terry, 2002).

Organisational leaders can shape the identity of the organisation and promote its legitimacy among actors in its environment in two ways: (1) by creating and sustaining a strong organisational culture (Schein, 2004; DiIulio, 1994) and (2) by managing environmental dependencies (Selznick, 1957; Pfeffer and Salancik, 1978).

### *Internal leadership*

When a new organisation is created, its leaders become responsible for instilling it with value (Selznick, 1957: 121-122). They have to monitor and facilitate the process of organisational interaction by which specific norms, routines and practices emerge. Moreover, under conditions of formal autonomy, leaders can actively shape this process in two ways (Boin and Christensen, 2008; *cf.* Finnemore and Sikkink, 1998): by selecting and codifying emerging norms, routines and practices, and by sustaining embedded norms, routines and practices.

To promote and uphold embedded norms, routines and practices, organisational leaders must adopt specific measures, such as selective recruiting and specialised training (Selznick, 1957; Kaufman, 1960). Leaders can teach their beliefs and values to new members of the organisation. To that end, they may use orientation programs, procedure manuals, and observation of the norms, practices, and routines. If beliefs and values prove successful, that is, if they demonstrate their effectiveness when it comes to

the formation of an organisational identity, they will be transformed into taken-for-granted assumptions (Schein, 2004).

Leaders must further be aware of the needs of employees and meet these needs through social, moral and symbolic incentives (DiIulio, 1994). Meeting employees' needs will enhance their loyalty and commitment to the organisation. As Barnard (2002 [1938]: 169) notes:

The zone of indifference [that is, the group of orders that is unquestionably acceptable to employees] will be wider or narrower depending upon the degree to which the inducements exceed the burdens and sacrifices which determine the individual's adhesion to the organization.

Moreover, they must spur innovation in both managerial techniques and policy and programs. By introducing "managerial techniques that appear to indicate unique managerial competence", agency leaders may seek (and gain) a reputation as an innovative organisation (Sapolsky, 1972: 58). Through innovation, agency leaders may establish their agencies as uniquely capable of providing a certain product or service (Doig and Hargrove, 1987; Wilson, 1989; Carpenter, 2001).

### *External leadership*

In addition to interaction processes within the organisation, institutional development results from the organisation's adaptation to the external environment. Leaders play a pivotal role in this process by defending the organisation's integrity (Selznick, 1957: 62-62). They must take into account the pressures from a continuously changing environment, but without endangering the special values and distinctive competence they helped build into the organisation (Boin and Christensen, 2008). They cannot only depend on the support of politicians for their survival, because this would make them vulnerable to restrictions and control, while, they, at the same time, must not merely rely on the support of their main clients, as this makes them seem captured (Rourke, 1984: 109). Effective leaders hence,

...are often experts in their own right and have a well developed understanding of their agency's critical tasks. They understand how to communicate internal needs to rivals and allies in the external political environment and how to avoid new tasks that could impair the agency's ability to perform its mission (Ellison, 1995: 178; see also Long, 1949; Stinchcombe, 1968; Wilson, 1978).

Being part of networks is crucial to managing external dependencies. The leaders of agencies have to liaise with other actors, both political and social and both inside and outside government. According to Carpenter (2001: 32), bureaucratic leaders should hold numerous and varied ties through which they can ground their agency's reputation: "The broader [the] embedment [in society], the more legitimate the agency appears". In order to be less dependent on one particular group, they have to build coalitions with multiple and diverse actors and create and maintain networks of political and societal support. This also holds true for supranational agencies (Sandholtz and Stone Sweet, 1998: 16).

Moreover, an agency's leadership must establish a reputation for regulatory, informational, or coordinative capacity among the actors part of its network (Carpenter, 2001: 32-33). While this reputation first of all has to be based on the actual expertise they harbour, they also have to make use of impression management, that is, "the abil-



ity to convey to others a sense of their own capacities”, persuading political principals and external stakeholders that they should continue supporting and sustaining the organisation (Rourke, 1984: 112). To be sure, the higher the hierarchical levels of an organisation, the more administrators are concerned with such tasks as public relations (Rourke, 1984: 113; Simon, 1997).

Often leaders operate behind the scenes, in informal networks, but sometimes their job implies attracting public attention by presenting themselves and their agencies as commanding the expertise necessary to deal with the problems the public in general and organised interests in particular regard as important (*cf.* Randall, 2006). Even agencies with tasks that are not very salient may attract public attention when their leaders are capable of selling their agency to the public (usually by making use of the media). Especially in times of crisis, leaders may publicly exploit the situation to augment the autonomy of the agency (Boin *et al.*, 2005).

Effective leaders are thus able to develop an image of what the organisation values highly and how it seeks to attain this. Such an image not only influences outsiders. It also imparts consensus among inside staff and officials on what the organisation stands for and its aspirations (Downs, 1967: 237-246).

### 3.8 Conclusion: a process model of autonomy development

The model elaborated in this chapter is depicted in Figure 3.1. Summarising the findings of existing research and integrating them into one framework, the model seeks to provide clarity on how the *process* by which (supranational) organisations develop a certain level of autonomy can be conceived. It guides the empirical investigation of EU agencies (where and what to look for) and, as such, helps to explain (the variation in) EU agency autonomy.

It is proposed that the development of EU agency autonomy is a function of processes of institutionalisation at both the system and the organisational level. Institutionalisation at the system-level, that is, the creation and design of formally autonomous EU agencies, may be the result of functional spill-overs, it may be a by-product of inter-institutional politics, and/or it may reflect institutional fads and legacies.

Institutionalisation at the organisational level is brought about by the formation of a distinct organisational identity and the acquisition of organisational legitimacy. The model helps to explain how a distinct organisational identity emerges as a result of an organisation’s ability to control information that its political superiors and clients and stakeholders do not have. It also shows how an organisation’s cohesion differentiates it from its environment. Further, it helps to explain how an organisation comes to be considered legitimate by EU institutions, EU member states, clients and stakeholders. It demonstrates how the environment provides both specific and diffuse support for the organisation and its activities.

Significantly, some EU agencies do not develop a degree of autonomy, I suggest, because the individuals inhabiting those agencies “conspire” to bureaucratisise European life (*cf.* Meier and Bohte, 2006: 74). Instead, they develop in response to environmental pressures and demands. Those agencies that have the internal characteristics and capacities to take advantage of a conducive environment can become, of course within certain boundaries, relatively autonomous entities. Autonomy development is not only about undirected evolutionary processes. Agency leadership, especially in the early years, is necessary (not sufficient) to manage environmental dependencies and exploit environmental opportunities as well as to facilitate internal capabilities.

The chapter identified a number of the mechanisms that may be at play in the different phases of the institutionalisation process and specified the different conditions under which these mechanisms are likely to operate. Accounts of autonomy development thus stress both the role played by contextual factors and human actors. On their own these factors and conditions do not provide sufficient explanations for the process of institutionalisation and the development of autonomy, but in conjunction, I put forward, they do.

## Notes

<sup>1</sup> See for an overview of the debate between 'old' and 'new' institutionalism and attempts to build bridges between the two, Powell and DiMaggio (1991), Greenwood and Hinings (1996), Selznick (1996), Hirsch and Lounsbury (1997) and Stinchcombe (1997).

<sup>2</sup> See for an overview of these approaches in general, Hall and Taylor (1996), Immergut (1998), and Peters (1999), and in relation to the EU, Bulmer (1994; 1998), Pollack (1996), Aspinwall and Schneider (2000) and Jupille *et al.* (2003).

<sup>3</sup> Institutionalisation is not an irreversible process; organisations can de-institutionalise (Oliver, 1992; Scott, 2001). Whereas institutionalisation is often seen as a linear process, it can thus better be considered a dynamic process, not necessarily going in a particular direction.

<sup>4</sup> In that sense, the process of institutionalisation may well increase the chances of survival of an organisation. Organisations that manage to achieve at least a minimal level of autonomy have secured political and societal support and are thus able to survive; organisations that do not succeed in achieving a minimal level of autonomy apparently lack that support and are bound to perish (Clark and Wilson, 1961: 157; Wilson, 1989: 181; *cf.* Kaufman, 1976; Boin *et al.*, 2010).

<sup>5</sup> Nor that institutionalised organisations (eventually) do not fail.

<sup>6</sup> In exceptional cases, organisations may even re-negotiate the terms of formal relationships with actors in their environments.

<sup>7</sup> This has been referred to as 'mutual constitution'. See, for instance, Giddens (1984), Sewell (1992), Holm (1995), Ruggie (1998), Wendt (1999), Johnston (2001) and Seo and Creed (2002).

<sup>8</sup> The discussion draws heavily on Rourke (1984) and the adaptations and refinements of his model by Meier (1980), Ellison (1995) and Meier and Bohte (2006).

<sup>9</sup> The legitimacy imperative seems especially critical for supranational EU organisations. As they lack the legitimacy that is traditionally conferred upon states through their voters, they may look at their environments for successful examples of institutional arrangements or structures (*cf.* Majone, 1996; Scharpf, 1999; Thatcher and Stone Sweet, 2002).

<sup>10</sup> Following Albert and Whetten (1985: 116-117), the terms identity, character and culture will be used interchangeably, even though identity and character are typically used for individuals and the term culture for societies.

<sup>11</sup> But see Khademan (1996) who argues the other way around: through autonomy organisational character is built. In essence, however, her argument is not much different from the argument employed here. Autonomy and organisational character are mutually reinforcing: (formal) autonomy, in turn, is a condition for character formation (Selznick, 1957), and character formation, in turn, leads to actual autonomy.

<sup>12</sup> Organisational crises, in turn, put the spotlights on an organisation's identity and may force it to examine and rethink its identity (Boin and 't Hart, 2000).

<sup>13</sup> The individuals that have to implement the provisions of the constituent document are usually not the same as those that have worked to negotiate the agreement on the creation of the organisation.

<sup>14</sup> Indeed, one of the main objectives of 'externalising' public organisations, i.e. placing them at arm's length of central government institutions, has often been to change their organisational cultures from bureaucratic to more entrepreneurial ones (see for instance Hakvoort en Veen-swijk, 1998).

<sup>15</sup> Khademian (1996), following Selznick (1957: 40), calls these norms “organizational commitments”. Organisations develop a character “through the elaboration of commitments – ways of acting and responding that can be changed, if at all, only at the risk of severe internal crisis”.

<sup>16</sup> Meier and Bohte (2006: 65) designate this condition as knowledge rather than expertise, as they argue that possession of information is the condition and not possession of information as the result of professionalisation. I follow Rourke (1984) and the refinement made by Ellison (1995) and designate the condition expertise while at the same time distinguishing two aspects of the concept: control over information and possession of a dominant profession.

<sup>17</sup> Rourke (1984) designates this condition as organisational vitality. I follow Meier en Bohte (2006) who refer to this condition as cohesion.

<sup>18</sup> In some instances, rules and procedures are imposed on organisations by their creators (see Chapter 2)

<sup>19</sup> In the literature, a distinction is made between two forms of legitimacy: input and output legitimacy (Scharpf, 1999). Input legitimacy hinges on procedural features such as the fact that the organisation is created by a democratically enacted statute that defines its legal authority and objectives; that agency heads are appointed by elected officials; and that agency decision making includes all relevant parties and follows rules and procedures that are open to judicial review. Output legitimacy, by contrast, is based on more substantive aspects such as an organisation’s policy consistency, independent expertise, and problem-solving capacity (Majone, 1996: 291-292).

<sup>20</sup> There is a difference between committees concerned with substantive policies and legislation, and those with the budget. The former committees usually want to see the agency perform its tasks and will most of the time support budget increases in order to see that the agency has adequate resources to do so; the latter is not primarily interested in the area of the agencies’ responsibilities but more led by cost reduction and efficiency arguments (Meier and Bohte, 2006: 61; Fenno, 1966; Seidman, 1998).

<sup>21</sup> Although certain objectives may be easily realised in terms of capacities and resources, organisations can decide not to obtain these objectives in their early years because their realisation might lead to unnecessary hostility in their environments that would be harmful at a later stage.

<sup>22</sup> In spite of the increased possibilities for autonomy in case of multiple principals, organisations are often left with little choice but to collaborate with those principals that share their policy goals, attempting to build a coalition in favour of their own preferences and interests (Waterman and Meier, 1998: 180).

<sup>23</sup> Politicians often prefer to have multiple agencies providing them with information than only one, as a certain overlap, or level of redundancy, usually increases the degree of reliability of information (Landau, 1969; Bendor, 1985; Heimann, 1997). From an efficiency point of view, however, overlap and redundancies are often considered to be undesirable.

<sup>24</sup> Clearly, support from other agencies is especially important if agencies have a clientele that consists of other agencies.

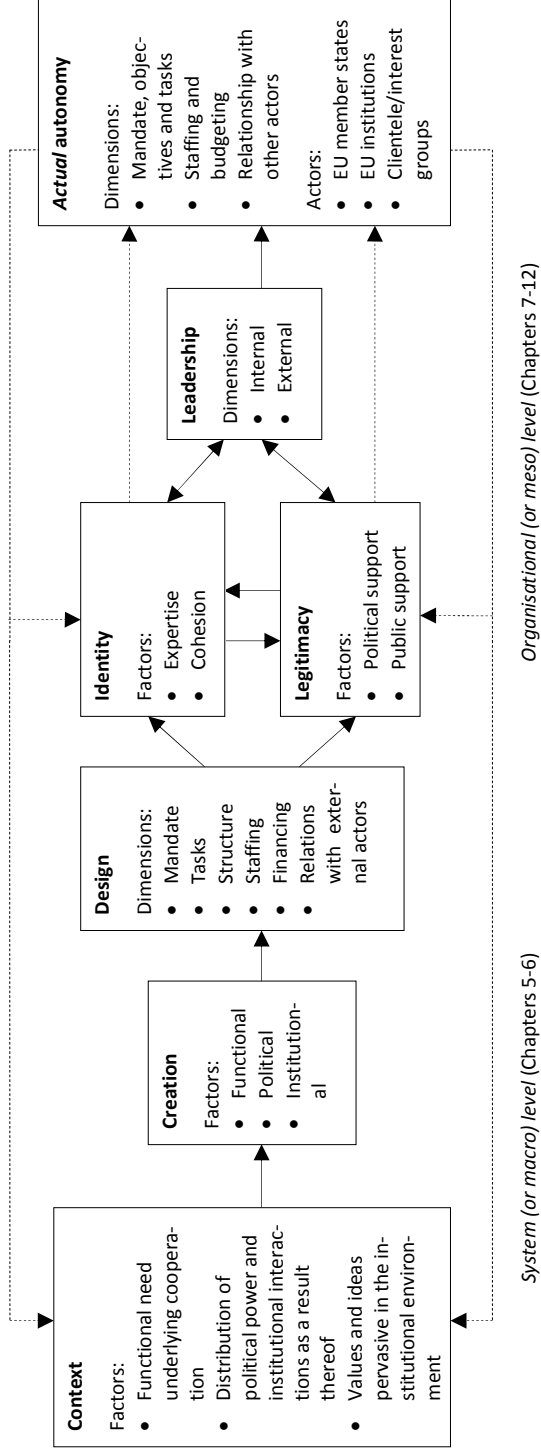
<sup>25</sup> That agencies should mobilise public support is far from unequivocal. Proponents of agencies subordinated to political control usually hold the view that agencies should confine themselves to administering policy programs and making policy recommendations as requested, but refrain from seeking support from clientele and stakeholder groups, and the broader public (see Chapter 2). Such a view, however “neglects the failure of [...] [political] parties to provide either a clear-cut decision as to what they should do or an adequately mobilized political support for a course of action” (Long, 1949: 205).

<sup>26</sup> I use Williams’ (2005) terminology in a descriptive way and do not rely on his more normative elaboration of the concepts.

<sup>27</sup> In order to assess the various scores, it is necessary to operationalise the different dimensions, which will be done in the next chapter.

<sup>28</sup> See also Collins and Porras (2002 [1994]: 280), who assert that leadership is not a “distinguishing variable” during the formative stages of firms.

<sup>29</sup> Others are wary of leadership-based explanations from a democratic governance perspective. For a general critique on the leadership approach to organisational analysis, see Perrow (1970).



**Figure 3.1** – A process model of EU agency autonomy development



## CHAPTER 4

# A QUALITATIVE COMPARISON OF MULTIPLE CASES

[Social] research, in one form or other, is *comparative* research.

– Stanley Lieberson (1985: 44)

### 4.1 Introduction: from distinctions to generalisations

While European Union agencies have a strong structural likeness, the development of EU agency autonomy is, it appears, a varied phenomenon. Instead of looking at their resemblance, the focus of this study will therefore be on the differences among EU agencies and what sets them apart. As such, this research aims to make both distinctions and generalisations. Its design is comparative, examining the variation among multiple EU agencies with regard to the process by which they develop autonomy.

To systematically compare the process by which EU agencies develop autonomy, this study makes use of a contextualised approach. Such an approach is appreciative of the idea that scientific knowledge about the social phenomenon studied cannot be gained separately from the context in which the phenomenon occurs. Therefore, not only the mechanisms that drive the development of EU agency autonomy are investigated, but also the factors upon which the outcome is conditional. To uncover what mechanisms are at play, a process-tracing method is used, allowing us to study the development of EU agency autonomy over time.

This chapter outlines the methodological aspects of the study. In Sections 4.2 and 4.3 an operational framework providing the indicators of the conditions and outcome is constructed. The method linking conditions and outcomes, process-tracing, is sketched in Section 4.4. Section 4.5 subsequently discusses the methods used to conduct the research, including the approach towards case comparison and selection. The techniques for collecting and analysing data, including document analysis and interviewing, are covered in Section 4.6, while Section 4.7 discusses the reliability and generalisability of the findings of this research.

### 4.2 Operational framework: assessing autonomy as an outcome

Assessing autonomy is notoriously difficult. Little research has been conducted that offers valid and reliable measures of organisational autonomy (Price and Mueller, 1986: 42). In recent years students of delegation have developed measures that allow us to systematically investigate the formal autonomy of EU agencies through, for instance, their legislative statutes (Huber and Shipan, 2002). Provisions in constituent documents, although perhaps a proxy for the freedom of EU agencies, only provide a rough indication of their formal autonomy, however.

### Formal autonomy

In this study, the degree of formal autonomy is gauged by applying a set of indicators partly based on Gilardi (2002: 880-884; 2008), who discerns five dimensions of formal autonomy: (1) the agency head status, (2) the management board members' status, (3) the general frame of relationships with the government and the parliament, (4) financial and organisational autonomy and (5) the extent of delegated regulatory competencies. As these dimensions are not immediately applicable to EU agencies, they have been adapted and complemented on the basis of Kreher (1997: 232-238) who distinguishes three dimensions on which EU agencies can be autonomous from supranational, national and sub-national actors: (1) mode of emergence, (2) formal status (divided into organisational structure and budgetary provisions), and (3) type of function.

The resulting set of indicators is based on seven dimensions of formal autonomy that are particularly applicable to EU agencies, but can be applied to the study of other agencies in western countries as well.<sup>1</sup> The dimensions include: (1) formal-legal status, (2) the agency's mandate, objective and tasks, (3) management board members' status, (4) agency director status, (5) personnel policy, (6) budgetary provisions, and the (7) obligations towards the European institutions and the EU member states. The indicators associated with these dimensions are – even though sometimes based on quantitative measures – qualitative categories that have been dichotomised (or in some cases, trichotomised). The presence or absence of a specific design feature gauges the level of formal autonomy that an agency enjoys on the various dimensions.<sup>2</sup> What follows is a brief explication of the different dimensions and indicators. The relation between the values of the indicators and the level of formal autonomy is elaborated on in Chapter 6.

*Formal-legal status* is measured by asking the following questions: On which legal provision is the agency based? A general treaty provision indicates a high level of autonomy, whereas a specific treaty provision indicates a low level of autonomy. Under which pillar of the EU does the agency fall? When the agency falls under the first (Community) pillar it is more autonomous from the member states than from the Commission; under the second and third (Union) pillars an agency is more autonomous from the Commission than from the member states. Is the independence of the agency formally stated? The more clearly the agency's independence is stated, the more autonomous it is.

Indicative of the agency's *mandate, objective, and tasks* are the answers to the following questions: How detailed is the agency's mandate, how clear its objective, and how specific its task? I look at the length and the content of the respective provisions in the constituent document. Does the agency have decision-making power? When an agency has decision-making power, it has a high degree of formal autonomy. Which adopting procedure for the work programme is used? The various procedures differ in the room to manoeuvre given to the agency (see Chapter 6).

The *management board members' status* is assessed by asking the following questions: What is the term of office? The longer the term is, the higher the degree of autonomy. Is the appointment of board members renewable? Autonomy is highest when terms are non-renewable (or renewable by acquiescence from political principals). Are member states and/or stakeholders represented in the board? Representation of one or both type of actors means decreased autonomy vis-à-vis those type of actors. How are decisions made by the board: absolute, qualified or simple majority? The more absolute the majority voting, the more difficult it is for the board to take decisions, and the higher the agency's autonomy.

Indicators of the *agency director's status* are: the term of office, the appointment procedure of the director, whether the conditions under which the director can be dismissed are explicitly stated, and whether the appointment can be renewed. When decisions on appointments are made at arm's length and the barriers to dismissal are high or to renewal are low, the autonomy of an agency is high.

**Table 4.1** – Dimensions and indicators of formal autonomy

| <i><b>Dimension</b></i>  | <i><b>Indicator</b></i>  |
|--|--|
| a. Formal-legal status   | 1. Legal provision on which the creation of the agency is based (general or specific treaty provision)<br>2. Pillar under which the agency falls (first, second or third pillar)<br>3. Independence of the agency formally stated (yes or no)  |
| b. Mandate, objectives and tasks                               | 4. Level of detail of the agency's mandate (more or less detailed)<br>5. Level of clarity of the agency's objectives (more or less clear)<br>6. Level of specificity of the agency's tasks (more or less specific)<br>7. Power to make decisions (yes or no)<br>8. Adoption of the work programme (see Chapter 6 for the various adopting procedures)                    |
| c. Management board members' status                            | 9. Term of office of the management board members (long or short)<br>10. Renewability of the appointment (yes or no)<br>11. Member state representation in the board (yes or no)<br>12. Stakeholder inclusion in the board (yes or no)<br>13. Voting procedure in the board (absolute, qualified or simple majority)   |
| d. Agency director status                                      | 14. Term of office of the director (long or short)<br>15. Appointment of the director (see Chapter 6 for the various appointing procedures)<br>16. Conditions under which the director can be dismissed explicitly stated (yes or no)<br>17. Renewability of the appointment (yes or no)   |
| e. Personnel policy  | 18. Agency in charge of personnel policy (yes or no)<br>19. Agency in charge of selecting, hiring and training, promoting and firing the agency's staff (yes or no)<br>20. Capacity in which staff is employed (individual or national)  |
| f. Budgetary provisions  | 21. Source of the agency's funding (self-funding, Community or member states funding)<br>22. Free (re-)allocation of financial resources (yes or no)   |
| g. Relationship with the EU institutions and the member states | 23. Formal obligations vis-à-vis the Commission (yes or no, see Chapter 6 for details)<br>24. Formal obligations vis-à-vis the Parliament (yes or no)<br>25. Formal obligations vis-à-vis the Council and the member states (yes or no)<br>26. Possibility to overturn the agency's decisions (yes or no)<br>27. Formal obligations to any other institution (yes or no) |

Whether an agency is autonomous with regard to its *personnel policy* is indicated by the answers to the following questions: Who is in charge of the agency's personnel policy (selecting, hiring and training staff)? Clearly, when the agency is in charge of personnel policy rather than the Commission, it has a high level of autonomy in this regard. In what capacity is staff employed? The agency is more autonomous when staff



is employed in an individual capacity instead of being representatives, delegates or liaisons of the member states. A low degree of political and/or national involvement in personnel matters points to a high degree of autonomy.

The answers to the following questions on *budgetary provisions* are indicative for whether an agency is financially autonomous: Which is the source of the agency's funding? Can the agency (re)allocate its financial resources freely? When an agency generates its own funding and can (re)allocate its financial resources, it has a high level of autonomy.

The *relationship with the EU institutions and the member states* is assessed through asking the following questions: Does the agency have formal obligations vis-à-vis the Commission, the Parliament, and/or the Council and the member states? The more formal obligations the agency has vis-à-vis these actors, the more constrained its autonomy. Can the Court (or anyone else) overturn the agency's decisions? Undoubtedly, when the Court can overturn the agency's decisions, it is less autonomous than if there was no legal recourse against its decisions. Are there any other institutions to which the agency has obligations? Generally speaking, the more organisations to which the agency has formal obligations, the less its formal autonomy.<sup>3</sup>

Table 4.1 shows the dimensions and indicators of formal autonomy as used in Chapter 6 (and, to a lesser extent, in the case chapters). It is by using this set of indicators, that the level of formal autonomy that agencies are granted through their constituent acts can be determined.

### *Actual autonomy*

Most research on organisational autonomy focuses on the formal aspects of the concept (Verhoest *et al.*, 2004; Christensen, 2001; Huber and Shipan, 2002; Epstein and O'Halloran, 1999; Yesilkagit and Christensen, 2009; but see Yesilkagit, 2004; Egeberg, 1998). Organisations are studied at the time of their creation, through their design and as structures that have been granted some degree of autonomy, or retrospectively, as long-standing entities that have somehow acquired a certain level of autonomy. They are usually approached in static terms, without considering the influences of political and social change; they are rarely, if ever, studied over a certain period of time. The challenge therefore is to study 'emerging' or 'evolving' organisations as they might develop autonomy in different ways (Katz and Gartner, 1988; Aldrich, 1999).

Given that autonomy is situational (see Chapter 2), there is not much merit in assessing organisational autonomy for one specific organisation at one particular point in time. Instead, it is more helpful to observe the loss or gain of a significant amount of autonomy by several organisations over a certain period of time. This research therefore focuses on the variation in autonomy development across agencies and over time, so both cross-sectionally and longitudinally.

If merely interested in formal autonomy, it would suffice to study the relatively static legislative statutes, and this is indeed what is done in Chapter 6. But I am particularly interested in the development of actual autonomy, that is, autonomy that diverges from what formally has been established. This level can be assessed by not only measuring the autonomy of agencies at their creation, but by also tracing the process of autonomy development over the years. Whereas attention should be paid to amendments made to the agency's legislative statute, the actual level of autonomy exercised is better gauged by investigating behaviours, that is, the decisions and actions, of agencies and their members in practice. Informal norms, routines and practices developed on

the basis of formal documents but not codified as such are examined in Chapters 7 to 12.

The interdependencies between the agency and its principals (or other actors, for that matter) make it very difficult to point to autonomy in practice. Agencies may seem to be autonomous if they are not formally controlled by principals, but when they are anticipating formal control and therefore are in fact being controlled. As a result, it becomes difficult to distinguish the presence of autonomy from the absence thereof, what has been referred to as 'observational equivalence' (Weingast and Moran, 1983). Moreover, a lot of the tasks organisations perform are not of crucial importance to politicians and organised interests and are likely to fall within their "zone of indifference" (or "acceptance") (Krause, 2003; Thatcher and Stone Sweet, 2002: 5; *cf.* Barnard, 2002 [1938]: 167-168; Simon, 1997: 185-186). What appears to be autonomy from these actors could simply be the result of their lack of interest in the organisation's activities.

The approach taken here is comparable to that of Thatcher and Stone Sweet (2002: 16; see also Thatcher, 2005) in that it first considers the formal institutional framework governing the autonomy of EU agencies, starting from the formal creation and design of agencies, and then examines the actual autonomy of EU agencies by "[f]ocusing on the behaviours that surround an agency's critical tasks over time [which] can provide a unique mechanism for examining bureaucratic behaviour" (Ellison, 1995: 168). Several behaviours that relate to those tasks of an organisation that are critical to its functioning and are indicative of its actual autonomy are grouped into three categories of dimensions: (1) decisions or actions with regard to mandate, objectives and tasks, (2) human and financial resources, and (3) relations with other actors.

Affirmative answers to the following questions point to actual autonomy with regard to *mandate, objectives and tasks*: Does the agency interpret its own mission and role? This could become clear through the drafting of formal mission statements and vision documents (not necessarily the mission statement or vision document themselves, but more the drafting thereof). Does the agency prioritise its own objectives and tasks? An indicator is the ease with which the priorities the agency proposes (for instance in its draft work programme) are agreed to by actors that formally decide on priorities. Does the agency decide itself on its working methods? When an agency is free to determine how it fulfils its tasks, i.e. with what kind of methods and techniques, it is autonomous. Does the agency draw its own conclusions or formulate its own recommendations or opinions? A clear indicator for actual autonomy is when an agency not only can gather information, but, on the basis of the information, can also make statements about policy or legislation.

Affirmative answers to the following questions point to actual autonomy with regard to *resources*: Does the agency (re-)allocate its own budget and deploy its own staff? Whether or not the political superiors accept the agency's expenditures is a clear indicator. If the agency's expenditures are not (easily) questioned, this indicates a high level of autonomy (Huntington, 1965; Keohane, 1969; Wilson, 1989). A similar kind of indicator applies to the selection, hiring, training, promotion and firing of staff. When the agency's principals refrain from interfering in the personnel management, by for instance asking questions about selection and hiring or promotion and firing of staff, the agency has a high level of autonomy. Autonomy is high when the agency director can make decisions regarding the day-to-day management of the agency that exceed his formal powers.

Affirmative answers to the following questions point to actual autonomy with regard to the *relationship with other actors*: Does the agency decide itself on its clients or target audience? When the agency is free in deciding to whom it renders its services, or at

least can also render services to other clients than its parent directorate-general in the Commission or the member states, it has a high level of autonomy. Does the agency decide on its relations with other bodies or organisations? A clear indicator here is whether or not the agency director engages in formal or informal cooperation with other EU agencies, other Commission DG's, non-EU member states, and international organisations.

The operational framework containing the dimensions and indicators of actual autonomy as used in the case chapters of this study is summarised in Table 4.2. The level of autonomy that agencies have in practice can be determined through this framework.

**Table 4.2** – Dimensions and indicators of actual autonomy

| <i><b>Dimension</b></i>           | <i><b>Indicator</b></i>  |
|-----------------------------------|--|
| a. Mandate, objectives and tasks  | <ol style="list-style-type: none"> <li>1. Does the agency interpret its own mission and role?</li> <li>2. Does the agency prioritise its own objectives and tasks?</li> <li>3. Does the agency determine its own working methods?</li> <li>4. Does the agency issue its own opinions, draw its own conclusions, or formulate its own recommendations?</li> </ol> |
| b. Staffing and budgeting         | <ol style="list-style-type: none"> <li>5. Does the agency deploy its own staff?</li> <li>6. Are selection, hiring, training, promotion and firing questioned?</li> <li>7. Does the agency (re-)allocate its own budget?</li> <li>8. Are financial expenditures questioned?</li> </ol>  |
| c. Relationship with other actors | <ol style="list-style-type: none"> <li>9. Does the agency choose its own clients or target audience?</li> <li>10. Does the agency establish its own (formal or informal) relations with other actors such as other EU agencies, other Commission DG's, non-EU member states, and international organisations?</li> </ol>   |

When an agency has a certain level of autonomy on one dimension, this does not necessarily imply that it has the same level of autonomy on another dimension. In fact, a higher level of autonomy in one area often comes with a lower level of autonomy in another. This phenomenon has been referred to as the paradox of autonomisation (Kickert, 1998; Smullen *et al.*, 2001; Verhoest *et al.*, 2004). Furthermore, the autonomy of an agency is not simply the sum of the autonomy with respect to the individual actors in the agency's environment. An EU agency considered autonomous in relation to one actor, for instance the Commission, is often not autonomous with regard to another (type of) actor, for instance the member states (Kreher, 1997: 238).

The degree of EU agency autonomy is thus largely determined by one's perspective. For example, if the perspective taken would primarily be that of studying the process of European integration, then it would perhaps suffice to concentrate on EU agencies' autonomy from member states. As the focus here, more generally, is on the behaviour of agencies operating at the EU level and the consequences thereof for the EU's system of multi-level governance, the autonomy in respect of a variety of actors and on different dimensions will be studied.

### 4.3 Operational framework: assessing conditions for agency autonomy

The different sources or determinants of agency autonomy are already difficult to distinguish in analysis, but they are even more difficult to separate in practice. Often they

are closely linked, with one factor influencing the other or in effect being part of another factor (Rourke, 1984: 81, 91-92). I will therefore not refer to independent variables but to conditions. For the factors investigated are not independent of each other, but coincide or interact to enable a certain outcome. This makes it difficult to tell whether a certain factor is present or not and to what extent. Despite this difficulty, an effort is made to distinguish among the different factors and to indicate measures by which they can be gauged. Because the research question can only to a limited extent be addressed by using quantitative indicators, the operational framework for this study primarily consists of qualitative measures.

### *Organisational identity*

*Expertise* The indicators of expertise, as summarised in Table 4.3, focus on the control over information and the possession of a dominant profession. The first indicator, the number of staff employed, illustrates the agency's potential for specialisation (Meier, 1980: 367). The larger the agency, the greater the potential for specialisation, and the more likely the control over information. The level of technical difficulty or scientific complexity of the information that an agency generates or processes – as assessed by whether laypersons can follow the way by which it is processed and presented – is another indicator of the control over information. Three additional indicators are whether or not the agency has in-house research capacities, whether or not others have such research capacities as well, and whether or not politicians or societal groups are “critically dependent” on these capacities (Rourke, 1984: 93; Meier and Bohte, 2006: 71). Another, indirect indicator is whether or not the agency – on the basis of the information that it generates or processes – renders decisions or delivers opinions that have to be followed by others. The compulsory nature of the decisions and opinions demonstrates the agency's control over information.

The professional background of staff is an indicator of professionalism. Clearly, if a certain professional background – notably such backgrounds as law, natural science/engineering, economics/business, and veterinary/medical science – dominates among staff, this points to the professionalism of the agency. Professionalism is also revealed by the membership of professional organisations and the adherence to professional standards.<sup>4</sup> Two other indicators of professionalism are whether or not the agency director is a scientist or technical expert in the agency's area of activity, and whether or not the agency's management board members are scientists or technical experts in the agency's area of activity (Meier, 1980: 367; Meier and Bohte, 2006: 65). The extent to which staff is being screened and assessed, either during selection and hiring or within the first few years, and the extent to which staff is being trained on the job by peers, immediate supervisors and others are also indicators of professionalism. A staff policy with, for instance, individual training plans and a career development system would point to a high degree of professionalism.

*Cohesion* The cohesion measure is a function of indicators exhibiting the commitment and unity of staff, as summarised in Table 4.3. The most concrete indicator of cohesion is turnover of highly qualified personnel, gauged by the voluntary separation rate and the average percentage of vacancies (Meier, 1980: 368).<sup>5</sup> As government agencies often experience difficulties in retaining highly qualified personnel, low turnover of such personnel indicates their commitment to the agency. The allegiance or loyalty of the organisation's staff to the organisation is another indicator for cohesion. Are there orientation or induction programs for new staff? Do staff members take pride in the organisation's achievements and show feelings of superiority towards outsiders? Do

they use language and symbols to reinforce being part of a special group? Are there special events to celebrate success and emphasise belonging? Do they make use of the agency's own facilities, such as restaurants, health clubs or social gathering places?

**Table 4.3** – Dimensions and indicators of organisational identity

| <i>Dimension</i> | <i>Indicator</i>   |
|------------------|--|
| a. Expertise     | <ol style="list-style-type: none"> <li>1. The number of staff employed</li> <li>2. The increase of staff over the years</li> <li>3. The level of technical difficulty or scientific complexity of the information that the agency generates or processes</li> <li>4. The agency having in-house research capacities</li> <li>5. The agency having technical or scientific capacity that others do not have</li> <li>6. The dependence of politicians or societal groups on these capacities</li> <li>7. The agency director being a scientist or technical expert in the agency's area of activity</li> <li>8. The agency's management board members being scientists or technical experts in the agency's area of activity</li> <li>9. The agency delivering opinions or making recommendations that have to be followed by others</li> <li>10. The professional background of staff</li> <li>11. The degree of membership of professional organisations</li> <li>12. The adherence to professional standards</li> </ol>  |
| b. Cohesion      | <ol style="list-style-type: none"> <li>13. The degree of turnover</li> <li>14. The number of vacancies</li> <li>15. Orientation or induction programs for new staff</li> <li>16. Staff being screened, either during hiring or within the first few years</li> <li>17. Staff being trained on the job by peers, immediate supervisors and others</li> <li>18. Staff taking pride in the organisation's achievements and showing feelings of superiority towards outsiders</li> <li>19. Staff using language and symbols to reinforce being part of a special group</li> <li>20. Special events to celebrate success and emphasise belonging</li> <li>21. Staff making use of the agency's own facilities (if any at all), such as restaurants, health clubs or social gathering places</li> <li>22. A dominant attachment to a certain objective or task among staff</li> <li>23. Staff exhibiting a commitment to accomplish that objective or perform that task</li> <li>24. Staff asserting (either verbally or in writing) certain norms, practices and routines the organisation has developed</li> <li>25. Staff reacting (either verbally or in writing) to the assertion of certain organisational norms, practices and routines through objecting (or refraining from objection)</li> </ol> |

Cohesion can further be measured by determining the extent to which there is a dominant attachment to a certain objective over other objectives among staff (Haas, 1964: 131). Does the staff consider the same goals important and do they interpret goals in the same way? The level of uniformity and consistency of the accounts of agency employees on how the organisation is to achieve its objectives is another indicator of cohesion (Keohane, 1989). Do they consider the same tasks appropriate to achieve the goals? Cohesion can also be measured by examining the extent to which agency employees exhibit a commitment to the critical tasks of the organisation that goes beyond rational calculation (Thompson, 1967; Rourke, 1984: 104; Wilson, 1989). <sup>6</sup> Do they display

common norms, routines and practices with regard to these tasks? When norms, routines and practises are uniform and consistent, this points to a certain unity among staff (Boin, 1998: 73).<sup>7</sup>

A related indicator of cohesion is the extent to which staff assert 'the way things are done' in the organisation, explicitly or by acting in a way that implicitly constitutes such an assertion, and by the extent to which staff react to the assertion of a certain norm, routine or practice through objecting or refraining from objection. Do they mention, explain, or justify behaviour that is not in accordance with the organisation's critical task?<sup>8</sup> If they do so, this reveals cohesion, because otherwise, there would be no need to mention, explain or justify their deviance (Finnemore and Sikkink, 1998).

### *Organisational legitimacy*

*Political support* The indicators of political support, as summarised in Table 4.4, cover both legislative and executive support. A simple indicator for political support is the level of financial resources appropriated to the organisation (Keohane, 1969; Cox and Jacobsen, 1972). Are politicians willing to support the organisation financially? The higher the level of financial resources the organisation extracts from its political superiors, the more it is supported. As such, a lack (or declining) level of financial resources testifies to a low (or decreasing) level of support. The percentage of the agency's request for financial resources obtained from political actors is another, less simplistic, indicator of support (Fenno, 1966). A similar indicator applies to the number of positions in the agency's establishment plan and their grade levels. Another indicator is the extent to which agencies get their mandate broadened and the scope of their tasks expanded so as to optimise (as opposed to maximise) their jurisdiction (Rourke, 1984: 119; Wilson, 1989).

Two additional indicators are whether or not the Commission asks the agency for advice, regardless of whether they are obliged to, and whether or not most member states (or at least the most important for the agency's functions) provide information to the agency, regardless of whether they are obliged to do so. A high level of demand (or a high level of supply for that matter) indicates support by the organisation's political superiors. Whether or not the Commission and the member states follow the agency's decisions and policies – without necessarily benefiting from the decisions and policies, or being obliged to follow them – is also an indicator of political support (Hurd, 1999: 389-92). If the agency's decisions and policies are not (easily) questioned, this indicates a high level of support.

Another measure of political support is the extent to which the Commission bargains or negotiates with the agency in order to secure its cooperation in the execution of policies or implementation of legislation (Rourke, 1984: 74). The extent to which other (national, EU or international) agencies seek to cooperate with the agency also points to political support for the agency, especially if the agencies seeking support enjoy a high level of political and public support.

The number and intensity of challenges to the organisation's right to exist can be used as a final measurement of support (Keohane, 1969: 865; Finnemore and Sikkink, 1998; Hurd, 1999). Do members or external stakeholders challenge the organisation and what reasons do they give for challenging it? Do they conceive of alternatives to the organisation as it is? Obviously, if an agency is constantly under attack from its political superiors, this does not testify to its support. One way to gauge the level of such support is to look into the questions raised in the European Parliament or national parliaments (*cf.* Thatcher, 2002b). Conversely, support can be measured by the extent to

which politicians come to the assistance of an organisation when it is under threat, in combination with the reasons they give for its assistance (Stinchcombe, 1968: 158-63).

*Public support* The indicators of public support, as summarised in Table 4.4, cover both support from the general public and support from clients and interest groups. An indicator of public support is expressed in opinion polls, such as the Eurobarometer, for the agency or the field or sector in which it is performing its tasks. For instance, does the public support increased spending for the agency or the field or sector in which it is performing its tasks? Another measure is the number of hits or visitors of the agency's website and the amount of media attention or press coverage the agency receives (Thatcher, 2002b: 966-968). To what extent is the press coverage positive or negative?

**Table 4.4** – Dimensions and indicators of organisational legitimacy

| <i><b>Dimension</b></i> | <i><b>Indicator</b></i>  |
|-------------------------|--|
| a. Political support    | <ol style="list-style-type: none"> <li>1. The amount of financial resources appropriated</li> <li>2. The increase of funding over the years</li> <li>3. The percentage of the agency's request for financial resources that is obtained</li> <li>4. The agency broadening its mandate and extending the scope of its tasks</li> <li>5. The Commission or the Council asking the agency for advice, regardless of whether they are obliged</li> <li>6. The member states providing information to the agency, regardless of whether they are obliged</li> <li>7. The Commission, the Council and/or the member states following the agency's opinions, decisions, and recommendations</li> <li>8. Questions asked in Parliament to demand information or question decisions</li> <li>9. Other agencies seeking cooperation from the agency</li> <li>10. The agency's authority and its right to exist being challenged</li> </ol> |
| b. Public support       | <ol style="list-style-type: none"> <li>11. The support as expressed in opinion polls for the agency or the field or sector in which it is performing tasks</li> <li>12. The public opinion on increased spending for the agency or the field or sector in which it is performing tasks</li> <li>13. The use of the agency's website (number of hits, visitors)</li> <li>14. The amount of media attention or press coverage received</li> <li>15. The amount of media attention or press coverage that is positive (or negative)</li> <li>16. External stakeholders and clients turning to the agency for opinions, decisions, and recommendations, or requesting the agency's support</li> <li>17. Interest groups accepting the agency's authority and its right to exist</li> <li>18. Decisions of the agency being challenged in Court and/or complaints filed with the ombudsman</li> </ol>                                 |

A clear indicator for legitimacy is the extent to which the agency's clients turn to the organisation for opinions, decisions, and recommendations, or request the agency's support – beyond the formal requirements to do so. When it comes to interest group support, the number of groups, their cohesion and the intensity of their support are important indicators (Meier, 1980, 266; Rourke, 1984: 99).

The amount and intensity of challenges to the organisation's right to exist can also be used as a measurement of public support. Do clients or interest groups accept or challenge the agency's authority? The number of legal challenges to the decisions of

agencies serves as an indicator, as well as the complaints filed with the ombudsman (Thatcher, 2002b: 963). If an agency is constantly under attack from its clientele and interest groups, this certainly demonstrates a low level of support.

### *Leadership as an intervening factor*

Leadership is an elusive concept. Most will agree that leadership is important and that agencies are at least to some extent dependent on it, but developing measures that point to a high or low degree of leadership is difficult. Instead of looking at personal traits or characteristics of agency leaders, leadership here is determined by their activities (Selznick, 1957; Boin, 2001). A number of different activities with regard to both the internal organisation and the external environment can be distinguished by looking at the behaviour of agency leaders. These activities are summarised in Table 4.5.

**Table 4.5** – Dimensions and indicators of leadership

| <i><b>Dimensions</b></i> | <i><b>Indicator</b></i>   |
|--------------------------|---|
| a. Internal              | <ol style="list-style-type: none"> <li>1. Appealing to the professional skills and expert knowledge of staff (for example, by giving them operational freedom)</li> <li>2. Upholding scientific and technical standards (by means of organising training courses related to the agency's mission, for instance)</li> <li>3. Promoting social gatherings of staff (such as 'national days')</li> <li>4. Settling disputes and conflicts within the agency (between individuals or departments)</li> <li>5. Arousing employees' enthusiasm and energy for the agency's objectives and tasks (through speeches or internal newsletters)</li> <li>6. Putting forward innovations in the agency's operations, policies and programs (e.g. promoting the use of information technology or emphasising transparency)</li> <li>7. Avoiding taking on tasks that might jeopardise the agency's objectives and tasks</li> </ol> |
| b. External              | <ol style="list-style-type: none"> <li>8. Presenting the agency as having a unique capacity to deal with the problems at hand (in writings or in dealings with external actors)</li> <li>9. Actively engaging in networking with political actors (through meetings, conferences etc.)</li> <li>10. Campaigning and/or lobbying for the agency's mission with external actors (notably through sending them letters or e-mails)</li> <li>11. Actively engaging in networking with organised interests (through meetings, conferences etc.)</li> <li>12. Spurring (re-)vitalisation of the agency's external relations (by entering into negotiations, concluding agreements, exchanging information etc.)</li> <li>13. Maintaining established or prevailing links with the external environment (through for instance appearances in the media)</li> </ol>   |

Agency leaders may first of all pay attention to the internal organisation, deliberately formulating long-term policy plans that reflect clear ideas about the agency's mission and the way to attain it (Boin, 1998: 75; Wilson, 1989). They can appeal to the professional skills and expert knowledge of staff and uphold scientific and technical standards; they can also promote social gatherings of staff, settle disputes and conflicts within the agency, and arouse employees' enthusiasm and energy for the agency's mission and its attainment. Leaders may further be concerned with the external environment, fending off interference in decision making and presenting a favourable agency image (Boin, 1998: 77). They can stress the agency's unique capacity to deal with the



problems at hand, and actively engage in networking with political actors; they can campaign for the agency's mission with external actors, and actively engage in networking with organised interests (Wilson, 1989; Carpenter, 2001).

In reality, agency leaders are likely to display a mixture of these different activities, depending on their personalities and the circumstances (Wilson, 1989). They cannot solely focus on the internal organisation or the external environment but must deal with both dimensions. They can put forward innovations in the agency's policies and programs, and spur revitalisation of the agency's external relations; they can avoid taking on tasks that might jeopardise the agency's critical tasks, and maintain established or prevailing links with the external environment.

#### 4.4 Process analysis: linking outcomes and conditions

This research not only tries to take account of the multiplicity of factors and conditions involved in the development of autonomy, but also of the various ways in which these factors and conditions are interconnected (*cf.* Moe, 1985: 1115). The theoretical framework of the study is therefore not only comprised of factors upon which autonomy is conditional, but also of mechanisms through which autonomy evolves. To uncover these mechanisms, the links between autonomy and the configurations 'producing' autonomy must be investigated. These links can be specified by using a process-tracing method.

##### *Social mechanisms*

It is not enough to know upon which factors autonomy is conditional. One needs to give an account of why autonomy develops as it does. Or, to put it simply: how does autonomy development *work*? Accounts that attempt to explain the development of a social phenomenon, autonomy in this case, are referred to as causal explanations. Causal explanations cite the social mechanism by which autonomy developed (Elster, 1989; Coleman, 1990; Stinchcombe, 1991; Bunge, 1997). According to Merton (1968: 43-44), social mechanisms are "social processes having designated consequences for designated parts of the social structure". He argues that it is the principal task of the social sciences to identify these social mechanisms and to establish under which conditions they operate. Thereby one could come to what Merton called 'middle range' theories.

Causal explanations citing the social mechanism must be distinguished from causal statements only mentioning the cause of autonomy (Little, 1991). Instead, causal explanations also specify *how* causality is exerted. Causal explanations are different from assertions about correlation. In the social sciences, one often cannot say that a certain kind of event is followed by another type of event or vice versa. Causal explanations are also not assertions about necessitation. The social sciences are rarely able to state necessary and sufficient conditions under which the various mechanisms are switched on (nonetheless, a careful attempt is made here). That said, causal explanations must also be distinguished from mere 'storytelling' or predictions focusing on how an event might have happened or could happen (Elster, 1989: 3-9).

Hedström and Swedberg (1998: 21-23) distinguish different types of social mechanisms: situational mechanisms (involving a single individual); action-formation mechanisms (involving an individual actor affected by the social structure) and trans-

formational mechanisms (involving a number of individuals). They base their distinction on Coleman's (1986; 1990) model of how to conceptualise collective social action, the macro-micro-macro model. The model explains variation (or change) at the macro-level by behaviour at the micro-level: macro-level events or conditions affect the individual actor, the individual actor processes the effects of these macro-level events or conditions, and outcomes are generated at the macro-level through the (inter)actions and behaviour of a number of individual actors. A social phenomenon such as the development of autonomy can thus be explained in terms of the interactions among individuals, or between individuals and a social structure.

The analytical distinction made by Hedström and Swedberg is useful for this research as it can be applied to the relationship among individuals interacting within an organisational setting, and between these organisations and their environments. It should be pointed out, though, that while this study also looks at leadership (the micro-level), it is mainly concerned with EU agencies (the meso-level), albeit within their environments (the macro-level). There is limited use in focusing on the individual level given the purpose of this research (*cf.* Stinchcombe, 1991). As set out above, this research does not purport to explain outcomes given particular conditions that constrain and regularise behaviour of agencies and their interests. Instead, it seeks to explain the process by which agencies as collective entities (not merely individual actors within agencies) develop a level of autonomy.

### *Process-tracing*

To identify the mechanisms and establish under which conditions they operate, the theoretical framework describes processes unfolding over time; "a series of occurrences or events rather than a set of relations among variables" (Mohr, 1982: 54, quoted in Scott, 1995: 65; *cf.* Abbott, 2001; Van de Ven and Scott Poole, 2005). Explanations for autonomy cannot be caught in straightforward relations between simple variables, but must be studied in terms of configurations of conditions that are necessary or sufficient for the occurrence of an outcome. This is what Mill (1967 [1843]) has called 'chemical causation' and Ragin (1987) has referred to as 'multiple conjunctural causality'.

In open systems such as societies or organisations, the cause and effect relations among initial conditions and outcomes are often not direct. Instead, the same outcome may be produced with different initial conditions and in many different ways. In general systems theory, this has been called 'equifinality'. In order to explain complex and heterogeneous social phenomena, it is thus necessary to consider cases as a whole instead of a collections of parts (variables), not restricting empirical observations by simplifying (theoretical) assumptions (Ragin, 1987; 1997). This does not mean that all conditions or causes are equally important in generating an outcome. While many different factors may be contributing to a given outcome, some conditions are more important than others with regard to their effect on the outcome (Lieberson, 1985: 185-191).

A process-tracing approach can help to map out the process by which social phenomena evolve (George, 1979; George and McKeown, 1985; George and Bennett, 2005). The process-tracing approach "is intended to investigate and explain the [...] process by which various initial conditions are translated into outcomes" (George and McKeown, 1985: 35). As such, it attempts to uncover what situational stimuli actors respond to; the cognitive process by which these stimuli are transformed into decisions or actions; the actual behaviour that then occurs; and the effect of various institutional arrangements (and the effect of other variables) on attention, processing, and behaviour (George and McKeown, 1985: 35). Within each sequence of events, process-tracing generates many

observations. Each decision or action in a sequence or series of occurrences can generate new outcomes linking the initial conditions to the ultimate outcomes.

An approach limited to the initial conditions or the ultimate outcome would restrict the number of observations and thus render it difficult to make statements about the development of autonomy. By examining multiple observations it is possible to assess which mechanisms are activated and under what conditions. The observations could thus help to establish the weight of the mechanisms and conditions as put forward in the analytical framework. Yet, process-tracing still does not make it possible to determine conclusively whether there is any causal link among certain events.

## 4.5 A multiple case study

This study uses a qualitative method to study multiple cases of EU agencies with regard to their autonomy development (*cf.* Smelser, 1976; Ragin, 1987; Ragin *et al.*, 1996; Ragin and Becker, 2000; Gerring, 2004). It looks at EU agencies in their entirety so as to shed light on the process by which they develop a level of autonomy. The case study method allows us to obtain specific knowledge about the development of the selected agencies. “Case studies are sensitive of how the position of [agencies] vis-à-vis their principals may change over time, and in ways unanticipated at the moment of delegation” (Thatcher and Stone Sweet, 2002: 16; see also Thatcher, 2005). A comparative study of multiple cases implies a number of steps to be taken, including the selection of the cases, and the structure and focus of the comparison.

### *Matched pair selection*

The case selection follows a two-step approach. As a first step, the entire population of EU agencies is studied for the level of formal autonomy. In order to maintain a minimal level of unit homogeneity, the population consists of cases that are selected on the basis of a clear definition of an EU agency (*cf.* Ragin, 1987; Ragin *et al.*, 1996; Gerring, 2007). All cases – thirty in total – share certain basic characteristics (see also Chapter 1): they are governed by European public law, they are distinct from the EU institutions (Council, Parliament, Commission, etc.), they have their own legal personality, they are set up by an act of primary or secondary legislation, and they have a technical, scientific or managerial task.

Even though the selected cases share these basic characteristics, this does not mean that the population of EU agencies is uniform. Far from it, in fact, as the population of EU agencies is what can be considered unified in its diversity. The method applied here does not require me to draw a random sample from the population so that I can use statistical techniques (Campbell and Stanley, 1963; Cook and Campbell, 1979). Although I try to take into account the difference in agencies’ initial characteristics because they may affect the outcome, it is both unfeasible and undesirable to control for these characteristics (Lieberson, 1985). Instead, the holistic method of comparing cases adopted in this research specifically allows for the determination of different combinations of factors, including agencies’ initial conditions, associated with specific outcomes or processes (Ragin, 1987).

The second step involves the detailed investigation of three subsets of cases for the development of actual autonomy. The selection of subsets is guided by a typology specifying a number of mutually exclusive and exhaustive initial conditions (Diesing, 1971).

Two conditions relating to the formal creation and design of agencies are of particular importance for their potential to develop a level of autonomy: whether the agency is a Community or Council agency and whether the agency has semi-regulatory powers (see also Chapter 6). Since Council agencies with semi-regulatory powers do not exist, this leaves us with three possible subsets of agencies: Community agencies with semi-regulatory power, Community agencies without semi-regulatory power, and Council agencies.

From each subset of agencies a pair of agencies is selected.<sup>9</sup> In order to maximise the variance between agencies in terms of conditions, the selection of agencies from the subsets of EU agencies is intentional. The agencies selected as part of the subsets have developed a higher (or lower) level of autonomy than expected on the basis of the theoretical explanations put forward, or have developed a particularly high (or low) level of autonomy that deserves explanation. Following Lijphart (1971; 1975), the selected pairs of agencies differ in the value of the particular factor or factors under consideration, but are similar with respect to most other factors. Pair-wise selection thus makes it possible, of course limited by the constraints applicable to all or most social phenomena, to determine the impact of a certain factor or constellation of factors on the autonomy of EU agencies.<sup>10</sup>

A first subset comprises two agencies regulating medicinal products and food safety in Europe: the European Medicines Agency (EMA) and the European Food Safety Authority (EFSA). These agencies have semi-regulatory powers, on the basis of which they are expected to develop a high level of autonomy, or at least a higher level than other agencies are expected to develop. While the agencies have both semi-regulatory powers, they differ with respect to a number of significant features, including their formal structure and composition and the sources of their funding. The EMA was created in 1993, whereas EFSA was only created in 2002. While the development of both agencies is analysed through the end of 2007, the comparison focuses on the first five years of the development of both agencies.

A second subset consists of two agencies monitoring the environment and racism in Europe: the European Environment Agency (EEA) and the European Monitoring Centre on Racism and Xenophobia (EUMC). These agencies differ from the agencies in the first subset in that they have monitoring tasks instead of regulatory powers on the basis of which they are expected to develop a lower level of autonomy than the agencies of the first sub-set. These agencies are relatively similar in kind, but they differ with regard to the level of autonomy they have developed. The EEA was already created in 1990, whereas the EUMC was created in 1997. While the development of both agencies is analysed until the end of 2007, the comparison focuses on the first ten years of the development of both agencies (and the transformation of an EUMC into a Fundamental Rights Agency).

A third subset consists of two agencies coordinating police and judicial cooperation in Europe: Europol and Eurojust. These agencies differ from the agencies in the first and second subset in that they fall under the third pillar of the EU, whereas the agencies in the other subsets belong to the first (or Community) pillar. In addition, these agencies neither have regulatory powers nor monitoring tasks. Instead, they coordinate cooperation among the member states. This difference makes us expect a lower level of autonomy. While the agencies are both Council agencies, they differ with respect to a number of significant features, including their formal structure and composition. Europol was created in 1993, whereas Eurojust was created in 2002. While the development of both agencies is analysed until the end of 2007, the comparison focuses on the

first five years of the development of both agencies. The selection of cases is summarised in Table 4.6.

**Table 4.6** – Selection of cases

|                            |                         | <b>Mandate/tasks</b>   |                                 |                                 |
|----------------------------|-------------------------|------------------------|---------------------------------|---------------------------------|
|                            |                         | <i>Semi-regulatory</i> | <i>Advisory/<br/>monitoring</i> | <i>Cooperation/coordination</i> |
| <b>Formal-legal status</b> | <i>Community agency</i> | EMEA<br>EFSA           | EEA<br>EUMC                     | -                               |
|                            | <i>Union agency</i>     | -                      | -                               | Europol<br>Eurojust             |

### *Structured, focused comparison*

To perform the case studies, “structured, focused comparison”, that stresses that data is to be collected in a systematic way, is a useful method (George, 1979; George and McKeown, 1985: 43; George and Bennett, 2005). This method is focused in that it only deals with “those aspects of the case that are believed to be relevant to the research objectives and data requirements of the study”; it is structured in that it defines and standardises “the data requirements of the case studies”. A method of structured, focused comparison means collecting data on the same factors and conditions across the different cases. Such is done here by means of a set of broad topics and general questions reflecting the theoretical focus of the study (see the operational framework). More specific aspects or idiosyncratic features of the cases are also addressed as long as they are relevant in answering the research question.

The case studies are structured in the following way. First of all, the period before the formal creation of the selected case is studied, followed by an examination of when the issue of creating an agency came on the agenda, for what reasons, and which actors were involved. Subsequently, the process that led to negotiation on the agency’s design and the official creation of the organisation is examined. Also discussed are the formal design characteristics of the selected agency such as mandate and tasks, composition and structure, and staffing and funding.

When the organisation has formally come into being, the operationalisation phase begins, which is assumed to be crucial for what the organisation is going to look like (see Chapter 3). Formal goals, procedures and rules only become ‘real’ when applied by the staff and officials of an agency. In this phase, operational details and implementation of formal provisions are discussed. If necessary, adjustments to the agency’s design are made on the basis of negative feedback, implementation experience, changes in the problem (or problem definition) and the environment, and unforeseen events and crisis.

In addition to the operationalisation phase, the consolidation phase is studied, during which operational details have been agreed upon and formal provisions have been implemented. While adjustments are still made, the organisation in this phase trans-

forms its action into stable patterns of behaviour, or at least that is what is expected on the basis of the theories outlined in Chapter 3. Both the operationalisation and consolidation phase are studied internally and externally, looking at the development of the mission and role of the agency as well as the development of the support of actors in the agency's environment. Finally, the case studies discuss the role played by the actors administering and governing the selected agency, both throughout the operationalisation and consolidation phase.

A five-year period is often considered to be the time needed for an organisation to start up its operations and reach 'cruising speed'. However, this may differ among EU agencies. It is assumed that they – when compared to agencies at the national level – face additional challenges relating, notably, to the multiple levels on which they operate and the numerous actors with which they maintain relations. Here, the 'early years' are therefore considered more subjectively, varying among agencies and depending on the time-perspective in mind when establishing the agency as well as the expectations of actors in the agency's environment ('t Hart, 2004).

## 4.6 Data collection and analysis

This research employs several techniques for collecting and analysing data on the selected organisations. The data for this study have been collected in three ways: through analysis of documents, semi-structured interviews, and non-participatory observation.

### *Document analysis*

Document analysis is used to obtain detailed information on the development of the population of EU agencies in general and the selected number of EU agencies specifically. Data is obtained by analysing the constituent documents of agencies, their annual reports and external evaluations of the first years of the agencies. This study relies on both primary sources such as preparatory texts, annual reports, internal memoranda, and speeches, as well as secondary sources, such as media coverage and academic writings. Sources of information used in this research are summarised in Table 4.7 (with parentheses around what I looked at in particular):

### *Interviewing*

Research on EU agencies would be relatively easy if limited to official documentation such as constituent acts and annual reports. Such documents were easily downloaded from agency websites. It was more difficult to find out from the documents what lies behind the formal language and official rhetoric. In order to understand the *process* by which EU agencies develop a level of autonomy, I have been talking to people involved, using the open-ended semi-structured interview (Hammer and Wildavsky, 1993: 57; Weiss, 1995: 9). Political and bureaucratic elites were asked not just about their attitudes or perceptions, but also about their concrete behaviours (Golden, 2000: 34-35).

A number of steps were involved in using interviews to collect data (see, in general, Dexter, 1970; Hammer and Wildavsky, 1993: chapter 5). In the selection of interviewees several criteria were applied.

**Table 4.7** – Sources of information

- 
- Constituent documents, notably regulation, rules of procedure (looked at amendments of regulation, changes in procedures)
  - Staff regulations (looked at selection criteria and training provided)
  - Financial regulations
  - Speeches by executive directors and chairs of the management board as well as by other actors such as the concerned Commissioners or EU Ministers (looked at reasons for speech, and main topics)
  - Questions, speeches and (transcripts of) debates in EP (looked at reasons for questions, speeches and debates, and main topics)
  - Internal reviews (looked at why review has taken place and ramifications of review, e.g. administrative reorganisations)
  - External evaluations (looked at why review has taken place and ramifications of review, e.g. administrative reorganisations)
  - UK House of Lords reports
  - Newspaper and magazine articles (through Krantenbank/Lexis-Nexis) (looked at reasons for publication and main topic)
  - Published interviews with (ex-)senior officials and outside experts
  - Annual reports (looked at how annual report comes about, how it is being discussed, by whom, and what the consequences are for the annual work programme)
  - Annual work programmes (looked at how work programme comes about, how it is being discussed, by whom, and who has a crucial say in deciding on prioritisation; looked at to what extent agencies can do what they propose)
  - Budget (looked at how budget comes about, where it comes from, how it is being discussed, by whom and who has a crucial say when it comes to deciding on allocation; looked at to what extent agencies get what they ask for)
  - Press releases (looked at reasons for press release, and main topics)
  - Client and stakeholder surveys (looked at reasons for survey, main results, and possible follow-ups)
  - Minutes and/or video footage of management board meetings (looked at how decisions are being made, that is, what kind of voting procedure is used, and who is making the decisions, that is, which actor has a crucial say when it comes to making decisions; particularly looked at the relationship between the management board and the director, that is, how is the director appointed, and to what extent the director follows the management board's instructions)
  - Letters and correspondence (between agencies and other agencies, the Commission, the Parliament and the Council)
  - Internal (agency) memoranda
  - (Internal) newsletters
  - (Official) Policy documents (Commission, Parliament and Council)
  - Mission statements
  - Training and education materials
  - Corporate publications
  - Organisational charts (and their changes over the years)
  - Reports, studies, decisions, opinions, recommendations produced by the agency
  - Articles and books written about the agencies, the field or sector and/or its leaders
- 

It was desirable to have interviews with both political and bureaucratic elites. In order to avoid bias, such individuals not only included current and former staff of the agencies in question, but also politicians sitting on parliamentary committees related to the fields of operation, or bureaucrats in the EU institutions and national government dealing with these organisations on a daily basis.<sup>11</sup> Apart from people closely involved in the

work of the concerned agency, outsiders (such as academic experts) and newcomers (people only just involved in the work of the organisation) were also interviewed, to shed light on the agency from a different perspective. The names of interviewees were primarily obtained through snowball sampling (Goldstein, 2002). Websites of the selected agencies, the online staff directory of the European Commission, and the website of the European Parliament were also used to select interviewees.

Getting access to interviewees to ask in depth questions proved difficult as they often had busy schedules (Aberbach and Rockman, 2002). Potential respondents were approached either by letter or through e-mail that included the following details: the general aims of the study, the sponsorship of the study, how the respondent's name was found, why the respondent was selected, the purpose of the interview, what in broad terms would be asked of the respondent, that confidentiality was guaranteed and the approximate length of the interview (Weiss, 1995: 35). In only in a few cases were respondents not willing (or not allowed) to tell their story. Usually a couple of weeks or sometimes even months lapsed before an interview was eventually fixed.

The plan was to proceed from the bottom up, in order to make effective use of interviews with top officials such as directors. In practice, this did not always work. All case studies started with one or two interviews with people favourably disposed to be interviewed (e.g. the father of one of my students, or the husband of a colleague) (Hammer and Wildavsky, 1993: 65). Some of the selected interviewees were 'experienced' respondents, having been questioned by other researchers before. The location of EU agencies led to further difficulties. While conducting research in The Hague and Brussels was relatively easy given the geographical proximity, travelling to the various locations of agencies was more time-consuming and costly. For the detailed case studies, the agencies located in Copenhagen, London, Parma and Vienna were visited at least once, and sometimes twice.

In order to prepare for the interview, I tried to acquaint myself with the official reasons for the agency's creation and its formal objectives and tasks and attempted to gather background details on the respondent, in order to be able to better target the questions (Hammer and Wildavsky, 1993: 75). The Internet was a useful tool here. At the start of the interviews, respondents were assured of anonymity and confidentiality, and the academic nature of the research was emphasised (Goldstein, 2002). In view of the anonymity, reference in the remainder of this study is made to the number of the interview only. Interviewees were literally quoted as much as possible, but if necessary citations were made anonymous. A list of interviewees and their (former) positions can be found in Appendix II.

Questions were open-ended, using a semi-structured list of topics reflecting the theoretical focus of the study (Leech, 2002). Such an approach allowed me to use the respondents as a source of insight while at the same time permitting the qualitative analysis on the basis of the theory. The use of a semi-structured topic list further made it possible to use follow-up questions building on the interviewees' statements, so as to cover a large number of topics in detail and to target questions (Hammer and Wildavsky, 1993).

Interview questions related to the historic origins, objectives and tasks, structure and composition, formal-legal status, decision-making procedures, budget, staff, director and management board, and the relations with actors in the environments of agencies. In addition, questions were posed on the agencies' development. Has the organisation experienced critical junctures? Can tipping points be distinguished? Has the organisation seen changes or modifications over time? Has it achieved unexpected results? Has something gone wrong at a high (political) cost? By asking these ques-



tions, the study attempts to uncover what specific events or circumstances in the agency's history organisational actors responded to, and the actual behaviours that they then displayed (Pierson, 2004; Thelen, 2003).

One should of course be careful not to attribute – in hindsight – too much importance to unique circumstances or single events. Instead, concrete events or circumstances when the autonomy of an agency is clearly at stake, and decisions or actions that could cause changes in the level of autonomy of the agency were identified beforehand. They include (*cf.* Wood and Waterman, 1991: 805):

- the (renewal of the) appointment of an (new) executive head;
- the formulation of the annual work programme;
- the drafting of the budget and the establishment plan;
- the restructuring of the administrative organisation;
- the adoption of new legislation; and,
- the conclusion of agreements with other organisations.

At the outset, the plan was to also ask interviewees to rank agencies in terms of their autonomy with regard to actors in their environment and with respect to decisions about policy, budget, and personnel (Price and Mueller, 1986: 42). By asking agency staff, political principals, external stakeholders and clients whether they consider the agency to be autonomous, thus probing 'subjective' perceptions and opinions, it would be possible to assess the perceived level of autonomy (Bouckaert and Peters, 2004: 24). It soon appeared that, as a result of the wide variety of EU agencies in terms of fields and sectors and the restricted viewpoints and experiences of those involved in the development of agencies, few respondents were able to rank the entire population of EU agencies.

This confirms Meier's (1980: 364-365) findings on using expert panels. In his research on federal government agencies, he also asked respondents to measure autonomy but found that this technique was flawed as the experts were rather hesitant to rank agencies, claiming that they did not have sufficient knowledge about the population of agencies studied. For the same reason, Q methodology (Brown, 1980; McKeown and Thomas, 1988) could not be used to study people's viewpoints on the relative degree of EU agency autonomy. In this research, persons with expertise about specific agencies were therefore not asked to rank all EU agencies, but were requested to compare them to similar EU agencies on which they also had enough knowledge (for instance, EFSA in the case of the EMEA or vice versa).

Another problem encountered during the interviews was the 'rationalisation in hindsight' of certain behaviours: interviewees claimed they had made a certain decision or took a specific action for a particular reason, which may or may not have been the case. In order to deal with this drawback, it was tried, as much as possible, to approach a real-time setting, going over concrete events or circumstances in the agency's history, and actual behaviours of organisational members and external actors in these situations (Weiss, 1995). Two other checks on the accuracy of the statements of respondents were performed. First, statements were verified with written sources, such as newspaper articles. Second, in order to reduce disagreement among respondents, interviewees were confronted with the opinions of previously interviewed respondents (Berry, 2002). At the end of the interviews, respondents were asked to mention the names of other potential interviewees and were requested to provide any relevant documentary evidence.

Although the first interview took place in December 2004, most interviews were conducted throughout 2006. The final interview was held in July 2007. Interviews usually took place at respondents' offices, but also at their homes, in restaurants, on outside terraces, when walking to a meeting or even in the car or on the plane. In total, 75 face-to-face interviews were held with 76 respondents (several interviews were held with two persons and some individuals were interviewed several times). In addition, 13 telephone interviews were held. The duration of the interviews, no matter whether they were face-to-face or by telephone, was on average more than an hour; some interviews took over two hours, and one interview took almost a whole afternoon. People from over 15 different nationalities were interviewed. With two respondents, question-and-answer emails were exchanged. Several interviewees were contacted with follow-up questions after the interview.

Most interviews, especially in the beginning, were recorded and then transcribed. Transcription proved a very time-consuming process and in the final stages of the research a student-assistant was therefore hired to speed up this process. Few respondents objected to recording. During these and other interviews notes were taken that were worked up immediately after the interview. The transcripts and the notes were subsequently coded and analysed on the basis of the analytical and operational framework (Miles and Huberman, 1994).

### *Non-participatory observation*

The visits to the EEA and the EUMC coincided with two-day meetings of their networks, EIONET and RAXEN. Notes were taken of observations made during these meetings. Often these notes served as input for interviews with participants in these meetings. Also attended were the 4<sup>th</sup> National EUMC Roundtable Conference, in Utrecht, the Netherlands, on 7 June 2006, and the Annual Meeting of the agencies with the EP Budget Committee, in Brussels, on 11 June 2007.

## **4.7 Reliability, validity and generalisability**

### *Reliability and validity*

Reliability and validity are a key concern in social science, especially when conducting case studies (King *et al.*, 1994; but see Adcock and Collier, 2001; Brady and Collier, 2004).<sup>12</sup> A concept such as autonomy is difficult to measure and – probably for that very reason – not many scholars have endeavoured to measure it. The extent to which the measures used in this study yield the same results for the selected case over and over again, that is, their reliability, is therefore likely to be limited. But, by going back and forth between the operational framework constructed and the empirical manifestations of the studied concepts, the reliability of this research has been enhanced.

The degree to which the study accurately reflects the concepts, that is, their validity, has been improved through extensive data gathering by means of document analysis, interviewing and non-participant observation. The validity is further enhanced by the representativeness of the interviewees. This increases the accuracy of the findings for the selected agencies as it simply provided more information upon which to formulate interpretations and from which to draw conclusions. Moreover, a variety of data sources has been used as opposed to relying on just one source of observation. This process is

usually referred to as triangulation. The factual correctness of the data has been verified by having interviewees scrutinise a draft version of the case studies (Yin, 2003) – 37 respondents provided me with (sometimes very detailed) comments – whereas the interpretation of the data has been corroborated by having professional and academic experts comment upon these drafts (Merriam, 1985).

Finally, alternative or rival explanations for the relations found between conditions and outcomes have explicitly been taken into account, asking whether the proposed conditions really caused the outcome or whether other conditions perhaps had more explanatory power. In addition, the study has made use of counterfactual reasoning, that is, it asked whether the outcome would also have occurred in the absence of the proposed conditions (Lieberson, 1985; Tetlock and Belkin, 1996; George and Bennett, 2005; Morgan and Winship, 2007; *cf.* Carpenter, 2001: 35).

### *Generalisability*

This research makes no claim to generalisability. The methods used in this study serve the purpose of explanation. The mechanism approach provides understanding (Elster, 1989: 10). By identification of certain mechanisms that led to autonomy under particular conditions, one knows more about how autonomy develops in the selected cases. One can point to certain regularities and patterns, but the extent to which findings and conclusions from a study conducted on the selected EU agencies can be applied to the population of EU agencies at large or even to national or international agencies is limited (*cf.* Lieberson, 1991; Little, 1993).

The findings and conclusions are thus first of all restricted to the population of EU agencies. Six agencies, all of them at least five years old and some more than ten years old, are therefore studied in detail. New and young EU agencies are taken into account in Chapters 5 and 6, but not in the case chapters (7 to 12). Furthermore, the focus is on one particular mode of EU governance, agencies, which is not compared to alternative modes of governance including more or less formally organised structures such as networks or completely different formal arrangements such as comitology (see Vos, 1999; Tarrant and Kelemen, 2007).

As the research concentrated on a demarcated group of EU agencies, no comparisons are made with executive agencies at the EU level, independent organisations within the Commission infrastructure (see Everson *et al.*, 1999), independent intergovernmental organisations at the EU level, or independent bodies established in the treaties. Furthermore, EU agencies have not been compared to national or federal agencies (see Yataganas, 2001; Geradin, 2005).

Whether the identified mechanisms also drive the development of autonomy in other cases cannot be established other than by conducting additional case studies. Apart from extending the sample of agencies, a range of different comparisons could be made to investigate the distinctiveness or the similarity of EU agencies as opposed to other national, EU and international organisations. Albeit necessarily limited, this research, through the cross-sectional and above all longitudinal study of the selected cases, is nevertheless likely to enrich empirical as well as theoretical perspectives on institutional development (Cummings, 1977, as referred to in Kimberley, 1980: 20; Lieberson, 1985).

**Notes**

<sup>1</sup> This in order to establish a certain degree of measurement equivalence (Adcock and Collier, 2001).

<sup>2</sup> As there is no common unit of measurement, it is difficult to weigh one dimension of autonomy against another (Rourke, 1984; Ellison, 1995).

<sup>3</sup> But, paradoxically perhaps, the higher the potential for actual autonomy (see Chapter 3).

<sup>4</sup> These measures are not used in this study because figures for the agencies studied in the case chapters were either unavailable or incomplete. For future research these measures may nevertheless be useful, which is why they are mentioned here.

<sup>5</sup> As precise turnover figures were often unavailable, we had to rely on statements by interviewees usually only providing rough estimates. An organisation's sick rate may also serve as an indicator of employee commitment. It was decided not to use this indicator as figures for the agencies studied in the case chapters were either unavailable or incomplete.

<sup>6</sup> This does not preclude that commitment can have outcomes in the interest of the actors or that lead to personal gain. But the effects of commitment are not the main reason for actors showing commitment to the organisation's critical task.

<sup>7</sup> When norms are considered, a distinction must be made between the expressed attitudes of staff, and their actual behaviour (Keohane, 1969: 867). Employees may express that they consider a certain objective the most important, but their behaviour may show otherwise. Institutionalisation processes to a large extent is 'what goes around in the minds of people', but certainly cannot be seen separately from what they do.

<sup>8</sup> It can be argued that inconsistent behaviour with an existing norm eventually – if continuously practised – can be considered an indication of the recognition of a new norm.

<sup>9</sup> See Collins and Porras (2002) for a similar kind of comparison but concerning companies.

<sup>10</sup> The pairs of agencies selected do not, it should be emphasised, represent cases contrasting 'success' and 'failure'. They merely represent cases that are 'different', either with regard to the conditions or the outcomes.

<sup>11</sup> Interviewing another group of potential respondents, representatives of the leading interest group organisations, proved difficult. Although it was tried in two cases (EMEA and EFSA), representatives were uncooperative during the interview or refused to participate in the study at all.

<sup>12</sup> Reliability and validity are closely connected and the differences are mostly a matter of definition.



## ***PART 2***

### ***AGENCY CREATION AND DESIGN***



## CHAPTER 5

# THE CREATION OF AGENCIES AT THE EUROPEAN LEVEL

The European agencies have been set up in successive waves in order to meet specific needs on a case-by-case basis.<sup>1</sup>

### 5.1 Introduction: by fits and starts<sup>2</sup>

In recent years, European Union agencies have become pervasive features of the Union's administrative space. Their number has grown by fits and starts, reflecting the specific requirements identified at the time of their creation, rather than as part of some grand scheme or deliberate design (Dehousse, 2008). The first agencies were created in the mid-1970s, but agencies have really proliferated at the EU level since the early 1990s. Today, the EU institutions and the EU member states increasingly rely on them. Some go so far as to refer to the sharp increase of EU agencies in the same terms as that of national agencies, speaking of 'agencification' (Geradin and Petit, 2004; Geradin *et al.*, 2005).

The creation of agencies is, of course, not unique to the EU system; western countries regularly create agencies. But the EU is not a polity similar to those states. The creation of EU agencies with a level of formal autonomy, alongside the institutions of the EU and its member states, has been influenced by the nature of EU politics and the distinct organisation of European governance. This does not mean experiences with agencies at the national level are irrelevant for EU agencies. On the contrary, part of the explanations for the creation of EU agencies follows from these experiences, as this chapter will show.

The chapter examines the decision to delegate tasks to agencies at the EU level. It asks how the process of agencification at the EU level can be explained. Underlying this question are a number of intricate sub-questions that will also be dealt with in this chapter: When was the establishment of agencies at the EU level first discussed? By whom? For what reasons? When were EU agencies created? By whom? Why were agencies created in some areas, whereas no agencies were created in other areas? Why were agencies not created all at the same time, but in different waves? Are EU agencies truly new? Or do they build on other organisations? If so, which ones? By answering these questions, the chapter enables us to understand why more or less autonomous agencies have been created at the EU level and why their creation is increasingly provoking controversy.

The chapter argues that the creation of EU agencies is often the result of a combination of functional needs, political motives, and institutional logics. More generally, it suggests that the reasons for delegating tasks to EU level agencies may be important determinants of the actual autonomy of EU agencies, the focus of this research. The chapter also shows that the frequent use of the agency option in recent years and the creation of a number of relatively autonomous agencies have triggered a debate on the creation of new EU agencies and the role of current agencies in the governance of the EU. It does so through examining the existing academic literature on EU agency creation as well as analysing policy documents and news reports.



Section 5.2 delves into the historic origins of agency creation, describing the different waves of agencification at the EU level. Section 5.3 subsequently examines the reasons for creating agencies, and distinguishing between functional grounds and political motives. In Section 5.4, a third reason for the proliferation of EU agencies is explored – the institutional logics underlying agency creation. Section 5.5 explains why agencies, initially formed as a solution to a problem, are now considered problems themselves. The chapter concludes with a short summary of the findings (Section 5.6).

## 5.2 Historic origins of EU agency creation

### *The development of EU executive politics*

The EU political system is different from national systems. It is still most often considered a ‘would-be polity’, as in many areas the EU has no decision-making power or formal authority to enforce its decisions, and its member states remain responsible for policy implementation (*cf.* Lindberg and Scheingold, 1970; Majone, 2009). Yet, the EU is not just another international organisation. It has a broad mandate in a number of important policy areas, such as agriculture and fisheries, competition, economic and monetary affairs, and environment (Wallace *et al.*, 2005). Given its supranational characteristics, the EU has been considered a different species of international organisation and sometimes even the only one of its kind (*sui generis*) (Nugent, 2003: 467, 511-12).

Policy making in the EU goes beyond mere cooperation between member states’ politicians (Wincott, 1995; Peterson, 1995). There is not only integration of substantive policies, but also integration in institutional terms, among national administrations and supranational EU organisations, such as the European Commission in particular but also the General Secretariat of the Council of the EU (Balint *et al.*, 2008; Christiansen and Vanhoonacker, 2008; Egeberg and Curtin, 2008).<sup>3</sup> This level of policy making, according to Peters (1992: 76; see also Wessels, 1997; Hofmann and Türk, 2006; Hofmann, 2008; Pollak and Puntcher Riekmann, 2008), is characterised by “a gradual accretion of common policies and standards through the European bureaucracy (and its masters within the Commission) and through its contacts with national bureaucracies and national and transnational interest groups.” Egeberg *et al.* (2006) argue that a genuine Union administration spanning different levels of government is developing and transforming executive politics in Europe.

Although not as convoluted as the executive branch of national governments, the institutional structure of the EU is certainly more elaborate than that of most other international organisations. With its sizeable number of employees, formal divisions and hierarchies, and specialised tasks, the EU can be thought of as “a series of big organizations” or “a multi-organization” (Page, 1997: 22-23, 27; Cram, 1994). Notably, the European Commission has developed into a relatively independent EU executive with a broad and expanding policy agenda that has a significant impact on the decisions of national governments (Sandholtz and Zysman, 1989; Cini, 1996; Pollack, 2003; Trondal, 2008). In a similar manner, the Council Secretariat has been described as the “unseen hand”, having considerable influence over the outcomes of treaty reform negotiations (Beach, 2004; 2005; see also Christiansen and Vanhoonacker, 2008).

### Early agencies

Thus, the development of the EU, just as in national polities, quite naturally (but not inevitably as will be shown below) brought about the birth of other organisations, including agencies (Lauwaars, 1979). One early agency, the Euratom Supply Agency, acting under the supervision of the European Commission, was created in the framework of the Euratom Treaty in 1958.<sup>4</sup> Given the expected shortage of uranium in the mid-1950s, the agency had to ensure a “regular” and “equitable” supply of ores, source materials and special fissile materials in the European Union. To achieve this objective, the agency was given the right of option on such materials produced in the member states and the exclusive right to finalise contracts relating to the supply of these materials.

Before the agency could start its operations, it was already deprived of its core purpose as it became clear that uranium was not as scarce as previously expected. Hence, the member states purchased and distributed fissile materials themselves rendering the agency’s exclusive right to finalise contracts obsolete. When the agency became operative in 1960, its role had been reduced to receiving notification of finalised contracts. In practice, the Supply Agency (which still exist today) thus turned out to be a much less powerful agency than initially was foreseen in the Euratom Treaty (Pirrotte *et al.*, 1988).<sup>5</sup>

Another early agency, the European Monetary Cooperation Fund (EMCF) was established in 1973 by the member states (Lauwaars, 1979). In view of the plans developed to achieve an economic and monetary union, the Fund was supposed to stabilise member states’ exchange rates by buying quantities of a member state’s currency on the foreign exchange market if its rate fell too far, and by selling quantities of a currency if its rate rose to high. The EMCF was initially placed under the authority of central banks’ governors, and later absorbed by the European Monetary Institute (EMI), which in 1999 was superseded by the European Central Bank (ECB) (*cf.* McNamara, 1998; Howarth and Loedel, 2005).

The first ‘real’ agencies, the European Centre for the Development of Vocational Training (CEDEFOP), with its offices in West Berlin, and the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND), headquartered in Dublin, both seeking to promote social dialogue at the European level, were created in 1975. They were the result of a social policy action programme agreed upon in 1974 (Vos, 1999: 190). With a limited mandate and few discretionary powers these agencies have been described as “relatively weak” (Kelemen, 1997: 1).

### The first wave of agency creation

Until the end of the 1980s, the creation of more EU agencies was hindered by the restrictive interpretation of the *Meroni* judgement, rendered under the European Coal and Steel Community (ECSC) Treaty in 1958 (Lauwaars, 1979; Dehousse *et al.*, 1992; Lenaerts, 1993). In the *Meroni* judgement, the European Court of Justice set out criteria that had to be met before the European institutions (in this case the High Authority of the ECSC) could delegate powers to other bodies or agencies.<sup>6</sup> In order to not disturb “the institutional balance which is characteristic of the institutional structure of the Community”, the Court ruled that the institutions may only delegate power to bodies or agencies “if it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority.”

While the judgment did not exclude the possibility of agencies – in fact, it allowed agencies as long as they were strictly limited to the detailed execution of legislation and policies made by the EU institutions – the Commission thwarted any attempt by the other EU institutions to confer autonomous decision-making power to agencies. In particular its Legal Service was afraid that delegation to agencies would infringe on the Commission's prerogative on initiating and executing EU policies, and therefore invoked the *Meroni* judgment as lacking an explicit legal basis for the creation of semi-autonomous EU agencies (Dehousse, 2002; Majone, 2002a).<sup>7</sup>

The lack of an explicit legal basis for the creation of EU agencies is not unique, however, when compared to the national level. Most constitutions, including that of the United States, do not mention purely executive departments, bureaus and agencies. Usually only the functions of the legislative, executive and judicial powers are specified in constitutions. Bureaucratic government nonetheless became an apparent feature of modern societies as the solution of societal problems demanded more and more executive functions. Also the delegation of regulatory tasks to semi-autonomous EU agencies was therefore increasingly considered, even by the Commission's Legal Service (Majone, 2002a; 2002b).

The end of the 1980s witnessed renewed interest in the idea of establishing European agencies. It became clear that problems with regard to economic integration persisted, while at the same time new problems emerged that could not effectively be dealt with by using existing institutional solutions. The adoption of the Single European Act in 1986 provided the Commission with a significant increase in workload. Member states thought the EU should play a role not only in solving economic problems, but also in dealing with environmental, health, and even security issues. The negotiation of the Maastricht Treaty in 1992 gave a boost to the responsibilities of the EU in a vast amount of areas. The shortcomings of "a purely legislative approach to market integration" became increasingly clear (Majone, 2002b: 329).

EU politics had long been about legislative processes. Only in a few specific policy areas, most notably competition, has the Commission been entrusted with directly overseeing the application of Community legislation. Policy execution is usually left to the member states. All activities needed to ensure proper implementation, including the transposition of legislation, the establishment of tools and instruments, the setting up of agencies, the monitoring and inspection by national regulators and the adherence to the law by the regulated sectors, take place at the member state level. But member states often lack the executive capacity to implement or the political willingness to comply with EU legislation, as a result of which implementation among the member states continues to be patchy (Berglund *et al.*, 2006; Versluis, 2007; Kaeding, 2008).

The complexities of EU policies demanded functions that could only be performed by large-scale bureaucratic organisations, or a high level of bureaucratic capacity, at the EU level. The rapid increase of the EU's responsibilities in the implementation of legislation and the execution of policies placed growing demands on the Commission as a bureaucratic actor. The Commission, even though it had grown in size over the years and is bigger than most international organisations, still had a limited amount of staff and a restricted budget compared to the member states. Hence, it did not have enough resources and capacities to fulfil these new responsibilities. But restrictions on the Commission's personnel budget, imposed by the European Parliament and the Council of Ministers, made it difficult for the Commission to expand its support staff (Kelemen, 2002: 101-102).

Furthermore, taking on these responsibilities would mean that the Commission, traditionally oriented towards the initiation of new policies, would have to play a differ-

ent role. As the European Commission in some fields is more a political decision-maker than a neutral administrator, this would mean that the implementation of legislation or execution of policies could become entangled with political issues and problems. Faced with demands for action and a lack of expertise to adequately design policies to solve persistent problems, it was thus necessary to devise new institutional solutions.

Over the past two decades, the EU has thus experimented with new forms of governance (Kohler-Koch and Eising, 1999; Sabel and Zeitlin, 2007). These new forms of governance are often informal in nature (Christiansen and Piattoni, 2003; Stacey and Rittberger, 2003) and go beyond the traditional divide between politics and administration and the hierarchical image of organisation (Jordan and Schout, 2006). They include policy networks (Peterson, 1995; Metcalfe, 2000; Richardson, 2005), innovative policy techniques such as the open method of coordination (Zeitlin and Pochet, 2005), and, in particular, regulatory governance through independent agencies (Majone, 1996).

Given the need for implementing capacity and the difficulty in obtaining this in another way, the delegation of tasks to functionally decentralised bodies became an attractive option for the Commission. In January 1989, Commission President Jacques Delors announced the creation of the first 'Community' agency, the European Environment Agency (EEA).<sup>8</sup> The Council approved the EEA regulation within ten months, and the relative ease of its approval spurred proposals from other Commission DGs (Kelemen, 2002: 101-102). By the end of 1997, ten new agencies had been established (see Figure 5.1).

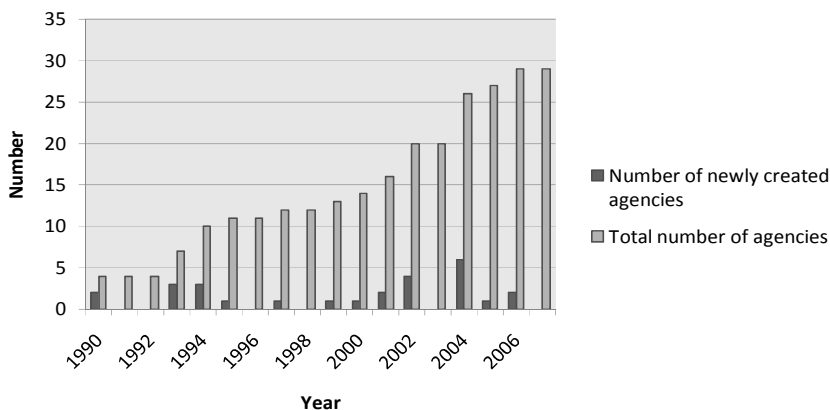
### *The second wave of agency creation*

When the Prodi Commission took office in September 1999, the EU engaged in a new wave of agency creation. The BSE crisis in 1996 and the resignation of the Santer Commission in 1999 had revealed serious shortcomings in the capacity of the European Commission to deliver effective and legitimate policies (Majone, 2000). In an attempt to restore the Commission's perceived loss of credibility and legitimacy, the new Prodi Commission launched a series of reforms. The creation of EU agencies, especially those during the second wave, should be seen as part of these reforms (Vos, 2000a). By the end of 2007, another fourteen Community agencies had been established, including the European Food Safety Authority (EFSA) and the European Maritime Safety (EMSA) and Aviation Safety Agencies (EASA) (see Figure 5.1).

To promote the development of the Common Foreign and Security Policy (CFSP) under the intergovernmental 'second pillar' of the EU, the member states agreed at the European Council in Cologne (1999) to place the European Institute for Security Studies (ISS) and the European Union Satellite Centre (EUSC), formerly part of the Western European Union (WEU), under the newly created office of the High Representative for the CFSP. In 2004, a European Defence Agency (EDA) was established, again under the responsibility of the High Representative.<sup>9</sup> Creating agencies had thus become an accepted instrument throughout the EU system, including not only supranational first pillar policies but also those falling under the intergovernmental second and third pillar.

In the area of justice and home affairs, the intergovernmental 'third pillar', EU member states created a European Police Office (Europol) in 1995, a European Police College (CEPOL) in 2000, and the European body for the enhancement of judicial co-operation in criminal matters (Eurojust) in 2002. While both CEPOL and Eurojust were based on Commission proposals, these EU agencies were all set up under the authority

of the Council to support cooperation among the national authorities of member states. The Commission enjoys structured relations with third pillar agencies (e.g. membership of the board), but it undertakes no executive functions and, until recently, played second (or third, for that matter) fiddle to the Council and the member states.



**Figure 5.1** – The proliferation of EU agencies (1990-2007)

The role of the Commission is slowly changing, as police, judicial and customs cooperation is becoming increasingly supranational. FRONTEX, the border agency, was established as a Community agency, as since 2004 the Commission has been able to initiate proposals on cooperation in the area of border control; Eurojust, although a Council agency, is funded from the Community budget; and Europol, originally based on a convention, will soon be made part of the EU institutional framework.<sup>10</sup>

### 5.3 Why create EU agencies? Functional and (bureau-)political reasons

Agencies are not unique to the EU system. States regularly create agencies. In the United States, the first agencies were established more than a century ago, and agencies have proliferated in most Western European countries as well (Van Thiel, 2001; Thatcher, 2002a; 2002b; James, 2003; Pollitt and Talbot, 2004; Pollitt *et al.*, 2004). Just as with national agencies, the choice for EU agencies lacks a universal rationale. The creation of each agency has been motivated by the need to respond to the particular circumstances of the moment. The literature on EU agencies makes an analytical distinction between two main reasons for independent agency creation, a functional and a political one.

#### *Functional needs*

Agencies are set up to meet functional needs, as tools to perform governmental tasks. They are supposed to (1) organise independent expertise at the EU level, (2) increase the transparency, visibility, accountability and legitimacy of EU policy making, (3) facilitate both European-wide cooperation between stakeholders and (4) efficient and flexible implementation of EU legislation, (5) offer cost-savings to industry and business, (6)

reduce transaction costs for national governments and thereby increase bureaucratic efficiency, and/or (7) encourage the harmonisation of regulatory practices in the member states.<sup>11</sup>

EU agencies are often created to answer the call for independent expertise of a highly technical or scientific nature not readily available within the Commission: “the independence of their technical and/or scientific assessments is [...] their real *raison d’être*. The main advantage is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations.”<sup>12</sup> As ‘non-majoritarian’ institutions, not directly accountable to voters or to their elected representatives, agencies are said to be insulated from the political process (*cf.* Dehousse *et al.*, 1992; Majone, 1997b). They are delegated the technical and scientific functions of the Commission, leaving an ‘unbundled’ Commission to focus on the political dimension (Spence, 2000). This insulation aims to ensure policy continuity, which is imperative to policy credibility (Majone, 2000; Vos, 2000a).

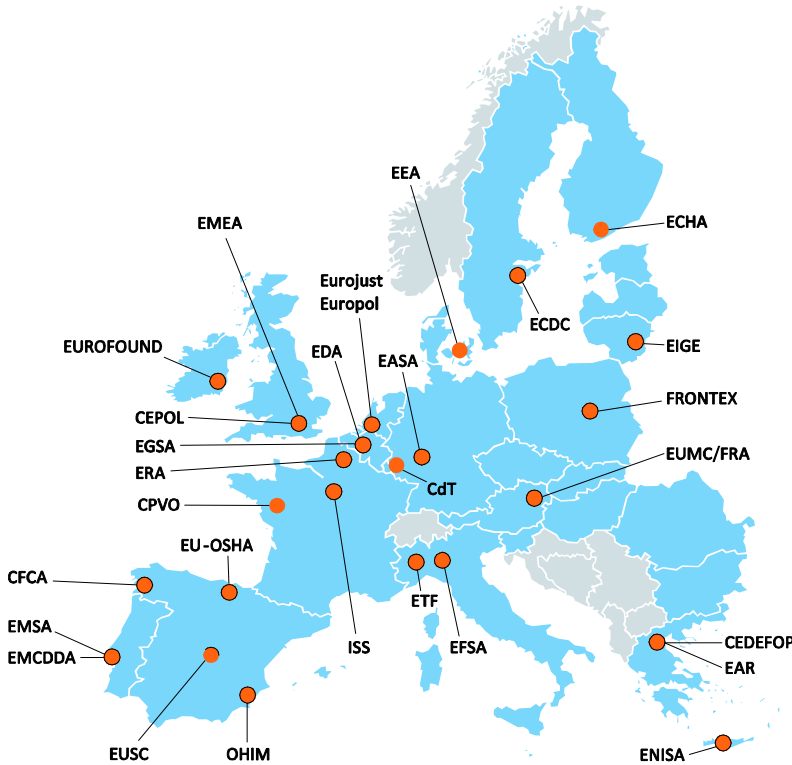
Another frequently used reason for agency creation is to remedy the perceived shortcomings of the committee framework (Everson *et al.*, 1999). After all, “[t]he Council-Commission-Comitology process is among the least transparent policy-making processes in the democratic world” (Shapiro, 1997: 291). As will be shown in Chapter 8, the BSE crisis clearly demonstrated the downside of this process, when anonymous experts were propelled into decision-making positions (Grönvall, 2001). In contrast to the opaque comitology system, “the agency option appears substantially more transparent” (Kreher, 1997: 242; Yataganas, 2001; Dehousse, 2002).

Agencies are not located in the ‘EU capital’ of Brussels, but decentralised geographically to locations in the EU member states (see Figure 5.2). The idea is that particular issues become increasingly identified with their location, for example referring to the ‘London’ agency for the evaluation of medicinal products or to the ‘Copenhagen’ agency for the environment. By giving increased visibility to EU decision-making – ‘bringing Europe closer to the citizen’ – agencies may meet the demand for public accountability, thereby increasing the legitimacy of EU policy making (Geradin and Petit, 2004: 36-37).

The lack of policy coordination and cooperation among stakeholders throughout Europe constitutes yet another often-cited motive to establish EU agencies. Before, stakeholders were essentially excluded from the EU policy-making process. Agencies can more easily create and/or coordinate (formal or informal) networks that ensure contact with stakeholders (Dehousse, 1997; Majone, 1997a; 1997b), thus encouraging the European-wide exchange of information and best practices and spurring further administrative integration in Europe (Kreher, 1997; Majone, 1997a; 1997b; Chiti, 2000; 2004; Yataganas, 2001). Moreover, several agencies’ management boards include stakeholders other than the Commission and the member states, such as the social partners, business and consumer groups. By offering ways of involving stakeholders, agencies can increase the perceived quality and acceptability of their work.

The creation of agencies is also supposed to contribute to the efficient and flexible implementation of Community policies, particularly in areas requiring frequent decisions based on technical or scientific considerations and where uncertainty is great, such as food safety (Majone, 1997a; 2000). Especially as the European administration is understaffed compared to national administrations, agencies and the networks they create and coordinate would increase the Community’s implementing capacity (Majone, 1996; Dehousse, 1997; Allio and Durand, 2003; but see Groenleer *et al.*, 2010). Moreover, agencies can be more efficient than the Commission because they are usually smaller organisational entities with more specialised expertise, which allows them

to respond to complex and emerging issues. They also are said to have more flexible staffing structures, allowing them to cope with a varying workload as well as to replace staff more easily and thereby maintain a high level of professionalism (Majone, 2002a; but see Schout and Pereyra, 2008).



**Figure 5.2** – Seats of EU agencies

Besides improving the EU's capacity to monitor policy implementation, the creation of agencies is also meant to reduce transaction costs, increase bureaucratic efficiency and encourage the harmonisation of regulatory practices in the member states. Instead of adding another layer of bureaucracy, EU agencies, in effect, could help reduce government bureaucracy by replacing the need for 27 individual national regulatory authorities, as well as offer cost-savings to industry and business since they would only have to deal with one agency.

Furthermore, despite the development of European-wide standards and benchmarks, practices continue to diverge among member states. Particularly the recent privatisation of industries such as telecommunications, public utilities and transport and the enlargement of the EU with formerly Communist countries in Central and Eastern Europe have highlighted the need to harmonise regulatory styles for proper functioning of the single European market (Majone, 2002b: 388). By facilitating networks of national authorities, EU agencies can diffuse regulatory practices and styles (Kelemen, 2002; 2004: 170-173).

### Political motives

Agencies are not only established for functional reasons. Behind the establishment of agencies are also political motives: (1) agencies are created to show the willingness of EU and national politicians to solve novel, pervasive and urgent problems, (2) they result from the conflict, bargaining, and compromise between the EU institutions, and (3) member states consider it prestigious to host them. In fact, many consider the creation of EU agencies an example of symbolic, inter-institutional or even 'pork barrel' politics (Page, 1997; Kelemen, 2002; 2005; Eijssbouts and van Ooik, 2006).

Both EU institutions and member states have used agency creation to demonstrate political will and decisiveness, especially in the wake of disasters and emergencies confronting the EU (Vos, 2000a; Eijssbouts and Ooik, 2006). The effects of crises in Europe increasingly cross national borders. Consider the BSE disease in 1996 and the Dioxin contamination in 1999, the *Erika* tanker running aground in 1999 and the sinking of the *Prestige* tanker in 2002. National response structures have repeatedly proven inadequate for the management of these crises. The United Kingdom and Belgium did not take effective action in responding to the threat of BSE and Dioxin (see e.g. Westlake, 1997; Chambers, 1999; Grönvall, 2001; Olsson, 2005); the *Erika* and *Prestige* disasters were compounded by the failure of France and Spain to react harmoniously.

Hence, the management of crises has moved to the top of the European Union's political agenda. Whereas most EU action remains rhetorical or symbolical, lately the EU has been taking a more explicit approach to the management of crises (Boin *et al.*, 2005; 2006; 2007). In the wake of BSE, Dioxin, and other food control emergencies, the EU rearranged its regulatory structures to trace and prepare for future food risks and threats (Vos, 2000b; Vincent, 2004; Lezaun and Groenleer, 2006). At the same time, crises laid bare the weak spots of the EU's response structures or complete lack thereof. Particularly, the mismanagement of the BSE crisis and the failure to prevent the *Prestige* accident stand out as examples of an EU incapable of acting effectively. Indeed, the failure to manage these and other crises has proven detrimental to the credibility of the European Commission and the legitimacy of the EU as a system of governance.

In reaction, independent agencies were created in the areas of, for instance, food safety, disease prevention and control, and maritime and aviation safety. Having been created in the wake of past crises and playing an important role in the management of future crises, EU agencies serve a dual purpose: they must increase the legitimacy of the EU through effectively managing potential risks and threats to EU citizens. The perceived autonomy of agencies and the authority they can claim on the basis of their technical expertise provide a basis for this legitimacy.

EU member states, arguably, were also willing to delegate tasks to EU agencies, notably in contested areas of governance such as food safety, in an effort to avoid blame for the mismanagement of future crises; the delegation of crisis management tasks to EU agencies was used by the Commission to offload responsibility. For national governments, EU agencies then serve as potential scapegoat to justify to their citizens the failure to cope with crises (Curtin, 2007; *cf.* Hood, 2002).

The creation of EU agencies should further be seen as resulting from the inter-institutional politics between the Commission, the Parliament and the Council (Kelemen, 2002: 99-102).<sup>13</sup> As Kelemen (2005: 175) notes: "[the] functional efficiency based understanding ignores much of the actual political struggle over the creation of European agencies." In the early 1990s, agency creation was not only a welcome solution to pressing policy problems, it was also politically acceptable from the viewpoint of the Commission, the Council and the member states, and the Parliament.



*Commission* Although the creation of independent agencies is often assumed to imply a weakening of its executive role, the Commission could actually gain in the process of agency creation. By delegating certain tasks to agencies, it could produce better policies, having improved information delivered by agencies that are supposed to have access to more specialised knowledge than the Commission. Or, as Commission President Barroso remarked during a meeting with the Heads of EU agencies:

[...] [R]ather than view the proliferation of agencies as a dilution of the executive function of the Commission, as some fear, I prefer to consider the agencies as useful tools that can help us to perform that executive function more efficiently and with more impact.<sup>14</sup>

Expansion of the EU's executive capacity may thus increase the power of the Commission. Indeed, by bolstering the consistency and credibility of EU policy making, the growth of agencies may very well strengthen the Commission in relation to the other European institutions and the member states.

One would expect that a weak Commission tries to expand its capacity through agency creation, as this means additional financial and, more importantly, human resources for the executive function. In the early 1990s, under the Presidency of Jacques Delors, the Commission, for example, expected that 'Euro-sceptic' member states would not support an expansion of the Commission's staff necessary to cope with the increased workload. Tasks would therefore have to be expanded and in such a way that additional staff could be financed. By delegating tasks to agencies, the Commission believed it could increase its implementation capacity without the otherwise concomitant expansion of its size (Kelemen, 2002: 101-102).<sup>15</sup>

Indeed, the number of posts created within the Commission since the early 1990s falls behind the cumulative figure for agencies staff (Dehousse, 2008: 789). But if anything can be said on the relation between the Commission's position and its inclination to resort to the creation of agencies, it is that this relation is ambiguous. Agencies have been created under different Commission Presidencies, varying in their positions vis-à-vis the other EU institutions. For instance, during both the Delors and the Prodi Commission, a large amount of agencies were created. But they used the agency option for a variety of reasons that cannot easily be disentangled. The Delors Commission, for example, used agency creation to hive off non-political tasks, whereas the Prodi Commission delegated tasks to agencies in order to restore the Commission's credibility.<sup>16</sup>

The Commission also delegated responsibilities to agencies when questions were scientifically or technically complex (e.g. medicines evaluation), politically sensitive (e.g. racism and xenophobia) or both (e.g. food safety).<sup>17</sup> With the creation of an agency the pressure was shifted from the Commission to the agency that – often with little or no practical assistance from the Commission – had to find solutions for problems that the Commission could not or did not want to resolve. When problems were not solved or new problems would emerge, the Commission could point to the agency responsible for coming up with solutions. Especially in the event of trouble, the Commission, like the member states, arguably considered delegation to agencies as an effective means to avoid or channel blame.

Moreover, after the Commission's loss of influence and prestige towards the end of the 1990s, agencies provided a safe haven for ambitious senior Commission bureaucrats with a career still ahead. Agencies served to create 'jobs for the boys' (cf. Majone, 2002a: 329). Precisely because agencies were supposed to be independent, these senior Commission bureaucrats were given the opportunity to develop what a respondent referred to as their "autonomous kingdoms".<sup>18</sup> Finally, the creation of an agency is also

considered to be prestigious for the different Commission DGs that do not yet have an agency and aspire to have “one of their own”.<sup>19</sup>

Importantly, however, the Commission does not decide to establish agencies by itself. It shares this power with the Council and the Parliament. Some argue that the concept of delegation is therefore ill-suited to situations in which tasks are conferred upon EU agencies (Dehousse, 2002). When creating EU agencies, powers were usually not taken away from the Commission but transferred vertically, from the national to the EU level. “Frequently they represent a pooling at EU level [...] of competences formerly exerted by member states in areas of shared competence, rather than performing tasks previously carried out by Commission departments.”<sup>20</sup> If tasks were not already performed at the EU level, it is claimed, the creation of an agency basically amounts to the transfer of sovereignty to the European level, and delegation of tasks to agencies could better be referred to as a process of ‘Europeanisation’ (Majone, 1996; 1997a).

Others argue that even if tasks are transferred from the national to the supranational level, the member states would not only do so because of functional pressures. They would also have to benefit in some way from the creation of agencies. In addition, there has been much less delegation by the member states to the European level than the ‘Europeanisation thesis’ claims (Eberlein and Grande, 2005: 94-96). In fact, in the case of agencies such as Eurojust, tasks were neither taken away from the Commission nor ‘delegated’ by the member states. As a Commission official states: “You cannot talk about transferring tasks from the Commission because [judicial cooperation in criminal matters] is not a task of the Commission. [...]”. The task is not a member state task either, however. Just like, for instance, the tasks of the Chemicals Agency, many of the functions of new agencies are novel (see also below).<sup>21</sup>

*Council* The agency option has generally been acceptable to the Council as also EU member states considered the creation of agencies to be in their political interest.<sup>22</sup> Member states in many cases expected to wield more influence and exert more control on EU law-making and implementation through the creation of EU agencies. The establishment of agencies would amount to a ‘re-nationalisation’ of previously delegated tasks from the national to the supranational level in several ways. The agencies’ management boards would largely be composed of member states representatives, giving member states influence over policy-making activities previously conducted within the Commission. Metcalfe (2000: 133) quotes the following from a Swedish government document titled *Autonomous agencies: For a more efficient Union and enhanced national influence*:

The [Swedish] Agency for Administrative Development considers that the [Swedish] Government’s scope for exerting influence on and gaining insight into operative work at European level is enhanced by the establishment of autonomous EU agencies. Most clearly, Swedish influence is increased by means of the board form of autonomous EU agencies, since each member country then has one vote (SAFAD, 1997: 28).

Moreover, the opposition of some member states, seeing EU agencies as a threat to existing national authorities already regulating particular policy sectors, was smothered by their inclusive design: scientific committees composed of experts designated by the national authorities would do much of the actual work. “Thus, to the extent that regulatory responsibilities were transferred from the Commission to one of the new agencies, they would be placed more firmly under intergovernmental control” (Kelemen, 2002: 99-101). Not all proposed agencies were acceptable to the member states. In the mid-1990s, a European telecom agency was proposed to regulate the liberalised EU telecom

market. Although supported by some members of the European Parliament, the agency was blocked by Germany, France and the United Kingdom, who were unwilling to transfer authority from existing national agencies to agencies at the European level (Kelemen, 2002: 110).<sup>23</sup>

Conversely, Germany, Italy, and later also the United Kingdom proposed the creation of an independent European Cartel Office in order for European competition policy to be set independently from political influence (Ehlermann, 1995; Wilks and McGowan, 1995). The Commission, however, opposed the proposal for fear of losing its extensive powers in the field of competition regulation. In response to a British proposal for a European competition watchdog, a Commission spokesman officially stated: "The European Commission competition department is already independent of political interference. The risk is that a stand-alone agency dealing with competition would be more susceptible to political interference than the Commission" (Geradin and Petit, 2004: 14; Kelemen, 2002: 111).<sup>24</sup>

An important reason the Council supported agency creation is because the location brings prestige as well as money and jobs to the host country. The even distribution of agencies among the EU member states – all of the 'EU 15' have been allocated their own agency – has led many observers to the conclusion that the creation of agencies is nothing more than a political 'pork barrel'. As each member state is interested in getting 'its own agency', agencies have often been used as negotiating material. Stressing that national considerations must not lead to the creation of new agencies, a European Parliament working document cynically notes: "The 2004 enlargement has considerably increased the number of potential host countries for agencies and thus the number of potential agencies."<sup>25</sup>

As the location of the agency is usually not mentioned in its constituent act, it is decided on by consensus by the Heads of State or Government on the basis of Article 289 of the Treaty establishing the European Community. It has repeatedly proven difficult to reach consensus among member states. Decisions on the location of agencies are therefore often marked by frantic backroom dealing, heated discussions and lengthy negotiations settled in the final hours of European Council meetings. This is illustrated by a news report of the 2001 Laeken summit during which the seats for thirteen agencies had to be allocated:

There was still important business to see to on the last afternoon [...]. Party bags had to be handed out. It would not have been fair, after all, if France went home with the chairmanship of a major Convention, if others left with nothing. So the Belgians came up with an ingenious solution. The others' party bags would contain the names of new EU agencies – some of them apparently dreamt up purely for the sake of fairness – which they would be allowed to house.<sup>26</sup>

The Belgian Council Presidency, after having been successful in assigning the chair and vice-chairs of the European Convention, bungled the allocation of agencies. It proposed to locate agencies that member states had not yet agreed to create (such as a civil protection agency), and in member states that had not even made a bid to host them. The Belgian Presidency, for instance, suggested locating the European Maritime Safety Agency in France, after which the Portuguese Prime Minister Guterres reportedly warned that Portugal would block all other decisions if the agency was not designated to Portugal. It even offered to move the Drug Monitoring Centre, already based in Portugal, to France.

The Laeken summit abruptly ended in discord with Italy's Prime Minister Berlusconi, who argued that Italy should be given the European Food Safety Authority (in part because of his concession on the introduction of a European Arrest Warrant) and famously insulted the Finns by publicly stating that they could not host the agency as they "don't even know what prosciutto is".<sup>27</sup> EFSA was eventually located in Parma (see Chapter 8), after Finland and Italy had settled their dispute and struck a deal on the locations of EFSA and the European Chemicals Agency (ECHA). Commenting upon the deal, Berlusconi again stunned the Finnish government by saying that he used his playboy charms to persuade Finnish President Mrs Tarja Halonen.<sup>28</sup>

Whereas the first agencies had been formally created as early as 1990, the actual decisions on their seats were only made during the Council meetings in Edinburgh in 1992 and in Brussels in 1993.<sup>29</sup> For instance, it took three years before a final decision was made on the seat of the European Environment Agency (see also Chapter 9). These delays have led to practical problems in getting agencies off the ground – until there is agreement on a location agencies can only recruit temporary staff and must be housed in provisional headquarters. Moreover, the physical distance from Brussels is said to isolate agencies from the main EU institutions, making it difficult to maintain contacts once the agency is established. A Commission official states:

If you want to know what is happening at the agency and if you want to have an influence thereon, it would be convenient if you are located in the same place. Commission officials and MEPs pay the agencies with a visit once every now and then, but that's it.<sup>30</sup>

A decision on the seat of the agencies created during the second wave, of which some were already operational but others had not been set up yet, was reached at the European Council meeting in Brussels in 2003.<sup>31</sup> During the meeting the 'old' member states made a commitment to give priority to the ten new member states when choosing sites for new agencies after the 2004 enlargement of the EU. But a decision on the seat of the Galileo Supervisory Authority, set to be finalised at the EU summit in Brussels in December 2006, was postponed because of mistrust between old and new member states.<sup>32</sup> The Czech Republic accused some Western EU states of trying to sabotage its bid by suddenly raising concerns about security.<sup>33</sup> Since 2004, new member states have been given two new agencies: the agency for border management is located in Poland and the agency for gender equality in Lithuania.<sup>34</sup>

*European Parliament* Until the mid-1990s, the European Parliament did not play a major role in the establishment of new agencies (Kreher, 1997). Emerging as a legislative actor alongside the Council after the Maastricht and Amsterdam Treaties, the Parliament began to assert its influence over the creation and design of new agencies, particularly by using its budgetary powers. The Parliament "woke up" late, however (Brinkhorst, 1996: 77).<sup>35</sup> It took until 1995, when the first agencies started to become operational, before the Parliament became aware that "the delegation of extensive implementation powers to agencies controlled by member state appointees threatened to undermine the Parliament's influence at the implementation stage" (Kelemen, 2002: 104).

The Parliament thought it could control agencies in the same way as the member states by having its representatives appointed in the board. However, Parliament representatives – usually well-meaning academics without much real power and, most importantly, without frequent contact with the Parliament – were often faced with a superior number of member state representatives. Because of the risk of member state in-

fluence on EU legislation and policies “without taking official and formal responsibility”, the Parliament started to examine the development of agencies more closely.<sup>36</sup>

The increased role of the Parliament vis-à-vis the Council led to another change in the Commission’s position on the creation of new agencies by the end of the 1990s. With the support of the Parliament, the Commission no longer saw the need to expand its activities by delegating significant powers to agencies if it could instead enlarge the EU’s implementing capacity without setting up new agencies with extensive powers (Kelemen, 2002; *cf.* Majone, 2002a). The Commission’s changed position is, for example, reflected in the limited scope of powers granted to the European Food Safety Authority, the first agency created through the co-decision procedure, giving the Parliament the power to adopt legislation together with the Council.

## 5.4 Institutional logics underlying agency creation

Functional and (bureau-)political explanations largely account for the creation of EU agencies. These explanations however do not sufficiently allow for the influence of institutional factors on the agencification process occurring at the EU level. Three factors, as mentioned in Chapter 3, are examined here in more detail: (1) the role of institutional entrepreneurs, (2) the pre-existence of forerunners, and (3) the transnational diffusion of ideas.

### *Promotion by entrepreneurs*

As pointed out by Kreher (1997: 232) “considering the emergence of the agencies from the perspective of who actually promoted the idea of setting up an agency reveals important differences among the agencies”. The creation of some agencies was promoted by one or more member states, as in the case of the Monitoring Centre for Drugs and Drug Addiction (EMCDDA) by French President Francois Mitterrand (Estievenart, 1996).

In October 1989, Mitterrand initiated a seven-step action programme to combat escalating drugs problem in Europe. Concerned about the increasing numbers of drug addicts, with the creation of a drug monitoring centre, Mitterrand saw an opportunity to combat drugs and drug addiction at the European level. The proposal envisaged a centre that would go beyond inter-governmental coordination and that would be established under the Treaty of Rome. Following Mitterrand’s proposal, an *ad hoc* European committee was set up to draw up the first European Plan to Combat Drugs, making recommendations to increase coordination at the member state and the European levels. The proposal was adopted by the Commission and approved by the European Parliament and the Council of Ministers in 1993 (Estievenart, 1996; Robertson, 1998).

Together with German Chancellor Helmut Kohl, Mitterrand had instigated the creation of the EUMC and Kohl himself had called for setting up a European Police Office modelled on the *Bundes Kriminal Amt* (see Chapter 11). The creation of other agencies was advanced by the Commission, such as in the case of the EEA – Commission President Delors promoted the establishment of this agency (Jiménez-Beltrán, 1996: 30) – or behind the scenes by officials of the Council Secretariat, such as in the case of Eurojust (Mangenot, 2005) (see Chapter 12).

### *Building on institutional forerunners*

Most agencies created during the *first* wave of agency creation built on institutional forerunners that laid the foundations for their creation. Institutional forerunners included Technical Assistance Units, Community programmes, scientific committees, and committees within the European Parliament (Kreher, 1997: 232-233).

In only a few cases, such as the Office for Harmonisation in the Internal Market (OHIM) and the Community Plant Variety Office (CPVO), were agencies the first to undertake activities at the European level. They were created together with a new Community regime, like the OHIM, with the registration system for trademarks (Combaldieu, 1996), and, in the case of the CPVO, with the registration system for new plant varieties (Kiewiet, 1998). The European Medicines Agency (EMA) occupies a middle position: the system for the authorisation of new medicines was partly new and partly complementary to the already existing evaluation system (Sauer, 1996; Kreher, 1997: 233). Although the EMA was also created to implement new Community legislation, which supplemented legislation already in place at the European level (see Chapter 7).

Many of the agencies created during the *second* wave did not build on pre-existing legislation or policies. Instead, agencies were created to implement new legislation, such as the general principles and requirements of food law in the case of EFSA (see Chapter 8), the 'Erika packages' in the case of the Maritime Safety Agency (EMSA), the regulatory framework for the management of chemicals (REACH) in the case of the ECHA, or new programmes, such as the Galileo satellite navigation programme in case of the GNSS Supervisory Authority. In fact, agencies were often created because the lack of pre-existing structures or arrangements at the EU level had demonstrated the need for EU action (or at least it was perceived as such). The EUMC, for instance, could not rely on extensive legislation or policies in the area of anti-discrimination. Rather, the agency was created for the very fact that such legislation or policies were not yet in place at the EU level, in essence serving as a 'fig leaf', according to an interviewee (see Chapter 10).<sup>37</sup>

### *Transnational diffusion of ideas*

The decision to exercise the agency option, and to use it increasingly frequently since the early 1990s, has also been the result of a process of transnational policy diffusion, or institutional isomorphism. "Agency creation has been some kind of fad; it was *à la mode*."<sup>38</sup> Although it is usually the EU that is being said to exert pressure on national governments to harmonise regulatory practices (Majone, 1996), when it comes to the creation of EU agencies, EU institutions themselves have also been influenced by the spread of, most notably, New Public Management (NPM) norms in the member states (*cf.* Pollitt and Bouckaert, 2004).

Whereas there has been some borrowing and comparing between EU agencies already existing and agencies-to-be, institutional isomorphism is less of a valid argument to explain the institutional design of individual agencies. The principle underlying the creation of agencies has usually been quite similar but "detailed rules and structures differ because they reflect the norms and practices that constitute sector-specific regulatory regimes" (Demortain, 2008: 3). As a result, agencies are comparable with regard to issues such as the distribution of power (as we have seen above), but different when it

comes to the institutional solutions designed (as will be shown in Chapter 6 and the case chapters).

## 5.5 The creation of EU agencies under debate

The popularity of EU agencies has declined in recent years. Whereas agencies were created as part of the EU reform, now they have become issue of debate.<sup>39</sup> The haphazard creation of agencies at the EU level led to a call for restraint from the Parliament, the Council and the Commission (albeit for different reasons), in particular where it concerned the delegation of autonomous powers to agencies.

The varied role, structure and profile of [...] agencies make the system untransparent, and raise doubts about their accountability and legitimacy. The diverse role of agencies fuels concerns that they might stray into area more properly the domain of the policy-making branches of the EU.<sup>40</sup>

The Commission has proposed several reforms to deal with the increasingly heterogeneous population of agencies. Already in the 2001 *White Paper on European Governance*, the Commission stated that “the creation of further autonomous regulatory agencies in clearly defined areas” would “improve the way rules are applied and enforced across the Union” but only under specific conditions.<sup>41</sup> Agencies could be granted decision-making power in areas where “a single public interest predominates and the tasks to be carried out require particular technical expertise”, while being subject to “an effective system of supervision and control.”

As it had announced in the White Paper, the Commission in 2002 produced a Communication on *The Operating Framework for the European Regulatory Agencies* for discussion with the Parliament and the Council.<sup>42</sup> On the basis thereof, the Commission, in 2005, issued a draft Interinstitutional Agreement aiming to establish a horizontal framework for agencies.<sup>43</sup> Having proposed the Interinstitutional Agreement itself in reaction to the Commission Communication on the operating framework, the Parliament reacted positively to the framework, considering it an instrument to ensure budgetary discipline and sound financial management of agencies.<sup>44</sup>

The Council, by contrast, has blocked negotiation of the framework. Most EU member states considered the draft already too detailed, leaving little room for negotiation. In reality, they were not keen on a lot of the harmonisation proposals because in their view, these would increase the Commission’s control over agencies.<sup>45</sup> In 2007, the German Council Presidency tried to set the negotiations afloat by issuing a non-paper asking member states for their opinions on the proposed horizontal framework, but without result.

Moreover, as a result of the increased visibility of (some) EU agencies and the growing political and public scrutiny of their activities, the fundamental question whether tasks should be transferred to an EU agency can no longer be de-politicised on the basis of functional arguments. Member states’ politicians want to avoid the perception that they are giving up their sovereignty in certain areas because that – both at the moment of delegation and at a later stage – can cost votes (see, for example, the outcome of the referendums on the European Constitution in France and the Netherlands in 2005). The political consequences of delegation thus decrease member states’ willingness to resort to agencies, even if they would be willing to delegate tasks on functional grounds.

In 2008, the Commission therefore announced that it would withdraw the 2005 draft Interinstitutional Agreement. Instead it presented a Communication on “the way forward” with European agencies, “re-launching the debate on the role of agencies and their place in the governance of the EU”. In order to have an open debate with the Council and the Parliament, it first announced a moratorium on the creation of new agencies.<sup>46</sup> In March 2009 representatives of the three institutions met for the first time to discuss, as an inter-institutional Working Group on agencies, issues such as funding, budget, supervision and management. The results of a horizontal evaluation of agencies, undertaken by an external consultant hired by the Commission, served as input for their discussions (which at the time of writing were ongoing).<sup>47</sup>

## **5.6 Conclusion: beyond functional needs to create agencies**

This chapter aimed to show that the creation of EU agencies can be explained by means of functional, political and institutional reasons. In reality, these reasons cannot be distinguished so clearly, as most agencies were created for a combination of reasons. The formal autonomy of agencies, from a functional perspective, has been an important reason for the creation of agencies. From a political viewpoint, the autonomy of agencies, not being fully controlled by one particular actor, has made their creation acceptable to a variety of actors. Institutionally, agencies’ autonomy fits the environment in which they came into being, making their very creation possible.

More in particular, the process of agencification in general and the delegation of autonomous powers to EU agencies can be seen as resulting from, or at least shaped by, several factors. The establishment of agencies at the EU level has first of all been driven by the changing nature of EU politics, which is no longer only about legislative politics. It has also become executive politics, with an increased need for organisational capacity. As it had become clear during the 1980s that legislative action alone would not be sufficient to effectively solve persistent and emerging policy problems, agencies were created to support the Commission and the member states in executing policies. By contributing to the efficiency and credibility of EU policies, they were considered part of the efforts to strengthen the EU system of governance.

Furthermore, the organisation of the EU, with power divided among the Commission, the Council, and the Parliament, made agency creation an attractive option for the EU institutions, leading to a ‘win-win-win’ situation. For the variety of players involved in executing EU policies, ranging from EU to national and local actors and from state to academic, NGO and private actors, agency creation was acceptable because they would all gain in some way. For instance, their expertise would be called upon, they would be included in the EU policy-making process, or they would host an EU agency. The establishment of EU agencies was also influenced by forces in the EU environment, including the activities of institutional entrepreneurs from the EU institutions or the member states, the existence of institutional forerunners at the EU level, and (albeit to a lesser extent) the diffusion of New Public Management norms throughout the EU.

The reasons underlying the decision to delegate tasks to EU agencies might offer important insight into the design of such agencies. As agency creation does not merely occur on functional arguments, but also on political and institutional grounds, this might have important consequences for the degree of autonomy which with agencies are designed. Indeed, the reasons for agency creation are a possible explanatory factor for the degree of formal autonomy invested in EU agencies, as the next chapter on the design of EU agencies demonstrates.



## Notes

<sup>1</sup> Commission of the European Communities (2005), *Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies*, COM(2005)59 final, Brussels 25 February, p. 2.

<sup>2</sup> Parts of this chapter are adapted from Groenleer (2006).

<sup>3</sup> See a special issue of *West European Politics* (2008), edited by Deirdre Curtin and Morten Egeberg, entirely devoted to the transformation of EU executive politics.

<sup>4</sup> See *The Statutes of the Euratom Supply Agency of 6 November 1958*, OJ B27, 06/12/1958, p. 534; Decision fixing the date on which the Euratom Supply Agency shall take up its duties and approving the Agency Rules of M\5 May 1960 determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials, OJ 32, 11/05/1960, p. 776/60.

<sup>5</sup> For a description of the historic development of the Euratom Supplies Agency, see chapter II.4 in: European Parliament, Directorate-General for Research, *The European Parliament and the Euratom Treaty: past, present and future*, Energy and Research Series, ENER 114 EN, Brussels, 2001, pp. 82-108.

<sup>6</sup> See European Court, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community, Case 9-56, Judgment of the Court of 13 June 1958, at 150-152.

<sup>7</sup> As the Meroni judgment was rendered under the ECSC Treaty, both its validity and applicability under the present Treaty are debatable. In subsequent judgements, notably the Romano case, the ECJ further restricted the delegation of discretionary powers to agencies. See Case 98/80, *Romano v INAMI*, 1981 ECR 1241.

<sup>8</sup> See Chapter 9 for a detailed analysis of its creation, design and development.

<sup>9</sup> The question of responsibility is particularly relevant with regard to the creation of the post of EU Foreign Affairs Minister, combining the functions of the High Representative for the CFSP and the External Relations Commissioner: it is not yet clear under whose responsibility – the Commission or the Council – the existing CFSP agencies would fall and where, institutionally, new agencies in the area of foreign policy should be established.

<sup>10</sup> See Part 5 for a detailed description and analysis of the creation, design and development of these two agencies.

<sup>11</sup> See for an overview of the recurring general justifications for the creation of EU agencies Commission of the European Communities (2003), Directorate-General Budget, *Meta-evaluation of the Community Agency system*, 15 September.

<sup>12</sup> See Commission of the European Communities (2002), Communication from the Commission, *The Operating Framework for the European Regulatory Agencies*, COM(2002) 718 final, Brussels, 11 December, p. 5.

<sup>13</sup> The European Court of Justice plays a limited role in the establishment of agencies (Bergström and Rotkirch, 2003).

<sup>14</sup> Speech by President Barroso on the occasion of the meeting of the Heads of EU agencies in Brussels, on 23 February 2006, available at <http://www.etf.europa.eu>, consulted on 23 May 2007.

<sup>15</sup> This argument also applies to executive agencies within the Commission. These internal agencies, as opposed to the external agencies that are the object of this study, are financed from programme budgets, that is, an expansion of the Commission's staff is made possible through the use of money officially appropriated to operational activities. Interview #5

<sup>16</sup> The resignation of the Santer Commission, following allegations of fraud, spurred the creation of the European Anti-Fraud Office (OLAF) in April 1999.

<sup>17</sup> Interview #5

<sup>18</sup> Interviews #5 and #68

<sup>19</sup> Interview #5

<sup>20</sup> See Information note in the context of the budgetary trilogue of 18/4/2007, Brussels, 16 April 2007.

<sup>21</sup> Interview #39

<sup>22</sup> From an analysis of the agencies created per Council Presidency there does not seem to be a relation between the member state holding the Presidency and the creation of an EU agency.

<sup>23</sup> A very similar situation occurred in 2008 when the Commission saw its plans for a single and centralised European Electronic Communications Market Authority being thwarted by the member states and, this time, also the Parliament (Groenleer and Kars, 2008).

<sup>24</sup> *EUobserver*, Britain calls for independent competition watchdog, 20 April 2005; *Financial Times*, Britain's finance minister calls for independent EU competition authority, 20 April 2005.

<sup>25</sup> European Parliament, Working document on a meeting with the decentralised agencies on the PDB for 2007, Committee on Budgets, PE 367.332v02-00, Brussels, 29 June 2006, p. 7.

<sup>26</sup> *BBC News*, EU steels itself to "deliver results", 15 December 2001, available at [http://news.bbc.co.uk/1/hi/english/world/europe/newsid\\_1712000/1712999.stm](http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1712000/1712999.stm), consulted on 13 March 2005.

<sup>27</sup> *International Herald Tribune*, Talks deadlock over who gets sites for new agencies: EU bickering snarls summit, 17 December 2001.

<sup>28</sup> *BBC News*, 'Playboy' Berlusconi irks Finland, 23 June 2005, available at <http://news.bbc.co.uk/2/hi/europe/4122596.stm>, consulted on 25 April 2007; *EUobserver*, Finns feel had done by on EU agency, 16 December 2003.

<sup>29</sup> Conclusions of the Presidency, Decision taken by common agreement between the Representatives of the Governments of the Member States, meeting at Head of State or Government level, on the location of the seats of certain bodies and departments of the European Communities, Edinburgh, 12 December 1992; and Brussels, 29 October 1993; *Financial Times*, Squabbles over EC Goodies Near an End, 25 October 1993; *NRC Handelsblad*, Europese Bank komt in Frankfurt; EG-top: Europol naar Den Haag [European Bank to Frankfurt; EC-summit: Europol to The Hague], 30 November 1993.

<sup>30</sup> Interview #17

<sup>31</sup> Conclusions of the Presidency, Decision taken by common agreement between the representatives of the Governments of the Member States, meeting at Head of State of Government level, on the location of the seats of the institutions and of certain bodies and departments of the European Union, Brussels, 13 December 2003.

<sup>32</sup> *EUobserver*, Agencies fight could end up on EU summit agenda, 24 November 2006.

<sup>33</sup> *EUobserver*, EU to choose Galileo seat despite technical delays, 11 December 2006; *EUobserver*, Security issues cloud Galileo seat discussions, 13 December 2006; *EUobserver*, Czechs complain against security spin in EU satellite spat, 15 December 2006.

<sup>34</sup> *EUobserver*, Poland to host EU borders agency, 15 April 2005; *EUobserver*, Lithuania gets EU gender institute, 1 December 2006.

<sup>35</sup> Interview #68

<sup>36</sup> European Parliament, Working document on a meeting with the decentralised agencies on the PDB for 2007, Committee on Budgets, PE 367.332v02-00, Brussels, 29 June 2006, pp. 1, 11.

<sup>37</sup> Interview #5

<sup>38</sup> Interview #5

<sup>39</sup> See for instance Andoura and Timmerman (2008).

<sup>40</sup> Commission of the European Communities (2008), Communication from the Commission, *European agencies – The way forward*, COM(2008) 135 final, Brussels, 11.3.2008, p. 6.

<sup>41</sup> Commission of the European Communities (2001), *European Governance: A White Paper*, COM(2001) 428 final, Brussels, 25 July, pp. 23-24.

<sup>42</sup> Commission of the European Communities (2002), Communication from the Commission, *The Operating Framework for the European Regulatory Agencies*, COM(2002) 718 final, Brussels, 11 December.

<sup>43</sup> Commission of the European Communities (2005), *Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies*, COM(2005)59 final, Brussels 25 February.

<sup>44</sup> See European Parliament (2003), Report on the Communication from the Commission, *The operating framework for the European Regulatory Agencies*, Committee on Constitutional Affairs, Rapporteur: Teresa Almeida Garret, 4 December, A5-0471/2003; European Parliament, Resolution on the Communication from the Commission, *The operating framework for the European Regulatory Agencies*, (COM(2002)718 – 2003/2089(INI)), P5\_TA-PROV(2004)0015.

<sup>45</sup> See also the report of the Assemblée Nationale, Rapport d'Information Déposé par la Délégation de L'Assemblée Nationale Pour l'Union Européenne (1), sur les agences européennes (COM [2005] 59 final / E 2910, COM [2005] 190 final / E 2903 et COM [2005] 280 final / E 2918), No. 3069, 3 mai 2006, pp. 71-74.

<sup>46</sup> See Commission of the European Communities (2008), Communication from the Commission, *European agencies – The way forward*, COM(2008) 135 final, Brussels, 11.3.2008; Commission seeks common approach on the future governance of European Agencies, IP/08/419, Brussels, 11/03/2008.

<sup>47</sup> EU starts discussion on European Agencies, Press release, IP/09/413, Brussels, 18 March 2009.

## CHAPTER 6

# THE DESIGN OF EUROPEAN UNION AGENCIES

European Union agencies] are typified by their diversity.<sup>1</sup>

### 6.1 Introduction: in many shapes and sizes<sup>2</sup>

European Union agencies come in many shapes and sizes. While they share certain formal characteristics, the differences among agencies outweigh the similarities.<sup>3</sup> This also applies to their level of autonomy. Upon their creation, some agencies are invested with a higher degree of autonomy than others. For instance, some have more decision-making power and are able to generate their own financial resources; others only have an advisory function and depend on the Commission or the member states for funding. As shown in the previous chapter, these differences at least partly reflect the different time periods in which they were created and the various reasons underlying their creation.

This chapter examines the formal design of EU agencies, particularly the autonomy that agencies were endowed with at the time of their creation through legislative statutes.<sup>4</sup> Understanding the development of EU agencies requires starting from their design, because what is formally put on paper by their creators with regard to their powers and controls is likely to shape their development in important ways. Whereas the design characteristics of agencies are certainly not the only factors, and it is essential to inquire further into the organisational development of particular agencies (as is done in the case chapters), design is an important determinant of the actual autonomy of EU agencies.<sup>5</sup>

The chapter provides a comparative overview, describing the design of agencies, while also laying out a framework for analysing their *formal* autonomy. Whereas at first glance EU agencies may look alike, a closer look reveals their distinct features. By focusing on the similarities and differences among agencies with regard to these features, the chapter discusses the different dimensions of formal autonomy and their indicators (see also Chapter 4), and offers an assessment of the formal autonomy of EU agencies. In Section 6.2, the formal-legal status of agencies is considered. Section 6.3 deals with the policies and decisions that agencies make. Thereafter, their structure and composition are set out (Section 6.4). Sections 6.5 and 6.6 examine the staffing and financing of agencies, while the relations that agencies maintain with external actors are discussed in Section 6.7. A short summary of the findings and some directions for the remainder of this study conclude this chapter (Section 6.8).

### 6.2 Formal-legal status

#### *Legal basis*

There is no explicit legal basis for the creation of EU agencies. The EC/EU treaties do not specify or clarify the legal framework for agency creation and design. Commission

proposals introduced at the Nice (2001) and Laeken (2003) European Councils to create a legal basis for agencies were unsuccessful (Bergström and Rotkirch, 2003). Apart from the European Defence Agency, Europol and Eurojust, agencies are not explicitly referred to in the Lisbon Treaty other than that they, like other institutions, bodies and offices, have to operate in accordance with certain principles of good governance, such as transparency.<sup>6</sup> The (new) Financial Regulation does enable the Commission to “entrust tasks of public authority and in particular budget implementation tasks” to agencies governed by Community law, bodies set up by the Communities, and national public sector bodies or bodies governed by private law with a public sector mission.<sup>7</sup>

When it comes to their legal basis, two kinds of EU agencies can be distinguished: Community and Union agencies. Community agencies are created by a decision based on secondary law, in other words, by legislative decision-making in the form of a Council regulation (Geradin and Petit, 2004; Kreher, 1997: 227; Vos, 2000a: 1121).<sup>8</sup> Each Community agency has its own regulation, in which the specific mandate, objectives and tasks of the agency are specified. Most regulations are not longer than a couple of pages, often only including procedural provisions. Some regulations, such as those of EFSA and the ECHA, also include substantial provisions.<sup>9</sup>

Most early agencies are based on Article 308 (formerly Article 235) of the Treaty establishing the European Community (TEC); except the European Environment Agency (EEA), which was created on the basis of Article 175 TEC. This general provision requires that the consultation procedure be applied to create an agency (Kreher, 1997: 232). The consultation procedure, not often used anymore, implies limited influence for the European Parliament during the legislative decision-making process and unanimous decision making by the Council.<sup>10</sup>

More recently established Community agencies are usually based on specific Treaty provisions, which provide for the co-decision procedure and imply majority voting. By relying on specific Treaty provisions, the Commission can limit the mandate of the agency to the scope of the specific Treaty provisions, whereas under Article 308 of the TEC the Council possesses extensive powers to determine the action to be undertaken by the Community (Vos, 2003; Geradin and Petit 2004: 43).

The United Kingdom challenged the legality of the establishment of agencies on the basis of specific Treaty provisions in the case of the European Network and information Security Agency's (ENISA) creation. The ENISA was established on the basis of the single market clause in Article 95 of the TEC. In the view of the UK the legal basis of the agency should have been Article 308 of the TEC. However, the European Court of Justice (ECJ) held that agencies that contribute to the proper functioning of the single market can be established on the basis of the single market clause even when their powers are essentially non-regulatory in nature.<sup>11</sup>

The legal basis of Community agencies matters for their formal autonomy. An agency's legal basis is a condition that can account for a high or low level of formal agency autonomy. Community agencies that are based on general treaty provisions are more autonomous with respect to the Commission than agencies that are based on specific treaty provisions, whereas Community agencies that are based on specific treaty provisions are more autonomous from the member states.

In addition to Community agencies, falling under the responsibility of the Commission, several agencies have been established that operate under the authority of the Council: Union agencies. As they are not based on a treaty provision, the indicator above – whether the treaty provision is general or specific – does not apply to them. The agencies that fall under the Common Foreign and Security Policy (CFSP) of the EU are created by a Council Joint Action, while agencies in the area of justice and home affairs

are created by a Council Decision or Regulation. Until the recent change in its formal status, Europol, the European Police Office, was an exception. Its initial constituent document was a convention that had to be signed and ratified by the member states, and could only be changed by means of additional protocols (see Chapter 11).

The formal status of agencies also influences *de jure* agency autonomy.<sup>12</sup> Community (or first pillar) agencies are more autonomous with respect to the member states than Union (or second or third pillar) agencies that, in turn, are more autonomous with respect to the Commission than Community agencies. After all, Community agencies are part of the EU's first pillar in which policy making has many supranational characteristics, whereas Union agencies fall under the second or third pillar in which policy making is essentially intergovernmental in nature.

### *Formal independence*

EU agencies are institutionally 'separated' (or 'disaggregated') from the Commission or the Council, their 'parent bodies' (Barbieri and Ongoro, 2008).<sup>13</sup> In other words, they have a level of formal autonomy. In most Commission documents and agencies' founding regulations this autonomy is referred to as independence (but see Chapter 2). Moreover, the term 'independence' is used in various ways, ranging from independence as a (or *the*) reason for creating agencies, to independence as a characteristic design feature or as a means by which an agency's task must be executed. Whereas some scholars claim that most founding regulations "expressly stipulate that the agency will be completely independent from the makers of law and politics" (Van Ooik, 2005: 145), an analysis of agencies' constituent acts reveals that there is significant variation at least in the way in which constituent acts formally state agencies' independence.

In some cases, such as the EEA or the Translation Centre (CdT) the reference is limited to legal autonomy or administrative independence, respectively; in other cases, including the European Training Foundation (ETF) and the EU Agency for Safety and Health at Work (EU-OSHA), the term independence or autonomy is not used at all in the agency's regulation. Only in two cases, the European Food Safety Agency (EFSA) and the Fundamental Rights Agency (FRA; formerly European Monitoring Centre for Racism and Xenophobia, EUMC), does the regulation contain a separate article on independence; in both cases, the article focuses on the independence of the agencies' employees and those individuals being part of their management boards and scientific committees.

Most references to independence, regardless of the agencies' tasks (see below), are made with regard to the independence with which the director of an agency has to fulfil his tasks. Similar references are made to the independent manner in which members of the agencies' management boards, scientific committees and, when appropriate such as in the cases of the Office for Harmonisation in the Internal Market (OHIM), the Community Plant Variety Office (CPVO), the European Aviation Safety Agency (EASA) and the European Chemicals Agency (ECHA), boards of appeal have to exercise their tasks. Reference to independence is also made when agencies are tasked with providing independent scientific support, advice, expertise, evaluations or assessments, as for instance in the case of the European Medicines Agency (EMA), EFSA and the ECHA. In case of several agencies, including the OHIM and the EASA, the agencies' "autonomous budget" is mentioned in their regulation.

In most cases, no reference is made to the actors from which the agency or its employees or their boards and committees have to be independent. The European Centre for the Development of Vocational Training (CEDEFOP) and the EMA are exceptions.

In the former case, it is expressly stated that the agency is independent of the Commission; in the latter case the regulation stipulates that the agency is independent of industry, notably pharmaceutical companies. Regulations often do not mention what the reason is for the agency to be granted independence. In two cases, however, EFSA and the European Network and Information Security Agency (ENISA), the regulation specifies that the agency is supposed to establish confidence by virtue of its independence. Both regulations also make reference to the agencies' ability to express "independently" their conclusions and orientations.

Clearly, a formal statement of the agency's independence (or autonomy) is an important condition for the agency's formal autonomy. Agencies are more autonomous when their regulations expressly state they are independent, than when their regulations make only marginal reference to independence or remain silent at all. The more references to formal independence (or autonomy) in its regulation, the higher the level of an agency's formal autonomy.

### **6.3 Mandate, objectives and tasks**

Existing agencies vary with regard to the objectives they are supposed to achieve, the tasks they perform in order to realise their objectives, and the mandate they have to fulfil their tasks. The population of EU agencies can be grouped into several categories of comparable agencies in terms of their objectives, tasks and mandate.<sup>14</sup>

#### *Mandate*

Most agencies have a limited mandate, laid down in the constituent act together with their objectives and tasks.<sup>15</sup> They differ from national agencies in the EU member states and other countries, particularly the United States, because they are generally not invested with broad regulatory powers (Majone, 1997b; Yataganas, 2001; Geradin, 2005).<sup>16</sup> Yet, the mandates given to agencies have developed over time, with recently created agencies playing a "very specific role" in the implementation of EU legislation in technical areas or on scientific issues.<sup>17</sup>

Only three Community agencies can make decisions, albeit only in individual cases: the Office for Harmonisation in the Internal Market registers Community trademarks and designs, the Plant Variety Office grants Community plant variety rights, and the Aviation Safety Agency issues certificates for aeronautical products.<sup>18</sup> Three other agencies, the Medicines Agency, the Food Safety Authority, and the Chemicals Agency, do not have decision-making power, but the Commission must take the opinions issued by these agencies into account when considering whether or not to grant authorisation for medicinal products, food additives or chemical substances. By rendering services to economic sectors, these six agencies facilitate the operation of the internal market (Majone, 2002a; Vos, 2003: 121).

The Commission has recently drawn up a framework for what it calls "regulatory agencies". Such agencies are "required to be actively involved in exercising the executive function by enacting instruments which contribute to regulating a specific sector."<sup>19</sup> Even though the term "regulatory" would seem to allude thereto, they cannot enact legislation themselves (Frank, 2004: 200).<sup>20</sup> Regulatory agencies are only empowered to adopt individual decisions in a clearly specified area of Community legislation but not legislative measures of general application.<sup>21</sup> Moreover, the Commission confusingly

makes a distinction between regulatory agencies with the power to enact legal instruments binding on third parties and those that have no independent power of decision (Geradin and Petit, 2004: 47). Following the framework, few of the current Community agencies would qualify as full-blown regulatory agencies.

All other Community agencies have predominantly advisory functions, which fall into four broad categories (Geradin and Petit, 2004: 43-49; Kreher 1997: 236-237; Vos 2003: 119-121; Yataganas 2001: 26). One group of agencies collects, analyses and disseminates information in their respective policy fields.<sup>22</sup> The European Training Foundation (ETF), for instance, assists pre-accession states and countries in the European neighbourhood in developing education and training systems. A number of these agencies, such as the Environment Agency (EEA), the Drug Monitoring Centre (EMCDDA), and the Monitoring Centre for Racism and Xenophobia (EUMC) also create and coordinate European information networks, connecting national focal points in the member states.<sup>23</sup>

A second group of agencies are tripartite organisations. They bring together representatives of employers, employees, member states and the Commission to inform and support the formulation of EU social policy.<sup>24</sup> The Agency for Safety and Health at Work (EU-OSHA), for example, shares 'good practice', and communicates information on occupational safety and health risks. A third group of agencies performs safety and/or interoperability tasks.<sup>25</sup> The Maritime Safety Agency (EMSA), for instance, visits member states' ports to monitor the EU control regime for ships. A final group consists of agencies that execute programmes and tasks for the EU within their respective fields of expertise. This group only includes the Translation Centre (CdT) and the Reconstruction Agency for the Balkans (EAR).<sup>26</sup>

As most Community agencies, Union agencies have no independent decision-making powers. Their work involves enhancing cooperation and coordination between member states in police and judicial matters,<sup>27</sup> and in foreign and security affairs,<sup>28</sup> where national governments remain the predominant actors. The EU Satellite Centre, for example, produces and utilises information derived from the analysis of earth observation space imagery, therewith supporting the EU's decision-making in the field of Common Foreign and Security Policy (CFSP).

An agency's mandate affects its formal autonomy. Agencies that are endowed with decision-making power are more autonomous from the Commission (or the member states), than agencies that only have advisory functions. There have not been any cases in which changes in constituent acts have altered the powers of agencies leading to a lower level of formal autonomy. A revised version of the EUMC's founding regulation limiting the agency's mandate was never even considered as Chapter 10 shows. Indeed, agencies' mandates were frequently expanded in revisions or amendments of their constituent acts. As Chapters 7 and 11 illustrate, the EMEA and Europol are examples of such agencies.

### *Objectives and tasks*

Constituent acts stipulate agencies' objectives and tasks.<sup>29</sup> Sometimes a constituent act also determines priority areas, but usually the agency has to translate the statutory objectives into more detailed priorities and the legal tasks into more concrete activities, for instance, in the form of (multi-)annual work programmes. Two agencies, the Food Safety Authority and the Centre for Disease Prevention and Control (ECDC), are explicitly allowed to carry out activities on their own initiative.<sup>30</sup>



The regulations of Community agencies spell out various procedures for the adoption of the work programme. In some cases, the agency's management board has to consult or seek the Commission's opinion;<sup>31</sup> in other cases, the board has to take into account the Commission's priorities.<sup>32</sup> The Maritime Safety Agency (EMSA) and the Railway Agency (ERA) are exceptions. In these cases, the Commission has to agree with the agency's work programme. When the Commission disagrees, the administrative board has to re-examine the work programme and adopt it either with a two-thirds majority, including the Commission representatives, or by unanimity of the member states' representatives.<sup>33</sup> The constituent documents of Union agencies also stipulate that the board adopts or approves the annual work programme and that it sends the programme to the Council or reports to the Council thereon.<sup>34</sup>

The way by which the work programme is adopted influences the autonomy of agencies. Community agencies are more autonomous from the Commission when they only have to consult or seek the opinion of the Commission, than when they also have to consider the Commission's priorities. Union agencies are more autonomous from the member states when they only have to adopt or approve the work programme, than when they also have to take into account the member states' requirements.

As with their mandates, several agencies have seen their tasks being expanded. One of the problems was that, while mandates expanded, funding often remained at the same level. The Commission, the Council or the Parliament's legislative committees asked agencies to perform new or adjusted tasks, but without the Parliament's budgetary committees providing agencies with the funding to perform these tasks. In the past, agencies have also taken up tasks during the year that were not specified in their work programmes up front, which, from the viewpoint of the Parliament's budgetary committees, has been considered a problem.<sup>35</sup>

## **6.4 Structure and composition: board, director and committees**

While EU agencies have different organisational structures, they are, apart from their staff (see Section 6.5), usually composed of a management board and an executive director. Several Community agencies also consist of one or more scientific or technical committees and/or advisory forums.

### *Management board*

All existing agencies have a management board, and some also have an executive board.<sup>36</sup> The management board formulates the strategic objectives of the agency. It also formally adopts the agency's work programme, annual report, budget and establishment plan, and typically appoints the executive director of the agency. Although the board is responsible for strategic management, it often appears to be difficult to strike a balance between strategic and operational management. "Boards fail to be effective links between governance and management if they move into details and try to take over day-to-day management functions or, conversely, if they are too remote and out of touch to influence the actions of top management" (Metcalf, 2000: 133).

The board members' term of office ranges from 2.5 to 5 years. This is relatively short in comparison to national agencies (Thatcher, 2002a; Gilardi, 2002; 2008). Whereas a longer term of office is argued to increase their independence from political influences and enhance the continuity of their activities, a shorter tenure is said to

make it more difficult for organised interests (notably industry) to capture the board. Members are almost always formally appointed by the Council. They generally cannot be removed from the board, which increases their independence. The chairperson of the board is elected from amongst its members for a term of usually two years, renewable once. The executive board is usually composed of a selected number of management board members, including the chairperson, the vice-chairs and a representative of the Commission. This executive board supervises the work of the agency and prepares the meetings of the management board. It is also entitled to make executive decisions.

Whether the management board can influence the agency's priorities and activities largely depends on its formal power,<sup>37</sup> which is a function of the composition of the management board and the decision-making procedure.<sup>38</sup> The composition of the board is specified in the constituent act. The boards of Union agencies are entirely composed of member state representatives, which is not surprising given the dominance of the member states under the second and third pillar. But also the boards of Community agencies, much to the dislike of the Commission, are primarily composed of representatives of EU member states, which "raises issues about the extent to which the Commission can be held accountable for decisions taken by agencies".<sup>39</sup>

The representation of member states in the board affects formal agency autonomy. Agencies are more autonomous with respect to the Commission when the board is mainly composed of representative designated by the member states, than when the board does not consist of member state representatives.

An exception is the management board of EFSA, in which not all member states are represented. EFSA's board includes fourteen members, four on the basis of their background in consumer organisations or industry, appointed by the Council in consultation with the EP on a proposal of the Commission, plus a representative of the Commission (see Chapter 8).<sup>40</sup> Another, but different, exception is the management board of the EUMC (now FRA) which consists of independent persons appointed by the member states, the Parliament, and the Council of Europe, and a representative of the Commission (see Chapter 10).

In addition to the representatives of member states, the management board includes representatives of the Commission and in some agencies also representatives of the European Parliament<sup>41</sup> and external stakeholders, such as industry or consumer groups or the social partners.<sup>42</sup> Agencies that do not include stakeholders in their management boards as full members sometimes include them as members without voting rights, such as in the case of the EMSA, the ENISA or the ERA, which are comprised of professionals from the sectors most concerned by their activities. Some agencies, in addition to (or instead of) inclusion of stakeholders in their boards, have a separate organ that comprises representatives of stakeholder groups, which is, for instance, the case for EFSA and the ENISA. Most boards are headed by a member state representative; in only two cases does a Commission representative head the board.<sup>43</sup> Most agencies also grant observer status to representatives of other EU institutions, other EU agencies, or third countries.<sup>44</sup>

Practical problems have arisen in relation to the large size of some management boards (notably those including the social partners), the lack of discussion on issues of strategic importance, and the difficulties of ensuring permanent high-level representation of stakeholders. The size problem is increasingly urgent after the recent enlargements of the EU. Some agencies saw the creation of an executive board as a solution to these problems. The Commission has proposed addressing the problem in new agencies by moving away from member state representation, instead having boards comprised of members appointed by the Commission and the Council, and members rep-

representing stakeholders.<sup>45</sup> An increased number of Commission representatives in the board of agencies would also have to make agencies more responsive to the needs of the Commission. For reasons detailed in Chapter 5, this proposal has not been acceptable to the Council, and therefore, boards of newly created agencies have not been included with a higher number of Commission representatives.<sup>46</sup>

The management board's composition raises the question whether boards of agencies should be considered part of the agency or part of their external environment. Some have argued that 'management board' is not the appropriate qualification for a body that is also supposed to supervise the work of agencies; *supervisory* board would have been a more suitable term.<sup>47</sup> When decisions made by the management board are regarded as made outside the agency, then the autonomy of an agency could be measured by determining the degree of freedom agency directors have with respect to their management boards. As we will see in the case chapters, the boards of agencies fulfil an important role as the interface between the agency and its environment, however. Ensuring that the agency's activities correspond with the wishes and demands of the environment, they symbolise both the independence of the organisation from external actors and the interdependence with these actors.<sup>48</sup>

There are various procedures for decision making in the boards. Standard voting requirements vary from absolute majority, to two-thirds majority, and simple majority. Voting rights for members of the boards vary as well, reflecting the degree of autonomy that is granted to an agency vis-à-vis other actors (Yataganas, 2001: 45). Specifically, not all members automatically have (full) voting rights: the Commission does not have the right to vote on the OHIM board; the Council of Europe representative in the board of the EUMC may not vote on decisions concerning the agency's budget; and, even though they are part of the Schengen agreement, Iceland and Norway have no right to vote on the FRONTEX board.<sup>49</sup> As most boards are composed of a majority of member state representatives, Commission representatives can be easily outvoted. Under the operating framework for regulatory agencies the Council and the Commission would therefore be equally represented in the board.<sup>50</sup>

The inclusion of external stakeholders in the board affects formal agency autonomy. Agencies that have external stakeholders in their boards are more autonomous from the Commission and the member states than agencies that have no stakeholders in their board, as stakeholder representation reduces the voting power of the Commission and the member states in the board.

### *Executive director*

Almost all agencies are headed by an executive director.<sup>51</sup> The term *executive* is misleading as often the director does not merely execute, but, as will be shown in the case chapters, actually often runs the agency.<sup>52</sup> The executive director bears responsibility for the day-to-day management, staff and personnel matters, the preparation of a draft budget, annual work programme and report, and the implementation of the budget.<sup>53</sup> He or she is also the legal representative of the agency. In the early stages of an agency, when the executive director has not been appointed yet, the chairperson of the board often serves as the face of the agency, which has sometimes resulted in an unclear division of labour after the appointment of the director.<sup>54</sup>

There are basically four appointing procedures for an agency's executive director. In the first procedure, most commonly used in Community agencies, the Commission (more in specific, the 'parent' directorate-general) proposes and the management board appoints the executive director. The second procedure, a variation on the first, is fol-

lowed in some Union agencies where the board appoints the director upon a proposal of the Secretary-General of the Council (at the same time serving as High Representative for the CFSP). In the third procedure, the Council of Ministers appoints the director, either upon a proposal of the Commission (CPVO) or the board (OHIM). In the fourth procedure, used in EUROFOUND and CEDEFOP, the board proposes and the Commission appoints.

Under the first procedure the Commission launches a call for expressions of interests. Applicants then are usually first screened by external consultants hired by the Commission. The remaining applicants are interviewed by a selection committee, also often involving the chair or another representative of the management board, and by the concerned Commissioners. The Commission subsequently prepares a shortlist typically of three candidates, which has to be agreed upon by the College of Commissioners with a two-thirds majority.<sup>55</sup> The list is then proposed to the board. The board hears the candidates and finally decides on the appointment of a new director. Whereas appointment is usually only a formality, there are exceptions, which seem to be conditional on the composition and the involvement of the board.<sup>56</sup>

The different appointing procedures indicate the degree of formal autonomy an agency has in relation to the Commission or the member states (Kreher, 1997: 234-235). Regarding the Commission, the highest degree of autonomy occurs when the second procedure is used; the lowest degree of autonomy from the supranational level occurs when the fourth procedure applies. From the member states, the highest degree of autonomy occurs when the second procedure is applied; the lowest degree of autonomy occurs when the third procedure is used. Of course, the exact level of autonomy depends on whether the appointing authority is actually left a choice by the proposing authority. Even as the proposing authority makes a pre-selection, thereby influencing the eventual appointment, the proposing authority usually has to provide a shortlist of candidates that allows the appointing authority a free choice.

While the Commission and the member states together still have the power to propose and appoint directors, the appointment process has been subject to changes over time. Most notable is the Parliament's increasing influence (see also Chapter 5). Directors of new agencies are now first heard by the EP. The Parliament can issue advice on the proposed candidate, but does not have the power to veto the appointment of a director.

Officially, directors are appointed on the basis of their professional competences and managerial skills (as opposed to, for instance, party affiliation or nationality). A majority of the former and current agency directors come from the Northern European countries. This unequal geographical distribution, according to one respondent, indeed shows that nationality does *not* play a role in the appointment of directors.<sup>57</sup> Another respondent commented that procedures existing at the EU level in many cases are actually much more rigorous than at the national level where director appointments often proceed through cooptation or are subject to political influence.<sup>58</sup> Executive directors, as a rule, do not have the nationality of the host country.

As for professional backgrounds, it appears that a distinction can be made among directors having work experience in one of the EU institutions, particularly the Commission, and those that have been employed in national administrations or otherwise.<sup>59</sup> Directors come from a variety of positions, ranging from directors of national agencies to university professors. Those executive directors that come from the Commission have often assumed the function with the knowledge that they have to return to their previous (often lower) position once their term of office ends.<sup>60</sup>

The executive director is usually appointed for a renewable period of five years.<sup>61</sup> In most cases, appointments have been renewed. Most constituent acts are silent on the conditions under which a director can be dismissed, although some, most notably Europol's convention, mention the procedure for dismissal; so far, only the founding regulation of the FRA (formerly EUMC) explicitly provides for an evaluation of the director's performance before extending his mandate.<sup>62</sup>

Even though not all appointments have been renewed after the first term (but most have) and some (three to be precise) directors have resigned, none of the directors has been forced to resign (or at least not officially) by the Council, the Commission or the member states before the end of their term (see also Busuioc and Groenleer, 2008). Resignation has often been for personal or professional reasons, such as taking up other more attractive professional positions, instead of as a result of interference from principals. The average length of tenure of agency directors with about 7.5 years is therefore relatively high.<sup>63</sup>

It is still being debated whether the appointment of executive directors can simply be extended by a decision extending the term of an incumbent director – which is common practice but, in the view of the Commission, poses “legal” problems – or whether the incumbent director has to apply for a new term and a full selection procedure has to take place, which would be costly and time-consuming.<sup>64</sup> The Commission has therefore proposed generic arrangements for EU agencies concerning the circumstances in which an executive director can be reappointed. More important than the legal problems – although not mentioned in the Commission's proposal – seem to be potential political problems: renewal by the board may make a director susceptible to pressure from board members. And since most boards are still made up of member state representatives, this would decrease the Commission's power towards the agencies.<sup>65</sup>

The case of EFSA is particularly interesting. As EFSA's board, for reasons detailed in Chapter 8, is independent from the Commission and the member states, the board considered a review of the appointment by the Commission “an attack on its independence”. The chair of the management board therefore sent an open letter to the Secretary-General of the European Commission in which he called the proposal to in effect transfer the power to reappoint an executive director from the board to the Commission “unacceptable”.<sup>66</sup>

In recent years, agency directors have come to realise they can make their voices heard more clearly when acting in concert. They have therefore organised into the Heads of EU agencies network, amounting to what can be called their ‘emancipation’ from the Commission and the member states. Under the coordination of one of the directors, the directors of the different EU agencies meet twice a year to discuss outstanding issues, such as staff policies, and common concerns, such as the budget.<sup>67</sup> Apart from a platform for the representation of their interests, the network thus also serves as a means to share experiences and learn from each other.<sup>68</sup>

### *Scientific committees and advisory forums*

Much of the work of agencies is done by scientists or experts. Several Community agencies, such as the EMEA and EFSA, make use of committees (or panels) comprising independent scientific or technical experts.<sup>69</sup> The committees assist the board and the director in scientific or technical matters. The agency's board usually appoints members of the committees based on their specific expertise. Often they are national experts working with national agencies in the same policy field. They meet regularly at the

agency in order to draft opinions. According to a former EMEA official: “The idea is that member states have the impression that they have a stake in the agency. We are not creating federal agencies. EU agencies still rely a lot on national authorities.”<sup>70</sup>

A number of Community agencies such as EFSA, the ECDC and the ETF have an advisory forum, which is comprised of the representatives of the national authorities. As the term ‘advisory’ already reveals, these advisory forums do not have decision-making power; they merely give advice to the board and the director. In case of the Centre for Disease Prevention and Control (ECDC), the forum, apart from the representatives of the national centres for disease prevention and control, also contains representatives of patients’ organisations and professional bodies. The Training Foundation (ETF) has an advisory forum consisting entirely of experts, which acts as an information relay between the foundation and the member states (De Rooij, 1996: 45).

## 6.5 Staffing: personnel policy

Agencies’ constituent acts generally do not mention much detail about staffing. Staff recruitment is the executive director’s responsibility. Selection is based on scientific or technical knowledge in a particular field or area, administrative or managerial expertise, whilst maintaining a balance with regard to the geographic distribution. As opposed to the Commission staff, agency staff members are not career civil servants. Agencies thus generally have a high level of formal autonomy with regard to recruiting and selecting personnel. That said, the executive director has frequent contacts with, in particular, the chairperson of the board in order to keep him or her updated on staffing and is increasingly being asked by the Parliament to report thereon.<sup>71</sup> Moreover, the director is limited on the number and type of staff employed, as the establishment plan comprising the number and type of staff is included in the agency’s budget.

Recruitment is subject to procedures different from those applicable to the Commission. In order to attract staff with a high level of expertise on a flexible basis, new agency staff do not have to go through the open competitions (*concours*) organised by the European Personnel Selection Office (EPSO) for jobs in the main EU institutions. Agencies’ selection procedures are therefore sometimes perceived as a backdoor for easy entry into the European civil service. Agencies, however, are not included among the EU bodies under the mobility clause, that is, agency staff cannot move freely between agencies and the EU institutions. It is therefore also unattractive for staff of the EU institutions to apply for a job with an agency.<sup>72</sup> Agencies, as a consequence, experience difficulties in recruiting qualified and experienced administrative personnel that could often easily be found in the EU institutions and particularly in the Commission.<sup>73</sup>

Another, very different reason for problems encountered with recruitment follows from the remote location of some agencies. Whereas many consider London is an attractive place to live, not everyone wants to work for instance in Helsinki or Parma. The vacancies at the European Chemicals Agency (ECHA), located in Helsinki, have reportedly been difficult to fill as a result of a shortage of luxury housing for the chemical experts coming from all over Europe.<sup>74</sup> Moreover, the country has to overcome the view that “Finland is a cold and remote country on the periphery of Europe where people speak a difficult language”.<sup>75</sup> Parma, where EFSA is housed, cannot easily be reached by plane. Even though the agency has arranged for transport back and forth to the closest airport – Bologna, at a distance of 100 kilometres from the agency – food scientists complain about the time spent on travelling to and from their regular meetings at the agency. A recurrent problem related to the location of agencies is the difficulties part-

ners experience in finding a job and the absence of appropriate education for agency staff's children, such as international or European schools (see also Schout and Pereyra, 2008).

Except for the two former WEU agencies, the EUSC and the ISS, agencies as a rule employ their staff on a temporary basis. Once their contracts have formally expired, staff in some instances can get a renewal for an indefinite period (without the position becoming permanent). While the ratio between temporary and permanent posts varies from agency to agency, depending on the nature of the individual agency's task, the Commission has given an indication to all agencies that the general ratio could be around 20 percent permanent posts. The temporary character of most of the contracts at agencies has nevertheless led to concerns about long-term policy consistency. Temporary agents or experts seconded from the member states eventually return to their former positions taking with them valuable knowledge.

Of course, the idea behind temporary contracts at agencies is the exchange of expertise between the EU and national level and among member states. But some agencies, it is argued, perform tasks that have a more permanent character than others; other agencies may not even have permanent tasks. Or as it was phrased by the Assembly of Agency Staff Committees (AASC):<sup>76</sup> "Permanent tasks should be performed by staff on permanent posts."<sup>77</sup> From the agency's perspective, the loss of knowledge through qualified and trained staff may have a negative effect on its autonomy. One respondent, himself a long-time agency staff member, commented that: "If you really want to be an independent agency, you should have permanent staff."<sup>78</sup>

It is ironic to note, however, that because their possibilities to move around are limited, many temporary agents have indeed become permanent agents. The turnover rate of personnel in some agencies is low, and the reality is that their staff is employed long-term. This has raised concerns, particularly with regard to maintaining scientific dynamism. Indeed, there is a risk of agencies becoming "fossilised".<sup>79</sup> This is especially the case for the older agencies that can grant permanent contracts. At EUROFOUND, established in Dublin in 1975, staff is "slowly getting old", according to one outside observer.<sup>80</sup> CEDEFOP, created in the same year, does not have this problem. The agency was originally based in West Berlin but transferred to Thessaloniki in 1995. Because many staff did not want to move from Germany to Greece, the transfer of the agency led to a significant renewal of its staff.

While selected on the basis of their expertise, agency staff usually originates from the various EU countries. As in any international organisation, staff members from the host country are over-represented, but particularly in lower-grade functions such as secretaries, drivers or security guards. The Community Fisheries Agency would have been an exception in terms of the geographic distribution of its staff. As only twenty countries have a coast, it was the original intention to staff the agency with nationals from these countries only. In the final decision on the composition of the staff, it was however decided that non-coastal states would also provide staff.<sup>81</sup>

Organisational differences between the Commission and agencies notwithstanding, agencies have been included in the revised Staff Regulations applicable to the Commission. As the staff regulations are much more oriented towards a traditional bureaucratic organisation with a hierarchical structure such as the Commission, agencies experience enormous difficulties in applying human resource policies (Schout and Pereyra, 2008). Agencies can deviate from the rules in the Staff Regulations, but this must be justified by the specific nature of the agency. In principle, the Commission cannot intervene with an agency that does not apply the regulations. As a Commission official stated in a meeting with the AASC representing the interests of the staff of EU agencies: "It is not

the role of the Commission to replace the individual administrations of agencies.” However, in the case of frequent deviations, the Commission “would have to reconsider its position.”<sup>82</sup>

Following inclusion in the revised staff regulations, many agencies have had to carry out personnel reforms. Yet agencies, especially those created during the first wave, were still lacking a proper personnel policy, including, for instance, (individual) training plans and a career development system. In 2004, a Parliament report found that “the average number of years before promotion at several agencies were considerably smaller than is the policy in the Commission, that vacancy rates were considerably higher compared to other institutions and that several of the requested new posts were not proposed at the lowest grade.”<sup>83</sup> Given that, as a result of the new Financial Regulation, the Parliament formally establishes the organigrammes of agencies, the Parliament downgraded a number of posts, for some of which recruitment was already completed.

The idea behind the downgrading of posts has been that salaries in the Commission and the agencies are quite similar while the probability of being selected for a job at the Commission is much lower. The EP did however not take into account the difference between the Commission’s officials, usually generalists, and agency staff, often specialists. In order to be able to recruit from the competitive market for certain specialists, agencies therefore cannot simply offer jobs at the lowest grade as this would make them unattractive for such specialists. In any case, the labour market for the main EU institutions is different from that of EU agencies.

The Parliament requested the Commission to establish guidelines concerning staff policy. These guidelines, once adopted, had to ensure a certain amount of coherence among the agencies, which would make inter-agency mobility possible. In October 2006, agency directors signed a memorandum of understanding to facilitate staff moving from one agency to another, therewith increasing the career opportunities whilst at the same time ensuring the exchange of good practices through their staff.<sup>84</sup>

Small agencies in particular have experienced difficulty with the complex and lengthy procedures involved in recruitment and selection, which in the past led to “dubious recruitment practices” at the agencies.<sup>85</sup> To select new staff at the EMCDDA, for instance, vacancy notices were imprecise, selection committees’ minutes were incomplete, and the criteria for assessing candidates were not defined in advance. In order to tackle staff recruitment problems, agencies have increasingly been using EPSO. The Parliament also proposed that the outcome of selection procedures would be externally validated before recruitment takes place, which would imply a serious limitation on the agencies’ autonomy with regard to selection.

The agencies’ staff has grown steadily since the first wave of agency creation in the early 1990s. Agencies have in fact grown more rapidly in terms of staff numbers than the EU institutions, including the Commission. The Parliament has on several occasions been highly critical on this “unguided growth”.<sup>86</sup> Moreover, although the impact of transferring tasks to agencies on the staffing of the individual DGs cannot be told in precise figures, there is no decrease in staff in those units of the Commission whose tasks have been outsourced to newly created agencies. In fact, in reply to a written question on the impact of the agencies on the Commission, the Commission answered: “The consequence for several [agencies] was that although there were some savings of personnel or funds in the Commission’s services, new personnel were needed to enable the services to monitor the work of these agencies.”<sup>87</sup>

Apart from the challenges that it posed to agencies (e.g. increased size of their management boards), the enlargement of the EU actually also solved some problems they



generally encountered with the restraints on their staff. The ten and later two new member states generated additional funding, also for agencies, which enabled them to recruit more staff.<sup>88</sup>

## **6.6 Financing: budgetary provisions**

In their early years, agencies receive funding from the Community budget to cover expenses, but afterwards they develop different sources of funding (Kreher, 1997: 235-236). Most Community agencies are financed from the general EU budget through a Community subsidy.<sup>89</sup> This makes agencies less autonomous than if they would acquire their own funding.<sup>90</sup> Given the broad range of their tasks, some agencies, even though primarily funded by a Community subvention, have acquired additional funding to finance activities. The income of Union agencies, by contrast, consists of assessed contributions from the member states. Much to its dislike, the Parliament, as a consequence, is not directly involved in the financial operations of these agencies. Some agencies also receive (voluntary) contributions from other national and international organisations.

Governments of member states that have an agency seat often make a contribution in the form of buildings, sites or infrastructures.<sup>91</sup> That this not always is the case is illustrated by the example of FRONTEX that wrote in a letter to EP President Josep Borrell on 30 April 2006:

Despite ongoing negotiations with the Polish government, it has not been possible to reach an agreement with the Polish government on the provision of suitable premises for the period after the end of 2006 just as it has not been possible to enter into a general headquarters agreement for FRONTEX.

Also in the case of the EMEA and the ECDC, the UK and Swedish governments made clear “they would not spend a penny” on the housing of these agencies.<sup>92</sup> And even when member states provide buildings, such as in the case of EFSA, they usually do so late – and as a result temporary premises have to be occupied, often at considerable costs – and the buildings offered are not always suitable for housing an agency, as the sixteenth century palace that the city of Parma made available for EFSA.

A few agencies are entirely or partially self-financed: the Medicines Agency, the Offices for Harmonisation in the Internal Market and Plant Variety,<sup>93</sup> and the Aviation Safety Agency charge their clients fees for the services they provide;<sup>94</sup> the Translation Centre receives financial contributions from its clients, mostly other agencies, for its translations. A debate is ongoing as to whether EFSA should also be partly financed by fees for services provided to the food industry (see Chapter 8). When agencies do not rely on others for funding, they can be more autonomous in their decisions and opinions.<sup>95</sup>

The sources of funding thus matter for formal agency autonomy. When agencies are entirely or partially self-financed they are more autonomous from the Commission or the member states, than when they receive funding from the Community budget or the member states. Entirely or partially self-financed agencies are, however, not completely free to determine the fees they charge; the power to set the fees is divided between the Commission and the Council, in accordance with a procedure laid down in the constituent acts.<sup>96</sup> Moreover, partially self-financed agencies are subject to the Community Financial Regulation, which prevents them from building up surpluses.<sup>97</sup>

In accordance with the Financial Regulation any surpluses are recovered by the Community budget, which is considered unacceptable by clients (usually industry) paying fees for services.<sup>98</sup>

Agencies have some degree of freedom in allocating their financial resources.<sup>99</sup> The budget is structured in different titles and chapters. Chapters are subdivided into articles and items. Budget title 1 contains personnel-related expenses such as salaries, budget title 2 includes administrative expenses such as buildings, and budget title 3 contains operative expenses related to the tasks of the agency. During the year, agencies can make transfers within chapters (from one article to another) and articles (from one budget item to another) with the approval of the management board. There are no limitations to alter appropriations within the various chapters and articles. Agencies, however, have to inform the European Parliament about transfers made between different titles and chapters. Transfers from one title to another and from one chapter to another are authorised within the limit of ten percent.<sup>100</sup> The Parliament has taken an active stance on such transfers.

While respecting the autonomy of the management bodies and their right to approve transfers which may be needed as the year progresses, it must be remembered that transfers are not an instrument to be used to alter or anticipate decisions taken by the budgetary authority (Tappin, 1998: 32).

As a consequence of their increasing number, the total amount of spending by agencies has developed rapidly in recent years. With resources becoming scarce, the EU has thus seen a growing portion of its annual budget being spent on EU agencies. The funding for agencies falls under the substantive headings of the EU budget, while this also includes appropriations for buildings and staff, expenses that under the Financial Regulation are considered administrative costs. As a result, administrative spending for most agencies is higher than operational spending, which has led to criticism from the Parliament.<sup>101</sup> But, even as their work is categorised as administrative, agencies' staff often performs operational tasks, or is at least concerned with carrying out EU policies.

The division of agencies' budgets in an administrative and operational part clearly show that the financial rules and procedures used for a large bureaucratic organisation like the Commission are not always applicable to agencies. Financial administration in accordance with the Commission's Financial Regulation places a large burden on the operations of small agencies (lacking the economies of scale) in particular, resulting in their dependence on other actors, notably the Commission, which is why some refer to these agencies as "mini-Commissions" (Schout and Pereyra, 2008).<sup>102</sup>

In 2006, the budgetary procedures were amended. The Commission, when drawing up a proposal for the creation of a new agency, now has to assess budgetary implications. On the basis of this information, the Parliament and the Council "commit themselves, in the framework of budgetary cooperation, to arrive at a *timely agreement* on the financing of the agency [*italics added* – MG]."<sup>103</sup> In the past, such agreement was often long in coming, which led to serious delays in setting up agencies and considerable uncertainty with regard to their operations. The amended procedure has since been applied to the creation of the Chemicals Agency, the Fundamental Rights Agency and the Gender Institute.

## 6.7 Relations with external actors: accountability and control

The growth of the number of agencies that are part of the EU administrative system and the gradual expansion of their competences in a variety of policy fields have, particularly in recent years, led to closer attention for their accountability and control. Agencies have various formal obligations vis-à-vis the EU institutions and the member states through which they can be controlled and held accountable (see e.g. Curtin, 2005; 2007; Everson *et al.*, 1999; Kelemen, 2002; Vos, 2003; Yataganas, 2001).<sup>104</sup>

*Commission* Besides representation in the management board and the power to propose or appoint the executive director, the Commission can make sure its needs are addressed through involvement in preparing the agency's work programme and drafting the agency's budget. As the Commission is not the only principal, it does not, as is common at the national level, negotiate contractual agreements with agencies (Barbieri and Ongoro, 2008: 412). On the basis of an external evaluation, it does periodically review the agencies and produces a report thereon that it sends to the Parliament and the Council.<sup>105</sup> These reports are meant both to assess the agencies' past activities and recommend changes for future activities.

Until a management board has been installed and a director has been appointed, agencies in many cases receive assistance from the Commission. Pending a decision on their location, agencies have sometimes started their activities in Commission offices. The Commission has also drafted rules and procedures for new agencies. There is usually no secondment of Commission officials to new agencies. Exceptions are the EMCDDA and ECHA. In both cases Commission officials were seconded in order to assist the agencies in starting up. But the Commission, afraid of being held responsible, has been quick to point out that it is "under no legal obligation" to give help to newly created agencies.<sup>106</sup>

Since the Barroso Commission entered office in 2004, however, Community agencies figure prominently in the portfolios of individual Commissioners. This would arguably make it clearer who should take responsibility when things go wrong, as "for every agency there is a potential disaster to be thought of".<sup>107</sup> As the EP will ultimately hold the Commission responsible, Commissioners are more sensitive to the actions of agencies than during the 1990s. They realise that even though agencies are independent it does not mean they are completely detached from the Commission. The outside world simply does not make a distinction between the Commission and agencies: they are both considered 'EU'.<sup>108</sup>

Particularly the affair caused by the alleged shelving of an EUMC report on anti-Semitism served as a wake-up call for individual Commissioners that they can be held accountable for agencies' actions.<sup>109</sup> Writing in the *Financial Times*, two Jewish leaders claimed that the European Commission was guilty of fuelling anti-Semitism.<sup>110</sup> Reacting furiously to the claims, Commission President Romano Prodi put a freeze on the arrangements for a conference on anti-Semitism in Europe. The relations between the Jewish Congress and the Commission were eventually restored after the EUMC announced the report would still be published. But the affair showed that even though, as Prodi's spokesman said, "the Centre was autonomous, and that the Commission was not responsible for the decision not to publish", the Commission was seen as being responsible.

As Prodi found himself in a situation where he was held responsible for the agency without having the means necessary to control it, it was decided to strengthen the position of individual Commissioners and as an institution vis-à-vis agencies.<sup>111</sup> While "[t]he Commission is currently reflecting on its political responsibilities as an institu-

tion towards the regulatory agencies, taking into account their statutory independence”, this does necessarily mean a decreased role for agencies in policy making, as Commission President Barroso seems to have suggested:

The Commission’s relations with the agencies cannot be considered to be a ‘one way street’ where we take the advice and information provided and do with it what we wish. As agencies become more specialised in their subject matter, there is a particular need for the Commission to be able to deal with issues that emerge in our relations with agencies in a coherent and transparent manner.<sup>112</sup>

Whereas agency directors had been liaising with Commission directors-general, now they discuss matters directly with the Commissioner.<sup>113</sup> The Commissioner has to be able to defend himself against the Council and the EP when it comes to decisions and actions of the agency. Agency directors, and MEPs alike, have however complained that the Commission’s approach is still inconsistent. The Commission only seems to be willing to exert control over the agencies when this yields political gain; in other circumstances, such as during their practical set-up, the Commission denies responsibility for agencies. This is also illustrated by the Commission’s response to agency directors’ request to get access to the Commission’s intranet. The request was denied because agencies, as they are independent, are outside the control of the Commission. Or that is at least what Catherine Day, the Commission’s Secretary-General, wrote in an e-mail to Thomas Lönngren, then coordinator of the network of agency directors.<sup>114</sup>

Whilst making it more clear which Commissioner is responsible, the explicit mentioning of agencies in their portfolios may also be a source of confusion and conflict between the Commission and agencies. Kreher (1997), for instance, mentions the possible case of a new medicine with European-wide approval causing severe negative side-effects. It is not unlikely that a blame game will ensue from the fragmentation of power between the Commission, which decides to approve a medicinal product, and the EMEA, which is responsible for providing the Commission with scientific advice on the evaluation of medicinal products. This is especially so, since the EMEA’s recommendations on the authorisation of medicinal products are usually ‘rubberstamped’ by the Commission, following a written procedure and without any discussion (see Chapter 7).<sup>115</sup>

In the Commission’s Secretariat-General, a senior official is charged with maintaining relations with the agencies and coordinating their work with that of the Commission. This position has evolved, with the increase of the number of agencies and their tasks, from a drop box for agency directors’ complaints to a focal point for coordination. The senior official chairs a horizontal working group concerned with administrative issues relating to the personnel and budget of agencies. He or she is also the chair of a working group of desk officers in the different ‘parent’ directorates-general, who serve as agencies’ point of contact in the Commission. These working groups are meant to streamline the Commission’s approach towards agencies, and to increase the homogeneity among agencies and the spread of best practices from one agency to the other. To that end, the senior official also attends the meetings of the network of agency directors (see above).<sup>116</sup>

*Parliament* There is no such focal point for coordination with EU agencies in the European Parliament; the creation and the design of agencies is dealt with in different parliamentary committees.<sup>117</sup> Specialised committees’ standing rapporteurs deal with agencies on substantive issues such as environmental protection through the Environment, Public Health and Food Safety (ENVI) Committee, or judicial cooperation

through the Civil Liberties, Justice and Home Affairs (LIBE) Committee. Budget rapporteurs are concerned with matters relating to the budgetary discharge, the follow-up of the budget, agencies' building and staffing needs and the preliminary draft budget (PDB).

The interests of standing rapporteurs and budget rapporteurs do not always converge: whereas the legislative committees have a tendency to call for the establishment of a new agency if the implementation of EU legislation does not function satisfactorily, the Committees on Budgets (COBU) and Budgetary Control (COCOBU) are more inclined to adopt a restrictive approach as "EU funds spent on a new agency cannot, at the same time, be spent on other important programmes or policies that would need to be launched".<sup>118</sup>

The Parliament can use its budgetary powers to exercise financial oversight over existing agencies. Acting on the Council's recommendation, it is foremost responsible for giving separate discharge for the implementation of the budgets of all agencies that receive grants from the general EU budget.<sup>119</sup> The discharge falls within the remit of the Committee on Budgetary Control. The Parliament further has to be informed of the use of transfers from one budget title or chapter to another and it can demand information on the financial situation of agencies, as happened in case of the Reconstruction Agency after allegations of corruption surrounding its work.<sup>120</sup>

Significantly, the Parliament can put on a reserve or withhold funding, and it has regularly done so, for instance, pending decisions on the locations of agencies or when the work programmes of agencies were not sufficiently clear (Brinkhorst, 1996).<sup>121</sup> In recent years, the release of the reserve has been made dependent on several conditions, such as a work plan including a clear overview of tasks and a comparison with the tasks performed in previous years, a positive evaluation of the specialised parliamentary committee, and full implementation of the Commission's guidelines on staff policy.<sup>122</sup> As the power of reserve is used to (re-)direct agencies, it implies an important restraint on their autonomy.<sup>123</sup> Especially in the early years of their development, when agencies are still in the build-up phase, putting a reserve on their budget has been said to slow down the development of agencies. The use of the reserve has therefore led to much criticism from agency directors.

Most older agencies have representatives of the Parliament, usually university professors, on their boards. Some of the newer agencies, such as the Aviation Safety Agency, the Border Agency and the Railway Agency, have to send the Parliament their annual report. The Parliament can also invite their executive director to report back on the agency's work. Members of the European Parliament have also visited agencies to meet with agency representatives on site. Since 1995, the Committees on Budgets and Budgetary Control have annually organised a meeting with the representatives of agencies to discuss "horizontal issues concerning all agencies and specific issues of individual agencies".<sup>124</sup> Sometimes these meetings have taken place in a rather hostile atmosphere.

But as agencies have become conscious of the information needs of the EP and members of the EP gained more knowledge of agencies' specific circumstances with regard to staffing and budgeting, relations between the agencies and (the members of) the EP have improved.<sup>125</sup> During the annual meeting with agencies in 2006, agencies received a standing ovation for delivering 'Europe' to its citizens.<sup>126</sup>

*Council and the member states* Member states control agencies through their representatives in the management boards, and they can further exercise influence over agencies through the networks of national authorities (Kelemen, 2002). EU agencies often have counterparts in the member states that share their functions: the European

Medicines Agency and the European Environment Agency have a similar mandate as national medicines and environment authorities. Therefore EU agencies do not often directly liaise with the public. This task is left to national agencies. Instead, EU agencies coordinate networks of national agencies in a particular policy domain. As agencies often rely heavily on the cooperation of national authorities in their respective policy areas, this must make them responsive to the demands of such national authorities and their governments (Everson *et al.*, 1999; Yatağan, 2001; Majone, 2002a).

Yet, member state governments may also be bypassed by direct interaction between European and national agencies brought together in European networks (Egeberg, 2006; Martens, 2006; Barbieri, 2006). Moreover, an increasing number of EU agencies deal with European citizens without first going through their national governments or agencies. One of the functions of the European Food Safety Agency, for example, is the communication of risks to the European public.

*Other institutions* The Commission's financial controller carries out an internal audit of the Commission agencies; external budget control of the Community agencies is performed by the European Court of Auditors (ECA).<sup>127</sup> In recent years, the ECA has paid more attention to agencies' performance. In 2008 for instance, it published a special report on the EU agencies titled "Getting Results" in which it set out to audit whether agencies had introduced the procedures and tools needed to provide reasonable assurance that their activities were performed in such a way as to achieve the expected results (see further Chapter 14).<sup>128</sup>

The Court of Justice exercises judicial oversight by its review of agency actions (or their boards of appeal, if applicable). The decisions made by agencies can be overturned by the Court, as has happened in the case of the EMEA. Agencies can be investigated by OLAF, with a view to combating fraud and protecting the Communities' financial interests, and by the European Ombudsman, in regard of complaints about maladministration (see further Curtin, 2005; 2007; Busuioc, 2010).

## 6.8 Conclusion: limited formal autonomy

This chapter set out to examine the *formal* autonomy of EU agencies, which is often put forward – by academics and practitioners alike – as one of the main reasons for their creation (see Chapter 5). It presented a number of dimensions and indicators which were used to assess the formal autonomy of all thirty agencies. In general, I find that EU agencies do *not* possess a high level of formal autonomy, neither in respect of the Commission nor in respect of the member states.

The use of the framework demonstrates how certain dimensions and indicators are particularly important in differentiating among agencies with regard to their formal autonomy. Dimensions on which considerable variation was found include the procedure for the appointment of the director and the sources of funding, as well as the composition of the management board and the mandate, objectives and tasks of EU agencies. On a few dimensions, particularly the status of the agency director and the autonomy with regard to personnel policy, I did not find much variation among agencies (or no variation at all).

Two observations can be made about the population of EU agencies studied. Most Union agencies 'score' the same on the various dimensions, and consequently are equally autonomous. This seems counterintuitive given the apparent differences among these agencies. It is very likely that an important condition distinguishing the agencies has been omitted, due to a bias towards Community agencies. More impor-

tantly, it can be debated whether it makes sense to compare Union agencies with Community agencies in the first place. In contrast to Union agencies, none of the Community agencies is the same: they all differ on at least one dimension. While, at first glance, agencies might look relatively similar, after scratching the surface, quite a number of differences become apparent.

There are several limitations to the findings presented in this chapter. First of all, the focus of this chapter is restricted to *formal* autonomy. It therefore remains unclear whether and to what extent agencies enjoy autonomy in practice. Because autonomy is regarded as designed into the formal structure of agencies, and thus considered to be static and fixed, the findings do not tell us much about the process by which the specified conditions lead to actual outcomes. The dichotomisation of indicators (see also the operational framework in Chapter 4), necessary in order to simplify the complex reality of agencies, further slights the temporal and informal dimension of autonomy. Moreover, it is not clear how the specified indicators are precisely related to the concept of autonomy. It seems likely that these structural features of agencies are important factors upon which agency autonomy is conditional, but in what way agencies exactly achieve autonomy cannot be concluded from this part of the research.

The remainder of this study therefore addresses the evolution of EU agency autonomy. The focus is not only on the variation in autonomy across different agencies, but also on the development of autonomy over time. In order to address the development of *actual* autonomy across agencies and over time, a number of in-depth case studies of agencies are performed using a process-tracing method. On the basis of the findings presented in this chapter, three subsets of agencies are investigated in Chapters 7 to 12.

A first subset consists of two semi-regulatory agencies, the EMEA and EFSA. These agencies differ considerably in their level of formal autonomy. A more detailed comparison of these cases should demonstrate whether the differences in agency design also lead to differences in their evolution. A second subset is comprised of two information monitoring or data collection agencies, the EEA and the EUMC/FRA. These agencies are relatively comparable as regards their degree of formal autonomy, but a closer look at these cases could shed light on the variation in the interaction between the agencies and the actors in their environment. A third subset consists of two Union agencies, Europol and Eurojust, that both seem to have a low level of formal autonomy. A detailed investigation of the cases should reveal whether these agencies are also relatively comparable with regard to the development of actual autonomy.

In sum, the formal design of agencies offers only limited insight in their development. Agencies are not merely passive; they can become actors in their own right in several ways, or at least that is what was proposed in Chapter 3. They can, for instance, learn how to exploit their formal powers and evade formal controls, they can develop informal understandings that may in effect alter formal arrangements, or they can deliberately go beyond their formal roles and develop informal norms and pursue their own objectives. These and other examples are examined in the following six case chapters.

## Notes

<sup>1</sup> Commission of the European Communities (2005), *Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies*, COM(2005)59 final, Brussels 25 February, p. 2.

<sup>2</sup> Parts of this chapter are adapted from Groenleer (2006).

<sup>3</sup> Commission of the European Communities (2002), Communication from the Commission, *The Operating Framework for the European Regulatory Agencies*, COM(2002) 718 final, Brussels, 11 December, p. 3; but see Barbieri and Ongaro (2008) who find that EU agencies, when compared to national agencies, are relatively homogeneous.

<sup>4</sup> Chapters 7 to 12 examine the actual autonomy of agencies, that is, the autonomy that agencies develop after they have formally been created (see Chapter 2).

<sup>5</sup> Formal design is treated here as outcome at time  $t$ , whereas in the case chapters that follow this chapter it is considered as condition or factor accounting for the autonomy of EU agencies at time  $t+1$ .

<sup>6</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ 2007 C 306/42, 44).

<sup>7</sup> See Article 54(2), Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

<sup>8</sup> Newly created executive agencies, reflecting their different status, are based on a Commission Decision.

<sup>9</sup> The regulation establishing EFSA is part of the regulation laying down the general principles and requirements of food law and thus totals 22 pages; the ECHA was established by the regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), with 849 pages one of the most complex pieces of law the EU has produced in its history.

<sup>10</sup> In two cases, the EMEA and the CPVO, the Commission proposed to base the creation of agencies on a different article of the TEC, which would have implied the use of the cooperation procedure and qualified majority voting in the Council. The legal basis was however changed by the Council during the drafting stage (Kreher, 1997: 232).

<sup>11</sup> See ECJ Judgments in the Case C-271/04, *United Kingdom v Parliament and Council* published on the website of the ECJ under <http://www.curia.europa.eu>.

<sup>12</sup> Although legally we can only speak of Community agencies and agencies created under the authority of the Council, all agencies at the European level, for the sake of clarity, are referred to here as European Union agencies.

<sup>13</sup> The use of these terms is a bit awkward, as, in many cases, agencies were never really part of these bodies, because they were created anew (see Chapter 5).

<sup>14</sup> These categories are not mutually exclusive, that is, agencies can be part of more than one category.

<sup>15</sup> The level of detail of the agency's mandate will not be assessed here. See the case chapters for a discussion of this feature for the concerned agencies.

<sup>16</sup> As a result, EU agencies are often much less visible and known than their national counterparts.

<sup>17</sup> See Commission of the European Communities, Directorate-General Budget, *Meta-evaluation of the Community Agency system*, 15 September 2003, p. 77.

<sup>18</sup> These agencies all have boards of appeal that decided on appeals against decisions taken by the agency. Decisions taken by the board of appeal or the agency (in cases where no right of appeal lies before the board) can be appealed before to the ECJ.

<sup>19</sup> See Operating framework for regulatory agencies, p. 4. See also Commission of the European Communities (2005), Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, COM(2005) 59 final, 25 February.

<sup>20</sup> The Parliament has suggested "that it might be preferable to avoid the term 'regulatory' so as to rule out any misunderstanding." See European Parliament resolution on the communication from the Commission: 'The operating framework for the European regulatory agencies' (COM(2002) 718 – 2003/2089(INI)), P5\_TA-PROV(2004)0015. See, in this regard, also Meuwese (2004).

<sup>21</sup> The question whether agencies can produce hard law is contested, however. During the 3<sup>rd</sup> NEWGOV Practitioner Forum, Adriaan Schout (then European Institute of Public Administration) gave the example of a particular type of airplane being grounded by the EASA. Even though



Meroni rules out 'general decisions', such a decision would in practice also affect other airplanes of that type and thus be 'general' whilst rendered in an individual case. See also Schout (2008).

<sup>22</sup> This group includes the ETF, the EU-OSHA and the ECDC.

<sup>23</sup> Such as the EEA (EIONET), the EMCDDA (REITOX) and the EUMC (RAXEN).

<sup>24</sup> This group includes CEDEFOP, EUROFOUND and the EU-OSHA.

<sup>25</sup> This group includes agencies created during the second wave, such as the EMSA, the ENISA, FRONTEX and the ERA.

<sup>26</sup> If created anew, these agencies would probably be created as executive agencies (see Chapter 1).

<sup>27</sup> This group includes Europol, CEPOL and EUROJUST.

<sup>28</sup> This group includes the EDA, the ISS and the EUSC.

<sup>29</sup> The clarity of the agency's objective and the specificity of its tasks will not be assessed here. See the case chapters for a discussion of these features for the concerned agencies. According to De Jonge (2007: 40-41), it is remarkable that EU agencies' founding acts include an overview of tasks in the first place, as the tasks of national agencies are usually found in separate documents.

<sup>30</sup> In the case of EFSA this is called 'self-tasking' (see Chapter 8). The activities that EFSA and the ECDC can carry out on their own initiative mainly concern the assessment of emerging risks and threats.

<sup>31</sup> In the case of, for instance, the ETF, the EAR, the EEA, the EMCDDA and the EASA.

<sup>32</sup> In the case of, for instance, CEDEFOP and EFSA.

<sup>33</sup> See Article 10, para 2(d) of the regulation establishing EMSA, and Article 25, para 2(c) of the regulation establishing ERA.

<sup>34</sup> It remains unclear from the constituent document of Eurojust what procedure is exactly followed.

<sup>35</sup> European Parliament, Working document on a meeting with the decentralised agencies on the PDB for 2008, Committee on Budgets, Rapporteur: Jutta Haug and Kyösti Virrankoski, PE 388.642v01-00, Brussels, 23.5.2007, p. 10.

<sup>36</sup> In some cases, the management board is called administrative (e.g., governing (e.g. EU-OSHA, ETF) or steering (e.g. EDA) board, or administrative council e.g. CPVO). In some cases, the executive board is referred to as bureau (e.g. EU-OSHA).

<sup>37</sup> See Commission of the European Communities (2003), Directorate-General Budget, *Meta-evaluation of the Community Agency system*, 15 September, p. 52.

<sup>38</sup> The design of these features is therefore often the result of intense inter-institutional strife and political wrangling as was shown in Chapter 5.

<sup>39</sup> See Commission of the European Communities (2008), Communication from the Commission, *European agencies – The way forward*, COM(2008) 135 final, Brussels, 11.3.2008, p. 5. As Szapiro notes (2005: 5): "The minority role reserved for the Commission, sometimes without voting rights, does not allow the agencies to make the most of their potential as instruments intended to contribute to the European regulatory area."

<sup>40</sup> Instead, a consultative body, the Advisory Forum, comprised of representatives from the competent bodies of the member states undertaking similar activities as EFSA, has been created.

<sup>41</sup> Representation of the EP in the boards of agencies has been criticised as it would lead to a blurring of responsibilities, the EP becoming responsible for policies and decisions that it has the task of controlling as well. See Commission of the European Communities (2002), Communication from the Commission, *The Operating Framework for the European Regulatory Agencies*, COM (2002) 718 final, Brussels, 11 December, p. 9.

<sup>42</sup> In cases in which the social partners are involved, the total number of board members is highest. The so-called governing board of the EU-OSHA has over 80 members, which is actually more than the staff employed by the agency.

<sup>43</sup> In the boards of the ETF and the CdT.

<sup>44</sup> Third countries may also be granted full membership of the agency, such as in the case of the EEA.

<sup>45</sup> See Commission of the European Communities (2002), Communication from the Commission, *The Operating Framework for the European Regulatory Agencies*, COM(2002) 718 final, Brussels, 11 December, p. 9.

<sup>46</sup> But, as a respondent warned: "If the Council and the EP do not want to design agencies in the way proposed by the Commission, the Commission can always hold this against them when they try to hold the Commission responsible for the actions and decisions of an agency" (see also below). Interview #5

<sup>47</sup> Interview #9. Given the managerial tasks of the board, the title 'supervisory board' would not cover the spectrum of its activities either, though.

<sup>48</sup> As board members often represent the agency externally and sometimes even defend its decisions and actions vis-à-vis other actors, boards are considered part of the organisation in the case chapters part of this study.

<sup>49</sup> By contrast, in the Community Fisheries Control Agency (CFCA), each member state has one vote, including the five landlocked countries *EUobserver*, New EU fisheries agency to be set up in Spain, 15 March 2005.

<sup>50</sup> Commission of the European Communities (2005), *Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies*, COM(2005)59 final, Brussels, 25 February.

<sup>51</sup> In two cases, OHIM and CPVO, the executive director is referred to as president.

<sup>52</sup> See Busuioc and Groenleer (2008) for a preliminary investigation into the administrative behaviour of EU agency directors.

<sup>53</sup> Some directors have additional powers. The director of the ENISA can, for example, establish ad hoc Working Groups composed of experts. See Article 7, para 8 of the ENISA Regulation.

<sup>54</sup> Interviews #31 and #76

<sup>55</sup> Interview #9

<sup>56</sup> The less the Commission's relative power in the board, the more likely it is that the board appoints a candidate from the shortlist prepared by the Commission that is not the first pick of the Commission. Moreover, the involvement of the chair or other members of the board in the pre-selection process may increase the relative influence of the board on the appointment of the director. Interview #31

<sup>57</sup> Interview #5

<sup>58</sup> Interview #9

<sup>59</sup> Apart from their professional skills and managerial competences, it is often suggested that political forces drive the appointment of directors. Although clear evidence is lacking, some insights in the process are reported in the case studies.

<sup>60</sup> Interview #5

<sup>61</sup> In the original regulation founding the ETF the director's term of office was simply renewable. In theory, this meant the appointment could be renewed infinitely. The term of office has later been adjusted making it renewable only once and with a maximum of five years. In 2006, Bart Kiewiet, President of the CPVO, was reappointed for a third five-year term.

<sup>62</sup> Article 14, para 3 of the FRA founding regulation.

<sup>63</sup> Note that this figure is only based on the years in office of eight former directors of Community agencies created between 1990 and 2002. Data on the CdT and the EAR are not included given the different status of these agencies; data for CEDEFOP and EUROFOUND, both created in 1975, is incomplete and would potentially have caused a bias; the same applies to data for Union agencies; data for agencies created after 2003 is absent, as directors of these agencies at the time of writing were still in office.

<sup>64</sup> See Commission of the European Communities, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation [...] as regards the term of office of the Executive Director*, COM(2005) 190 final, Brussels, 13 May 2005.

<sup>65</sup> Interview #9

<sup>66</sup> EFSA, Letter of Stuart Slorach, Chair of the Management Board to David O'Sullivan, Secretary-General of the European Commission, Parma, 25 July 2005, available at <http://www.efsa.europa.eu>

efsa.europa.eu/ EFSA/Non\_Scientific \_Document/mb\_correspond\_secgen\_en1.pdf, consulted on 22 February 2008.

<sup>67</sup> Interview #62

<sup>68</sup> Interview #53

<sup>69</sup> The EMCDDA, like the EMEA, EFSA, and the EEA, has a scientific committee. This committee, however, is not consisting of independent experts but of member state representatives (Estievenart, 1996). The EUMC had no scientific committee.

<sup>70</sup> Interview #9

<sup>71</sup> This is especially so if the director has to make decisions (e.g. hiring or firing of senior staff) that have a bearing on certain countries. Interview #31

<sup>72</sup> Interviews #27 and #51. See also EEA Annual Report 2002, p. 41.

<sup>73</sup> Then again, agencies were, amongst other reasons, created because many of the staff required for agencies are experts that cannot be easily found in the ranks of the Commission.

<sup>74</sup> In fact, many chemical experts are expected to come from the Commission's Joint Research Centre (JRC) in Ispra, Italy.

<sup>75</sup> *EUobserver*, Luxury housing shortage could delay EU chemicals project, 1 September 2006.

<sup>76</sup> The AASC has been in existence since 2001 and meets twice a year at different agencies in turn. Like the network of agency directors, the AASC is governed by a troika of representatives from three different agencies.

<sup>77</sup> Position of the AASC on the staffing of agencies, as referred to in AASC Newsletter, Special edition, Minutes of meeting with Mr Chêne, Director-General Personnel and Administration, 'Role of the Commission as regards the personnel policy in the Agencies', June 2005.

<sup>78</sup> Interview #27

<sup>79</sup> Interview #27

<sup>80</sup> Interview #5

<sup>81</sup> *EUobserver*, New EU Fisheries Agency to be set up in Spain, 15 March 2005.

<sup>82</sup> See AASC Newsletter, Special Edition, Minutes of the meeting of the AASC with Mr Terberger, Head of Unit, General Horizontal Issues, DG Admin, 'Policy and recruitment of external staff', June 2005.

<sup>83</sup> EP report, A5-0212/2004 by Jan Mulder. Interview #70

<sup>84</sup> Interview #56

<sup>85</sup> EP report, A5-0212/2004 by Jan Mulder. Interview #70

<sup>86</sup> See for instance, European Parliament, Committee on Budgetary Control, *Working Document on Governance in the European Union*, Part 2, Rapporteur: Ingeborg Gräßle, 30.8.2007, PE 393.886v01-00, p. 8.

<sup>87</sup> Written Question by Jutta Haug (PSE) to the Commission, *Impact of the decentralised bodies on the Commission*, E-3156/2006, 11 July 2006; Preliminary answer given by Mr Barosso on behalf of the Commission, E-3156/2006, 2 August 2006; Supplementary answer given Mr Barosso on behalf of the Commission, E-3156/2006, 24 October 2006.

<sup>88</sup> Interview #31

<sup>89</sup> Following the principle that, in order not to compromise the power of the EU's budgetary authorities, i.e. the Council and the Parliament, the Community must finance all agency activities that fall within the remit of their legal mandate.

<sup>90</sup> It is however argued that the relative stability and security of agency funding coming from the EU budget makes it possible for agencies to be more consistent in terms of planning.

<sup>91</sup> At a trilogue on 18 March 2003, it was agreed that "the European Parliament, the Council and the Commission would point out that the budget of the bodies referred to in Article 185 of the Financial Regulation may include a financial contribution from the host member state". See European Parliament, *Working Document on a meeting with the decentralised agencies on the PDB for 2006*, Committee on Budgets, PE 360.015v01-00, DT\570749EN.doc, 13 June 2005; see also *Information received by the Commission on Buildings and Privileges of Decentralised agencies* (04/10/2007).

<sup>92</sup> Interview #9

<sup>93</sup> OHIM and CPVO are entirely self-financed. Especially OHIM derives a high income from fees. There has been discussion about setting up an agency to register original products such as French cheese. OHIM could also perform this task but because the producers of these products are usually small companies they often lack the financial means necessary for a trademark. The Commission is willing to use Community money for this purpose but OHIM has declined this as it prefers to grant trademarks for such original products on its own. Relying on a Community subsidy would make OHIM dependent on the Commission, and as a consequence, would lower its (high) degree of (financial) autonomy. Interview #5

<sup>94</sup> Considering the public character of the services it renders, the EMEA, in contrast to the OHIM and the CPVO, is not supposed to become entirely financed by fees. This would make the agencies too dependent on the pharmaceutical and aviation industry (Vos, 2003).

<sup>95</sup> This of course does not mean that they are automatically autonomous in practice. Moreover, that they acquire their own funding does not mean that they are assured of sufficient financial resources at all times as we will see in Chapter 8 in the case of the EMEA.

<sup>96</sup> This has led to strange situations: on the one hand, in its early years, the EASA has for instance been taking a loss because member states, protecting their own aviation industry, set fees that were too low to cover the agency's expenses; on the other hand, OHIM has been making a profit because member states, in defence of their national trademark bodies, set high fees in order to make the Office unattractive that were nevertheless preferred over national trade marks by industry (Schout and Pereyra, 2008).

<sup>97</sup> CPVO and OHIM are not covered by the Community Financial Regulation and can accumulate surpluses.

<sup>98</sup> See Agencies discharge 2006, *Questions from CONT secretariat to the Commission*, BXL 13.12.07, p. 1-3.

<sup>99</sup> Interview #68

<sup>100</sup> See Article 22, Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

<sup>101</sup> And when there is a decrease in agencies' spending, this often occurs in regard of operational expenditures. For instance, the budget decreases of CEDEFOP, EUROFOUND and the Monitoring Centre for Drugs and Drug Addiction only concerned operational expenditures.

<sup>102</sup> The Commission now recognises that the small size of agencies compared to EU institutions "would seem to justify appropriate adaptations" when it comes to applying the Financial as well as the Staff regulations. Commission of the European Communities (2008), *Communication from the Commission, European agencies – The way forward*, COM (2008) 135 final, Brussels, 11.3.2008, p. 6. Interview #71

<sup>103</sup> Article 47, *Interinstitutional Agreement on budgetary discipline and sound financial management*, 2006/C 139/01.

<sup>104</sup> While they are also increasingly scrutinised by organised interests and the media, this section concentrates on relations with government actors.

<sup>105</sup> The Commission's DG Budget has also compiled overviews of the major findings from the external evaluations carried out. See for instance Commission of the European Communities, Directorate-General Budget, Meta-evaluation of the Community Agency system, 15 September 2003; and the Summary of evaluation carried out on decentralized agencies, version 08/10/07.

<sup>106</sup> Interview #5

<sup>107</sup> Interview #5

<sup>108</sup> Interview #25. Vice versa this means that decisions the Commission is making or actions it is taken can have an impact on the work of the agencies, regardless their level of autonomy.

<sup>109</sup> See Chapter 10 for a more detailed discussion of the affair.

<sup>110</sup> *Financial Times*, Prodi shelves anti-Semitism conference after 'rancorous dispute' with Jewish leaders, 5 January 2004.

<sup>111</sup> Interview #5

<sup>112</sup> Speech by President Barroso on the occasion of the meeting of the Heads of EU agencies in Brussels, on 23 February 2006, available at <http://www.etf.europa.eu>, consulted on 23 May 2007.

<sup>113</sup> Interviews #5 and #9

<sup>114</sup> Interview #55

<sup>115</sup> In view of a clear division of responsibilities, it might thus be reasonable to also delegate EU agencies the responsibility for the respective policy goal. Remark made by Manuel Szapiro, European Commission, during 3<sup>rd</sup> NEWGOV Practitioner Forum, Brussels, 20 April 2007.

<sup>116</sup> Interview #5

<sup>117</sup> This is perhaps not surprising given that agencies initially only communicated with the Parliament via the Commission. As their numbers have grown, agencies have emancipated from the Commission and increasingly contacted the EP directly (Tappin, 1998).

<sup>118</sup> European Parliament, *Working document on a meeting with the decentralised agencies on the PDB for 2007*, Committee on Budgets, PE 367.332v02-00, Brussels, 29 June 2006, p. 3.

<sup>119</sup> There has been some discussion as to whether the EP should also be able to give separate discharge to agencies that do not directly receive funds from the Community budget, but that are carrying out activities on behalf of the Union. See for European Parliament, Budgetary Support Unit, *Agencies' Discharge*, Brussels, 12/12/2006.

<sup>120</sup> See *EUobserver* (2004), MEPs Back Balkan Agency Plagued by Corruption Allegations, 20 November.

<sup>121</sup> Interview #68

<sup>122</sup> European Parliament, *Working document on a meeting with the decentralised agencies on the PDB for 2008*, Committee on Budgets, Rapporteur: Jutta Haug and Kyösti Virrankoski, PE 388.642v01-00, Brussels, 23.5.2007, p. 5-6.

<sup>123</sup> Interview #68

<sup>124</sup> European Parliament, *Working document on a meeting with the decentralised agencies on the PDB for 2007*, Committee on Budgets, PE 367.332v02-00, Brussels, 29 June 2006, p. 3.

<sup>125</sup> Over time, agency directors have learned how to lobby the Parliament, for instance, sending letters to MEPs. Much to the dislike of the Commission, which perceived such direct contacts between agencies and the EP as an attempt of agencies to circumvent the Commission. Interviews #9 and #68

<sup>126</sup> Interview #53

<sup>127</sup> Union agencies are not audited by the ECA.

<sup>128</sup> European Court of Auditors, *Special Report No 5/2008 on the European Union's agencies – getting results*. While the ECA recognises that measuring the performance of agencies exercising tasks that are difficult to identify is “a considerable challenge”, it nevertheless proceeds to audit its work programming, objective setting involving the use of performance indicators to measure the implementation of the objectives, and evaluation.

## **PART 3**

### **CASE STUDIES OF AGENCY DEVELOPMENT: REGULATION THROUGH AGENCIES**

Taking into consideration the data provided, the overall safety issues and the benefit to risk balance, as well as the commitments to be undertaken by the company, the CPMP [Committee for Proprietary Medicinal Products] considered the benefit to risk assessment positive and recommended the granting of a Marketing Authorisation for all strengths and presentations of this medical product. The product is authorized for the indication 'treatment of erectile dysfunction, which is the inability to achieve or maintain a penile erection sufficient for satisfactory sexual performance'. Upon the 5-year renewal assessment (July 2003), the CHMP [Committee for Human Medicinal Products] concluded that the safety and the efficacy of this medicinal product continued to be adequately and sufficiently demonstrated and therefore considered by consensus that the benefit/risk profile of VIAGRA continues to be favourable for the treatment of men with erectile dysfunction.<sup>1</sup>

Maize NK603 has been developed for tolerance to glyphosate herbicide by the introduction of a glyphosate tolerant 5-enolpyruvylshikimate-3-phosphate synthase (PSPS) gene from *Agrobacterium* sp. The Panel has considered information provided on (1) the molecular inserts within the transgenic event, (2) the chemical composition of the GM [genetically modified] and non-GM maize, (3) the safety of proteins expressed and (4) the potential for risks associated with any changes to the toxicological, allergenic and nutritional properties of NK603. Having considered the evidence, the GMO Panel is of the opinion that NK603 maize for food or feed or processing is unlikely to have an adverse effect on human and animal health and, in that context, the environment.<sup>2</sup>

Most of the time, the operations of agencies go unnoticed by the public. This is different for agencies regulating such politically sensitive and emotionally-laden issues as pharmaceuticals and food safety, which not only involve enormous economic interests but also concern the public health of millions of EU citizens. When it positively advised on the entry of Viagra into the European market, the European Medicines agency (EMA) managed to attract considerable public attention. The European Food Safety Authority (EFSA) made headlines when it released a positive opinion on the application for the marketing of the genetically modified (GM) maize NK603. These two agencies are the object of study in the following two chapters.

Both the EMA and EFSA are Community agencies, established under the first pillar of the European Union, with semi-regulatory powers: The EMA protects public and animal health by evaluating medicinal products in Europe, while EFSA provides scientific advice on all matters impacting EU food safety. Together with the European Centre for Disease Prevention and Control (ECDC), they are supposed to protect the health of EU citizens through their autonomy.

When compared to other EU agencies, both the EMA and EFSA display a relatively high level of formal autonomy from political actors, private companies and organised interests. Given the pressure from the member states, the pharmaceutical industry and patient groups to authorise particular medicinal products in view of their national, economic, and health interests, autonomy was a principal reason for the EMA's creation and one of the cornerstones in its design (Permanand and Mossialos, 2005: 688-690; Gehring and Krapohl, 2007: 211). The creation of EFSA has been driven by food safety

crises (Vos, 2000b; Krapohl, 2003; Lezaun and Groenleer, 2006). In view of the politicisation of expert decision-making during the BSE (or mad cow disease) crisis and dioxin scandal, there was a broadly shared feeling that politics should be more strictly separated from science. To that end, an independent authority for food safety was created.

Despite these similar features, both agencies are characterised by different dynamics with regard to their development. The EMEA increased its autonomy, whereas EFSA did not succeed in doing so. These cases thus raise questions on why the organisation that on paper seems to be the most autonomous in practice appears to be less autonomous, whereas the organisation that formally is less autonomous, has actually developed a high level of autonomy from political actors. The chapters provide an account of the creation and early development of these two agencies from an institutional perspective. They explore the mechanisms affecting their development over time and the conditions under which these mechanisms operate.

One obvious factor that could account for the difference between the EMEA and EFSA needs to be tackled up front: subject matter. Of course it can be argued that regulating pharmaceuticals is something completely different than regulating foodstuffs because of the different nature of the products. Whereas pharmaceuticals are relatively homogenous products and can therefore be more easily authorised before sale, food products are relatively heterogeneous, which makes it difficult to subject them to pre-market authorisation (Krapohl, 2007b). One respondent claimed:

The differences between the EMEA and EFSA do not come from design or development. They come from the subject matter. Food is far more irrational and emotional than pharmaceuticals. [...] It is just a different world and that I believe is the main reason for the differences.<sup>3</sup>

The specificity argument has often been used by actors in the food sector for strategic reasons, to prevent comparing with and borrowing from the pharmaceutical sector (Demortain, 2008: 17). Regulating pharmaceuticals is not completely different than regulating food, however. Medicinal products have at least partly become so homogenous for the very fact that they have undergone strict regulation much longer than food products (Krapohl, 2007b). A comparison of the EMEA and EFSA is therefore impossible without considering the historical background. Therefore, both chapters begin with the historical origins of both agencies and the resulting design choices.

## Notes

<sup>1</sup> EMEA, Viagra, European Public Assessment Report, Scientific Discussion, Revision 9, published 6 December 2007, available at <http://www.emea.europa.eu/humandocs/PDFs/EPAR/viagra/113698en6.pdf>, consulted on 2 February 2008.

<sup>2</sup> EFSA, Opinion of the Scientific Panel on Genetically Modified Organisms on a request from the Commission related to the safety of foods and food ingredients derived from herbicide-tolerant genetically modified maize NK603, for which a request for placing on the market was submitted under Article 4 of the Novel Food Regulation (EC) No. 258/97 by Monsanto (Question No. EFSA-Q-2003-002), adopted on 25 November 2003.

<sup>3</sup> Interviews #73 and #75

## CHAPTER 7

# REGULATING THE PHARMACEUTICALS SECTOR: THE CASE OF THE EUROPEAN MEDICINES AGENCY

The agency cannot do anything without the expertise from the member states whereas if the member states do not support the EMEA they will not get new medicines approved for their citizens. I think that everybody understands this picture.

– EMEA management board member<sup>1</sup>

### 7.1 Introduction: medicines for Europe

Most observers consider the development of the European Medicines Agency (EMA) a ‘success story’. From the start, the agency has demonstrated to pharmaceutical companies its added value for the regulation of the European pharmaceuticals sector, and over the years it has increased its profile with respect to the member states and their national authorities as well as European bodies and international organisations.

Whereas the agency was already relatively autonomous upon its creation, for instance being partially self-financed, it further developed its autonomy in practice. Key to the agency’s autonomy, somewhat paradoxically perhaps, has been the cooperative relations with the member states and their authorities. Apart from delivering high quality opinions in a short time span and thereby speeding up the assessment process for medicines as well as enhancing public health, it seems that positioning itself as a network agency rather than emphasising its autonomous position vis-à-vis other actors, has in fact been crucial for the EMA’s increased autonomy.

This chapter looks into how this agency developed, particularly focusing on the first years of its existence. Section 7.2 goes back to the conception of the agency, giving a short overview of pharmaceuticals regulation in the EU before the agency’s creation. In the following section (7.3), the agency’s formal design, as a potential factor influencing its development is examined, particularly looking at its objectives, tasks, mandate and structure. The agency’s early development is discussed in Section 7.4, focusing on how the agency has interpreted its formal tasks and how it has translated them into relationships with other actors. Section 7.5 concludes the chapter with an analysis of factors accounting for the EMA’s early development.

### 7.2 Historical background to the EMA’s creation: the culmination of thirty years of legislation

The creation of the EMA on 22 July 1993 was part of the first wave of agency creation at the EU level.<sup>2</sup> Although the agency was created to implement new Community legislation, this legislation supplemented legislative measures and institutional arrangements already in place at the European level. In fact, the EMA was the culmination of thirty years of pharmaceutical legislation. The historical background to the EMA’s



creation helps to explain why the agency was created as it was, with significant tasks and responsibilities of its own, but firmly embedded in a new multi-layered system for the evaluation of pharmaceuticals.

### *Pharmaceuticals regulation until 1995: from thalidomide to the internal market*

The pharmaceutical sector is one of the most regulated market sectors. European legislation existed long before the EMEA's creation. The history of pharmaceuticals regulation in Europe starts in 1961, when it was discovered that thalidomide, a medication prescribed to pregnant women since 1957 to combat morning sickness, caused severe malformations to their children. After the thalidomide tragedy, regulatory agencies were created all over Europe to approve medicinal products before sale (Feick, 2002; Van der Giesen and Hekster, 2005: 69; Krapohl, 2007b).

The tragedy also marked the starting point for EU action. In 1965, the EU adopted Council Directive 65/65/EEC, laying down the principle of granting pre-marketing authorisations for medicinal products in the member states based on quality, safety and efficacy. As a result of both the economic integration of Europe and the internationalisation of the pharmaceutical industry, much national legislation has been replaced by EU legislation or became less important from that time onwards (Vos, 1999: 206-210; Van der Giesen and Hekster, 2005: 70).

For a long time, national regulatory agencies were responsible for the approval of medicines before sale in their country. Pharmaceutical companies that were granted authorisation in one member state could obtain approval for their product in other member states by requesting that competent authorities of these countries to recognise the authorisation. In 1975, Directive 75/319/EC provided for the creation of the Committee for Proprietary Medicinal Products (CPMP) that could render scientific – yet legally unbinding – advice to the requested member states in case they were reluctant or unwilling to recognise the authorisation. Due to different definitions and diverging interpretations among the member states and their agencies, the CPMP was commonly involved (Hancher, 1990; 1991; Van der Giesen, 1996: 59-60; Vos, 1999: 206-210).<sup>3</sup>

In 1987, Directive 87/22/EEC made it mandatory for member states to consult the CPMP before they could decide on authorisation at the national level of medicines produced with biotechnology. CPMP consultations were optional for other innovative medicinal products. At the request of the pharmaceutical company, the national authority of one of the member states would serve as the member state evaluating the product and report to the other member states, which were supposed to rely on these reports. But differences among member states over findings, mutual distrust of national authorities in each other's evaluations, and the considerable time lag between the committee's advice and the authorisation by the member states continued to hamper the establishment of an internal market for medicines (Hancher, 1990; 1991; Van der Giesen, 1996: 60-61; Vos, 1999: 206-209).

### *Towards a centralised approach*

Health policy traditionally is an issue of shared competence between the supranational and the national level. Member states, fearing a loss of sovereignty in a single market for medicines, restricted the Commission to promoting the liberalisation of the European pharmaceuticals market. The Commission had to respect the authority of the member states in the field of public health, particularly with regard to the pricing and

reimbursement of medicines. As a result, the objectives of its policy with regard to pharmaceuticals have been relatively compatible with the industry's, that is, removing barriers to economic integration rather than protecting public health and consumer rights (Permanand and Altenstetter, 2004: 49; Permanand and Mossialos, 2005: 705; *cf.* Kelemen, 2004).

By the end of the 1980s, the Commission, in particular its Directorate-General (DG) Enterprise, became concerned that the pharmaceutical sector would not make the 1992 deadline for the completion of the single market.<sup>4</sup> Hence, the Commission convinced the industry of the need for a centralised approach, which would reduce transaction costs, and make the approval process more efficient (Permanand, 2002; *cf.* Kelemen, 2004). As opposed to the mutual recognition and consultation procedures, which were dominated by national regulatory agencies, the centralised procedure would be coordinated by a single EU authorisation agency (Deboyser, 1995; Gardner, 1996).<sup>5</sup> The failure of the decentralised approach thus spurred the emergence of a supranational regulatory regime from which the industry and the Commission were the prime beneficiaries (Abraham and Lewis, 2000; Permanand and Mossialos, 2005: 699).

### *Introduction of a new EU authorisation system*

The agency was created together with a new European system for the authorisation of medicinal products for human and veterinary use. The system distinguished between two approval procedures: a decentralised and a centralised one. In the decentralised procedure, the assessment of applications for a marketing authorisation in one member state serves as the basis for marketing authorisations in other member states. In the centralised procedure, by contrast, the new EU agency would function as a 'secretariat', validating the applications of pharmaceutical companies, coordinating the assessment of new medicines by national authorities and delivering to the Commission opinions on which to base an authorisation decision. Hence, the agency was supposed to be the hub of a multi-level network of actors involved in pharmaceuticals regulation (Metcalf, 2000: 131; Kelemen, 145-146).

Upon its introduction, the centralised procedure applied to a limited category of medicines only: pharmaceutical companies were obliged to follow the procedure for biotech products, while using the procedure was optional for other innovative products. "Nobody wanted the procedure to fail due to work overload, which would strangle the new agency" (Feick, 2002: 18). In addition, it was believed that the chances of reaching consensus in the agency's expert committees would be higher if discussion concentrated on the most innovative products. "Nobody wanted the deliberations and negotiations to be driven into highly controversial pharmacological, medical and administrative issues" (*ibid.*).

### *Building the agency*

The EMEA did not completely start from scratch (Krapohl, 2004). It was assembled of pre-existing building blocks: the Committee for Human Medicinal Products (CHMP, the former CPMP) and the Committee for Veterinary Medicinal Products (CVMP).<sup>6</sup> The advisory work of these committees consisting of member state experts lasted until December 1994. With the creation of the EMEA, they were transformed into EMEA scientific committees. Even as the mandates, roles and legal implications of the opinions of the former scientific committees changed when they were merged into the

EMA, the agency was thus able “to build on the considerable base of previous co-operation and experience” and a “history of established relationships”.<sup>7</sup>

The agency was inaugurated in January 1995. At that time, the agency’s premises at London’s Canary Wharf – now a bustling place, but then an area under construction – were not ready to be occupied. Texaco, renting office space in the same building, allowed the EMA to use one of its meeting rooms, which made it seem like the EMA was fully operational. With little help from the Commission’s DG Enterprise or the British government, the agency’s first director, the Frenchman Fernand Sauer, relied on the Commission delegation in London and the members of the management board for practical assistance.<sup>8</sup> He had to choose carpets and chairs, design meeting rooms and interpretation facilities, and, “most important for a Frenchman”, discuss the arrangements for the restaurant.<sup>9</sup> In May 1995, while the agency’s premises were still being furnished, the EMA delivered its first opinion.

### 7.3 The EMA’s formal autonomy: clever design

#### *Key objective*

Although not completely built from scratch, the EMA is a novel organisation that does not resemble national medicinal authorities’ design features. By organising independent expertise at the EU level and by enhancing the regulatory cooperation between the member states, the EU sought to achieve sometimes conflicting objectives: the competitiveness of the European pharmaceutical industry and the protection of EU citizens’ health.<sup>10</sup> But the agency was primarily created to further the efficient and flexible implementation of EU legislation, in particular the new system for authorising medicinal products to ensure “the rapid access of new products to a Community scale market” (Sauer, 1996: 23).

#### *Pre-marketing tasks*

The EMA’s primary task is risk assessment by performing scientific evaluations of medicinal products and providing the Commission with advice. Under the centralised procedure (see Figure 7.1), companies submit a marketing authorisation application to the EMA. The relevant scientific committee then carries out an evaluation. It appoints two of its members as rapporteur and co-rapporteur who coordinate the evaluation work. If the relevant committee concludes that quality, safety and efficacy of the medicinal product is sufficiently proven, it adopts a favourable opinion. Voting in the committees takes place by majority. Minority views are attached to the opinion and mentioned in the European Public Assessment Report (EPAR), which provides a summary of the grounds for the opinion in favour of granting a marketing authorisation.

#### *Limited mandate*

The EMA’s scientific committee normally gives its opinions within 210 days after receipt of the application. The committee’s evaluation is sent to the Commission to be transformed into a single marketing authorisation valid for the entire EU. On the basis of the committee’s advice, the Commission adopts a draft opinion. If the Commission’s

draft decision deviates from the agency’s opinion, the Commission has to attach an explanation of the reasons for the deviation.

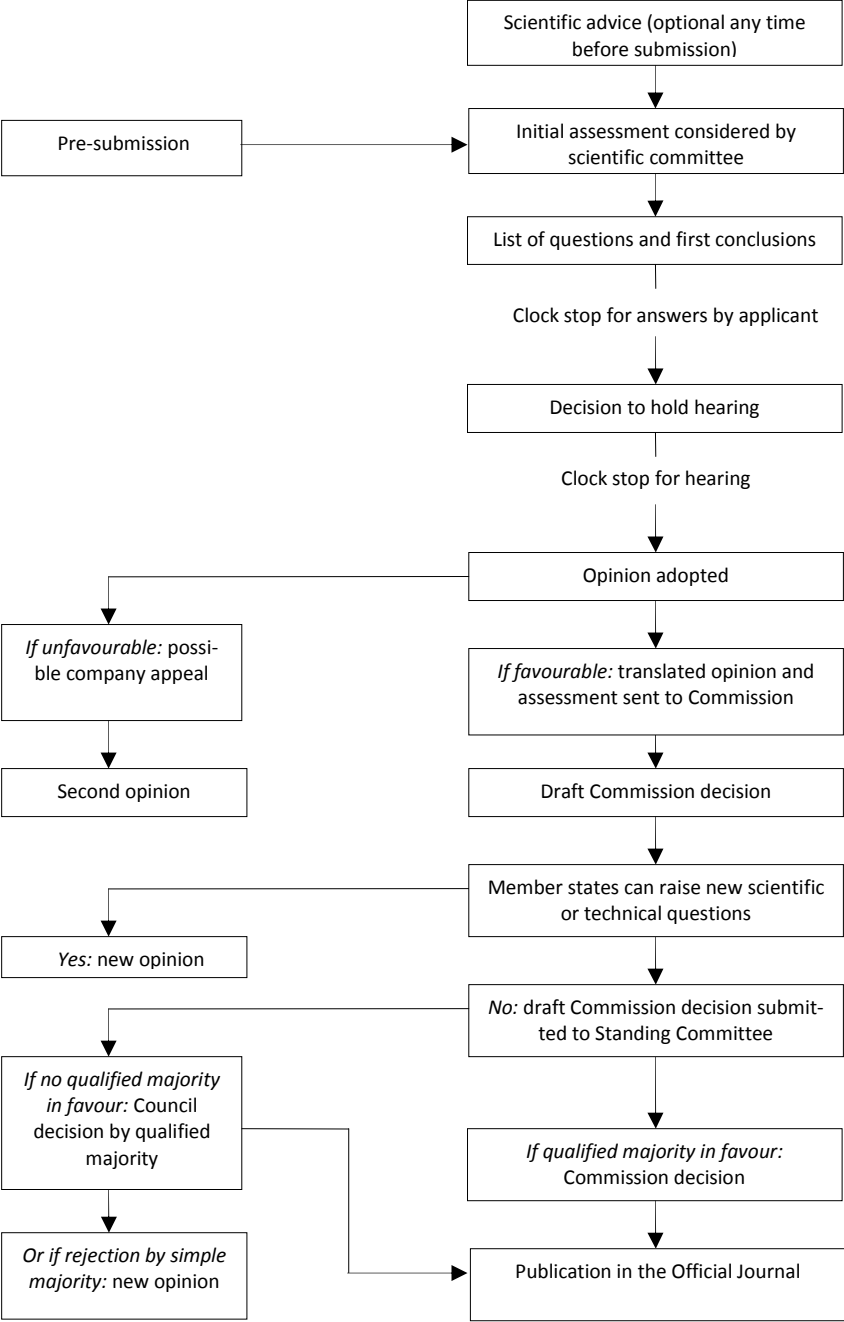


Figure 7.1 – The centralised procedure

During the review of the EU pharmaceutical legislation, the Commission proposed to reduce this time period, but the proposal was opposed by national governments, which believed shortened approval times would interfere with the scientific quality of the assessment and evaluation work. The original deadlines for assessment and evaluation were therefore maintained. Instead, the Commission was forced to reduce the time for its own decisions from 30 to 15 days (Broscheid and Feick, 2005: 22-23).

On the basis of a draft Commission decision, member states can raise new scientific or technical questions. When they do so, the decision is referred back to the committee. If the member states do not raise new questions, the draft decision is submitted to the Standing Committee on Medicinal Products for Human Use, a comitology committee of member state representatives that formally decides on the authorisation. If no member state raises objections against the draft decision, the decision is adopted through written procedure. Otherwise a meeting of the Standing Committee is convened. If there is no qualified majority in the Standing Committee in favour of the Commission proposal, the Council of Ministers renders a decision by qualified majority.<sup>11</sup>

In performing the assessment task, the EMEA thus has a limited mandate.<sup>12</sup> The agency merely advises the Commission on the scientific and technical aspects of pharmaceutical policy; it does not have decision-making powers. Formally, the Commission and the member states in the Standing Committee (or the Council) remain responsible for risk management. They ultimately decide on policy issues, also taking into account issues other than just scientific and technical factors such as economic, ethical or political factors.

### *Post-marketing tasks*

In addition to coordinating the pre-marketing scientific evaluation of the quality, safety and efficacy of medicinal products, the EMEA also provides information to patients and health care professionals and coordinates the post-marketing control and monitoring of authorised medicines (usually referred to as pharmacovigilance). Once introduced widely into the market, newly approved medicines sometimes cause side-effects not seen in earlier research. Sometimes these side-effects necessitate withdrawal of a product from the market. The agency keeps and transmits assessment reports and information on authorised medicinal products, and disseminates information on adverse reactions. In case of 'severe' adverse reactions, only the Commission can repeal a marketing approval. The EMEA does not have enforcement powers and as such cannot be referred to as the EU's drug watchdog.<sup>13</sup> The EMEA may, on the basis of the assessment of its expert committees, advise the Commission to restrict the marketing of a drug.<sup>14</sup>

Finally, in case of a conflict between two member states about the application of a marketing authorisation granted under the decentralised procedure, the EMEA settles the dispute. But the EMEA rarely arbitrates as companies usually withdraw their application in the member state withholding recognition of the assessment (Feick, 2002: 20; Garattini and Bertele, 2004: 93). Member states frequently make objections to marketing of a new drug on the basis of the argument that the drug could cause a 'risk to public health'. These frequent (and often improper) objections under the decentralised procedure have probably further increased pharmaceutical companies' use of the centralised procedure (see below).<sup>15</sup>

### *A member states' board and a European director*

As in most EU agencies created during the early 1990s, the EMEA management board is primarily composed of representatives from the member states' medicines authorities.<sup>16</sup> The EMEA management board initially consisted of two representatives per member state, while also the Commission and the Parliament had two representatives each. The composition of the board reflects the interdependence of the many actors involved in pharmaceuticals regulation, allowing "joint ownership" of the agency between the member states and the EU institutions.<sup>17</sup>

The executive director of the EMEA is an EU official. He is responsible for the day-to-day management of the agency, including budgeting and staffing, and reporting to EU institutions and member states. Although he is relatively independent in hiring people and allocating money, he has to follow the Commission's staff and financial regulations.

### *National experts and industry fees*

The agency employs its personnel on a temporary basis, but contracts become permanent after two terms of five years. Its staff is responsible for providing administrative and technical support to the scientific committees of experts, which do most of the actual work of the agency. The EMEA currently has a number of different committees. In addition to the above mentioned Committee for Medicinal Products for Human Use (CHMP) and the Committee for Medicinal Products for Veterinary Use (CVMP), the Committee on Orphan Medicinal Products (COMP) and the Committee on Herbal Medicinal Products (HMPC) were established in 2001 and 2004 respectively. In 2007, a Paediatric Committee (PDCO) was created.<sup>18</sup>

The database of the agency consists of more than 3000 experts<sup>19</sup> nominated by the member states and appointed by the management board "by reason of their role and experience in the evaluation of medicinal products for human and veterinary use as appropriate."<sup>20</sup> In order to ensure that experts have the highest level of scientific qualifications and that committees cover the widest variety of scientific disciplines, the agency must consult the management board on the nomination of experts. Although experts are nominated by their national authorities, member states must refrain from giving their experts instructions that conflict with the tasks they perform for the agency, respecting and guaranteeing their independence.<sup>21</sup>

Moreover, in order to ensure the agency's autonomy vis-à-vis the EU institutions, the EMEA is one of few agencies that is partially self-financed. It charges pharmaceutical companies fees for its services. The power to determine the fees, however, is divided between the Commission and the Council. Considering the public character of the services it renders, the EMEA is not entirely financed by fees (Vos, 2003). So the agency is not too dependent on industry fees, the Commission contributes a subsidy for which the agency is accountable to the Parliament and the Council.

## 7.4 Autonomy in practice: a professional network organisation

### *From authorisation to supervision: towards a 'European FDA'?*

Although the founding regulation does not spell out all details, and also quotes public health protection and promotion, the EMEA's role has been clear from the start: it processes applications from pharmaceutical companies in order to promote the free circulation of drugs in the EU. Hence,

...[t]he development of the agency's mandate has been relatively linear: simply more kinds of different medicines were added to the agency's remit. Its main task remained assessing the files submitted by industry and producing clear output in the form of an opinion.<sup>22</sup>

For example, the centralised procedure is now used for orphan drugs (i.e. medicines for rare diseases). Ever since the European legislative framework for pharmaceuticals was reviewed between 2001 and 2004,<sup>23</sup> medicinal products in development for cancer, AIDS, diabetes and neurodegenerative diseases must be submitted directly to the EMEA. And as of 2008 using the centralised procedure is obligatory for medicines for auto-immune diseases and other immune dysfunctions and viral diseases.

These formal scope extensions often did not result in increased responsibility for the EMEA as, in practice, most medicinal products were already authorised through the centralised procedure. In the first year of the new system one third of the applications received concerned biotech products for which the centralised procedure was always mandatory, while two thirds related to other products such as medicines to treat AIDS, for which the centralised procedure at that time was still voluntary, thus demonstrating the success of the procedure (Vos, 1999: 221). Since new pharmaceutical legislation came into effect in 2005, the EMEA may also grant conditional approval for new medicinal products. And an accelerated procedure for approval of drugs of major therapeutic interest, a practice which already existed informally, has been formalised.<sup>24</sup> In this way, patients may benefit earlier from available therapies. With the wider applicability of the centralised procedure, the number of applications has steadily risen.<sup>25</sup>

Although the EMEA started off as an agency promoting the free circulation of medicines in the EU, its responsibility has increased over the years to include the protection of public health. Initially concerned with the interests of the pharmaceutical industry, the agency has shifted its focus to ensure that European patients also derive maximum benefit from the regulatory system. The increased focus on patients is, for example, apparent in the legislation on and subsequent creation of committees for orphan drugs, herbal medicines and medicines for children. More pro-actively, the agency has gradually expanded its activities in the public health area. It now also renders advice to health care professionals and patients groups and involves them in the provision of information, as well as in the opinion-making process through full membership in the COMP and the PDCO.

Moreover, the agency is increasingly involved in the surveillance of the pharmaceutical market.<sup>26</sup> At the outset, pharmacovigilance was an underdeveloped part of the EMEA's mission. Enforcement essentially was a member state responsibility and thus a decentralised task.<sup>27</sup> Already in 1995 the agency got caught up in a discussion with national authorities over the reaction to new research on so-called third generation oral contraceptives. Several studies suggested that the pills, not authorised by the agency itself, significantly increased the risk of blood clots. In reaction, experts on the EMEA's scientific committee decided to come to a position statement on the basis of the evi-

dence available. As a position statement is not enforceable upon the member states, the UK and German authorities went ahead with restricting use of the pills anyway. The only thing the EMEA could do was issuing a public statement qualifying the German and UK reactions as inappropriate.<sup>28</sup>

Until 2001, there were no major incidents with new drugs approved by the agency. Whether that is a result of the authorisation system or whether it is sheer luck is of course difficult to tell.<sup>29</sup> Over the years, the agency's approach to pharmacovigilance has gradually become more pro-active. The agency's Unit for the Evaluation of Medicinal Products for Human Use was for instance re-organised into two operational units dealing with pre- and post-authorisation aspects of medicines for humans, allowing the agency to follow medicinal products throughout their entire life cycle.<sup>30</sup> The high-profile withdrawals of Baycol (also called Lipobay) and Vioxx, approved through national and decentralised procedures, demonstrated that the EMEA's coordinating role with regard to pharmacovigilance in the EU should be broadened and that the agency should be more pro-active.<sup>31</sup>

*Baycol/Lipobay* In 2001, Bayer suddenly withdrew its anti-cholesterol medicine Baycol from the market. The reason for the withdrawal, according to a press release by the company, was increasing reports of side-effects involving muscular weakness. In June of the same year, changes had already been made to the EU prescribing information, of which health professionals were informed through so-called 'Dear Doctor' letters. The recall took the EMEA and the member states by surprise. The high profile withdrawal of Baycol was followed by another much publicised recall.

*Vioxx* In September 2004, Vioxx, a painkiller, had to be withdrawn from the market by the company producing the drug, Merck, as it had appeared from a recently finished study that the drug caused an increased risk of heart attacks and strokes among patients with heart and vascular diseases. Merck fell into discredit when it became clear that it had been aware of the painkiller's side-effects for a long time. Also the EMEA had concerns about the safety of medicines such as Vioxx, but it advised the member states to keep the product on the market, provided that the product package was adapted to better describe the side-effects.<sup>32</sup>

Whereas both affairs negatively affected the image of the pharmaceuticals industry and the authority of regulatory agencies, in particular the US Food and Drug Administration (FDA),<sup>33</sup> they left the EMEA's reputation relatively unscathed. If the Baycol and Vioxx affairs had any consequences for the agency, they were positive. The recalls underlined the necessity and advantages of an increased role for the agency in post-marketing surveillance. Since 2002, national authorities are obliged to report adverse effects that have occurred within their territories to the EMEA, which stores them in the EudraVigilance database (Van der Giesen and Hekster, 2005: 83). This approach had its limitations as not all side-effects are detected. In case of Vioxx, for instance, the adverse effects of the product were not reported by patients or health care professionals, but by a follow-up study that was performed.

Previously, the EMEA mainly exerted informal pressure on pharmaceutical companies. The agency's director for instance contacted pharmaceutical companies urging them to withdraw their drug from the market or else going public with the damaging information, something that a company of course wanted to avoid.<sup>34</sup> The agency also launched informal investigations into the safety of certain medicines, such as when a study pointed to cancer risks of hormone replacement therapy (HRT) in 1995. Martin Harvey, the agency's spokesman, then stated to the press: "We felt this was something that the agency couldn't just ignore, even though no-one has formally referred it to



us.”<sup>35</sup> Since a penalties regulation was adopted in 2007, the EMEA can conduct additional investigations into the safety of a certain drug already authorised for entry on the market. On the basis of the EMEA’s report, the Commission can impose penalties on pharmaceutical companies for breaches of specified obligations (e.g. not having recorded all suspected adverse reactions).

In 2002, the heads of national agencies together with the EMEA agreed to develop a European Risk Management Strategy (ERMS), in which they shifted from a reactive pharmacovigilance approach to a more pro-active approach. The EMEA still lacks the formal power to order pharmaceutical companies to withdraw their product from the market in case of severe side-effects, but since the introduction of Community legislation in 2005, for instance making electronic reporting of side-effects mandatory, its coordination role has been strengthened.

The broader scope of the agency’s mandate and tasks are reflected in its changed name, from ‘European Agency for the Evaluation of Medicinal Products’ to ‘European Medicines Agency’. While the process of scope enlargement has for sure led to increased supranationalism with regards to marketing authorisations, the EMEA has certainly not yet and will probably not in the foreseeable future grow into an agency with powers similar to that of the FDA. Yet, respondents representing both the agency and its clients and stakeholders are convinced that the future trend will be an even further increased use of the centralised procedure.

### *Professional consensus*

Decision making under the centralised procedure is characterised by a high level of consensus. For example, of the 123 positive opinions the EMEA has issued between 1995 and 1999, 107 were adopted unanimously (Sauer, 2002: 4, as referred to in Feick, 2002: 18).<sup>36</sup> Sometimes the advice was preceded by lengthy and intensive consultations due to differences among the committee members. But because in the early years almost all opinions were adopted unanimously, “it can be derived that the ‘will to work it out’ is clearly present with all [committee] members and that cooperation is constructive” (Van der Giesen, 1996: 66). Also, in later years, scientific opinions have mostly been adopted by a consensus of committee members (Garattini and Bertele, 2004: 92; Gehring and Krapohl, 2007: 217-218).

The high level of agreement among committee members is to some extent designed into the system. When the expert committees are unable to come to agreement, the Commission and the member states (and their national authorities) are likely to resort to intergovernmental (or inter-administrative) negotiations and bargaining, the outcomes of which are uncertain, and may well reflect political rather than scientific arguments (Feick, 2002: 30). So there is a strong incentive for the committee members, as experts, to come to agreement amongst themselves.

Moreover, experts in the committees use the same criteria for the evaluation of medicinal products. Two Community Codes<sup>37</sup> specify the evaluation criteria – safety, efficacy and quality – and exclude such factors as the economic well-being of the pharmaceutical industry, financial constraints of domestic healthcare systems (Gehring and Krapohl, 2007: 218) or ethical objections to medicines such as contraceptives or abortifacients. As long as experts apply these criteria when evaluating a medicine and do not take into account other interests, thus rendering scientifically sound advice, they can claim authority over non-scientific actors (in this case, the Commission and the member states).

But due to the conflicting nature of the safety and efficacy criteria (for example, a drug can be effective but cause harmful side-effects) the evaluation still involves a high level of autonomy for the committees (Gehring and Krapohl, 2007: 220-221). Partly for this reason the agency has adopted numerous additional guidance documents, the adherence to which adds to the credibility of the authorisation system and the scientific advice rendered.

The endeavour of the EMEA to elaborate numerous additional guidance documents contributes to avoiding arbitrary or unconvincing decisions which might undermine its reputation as a sound regulator and lead to the intervention of non-scientific actors. Thus, the expert committee limits its own discretion and successfully sidesteps the internal credible commitment problem which might arise from the fact that its members implicitly represent their domestic authorization agencies (Gehring and Krapohl, 2007: 223).

Moreover, professionalism has led experts in the committees to pursue consensus in decision making, instead of following national interests. Although they come from different national cultures, they have similar professional backgrounds, many of them being pharmacists or medical doctors. Moreover, as experts they share the same professional standards with regard to evaluating medicine. Although officially appointed by the member states, they often developed “cosmopolitan” orientations or “supranational” identities, associating with the agency (or rather, the transnational network of experts involved in its work) not necessarily instead of but *in addition to* their affiliation with a particular member state or national agency (Majone, 2000; Broscheid and Feick, 2005: 27).

Such identities or orientations have further developed as a result of interaction among experts. Several respondents mention the frequent and lengthy meetings at the EMEA’s premises in London. Experts usually spend three to four days a month discussing general scientific matters together. The EMEA provides them with meeting and working facilities.<sup>38</sup> In addition to these committee meetings, experts also participate in various working parties or scientific advisory groups, both in the framework of the EMEA and in the context of international regimes such as the International Conference on Harmonisation (ICH).<sup>39</sup>

Not everyone regards the high level of consensus as positive. Silvio Garattini, an Italian scientist and former member of the Committee for Human Medicinal Products (CHMP), has frequently criticised the lack of debate in the committee. In *Celebrating Ten Years – Portrait of the European Medicines Agency*, he writes that:

...the [CHMP] seems to be a machine geared to say “yes” always, forcing a consensus that frequently may not in fact exist. I believe that more debate and criticism are needed in the [committee] meetings; more divergent opinions would make our work more reliable and legitimise our position.”<sup>40</sup>

According to Garattini, “in some cases national interests or the position of national agencies, depending on their previous deliberations, tend to obscure personal evaluations.” The low number of negative opinions in the early years, he argues, has been the result of the evaluation of medicines with a high chance of being approved and the withdrawal of applications that would otherwise have led to negative opinions.

### *The de facto binding value of opinions*

Even though the Commission still makes the authorisation decision, the agency's expert committees "pre-determine" that decision (Feick, 2002: 8). The agency's committees prepare a draft of the Commission decision authorising a particular medicine, which the Commission generally accepts without changes. The member states typically follow the agency's advice. They seldom ask additional questions and when they do the eventual advice rendered by the scientific committee rarely differs from its initial advice (Feick, 2002: 8). Moreover, the Standing Committee has always been able to decide on the proposed measures. Not a single decision has been referred to the Council.

The absence of discussion could of course be the result of the perceived quality of the agency's opinions, as the agency claims: "The consistent and high quality of the CPMP [now CHMP] opinions prevented further scientific discussions during the Standing Committee phase. This facilitated the issuing of Commission Decisions granting Community marketing authorizations."<sup>41</sup> The absence of discussion seems also partly due to the way the procedures and rules are written (Everson *et al.*, 1999: 197). The Commission can only deviate from the agency's advice when it gives reasons for doing so, which makes it more likely that the Commission will follow the advice. In addition, the Commission and the member states cannot simply ignore the advice of the EMEA. When they do not agree with the EMEA's advice, they have to refer the advice back to the expert committee for re-examination.

Furthermore, member state representatives only meet in the Standing Committee upon the request of at least one member state or when the Commission's proposal for a decision deviates from the agency's advice. In the agency's early days, member states found it difficult to accept opinions readily and they thus requested meetings of the Standing Committee, thereby slowing down the process. "What was to be an exceptional procedure became an ordinary procedure in the sense that we would always meet and discuss all the details of the authorisation, including some very practical aspects."<sup>42</sup> In no case did the member states ever change a decision. Once they got used to the new system, most authorisation decisions taken by the Standing Committee were adopted following the written procedure and member state representatives rarely met to decide upon authorisations (Vos, 1999: 212-213).

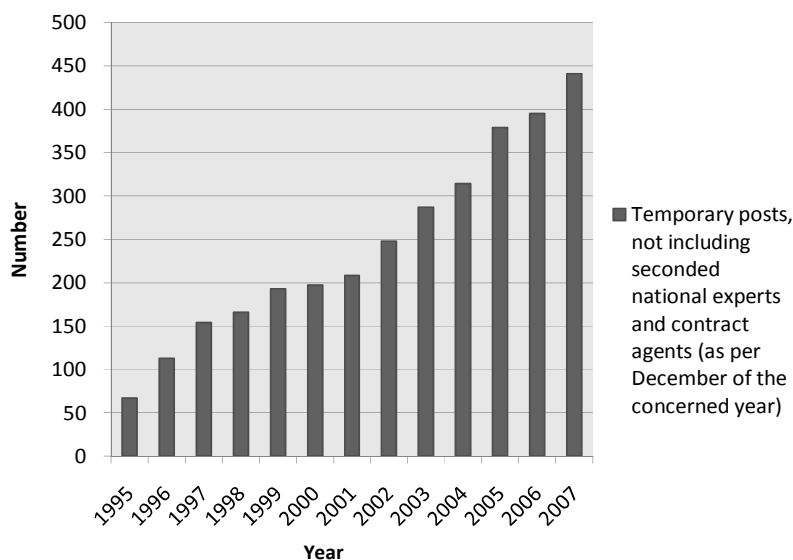
So whereas the agency does not have a legal right of decision, its opinions on the authorisation of medicinal products have a *de facto* binding value because they are virtually 'rubberstamped' by the Commission and the member states (Dehousse, 2002). "[E]very final decision under the centralized authorization procedure reflects the relevant scientific opinion of the EMEA committee" (Gehring and Krapohl, 2007: 217). In practice, the agency thus not only fulfils risk assessment and communication tasks, but is also involved in risk management activities (Krapohl, 2004: 534).

### *From supporting to supplanting experts?*

The EMEA's staff has rapidly expanded over the years and is still growing. The agency started with just a handful of people in 1995 and has grown to over 400 employees in 2007 (see Figure 7.2). The increase has largely followed developments in the volumes of applications that the agency processes, even though EMEA staff do not perform evaluations themselves.<sup>43</sup> In order to maintain a high level of expertise it is considered necessary that the actual scientific work takes place in the member states. As a respondent

says: “If you would centralise everything in London, this would lead to ‘paper scientists’ there.”<sup>44</sup>

Yet, EMEA staff can exert significant influence over the evaluation process in different ways. They possess knowledge of the relevant EU legislation which enables them to advise experts during committee meetings. They also take minutes during these meetings and prepare drafts for the committee’s consideration, thereby ensuring the consistency of opinions. Furthermore, they prepare the European Public Assessment Report (EPAR) which is published on the EMEA’s website.<sup>45</sup>



**Figure 7.2** – Staff development (1995-2007)

Sources: EMEA annual reports

As in the beginning the agency was still unknown, it was difficult to attract older and more experienced people. The agency could only offer them inferior grades. As one respondent states: “I had 15 years of experience in industry, a big car, a nice house, stock options. I had everything. Why would I give that up?”<sup>46</sup> Over time, recognition by the pharmaceutical industry in combination with a wider applicability of the centralised procedure made it more prestigious to work for the agency. What is more, the increased size of the agency offered staff more possibilities for internal mobility and the possibilities for interagency mobility have also increased since the signing of a memorandum by the EU agency directors in 2006.<sup>47</sup>

Hence, the first staff members of the EMEA were relatively young and inexperienced. After a trial period, they were usually offered five year renewable contracts; after ten years they qualified for an ‘unlimited temporary agent contract’.<sup>48</sup> Although the first staff members were highly motivated, their lack of training in scientific issues initially caused tensions with the members of the committees incorporated into the EMEA who considered them to be lacking the necessary technical skills. The training systems put in place in the early years proved highly effective in transferring the required knowledge.<sup>49</sup> Tensions were thus soon replaced with constructive working relationships (Hauray, 2006). The commitment of staff to ensure timely, high quality and truly objec-

tive assessments, for instance through the development of standard operating procedures (SOPs) and an integrated quality management (IQM) system, is lauded by experts, clients and stakeholders alike.<sup>50</sup>

Administrative staff only makes up 15 percent of the agency's personnel; 85 percent of the staff consists of pharmacists, chemists, medical doctors, veterinarians, and specialists in regulatory affairs. In contrast to the Commission's officials, the agency's experts do not automatically have an international orientation, and are not necessarily skilled in speaking foreign languages. "We are looking for oncologists, who have ten, fifteen years of experience in oncology, not in languages", an EMEA official says. With the agency becoming more heavily involved in the public health area, it for instance created a department for medical information, allowing the public to contact the EMEA to get information on new medicines. "All this requires that our people really have the latest knowledge of our medicines and for this we need very experienced specialists in the field, beyond the pure regulatory specialists among us."<sup>51</sup>

In order to further build up its in-house research capacity, also in view of the EMEA's extended tasks as a result of the new legislation adopted in 2004, the agency has in recent years taken steps to complement its secretarial staff with more scientific experts of its own. It would not only need this capacity to validate the incoming applications, but also to control the quality of the agency's scientific work. A respondent explains: "They are the institutional memory of the organisation and as such have to ensure the consistency with previous opinions."<sup>52</sup> Furthermore, relying on a network of experts (mostly) working for national authorities has obvious disadvantages in terms of control: while such experts work for the agency, they are not employed by the agency and do not fall under the director's authority.

Completely centralising expertise at the agency hardly seems a real option, however. Precisely because many national experts are simultaneously affiliated with hospitals, universities and other research institutes, they can keep up on specialised knowledge and are less likely to be driven by either the interests of national agencies or the EMEA. A respondent says:

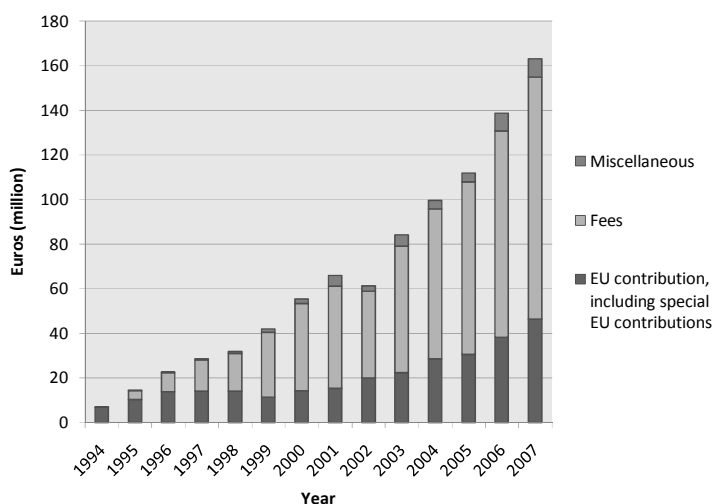
The tendency to contract permanent scientific staff is [...] worrying, [...] both for reasons of efficacy and independence. The agency must be free to contract the scientific services it needs through the [national] agencies or through the network of specialists in European research centres. The agency can never aspire to having a team of scientists of sufficient quality to meet the changing needs of scientific progress. Moreover, it could prove difficult to control this internal group of civil servants within the agency and they may end up being vulnerable to the pressure of companies. Scientific advice has to come from many sources and be decentralised both for scientific demands and for the agency's independence.<sup>53</sup>

Directly calling on experts in the member states without the interference of the national authorities (as EFSA does) is also impracticable given the large numbers of experts necessary to assist in the evaluation process and the bureaucratic support these experts need to perform the evaluations (Van der Giesen, 1996: 70). Moreover, it will most likely lead to increased member state control over the advice rendered by EMEA committees at a later stage in the evaluation process.

### *Between private enterprise and public body*

The agency's financing largely takes place through industry fees for marketing authorisation. In recent years, about 70 percent of the total revenues are fees collected from companies applying for marketing authorisation (see Figure 7.3).<sup>54</sup> Although drug agencies around the world are funded similarly, the percentage of funding from fees at the EMEA is substantially higher. This has prompted critics to question the agency's ability to act independently and argue that the Commission subsidy should make up a higher percentage of the EMEA's budget (Garattini and Bertele, 2004: 88). Given the trend towards reducing EU spending, an increase in the Commission subsidy is unlikely in the foreseeable future, however.<sup>55</sup> Moreover, a subsidy increase would reduce the EMEA's dependency on industry, but increase its dependence on the Commission.

The dependence on fees has led to concerns within the agency from the beginning. One problem is that the number of applications cannot easily be anticipated, as the number of applications is highly volatile, even throughout the year.<sup>56</sup> Because following the centralised procedure is not compulsory for all medicines, companies may still go through the decentralised procedure, applying with national regulatory bodies for marketing authorisation. The EMEA and national agencies then have to 'compete' for funding, which makes both dependent on the pharmaceutical industry (Mossialos, Walley and Mrazek, 2004: 7).



**Figure 7.3** – Budget development (1995-2007)

Sources: EMEA annual reports

For example, the income from companies applying for authorisation in the first years of the EMEA's existence was significantly lower than expected at the time of the agency's creation. The EMEA therefore had to rely more on funding provided by the Commission than initially foreseen.<sup>57</sup> Part of the difficult financial situation faced in the early years was solved by agreeing on annual fees for monitoring and control of

authorised medicines, so-called user-fees, ensuring a more stable source of income. At the same time, however, research and development of new innovative drugs has become less attractive due to the high costs involved. A large reduction of the number of applications for approval of medicinal products in 2002 therefore resulted in serious financial problems and made it necessary for the agency to temporarily downsize its operations.<sup>58</sup>

As a consequence of the uncertainty involved in the fee system, the agency has to make financial obligations at the beginning of the year without knowing the exact amount of money it can spend during the year, which goes against basic budgeting principles. "We operate like a private enterprise, while we are a public body", a respondent comments.<sup>59</sup> Furthermore, as a public body, the agency was initially not entitled to set aside any surplus as a reserve. Money left at the end of the year had to be transferred to the Community budget, which posed problems as it concerned money from fees paid by pharmaceutical companies to the EMEA that could not suddenly be used for other purposes. The agency can now set aside reserves to which it has rapid access through a simple letter from the director to the Commission.<sup>60</sup>

Whereas the EU Financial Regulation allows the agency considerable freedom in the re-allocation of its budget, the room to manoeuvre in practice is rather narrow because a large part of the budget is legally committed to salaries, rents, infrastructures etc. Furthermore, about 50 percent of the fees are transferred to the member states for supplying expertise to the committees. As the total budget of the EMEA is small, certainly when compared to what national agencies have at their disposal, the actual amount that is left to re-allocate is thus limited.<sup>61</sup>

### *Cooperation through cooptation*

Through their representation in the management board member states can wield considerable influence on and exert substantial control over agency decision making. Member state representatives are often high-level officials involved in the authorisation of medicines at the national level. Sometimes they come from national ministries of health, but usually they are the heads of national medicines agencies. This gives rise to a dilemma pointed out by Metcalfe (2000: 134):

On the one hand, cooperation with national authorities at a working level is facilitated by their participation in the EMEA Board. Excluding them might jeopardize the development of reliable partnerships. On the other hand, the dominance of outside interests in the Board, some of which are competitive, may threaten the continuity and coherence of EMEA's policy.

Whether the inclusion of national agencies in the management board compromises the independence of the agency highly depends on the functioning of the board, notably how members interpret their role, behaving as part of a collective and thus identifying with the EMEA or acting as individuals and thus representing their member states. Most respondents consider the representation of national authorities in the board an advantage:

It means that first there is a high level of competence, because these people are running themselves an agency. They know about the problems of running a drug agency. The second of course is that it gives them some control. The national agencies at the beginning had thirty members as compared to two members each for the Parliament and the Commission. So the power was in the hands of the national agencies. And, finally, I think it was a very good idea to have the highest level of representation from the national agencies in the board, because

these people were running an agency so they had better things to do than to come to London too often to interfere in the daily life of the agency.<sup>62</sup>

The composition of the management board is a clear example of cooptation. Whereas cooptation is often used as a defensive strategy – including external actors in the decision-making bodies of an organisation “as a means of averting threats to its stability or existence” – cooptation in the case of the EMEA has been used as an innovative strategy “to strengthen EMEA’s own corporate identity *and* promote the integration of the whole system” (Metcalf, 2000: 135). The EMEA (and, of course, those responsible for its design) has thus made a virtue out of a necessity. Through involving member states’ medicines agencies, the agency not only soothed the relation with potentially hostile organisations, but it also strengthened its position as the nucleus of the new authorisation system.

Cooptation seems to have ensured that the EMEA has not suffered major scandals: in case of problems with medicines occurring at the national level, member state representatives raise such problems in the board and discuss possible measures to be taken at the EU level.<sup>63</sup> Additionally, it has had a legitimising effect on the medicines-approval system. “We have not seen a single case of the EMEA saying ‘This drug is dangerous’ and the member states saying ‘No, this is wrong’ and the EMEA saying ‘This drug should not enter the market’ and the member states saying ‘It should, we need this drug’. There has not been a single case.”<sup>64</sup> Furthermore, the inclusion of the representatives of national governments in the EMEA management board appears to have ensured that the agency’s decisions and activities are accepted and supported by the member states’ key governmental actors. Instead of resulting in a loss of autonomy, cooptation thus helped to increase the agency’s autonomy.

The board provides a forum for discussion, consultation and learning among actors involved in the regulation of pharmaceuticals in the EU, therewith developing and reinforcing links between the various actors in the network. The members of the board frequently meet outside of the formal board meetings, often in the course of other professional forums such as the Heads of Medicines Agencies (HMA) network, which results in personal contacts, informal communication and exchange of information beyond formal occasions. “These high level formal and informal links are often important for building agendas and forming consensus. People expect to meet regularly and establish a group with a sense of joint responsibility for the performance of the regulatory system” (Metcalf, 2000: 137).<sup>65</sup>

There are clear disadvantages, however. Heads of national authorities are, of course, not likely to make decisions that endanger the position of their organisations. As a result, initiatives strengthening the position of the EMEA vis-à-vis national agencies, especially those concerning the fee system, have been blocked. In addition, the behaviour of board members is highly dependent on the interest that member states have in the agency’s activities. Whereas some board members have tried to approach issues from the agency’s point of view, others have considered issues from a national point of view. Countries with large pharmaceutical companies in particular want to keep a watchful eye on what the agency is doing, which has sometimes politicised discussions in the board (Metcalf, 2000: 134).

In May 2004, after the review of the EU pharmaceutical legislation, the composition of the board was changed. In view of the enlargement of the EU, the number of representatives per member state was reduced from two to one. The EP’s proposal of modelling the agency’s board after the newly created European Food Safety Authority’s (EFSA) board, which is made up of independent experts, was unacceptable to the



member states. By way of compromise, the member states agreed on including two representatives of patients' organisations and one representative each of doctors' and veterinarians' organisations. Industry remained excluded from the board.

The expansion of the board due to the enlargement of the EU and the inclusion of patients' and doctors' representatives has made representatives of national agencies feel that they do not have enough power to influence the agency's policies and decisions anymore. Members already had a weaker information position than the director and his staff as they meet only four times a year, receive documents for the meetings no more than a few weeks in advance, lack staff to support them in their work and usually have not much time to prepare for the meetings. But with the reduction from one to two members per country their position has further weakened.

As the board nearly always decides on the basis of consensus, the increased number of countries on the board makes it difficult to agree upon amendments to the documents during the meetings. Of course there is debate, sometimes intense, but most of the time the board is supportive of the director's proposals.<sup>66</sup> According to a respondent:

[The board meeting] seems more a meeting of the secretariat of the agency that the members of the board attend. They are more to receive information from the director and his services and to give formal approval to all his proposals. Seldom are significant changes introduced. When this is attempted it seems that there is a group dynamic that tries to avoid all tension. Most proposals [for changes] fail due to the lack of majority support since they are seen not as an exercise of the board's responsibilities, but rather as a correction or criticism of the executive director and his team.<sup>67</sup>

Another respondent adds:

There are always different opinions from single members, proposing something else or criticising a proposal. I cannot say that there is a collective board opinion. This is also the difficulty, that first there is the proposal from the director and there are different voices concerning certain details, but that then there is no collective view on what should be changed.<sup>68</sup>

When member states experience difficulty in reaching agreement, it is often the Commission, on the basis of its in-depth knowledge of the regulatory framework, that can clarify matters and spell out the different options. Several respondents note that, because it is also in the interest of the Commission that the system functions well, it always tries to find ways to break through the impasse. The Commission has thus been able to play a significant role in defending the agency against the member states' criticisms.

By contrast, it is often unclear on whose behalf EP representatives, often university professors and not members of the EP itself, really speak and whom they actually represent in the board (see Sauer, 1996). As a respondent lamented: "From all the others, we know their background. We know that they are representing member states governments, the European Commission, patients, doctors and veterinarian associations, but in case of the EP representatives it is unclear."<sup>69</sup>

### *From entrepreneurial to consolidating leadership*

Although the board adopts key documents such as the budget, the work programme and the annual report, it is the director who actually manages the agency. It has taken the EMEA's first director, Fernand Sauer, some time to persuade the board of this divi-

sion of labour. “As a director you have to make clear to them that they are not permanent staff. They have four or so meetings per year, but that is it.”<sup>70</sup> Sauer realised that, seen from an efficiency perspective, a small board may be more ideal, but for the agency’s legitimacy, a board including member state representatives was essential:

Given that the EMEA is an agency that is performing tasks that were previously performed by national regulatory bodies, you have to get the member states on board. You are not taking away powers from the Commission, you are sharing competences with the member states.<sup>71</sup>

Leadership has played a key part in positioning the agency in its environment, relating to the Commission and the Parliament and, notably, linking up with national authorities. “As a director”, Sauer notes, “you have to become a lobbyist. I had to learn this because as a Commission official you are usually the one who is being lobbied.”<sup>72</sup> This for instance meant lobbying with the Commission for a budget increase or with the EP for the release of a reserve. It also meant working in the background to promote consensus among the member states and their regulatory agencies. Instead of reacting to the environment, Sauer pro-actively reached out to external actors, e.g. using the representation of the member in the board to the agency’s own advantage and closely cooperating with the first chair of the board, the Brit Strachan Heppell.<sup>73</sup>

Before the EMEA’s creation, it took four to six years to get a drug authorised. The mission of the EMEA’s first director was to bring this down to twelve months. By organising staff around this mission, creating a culture in which performance was important and indicators were used to measure performance, the agency succeeded in attaining its mission in its first year.<sup>74</sup> By so doing, Sauer convinced industry, which at the beginning was at best indifferent towards the new agency, of its capacity (Hauray, 2006). He also built up a reputation with patients groups. Publication of assessment reports from the start of the agency, for instance, quickly made clear that the director attached importance to transparency and openness.<sup>75</sup>

Sauer’s professional background proved useful in setting up and managing the new agency. He had been trained as a pharmacist and a lawyer, and had worked both at the French ministry for health and with the Commission. In fact, since 1985 he had been a head of the unit responsible for pharmaceuticals of the Commission’s DG Enterprise and in charge of the introduction of the new approval system. While it did not mean that Sauer never had to argue with the Commission, his experience helped to come to agreement.<sup>76</sup> Issues that led to disagreement were resolved between the agency and the Commission before discussing them, or even without discussing them, with the board.<sup>77</sup>

Moreover, as a former deputy chairman of the CPMP (now CHMP), he knew the experts with whom he worked. Sauer sped up the time it took to pay experts who came to committee meetings by organising their travel arrangements and reimbursing them immediately – something which in the Commission often is a bureaucratic hassle. In addition, as experts usually spend almost a week per month at the EMEA, he provided them with offices, the so-called ‘bureaux de passage’. Even though experts are not formally staff, Sauer considered it important for the organisation’s internal cohesion that “[t]hey are not treated differently than staff”.<sup>78</sup>

The first director of the EMEA was particularly active in shaping the internal organisation. He provided a canteen with good food (and decent wines) in order to make sure staff and experts would have lunch together at the EMEA premises.<sup>79</sup> He also organised soccer matches among staff, experts, and industry. Staff and experts would not play with, but against industry, therewith reinforcing the ties between them. An interviewee

says: "It is important that you get rid of the divide in the agency. It is much more a network to which both the staff of the agency and experts belong".<sup>80</sup>

In order to further develop the competences of staff through critical feedback on their performance, Sauer introduced an internal quality management system. Staff members were involved in the formulation of the agency's mission, which enhanced their loyalty and commitment to the agency. Another interviewee says: "I must say that when I came here, from industry, that I had never seen secretaries work voluntarily until eight in the evening or even on Sundays."<sup>81</sup> Respondents agree that much of the enthusiasm and dedication of the staff was the result of the leadership of Sauer.

After having served a full five-year term and two years of his second term, Sauer returned to the Commission where, as a director for public health, he remained actively involved in the work of the EMEA and in the creation of new agencies in the field (such as the European Centre for Disease Prevention and Control). Sauer's approach was effective in the early years of the agency when the organisation was still small. Sauer was on top of everything, keeping himself informed of what exactly was happening in the organisation. By the time of his resignation in 2000 the EMEA had grown into an organisation with almost 200 staff and a budget of more than 50 million Euros. Hence, Sauer's successor, the Swede Thomas Lönngren, could no longer rely on the hands-on form of leadership exercised by Sauer, but had to apply a different approach, allowing heads of unit increased room to manoeuvre.<sup>82</sup>

Lönngren, qualified as a pharmacist, was a former deputy director-general of the Swedish Medicinal Products Agency. His laid back character and casual style (in contrast to Sauer's more hierarchical style) nicely fitted the consolidation phase the agency had entered by 2000, which is not to say the agency did not evolve any further under Lönngren. On the contrary. The negotiations over the review of the EU pharmaceuticals system between 2001 and 2004 intensified the agency's relations with the Council and particularly with the EP. Lönngren continued his predecessor's practice of addressing the EP and MEPs have visited the EMEA; the EP's Environment Committee (although not in full) even held one of its two annual meetings outside of the EP premises at the EMEA.<sup>83</sup>

While some consider Lönngren as "more technical than political" and therefore less visionary than Sauer, Lönngren has been just as ambitious (Louët, 2004). As part of the agency's proactive approach, he for example produced a long-term strategy document, the EMEA Road Map to 2010.<sup>84</sup> The Roadmap outlines a vision for the agency, its objectives, and the actions necessary to implement those objectives, including continuous monitoring of medicinal products, improving the access to information, stimulating innovation and research in the EU's pharmaceutical sector and providing advice to small and medium-sized enterprises.

### *Pharmaceutical companies, patients and health care professionals: shared interests*

The industry found its way to the agency relatively quickly. This was partially the result of the close working relationship between the EMEA and the European Federation of Pharmaceutical Industries' Associations (EFPIA) and the 'Information Days' Sauer organised to help explain the agency's procedures and receive feedback from pharmaceutical companies.

But it was certainly also the result of the centralised procedure's attractiveness. For companies, it is much easier to apply for authorisation at the EU than at the national

level. They benefit from a regulatory system in which the EMEA is the focal organisation, replacing 27 national authorities.<sup>85</sup> The decentralised procedure had often prevented innovative medicines to be developed because of high research costs. Even when innovative medicines were developed, they could not be marketed quickly because of the lengthy authorisation procedures. Given that the market for medicines is increasingly international “it may actually be a source of competitive advantage if [a centralised procedure] safeguards standards and encourages innovation and new product development rather than putting obstacles in their way” (Everson *et al.*, 1999: 194).

One of the main objectives of the centralised procedure therefore was the reduction of approval times, not only to make new therapies available to patients sooner, but also to increase the competitiveness of European pharmaceutical companies. Especially in its early years, the agency significantly increased the speed of approval. The mean approval time was cut significantly compared to pre-1995.<sup>86</sup> The expanded workload in the early years was thus at least partly the result of the agency’s capacity to deliver. It testified to “the confidence that the industry has in the EMEA being able to efficiently undertake its tasks” (Sauer, 1996: 27).<sup>87</sup>

Industry support for the agency is also reflected in the limited number of legal challenges. In the early years, only a few decisions have been appealed by industry.<sup>88</sup> These cases most often concerned decisions on harmonisation measures in regard of existing drugs, not the approval of new drugs. Industry generally respects the EMEA’s assessments. In fact, the science underlying the EMEA’s opinions has never been successfully challenged.<sup>89</sup> According to several respondents, the EMEA’s expertise is broadly recognised and accepted.

In recent years, scientific advice to pharmaceutical companies, especially so-called small and medium enterprises (SMEs), has become a more significant part of the EMEA’s work. For that reason, the agency set up an SME office.<sup>90</sup> The number of cases in which the agency has rendered advice increased from 50 to 300 in just five years. The advice, rendered by the EMEA during the research and development stage, is non-binding, which reduces the risk for the agency of becoming too closely involved in the development of a new drug.<sup>91</sup>

The EMEA relies on industry support and therefore must maintain close working relationships with industry. However, becoming too entwined may endanger the agency’s independence in rendering its opinions. When industry representatives visit the EMEA premises, they are for instance given a distinctive red badge. For the same reason, the board does not contain industry representatives – even though proposals to that end were put forward by the Commission and supported by the Parliament during the revision of the legislative framework. Whereas the organisation of soccer matches between a team of EMEA staff and experts and a team of industry representatives was criticised by Vos (1999) as a potential risk for agency capture, the director says he organised such public soccer matches with industry precisely to fight against capture of individual experts by industry in other ways.<sup>92</sup>

More generally, academic observers have criticised the agency for favouring the interests of industry (speed of approval) over those of patients (the stringency of the assessment) (e.g. Abbasi and Herxheimer, 1998;<sup>93</sup> Abraham and Lewis, 2000; Lewis and Abraham, 2001; Garattini and Bertele, 2001). Evidence that the agency has been unduly influenced by industry and that close relations with industry have led to opinions being rendered that did not meet the safety and efficacy criteria, is (so far) lacking however (Feick, 2002: 49; Hauray, 2006). Even when the agency would to a certain extent have been influenced by industry, the question is whether it has been more (easily) influenced than the Commission or national regulatory agencies.

Because of the highly technical nature of the work and the limited amount of scientific experts available, most experts advising on the authorisation of medicinal products have links with pharmaceutical companies. Such links are claimed to be inevitable and even necessary, “if you aspire to have the best scientists in these committees”, according to a respondent.<sup>94</sup> The EMEA has therefore followed a policy of openness and transparency. Meetings of the committees commence with experts declaring their interests. The list of experts and their nominating authority is publicly available on the agency’s website and their written declarations of interests can be consulted at the EMEA’s premises.

Until the revision of the EU pharmaceutical legislation, and the inclusion of patients’ representatives in the board, patients’ interests were often not explicitly considered (Garattini and Bertele, 2001; 2004). At least, according to some. But while they are often portrayed as opposed, industry and consumer interests often do not contradict each other. They have a shared interest in the quick release of new medicines and therefore both press for speedy approval.<sup>95</sup> As this has been a concern in view of the integrity of patients’ groups, they are now officially represented in the agency’s management board. Indeed, the presence of patient representatives in the board as well as legislative changes in the field of for instance orphan drugs were made possible by a continuous dialogue with consumer and patients’ organisations. These organisations held quarterly meetings with the EMEA director and the CPMP/CHMP, were systematically consulted on every initiative, and participated actively in the annual public Information Days of the EMEA.<sup>96</sup>

The perceived lack of attention for public health in the past, then, has not so much or at least not only been the result of the powerful lobbyists of the industry. It has to a large extent been the consequence of the weak lobby of patients’ and doctors’ organisations. Whereas producers constitute a clearly delineated group and have a clear interest in pharmaceuticals regulation, patients are a larger group and have dispersed interests (Abraham and Lewis, 2000: 44-49).<sup>97</sup> Health care professionals are primarily organised at the national level where they have an influential position. Most of the lobbying at the EU level, however, is performed by secretariats lacking the involvement of doctors and veterinarians themselves.<sup>98</sup>

### *Managing the network of national authorities*

The EMEA was never meant to be a European equivalent of the US Food and Drug Administration (FDA), centralising evaluation and supervision activities at the European level. Although the EMEA coordinates the centralised procedure, most of the evaluation work is still done at the national level, relying on the resources and support of national medicines agencies. Interestingly, the core activities of the EMEA thus are not carried out within the organisation but are decentralised, in a network of other organisations. The agency acts as a focal organisation, which requires it to be responsive to national authorities’ demands (Everson *et al.*, 1999; Yataganas, 2001; Majone, 2002a). Indeed,

[i]f an entirely new and separate organization had been created without any involvement of the Member States it would probably have been perceived as a threat by national regulatory authorities and found it difficult to secure their cooperation (Metcalf, 2000: 135).

There are several advantages of including member states’ national authorities in the work of the EMEA (Metcalf, 2000: 136-137). First of all, it provides the agency with expertise. Given its lack of in-house expertise, the EMEA simply cannot perform its

tasks without making use of the expertise available in the member states. By including national agencies' experts, the agency can also make use of their resources. Experts affiliated with a national authority can draw on the agency's apparatus to handle the enormous amount of documentation involved in one application. Thus, the EMEA clearly has an interest in strong national agencies.<sup>99</sup>

By providing expertise, national agencies, in turn, can exert a significant influence over the assessment of medicines, even under the centralised procedure. Participatory inclusion has thus preserved their position:

National regulatory authorities, although losing autonomy, are included in the European procedures as indispensable participants, thus protecting their interest in organization survival. This means that the interests of the potentially most critical adversaries of further Europeanization are quite well protected – at least for the foreseeable future (Feick, 2002: 14; Broscheid and Feick, 2005: 28).

National regulatory agencies still widely vary in terms of their size and the expertise they harbour.<sup>100</sup> Some national authorities had an interest in cooperation because they themselves lacked sufficient regulatory capacity. Particularly drug agencies in small countries usually have less money to spend, and as a result, they lack expertise. In these countries, expertise is often still concentrated in hospitals or laboratories, whereas agencies in large countries have most of their expertise in-house.<sup>101</sup>

The reliance on national experts also confers credibility on the agency's scientific work, reducing the potential for dispute and disagreement with national authorities, and the evaluation system more broadly. Especially in the early years, the employment of staff from national agencies made the agency look more trustworthy in the eyes of the national agencies.<sup>102</sup> What is more, relying on member states' experts rather than independent experts affiliated with universities or other research institutes actually strengthens the agency's independent position (Gehring and Krapohl, 2007). Independent experts, not being employed with a national authority, often rely on funding coming from the pharmaceutical industry, thereby possibly compromising their independence.

Furthermore, including national authorities in the work of the EMEA enhances the coordination between the agency and national authorities, which is necessary for the authorisation system to operate effectively. Experts in the scientific committees effectively serve as the link between the agency and the national authorities (Van der Giesen, 1996: 51). By bringing the member states together, the EMEA simultaneously helps to create and coordinate a professional network of regulators throughout the EU member states, thereby also buttressing its position as a hub in the regulatory network. Indeed, both practitioners and academic observers consider the partnership between the agency and the national regulatory authorities a key factor influencing the development of the EMEA.<sup>103</sup>

At the same time, the agency is a competitor to national authorities, particularly with regard to staff and, most importantly, funding.<sup>104</sup> When pharmaceutical companies choose to follow the centralised procedure, member states' authorities lose income to the EMEA. Whereas national authorities are paid for their expertise, they all receive 50 percent of the fee paid by industry, regardless of their actual expenses.<sup>105</sup> In particular, the national authorities of the large member states complain that the level of payment is only partly compensating for the costs they make. Because of the continuing discord among member states over this issue, a decision to amend the fee system with regard to the division of money was still pending at the time of writing.<sup>106</sup>

One of the questions during the revision of the legal framework between 2001 and 2004 was whether experts should continue to be appointed by national authorities or whether agency's committees should select them based on their expertise (Broscheid and Feick, 2005: 25). Under pressure of the member states, particularly Germany, Denmark, the United Kingdom and the Netherlands, it was eventually decided that national influence over the composition of the EMEA's committees should be retained. In view of the enlargement of the EU, the number of experts in the committees nominated by the member states was nonetheless reduced from two to one. And as a concession to the Commission and the Parliament, it was also decided that the CHMP could select five additional members on the basis of their expertise (Broscheid and Feick, 2005: 33).

Undeniably, the creation of the EMEA helped foster a degree of mutual understanding and trust among national authorities. In spite of their differences, they initially shared a similar distrust of the new system upon its introduction where it concerned their own positions. National agencies were reluctant of cooperating within the EMEA framework. But as at the political level the decision to create the EMEA had already been made, national agencies were more or less forced to cooperate with each other and the new agency. A respondent says:

I was surprised to see how the same member states that had prepared legislation were now more or less opposing it. I did not understand the power play, well, until it became clear to me that those being involved in legislation at the EU level are different from those implementing legislation at the national level.<sup>107</sup>

The position of the member states is not straightforward. On the one hand, national governments as represented in the Council through their ministers or ministry representatives are the legal founders and political principals of the agency; on the other hand, their national agencies are the bureaucratic counterparts of the EMEA and the ones responsible for the implementation into practice of the legal framework. According to a respondent: "There is almost a disconnect between what the member states say in the Council, legislation that they approve at the political level, and what national agencies actually can deliver."<sup>108</sup>

Realising they could only maintain their positions by cooperating to resolve the problems that had hampered the regulatory system before, the leaders of the national medicines agencies decided to create an informal network of Heads of Medicines Agencies (HMA). Since 1996, the network has met about four times each year under the chairmanship of the member state that holds the Presidency of the EU.<sup>109</sup> The EMEA was initially not invited to take part in the meetings of heads of national agencies, but the agency's director quickly understood that he would have to make this network part of existing transnational structures, for otherwise it would pit the heads of national agencies against the EMEA.

As suspicion disappeared, national agencies learned to trust each other and the EMEA.<sup>110</sup> Most national authorities have been supplying the agency with the expertise required to fulfil its mission and have used it as a forum for discussion on scientific issues with regard to pharmaceuticals regulation. So whereas the informal network of Heads of Medicines agencies started off as the result of a defensive strategy, it has over time developed into a cooperative structure providing "a mechanism for communicating the views of member states' competent authorities with the Commission and the EMEA".<sup>111</sup>

Nowadays, the EMEA is not only involved in the meetings of the HMA, it also makes use of the network to influence national agencies, giving them the impression

that they in fact “own” the agency.<sup>112</sup> Member states’ agencies are closely involved in the opinions issued by the agency, which makes it difficult for them to challenge these opinions for scientific reasons (Gehring and Krapohl, 2007: 215). There have been cases when member states raised questions about a draft decision of the Commission based on the assessment of the EMEA, but cases of disagreement between the agency and national agencies have been largely absent.

### *Pre-empting political interference*

According to Gehring and Krapohl (2007: 220) the absence of disagreement between the agency and national authorities or member state politicians results from the EMEA committees’ evaluation criteria and the Court’s judicial oversight of authorisation decisions. In light of the possibility that companies take legal action, the member states are wary of deviating from the scientific opinions of the expert committees. They therefore typically follow the committees’ opinions and rely on judicial supervision. The EMEA can act autonomously from the member states because of “the restrictions imposed on the non-scientific actors by the authorization system” (p. 222).

This argument, while convincing, is too one-sided. It is convincing as it examines the relations between the EMEA and the member states. But as it only looks at the use of control and the restrictions, it neglects the capacities of the EMEA and its committees composed of national experts. Indeed, the fact that the member states have generally followed the agency could also indicate that the advice rendered by scientific experts has never contradicted the interests of political actors or that political considerations were already taken into account by the expert committee.

Because scientific committees bring together experts from member states’ national authorities, the lack of discussion in the decision-making stage is not difficult to understand. Some claim that the scientific assessment of medicines by the agency actually remains “in the hands of the member states” (Vos, 1999: 229). Member state representatives in the Standing Committee often are senior officials from national regulatory authorities who are unlikely to disagree with the opinions of national experts working for the same authorities. And given that the experts in the CHMP depend on the member states for their position, they are unlikely to issue opinions that are not in line with the position of their national authorities. Hence, “[o]pinions adopted by the CPMP [now CHMP] are [...] likely to include not only purely scientific, but also normative (nationally-flavoured) elements” (Vos, 1999: 226).<sup>113</sup>

Hauray (2006), based on the observation of expert discussions in the CHMP, finds that experts implicitly take into account non-scientific factors. Opinions comprise assessments of the necessity and acceptability of a treatment, with regard to the size of the patient group and the importance of the disease for patients’ and public health. Eventually, member states have to reimburse medicines approved by the agency. The scientific committees take that into consideration: “The committee for instance will not easily agree on a medicine that prolongs the life of a patient suffering from cancer for two weeks. The costs for national government simply do not balance the benefits for the patient’s health.”<sup>114</sup>

National experts in the agency’s committees know their domestic regulatory cultures and traditions and are thus not only able to assess the risks related to the authorisation of new medicines from a scientific perspective, but can also judge whether the degree of risk is politically acceptable in their home countries (Krapohl, 2004: 534). A respondent gives an example: “A sedative can only be sold in Greece with all kinds of warnings on the label that it might be addictive, whereas this does not pose any prob-



lem in Sweden.<sup>115</sup> Health professionals and patients in the various countries have different information needs. "In Ireland the information might take only 2 or 3 pages, but in Germany it would take 20 pages."

At the same time, the EMEA's mandate is limited to medicines evaluation and member states do not have to reimburse medicines approved by the EMEA. This has made it possible for more controversial medicines such as Viagra to be approved without member states objecting in the decision-making process: "[Viagra] was approved because we told the member states, 'You can still decide whether to reimburse it or not.'"<sup>116</sup> Even if a license is granted, it can thus take several years before medicines are reimbursed in individual European countries or never happen at all.

### *From harmonisation of practices to rationalisation of capacities?*

While there is still a lot of variation among member states and their authorities, for instance when it comes to reimbursement and pricing, the participation of national experts in a transnational process of medicines evaluation has led to a certain degree of convergence of evaluation practices and methods as well as organisational structures (Hauray, 2006). "The real success of the EMEA has been the creation of significant areas of agreement and harmony in the regulatory community".<sup>117</sup>

At the outset, many also viewed the EMEA as a body that would reduce regulatory bureaucracy in Europe. But harmonisation has not been accompanied by efficiency gains.<sup>118</sup> "[A]lthough the member states initially feared that their own regulatory authorities would be squeezed out and that a streamlined system would mean rationalisation of some (national) industry operations, this has not really happened in practice" (Permanand and Mossialos, 2005: 700). The agency has realised that if it takes over the tasks of national authorities this would eventually result in expertise in the member states being reduced and, thereby, could lead to expertise falling beneath a critical level. As a consequence, national authorities would no longer be able to do their work adequately and therefore also would not be able to deliver the required expertise for the centralised procedure.

It is therefore more likely that a number of member states would acquire a leading role, also when it comes to supplying expertise for the centralised procedure. The other member states would merely follow the decisions made whilst delivering expertise only in very specific areas (Van der Giesen, 1996: 70). Indeed, it is believed that such "work sharing" in time could lead to the development of 'centres of excellence' as part of a more integrated and homogeneous organisational system of market authorisation with the EMEA as central authority.<sup>119</sup> Such a system would be markedly different from the current network system in which the EMEA coordinates more or less autonomously operating national authorities (Broscheid and Feick, 2005: 29).

### *The agency and the Commission: mutual dependence*

While pharmaceutical companies are perhaps the EMEA's main clients, it officially is the Commission to whom the agency delivers its scientific opinions. Respondents confirm that the relationship between the Commission and the EMEA was relatively clear from the start.<sup>120</sup>

Differing from most (if not all) member states, in which regulation of the pharmaceutical sector is the responsibility of a health ministry, the EMEA falls under the responsibility of the Commission's DG Enterprise. This linkage follows the original em-

phasis on industry interests. It was DG Enterprise that pushed for a medicines agency in the first place.<sup>121</sup> But DG Enterprise is not the only link between the Commission and the agency, which officials in DG Enterprise have found difficult to swallow.<sup>122</sup> Particularly since the emphasis at the EU level has shifted to consumer and patients' interests, the agency has also developed relations with other Commission DGs, notably DG Health and Consumer Protection. Indeed, some have proposed that "line responsibility" for the agency should lie with the Commissioner for health policy as it would satisfy both the demand for accountability and ensure the agency's autonomy and therefore its credibility.<sup>123</sup>

Although the first director came from the ranks of the Commission's DG Enterprise, this did not mean that the Commission could tell the EMEA what to do.<sup>124</sup> Especially in the early years the Commission often asked the agency to perform tasks not officially part of its mandate. The EMEA usually reacted by requesting more staff to perform such tasks. A respondent recounts: "At a certain moment the Commission representative in the management board lashed out at the director 'When will the EMEA stop asking for more people?' and the director answered 'The day that you stop giving us more tasks.'"<sup>125</sup> So while the EMEA depended on the Commission for a portion of its budget, the agency received most of its funding through fees from industry. And when the Commission asked the agency to perform a certain task that was not part of its mandate and could not be financed from fees, e.g. the review of drugs already marketed, it typically had to provide additional funding.<sup>126</sup>

More importantly, while the EMEA has no formal decision-making power, its opinions and advice are highly influential in regulating the European pharmaceutical sector. The Commission cannot simply disregard the agency's advice. Indeed, it would not be in the Commission's interest to question the agency's opinions. Because one of the reasons to create the agency was to more clearly separate science from politics, interference by the Commission, even occasionally, could undermine the legitimacy of the EMEA and the credibility of the authorisation system (Everson *et al.*, 1999: 198).<sup>127</sup> What is more, the Commission does not have the scientific expertise required to determine whether the EMEA's advice is scientifically sound. The whole idea behind the creation of the EMEA was that the Commission would rely on the agency for scientific expertise, allowing it to focus on policy making.

Even if the Commission does not interfere in the scientific work of the agency, the EMEA is always aware of the possibility, albeit merely theoretical, that the Commission would challenge its expert opinion. Ultimately, the Commission (or, in case of disputes, the Council) decides, so the agency's expert committees realise that they better reach opinions that are acceptable to a majority of member states. So while independent from the Commission when deciding on authorisations, the agency "does so in the shadow of threatened intervention by the Commission and/or the Standing Committee" (Gehring and Krapohl, 2007: 217). The Commission and the agency are thus mutually dependent: the Commission depends on the professional expertise of the agency, whereas the agency in the end depends on the hierarchical authority of the Commission.

Although some member states and pharmaceutical companies have – mainly for efficiency reasons – expressed favour towards transferring the formal power to decide on authorisations from the Commission to the EMEA, the Commission will not easily accept this. Apart from the fact that delegation of decision-making power to EU-level agencies is still a matter of legal debate, allowing the EMEA to make final decisions would deprive the Commission of the possibility – however theoretical it may be – to intervene in what is not merely a scientific and technical process.<sup>128</sup> Respondents agree

that efficiency reasons alone can therefore not be decisive in granting the agency decision-making power.<sup>129</sup>

Moreover, the EMEA is reluctant as well. Formally granting the agency with the mandate to make the final decision might endanger its independent position, as the EMEA's autonomy relies heavily on cooperation with other stakeholders, including the Commission. As Everson *et al.* (1999: 186) point out: "Paradoxically, an independent right of decision would inhibit rather than enhance EMEA's effectiveness, because its effectiveness depends on its ability to secure cooperation in exercising its autonomy."

### *The agency as an international actor*

On the basis of the role it plays in the EU regulatory network, the EMEA also maintains relations with organisations outside Europe. Other countries, also the US, increasingly look at the EMEA and their agencies, such as the FDA, increasingly cooperate with the EMEA, for instance to facilitate information sharing.<sup>130</sup> The 'EMEA model', designed in the context of the European Union, has even served as an example for other regional organisations such as ASEAN.<sup>131</sup> The EMEA is now recognised as a leading global regulator.

Even as international relations are the prerogative of the Commission, the EMEA has in practice served as an important advisor to the Commission. The agency has often represented the EU in international expert meetings, such as those of the International Conference on Harmonisation (ICH), which includes the authorities and industries of the three most important regions in the world with regard to the development of innovative medicines (the US, Europe and Japan).<sup>132</sup>

## **7.5 Conclusion: networked autonomy**

Contrary to most other EU agencies, the EMEA has not been evaluated by an outside body during its existence.<sup>133</sup> Yet, it has the reputation of being one of the most effective EU agencies. This chapter showed that, besides the agency's relatively uncontroversial creation and inclusive design, key to its perceived success is how the agency positioned itself vis-à-vis other actors. While it was formally already relatively autonomous, the EMEA became more autonomous over the years. Importantly, the increase in autonomy seems not to have occurred in spite of but *because of* the agency's close relations with those involved in the regulation of pharmaceuticals, notably national authorities and the Commission but also industry, health care professionals' and patients' organisations. What follows is a brief account of the factors that affected the EMEA's development.

A core problem the EMEA was created to solve was the slow assessment procedures for medicines. The agency's function was clear to not only the agency's staff but also to the outside world. The EMEA quickly reduced the evaluation time for new medicines, thereby demonstrating its value to pharmaceutical companies seeking to market their medicinal products. Whereas formally the agency is only a risk assessor, its opinions, though not legally binding, have been adopted without much debate by the Commission and the member states, i.e. the risk managers. In fact, it is likely that the agency would have developed less actual autonomy if endowed with the formal power to make decisions. The formal expansions of the agency's tasks, in line with its initial mandate, were undisputed and, just as important, often already in practice before being put on

paper. Through these expansions, the EMEA has even developed actual risk management activities, for example, with regard to pharmacovigilance.

As a professional network organisation, the EMEA has developed an extensive transnational web of knowledge-based professionals, which plays an important role in generating a solid reputation and credibility for its work. These professionals have specialised knowledge and recognised competences about the evaluation of medicines. Hence, they have been allowed to perform this task with a high level of autonomy, sometimes also taking into account more political factors. The EMEA's experts have clearly performed in the shadow of hierarchy, however. The Commission and the member states in theory could have intervened any time. But they did not, for they also depended on the agency for its opinions and, perhaps more importantly, realised intervention would put the credibility of the authorisation system at risk.

Moreover, member states' national authorities are closely involved in the agency's assessment work through their experts (who constitute the EMEA's panels) and their representation in the management board. The EMEA relied on the cooperation of national authorities. It therefore coordinated rather than centralised activities. Not being obviously autonomous and adopting a moderate approach to demonstrating autonomy has its advantages. It actually made it easier to exert influence through networking and to establish a reputation in those networks. Instead of resulting in a loss of autonomy, the partnership between the EMEA and the national authorities is a key factor to the high level of support for the agency's work. What is more, the case of the EMEA clearly shows that whereas the development of in-house research capacity would seem to add to the autonomy of the agency, it actually threatens to decrease the agency's autonomy.

At the same time, the EMEA has effectively applied a strategy of differentiation. It managed to distinguish itself from national authorities through the geographical scope of its work (approval of medicinal products for the whole Union) and the speed with which it delivered opinions (much faster than under the national systems).

In view of changing needs and expectations with regard to for instance openness and transparency, the involvement of patients, and the added value of new medicines, the agency has over time adapted its operations. Notwithstanding such changing demands, environmental conditions under which EMEA officials operated were relatively stable. Industry and consumers, albeit for different reasons, often want the same thing from the agency, a swift opinion on a new medicinal product. Hence, they have an interest in centralisation of tasks at the EU level and cooperation in the framework of the agency. And contrary to other EU agencies, the EMEA could do its work without being directly exposed to political pressure. The fact that the EMEA performs a task that has measurable outputs (its scientific opinions on authorisation applications) has made it easier to become accepted and supported by, for instance, the European Parliament.

The EMEA's leadership has been crucial to its development. Whereas at other agencies attention for the internal organisation often preceded attention for the external environment, at the EMEA, these have been parallel processes. Of course, the agency was lucky to be based in London, which made it easier to attract staff. But it was the EMEA's first director who developed a culture of performance. Moreover, he made use of the opportunities the environment offered to carve out a distinct role for the agency. Again this was easier because the agency did not have international competitors, but it was the EMEA director who effectively organised international cooperation between the US and Japan. The second director, with the agency already prominently figuring on the European/international map, could consolidate its position, and further develop links, for instance, with the European Parliament, in order to reduce dependence on the Commission.

While there is certainly a trend towards increased Europeanisation, that is, delegation of further tasks and powers to the EMEA, the agency continues to rely on national authorities and, as long as the EMEA's in-house research capacities remain limited, will probably do so in the foreseeable future. Yet, as it is unlikely that the EMEA will grow into a European FDA, with similar regulatory powers, it is almost certain that medicines evaluation will be further centralised, or rather, coordinated at the European level. What is more, together with other EU agencies such as the European Centre for Disease Prevention and Control (ECDC) and the European Food Safety Authority (EFSA), and in the framework of international cooperation, the agency is likely to become an even stronger player in the field of public health.

## Notes

<sup>1</sup> Interview #36

<sup>2</sup> Council Regulation (EEC) No. 2309/93 of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products (hereafter referred to as 'founding regulation').

<sup>3</sup> Interview #3

<sup>4</sup> Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament: On the Outlines of an Industrial Policy for the Pharmaceutical Sector in the European Community*, COM(93) 718 final, Brussels, 02.03.1994.

<sup>5</sup> Interview #73

<sup>6</sup> This chapter mainly focuses on the activities of the agency with regard to medicinal products for human use.

<sup>7</sup> EMEA Annual Report (hereafter abbreviated as 'AR') 1995, p. 9.

<sup>8</sup> Interviews #9 and #75

<sup>9</sup> Fernand Sauer in EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 8.

<sup>10</sup> AR 1995, p. 8; See also Günter Verheugen in EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 21.

<sup>11</sup> Market authorisations are valid for a period of five years and may be renewed after expiration of this period.

<sup>12</sup> In comparison, the US Food and Drug Agency (FDA) has a much broader remit than the EMEA. It is not only responsible for drugs but also for food and it has the power of decision and enforcement.

<sup>13</sup> But see *Businessweek*, A Drug Watchdog to Rival the FDA. Europe's agency will soon have new powers. Will it take the lead on safety?, 28 February 2005.

<sup>14</sup> Interview #78

<sup>15</sup> See the report by CMS Cameron McKenna and Andersen Consulting (2000), *Evaluation of the operation of Community procedures for the authorisation of medicinal products, Synopsis of the interim report*, available at <http://ec.europa.eu/enterprise/pharmaceuticals/pharmacos/docs/doc2000/sept/audit0600.pdf>, consulted on 18 October 2007. See e.g. Feick (2002) for an evaluation of the decentralised procedure and Broscheid and Feick (2005) for an evaluation of the review of the decentralised procedure and changes made. As this chapter concentrates on the EMEA, it primarily focuses on the centralised procedure in which the agency plays a central role.

<sup>16</sup> The EMEA board also comprises representatives of Norway, Iceland and Liechtenstein, that as EFTA countries are part of the regulatory system.

<sup>17</sup> Interview #9

<sup>18</sup> Most recently, in 2009, a Committee for Advanced Therapies (CAT) was established.

<sup>19</sup> Not all these experts are equally active. Some are still in the database but have left their position and can no longer be appointed.

<sup>20</sup> Article 52, para 1 of the founding regulation.

<sup>21</sup> EMEA, *Statement of Principles Governing the Partnership between the National Competent Authorities and the European Agency for the Evaluation of Medicinal Products*, adopted by the Management Board on 4 December 1996, EMEA/MB/013/97.final (EN).

<sup>22</sup> Interview #75

<sup>23</sup> Commission of the European Communities, *Reform of EU Pharmaceutical Legislation*, MEMO/03/262, Brussels, 18 December 2003.

<sup>24</sup> The FDA already has these powers.

<sup>25</sup> Interview #56

<sup>26</sup> Interviews #74 and #77

<sup>27</sup> Interview #57

<sup>28</sup> For a more detailed description see *Pharmaceutical Executive*, Inside EMEA. Fernand Sauer: Tending the Garden, January 1996, p. 51.

<sup>29</sup> Interviews #73 and #74

<sup>30</sup> EMEA, New EMEA human medicines units announced, Press release, London, 15 January 2001, EMEA/D/817/01.

<sup>31</sup> Interview #78

<sup>32</sup> See EMEA press release, 6 October 2004; *NRC Handelsblad*, Gevaren van Vioxx al in 2000 bekend; Felle kritiek op Merck [Risks of Vioxx already known in 2000; Fierce criticism on Merck], 5 November 2004, p. 9.

<sup>33</sup> *NRC Handelsblad*, Toezicht farmacie is zwak [Supervision pharmacy is weak], 10 October 2006, p. 9.

<sup>34</sup> Interview #78

<sup>35</sup> *BBC News*, HRT safety probe launched, 4 September 2003, available at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/healthy/3080980.stm>, consulted on 21 September 2005.

<sup>36</sup> See also interview #9

<sup>37</sup> Directive 2001/82/EC of the European Parliament and the Council of 6 November 2001 on the Community Code Relating to Veterinary Medicinal Products [Official Journal L 311 of 28.11.2001]; Directive 2001/83/EC of the European Parliament and the Council of 6 November 2001 on the Community Code Relating to Medicinal Products for Human Use [Official Journal L 311 of 28.11.2001]. These two directives combine all current legal provisions concerning marketing authorisation and the manufacture, labeling, classification, distribution and advertising of medicinal products for human and veterinary use.

<sup>38</sup> Interview #9

<sup>39</sup> See the EMEA's website for an overview of these working parties and other groups. [http://www.emea.europa.eu/htms/general/contacts/CHMP/CHMP\\_WPs.html](http://www.emea.europa.eu/htms/general/contacts/CHMP/CHMP_WPs.html)

<sup>40</sup> EMEA, 2004, p. 88.

<sup>41</sup> AR 1997, p. 22.

<sup>42</sup> Interview #3. See also Fernand Sauer in *Pharmaceutical Executive*, EMEA's Fernand Sauer. The new European agency logs a successful year, January 1997, p. 52.

<sup>43</sup> Compare this to the FDA that employs over 9000 staff, working at locations around the US.

<sup>44</sup> Interview #3

<sup>45</sup> Interview #77

<sup>46</sup> Interview #55

<sup>47</sup> Interview #56

<sup>48</sup> Interviews #9 and #56. Officially, staff remains temporary agents, however.

<sup>49</sup> Interview #9

<sup>50</sup> See, for instance, Vittorio Silano, former member of the CHMP and the management board in EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 104.

<sup>51</sup> Interview #56

<sup>52</sup> Interview #77

<sup>53</sup> Interview #66

<sup>54</sup> By way of comparison, only 10 percent of the US FDA's revenues are fees collected from the pharmaceutical industry.

<sup>55</sup> Interview #3

<sup>56</sup> Interview #56

<sup>57</sup> AR 1997, p. 15.

<sup>58</sup> AR 2002, pp. 3-4.

<sup>59</sup> Interview #56

<sup>60</sup> Instead of using the so-called 'Notenboom-procedure' for transfer between underspent and overspent budget lines.

<sup>61</sup> Interviews #9 and #56

<sup>62</sup> Interview #73

<sup>63</sup> Interview #3

<sup>64</sup> Interview #73

<sup>65</sup> Interview #36

<sup>66</sup> Interview #57

<sup>67</sup> Interview #66

<sup>68</sup> Interview #36

<sup>69</sup> Interview #36

<sup>70</sup> Interview

<sup>71</sup> Interview #9

<sup>72</sup> Interview

<sup>73</sup> Interviews #36 and #75

<sup>74</sup> Interviews #9 and #55. See also *Pharmaceutical Executive*, EMEA – Force for Global Development. A Conversation with Fernand Sauer, July 1999, pp. 65-83.

<sup>75</sup> Interview #75. See also Horst Reichenbach, Director-General, DG Enterprise, European Commission in EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 97.

<sup>76</sup> Interview #75

<sup>77</sup> Interviews #57, #73 and #75

<sup>78</sup> Interviews #9, #57 and #75

<sup>79</sup> Fernand Sauer in *E-Sharp*, Small is Beautiful, March-April 2006, p. 54.

<sup>80</sup> Interview #9

<sup>81</sup> Interview #55

<sup>82</sup> Interview #57

<sup>83</sup> Interview #66

<sup>84</sup> EMEA, *The European Medicines Agency Road Map to 2010: Preparing the Ground for the Future*, EMEA/H/34163/03/Final, London, 4 March 2005.

<sup>85</sup> Interview #57

<sup>86</sup> As a result of competition between national regulatory agencies under the decentralised procedures, there had been a converging trend before the introduction of the centralised procedure towards the reduction of the approval time (Feick, 2002: 43-44).

<sup>87</sup> A joint EMEA/EFPIA survey published in October 1997 found that 33 percent of the companies were very satisfied with the centralised procedure, 61 percent were satisfied, while only 6 percent were dissatisfied (Walsh, 1999: 239).

<sup>88</sup> Interviews #3 and #73

<sup>89</sup> Interview #75. See also Patrick Le Courtois, Director Pre-Authorisation of Medicines for Human Use, in EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 96.

<sup>90</sup> EMEA, European Medicines Agency opens SME Office to support small and medium-sized enterprises, Press release, EMEA/261632/2005, 15 December 2005.

<sup>91</sup> By way of comparison, the advice rendered by the US FDA is binding. FDA officials have to grant approval to companies for the development of a product and from that moment onwards grant authorisations for the different phases of product development, whereas EMEA experts only adopt an opinion on the evaluation of a drug once. In the case of the FDA, intimate linkages between the agency and the industry before and during the application process increased the number of drugs approved, as regulators, by supporting the application throughout the process,

had become entwined with the applicants. In the past, this has endangered the FDA's independent position. Interviews #3 and #77

<sup>92</sup> The EMEA team usually lost these matches. Fernand Sauer in *E-Sharp*, Small is Beautiful, March-April 2006, p. 54.

<sup>93</sup> See also Fernand Sauer's (1998) open letter to the Editor of the *British Medical Journal* in response to the editorial by Abbasi and Herxheimer.

<sup>94</sup> Interview #9. See also Fernand Sauer in *Pharmaceutical Executive*, Inside EMEA. Fernand Sauer: Tending the Garden, January 1996, p. 47.

<sup>95</sup> Interviews #9 and #74

<sup>96</sup> Interview #33

<sup>97</sup> Interview #66

<sup>98</sup> Interview #74

<sup>99</sup> Interview #57

<sup>100</sup> Interviews #55 and #57

<sup>101</sup> Interviews #9, #57 and #73. In view of the practical involvement in clinical research, in-house expertise does not always have to be an advantage, however.

<sup>102</sup> Interview #73

<sup>103</sup> Interviews #3 and #73. See also AR 1999.

<sup>104</sup> Interview #73

<sup>105</sup> Interview #75

<sup>106</sup> Interviews #36 and #56

<sup>107</sup> Interview #36

<sup>108</sup> Interview #57

<sup>109</sup> See the website of the HMA, <http://www.hma.eu>.

<sup>110</sup> EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 15.

<sup>111</sup> See HMA's mission statement, available at <http://www.hma.eu/hmajoint.html>, consulted on 29 December 2007.

<sup>112</sup> Interviews #9, #36 and #78

<sup>113</sup> Because of this conflict of interests, the Commission originally proposed the creation of a scientific council consisting of five to nine eminent scientists who would review the work of the CHMP (Vos, 1999: 229-230). As such, the body would be more or less comparable to the scientific committee in the case of the EEA (see Chapter 9).

<sup>114</sup> Interview #77

<sup>115</sup> Interview #77

<sup>116</sup> Fernand Sauer in *Pharmaceutical Executive*, EMEA – Force for Global Development. A Conversation with Fernand Sauer, July 1999, p. 78.

<sup>117</sup> Steven Dean, former chair of the CVMP in EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 103.

<sup>118</sup> Interview #74

<sup>119</sup> Interview #77

<sup>120</sup> Interviews #57 and #73

<sup>121</sup> AR 1995, pp. 8-10. Formally, the relevant 'public health' articles only came into force in 1999. Ever since, all pharmaceutical legislation has been based on both Article 95 and 152 of the TEU and discussed and approved by health ministers, in the presence of both the commissioners for enterprise and health.

<sup>122</sup> Interview #55

<sup>123</sup> Ken Collins, former chair of the EP's Environment, Public Health and Consumer Protection Committee in EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 100. See also Bassi, Bertele and Garattini (2003). Under the Lisbon Treaty, pharmaceuticals are brought under the health article and, as a consequence, the pharmaceutical file should normally go to the future health commissioner.

<sup>124</sup> Interview #9

<sup>125</sup> Interview #55



<sup>126</sup> Interview #73

<sup>127</sup> The question is of course whether the Commission has the expertise to interfere at all, given that agencies are delegated tasks for which the Commission lacks the specific technical or scientific knowledge.

<sup>128</sup> Interview #74

<sup>129</sup> In most EU member states authorisation decisions are taken under the responsibility of the minister. An exception is the Netherlands where the Dutch Medicines Evaluation Board decides on authorisations independently of the minister of health who cannot interfere in the decisions of the Board. Interviews #3 and #74

<sup>130</sup> See, for instance, EMEA, Cooperation on medicines regulation intensified, Press release, EMEA/93090/2006, London, 14 March 2006.

<sup>131</sup> Interview #57. See also, EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 9.

<sup>132</sup> EMEA, *Celebrating Ten Years – Portrait of the European Medicines Agency*, London, 2004, p. 39.

<sup>133</sup> The evaluation carried out by CMS Cameron McKenna and Andersen Consulting on behalf of the Commission concerned the operation of Community procedures for the authorisation of medicinal products and not the EMEA itself.

## CHAPTER 8

# REGULATING THE FOODSTUFFS SECTOR: THE CASE OF THE EUROPEAN FOOD SAFETY AUTHORITY

At the end of the day we are trying to find the best ways to protect consumers from risks – each organization playing its own specific but complementary role. Independence is important to the scientific credibility of risk assessments but this has to be managed responsibly to ensure that this does not lead to isolation and irrelevance.

– Catherine Geslain-Lanéelle, EFSA executive director<sup>1</sup>

### 8.1 Introduction: not quite an authority (yet)

If EFSA were solely judged in accordance with the low number of food scandals or crises since its establishment, then it could definitely be seen as a success. The absence of major food crises and scandals, however, conceals the difficulties the agency has experienced in the early years of its existence. EFSA, on paper one of the most autonomous agencies, did not succeed in translating its autonomy into practice. While the agency has produced work of high scientific value and has been transparent in its actions, it has also been subject to political controversy, particularly with regard to its authorisation work. In its early days, the agency has thus not been able to live up to its official designation as Europe's 'authority' on food safety. For sure, a designation difficult to live up to.

Ironically perhaps, EFSA's autonomy seems to have been impinged upon by political actors for the very fact that the agency put a lot of emphasis on its autonomous status in the early years. Although this was to some extent necessary in view of building up a distinct identity, it sometimes meant that the agency was isolating itself from its institutional environment rather than generating acceptance as a player in its own right. This actually appears to have made politicians interfere in the 'scientific' activities of EFSA, notably when it concerned contested issues such as genetically modified food. In recent years, the agency has therefore adopted a more integrative approach towards its institutional environment.

This chapter first traces the historical path leading to the creation of EFSA (in Section 8.2). That history has been a defining factor in the design of the agency as an autonomous entity becomes clear in Section 8.3, which deals with the agency's formal design features. In Section 8.4 the institutional development of the agency is described, depicting the agency's efforts to form a distinct identity, and the difficulties it experienced in acquiring legitimacy from political actors and organised interests in the field of European food safety regulation on the basis of this identity. The chapter is concluded with an analysis of the factors that account for the level of EFSA's actual autonomy and the development thereof until the end of 2007 (Section 8.5).

## 8.2 Historic origins of EFSA: on crisis and reform

EFSA was the first of a new wave of EU-level agencies to be established (see Chapter 5). Its history is inextricably bound up with the repeated outbreaks of Bovine Spongiform Encephalitis (BSE) or 'mad cow' disease. The BSE crisis in 1996 spurred the reform of the EU's food policy and, together with other food scares such as the dioxin scandal, eventually prompted the adoption of a regulation for an independent European Food Safety Authority on 28 January 2002.<sup>2</sup>

### *EU food regulation until the BSE crisis*

Food regulation in the EU goes back much longer than the BSE crisis. Ever since the first Council Directive on food was adopted in 1962, the EU has gradually built up a common foodstuffs market (Vogel, 1995: 24-43). But "[t]he single market – with its abolition of internal frontiers and checks – was introduced largely without the accompanying changes needed to police it properly" (Chambers, 1999: 98). As food regulation mainly focused on removing barriers to trade, public health concerns played a minor role. At the end of the 1980s, the protection of public health slowly entered EU law through horizontal legislation. The Council adopted directives on food and veterinary control, as well as food hygiene and contaminants (Hellebø, 1999; 2005; Vos, 1999: 137; Ugland and Veggeland, 2006: 612).

The increased involvement of the EU in the regulation of foodstuffs amplified the European Commission's role. Together with various comitology committees representing the member states, experts and interest groups, the Commission was responsible for ensuring the implementation of food laws (Joerges and Neyer, 1997b; Vos, 1999). To coordinate national inspection and control procedures, it in 1991 set up the Office of Veterinary and Phytosanitary Inspection and Control (OVPIC), which was later converted into the Food and Veterinary Office (FVO) (Chambers, 1999: 103; Kelemen, 2004). Yet, issues of food safety remained institutionally dispersed over various Commission DGs, directorates and services, while a new DG for Consumer Policy, created in 1995, was initially not given any responsibilities with regard to food safety (Ugland and Veggeland, 2006: 613-614; Chambers, 1999).

Moreover, decision-making in the committee system was constrained by national interests. Member states preferred mutual recognition of regulatory measures; they only supported common regulatory measures when the costs and benefits of such measures were not too asymmetrically distributed and usually acted in defence of domestic industries and consumers (Krapohl and Zurek, 2006: 14). Only after the BSE crisis had distorted the internal market in food products, food safety emerged as a Community concern, dramatically altering the EU's regulatory approach (Kanska, 2004: 713).

### *BSE and beyond*

It was precisely the success of the mutual recognition of regulatory measures and the establishment of an internal market for food that enabled the spread of BSE from the United Kingdom to the rest of Europe during the 1980s and 1990s (Chambers, 1999: 98-99). Initially, the BSE was defined as a veterinary problem, of no consequence to public health. The Commission and the member states radically changed their positions after the British government announced that scientists could no longer rule out

that eating beef contaminated with BSE could cause the fatal human affliction Creutzfeldt-Jakob disease. The announcement sparked what has become known as the BSE crisis (Westlake, 1997; Vos, 2000b: 231-233).<sup>3</sup>

The report of the European Parliament's Temporary Committee of Inquiry into the BSE crisis highlighted the serious failings of the Commission before and during the crisis.<sup>4</sup> In reaction to the report, Commission President Jacques Santer announced that action would be undertaken in the areas where the Committee of Inquiry had found shortcomings, and that the creation of an independent agency had to be considered.<sup>5</sup> The response of the Commission signified a shift to an approach in which economic motives and agricultural policy concerns were no longer dominating issues of public health and consumer confidence (Ugland and Veggeland, 2006: 620-621; Hellebø, 2005), and in which the timely provision of independent scientific advice on food risks had become paramount (Vos, 2000b: 234).

In May 1999, in the midst of the subsequent reform process, a new food crisis broke out over the contamination of Belgian poultry with carcinogenic dioxin through feeding stuff. The dioxin scandal emphasised the need to further strengthen EU food safety regulation (Lezaun and Groenleer, 2006; Shears, Zollers and Hurd, 2001: 77-78; Olsson, 2005).<sup>6</sup> In the meantime, BSE had spread from the UK to most other EU member states, making it a European problem (Krapohl, 2003; Krapohl and Zurek, 2006). The mismanagement of the BSE crisis and the dioxin scandal, as well as the growing concerns about genetically modified (GM) food products, provided the opportunity to reform the existing regulatory regime and create an independent European food agency.<sup>7</sup>

### *The White Paper and the creation of EFSA*

In his first speech to the Parliament in October 1999, Romano Prodi, the new president of the Commission, announced that restoring consumer confidence in food safety would be among the top priorities of the new Commission. He proposed the creation of a European food agency, possibly modelled on the US Food and Drug Agency or the EMEA, that by restoring consumer confidence was to enhance the legitimacy of the EU (Vos, 2000b: 247; Hellebø, 2005).<sup>8</sup> Upon the Commission's request, three leading scientists developed a blueprint for an independent food and public health authority with regulatory powers.<sup>9</sup> But the blueprint was rejected, as delegating regulatory powers to an independent agency would go against the EU Treaty (Buonanno, 2006: 264-266).

In January 2000, three months after the publication of the scientists' report, the Commission published a White Paper on Food Safety, including a proposal for the creation of an independent European food agency.<sup>10</sup> In order to stress the agency's main ambition – to become the scientific point of reference in the area of food – it was decided to use *authority* instead of *agency*.<sup>11</sup> The White Paper stressed the restricted scope of the agency to scientific advice and information analysis, but did not preclude a future extension:

As indicated earlier, the existing Treaty provisions impose constraints in the activities that can be attributed to the Authority, but this should not be taken to mean that a possible future extension of its competences should be discounted. Such an extension should only be considered in light of the experience with the functioning of the Authority and the confidence gained in its operation, including the possible need to change the Treaty.<sup>12</sup>

The agency was the first agency created using the co-decision procedure (see Chapter 6). This procedure made it possible for the European Parliament (EP) to exert strong

influence over the agency design, notably insisting on mechanisms and procedures to control the agency (Kelemen, 2004: 139-140; Buonanno, 2006). While the original proposal referred to a European food authority, the Parliament demanded that the agency's competence would be restricted to food safety. Hence, the agency was renamed the European Food *Safety* Authority (Buonanno, 2006: 270). Moreover, the agency was tasked with risk assessment only; the Commission, together with the member states, remained responsible for risk management and thus accountable to the Parliament (Chalmers, 2003: 536).

Meanwhile, taking advantage of the changed circumstances after the BSE crisis, the Commission had secured additional resources for its Food and Veterinary Office thereby significantly increasing its enforcement capacity. So "[e]mpowered by backing from the EP, the Commission succeeded in expanding the EU's information gathering and analysis capacity through EFSA, while at the same time expanding and maintaining control over its own inspection and enforcement force (the FVO)" (Kelemen, 2004: 140).

### *Getting established*

Once the regulation for an EFSA was adopted, a small team was set up in the new DG Public Health and Consumer Protection (SANCO) to coordinate the creation of EFSA.<sup>13</sup> This so-called 'implementation group' was basically running the agency in its early months. For instance, it prepared press releases, wrote the management board's internal rules and procedures, drafted the board's voting procedures, organised board meetings, and recruited some of the first (temporary) staff. Only when the board had held its inaugural meeting, in September 2002, could candidates for senior positions be selected and interviewed.

The Commission had advertised the post of director in February 2002 but had to re-advertise in May because too few candidates of high calibre had applied for the post. The board finally nominated Geoffrey Podger as agency director. He took up his post on 1 February 2003, after which the agency could really start its operations.

The difficulties in recruiting a director were at least partly due to the lack of clarity on the permanent location of the agency. EU member states were arguing over which European city should become the agency's home (see also Chapter 5). In addition to Parma, Helsinki, Barcelona and Lille were in the running to host the agency. Commission President Prodi and SANCO Commissioner David Byrne preferred a central location, opting for Luxembourg or Brussels.<sup>14</sup> It was not until early 2004 that a deal was struck on EFSA's location. The agency was relocated to Parma in October 2005.<sup>15</sup>

## **8.3 EFSA's formal design: independence as hallmark**

### *Broad remit, limited powers*

EFSA's founding regulation defines its role as providing scientific advice and scientific and technical support "in all fields which have a direct or indirect impact on food or feed safety", as well as providing independent information on all matters within these fields and communicating on risks to the public.<sup>16</sup> By fulfilling this role, the agency contributes to a high level of health protection. But it does so "in the context of the

operation of the internal market”, thus reflecting the inherent tension in its mission between consumer protection and free movement of goods (Kanska, 2004: 713).

The agency assesses and detects (emerging) food risks, enabling the Commission and the member states to deal with such risks more effectively than before. EFSA's output includes guidance documents, statements, conclusions, and, notably, scientific opinions. These opinions are rendered in response to questions formally addressed to the agency by the Commission, the member states and the Parliament.<sup>17</sup> Based on its risk assessments, the agency communicates on food safety issues, raising awareness and explaining the outcomes and implications of its assessments. It shares the responsibility for risk communication with the Commission and the member states. Importantly, in light of the BSE crises and dioxin scandal, EFSA participates in a crisis unit during food emergencies, providing the Commission with scientific and technical assistance.<sup>18</sup>

As a scientific advisory body, the agency is limited in its formal powers (Kelemen, 2002; Vos, 2003). EFSA's design is based on the Franco-German model of food regulation in which risk assessment is strictly separated from risk management. When EFSA was created it was believed that scientists should not, as had happened in the case of the BSE crisis (Grönvall, 2001), be propelled into decision-making positions. The Commission and the member states therefore remain responsible for political decision making with regard to food risks and emergencies as well as the evaluation of socio-economic concerns (which is also in line with the *Meroni* doctrine, see Chapter 5).<sup>19</sup> They decide on the level of acceptability of risks taking into account not just scientific evidence delivered by EFSA but also “other legitimate factors relevant for the matter”.<sup>20</sup>

On the basis of EFSA's advice, the Commission develops policies and proposes legislation. The Commission's proposals or drafts are referred to the Standing Committee on the Food Chain and Animal Health that acts in accordance with the so-called regulatory procedure. Hence, the Commission has to inform Parliament of the proposal and the Council cannot block a draft decision or proposed policy with a simple majority, but instead needs a qualified majority. The Commission is responsible for monitoring and enforcing the implementation of legislative measures adopted by the Council.<sup>21</sup>

### *Independent science...*

There are few EU organisations that can claim as much formal autonomy as EFSA. Acting on its own initiative, the agency can provide advice on any matter within its mission, referred to as ‘self-tasking’, thus ensuring its independent position towards external actors.<sup>22</sup> The founding regulation includes a specific article on independence that stipulates that the agency's director, management board, and advisory forum as well as its scientists act independently of external influence, in the public's interest.<sup>23</sup>

EFSA has various scientific panels, each responsible for a different aspect of food and feed safety. They consist of up to 21 persons each and meet regularly in Parma. How often they meet depends on their workload, which varies from panel to panel. The chairpersons of the panels together with six independent experts make up the scientific committee, which is responsible for coordinating the panels' work. The committee chair attends management board meetings to update members on the panels' activities.

The panels prepare the scientific opinions of the agency. In the event that scientists disagree with the opinion rendered they can issue a dissenting opinion. EFSA opinions must be published, together with such minority views.<sup>24</sup> In order to ensure the transparency of its procedures, its agendas and committee and panel meeting minutes have

to be made public as well. Experts sitting on the panels are not paid for their services, merely reimbursed for expenses.

Importantly, national authorities do not nominate experts serving on EFSA's panels, as was the case before the BSE crisis and occurs at the European Medicines Agency. The agency's opinions are based on the expert judgment of 'European' rather than 'national' scientists (Buonanno, 2006: 275). Experts are independent scientists, not representing member states or their national authorities. Following an open call for expressions of interest, and on the basis of an agency proposal, they are officially appointed by the EFSA management board.<sup>25</sup> The board has the possibility to react to the lists of qualified candidates prepared by the agency in view of, for instance, geographic distribution. But neither the agency nor the board is involved in the content of the opinions that the scientific panels render, which is a matter for the panels alone.<sup>26</sup>

### *...in a multi-actor setting*

The agency is of course not fully autonomous. It has to work closely with EU institutions and build up networks of member states' national agencies in the area of food safety. For there was "a desire by all the central political actors that EFSA[']s creation] should not disrupt the existing institutional settlement" (Chalmers, 2003: 536). The agency's design therefore reflects the political compromise among the Commission, the member states in the Council and the Parliament over the division of power (Kelemen, 2002).

EFSA is not governed by a management board primarily made up of member state representatives, which distinguishes it from other agencies.<sup>27</sup> The management board includes 14 members, four of which have a background in consumer organisations or industry, plus a Commission representative. Members are not appointed on the basis of their nationality, but in a personal capacity, and by reason of their professional background and expertise. Following an open call for expression of interest, the Commission draws up a list of potential candidates from those expressing interest and fulfilling the criteria established. The Council selects the members of the board from the list, after receiving the opinion of the EP.

The management board is responsible for the adoption of several key documents including the budget, the work programme and the annual report. In contrast to the constituent acts of other agencies, the constituent act of EFSA spells out a procedure for adopting the work programme. The management board has to "ensure that these programmes are consistent with the Community's legislative and policy priorities in the area of food safety", thus reducing the agency's formal autonomy.<sup>28</sup>

In order to compensate member states for the lack of representation in the board, EFSA has an advisory forum (AF). The AF is composed of representatives from the competent bodies of the member states undertaking similar activities as EFSA, usually the heads of national food agencies.<sup>29</sup> Each member state appoints its representative in the AF.<sup>30</sup> Importantly, the AF members do not have decision-making competences. They only have a consultative role, advising the EFSA director, for instance, on the priorities proposed in the agency's work programme.

Furthermore, the AF facilitates cooperation between national authorities and the agency. For example, it plays an important role in early identification of potential sources of divergence between national agencies. When national authorities come to a different conclusion than EFSA, a joint document has to be prepared that identifies contentious issues and exposes uncertainties (Chalmers, 2003: 548-550).<sup>31</sup>

The advisory forum is the member states' link with the agency's executive director, who chairs the AF.<sup>32</sup> The director is in charge of day-to-day management including staffing and budgeting matters. He is appointed after a hearing in the EP. He does not answer to the Commission or the member states, but is instead relatively independent. The director does have to render account to the board, which can remove him from office by a majority vote.

EFSA is entirely funded through the Community budget, which enables it "to act independently of political, economic or other undue influences and to be seen to be so acting".<sup>33</sup> The food industry does not pay for services rendered by EFSA as this would make the agency dependent on industry, which both the Commission and the member states want to avoid in view of the negative experiences of the past. Yet, the agency's financial autonomy is limited as it depends on the Commission to propose a budget, and on the Council and the Parliament to subsequently approve the budget.

The agency is staffed with temporary agents who are offered five-year contracts that are renewable. These contracts become indefinite term contracts after the first renewal (so after ten years). The agency's staff members form the secretariat for the scientists undertaking the risk assessments and are responsible for coordinating their work, as well as the agency's risk communication activities. They also provide support to the board and advisory forum and liaise with stakeholders groups, the EU institutions and other international actors.

## 8.4 Autonomy in practice: between isolation and interference

### *From assessing food safety to rendering opinions on nutrition*

Not surprisingly given the historical background to its creation, the agency's initial focus was on preventing food risks from materialising into crises. Respondents interviewed for an assessment of EFSA's image in March-April 2004, published as the so-called Paeps report, "all agree[d] that a next crisis – and hopefully a prevention of that crisis – would be the only real way to truly assess to what extent EFSA is really ready and doing well".<sup>34</sup> Since EFSA's creation food safety issues have occurred, but no major food scandals or crises have struck the EU.<sup>35</sup> One could therefore conclude that EFSA has indeed done well.

But food safety issues have changed since BSE and dioxin. Among the interviewees for this study as well as those of the Paeps report and the external evaluation of the agency conducted in 2005, there is strong consensus that the most important issue regarding food safety is no longer the next food scandal or crisis. The agency has been given a wide brief to cover all the stages of the food chain, from the production of animal feed to the supply of food to consumers. As the agency's precise risk assessment duties are not clearly spelled out, this means that its mission over the years could progressively be broadened to include a variety of new areas of attention (admittedly, sometimes already foreseen in the founding regulation).

The agency is now also concentrating on "major public health concerns" such as the safety of GM food products and unhealthy dietary habits of European citizens.<sup>36</sup> Almost all pre-market approvals in the area of the food chain are centralised and performed by EFSA. The agency for instance has been given a formal role in the authorisation of additives, flavourings, pesticides, and notably Genetically Modified Organisms (GMOs). Under the new Regulation (EC) 1829/2003 on GM food and feed, the Commission



made EFSA responsible for assessing GMOs before their authorisation for marketing.<sup>37</sup> Applications officially still have to be submitted to the national authorities, but are then forwarded to the agency where EFSA's GMO panel assesses the dossiers and formulates an opinion. On paper, the powers of national authorities to object to the marketing of food and feeds have thereby been reduced (Chalmers, 2005).

Both within the agency and the Commission ideas also grew to expand EFSA's remit to rendering opinions on nutrition and health.<sup>38</sup> As the chair of the management board, Stuart Slorach stated: "[A]ccess to safe food does not in itself guarantee good health. We also need to have healthy dietary habits. I believe that EFSA will play an increasing role in providing the scientific basis for advice in this area."<sup>39</sup> It was not a surprise then that the board welcomed the recommendation made in the 2005 external evaluation report to become more active in these areas.<sup>40</sup> In May 2007, legislation was adopted that allowed EFSA to render opinions on nutrition and health claims.<sup>41</sup> Companies that want to use statements that a food product could, for instance, lower cholesterol first have to ask permission to EFSA that assesses whether claims are scientifically substantiated.

The agency's expanded role with regard to nutrition and GMOs has not gone uncontested. Some respondents thought "that too broad a definition of risks (i.e. inclusion of the total diet) would broaden EFSA's scope too much and potentially divert it from its priority focus on the safety of the food chain."<sup>42</sup> And not all interviewees believed the assessment of GMOs to be an appropriate task for EFSA, considering the issue of GMOs to be more an environmental and social issue than a food safety issue.<sup>43</sup> Indeed, the issue of GM products and other new foods has become a bone of contention and has led to major political interference in the work of EFSA, as will be detailed below.

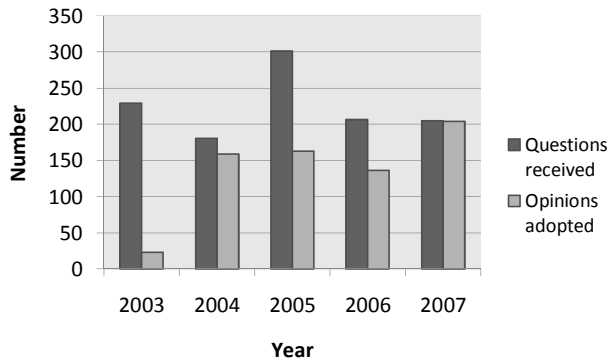
### *Regulating by authority?*

While, in theory, the member states and the Parliament can also pose questions to the agency, in practice, it has been the Commission, usually DG SANCO and sometimes DG Environment, that asks EFSA for opinions.<sup>44</sup> Of the more than five hundred opinions that the agency in 2007 had rendered since the scientific panels started their work in May 2003, a majority concerned authorisations and were requested by the Commission in accordance with pre-market approval procedures. Figure 8.1 depicts the number of questions received and opinions adopted over the years.

As the House of Lords Select Committee on European Union noted in 2000, "the [EFSA's] credibility will depend on the Commission's willingness to act on its advice."<sup>45</sup> The question whether EFSA's opinions are followed by the Commission proved difficult to answer as it is often unclear what it means for the Commission to act on an advice. Respondents say that not all opinions have been used, although most are taken into account. Reasons for non-use of opinions differ: an opinion might have been unclear, it might have been too late, it might not have been politically relevant anymore, or it might not have been convenient to the Commission.

Although the Commission claims it is giving regular feedback on what it has done with EFSA's advice in terms of risk management, interviewees admitted that EFSA, especially in the early years, often did not exactly know what was done with its opinions.<sup>46</sup> A respondent explains: "In many cases opinions have to be interpreted. The scientific advice of EFSA is often not black or white, but grey."<sup>47</sup> This means that when the agency is, for instance, of the opinion that there is a certain level of risk involved in the marketing of a particular food product, the Commission may nevertheless decide to authorise the product.<sup>48</sup> Another respondent adds:

Sometimes you look at the legislation that they [the Commission – MG] have developed and you think: ‘I am not quite sure how that reflects what we did in our opinion.’ At other times, it is very clear when we say this is safe and this isn’t and that is what it says in the legislation.<sup>49</sup>



**Figure 8.1** – Questions and opinions (2003-2007)

*Note:* The high amount of questions received in 2003 was due to the backlog that had developed in the Commission in the years before EFSA’s creation.

*Sources:* EFSA annual reports

Even if EFSA’s opinions are merely advisory and are perhaps not always reflected in Community legislation, scholars claim that they do undeniably have normative effects (Chalmers, 2003: 540; Kanska, 2004). For one thing, the Commission cannot simply disregard the agency’s advice. In accordance with legislation laying down the authorisation procedures, for instance in the area of GM food and feed, it has to find equivalent scientific evidence and give reasons justifying its reliance thereon.<sup>50</sup> This would make it all the more important for the Commission to ensure that the opinions rendered by the agency, such as those on GMOs, are in line with its preferred policies.<sup>51</sup>

Because “sound arguments” are the only means by which EFSA can establish its authority, it is of crucial importance for EFSA to “get the science right.”<sup>52</sup> According to the Paeps report on the perception of EFSA’s early performance among clients and stakeholders, the quality of the opinions was generally judged to be high. The 2005 external evaluation report on EFSA’s functioning reached similar conclusions. Whereas EFSA’s opinions certainly have gained some standing, it does not mean that they are undisputed and it would certainly be too strong to attribute a *de facto* binding value to them, as has become clear over the distinction between risk assessment and risk management.

### *The ‘grey zone’ between risk assessment and risk management*

EFSA’s assessment of the risks involved in the marketing of a certain food product often includes certain prescriptive elements.<sup>53</sup> Whereas advice on managing such risks in the early years was by no means accepted, the risk managers nowadays demand that the agency presents risk management options and takes into account the feasibility of particular measures (Vos and Wendler, 2006). Indeed, “[i]t was felt that the risk manag-

ers should be explicitly aware of a number of options so as to avoid much ‘politics’ in the management process.”<sup>54</sup> The example of semicarbazide in baby food is illustrative:

The first EFSA director was very aware that we couldn’t just put an opinion on this issue on the website and that we should try to help the risk manager a bit more and possibly evaluate some of the risk management options and the implications of the advice. That was quite early on and already we were in an area, a sort of grey area as you can imagine. But the director at the time spoke with the Commission and the Commission said ‘yes please, go ahead’ and that is what we did.<sup>55</sup>

Certain member states have expressed concerns about the distinction between risk assessment and risk management becoming blurred when EFSA supports the Commission in the interpretation and consideration of its opinions. They worried that “the formulation of management options could give way to ‘unhealthy’ trading-off discussions between the Commission and EFSA and erode the independence of EFSA”.<sup>56</sup> EFSA, they argued, may conclude that there is a certain risk on the basis of the facts, but whether the risk necessitates action is up to the Commission to decide. As a respondent said:

This [decision] is often not straightforward, as it is difficult to determine what level of risk is acceptable. Possible measures therefore also require discussions in the Commission on economic, societal, traditional, ethical or environmental factors, as well as the feasibility of controls.<sup>57</sup>

Furthermore, there has been some concern among some member states and non-governmental organisations (NGOs) about the Commission exploiting the separation between risk assessment and risk management, particularly where it concerns heavily contested food products such as GMOs. In its early years, EFSA found GM food to be safe on several occasions (see also below). The Commission subsequently approved these opinions without much discussion, which has led to a stalemate in the Council and protest from environmental interest groups. They claimed that the Commission misused EFSA’s scientific advice in order to push through the authorisation of GMOs in view of economic motives.<sup>58</sup> The Commission has in turn usually shifted the blame to EFSA, accusing it of not sufficiently considering contextual factors, which has (further) damaged the agency’s authority.

Especially with regard to heavily contested products such as GMOs, EFSA’s opinions are increasingly debated. They would go beyond objective advice, incorporating normative and risk management issues as science (Levidow and Carr, 2007: 888-889). These debates do not necessarily concern the independence or quality of EFSA’s science. Some EU countries simply do not want to allow GM food because they know their populations are against it.<sup>59</sup> So when they come to different conclusions, usually on the basis of precautionary approaches, it is often for socio-political rather than scientific reasons (Kanska, 2004: 712).

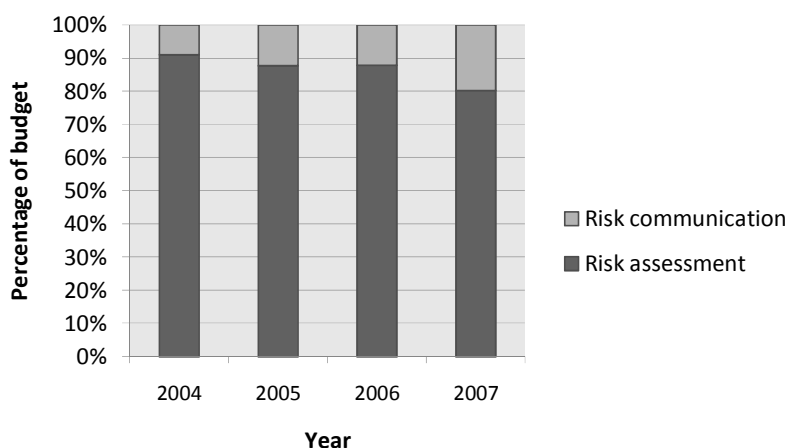
### *Communicating risks*

The agency’s ambiguous role in risk communication led to internal discussion on whether risk communication should be a priority at all in the early years.<sup>60</sup> Two broad currents were apparent: one, represented mostly by experts in its scientific panels and staff in EFSA’s science department, believed that the agency should give priority to, at

least in its early years, the scientific evaluation of food and the provision of advice on this basis:

There is too much emphasis on the communication, what I agree with to a certain degree, but what I also find bothering, and [...] of which I think that this is something we have to work very hard on once we are established. In the build-up phase I think that we should devote all our energy to the quality of the product and timely delivery thereof. Our reputation in the sense that we actively promote our work has a bit lower priority. But I do not want to say that we do not have to do that of course. It is a difference in emphasis.<sup>61</sup>

The other current consisted mainly of staff in EFSA's communications department and some experts in the scientific panels who saw communication of the agency's opinions as an essential part of its mandate. Especially in the agency's early years, they believed communication to be critical for the establishment of its reputation as an organisation dedicated not only to scientific excellence and independence, but also to openness and transparency. A comparison of the proportion of the total budget spent on activities relating to risk communication and risk assessment, however, shows that, while the proportion allocated to risk communication has slightly increased, the proportion spent on risk assessment is still significantly higher (see Figure 8.2).



**Figure 8.2** – Budget allocated to risk assessment and risk communication (2004-2007)

Sources: EFSA annual reports

As Gabbi (2007: 5) notes, the shared competence for risk communication is a potential source of conflict between the agency and the Commission. EFSA communicates 'on its own initiative' in the fields within its mission, but has to take into account the Commission's role as risk manager. The agency thus informs the Commission of press releases before they are actually sent out, which gives the Commission the opportunity to provide feedback. This does not mean that EFSA always follows the Commission's view on a matter:

Sometimes we have to agree to disagree, because in particular with regard to the European Commission we are an independent voice [...] so we know that sometimes we say things that might give them a bit of a hard time, but what can they do, that is why we are created.<sup>62</sup>

The Commission's fear is that EFSA puts out scientific messages that are misinterpreted by the public, causing people to turn away from a particular type of food leading to economic losses for industry and image damage for member states. EFSA's communication on avian influenza or bird flu is a case in point (see also Gabbi, 2007). On 25 October 2005, the *Financial Times* first reported "a precautionary warning" by EFSA, advising Europeans to avoid eating raw eggs and to cook chicken to decrease the risk of contracting bird flu. In the article Herman Koeter, then EFSA's director of science, was quoted saying:

We have no proof at all that people can contract the virus through the digestive route. However, we cannot exclude that theoretically it would be possible for that to happen. [...] Theoretically, it could be possible that, if you eat the raw blood of an infected chicken, the virus is then not totally killed in the stomach.<sup>63</sup>

According to the agency the advice was in line with standard advice to combat more widespread diseases like salmonella. But the Commission and the member states, meeting that same day in the Standing Committee to decide on import bans following the detection of avian influenza in the UK, were taken by surprise. Not only were they annoyed by the wayward action of the agency, they also considered the comparison with salmonella to be confusing and criticised EFSA for causing panic.<sup>64</sup> The Commission and the member states forced the agency to rectify its statements, which the agency did in a press release the next day.<sup>65</sup> But the agency itself saw its independent position only being supported by the reaction of the Commission:

They were not happy with that, but not because what we stated was not supported by science. No, they considered what we said to be exaggerated and pointed to the drop in the sale of eggs. Well, then we say, we are very sorry but that is not our problem that the egg sales are decreasing. That is not our responsibility. [...] There is a certain risk and that we have to alleviate.<sup>66</sup>

EFSA, in turn, is concerned that the Commission's communications do not adequately take into account its scientific advice. Consider the example of the methyl mercury case. In this case, the EFSA panel on contaminants found that methyl mercury toxicity in food, particularly fish, occurs at low exposure levels and that exposure should therefore be minimised especially for vulnerable groups such as pregnant women and young children. On the basis of the opinion, the Commission drafted a press release that was sent to EFSA for feedback (Gabbi, 2007: 6-7). An EFSA official remembers:

...a long and difficult meeting with the European Commission. They wanted to put out their own communications based on our opinion, supposedly on our opinion, in which they were very explicit about the quantities of fish that consumers in the member states should eat. And we said, of course you are free to do as you wish, but what you want to do is not backed by our science, and we think that it is not desirable to put out a very specific diet message across Europe. That has to be done on a national level. We had a quite different view on that.

The agency sent the Commission a draft of the press release that it had prepared accompanying the opinion, which the Commission, in turn, considered to be going beyond risk assessment since it contained direct advice to consumers. In spite of the Commission's complaints, EFSA published its press release unaltered on 18 March 2004.<sup>67</sup> After discussion with the member states, the Commission prepared an information note that was published on its website together with the EFSA press release, opin-

ion and summary. EFSA felt that the resulting communication was confusing, and it expressed its dissatisfaction with the course of events in the advisory forum and the Forum's working group on communications (Gabbi, 2007: 6-7).<sup>68</sup>

National authorities are still wary of coordinating their communications with the agency. In the early days, they rendered opinions without informing the Commission and the other member states through the advisory forum. Also, when national agencies put out communications based on opinions rendered by EFSA, they often did not refer to the agency. For EFSA's visibility this is of crucial importance, however.<sup>69</sup>

If we merely render a scientific opinion, then of course no one will read it. [...] It also has to give us, let's be honest about that, a certain visibility. That is something we have to take into account, how visible is EFSA with consumers and the organisations that represent them.<sup>70</sup>

In order to get both the national authorities on board and to have a more direct impact on EU citizens, the agency adopted a strategy that it refers to as "influencing the influencers". The agency realises that as a European level organisation, it is not always best placed to raise the attention of the national media and to communicate to all EU citizens in a language that they can relate to and understand. It is therefore not only communicating messages directly to European citizens or indirectly to media across Europe (via press releases and press briefings), but also through other intermediaries between the EU and national citizens such as national agencies as well as consumer, industry, environmental and other organisations. For these intermediaries, like journalists adapt their messages to their audiences, know how to craft messages that address specific, most often national, concerns.<sup>71</sup>

### *Balancing independence and excellence*

The link with the member states is less direct when it comes to the independent experts in the scientific panels and committee, who are responsible for the bulk of the agency's scientific output. The fact that they are not nominated by the member states does not mean that they cannot be employed with national food agencies or government institutes.<sup>72</sup> As opposed to a narrow conception of independence in which scientists working for EFSA may not be linked to national agencies or food companies in any possible way, EFSA quite early on in its history adopted a broad view of independence, as shown by the following case.

In November 2004, the international NGO Friends of the Earth (FoE) launched an assault on EFSA and its work on GM foods and crops. In a report titled 'Throwing Caution to the Wind – a Review of the European Food Safety Authority and its Work on Genetically Modified Food and Crops', the NGO claimed that EFSA's GMO panel was biased and that members had links with industry.<sup>73</sup> EFSA reacted immediately by stating it did not believe the report called into question the legitimacy of its opinions.<sup>74</sup> The chair and the director subsequently sent a reply to FoE on behalf of the board and the agency in which they defended EFSA science, making it clear that EFSA would not refrain from making use of national experts:

EFSA selects the best available experts in Europe. It is therefore not surprising that these experts are also involved in evaluations at the national level. EFSA does not take the view that the participation in risk assessment committees or panels at the national level represents a conflict of interest. Scientific opinions for the European Union, as developed by EFSA panels, are in fact the outcome of a consensus-building process of individual opinions and views of experts with differing cultural and social backgrounds. Therefore, it would be extremely odd

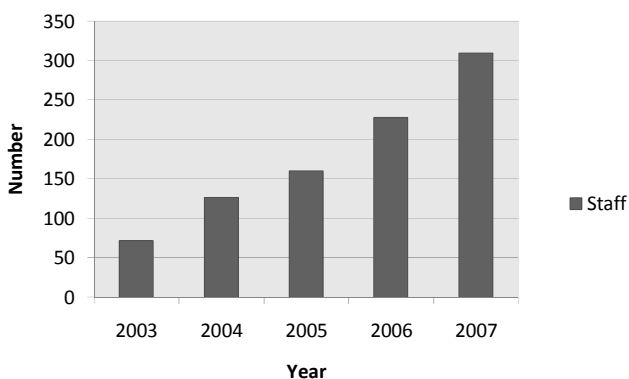
and difficult to explain if EFSA's policy would have been to exclude leading national experts from the discussion by reasoning that their national background is considered a bias.<sup>75</sup>

Independence also does not mean that scientists cannot have previously worked for industry. Food companies have close ties with academia, research institutes and even governmental bodies through research and funding. In practice, much of the science is produced by industry and can simply not be disregarded by the agency (Chalmers, 2003: 550; Gabbi, 2007: 12). Take for instance the highly mediatised aspartame case concerning the sweetener's use, for instance, in Diet Coke, which an Italian research institute found to be carcinogenic. In this case, the media reported extensively on the panel members conducting EFSA's assessment because some of them had previously been invited by industry to give presentations. EFSA determined that there had been no conflicts of interest. "They had not even been working for industry. They merely received a reimbursement of their travel expenses."<sup>76</sup>

Recruiting experts has thus created a paradox for EFSA: the most independent scientists are not always the best scientists, whereas the best scientists usually have links with industry.<sup>77</sup> In the 2005 external evaluation report some interviewees called for relying on both innovation-driven industry expertise and independence-driven EFSA expertise. The agency has therefore attempted to strike a balance between relying on scientists linked to industry for some of its scientific advice, while retaining its independence from industry by also drawing from other sources of expertise such as academia, research institutes, and government bodies.<sup>78</sup>

### *Obstacles to recruitment*

Recruitment of personnel has posed serious obstacles throughout EFSA's development.<sup>79</sup> For a long time the agency remained below its projected staffing levels (see Figure 8.3), in particular where it concerned staff supporting the panels. Some panels have therefore been overloaded with work that normally would have been carried out by support staff.



**Figure 8.3** – Staff development (2003-2007)

Sources: EFSA annual reports

One of the main reasons for the delays in the recruitment has been the (re-)location of the agency. Even though most staff already working for EFSA in Brussels moved to Parma, reflecting their commitment to the organisation, the agency's location is not as attractive and convenient as for instance London.<sup>80</sup> In addition, Parma is certainly not the "easily accessible location" the Commission advocated in the White Paper on Food Safety. Some respondents claimed that the poor travel connections and the resulting long shuttle journeys have discouraged potential members to apply.<sup>81</sup> Hence, the political decision to locate the agency in Parma is not only costing time and money but also has a potential impact on the quality of EFSA's science.<sup>82</sup>

Recruitment was further hindered by the amount of applications, the length of the formal procedures, as well as by restrictions concerning the grade of staff to be hired.<sup>83</sup> Often agreement on the list of posts by the European Parliaments was late, such as in 2005 when the number and the level of staff to be hired were not available until June of the same year.<sup>84</sup> The EP then downgraded 38 posts "for some of which recruitment was already completed" (see also Chapter 6). Even as the management board intervened and reinstated 19 of the 39 posts, the EP action had "a negative impact on the attractiveness of EFSA scientific jobs."<sup>85</sup>

Only when EFSA moved to Parma did staffing levels start to increase significantly. But while in the early years the number of applicants per vacancy was high, the quality of the applicants was not always as high as required. EFSA's aim is to attract the best. "Clearly, people with such profiles are rarities in the European labour market."<sup>86</sup> Moreover, the number of applicants per vacancy has decreased, which according to some interviewees reflects the decreased attractiveness of EFSA scientific jobs. The geographic distribution of both staff and applicants also posed problems. Belgium, the initial host country, provided the major proportion of staff in the early years and since the move to Parma the majority of applicants is of Italian origin.<sup>87</sup>

As staff progressively moved to Parma and newly recruited staff immediately took up their posts in Parma from October 2004 onwards, it has been difficult to build up an EFSA culture. These difficulties are exacerbated by the problems EFSA experienced in retaining its staff, as indicated by a relatively high turnover in the early years, and the changes in leadership (three directors in four years) with associated changes in styles and directions.<sup>88</sup> Most interviewees indicated that only since the agency has become fully operational in Parma a culture has started to develop.<sup>89</sup>

### *From scientific expert services to scientific cooperation and assistance*

As the lack of in-house scientific expertise to undertake preparatory risk assessment work was an important reason for establishing a permanent food agency, the majority of the first staff members were scientists. They were assigned to the different panels to assist the experts in their work. Many of the first staff members, recruited by the implementation group, came from the Commission where they had already been working with committees of experts.<sup>90</sup>

Moreover, in order to provide further scientific and technical assistance, "beyond assisting panels and having questions answered", the agency has been recruiting scientists for its own Scientific Expert Services (SES). Rather than building its own laboratories, the agency attracted staff, for example, with knowledge of quantifying risks and conducting statistical analyses or with expertise in hazard and exposure assessment methodologies so that the agency could "pro-actively set its tasks".<sup>91</sup> In that way, according to some interviewees, time and money have also been saved, for "not every single issue needs extensive and time-consuming panel consultation".<sup>92</sup>



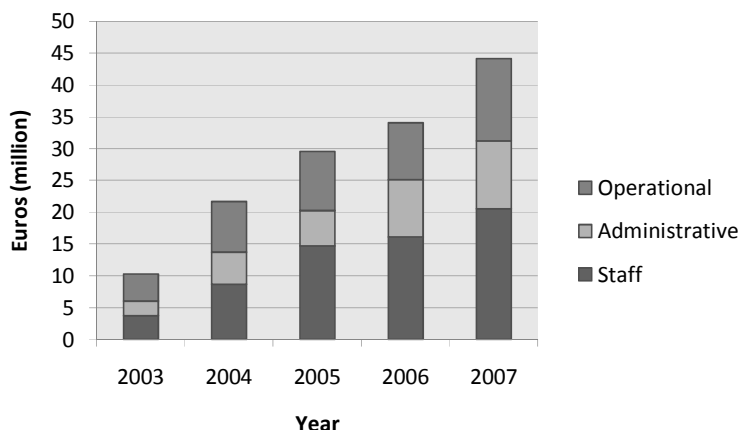
The build-up of in-house expertise was halted by an internal reorganisation following the 2005 external evaluation of the agency. Whereas scientific cooperation and assistance were initially merely part of the SES, these activities were organised in a separate department under the science directorate and effectively replaced the SES. The changes to the agency's formal organisational chart reflected the perceived need to increase attention for its environment (see below), notably working more closely with national agencies and their experts as well as with research institutes and centres in the member states.

### *To fee or not to fee*

Even though its budget shows a steady growth (see Figure 8.4), EFSA suffered from a lack of financial resources, especially in its early years. The Parliament, locked in a struggle with the Council and determined to show its teeth, used its power to put a substantial part of the agency's budget in reserve pending a decision on the permanent location. The resulting budget shortfall reduced the agency's ability to recruit staff and make the committee and panels operational.<sup>93</sup>

In 2007, the agency was faced with another financial setback when the Council decided to reduce the budget heading under which EFSA operates, basically implying that the agency would have to stop growing and could not reach the required capacity. The budget cuts came at a time when EFSA's workload was rapidly increasing as a result of new legislation on such issues as novel foods and food additives. The chair of the board and the director sent a letter to the EP to call attention to the issue and seek support for reinstating the increase in the authority's budget.<sup>94</sup>

The Authority is still in a critical development phase and freezing the budget at current level will inevitably affect its ability to provide the scientific basis for legislation in the area of food and feed safety, which is its *raison d'être*.



**Figure 8.4** – Budget development (2003-2007)

Sources: EFSA annual reports

In order to compensate for the budgetary shortfall, EFSA announced that it might have to start collecting fees from food companies for its work. Whether the agency would be

able to charge fees to industry for specific authorisation services was left open in the founding regulation.<sup>95</sup> Given the emphasis on its independence, the introduction of fees has been heavily debated ever since the agency's creation, with strongly divided opinions. The reliance on industry fees might lead external actors to perceive EFSA as less independent. "If the money received from large biotech companies is part of your ability to function, then you don't look very independent", says one interviewee.<sup>96</sup> Even if the introduction of a fee system does not result in a real threat for its independence, the mere perception thereof could be detrimental for EFSA's reputation.

In 2006, the Commission launched a public consultation on the possible introduction of a fee system. Unsurprisingly, industry reacted with reluctance. EFSA was not necessarily in favour of a fee system either. Respondents note that given the fluctuations in the number of applications, EFSA would probably never be able to generate a flat rate income through fees. It would therefore always remain dependent on a Community subsidy. Moreover, charging fees introduces an element of uncertainty in the agency's resource allocation and planning which, according to the management board, can have a negative impact on the scientific advice it can deliver.<sup>97</sup>

The use of fees is also bound to lead to problems in its relation with the Commission as its main client. When companies have to pay a fee, they expect to be given priority. This would mean the Commission has to wait longer for its opinions.<sup>98</sup> In general, the introduction of fees can result in skewed priorities towards the needs of companies rather than maintaining "a balance across all its activities when determining its work programmes."<sup>99</sup> The decision to allow EFSA to charge fees is thus essentially a political one that has important consequences for the agency's activities and its relations with other actors. Neither the agency nor the Commission and member states have been willing to face these consequences in the agency's formative years.

### *The board as guardian of the agency's independence?*

EFSA's management board has a particular interest in safeguarding the agency's independence, for instance, when it comes to funding. In the early years, the board and agency were almost indistinguishable. The fact that the board had been appointed and was having its first meetings while the first director was yet to be hired, made it possible and sometimes also necessary for board members to meddle with the agency's daily operations: "At the beginning there was no staff. That made the board perhaps look more occupied with the day-to-day running of the agency. But there was just no one else to do so."<sup>100</sup>

The role of the board has gradually changed.<sup>101</sup> The chair of the board initially represented the agency externally. But this task was taken over by the first director, as soon as he was appointed.<sup>102</sup> Furthermore, once basic structures were in place and documents concerning procedural issues were adopted, the board's interest became more strategic.<sup>103</sup>

One of the board's main tasks is the adoption of the work programme. The director makes a proposal, and the board then comments upon it after which it adopts a revised version of the work plan. The revised version usually does not differ much from the one proposed by the agency. As about 90 percent of what EFSA is proposing to the board is followed, it would seem that the board is not very critical.<sup>104</sup> Interviews reveal that the relations between the agency and the board have generally been easy. Especially after the early days, the board concentrated on the overall picture, not delving into the details of documents the agency put up for adoption. Even if the board did not agree on certain paragraphs, they have adopted documents in the understanding that the agency would

alter such paragraphs. As for the 10 percent where the board made objections, these have often come from the side of the Commission. An interviewee gives an example:

We have now twice proposed to raise the indemnity of the experts on the panels from 300 to 450 Euros a day. Most of the members of the board did not object until the Commission reacted to the proposal. Then the other board members really started to go through the documents. As the board is responsible for the budget, they were also sensitive to the Commission's argument that the agency would have budget problems coming up in the next year. So the board rejected it. But if the Commission would not have been so against it the board would have probably accepted it.<sup>105</sup>

An analysis of the board's decision making shows that members often follow the Commission representative, also when it concerns the work programme.<sup>106</sup> The dominant position of the Commission within the board is of course not surprising, in view of its information lead, particularly on staffing and budgetary matters, and its technical know-how and given the board's obligation to ensure that the work programme is consistent with the Commission's priorities.<sup>107</sup> It does, however, belie the Commission's claim that it has no control over agencies, in this case EFSA, whereas it can be held accountable for their actions by the Parliament. And it is perhaps for this uneven relation between the Commission representative and the other board members that the external evaluation report concluded that the composition of the board "probably" contributed to EFSA's independence.<sup>108</sup>

Board members' nationality has played no role in the board's decision-making. Even though posts in the board have rotated among members from different countries and the large member states have always been part of the board through a board member, respondents agree that board members have generally shown unaffected by their nationality.<sup>109</sup> In practice, the absence of member state representation might thus have led to a lower level of politicisation compared to other agencies' management boards.

But the absence of member state representation has also increased the Commission's role. Besides its influence over the board's decision-making, the Commission has exercised considerable influence over the board's composition, leaving the Council limited choice. For the selection of the first board, for instance, the Commission presented a list of 'only' 30 candidates for 14 posts (Kanska, 2004: 716). The same happened with the selection of the first director. It was only after the Commission had short-listed three candidates that the board became involved.

### *From confrontational to appealing leadership*

At the time of his appointment as EFSA's first director in 2002, Geoffrey Podger was Chief Executive of the UK Food Standards Agency (FSA) and had been responsible for its establishment in 2000.<sup>110</sup> Podger believed strongly in delegating responsibility (e.g. for science) when there were staff available to delegate to. Heads of units managed their dossiers "in full autonomy", and the management team, consisting of the director and the heads of departments, met on an infrequent and informal basis.<sup>111</sup> Although he spent over half of his time on administrative matters including recruitment, finance and the move to Parma, Podger was more a "political animal" than a manager.

A major cause of tension in the early years concerned the relationship with the Commission, particularly EFSA's parent DG SANCO. In an attempt to establish a reputation for independence, Podger was always asserting the autonomy of the agency vis-à-vis the Commission, often starting his speeches saying: "EFSA is completely divorced

from the Commission. [...] Despite the circumstances among divorced couples, you still need to get together again to care for the children.”<sup>112</sup> Some simply say that Podger was on a “collision course” with the Commission,<sup>113</sup> while others note that his approach was meant to clarify the relationship with the Commission: “There was a time in the beginning that the first executive director was actually seeking conflict with the Commission, to demonstrate [the agency’s independence].”<sup>114</sup>

Not only were relations strained with the Commission, but also with the European Parliament. The parliamentarians in the EP’s Environment Committee (ENVI) were occasionally downright hostile to the agency particularly when it concerned EFSA’s opinions on GM products. “But Podger was good at handling them”.<sup>115</sup> For example, when the European Commissioners for Health and the Environment publicly stated that EFSA, in view of the assessment of the risk of GMOs, should deliver better science, Podger sent letters to the MEPs in order to inform them on what EFSA was really doing so as to help MEPs make up their minds.<sup>116</sup>

In November 2005, before completing his five-year term, Podger left the agency to take up a new post as Chief Executive of the British Health and Safety Executive. Until a successor was found, the Dutchman Herman Koëter, EFSA’s director of science, took over. Like Podger, Koëter was of the opinion that some tension between the risk assessor and the manager was healthy.<sup>117</sup> He thus continued Podger’s approach, seeking to further clarify the relationship between the agency and the Commission.<sup>118</sup> In contrast to Podger, Koëter was not a political animal. When Podger’s successor was found Koëter therefore “gladly” resumed his position as director of science and deputy executive director: “In that capacity I am in charge of 75 percent of the EFSA staff (all scientists, more close to our endproduct (scientific opinions) and less often cutting ribbons in Italy or having dinners that do not really appeal to me.”<sup>119</sup>

It took until July 2006 before a new director was appointed, the French Catherine Geslain-Lanéelle. She had a background at the national level, but had been working at the Commission from 1991 to 1993 in DG III (DG Industry and Internal Market) in the area of food safety.<sup>120</sup> Upon the creation of the agency she was appointed as one of the vice-chairs of the board. Hence, because of her close ties with EFSA, her appointment as its director by the same board was a delicate affair. The more so as the Commission reportedly preferred one of the other three candidates, who came from the ranks of the Commission.<sup>121</sup>

Geslain took up her post as the agency was entering a new development phase. While the agency had grown, its structures had remained unchanged. In order to adapt to the circumstances, Geslain introduced several substantive changes to the organisational chart, in particular dividing the science directorate into two directorates, one for risk assessment and one for scientific cooperation.<sup>122</sup> Emphasising the agency’s independence, which had been considered of utmost importance in its early years, had become less necessary. Geslain felt the relation with the Commission needed to be improved and that more use of national authorities’ expertise should be made. Cooperation and networking became the new buzzwords.

### *Demonstrating its independence from the Commission*

The Commission is EFSA’s main client. Therefore, one of the first units created within EFSA was a special unit for inter-institutional relations devoted mainly to interactions with the Commission. A former member of the implementation group who was originally working for the Commission led the unit. Also DG SANCO created a special unit,

a novelty as compared to the relations between the Commission and other agencies, in order to maintain day-to-day relations with the agency.<sup>123</sup>

The Commission's unit on relations with EFSA serves as an interface between the Commission and the agency, allowing each to concentrate on its own tasks.<sup>124</sup> All formal questions to and answers from the agency pass through the unit. As the agency initially experienced difficulty in answering vaguely and imprecisely posed questions, Podger requested that a process be put in place for the Commission to better define their questions. After initial refusal of the Commission to do so, the unit now plays an important role in checking the terms of reference of the Commission's requests. In addition, by attending scientific committee and panel meetings, Commission experts ensure that questions put to EFSA are understood by EFSA's independent experts (Gabbi, 2007: 8-9).<sup>125</sup>

In spite of the structural arrangements designed to enable the interaction between the two entities, the relation between the Commission and EFSA in the early years was conflictive. "I don't think the Commission had ever really realised what the Regulation in practice would mean for its functioning", a respondent says.<sup>126</sup> Most tasks currently performed by the agency were previously carried out by or under the control of the Commission. The experts 'remaining behind' in the Commission found it difficult to accept their changed role, no longer being responsible for science.<sup>127</sup> They felt threatened by EFSA, and, afraid of losing even more tasks, thus attempted to retain their influence over the new agency.<sup>128</sup>

This has been reflected in what a respondent called "a rather paternalistic view" of the agency.<sup>129</sup> In the early days, the Commission wanted the agency to work solely on formal requests for advice.<sup>130</sup> The Paeps report found that other stakeholders had "the feeling that the Commission sets EFSA's agenda, and that resource allocation is potentially driven by response-to-request rather than by the magnitude of potential risk".<sup>131</sup> In addition, the Commission strongly influenced EFSA's work by the mere wording of its requests for advice. Especially in the beginning, a respondent observes, "the Commission was often seeking scientific opinions to underpin its policies and legislation rather than really being interested in receiving advice".<sup>132</sup>

The agency has therefore been trying to demonstrate through self-tasking that it is not simply a means to legitimise the Commission's policies. According to EFSA's first director: "EFSA should take up issues that others either aren't or aren't yet worrying about – issues that go beyond what is trendy in risk assessment at the given moment."<sup>133</sup> The agency has thus issued several opinions without having been requested to do so by the risk managers.<sup>134</sup> In the case of blue tongue, for example, the agency decided to do more investigations as a self-mandated addition to the Commission's question, in spite of the Commission's concerns.<sup>135</sup>

In the early days of the agency, the Commission complained about delays in the provision of EFSA's advice. While not obliged to ask for advice, the Commission in many cases simply needs an EFSA opinion to base decisions on and justify proposing new or revised legislative measures.<sup>136</sup> Hence, "[t]he Commission expressed extreme concern about the fact that, despite of this time pressure on their projects, EFSA still seems to find time to initiate self-tasking."<sup>137</sup> The management board defended the agency pointing out that the timely provision of opinions was important, and that legal deadlines and the Commission's own prioritisation were sought to be met to the extent possible, but that it could not mean that EFSA would compromise on the quality of its science.<sup>138</sup>

The founding regulation is fuzzy on what the amount of self-tasking vis-à-vis Commission-requested work should be.<sup>139</sup> How much time and money the agency actually

spent on self-tasking in the early years is not exactly clear. Estimates vary from about 15 percent of the resources of the science department to around four percent of the agency's activities. Judging from these estimates, the amount of self-tasking has been limited, maintaining the balance between answering the questions asked by the Commission and employing self-initiated activities.<sup>140</sup> Respondents nevertheless agree that the mere possibility of self-tasking is crucial for EFSA's autonomous status:

If we find that something has to be done in the area of plant health and the European Commission has difficulty with that, then we can do it anyway because we are independent. It could happen that the Commission does not know what they have to do with it in terms of policy or legislation but regardless thereof we can go ahead anyway if our experts think it is a task for EFSA.<sup>141</sup>

It is important for us that we maintain our own identity, thus uphold our independence from the Commission. So if the Commission wants us to do A and we rather do B, then we by all means have to do B if we have enough reasons to tell the Commission why we do B. And whether they are happy with that or not, that does not really interest me so much. In practice it happens quite regularly that the Commission considers that we are working on issues of which they think we should not be working on.<sup>142</sup>

In turn, EFSA's work, unlike other EU agencies, is significantly affected by the Commission's legislative measures.<sup>143</sup> As the Commission has not always consulted EFSA on legislative proposals that impact its work and the resources available for that work, the agency considered it necessary to instead reinforce its links with the Council and its working groups.<sup>144</sup> An EFSA staff member says:

No other agency has been as often going to the Council like we have. The EMEA was only in the Council for the negotiations of the revised legislation, but there is nothing in the Council that affects them. We have pesticides, GMO's, or additives. [...] No other agency has ever needed to be there as often as we need to be there.<sup>145</sup>

Whereas Council Presidencies have been more and more keen on involving EFSA, the Commission has very much opposed direct contact between the agency and for instance the Council. As far as the Commission is concerned "the agency should not be anywhere near the Council. [...] At one point, the Commission would not even send us the agenda of the Standing Committee", the EFSA staff member continues. The Commission gave up its resistance when it realised that the Council Presidency would invite EFSA anyway.

Much of the tension between the Commission and the agency has been due to the agency's unclear remit regarding risk communication. Particularly in the early years "there [was] a certain irritation, especially at the Commission, about EFSA's focus seemingly biasing towards topics with high media interest rather than often more complex assessment work which is essential to underpin policy and legislation."<sup>146</sup> DG SANCO felt that EFSA was using the media to establish its independence from the Commission.<sup>147</sup> A certain amount of competition with Commission was almost inevitable and, to a certain extent, necessary for the fulfilment of EFSA's mandate.<sup>148</sup> But the agency's constant emphasis on its formal independence inhibited the interaction that SANCO Commissioner Byrne had initially called for in a speech at the board's inaugural session.<sup>149</sup>

In recent years, the agency has acknowledged that, in order for its science to be accepted, it depends on the Commission, and that it cannot solely focus on "objectively

analysing and scientifically interpreting the facts".<sup>150</sup> The Commission, in turn, has gradually become used to the agency's existence and realises that "it is not the only kid on the block anymore". The new SANCO DG Robert Madelin understood that an independent EFSA, "playing a part in the overall food system and cultivating its relations with the various institutions", would not necessarily be a threat to the Commission. Paradoxically perhaps, the functional separation of tasks has made it all the more necessary for the two entities to cooperate in a more structural way (Gabbi, 2007: 5).

### *Politicisation of the risk assessment process*

A similarly paradoxical situation applies to the agency's relation with the member states and their national authorities: precisely because member states are not represented in the management board and their national authorities are not directly involved in the scientific process, as in the case of the EMEA, they tend to regard the agency's advice with much more suspicion and are more inclined to disagree in the Standing Committee and/or in the Council (Krapohl, 2007a). So the Standing Committee usually meets to discuss the proposals or drafts of the Commission<sup>151</sup> and the Council of Ministers often controls whether Commission proposals based on EFSA's advice make it into legislation and policy (Krapohl, 2004: 533-534). "Suppressing political contestation in one arena simply leads to its emerging elsewhere", as Chalmers (2005: 650) describes it aptly.<sup>152</sup>

Indeed, member states regularly bring in political considerations, questioning EFSA's opinions and deviating from them – just like they did before the establishment of EFSA. Even as there are several directives dealing with authorisations in the food and feed area and each of these directives includes a provision on the criteria for authorisation (but see Krapohl, 2004: 535-536), regulatory policy making in the food and feed safety area continues to be politicised, rather than driven by scientific evidence.<sup>153</sup> This politicisation is strikingly illustrated by the examples of GM and cloned food (see, for instance, Chalmers, 2005; Buonanno, 2006: 275-276; Borrás, Koutalakis and Wendler, 2007; Christiansen and Polak, 2009; cf. Buonanno *et al.*, 2001).

*Genetically Modified food* EFSA has on several occasions advised the Commission to authorise GM food products. The Commission has usually followed EFSA's advice. Although certain member states (such as the Netherlands, Sweden and the UK) are in favour of authorising GM products, GMOs are still considered with suspicion in a large number of other EU member states (notably Austria, France and Germany). This led to a deadlock in the Standing Committee and the Council of Ministers, with no vote at all or split votes ever since the EU moratorium on the marketing of GMOs ended in May 2004.

In accordance with the comitology procedures, the Commission has adopted authorisations, even though they were not supported by a qualified majority of member states. Member states have been highly critical of this practice, accusing the Commission of not being sensitive enough to the concerns raised against GM products. In reaction, some member states have disregarded the Commission's authorisations and have adopted "safeguard measures" banning GM products from their markets on the basis of "remaining scientific uncertainty", thus casting serious doubt on the risk assessment carried out by EFSA. Ministers openly criticised EFSA's GMO risk assessments, calling for a change in the approach taken.

In April 2006, the Commission, under increased member state pressure, admitted that GMO assessment needed improvement. Environment Commissioner Stavros Dimas and SANCO Commissioner Markos Kyprianou called directly on EFSA to consider member states' concerns in the scientific evaluation phase or give better reasons for not doing so. When the Commission feels a member state's observation "raises important new scientific questions not properly or completely addressed by the European Food Safety Authority opin-

ion,” the Commission may suspend the procedure and refer back the question for further consideration by EFSA.<sup>154</sup>

In the agency's early years, the Council had sought to increase its influence over the authorisation of food products, by inserting a so-called ‘administrative review clause’ in a number of regulations, including the one on GM food and feed. The clause empowers the Commission to review EFSA opinions, thus impinging on the agency's autonomy and undermining its authority. Then, the management board vehemently objected to the insertion of the clause, sending letters to the Commission, the Council and the Parliament that were also published on EFSA's website.<sup>155</sup>

Whereas the Commission maintained that it was not putting up for debate the working practices of EFSA or its earlier opinions, Commissioner Dimas during a press conference openly questioned the quality of scientific opinions rendered by EFSA saying that the opinions “have relied exclusively on information provided by companies that look at short-term effects” and that “EFSA cannot give a sound scientific opinion on long-term effects of GMOs”.<sup>156</sup> The agency saw the statements as a direct attack, and feared that the Commission's proposals would further ‘politicise’ the GM approval process.<sup>157</sup>

*Cloned food* The politicisation of the risk assessment process is also illustrated by the recent example of cloned food. In response to the announcements that the US FDA would consider the safety of cloned food, the Commission requested EFSA to provide an opinion. It also asked its advisory group, the European Group on Ethics in Science and New Technology (EGE) to look at whether cloning animals for food is ethically justified. Whereas EFSA on 15 January 2008 tentatively concluded that cloned food was safe for consumption, the EGE declared on 17 January 2008 that it had doubts as to whether the production of cloned food was ethically justified.<sup>158</sup>

Just as with EFSA's opinions on GM food products, its draft opinion on cloned food provoked critical reactions from environmental organisations and certain member states. The French Minister of Agriculture for instance said that he would resolutely say *non* if he would be served a piece of cloned meat.<sup>159</sup> Even though the agency had not rendered its final opinion, the perceived disagreement with the Ethics Group (as well as the agreement with the US FDA that ‘coincidentally’ issued its opinion on cloned food a day after EFSA) immediately forced it into a defensive position.<sup>160</sup>

The examples of GMOs and cloned food show that while on paper risk assessment and risk management may be clearly separated, in practice there is often no sharp distinction between science and politics. Too much emphasis on their separation, both functionally and structurally, might even be counterproductive from the agency's point of view, as it allows the Commission and the member states to distance themselves from EFSA and use it as a scapegoat (*cf.* Alemanno, 2006), as is pointed out below. Whereas controversies over food are almost inevitable in modern societies, also in the EU, in view of socio-economic and ethical differences, EFSA risks becoming a victim of such controversies when they lead to questions about the agency's authority.

Moreover, the examples above demonstrate the importance of involving the member states in the scientific process in order to establish credibility in EFSA's work. Credibility does not automatically follow from objective scientific expertise. When scientific expertise does not (or is not perceived to) build on knowledge in the member states, the member states are less inclined to accept such expertise and more likely to question it. “The prevalent harmonisation strategy [in which EFSA centralises scientific expertise] aggregated EU-national disharmonies rather than reduced them” (Levidow and Carr, 2007: 891-892).

Apart from increasing the diversity of experts' scientific views to make EFSA expertise more broadly recognised, one of the main recommendations of the 2005 external evaluation of EFSA was therefore that the member states and their national authorities,



by design not co-opted in the decision-making bodies of EFSA, would have to be involved more closely in the agency's work, especially its scientific activities.<sup>161</sup>

### *Towards closer involvement of national authorities*

Given the context in which the agency was created, it is not so strange that it required time for EFSA and the national agencies to adjust to each other and to the new institutional landscape in which they found themselves. At the time of EFSA's creation the conditions for cooperation were not particularly favourable: mutual trust and understanding still needed to develop. Establishing relations with national agencies therefore required a careful approach. As a staff member explains:

I am not going to talk with those agencies too early about what they should not do because EFSA could do it. [...] I did immediately go the national food agencies to explain this. I said: 'Do not think we want to be your competitor or a sixteenth national organisation. We just want to render European opinions, by experts from all member states, free from political considerations, and based on accepted methods'.<sup>162</sup>

Hence, the agency focused on the quality of its own science. The expectation was that a high level of quality would convince national authorities to cooperate, and that they would eventually realise that they do not necessarily have to perform all risk assessments themselves anymore.<sup>163</sup>

This approach worked to some extent. The fact that some agencies, such as the Dutch Food and Consumer Product Safety Authority (*Voedsel en Waren Autoriteit*, VWA) have not increased their assessment unit in view of EFSA's activities, is an indicator of EFSA's increasing scientific credibility among national authorities.<sup>164</sup> Other national agencies, however, continue to conduct their own assessments, reluctant to rely exclusively on EFSA, especially when it concerns 'new' food. Moreover, some respondents warn against the negative side effects of EFSA taking over activities from national agencies and argue in favour of balancing scientific work undertaken at the European and national levels.

In some countries, national authorities might become redundant when EFSA is doing its job. National politicians, particularly in smaller countries, might then ask why there is still a need for a national agency. But if you do not have experts in the member states anymore, there can be no pooling of efforts. So somehow a balance must therefore be struck.<sup>165</sup>

The advisory forum (AF) was created to play a crucial role in striking this balance. It would function as a platform for the exchange of scientific information among national agencies and between them and EFSA. In practice, the forum has been playing a limited role in the early years. The AF, rather than increasing information sharing, mainly served as a stage for EFSA to inform national agencies on the progress of its work.<sup>166</sup> Several reasons can account for the limited role played by the forum in the early years.

The AF is made up of very different people in terms of national background, hierarchical level and expert knowledge. Particularly in the early years, these people still needed to get to know each other and develop a level of mutual understanding. Podger, himself a former national agency chief executive and therefore particularly sensitive to the needs of national authorities, considered that the time was not ready yet for intensified cooperation. Arguably, the intensified cooperation among national agencies and EFSA that has occurred in recent years has however been made possible by the foundations laid in the first few years of EFSA's existence.

The agency did not take away competences from national agencies (in contrast to the EMEA in the pharmaceuticals area), but was set up in parallel to national agencies.<sup>167</sup> So because a lot of food safety agencies at the national level either did not exist or were created around the same time as EFSA (Krapohl, 2007b: 41),<sup>168</sup> member states were initially represented by national scientists or experts rather than the heads of their national food agencies. This situation not only inhibited networking, it also led several (often larger) member states to, in turn, represent less senior officials than the head of their national agency. Certain member states, dissatisfied with the AF's functioning, even threatened to discontinue their participation.

Moreover, national food agencies have widely varying responsibilities. There are only two member states, France and Germany, in which risk assessment and risk management are separated as in the case of EFSA (and which consequently experienced similar conflicts between risk assessment agencies and political risk managers as EFSA); in most member states, such as in the UK and the Netherlands, risk assessment and management are the responsibility of one agency. As risk management does not fall within the realm of EFSA, the forum can only deal with risk assessment and communication matters.<sup>169</sup> Heads of national food agencies therefore established a network separate from EFSA that provided them with a platform to exchange views and share ideas also concerning risk management.

Importantly, even though there have been disputes between national agencies and EFSA, often as a result of different approaches to risk assessment,<sup>170</sup> there have not been any official cases of conflict.<sup>171</sup> The differences that occur are mainly among member states and between member states and the Commission in the risk management process. When they are not able to resolve their differences based on factors other than scientific arguments, however, the member states and the Commission tend to blame EFSA (Buonanno, 2006: 276). As EFSA's counterparts in the member states understood the agency's difficult position, for they were often at loggerheads with their risk managers themselves, cooptation of national authorities in the agency's scientific work, might have prevented some of the controversy over EFSA's science.

Since her appointment in 2006, EFSA's second director has therefore been increasing the agency's efforts to work together with member states' food agencies, including in the area of GMOs.<sup>172</sup> Whether such increased involvement by national agencies in EFSA's scientific work leads to more political acceptance and less interference from politicians remains to be seen, however. Several respondents pointed to the lack of contact between member state politicians and their national authorities who are involved in the work of EFSA through the AF:

Sometimes they are not aware of EFSA's opinions. This is because we send our opinions to the AF. Members often represent risk assessors. If such a body hasn't done its work in disseminating the opinion to the national risk managers such as ministries then these actors won't know.<sup>173</sup>

As a result, national representatives in the Standing Committee or the Council might adopt a position that differs from the position adopted by the representatives of national agencies in the AF.<sup>174</sup> Hence, EFSA's legitimacy not only depends on its networking with national authorities and scientific bodies but also on its relations with political and other bodies in the member states. Realising this, the agency in 2007 established a network of national focal points to facilitate the flow of information and dialogue between EFSA and national food safety networks.<sup>175</sup> Yet, EFSA being a scientific body, cooperation through the focal points remains scientific rather than political.

*Between industry and consumers*

Securing independence from politics by separating risk assessment and risk management and dividing tasks among the agency and the EU institutions has, as a result of experience in the past, received much more attention than isolating EFSA from commercial influences.<sup>176</sup> For one thing, because the agency initially was mainly involved in post-market control of food and feedstuffs, there was often no formal direct relationship between industry and agency. Nowadays, however, the agency allocates the majority of its resources to assessing the dossiers submitted for pre-marketing authorisations in case of food and feed additives, GMOs, pesticides, novel foods and health claims.

From the start, industry has been quite positive about the agency.<sup>177</sup> This is not surprising as industry is considerably benefiting from its centralised procedures. Companies no longer have to go through all the member states' national agencies. Instead they have one contact point at the EU level. The creation of the agency in effect lowers the costs of regulation for the industry, especially because EFSA does not (yet) charge fees for authorisations. The economic incentives are thus strong, particularly in the case of GMOs where there are still relatively few companies (Kanska, 2004: 716).

Yet, the regulatory process in the foodstuffs sector is less rigorous than in for instance the pharmaceuticals sector. There are many different pieces of legislation which are not always consistent. This has an impact on EFSA's legitimacy as companies use any legal recourse they have when they consider the process not transparent or unfair. EFSA has already had several court cases lodged against it by companies – which it has usually won – and some interviewees expect the number to increase.<sup>178</sup> Other interviewees do not consider the number of court cases to reflect a problem with legislation. On the contrary the fact that EFSA has usually won its cases demonstrates that the different pieces of legislation are not that incoherent at all. Moreover, industry uses legal recourse mostly in one sector (pesticides) and the legislation concerning this sector is rather precise.<sup>179</sup>

The situation for consumers is almost the reverse. As the benefits of food safety regulation are distributed over a large group in society and consumers are usually not directly affected by what EFSA does, this makes it difficult for consumer groups to represent their interests within the agency (Kanska, 2004: 716). What is more, consumers have less possibility for making their voice heard, as they do not have legal standing. Whereas companies can challenge authorisations in Court, only persons directly and individually concerned can lodge a complaint (Kanska, 2004: 726). On paper, consumer interests would have been guaranteed through the composition of the board, but, in practice, the first board only contained one member with a consumer background.

Consumer and other groups such as environmental NGOs had high expectations for the agency. It was thus important for the agency to quickly gain their confidence. For that reason the agency sought to ensure a certain balance in its work, not only answering the Commission's questions but also, as was mentioned above, considering "wider scientific issues".<sup>180</sup> The first reactions on the agency's performance from consumer organisations were "quite positive".<sup>181</sup> Initially, as shown in the Paeps report, they evaluated the agency better than other actors, such as the Commission. Whereas consumer and other interests groups welcomed the establishment of EFSA, they have gradually become more critical of it.<sup>182</sup>

Apart from the alleged absence of members with a consumer background in the management board and the criticism that this has raised,<sup>183</sup> the increasingly negative image of EFSA among environmental NGOs was primarily shaped by its opinions on the controversial issue of GM products. Indeed, the controversy between EFSA, the

Commission and the member states, which is more of a political than a scientific nature, helped opponents of biotech food products to intensify their anti-campaign. It inadvertently made it easier for environmental groups to cast even more doubt on the safety of GMOs and to further reduce the credibility of the EU regulatory framework, including the position of EFSA therein (Levidow and Carr, 2007).

During one of EFSA's first meetings with stakeholders in 2003, EFSA's first director put forward the idea to set up a stakeholder consultative platform so as to more closely involve representatives of both consumer and industrial organisations and allow a formal means of information exchange. While EFSA's founding regulation provides for the development of effective contacts between EFSA and interested parties (consumers, industry etc.), such a structure had not been foreseen but was established at the demand of the many interest groups involved in EFSA's work. In order to open up the scientific process, EFSA has further introduced stakeholder colloquia, technical meetings, public consultations, and open days, particularly in response to the GMO debate.

### *The schizophrenic position of the European Parliament*

The European Parliament's position has been ambiguous, or even "schizophrenic", as one interviewee stated. On the one hand, the EP has been an ardent supporter of a strong EFSA. It assigns EFSA with more and more work, such as in the areas of nutrition, additives and pesticides. On the other hand, it is reluctant to provide the necessary financial and human resources.<sup>184</sup> This contradictory situation is not unique to EFSA; other agencies also have to deal with both a specific legislative committee and the budget committee. But whereas in the case of other agencies, the legislative committee was an ally of the agency, the Environment Committee (ENVI) has often been more of an enemy, as several of its members have been highly critical towards EFSA, mainly because of its work on GMOs.<sup>185</sup>

Whereas already in the Paeps report it was noted that "there could be a stronger link to the European Parliament than is currently the case",<sup>186</sup> only in recent years has the agency been trying to reinforce links with the EP, informing it more in detail of its activities and incorporating the EP's input into its work programme more systematically.<sup>187</sup> EFSA can also provide input to the EP in the areas of its mission through a permanent seat on the ENVI Committee and an EFSA official is now designated to liaise with the EP.<sup>188</sup>

## **8.5 Conclusion: food for thought**

EFSA was created in the wake of a number of highly politicised food crises and as part of a fundamental reform of the EU food regime. The BSE crisis and other food scandals have made the pendulum swing from one extreme to the other. Today regulating food, after decades of economic motives, is increasingly focused on public health issues. And EFSA, through its scientific work and transparent actions, is playing an important role in food regulation.

In view of its historic origins, autonomy was made a characteristic feature of the agency's design as well as a guiding principle in its early development. EFSA was created as an independent risk assessment body. But autonomy on paper is not the same as, or does not automatically lead to, autonomy in practice. EFSA's formal autonomy, or rather, the way the agency translated it into reality, resulted in separation from external

actors, notably the Commission. Given the roles of the agency as risk assessor and the Commission as risk manager this to some extent was intended and part of the proper implementation of the relationship between the two. But the agency's translation into practice also led to interference of risk managers in its work and put the credibility of the regulatory system at risk. There are various reasons for this development.

EFSA had a difficult start. The decision on its location was delayed, funding was limited and recruitment was slow, whereas the workload was enormous. At the same time, expectations of clients and stakeholders were high. Although I found a high level of commitment among EFSA staff to meet expectations, the practical problems of the early years hindered the emergence of an EFSA culture (and according to recent reports such a culture has still not developed). Yet, the attachment to independence in combination with quality seemed to have been holding the agency together.

From the start, EFSA has strongly focused on providing independent, high-quality science. Its scientific panels were comprised of independent scientists. Selecting those scientists has not always been easy, as the top scientists often were not the most independent ones, thus displaying a tension between independence and excellence. In spite of its limited financial and human resources, the agency's role increased quite soon after its creation, from the prevention of food risks materialising into crises to the authorisation of, for instance, GM products and the provision of opinions on, for example, nutrition and health claims. Even though foreseen on paper, in practice this meant an increase of the agency's autonomy.

While EFSA's science has generally been considered independent and of high quality, the assessment of GMO's in particular has become a bone of contention with risk managers and NGOs, mainly because of their political objection to GMOs. It demonstrated, however, that the agency has not (yet) built up such a high level of authority that its opinions are accepted without discussion by the risk managers (the Commission and the member states). Emphasising independent science of high quality, EFSA initially did not sufficiently anticipate risk managers' reactions whilst also not adequately co-opting national risk assessment agencies in its scientific work, therewith eliciting precisely the politicisation that it wanted to avoid. The Commission and the member states, not being able to agree on a political level, cleverly shifted the blame to EFSA making the agency the new scapegoat.

As EFSA did not have to deal with long-standing national agencies, this seems to have made cooperation and networking not an immediate concern in the early years, or at least the agency concentrated on building its scientific identity first. The advisory forum, in which (newly created) national agencies are represented, was therefore often not more than a communication channel for EFSA rather than the platform for information exchange it was supposed to be. In addition, national authorities continued to perform their own risk assessments. While their experts are sometimes part of EFSA's panels, they always participate as independent scientists, which inhibits networking among national agencies.

It has often been the board that manifested itself as the guardian of the agency's independence. In that sense, the role of the EFSA board is different than in most other agencies, as it is much more interlaced with the agency's actual work. But the very fact that EFSA board members are independent, and not embedded in national structures, makes it also more difficult for the agency to acquire a degree of legitimacy. Moreover, the absence of member state representatives has increased the actual role of the Commission representative in the board, who exerts a strong influence over the agency's priority-setting. That said, the room to manoeuvre for actors involved is limited given that a lot of the priority-setting of the agency, as agreed upon in the work programme,

follows from the procedures set up in Council/EP legislation (for instance with regard to the review of active substances in pesticides).

EFSA's first director was a strong personality with a clear vision on the agency. He constantly tried to demonstrate the agency's autonomy, in part by engaging in 'self-tasking'. Particularly risk communication, significantly improved since EFSA's creation, has been a continuing source of tension with the Commission, as it occurs on the nexus between risk assessment and management. The agency, with the support of the board, set itself apart from political actors, so as to develop its independent character, which sometimes irritated the Commission (or at least some people in the Commission). This strategy, whereas in the early days perhaps necessary to establish the boundaries of its independence, eventually appears to have backfired on the agency. As also by design political actors are not co-opted in the agency's work (for the EU chose to separate risk assessment and risk management), this seems to have made them occasionally interfere in the scientific activities of EFSA.

Now that autonomy has become less of an issue to emphasise, establishing relations with other organisations such as the Commission and the member states, but also non-state actors, has received more attention. The second director made cooperation and networking with other actors, notably national agencies, her top priority. And in its opinions on GMOs, the agency has taken a more nuanced approach to the distinction between risk assessment and risk management, not positioning itself solely as a technocratic body but also answering, more broadly, concerns raised by member states and NGOs.

Whereas in the short term, food regulation is not likely to become less controversial, especially not where it concerns technological developments such as GMO's, cloned food and nanotechnology, there are signs that a balance is slowly being struck with regard to the integration of scientific evidence into the political debate. EFSA is certainly not an authority (yet), but it has already been an important beacon of change, in spite of (or maybe because of) the difficulties it has experienced in its still young life.

## Notes

<sup>1</sup> Speech by Catherine Geslain-Lanéelle, Executive Director of EFSA, Head of Food Agencies Meeting, Managing the Risk Assessment/Risk Management Interface, Helsinki, 1 December 2006, available at [http://www.efsa.europa.eu/EFSA/Non\\_Scientific\\_Document/dir\\_hoa\\_catherine\\_speech\\_helsinki\\_en.pdf](http://www.efsa.europa.eu/EFSA/Non_Scientific_Document/dir_hoa_catherine_speech_helsinki_en.pdf), consulted on 25 January 2008, p. 4.

<sup>2</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

<sup>3</sup> The crisis had long-lasting effects, not only for the UK but also for other member states and the EU as a whole. This chapter only discusses the effects concerning the creation of EFSA. For more detailed accounts of the crisis and its effects, see Westlake (1997), Chambers (1999), Vos (2000), Grönvall (2001), Kelemen (2004), Krapohl (2004), Vincent (2004), Krapohl and Zurek (2006), and Lezaun and Groenleer (2006).

<sup>4</sup> European Parliament (1997), *Report on 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*, Strasbourg.

<sup>5</sup> Speech by Jacques Santer, President of the European Commission, 18 February 1997.

<sup>6</sup> European Commission, White Paper on Food Safety COM(1999) 719, p. 4.

<sup>7</sup> Interview #1

<sup>8</sup> Speech by Romano Prodi, President of the Commission, 5 October 1999.

<sup>9</sup> James, P., Kemper, F. and Pascal, G. (1999), *A European Food and Public Health Authority: The Future of Scientific Advice in the EU*, Report Commissioned by the Director General of DG XXIV, Brussels.

<sup>10</sup> European Commission, White Paper on Food Safety COM(1999) 719.

<sup>11</sup> Interview #1

<sup>12</sup> European Commission, White Paper on Food Safety COM(1999) 719, p. 17.

<sup>13</sup> Interviews #62 and #72

<sup>14</sup> Lille was given the Railway Agency, and Spain reportedly agreed to drop its demand for the agency to be sited in Barcelona after a Commission fisheries director-general was fired. *EUobserver*, Secret Deal on Fish and Food Safety Authority, 17 May 2002, available at <http://www.euobserver.com>, consulted on 12 January 2008.

<sup>15</sup> Until a permanent location is realised, the agency rents temporary office space – originally designed as hospital facilities – from the community of Parma. The Italian authorities had proposed the former Parmalat headquarters as a permanent location, but EFSA staff opposed this as it was located outside the city of Parma. Permanent headquarters will now be built near the Palazzo Ducale, the agency's official seat.

<sup>16</sup> This in contrast to the US FDA which not only has the responsibility for risk assessment but also has legislative power in the area of food. The FDA, however, is not an independent agency, but placed within the US Department of Health and Human Services.

<sup>17</sup> See for the procedure applied by the European Food Safety Authority to requests for scientific opinions referred to it, Commission Regulation (EC) No 1304/2003 of 11 July 2003 [Official Journal L 185 of 24.07.2003].

<sup>18</sup> Interview #1

<sup>19</sup> Interview #1

<sup>20</sup> See for instance Regulation 1829/2003 on genetically modified food and feed.

<sup>21</sup> EFSA's mission is different from the US FDA which protects citizens' health by monitoring as well as enforcing food safety.

<sup>22</sup> Decisions about self-tasking are usually made by the executive director, in close consultation with the director of science and the chairs of the respective scientific committee or panel. Interview #63. See also External evaluation report, p. 26.

<sup>23</sup> Article 37 of EFSA's founding regulation.

<sup>24</sup> Article 38, para 1(b) of the founding regulation.

<sup>25</sup> Interview #23

<sup>26</sup> Interview #76

<sup>27</sup> Interviews #1, #75 and #76

<sup>28</sup> Article 25, para 8 of the founding regulation.

<sup>29</sup> The AF also includes observers from Norway, Iceland and Switzerland and a representative from the European Commission. European countries which are not members of the EU can participate in the work of the agency as long as they transpose and implement the body of EU food safety legislation.

<sup>30</sup> Article 27, para 1 of the founding regulation.

<sup>31</sup> Article 30 of the founding regulation.

<sup>32</sup> EFSA, Agenda item 5 – Division of responsibilities between the Advisory Forum and other Organs of the EFSA and ensuring coherence between these, DOC AF 04.07.2003 – 3.

<sup>33</sup> EFSA, Letter from Professor P. Wall, Chair of the EFSA Management Board, to R. Madelin, Director-General, Health and Consumer Protection Directorate, European Commission, Consultation on fees, MB 27.03.2007-7.

<sup>34</sup> FPA Market and Management Advice, Assessment of the Current Image of the European Food Safety Authority, Interviews with interested parties and stakeholders, March-April 2004 (hereafter referred to as 'Paeps report'), p. 7.

<sup>35</sup> Or they have been dealt with effectively by EFSA. See, for instance, Ederer and Davies (2005) for an analysis of EFSA's role in handling the contamination of foodstuffs with Sudan dye, arguably "Europe's most expensive food safety issue since BSE".

<sup>36</sup> Interview #75. See also AR 2006, p. 40.

<sup>37</sup> AR 2004, pp. 26, 28-29.

<sup>38</sup> Interview #1

<sup>39</sup> EFSA, Speech of Stuart Slorach delivered at the Inaugural Ceremony of EFSA in Parma, 21 June 2005.

<sup>40</sup> Bureau van Dijk Ingénieurs Conseils with Arcadia International EEIG, Evaluation of EFSA, Final Report, Brussels, 5 December 2005 (hereafter referred to as 'external evaluation report'); Management board conclusions and recommendations, p. 5.

<sup>41</sup> EFSA, EFSA takes forward its work on Nutrition and Health Claims. Consultation begins on draft guidance for health claims applications, Press Release, 16 May 2007.

<sup>42</sup> Paeps report, p. 10. Several interviews

<sup>43</sup> Paeps report, p. 7. Several interviews

<sup>44</sup> The number of opinions is not a very meaningful indicator for the performance of the agency as the complexity of issues varies widely. See for an illustration, AR 2004, p. 19. In order to get a grasp of the level of activity of the agency's panels it is more helpful to look at the number of plenary and working group meetings.

<sup>45</sup> House of Lords, Select Committee on European Union, Seventh Report, A European Food Authority, 16 May 2000, available at <http://www.publications.parliament.uk/pa/ld199900/ldselect/ldeucom/66/6605.htm>, para 61.

<sup>46</sup> Interviews #62, #63 and #72

<sup>47</sup> Interview #72

<sup>48</sup> Interview #1a

<sup>49</sup> Interview #62

<sup>50</sup> See the Court of First Instance's *Pfizer Animal Health* judgement of 2002, Case T-13/99 *Pfizer v Council* [2002] ECR II-3305.

<sup>51</sup> As some claim the Commission has done by filtering the list with nominations for EFSA's scientific panels.

<sup>52</sup> As stated by Stuart Slorach in *Staatscourant*, Europese Voedselautoriteit: geen geld of macht maar degelijke argumenten [European Food Safety Authority: No money or power but sound arguments], 74, 15 April 2003, p. 2.

<sup>53</sup> Interview #1

<sup>54</sup> Paeps report, p. 28.

<sup>55</sup> Interview #60. See also AR 2003, p. 20.

<sup>56</sup> Paeps report, p. 11.

<sup>57</sup> Interview #71

<sup>58</sup> Interview #2. Some claim that the setting up of an agency was not aimed at improving the health of EU citizens at all, but was aimed at enhancing the smooth functioning of the internal market for food. Through the agency, the Commission would be able to put pressure on those member states that were still hindering free circulation, especially of GM products. "Consumer health is treated only instrumentally, as a tool to achieve this aim and not as an aim in itself" (Kanska, 2004: 726).

<sup>59</sup> Interview #72

<sup>60</sup> External evaluation report, p. 5.

<sup>61</sup> Interview #64

<sup>62</sup> Interviews #60; also interview #64

<sup>63</sup> *Financial Times*, EU Bird Flu Alert as Outbreak Spreads to Croatia, 25 October 2005, available on <http://www.ft.com/cms/s/0/bcea3836-4578-11da-981b-00000e2511c8.html>, consulted on 11 January 2008; *EUobserver*, EU health authority criticized for causing bird flu panic, 26 October 2005, available on <http://www.euobserver.com>, consulted on 26 October 2005; *NRC Handelsblad*, Advies om geen rauwe eieren te eten; EU waarschuwt consument, 26 October 2005.

<sup>64</sup> Interview #71

<sup>65</sup> EFSA, EFSA Provides Update on Avian Influenza and Food Safety, Press Release, 26 October 2005.

<sup>66</sup> Interview #64



<sup>67</sup> EFSA, EFSA provides assessment on mercury in fish: precautionary advice given to vulnerable groups, 18 March 2004.

<sup>68</sup> Interview #60

<sup>69</sup> Interview #60

<sup>70</sup> Interview #64

<sup>71</sup> EFSA, EFSA risk communications strategy and plans, MB 12.09.2006 – adopted by written procedure on 8 November 2006; External evaluation report, p. 24 Speech of Catherine Geslain-Lanéelle, Executive Director of EFSA, Head of Food Agencies Meeting, Managing the Risk Assessment/Risk Management Interface, Helsinki, 1 December 2006, available at [http://www.efsa.europa.eu/EFSA/Non\\_Scientific\\_Document/dir\\_hoa\\_catherine\\_speech\\_helsinki\\_en.pdf](http://www.efsa.europa.eu/EFSA/Non_Scientific_Document/dir_hoa_catherine_speech_helsinki_en.pdf), consulted on 25 January 2008, p. 4

<sup>72</sup> Interview #1a. Yet, as panel members are independent, the agency does not automatically have access to information available in national agencies.

<sup>73</sup> Whereas several members were known for being in favour of biotechnology, none were selected that were critically towards the safety of GMOs. Moreover, some members would have been selected for their willingness to reach consensus (Levidow and Carr, 2007: 887-888).

<sup>74</sup> Interview #76. EFSA, EFSA response to report of Friends of the Earth Europe regarding risk assessments of the EFSA GMO Panel, Press release, 29 November 2004. See also Randall (2006).

<sup>75</sup> Letter of Stuart Slorach to Friends of the Earth, Brussels, 19 January 2005; see also EFSA, EFSA Management Board reiterates its confidence in the independence and commitment to transparency of its Scientific Panels, Press release, 17 December 2004.

<sup>76</sup> Interview #63

<sup>77</sup> Interview #64

<sup>78</sup> Interview #71

<sup>79</sup> Interviews #1, #23 and #75

<sup>80</sup> Although some EMEA staff applied for a job with EFSA. Interview #1

<sup>81</sup> Interviews #75 and #76

<sup>82</sup> In 2005, EFSA for instance spent Euro 800,000 of its Euro 31 million Euros budget on getting experts from different Italian airports to Parma. See *Food Quality News*, EU's food agency battles attempts to hijack science, 19 September 2006, available at <http://www.foodqualitynews.com/news/printNewsBis.asp?d=70720>, consulted on 11 January 2008.

<sup>83</sup> In 2003, for example, more than 5500 candidates applied for a job with EFSA. AR 2003, p. 11; External evaluation report, p. 15.

<sup>84</sup> AR 2005, p. 20.

<sup>85</sup> External evaluation report, p. 15.

<sup>86</sup> AR 2004, p. 15.

<sup>87</sup> Interview #75. See AR 2004, p. 15. This is common in most international organisations as well as in the EU institutions.

<sup>88</sup> Interview #75

<sup>89</sup> But not without problems, as shown by the allegations of poor management and low staff morale made by former and current EFSA staff. See *Elsevier Voedingsmiddelen Industrie*, Koëter: 'Kwaliteit EFSA in gevaar', 20 October 2008, available at <http://www.evmi.nl/nieuws/voedselveiligheid-kwaliteit/6325/Koëter-kwaliteit-efsa-in-gevaar.html>, consulted on 18 September 2009; *Elsevier Voedingsmiddelen Industrie*, EFSA zwijgt op kritiek Koëter, 23 October 2008, available at <http://www.evmi.nl/nieuws/voedselveiligheid-kwaliteit/6348/efsa-zwijgt-op-kritiek-koeter.html>, consulted on 18 September 2009; *European Voice*, Clamour of unhappiness at EU agency stirs the Parliament, 13 November 2008.

<sup>90</sup> Interview #64

<sup>91</sup> Interview #64

<sup>92</sup> Paeps report, p. 19.

<sup>93</sup> Interview #76. See also Minutes Management Board Meeting 11 November 2002 and 16 September 2003; EFSA, EFSA Management Board looks at key issues, 22 January 2003.

<sup>94</sup> EFSA, Reduced budget concerns EFSA management board, Press release, 25 January 2006; EFSA, Letter from the Chair of the Board and the Acting Executive Director of EFSA to the Presi-

dent of the European Parliament concerning the Council's common position on the financial framework 2007-2013, Parma, 27 January 2006; See also, Budget cuts undermining food safety warns EFSA, 25 January 2006, available at <http://www.nutraingredients.com/news/printNewsBNis.asp?id=65349>, consulted on 7 March 2007.

<sup>95</sup> Interview #1

<sup>96</sup> Interview #62

<sup>97</sup> Letter from Patrick Wall, Chair of the EFSA management board, to Robert Madelin, DG SANCO, 27.03.2007 – 7 Consultation on fees, available at [http://www.efsa.europa.eu/cs/BlobServer/Non\\_Scientific\\_Document/mb\\_letter\\_on\\_fees,0.pdf?ssbinary=true](http://www.efsa.europa.eu/cs/BlobServer/Non_Scientific_Document/mb_letter_on_fees,0.pdf?ssbinary=true), consulted on 30 March 2007.

<sup>98</sup> Interview #76

<sup>99</sup> Letter from Patrick Wall, Chair of the EFSA management board, to Robert Madelin, DG SANCO, 27.03.2007 – 7 Consultation on fees, available at [http://www.efsa.europa.eu/cs/BlobServer/Non\\_Scientific\\_Document/mb\\_letter\\_on\\_fees,0.pdf?ssbinary=true](http://www.efsa.europa.eu/cs/BlobServer/Non_Scientific_Document/mb_letter_on_fees,0.pdf?ssbinary=true), consulted on 30 March 2007.

<sup>100</sup> Interview #76

<sup>101</sup> Interviews #73 and #75

<sup>102</sup> Interview #75

<sup>103</sup> Interview #62. See also External evaluation report, p. 11.

<sup>104</sup> Interview #62. See also External evaluation report, p. 11.

<sup>105</sup> Interview #62

<sup>106</sup> Interview #65. All board meetings are broadcasted through the agency's website. For this research several of these meetings were viewed.

<sup>107</sup> Interview #72. See Article 25, para 8 of the founding regulation.

<sup>108</sup> External evaluation, p. 10.

<sup>109</sup> Interview #62

<sup>110</sup> Interview #62. See also EFSA, Head of food safety authority appointed, Press release, 2 December 2002

<sup>111</sup> Interview #76. See also External evaluation report, p. 14.

<sup>112</sup> As stated during a joint EPC/KBF Policy Briefing on 9 October 2003 on the Role of the European Food Safety Agency.

<sup>113</sup> Interview #5

<sup>114</sup> Interviews #64, #75 and #76

<sup>115</sup> Interview #76

<sup>116</sup> Interview #64

<sup>117</sup> Interview #65

<sup>118</sup> Interview #23

<sup>119</sup> *Elsevier Voedingsmiddelen Industrie*, Nederlandschap zat Koëter in de weg, 21 February 2006, available at <http://www.evmi.nl/nieuws/voedselveiligheid-kwaliteit/652/nederlandschap-zat-koeter-in-de-weg.html>, consulted on 18 September 2009.

<sup>120</sup> Speech of Catherine Geslain-Lanéelle as nominee to be the executive director of EFSA to the ENVI Committee, Brussels, 23 February 2006. See EFSA's website for her biography.

<sup>121</sup> Interview

<sup>122</sup> Interviews #65 and #76. As a result, Koëter lost his position as director of science and was made 'special adviser to the director'. Minutes of the management board meeting of 23 January 2008.

<sup>123</sup> Interviews #71 and #75

<sup>124</sup> The creation of the unit led to criticism from other parts of the Commission as it would defeat the aims of setting up the agency, that is, transferring tasks to a specialised body in order for the Commission to focus on its tasks as the risk manager.

<sup>125</sup> Interviews #71 and #72

<sup>126</sup> Interview #62

<sup>127</sup> Interviews #62 and #76

<sup>128</sup> EFSA now has about the same number of staff as the three directorates of DG SANCO dealing with food and feed safety together.

<sup>129</sup> Interview #62

<sup>130</sup> Interview #71

<sup>131</sup> Paeps report, p. 11.

<sup>132</sup> Interview #62

<sup>133</sup> As stated by Geoffrey Podger during a joint EPC/KBF Policy Briefing on 9 October 2003 on the Role of the European Food Safety Agency.

<sup>134</sup> Interview #1

<sup>135</sup> EFSA, Letter from Mrs Catherine Geslain-Lanéelle, the Executive Director of EFSA, to Mr Robert Madelin, General Director of DG SANCO, on blue tongue self mandate revision, Parma, 7 March 2007.

<sup>136</sup> Interviews #72 and #76

<sup>137</sup> Paeps report, p. 30.

<sup>138</sup> Interview #76. See also EFSA, Setting of priorities, MB 18.06.2003 – adopted. EFSA, Priorities and openness at EFSA, Press release, 18 June 2003; External evaluation report, p. 14; EFSA, Meeting deadlines cannot be at the price of inferior science: EFSA Management Board confirms commitment to delivering independent, high quality scientific advice in reasonable timeframes, Press release, 27 April 2004.

<sup>139</sup> External evaluation, p. 5.

<sup>140</sup> External evaluation report, p. 23.

<sup>141</sup> Interview #63

<sup>142</sup> Interview #64

<sup>143</sup> AR 2004, p. 38.

<sup>144</sup> Impact assessments of proposed legislation concentrate on the effects for the Commission resources. The effects for agencies are often not taken into account. Interview #62

<sup>145</sup> Interview #62

<sup>146</sup> Paeps report

<sup>147</sup> External evaluation report, p. 24

<sup>148</sup> Interview #23

<sup>149</sup> Speech by David Byrne, Commissioner for Consumer and Health Protection, EFSA: Excellence, integrity, and openness, Inaugural meeting of the Management Board of the European Food Safety Authority, Brussels, 18 September 2002. Interview #71

<sup>150</sup> Interview #62

<sup>151</sup> In contrast to the EMEA, where the Standing Committee rarely meets to discuss the Commission's authorisations.

<sup>152</sup> Interview #75

<sup>153</sup> In addition, Article 14 of the EU's food regulation (178/2002) generally mentions that food shall not be marketed if it is 'unsafe', meaning that it is injurious to health or unfit for human consumption. This article is only to be used when specific legislation on safety requirements is missing or is insufficient because of new science. Interviewees compared the relatively limited amount of pages detailing the procedures for pre-marketing approvals in the food and feed area to the almost 2000 pages of legislation detailing the procedures for the assessment of pharmaceuticals and the over 800 pages of legislation specifying the procedures for the evaluation of chemicals. Interviews #75 and #77

<sup>154</sup> *Environment News Service*, EU alters GMO assessments to satisfy Resistant Member States, 12 April 2006, available at <http://www.ens-newswire.com/ens/apr2006/2006-04-12-04.asp>, consulted on 7 March 2007; *De Volkskrant*, Beter overleg over genvoedsel, 13 April 2006.

<sup>155</sup> See letter to the Council, the Commission and the European Parliament on 19 May 2004, [www.efsa.eu.int/mboard/initiatives](http://www.efsa.eu.int/mboard/initiatives), published 2 June 2004, last updated 7 September 2004, consulted on 9 November 2004; Response to the Management Board from the Commissioner for Health and Consumer Protection, David Byrne, 24 June 2004.

<sup>156</sup> *Reuters*, 'Safety checks on GMOs flawed': EU environment chief, 5 April 2006.

<sup>157</sup> GM food proposals could ‘politicise’ approvals process, 13 April 2004, available at <http://www.foodnavigator.com/news/printNewsBis.asp?id=67051>, consulted on 25 January 2008.

<sup>158</sup> *EUobserver*, EU advisors question ethics cloned food, 17 January 2008, available at <http://euobserver.com/9/25477?print=1>, consulted on 21 January 2008.

<sup>159</sup> *De Volkskrant*, Europa twijfelt over ‘kloonvlees’, 19 January 2008.

<sup>160</sup> EFSA’s final opinion was rendered on 15 July 2008, after a public consultation process, and was much more negative with respect to cloning than the initial draft. *EurActiv*, EU experts say ‘yes, but’ to animal cloning for food, 25 July 2008, available at [http://www.euractiv.com/en/cap/eu-experts-animal-cloning-food/article-174475?\\_print](http://www.euractiv.com/en/cap/eu-experts-animal-cloning-food/article-174475?_print), consulted on 25 July 2008.

<sup>161</sup> External evaluation report, p. 11.

<sup>162</sup> Interview #64

<sup>163</sup> Interview #64

<sup>164</sup> Interviews #64 and #65

<sup>165</sup> Interview #76

<sup>166</sup> External evaluation report, p. 20; IGAS (rapport no. 2004-185)/COPERCI (rapport C-2004-T no. 143), L’articulation entre expertises nationale et européenne en matière de sécurité alimentaire, Décembre 2004.

<sup>167</sup> Interview #73

<sup>168</sup> By the end of 2002, ten out of fifteen EU member states had a national food agency: Sweden (1972), Denmark (1997), Ireland, (1999), France (1999), UK (2000), Greece (2001), Germany (2002), Netherlands (2002), Austria (2002), and Belgium (2002).

<sup>169</sup> EFSA, Discussion paper on developments in the Advisory Forum, AF 04.07.2003 – 4.

<sup>170</sup> There still is for instance limited harmonisation as regards exposure assessment as a consequence of which the interpretation of results varies from country to country. Interview #64

<sup>171</sup> Interviews #1a and #64

<sup>172</sup> Interview #63. See EFSA, Strategy for cooperation and networking between the EU member states and EFSA, MB 19.12.2006; EFSA, EFSA restates its on-going strategy and explains new initiatives for co-operation with member states in GMO risk assessment, Press Release, 22 June 2006.

<sup>173</sup> Interview #60

<sup>174</sup> Interview #65

<sup>175</sup> Interview #65. See also EFSA, Speech by Catherine Geslain-Lanéelle, Executive Director of the European Food Safety Authority, Addressing the EU Permanent Representatives Committee (COREPER), Speaking notes, Brussels, 13 June 2007, p. 7.

<sup>176</sup> Interview #1

<sup>177</sup> Paeps report, p. 28.

<sup>178</sup> Interviews #1, 1a, #23 and #75

<sup>179</sup> Interviews #71 and #72

<sup>180</sup> AR 2003, p. 29.

<sup>181</sup> Paeps report, p. 28.

<sup>182</sup> See EFSA, Management Board Conclusions of the External Evaluation of EFSA and Recommendations Arising from the Report, MB 20.06.2006 – 4 – adopted, p. 2.

<sup>183</sup> In 2004, the European Consumers’ Organisation (BEUC) for instance lodged a complaint to the European Ombudsman. Interview #76. An analysis of the first board members allegedly shows that five of them actually had an industry background whereas only one member was directly associated with consumer organisations (Kanska, 2004: 717). Also in the second board more members had a link with industry than a consumer background.

<sup>184</sup> Interview #62

<sup>185</sup> Interview #62

<sup>186</sup> Paeps report, p. 12.

<sup>187</sup> Interview #62. See also European Parliament, Committee on the Environment, Public Health and Food Safety, The Secretariat, Summary Note. ENVI Committee Delegation to the European Food Safety Authority (EFSA) on 7 November 2005, Brussels, 22 November 2005.

<sup>188</sup> AR 2006, p. 28.



## **PART 4**

### **CASE STUDIES OF AGENCY DEVELOPMENT: MONITORING THROUGH AGENCIES**

To enable the EU to meet future overall greenhouse gas emission reduction targets by 2020, the transport sector must raise its game and improve its environmental performance. Had transport sector emissions followed the same reduction trend as in society as a whole, total EU-27 greenhouse gas emissions during the period 1990–2005 would have fallen by 14% instead of 7.9%.

Previous and current EU policies have mainly focused on improving vehicle technology and fuel quality to reduce pressures on the environment. Trends and projections clearly show that these policies have not been enough to succeed in reducing greenhouse gas emissions from transport and that the effect of introduced mitigation measures has been more than offset by increased transport volumes. To achieve emission reductions, measures and policy instruments must therefore also address demand for transport in a serious way. [...]

To address transport demand, measures and policy instruments must go beyond the transport sector itself and be introduced into sectors of the economy such as households, industry and service, within which the demand for transport actually originates. Setting a realistic but still challenging sectoral target for limiting or reducing greenhouse gas emissions from transport would encourage stakeholders and policy-makers to develop and implement necessary measures and policy instruments. It would also facilitate the monitoring of improvements in the sector's environmental performance.<sup>1</sup>

[N]ot all specialised bodies disclose the grounds of discrimination for individual complaints, which makes it impossible to ascertain how many cases of ethnic discrimination were processed by the legal system during the year.

This weakness relates to a broader message of this report, namely that for discrimination to be recognised and tackled there need to be systems in place for producing relevant and accurate data. This should include data on the circumstances of those groups who are potential victims of discrimination, in all the thematic areas of education, employment and housing, as well as on incidents of racist violence and crime.

This is important for a number of reasons, not least because of the need for evidence-based policies to combat discrimination and racist crimes. For example, whilst there is evidence in this year's report of some innovative positive action practices against discrimination in employment, such positive action is difficult to introduce and apply without accurate equality data on the employment circumstances of those groups who are the targets of such policies.

Meanwhile, in the context of the continuing gaps in our knowledge resulting from the patchiness of equality data, this report demonstrates examples in many Member States where research investigations have had the important function of identifying and bringing to public attention incidents and processes of racism and discrimination in the fields of employment, housing and education.<sup>2</sup>

Relevant and accurate information is invaluable for policy makers attempting to solve problems that cannot be contained by national borders such as environmental pollution and climate change, or problems that are experienced by more than one country at the same time such as racism and discrimination. During the 1980s and 1990s, information on such problems was essentially lacking at the European level, which inhibited policy makers in solving problems in an effective manner. Member states did not always gather data, and if they did, data was often patchy. As a consequence, it was unclear how pressing the problems actually were, what factors could be causing them, and

how they could be effectively tackled. It was thus believed that more reliable and comparable information was needed. The creation of EU agencies was seen as a means thereto.

The excerpts above, from reports on the environment and racism and xenophobia produced by the European Environment Agency (EEA) and the European Monitoring Centre for Racism and Xenophobia (now known as the Fundamental Rights Agency, FRA), testify to the considerable amount of monitoring efforts currently taking place at the EU level through independent agencies. As input for Community policies, the information collected is an important source of potential power in the hands of these agencies. The excerpts also highlight the possible difficulties in collecting data comparable across the 27 member states and the potential tensions with, for instance, the European Commission and the EU member states with regard to evaluations of the effectiveness of existing EU policies and advice on new policy measures and instruments.

Created as independent bodies to organise expertise at the European level and to involve stakeholders in European policy making, both the EEA and the EUMC have rather similar structural features and formal characteristics. Together with the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and the European Centre for Disease Prevention and Control (ECDC), they create and coordinate European information networks, connecting institutes and centres in the EU member states. Because they monitor the European environment, racism and xenophobia in Europe, the use of drugs and drug addiction among Europeans, and the spread of infectious diseases, these agencies have also been called 'information agencies'. To ensure the credibility of the information they produce, these agencies would have to be free from interference by the EU institutions and the member states.

As the cases below show, the EEA and the EUMC have evolved in different ways. This evokes a puzzle: Why is it that differences exist in the degree of autonomy that these EU agencies have developed? On the basis of their rather similar structural features and formal characteristics, I would expect them to achieve relatively comparable levels of autonomy. How have the EUMC and the EEA developed from when they were created and what conditions or factors have shaped their development?

To answer these questions, the following chapters examine the early development of the EEA, since its inception in 1989 to its first comprehensive external evaluation more than ten years later, and the EUMC, from its genesis in the mid-1990s until its metamorphosis into the Fundamental Rights Agency more than a decade later. It describes how the EEA and the EUMC have developed immediately after their formal creation and explains why they have developed in different ways in their early years.

## Notes

<sup>1</sup> EEA, *Climate for a transport change: TERM 2007: indicators tracking transport and environment in the European Union*, EEA Report No 1/2008, p. 4.

<sup>2</sup> EUMC/FRA, *Report on Racism and Xenophobia in the Member States of the EU*, 2007, p. 1.

## CHAPTER 9

### MONITORING THE ENVIRONMENT:

### THE CASE OF THE EUROPEAN ENVIRONMENT AGENCY

Our responsibility is not just to listen to the political signal, it is also our responsibility to attend to the scientific signal, enabling policymakers to be ‘avant-garde’.

– EEA official<sup>1</sup>

#### 9.1 Introduction: putting information to work

The European Environment Agency (EEA) started off with a limited amount of formal autonomy. Over time, however, it has developed a considerable level of autonomy with regard to the Commission, the member countries and other actors. Indeed, since its creation, the EEA has grown “into a mature organisation that has an accepted position on the European stage”, in the words of the Commission, the agency’s main principal.<sup>2</sup>

This chapter shows that, although the agency was not highly regarded for its work in the beginning and the relevance of its work for EU policy making was initially questioned, it slowly seems to have built a reputation for quality. It has assumed an important role in supporting EU policy making on environmental matters, thus putting information to work. The agency’s leadership has been crucial in carving out a niche for the organisation, despite external actors, notably the Commission’s, initial hostility to its ambitions.

The remainder of this chapter explores and explains the EEA’s evolution, concentrating on the first decade of its life. Section 9.2 outlines the historic origins of the EEA. In Section 9.3 the agency’s formal autonomy is described on the basis of design characteristics such as objectives and tasks, and organisational structure. Section 9.4 considers the actual autonomy of the EEA, setting out how the agency clarified its role in the policy-making process and how it gave shape to its character as a network organisation. This section also gives an account of how the agency has sought to become accepted by its clients and stakeholders and how it managed relations, notably with the Commission, but also with the member states, the European Parliament (EP) and other EU and international organisations. The chapter concludes with an exploration of the possible explanations of the EEA’s evolution (Section 9.5).

#### 9.2 Historical background to the EEA’s creation: greening Europe

The European Environment Agency (EEA) was created on 7 May 1990 on the basis of Council Regulation (EEC) No 1210/90.<sup>3</sup> Although the environment was not mentioned in any of the Treaties founding the European Communities, the EU had enacted a substantial body of environmental legislation since the 1960s (Weale *et al.*, 2000; Jordan, 2002; *cf.* Lenschow, 2005). Until the creation of the EEA, however, data and information



to assess the state of the European environment and the effects of these legislative measures were lacking.<sup>4</sup>

### *Laying the foundation: the CORINE programme*

The foundation for the creation of the EEA was laid in 1985, when the CORINE ('coordination of information on the environment') programme was established.<sup>5</sup> The CORINE programme served as a pilot project for the collection of data on Europe's environment. The programme officially came to an end in 1990, but parts of the programme were later transferred to the EEA. A key lesson drawn from the CORINE data gathering system was that it proved difficult to gather objective, reliable, and comparable data on environmental issues for the whole European continent. Data collection capacities were either lacking or varying data gathering methodologies were used, making it difficult to aggregate data from the national to the European level. Experts identified the need for coordinating national resources and structures, which required a body that could amass EU data (Schout, 1999: 88).<sup>6</sup>

### *The Commission and the proposal to create an agency*

Until the end of the 1980s, EU institutions and the member states were mainly focused on the proper functioning of the Internal Market. But in the December 1988 meeting at Rhodes, the European Council declared that it was essential to increase the efforts to protect the environment and to ensure that environmental protection would also become an integral part of other Community policies. EU member states recognised that growing environmental problems had to be met with improved information on the changing environment.<sup>7</sup>

In a speech at the European Parliament in January 1989, Commission President Delors announced "the introduction of a European system of environmental measurement and verification which could be the precursor of a European environment agency."<sup>8</sup> The announcement surprised even the Commission's own Directorate-General Environment (then DG XI) (Jiménez-Beltrán, 1996: 30). Delors' proposal for a body separate from the Commission was strategic. He realised that, although the member states would not agree with expanding the Commission services, they would probably be favourably disposed to building on existing national capacities for collecting and analysing environmental data and information (Schout, 1999; Kelemen, 2002).

In July 1989, only eight months after the EU member states had called for improved information on the European environment, the European Commission presented a proposal for the creation of a European Environment Agency.<sup>9</sup> At the presentation of the proposal, then European Environment Commissioner, Carlo Ripa di Meana, stated that "the main purpose of the Agency is to aid the Member States in meeting the environmental protection and restoration goals, as defined in the Treaty and in the different environmental programmes of the Community" (Jiménez-Beltrán, 1996: 30).

### *A delayed start: the EEA task force and beyond*

The EEA's founding regulation entered into force on 20 November 1993, when the Council decided on the location of the agency – Copenhagen, Denmark. EU member states' disagreements over agency seats had considerably delayed the decision on the EEA's location (see Chapter 5). All member states except Luxembourg had expressed an

interest in housing the agency. By 1992 only Denmark and Spain were left, and eventually Denmark was chosen.<sup>10</sup>

From the official creation of the agency in 1989 to when it became operational in 1994, a special task force was active in DG Environment to prepare the agency's activities.<sup>11</sup> The task force maintained, updated and reported on the activities in the framework of the CORINE programme. It also began working on a draft for the first multi-annual work programme of the agency. The drafting of the work programme was stalled when it became clear that the seat decision would be delayed. Member states did not favour the task force doing the initial interpretation of the regulation. Instead, they wanted the first director – to be appointed by their representatives in the management board – to leave his mark on the organisation.<sup>12</sup>

When the agency's premises were finished in August 1994 on Kongens Nytorv in the centre of Copenhagen, the task force was dissolved. As an informal forerunner, the task force enabled the agency to immediately deliver outputs, in spite of the limited staff (Jiménez-Beltrán, 1996: 35). With only six staff, the EEA began to recruit. For 26 advertised posts, more than 7000 applications were received.<sup>13</sup> The Commission did not provide much assistance to the agency in its early operations. Apart from having no practical experience with setting up agencies at that time, the Commission emphasised the independent status of the agency.

### 9.3 The EEA's design: limited formal autonomy

#### *An information body*

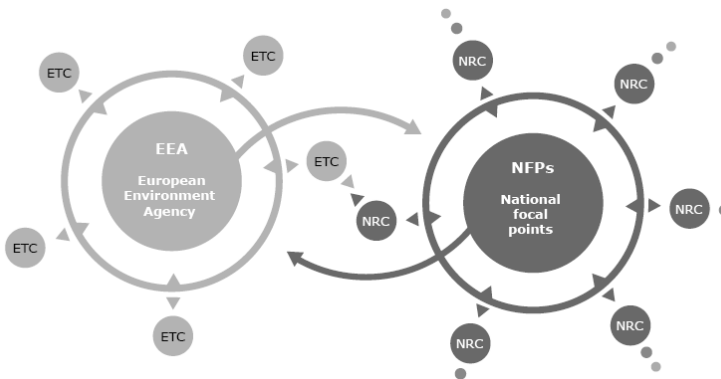
Instead of a (semi-)regulatory authority, such as the agencies discussed in the previous two case chapters, the EEA is an information body. Its formal objective, as laid down in its founding regulation, is to provide objective, reliable and comparable information at the European level to support both the Community and the member states in taking appropriate measures to protect the environment. It must also assess the effects of these measures and inform the public about the state of the environment.<sup>14</sup>

To realise these objectives, the agency carries out a wide range of activities. Its principle task is the collection, processing and analysis of data from which the EEA produces a broad array of reports. Apart from reports addressing particular topics or issues, every five (initially three) years, it must publish a major report on the state of, and since the amendment of the founding Regulation in 1999, also trends in and prospects for the European environment, the so-called State of the Environment and Outlook (SoE) report. The EEA has the freedom to publish this and other reports without first asking for the Commission's permission and without prior approval from the member state representatives in the management board.

Rather than creating new capacities to collect information at the EU level, the EEA relies on existing capacities at the member state level. National institutes and centres provide the agency with their environmental data that the agency then aggregates to the European level. These institutes and centres often have extensive experience with data collection and usually have built up specific expertise over a long period of time. The EEA brings them together in a network of partners at the European, national and regional level "that can add European value to their information systems."<sup>15</sup> As the nucleus in the network, the EEA coordinates the collection, processing and analysis of data, including the work already started under the CORINE programme.

A structure was needed that was not “stand alone” as the CORINE system had been, but that would be built around information delivery to the agency by the different national institutes and centres through a “reporting” system.<sup>16</sup> Therefore, a core task of the agency was to set up and coordinate a European Environment Information and Observation Network (EIONET). The EIONET network is comprised of European Topic Centres (ETCs), National Reference Centres (NRCs) and National Focal Points (NFPs) (see Figure 9.1). In total, the EIONET involves approximately 900 experts and around 300 national institutes and centres.<sup>17</sup>

ETCs are typically national institutes working on a certain environmental topic together in a consortium with other institutes.<sup>18</sup> They execute tasks identified in the EEA’s work programme by gathering and assessing data collected by the National Reference Centres, which are (groups of) experts in national environment organisations on specific themes nominated and funded by the member country. In institutional terms, ETCs are separate entities, however, they are contracted by the EEA and as such fall under the authority of the agency. NFPs are the official contact persons for the agency in the member states.<sup>19</sup> They are also part of the network, but in contrast to ETCs, not subordinate to the agency. NFPs are nominated and funded by the member countries, and remain under their control.<sup>20</sup>



**Figure 9.1** – The EEA and EIONET  
 Source: EEA, *EIONET connects*, p. 2.

### *In support of policy*

The founding regulation grants limited powers to the EEA. The agency gathers data and draws conclusions from the collected information, but the Commission continues to be responsible for drafting policy proposals and monitoring legislative compliance. The EEA can only gather information in support of policy. It cannot oblige member states to develop effective environmental monitoring and information systems or insist on improvement of the quality or quantity of the data that member states provide to the EEA, nor can it compel member states to deliver data to the agency.<sup>21</sup>

With the revision of the agency’s founding regulation in 1999, the Commission proposed that member states “shall cooperate” with the agency, but this was watered down after member states’ resistance so as to read “shall, as appropriate, cooperate” (Schout, 1999: 141). In addition, the agency has suggested that it should undertake periodic quality assurance reviews of the monitoring arrangements in the member

states and make recommendations for their improvement.<sup>22</sup> Neither the Commission nor the member states have been in favour of delegating such tasks to the EEA, however. As there is still a wide variety in national structures for reporting environmental information, such reviews and recommendation could, in effect, force all member states to standardise reporting capacities.<sup>23</sup>

At the outset, some Members of the European Parliament (MEPs) saw the agency play an active role in monitoring member states' implementation of environmental legislation. They perceived the agency not only as a partner to provide information, but also as an environmental "watch dog" (Jiménez-Beltrán, 1996: 30). However, the EEA has not been given a direct role in inspecting factories or plants or enforcing Community legislation by the member states. Apart from the Commission and member states not being in favour of the agency assuming an inspection role, EEA officials themselves recognised that such a function would not necessarily serve the organisation.

Because the EEA depends heavily on member state cooperation for its data collection tasks, it does not want to engage in policing the member states, therewith "probably comprising its ability to obtain reliable information from the member states on a voluntary basis."<sup>24</sup> It prefers to help in a cooperative way to build up information structures, instead of undertaking enforcement functions (Kelemen, 2004: 179).<sup>25</sup> The agency's first executive director warned that such functions could put the agency's independent position at risk.

Giving to the Agency direct tasks of inspection or control of the implementation of legislation, or in environmental management (eco-labelling), or as an arbitration body should affect its main role, distract capacities to it and eventually its possibilities to be recognized as an independent, and credible source of the best available environmental information (Jiménez-Beltrán, 1996: 36).

Moreover, the agency's relationship with its member countries is supposed to be its "fundamental strength".<sup>26</sup> Instead of the rather vertical relationship between the member states and the Commission, the relationship between the member states and the EEA was conceived as more horizontal. The member states are obliged to report to the Commission for compliance purposes. This means that the Commission can take them to the European Court of Justice for non-compliance with EU legislation. Hence, the member states only provide information when they absolutely must. But when the member states provide the EEA with information, they do so on a voluntary basis, for learning purposes. The member states would therefore be more willing to openly share information with the agency, or at least that is what was expected. Mere participation in the EIONET would make member states increasingly inclined to develop effective environmental monitoring and information systems, and deliver data and information on national situations to the agency.

Member states' participation in broader European networks, and the sharing of information will progressively change national structures, introducing harmonisation as a fact more than as a regulated requirement (Jiménez-Beltrán, 1996: 39).

So when its founding regulation was amended in 1999, the agency's information role was enlarged but its tasks and powers remained unchanged. A specific reference was inserted to allow the EEA to report not only on the state of, but also on the 'trends in' and the 'prospects for' the environment. This reference enabled the agency to develop capacity to project the impact of future developments on the environment.<sup>27</sup> In addition, a reference was added on sustainable development.<sup>28</sup> This reference made it pos-

sible for the agency to expand the areas in which it is active, also collecting data and analysing information on the integration of the environment in economic sectors, such as agriculture, transport, and energy.

### *Managing, directing and overseeing the agency*

The management board is the decision-making body of the agency. It appoints the director and decides on the multi-annual work programme (MAWP), the budget and the annual report. To that end, it meets about three times per year. The board is mainly comprised of the senior officials of member countries, generally represented at the director-general level, in order to ensure member state involvement in the work of the agency. As membership in the EEA is also open to countries that are not members of the EU but that conclude an agreement with the Commission, the board currently includes representatives of the 27 EU member states plus representatives of Iceland, Norway, Liechtenstein, Switzerland and Turkey.<sup>29</sup>

In addition, the Commission delegates two officials, from DG Environment and DG Research, to the board.<sup>30</sup> While the Commission formally gives an opinion on the multi-annual work programme, its opinion is non-binding and can easily be overruled by a two-thirds majority of the board members. The EP, finally, designates two independent experts to the board who, apart from representing the EP, must also represent the broader public.<sup>31</sup> So as not to hinder the responsibilities of the EP in terms of control, the individuals representing the EP do not operate with instructions from the EP. With representation from a variety of actors, the board's composition reflects the different interests that the agency is supposed to serve.

As the size of the board, with each member country having a representative, inhibited detailed discussions, preparations for board meetings became increasingly time-consuming and the meeting agendas more and more burdened, it was agreed that a bureau should be created. This bureau consists of the chairperson of the board, the three vice-chairs and one member each from the Commission and the Parliament.<sup>32</sup> The bureau would prepare the board meetings, make executive decisions, and deal with urgent issues. It was established in 1997 and formalised through the amendment of the regulation in 1999. The bureau meets more frequently than the board, about once every two months, and maintains close contact with the agency's executive director.

The executive director of the EEA, like in most other EU agencies, is responsible for the day-to-day management of the agency. He makes proposals for the multi-annual work programme and the budget and is in charge of drafting the annual report. He is also responsible for staff matters. For purposes of recruitment, the director must consider the scientific committee's opinion.

The scientific committee is supposed to oversee the scientific quality of the agency's work. It is currently comprised of 19 independent experts in specific environmental subfields. The committee assists the board and the director by rendering advice on the draft work programme, controlling the quality of EEA reports,<sup>33</sup> selecting the ETCs and reviewing their activities, and appointing new staff.<sup>34</sup> The committee is further playing an important role by identifying new developments and emerging issues, as well as opportunities for the agency to act on in the future.

### *The EEA's staffing and financing*

Most of the agency's staff is employed on a temporary basis. They fall under the Community staff rules (see also Chapter 6). The agency also makes use of national officials seconded by member countries, who operate under the control of the director but remain employed with national agencies.

The agency's funding comes from the Community budget, and more precisely from the budget of DG Environment. Hence, DG Environment can exert a strong influence over the work programme of the agency by aligning it with its own policy priorities instead of allowing the agency to develop its own projects or engage in cooperation with other DGs.<sup>35</sup> Because the agency's budget is included with that of DG Environment, the EEA is "limited in its ability to defend its proposed budget in the adoption process" (Jiménez-Beltrán, 1997: 63). Apart from the Community subsidy, the agency can receive additional funding for specific services rendered to, for instance, member states or other DGs than DG Environment.<sup>36</sup>

## **9.4 The EEA's autonomy in practice: evolving into an institution?**

### *From data gathering to policy analysis*

The interpretation of the agency's mission has evolved over the years. According to Schout (1999: 90), the tasks and activities of the agency reflect the variety of interests of the actors involved in its creation. He distinguishes different camps. One camp consisted of the Commission and certain member states that considered the agency to merely have a data-gathering role. The Commission would use data gathered by the agency to draft environmental legislative measures and to ensure the implementation of Community environmental legislation. The agency's tasks were restricted to delivering facts and figures on the current state of the environment on which policymakers could subsequently base their decisions.

Other member states, mainly Northern European countries, such as Denmark, Germany and the Netherlands, and certain officials in the Commission who were closely involved in the creation of the EEA, formed another camp. This group wanted the EEA not simply to have information gathering tasks, but also believed the agency would have to utilise the data collected to change member states' behaviour. In Majone's (1997a) words, regulate through information. As a respondent remarked:

The agency was not meant to be directing or leading policy, and, yet, in a way that would be its most valuable task, to be able to push policymakers on scientific issues rather than just respond to requests for scientific information from policymakers.<sup>37</sup>

In the early years, the open wording of the mandate led to considerable confusion and even conflict among the agency and its main principal, the Commission, over the limits of the EEA's remit. Whilst the EEA is not directly involved in policy making, in practice its support tasks often imply policy analysis (such as evaluating the efficiency of existing policy measures), the identification of possible alternative scenarios (instead of only the current situation) and policy advice (that is, reviewing policy options and making policy recommendations) (Jiménez-Beltrán, 1997: 62).<sup>38</sup> The controversy over the EEA's report on green taxes, produced at the request of the EP in 1996, illustrates the sensi-

tivities within the Commission on this point, as it thought the agency had gone too far in making recommendations on policy in its conclusions.<sup>39</sup>

In the early years, the agency could not make environmental outlooks and develop scenarios as the Commission considered this to be its own terrain. Conducting scenario studies would imply the assessment of current policies and could point to the ineffectiveness thereof, something DG Environment found difficult to accept. This did not keep the EEA from trying to extend the agency's territory. In its second multi-annual work programme the EEA noted that it wanted to "develop the capacity to identify emerging issues and to give early warnings [as well as to] undertake work to support the Commission in its analysis of such issues and the framing of action to deal with them".<sup>40</sup> The Commission fiercely opposed such a role for the agency as, in its view, outlook and scenario studies would distract from the agency's main tasks and, more importantly, could very well produce findings critical of the Commission's policies.<sup>41</sup>

Gradually, the agency has become more capable of using its information strategically. It tried to influence policy choices by the findings and conclusions drawn from its analysis of data and information.<sup>42</sup> Reports were written in a 'policy-oriented way', which would make them impossible for policymakers to ignore.<sup>43</sup> So whereas in the early years the agency was busy discovering what information was needed and how it would have to be collected, over time it gained an understanding of what information was available and how it could be gathered. Interviewees agree that this enabled the EEA to have an impact on environmental policy making through its information.

Currently, the EEA's data is put to use for policy making and the agency is increasingly involved in drafting policy proposals, revising of specific directives and reporting on policy effectiveness.<sup>44</sup>

Over the last ten years, since its creation, the EEA has evolved from an organisation providing environmental information and data on the state of the environment, to one which is increasingly being asked by the European Parliament, the European Commission and our member countries to report on the effectiveness of existing environmental policies and their implementation.<sup>45</sup>

For instance, in the multi-annual work programme for 2004-2008, the agency proposed a number of projects dealing with policy effectiveness.<sup>46</sup> Whereas in the early years of the agency the Commission would have opposed such projects, it did not object to these proposals this time around. Moreover, the agency has increasingly been involved in drawing up future scenarios and outlooks, exposing environmental trends across the EU. As part of its integrated approach to the environment, the EEA has also been expanding its capabilities by studying interactions among the environment and economic policy sectors such as agriculture, transport or energy.<sup>47</sup>

### *Identifying the agency's clientele*

The founding regulation mentions a variety of potential clients. It was not immediately clear whom the agency would primarily serve: the Commission, the member states or the EP and the public. These different clientele require a different approach with regard to information (Hoornbeek, 2000).<sup>48</sup> If the agency would only have to supply information to European and national policymakers, then specific technical data would be necessary. But if the EEA would also have to provide information to other actors, general

environmental reports would be needed as well. Moreover, such reports would have to be widely disseminated and made publicly accessible.

Officially, in the early years the EEA concentrated its efforts on EU policymakers, notably the Commission, while paying less attention to other potential clients such as the general public.<sup>49</sup> Yet, in reality, the agency spent much time and many resources on compiling general reports, such as the State of the Environment (SoE) report, that were not necessarily aimed at supporting the Commission.

In the first years of its existence, the agency was producing many reports and I think for a good reason. It wanted to make itself visible. And one of the ways to make yourself visible is publishing lots and lots of reports.<sup>50</sup>

While the SoEs in particular were important “flagships” for the agency in its early years,<sup>51</sup> the Commission complained about the scientific quality and the relevance of the reports for policy making. It demanded targeted information, not general reports. The first director of the EEA made it clear, however, that the agency’s mission was not only to support policy making, but also included making environmental data and information accessible to the public. The agency thus sought to serve more than one client with the same approach to information, instead of determining key clients, products and services from the user’s perspective.<sup>52</sup>

The downside of seeking to serve a broad range of clients at the same time, and obtaining visibility among a wide audience, has been the fragmentation of the agency’s output. The absence of “identifying specific target audiences, has given rise to criticisms that the EEA has taken somewhat of a ‘butterfly’ approach moving rapidly across a wide range of subjects, often in a highly visible (but somewhat superficial) way.”<sup>53</sup> While on the whole there was wide support for the work of the EEA, its creation had raised a level of expectation that could not always be met. This caused particular clients, notably the EP, to be dissatisfied with some of the agency’s outputs (Schout, 1999: 106), or the lack thereof. For example, the agency had done little concerning chemicals, despite this subject’s mention in the founding regulation.<sup>54</sup>

It was certainly not only the agency that was to blame. At the outset, difficulties arose in defining the information demanded by the agency’s clients. As long-term or even mid-term strategies for environmental policy both at the national and EU level were often lacking, it was not always clear for the agency what was actually necessary in terms of policy input. Moreover, many of the quality problems could not be attributed to the EEA, but rather to the member states that provided the agency with poor data. But given its precarious relationship with the member states, the agency was reluctant to put pressure on the member states for quality control.

Over time, the agency shifted its output (or rather broadened it) from only general products such as the SoE reports to more targeted services for particular clients, for instance through its website.<sup>55</sup> The agency’s strategy, together with other European bodies, now consists of streamlining reporting into a so-called ‘shared environmental information system’ (SEIS) to improve the quality, relevance and timeliness of information for European and national policymakers.<sup>56</sup> The SEIS must also make environmental information available to the public to inform them in real-time on the environment. Consider the example of Ozone Web through which citizens are supplied with up-to-date information on ozone pollution conditions across Europe.<sup>57</sup>



*Coordinating the EIONET*

A key feature of the EEA is that, for a large part of the data that it gathers, it depends on other organisations brought together in its information network, the EIONET. Apart from mentioning the network's elements, the agency's constituent regulation is rather vague on how the EIONET was supposed to be coordinated, which resulted in quite some discussion between the different actors involved in the network, particularly with regard to the role of ETCs and NFPs.

Due to the prestige involved in having a European Topic Centre (ETC), the decisions on ETCs have been much politicised.<sup>58</sup> Especially in the early years, the board, for instance, made changes to the list of ETCs as proposed by the agency. As ETCs are not only financed by the EEA – they are also supported by the countries in which they are located through a national contribution – this makes decisions on ETCs politically salient.<sup>59</sup> In order to compensate member states without an ETC, member states had a tendency to increase the number of organisations in the ETC consortia, while also obstructing EEA proposals to cut back on ETCs that were not delivering good quality work.

Furthermore, there is great variation in the positions and profiles of National Focal Points (NFPs), also vis-à-vis their management board members.<sup>60</sup> In some cases, such as the UK, the NFP is hierarchically subordinate to the management board member, the latter being the director of the former. Initially, several member states almost automatically considered NFPs as instruments to wield their influence over the activities of the EIONET and therewith, the EEA. Afraid of being 'named and shamed', they thought of NFPs as instruments to provide a check on the information concerning the national situation being passed on to the EEA.

The agency, by contrast, has often considered NFPs as a part of its own organisation. Even though the EEA's founding regulation does not provide the EEA with any power to compel or to coerce NFPs, it was the agency that created and still coordinates the EIONET.<sup>61</sup> Hence, as link between the member states and the agency, NFPs have assumed a dual role.<sup>62</sup> They both represent the member states in the EEA, notably through coordinating the data delivery to the agency, and promote the agency in the member states, for instance by distributing the reports of the agency.<sup>63</sup> Thus, they play an informal role in advising the board member on decisions with the management board and "in pressing the administrations to adapt national monitoring systems to meet the needs of the emerging EU network" (Schout, 1999: 148).<sup>64</sup>

But because NFPs usually occupy positions in the periphery of decision making, they have often experienced difficulty in garnering support for the work of the EEA in the member states. Depending on national priorities and resources available, considerable differences exist between NFPs in terms of their involvement in and contribution to the work of the EEA.<sup>65</sup> The varied approaches of the member states towards organising their national network and the weakness of some of the NFPs, together with the lack of formal power of the EEA to control data gathering (systems) at the national level through the NFPs, have been argued to undermine the credibility of the data collection system.<sup>66</sup>

Over time, however, the frequent contacts and stable relations among NFPs have contributed to the development of shared norms with regard to running the EIONET. As the 2003 external evaluation of the EEA finds: "The network is characterised by shared underlying values. Everyone in the network is in some way involved in environmental data processing."<sup>67</sup> On the basis of their experiences with EIONET, NFPs have furthered adaptations to and innovations in their national systems. Even as the

EIONET has not led to the emergence of a European environment community, the network has thus contributed to the 'Europeanisation' of national data systems.<sup>68</sup>

### *Professional bureaucracy versus network organisation*

Given its role coordinating the EIONET, the EEA was meant to be a small structure with a limited amount of staff. It was supposed to operate as a node in the network of national institutes and centres. Opinions diverged however on exactly what being such a node in a network would entail. Would the agency simply collate national information, thus serving as an intermediary among national institutes and centres and the Commission, or would it also process this information into European environmental information and even perform research itself?

When the EIONET was established, the initial focus of the agency was primarily on the technical side, such as attracting technical expertise and deciding on the first ETCs, instead of on the managerial aspects of the network. Schout (1999: 102) notes that, consequently, much of the early staff members had a technical or scientific background, with expertise in the principal areas of activity of the agency, notably in the area of air and later also water, rather than having experience running a network.<sup>69</sup>

Moreover, in the early years there appeared to be a mismatch between the experience and expertise of the staff and the ambition of the agency to engage in policy-oriented work. Most of the initial staff had a background in natural sciences or engineering instead of in social sciences, and in the early years no training programmes for staff in policy-related skills were provided.<sup>70</sup> Now that the role of the EEA as a network manager and policy supporter has become clearer, the recruitment pattern has changed. More staff with a managerial and a policy background has been hired.

The network approach of the agency has clear drawbacks when it comes to the build-up of expertise within the EEA. As in other EU agencies, staff is employed on a temporary basis in order to ensure flexibility. This makes it difficult to create and maintain expertise and build long-term working relations. Concerns were voiced about changes in ETCs due to discontinuation of contracts and about the reliance on consultants, and the resulting loss of experience and expertise. Moreover, EEA staff did not seem to build close relations with NFPs, as was clearly shown by a poster announcing a meeting to familiarise EEA staff with NFPs on which NFPs were depicted as visitors from outer space.<sup>71</sup>

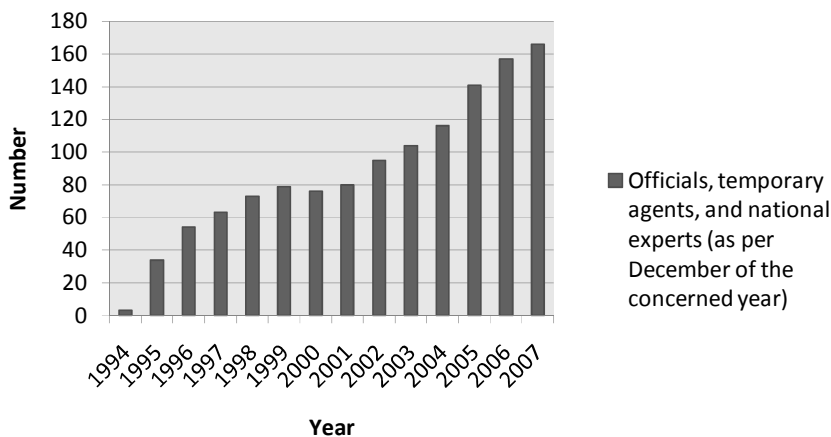
Yet, contracts of temporary agents are often extended and employee turnover is generally low.<sup>72</sup> According to interviewees, the relative continuity of the agency's staff has enhanced informal interaction within the EEA.<sup>73</sup> Staff has been highly committed, often working beyond required hours. This commitment is sustained by hiring people that fit the EEA profile, which seems to have a positive effect on the quality of its workforce. The EEA is now considered to be a good career opportunity by experts in the environment field. This in turn helped the agency to take on additional staff so as to increase the level of in-house expertise at the EEA.<sup>74</sup>

While ETCs are increasingly effective in gathering data on their respective topics, the integration of data for cross-cutting analyses remains problematic.<sup>75</sup> In-house experts could synthesise the work of ETCs without having to rely on consultants. More importantly, enhanced in-house expertise enables the agency to determine priorities across the different areas, "albeit", as a respondent was quick to point out, "in conjunction with the partners in the EIONET".<sup>76</sup>

### Limited organisational capacity

Not surprisingly, increasing in-house expertise is controversial among the agency's political principals as it is seen as a stealthy way to increase agency autonomy. In the end, however, the agency's principals as represented in the management board decide on the annual plan identifying the number of agency staff and on the Community subsidy from which the EEA is funded. The first director therefore remarked: "In practice, the limitations on the Agency's autonomy and activities come [more] from limited capacity and time, than from restrictions in [the] Regulation" (Jiménez-Beltrán, 1997: 62).

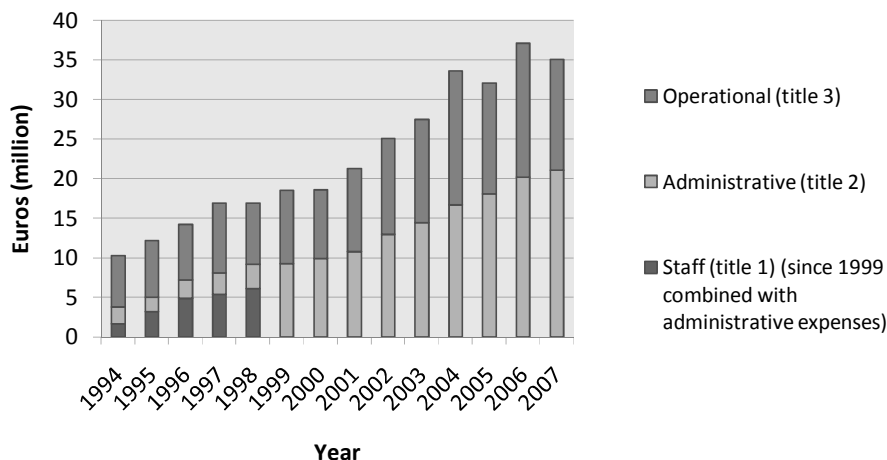
Even though the EEA is a nucleus organisation, the amount of staff in relation to the wide range of tasks remains low. The agency has only slowly grown in terms of staff over the years and remains small (see Figure 9.2), particularly when compared to national environment agencies and especially in relation to the US Environmental Protection Agency (Hoornebeek, 2000). Because most staff was not on their posts until late 1995 and the level of staff only exceeded 100 from 2002 onwards, the early years saw "a significant stress at the level of personnel resources (with more than 20% work overload)".<sup>77</sup> In the early years, the EEA therefore made extensive use of external consultants as well as national and Commission (notably JRC) experts.<sup>78</sup>



**Figure 9.2** – Staff development (1994-2007)

Sources: EEA annual reports

Furthermore, the EEA has a small budget of which almost half is spent on the EIONET, particularly the ETCs (see Figure 9.3). A large part is reserved for structural costs relating to personnel, housing or technical equipment. This leaves a limited budget to allocate to self-initiated activities.<sup>79</sup> With the budget freeze in 1998 and only a slight increase in the budget until 2000, it became increasingly difficult for the agency to meet the growing demands for environmental information and to perform the tasks in accordance with the agency's reinforced mandate.<sup>80</sup>



**Figure 9.3** – Budget development (1994-2007)

Sources: EEA annual reports

In view of its limited resources, the EEA set out to seek extra funding from other Commission DGs as well as from external sources “for activities that are compatible with core tasks”.<sup>81</sup> Although it was not entirely clear what kind of activities were compatible with the agency’s core tasks (or maybe precisely because thereof), this strategy has proven effective. The EEA acquired extra funds by supporting the enlargement process, the integration of environment into other policies such as transport, energy and agriculture and pan-European programmes beyond the EU. Whereas until 2001 only ten percent of the agency’s income came from sources other than the Community budget, this percentage has almost doubled in recent years.

Additional funding also came with the accession of new member states to the EU in 2004. The new member states had to pay their contribution to the EU, which increased the amount of funding allocated to the EEA. The agency’s budget stabilised from 2006 onwards.

### *From entrepreneur...*

The increase in additional funding has effectively decreased the agency’s dependence on its parent department, DG Environment, something for which the EEA’s first director, Domingo Jiménez-Beltrán, has been actively striving. By establishing the EEA’s independence, he has without doubt made an important contribution to the institutionalisation of the agency, as observers such as Schout (1999: 126) have noted.

After his nomination by the Commission and the appointment by the board, Beltrán showed himself to be an entrepreneurial leader, with a clear vision on the direction in which the agency should develop.<sup>82</sup> He identified as one of the most important challenges in the early years “being recognized as an independent source of reliable information, of the best available information” (Jiménez-Beltrán, 1996: 38). Instead of a “cemetery for information that is rarely used”, the agency would have to be (pro-)actively contributing to environmental policy.<sup>83</sup> Especially in the early years, this approach towards policy analysis and advice led to disagreements and, at times, conflicts with the Commission, particularly DG Environment. A respondent says:

As the agency you are in a difficult position because you are not only dependent on the member states for information, but you are also dependent on the Commission for money. If you do things that DG Environment does not like, than the Commission has the possibility to refuse further subsidies or at least to cut funds. That was an unpleasant tension. Beltrán has never kept his mouth shut for this reason, however. That was courageous, something I have respect for.<sup>84</sup>

Although the disagreements and conflicts can at least partly be seen as “a necessary or inevitable product of testing the boundaries of legitimate activities for the fledgling Agency”, the political approach of the EEA director has certainly strained relations with the Commission.<sup>85</sup> In 2002, for example, the director wrote a letter to the secretary-general of the Commission to complain about the quality of the environmental dimension of a set of structural indicators produced by the Commission’s Secretariat-General.<sup>86</sup> While the Secretariat-General promised to improve the indicators, Beltrán had already approached the environmental press, which reported widely on his criticism, causing ill feelings with the Commission.<sup>87</sup>

As Beltrán was primarily concerned with establishing the EEA as an independent agency and putting the agency on the map (Schout, 1999: 123), he paid less attention to internal management. The first staff members of the agency had extensive operational freedom to give shape to the agency’s activities. As a former official seconded from one of the member countries describes:

You had the regulation. And there had been a task force to prepare the establishment of the EEA. But what we would have to do was not fully clear. [...] But for me this of course provided a lot of freedom to do the things I personally thought were important [...] That was, making the EEA of relevance to policy. I felt encouraged by my national government’s policy on this issue and was supported by the director. I think that was also why he wanted to have an expert from my country. The director was one of the few people who really understood the wider scope of the first report that I produced.<sup>88</sup>

Over time, however, the agency slowly shifted from an entrepreneurial organisation to a more bureaucratic organisation where the agency’s leadership made decisions on programmes and policies, rather than the staff. Employees were left less room to manoeuvre than in the early years.

### *...to manager*

Beltrán left the agency in 2002. In 1999, his appointment had on his own request only been renewed for a three-year period. The appointment of Beltrán’s successor led to a clash between the management board and the Commission, with the board showing its teeth.

The candidate the Commission favoured was considered too weak by the board, whereas the candidate the board supported did not fit the profile the Commission had put in the job advertisement.<sup>89</sup> Upon the request of the board, it was decided to redo the appointment procedure based on broader selection criteria and after a new call for applications in a wider range of printed and electronic media. This resulted in a considerable delay of almost one year but eventually led to the appointment of Jacqueline McGlade, a university professor in environmental informatics.<sup>90</sup> She enjoyed the support of both the Commission and the board.

Since McGlade took over as director, relations between the Commission and the agency have improved substantially. The interactions between McGlade and the new

Director-General for Environment Catherine Day, appointed around the same time as McGlade, have been a strong driving force for positive understanding. The two for instance agreed on a clearer division of responsibilities between the Commission and the agency.

Internally, McGlade left her staff much less operational freedom than her predecessor. To a certain extent, this was inevitable given the growth of the organisation and the limited attention for the agency's internal management.<sup>91</sup> When McGlade arrived at the agency there was, as some respondents said, still a sense that it was a research institution in which staff could choose their own projects. The changes in the political and the perspective of the enlargement of the EU made it necessary to address the agency's structure and procedure to meet evolving needs.<sup>92</sup>

Given the rise in expectations and the need to deliver, McGlade introduced an internal management system, aligning planning of human and financial resources with the annual work programme. The system facilitated a culture of performance, in which staff members are managed by objectives, having individual targets linked to the overall organisational goals. Additionally, she introduced a balanced score card in order to quantify whether the EEA strategy has been achieved.<sup>93</sup> McGlade also created a new layer of middle managers "to strengthen day-to-day people management".<sup>94</sup>

The second director attached much value to the credibility of the agency. She felt it was necessary for the reputation of the agency "to make sure that the numbers are always right".<sup>95</sup> An example is its results on the greenhouse gas emissions of Denmark, renowned for its green image and the host country of the agency. The results were disputed by Danish politicians but after a public inquiry and parliamentary hearings where McGlade appeared it proved that the EEA's figures were correct.

### *Fighting off political pressures*

From the member states' point of view, even (or perhaps especially) if the numbers are right, publication is not always desirable. In the beginning they have therefore criticised the agency of lacking a "feeling for the political environment in which it operates" by seeking out too much press (Schout, 1999: 108). While the agency notifies the member states of "uncomfortable messages" in advance, it has always stood by the results reported in its publications, countering such criticism by pointing to its independent position.<sup>96</sup> Even though in the early years, certain member states in some cases exercised pressure to delay reports, or to not make them public, the agency has always observed the deadlines and provided access to its publications.

Individual member states have occasionally tried to use the board to influence the contents and timing of agency publications. Early on, however, the board decided not to interfere in substantial matters and, indeed, has never meddled in the contents of reports produced by the agency. Although the board discusses them, reports were never approved before publication, and the conclusions have always been accepted (although sometimes reluctantly). As a result, there has never been any doubt about the independence of the data and information provided in EEA reports and the findings and conclusions derived from these data and information – as opposed to the oftentimes politically coloured data on the environment before the EEA's creation.

The EEA's first director had made it clear that the independence of the agency implies that "no end of the pipe controls over the final products or reports of the Agency, other than those i.e. by the Scientific Committee, as part of a formalized quality assurance process, be established nor suspected to exist" (Jiménez-Beltrán, 1996: 41). The committee has been important in fighting off political pressures, especially where it

concerned the designation of ETCs but also with regard to drawing conclusions in EEA reports (Schout, 1999: 107, 127). As such, it serves an important guarantee for the credibility of the agency and its work.

On the other hand, the committee's advice has sometimes been used to legitimise the EEA's work, even though, according to interviewees, it currently cannot confer scientific credibility on the agency's work.<sup>97</sup> The key problem is the limited time that committee members have, as they offer their services for free and, as top scientists, usually have a busy schedule. Committee members therefore sometimes see themselves as "unpaid and unrecognised editors of or commentators on reports, without exactly knowing what science had gone into these reports". The committee's support for a report through an opinion then comes down to "validation by admission", as a respondent put it.<sup>98</sup>

### *Between healthy tensions and hostile relations*

Whereas on paper member state representatives dominate decision making in the management board, the Commission's opinion carried a strong weight and member state representatives, at least in the early years, in practice often followed the Commission's representatives (Schout, 1999: 97, 130). Member state representatives apparently realised that the Commission, as the agency's main principal and client, cannot simply be passed over, as the added value of the agency, also from the perspective of the member states, is highly dependent on the agency's input into the Commission's work.

DG Environment, the agency's parent DG, can steer agency decisions based on its opinion of the (multi-)annual work programme and via the agency's budget. The agency does not have to consider the Commission's opinion about the draft work programme, but it "would be stupid not to", an EEA official points out.<sup>99</sup> In practice, the director, rather than the chairperson of the board, is in frequent contact with the Commission to synchronise the agency's work programme with the Commission's. Such synchronisation may imply a considerable limitation of the agency's autonomy. When the Commission, for instance, expressed reservations regarding 12 of the 93 projects proposed in the agency's first multi-annual work programme, the agency had to exclude these projects, mainly relating to sustainable development, policy instruments and the 'state of action'.<sup>100</sup>

That the agency pro-actively tests the Commission's support for its proposed projects, as it did in the case above, does not mean that it always does what the Commission wants.<sup>101</sup> On the contrary, there has frequently been a divergence of views. A key controversial issue with the Commission, as described above, concerned the role of the agency with regard to evaluating policies, forecasting trends and drawing conclusions from the collected data as mentioned above. The Commission believed these activities did not fall within the scope of the agency's mandate, but according to the agency they were required to fulfil its objectives.

Even though reference to sustainable development in the amended regulation of 1999 made it easier to work for other DGs, the EEA has mainly served DG Environment. Although the agency was interested in broadening its terrain to other DGs "so as to facilitate the integration of the environment into other sectors",<sup>102</sup> DG Environment, at least in the early years, has continuously sought to restrict the EEA's activities, "trying to limit the role of the EEA to a service body instead of pushing the agency as an instrument for environment policy" (Schout, 1999: 96). For subsequent directors-general of DG Environment it was clear that the Commission was the main client of

the agency and that the agency was to provide DG Environment with data on the state of the environment.

The Commission's paternalistic position towards the agency became apparent, for example, in 1998 when DG Environment put the agency under pressure to reduce the work programme with "less essential tasks" and concentrate on data collection only, and in 2000, when the DG complained about "a major shift in emphasis" taking place with European Topic Centres (ETCs) not only being expected by the EEA to collect information but also engage in prospective analysis, scenario building and policy evaluation.<sup>103</sup> For a long time, and in spite of its continuous attempts to demonstrate its institutional separation from DG Environment, the agency for national actors and EU citizens has therefore been 'the Commission'.<sup>104</sup>

In practice, the work programme and projects are not only determined by the need and demands of European and national policymakers. Because the initiative to present a draft of the work programme lies with the agency, the EEA can 'pre-structure' the discussion with the board and influence the board's decisions on the work programme. This makes the work programme "the main tool for the Agency in establishing independence".<sup>105</sup> Moreover, as new issues arise during the year, the agency has considerable leeway to prioritise.<sup>106</sup> It is increasingly feeding in its own priorities in terms of influencing the broader environmental policy agenda as a result of the trends it analyses and the policy options it explores.

Thus, the work programme usually reflects a compromise between the needs and demands of the agency's clients and stakeholders, particularly the Commission, and the evaluation of the agency itself.<sup>107</sup> Interviewees estimate that around 70 percent of the agency's activities is now more or less directly supporting the Commission's work; the other 30 percent is made up of activities the agency performs on its own initiative, the output of which is used by actors other than the Commission.<sup>108</sup>

### *Coordination of agency-Commission relations*

It took some time for the Commission to realise that the creation of the EEA had consequences for the management of its internal organisation (Schout, 1999). Initially, it appeared that no one in the Commission was responsible for relations with the EEA. Within DG Environment, there was no coordination of the demands and requests for information from the individual units, and views diverged among officials on the precise role of the EEA in the policy-making process.

Some Commission officials questioned the need for the EEA given the existence of other bodies such as Eurostat and the JRC within the Commission's own services. Relying on these bodies would save the Commission time and resources that it instead would have to spend on "preventing the EEA from engaging in policy analysis" (Schout, 1999: 105). Moreover, as Commission officials did not always consider the EEA's information on the state of the European environment to be relevant, it preferred to contract out data collection tasks to consultants. This way, it could retain control over the information produced rather than relying on the work of an autonomous EEA, which, especially in the beginning because of its limited amount of staff and the lack of specific expertise in certain areas, had to hire consultants anyway.<sup>109</sup>

After the appointment of Catherine Day as director-general, the relationship between the EEA and DG Environment improved. "Many problems between the Commission and the EEA vanished into thin air with her arrival [...] Day was more generous in delegating certain tasks to the agency that first had belonged to the Commission." Day personally maintained close contact with Jacqueline McGlade, the agency's second



director. Together they discussed the contribution of the agency to the activities of the Commission, moving away from the *ad hoc* planning and reporting of the agency's early years.

### *The EEA as strategic asset for the Commission*

Commission officials have gradually come to realise "that [the Commission] stands to gain considerably through a strong and independent environment agency..." (Schout, 1999: 93). They understand that it strengthens their position when they refer to objective and reliable information that is publicly available and produced by an independent agency.<sup>110</sup> Especially when the Commission wants to convince politicians and the public that that more needs to be done at the European level for the EU to be ready to face future environmental problems, it needs evidence for its claim that environmental policies work (or needs to know how it can improve them if they do not work).<sup>111</sup> As the chairman of the board more generally states:

At a time when new environmental policy initiatives are coming under scrutiny at European level, the strategic importance of the EEA to policy-makers is increased. [...] The message is clear – when environmental initiatives are based on high-quality information with the EEA name on it, we are all strengthened in our ultimate goal of pushing forward the environmental agenda.<sup>112</sup>

Even as Commission officials initially criticised the agency for not delivering the detailed figures and specific facts they needed, they have increasingly been using EEA reports and studies, for instance, those on the monitoring of climate change, which contain compilations "that others cannot produce".<sup>113</sup> Throughout the years, the relevance of the agency's work for the Commission has increased which, in turn, has contributed to the support the agency has received from the Commission, and in the above instance, DG Environment's climate change unit.<sup>114</sup> An interviewee remarks that the convergence between the agency's expanding mission and the Commission's shifting ambition has increased the role of the agency even further:

In the last two to three years, as the trust in the data and the information we provide has grown, and we have shown the value added of having a European dimension as opposed to only looking at individual countries, we have been invited into the broader debate about the future of Europe.<sup>115</sup>

Before Day's arrival, the bi-annual visits of the agency's management to DG Environment were used by the different units to put forward their own priorities. Since the arrival of Day, the coordination within DG Environment has been strengthened. A focal point was created in DG Environment to coordinate the Commission's relationship with the agency. Now, bi-annual meetings are used to initiate strategic discussions on the agency's priorities. The Commission has become aware that it has to approach the agency in a more streamlined manner, with an integrated DG Environment view, because as Day put it according to an interviewee: "What we get out of [the EEA], depends on what we put in."<sup>116</sup>

After more than ten years of operation, the EEA's contribution in terms of drawing independent conclusions is not only established but also accepted and valued, not in the least by the Commission.<sup>117</sup> "The agency has started to deliver more of what its clients, stakeholders, and most notably the Commission want, while clients and stakeholders have come to realise the benefits of the agency."<sup>118</sup> In its report reviewing the

EEA delivered to the Council in December 2003, the Commission recommended that the EEA move towards supporting all stages of the policy cycle, naturally “in close cooperation with the Commission services.”<sup>119</sup>

This does not mean that there is always agreement over the role of the agency in the policy-making process. As the Commission is not the only client, and the agency also has obligations towards other actors, including the Council and the member states, the EP and the broader public, the Commission’s requests are not necessarily granted by the EEA.<sup>120</sup> The Commission is aware, though, that it is not the only client of the agency and that the agency for instance also serves the Council Presidency with special reports on request. But disagreement between the Commission and the EEA no longer equates conflict, as was often the case in the early years of the agency’s life.

### *Member countries and the effects of peer pressure*

As mentioned above, the initial support from individual member states for the agency tended to differ according to the powers that they believed the EEA should be granted. Eventually the EEA has been invested with little formal power of its own to make member states hand over information.

Yet, member countries’ representatives in the board have agreed upon so-called ‘priority data flow areas’ in which they, through their NFP, deliver data to the EEA and the agency then scores their performance.<sup>121</sup> Although these obligations are not legally binding, they are “morally” binding: apart from the fact that member countries, through agreeing on the agency’s founding regulation, have committed themselves to work with the agency, there is a strong incentive to satisfy the demands of the agency.<sup>122</sup> For whenever a country has not satisfied the agency’s demands, this appears in the scores (the country is ‘named’) and the EEA director simply has to point this out to the board member of the concerned country (the country is ‘shamed’).<sup>123</sup>

Member states and their representatives in the board are usually not surprised by the information the agency produces.<sup>124</sup> After all, they delivered the data to the EEA or have already received the data from national institutes and centres that, especially in countries that have a long tradition in monitoring the environment, continue to play a predominant role. This has also led to a certain amount of “data delivering fatigue”, as one interviewee described it.<sup>125</sup> But what national policymakers cannot do, and what the EEA can, is put the information on national (and increasingly on regional and local) situations in a broader European context.

Over time, the agency has become more “brave” in drawing attention to differences among and within member states, both with regard to the state of the environment and the efforts and progress in improving it.<sup>126</sup> As was pointed out by several interviewees, the information in reports or studies of the EEA serves as an important benchmark for countries, despite the ever-present problem of comparability.<sup>127</sup> Countries, such as Denmark in the aforementioned example on greenhouse gas emissions, might think they are performing well, but when compared to other countries, they might be doing worse than expected, which tends to have an encouraging effect.<sup>128</sup>

Indeed, national administrations use the products of the EEA domestically to press for environmental changes.<sup>129</sup> This is especially so for the ‘new’ member states. Even before the 2004 enlargement of the EU, the agency, as one of the first EU institutions, was closely cooperating with Central and Eastern European countries. These countries wanted to strengthen their own policies through their EEA membership and benefit from EU environmental policies. For the ‘new’ member states, participation in the EIONET, for instance, is a way to raise the standards of their monitoring systems.<sup>130</sup>

So even without a formal obligation to report, the data collection systems of member states slowly converge through mere participation in the agency's work (Schout, 1999: 141). Respondents agree that the interaction in the network has brought member states, their research centres, institutes and NFPs closer to a common understanding on the importance of collecting, processing and analysing information at the European level. The agency has thereby not only brought added value for individual member states, but also for the EU as a whole.

### *Achieving relevance for the EP*

The nature of the EEA's tasks – supporting policy making through information gathering – means the EP is more involved in the agency's work than in the case of other EU agencies. In contrast to the detailed data that the Commission needs, however, the EP and in particular its Environment Committee is interested in general reports that not only deal with the state of the environment but also give an outlook of future developments. From the outset, this made the EP favour a truly autonomous EEA that does not merely collect data for the Commission but that also works on its own initiative.

Yet, the EP has not been fully utilising the EEA's support in the past.<sup>131</sup> In a letter to the chairperson of the management board in 2000, the chair of the EP's Environment Committee stated that "the nature and timing of the agency's outputs were of little direct use to the Committee in considering proposed legislation within the strict timetable laid down by the co-decision procedure".<sup>132</sup> Holding up a thick, heavy EEA report, a respondent noted that the agency's reports are not always politically relevant:

If such a report is produced when the topic is relevant then you read it. Otherwise you put it on a pile or throw it away. [...] Moreover, such a thick report I am not going to take with me. I've asked them whether they could not come with a shorter version but they said that the Commission wanted it this way.<sup>133</sup>

Most of the work the agency produces has a long-term perspective, which complicates working relations with the Parliament, as its focus is more immediate. Whereas MEPs complain about the slowness of the agency, the agency complains about the "short-term-ism" of MEPs.<sup>134</sup> As one interviewee tells it:

That reminds me of last week when they [the EP] were looking for information about waste disposal. We asked them 'When do you want it?' and they said 'On Monday'. And we said 'Sorry this is a six-month exercise which you ask us to do'. But they did not ask that question to us six months ago. If they had we could have done something about it.<sup>135</sup>

In the early years, the agency was not very active in lobbying the EP, and instead adopted a rather reactive approach. This has sometimes led MEPs to resort to other sources for information.<sup>136</sup> Especially since the appointment of the second director the agency has been seeking out the EP more regularly. The agency is now trying to direct its work more towards the needs of MEPs. For instance, the EEA has developed a set of short reports and it provides short summaries with its reports. It also holds an information seminar for the members of the EP's Environment Committee and their assistants and has appointed a liaison officer to maintain contacts with the EP.

Still, the saliency of the EEA's work for MEPs is changing over time. Initially, the EEA could count on a high level of attention as the environment occupied a prominent place on the political agenda. When the agency was finally up and running it had to

compete for attention with other, then more salient, issues. More recently, environmental policy issues are experiencing a revival, primarily as a result of the attention for global warming. This is prompting increased political interest and spurring new initiatives from parliamentarians, as well as providing novel opportunities for the EEA.

### *Competition and cooperation with other international organisations*

The EEA is not the only international environmental organisation. There is potential overlap (and thus rivalry) with the activities of other Community bodies. The EEA's founding regulation therefore explicitly stipulates that the EEA has to cooperate with Eurostat, the EU's statistical office, and the Commission's Joint Research Centre (JRC).<sup>137</sup> To that end, early on the agency signed memorandums of understanding with these bodies.<sup>138</sup> And, as key partners of the agency, the directors of Eurostat and the JRC are represented on the EEA's board.

Initially, the overlapping activities of the EEA and Eurostat – an independent entity but, in contrast to the EEA, placed within the Commission services – led to competition between the two organisations. Countries are legally obliged to furnish Eurostat with requested data, whereas the EEA cannot compel member states to comply with a request for data. So when Eurostat received information from member states that was supposed to be shared with the EEA but never did so, this caused tensions. “The agency really had to conquer itself a position in the field of data collection.”<sup>139</sup> As it sometimes did so rather aggressively, this provoked a defensive reaction by Eurostat.

Eventually, Eurostat and the EEA agreed that Eurostat would deliver information in some areas on which the EEA is also working, such as waste, because of Eurostat's extended experience in this field.<sup>140</sup> The EEA subsequently processes and analyses this information. In addition, since 2005, the parallel networks that the EEA and Eurostat were running, the EIONET and the Environment Information Network, have been brought together in order to avoid double work. And, what is more, the EEA management board has to approve the environmental portion of Eurostat's statistical work programme.<sup>141</sup> The EEA thus seems to be slowly taking over Eurostat's place in the environmental area.<sup>142</sup>

The collaboration between the JRC and the EEA is of a different kind. The JRC consists of a number of research institutes, including the Institute for Environment and Sustainability, which has almost twice as many staff members as the agency.<sup>143</sup> The JRC usually does not directly touch on the agency's work; it often cooperates directly with ETCs due to its competencies in some of the topic areas. In line with the information-sharing agreement between Eurostat and the EEA, the JRC has agreed with the EEA that it takes responsibility for the collection of data on forests and soil and distributes it to the agency.

Since 2001, the EEA has been active in developing a system to share environmental data among the so-called ‘Group of Four’, made up of the EEA, the Commission's DG Environment, Eurostat and the JRC. The establishment of this Shared Environment Information System (SEIS), got a slow start due to strained relations between the different actors. The four bodies now consider the system to contribute to the streamlining of data management in Europe, dividing responsibilities for data collection and analysis among them.<sup>144</sup> Whereas the various international bodies had previously collected their own data, “there is now a shared view that we cannot do this alone”.<sup>145</sup> The Water Information System for Europe (WISE), a partnership of the Group of Four, serves as an example.<sup>146</sup>

In contrast to the not always easy relations with EU-level counterparts, the EEA has from the start been closely cooperating with a potential international contender – the United Nations Environment Programme (UNEP).<sup>147</sup> Because the bulk of the organisations' EU-level work is "highly complementary if not fully complementary", they concluded a memorandum of understanding in which they clarified their respective roles. The EEA is a formal collaborating centre for UNEP, playing a prominent role in its assessment and reporting work, while also benefiting from its expertise in developing future outlooks and scenarios.

For both the EEA and UNEP, cooperation is indeed a strategy to be heard by politicians as well as by the public. They realise that they have not only overlapping mandates, but also overlapping interests. To avoid public confusion about disseminated information as well as politicians' complaints on duplication of work, and in order to maximise the impact of their message, the organisations consider it important to speak with more or less the same voice.<sup>148</sup>

## **9.5 Conclusion: consolidating its position on the European stage**

This chapter examined the development of the European Environment Agency (EEA). Despite restrictions in its formal mandate, it has developed into a body operating relatively autonomously on a wide range of environmental topics and throughout the various stages of the policy-making process. Upon the 1999 external evaluation of the EEA's functioning and the subsequent amendment of the agency's founding regulation, the agency took on an increasing number of tasks, enlarging its formal scope of action. Particularly since its second external evaluation in 2003 (a period on which this chapter put less emphasis), the EEA has become generally accepted as necessary and valuable by the actors in its external environment. Several concurrently operating mechanisms and conditions have driven the agency's institutionalisation.

While the EEA was originally created as an agency to support policy, not make it, the vague wording of its mandate made it possible to go beyond a purely informational role and also analyse the effects of EU environment policies and make recommendations for future policies. Particularly the first officials, many of which had also been part of the EEA task force, were able to influence the way in which the translation of formal objectives and tasks into practice took place. Also, because the Commission did not offer much assistance in getting the agency off the ground, and at the time of its creation there were no other examples of EU agencies to replicate, the early development of the agency can be described as a process of trial and error.

Although it is trying to build up in-house expertise, the EEA still remains heavily reliant on its network of national actors for information: notably the European Topic Centres, contracted by the agency, and National Focal Points, operating under the authority of the member states. Indeed, precisely because the agency does not have the power to make member states provide information, and thus is dependent on their voluntary cooperation, it does not want inspection or enforcement tasks, and has successfully averted attempts to give it such tasks. Moreover, through voluntary cooperation in the network, a certain level of harmonisation has been achieved, which is especially apparent for new member states that have been associated with the work of the EEA even before the 2004 enlargement of the EU.

In its early years the EEA fought tough battles with the Commission concerning the interpretation of its mandate. The Commission's DG Environment, the agency's parent DG, initially opposed an expanded role for the EEA and intervened when the EEA went

beyond the formal scope of its autonomy. This was especially so because the Commission considered the quality of the EEA's output in the early years to be poor, and as it was not obliged to use the agency's products, it therefore often turned to other sources. The initial lack of quality largely resulted from the almost contradictory need to build up the organisation whilst also demonstrating its capacity to gain legitimacy from stakeholders and thereby obtain additional resources.

While the EEA had to prove it could add value, forcible demonstrations of its autonomy initially had the opposite effect. The agency alienated itself from DG Environment by excessively focusing on its autonomy. To be sure, this to some extent may have been necessary in order not to become considered as the Commission's 'lap dog'. Over time, the value of the EEA has not only increased in terms of the quality of its output, but also in terms of the strategic importance thereof, supporting the Commission's policies and strengthening the Commission's position vis-à-vis the EP, the Council and the member states. Hence, conflict between the Commission and the EEA has turned into complementarity when it comes to their respective roles.

At the start, with a clientele as broad as 'the Community and the member states', the EEA experienced difficulty in determining who to serve and how. Over time, it realised that it must differentiate the products it delivered for the Parliament, the Commission, the member states and the public. Having learned to satisfy different actors in different ways, the EEA has been able to develop a significant level of legitimacy from these actors, including the public at large. Hence, the Commission, in its 2003 external evaluation report, wrote: "the Agency has built up a solid reputation, which in turn leads users to trust it and further increases the EEA's room to manoeuvre".<sup>149</sup>

The EEA's management and leadership have been important factors in its development. It helps that representatives of national governments are included in the EEA's management board and that they by and large have refrained from political interference with the agency's work. Moreover the inclusion of member state representatives appears to have ensured that the agency's activities are accepted and supported by key governmental actors in the member states. The agency has learned to add value to activities of national institutes and centres, as well as other European and international bodies such as Eurostat, the JRC and UNEP. In fact, through the central position that the EEA has acquired in the network and the role it has developed in initiating and coordinating activities, the EEA is now having a substantial impact on environmental policy making in the EU.<sup>150</sup>

In particular, the two directors of the EEA have left their marks on the course of the agency, albeit in different ways. Beltrán actively sought to ensure the agency's independence. However, resulting tensions with DG Environment were important in clarifying the roles of the agency and the Commission. The second director has been an important driving force in changing the agency's attitude towards the Commission, adopting a more conciliatory approach. Furthermore, whereas the first director left his staff a lot of freedom in executing their tasks, McGlade introduced professional management structures and techniques that suited the organisation's bigger size. Each in their own way, the directors made important contributions to the institutionalisation of the EEA.

## Notes

<sup>1</sup> Interview #27

<sup>2</sup> Commission of the European Communities, *Report from the Commission to the Council. Review of the European Environment Agency (EEA)*, COM(2003) 800 final, Brussels, 22 December 2003 (hereafter referred to as 'Commission report'), p. 3.

<sup>3</sup> Hereafter referred to as the EEA's 'founding' or 'constituent regulation'. In contrast to most other early agencies, the creation of the EEA was based on Article 175 of the TEC. See Chapter 6.

<sup>4</sup> Interview #68

<sup>5</sup> Details can be found in Decision 85/338 EEC on the CORINE information system.

<sup>6</sup> Interview #59

<sup>7</sup> Council of the European Union, Presidency Conclusions, Annex 1: Declaration on the Environment, SN 443/1/88

<sup>8</sup> O.J. Eur.Comm. No 2-373 73 (1989) (Debates of the European Parliament)

<sup>9</sup> COM(1989) 303 final, Brussels, 12 July 1989.

<sup>10</sup> There were several reasons to locate the EEA in Copenhagen: the proximity to the Danish Ministry for the Environment was thought to raise the profile of the agency; the additional financial support provided by the Danish government (notwithstanding the support promised by other member states), and the fact that Denmark, contrary to most other member states, did not run for more than one agency (Schout, 1999: 87).

<sup>11</sup> Interviews #27 and #59

<sup>12</sup> Interview #58

<sup>13</sup> Annual Report (hereafter abbreviated as 'AR') 1995, p. 2.

<sup>14</sup> See Articles 2 and 3 of the founding regulation

<sup>15</sup> AR 1995, Preface by Domingo Jiménez-Beltrán, Executive Director of the EEA, p. 4.

<sup>16</sup> EEA, EIONET, Presentation by Barbara Clark, November 2006.

<sup>17</sup> EEA, EIONET connects, available at <http://www.eea.europa.eu/organisation/nfp-eionet-group/presentation>, consulted on 10 May 2007; EEA, EIONET, presentation by Barbara Clark, November 2006, available at <http://www.eea.europa.eu/organisation/nfp-eionet-group/presentation>, consulted on 10 May 2007.

<sup>18</sup> An example is the Netherlands Environmental Assessment Agency (PBL), which functions as the ETC for air and climate change. See <http://air-climate.eionet.europa.eu>.

<sup>19</sup> In the Dutch case, the NFP comes from the same organisation that functions as the ETC for air and climate change, the PBL.

<sup>20</sup> Interview #53

<sup>21</sup> Interviews #52 and #69. See also IEEP/EIPA evaluation, p. 80. In this regard, the EEA differs considerably from the US Environmental Protection Agency (EPA). See Hoornbeek (2000).

<sup>22</sup> AR 1996, Foreword by the Chairman of the EEA Management Board, p. 7; See also AR 1998, p. 7.

<sup>23</sup> Interviews #42 and #43

<sup>24</sup> AR 1998, Foreword by the Chairman of the EEA Management Board, p. 7.

<sup>25</sup> Interview #2. See also Derek Osborn, former chairperson of the Board, before the UK Parliament, House of Lords, Select Committee on European Communities, *Community Environmental Law: Making it Work*, Second Report, 1997-1998, 1 July 1997, available at <http://www.publications.parliament.uk>, consulted on 25 May 2007, para 54; AR 1996, Foreword by the Chairman of the EEA Management Board, pp. 6-7.

<sup>26</sup> Interview #27

<sup>27</sup> AR 1999, Foreword by the Chairman of the Management Board Kees Zoeteman, p. 7.

<sup>28</sup> Regulation 933/1999/EC

<sup>29</sup> Note that the agency is called the 'European Environment Agency' and not the 'European Union Environment Agency'.

<sup>30</sup> Eurostat and the Commission's Joint Research Centre (JRC) fall under DG Research.

<sup>31</sup> When the founding regulation was negotiated the EP insisted on representation in the board. The Commission's DG Environment agreed as it considered it could thus rally the support of the

Parliament's Environment Committee – one of the first committee's with a certain clout - while at the same time implicating the EP in the management of the agency. Interview #68

<sup>32</sup> The chairman of the scientific committee attends the meetings as an observer.

<sup>33</sup> The responsibility for the quality assurance of the data on which the reports are based, however, lies with the ETCs, or even at the member state level.

<sup>34</sup> The committee's chairman, though not a board member, is invited to all board meetings and receives a copy of all mail sent to the board.

<sup>35</sup> The Commission negotiates the level of the membership fees for third countries. See Commission report, p. 11.

<sup>36</sup> IEPP/EIPA evaluation, p. 35.

<sup>37</sup> Interview #59

<sup>38</sup> In Northern European countries, it is quite common that national environment agencies develop policy scenarios and put forward policy options. This is not considered as immediately engaging in policy making.

<sup>39</sup> AR 1996, Foreword by the Chairman of the EEA Management Board, p. 6. See also UK Parliament, House of Lords, Select Committee on European Communities, Second Report, 1997-1998, *Community Environmental Law: Making it Work*, 1 July 1997, available at <http://www.publications.parliament.uk>, consulted on 25 May 2007, para 57.

<sup>40</sup> Multi-Annual Work Programme (MAWP) 1999-2003, p. 3.

<sup>41</sup> Interviews #2 and #59

<sup>42</sup> Interview #27

<sup>43</sup> Interview #50

<sup>44</sup> Interview #69

<sup>45</sup> EEA, The Contribution of Policy Effectiveness Evaluation to Better Regulation, Professor Jacqueline McGlade, Executive Director EEA, At the Launch of Two EEA Studies on Policy Effectiveness, Copenhagen, 7 October 2005.

<sup>46</sup> MAWP 2004-2008, p. iii.

<sup>47</sup> EEA strategy 2004-2008, Overview by the Executive Director, p. v.

<sup>48</sup> Interview #59

<sup>49</sup> AR 1998, p. 5.

<sup>50</sup> Interview #43

<sup>51</sup> IEPP/EIPA evaluation, p. 30.

<sup>52</sup> Arthur Andersen, Evaluation of the EEA and the EIONET 1994-2000, Copenhagen, December 2000 (hereafter referred to as the 'Arthur Andersen' or '2000 evaluation'), pp. 30-31.

<sup>53</sup> IEPP/EIPA evaluation, p. 31.

<sup>54</sup> Commission report, p. 20.

<sup>55</sup> Arthur Andersen evaluation, p. 30; IEPP/EIPA evaluation, p. 29.

<sup>56</sup> AR 2001, p. 11.

<sup>57</sup> Interview #58. See also the EEA website at <http://www.eea.europa.eu/maps/ozone/welcome>.

<sup>58</sup> Interview #31

<sup>59</sup> On average, national contributions account for approximately one-third of the ETCs budgets; some ETCs were for about fifty percent financed through government money, others received almost nothing. Interview #50

<sup>60</sup> Arthur Andersen evaluation, 2000, p. 45; IEPP/EIPA evaluation, p. 79.

<sup>61</sup> Some go so far as to argue that the EIONET, although it has been created by the EEA and its activities are coordinated by the agency, has a separate standing. One interviewee claimed: "We can do whatever we want". Interview #42

<sup>62</sup> Interviews #43 and #52

<sup>63</sup> Interview #45

<sup>64</sup> Interviews #43, #45, and #57

<sup>65</sup> Interviews #52, #55 and #58. See also Paper produced by the NFPs in June 1996; Report prepared in the framework of the Danish Support Programme to the Agency; AR 1996, pp. 14-15.

<sup>66</sup> IEPP/EIPA evaluation, p. 80.

<sup>67</sup> IEPP/EIPA evaluation, p. 82.



<sup>68</sup> IEEP/EIPA evaluation, p. 83.

<sup>69</sup> Interview #42

<sup>70</sup> Arthur Andersen evaluation, pp. 37-38; IEEP/EIPA evaluation, p. 36.

<sup>71</sup> Interview #55

<sup>72</sup> Interview #55. Unfortunately, no precise figures are available.

<sup>73</sup> Interview #32

<sup>74</sup> Interview #58

<sup>75</sup> IEEP/EIPA evaluation, p. 77

<sup>76</sup> Interview #53

<sup>77</sup> AR 1998, p. 11; IEEP/EIPA evaluation, p. 24.

<sup>78</sup> Interview #50

<sup>79</sup> AR 1997, Preface by EEA Executive Director, Domingo Jiménez-Beltrán, pp. 8-9.

<sup>80</sup> See also ARs 1998, 1999, and 2000.

<sup>81</sup> AR 2000, Foreword by the Chairman of the Management Board Kees Zoeteman, p. 4.

<sup>82</sup> Interview #2

<sup>83</sup> Speech by Domingo Jiménez-Beltrán, Executive Director EEA, Information and Environmental Management. The Role of the European Environment Agency, The International Institute for Industrial Environmental Economics, Lund University, Inauguration of the Institute, Opening Ceremony, 15 September 1995.

<sup>84</sup> Interview #31

<sup>85</sup> See IEEP/EIPA evaluation, p. 63. Interviews #31 and #69.

<sup>86</sup> Already in 2001, the director noted about the first synthesis report based on the structural indicators that "the experience was not the best from the Agency's point of view, as the presence of environmental information was rather limited [but] that was a first trial and we all look forward to substantial improvements in the future." AR 2001, Preface by Domingo Jiménez-Beltrán, Executive Director of the European Environment Agency, p. 3.

<sup>87</sup> Several interviews. See also IEEP/EIPA evaluation, p. 61.

<sup>88</sup> Interview #50

<sup>89</sup> Formal procedures play an important role in the selection of a director. The Commission is reluctant to diverge from the profile as put in the job interview as it fears candidates to lodge an appeal if they are not selected and formal procedures have not been followed. Interview #31

<sup>90</sup> EEA, Environmental scientist appointed to lead European Environment Agency, News Release, Copenhagen, 26 February 2003.

<sup>91</sup> Interview #42. See also Arthur Andersen evaluation, pp. 37-38.

<sup>92</sup> Several interviews

<sup>93</sup> AR 2003, p. 27; AR 2004, p. 37.

<sup>94</sup> Interview

<sup>95</sup> Interview #53

<sup>96</sup> Interview #53

<sup>97</sup> Interview #59

<sup>98</sup> Often, it is even the agency that also drafts these opinions in the first place. Interview #59

<sup>99</sup> Interview #27

<sup>100</sup> IEEP/EIPA evaluation, pp. 24-25.

<sup>101</sup> IEEP en EIPA evaluation, pp. 58-60.

<sup>102</sup> AR 1996, p. 6.

<sup>103</sup> Letters from Director-General Currie to the EEA.

<sup>104</sup> Arthur Andersen evaluation, p. 25.

<sup>105</sup> AR 1995, p. 8.

<sup>106</sup> IEEP/EIPA evaluation, p. 91.

<sup>107</sup> IEEP/EIPA evaluation, p. 62.

<sup>108</sup> For example, in case of the ETC for air and climate change, an area in which much of the data are obligatory, approximately 80 to 90 percent of the tasks are fixed, concerning data that the EEA has to deliver to the Commission. The remaining 10 to 20 percent can be filled with activities that ETCs and the EEA determine jointly. Interview #50

<sup>109</sup> IEEP/EIPA evaluation, p. 83.

<sup>110</sup> Interview #51

<sup>111</sup> Interviews #27 and #53

<sup>112</sup> AR 2004, Message from the Chairman of the Board, p. 7; see also MAWP 2004-2008, Foreword by the Management Board Chairman, p. iii.

<sup>113</sup> Interview #31

<sup>114</sup> Interview #27

<sup>115</sup> Interview #53

<sup>116</sup> Interview #69

<sup>117</sup> IEEP/EIPA evaluation, p. 60.

<sup>118</sup> Interview #43

<sup>119</sup> Commission report, 2003, p. 10.

<sup>120</sup> IEEP/EIPA evaluation, p. 42.

<sup>121</sup> Scoring takes place through the use of smileys. For each data flow, countries can collect between a maximum score of +3 points (☺☺☺) and -1 point (☹). See EEA, EIONET Priority data flows, May 2005 - June 2006.

<sup>122</sup> Interview #42

<sup>123</sup> Interview #53

<sup>124</sup> Interview #45

<sup>125</sup> Interview #43

<sup>126</sup> Interview #53. See also AR 1998, Foreword by the Chairman of the Management Board, p. 7; AR 1999, Foreword by the Outgoing Chairman of the Management Board, pp. 5-6.

<sup>127</sup> Interviews #31 and #42

<sup>128</sup> Interviews #31 and #53

<sup>129</sup> Interview #53

<sup>130</sup> Interview #50

<sup>131</sup> Commission report, p. 9.

<sup>132</sup> See Letter from Dr. Caroline Jackson, Chair of the EPs Committee on the Environment, Public Health and Consumer Policy to Mr Kees Zoeteman, Chairman of the EEA's Management Board, 14 November 2000; IEEP/EIPA evaluation, p. 43. Interview #31

<sup>133</sup> Interview #17

<sup>134</sup> Interview #27

<sup>135</sup> Interview #27

<sup>136</sup> Interview #17

<sup>137</sup> See Article 15 of the regulation. Guidelines for cooperation are set out in an Annex to the Regulation. The modified Regulation of 1999 further emphasises the need for the EEA to coordinate its work with similar organisations at the EU or national level.

<sup>138</sup> AR 1995, p. 8.

<sup>139</sup> Interview #31

<sup>140</sup> But the agency has been quick to point out that cooperation with Eurostat in this and other areas does not mean that the agency is not active in these areas anymore. Interview #27

<sup>141</sup> Interview #54

<sup>142</sup> Interview #42

<sup>143</sup> Interview #51

<sup>144</sup> AR 2001, Foreword by Kees Zoeteman Chairman of the Management Board of the European Environment Agency, p. 5.

<sup>145</sup> Interview #51

<sup>146</sup> Interviews #51 and #54. See also the WISE website at <http://water.europa.eu>.

<sup>147</sup> AR 1996, p. 12; AR 1998, p. 12.

<sup>148</sup> Interview #32

<sup>149</sup> Commission report, p. 11.

<sup>150</sup> IEEP/EIPA evaluation, p. 60.



# CHAPTER 10

## MONITORING DISCRIMINATION: THE CASE OF THE EUROPEAN MONITORING CENTRE FOR RACISM AND XENOPHOBIA

[The EUMC] was established by governments but given a certain level of autonomy. And the EUMC's staff, they wanted to be so autonomous that they did not take notice of what governments actually wanted.

– Respondent<sup>1</sup>

### 10.1 Introduction: giving Europe a soul?

The EUMC was created as a formally autonomous entity. Yet, the scope and extent of the autonomy that it in its early years has developed with respect to the actors in its politically very sensitive environment has remained limited. Whenever the centre tried to go beyond its formal mandate, it was quickly curtailed by the Commission. Eventually, the Council transformed it into an agency with an enlarged mandate, the Fundamental Rights Agency (FRA), which started its operations in 2007.

This chapter discusses the EUMC's early development, whilst also briefly examining its transformation into the FRA. It shows that the centre's relatively small degree of actual autonomy can be explained by the contested identity of the centre. Its early development is characterised by an absence of agreement on what its core tasks were, how these core tasks had to be performed, and how the centre, in the performance of its tasks, should have related to other actors. The EUMC's leadership was unable to successfully shape the centre's development, initially being preoccupied with the management of external relations (also due to the EU measures against the Austrian government), at the expense of the internal organisation. In its early years, the EUMC was thus never really able to give Europe a "soul" as intended by its founders.<sup>2</sup>

Section 10.2 presents a short history of the EUMC's creation. The centre's formal autonomy is described in Section 10.3. In Section 10.4, the autonomy that the centre developed in practice is discussed, focusing on the absence of agreement on what the centre's objectives and tasks were and how these tasks had to be performed, as well as its relations with its clients and stakeholders, notably a lack of acceptance by these actors of the way the centre performed its tasks. The chapter concludes with a short analysis, identifying the mechanisms at play and specifying factors and conditions that have affected the EUMC's early development (Section 10.5).

## 10.2 Historical background to the EUMC's creation: from national responsibility to European concern

The European Monitoring Centre on Racism and Xenophobia (EUMC) was created on 2 June 1997.<sup>3</sup> Until 1997, no binding EU legislation or policies existed in this sphere. Although on a number of occasions, the EU, through Joint Declarations and Council Resolutions, had stressed the importance of the respect for human rights, fighting racism, xenophobia, and anti-Semitism, these issues essentially remained the member states' responsibility. Serving as an expression of the EU's commitment in this area, the creation of the EUMC as an autonomous EU-level agency therefore has a highly political character.

### *The development of European anti-discrimination legislation and policies*

The issue of racism entered the European stage in the early 1980s. In the 1984 elections for the European Parliament (EP) extreme right-wing parties, particularly the French *Front National*, gained a considerable number of seats. In 1985, a Parliamentary Committee of Inquiry concluded that action taken at the national level to fight racism should be supplemented by measures at the European level.<sup>4</sup> However, whereas the Council adopted non-binding agreements spurring national governments to take action against racism, it also showed reluctance in enacting binding legislation on racial discrimination.

While opinions diverged on the European Community's legal competence and the contribution it could make in this sphere, a second Committee of Inquiry concluded in 1990 that legislation at the European level could help to combat racism.<sup>5</sup> None of the Committee's recommendations were acted upon, however.<sup>6</sup> The Commission, while putting forward proposals and taking initiatives, faced opposition from the Council. If proposals and initiatives were not completely abandoned, they were often subject to severe delays or watered down by the Commission to achieve unanimous approval in the Council.<sup>7</sup>

### *Towards a European Monitoring Centre: the Consultative Commission*

In the early 1990s, European countries were confronted with a dramatic increase in racist violence. Germany in particular experienced a surge of violence against foreigners. Attacks such as in Mölln in November 1992, during which three Turkish women died because German skinheads set their house to fire, and in Solingen in May 1993, in which five members of a Turkish family got killed and several others were severely injured, caused dismay all over Europe and dominated international media headlines for weeks.

From the mid-1990s onwards, the Council, under pressure by civil society and non-governmental organisations to take action, shifted its approach. In Corfu in 1994, it set up the Consultative Commission on Racism and Xenophobia in order to step up efforts to define, at the European Union level, a strategy aimed at combating racism and xenophobia. "Yet, the creation of the Consultative Commission was largely a political response."<sup>8</sup> The Consultative Commission – also known as Kahn Commission after its chairman Jean Kahn – consisted of an independent expert from each of the EU member states, two Parliament members, a Commission representative and an observer of

the Council of Europe. Not unsurprisingly, it concluded that there was a need for increased action at the European level.<sup>9</sup>

During the 1995 European Council in Cannes, the Consultative Commission was asked to extend its work to study the feasibility of an autonomous European Monitoring Centre on Racism and Xenophobia. The Consultative Commission looked into both the scientific and technical and the legal and institutional aspects of a European Monitoring Centre. It submitted a report to the European Council in Florence in 1996, which set out how a Monitoring Centre could be set up and what tasks and responsibilities it should be given.

### *The creation of the centre: a turbulent start*

On the basis of the Consultative Commission's report, the European Commission put forward a proposal for the creation of a European Monitoring Centre on Racism and Xenophobia in December 1996.<sup>10</sup> The Council adopted the regulation establishing the centre, but not all member states were enthusiastic about this decision, a respondent says:

There were real differences of opinion between the member states whether there was a need for a European agency given that the [Council of Europe's] ECRI already existed. Nevertheless, it was difficult to be against a body fighting racism and everybody had to go along with it.<sup>11</sup>

Meanwhile, the fight against racism and discrimination also occupied a more prominent place on the agenda of the European Commission. The Commission presented a 'Communication on racism, xenophobia and anti-Semitism' outlining its future action in the fight against racism including the designation of 1997 as the European Year against Racism.<sup>12</sup> The Year sparked a wealth of activities and initiatives including the establishment of a European platform of anti-racism non-governmental organisations, the European Network Against Racism (ENAR) and the presentation, in 1998, of a Commission Action plan against racism.<sup>13</sup>

The EUMC had to start from scratch. Upon her arrival mid-July 1998, the centre's director, the German Beate Winkler, faced four empty rooms. There was no staff and there were no facilities. Whereas the secondment of Commission staff to newly created agencies in order to assist in budgeting and staffing has now become standard practice, no Commission staff was seconded to the EUMC to offer assistance in its start-up phase – something for which the Commission was later criticised by external evaluators.<sup>14</sup> After it had been temporarily housed in the Austrian Federal Chancellery,<sup>15</sup> the EUMC moved into its modest premises in Vienna – if not for the EU flag, easily overlooked – which were officially opened on 7 April 2000.

The opening of the centre coincided with political tensions between the EU and Austria. At the end of January 2000, the 'EU 14' had imposed measures on Austria because Jörg Haider's right-wing Freedom Party (FPÖ) had been included in Austria's governing coalition. This led to a sharp increase in media coverage for the opening. "For a number of reasons" the management board had decided to invite only heads of states, which was publicly criticised by the Austrian government. It stated that it intended to send a representative to the opening ceremony.<sup>16</sup> The opening thus turned into a highly politicised affair, securing an unexpectedly high profile for the EUMC at its foundation, yet setting the stage for the difficult relations with the actors in its environment in the years to come.

### **10.3 The EUMC's formal autonomy: maximum autonomy with minimal powers**

#### *Limited by design*

In his foreword to the first annual report, then chairman of the EUMC management board, Jean Kahn, referred to the creation of the centre as “a completely new, independent institution of the European Union” meant to bring together experts of the Member States, the European Parliament, the European Commission and the Council of Europe “to not only collect and analyse data and information but also to communicate findings and strategies as well as to develop new forms of cooperation.”<sup>17</sup>

Like the European Environment Agency (EEA), the EUMC was an information body, which on paper reduced the potential for autonomy. Articles 284 and 308 (formerly Articles 213 and 235) of the Treaty of the European Community formed the legal basis for the centre's establishment, enabling it to operate with its own legal personality. The purpose of the EUMC was to provide the Community and its member states with objective, reliable and comparable data on the phenomena and manifestations of racism, xenophobia, and anti-Semitism at the European level. In order to accomplish this, the centre performed a variety of tasks, of which the main task was to collect, analyse and disseminate information and data for which it set up and coordinated the Racism and Xenophobia Information Network (RAXEN).

When creating the EUMC, one option was the creation of a large research institute that would conduct its own research.<sup>18</sup> It was decided, however, also because of the EUMC's limited budget (see below), that the centre should not gather information itself, but instead be the nucleus in a network of specialised organisations which would do the actual data collection. For, at the member state level, “there are numerous outstanding organizations which study racism and xenophobia”.<sup>19</sup> Apart from the centre as a central unit, the network thus consisted of so-called National Focal Points (NFPs) in each of the member states. The NFPs represented the data and information “entry points” to the centre at the national level.

As the central unit, the EUMC had limited capacity for original research. It was supposed to coordinate the research of NFPs and synthesise their reports. On the basis thereof, it was entitled to draw its own conclusions and formulate opinions. These conclusions and opinions were contained in its ‘annual report’, the principal output of the centre, not only providing information about the activities of the centre (as annual reports usually do) but also giving an overview of the racism, xenophobia and anti-Semitism situation in the member states.<sup>20</sup> The centre was supposed to enjoy “maximum autonomy” in the performance of these tasks.<sup>21</sup>

The EUMC's formal remit was restricted, however. The areas in which the centre could collect and process data and information ranged from education and media to the free movement of persons and goods; gathering information on police and judicial authorities was not included in the EUMC's mandate. Furthermore, the centre could not compel member states to provide data and information, nor did EU institutions have to make use of data and information received from the centre.<sup>22</sup>

Moreover, the responsibility for policy making continued to lie with the Commission. It retained the right of initiative in many areas of human rights and discrimination, including racism and xenophobia. Also in regard to policy implementation, the Commission still was the predominant actor. The EUMC collected and analysed data on the impact of directives and participates in the Commission's working group on the

implementation of the Council directives on racial equality (2000/43/EC) and employment equality (2000/78/EC) and the Commission's working group on data collection. However, it did not monitor member states' compliance with European legislation and policies in the field of racism and discrimination.<sup>23</sup>

### *The centre's composition and structure*

When creating the EUMC, it was thought that although each member state would appoint someone to sit on the centre's management board, the board should operate independently from the interests of national governments, on the basis of its specific expertise on racism and xenophobia. To establish a link with the Commission and coordinate with the Council of Europe (CoE), the board also had a representative from the Commission and the CoE. Additionally, the board was supposed to be complemented by an independent person (e.g. an academic professor) appointed by the EP.

The board, which met at least twice each year, was responsible for adopting the centre's annual work programme and its annual report. It also decided on the budget and appointed the centre's director. Decisions were taken by a two-thirds majority of the board members. The CoE representative, however, was not allowed to vote on budgetary matters. Board members' term of office was three years, renewable once.

The board was supported by an executive board, which supervised the formulation and implementation of the centre's work programme and budget. It also worked with the centre's director to prepare the management board meetings.<sup>24</sup> The executive board was comprised of the chairman, vice chairman and one elected member of the management board. The representatives of the CoE and the Commission were *ex officio* members. While this composition made it possible for the executive board to control the work of the EUMC, it also endowed the centre with a certain degree of formal autonomy from the Commission and the CoE.

The director of the EUMC, the centre's legal representative, was appointed by the board upon the proposal of the Commission for a renewable period of four years. The director proposed priorities for operational activities, laid out in annual draft work programmes (the EUMC has not been working with multi-annual work programmes), which the board discussed.<sup>25</sup> She was also in charge of implementing the budget, all staff issues, and "matters of day-to-day administration". Compared to other agencies, the provisions regarding staffing and budgets in the EUMC's founding regulation were relatively straightforward. The centre's staff was EU staff, subject to EU employment rules, while the centre's revenues are largely comprised of a Commission subsidy entered under the heading of the Commission's Directorate-General (DG) Employment, Social Affairs, and Equal Opportunities, the EUMC's 'parent DG'.

In 2005, administrative responsibility for the EUMC was transferred to the Justice, Liberty and Security (JLS) DG. The transferral reflected the "gradual shift to address racism issues within a rights-based approach in addition to the welfare approach" and was also in line with the decision to "extend" the EUMC's mandate into the field of fundamental rights.<sup>26</sup>

### *Transformation into a Fundamental Rights Agency*

The founding regulation of the EUMC allowed for modification or extension of the centre's tasks, depending on changes in the Community's powers. When the EUMC was still in its start-up phase, the idea of a 'European Human Rights Monitoring



Agency' was aired in a report for the *Comité des sages* (Alston and Weiler, 1999). The idea was subsequently mentioned in the conclusions of the European Council in Cologne in 1999.<sup>27</sup> Also the final report of the "three wise men" on the measures against Austria recommended strengthening the EUMC's activities, budget and status in order to make the establishment of a full EU Agency on Human Rights possible.<sup>28</sup> The recommendation of the three wise men was discussed in a meeting of the management board, but "some members of the Board felt that the EUMC should fulfil its present mandate, before discussing to expand it."<sup>29</sup>

In December 2003, the European Council decided to transform the EUMC into a Fundamental Rights Agency (FRA).<sup>30</sup> Under the impression that the idea of an agency dealing with human rights more broadly had definitely been dismissed, now that the centre was finally reaching cruising speed, both the EUMC and the Commission were taken by surprise.<sup>31</sup> This gave rise to the feeling that the decision was made for no clear reason but political horse-trading among the member states in the Council. Austria reportedly felt that its share in hosting EU organisations was significantly smaller than other member states. Deciding on the seats of other agencies, the Council, in turn for Austria's support, therefore promised Austria the enlargement of the EUMC's mandate and the transformation of the centre into a (supposedly) more prestigious Fundamental Rights Agency.<sup>32</sup>

Although the creation of an FRA was in line with the EU's Charter on Fundamental Rights, which had been agreed upon in December 2000 and was originally included in the proposed Constitutional Treaty, the decision "cannot be said to have been the result of extensive reflections", as an interviewee put it.<sup>33</sup> So while the Council decided on the creation of the agency, it did not spell out how it should function. In 2004, the Commission, at the Council's request, therefore presented a Communication on the extension of the EUMC's mandate into an FRA.<sup>34</sup> Officially, the FRA was intended to contribute to more coherence and consistency in the EU human rights policy. The added value of the FRA would be in its "service function": by gathering and processing human rights-related information, it was supposed to support the EU institutions and the member states.

While the EUMC was invited to participate in the public consultation process that followed the proposal for a Council regulation establishing an FRA, it was not closely involved in the extension of its mandate into fundamental rights. In its preliminary remarks on the Commission proposal, it emphasised that an FRA needed to be adequately resourced to be effective. Moreover it voiced concerns about the possible dilution of the centre's tasks when it became part of a larger organisation not only devoted to racism and xenophobia.<sup>35</sup>

The extension of the EUMC into an FRA also led to a dispute over the new agency's mandate, highlighting a tension inherent to the dynamic of the EU and particularly with regard to human rights protection, that is, the Union's involvement in the internal affairs of its members.<sup>36</sup> Discussions emerged, particularly within the EP's Committee on Civil Liberties, Justice and Home Affairs, on whether the new agency should also cover such issues as police abuse, racism, torture or treatment of prisoners as well as intergovernmental co-operation on policing, justice, immigration, and counter-terrorism issues.<sup>37</sup> Several countries, including Germany and the UK, opposed granting such power. Eventually, the Council decided that the FRA's mandate would be limited to monitoring the fundamental rights situation in the EU's areas of competence and in the member states when implementing Community law.<sup>38</sup> The FRA thus cannot monitor the enforcement of fundamental rights in the member states.<sup>39</sup>

Furthermore, as the discussion around the creation of an FRA concentrated on its potential involvement in the affairs of the member states and its possible overlap with the activities of other organisations, the autonomy of the FRA received less attention. The EUMC warned that priority themes should not be entrenched in the founding regulation, while NGOs voiced concern over the control that the Commission and the member states could exercise over the agency's (multi-annual) work programme and the priorities therein.<sup>40</sup> In addition, the FRA can formulate opinions and recommendations, but only if asked by the EU institutions or countries. Although Franco Frattini, EU Commissioner for Justice, Liberty and Security, said that the Commission would certainly make use of this provision, it clearly restricts the agency's freedom.<sup>41</sup>

The agency was finally established on 15 February 2007 by adoption of Council Regulation (EC) No 168/2007, transforming the EUMC into the FRA. In addition to RAXEN, the network of experts in the field reporting on racism and xenophobia, the FRA maintains a network of legal experts, known as FRALEX, delivering reports and studies on a variety of human rights issues. In accordance with the regulation, a cooperation network, the so-called Fundamental Rights Platform, acts as the agency's link with civil society, involving a wide variety of fundamental rights players (NGOs, trade unions, churches, universities etc.). Rather than organising systematic data collection, the idea of the platform is to exchange information and pool knowledge, as well as to coordinate activities and ensure cooperation between the agency and relevant stakeholders.

The FRA also has a management board (largely the same as the EUMC's), an executive board, and a director (Morten Kjaerum from Denmark, a former EUMC board member). While during the EUMC's transformation into an FRA the autonomy of the management board has remained unchanged, the final text of the regulation creating the FRA explicitly mentions that board members, apart from their knowledge of fundamental rights, should have "appropriate experience in the management of public or private sector organizations".<sup>42</sup> In addition, to make a clear distinction between strategic and managerial issues and operational and scientific issues, the new FRA has also been equipped with a scientific committee composed of independent fundamental rights experts.<sup>43</sup> The committee has to guarantee the scientific quality of the agency's work, a recurring issue of debate at the EUMC, to the early development of which I now turn.

## 10.4 The EUMC's early development: control in practice

The vague mandate of the EUMC left ample room for interpretation. Therefore, from the start of the centre's activities, differences of opinion have existed between the EUMC and the actors in its environment on the translation of the centre's objectives and tasks into practice.

### *The problem of comparability*

Comparability, which lied at the core of the EUMC's work, has posed difficulties ever since the start of the centre. When the EUMC was created, it, according to the 1998 annual report, saw itself faced with "a tremendous lack of comparability" across EU member states.<sup>44</sup> No common definitions of racism and xenophobia existed. "Racism and xenophobia are wide concepts, ranging from small everyday acts of discrimination,

through the barriers which are inadvertently established at all levels by public and private institutions, to acts of the most extreme violence.”<sup>45</sup> In addition, racism and xenophobia are subjective concepts. Their meaning is highly influenced by people’s feelings, which, in turn, greatly depend on individual perception.<sup>46</sup> Moreover, racism and xenophobia are historically and politically-laden concepts. In Germany, for instance, even the use of the word ‘racism’ was a taboo after the holocaust.

Not only was there no agreement on the definitions of racism and xenophobia, a great variety of methods to collect data on racism and xenophobia were used throughout the EU. “The approaches to the collection of data vary enormously, from sophisticated, official mechanisms in some Member States to more basic approaches, heavily reliant on the collection of data by non-governmental organisations, in others.”<sup>47</sup> Some countries did not even have proper data collection systems in place. The variety of data collection procedures also caused problems when aggregating data on racism, xenophobia and anti-Semitism. Countries such as the United Kingdom, the Netherlands, and Sweden reported more acts and expressions of racism and xenophobia than other countries simply because they used more systematic data collection methods than countries such as France and Italy.<sup>48</sup>

In addition to the lack of reliable data and the conceptual and methodological difficulties, the centre has been “very careful” in making comparisons between countries.<sup>49</sup> Racism and discrimination are politically very sensitive issues. The differences between countries are such that findings can never be simply aggregated to the EU level, or that is at least what many member state governments claimed. Member states often agreed on fighting expressions and acts of racism and discrimination, but when it came to concrete measures they differed and pointed to specific national circumstances that would make it impossible to adopt a common European approach.

From a scientific point of view, the head of EUMC’s research unit has also pointed out that even if – as in the economic or environmental field – it would be possible to come up with statistical data on racism and discrimination, “there is a limit to the degree of transnational comparability that can be expected, because of all the other factors of national context which might have an effect” (Wrench, 2005: 75). He warned against over-emphasising the desirability of comparability – something which, in the view of the EUMC, the Commission has constantly been doing – and instead stressed that reliable data on racism and discrimination within a single member state is worth aiming at, even if it is not comparable to other member states.

Furthermore, even though the designation as a ‘monitoring centre’ would perhaps suggest otherwise, the EUMC has from the outset been trying to develop a much broader role than merely gathering information on the phenomena and manifestations of racism, xenophobia, and anti-Semitism.<sup>50</sup> Particularly, it sought to examine ‘good practices’ and formulate strategies in dealing with these phenomena and manifestations, therewith converting collected data and information into practical knowledge. According to the Commission, however, the extension of the EUMC’s role to include a campaigning remit compromised its role as an objective data provider (see below).<sup>51</sup>

Hence, the added value of the EUMC as providing not only comparable but also objective data has time and again been put up for debate, sometimes by the Commission and the member states, by international organisations, or by the EUMC itself.<sup>52</sup>

### *Setting up the centre’s information network*

At its creation, the structure of the EUMC’s data collection network was far from clear. A number of issues had not been resolved in the centre’s constituent regulation, in-

cluding the kind of participation in the network, the number of nominations per country, the balance between the different types of organisations, and the comparability criteria.<sup>53</sup> To define the steps to set up the Racism and Xenophobia Information Network (RAXEN) and to resolve some of these issues, the centre commissioned a feasibility study.<sup>54</sup> The study – or Liebkind Report, named after its author – was completed in June 1999 and presented two alternative models to setting up RAXEN.<sup>55</sup> In the first model, the EUMC would rely on government and government-related organisations for the collection of data, whereas, the second model was based on establishing a network of academic institutes, non-governmental organisations and in some cases, governmental organisations that would enter into a contractual relationship with the EUMC, making it possible to clearly specify what data was to be collected, how and when.<sup>56</sup>

Throughout 1999, the EUMC started a consultation process, organising a series of conferences to establish a common agreed approach for the network. The consultation of a wide variety of stakeholders resulted in several recommendations including, among others, that RAXEN should adopt a “gradualist” and “pragmatic long-term approach” in view of the difficulties with the comparability of data, and that a “mapping exercise” should be conducted to chart existing research in the field of racism and discrimination and to identify knowledge gaps.<sup>57</sup> Moreover, common understanding in terms of research format and terminology was to be developed, participation on an equal footing had to be ensured, and the relationship between the participants in the network and the EUMC would have to be “reciprocal”.<sup>58</sup> At the end of 1999, the centre formulated a set of guidelines on the basis of which the network was to be run. The guidelines were adopted by the management board in February 2000.

In line with the feasibility study's second model, the EUMC decided that RAXEN should be comprised of independent national focal points (NFPs) instead of relying on government and government-related organisations. By using independent NFPs, RAXEN was a novel and unique kind of European information network, as those respondents representing the EUMC in particular like to emphasise. Whereas data would normally have been collected by official authorities (e.g. statistical offices), many member states did not have an official authority collecting data on racism and discrimination.<sup>59</sup> What is more, it was felt that such organisations did not have the necessary autonomy to be perceived as providing objective data. Indeed, in some cases member states were also seen as part of the problem. It was thus decided not to ask member states to nominate NFPs, but rather to launch a call for tender ensuring both the independence of NFPs and their knowledge and experience in the field.<sup>60</sup>

In 2000, after a considerable delay due to difficulty over the appointment of a head for the unit responsible for RAXEN, the first phase of the information network, RAXEN 1, could start.<sup>61</sup> It involved NFPs of only seven member states because the centre had not received substantial offers from the other member states.<sup>62</sup> Although RAXEN 1, as part of the mapping exercise, provided information on existing research on racism and discrimination and identified knowledge gaps, it did not come up with comparable data definitions. RAXEN 2 – the second year of the network – sought to remedy the shortcomings of RAXEN 1. It completed the mapping exercise in the eight other EU countries, for which NFPs were selected in the meantime. In addition, it collected data in four priority fields – employment, legislation, racial violence, and education – chosen by consultation with both European and national institutes, particularly to support the Commission in the implementation of directives based on Article 13 (non-discrimination clause) of the EU Treaty and the Community action programme.<sup>63</sup>

*Between hierarchy and network*

While the EUMC portrayed itself as a “network organisation”,<sup>64</sup> it adopted a rather centralised approach towards collecting data in order to accomplish comparability. This approach, initially only endorsed by a few EUMC staff members, was most clearly expressed in the systematic way by which data had to be collected by the NFPs. The responsible head of unit for research and networks, an information scientist, provided NFPs with data collection templates that outlined the data to be gathered. The EUMC’s data collection approach was based on strict criteria – “procrustean” as one interviewee put it<sup>65</sup> – seeking to enforce uniformity across the member states by terms and concepts that fit every country.<sup>66</sup> While the approach gained support among both EUMC staff members and NFPs, it soon became clear that as a result of the variation in definitions and methodologies used, the EUMC and NFPs could only agree on common definitions for the fields of education and employment. The approach to comparability the EUMC adopted was thus one of “providing data to a common definition, but also highlighting differences between data”.<sup>67</sup>

Furthermore, RAXEN 1 and 2 pointed to significant differences in the types of NFPs.<sup>68</sup> Some were non-governmental organisations (NGOs), while others were academic institutions. Some were activist, while others were research-oriented. Some NFPs fully depended on the EUMC for their financing, while for others payment received was only one of several sources of income.<sup>69</sup> This reflected the situation in the member states, but also clearly affected NFP’s independence. Importantly, some only had limited experience with collecting data on racism, xenophobia and anti-Semitism and found it not so difficult to accept the EU-wide standards imposed by the centre, whereas others were ‘in the business’ for almost twenty years and were reluctant to move away from their national reporting systems towards a European approach with minimum reporting standards. In any case, the diversity of the network was “not necessarily conducive to the objective of achieving comparable data”.<sup>70</sup>

In 2003, the fourth year of RAXEN, the data collection approach resulted in about 8000 pages of country information, of which a substantial amount was not considered to be directly relevant by NFPs for the specific situation in their countries. The enormous amount of data put a strain on the centre, as it had to be processed into a comparative report by only three EUMC staff members, resulting in serious delays in the publication of results. Relying on the NFPs for data, the EUMC’s in-house capacity for research was limited and training in networking skills had been lacking in the first years.<sup>71</sup> While the EUMC’s director frequently made requests for more resources, her requests remained unheard.

Moreover, the centre was faced with a dilemma: in order to have an impact, it also had to build up its staff in the area of dissemination of information and the establishment of the centre’s profile. The difficulties in allocating staff did not help improve the quality of the centre’s outputs (which in turn made it more difficult to have an impact).<sup>72</sup> Subcontracting (more) work to external experts also was not an option as it required EUMC staff to make revisions and not necessarily led to better quality (see also below).

Indeed, collecting data based on strict guidelines and rigid criteria for the comparability of data proved unworkable and it had become clear that the operation and output of RAXEN had to be reviewed. The NFPs suggested adopting a more pragmatic approach towards data collection. This led to a fierce debate between the EUMC and the NFPs, focusing on whether the EUMC should function as a central organisation, with the NFPs as contractors merely executing the wishes of the central organisation, or

whether the EUMC should work on the basis of a partnership-relation, cooperating with the NFPs in a network setting.<sup>73</sup> NFPs argued that ownership of products could be shared, which would enable them to also publish findings nationally at the moment of delivery to the EUMC. This would also solve the problem of the centre's lack of visibility at the level of the member states was the opinion of some NFPs.<sup>74</sup> The EUMC however argued that, even though ownership could perhaps be shared, the agency would in the end always bear the responsibility, and thus should be in control.<sup>75</sup>

On the basis of the experiences of the actors involved, the EUMC's director started a reorganisation of the EUMC, including the system of data collection. A new head of the research and networks unit was appointed who had previously been involved with the EUMC as an NFP representative. It was decided to adopt a more decentralised approach using broader guidelines for data collection and more active involvement of the NFPs in the EUMC's work. But, as one interviewee remarked and several others confirmed, the culture of the organisation essentially remained unchanged, or at least it was perceived as such.<sup>76</sup> "While the new norm is network and partnership, the reflex is often hierarchy and command."<sup>77</sup>

The modification of the data collection system had implications for the mission and role of the centre. It made it more difficult to compare data across the EU and make general statements that could be used by European and national policymakers, in line with its role as a service organisation. In 2003, the centre therefore adopted "a new strategic approach", including to RAXEN, trying to tailor the work of RAXEN more closely to the priorities of its clients and stakeholders as well as improving feedback on the impact of its products and services. To do this, it surveyed the EP, the Commission and the member states on their information needs and demands.<sup>78</sup> It developed a strategy aimed at delivering "the right products at the right time", as clients and stakeholders had often complained about the relevance and timeliness of the EUMC's reports.<sup>79</sup>

Simultaneously and on the basis of the new strategy, it started to more actively pursue the comparability of data: in the short term by collecting data from NFPs under common headings, and in the long term by building comparability into the methodology, "thereby producing directly comparable data in specific limited fields".<sup>80</sup> In 2003 and 2004, this led to the publication of comparative reports on employment, education and legislation, which were generally perceived to be of high(er) quality. With such reports, the EUMC eventually hoped to encourage member states to improve their data collection systems.<sup>81</sup> The issue of comparability (or the continuing lack of comparable data) therefore became a key issue in the centre's annual reports and its presentations.

But right at the time when cooperation in RAXEN started to bear fruit, the network had to be enlarged with ten NFPs from the newly acceded EU member states having hardly any experience in collecting data while having major problems with regard to racism and discrimination. Like the European Environment Agency, the EUMC had been in the forefront of the enlargement process by including the new member states in their network before their official accession. Enlargement nevertheless meant a shock to the EUMC's structures and systems and had a significant influence on the EUMC reaching its comparability and harmonisation goals.

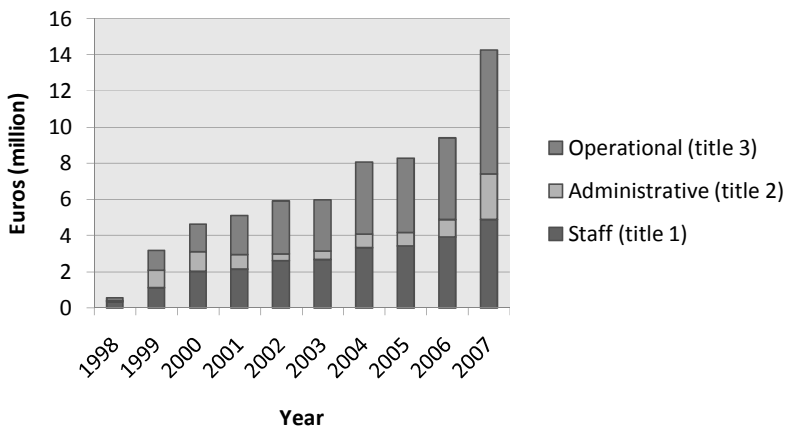
Thus RAXEN, very much the result of a learning process, clearly had its limits with regard to harmonising the data collection on racism and xenophobia in the EU. Through its networking, the EUMC has not been able to convince the member states to improve their data collection systems.<sup>82</sup> In every annual report from the centre's creation to its transformation into the FRA, the EUMC concluded that data collection sys-

tems and mechanisms in the member states were inadequate and that more effective and comprehensive systems needed to be established.<sup>83</sup> But to no avail.

### *The liability of smallness*

With a budget not exceeding 10 million Euros and a staff slightly above 30 people, as of 2007, the EUMC is one of the smallest EU agencies (see Figures 10.1 and 10.2). The centre's small size has become one of the key problems in its development, as the centre did not succeed in breaking out of an almost vicious circle.<sup>84</sup>

Because of its small size the centre experienced difficulty in producing results, which would be needed to attract additional resources. The 2002 external evaluation of the EUMC noted that the resources devoted to the prime objective of the centre were relatively low.<sup>85</sup> What is more, until 2002, the centre did not fully execute its budget. The under-spending was mainly due to the lack of human resources. While the centre's controversial task made it difficult to attract additional funding, the under-spending made it even more difficult. Consequently, the limited number of staff was overburdened trying to carry out the rather ambitious work programme.<sup>86</sup> As a result, delays occurred, for instance in getting RAXEN up and running, which had a negative impact on the centre's capacity to deliver.



**Figure 10.1** – Budget development (1998-2007)

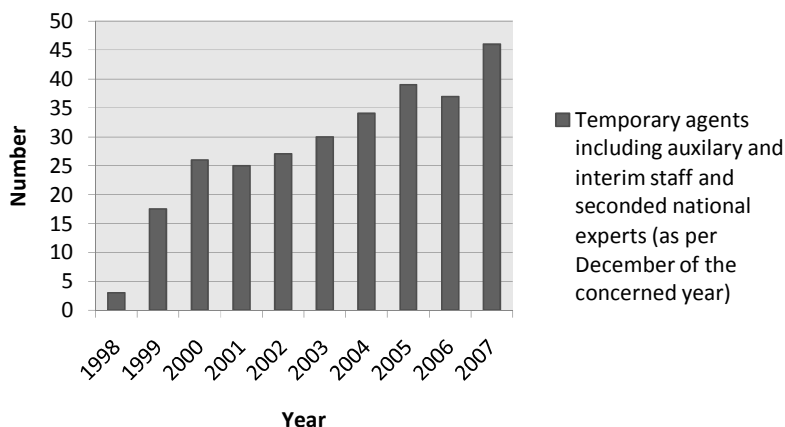
Sources: EUMC annual reports

Furthermore, recruitment for the EUMC was delayed due to the lengthy procedures the centre had to follow. The director was basically on her own to perform this task. In the first years, the number of management board members was higher than the number of staff. Only two staff members could be appointed in the centre's first year. And although the number of staff grew over the years, recruitment continued to draw heavily on the centre's resources, also as a result of fluctuation among the staff when the first contracts expired.<sup>87</sup> This fluctuation, in turn, has been said to affect the EUMC's capacity to learn from mistakes, especially with regard to the way RAXEN was run.<sup>88</sup>

In the early years, one point of discussion was whether the centre should perform its own research or rely on contract research. With limited staff, the centre did not have much choice other than contracting it out on the basis of a call for tender and terms of

reference.<sup>89</sup> In addition, most of the first staff members hired, such as those in charge of running RAXEN, had experience in data collection but lacked expertise in the field of racism and xenophobia. Instead, many of them had a background in international organisations more generally. They were coming from the Commission ranks, had been working with the Parliament, or had served in international organisations, such as the UN or the OSCE.

From 2003 onwards, with the recruitment of additional staff, the EUMC started, albeit it on a small scale, to develop in-house research capacity. This meant that it did not only have to rely on research performed by contractors anymore.<sup>90</sup> The experiences with a report on anti-Semitism commissioned in 2003 made clear “that there are limitations to contracting out studies”, particularly in view of the “politically very sensitive nature of [the EUMC’s] work”.<sup>91</sup> The advantage of performing research in-house, interviewees point out, was that it could be internally controlled and that autonomy was assured. While external contractors might have produced good quality reports, these reports often did not fit the requirements as set by the Commission and, subsequently, applied by the centre. And after some time, EUMC employees knew what a report needed in order for it to be used for policy preparation purposes.<sup>92</sup>



**Figure 10.2** – Staff development (1998-2007)

*Sources:* EUMC annual reports; European Court of Auditors reports

For a long time, however, at least until 2003, the EUMC lacked sufficient resources to conduct its own research. While EUMC researchers compiled the information, wrote the report, made corrections to it and completed it with a summary, most reports were still produced by data or information provided by contractors, be they NFPs delivering data for the annual report, or research institutes or universities, when it concerned thematic reports. Indeed, in the early years, apart from the conclusions and recommendations of reports, “[w]e never wrote anything ourselves”, a former EUMC staff member remarks.<sup>93</sup> The limited amount of substantive work displeased some staff that actually had a background in the field of racism and discrimination.

Because the centre was such a small agency in the early years, some of the staff members with a professional background in the field of racism and xenophobia felt they could not fully utilise their skills.<sup>94</sup> Whereas they expected to be working on substantive issues, instead they were busy drafting calls for tender and terms of reference.



This caused some frustration. "We had to be a small Commission", a former staff member said.<sup>95</sup> Especially in the early days, the centre's staff spent most of its time on administrative issues such as budgeting and staffing, struggling to comply with the financial and staff rules of the Community. As an EUMC staff member illustrates:

First of all, there is the control by the Court of Auditors. This takes me every year two weeks of preparation. Then, there is the control by the Internal Auditor of the Commission. That takes me another two weeks of preparation. Furthermore, every year, there are three meetings of the management board and six meetings of the executive board. And as a head of unit, I also have to prepare career development plans and staff reports. [...] As a result, I spend 30 percent of my time on substantive work, 70 percent I spend on administrative tasks.<sup>96</sup>

Interestingly, some respondents brought up cultural diversity as a factor hampering interaction and communication among staff and between the centre and its partners at the EU and national level. "The problems that organisations are supposed to tackle, are also often the problems with which they themselves experience problems", according to a respondent.<sup>97</sup> But most staff, being highly committed to the work of the centre, learned to cope with such politico-administrative and cultural constraints over time, accepting that they were part of a broader context made up of other EU and international actors "from which they could not hide".<sup>98</sup>

### *The board as part of the centre*

It is indeed difficult to separate the EUMC from its external environment. On paper, the EUMC's management board was part of its environment, providing policy direction and performing supervisory tasks; in practice, however, the management board seems to have operated much more as part of the organisation itself.

Board members came from a wide variety of backgrounds reflecting varying political priorities attached to the EUMC by the member states: some were former ministers, others were academics, and still others were NGO activists.<sup>99</sup> This has been said to ensure a host of perspectives, which was considered valuable for the work of the centre. It allowed the centre to pursue a wide range of different priorities, always able to garner the support of at least some of the board members.<sup>100</sup> But it also made it possible for the Commission, on the basis of its privileged information position, to influence (if not control) decision making in the board.

A respondent noted that the Commission had regular internal pre-meetings before actual board or bureau meetings. They agreed on how each particular agenda point was going to be handled. Moreover, the Commission had a team of people working on preparing the meetings, while most of the other members of the board had other obligations. If they were lucky they managed to read the documents on the plane to Vienna. As a result the Commission was able to wield "a disproportionate influence" over the outcome of the discussions.<sup>101</sup>

The first chairman of the management board (and therefore also chairman of the executive board) was the Frenchman Jean Kahn, who had personally lobbied for the creation of the centre with European leaders. Kahn, as chairman of the management board and formally not representing the centre externally,<sup>102</sup> was very much the personification of the EUMC.<sup>103</sup> Representing a coalition of members from civil society and non-governmental organisations, he had succeeded in convincing German Chancellor Kohl and French President Mitterrand of the need to establish the Consultative Commission to lay the groundwork for the establishment of the centre.

The active members of the Consultative Commission (or Kahn Commission) all ended up on the first board. In that sense, the first board was considered a continuation of the Kahn Commission, much to the European Commission's disquiet.<sup>104</sup> "The Kahn Commission was made up of people who in general were high profile political figures. And, really, they were not interested in what it said in the regulation of the centre and that created tension with the European Commission representatives," an interviewee recounts. "Kahn was the leader of a group of board members that wanted the centre to look much more like a human rights agency. I had the impression that some people were there for reasons other than to actually implement the provisions of the regulation."<sup>105</sup>

Most members of the board were not managers with knowledge of organisational planning and budgetary control. Instead of concentrating on their supervisory task as outlined in the regulation, the first management board of the EUMC was often "involved in discussions on the political relationship of the Centre with Governments and EU institutions, thus trying to define the Centre's identity in relation to other bodies."<sup>106</sup> The board voiced criticism about the rigid procedures that the centre had to follow and the lack of political reactivity to events in the EU. "The European Commission was seen by many members of the management board as trying to prevent the centre from making certain political statements."<sup>107</sup> The board nonetheless published statements on the events in Kosovo, the situation in East Timor, and, particularly, on the political situation in Austria.<sup>108</sup>

The EUMC, in the majority of the board's opinion, had to demonstrate its independent position vis-à-vis the Commission and the member states. Several board members expressed their concerns about the absence of the EUMC at the Community (and international) level and the limited visibility of the centre in the member states.<sup>109</sup> The EUMC if noted at all was often not distinguished from the European Commission.

People would call us and ask us about 'that Eurobarometer survey you did' and I would ask 'what Eurobarometer study?' and they would say 'well the one on attitudes towards foreigners' and then I would tell them that it was not us but the European Commission who conducted this survey. But for the outside world you are just EU.<sup>110</sup>

A minority of board members, those representing the European Commission but also those representing the CoE and some member states, believed that the EUMC, in line with its constituent regulation, should perform a more low-key scientific role producing data. Other members of the board expressed concerns about the activities of the centre in the area of right-wing extremism, arguing that it risked being viewed as (partly) politically motivated.<sup>111</sup> As a result, however, not much time was spent on overall policy direction.<sup>112</sup> One respondent notes:

The lack of agreement on the overall direction led to a continuous tension in the management board that affected and slowed down the entire development of the agency [...] and it was only during the second period of the management board that greater clarity was achieved.<sup>113</sup>

The external focus of the board kept it from debating internal issues.<sup>114</sup> The key issue of data comparability, for example, apparently was not extensively discussed by the board. The board did not develop a long-term strategy or vision on how the EUMC should attempt to enhance the comparability of data, not even when the difficulties with the coordination of RAXEN became clear and when this started to damage the centre's credibility. Moreover, it was unclear who was ultimately responsible for the overall

strategic direction of the agency, the director or the management board.<sup>115</sup> The board did not seem to have control over the EUMC, or at least it did not seem to object to the centre's staff making its own decisions. For example, when the EUMC established a Rapid Response and Evaluation Network (RAREN), not proposed in the original work programme for 2000, the management board was not consulted. While the board was not in favour of the EUMC's decision to establish a network of national liaison officers, it did not object.<sup>116</sup>

When Kahn was not nominated by France for a second period, Vice-Chairman Bob Purkiss took over as chairman of the board. Just before Purkiss' term as chair ended in 2003, he was faced with an affair over the alleged shelving of a report on anti-Semitism which caused serious damage to the centre's reputation. The affair deserves closer attention because it demonstrates an important disadvantage of board members having expertise in the field of racism and xenophobia only, instead of also having management skills: the politicisation of the board's decisions on EUMC report conclusions and the board's lack of control over internal management.

### *Politicisation of the board's decision making*

In contrast to their lack of interest in managerial matters, individual board members of the EUMC interfered with the contents of the reports, particularly the data for their respective countries. Sometimes the interference seemed to have been justified by the poor quality of the reports, but as the core task of the centre was to independently collect and analyse data and information, interference with the conclusions of the centre's reports raised debate about its *raison d'être*. At the same time, according to a respondent, many members of the board,

...wanted to be as far away as possible from the national authorities so that they would not be influenced by them. That created a huge gap between what the member states thought that the agency was going to do and what they, the members of the board, were doing.<sup>117</sup>

During the board's first term, most board members therefore did not let national considerations play a role. This was much less the case in the second period, however. The amount of comments by board members on the annual report dramatically increased. In 2002, the board established a working group "to follow closely the drafting of the annual report and to finalise the recommendations."<sup>118</sup> Whenever a section of the draft report was discussed dealing with the situation in a particular country the board member from that country questioned the reported findings. "Even if a country had not achieved anything at all in terms of addressing the situation we therefore had to emphasise good practices and future ambitions".<sup>119</sup> From time to time the management board almost seemed to be an "editorial board", according to a former board member.<sup>120</sup> Another former board member, however, reacts:

I find it normal that you follow closely what is written about your country, even though you are appointed in a personal capacity. When certain generalisations are thrown in the air about your country and you know that is not the case, you intervene, and that may be perceived as taking a defensive position.<sup>121</sup>

In 2002, the EUMC director decided a report was needed on the increasing amount of anti-Semite expressions and acts throughout Europe. It made use of the so-called 'rapid response function', investigating an urgent issue within a short time frame. This func-

tion had also been used to monitor the situation of Muslims in the EU member states immediately after the terrorist attacks of September 11 and had then proven effective in raising awareness.<sup>122</sup> This success was also acknowledged by the Commission, using the work done by NFPs in this case as a resource.<sup>123</sup>

The centre asked the NFPs to count the number of anti-Semitic expressions and acts in their countries over a four-week period in April-May 2002 in order to decide in which way the EUMC would follow the situation.<sup>124</sup> The EUMC contracted the renowned Berlin Centre of Research on Anti-Semitism to compose a synthesis report on the basis of the material collected by the NFPs, whilst continuing to follow the situation closely over a longer period. The draft report produced by the German institute revealed “inadequacies” in the data collected. Due to the short time period and the imprecise way in which the EUMC had posed its questions, the data gathered by the NFPs<sup>125</sup> – many of them not trained to recognise the various manifestations of anti-Semitism – was generally of poor quality.

Because the report was based on data collected by the rapid response function, the board wanted to decide about the publication of the report. It eventually decided to withhold the report from publication as the draft the German research centre submitted, in the words of the chairman of the board, “did not meet any of the usual quality standards that all EUMC publications must adhere to”.<sup>126</sup> It has been suggested by the research centre that, because the study was not rejected by all members of the management board, “political pressure from various EU countries on the management board had led to its non-publication”.<sup>127</sup> The research centre remarked that: [...] a scientific study cannot take politics into consideration; on the contrary, scientists must conduct research and present facts that can serve as a basis for political decisions”.

Thus far, the discussions had remained behind the closed doors of the board and the agency. The affair exploded, however, when the *Financial Times* published an article containing allegations that the draft was shelved “because the study concluded that Muslims and pro-Palestinian groups were behind many of the incidents”.<sup>128</sup> While so far the EUMC had not generated a lot of media interest, the affair led to an enormous amount of coverage in the international press. It made the EUMC’s environment sorely realise “the broader external dimensions to the work it is doing and the way that it has an impact on the perceptions of the EU in tackling issues such as racism and discrimination”, as one EUMC staff member observed.<sup>129</sup> Even Commission President Prodi became involved in the affair when the Commission, although it had nothing to do with the decision of the centre not to publish the report, was accused of fuelling anti-Semitism (see Chapter 5).

After pressure had been exerted on the EUMC and the Commission by the US Congress, as well as Jewish organisations both in the US and Europe, to make the report public, an incomplete first draft of the report leaked to the press and was publicised on the internet.<sup>130</sup> A new report, based on a second data collection exercise covering a longer time period and using more precise questions, was published in the spring of 2004. In order to complement the material in the report and to remedy some of the deficiencies, a complimentary report was published consisting of interviews with prominent members of the Jewish community in the EU.<sup>131</sup>

The affair apparently has been a traumatic experience for people involved in the EUMC’s work, as it was constantly popping up in internal discussions and consistently being referred to in terms of mistakes made (e.g. underestimating the political saliency of its work) and lessons learned (e.g. ‘getting things right’ in its reports). Moreover, the affair was a severe blow to the agency’s image, a blow from which it, according to many respondents, has suffered until its transformation into the FRA.<sup>132</sup> The agency’s direc-

tor, through her widespread networks in the field, eventually played a central role in bringing the affair to an end.

### *Caught between the board and the Commission*

In 1998, Beate Winkler was appointed by the management board as the centre's first (and eventually only) director.<sup>133</sup> The Commission had short-listed three candidates of whom Winkler was one.<sup>134</sup> Winkler had participated in a hearing of the Consultative Commission and had made a good impression on its members, and proved knowledgeable in the field. The other two candidates, coming from the ranks of the Commission and preferred over Winkler by the Commission, had no experience in the field of racism and discrimination. In the Commission's view, the centre should have had a manager-type director, primarily taking care of the centre's internal management.

The management board, independent in its ability to appoint a director, applied other criteria. Not so much concerned with the internal organisation, at least not at that time, but more with the centre's public image and its relations to experts in the field, the board appointed Winkler.<sup>135</sup> The board reasoned that, when deemed necessary at a later stage, an assistant director responsible for internal management could be appointed.<sup>136</sup> The director had to make the centre visible to the rest of the world. Winkler, having a background in communication as well, was thought to be the advocate-type director needed.

Through extensive travelling and numerous contacts all over Europe, Winkler acquired a high level of authority, notably with members of the European Parliament with whom she maintained close contact.<sup>137</sup> She has indeed been a true advocate of the EUMC. In 1999, for instance, her public representation alone amounted to 36 speeches and contributions to various conferences and seminars.<sup>138</sup> So while the board did interview candidates for the director's post, it decided to re-appoint Winkler as director of the centre in 2002, thereby confirming its support for her leadership.<sup>139</sup>

Preoccupied with the challenge to establish external networks and to ensure the impact of the centre's work, Winkler in the early years paid less attention to the management of its internal organisation. In its 2000 report the Commission noted that improvements in the management of the agency were possible.<sup>140</sup> Financial and administrative problems arose, for instance, concerning tendering procedures, that were not adequately dealt with by the centre and led to concern with the Court of Auditors.<sup>141</sup> Difficulty also related to staff selection and recruitment, and relations between the centre's top management and staff members. The problems with RAXEN and the affair with the anti-Semitism report made the director reinforce her control over the internal organisation. She carried out a reorganisation of the agency which eventually contributed to solving the most pressing problems.<sup>142</sup>

But the director remained caught between the management board, to whom she was answerable, and the Commission, whom she was supposed to serve. Winkler says of her job as a director: "Sisyphus was a happy person".<sup>143</sup> Aspiring to an expanded role for the centre, Kahn wanted to have her out in the field boosting the centre's human rights image, whereas the Commission saw her at the agency performing the tasks specified in the regulation. "Clearly she wanted the success of the agency more than anything," a respondent says, "but she wasn't ever given a clear picture by the people who employed her of what the benchmarks of success were."<sup>144</sup>

### *Developing priorities separate from the Commission*

The EUMC's constituent regulation stipulated that the centre is serving the "Community and its Member States". When the centre started its activities, however, there was no consensus on whether it should primarily produce data for the Commission or whether it should also provide information to the EU member states, or even for the broader European public. In addition, Members of European Parliament (MEPs) expected the centre to 'name and shame' member states not in compliance with EU law. It took some time to clarify the role of the centre vis-à-vis the Commission with one of the questions being which of the two organisations would monitor the transposition of directives.<sup>145</sup>

For the Commission, the EUMC was essentially a data collection body. All other activities of the agency, in the Commission's perspective, had to fit its data collection objective. At the beginning of 2001 the EUMC signed a memorandum of understanding with the European Commission, setting out the framework for direct contacts and concrete cooperation.<sup>146</sup> The EUMC would have to provide the Commission with comparable data that can be of use to base policies on combating racism and xenophobia. For that purpose, the Commission wanted the EUMC to identify 'good practices' that could be transferred from one country to another. Most NFPs and staff members were convinced that the comparability problem would make this difficult if not impossible.<sup>147</sup>

On the basis of its formally autonomous position, the EUMC quickly developed its own priorities, which were not always in line with the priority needs of the Commission. The centre "developed [a] strategy to think and act in terms of *"and"* and not of *"or"*, collecting both statistical and subjective data, reporting on both negative and positive developments, and instead of solely focusing on data collection, also stressing its advocacy role, campaigning against racism and xenophobia.<sup>148</sup>

The campaigning profile revealed itself early, during the opening of the centre. Against the wishes of the centre, Austrian Foreign Minister (later to become an EU Commissioner) Mrs Benita Ferrero-Waldner, as an Austrian People's Party (ÖVP) member of the governing coalition associated with the right-wing Freedom Party (FPÖ), attended the opening.<sup>149</sup> In a statement by Bob Purkiss, vice-chairman of the management board, the EUMC made clear that it had not invited Ferrero-Waldner and did not allow her to make a statement during the opening. This action of the centre caused friction with the Commission.

Furthermore, the centre also focused its attention on tasks that it, formally speaking, was to carry out, but that did not necessarily fit its prime objective, at least not in the eyes of the Commission. These tasks included conducting or initiating research on the phenomena of racism and xenophobia, and facilitating and encouraging the organisation of round tables in the member states and at the EU level.<sup>150</sup> The Commission, in its 2003 evaluation of the centre's activities, thus noted that the centre should not undertake "ancillary research" that is not directly related to the core tasks of the EUMC and that the roundtables in practice "have not been effective from the point of view of gathering data."<sup>151</sup> Apart from the fact that these tasks were actually laid down in the founding regulation, agency officials considered the round tables in particular of key importance for exchanging findings and experiences with civil society in the member states.<sup>152</sup>

The Commission was even more critical about the agency when it remarked that "it is clear that the objective of comparability has not yet been achieved to any substantial degree."<sup>153</sup> The Commission, for instance, rejected the use of media reports, which especially in the early years were also used as a source of information, as not being

"scientific". It also questioned the coverage of particular incidents, stressing that reports needed to be more "analytical".<sup>154</sup> While the Commission noted that the quality of the data was improving, it also stated that it "has not so far allowed genuine comparisons to be drawn between the situations in the different Member States nor an assessment of the effectiveness of the anti-racist policies pursued by individual countries."<sup>155</sup>

Indeed, the disparity between agency activities and Commission policy has made the Commission turn to other information sources, such as the network of legal experts providing information on the implementation of the anti-discrimination directives in national law and independent analysis on their impact in practice,<sup>156</sup> and the network of independent experts assessing the safeguarding of fundamental rights in the EU member states.<sup>157</sup> The Commission felt it could not ask NFPs for this information given that they were often NGOs and would therefore lack the high level of legal expertise. To be sure, the work done by the centre was supposed to support the Commission's activities. It was the implementation of directives that would be driving the changes in the member states on which the EUMC had to report. But because much of the early material produced by the centre was considered to be "anecdotal" the Commission found it difficult to use.<sup>158</sup>

Thus, instead of contributing to the activities of the Commission, alleviating its workload and making it possible to concentrate on its policy-making role in the area of racism and discrimination, the creation of the EUMC, according to some, led to an increase in the Commission's work. But not the kind of work it sought to carry out. A respondent noted that the Commission "devoted a lot of effort to manage differences between the agency and the Commission [...] especially in the start-up phase".<sup>159</sup> The more time EUMC staff spent on campaigning, and more difficulty it experienced in delivering comparable data, the more some people in the Commission believed that instead of devoting all those efforts, it would actually be more efficient if the Commission would simply do the work of the EUMC.

To deliver 'value for money', the Commission believed "that the Centre need[ed] to concentrate on its role as the data collection body foreseen by the Regulation, and that it should give less weight to establishing a profile as a campaigning organisation, which has caused some confusion as to its objectives."<sup>160</sup> The Commission's 2003 evaluation of the centre included a proposal for a recast version of the Council Regulation establishing the EUMC. Given its most important criticism, the Commission's proposal effectively came down to refocusing the centre on its prime objective as laid down in the regulation: providing the EU institutions and the member states with comparable data on racism, xenophobia and anti-Semitism.

Thus, as soon as it appeared that the EUMC was developing in a way inconsistent with the expectations of the Commission, the Commission, considering itself the main client of the EUMC, demanded that the centre refocus its objectives on collecting comparable data rather than doing advocacy work.<sup>161</sup> Hence, an extension of the agency's mandate to other fields, as suggested by a 2002 external evaluation of the agency, would for the Commission be "an unwelcome distraction within the limits of the resources likely to be available to the Centre and that it would lead to a weakening of the emphasis on racism".<sup>162</sup>

After 2003, and its reorganisation, the EUMC sought to align its activities with the priorities as agreed on by the Commission and the Council. The centre has for instance published findings on racial discrimination in employment and housing, which closely related to Commission policies in these areas. Furthermore, the centre, after being evaluated, introduced a process for reporting progress in implementing its annual work programme, making it easier to see how individual projects fitted the centre's main

objectives (or those of the Community more generally).<sup>163</sup> But, although the quality of the reports may have improved from the Commission's point of view, the relevance of the EUMC's work remained an issue, also after 2003 and for other actors such as the member states.<sup>164</sup>

### *The limited involvement of the member states*

It has taken some time before the Council and the EU member states were involved in the centre's work.<sup>165</sup> As NFPs and board members were independent from national governments, there initially was no official link between the centre and national governments. As a result, the member states were often unaware of the EUMC's work, despite the centre's efforts to promote its output. The centre's reports were scarcely used by member states' policy makers. To support countries in the implementation of the Article 13 directives, the EUMC for instance prepared reports on anti-discrimination legislation in the member states. Only "some" member states indicated that they found the reports useful in aiding them in their work.<sup>166</sup> The limited use of the EUMC's opinions and conclusions was also demonstrated by disappointing results from an EUMC questionnaire sent to member state governments in 2005.<sup>167</sup>

Moreover, although national governments did not like to be 'named and shamed' in EUMC reports, they generally seemed to be indifferent to the work of the centre, especially in the beginning.<sup>168</sup> Also national parliaments rarely paid attention to EUMC reports.<sup>169</sup> The issue of racism and xenophobia, although recognised as a problem, has not been high on the political agenda in most member states; for many member states the lack of reliable data simply meant that they could ignore the problem. In 2000, with Haider taking part in Austria's governing coalition and the subsequent measures of the 'EU14', an opportunity arose to push the issue. But the EUMC, "too outraged with what was happening in Austria", did not succeed in convincing member states change the way they dealt with the issue.<sup>170</sup>

Meanwhile, under the perceived threat of terrorism and fundamentalist Islam, the political debate shifted to the restriction of civil liberties and the integration of minorities into western society. Also in the face of its transformation into the FRA and the transfer of administrative responsibility for the EUMC to DG JLS, this meant that the EUMC had to redefine its focus, for instance, concentrating more on racist crime, the position of Muslim communities, Islamophobia, and the impact of security legislation.<sup>171</sup> Member states' interest in its activities however continued to be limited.

What is more, governments could be indifferent because the centre could not compel them to change their systems of data collection and to provide data and information. The EUMC depended on voluntary cooperation from member states.<sup>172</sup> For example, some countries have been willing to invite the EUMC to participate in activities at the national level, such as roundtables with civil society, providing the centre with the opportunity to raise awareness.<sup>173</sup> But the reluctance of other governments to cooperate with the NFPs at the national level has impeded the work of the EUMC at the European level.<sup>174</sup> In a speech at the 3<sup>rd</sup> National Roundtable Conference on Racism and Xenophobia in the Netherlands, the Dutch Minister for Immigration and Integration, Rita Verdonk, even warned the EUMC to improve the quality of its reports "or else it will be difficult for the Netherlands to continue its support to the EUMC".<sup>175</sup>

As the member states are responsible for legislation and policies in the field of racism and discrimination, and as they have the power to change national data collection systems, the EUMC recognised that it had to work closely with national governments if it wanted to develop comparable datasets. "[...] [U]ltimately the Centre's remit is un-



achievable unless national authorities adopt compatible if not common classification systems".<sup>176</sup> For a long time the adoption of such data collection systems was hindered by various national traditions and the different legal approaches towards monitoring racism and discrimination. The EUMC was supposed to change this. But by deciding not to involve the member states directly in the work of RAXEN – understandable from an autonomy point of view – it was difficult to achieve the objective of comparability. In addition, "there was nothing built in the Regulation for coordinating work with the member states, at the government level."<sup>177</sup>

To nevertheless involve member state governments in its work, the EUMC in 2001 established a network of liaison officers in national ministries.<sup>178</sup> The idea was that these liaison officers would feed the work of the EUMC functioning as a link with national ministries. In practice, requests for support channelled through the liaison officers have been highly dependent on the political priority that racism and discrimination issues had in a member state. It of course also depended on the quality and relevance of the work delivered by the EUMC, with which the member states, according to several respondents, are increasingly satisfied.<sup>179</sup>

Furthermore, liaison officers would check the accuracy of the information produced by the NFP for the EUMC's annual report, as the centre itself lacked the local knowledge to verify information by NFPs. This has raised questions with NFPs, for they considered themselves the experts.<sup>180</sup> Meetings between the EUMC and the liaison officers, held twice a year, have nevertheless been said to enhance information flow to and from member states, encompassing examples of good practice and policy development. They have also been said to improve the input into the EUMC working programme process through the identification of member states' needs, and into the annual report process by assessing impacts of EUMC recommendations at the national level.<sup>181</sup>

But the precise relation between the EUMC and liaison officers has never been fleshed out.<sup>182</sup> Questions the liaison function raised with NFPs also raised suspicion of board members, because, after all, "they were the liaison officers."<sup>183</sup> Some liaison officers were not aware of what was expected of them. Also, liaison officers have in many cases been junior officials, not able to exercise influence at a high enough level in the member states.<sup>184</sup>

### *Contributing to the activities of the Council of Europe*

The centre entered a field replete with other organisations, not only national but also international ones, in which it had "to find a place for itself."<sup>185</sup> It was thus supposed to "identify synergies, avoiding duplication and undertaking complimentary actions where they add value to the general work of intergovernmental organizations", and, for that purpose, establish networks of cooperation.<sup>186</sup> The EUMC contributed to the activities of the Council of Europe (CoE) and other organisations such as the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) or the UN's Committee on the Elimination of Racial Discrimination (CERD), but was often not a key partner.<sup>187</sup> Moreover, whereas the centre itself could decide on the contracts it concluded with the NFPs, the Commission decided on the centre's agreements with other international and European bodies.

In order to avoid overlap or duplication of work and "to ensure through close cooperation with the Council of Europe that it provides added value", the centre was especially supposed to maintain close relations with the CoE's Commission against Racism and Intolerance (ECRI).<sup>188</sup> ECRI was set up in 1993 "to combat racism, xenophobia, anti-Semitism and intolerance at the level of greater Europe and from the perspective of

the protection of human rights".<sup>189</sup> This objective comes close to the EUMC's mission, which made it difficult for outside observers to identify the distinct character of the EUMC. ECRI's approach to data collection, however, is "totally different" from the EUMC's approach.<sup>190</sup> Whereas the EUMC's data was collected by specialised organisations in the EU member states, ECRI conducts its own investigations in its member countries. While ECRI's 'country-by-country' approach might lead to more comparable information, its rapporteurs are usually unfamiliar with specific situations in the member states they visit. The centre's reports, by contrast, were more detailed and comprehensive than those of ECRI, but, as explained above, tended to be less comparable.<sup>191</sup>

When creating the EUMC there was some discussion on not having it be a joint monitoring centre with the CoE. This idea was successfully resisted by the Consultative Commission. The Consultative Commission believed that the broad membership of the CoE to include countries not known for respecting human rights and democratic principles, would make it difficult to be critical of particular countries. They thought of the EUMC as a body autonomous of the member states.<sup>192</sup> Interestingly enough, CoE representatives view this the other way around. They consider the EUMC a body dependent on the Commission and the EU member states, which made it difficult for the centre to act autonomously.<sup>193</sup>

To coordinate their activities, the CoE has been represented in the management board. In 1998, the Commission, on behalf of the centre, concluded an agreement with the CoE and in 2002, the Council's Committee of Ministers adopted the Statute of ECRI, in accordance with which the EUMC, through one of the board members, is represented in ECRI.<sup>194</sup> While constructive, cooperation between the two organisations long remained limited to relations at the management level. Operational cooperation, particularly focusing on the organisation of joint activities and the development of common methodologies, really started to take off from 2002 onwards.<sup>195</sup> As cooperation has significantly improved ever since, the degree of overlap between the EUCM and ECRI has in practice remained limited.<sup>196</sup>

Although monitoring racism and xenophobia would remain the core elements of the new Fundamental Rights Agency, the transformation of the centre has caused serious concerns among national<sup>197</sup> and European parliamentarians<sup>198</sup> over duplication in the area of human rights. The potential overlap with the activities of the CoE and other organisations in the area of fundamental rights was also one of the main arguments against the establishment of an FRA.<sup>199</sup> The initial reaction of the CoE on the decision to create the FRA was defensive, if not hostile. Terry Davis, Secretary-General of the Council of Europe, commented on the proposed agency: "With all the best will in the world, I can't understand what it is going to do."<sup>200</sup> But once the FRA had been created, the CoE changed its tune, for instance concluding a cooperation agreement with the FRA.

## 10.5 Conclusion: in search of a distinct and legitimate identity

This chapter discussed the EUMC's early development. It demonstrated that while formally, the centre had a limited remit, this has not kept it from interpreting its mission and role more broadly than the Commission, its main principal, would have liked. The EUMC actively campaigned against racism and discrimination instead of merely collecting data and information. In its early years, the EUMC thus fought tough battles with its 'parent DG' in the Commission over the interpretation of its mandate, objec-

tives and tasks. The Commission did not have to rely on the centre for its information however and it has therefore often turned to other sources.

The EUMC has from the start faced difficulty in collecting data, let alone collecting *comparable* data, which made it difficult to show added value. Several factors can explain this. The centre operated in a politically very sensitive area (more than some other EU agencies) which made member states reluctant to cooperate. Rather than the result of functional considerations, the centre's creation has been more of a symbolical nature, to make up for the lack of EU action in this area. The fact that it was located in Austria just before the EU measures against this country and did not receive any help from the Commission to get started, did not make it much easier for the agency's director and her staff.

In addition, and related, the centre's small size inhibited specialisation, which in turn hampered its potential to deliver high quality reports, at least in the early years. Furthermore, the relationship between the EUMC and its network of national focal points, on which it relied for information, has sometimes been acrimonious. The centre initially adopted a rather centralised approach toward steering the network of NFPs, instead of coordinating their work. An adjustment of this approach in 2003 is said to have improved the relations between the agency and the NFPs during the final years of the EUMC's existence.

A further reduction of the centre's autonomy came from the management board. The board or at least some of its members, notwithstanding (or perhaps due to) the fact that they were appointed on the basis of their expertise in the field rather than their management qualities, have regularly meddled with EUMC conclusions, for instance for reasons of national interest. This has seriously decreased the credibility of the centre. The highly politicised and mediated shelving of the EUMC's anti-Semitism report serves as an example of the board's interference in the agency's work.

Moreover, the EUMC's management board, as opposed to the boards of other EU agencies composed of experts acting in their personal capacity, was supposed to be autonomous from the member states. As a result, however, the Commission has been able to exercise important decision-making influence over the board. When the EUMC tried to go beyond its formal scope of autonomy, the Commission intervened, seeking to – in its eyes – refocus the agency on its core task, that is, providing comparable data.

The EUMC's first (and only) director was caught in between. Winkler was very active in networking and campaigning for the EUMC's objectives and tasks but, in the early years spending much time on external representation, she paid less attention to the centre's internal functioning. This, in part, resulted in disputes and conflicts to arise within the centre, which impacted on its early work. Because the EUMC initially did not deliver results, it in turn experienced difficulty in retaining and attracting well-qualified people. Also this situation slowly changed after the reorganisation of the agency in 2003, but had a long-lasting effect on the agency's reputation among stakeholders.

The centre initially distanced itself from the member states by focusing on its autonomy not only from political actors but also from bureaucratic ones. Member states at the same time, not considering racism and xenophobia a top priority, often were indifferent to the agency's work. Although the EUMC created a network of liaison officers at the bureaucratic level, which proved quite effective, the EUMC's impact on the member states has remained limited. Whereas cooperation with the Council of Europe's ECRI had increased over the years, the proposed transformation of the EUMC into an FRA led to hostility from the part of the Council of Europe. This decreased the

legitimacy of the EUMC and initially also the FRA's, the new body's role being called into question.

Building on the experiences of the EUMC, the challenge for the FRA will therefore be to gain and maintain autonomy, while at the same time establishing links with the EU member states, the Commission, the Parliament, other international bodies and civil society and adding value to their work on the basis of a distinct identity. Only then will it not merely be autonomous but also heard.

## Notes

<sup>1</sup> Interview #22

<sup>2</sup> EUMC Annual Report (hereafter referred to as 'AR') 1998, Presentation by the Chairman of the Board, p. 2.

<sup>3</sup> Council Regulation (EEC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (hereafter referred to as 'founding' or 'constituent regulation')

<sup>4</sup> European Parliament (1985), *Committee of Inquiry into the rise of fascism and racism in Europe* (Evrigenis Report), Luxembourg: European Parliament.

<sup>5</sup> European Parliament (1991), *Report of the Committee of Inquiry on Racism and Xenophobia* (Ford Report), Luxembourg: European Parliament.

<sup>6</sup> Interview #21

<sup>7</sup> European Parliament (1997), *European Union Anti-Discrimination Policy: From Equal Opportunities between Women and Men to Combating Racism*, Directorate-General for Research, Working document, Public Liberties Series, LIBE 102 EN.

<sup>8</sup> Interview #22

<sup>9</sup> Consultative Commission on Racism and Xenophobia, Final Report, April 1995. The final report was not endorsed by all Consultative Commission members. Baroness Flather, representative from the UK, made a statement in which she expressed doubts "about the value of the 'Observatory' proposal because it seemed to me that it would do little in the short term other than to allow the growth of an additional bureaucracy. I do not see that members of minority communities will gain any immediate, or possible even long-term, benefits from this."

<sup>10</sup> Commission of the European Communities, *Proposal for a Council Regulation (EC) establishing a European Monitoring Centre for Racism and Xenophobia*, COM(96) 615, Brussels, 22 November 1996.

<sup>11</sup> Interview #22

<sup>12</sup> Commission of the European Communities, Communication from the Commission on racism, xenophobia and anti-Semitism. *Proposal for a Council Decision designating 1997 as the European Year against Racism*, COM(95)653, Brussels, 13 December 1995.

<sup>13</sup> Commission of the European Communities, Communication from the Commission. An action plan against racism, COM(1998) 183 final, 25 March 1998.

<sup>14</sup> Interview #22

<sup>15</sup> There have been reports about illegal Austrian interference with the work of the agency when it was still housed in the chancellery. But the relationship between the Centre and the host country improved over time. The EUMC had never worked so closely with an EU Presidency before as with the Austrian Presidency of the EU in the first half of 2006. Interviews #4 and #25

<sup>16</sup> AR 1999, p. 117.

<sup>17</sup> AR 1998, Presentation by the Chairman of the Board, p. 2.

<sup>18</sup> France would have been willing to host such an institute. Interview #4

<sup>19</sup> See preamble para. 18 of the EUMC's founding regulation.

<sup>20</sup> The term 'annual report' is confusing as most organisations and EU agencies alike reserve this term for the yearly report to stakeholders containing information on management operations and the organisation's financial situation. Instead, the EUMC annual report contained two parts: a part on the racism, xenophobia and anti-Semitism situation in the member states and a part on the activities of the EUMC.

<sup>21</sup> See preamble, para 23 of the EUMC's founding regulation.

<sup>22</sup> Interview #4

<sup>23</sup> Interview #7. See also AR 2002, pp. 26-27; AR 2004, p. 24.

<sup>24</sup> These tasks are comparable to that of the bureau of the EEA's management board.

<sup>25</sup> AR 1998, p. 16.

<sup>26</sup> AR 2004, pp. 24-25.

<sup>27</sup> Cologne European Council, Presidency Conclusions, 1999.

<sup>28</sup> AR 2000, p. 116.

<sup>29</sup> AR 2000, p. 117.

<sup>30</sup> European Council, Presidency Conclusions, 12/13 December 2003.

<sup>31</sup> Interviews #22 and #38

<sup>32</sup> Interview #22

<sup>33</sup> Interview #38

<sup>34</sup> See Commission of the European Communities, Communication from the Commission. *The Fundamental Rights Agency*. Public Consultation document, Brussels, COM(2004)693 final, 25.10.2004; Vice-President Franco Frattini, Commissioner for Justice, Freedom and Security, Opening of the Public Hearing, Public Hearing – Fundamental Rights Agency, Speech/05/34, Brussels, 25 January 2005.

<sup>35</sup> EUMC, Preliminary Remarks of the EUMC on the Communication from the European Commission paper COM(2004)693 of 25 October 2004 regarding the extension of the EUMC into a Fundamental Rights Agency, December 2004; AR 2004, p. 4; EUMC, Fundamental Rights Agency can learn from EUMC experience. Interview with Anastasia Crickley, new Chair of the EUMC Management Board, Equal Voices, Issue 15, available at [fra.europa.eu](http://fra.europa.eu), consulted on 6 August 2008.

<sup>36</sup> *EUobserver*, Legal dispute could delay EU rights agency, 12 September 2006.

<sup>37</sup> *EurActiv*, Human rights agency remit 'must include terrorism', 14 September 2006, available at [www.euractiv.com](http://www.euractiv.com), consulted on 17 July 2007.

<sup>38</sup> It was decided however to re-examine the possibility of extending the agency's scope to policy and judicial cooperation in criminal matters by the end of 2009. See *EUobserver*, EU opts for fundamental rights agency with limited scope, 5 December 2006.

<sup>39</sup> Amnesty International, Report, 2006; *EUobserver*, Amnesty says EU minimalist on human rights role, 24 May 2006.

<sup>40</sup> Letter by the Social Platform, the Amnesty International EU Office for the Human Rights and Democracy Network, and the European NGO Confederation for Relief and Development to Wolfgang Schäussel, Federal Chancellor, President of the European Council, 22 March 2006; ENAR, Fundamental Rights Agency: Austrian Presidency urged not to rush into political compromise that would jeopardize the protection of rights in Europe, Press Release, Brussels, 22 March 2006.

<sup>41</sup> *EUobserver*, EU opts for fundamental rights agency with limited scope, 5 December 2006.

<sup>42</sup> See Article 12, para. 1 of the FRA constituent regulation. Interview #38

<sup>43</sup> The 11 members of the scientific committee are appointed by the management board following a selection procedure and after consulting with the relevant committee of the European Parliament. Their term of office is five years and is not renewable.

<sup>44</sup> AR 1998, p. 22.

<sup>45</sup> Commission Communication, 2003, p. 2.

<sup>46</sup> Presentation by Beate Winkler, Director of the EUMC, during the EUMC National Round Table, in Utrecht, The Netherlands, on 7 June 2006.

<sup>47</sup> Commission Communication, 2003, p. 4.

<sup>48</sup> In 2004, for instance, the UK reported 52.694 racist incidents whereas Italy reported 0. See AR 2004.

<sup>49</sup> Interview #24

<sup>50</sup> At the same time, the term monitoring should not be taken to signify a role for the Centre in the monitoring of compliance with EU legislation.

<sup>51</sup> External evaluation, 2002, p. 46.

<sup>52</sup> Interview #24

<sup>53</sup> AR 1998, pp. 20-21; Commission interim report, 2000, p. 12.

<sup>54</sup> AR 1999, pp. 101-102.

<sup>55</sup> Report on the definition of and steps to be taken to develop and establish the RAXEN network, Karmela Liebkind, Professor of Social Psychology, University of Helsinki, June 1999 (hereafter referred to as 'Liebkind Report')

<sup>56</sup> Liebkind report, June 1999

<sup>57</sup> Report to the Management Board on the consultation exercise on the setting up of the RAXEN network, September 1999.

<sup>58</sup> AR 1999, p. 103.

<sup>59</sup> External evaluation, 2002, p. 13.

<sup>60</sup> External evaluation, 2002, p. 10.

<sup>61</sup> The initially appointed head did not take up his position, which necessitated a new round of applications.

<sup>62</sup> It has been suggested that the poor response resulted from the limited duration of the RAXEN mapping exercise, the small amount of money offered, the lack of background information, and the unfamiliarity of the staff with the tendering process. See AR 2000, pp. 104-105; External evaluation, 2002, p. 14.

<sup>63</sup> AR 2002, p. 9.

<sup>64</sup> See, for instance, EUMC, Summary of Activities, July 1998 – February 2007, Working Paper.

<sup>65</sup> Procrustes is the name of a mythological figure who fitted his victims to a bed by stretching them or cutting off parts of them.

<sup>66</sup> Interview #7

<sup>67</sup> External evaluation, 2002, pp. 19-20.

<sup>68</sup> AR 2000, p. 105.

<sup>69</sup> Interview #7

<sup>70</sup> External evaluation, 2002, p. 19.

<sup>71</sup> The Committee of the Regions for instance recommended to expand the capacity for original research and to provide staff training. See Opinion of the Committee of the Regions on the 'Report from the Commission on the activities of the European Monitoring Centre on racism and Xenophobia', 2002/c 107/09, 14 November 2001, paras 8 and 16.

<sup>72</sup> Commission Communication, 2003, p. 12.

<sup>73</sup> Interview #4

<sup>74</sup> The visibility problem therefore then was not a problem of visibility but a problem in the balance of the relationship between the EUMC and NFPs.

<sup>75</sup> Which does not testify to much trust in the work of NFPs.

<sup>76</sup> This at least partly resulted from the first head of the RAXEN unit recruiting like-minded people who continued to be employed with the EUMC after his departure.

<sup>77</sup> Interview #4

<sup>78</sup> AR 2003, p. 3. See also Presentation by Beate Winkler, Director of the EUMC, during the EUMC National Round Table, in Utrecht, The Netherlands, on 7 June 2006.

<sup>79</sup> AR 2004, p. 4.

<sup>80</sup> AR 2003, p. 21.

<sup>81</sup> AR 2003, p. 27.

<sup>82</sup> Interview #22

<sup>83</sup> See also Presentation by Beate Winkler, Director of the EUMC, during the EUMC National Round Table, in Utrecht, The Netherlands, on 7 June 2006; EUMC, Summary of Activities, July 1998 – February 2007, Working Paper, p. 9.

<sup>84</sup> Interview #7

<sup>85</sup> External evaluation, 2002.

<sup>86</sup> Interviews #4 and #25. A comparison of the annual work programmes over the years shows that the list of activities has not substantially increased, whereas the amount of staff has.

<sup>87</sup> AR 2003, p. 39.

<sup>88</sup> Interviews #4 and #22

<sup>89</sup> Interviews #24 and #30

<sup>90</sup> EUMC, Summary of Activities, July 1998 – February 2007, Working Paper, p. 11.

<sup>91</sup> EUMC, Fundamental Right Agency can learn from EUMC experience. Interview with Anastasia Crickley, new Chair of the EUMC Management Board, Equal Voices, Issue 15, available at [fra.europa.eu](http://fra.europa.eu), consulted on 6 August 2008.

<sup>92</sup> Interview #7

<sup>93</sup> Interview #38

<sup>94</sup> Interviews #25 and #30

<sup>95</sup> Interview #30

<sup>96</sup> Interview #7

<sup>97</sup> Interview #24

<sup>98</sup> Interview #25

<sup>99</sup> Interview #4

<sup>100</sup> Interview #25

<sup>101</sup> Interviews #22 and #40

<sup>102</sup> This has sometimes led to disagreements between the director, who was the face of the agency, and the chairperson of the board with regard to their respective roles when it came to representing the EUMC. Interview #4

<sup>103</sup> In 2003, the agency created the Jean Kahn Award for outstanding contributions to combating racism, xenophobia and anti-Semitism in Europe.

<sup>104</sup> Interview #22. See also Commission Communication, 2003, p. 11.

<sup>105</sup> Interview #22

<sup>106</sup> Commission Communication, 2003, p. 11. Interviews #13 and #22. See also summaries of management board meetings as reported in the annual reports until 2003.

<sup>107</sup> Interview #22

<sup>108</sup> AR 1999, p. 123; AR 2000, p. 117.

<sup>109</sup> See, for instance, the letters from Italian board member, Dr. Francesco Margiotta Broglio, to the agency director, Beate Winkler, and her reply.

<sup>110</sup> Interview #25

<sup>111</sup> Interview #22

<sup>112</sup> The Committee of the Regions therefore considered that the board should continue with “promoting a clearer organisational identity and focus on priorities for the EUMC”, while also “being more involved in input and advice in terms of strategy and direction”. See Committee of the Regions, Opinion of the Committee of the Regions on the ‘Report from the Commission on the activities of the European Monitoring Centre on racism and Xenophobia’, 2002/c 107/09, 14 November 2001, para 4 (i) and (ii).

<sup>113</sup> Interview #22

<sup>114</sup> Several interviews. See also summaries of the management board meetings as reported in the annual reports until 2003.

<sup>115</sup> See External evaluation, 2002, p. 56.

<sup>116</sup> External evaluation, 2002, pp. 16, 24; see also EUMC work programme, 2000.

<sup>117</sup> Interview #22

<sup>118</sup> AR 2002, p. 37.

<sup>119</sup> Interview #30

<sup>120</sup> Interview #13

<sup>121</sup> Interview #40

<sup>122</sup> AR 2002, p. 12. The rapid response function was also used after the London bombings. Only four hours after the bombings had occurred, the EUMC requested the NFPs to follow the situation in their country closely and report to the Centre.

<sup>123</sup> Interview #22

<sup>124</sup> AR 2003, pp. 10-11.

<sup>125</sup> Not all NFPs participated in the project as they did not agree on the research design.

<sup>126</sup> Letter from Bob Purkiss to Mr Andre Gowers, editor of the *Financial Times* on the FT Reports dated 22/23 and 24 November on 'EU racism body shelves report on anti-Semitism' and 'Brussels urged to publish anti-Semitism report', Vienna, 25 November 2003.

<sup>127</sup> Centre for Research on Anti-Semitism, Newsletter, Nr. 26, December 2003. The research centre also claimed that board members were not experts in the field of anti-Semitism, as they overwhelmingly came from the areas of politics and administration.

<sup>128</sup> *Financial Times*, EU racism body shelves report on anti-Semitism, 22/23 November; Brussels urged to publish anti-Semitism report, 24 November 2003; see also Letter from Bob Purkiss to Mr Andre Gowers, editor of the *Financial Times* on the FT Reports dated 22/23 and 24 November on 'EU racism body shelves report on anti-Semitism' and 'Brussels urged to publish anti-Semitism report', Vienna, 25 November 2003; and EUMC Media Release, Issue: 194-03-03-11-02-EN, 26 November 2003

<sup>129</sup> Interview #25

<sup>130</sup> *EurActiv*, Withheld EU report on anti-Semitism goes public on the Internet, 4 December 2003, available on [www.euractiv.com](http://www.euractiv.com), consulted on 17 July 2007.

<sup>131</sup> Several interviews. *EurActiv*, Major anti-Semitism report finally published by EU, 2 April 2004, available on [www.euractiv.com](http://www.euractiv.com), consulted on 17 July 2007; AR 2004, p. 20.

<sup>132</sup> Interviews #4, #13 and #40

<sup>133</sup> AR 1998, p. 15.

<sup>134</sup> In total, the Commission received 255 applications for the position of director.

<sup>135</sup> Interview #13

<sup>136</sup> Interview #13. The French head of administration, who was responsible for the internal organisation, left the Centre after disagreement with Winkler.

<sup>137</sup> Interviews #4, #21 and #25. The EUMC's director for instance presented the Centre's annual report in the presence of a member of the EP's committee for Civil Liberties, Justice and Home Affairs (LIBE).

<sup>138</sup> AR 1999, p. 116.

<sup>139</sup> AR 2002, p. 38.

<sup>140</sup> Commission report, 2000, p. 10.

<sup>141</sup> Interviews #4 and #22. See also the reports of the Court of Auditors, e.g. those covering 1998 and 1999.

<sup>142</sup> Interviews #4 and #24

<sup>143</sup> Interview

<sup>144</sup> Interview #22

<sup>145</sup> Interview #38

<sup>146</sup> AR 2001, p. 100.

<sup>147</sup> Interview #30

<sup>148</sup> EUMC, Summary of Activities, July 1998 – February 2007, Working Paper, p. 9.

<sup>149</sup> She had actually been encouraged to attend the opening ceremony by her Dutch colleague, Mr Jozias van Aartsen, who had sent a letter to his 14 EU colleagues calling for their attendance. Dutch member of the management board, Mr Ed van Thijn, was not pleased: "With her attendance she steps on the soul of this Centre. Our credibility is at stake when you accept people to attend that have helped racism to sit at the governing table [translation from Dutch – MG]". See Algemeen Nederlands Persbureau, Van Aartsen zorgt voor commotie bij opening racismebureau, 7 April 2000. Interviews #4 and #13

<sup>150</sup> External evaluation, 2002, p. 8; see also EUMC work programmes and annual reports.

<sup>151</sup> Commission Communication, 2003, p. 5.

<sup>152</sup> AR 1998, pp. 23-25; as also supported by the Committee of the Regions, Opinion of the Committee of the Regions on the 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97 and the Proposal for a Council regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version)', 2004/C 109/09, 12 February 2004, para 5.



<sup>153</sup> Commission Communication, 2003, p. 4.

<sup>154</sup> Interview #22

<sup>155</sup> Commission Communication, 2003, p. 4.

<sup>156</sup> See [http://ec.europa.eu/employment\\_social/fundamental\\_rights/policy/aneval/legnet\\_en.htm](http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm), consulted on 21 August 2007.

<sup>157</sup> See [http://ec.europa.eu/justice\\_home/cfr\\_cdf/index\\_en.htm](http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm), consulted on 21 August 2007; see also remarks made by Professor Rick Lawson, Dutch member of the network, during the EUMC National Round Table, in Utrecht, The Netherlands, on 7 June 2006.

<sup>158</sup> Interview #22

<sup>159</sup> Interview #22

<sup>160</sup> Commission Communication, 2003, p. 17.

<sup>161</sup> This view was not shared by all other EU actors. The Committee of the Regions by contrast considered there to be an essential link among data collection, information analysis and awareness-raising activities. They believed the EUMC should therefore be more involved in policy making: "data collection is [...] a necessary but not a sufficient condition for the Centre to fulfil its remit as intended by the Regulation". See Opinion of the Committee of the Regions on the 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97 and the Proposal for a Council regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version)', 2004/C 109/09, 12 February 2004, para. 5-6.

<sup>162</sup> Commission Communication, 2003, p. 9.

<sup>163</sup> Commission Communication, 2003, p. 13.

<sup>164</sup> Interview #38

<sup>165</sup> The EUMC has only been supporting the Presidencies of the EU in its final years. See AR 2005, p. 30.

<sup>166</sup> AR 2002, p. 26.

<sup>167</sup> If filled out at all, most answers to the questions pointed to limited use. Interview #4

<sup>168</sup> Interview #22

<sup>169</sup> Interview #13

<sup>170</sup> Interview #22

<sup>171</sup> Interview #25

<sup>172</sup> In this sense, the Centre resembled most other international organisations in the field of human rights.

<sup>173</sup> Interview #25

<sup>174</sup> Interview #30

<sup>175</sup> Landelijk Bureau Racismebestrijding (LBR), Verdonk: Europees waarnemingscentrum moet kwaliteit verhogen. Rondetafelconferentie bespreekt toekomst racismebestrijding' [Verdonk: European Monitoring Centre has to improve quality. Roundtable conference discusses future fight against racism], Press Release, Rotterdam, 16 December 2003, available at <http://www.lbr.nl/internationaal/eumckwaliteit.html>, consulted on 24 October 2005.

<sup>176</sup> Commission Communication, 2003, p. 5; See also Opinion of the Committee of the Regions on the 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97 and the Proposal for a Council regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version)', 2004/C 109/09, 12 February 2004, para 9.

<sup>177</sup> Interview #25

<sup>178</sup> Interviews #22 and #25. See also AR 2001, p. 101.

<sup>179</sup> Interviews #25 and #40

<sup>180</sup> Interview #4

<sup>181</sup> Interview #22. See also AR 2002, p. 32; presentation by Beate Winkler, Director of the EUMC, during the EUMC National Round Table, in Utrecht, The Netherlands, on 7 June 2006.

<sup>182</sup> During the first meeting in March 2002 the role of government liaison officers was merely “outlined”. See AR 2002, p. 32.

<sup>183</sup> Interview #22

<sup>184</sup> External evaluation, 2002, p. 24.

<sup>185</sup> See, for instance, EUMC, Summary of Activities, July 1998 – February 2007, Working Paper, p. 7.

<sup>186</sup> AR 2004, p. 28.

<sup>187</sup> Interview #25

<sup>188</sup> Article 3, para 2 of the EUMC’s founding regulation.

<sup>189</sup> See Council Decision 1999/132/EC of 21 December 1998 and Council of Europe Committee of Ministers, Resolution Res(2002)8 on the statute of the European Commission against Racism and Intolerance, Adopted by the Committee of Ministers on 13 June 2002 at the 799th meeting of the Ministers’ Deputies.

<sup>190</sup> Interview #40. See also EUMC, Summary of Activities, July 1998 – February 2007, Working Paper, p. 13.

<sup>191</sup> Interview #4

<sup>192</sup> Interview #21

<sup>193</sup> Interview #40

<sup>194</sup> See Council Decision 1999/132/EC of 21 December 1998 and Council of Europe Committee of Ministers, Resolution Res(2002)8 on the statute of the European Commission against Racism and Intolerance, Adopted by the Committee of Ministers on 13 June 2002 at the 799th meeting of the Ministers’ Deputies.

<sup>195</sup> Interview #25

<sup>196</sup> AR 2002, p. 30; AR 2004, p. 29; External evaluation, 2002, p. 75. Interviews #25 and #40

<sup>197</sup> The Dutch Senate has spoken out against the creation of an FRA. Not coincidentally the chair of the Dutch Senate committee on European cooperation, Mr Rene van der Linden, was at the time also the President of the CoE’s Parliamentary Assembly. Together with Mr Erik Jurgens, a member of the Dutch Senate and the CoE’s Parliamentary Assembly as well, he actively expressed his discontent with the creation of the FRA. See also Letter Dutch Senate Committee to Foreign Minister Bot, 2 December 2005; Dutch Senate Press Release, 14 March 2006. In addition, the House of Lords’ European Union Committee published a critical report on ‘Human rights protection in Europe: the Fundamental Rights Agency’, 29<sup>th</sup> Report of Session 2005-6. This report notes that, aside from potential duplication with human right bodies in general, there is possible overlap between the FRA and another new agency, the European Institute for Gender Equality.

<sup>198</sup> *EUobserver*, New EU agency raises questions of scope and duplication, 26 May 2005, available at [www.euobserver.com](http://www.euobserver.com), consulted on 27 May 2005. The need for a European Gender Equality Institute has equally been debated, particularly among MEPs. Some have argued that the institute could easily have become a special section of the EU FRA, like the EUMC. See *EUobserver*, Three countries step up fight to host EU gender institute, 14 March 2006.

<sup>199</sup> See Council of Europe, The Fundamental Rights Agency of the European Union – A Council of Europe Perspective, Contribution by the Secretary-General of the Council of Europe, SG/Inf (2004)34, 16 December 2004.

<sup>200</sup> *Financial Times*, Too many of us in the human rights business, European leaders are told, 7 February 2005; *EUobserver*, EU discouraged from further overlap in human rights monitoring, 7 February 2005, available on <http://www.euobserver.com>, consulted on 2 August 2005.



## **PART 5**

### **CASE STUDIES OF AGENCY DEVELOPMENT: COOPERATION THROUGH AGENCIES**

This morning, a large Europe-wide co-ordinated police and judicial action took place in Belgium, Germany, France, the Netherlands, Italy and the United Kingdom. In all these countries, house searches and arrests were made, based on European Arrest Warrants issued by the investigating magistrate in Liege, Belgium. The targets are members of a transnational Albanian criminal network, who were also operating in Luxembourg and Austria. The criminal organisation was involved in trafficking of drugs, trafficking in human beings and prostitution, money laundering, trafficking of illegal arms, trafficking in stolen vehicles, document fraud and organised transnational burglary.

The extensive investigation started in July 2006, following the arrest of a drugs courier in France, transporting cocaine to Italy. Following co-ordination meetings at Eurojust in 2006 and 2007, a co-ordinated and coherent approach to the police investigations and prosecutions was possible, leading to successful actions and positive results. Eurojust and Europol will continue to support national authorities in their fight against criminal networks by following this strategy.

Mr Max-Peter Ratzel, Director of Europol, commented: "I congratulate the Belgian authorities on this successful result. The operation is an excellent and valuable example of what law enforcement authorities can achieve via joint efforts and co-operation." Mr Michael Kennedy, President of the College of Eurojust, added: "To be effective in the fight against organised cross-border crime in Europe, investigators and prosecutors must co-ordinate their activity and work closely together. I am pleased that Eurojust, which was created specifically to assist and support these types of cases, has played a significant role in the successful actions that have taken place today in six European Union Member States."

In Belgium, around 200 policemen came into action in Liege, Huy, Arlon, Tongeren and Antwerp; 40 house searches were made and 40 persons questioned. Sixteen people were brought to the investigating magistrate and four arrested so far. A large sum of money, weapons, 5 kg of cannabis, false documents, computers and cars were seized in Belgium. Additional information will be issued in due time by the national authorities.<sup>1</sup>

Criminals do not respect national borders. The threats from organised crime such as terrorism, drug trafficking, and money laundering are increasingly global and transnational. If such crime is to be effectively prevented, detected and fought, international cooperation is required. This is especially true for the EU, which has progressively removed its internal border controls and has seen a sharp increase in the movement of people, capital, goods and services across its territory. But information sharing between national law enforcement authorities has been difficult and cooperation has been ineffective in combating crime. In fact, criminals often organise their activities to take advantage of the barriers in cooperation that still exist between countries.

EU member states therefore considered it necessary to tackle cross-border crime by transnational cooperation between the law enforcement authorities (police, judiciary, and customs) of EU member states. As crime had always been dealt with at the national level, the mechanisms available at the EU level to fight organised crime were insufficient and inappropriate. Since 1999, EU police and judicial cooperation has increased remarkably quick. With the adoption of numerous legally binding instruments and the creation of various programs, networks and agencies, EU member states built a legal and institutional infrastructure for fighting organised crime (Occhipinti, 2003; Walker,

2004; Lavanex and Wallace, 2005). Two of these agencies, prominently figuring in the press release above, are examined in the two next chapters: the European Police Office (Europol) and the EU's judicial cooperation unit (Eurojust).

Created as permanent bodies to coordinate police and judicial activities across national borders, Europol and Eurojust have rather similar objectives and tasks. Together with the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), they facilitate the exchange of information and provide support to the member states in their fight against crime. As they enhance cooperation among member states, these agencies are referred to here as 'cooperation' (or 'coordination') agencies. To ensure flexible cooperation between practitioners and loose trans-governmental coordination, Europol and Eurojust are supposed to operate free from the political pressure of the member states and the tight grip of the EU institutions, whilst being under democratic control and responsive to their wishes and demands.

Although they are not entirely similar with regards to their organisation structure, both have to engender cooperation from national and international law enforcement authorities. Europol and Eurojust have, however, evolved in different ways. This raises the puzzle as to why the two organisations have developed in such an uneven way in their early years. The following two chapters explain why Europol has not been able to obtain widespread support, whereas Eurojust has managed to build trust and gain confidence. The chapters look into the early development of these two agencies. They trace their historic origins, lay out their structure and design and describe their actual functioning.

#### **Note**

<sup>1</sup> Joint Eurojust-Europol Press Release: Eurojust and Europol co-ordinated action against organised criminal network in six countries, The Hague, 13 June 2007.

# CHAPTER 11

## COOPERATION AMONG POLICE FORCES: THE CASE OF EUROPOL

In the beginning, Europol was swimming with its arms inwards, seeking to bring in everything. But if you swim like that, you do not make much progress. Rather, there is a chance that you drown.

– Former Europol Liaison Officer<sup>1</sup>

### 11.1 Introduction: arrested development

It has taken the European Police Office (Europol) considerable time to reach cruising speed. The office was created as a formally autonomous organisation. Yet, its actual autonomy has been confined, particularly by its legal foundation. Its tasks were enlarged time and again, but the systems and procedures to exchange information remained cumbersome. Initially, Europol faced a lack of cooperation from national police authorities, reluctant to share information with a European body of which the added value was unclear. As a consequence, the agency remained isolated from member states' activities and hardly contributed to the EU's law enforcement action.

Yet, the scope and extent of the autonomy Europol has developed from the actors in its environment has slowly grown. The office's activities are now, a decade since its creation, more closely linked to ongoing investigations at the national level, making cooperation with Europol more attractive for national police authorities. Europol is gradually starting to convince the member states that it can add value to the activities of national police forces. Even as Europol may be 'maturing', it is still far from the European FBI that some of its originators intended it to become.

This chapter proceeds as follows. Section 11.2 gives a short historical background, setting out the needs and pressures leading up to the creation of Europol. In Section 11.3, the formal autonomy of the office upon creation is examined, as well as the extension of its autonomy thereafter. Section 11.4 discusses the gradual maturing of Europol. It details the autonomy that the office has developed over time. In Section 11.5, explanations are offered to account for the difficulties that Europol has confronted in developing into an autonomous organisation.

### 11.2 The creation of Europol: the long pedigree of European police cooperation

The European Police Office (Europol) was formally created on 18 July 1995 with the signing of the Europol Convention.<sup>2</sup> It resulted from both functional needs and political pressures to increased cooperation among EU countries regarding police matters. European police cooperation has a long pedigree. Well before World War II, European countries coordinated police matters on a bilateral level and in specific cases. Until the

1990s the exchange of information and operational cooperation between their police officers across European borders remained limited, however (Deflem, 2002: 45-77, 124-152; Fijnaut, 2004: 247-248).

### *The Trevi Group and the initiative for a European Drugs Intelligence Unit*

Repeated acts of terrorism in several European countries, most notably the hostage-taking and killing of Israeli athletes at the Munich Olympic Games, led to the creation of the Trevi Group in 1975. Originally, the Group was intended as an intergovernmental platform for European ministers of justice and interior to develop counter-terrorism measures. Gradually, it grew into an arena for the establishment of cooperative practices and the exchange of information between civil servants and police officers in specific areas of policing such as drug trafficking, money laundering and environmental crime. Cooperation remained intergovernmental and was kept outside the Community legal framework (Den Boer and Walker, 1993: 6; Woodward, 1993: 9-11; Anderson, 1995).

In December 1987, Trevi ministers agreed on the posting of Drugs Liaison Officers (DLOs) outside Europe to collect information on drug trafficking. Proposals were also made to establishment National Drugs Intelligence Units (NDIUs) to coordinate the exchange of information on drug trafficking and drug-related crime among the member states. In June 1991 Trevi ministers decided to establish guidelines for the DLOs to work within the EU to gather information on crime in general. Together with the proposals for the establishment of NDIUs, this culminated in the initiative for a European Drugs Intelligence Unit (EDIU) (Woodward, 1993: 14; Anderson, 1995).

### *Kohl's idea for a European FBI*

The momentum for EU police cooperation significantly increased in the early 1990s. The disappearance of border controls between the EU member states in combination with the rise in transboundary crime as a result of the collapse of the Berlin Wall led many politicians to call for greater cooperation between European police forces (Den Boer and Walker, 1993: 8-9).

In June 1991, German Chancellor Helmut Kohl proposed the creation of a European Police Office. This office, modelled on the US Federal Bureau of Investigation (FBI)<sup>3</sup> and the German Federal Criminal Police Office (BKA), would have to be established by December 1993 and was supposed to be developed in two stages. It would start with the exchange of information and experience and would then get further powers to act within the jurisdictions of the member states (Woodward, 1993: 12; Anderson, 1995).

In August 1991, the Trevi Group established the Ad Hoc Working Group on Europol (AHWGE), comprised of senior government officials. Its task was to prepare the establishment of a European Drugs Intelligence Unit, combining the initiative of the Trevi Group and Kohl's idea. The EDIU would thus start off as a focal point for the National Drug Intelligence Units in the member states to exchange information on drug trafficking, and would eventually be extended to a full-fledged European Police Office, collecting and analysing data on organised crime. It would not have operational or executive powers (Woodward, 1993: 15).

The creation of the office, while not explicitly mentioned, was also 'smuggled' into the negotiations of Maastricht Treaty. The Treaty, from December 1991, included pro-

visions for cooperation in the field of justice and home affairs (the so-called 'third pillar') and therewith gave the establishment of Europol legal footing (Den Boer and Walker, 1993; Anderson, 1995).<sup>4</sup>

### *From Europol Drugs Unit to Europol*

In June 1992, Trevi ministers agreed to establish the Project Group Europol (PGE), which was charged with drafting a plan for the Europol Drugs Unit (EDU), as it was then known. The PGE consisted of about twenty police officers, on secondment from eight different member states, with operational experience in the area of drugs.<sup>5</sup> Jürgen Storbeck, coming from the German BKA, was appointed as its head.<sup>6</sup> The PGE was temporarily housed in Strasbourg, France.

By the end of 1992, the Project Group delivered its plans for the EDU and in June 1993, the justice and interior ministers signed an agreement on its establishment. Discussions on the eventual location of Europol led to squabbling between France and the Netherlands and caused considerable delay. In December 1993, in the context of the discussion on the location of other new EU institutions, it was decided that the office's headquarters would be based in The Hague, the Netherlands. The EDU began its operational activities in The Hague in February 1994.

The EDU's remit was strictly limited to the exchange and analysis of information and intelligence on drug trafficking affecting at least two member states and helping the police and other competent agencies to combat these activities. It was prohibited from holding personal information in any form, had no operational powers, and did not have legal control over its liaison officers (Woodward, 1993: 19; Occhipinti, 2003: 52).

In reaction to particular events, such as the Dutroux affair in Belgium, and driven by the ambitions of the German EU Presidency in the second half of 1994, the mandate of EDU was expanded twice. In March 1995, the Justice and Home Affairs (JHA) Council first passed a joint action to include the smuggling of nuclear materials, illegal immigration, and trafficking of stolen vehicles; in February 1997, it expanded EDU's remit to include human trafficking. With the expanded area of activities, the EDU's work load increased significantly, and it successfully contributed to a number of operations, in light of which the JHA Council decided to increase the unit's staff and funding (Occhipinti, 2003: 53-57).

Meanwhile, the Ad hoc Working Group on Europol was preparing the intergovernmental convention on which the establishment of Europol would legally be based. After lengthy negotiations, member states signed the Europol Convention in July 1995. Following ratification by the national parliaments of all 15 EU member states, the Convention entered into force on 1 October 1998.<sup>7</sup> On 1 July 1999, four years after the Convention was signed, Europol became fully operational, behind the secured fences of its ivy-covered headquarters that had previously housed the Dutch *Centrale Recherche Informatiedienst* (CRI) and, during World War II, the German Gestapo.<sup>8</sup>



### 11.3 Europol's formal autonomy: bringing a knife to a gunfight

#### *Objective and tasks*

The office's formal objective, as laid down in the Europol Convention, is to improve "the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime".<sup>9</sup> Unlike national police forces, Europol does not have executive powers. Europol officers cannot carry guns, conduct home searches or tap wires, nor can they question, arrest or detain suspects.<sup>10</sup> Europol instead supports member state investigations, coordinates and supports international investigations, and cooperates with 'third states' and international organisations to enhance the fight against organised crime.

#### *Mandated crime areas: all forms of international organised crime*

Europol's mandate includes all forms of serious crime as mentioned in the annex of the Europol Convention if:

...there are factual indications that an organised criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned.<sup>11</sup>

In accordance with the Convention, the JHA Council can decide to extend Europol's mandate if member states unanimously agree. Amendments to the Europol Convention require the adoption of additional protocols to the Convention. As these protocols must be ratified by the national parliaments of *all* member states before they enter into force, this makes amending the convention a long and arduous process. This has, however, not kept the Council from progressively extending Europol's remit both by expanding the types of crime it is competent to handle, and by the kind of activities it is allowed to undertake (Occhipinti, 2003: 58-59, 70, 137).

Expansions of the crime areas, just as with the EDU, came with high profile events or incidents and usually were political decisions. Even before Europol had officially started its activities, the Council extended its mandate to combat counterfeiting the Euro. Terrorism, which had initially not been included in the Europol Convention, was eventually also made part of the office's mandate, pushed mainly by Spain in view of its fight against the Basque separatist group ETA. One year after its formal creation, the JHA Council granted Europol authority to deal with money laundering, regardless of whether it was competent over the underlying crime. A protocol amending the Convention to this effect entered into force in March 2007.<sup>12</sup>

The terrorist attacks of September 11 gave an enormous boost to police and judicial cooperation at the EU level, also in the framework of Europol (Den Boer, 2003: 199-200; Deflem, 2006). The Council decided to extend Europol's mandate to *all* other forms of crime listed in the annex to the Europol Convention as of 1 January 2002.<sup>13</sup> The decision would have been taken anyway, but was accelerated by the attacks. Whereas the crimes initially covered by Europol's mandate are defined, the crimes over which it gained competence through the Council's decision were not explicitly defined. Very broadly, Europol's remit thus focuses on serious forms of transnational organised crime.

A proposal of the Danish Presidency in July 2002 suggested replacing the existing provisions on Europol's remit by the generic term 'serious international crime'. This would leave it to Europol to interpret the term and therewith define its own remit. It would allow the office more flexibility in its operations without having to await the lengthy process of amending the Convention time and again. But it would also remain unclear whether the crimes within Europol's mandate would have to be 'organised' and have a 'cross-border' dimension.<sup>14</sup> In November 2003, agreement was reached on a protocol, including *possible* competence for Europol to deal with crimes other than those listed in the Convention's annex. The protocol entered into force in April 2007.<sup>15</sup>

### *Operational powers: right of initiative and participation in Joint Investigation Teams*

Much more controversial than enlarging the area of crime for which Europol was responsible was broadening the powers with regard to the different areas of crime, as most EU countries opposed any operational activity of Europol. In 1997, a High Level Expert Group of senior police, justice and customs officials presented the Action Plan to Combat Organized Crime. The Action Plan included recommendation permitting Europol to request that national police forces conduct investigations, the so-called 'right of initiative', and a guideline on permitting it to participate in joint operations with national authorities, the so-called Joint Investigation Teams (JITs).

The recommendation on the right of initiative, which was adopted by the Council in 2000, makes it possible for the office to request that competent national authorities start an investigation in specific cases.<sup>16</sup> Member states should give such requests due consideration and must inform Europol whether the requested investigation will be initiated. If an investigation has been started, they have to inform Europol on the outcomes of the investigation; if no investigation has been initiated, they have to explain why not.

Since 2007, Europol is also allowed to participate in JITs.<sup>17</sup> These teams are comprised of representatives of national police forces that carry out their tasks in accordance with the law of the country in which they operate.<sup>18</sup> Europol officers "can assist in all activities", but "in a support capacity" only, that is, they cannot "take part in the taking of any coercive measures" (Schalken and Pronk, 2002: 74; De Buck, 2007: 259-261). As former deputy director Bruggeman said in 2003: "We do not order a house search, but we are present. We can say: confiscate this, take note of that, or have a look behind that flower box."<sup>19</sup>

As a result of the multi-interpretable wording of the Protocol on joint investigation teams the exact scope of competences of Europol officials in JITs remains unclear. Some consider Europol's role limited to producing analyses on information delivered by member states. "By support is meant that Europol should place its knowledge at the disposal of JITs; assist with the coordination of operations by JITs; provide advice on technical matters and help with the analysis of the offences" (De Buck, 2007: 257).<sup>20</sup> According to others, however, the protocol makes it possible for Europol officers to take part in operational work at their national colleagues' request. Europol officers would thus have *de facto* operational competences when they take part in JITs (Van der Schans and Van Buuren, 2003: 97).<sup>21</sup>

*Core task: information exchange and analysis*

Europol's core task is facilitating the exchange of information between the member states.<sup>22</sup> Instead of having its own police force, Europol works through a network of liaison officers. For that purpose, each member state has created a Europol National Unit (ENU) to link with the national authorities. ENUs have access to all databases in their country, while they are represented at Europol headquarters by one or more Europol Liaison Officers (ELOs). Together, these ELOs form the national liaison office or desk at Europol, which acts as a kind of embassy within the Europol building and is responsible for coordinating requests for assistance and the exchange of information. It also facilitates investigations and operations of national agencies including cross border surveillance of suspects and controlled delivery of drugs.<sup>23</sup>

In contrast to the Europol Drugs Unit, Europol cannot merely collect and analyse information, it can also store and organise information in its own databases. To compile information received from ENUs, Europol maintains a database, the so-called Europol Computer System (TECS). The system is comprised of three components: the Europol Information System (EIS), the Analysis Work Files (AWFs) and the index system. The EIS is supposed to allow for easy data entry directly into the system and the rapid reference of the available information, while AWFs are meant for sensitive information and data on 'live' or ongoing investigations and are therefore are subject to strict procedures.<sup>24</sup> The opening of a new AWF has to be approved by the management board.

Europol is invested with limited powers to make member states share information and has restricted access to external databases that store other kind of information such as the Schengen Information System. Whether national police officers provide Europol with data is essentially left up to their discretion. They may decline to provide information if doing so would for instance harm national security interests or jeopardise the success of current investigations or the safety of individuals.<sup>25</sup> Moreover, information that the member states provide Europol with does not always have to be shared with other member states. Information bearing on specific cases and with an operational aim can only be accessed by the member state that has provided the information, those directly concerned and others that are invited.<sup>26</sup> So national law enforcement agencies essentially remain owners of the information they have gathered.

Apart from facilitating the exchange of information, Europol also provides member states with analytical support in its areas of competency and prepares strategic reports. Since 1994, Europol has annually produced Organised Crime Situation Reports (OCSRs).<sup>27</sup> These reports give an update on organised crime in the EU especially with regard to its transnational manifestations. It also assists member states through advice and research, and develops specialist knowledge in specific areas.

*Management board and executive director*

According to Fijnaut (2004: 255), "Europol is perhaps the most controlled police agency in Europe". Whereas "the most controlled policy agency" is perhaps a bit exaggerated, the office is certainly subject to extensive controls, at least on paper.<sup>28</sup> Apart from the Joint Supervisory Board, which monitors the observance of the regulations for the protection of personal data, the office has a management board (hereafter also referred to as 'board') that monitors its activities on behalf of the ministers in the JHA Council. Setting out the overall strategic goals for Europol, the board approves, by unanimity, the

office's report on its activities during the previous year and its budget and work programme for the next year, which are then formally endorsed by the JHA Council. It thus serves as the bureaucratic gateway for political decision making in the Council.<sup>29</sup>

The management board is comprised of one representative from each member states and is chaired by the member state holding the Presidency of the Council. Each member has one vote. The Commission is also represented in the board but does not have the right to vote. Most member states send a delegation to the board meetings consisting of a variety of representatives, ranging from government officials to professionals with a police or judicial background.<sup>30</sup> The Dutch delegation, for example, is comprised of representatives of the ministries of the interior and justice and the national law enforcement agencies.<sup>31</sup> The board formally meets at least twice a year, but the large amount of issues to be addressed usually makes it necessary to get together six times.

Formally, Europol's director is responsible for the daily operations of the organisation, including the drafting and implementation of the budget, the planning and programming of the work, and the selection and recruitment of personnel. He reports to the management board. The director also represents the agency externally. He has the power to negotiate with third countries, other EU bodies and international organisations to conclude agreements.<sup>32</sup> But he cannot officially start negotiations and sign agreements with non-EU states and international organisations before the Council has given its green light. Moreover, the decision to cooperate with other EU bodies still has to be approved by the management board.

The Council appoints the director by unanimous decision and after having heard the opinion of the management board, for a four-year period renewable once. Several deputy directors, also appointed by the Council for a four-year period that may be extended once, assist him. Together the director and his deputies form the directorate. Different from most other agencies, the director and deputy directors can be dismissed by a two-thirds majority of the Council, after hearing the board.

### *Financing and personnel*

Europol is funded by contributions from the member states, based on a GDP key, which results in member states who contribute a large share of the total budget, such as Germany, demanding a substantial influence over the office's activities in a more informal way. Hence, it is not a coincidence that the two first directors were of German origin.<sup>33</sup> The Council approves of the draft budget and oversees the implementation of the budget; the Commission and the Parliament have very limited powers with regard to the financing of the office.

There are several categories of Europol personnel: Europol Liaison Officers (ELOs) and Europol staff comprised of specialists and analysts. ELOs represent national law enforcement authorities and are seconded to Europol by the member states. While ELOs have to comply with the provisions applicable to the administration of Europol, they do not fall under the director's command. They remain subject to the national law of the seconding member state. Most Europol staff, both specialists and analysts, serves on a temporary basis. They usually have four-year contracts that are renewable between two to four years. While they are EU staff, they do not fall under the Commission's staff rules.<sup>34</sup> This changes when Europol becomes a full-fledged EU agency.

### *Towards a full-fledged EU agency*

In 2006, EU member states agreed that Europol's role should be expanded. This, however, could not be done as long as the Europol Convention served as a legal straight-jacket, hampering the office's functioning. Member states therefore decided to replace the Convention with a new legal document that could be more easily amended.<sup>35</sup>

The Commission subsequently put forward a draft Council decision, proposing the transformation of Europol into a full-fledged EU body.<sup>36</sup> As such, the office would be financed by the Union and its staff would become proper EU staff. The Commission's proposal incorporated the changes made by the three protocols amending the Convention, expanded its competences with regard to investigative and operational action, and extended Europol's mandate to cover all serious transnational crime, whether organised or not.

After intense negotiations in the Council, the member states on 18 April 2008 agreed on the text of a decision conferring EU agency status on the office as per 1 January 2010.<sup>37</sup> The decision can be amended by further decisions agreed upon unanimously by the Council, instead of having to draw up protocols that have to be ratified by national parliaments and therefore take years to enter into force. "This", according to the Commission, "is particularly relevant for Europol as an organisation, since experience has demonstrated that there is a recurrent need to adapt its legal basis."<sup>38</sup> Moreover, the decision provides for qualified majority voting in the Council and two-thirds majority voting in the management board when approving or implementing measures such as those regarding external relations, exchange of personal data, staff and financial rules. In the past, decision making on such measures led to heated political debates, hampering the office's development, as will be shown below.

## **11.4 The development of the office: handing policing over to Europe?**

### *Clearing house or operational force?*

By 1995, member states were not ready to transfer authority to a supranational entity. Europol was therefore created as an intergovernmental body, outside the Community legal framework and with its own convention. While laying out Europol's formal objectives, mandate and tasks, the Europol Convention does not provide details on Europol's exact role in improving European police cooperation. From the outset there were different ideas about what activities Europol would have to initiate, and there is still no agreement on its identity. It seems that, partly as a result thereof, perceptions of the office's effectiveness have varied among different EU and national actors and throughout time.

The debate on Europol's role centred on whether it should be conferred operational competences. Some countries such as the UK and the Netherlands have always opposed such a role.<sup>39</sup> They consider the main function of Europol to collect and analyse data, "brokering information", much like the UK Serious Organised Crime Agency (SOCA) or the Dutch *Dienst IPOL*.<sup>40</sup> Indeed, for most member states Europol was only acceptable as a coordinating intelligence agency, a "clearing house for information" (Fijnaut, 1993: 81).<sup>41</sup> Other countries, notably Germany, have advocated expanding Europol's role to grant it investigative powers. Europol itself has been keen on acquiring operational powers. But, in accordance with its formal mandate, it had to start off as

an agency facilitating the exchange of data between national agencies, primarily through building information systems.<sup>42</sup>

### *Building information systems*

The development of the Europol Information System (EIS), most interviewees agree, was a primary obstacle to progress in Europol's early years.<sup>43</sup> Its development was delayed by a corruption scandal concerning funds allocated to the EIS (see below). But the biggest delays have been caused by the elongated search for an ideal system. For a long time it proved difficult to balance the wishes and demands of the various actors involved with the technical possibilities and limitations.<sup>44</sup>

In December 2001, the EIS finally became operational but only for data exchanges on the Euro and in English. Another delay occurred in 2002 "due to unexpected technical problems" that could not be dealt with in time by the consortium implementing the project and the bankruptcy of one of the sub-contractors of the consortium.<sup>45</sup> The system was supposed to be up and running in February 2003 but "due to the underestimation of the number of problems that would arise and/or the overestimation of the consortium's capacity to deliver", the system was not delivered. When the system was delivered in June 2003 it was "not up to standard".<sup>46</sup>

Only since October 2005 could member states fully use the EIS.<sup>47</sup> The delay in the availability of the EIS has long undermined the confidence in Europol. Indeed, "[t]he lack of a European information system has been one of our main handicaps [...] I still regret that the computer system was not ready earlier. Expectations have been raised that Europol could not met", according to Bruggeman.<sup>48</sup> The problems with the information system have made it difficult for Europol to demonstrate its added value. But even now that the EIS is operational, data is not always entered, and, even if it is, there are still concerns about the accuracy of information entered into the databases.<sup>49</sup>

Before the EIS was up and running, data exchanged in Europol's framework could only be stored in Analysis Work Files (AWFs).<sup>50</sup> The process of opening such a file was time-consuming,<sup>51</sup> sometimes taking up to nine months. When member states were prepared to send information at all, Europol could often not accept it as no AWF had been opened yet, which then led to misunderstandings with the member states.<sup>52</sup> Before simplified procedures entered into force to open data files and retrieve data from them, Europol's director has made use of a more swift procedure which makes it possible to open an AWF without the immediate approval of the board.<sup>53</sup> Rigidity of procedures, especially those with regard to data protection, has hampered the use of AWFs. Some AWFs, created in the early years of Europol's existence, have never really resulted in any operational success, but still exist, oftentimes void of information.<sup>54</sup>

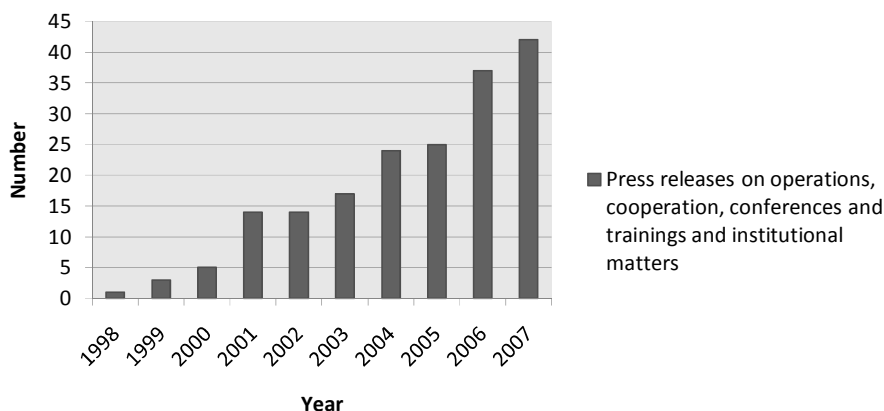
### *A moderate approach*

As the Protocol enabling Europol to request investigations and participate in JITs has only entered into force in March 2007, and as Europol has not made extensive use of its new powers yet, it is too early to tell whether these amount to a higher degree of autonomy in practice.

While Europol can formally ask member states to start an investigation, it is likely to be cautious in making use of this right. And even if it would make use of it, Europol would probably do so on an informal basis. Furthermore, when member states are unable or unwilling to provide it with information there is no sense in asking for an

investigation. After all, Europol can ask member states to start an investigation, not order them to do so.<sup>55</sup> Moreover, member states are unlikely to wait for a formal request of Europol if they really are able and willing to conduct an investigation. If a member state only starts an investigation after a formal request, other member states probably want to know why the member state did not do so on its own initiative.

The participation in JITs formally enabled Europol officers to join the operational actions of the member states. But even before the participation of Europol officials in JITs was formally possible, Europol had informally been involved in investigative teams through, for instance, sharing the outcome of an AWF with a JIT or including ENU officials in a JIT (Rijken, 2006: 105; Block, 2008). In practice, Europol's role has not changed much. An effort to set up a JIT on human trafficking during the Dutch Presidency of the EU in 2004 did, for instance, not even take into account the work Europol had already been doing on this issue (Rijken, 2006: 112; Rijken and Vermeulen, 2006).<sup>56</sup> The delayed implementation of the legislation concerning JITs, together with the lack of familiarity with the mechanism among national police forces, has led to "a very low level of use of JITs" up until now (Gualtieri, 2007: 238).<sup>57</sup> As a consequence, the mere possibility for Europol to enhance its operational role has remained limited.



**Figure 11.1** – Press releases (1998-2007)

Source: Europol website

Moreover, while Europol has assisted in various operations resulting in the break-up of criminal organisations and the arrest of suspects, Europol officials depend on national police officers for the operational side of investigations. This is sometimes "frustrating" for Europol officials.<sup>58</sup> Member states always take credit for successful operations, even when the success can at least partly be attributed to Europol. But the office realises that if it would claim success, national police forces would probably not provide it with information. Europol has therefore been rather cautious in promoting itself. Before issuing a press release it always consults the concerned member states, and it mentions them explicitly in the press release.<sup>59</sup> Only since recently has Europol been treating successful operations as an opportunity to boost its image (see Figure 11.1).<sup>60</sup>

Some have argued that Europol's role has in fact already shifted from a 'reactive' information and intelligence agency to a more 'proactive' investigative and operational

unit, slowly but steadily moving towards the European version of the FBI as foreseen by Chancellor Kohl (Occhipinti, 2003). Others maintain that

...Europol is NOT an FBI and not intended to become a comparable instrument of the EU. All co-operation is based on intergovernmental co-operation and its role is limited to intelligence handling, support and co-ordination, even by supporting joint teams, and a [...] right of initiative.<sup>61</sup>

Indeed, not even Europol's changed legal status as per 1 January 2010 makes it a 'European FBI'. Arresting suspects remains the domain of national police forces. "Although it may aspire to a wider role, Europol remains essentially an intelligence agency, something to which the feds – or, at least, their political masters – profess to aspire" (Jeffreys-Jones, 2006: 91).

### *Increasing its role*

Yet, it is undeniable that as a result of the succession of small changes to its remit, the office is increasing its role.<sup>62</sup> Particularly the introduction of the Euro has been an excellent opportunity for Europol to demonstrate its capacity. As a global currency, the Euro has become an attractive object for counterfeiting organisations in the EU and third countries.<sup>63</sup> While the Euro is the common currency in a majority of EU member states, none of them has a particular interest in combating its counterfeiting. This (and the resulting collective action problem) is what makes Euro counterfeiting different from other forms of crime Europol is tackling.<sup>64</sup> As a consequence the involvement of Europol in operational issues rapidly increased. Initially, the office's action was stymied by its lack of competence in the area. It could for instance not directly receive information from third states concerning Euro counterfeiting. Only in 2005 the Council agreed on designating Europol as the central authority for combating Euro counterfeiting.<sup>65</sup>

The office's added value was not only demonstrated by its successes achieved in helping to round up Euro counterfeiting groups. Its continued work on dismantling drug laboratories and organising controlled deliveries drug trafficking and money laundering as well as the office's contribution to the coordination of national police operations in the area of child pornography, illegal immigration and trafficking of human beings testified to its augmented role.<sup>66</sup> Whereas before information delivered to Europol often concerned cases that were already closed, now its work is of more added value because the office is increasingly supplied with information that has a bearing on 'live' or ongoing investigations.

Moreover, Europol initially focused on particular forms of crime, but since it now covers all forms of serious organised crime it has changed its approach to target criminal organisations regardless of whether they would be dealing drugs, smuggling weapons or trafficking human beings.<sup>67</sup> "The fact is that criminal groups seldom concentrate on a single type of crime", a former Europol official explains.<sup>68</sup> Europol, in adopting this 'target-oriented approach', can concentrate its efforts on providing operational support to live investigations, therewith making Europol a much more attractive partner for member states and ensuring their commitment to provide input and to follow up.<sup>69</sup> As Europol stated in its 2003 annual report:

There is a trend to a remarkable increase in the demand of analytical support by investigating units in the Member States. Therefore while the progress of some projects is hindered by a lack of information from Member States resulting in the redefinition of the project focus, in



many other cases the amount and quality of information related to live investigations given has improved the added value available for the Member States. This in turn is generating more requests for support, up to a point where it is necessary to prioritise work and find strategies to increase analytical staff at Europol.<sup>70</sup>

Because member states often remained unwilling to exchange information, the 'Hague Programme' introduced the 'principle of availability'.<sup>71</sup> Since January 2008, this principle obliges national law enforcement agencies to make six categories of information available to their counterparts in other member states.<sup>72</sup> The Treaty of Prüm, signed by the Benelux countries, Austria, France, Germany and Spain in May 2005, allows for the availability of three more categories of data, including DNA profiles. Because of its operational success, the Council decided to partially integrate the treaty into the EU legal framework.<sup>73</sup> As a result, police officers no longer need a formal request or have to rely on informal networks in order to obtain information. Europol is included in the authorities that have access to national data.

In spite of its increased role, Europol is still not playing a central role in European police cooperation. This is most evident in the area of terrorism where a host of new institutions have been created, often without the (direct) involvement of Europol (see further Den Boer *et al.*, 2008). An example is the Council's Joint Situation Centre (Sit-Cen), which mainly focuses on foreign and security policy issues, but now also comprises analysts from internal security services, therewith emerging as a potential competitor. This led a House of Lords committee to conclude: "The proliferation of other groups and bodies might not all have been necessary if Europol had established itself as the lead EU player in this area."<sup>74</sup>

The development of Europol's mission and role has had a significant impact on its internal organisation. In its early years, Europol tried to steer its internal work towards operational activities, as opposed to strategic activities. Already in the 2000 annual report it was concluded that "the objective to increase Europol's operational relevance was achieved".<sup>75</sup> Moreover, after having developed rapidly in its first years, it was stated that "a process of internal consolidation" was underway. Most interviewees, however, indicate that the organisation in its early years was "continuously changing": as its mandate was broadened and tasks were added, budgets increased and staff was hired, as a result of which the organisational chart was adapted "at least four or five times".<sup>76</sup>

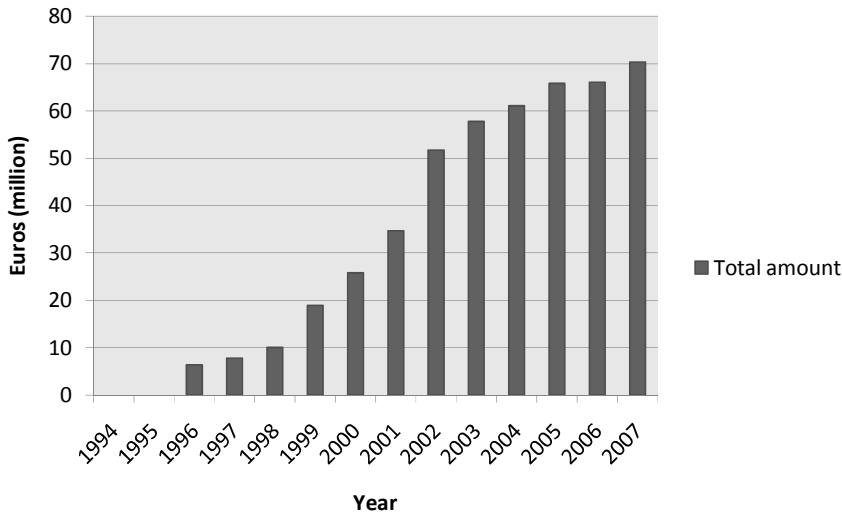
### *Control over the budget*

In the view of the member states, or at least their police chiefs, any money spent on Europol would not be spent on national police forces, which made Europol a competitor for scarce resources. National police chiefs, in the words of a respondent, would "rather have three more police cars than raising the budget of Europol".<sup>77</sup> Despite difficulties the Europol director therefore experienced in obtaining money from member states, its budget has substantially increased since it formally started its operations in 1999, therewith continuing the upward trend in budget development since the creation of EDU (see Figure 11.2).

Given the increased demand on its services after the attacks of September 11, the already significantly raised budget for 2002 proved to be insufficient. In February 2002, Europol's budget was therefore supplemented by Euro 3.2 million in order to fund new counter-terrorism activities.<sup>78</sup> Notably, a task force of counter-terrorist specialists (CTTF) from the member states was established within Europol to collect information and prepare threat analyses.<sup>79</sup> It was also agreed that Europol would provide the Coun-

cil with a so-called EU Terrorism Situation and Trends Report (TE-SAT), providing strategic information on terrorism and terrorist networks.

But a proposal to provide Europol with additional resources from the Community budget for certain anti-terrorist activities was received by the member states with great suspicion. An enlarged role for the Commission and the Parliament would make it difficult to set the office's priorities, as the Community's priorities would not necessarily coincide with (individual) member states' priorities. Moreover, Community funding would have an effect on the intergovernmental status of Europol, as it would make Europol responsible to the Commission and the Parliament.<sup>80</sup>



**Figure 11.2** – Budget development (1994-2007)

*Note:* Data for 1994 and 1995 are missing.

*Sources:* Europol annual reports

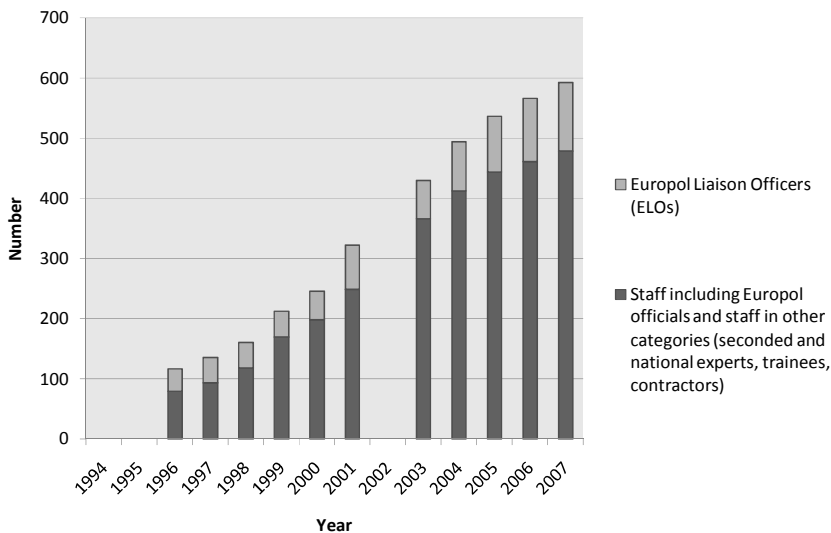
Already in its early years, Europol had tried to obtain money from the Community budget for particular projects. But, as interviewees indicate, it was the Council that time and again opposed the Parliament making funding available to Europol. “The Council refused a Community subsidy, considering it an attempt of the Parliament to gain control over Europol. It wanted itself to maintain control over the agency.”<sup>81</sup>

### *Recruiting qualified personnel*

The rapid expansion of the budget is related to a strong rise in the number of personnel. Under the responsibility of the director, a large amount of staff was recruited, particularly after September 11 (see Figure 11.3). In the beginning, when Europol was still EDU, the director had limited influence on selection. Staff was seconded by the member states, and could not be refused by the director. Candidates put forward by member states were not always the individuals that the unit itself considered to be qualified for the job. As they had a variety of backgrounds, they pulled the organisation in different directions. When EDU was converted into Europol, many of the EDU staff became

Europol staff. Member state influence on staffing in the early years has thus inhibited Europol from developing a clear identity, separate from the member states.<sup>82</sup>

Once the Europol Convention had entered into force, Europol's director was able to recruit his 'own' staff. The majority of staff still comes from national law enforcement agencies.<sup>83</sup> They are appointed as Europol officers. Member states have been keen on getting their nationals selected, putting pressure on the director to balance the nationalities of staff. The higher the post, the more the member states are involved in the selection of a candidate, and the more political the appointment process becomes.<sup>84</sup> The problems experienced with seconded staff during the EDU period remain the same for Europol. Some seconded staff, while perhaps qualified national police officers, simply do not speak enough English to communicate with their colleagues from other countries.<sup>85</sup>



**Figure 11.3** – Staff development (1994-2007)

*Note:* In 1994, when Europol was still EDU, the total staff number was 53. No figures are available for 1995. In 2002, there was a sharp rise in staff due to recruitment after the terrorist attacks of September 11. At the end of the year, Europol personnel totalled 386.

*Sources:* Europol annual reports

A point of discussion was whether staff should be appointed on a permanent or temporary basis. Flexibility in staffing was considered necessary given the dynamics of cross-border policing. "The idea was to frequently rotate staff, avoiding them to set in their ways and ensuring that they would stay in touch with professional practice. This would at the same time allow new staff with fresh ideas to enter the organisation."<sup>86</sup> Despite the advantages, this had several disadvantages including the loss of institutional memory. It also meant that Europol was continuously recruiting and selecting personnel, a time-consuming activity, which had a huge impact on the organisation.<sup>87</sup> In 2003, for instance, Europol received 3931 applications, on average 50 per vacancy.<sup>88</sup>

Especially in the early years when Europol was practically unknown by national law enforcement authorities, the office had many problems in recruiting competent staff. For one thing, national police forces, if aware of vacancies at Europol at all, did not always inform their officers of the job opportunities, afraid of losing qualified staff to Europol.<sup>89</sup> What is more, Europol was not considered a particularly good career move. "Staff were seconded from the police forces of the member states, but when they returned to their own countries they found [...] that they had marked time in terms of their careers and had to resume at their former ranks" (Jeffreys-Jones, 2006: 87).

While Europol is increasingly perceived as a good career move, interviewees confirmed that their Europol service would still not necessarily help them to get a promotion at home. Whereas in some countries national authorities encourage working for an international organisation by granting unpaid leave, in most countries it is not guaranteed that Europol officials are able to take up their former position. This increases job insecurity for staff with temporary contracts and reduces the attractiveness of a job with Europol.<sup>90</sup> For this reason, Europol director Ratzel urged the member states to recognise a job as Europol official as a criterion for promotion (Jeffreys-Jones, 2006: 87).

Another problem concerns the bureaucratic image that many national police officers still have of Europol. As they do not consider it to be the "real" work or, in other words, operational police work, professional investigators often do not apply for a job with the office. At the same time, the police officers that were recruited by Europol, especially in the early years, often became frustrated because their work was restricted to exchanging information. Before working at Europol, many staff in Europol's serious crime department (which employs about half of Europol's staff) had been "catching criminals" in their home countries, and found it difficult to adapt to their different responsibilities.<sup>91</sup>

Over time, however, Europol has built up a certain reputation, as is indicated by both the quantity and quality of the applicants for positions with Europol, and the positions that former staff assumed with both national and international organisations after leaving the office.<sup>92</sup>

### *The relationship between the director and the board*

The hierarchical relationship between the director and the board is unclear, which has caused tensions. Officially, Europol's structure is characterised by duality. In general, however, the position of the Europol director vis-à-vis the board has proven to be weak. For almost all important decisions the director has to ask the management board's permission. "It was very difficult to get and to keep a certain autonomy from the management board", Europol's first director, Jürgen Storbeck, says.<sup>93</sup>

Storbeck, a lawyer by training, led the organisation since 1992 as Head of the Project Team of Europol. While he enjoyed political support from his home country Germany, his relationship with management board representatives of other member states has been described as "acrimonious".<sup>94</sup> Storbeck considered the board to be patronising and felt the directorate was being controlled too much. He wished to be more autonomous in handling the organisation's affairs. Often, the board was unable to make decisions because of national interests or cultural differences. Indeed, the politicisation of the board's decision making sometimes had a paralysing effect on the organisation.

The appointment of the director and deputy directors in particular has led to decisions based on political considerations rather than on arguments of quality and competence.<sup>95</sup> When Storbeck's mandate ended in June 2004, Germany urged him to consider another term. France, however, presented its own candidate, and because mem-

ber states could not reach agreement, Germany eventually withdrew the candidacy of Storbeck.<sup>96</sup> As a result of member states insisting on their own national candidates, the post of director was left vacant for more than eight months, which seriously damaged the organisation.<sup>97</sup>

Internally, it had a demoralising effect on staff as crucial decisions on the office's operations were postponed; externally, it led to the absence of Europol representation in European and international forums, as an acting director would not be invited to important meetings. The JHA Council finally decided to appoint the German Max-Peter Ratzel, former head of the organised and general crime section of the German Federal Criminal Police Office (BKA), as the new director in February 2005.<sup>98</sup>

Whereas the directorate has complained that the board micro-manages, focusing on a high level of details, management board members have complained about the lack of details provided by the directorate.<sup>99</sup> In order to perform its control function, the board depends on the directorate for information. Whereas sometimes they were overloaded with information, in other instances they received none at all. Particularly the former Belgian member of the board, Patrick Zanders, has often expressed himself in negative terms about the board's relationship with the directorate. "There is a high degree of mutual distrust. That is reflected during the discussion of the budget, the work plans and the Europol information system."<sup>100</sup>

Two particular circumstances or events further exacerbated mutual distrust.<sup>101</sup> First of all, the slow progress on the development of the EIS. The board wanted to see results, but these did not materialise (see above). On top of that, a corruption scandal, uncovered by the Belgian newspaper *De Morgen*, which shook the organisation at its foundation.<sup>102</sup>

During the 1999 audit of Europol it appeared that funds were misappropriated. In April 2001 the management board set up a committee, headed by the Irish representative of the board, to scrutinise the matter. Based on the results of the internal investigation, Europol's director agreed that the matter should be referred to the Dutch police. On 30 May Europol headquarters were raided by a special Dutch police team, after the French head of Europol's IT unit had been arrested at his home and taken into custody. The official was suspected of diverting Europol funds for the computer system to secret bank accounts, among others, in Bermuda. The board felt that it had not been properly informed by the directorate once it had become aware of the possible misappropriation of funds.

The scandal laid bare the shortcomings of the internal management system. According to the board, it testified to the lack of control over the agency's operations, right at the time when the member states were planning an extension of Europol's role. It blamed Storbeck for not taking decisive measures and demanded that the directorate inform the board more extensively. To restore the relationship between the board and the directorate, the Belgian Presidency proposed making it easier for the board to control the Europol directorate.<sup>103</sup> Van der Schans and Van Buuren (2003: 108) quote from the proposal:

The degree to which the directorate is allowed autonomy in its management tasks will be determined by the question whether the directorate can prove that it has control and reporting instruments, has strategic planning systems and can translate strategy into annual operational plans.

To measure Europol's performance, a system was introduced that allows Europol's directorate to evaluate its functions on a continuous basis by means of performance

indicators. These indicators were used in 2003 for the first time and have since been further developed.<sup>104</sup> Moreover, a 'change plan' was developed that, incorporating the results of internal evaluations and audits conducted during the organisation's early years, had to improve the reporting to the board.<sup>105</sup>

### *Nurturing a Europol culture*

When the office was still relatively small, all staff members knew each other. There was a bar at Europol's premises where they went after working hours, and they gathered to celebrate national holidays such as *Sinterklaas*. These facilities and events, according to several interviewees, contributed to the development of a certain extent of '*esprit de cops*'.<sup>106</sup> But a real Europol culture, generating staff commitment to the organisation, has been lacking, at least partly due to the multi-lingual and multi-disciplinary character of the office as well as the temporary contracts of most Europol personnel. As most staff returned to their national law enforcement agencies after four to six years, the level of identification with the office remained relatively low.

The difficulty of nurturing a Europol culture was also the result of the way in which Europol was organised, with different categories of staff. Given their different legal status from Europol's analysts and specialists, Europol Liaison Officers (ELOs) have not always been cooperative when it comes to sharing information, which caused tensions.<sup>107</sup> Whereas often Europol was blamed for bad quality information or delays in transmission, in many cases ELOs, their national desks and units were at least partly to blame. An interviewee in this context remarked that *Europol* Liaison Officer is actually a misleading term for what in essence is a *national* liaison officer placed within the Europol building.<sup>108</sup>

In addition, general organisational processes (exchange, analysis, expertise) were initially separated from specific crimes areas (drug trafficking, forgery of money laundering, human trafficking, terrorism and so forth). The analysis department was the largest department. As the work of analysts often overlapped with that of specialists in other departments, this strained relations between the two categories of staff. In order to ensure closer contact between Europol analysts and specialists, this structure was eventually adjusted in 2001. Also, in preparation of the extension of the mandate as per 1 January 2002, separate departments were merged into one department of serious crime. They no longer worked separately on the same projects but cooperated in teams under the responsibility of a project manager.<sup>109</sup>

The lack of a Europol culture glaringly manifested itself through the corruption scandal, when a Europol official committed precisely the kind of crime that Europol was trying to combat. The scandal resulted in increased attention for the organisation's culture. An internal Europol document notes that: "The current situation and the absolute necessity for every police organisation to guarantee the highest possible level of confidentiality, security and integrity, requires the immediate implementation of a strategy for the enforcement of professional standards".<sup>110</sup> A professional standards policy was developed in 2002.<sup>111</sup>

The increased attention for the organisation's culture did (obviously) not immediately take effect. In 2004, Europol still appeared to lack a "corporate spirit". The PR unit was therefore transformed into a corporate communications unit focusing on "all aspects of communication", including internal communication.<sup>112</sup> Furthermore, interviewees noted that views continued to diverge from unit to unit, for instance on what kind of expertise should be hired, strategic or operational. When Ratzel succeeded Storbeck as the director of Europol he, more than Storbeck, focused on the internal

organisation.<sup>113</sup> In 2005, he for instance, installed an internal commission to formulate a common vision that was supposed to contribute to the emergence of a Europol identity.<sup>114</sup>

### *The effects of networking*

Whereas the frequent changes in Europol's personnel make it difficult to nurture a Europol culture, the rotation system does serve as a means to mould 'European police officers'.<sup>115</sup> Police systems in Europe are still organised in various ways, which makes cooperation difficult.<sup>116</sup> Language differences continue to cause confusion among national police officers and constrain direct contact communication. But participation of national police officers in cross-border networks makes them aware of national characteristics and idiosyncrasies. Furthermore, when they return to their national jurisdiction after their Europol service they become part of an expanding European network.

ELOs are for example located together in the same part of Europol's premises, the liaison building. As a result, they know each other. If they have a case for which they need assistance of another country they simply walk down the corridor and knock on each other's door. The contacts between ELOs and their national units take place in the national language. But as the Europol director decided that staff should use English (always a sensitive, this makes it possible for ELOs to communicate with ELOs from other national desks.<sup>117</sup> Respondents agree that facilitating this network of liaisons is probably one of Europol's key strengths.<sup>118</sup>

Furthermore, Europol is comprised of representatives of different kinds of agencies: it makes use of a 'multi-agency approach'.<sup>119</sup> ELOs are not only regular police officers but they also come from various law enforcement agencies: customs, immigration services, border and financial police, and security services. Therefore, Europol and its network of ELOs bridge the differences and tensions among the various national authorities. A respondent joked "Europol is the only place where French gendarmes and French police officers are sitting together at the same table".<sup>120</sup>

Europol, while perhaps not always directly, thus has an impact on national police systems. For instance, when Europol started its activities, not many national police forces were actually engaged in analytical work. Staff differed substantially in the approach they followed with regard to analysing data.<sup>121</sup> Much time was therefore spent on developing a common approach towards analysis, the so-called 'intelligence-led policing', which was agreed upon by the ENU's and the management board. ELOs received training from Europol experts in strategic and operational analysis, which in turn enabled them to disseminate their knowledge at the national level.<sup>122</sup>

The office thus serves as a platform for the exchange of best police practices and as a way for national law enforcement agencies to benchmark investigation methods (Brady, 2007: 30).<sup>123</sup> By supporting the member states in improving their capabilities to collect and analyse information, Europol contributes, albeit in a limited way, to overcoming the legal and cultural differences that still exist and that keep alive the mistrust among police officers in the member states and between national police officers and Europol. But Europol's contribution remains contested, as we will see below.

### *Meeting member states' expectations: delivering value for money?*

Especially after high profile events, member state politicians kept calling for increased cooperation among national law enforcement agencies. They invested Europol with

more and more tasks, often without getting the opinions of law enforcement officers in the field. Europol never really asked for the progressive extension of its mandate, but it also did not resist. As Bruggeman observes: "Politicians gave us time and again new tasks. We have contributed to that. We were certainly not averse to new tasks. In hindsight, we have to accept the fact that it all was a bit too fast and too ambitious."<sup>124</sup> Bruggeman, a former Belgian police officer, was Storbeck's deputy from the start and was, more than Storbeck, concerned with increasing Europol's role.<sup>125</sup> The extensive growth in competences as well as the ever-expanding budget and staff created high expectations about Europol's performance – expectations the office could not meet.

Member states have thus criticised Europol. Germany openly questioned whether Europol was delivering value for money (Occhipinti, 2003: 193), the Netherlands complained about the quality of Europol's work, and Belgium even called for winding up the agency if it would not improve its performance.<sup>126</sup> But instead of enabling Europol to perform its existing tasks properly, member state politicians further extended Europol's remit to give responsibility for a wider range of crimes and to invest it with certain operational capabilities. Europol thus had to prioritise its tasks.

Ultimately, the Council, and on its behalf, the management board determines Europol's priorities on a yearly basis. This does not mean that the office's priorities have always been clear. The annual work programme can be described as an "aggregate of wish lists".<sup>127</sup> Long-term priorities for EU police cooperation have been defined by the European Councils, such as those in Tampere (1999) and The Hague (2005). The various Council Presidencies have uploaded their domestic agendas. As a former Europol official said back in 2001: "[...] I would say that about 85 percent of all our activities are initiated by the member states. [...] We are a member state's organisation and it is reflected in our activities."<sup>128</sup>

On the basis of its Organised Crime Situation Reports (OCSRs), and taking into account the advice of the ELOs and the Heads of the ENUs,<sup>129</sup> Europol annually identified the crime areas that, in its perspective, should be given priority. That most of Europol's activities are initiated by the member states does not mean that there has been no room for the office to manoeuvre. A respondent tells about member states' 'back-scratching' tendencies of which Europol could take advantage:

A lot of the time it was a question of compromise. In the early years we did quite a lot on Hells Angels and motorcycle gangs. This was the main interest of the Scandinavian countries. But then Spain said: 'You also have to do some terrorism for us'. Although such projects perhaps had a lower priority for Europol, we also had to accept them in order to get high priority projects.<sup>130</sup>

Since 2006, Europol produces Organised Crime Threat Assessments (OCTAs).<sup>131</sup> Instead of descriptively reporting on the dominant trends, as the OCSR did, the OCTA provides "a more far-reaching predictive assessment," which allows for "a forward-looking strategic and, in a second step, operational priority setting."<sup>132</sup> The OCTA fits the more pro-active approach to fighting organised crime that Europol has adopted in recent years.<sup>133</sup> It incorporates input from a multitude of sources at the EU and national level including Eurojust, FRONTEX and OLAF. The approach makes it possible for Europol to influence the Council's priority setting by shaping the Task Force of Police Chiefs' understanding of the crime threat.

The Task Force of Police Chiefs (PCTF) had in 1999 been created by the Council to cooperate towards the convergence of police systems in Europe. The PCTF has a double role.<sup>134</sup> On the one hand its task is to advise political decision-makers on the feasibility



of their policy plans. As such they can influence priority setting at the EU level. This could prove advantageous for Europol, as it would ensure that demands placed on it by politicians would be more realistic. On the other hand, the PCTF is tasked to enforce the set priorities at the national level by encouraging police forces to exchange information through Europol. Europol could thus benefit from an improved information exchange.

Whereas Europol previously tried to 'sell' its projects to the member states, now projects are developed in cooperation with the member states, thereby ensuring they are in line with their priorities.<sup>135</sup> Yet, the OCTA is not only based upon information obtained from national law enforcement agencies, it also uses information that Europol generated itself. This is supposed to enhance its assessment of serious organised crime in the EU, while it at the same time makes Europol less dependent on national police forces for information and more relevant for those national police forces because it can provide them with 'new' information for further investigations (see also above).<sup>136</sup>

### *Lacking professional support*

Yet, a wide gap exists between the political ambitions of member states' politicians and the implementation of these ambitions by the professionals in the national police forces. As Jan Wiarda, former Dutch representative in the PCTF, remarks:

It is one thing to call for something and to put a structure in place. But everything eventually comes down to basic routines in the day-to-day police work. The learning processes that will have to take place there, but also in the public bureaucracies, take a lot of time.<sup>137</sup>

Numerous legal and cultural constraints are still present. Moreover, there does not seem to be a sense of urgency among national police forces in Europe to cooperate. Even in the wake of the Madrid bombings, intelligence services proved unwilling to provide Europol with complete and timely information (Walsh, 2006: 637-638).<sup>138</sup> Europol continues to be seen by national authorities as decreed by the top without an urgent need identified at the bottom.<sup>139</sup> Also the Police Chiefs, even if they would be willing to do so, lack the power to insist on the cooperation through Europol. The Task Force has no formal legal basis at the EU level and at the national level the official status of Police chiefs varies.

Although the procedures for AWFs have been streamlined and the EIS has become available, the office still faces a lack of collaboration from national police services. As director Max-Peter Ratzel remarked in his foreword to the 2005 AR: "Whilst the systems are there to combat organised crime, we have to *use* them to underline the reason why they were implemented [*italics added – MG*]"<sup>140</sup> This requires close cooperation from the national law enforcement authorities. Some member states still do not provide Europol with the support it needs to deliver results. And even in supportive member states cooperation is usually dependent on the voluntary commitment of a small number of individuals who consider it a priority.<sup>141</sup>

This has resulted in the paradoxical situation that, in order for Europol to prove its added value to national police officers, it needed their support in collating information. However, because Europol enjoyed limited support from national law enforcement agencies, police officers in the member states did not provide the office with the information necessary to demonstrate its added value as a European law enforcement agency. In the words of the former Belgian delegate to the management board: "Because Europol cannot demonstrate any results, police officers don't have confidence in

it and because they don't see any added value, they are not inclined to provide Europol with sensitive information."<sup>142</sup>

Moreover, whereas initially it promised the member states results it could not deliver because the systems were lacking, Europol subsequently adopted a strategy referred to as "underpromise and overdeliver".<sup>143</sup> Afraid to antagonise the member states, it did not actively market the value it could add to national investigations. This strategy of moderation seems to have backfired: because Europol did not demonstrate to member states that it had something to offer that they could not get anywhere else, the member states did not use the organisation and its systems for information exchange. For a long time, national police forces have thus looked at Europol with suspicion or have disregarded it altogether.

For one thing, generating trust and confidence between police forces is notoriously difficult. This is exacerbated when it concerns cooperation between police forces across European borders. Even if police officers are aware of the necessity of international cooperation, they will not necessarily share information with their counterparts in other countries, let alone with international or European bodies. Indeed, there are strong incentives *not* to cooperate beyond national borders, thus encouraging "intelligence cocooning".<sup>144</sup> National police forces are being rewarded for combating crime at the national level, and not for fighting organised crime across national borders.<sup>145</sup> As a result, police forces in Europe are foremost nationally or even regionally and locally oriented. Even when they cooperate with police forces in other countries, they are focused on bringing about successes in their own countries first.

Furthermore, because police officers generally do not like to share their successes with colleagues, they are wary of providing Europol with information with which it can achieve successes, autonomously from the member states.<sup>146</sup> Moreover, police officers are careful not to put their reputation on the line. This makes them reluctant to rely on information that they have not collected themselves and of which they do not know the source, or to pass on information without knowing what is being done with it. In order to gain the trust and confidence of national police officers, Europol's data protection rules are strict. Strict rules, however, hamper the exchange of information, which in turn has a negative impact on Europol's reputation. The FBI, for instance, withdrew a liaison officer after three months because strict rules made it impossible to share information with Europol.<sup>147</sup>

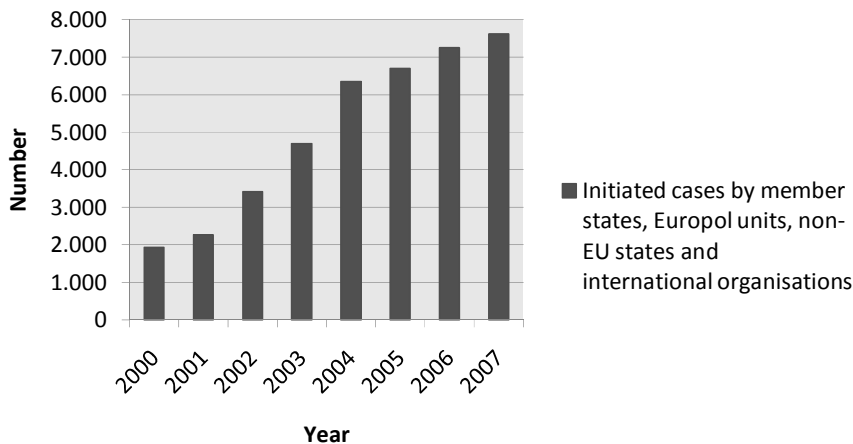
And even if national police officers trust each other and have confidence in each other's working methods, they are unlikely to pool operational authority until they are persuaded of the distinct competence of a supranational entity like Europol (Den Boer and Walker, 1993: 15). As a supranational entity, national police officers claim, Europol would not understand specific national circumstances.<sup>148</sup> They therefore usually opted for improving arrangements for cooperation between existing agencies based on mutual recognition of rules and procedures, rather than working with an organisation such as Europol that, as they see it, is based on increased harmonisation of police practices. They often prefer to exchange information bilaterally on the basis of personal contacts without the interference of Europol and without storing the information in its computer databases.<sup>149</sup>

When national law enforcement agencies were willing to make use of Europol, they still had to go through their national units. Europol was not allowed to liaise directly with national law enforcement authorities. Contact through ENUs, however, was considered a complicated way of receiving information. It also often did not result in receiving any information at all. From Europol's perspective, contacting the competent authorities directly would have the advantage of increasing the information at its dis-

posals whilst also demonstrating its capacities to national authorities.<sup>150</sup> A former Europol official, heading the office's unit responsible for forgery of money, explains:

As police officers we decided that there was only one way to try to overcome this problem and that was to make direct contact. [...] We obviously made sure that we had permission to do this but we contacted the people in the countries, the people who have this information to provide to us. We explained why we wanted it, we explained what we were going to do with it and we explained in fuller terms what the process was about. We found that, having done this, they now understood. Please do not forget that we were speaking to people who we knew.<sup>151</sup>

Some countries allowed such direct contact.<sup>152</sup> Other countries opposed the practice, arguing that bypassing the national units would lead to confusion.<sup>153</sup> A pragmatic compromise was found; Europol is allowed to directly contact the competent national authorities, on the condition that the ENU is informed at the same time.



**Figure 11.4** – Initiated cases (2000-2007)  
Sources: Europol annual reports

Over time, the quantity of information exchanged through Europol has increased if determined by the number of initiated cases and messages (see Figures 11.4 and 11.5). The increase in quantity does not say much about the quality of the information exchanged and the information sharing with individual member states, however. Member states still complain about the lack of clarity of questionnaires Europol asks them to complete for, amongst others, its OCTA, and the trivial results that they yield. This had a negative impact on national police forces' willingness to cooperate. The questionnaires and the research methods have been described by a critical academic observer as "a cycle of self-assurance" without much added value for law enforcement agencies in the member states.<sup>154</sup>

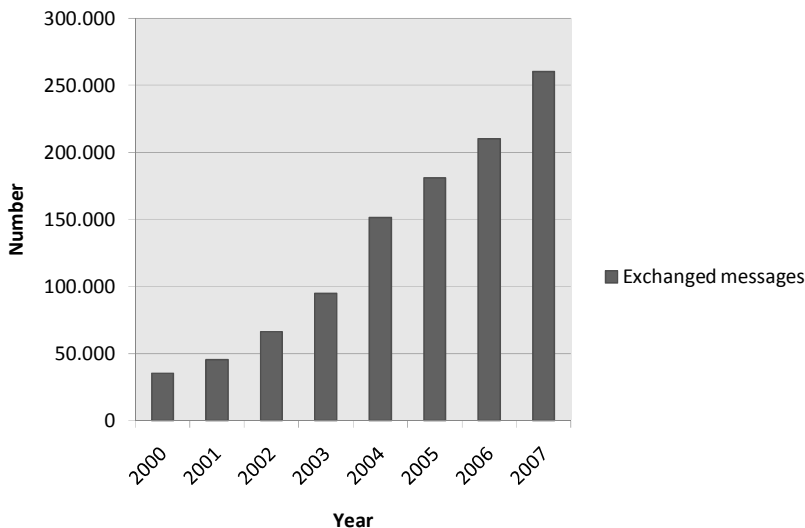
But there seems to be general agreement among interviewees that the information supplied to Europol is of higher quality and is transmitted more quickly now than in the office's early years. This is partly because the quality of the requests channelled through Europol has improved.<sup>155</sup> It also confirms Europol's growing importance, as is for instance indicated by the increasing level of complexity of the cases, the varied type of crime that the information concerns, the different kinds of activity for which the

information was exchanged, and the higher number of countries involved.<sup>156</sup> As a Europol official argued, key to the increased use of the office is voluntary cooperation:

One thing is very clear. The contributions are only good and substantial if they are voluntarily. So, this is maybe a little bit a personal opinion, but to my mind we don't need an obligation to forward information. We don't need any obligation to react to our initiative to start investigations. Experience showed that if we are producing substantial results that are used by member states for further investigations, this is the best way to get member states that are hesitating, be it for legal reasons, for lack of confidence or whatever, to join the club.<sup>157</sup>

### External cooperation

Since the information exchange with EU member states continues to be problematic, Europol tries to increase its added value by cooperation with third countries, other EU bodies and international organisations. The idea is that Europol improves its information position vis-à-vis the member states and that the member states therefore increasingly have to rely on Europol. Hence, the office has for instance concluded agreements allowing for the exchange of data with the US, Interpol and Eurojust.<sup>158</sup>



**Figure 11.5** – Exchanged messages (2000-2007)

Sources: Europol annual reports

The agreement with the US on paper makes Europol the one-stop-shop for EU-US cooperation in the area of terrorism and organised crime.<sup>159</sup> But cooperation between the US and Europol developed slowly. Due to the strict data protection rules, Europol analysts could initially not share information with US liaison officers in The Hague. US law enforcement officials still mistrust the office as a result of unfamiliarity with its intelligence culture. They therefore prefer long-established and well-functioning bilateral cooperation with EU member states over using Europol as a one-stop shop. “Any added value that Europol can provide is either not perceived or is deemed outweighed by the benefits to be derived from dealing with Member States directly.”<sup>160</sup> The member states themselves have also hardly made use of Europol’s liaison office in Washing-

ton D.C., preferring instead to maintain bilateral relations serving their national interests (Brady, 2007: 34).

Furthermore, the relation between Europol and the international police organisation, Interpol, has been characterised by distrust.<sup>161</sup> Although it facilitates international police cooperation, not only with regard to organised crime but also in other areas, Interpol does not analyse 'live' information and does not offer immediate operational support apart from its '(international) notices'.<sup>162</sup> Its criminal intelligence analysis is more strategic in nature. It nevertheless feared that Europol would duplicate its efforts, particularly those of its European Division at Interpol headquarters in Lyon.<sup>163</sup> Only since 2005 has the operational cooperation between the two organisations started to improve.<sup>164</sup>

A cooperation agreement between Europol and OLAF, the EU's investigative office for fraud, took years of discussions (Fijnaut, 2004: 262-264). Cooperation became especially urgent after the mandate of Europol was extended to deal with all serious forms of international crime including fraud and corruption, which led to overlap in the criminal activities both organisations cover. But particularly Europol's central role in the fight against Euro-counterfeiting has been said to intensify the competition with OLAF.<sup>165</sup>

### *Growing supranational character*

Member states have been reluctant to grant the European Commission a role with regard to Europol. While the Commission is formally associated with the work in the area of police cooperation and attends meetings of the management board, Europol and the Commission had to formalise their cooperation by signing a co-operation agreement, necessary "because of the strict legal framework of the Europol Convention and its implementing regulations".<sup>166</sup> For the Commission, this agreement made it possible to use strategic information such as situation reports and threat assessments.

As decision making on the Europol Convention took place under the EU's 'third pillar', the European Parliament (EP) was not consulted. Efforts to create an inter-parliamentary supervisory organ for Europol failed because member states did not want the Parliament monitoring an intergovernmental body. Under the Amsterdam Treaty Europol was supposed to share information with the EP, but the office refused. It for instance only provided a "sanitized" version of its annual report (Occhipinti, 2003: 138). Also, the Parliament was not involved when the Europol director finalised a highly contentious agreement with the US on the transfer of personal data. So while the EP is generally in favour of a strong EU agency to combat transboundary crime, the EP has always advised against the approval of the Europol budget, advice the Council has consistently ignored.<sup>167</sup>

Policing may still be an intergovernmental area, police cooperation through Europol is increasingly becoming supranational (Occhipinti, 2003). Relations between the EP's Civil Liberties, Justice and Home Affairs (LIBE) committee and Europol have improved in recent years. Whereas previously the member states did not allow the EP to exchange views with Europol's director, it has now become possible for the director to appear to answer the EP's questions. Both Storbeck and Ratzel have voluntarily appeared before the LIBE committee (Jeffrey-Jones, 2006: 91).<sup>168</sup> Whereas the EP had been complaining of the lack of sufficient oversight while Europol's powers were time and again enhanced, the inclusion of Europol into the Community framework means a further expansion of the possible mechanisms for control by the EP, therewith increasing the office's extensively debated democratic accountability.

## 11.5 Conclusion: a bit more cop

This chapter set out to examine the development of the European Police Office, particularly in its early years. The actual autonomy of Europol has not substantially increased. Europol could not make its own decisions, nor could it influence the policy-making process either at the EU or the national level. Only in recent years has Europol shown signs of maturity, gradually establishing itself as the independent European law enforcement agency foreseen by its originators.

A combination of factors may explain the office's development. First of all, Europol's development has been strongly affected by its design. European police cooperation, in spite of its long pedigree, essentially remains intergovernmental, with the member states in control. The difficulties in adapting Europol's legal basis hampered the office's effective functioning. Due to its limited operational competences, the possibilities for enlarging the scope of its autonomy have been restricted. The distinction between Europol staff and Europol Liaison Officers made it difficult to create a level of cohesion. Design is a necessary but not a sufficient condition for the office's development, however.

For a long time, Europol's identity was ambiguous. Was it a clearing house for information, an intelligence broker, or would it also have operational or even executive powers? Over time, the agency was endowed with powers that enable it to do more than just collect and analyse information, but in practice it is highly reliant on the member states to exercise these powers. Its new status as a full-fledged EU agency may increase its independence from the member states in terms of funding and staffing. Yet, the member states will still not depend on Europol for their information. Apart from their national police forces, they make use of other institutional arrangements at the EU level, as is particularly clear in the area of terrorism. Moreover, Europol faces competition from international organisations, distracting it from achieving its core objectives.

Furthermore, because Europol's initial focus was on building technical systems to facilitate the sharing of information among national law enforcement authorities, not much attention has been paid to overcoming the mistrust that hampers the exchange of information between national police forces, Europol's 'clients'. Due to the problems in getting the technical systems up and running, in combination with its limited operational competences, Europol could not deliver and thus could not convince national police forces of its added value. The modest approach adopted by Europol when it comes to using its increased operational powers and claiming success for operations and investigations added to the perceived lack of outputs.

At the political level, member states have mostly been supportive of the office, albeit often for opportunistic reasons. Politicians have invested Europol with more and more tasks. Europol, keen on showing its worth, has never objected. However, there has been a wide gap in support between the political and the bureaucratic and professional level. A corruption scandal only added to the negative image of Europol among national bureaucrats and police officers. It not only meant a blow to the confidence in the organisation but also caused harm to its already shaky reputation with national police agencies. This also did not contribute to the attractiveness of Europol as a career opportunity.

The first director has been an important factor in getting the office off the ground. But whereas it is independent on paper, Europol's leadership has been confined in practice. In the view of member state representatives in the board, the first director did not exercise adequate controls, which became apparent with the corruption scandal, whilst member state politicians kept investing the agency with additional tasks. Euro-

pol's director could not do much more than accept such tasks. The second director therefore was kept on a tighter leash by the member states in the board and he himself also adopted a more hands-on approach towards its staff. Moreover, he realised that Europol had to approach member state politicians more actively and contribute to the activities of national police forces more directly in order for the office to survive and, eventually, thrive.

While the office still faces major difficulties with regard to the professional culture and the political sensitivity of police cooperation in Europe, it slowly (though not always surely) is breaking out of the vicious circle in which it found itself for a long time. Its role in Euro counterfeiting, through which it is demonstrating its capacity, is often mentioned as a success. Interestingly, even as not all interviewees agree on whether it is desirable, most see it as inevitable that in the long run Europol will develop into an operational police office with investigative powers. The transformation into a full-fledged EU agency could be seen as a first step in such a direction.

## Notes

<sup>1</sup> Interview #16

<sup>2</sup> Convention Based on Article K.3 of the Treaty on European Union, on the Establishment of a European Police Office (Europol Convention), adopted on 26 July 1995.

<sup>3</sup> As the FBI, Europol has to contend with the restrictions of a (more or less) federal system. Both organisations only are competent to deal with crimes that affect at least two (member) states, and that are offences in all (member) states. But, in contrast to the FBI, Europol does not investigate crimes. It facilitates the exchange of information and intelligence. As such, its tasks can be better compared to that of the US Central Intelligence Agency (CIA). See Jeffrey-Jones (2006) for an inquiry into the idea of a European FBI.

<sup>4</sup> Articles K.1-K.9 of Title VI.

<sup>5</sup> Interview #41

<sup>6</sup> As prime movers of the project, France agreed with Germany that a German head would be appointed, if Europol, in turn, would be located in France, either in Strasbourg or Lyon where Interpol is headquartered. Interview #41

<sup>7</sup> Although three years is relatively short for an international agreement to be ratified, many observers viewed the time lag between the signing and entry into force of the Convention as a reflection of member states' disinterest in the organisation. Interview #79

<sup>8</sup> Since 1 July 1999, Europol has also dealt with child pornography, terrorism, forgery of money and other means of payment.

<sup>9</sup> See Article 2 of the Europol Convention.

<sup>10</sup> It has therefore not been considered necessary to place Europol under judicial control.

<sup>11</sup> See Article 2 of the Europol Convention.

<sup>12</sup> See Council Act of 30 November 2000, Money laundering, OJ C 358 of 13 December 2000 (entered into force on 29 March 2007).

<sup>13</sup> Council Decision of 6 December 2001, Mandate to combat serious international crime, OJ C 362 of 18.12.2001 (entered into force 1.1.2002).

<sup>14</sup> House of Lords, Select Committee on the European Union, Europol's Role in Fighting Crime, Session 2002-03, 5<sup>th</sup> Report, HL Paper 43, p. 7-9.

<sup>15</sup> Council Act of 27 November 2003, Protocol, OJ C 2 of 06.01.2004 (entered into force on 18.4.2007).

<sup>16</sup> Council Recommendation of 28 September 2000 to Member States in respect of requests made by Europol to initiate criminal investigations in specific cases, OJ C 289 12.10.00.

<sup>17</sup> Council Act of 28 November, Protocol on joint investigation teams, OJ C 312 of 16.12.2002 (entered into force 29.3.2007).

<sup>18</sup> This raised questions over the diplomatic protection of Europol officials. Whereas like other officials of international organisations they enjoy diplomatic protection, member states decided that Europol officials participating in a JIT do not have the privileges and immunity normally granted to them. *Staatscourant*, Immunitet Europol-medewerkers in onderzoeksteams aanpassen, 11 March 2002.

<sup>19</sup> Willy Bruggeman as quoted in Van der Schans and Van Buuren (2003).

<sup>20</sup> Interviews #12 and #16

<sup>21</sup> As also seems to be suggested by former Dutch Minister of Justice, Benk Korthals. See *Staatscourant*, Operationele bevoegdheden Europol mogelijk, 10 December 2001, p. 1.

<sup>22</sup> See Article 3 of the Europol Convention.

<sup>23</sup> Interview #16

<sup>24</sup> They can only be opened after a feasibility study on the nature of the problem, the participating countries, the availability of data, and the possible operational consequences. Interviews #12 and #20

<sup>25</sup> See Article 4, para 5 of the Europol Convention.

<sup>26</sup> See Article 10, para 7 of the Europol Convention.

<sup>27</sup> The decision that an OCSR should be published was made by the Council in November 1993. Since 1998 a public version of the OCSR is published on the website of Europol.

<sup>28</sup> It is however not subject to supervision by some form of European prosecution service. See for the issues that this has raised, Chapter 12 on Eurojust.

<sup>29</sup> Interview #6. Whether this is desirable in view of judicial control and democratic legitimacy can be debated.

<sup>30</sup> Interview #10

<sup>31</sup> Interview #80

<sup>32</sup> Council Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third states and non-EU bodies; amended by the Council decision of 6 December 2001 and the Council decision of 13 June 2002.

<sup>33</sup> Interview #6

<sup>34</sup> This has raised questions about their legal accountability.

<sup>35</sup> Interview #15

<sup>36</sup> Commission of the European Communities, *Proposal for a Council Decision establishing the European Police Office (EUROPOL)*, Brussels, 20 December 2006, COM(2006) 817 final; European Commission, Europol to become a more effective EU agency to help police cooperation between the Member States, Press release, IP/06/1861, Brussels, 20 December 2006; *EUobserver*, Brussels to boost powers of EU police office, 18 December 2006, available at <http://www.euobserver.com>, consulted on 19 December 2006.

<sup>37</sup> European Commission, Europol to become EU agency in 2010, Press Release, IP/08/610, Brussels, 18 April 2008

<sup>38</sup> Commission of the European Communities, *Proposal for a Council Decision establishing the European Police Office (EUROPOL)*, Brussels, 20 December 2006, COM(2006) 817 final, p. 2.

<sup>39</sup> Interview #6

<sup>40</sup> SOCA was formed in 2006 out of the former National Crime Intelligence Service (NCIS); *DienstIPOL* came into being in 2008 as a result of the merger of two services previously part of the *Centrale Recherche Informatiedienst* (CRI).

<sup>41</sup> Interview #6

<sup>42</sup> Interview #41. In the United States, with over fifty agencies at the federal and state level, a similar centre bringing together liaison officers of the different agencies had proven effective in facilitating the exchange of information.

<sup>43</sup> Interviews #6, #10, #18 and #41

<sup>44</sup> Interview #6

<sup>45</sup> Europol Annual Report (hereafter referred to as 'AR') 2002, p. 17.

<sup>46</sup> AR 2003, p. 15.

<sup>47</sup> Europol, Information System made available for all EU Member States, Press release, The Hague, 10 October 2005.



<sup>48</sup> As quoted in *Staatscourant*. Also interview #18

<sup>49</sup> Several interviews

<sup>50</sup> Interview #16

<sup>51</sup> AR 1999, p. 10.

<sup>52</sup> See Derek Porter in 'From Europol to Parlopol: Interparliamentary Conference on Democratic Control of Europol', Europol conference organized by the Senate and the House of Representatives of the Dutch States General, 7-8 June 2001 (hereafter referred to as 'Parlopol report'), p. 47.

<sup>53</sup> In accordance with Article 12 of the Europol Convention.

<sup>54</sup> Interview #16

<sup>55</sup> Interview #16

<sup>56</sup> This in contrast to the JIT on drugs in which the initiative for the JIT came originated from the operational level (Rijken, 2006: 114-115).

<sup>57</sup> So far, no JIT has been initiated on the basis of the Council Framework Decision of 2002.

<sup>58</sup> Interview #20

<sup>59</sup> Interview #15

<sup>60</sup> This in contrast to the FBI that especially under Hoover made a major effort of boosting its image by publicly claiming success for the arrest of high-profile criminal suspects (Jeffreys-Jones, 2007).

<sup>61</sup> See Willy Bruggeman, Deputy Director Europol, Europol – A European FBI in the Making?, Lecture in Cicero Foundation Great Debate Seminar "Justice and Home Affairs" - How to Implement the Amsterdam Treaty, Paris, 13-14 April 2000.

<sup>62</sup> House of Lords, Select Committee on the European Union, Europol's Role in Fighting Crime, Session 2002-03, 5<sup>th</sup> Report, HL Paper 43, p. 12.

<sup>63</sup> *International Herald Tribune*, Euro Notes: Bonanza for the Underworld?, 15 August 2001.

<sup>64</sup> See also remarks by Derek Porter in Parlopol report, p. 53. The Parlopol conference took place one week after the corruption scandal became public.

<sup>65</sup> Council decision of 12 July 2005, Protection of the Euro, OJ L 185 of 16.07.2005 (entered into force 16.07.2005).

<sup>66</sup> See for instance Europol, Child sex offender network disrupted, Press release, The Hague, 15 February 2007; Europol, Europol supports investigations against a major people smuggling network in France, Press release, The Hague, 28 September 2006; Europol and Eurojust support Italian and Polish operation against human traffickers, Press Release, The Hague, 18 July 2006; Europol, International action against child sex offender networks, The Hague, 10 May 2006; Europol, Co-ordinate action in 5 countries against a major people smuggling network, The Hague, 15 December 2005; Europol, Co-ordinated action in 13 countries against child pornography, Press release, The Hague, 14 June 2005; Europol, Internet child abuse networks smashed, Press release, The Hague, 26 February 2004. Interviews #8, #18 and #41

<sup>67</sup> See AWP 2002 and AR 2002

<sup>68</sup> Interview #18; also interview #6

<sup>69</sup> Interview #12

<sup>70</sup> AR 2003, p. 11.

<sup>71</sup> Interview #18

<sup>72</sup> See Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, Council document 9778/2/05 REV2; see also Commission Communication, *The Hague Programme: Ten priorities for the next five years*, COM(2005)184 final.

<sup>73</sup> Council of the European Union, 2781<sup>st</sup> Council Meeting, Justice and Home Affairs, Press Release, 5922/07 (Presse 16), Brussels, 15 February 2007.

<sup>74</sup> House of Lords, Select Committee on the European Union, Fifth Report, Session 2004-2005, at 63. Interview #79

<sup>75</sup> AR 2000, p. 10.

<sup>76</sup> Interview #10. The problem of ever-changing charts is not unique for Europol. It also happens to national police organisations.

<sup>77</sup> Interview #41. Also interview #18

- <sup>78</sup> AR 2001, p. 12; AR 2002, p. 18.
- <sup>79</sup> JHA Council, 20 September 2001; European Council, 25 September 2001
- <sup>80</sup> House of Lords, Select Committee on the European Union, Europol's Role in Fighting Crime, Session 2002-03, 5<sup>th</sup> Report, HL Paper 43, pp. 14-15.
- <sup>81</sup> Interview #41. Also interviews #6, #10, and #18
- <sup>82</sup> Interview #41
- <sup>83</sup> Interview #8
- <sup>84</sup> See Geuijen *et al.* (2008) for an illustration.
- <sup>85</sup> Interview #20
- <sup>86</sup> Interview #18; also interview #20
- <sup>87</sup> Interview #15
- <sup>88</sup> AR 2003, p. 17.
- <sup>89</sup> Interview #16
- <sup>90</sup> Interviews #8, #10 and #15
- <sup>91</sup> Interview #10 and #16
- <sup>92</sup> Interviews #10 and #12
- <sup>93</sup> Interview
- <sup>94</sup> Interview #6
- <sup>95</sup> Interview #41
- <sup>96</sup> *EUobserver*, France and Germany fight over police post, 7 June 2004.
- <sup>97</sup> House of Lords, Select Committee on the European Union, Fifth report, Session 2004-2005, at 64.
- <sup>98</sup> *Frankfurter Allgemeine Zeitung*, Policing: Der Lange Weg zum Europol-Direktor; Das Polizeiamt war lang führungslos, 28 February 2005; *EUobserver*, Tough battle looms over nomination of new Europol chief, 18 February 2005.
- <sup>99</sup> Interview #6
- <sup>100</sup> Zanders as quoted in Van der Schans and Van Buuren (2003: 106).
- <sup>101</sup> Interview #10
- <sup>102</sup> Europol, Press Release, The Hague, 8 June 2001; Statewatch, Europol Corruption Scandal: French Europol official arrested for alleged fraud and money-laundering, 15 June 2001, available on <http://www.statewatch.org/news/2001/jun/03europol.htm>, consulted on 15 June 2007. See also Van der Schans and Van Buuren (2003: 102-104) and Occhipinti (2003: 132-133).
- <sup>103</sup> Presidency proposal on the relationship between Europol MB and Europol directorate – Guidelines for Europol approach, The Hague, 15 August 2001, file no. 87 2001.
- <sup>104</sup> AR 2002, p. 19; AR 2003, p. 17.
- <sup>105</sup> AR 2002, p. 19.
- <sup>106</sup> Interviews #8, #10, #12 and #41
- <sup>107</sup> Interview #10
- <sup>108</sup> Interview #16
- <sup>109</sup> See remarks Gilles Leclair, Deputy Director of Europol, as reported in Parlopol report, p. 78. Also interviews #10 and #12
- <sup>110</sup> Proposed concept for a strategy in relation with Europol's professional standards, The Hague, 25 June 2001, file no. 1000-05, as quoted by Van der Schans and Van Buuren (2003: 105).
- <sup>111</sup> AR 2002, p. 18.
- <sup>112</sup> AR 2004, p. 23.
- <sup>113</sup> Interviews #6 and #12
- <sup>114</sup> Interview #16. See also AR 2005, pp. 3, 24.
- <sup>115</sup> Interview #8
- <sup>116</sup> Interview #79
- <sup>117</sup> Interview #41
- <sup>118</sup> Interview #16
- <sup>119</sup> Interview #10
- <sup>120</sup> Interview #41; also interview #10
- <sup>121</sup> Interview #41

<sup>122</sup> Interview #20

<sup>123</sup> Interview #79

<sup>124</sup> Willy Bruggeman, as quoted in *Staatscourant*.

<sup>125</sup> Interview #10

<sup>126</sup> See *Staatscourant*, Europol desnoods opdoeken, 28 February 2002, p. 5; *Financial Times*, Belgian Interior Minister Urges Critical Evaluation of Europol, February 16, 2002.

<sup>127</sup> Interview #79

<sup>128</sup> Remarks by Richard Weijenberg, Head of Europol's Drug Unit, as reported in Parlopol report, p. 73.

<sup>129</sup> The Heads of ENUs usually meet six times a year and can assist Europol by giving advice, for instance, on its annual priorities. Interview #16

<sup>130</sup> Interview #10

<sup>131</sup> See Council Conclusions 12 October 2005

<sup>132</sup> OCSR 2005, Foreword by the Director, p. 3.

<sup>133</sup> In this approach, developed in the UK, policing is based on intelligence analyses and threat assessments.

<sup>134</sup> Interview #15

<sup>135</sup> Interview #12

<sup>136</sup> AR 2006, p. 5. Also interview #12

<sup>137</sup> See interview with Wiarda in *Staatscourant*, Geen operationele bevoegdheid Europol, 16 January 2002, p. 2.

<sup>138</sup> AR 2006, p. 13.

<sup>139</sup> Interview #80

<sup>140</sup> AR 2005, Director's foreword, p. 3.

<sup>141</sup> Interview #18

<sup>142</sup> Patrick Zanders, as quoted in Van der Schans and Van Buuren (2003).

<sup>143</sup> Interview #10

<sup>144</sup> Interview #79

<sup>145</sup> Interview #16

<sup>146</sup> See interview with Wiarda in *Staatscourant*, Geen operationele bevoegdheid Europol, 16 January 2002, p. 2.

<sup>147</sup> Interview #10

<sup>148</sup> Interview #18

<sup>149</sup> Interview #80

<sup>150</sup> Interview #41

<sup>151</sup> See remarks made by Derek Porter in Parlopol report, p. 46.

<sup>152</sup> See remarks made by Richard Weijenberg in Parlopol report, pp. 77, 86.

<sup>153</sup> House of Lords, Select Committee on the European Union, Europol's Role in Fighting Crime, Session 2002-03, 5<sup>th</sup> Report, HL Paper 43, p. 10.

<sup>154</sup> Professor Petrus van Duyne as quoted in *NRC Next*, Gekmakende lijsten van Europese politie. Hoogleraar hekelt 'trivialiteiten' van Europol, 8 November 2007, p. 10.

<sup>155</sup> Interview #16

<sup>156</sup> Although messages on other areas of crime such as illegal immigration, stolen vehicles, and money laundering have increased, the main area of crime remains illicit drugs trafficking.

<sup>157</sup> Christian Bratz, Group leader responsible for Illegal Immigration within Europol, as reported in Parlopol report, p. 119.

<sup>158</sup> The relations between Europol and Eurojust are discussed in Chapter 12.

<sup>159</sup> *Agreement between the United States of America and the European Police Office*, Brussels, 6 December 2001; *Draft Supplemental Agreement between the United States of America and the European Police Office on the Exchange of Personal Data and Related Information*, Brussels, 4 November 2002, 13689/02, Europol 82.

<sup>160</sup> Council of the European Union, *Mutual evaluation of the co-operation agreements Europol-United States*, 11502/05, Brussels, 27 July 2005, p. 11.

<sup>161</sup> Interview #6

<sup>162</sup> Interview #8. See the Interpol website, <http://www.interpol.int/public/Notices/default.asp>.

<sup>163</sup> Interview #10

<sup>164</sup> Europol, Europol director visits Interpol to discuss police cooperation, Press release, The Hague, 31 July 2006.

<sup>165</sup> Interview #10

<sup>166</sup> Europol, Joint Press Release of Europol and the European Commission. A Cooperation Agreement Between Commission and Europol, The Hague, 18 February 2003.

<sup>167</sup> Interview #18

<sup>168</sup> Interview #41



# CHAPTER 12

## COOPERATION AMONG JUDICIAL AUTHORITIES: THE CASE OF EUROJUST

We make our own agenda, but we have connections with both the Commission and the Council. They could ask us to do certain things and we have to answer them, of course. But they could never get involved in our casework. That is not possible for them.

– Eurojust national member<sup>1</sup>

### 12.1 Introduction: doing full justice

Eurojust started off with a relatively high degree of formal autonomy, which it has further expanded over time with regard to the EU institutions and the member states. Since its creation, Eurojust garnered a high level of support for its activities. Already in its very early years, the House of Lords for instance hailed it as “an example of the sort of effective practical co-operation that an EU agency can provide [...]”.<sup>2</sup> Indeed, the operational nature of the work combined with the involvement of concerned national and European actors has allowed the agency to generate a substantial degree of legitimacy.

Whereas design has proven an important factor influencing its early development, over time, the hybrid nature of the organisation’s structure, incorporating both inter-governmental and supranational features, has caused difficulty with regard to its internal cohesion. In addition, the agency still very much serves as an instrument to enhance cooperation among member states, and its influence on member state policies remains limited. But that, at the same time, also appears to be its strength, and, partly because of that, proposals by the Commission to transform the body into a European Public Prosecutor, seem to have been countered by the member states.

This chapter is organised into the following sections. Section 12.2 traces the historical origins of Eurojust. In Section 12.3, its formal autonomy is examined, as well as the extension of thereof with the passage of time. Section 12.4 discusses the quick growth of Eurojust, focusing on the first five years of the body’s existence. It offers empirical insights into the way the agency increased its autonomy in practice. In Section 12.5, several explanations are proposed that can account for the relative ease with which the body has increased its autonomy over time.

### 12.2 The conception of Eurojust: pendant to Europol

Eurojust was created by a Council decision on 28 February 2002.<sup>3</sup> The idea of setting up a European judicial cooperation unit has its genesis in the early 1990s. When the creation of Europol was raised by German Chancellor Kohl, Eurojust had already been thought of as a “pendant” to Europol.<sup>4</sup> Member states believed that there was a functional need to complement police cooperation at the EU level with the coordination of legal proceedings among member states’ national authorities. But it took until the end

of the 1990s before a proposal for a European judicial cooperation unit was made (Mangenot, 2005: 27-28).

### *A counterpart to Europol*

As the time was not yet ripe for the creation of a European body like Europol, the idea of establishing a 'decentralised network' gained ground first. In 1998, on the basis of a recommendation in the Action Plan to Combat Organized Crime of 1997, the idea led to the creation of the European Judicial Network (EJN), the first operational mechanism for judicial cooperation in the EU.<sup>5</sup> The EJN is composed of legal practitioners in the member states, who serve as contact points for judicial cooperation, both in general and for specific forms of serious crime.<sup>6</sup> These contact points mainly work bilaterally, although it is possible that they are involved in multilateral cases. As such, the EJN reflects the level of integration at the time of its establishment.

Meanwhile, ideas for a European judicial cooperation unit had further developed in the Council Secretariat's Directorate-General for Justice and Home Affairs (JHA). In informal discussions in the DG's judicial cooperation unit, headed by an actively engaged former judge from Sweden, the unit was termed 'Eurojust', therewith explicitly referring to it as a judicial counterpart of Europol. As suggested by Germany, and in close cooperation with France, a proposal, largely developed in the Council Secretariat, to set up such a unit was put forward at the informal meeting of ministers for justice and home affairs held at Turku in Finland in September 1999. The proposal was adopted by the special meeting of the European Council on Justice and Home Affairs in Tampere in October 1999.<sup>7</sup> It anticipated establishing Eurojust already by the end of 2001 (Mangenot, 2005: 28).

Given the strict deadline, the four countries holding the Council Presidency until the end of 2001, namely Portugal, France, Sweden, and Belgium, started preparing for a draft text immediately after the Tampere Council. During the Portuguese Presidency a document with exploratory thoughts concentrating on the circumscription of Eurojust's competences and the definition of its powers was tabled. On the basis of this document and the informal JHA Council of March 2000, the four presidencies drafted a more concrete set of guidelines to establish Eurojust. An initiative by the four presidencies for a Council decision was eventually presented during the French Presidency in July 2000. It foresaw the creation of an autonomous organisational unit composed of one 'national member' for every member state.

Germany, without first consulting the presidencies, put forward its own initiative for a Council decision. In the German initiative Eurojust would consist of a group of 'liaison officers' designated by the member states and supported by the Council Secretariat. The group would not function as a separate organisational entity.<sup>8</sup> The presidencies and the Council Secretariat had reservations about the German initiative. Particularly the Belgians wanted to avoid making the same mistake as with the creation of Europol, which, they felt suffered from permanent tension between its intergovernmental and supranational character. Europol, while initially giving rise to the creation of Eurojust, now clearly served as a "contre-modèle institutionnel" (Mangenot, 2005: 29).

### *Pro-Eurojust as forerunner*

Just as with Europol, which was preceded by the Europol Drugs Unit, the Council decided to create a forerunner to Eurojust in December 2000.<sup>9</sup> The provisional judicial co-operation unit, called Pro-Eurojust, resembled the German initiative, that is, each member state designating a representative to the unit, and the unit relying on the resources of the member states. As “a kind of round table of prosecutors from all member states”, the unit provided “a first module, a kind of laboratory, enabling concepts of Eurojust to be tried and tested.”<sup>10</sup>

In March 2001, Pro-Eurojust thus started its work without staff but with prosecutors and judges.<sup>11</sup> It was led by the representative of the member state holding the EU presidency, which at the time of its creation was Sweden, and was temporarily located in the Council’s *Justus Lipsius* building in Brussels. It was formally and informally supported by the Secretariat of the Council. The unit mainly concentrated on operational work. It described itself as a “case co-ordination centre or a clearinghouse for co-ordination and facilitation of co-operation between competent authorities concerned with investigations and prosecutions into serious or organised crime”.<sup>12</sup> By the end of 2001, the member states had involved the unit in more than 180 cases.

### *From provisional unit to permanent body*

The negotiations on the proposal to establish Eurojust were lengthy and complex. Difficulties arose due to the numerous areas of concern for the member states (e.g. competences and powers of Eurojust, data protection, liabilities and immunities of Eurojust members and staff, judicial supervision of Eurojust) and the diverging interpretations of the Tampere conclusions.<sup>13</sup> As one respondent says:

When Chancellor Kohl proposed a European FBI he had something completely different in mind. It happens quite often in the EU, you will find out that someone else has an idea or some may have ideas and they propose something. Then you start negotiating and you see what you achieve. And it was the same thing with Eurojust. You had an idea so you knew that it was going to be created by the end of 2001 but exactly what it would look like and what kind of mission and powers, that nobody knew.<sup>14</sup>

Member states eventually arrived at the idea of a national member, who would remain part of his or her national jurisdiction and thus would be able to liaise easily with national authorities, but would also become a member of Eurojust’s governing body, the college.

In December 2001, right at the time when the Council agreed on establishing Eurojust, the Commission published its Green Paper on founding a European Public Prosecutor (EPP). The services of the Commission’s Financial Controller had proposed setting up an EPP with the support of the Commission’s DG Budget and the Parliament’s Budget Committee.<sup>15</sup> They were concerned that Eurojust would not be able to pay enough attention to the protection of the Community’s financial interests. The Commission’s DG Justice and Home Affairs, however, preferred the creation of Eurojust considering it an opportunity to further incorporate judicial cooperation, conceived more broadly than the protection of the Community’s financial interests, into the Community framework.

In February 2002, at the same meeting the JHA Council decided on Eurojust’s temporary location in The Hague, member states agreed that an EPP would not (yet) be set



up, the idea of Eurojust indeed serving as a kind of compromise solution to either pure intergovernmental cooperation in a broad field or pure supranational cooperation in a limited area (see also below). The body became operational in May 2002 when the administrative director, Ernst Merz from Germany, was appointed. Merz was initially appointed on a temporary basis, but was awarded a five-year contract in September 2002. Once in office, he began to recruit a small temporary task force to build an administrative infrastructure in support of the college's work. Three national members assisted the task force. The national members of the provisional unit took on the role of national members of Eurojust until the national members were definitively appointed.

Meanwhile, Eurojust had moved to The Hague where it was temporarily housed in the 'Hague Arc', together with the newly created International Criminal Court. The final decision on Eurojust's location got caught in the dispute among government leaders at the 2001 Laeken summit over the sites of 13 new EU bodies (see Chapter 5). France, Luxembourg and also Belgium were still in the running for permanently hosting Eurojust. In December 2003, member states decided that the unit should be headquartered in The Hague, one of the main reasons being the proximity to Europol.

### **12.3 Eurojust's formal design: hybrid autonomy**

#### *Objective, mandate and tasks*

Eurojust's design reflects increased integration in the field of police and judicial cooperation. Whereas previously, a clear distinction between international public law institutions existed, such as Europol and agencies based on Community law, Eurojust "is something in between. It has two legs: one leg in the first pillar and one in the third pillar."<sup>16</sup>

Eurojust's objective, as stipulated in its constituent decision (hereafter referred to as 'Eurojust decision'), is to enhance the development of European-wide cooperation on criminal justice cases.<sup>17</sup> It aims to stimulate and improve the coordination of cross-border investigations and prosecutions among the competent authorities of the member states and to support them in their cooperation.<sup>18</sup> Although it makes recommendations to change laws in order to improve mutual legal assistance and extradition arrangements, Eurojust does not change national laws nor try to harmonise them. National investigative, prosecutorial and judicial authorities remain the key actors in European law enforcement (Van den Wyngaert, 2004: 210; Thwaites, 2006: 295).

Eurojust's mandate is rather broad. It extends primarily to serious crime concerning two or more member states, particularly when it is organised crime.<sup>19</sup> It is thus competent for the same crimes as Europol. In addition to this list, however, Eurojust has a number of additional crimes that partially overlap the Europol crimes, such as computer and environmental crime and criminal offences affecting the European Community's financial interests. For all of these crimes, Eurojust is also competent when they are committed together with "other offences". Moreover, upon the request of a prosecutor in a member state Eurojust can provide assistance in case of any other type of offence.

Eurojust is an operational organisation. It assists national judges and prosecutors in concrete and ongoing cross-border cases. It, for instance, facilitates the execution of international mutual legal assistance and the implementation of extradition requests, and provides logistical support such as translation, interpretation and the organisation

of coordination meetings. Furthermore, it coordinates investigations and prosecutions. Notably, Eurojust may ask member states' authorities to undertake an investigation or prosecution, or set up a joint investigation team (JIT) (in close cooperation with Europol, see also Chapter 11). Eurojust may also request certain member states to refrain from investigating or prosecuting, while asking other member states that are in a better position to undertake an investigation or prosecute specific acts.<sup>20</sup> Finally, it can ask member states to provide information.

Whereas Eurojust can ask national authorities to initiate investigations or prosecutions, it has no authority (yet) to launch or carry out investigations or prosecutions itself. Moreover, member states may decide not to comply with such a request. They can also refuse to provide Eurojust with information or accept that another state is better placed to conduct an investigation or prosecution. Importantly, however, they must give reasons for their non-compliance. They can only refuse without informing Eurojust of the reasons for its decision when it concerns national security interests, investigations under way, or the safety of individuals.<sup>21</sup>

### *National members*

Eurojust fulfils its tasks through its 'national members', acting individually or together as a 'college' (see below).<sup>22</sup> The terms 'national' and 'member' reflect the compromise between an intergovernmental and a supranational design.

Each member state seconds a prosecutor or judge (or police officer of similar competence) to Eurojust as national member. They handle individual cases, and all information exchanged between Eurojust and a member state is directed through them. They can both request information from other countries and be asked for information. Under Article 6(a) of the constituent decision, they can also ask a member state to start an investigation or take up a case. As experienced practitioners, national members supposedly have extensive knowledge of the substantive and procedural law of their home country. While they remain part of their national jurisdictions, they work together at Eurojust's premises. This allows for an efficient exchange of information between national members.

The member state determines the length of a national member's term of office, defines the nature and the extent of the judicial powers it grants its national member within its own territory, and provides the right for a national member to act in relation to foreign judicial authorities. Member states were deliberately left to decide on the powers of their national member. As a respondent involved in designing Eurojust says:

I thought – and many with me – that if you let the member states free [to manage their own national members] then some national members will be drawn upwards rather than if you decide in the beginning on a harmonised set of powers which would result in a lowest common denominator.<sup>23</sup>

Some national members are supported by one or more deputies or assistants, either based in The Hague or in their home country. These deputies or assistants not only support their national member, they can also substitute for him or her. Some desks also include seconded national experts (SNEs). They are formally employed by the administration and therefore cannot deputise for the national member.<sup>24</sup>

### *The college*

Unlike other EU agencies, Eurojust does not have a management board, at least not in a similar form. Its activities are monitored by a Joint Supervisory Board (JSB), ensuring that personal data processing is carried out in accordance with data protection rules and supervised by the JHA Council ministers. The college of national members serves as Eurojust's decision-making body. For example, under Article 7(a) of the constituent decision it can as a college ask a member state to start an investigation or take up a case. Apart from the casework, the college is responsible for the organisation and operation of Eurojust. It reports annually to the JHA Council on Eurojust's activities.

A president and two vice-presidents, elected by the national members, chair the college. As *primus inter pares*, the president presides over the college meetings and represents Eurojust externally. Although the college negotiates agreements with other entities, such agreements are subject to Council approval. The Commission is not represented in the college. Even though during the negotiation of the Eurojust decision the Commission tried to obtain a seat, the member states considered that the Commission, as an administrative body, should not be part of the college, given the operational nature of much of the college's work.<sup>25</sup>

Each national member has one vote within the college. Most decisions are determined by a two-thirds majority; only the decision on the appointment of the director of the college is unanimous. This means that for the college to make decisions it needs a quorum of at least 18 members. Deputies and assistants can only formally replace their national member when countries officially notify the Council about this.

In 2005, a secretary to the college was recruited to assist the president in his administrative tasks related to the college. In accordance with Article 7 of the Rules of Procedure, the secretary works in close consultation with the president, but under the authority of Eurojust's administrative director (see below). She in fact is "working in the middle of two worlds", providing services to both the college and the administration, while at the same time operating relatively independently from these organs. Apart from running the secretariat of the college, which includes the preparation of the college and team meetings, the secretary is responsible for facilitating links within the college and fostering the relationships between the college and the administration.

### *The administration and its director*

The administration assists the college by providing its secretariat. It is headed by an administrative director who is an EU official. Selected from a list of candidates and appointed with unanimous agreement of the college, the administrative director reports to the college through the president. To that end, he has weekly meetings with the president in which they inform each other of operational and administrative developments.<sup>26</sup> The director works under the authority of the college, which may remove him from office.

The director is responsible for the day-to-day administration of Eurojust and for budget and staff matters. This is different from most other EU agencies where the director is not only in charge of the administrative but also the operational side of the organisation.<sup>27</sup> "The member states simply wanted to keep [the administrative director] out of the casework", an interviewee comments, "which from their point of view is understandable".<sup>28</sup>

### *Funding and personnel*

Since the Amsterdam Treaty, any EU action, including action under the third pillar, is financed from the EU's general (also termed 'Community') budget, unless the member states unanimously decide otherwise.<sup>29</sup> Eurojust was the first third pillar agency to be financed from the Community budget. This makes the Parliament, together with the Council, the budget authority. Eurojust has to report to the EP through the Presidency of the Council. By fixing the budget, the Commission can significantly influence the agency's activities. The salaries of the national members, their deputies and assistants are, however, still borne by their member state of origin, revealing the intergovernmental features of the agency. And, in effect, leading to "a doubling of the budget".<sup>30</sup>

Whereas the national members remain part of their national system, Eurojust staff is EU staff. It is subject to the same rules and regulations as Commission personnel. Eurojust staff falls under the responsibility of the administrative director and provides administrative support to the college, including with regard to budgetary and financial issues, information management, legal matters, and facility management.

### *Towards a European Public Prosecutor?*

In October 2007, the Commission presented a Communication on the role of Eurojust and the EJP in which it proposed amending the Eurojust decision.<sup>31</sup> "The quality and speed of the handling of cases are generally recognised. But the development of Eurojust needs to be accompanied by a clarification and reinforcement of the powers of the national members and by greater authority for the college." All national members would have to be invested with a basic level of power and would have a minimum three year-long mandate.

The Commission Communication, mainly focusing on the short- and mid-term possibilities for strengthening Eurojust, did not explicitly mention the creation of a European Public Prosecutor.<sup>32</sup> It did however indicate that in the longer term the powers of national members might be reinforced to give them a role in taking specific investigative measures, setting up and participating in a JIT and initiating criminal cases, especially those involving crimes against the financial interests of the EU. In that sense, the Communication followed the conclusions of the meeting of specialists in Vienna in September 2006, which called for a "step-by-step approach".<sup>33</sup>

The Commission's proposals met resistance from several member states. In January 2008, a group of 14 member states, including France, Italy, Spain, and the Netherlands, therefore tabled its own proposal for reinforcing Eurojust with regard to the powers of national members but also with regard to strengthening its capacity to work with external partners. As its planning had been overtaken by the member state proposal and as the proposal largely took into account the Commission proposal, the Commission indicated that it would no longer make a legislative proposal.<sup>34</sup> In December 2008, the Council adopted a new Decision strengthening Eurojust and amending the founding Decision.<sup>35</sup>

Meanwhile, the ratification of the Lisbon Treaty would make it possible for Eurojust to be invested with the power to initiate criminal investigations, as well as propose the initiation of prosecutions conducted by competent national authorities, and coordinate such investigations and prosecutions. The Lisbon Treaty also paves the way for the creation of a European Public Prosecutor to combat crimes affecting the financial inter-

ests of the EU. But what the exact role of an EPP and its relation with Eurojust would be remains unclear.

## 12.4 Eurojust's autonomy in practice: an instrumental role

### *Unit for Judicial cooperation or embryo of a European Public Prosecutor?*

Upon its creation, Eurojust has been described as a "legal melting-pot from which subsequent developments to strengthen the European judicial area will be defined."<sup>36</sup> One of the key questions during the early years of the organisation was whether these developments would eventually entail the creation of a European Public Prosecutor (EPP) and whether the unit would have to be built as the embryo of such an EPP. For some Eurojust would be the first step towards such an institution; others however considered this to be a step too far.

Eurojust is therefore "at the crossroads between two conflicting models: one seeking increased harmonisation of criminal law and procedures and centralised EU structures and the other based on mutual recognition of Member States' laws and procedures and enhanced co-operation between them."<sup>37</sup> Some countries, such as Spain and Portugal, have favoured increased harmonisation instead, through setting up a European Public Prosecutor. They have even proposed broadening the scope of action of such an EPP to cover all areas of crime, not just crime against the financial interests of the EU, an area in which harmonisation has already significantly progressed. Most member states are opposed to increased harmonisation and are reluctant with regard to the creation of an EPP, in view of national sovereignty, democratic control and practical feasibility. These countries have therefore opted for mutual recognition.

It is highly likely that Eurojust would never have seen the light of day if it had not been for the fact that its very idea had something that could satisfy both 'camps' - for one it is the beginning, for the other it is the end.<sup>38</sup>

Hence, Eurojust was not set up with a view to harmonise, but on the basis of mutual legal assistance. Before an EU prosecutor can be created a European penal code is needed. As for now, there is no European criminal code, and perhaps more important, there is no European criminal procedure.<sup>39</sup> Eurojust is still working with 29 different legal systems.<sup>40</sup> As one interviewee points out: "The reason why we set up Eurojust was exactly because national procedures and systems are so different. [This is why] we have one person from each member state who can communicate directly with his colleagues."<sup>41</sup> Moreover, if Eurojust really would have to become the judicial pendant to Europol, also exercising control over Europol in the national context, a European Criminal Court or equivalent of that would have to be set up as well.<sup>42</sup>

While Eurojust's mandate was not broadened to become an EPP, Eurojust has gradually been preparing to become an EPP if required. "If it should come to pass in the future", the unit stated in its annual report for 2004, "we look forward to seeing a European Public Prosecutor being created from Eurojust."<sup>43</sup> An example of its preparations is Eurojust's work on deciding the best place for prosecution, an unresolved issue of EU criminal policy and closely related to the setting up of the EPP. In 2003, the unit for instance produced a set of guidelines for deciding which jurisdiction should prosecute.<sup>44</sup> The issue of conflicting jurisdictions, however, can also be argued to reflect the intergovernmental character of the cooperation through Eurojust. For the moment,

lacking the power to start an investigation, Eurojust hardly has any influence on national prosecutorial policies.<sup>45</sup>

### *Coordinating cross-border cases*

From the beginning, a key priority of Eurojust has been the enhancement of operational casework through coordinating cooperation between the member states. Cases are usually referred to Eurojust by the member states. “I don’t take up a case myself, even if I have the competence under my national law to do so”, a national member says. “It is always a contact at home asking me what we are going to do with a certain case.”<sup>46</sup> Once cases reach the European level, member states have already decided to gather intelligence on the national level and to investigate specific acts. A case is often only referred to Eurojust when they face problems in solving the case on their own. Ultimately, the member states decide on cooperation with other member states and coordination at the EU level.

In coordinating cases, Eurojust works on different levels.<sup>47</sup> When cases are referred to Eurojust they are first discussed in the college assembling for twice-weekly operational meetings. These meetings are called ‘level 1’ meetings.

Every college meeting we start with a tour de table which means that we announce new cases and we tell the college which countries are involved, what kind of crime it is, what kind of organisation it is. [...] We have this tour de table because everybody should be aware of what is going on, because it happens now and then that people recognise links to their home country.<sup>48</sup>

While the college usually approves the opening of new cases, this does not mean that it automatically accepts all cases brought to it by the member states. In addition to being serious enough, the case should also involve at least two member states. But, as a national member points out, “there are no strict rules for cases Eurojust should accept”. The college makes decisions on a case-by-case basis. Also a case concerning trafficking in human beings involving only one member state and one or more states outside the EU can be taken up by the college.<sup>49</sup> Moreover, particularly in the early years, the approval of a case depended on whether national members ‘needed’ such a case in terms of visibility in their home country.<sup>50</sup>

Subsequently to the level-1 meetings, Eurojust gathers the countries directly concerned with the case for another, often informal meeting. These are restricted to a number of national members directly involved in a case, the so-called ‘level 2’ meetings. Because national members all work at Eurojust’s premises they can quickly and without many formalities get together; they just walk over to the other end of the corridor. After liaising with their home country, they can then decide on action.

But “the most important operational tool Eurojust has at its disposal” are the more formal coordination meetings, referred to as ‘level 3’ meetings.<sup>51</sup> The national member continues:

The next step is, if we, for example – which very often happens – have different investigations dealing with the same crime or with the same criminal organisation in different countries, we invite prosecutors or investigators from all the involved countries here and then we exchange information and discuss who is going to do what, to avoid double work. That is the really strong thing of Eurojust.<sup>52</sup>

Coordination meetings are held either at the Eurojust premises or in one of the involved countries, and attended by magistrates, prosecutors and police officers from the concerned member states. In order to account for language differences, the meetings are simultaneously translated. The countries involved each have their own role in the investigations; one of the countries usually takes the lead. This approach of working together has ensured that the investigators and prosecutors discuss cases of mutual interest.<sup>53</sup> It is through these meetings, interviewees agree, that Eurojust has most added value:

It is difficult to see how coordination could have been achieved so effectively without a structure such as Eurojust. It could have been achieved, national prosecutors could have made their own travel arrangements but it just seems rather unlikely that, excuse me, impossible that this could have been that effective without the facilities that Eurojust is offering.<sup>54</sup>

### *Adopting a strategic approach*

While Eurojust still plays a primarily operational role, it has been developing a more strategic approach.<sup>55</sup> Besides coordination meetings, Eurojust, on its own initiative, has been organising strategic meetings on particular topics, such as terrorism, trafficking in human beings and practical issues relating to the European Arrest Warrant.<sup>56</sup> These strategic meetings are informative in that they provide a forum for practitioners to discuss practical issues and share best practices. They are also aimed at building up networks of national investigators and prosecutors that can be relied upon when a case is referred to Eurojust. But, most importantly, they have a strategic function in that they are intended to promote Eurojust, demonstrating its added value to national authorities and therewith attracting more case referrals.<sup>57</sup>

Successful operational casework is the best way to attract a higher number of case referrals. In 2006, the body therefore decided to reduce the number of strategic meetings to a maximum of five per year so that more operational meetings on specific cases could be held.<sup>58</sup> At the same time, a new category of meetings was introduced, so-called tactical meetings, in which countries share knowledge and exchange best practices on a level between the operational and strategic levels.<sup>59</sup>

Another way for Eurojust to act more strategically is to generate its own cases in a more pro-active way, instead of waiting for member states to refer cases.<sup>60</sup> So far, this possibility has been underused because it requires full access to databases and registers and the capacity to analyse data and information. Eurojust, like Europol, only has limited access to databases such as the Schengen Information System (SIS). Moreover, since Eurojust does not have its own analysis capacity, it would have to cooperate with police authorities, be involved in investigations of national police agencies at an early stage, and work more closely with European police bodies and organs, notably Europol, relying on its Analysis Work Files (AWFs) and, increasingly, on its Organised Crime Threat Assessments (OCTAs).<sup>61</sup>

It is difficult for Eurojust to become involved at an early stage, however.<sup>62</sup> The position of Eurojust towards police authorities is not exactly clear, as it depends on the position of its individual national members towards police authorities in their home countries.<sup>63</sup> The very reason underlying Eurojust's creation, the transnational character of much organised crime, also inhibits the generation of cases via national police authorities, or, in other words, bottom up referrals. The inability and unwillingness of national police forces to effectively deal with such crime further complicates the generation of cases. In its 2004 and 2005 annual reports, Eurojust nevertheless reported a significant

increase in cases referred for assistance at an early stage of investigations, allowing it “to add real value”.<sup>64</sup>

To ensure that it is involved in the investigations at the earliest stage possible, Eurojust can broaden the geographical scope of a case referred to it by one member state to other member states through electronic coupling of data in its Case Management System (CMS). Particularly in terrorism cases this is essential. “[National members] can and do that more and more, when they for instance have a bilateral case and they see that a third country is involved they go to that national member and say ‘We see here something that is of interest for you as well.’”<sup>65</sup> De Jonge (2005: 55) notes that “[s]ome national members expressed that this oversteps the supportive role of the organisation, and it would be premature for such an attitude.” The cases generated this way are therefore scarce. As a national member says:

It happened once that I took up a case because I was asked by Eurojust. They had difficulties finding a prosecutor from my home country and they asked me to find one and I found a prosecutor. But that is an exception and very unusual.<sup>66</sup>

Eurojust’s national members can also request investigations or prosecutions based on information provided by the competent authorities of third states, other EU and international organisations and bodies. As Eurojust is still in the process of establishing relations with third states, other EU bodies and international organisations, not many cases have been generated in this way. Yet, even without formal agreements, informal relations with countries outside the EU have led to successes, for example in cases on trafficking in human beings involving Albania and Macedonia (De Jonge, 2005: 59).<sup>67</sup>

Moreover, Eurojust can, through coordination work, help identify operational cases suitable for JITs (Helmberg, 2007: 249-250). Eurojust officials can subsequently participate in a JIT, either as a national member bound by national law or as a college member representing Eurojust. For the success of such endeavour, it is important that countries see the need for JITs. Coordination initiated top-down is likely to fail if it does not have bottom-up support, as is, for instance, shown by the unsuccessful attempt during the Dutch EU presidency to establish a JIT on human trafficking in 2004 (Rijken, 2006; Rijken and Vermeulen, 2006).

Even though the generation of a case can occur at the European level, it cannot take place without information provided by the member states. When member states’ willingness to share intelligence is limited or absent, the involvement of Eurojust in a JIT does not add much value, especially as there are still practical and cultural problems with allowing Eurojust personnel to operate in sovereign states. In case of the unsuccessful JIT on human trafficking, Eurojust participated as an observer, but could not play a significant role (De Jonge, 2005: 53; Rijken, 2006).<sup>68</sup> So Eurojust remains highly dependent on the willingness of others to provide it with information and involve it in operational casework.

### *Exerting informal pressure*

Eurojust can put informal pressure on the member states, requesting that they initiate investigations. Member states can refuse to do so, but this is not without risk if it does so repeatedly. “If a country several times decides not to act on our request within a short period of time, then we will make sure that a question will be asked in the Council.”<sup>69</sup> At the national level this is well-understood. In the Netherlands, for instance, the policy guidelines (*beleidsregels*) on JITs note that: “Requests by Eurojust are of course



never without obligations. If the requested party considers that a request cannot be complied with, such a decision will have to be adequately justified.”<sup>70</sup> And: “The refusal of a request to set up a JIT can lead to the Minister of Justice of the concerned country being called to account in the Justice and Home Affairs Council”.<sup>71</sup>

The requirement that member states can only formally refuse to involve Eurojust in investigations and prosecutions when they can justify their non-compliance in practice serves as an informal pressure on member states to cooperate. National authorities do not want to be seen as non-cooperative. Above all, they do not want to risk any potential negative consequences of *not* following a Eurojust recommendation, as they will have to explain to their minister why they did not comply. They therefore often refer a case to Eurojust for coordination purposes without a formal request from Eurojust.<sup>72</sup> The threat of explicit mentioning (‘naming and shaming’) of non-cooperative member states in the Eurojust annual report or by bringing the matter to the Council’s attention has reportedly had an effect on member states.<sup>73</sup>

In fact, the college acted under the provisions of Article 7(a) of the Eurojust decision, allowing it to ask member states to start an investigation or take up a case, for the first time only in 2005. In the first case, Spain was formally asked to initiate investigations and, if necessary, prosecutions in an art fraud case also involving the UK. In the second case, the *Prestige* case, the French and Spanish authorities were requested to accept that Spain was in a better position than France to prosecute.<sup>74</sup> Both requests were complied with. In line with the objective to make more frequent use of its formal powers, individual national members in 2006 issued six recommendations under Article 6(a) of the Eurojust decision two of which concerned Portugal and four concerning Spain.<sup>75</sup>

But in practice there are not many opportunities to use the powers under Articles 6(a) and 7(a). Apart from it sometimes being enough for national members to make an informal recommendation, the use of its formal powers may in fact backfire. If member states, for whatever reason, are hesitant to cooperate, a formal request from Eurojust may actually lead to the demise of their cooperative stance towards Eurojust.

### *Relying on professional networks*

The strength of Eurojust is closely linked to the strength of its national members, or as the president of the college has frequently noted: “Any chain is only as strong as its weakest link”.<sup>76</sup> Already during the Pro-Eurojust phase it had become clear “that the extent of a [national] member’s powers had an immediate and practical impact on the working of facilitating and stimulating investigations”.<sup>77</sup>

Member states have however implemented the Eurojust decision in an uneven fashion. Not all member states have conferred the same investigative or prosecutorial powers to their national members. Indeed, some national members have extensive competences under national law, whereas others have only limited powers.<sup>78</sup> Not all national members have been given powers to, for instance, issue letters of request and support controlled deliveries or undercover operations.<sup>79</sup> In addition, the support they receive differs substantially. The Spanish desk, one of the most requested for a long time only housed the national member, whereas the UK and France have appointed several deputies and assistants in addition.<sup>80</sup> A few national members “have not even been given their own apartment and have to live in hotel buildings.”<sup>81</sup>

As a result of national members’ diverging competences, many problems have been encountered in the operational cooperation among member states in the early years of Eurojust’s existence. Hence, Eurojust has on several occasions urged member states to

grant at least a basic or minimum level of powers to their national members, including for instance powers to issue, receive and forward letters of request and to authorise controlled deliveries, phone taps and undercover operations.

In December 2004, the Council invited Eurojust to evaluate its experiences with the powers attributed to its national members. The analysis Eurojust prepared suggested “that only very few national members have experienced real problems because of the absence of specific judicial powers granted either to themselves or to the other national members with whom they work.”<sup>82</sup> Eurojust has been quick to nuance this suggestion, pointing out the limitations of the analysis, particularly “that it can only reflect the experiences gained by national members under the powers as they currently stand”. Even though the national members have experienced few problems, Eurojust still believed that more powers were needed stating that:

It may well be that further powers will strengthen the role of Eurojust, bringing in more case referrals and information concerning serious crime to Eurojust for assistance through co-operation and co-ordination between the Member States, and so again make stronger powers necessary.<sup>83</sup>

Because the formal powers of national members are generally limited, their professional networks and personal qualities are crucial. The less formal powers a national member has, the more he or she has to rely on exerting informal influence. Usually, national members have gained considerable work experience, mostly as public prosecutors, in their national judicial systems before joining Eurojust.<sup>84</sup> As a result they have developed close relations with the competent authorities in their home countries, which makes member state authorities less reluctant to involve Eurojust. Indeed, the performance of Eurojust very much depends on the individual national members.<sup>85</sup>

According to Roelof Jan Manschot, national member for the Netherlands and a national prosecutor for over thirty years before joining Eurojust, “countries are represented by experienced officers that are held in great respect in their home countries”.<sup>86</sup> This helps Eurojust to build trust and gain confidence among national authorities, he says. Through their professional networks, national members can circumvent the bureaucratic obstacles and legal barriers that in many instances still exist. “If I call a Dutch colleague on Saturday night at three o’clock, he knows it is serious. And we know we can rely on each other”.<sup>87</sup> The speed and efficacy with which Eurojust works, also outside regular working hours, have proven important factors to building a strong reputation in the field.

Countries have sometimes seconded less senior members of their judiciary to Eurojust. As they are relatively young and inexperienced, these national members lack the professional networks that their older colleagues can fall back upon. Lacking such a network, they have experienced difficulties in making their national authorities refer cases to Eurojust. Another problem is that they leave Eurojust earlier than their more senior colleagues because of national level career opportunities.<sup>88</sup> Indeed, it seems that the member states that refer the most cases to Eurojust are those that have sent a national member to The Hague that is relatively well-known and respected in their home countries which enables him or her to work closely with the competent national authorities, especially in urgent cases.<sup>89</sup>

National members can make an important contribution to the promotion and marketing of Eurojust in their home country, not only during their time at Eurojust, but also when they have returned to their national jurisdictions. Some members have assumed influential positions in their home countries, such as the former national mem-

ber for Slovenia who became a Prosecutor General for Slovenia; a former national member for Denmark who was appointed Chief Constable in the Danish Police Service; and the first president of Eurojust, Michael Kennedy, who stepped down in November 2007 to become Chief Operating Officer in the UK's Crown Prosecution Service.<sup>90</sup>

Eurojust is thus considered a good career move, and former national members are highly regarded. National members never completely leave their national jurisdictions, and when they return they have acquired a level of expertise that is difficult to find at the national level.<sup>91</sup>

### *Adapting the organisational structure*

The emphasis on operational activities has affected the way Eurojust has dealt with organisational matters. Instead of administrative staff, Eurojust started with national members, that is, prosecutors and judges, who felt that any time spent on organisational matters, "although necessary", undermined the capacity to develop casework activity.<sup>92</sup> The aim is to retain a "lean" and "flexible" organisational structure, whilst at the same time further developing the organisation's case work activity.<sup>93</sup>

In the beginning, all the national members were involved in decision making on all issues, but with the rapid increase in the number of issues to deal with, this structure proved unworkable. In September 2002, four committees dealing with casework, strategy, communications, and administration were therefore established. They consisted of smaller groups of national members; Eurojust staff was not involved. The committee structure allowed national members to divide their time among operational work and college work.<sup>94</sup>

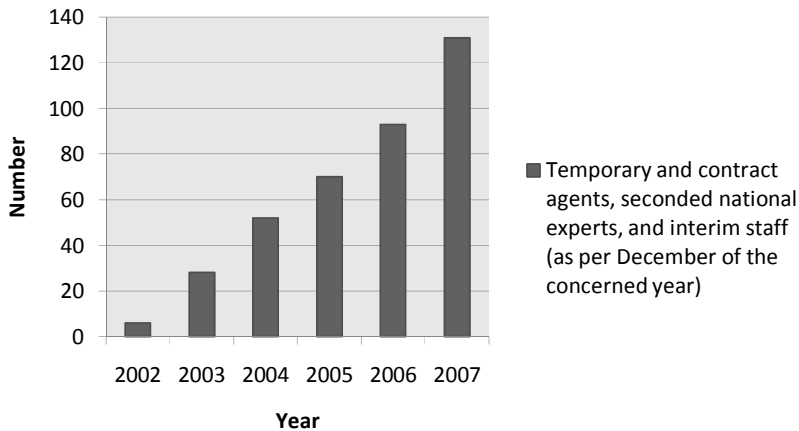
Given the further increased workload, EU enlargement and the growth of the administrative staff, it was decided in October 2004 to transform the committee structure into 21 teams comprised of several national members, deputies, and assistants and supported by staff in the Eurojust administration. The teams covered a variety of different issues, working on particular areas of crime, but also on administrative issues.<sup>95</sup> However, the augmented number of teams substantially increased the amount of weekly meetings that some national members had to attend, and it was therefore decided to reduce the number of teams by merging some of them.<sup>96</sup>

The different teams of national members have a strong influence on the college's decisions on a specific topic. But while the team structure was created to deal with the organisation's increasing workload, "almost anything goes to the college for approval".<sup>97</sup> Sometimes even minor issues are decided by the college, which therefore becomes overburdened with administrative tasks that distract it from its operational tasks. Moreover, as not all members can always be present during the meetings of the college, serious delays in decision making have occurred.<sup>98</sup> Hence, whereas Eurojust staff has taken part in the teams in the past, notably the administration team, but not systematically, it is now becoming more closely involved in the college's work.

### *Involving the administration*

In official documents, the college is often used synonymously with Eurojust. This not only ignores the fact that the college is comprised of individual national members, appointed by the EU countries, but also that it is supported by a supranational bureaucracy, the administration.

The relationship among the college and the administration and its director is formally characterised by monism: the administration is subordinate to the college. Yet, the Eurojust decision is far from clear on the exact role of the administration, particularly vis-à-vis the college. Some considered the administration to be assisting the college in administrative matters; others believed it was there to serve Eurojust as a whole, also with respect to casework. For a long time there has been, as one respondent put it, “an invisible wall between the national members and their assistants, and the ‘real’ Eurojust staff.”<sup>99</sup>



**Figure 12.1** – Staff development (2002-2007)

Sources: Eurojust annual reports

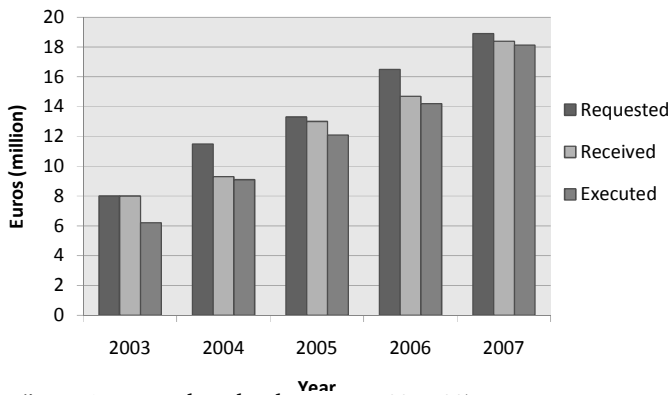
As Figure 12.1 shows Eurojust’s staff has quickly grown in the first five years of its existence, and certainly in recent years. As a consequence, the body’s budget has also increased significantly over time (see Figure 12.2). Especially in the beginning, staff mainly consisted of secretaries. After a while financial experts, HR advisers, and IT specialists were hired and conference managers and interpreters were recruited. In recent years, it has become clear, that given the way by which national members are appointed, not necessarily all expertise is available in the college, and that national members, in view of their increased workload, simply lack the time to deal with all issues.

The administration has therefore been gradually building up its own level of expertise. Initially, the negotiations with third countries were for instance carried out by national members only, without involving the administration’s legal service. In the early years, this did not pose major problems, but when national members started to leave Eurojust it has begun to lead to difficulties in retaining the organisation’s institutional memory. On the basis of its in-house expertise the administration can ensure the continuity of the organisation when national members return to their national jurisdictions. “But,” a respondent says:

...I am not sure it is understood that this may be a problem for the institution. They have so many other things to do. [...] When for instance the cooperation agreement with Norway was negotiated, this was done by national members that have left Eurojust now.<sup>100</sup>

Furthermore, in the early years, the administration was not involved in planning activities, as this was done by national members. In October 2005, the heads of unit within the administration took part in planning an event for the first time.<sup>101</sup>

The administration is a natural part of Eurojust and should be seen as the integral part of Eurojust that it is. The fact that the administration is nowadays involved in the Planning Event is a sign of maturity of the organisation and demonstrates that it is beginning to act as an entity, as a whole.<sup>102</sup>



**Figure 12.2** – Budget development (2003-2007)

Sources: Eurojust annual reports

Moreover, senior members of the administration were also involved in defining Eurojust's mission and vision in November 2005.<sup>103</sup> Whereas before the college's annual objectives were incorporated in the annual report, and the administration worked on the basis of an administrative work programme, the college and the administration now together drafted an Annual Work Programme (AWP) for the entire organisation. The AWP combines Eurojust's vision with concrete annual objectives and further improves planning, prioritisation and monitoring of organisational processes.<sup>104</sup>

The trend of including the administration in the work of national members has continued. Eurojust staff assists the college in administrative matters, and in recent years has also become involved in operational work. Notably, a Case Management Team was created within the administration. The team is comprised of Case Management Analysts that support the national members in their operational work by analysing information, identifying links between cases and searching for trends through the Case Management System (CMS).<sup>105</sup> The CMS was developed under the responsibility of a team headed by the Portuguese national member, but it was the administration's Information Management Unit that did the actual work.<sup>106</sup>

So whereas in the early days the college and the administration operated in a relatively isolated fashion, the college has realised that Eurojust had entered another phase in its development that required more collaboration.<sup>107</sup> As stated by Michael Kennedy upon the college's decision to offer Ernst Merz, the first administrative director, another five-year contract:

We have achieved a great deal during the past five years, and there has been good leadership of the Eurojust Administration, but Eurojust is now a very different organisation which needs to develop in different ways. This calls for a change in focus to ensure we get the best from

the skills and abilities of the College, but also from the skills and talents of all the Administrative staff. We must work more effectively and efficiently and better as a team to deliver the services expected by the investigators and prosecutors and all the citizens of Europe. Together we must do our utmost to succeed in the fight against organised crime.<sup>108</sup>

Upon the expiry of Merz's five-year contract in 2007, the college had decided that the job should be advertised, in the official wording of the press release, "to attract the best candidates for the future development of Eurojust." Two applicants were considered qualified for the job by the selection committee. While the college could simply have renewed Merz's appointment, without going through a selection procedure, it decided to offer him another five-year contract "after long and careful deliberation". The wording of the press release conceals the disagreement within the college, some members favouring a renewal whereas others were opposed.<sup>109</sup> Merz's contract was renewed but he left the agency in May 2008 to become the president of a Higher Court in Germany.

Most of the decision-making power lies with the college. The director has only a few significant powers, such as those regarding staff selection. As a former judge, Merz understood the national members. Even when not formally obliged to, Merz often preferred to inform the college and ask for approval of his decisions. But some national members considered Merz to lack the capacity to effectively control the administration.<sup>110</sup> With the growth of the administration they complained that the administration, or at least certain units, had become less service-oriented. Moreover, the output of some units was further reduced as a result of internal strife.

When re-appointing Merz in 2007, the college agreed "to make some changes in the working relationship between the college and the administrative director, to further improve the efficient operational challenges that face a new and developing organisation."<sup>111</sup> Although a document concerning the relations between the college and the administration was still under preparation at the time of writing, the "changes" referred to in the official wording of the press release are likely to be a further decrease of the administrative director's powers vis-à-vis the college. Through increasing the reporting obligations, the college wants to enhance the accountability of the administration.<sup>112</sup>

### *Maintaining autonomy from national authorities*

Eurojust enjoys broad support from national authorities. A customer satisfaction exercise showed that most national authorities were 'satisfied' or even 'very satisfied' with Eurojust's casework in 2005.<sup>113</sup> A large part of this support, as is emphasised by several interviewees, seems to follow from the mere fact that national authorities are part of Eurojust through their national members.<sup>114</sup>

There is a potential danger in the tight connection between national members and their national authorities, however. With national members being dependent on them for their appointment, salaries and powers, there is always a possibility that member states try to exert influence over the work of Eurojust through their national members.<sup>115</sup> As national members are part of their national judicial systems, they are subject to national instructions.<sup>116</sup>

The relations between national members and their national judiciary authorities, and in particular, the degree of *formal* autonomy from the competent national authorities vary from country to country. Whereas the Swedish member is completely independent from her national hierarchy, the Belgian member cannot make any decisions by herself. In 2005, the Polish national member was called back to Poland and replaced by a confidant of the new political regime. The same happened in 2007 with Slovakia's

national member.<sup>117</sup> To what extent such replacements indicate political interference in Eurojust's work is unclear. A respondent remarks: "Of course a change of government might lead to the replacement of a national member. But that does not mean that governments exert an influence over Eurojust's work."<sup>118</sup>

The power of national ministers vis-à-vis their national members does raise doubts in view of the use of Article 7(a) of the Eurojust decision, which provides the college with a great range of powers. As some national members operate under the instruction of their national hierarchy more strictly than others, this would give national authorities potential influence over college decisions and recommendations through their national members. It would thus be possible for the authorities of one member state to interfere with investigations or prosecutions relating to another member state, therewith encroaching upon the national sovereignty of this state.<sup>119</sup>

Some member states can perhaps tell their national member what to do, but they cannot give the college orders when it comes to focusing on particular cases. "[W]hat we are doing for instance is that we say that [Eurojust] should try to concentrate on the more complex cases and the more serious cases."<sup>120</sup> Furthermore, "a national member could say that he or she wanted to follow the instructions of his national government, but that the college has decided differently."<sup>121</sup> Eurojust thus has a certain amount of independence from the member states when acting as a college. The Dutch member remarks:

Although I am a national member for the Netherlands and I will try to follow the instructions given by the Dutch Public Prosecution Services, I consider myself in the Eurojust setting bound by the decisions of the college and I will execute these.<sup>122</sup>

What is more, when it comes to coordinating cases, the organisation almost always acts through the national members. Only in exceptional circumstances are cases adopted as a 'college case', which happened with a case brought to Eurojust by the UK desk concerning large-scale Value Added Tax (VAT) fraud involving 18 member states.<sup>123</sup>

The Council, in the same way as some ministers of justice in the member states, can give policy directions to Eurojust.<sup>124</sup> For instance, it did so implicitly by signalling the importance of focusing on terrorism through the adoption of a Council decision on the exchange of information in relation to terrorism cases, which broadened the scope of information that must be transmitted to Eurojust.<sup>125</sup> The Council has also given more explicit policy directions through its conclusions on the Eurojust annual report. In its conclusions on the annual report for 2006, the Council, for example 'invited' Eurojust to strengthen its capacity to deal with and analyse data related to casework through recruiting case management analysts.<sup>126</sup>

### *Identifying impediments to cooperation*

Eurojust's function to coordinate investigations and prosecutions at the EU level, instead of merely facilitating concerted action among EU member states, is in its own words "completely new in the EU".<sup>127</sup> It therefore takes time to raise the awareness of the competent authorities in the member states and gain their confidence. Whereas "for every prosecutor or policeman that has had contact with Eurojust you will never find anyone who is dissatisfied with it, the problem is that prosecutors and policemen do not speak very much to each other on their various cases."<sup>128</sup> Some member states have actively supported their national members, as reflected in the high number of cases referred from these countries. In such countries the cooperation with Eurojust is

often enhanced through a specialised unit in the prosecution services dealing with transboundary cases.

But most prosecutors and magistrates still think and act nationally or locally. "If you are a national prosecutor that has to deal with 160 cases per month and only ten of them are international, then you might want to deal with them as quickly as possible."<sup>129</sup> As a consequence, leads to other jurisdictions are not always followed up on and cases are often not substantiated with evidence from other jurisdictions, because this would cause delays and could thus jeopardise short-term success at the national level. National prosecutors and magistrates often consider a case solved when the national or local manifestations are effectively dealt with, in spite of the fact that it potentially has an international dimension. Only for few prosecutors and magistrates international cooperation is daily business.<sup>130</sup>

The lack of awareness of the international dimension is exacerbated by the negative incentive structure at the national level, that is, national authorities are often not rewarded for judicial cooperation across national borders. On the contrary, national law enforcement authorities have to follow national and local priorities. They are pushed to attain a certain number of convictions in their own jurisdictions within a particular period of time. As a result, whether a case is referred to Eurojust is still highly dependent on the willingness of individual prosecutors or magistrates to take the initiative to involve Eurojust, and Eurojust thus is often only involved at a later stage of the investigations (De Jonge, 2005: 54).

In spite of many efforts to increase mutual trust, most notably in the framework of the European Arrest Warrant, a lack of mutual trust and confidence still hampers judicial cooperation between countries. Countries are not familiar with each other's legal systems and believe that other countries for instance apply lower standards of due process:

It is a matter of trust. Investigators and prosecutors are very conservative. They don't like to share information, not even in their own country. Let alone with a country far away and in a language they don't know. They are worried that they are endangering their own investigations by sharing information, but we try to bring them together and create trust.<sup>131</sup>

The relation between police and judicial authorities is still organised in various ways throughout the EU. In Denmark, for instance, the public prosecution services only come into play at the very end of investigations, whereas in the Netherlands, for example, the public prosecution services lead investigations. Danish police officers are therefore less likely to involve a European judicial cooperation unit than their Dutch colleagues. In some countries, such as the Netherlands, the principle of opportunity applies, that is, prosecutors are not obliged to prosecute. They can decide, for instance in drug cases, not to prosecute. In other countries, the legality principle obtains, that is, crimes always have to be prosecuted. In Italy a case counts as closed when it is transferred to another jurisdiction, which makes it more likely that Italian prosecutors refer a case to Eurojust.<sup>132</sup>

When impediments to cooperation are identified, Eurojust reports them to the competent authorities through its national members, or it makes use of the power it, in accordance with the Eurojust decision, has to put forward proposals for the improvement of judicial cooperation in its annual report.<sup>133</sup> In its 2001 and 2002 annual reports, for instance, Eurojust provides a long list of obstacles to mutual legal assistance, and its 2005 annual report contains four pages listing barriers to casework as identified by the national members and their assistants.<sup>134</sup>



Indeed, Eurojust has sought to become more pro-active in influencing EU policymakers in the area of criminal justice.<sup>135</sup> National members individually advise their national governments on policy issues within the realm of Eurojust's competences. The organisation has also established a specific team of Eurojust national members for this purpose, the 'Brussels' team, which is consulted frequently by, for instance, the Council, the EP and the Police Chiefs Task Force.<sup>136</sup> When Eurojust first wanted to appear in a Council meeting, some member states were against it, arguing that prosecutors and judges do not have anything to do with the discussions in the Council.<sup>137</sup> This has changed over the years. Now the Council regularly invites Eurojust. The Eurojust president has addressed the Council on special occasions such as the Joint Ministerial meeting of the JHA Ministers from all EU states and the Western Balkans.<sup>138</sup>

Eurojust's pro-activeness has not always been received with great enthusiasm, particularly not at the member states' bureaucratic level. "Whereas the political level is often inclined to cooperate towards improving problematic issues, the bureaucratic level remains reluctant."<sup>139</sup> Eurojust's job, many bureaucrats assert, is individual case work, applying the law but not writing it.<sup>140</sup> For that reason they have been wary of Eurojust adopting a more strategic approach.<sup>141</sup>

### *Delayed transposition*

Bureaucratic reluctance at the national level has thus further hampered Eurojust's potential. In order to cooperate through Eurojust, member states had to transpose the Eurojust decision into national legislation. "Civil servants in many countries have tried to make the implementation legislation fit the national legal system. This has caused unnecessary delays and has undermined Eurojust's effectiveness in the early years."<sup>142</sup>

The deadline for transposition was September 2003. By that time only one member state (Portugal) had done so. By 2006, one country (Greece) still had not transposed the decision. College President Michael Kennedy commented that not incorporating, where necessary, the Eurojust decision into national law restricts Eurojust's capacity and is "like sending an athlete to the Olympics without running shoes".<sup>143</sup>

### *Fostering mutual trust and confidence*

"[T]o ensure they will consult [Eurojust] and refer issues to [it] without hesitation", Eurojust had to gain the trust and confidence of the national authorities involved in its work.<sup>144</sup> For that purpose, during the two or three days a week that they do not meet in The Hague, national members conduct "mission work" both in their own country and in other countries. Such work appeared to be particularly effective when a national member brings a colleague of another jurisdiction.<sup>145</sup> Moreover, national members devote one week every two months, their so-called 'domestic week', to building relations with national authorities by visiting courts and prosecution services.<sup>146</sup> These activities actually serve a dual objective: apart from raising awareness, national members often return to Eurojust with new cases.

National members participate in various national and international forums. They have made presentations to communicate Eurojust's objectives and to market the possibilities it offers in facilitating cooperation and improving coordination. They have been involved in trainings and seminars with the national authorities, have given interviews to the media, or have received member state delegations at Eurojust's premises.

Although it is very demanding on the limited resources, Eurojust considered such activities, in particular in its initial phase, an important part of its work.<sup>147</sup>

But from the start, Eurojust has realised that its “most effective marketing tool”, to ensure that more cases will be referred to it, is “[d]elivering results which satisfy the national authorities”.<sup>148</sup> This, especially in the early days of the organisation and concerning countries in which Eurojust experienced difficulties in becoming known, sometimes meant accepting cases that might have been better handled by other organisations or individuals who deal with international judicial co-operation such as the EJN.<sup>149</sup> Refusing such cases, however, could have made national authorities reluctant to approach Eurojust another time.<sup>150</sup>

You do not start by telling people who approach you: ‘Go away, call somebody else.’ That is the worst thing you could do. No, you say ‘I will solve your problems’ and then you walk across the corridor and ask a colleague of another member state. And if it is not a case for Eurojust, you will give them the contact details of the right person or organisation in the European Judicial Network.<sup>151</sup>

Moreover, Eurojust has realised the importance of receiving feedback. In many cases, however, national members have to request feedback instead of receiving it straight away from their national authorities (or other national members). And even if feedback is provided, it is usually limited to the specific request to Eurojust but not about the outcome of the case.<sup>152</sup> National members have therefore regularly contacted national authorities to follow-up on cases they have handled or even translated national judgments rendered in cases that demonstrate good cooperation.<sup>153</sup>

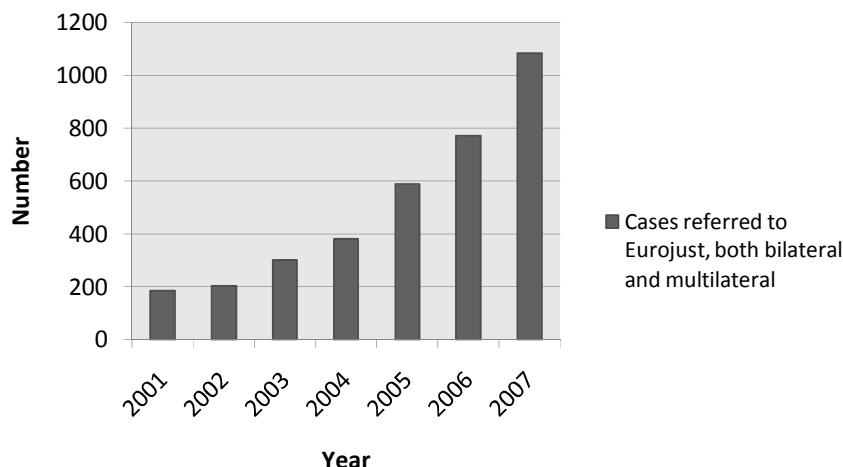
### *Selling its success*

Eurojust has not been shy in publicising its contributions to operational results. “[But] we need to see Eurojust in the papers more often”, an interviewee representing an EU institution noted.<sup>154</sup> This is true not only for Eurojust to become better known among practitioners, but also among the media and the general public. An EU official affirms: “It is important that European citizens know what is going on, that there are some real successes at the EU level”. For this reason, Eurojust’s efforts when national authorities solve a case with the help of the agency are generally applauded following mention in press releases, especially by the interviewees representing the EU.<sup>155</sup>

Although Eurojust does not conduct investigations itself, through coordinating investigations it can be involved in successful cases, showing investigators and prosecutors that Eurojust can add value to their work. This makes Eurojust a more easy ‘sell’ than, for instance, Europol, which often does not fulfil an operational role in investigations. “Eurojust’s results are much more tangible”.<sup>156</sup> From the beginning Eurojust has included a section on ‘casework illustrations’ in its annual report, showcasing successful cases. As is stated in Eurojust’s 2003 annual report: “One real success often helps to publicise Eurojust in ways which cannot be achieved simply by organising meetings or giving presentations to publicise our organisation.”<sup>157</sup>

Eurojust has been quite effective in its early years when measured on the basis of cases referred by member states. An indicator for its success is the significant increase in cases handled (i.e. coordinated). Figure 12.3 shows that since its creation Eurojust has been handling a mounting number of cases. In 2007, it registered a case increase of 41 percent. Despite the increase in its casework, Eurojust felt that it was not being used enough and in the right way by member states. Member state authorities were still

handling many cases in which Eurojust considered it could add value. And although Eurojust's 2002 annual report notes that competent authorities have begun to understand what cases to refer to Eurojust, most of the referrals still concern bilateral cases.



**Figure 12.3** – Referred cases (2001-2007)

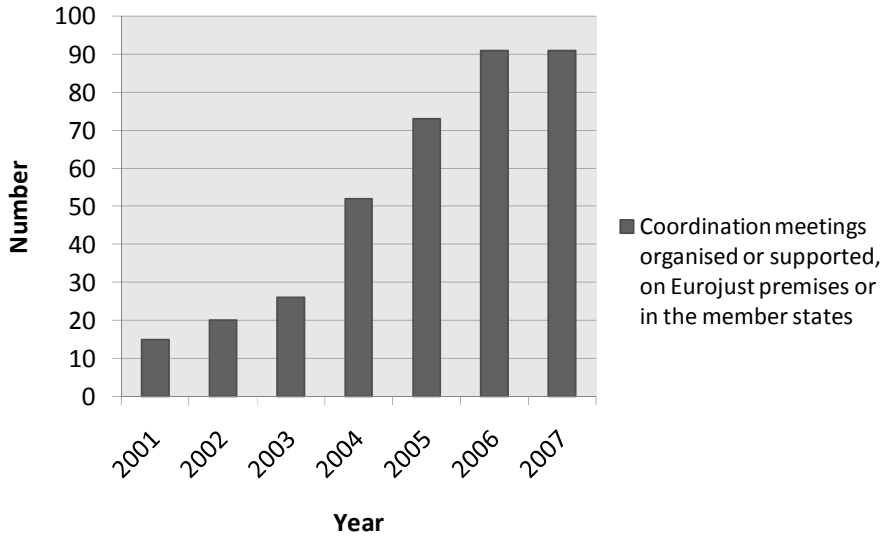
Sources: Eurojust annual reports

As the classification 'bilateral' or 'multilateral' does not capture the complexity of the cases it deals with, since 2006 Eurojust has started to categorise cases as more or less complex instead of bilateral or multilateral. Moreover, while it serves as an estimate of Eurojust's activities, the number of referred cases, according to Eurojust, does not reflect the actual involvement of national members in judicial cooperation among member states. That is why the number of Eurojust's coordination meetings is considered a more reliable measure for its performance.<sup>158</sup>

Over the years, Eurojust has coordinated a growing number of meetings among national prosecutors and magistrates (see Figure 12.4). "I feel this increase, rather than the unsophisticated comparison of the numbers of bilateral and multilateral cases, is a more accurate reflection of the complexity of the caseload handled by Eurojust", writes Michael Kennedy in his foreword to the 2005 annual report.<sup>159</sup>

As it is still an area in which a great variety of different judicial approaches exist throughout the EU, the exchange of information on terrorism is perhaps one of the most reliable indicators for the confidence that national authorities have in Eurojust. While terrorism represents a high number of coordination meetings, it clearly shows that Eurojust has not developed into the port of call for coordination, in this area of crime.<sup>160</sup> As is stated in Eurojust's annual report for 2005:

[S]everal Member States remain more confident with their own networks and with bilateral methods than with availing themselves of the opportunity to co-operate through Eurojust. The situation has not improved significantly. Only a few Member States exchange information on terrorism matters with Eurojust regularly and in a structured way; some Member States do so in an unstructured way. But for the majority it is done only from time to time or not at all.<sup>161</sup>



**Figure 12.4** – Coordination meetings (2001-2007)

Sources: Eurojust annual reports

Notwithstanding the increase in the number of terrorist cases in 2006, terrorism, as in the years before, made up a small percentage of the types of crime referred to Eurojust. Therefore, the Council has once again called upon national law enforcement authorities to supply Eurojust with information more rapidly.<sup>162</sup>

### *Strengthening supranational action*

The relations between the Commission and Eurojust have been close from the beginning. The Commission was involved in the negotiations of the Eurojust decision and since the creation of Pro-Eurojust, a desk officer in DG Justice, Liberty and Security, himself a former prosecutor, took part in the regular meetings with the EU presidency, the Council Secretariat and Eurojust's president and administrative director.<sup>163</sup> Indeed, the Commission has always worked closely together with the Council Secretariat.<sup>164</sup> The regular meetings (initially held every six weeks but now less often) allow Eurojust to inform the Commission of its activities. But the Commission is only informed of the general developments in Eurojust's casework. It is not involved in specific cases.<sup>165</sup>

Especially in the early years when Eurojust did not yet have its own staff, the Commission services actively supported the unit. As time progressed and Eurojust hired staff, the Commission became less deeply involved in the unit's activities on a daily basis. It does exert significant influence over Eurojust's priorities through its role in the budget process. While the Council can use the Conclusions of its meetings as a steering mechanism (see above), the Commission controls the agency through fixing the budget. "Eurojust requests money from the Commission and it has to explain and discuss that. In the discussion there are a lot of possibilities for the Commission to say 'Well, you say that seminar is a priority but we don't think that so we won't give you money for that.'"<sup>166</sup>

The relationship between the Commission and the agency is now more formal than in the early years. This also applies to consultation; Eurojust is briefed by the Commission on the state of affairs with regard to policies and legislation being prepared. Often Eurojust is asked for advice on the basis of its expert knowledge and practical experiences, but often at a rather late stage in the process and with a short deadline for feedback.<sup>167</sup> The Commission's consultation of Eurojust does not only reinforce Eurojust's role in judicial cooperation, it can also strengthen the Commission's position vis-à-vis the member states. A respondent says:

I have always tried not to miss the opportunity to remind Eurojust of the provision in the decision [to make proposals for the improvement of judicial cooperation] and I have encouraged them to at least identify problems and also to make suggestions. [...] I mean, these are all the same things we say but I think it is more powerful if practitioners also say it. It lends more weight and it is also helpful to get the message across that the Commission is not saying that certain decisions need to be implemented as a matter principle but because it is only through implementation that they can have real consequences and that we can benefit from them.<sup>168</sup>

### *External cooperation*

Already when it was still operating as Pro-Eurojust, the unit made a range of contacts with other countries outside the EU. Some countries have appointed a liaison magistrate (e.g. Norway) or a prosecutor (e.g. the US) to Eurojust. They are present during college meetings and can also open cases as the Norwegian liaison magistrate has done on several occasions.<sup>169</sup> The mere fact that the US was willing to enter into agreement with an EU body instead of solely relying on bilateral contacts with the member states, according to some interviewees, shows that Eurojust is considered a partner in the fight against organised crime.<sup>170</sup> But actual cooperation with countries outside the EU through Eurojust has so far been limited. Although it has been serving as a facilitator of contacts and is becoming more important as a coordination vehicle for countries like the US, Eurojust has not (yet) developed into a 'one-stop shop' for multi-lateral cases involving third states.<sup>171</sup>

Cooperation with other EU bodies, notably Europol and the European Anti-Fraud Office (OLAF), has been hampered by problems of a legal, political, and cultural nature. Europol's legal framework made it difficult to enter into formal agreement with Eurojust, and once legal obstacles were surmounted, it became clear to Eurojust that there was not much, or at least not much quality information to be obtained from Europol.<sup>172</sup> Particularly, the procedure for Europol to set up an Analysis Work File in a case dealt with by Eurojust was considered cumbersome.<sup>173</sup> While the organisations can participate together in setting up JITs, the instrument formally has not been frequently used as member states still lack appropriate legislation or prefer to cooperate on a more informal basis. Eurojust and Europol have therefore been promoting the use of JITs, for instance, through convening seminars and launching a common webpage on JITs.<sup>174</sup>

Cooperation between Europol and Eurojust was further inhibited by a basic problem of fighting transboundary crime in Europe, that is, the different systems with regard to the role of prosecutors and police. Some member states have obstructed cooperation between their national members and ELOs at Eurojust and Europol, because they do not want, not even (or perhaps, certainly not) at the European level, prosecutors to 'oversee' the work of the police.<sup>175</sup> These differences could perhaps have been "circumvented" if Europol and Eurojust were re-located to the same building in The Hague.<sup>176</sup> But, to the disappointment of Eurojust and Europol, this proved to be impossible.<sup>177</sup>

There is clearly some overlap in the competences of Eurojust and OLAF, the EU's anti-fraud office. While OLAF conducts administrative investigations, these may point to criminal offences; and although Eurojust deals with serious organised crime, such crime may involve fraud and corruption. Moreover, if an office of the European Public Prosecutor is set up, it will probably be done so in relation to the protection of the financial interests of the Community. According to several interviewees, OLAF therefore initially considered Eurojust a rival.<sup>178</sup> While the relations between the two organisations have improved, the exchange of information remains problematic.<sup>179</sup> OLAF referred few cases to Eurojust on fraud against the financial interests of the EU. Even now as OLAF has started to refer cases to Eurojust, they do not always allow sufficient time for Eurojust to add value.<sup>180</sup>

## 12.5 Conclusion: a law unto themselves?

Upon Eurojust's fifth anniversary in 2007, European Commissioner Frattini commented that Eurojust had developed into "an indispensable and efficient *tool* ensuring smooth, non-bureaucratic, but legally sound cooperation [*italics added* – MG]."<sup>181</sup> The increase in the body's role can be explained by several interrelated factors. As in the case of Europol, design played an important role in Eurojust's development. But this time, design had a different effect. Eurojust's hybrid structure facilitated flexibility while allowing for the involvement of both the member states and the Commission.

Eurojust has been assigned a relatively clear function. And because the agency was given operational tasks from the start, there was no need to extend its mandate. Eurojust tried to adopt a more strategic approach but realised that this would not necessarily help it further develop the organisation as its added value is clearly in generating concrete outputs through operational casework. The use of output indicators demonstrating Eurojust's effectiveness has increased support for the agency and motivated its staff. This might also explain why Eurojust did not experience difficulties in attracting well-qualified people.

The role played by national members has been especially crucial. Their professional networking appeared just as valuable an asset as formal powers in enhancing the agency's performance. Close working relations with other national members and national counterparts have increased the effectiveness of transboundary cooperation. Eurojust quickly developed a reputation for effectiveness among national agencies, showing a growing number of opinions and an increasing number of coordination meetings, thereby distinguishing their products from those of national agencies. Differentiation thus was an effective strategy in generating acceptance.

Yet, Eurojust's influence on national investigatory and prosecutorial policies is limited. The body is confronted with the same problem as Europol, namely that there is much variation in legal systems for prosecutions and investigations at the national level. National agencies, for various reasons, are reluctant to engage in cross-border cooperation. So whereas the body perhaps has become indispensable with regard to cooperation on certain forms of organised crime, figures show that cooperation and exchange in areas such as terrorism remains limited.

Internally, Eurojust's structure has led to tensions. Discerning between the administration and the college and its national members, the unit faced difficulties in creating a level of unity, even though legal professionals dominate both the college and the administration. Not many traces of internal cohesion were found, at least not when looking at it from the perspective of Eurojust as a whole. This does not mean that we cannot

speak of a Eurojust culture. Within the college and within the administration the culture is one of achieving results. While cohesion is perhaps not extremely high due to the 'wall' between the administration and the college, pragmatism and achieving operational results is the unifying thought.

As a consequence, Eurojust's added value as a European Union agency has never been a point of discussion neither regarding national agencies, nor other institutional arrangements at the European level. Indeed, Eurojust does not have to contend or compete with international bodies, which strengthens its position on the international scene. The agency's leadership has further contributed to that strong position in the field, albeit indirectly. Eurojust is a special case when it comes to leadership. It has a director who is only responsible for the administrative organisation, whereas actual leadership is distributed between the national members in the college. It nonetheless helped that the first college president and his vice-presidents enjoyed a reputation in the professional field.

For all actors involved it is clear what Eurojust's role is, at least for the moment. Although it can be said to have developed into a more or less self-contained entity, Eurojust essentially remains a tool used to further cooperation. Views diverge about the agency's future. Some see the body as 'merely' coordinating and facilitating, basically continuing its current work, whereas others consider it to be the first step towards an independent European public prosecutor. Even if an EPP will be created from Eurojust – several respondents cynically note that only a large-scale terrorist attack will probably bring about the political will necessary for such a creation in the short term – it is likely that the current operational casework will continue.

## Notes

<sup>1</sup> Interview #28

<sup>2</sup> The United Kingdom Parliament, Subcommittee F (Home Affairs) of House of Lords' Select Committee on European Union, Twenty-Third Report, Judicial Co-operation in the EU: the role of Eurojust, para. 107, <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/138/13804.htm>, consulted on 8 November 2004.

<sup>3</sup> Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA).

<sup>4</sup> Interview #29

<sup>5</sup> Hans Nilsson, Eurojust: the beginning or the end of the European Public Prosecutor? Paper presented to the third EUROJUSTICE conference in Santander, Spain, 24-27 October 2000, p. 2-3; see also interview #29.

<sup>6</sup> European Commission, JHA, Laeken European Council, Eurojust – Helping the EU's legal systems to combat cross-border crime, [http://europa.eu.int/comm/justice\\_home/news/laeken\\_council/en/eurojust\\_en.htm](http://europa.eu.int/comm/justice_home/news/laeken_council/en/eurojust_en.htm), consulted on 13 November 2002.

<sup>7</sup> Conclusions of the European Council, Tampere, 15-16 October 1999, para. 46.

<sup>8</sup> Hans Nilsson, Eurojust: the beginning or the end of the European Public Prosecutor?, Paper presented to the third EUROJUSTICE conference in Santander, Spain, 24-27 October 2000, p. 10.

<sup>9</sup> Council Decision of 14 December 2000 setting up a Provisional Judicial Cooperation Unit, Official Journal L 324/2, 21.12.2000.

<sup>10</sup> European Commission, JHA, Laeken European Council, Eurojust – Helping the EU's legal systems to combat cross-border crime, available at [http://europa.eu.int/comm/justice\\_home/news/laeken\\_council/en/eurojust\\_en.htm](http://europa.eu.int/comm/justice_home/news/laeken_council/en/eurojust_en.htm), consulted on 13 November 2002.

<sup>11</sup> Interview #35

<sup>12</sup> Pro-Eurojust Report 2001, p. 5.

<sup>13</sup> The United Kingdom Parliament, Subcommittee F (Home Affairs) of House of Lords' Select Committee on European Union, Twenty-Third Report, Judicial Co-operation in the EU: the role of Eurojust, <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/138/13804.htm>, consulted on 8 November 2004.

<sup>14</sup> Interview #29

<sup>15</sup> *Staatscourant*, Europees OM voor aanpak fraude, 29 January 2002, p. 4. Also interview #29

<sup>16</sup> Interview #35

<sup>17</sup> Contrary to Europol, Eurojust is not based on an intergovernmental convention but on a supranational decision. By the time of Europol's creation, decisions were not yet part of the EU's set of legal instruments in the area of justice and home affairs. The use of a decision to create Eurojust "was accepted by the member states that had all seen how disastrous it had been to create Europol by convention". Interview #29

<sup>18</sup> See Article 3, para 1 of the Eurojust decision.

<sup>19</sup> See Article 4 of the Eurojust decision.

<sup>20</sup> This happened in the case of the sinking of the Prestige tanker, when Eurojust decided that Spain was better placed to prosecute than France. See Eurojust, Eurojust's decision on the "Prestige Case" (Case Nr 27/FR/2003), Press release, The Hague, 23 November 2005.

<sup>21</sup> See Article 8 of the Eurojust decision.

<sup>22</sup> See Article 6 and 7 of the Eurojust decision.

<sup>23</sup> Interview #29

<sup>24</sup> Interview #82

<sup>25</sup> Interview #35

<sup>26</sup> Interview #19

<sup>27</sup> But similar to the European Aviation Safety Agency (EASA) that also has an administrative director.

<sup>28</sup> Interview #35

<sup>29</sup> Interview #35. Article 41 of the Amsterdam Treaty establishes that under the third pillar a decision not to charge certain operating expenditure to the budget of the EU has to be taken by the Council acting unanimously, whereas before the Amsterdam Treaty, this provision was the other way around.

<sup>30</sup> Interview #29

<sup>31</sup> Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union, COM(2007) 644 final, Brussels, 23.10.2007; European Commission, Commission wants to strengthen the role of Eurojust in the fight against organised crime and terrorism, Press release, IP/07/1574, 23 October 2007.

<sup>32</sup> *EUobserver*, Brussels set to strengthen EU crime body, 24 October 2007, available on <http://euobserver.com/9/25032/?print=1>, consulted on 29 October 2007

<sup>33</sup> Council of the European Union, Note from the Presidency to the Article 36 Committee, Report of the seminar "A Seminar with 2020 Vision: The Future of Eurojust and the European Judicial Network", Vienna, 25-26 September 2006, 14123/06, Brussels, 19 October 2006.

<sup>34</sup> Council of the European Union, Initiative of the Kingdom of Belgium, the Czech Republic ... and the Kingdom of Sweden with a view to adopting a Council Decision of ... on the strengthening of Eurojust and amending Decision 2002/187/JHA, (OJL 2008/C 54/02, 27.2.2008); *EUobserver*, EU states muscle in on bloc's judicial body, 6 May 2008, available on <http://euobserver.com/9/26082/?print=1>, consulted on 6 May 2008.

<sup>35</sup> Council Decision 2009/426/JHA of 16 December 2008

<sup>36</sup> Eurojust, What is Eurojust's role?, available at <http://www.eurojust.eu.int/index.htm>, consulted on 8 November 2004.

<sup>37</sup> The United Kingdom Parliament, Subcommittee F (Home Affairs) of House of Lords' Select Committee on European Union, Twenty-Third Report, Judicial Co-operation in the EU: the role of Eurojust, para 6, available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/138/13804.htm>, consulted on 8 November 2004.



<sup>38</sup> Quote from interview with Hans Nilsson, Head of Judicial Co-operation in the Council Secretariat, The United Kingdom Parliament, Subcommittee F (Home Affairs) of House of Lords' Select Committee on European Union, Twenty-Third Report, Judicial Co-operation in the EU: the role of Eurojust, para. 6, <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/138/13804.htm>, consulted on 8 November 2004.

<sup>39</sup> Yet, there are some common definitions of crimes, for instance in the area of environmental criminal law and, even though the term will not be used officially, 'European crimes' can thus be said to exist.

<sup>40</sup> The UK has three different legal systems. Including the German Länder would even further increase the number of legal systems.

<sup>41</sup> Interview #35

<sup>42</sup> Interview #29

<sup>43</sup> Eurojust Activity Report (hereafter abbreviated 'AR') for 2004, p. 19. It therewith referred to the renounced Constitutional Treaty that mentioned the creation of a European Public Prosecutor, but explicitly stating that such a body could only be established "from Eurojust"; see also AR 2005, p. 96.

<sup>44</sup> See Annex to AR 2003 and 2004; Presentation by Prof.dr. Gert Vermeulen, Eurojust and the best place to prosecute, at the Eurojust seminar "Deciding where to prosecute", The Hague, 18-19 November 2003.

<sup>45</sup> While these guidelines do have an influence (albeit a limited one) on national legal systems, they are not binding. See *Hosseini v. France*, 2006 WL 1635010, [2006] EWHC 1333 (DC Jun 08, 2006).

<sup>46</sup> Interview #28

<sup>47</sup> Interview #14

<sup>48</sup> Interview #28

<sup>49</sup> Interview #28

<sup>50</sup> Interview #82

<sup>51</sup> Interview #82

<sup>52</sup> Interview #28

<sup>53</sup> Interview #14

<sup>54</sup> Interview #39. See also Thwaites (2006: 294).

<sup>55</sup> See ARs 2004 and 2005

<sup>56</sup> Interview #39. See for instance AR 2004, pp. 25-30; AR 2005, pp. 37-47.

<sup>57</sup> Interview #14. See also AR 2002, p. 8; 2004, p. 66; AR 2005, p. 37.

<sup>58</sup> AR 2006, p. 68.

<sup>59</sup> Interview #82

<sup>60</sup> Interview #28. See also AR 2002, p. 35; AR 2003, p. 48.

<sup>61</sup> Interviews #14 and #29. The OCTA is drafted by Europol but incorporates the input of a multitude of sources at the EU and national level including Eurojust, FRONTEX and OLAF.

<sup>62</sup> See De Jonge (2005: 59).

<sup>63</sup> The Finnish national member, for instance, does not have any authority over the police in his country.

<sup>64</sup> AR 2004, Foreword, p. 4; AR 2005, Foreword, p. 5.

<sup>65</sup> Interview #29

<sup>66</sup> Interview #28

<sup>67</sup> Eurojust is allowed to cooperate with third countries without an agreement in urgent cases and if no personal data is transmitted by Eurojust. See Article 3, para 2 and Article 27, para 3.

<sup>68</sup> Sometimes problems were of a financial nature. Eurojust has therefore sought powers to make funding available for the establishment JITs. See *European Voice*, Eurojust seeks more powers, vol. 1, no. 12, 29 March 2007.

<sup>69</sup> Roelof Jan Manschot, national member for the Netherlands, as quoted in Van der Schans and Van Buuren (2003: 144).

<sup>70</sup> Beleidsregels Aanwijzing internationale gemeenschappelijke onderzoeksteams [Policy guidelines JITs], available at <http://archieff.om.nl/beleid>, consulted on 8 August 2007, p. 6.

<sup>71</sup> Beleidsregels Aanwijzing internationale gemeenschappelijke onderzoeksteams [Policy guidelines JITs], available at <http://archieff.om.nl/beleid>, consulted on 8 August 2007, note 5, p. 13

<sup>72</sup> Interview #14. See AR 2006, p. 68.

<sup>73</sup> The United Kingdom Parliament, Subcommittee F (Home Affairs) of House of Lords' Select Committee on European Union, Twenty-Third Report, Judicial Co-operation in the EU: the role of Eurojust, para. 44, <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/138/13804.htm>, consulted on 8 November 2004. See also Thwaites (2006: 296).

<sup>74</sup> AR 2005, p. 32; Eurojust, Eurojust's decision on the "Prestige Case" (Case Nr. 27/FR/2003), Press Release, The Hague, 23 November 2005; Eurojust, Follow-up on Eurojust's decision on the Prestige Case (Case Nr. 27/FR/2003), Press Release, The Hague, 24 January 2006. Interview #29

<sup>75</sup> AR 2006, p. 30. As a Eurojust official remarked, it is quite likely that there have been more of such recommendations. But because they are made on a rather informal basis, for instance through e-mail, they are not always registered as such. Interview #82

<sup>76</sup> E.g. AR 2004, p. 12; AR 2005, p. 25.

<sup>77</sup> Pro-Eurojust Report 2001, p. 10

<sup>78</sup> Interview #28

<sup>79</sup> AR 2005, p. 15.

<sup>80</sup> Interviews #29 and #82

<sup>81</sup> Interview #29

<sup>82</sup> AR 2005, p. 25-26.

<sup>83</sup> AR 2005, p. 25-26.

<sup>84</sup> See Article 2, para 1 and Article 2, para 2 of the Eurojust decision.

<sup>85</sup> Interview #81

<sup>86</sup> *NRC Next*, 'Wij pakken grote vissen'. Eurojust: Europees antwoord op internationale criminaliteit, p. 11, 1 May 2007. Also interview #29

<sup>87</sup> Interview

<sup>88</sup> Interviews #14 and #28

<sup>89</sup> Which does not necessarily mean that member states that refer fewer cases to Eurojust are those that have sent a national member that is less well-known and is more junior. The Netherlands for instance is often asked for information, but in the early years did not request for much information itself, as is critically noted by Eurojust, for instance, in its AR 2004, p. 23. This has changed in recent years, however. Interviews #14, #81 and #82.

<sup>90</sup> AR 2005, p. 8; AR 2006, p. 7.

<sup>91</sup> As one respondent remarked, this is entirely different for Europol: "If you leave the national police forces for a European or international career, you are considered to have left for good." Interview #82. See also the Europol case study.

<sup>92</sup> This is how the college explains the decrease in cases dealt with in 2002. See AR 2002, p. 8.

<sup>93</sup> Interview #14

<sup>94</sup> AR 2002, p. 6.

<sup>95</sup> AR 2004, pp. 9, 70.

<sup>96</sup> AR 2005, p. 10.

<sup>97</sup> Interview #82

<sup>98</sup> AR 2006, p. 10. Also interview #82

<sup>99</sup> This 'wall' leads to strange situations. For example, in practice national members' secretaries have to cooperate closely with their national members, but officially they are part of the administration and subject to the authority of the administrative director. So it entirely depends on the national member whether he or she is willing to support his or her secretary when it comes to disagreements with the director. Interview #35; also interview #29

<sup>100</sup> Interview #29

<sup>101</sup> AR 2005, p. 90.

<sup>102</sup> Hans Nilsson, A Vision for Eurojust, unpublished paper, p. 2.

<sup>103</sup> AR 2005, p. 94.

<sup>104</sup> AR 2006, p. 69.

<sup>105</sup> AR 2006, pp. 58, 63.

<sup>106</sup> Interview #81

<sup>107</sup> Interview #29

<sup>108</sup> Eurojust, Ernst Merz is new Administrative Director for Eurojust, Press Release, The Hague, 25 July 2007.

<sup>109</sup> Interview #82

<sup>110</sup> Interview #82

<sup>111</sup> Eurojust, Ernst Merz is new Administrative Director for Eurojust, Press Release, The Hague, 25 July 2007.

<sup>112</sup> Interview #82

<sup>113</sup> AR 2005, pp. 47, 114-115.

<sup>114</sup> Interview #35

<sup>115</sup> Eurojust has no real possibility to do something about an ill-performing national member of deputy, such as in the case of a deputy that hardly spoke any foreign languages.

<sup>116</sup> Interview #35

<sup>117</sup> Interview #81. Also in Spain and Italy, national members have had troubles with their national authorities, but this has not led to their replacement. Interview #82

<sup>118</sup> Interview #82

<sup>119</sup> Interview #81. See also Jean-Francois Bohnert, Eurojust French deputy national member, The statute of National Members: Their relations with national judicial authorities, Workshop B1, Seminar on Powers of Eurojust National Members, organised by the Italian Presidency, Rome, 14-15 November 2003, available at [http://www.giustizia.it/pol\\_internaz/coop/bohnert\\_en.htm](http://www.giustizia.it/pol_internaz/coop/bohnert_en.htm), consulted on 8 August 2007.

<sup>120</sup> Interview #29

<sup>121</sup> Interview #35

<sup>122</sup> Interview #14. Although the Dutch national member resorts under the Public Prosecution Services, and although these services formally are part of the Ministry of Justice, they operate with a high level of independence of the Dutch Minister of Justice.

<sup>123</sup> Eurojust, Eurojust held a co-ordination meeting on international VAT carousel fraud estimated at €2.1 billion and involving 18 Member States, Press Release, The Hague, 13 March 2007.

<sup>124</sup> Interview #39

<sup>125</sup> (671/JHA) of 20 September 2005

<sup>126</sup> Council of the European Union, 2807<sup>th</sup> Justice and Home Affairs Council Meeting, Council Conclusions on the fifth Eurojust Annual Report (calendar year 2006), Luxembourg, 12 and 13 June 2006.

<sup>127</sup> AR 2002, p. 9.

<sup>128</sup> Interview #29

<sup>129</sup> Interview #35

<sup>130</sup> Interviews #80 and #81

<sup>131</sup> Michael Kennedy, President of the College, as quoted in *NRC Handelsblad*, Wij kunnen Griek en Brit laten praten; President Kennedy van Eurojust wil wantrouwen aanklagers opheffen [We can make a Greek and Brit talk; President Kennedy of Eurojust wants to take away the mistrust among prosecutors], 1 March 2005, p. 3.

<sup>132</sup> Interview #81

<sup>133</sup> Interviews #81 and #39

<sup>134</sup> AR 2001, pp. 13-15; AR 2002, pp. 15-17; AR 2005, pp. 109-114.

<sup>135</sup> AR 2004, p. 66.

<sup>136</sup> AR 2005, p. 14.

<sup>137</sup> Interview #35

<sup>138</sup> AR 2003, p. 42.

<sup>139</sup> Interview #14

<sup>140</sup> Interview #35

<sup>141</sup> Interview #29

<sup>142</sup> Interview #14

- <sup>143</sup> Eurojust, Eurojust dealt with more than 300 cases in 2003, Press release, The Hague, 21 June 2004.
- <sup>144</sup> President of the College Michael Kennedy upon his re-election as President, see Eurojust, President re-elected at Eurojust, Press release, 7 June 2005.
- <sup>145</sup> Interview #14
- <sup>146</sup> AR 2002; AR 2003, p. 36.
- <sup>147</sup> AR 2003, p. 37.
- <sup>148</sup> AR 2005, p. 47. Also interview #28
- <sup>149</sup> AR 2002, p. 9.
- <sup>150</sup> Interview #82
- <sup>151</sup> Interview #39 Also interview #28
- <sup>152</sup> AR 2005, p. 113.
- <sup>153</sup> Interview #39
- <sup>154</sup> Hans Nilsson, A Vision for Eurojust, unpublished paper, p. 5.
- <sup>155</sup> Interview #39
- <sup>156</sup> Interview #82
- <sup>157</sup> AR 2003, p. 36.
- <sup>158</sup> Interviews #29 and #82
- <sup>159</sup> AR 2005, Foreword, p. 4.
- <sup>160</sup> AR 2005, pp. 28-29.
- <sup>161</sup> AR 2005, p. 36.
- <sup>162</sup> Council conclusions on the fifth Eurojust Annual Report, 2007.
- <sup>163</sup> AR 2005, p. 14.
- <sup>164</sup> Commission and Council Secretariat officials even drive together to meetings in The Hague. Interview #29
- <sup>165</sup> Interview #39
- <sup>166</sup> Interview #29
- <sup>167</sup> AR 2002, p. 23. Also interview #35
- <sup>168</sup> Interview #39
- <sup>169</sup> Interviews #29 and #82
- <sup>170</sup> Interview #39
- <sup>171</sup> Interview #29
- <sup>172</sup> AR 2004, p. 15; *cf.* The United Kingdom Parliament, Subcommittee F (Home Affairs) of House of Lords' Select Committee on European Union, Twenty-Third Report, Judicial Co-operation in the EU: the role of Eurojust, para. 73, <http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/138/13804.htm>, consulted on 8 November 2004.
- <sup>173</sup> AR 2003, p. 11. Also interview #29
- <sup>174</sup> AR 2004, p. 16; AR 2005, pp. 20-21; AR 2006. National experts on JITs have met in November 2005, at Eurojust, and in November 2006, at Europol.
- <sup>175</sup> Interview #6
- <sup>176</sup> Brady, H., Should Europol and Eurojust merge?, 7 December 2007, available at <http://centreforeuropeanreform.blogspot.com>, consulted on 5 March 2008.
- <sup>177</sup> AR 2006, p. 6
- <sup>178</sup> Interviews #14, #35 and #39. See also The United Kingdom Parliament, Subcommittee F (Home Affairs) of House of Lords' Select Committee on European Union, Twenty-Third Report, Judicial Co-operation in the EU: the role of Eurojust, paras 61-68, <http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/138/13804.htm>, consulted on 8 November 2004.
- <sup>179</sup> Interview #35
- <sup>180</sup> AR 2005, pp. 21-23.
- <sup>181</sup> Eurojust, Eurojust celebrates its five years of existence, Press release, The Hague, 6 March 2007.



## ***PART 6***

### ***CONCLUSIONS AND REFLECTIONS***



# CHAPTER 13

## CONCLUSIONS:

### AUTONOMY, INSTITUTIONALISATION AND THE LEADERSHIP OF EUROPEAN UNION AGENCIES

#### 13.1 Introduction: EU agencies actually

This book studied the autonomy of European Union agencies. While officially autonomy from the EU institutions and the member states has been one of the main reasons for their creation, most EU agencies are by design endowed with a limited degree of formal autonomy. They are legally autonomous, which distinguishes them from other more or less autonomous entities within the Commission services. However, they do rely heavily on the EU institutions and the member states for their mandate, objectives and tasks, composition and structure as well as their staffing and financing.

Some EU agencies, over time, have developed into more autonomous entities than others. This variation is puzzling as, on the basis of prevailing theoretical perspectives, one would have expected EU agencies to be merely executing the wishes of their political principals, the EU institutions and the member states. And if EU-level agencies develop levels of autonomy at all, one would have expected such levels to be comparable, given the similarities in the official reasons behind agency creation and their formal design. The question therefore is why some EU agencies develop into relatively autonomous entities, whereas others do not or do to a much lesser degree.

To answer this question, this study provided an account of the institutional development of EU agencies, identifying the mechanisms by which agencies develop into relatively autonomous entities (or not) and specifying the conditions under which these mechanisms operate. Unlike the existing literature on EU agencies, which concentrates on the controls exerted by their political principals, this study's focus was on the *actual* autonomous behaviour of EU agencies as actors in their own right. While design is likely to influence what agencies can do and how they do it, it does not foretell it all. That is why this study, apart from analysing founding documents, delved into the day-to-day practice of EU agencies. Agencies were studied beyond the moment of formal creation, exploring how they translate formal tasks into working practices and how they shape the relations with actors in their environments.

The study made use of various concepts and multiple theories, notably those derived from the literature on (public) organisations and the European Union (Chapters 2 and 3) and applied a set of methods and techniques (Chapter 4) for empirical research. On the basis thereof, it examined the creation of the entire population of agencies (Chapter 5), particularly the various reasons underlying the creation as officially put forward by their principals or as observed in the academic literature, and looked at the different designs of agencies (Chapter 6), notably the formal autonomy granted to agencies and as laid down in their constituent acts.



Both the creation and design of EU agencies were considered as possible factors explaining developmental variation of a selected number of agencies (for reasons outlined in Chapter 4) – the European Medicines Agency (EMA), the European Food Safety Authority (EFSA), the European Environment Agency (EEA), the European Monitoring Centre for Racism and Xenophobia now transformed into the Fundamental Rights Agency (FRA), the European Police Office (Europol) and the European Union's judicial cooperation unit (Eurojust) – that were studied in the case chapters based on document analysis, interviews, and non-participatory observation (Chapters 7 to 12).

This chapter summarises the findings of this study. It also looks forward and suggests propositions to be tested in future research on the development of public sector organisations in general and supranational organisations or EU agencies in particular. Section 13.2 compares the reasons for creation, the formal autonomy and the actual autonomy of EU agencies. Subsequently, I identify patterns in the development of actual agency autonomy by evaluating the six cases studies in terms of the process of institutionalisation (Section 13.3), and also examine the two sub-processes: the formation of a distinct organisational identity (Section 13.4) and the acquisition of substantial organisational legitimacy (Section 13.5). Section 13.6 discusses agency leadership, which appeared to be a crucial intervening factor in the institutionalisation process. The chapter ends with a synthesis of the main conclusions (Section 13.7).

## 13.2 Comparing EU agency development: beyond the formal scope of autonomy

### *Autonomy as a reason for creation*

Autonomy has been put forward as an important reason underlying the creation of agencies (see e.g. Kreher, 1997; Majone, 1997a; Dehousse, 1997). Agencies contribute to the EU's implementing capacity, fulfilling a need for independent technical expertise and scientific knowledge. Problems with the implementation of EU legislation and the execution of EU policies made the Commission and the member states resort to agencies (Groenleer *et al.*, 2010). The resulting proliferation of EU agencies in various policy sectors thus signifies the increasingly executive nature of EU politics (e.g. Kelemen, 2005; Egeberg, 2006; Tallberg, 2006; Trondal, 2007; Trondal and Jeppesen, 2008; Egeberg and Curtin, 2008).

Indeed, this research confirmed that the EU is no longer – if it ever was – just a legislative actor, leaving the implementation of EU law entirely to the member states. With the creation of its own agencies, the EU (but not necessarily the Commission) developed the capacity to perform certain tasks autonomously (at arm's length) from the main EU institutions and the member states. But agencies have not solely been created for functional reasons, as this research also shows. In reality, the creation of agencies also served political motives and was driven by institutional fads and legacies.

The creation of EU agencies was only possible because the Commission, the Council, and the Parliament, in different ways, benefited from the agency option, confirming Kelemen's earlier findings (1997; 2002; 2005). The formal autonomy of agencies served as a guarantee for each of these actors that the other would not gain too much and the power balance among them would not be disrupted. Furthermore, the creation of EU agencies fitted developments in the wider EU environment. Delegating tasks to autonomous agencies formed part of an effort to increase the legitimacy of the EU

(especially in the wake of crises) by separating political decision making from the execution of decisions, in line with the New Public Management trends *à la mode* in the member states.

That agencies were not solely created for functional reasons, but also for political and institutional reasons, is reflected in their design. To maintain the power balance between the EU and the national level, the member states, for instance, were represented in the EMEA's management board. However, with the BSE crisis fresh in mind, EFSA's management board was thought to be completely autonomous from possible member state politicisation. The reasons underlying agency creation are a possible explanation for the level of actual autonomy, as is shown in the next section.

### *Autonomy by design*

By design, EU agencies are more or less autonomous in relation to certain actors in their environments. Determining the level of agency autonomy thus requires distinguishing the organisation from its environment and identifying the various actors. This research mainly concentrated on autonomy from political actors, particularly EU institutions and member states, but also bureaucratic actors, such as national agencies, other EU bodies and international organisations.

In general, agencies were *not* found to possess a high level of formal autonomy, neither with respect to the Commission nor with respect to member states. Most Community agencies are designed as extensions of the Commission's bureaucracy, while Union agencies are often devised as continuations of member state politics. Whereas from a functional point of view agencies are supposed to be autonomous and in the official EU discourse they are indeed referred to as such, the political and institutional reasons underlying their creation have often led to significantly restricted autonomy.

Yet, the analysis of the agencies' constituent documents in Chapter 6 shows variation in the degree of autonomy that EU agencies *formally* (that is, on paper) enjoy vis-à-vis the EU institutions and the member states (*cf.* Kreher, 1997; Geradin and Petit, 2004; Vos, 2005). Community or first pillar agencies, such as the EMEA, EFSA, EEA and the EUMC, vary in their autonomy from the Commission, whereas third pillar agencies, such as Europol and Eurojust, differ with regard to their autonomy from the member states. Dimensions on which variation was found between these agencies particularly include (1) the sources of their funding and (2) the appointment of their director, as well as (3) the composition of the management board and (4) the mandate, objectives and tasks.

Most agencies have limited leeway to allocate their (usually small) budgets, as a large portion is reserved for structural costs relating to, for instance, personnel, housing or technical equipment, for which they need the approval of the Commission, Parliament and/or Council. Even agencies that are partially or completely self-financed, such as the EMEA, are not completely free in setting the fees they charge; the power to fix the level of the fees is divided between the Commission and the Council. And although agency directors often decide on the selection and recruitment of staff, they are themselves usually appointed (and if necessary dismissed) by the Commission and the Council or the management board.

An agency has a higher level of formal autonomy, particularly from the member states, when its management board is not comprised of member state representatives, but instead consists of independent members and/or representatives of stakeholders or clients, as is the case at EFSA and the EUMC/FRA. When an agency has decision-

making powers, its formal autonomy is higher than when it only has advisory functions. None of the currently existing agencies, however, are full-blown regulatory agencies with the power to make rules (even though the Commission generally – and somewhat confusingly – refers to them as regulatory agencies).

Their constituent acts usually give clear direction with regard to the mandate, objectives and tasks of agencies (purportedly, much more than is the case for other national and US agencies). For example, the EMEA's founding regulation stipulates that the Commission, and not the agency, has decision-making power, and Europol is restricted in its operational work through the limited competences and responsibilities laid down in its convention. The level of *formal* agency autonomy designed into the agency's structures and procedures – itself a consequence of the reasons underlying agency creation – explains the degree of *actual* autonomy. Therefore in the discussion below on the different patterns in the development of actual autonomy, I begin with factors and conditions relating to formal design. But, as I subsequently show, design is certainly not the sole determinant.

### Actual autonomy

In Chapter 2 of this study, the *actual* autonomy of an EU agency was defined as the organisation's ability to choose among different behaviours pertaining to what its critical tasks are, how and with what resources it performs these tasks, and how the organisation, in the performance of its tasks, relates to other actors in its environment. Defined as such, actual autonomy was distinguished from independence – the condition of being politically free; discretion – the latitude with which public agencies officially act to implement policies; and control – the constraints placed on (the actual use of) an agency's powers by actors in its environment.

In general, agencies were constrained by the political limits on their autonomy. Their principals did not allow them to do whatever they wanted. Most of the time, the Commission and the member states remained in control. When agencies went beyond the formal scope of their autonomy, the Commission or the member states usually intervened. Agencies certainly were not fully autonomous (or independent), but nor were they always completely under control. In spite of political limits, the empirical evidence shows that several agencies sometimes could make their own decisions and take action when implementing legislation and executing policies. At times, through their decisions and actions, some agencies even influenced the policy-making process.

I found substantial variation between agencies on the different dimensions of actual autonomy, particularly with regard to whether they could (1) interpret their mission and role, (2) prioritise their objectives and tasks, (3) choose their clients or target audience (4) determine their working methods, (5) draw their own conclusions or formulate their own opinions and recommendations, (6) allocate their budget and deploy their staff, and (7) enter into relations with other actors.

A narrow remit has not kept some agencies studied here from interpreting their mission and role more broadly than their political principals may have liked, prioritising those objectives and tasks that they prefer, and giving shape to working methods in accordance with their wishes. EFSA spent considerable time on 'self-tasking'; the EEA engaged in the analysis of the effectiveness of EU environment policy; and the EUMC actively campaigned against racism and discrimination. The opinions, recommendations and conclusions of other agencies have gained much weight in the policy-making process. The EMEA's opinions, although formally not binding on the Commission, have in practice obtained a decision-like status (*cf.* Dehousse, 1997; Gehring and

Krapohl, 2007); Eurojust's recommendations, even though not always formalised as such, are considered to exert significant informal pressure on the member states.

Although four of the six selected agencies relied on the Commission for budget approval, some decreased their formal dependence on the Commission or a particular DG of the Commission and at the same time increased their budgets. They sought (and received) funding from industry (EFSA) or from other Commission DGs rather than their parent DG (EEA). Moreover, given the small size of agencies as well as their interdependence with national agencies, the actual work of the agencies was done by national scientists and experts brought together in formal or informal networks based on their specific skills and expertise. Not all of the agencies could simply enter into formal relations with other organisations – in fact, most cannot – but some have nevertheless made their own decisions on informal cooperation. All six agencies have engaged in inter-organisational cooperation, although sometimes after considerable tensions with national and/or international counterparts.

To be sure, the actual autonomy of EU agencies is not simply the sum of the various degrees of autonomy on different dimensions and levels of autonomy from the EU institutions and member states. Agencies that develop more autonomy concerning the interpretation of their mission and role in policy do not necessarily develop more autonomy with regard to the relations they establish with others and vice-versa; agencies that are autonomous from the Commission are often not autonomous from the Council or member states and vice-versa. It is therefore difficult to rank agencies according to the *total* level of autonomy they have developed. Indeed, the findings reported in Chapter 6 on the different dimensions of agencies' formal autonomy and the case chapters (7 to 12) underline the value of the differentiated approach to autonomy used in this study.

In general, none of the agencies studied appears to be fully autonomous from the Commission or the member states, neither on paper nor in practice, and the assertion of some EU agencies being 'out of control' or not being under any control is therefore exaggerated. As Yataganas (2001: 45) has argued: "The independence of agencies is not a myth. Their alleged irresponsibility of action is." At the same time, neither the Commission nor the member states are always fully in control. At least some agencies I investigated have achieved a level of actual autonomy exceeding their formal autonomy from these actors. These differences across agencies and over time evoke questions on how this can be explained. The next section examines the patterns I found in the development of EU agency autonomy, evaluating the explorative and explanatory power of the analytical model put forward in Chapter 3.

### **13.3 Patterns in the development of EU agency autonomy: from identity to legitimacy**

Agencies that have achieved relatively high levels of actual autonomy were expected to have undergone a process of *institutionalisation* (Selznick, 1949; 1957; Merton, 1957; Stinchcombe, 1968; Scott, 2001). Institutionalisation was defined as the emergence over time of a distinct organisational identity considered legitimate by the agency's staff, supranational EU institutions, member states and external stakeholders. Thus defined, two closely related sub-processes help to explain the scope and extent of autonomy of an agency: the formation of a distinct identity, which relates to the degree of consensus on the interpretation of the agency's mission and tasks, and the acquisition of substan-

tial organisational legitimacy, which concerns the extent to which actors in its environment support the agency.

Table 13.1 shows the position of the selected agencies on a high-low scale with regard to the emergence of a distinct organisational identity and the development of substantial levels of organisational legitimacy (or, in other words, with regard to their degree of institutionalisation) at the end of 2007, the time of finishing the empirical research for this book.

**Table 13.1** – The institutional development of the six EU agencies studied

|                         |      | Organisational legitimacy            |                                     |
|-------------------------|------|--------------------------------------|-------------------------------------|
|                         |      | High                                 | Low                                 |
| Organisational identity | High | EMEA<br>EEA<br>Eurojust   early EMEA | Europol<br>early EEA                |
|                         | Low  | early EFSA   EFSA<br>early Eurojust  | EUMC<br>early Europol<br>early EUMC |

EU agencies were found to vary in their level of actual autonomy. Agencies with a relatively high level of actual autonomy (such as the EMEA, Eurojust, and to a lesser extent the EEA) have over time developed both a distinct identity compared to other organisations, and a substantial level of legitimacy from the actors in their environments. However, agencies with a relatively low degree of actual autonomy have developed neither (EUMC/FRA), or started to develop either a distinct identity or substantial organisational legitimacy only after several years (Europol). EFSA is an exceptional case, as it actually began its life with a high level of legitimacy (at least partly reflected in its high level of formal autonomy) but saw this decrease in its early years, resulting in a lower level of autonomy in practice than on paper. Even though it is impossible to say that a distinct identity and substantial levels of legitimacy are necessary and/or sufficient for actual autonomy to develop (and thus whether there is a causal link), I have shown that these two sub-processes, albeit often indirectly, are important in explaining the variation in outcomes observed.

These findings are more nuanced than Williams' (2005) distinction between 'schizophrenic' EU agencies – those lacking a distinct organisational identity; and 'monomaniac' EU agencies – those with a low level of organisational legitimacy. The agencies in the upper left quadrant were able – at least for the research on their early years – to strike a balance between actively searching for allies and engaging in partnerships in order to acquire a level of legitimacy while also instilling a set of core values so as to form a distinct identity. They are thus called highly or at least moderately 'institutionalised' EU agencies.

What is more, agencies, as expected, moved, are still moving at the time of writing this book, and will probably keep moving from high to low (and vice-versa) within the typological space through time. Clearly, institutional development is not a linear process and proceeds at different speeds.<sup>1</sup> It is characterised by change and instability rather than order and equilibrium. As the case of EFSA shows, being valued upon creation

does not guarantee long-term acceptance, nor does an indistinct organisational identity at the outset make it impossible to develop a more clear profile over time as demonstrated by the Europol case. This also holds true for the agencies found to have developed a distinct identity and a considerable degree of legitimacy in their early years.<sup>2</sup>

**Table 13.2** – Propositions to be tested in future research

| <i>No.</i> | <i>Proposition</i>   |
|------------|--|
| 1          | If a (supranational) organisation relies on (national) actors controlling critical information, it is likely to build up a high level of expertise, which has a positive effect on its autonomy.   |
| 2          | If a (supranational) organisation provides ‘real time’, ‘live’ or ‘new’ information to its clients and (national) stakeholders and/or if it aggregates the information to the level on which it is active, it is likely to create an information asymmetry, which increases its autonomy.                        |
| 3          | If a (supranational) organisation’s supervisory, management or administrative board is composed of persons having substantive knowledge of the organisation’s field of action, this increases the likelihood of board interference in the organisation’s work and thereby decreases the organisation’s autonomy. |
| 4          | If a (supranational) organisation does not commit to staff through for instance (semi-) permanent contracts or career development, it is likely that the level of the staff’s identification with the organisation will remain low, negatively affecting the organisation’s autonomy.                            |
| 5          | If a (supranational) organisation makes use of measurable performance indicators and produces tangible results to clients and stakeholders, it is more likely to gain support from its political principals, and its autonomy thus is enhanced.  |
| 6          | If a (supranational) organisation’s (type of) tasks deviate from those of already existing structures and arrangements in its field of action, the likelihood that it will gain support from its political principals is low, decreasing the organisation’s autonomy.  |
| 7          | If a (supranational) organisation continuously emphasises its formally autonomous position, this hampers interaction with actors in its environment and has a negative effect on the organisation’s autonomy.  |
| 8          | If a (supranational) organisation cooperates with (potential) bureaucratic contenders, taking their preferences and interests into account, this is likely to have a positive effect on the support for the organisation and, thereby, on its degree of autonomy.  |
| 9          | If a (supranational) organisation develops a reputation for effectiveness and/or demonstrates its unique capacity in its early years, actors in its environment are likely to support the organisation, having a positive effect on its autonomy.  |
| 10         | If a (supranational) organisation attends to the wishes and demands of external actors selectively or sequentially, it is likely to gain support from a variety of actors, which has a positive effect on the organisation’s autonomy.   |
| 11         | If a (supranational) organisation involves its clientele and interest groups in the decision-making process, this is likely to have a positive effect on its support from such actors and thus adds to the agency’s autonomy.  |
| 12         | If a (supranational) organisation’s type of leadership fits the organisation’s developmental stage, the organisation is more likely to become institutionalised, and its autonomy increases.   |

On the basis of the theoretical explanations put forward in Chapter 3 – operationalising the internal and external dimensions of institutionalisation – an attempt is made to explain the differences in the autonomy development of the six EU agencies studied. The formation of a distinct identity was proposed to follow from an agency’s level of expertise and cohesion, while the acquisition of legitimacy was suggested to result from the political and public support it enjoys. Agency leadership was put forward as a crucial intervening factor. From the empirical investigation of EU agencies’ development,

a set of propositions is derived that can be tested in future research on the development of public sector organisations in general and supranational organisations or EU agencies in particular. For an overview, see Table 13.2.

### 13.4 The formation of a distinct agency identity: infusing value

#### *Expertise: when information is power*

In order for an agency to form a distinct identity it needs to be infused with value. This means both staff and external actors need to agree on the agency's valued ends, the means by which these valued ends are to be attained, and the standard of appropriate behaviour for employees in relation to these valued ends. In other words, there has to be a widely shared and approved understanding of the organisation's critical tasks. In Chapter 3 expertise was put forward as an important integrative force, thus likely to positively affect an agency's degree of autonomy. Expertise enables agencies to develop a distinct organisational identity in two particular ways: through (1) the control over information, and (2) a dominant profession (Rourke, 1984; Ellison, 1995).

*Control over information* The informational capacity of EU agencies, and the resulting asymmetry of knowledge with their principals, is an important source for autonomy (see also Carpenter, 2001; Tallberg, 2000; Hammond and Knott, 1996). As a rule, EU agencies, just like most other international organisations, play a limited role in the policy-making process. They implement or execute and sometimes advise on or evaluate, but ultimately (national) political actors decide on policies. Yet, I found that agencies vary in the amount of control over information they are capable of exercising (*cf.* Rourke, 1984). Some exercised more control than others, demonstrated by the extent to which their opinions, conclusions and recommendations were used and followed by others – notably the Commission and the member states. Some agencies thus were capable of influencing decisions. How could these differences between agencies be explained?

Part of the explanation follows from the nature and scope of an agency's function. The semi-regulatory agencies (EMEA, EFSA) experienced less difficulty in establishing control over information than the monitoring (EEA, EUMC/FRA) and coordination agencies (Europol, Eurojust). Those providing the bulk of the information to semi-regulatory agencies, the regulated industries, have an interest in providing information. The monitoring agencies and particularly the coordination agencies heavily rely on often reluctant and sometimes downright unwilling national authorities. I also found differences in the control over information *between* agencies with similar functions. The EEA, for instance, has gradually become more capable of producing information, whereas the EUMC/FRA still faces difficulty in gathering data. Agency function is therefore only part of the explanation for the differences in control over information.

The type of information an agency collects is another important factor upon which the control over information is conditional. Agencies that gathered data with a high level of scientific complexity or technical difficulty, notably the semi-regulatory agencies, had an easier job of persuading politicians. The EMEA and EFSA, and also the EEA, operate in scientifically complex areas, whereas the EUMC and Europol operate in areas that are politically sensitive but not technically difficult. The kind of information an agency collects is closely related to its function. Both factors are more or less fixed,

that is, they cannot easily be changed by agencies, as they follow from their formal design, which can only be modified by its political principals.

The function of an agency and the type of information collected does not alone account for differences in informational capacity, however. By comparing agencies' founding regulations and annual work programmes and reports, I found substantial differences in specialisation and attention. Agencies that specialised in a particular set of tasks and concentrated their attention on building up skills and knowledge in relation to these tasks developed a higher level of expertise than agencies that did not dedicate themselves to specific tasks. The latter agencies, of which the EUMC is the most obvious case, did not always draw lessons from past experience and sometimes made the same mistakes. They experienced difficulty in developing effective practices and routines (*cf.* Cyert and March, 1963; Meier and Bohte, 2005; Sabatier and Jenkins-Smith, 1993). As a result, these agencies did not demonstrate their competence to solve complex problems, which, as is also demonstrated below, is a necessary (but not a sufficient) condition for earning acceptance and credibility within their environment (*cf.* Sapolsky, 1972; Maynard-Moody, 1989; Khademanian, 1996; Waterman and Meier, 1998).

Even when agencies made an attempt to focus, their principals, notably in the case of Europol, sometimes hindered the agencies' ability to do so. Often for political reasons, principals broadened agencies' mandate or extended their tasks. In the case of Europol this happened even before the office began its work. In addition, the small size of some agencies, notably the EUMC and, in the beginning, the EEA, hampered specialisation and attention. Small agencies in terms of staff were not able to dedicate themselves easily to particular tasks, arguably testifying for what is termed the 'liability of smallness' (instead of, or in addition to, a liability of newness) (Aldrich and Auster, 1986). That said, agencies with a sizeable number of staff, such as Europol, were also unable to specialise and concentrate attention. Hence, size does not, at least not on its own, affect an agency's autonomy (see also Robey, Bakr, and Miller, 1977; Baum, 1996), so there must be other reasons as well.

Although several agencies, notably the EMEA and EFSA, have attempted to develop in-house expertise, most agencies did not acquire such capacity from the start. Instead, I found that they (or at least the EMEA) relied on networks of national actors to collect information, as these national actors employed experts in a particular field or controlled local knowledge that agencies needed and, just as important, possessed a critical resource for EU agencies in their early years: support (see further below). When agencies adopted a command and control approach towards information gathering, even though they could perhaps do so formally, it created friction between EU agencies and national actors (*cf.* De Bruijn and Ten Heuvelhof, 2008). The strained relations between the EUMC and its network of national focal points are a case in point. This leads me to the following proposition to be tested in future research:

*Proposition #1:* If a (supranational) organisation relies on (national) actors controlling critical information, it is likely to build up a high level of expertise, which has a positive effect on its autonomy.

Variation also exists with regard to the consequences of the capacity to control information. In a few instances, agencies, usually semi-regulatory ones, influenced the solutions to the problems on which they collected information, thus 'regulating by information' (Majone, 1997a; Shapiro, 1997), even when the formal decisions on these solutions were made by others. The EMEA is the most obvious example. Although the Commission has the legal authority to make final decisions on the approval of medici-



nal products, it has rarely (if ever) deviated from the EMEA's opinion. In the case of EFSA, the control over information has sometimes led to confrontations with the Commission. The agency realised that it could influence policy choices and regulatory decisions since the Commission relies on the agency's expert knowledge. However, EFSA's emphasis on the independence of its expertise in the early years, while perhaps necessary so as to form its identity, made it difficult to interact with its political (or rather, politicised) environment, which negatively affected its autonomy (see further below).

Monitoring and coordination agencies have a significantly weaker position than semi-regulatory agencies because the Commission and the member states often do not rely on the information provided by these agencies, and pure information asymmetries do not exist (*cf.* Waterman and Meier, 1998). In fact, in the cases of the EUMC and Europol, the Commission and the member states made use of other information sources. Some agencies with a monitoring or coordination function nevertheless had an influence on policy making, albeit a limited one. They generated 'new' (real-time or live) information instead of relying on others to provide them with 'old' information, as Eurojust did, or they analysed information and drew lessons or conclusions at an aggregate (EU) level and made recommendations on the basis of its analysis, as the EEA did. This leads me to the following proposition to be tested in future research:

*Proposition #2:* If a (supranational) organisation provides 'real time', 'live' or 'new' information to its clients and (national) stakeholders and/or if it aggregates the information to the level on which it is active, it is likely to create an information asymmetry, which increases its autonomy.

*A dominant profession* The specialised knowledge and recognised competences of the professionals working for EU agencies, and the authority they hold, are other key sources of autonomy. Agencies generally employ experts. Some agencies, such as the EMEA and EFSA, harbour more specialised knowledge and recognised competences than others, as is evident in the professional (and educational) backgrounds of their staff members. Hence, these agencies established a recognisable profile fairly easily, based on their shared normative standards and cognitive beliefs (*cf.* Moe, 1987; Schein, 2004).

The nature of the functions assigned to agencies is an important condition for the dominance of a profession: the function of the EMEA and to a lesser extent that of EFSA is more clearly demarcated than the functions of the EEA and the EUMC. Both semi-regulatory agencies are consequently inhabited by a group of professionals who are generally held in high esteem, such as pharmacists, doctors, veterinarians, and food scientists. Because these professions typically garner a high level of trust, the EMEA and EFSA are allowed more freedom in managing their own affairs than the social scientists and police officers employed by the EUMC and Europol (*cf.* Meier and Bohte, 2006). The prestige of professional groups is not decisive, however, as the contestation of EFSA's expertise shows.

I found no evidence that pointed to a higher level of agency autonomy as a result of the agency's leadership having a professional background in an agency's area of activity. On the contrary, professional expertise in some cases hampered the performance of management boards, such as in the case of the EUMC. Whereas their professional expertise could have increased the autonomy of the agency through helping it to establish its profile, it rather had the opposite effect, with board members interfering in operations and leading to a lower degree of agency autonomy. Again, the EFSA case

differs from other cases as management board members, even though mostly experts, generally did not interfere in the activities of the agency. This nonetheless leads me to the following proposition to be tested in future research:

*Proposition #3:* If a (supranational) organisation's supervisory, management or administrative board is composed of persons having substantive knowledge of the organisation's field of action, this increases the likelihood of board interference in the organisation's work and thereby decreases the organisation's autonomy.

The categories of professional knowledge that agencies generate or process were another factor accounting for the variation among agencies. The semi-regulatory agencies use techniques that cannot easily be mastered by laypersons but that do produce measurable outputs in the form of scientific opinions. Although Eurojust's tasks are easier to understand than those of the EMEA and EFSA, the agency, by contrast to for example the EUMC and Europol, does generate tangible outputs, that is, cases and coordination meetings, and its knowledge is therefore more easily accepted than the information contained in the reports produced by the EUMC and Europol.

As briefly mentioned above, most professionals involved in the activities of agencies are not (permanently) employed by the agencies. They work with national authorities, universities and research institutes, or non-governmental organisations whilst being part of transnational networks of professionals who lend their expertise to agencies (*cf.* Haas, 1992; Boli and Thomas, 1999; Finnemore and Sikkink, 1998; Barnett and Finnemore, 1999; 2004; Slaughter, 2004; Djelic and Sahlin-Andersson, 2006; Brunsson *et al.*, 2000). There is variation in the degree to which agencies relate to the professionals in these networks. Whereas the EUMC considered national focal points as mere contractors, for instance depriving them from the ownership of the information that they supplied, the EMEA saw national authorities as partners (admittedly, also forced by design), merely coordinating their tasks at the EU level while leaving implementation of these tasks to the national level.

Indeed, as noted above, most agencies do not possess sufficient in-house capacity to perform their tasks without the cooperation of others. But as some agencies have tried to develop in-house research capacity, selection and training of their staff has become more and more important to ensure that (professional) values are imbued in agency employees. This brings us to the second aspect of agency identity: cohesion.

### *Cohesion: all for one?*

To develop a distinct organisational identity, expertise is a necessary, but not a sufficient condition. An agency's level of cohesion was suggested to have a positive effect on its identity and therefore on its degree of autonomy. Cohesion would enable agencies to develop a distinct organisational identity in essentially two ways: through (1) commitment of staff, and (2) the uniformity of their values.

*Commitment of staff* The commitment of the employees working for EU agencies, and the expected increase in performance as a consequence thereof is not a conclusive determinant of autonomy. People working for international organisations such as the United Nations or the EU are often implicitly assumed to strongly identify with their job, considering it more than just a way to earn money. EU agencies should be no exception. Especially in the early years, the undersized staff is under a lot of pressure to get the organisation up and running and quickly deliver the first results. It is in those early years that they would develop a degree of cohesion (Rourke, 1984).

I did not find particularly high levels of commitment in the six cases I studied, at least not to the institutional interests of the agencies themselves. The commitment I found resembles the cosmopolitan kind of commitment that Merton (1957) and Gouldner (1958) referred to, that is, loyalty to the rules, criteria and standards of the transnational professional group rather than allegiance to the agency. The distinction made between 'cosmopolitans', typically not so loyal to institutional interests (be it of a national or supranational organisation), and 'locals', usually more loyal to their national organisations than to supranational bodies, thus proves helpful in understanding the relations between agencies and their staff. Especially so, because most (if not all) agencies heavily rely on national experts working for the agency on a temporary and often unpaid basis.

Majone (2000) expected national experts' involvement with EU agencies to transform them from locals into cosmopolitans, shifting their allegiance from the national to the European level. Such a transformation has, at least partly, occurred at the EMEA, where national experts are considered part of the agency and see themselves as part of a European system of medicines evaluation. But it did only slowly occur or not at all in the case of EFSA and the EUMC. EFSA's advisory forum, although providing an institutional locus at the EU level, has not created a favourable environment for the transformation of national regulators from locals into cosmopolitans. Cooperation in the framework of the EUMC's information gathering network is characterised by continuous discussion between locals (national experts) and cosmopolitans (agency staff) over common definitions and data comparability precisely because of the lack of rules, criteria and standards (which also points to a lack of shared values).

A factor that positively affected agency employees' commitment, albeit indirectly, was the clarity of performance indicators. The EMEA and Eurojust, and to a lesser extent EFSA and the EEA, made use of clear indicators demonstrating their effectiveness, which increased external support for the agencies and seems to have enhanced staff motivation. The reputation for effectiveness of an agency, in turn, seems to have had a positive effect on the attractiveness of an agency as an employer. The EMEA and Eurojust, and to a lesser extent EFSA and the EEA, have become known for their effectiveness, which makes it more appealing for highly qualified individuals to apply for a job with these agencies. Other agencies, such as the EUMC and Europol, by contrast, are – also for other reasons – not considered to be good career opportunities.

Location also factors in to attracting employees. EFSA saw part of its staff (albeit a small part) resign when it moved from Brussels to Parma and once in Parma, encountered problems in hiring qualified non-Italian staff, whereas the EMEA, located in London from the outset, did not experience problems in recruiting staff, London being a magnet for young and talented professionals. In addition, when staff worked at the same location from the beginning, they met more frequently than when they were not simultaneously operating in one place (*cf.* Checkel, 2003; Lewis, 2005). Some agencies made arrangements to encourage interaction among staff and external experts not always working at the agency. As a result, not only the level of commitment of agency staff and experts, but also their unity appears to have been increased, which leads us to another way to develop cohesion.

*Shared values* The unity among the staff of EU agencies and the resulting social differentiation is a determinant of autonomy, although seemingly a weak one. I did not find clear differences between agencies regarding staff unity.<sup>3</sup> Yet, the level of unity was at least partially affected by the agency's function. Some agencies, such as the EMEA, EFSA and to a lesser extent Eurojust, the EEA, and Europol, can only recruit individuals with a specific professional background. Indeed, agencies that were dominated by a single profession from inception, such as the EMEA had less difficulty in developing a

high level of unity (*cf.* Wilson, 1989; Kaufman, 1960; Golden, 2000). But less difficulty certainly did not mean no difficulty at all, as the EFSA and Eurojust cases clearly show.

The professional values carried by the staff recruited from the Commission and the member states, but also from non-state actors such as industry and universities, shaped the way they interpreted the agency's mandate and translated its objectives and tasks into practice. In particular, the first officials of agencies or agencies' forerunners, such as the EEA task force, pro-Eurojust, or the Europol Drugs Unit, were able to influence the interpretation and translation of the agency's mandate (*cf.* Wilson, 1989). It is probably for that same reason that the political principals of agencies, such as the Commission in the case of the EEA and the Council in the case of pro-Eurojust, were closely involved in the selection of the agencies' first officials or in assembling their forerunners (*cf.* Etzioni, 1961; Peters, 1999).

Agencies, such as the EMEA and Eurojust, that had been assigned with clearly specified functions from the beginning, such as authorising medicinal products and coordinating cases of organised crime, more easily developed a level of consensus among staff than agencies that had more ambiguous objectives and less precisely defined tasks (*cf.* Wilson, 1989). The latter agencies were often tempted to broaden the scope of their activities, which is particularly evident in the case of the EUMC where previous work experiences of management board members had a strong influence on the course of the organisation.

Most agencies did not actively (or at least not visibly to the eye of an outside observer) build a level of uniformity through either (a) hiring employees already holding certain values, (b) socialising new staff, and/or or (c) instilling rules and procedures with particular values. Agencies differed in the extent to which they relied on young and talented individuals instead of on more experienced, senior people. In the case of the EMEA, staff recruited was young, with the advantage that they could easily be inculcated with certain norms on how to go about their job. Other agencies, such as Europol and Eurojust, instead preferred experienced staff (i.e. Europol liaison officers, Eurojust national members), given that their previous work experience is a valuable asset in enhancing the agency's performance.

In addition, most agencies did not have their own educational and training systems.<sup>4</sup> Some agencies provided their staff with education and training, but this primarily concerned the transfer of technical knowledge, such as agency-specific computer systems, not necessarily norms on how to go about their job. With the exception of the EMEA's 'culture of performance' and Eurojust's 'culture of pragmatism', I did not find strong agency cultures, as present in specific language or characteristic symbols, let alone agency ideologies or myths. Several agencies did develop mission statements, but these often were confined to the official goals of the agency and did not really express the agency-specific values and beliefs.

While most agencies have their own restaurants and organise social events for staff, a high level of identification with the agency is generally hindered by the temporary nature of contracts (or the formal ties that staff maintain with national agencies, as in the case of Europol's Liaison Officers) and the lack of career development as a means of strengthening agency autonomy (*cf.* Egeberg, 2004; Trondal *et al.*, 2005). This leads me to the following proposition to be tested in future research:

*Proposition #4:* If a (supranational) organisation does not commit to staff through for instance (semi-)permanent contracts or career development, it is likely that the level of the staff's identification with the organisation will remain low, negatively affecting the organisation's autonomy.

The uniformity of values within agencies has only clearly been enhanced through rules and procedures for decision making in a few cases (*cf.* Simon, 1997). In its early years, when an agency is still small in size, decision making is often informal. But when the agency's workload increases and the staff grows, internal decision-making processes become more formal. Some agencies managed to engrain values into the decision-making rules and procedures. The EMEA, for example, makes extensive use of standard operating procedures, reflecting the value the agency attaches to delivering opinions to the Commission in time.

### **13.5 The acquisition of a substantial level of agency legitimacy: adding value**

#### *Political support: together alone*

Whereas the formation of a distinct organisational identity showed an important factor influencing the development of agency autonomy, this process alone could not account for the variation in actual autonomy of EU agencies. Institutional development of EU agencies is not a 'one-way street', only involving the agency's staff; it also concerns other actors, notably political ones, who need to recognise the identity of the agency and consider it legitimate. Thereby, the support of political actors is likely to have a positive effect on an agency's degree of autonomy.

Political power over EU agencies, however, is dispersed, not only among the Commission, the Council and the Parliament, but also between the European and national levels. EU agencies have multiple political masters who they depend on for the performance of their tasks and whose support they accordingly need. In order to maximise their autonomy, agencies have to demonstrate that they add value to existing national, EU and international structures and arrangements. That is, they have to show they are uniquely capable of performing the tasks that they have been delegated, therewith complementing rather than duplicating existing structures and arrangements (Carpenter, 2001; Sapolsky, 1972; Wilson, 1989).

Agencies have done so to different degrees, and therefore, political support for agencies varies. For example, the EMEA and Eurojust have – at least not from their formal creation through the conclusion of this research – never been a point of discussion. EFSA and the EEA are (or have become) generally accepted as necessary and valuable additions to existing structures and arrangements, even though their activities are sometimes questioned by certain actors. The EUMC/FRA and Europol, by contrast, have experienced difficulty in legitimising their existence, and their role has thus continuously been called into question. They have not delivered the expected results, meaning they have not demonstrated their added value to either (1) political actors, (2) bureaucratic actors, or both.

*Support of political principals* The support of political parents for individual agencies differed from the beginning. Some agencies can almost be considered 'unwanted children'. The EUMC and its successor the FRA may not have been created if the deci-

sion was only left to the Commission. Many member states were initially not thrilled with the creation of the EEA. Hence, not all agencies had a fair chance of developing support from their principals in the first place. Furthermore, having been created for political rather than functional reasons, neither the Commission nor the member states really wanted to spend much time on such agencies (to put it crudely), and, once created, merely allowed them to exist. The difficulties that many agencies have faced in their early years, then, are not surprising.

But even agencies that aroused enthusiasm from their political masters in the early years were not assured of sustained support. Support comes and goes depending on political opportunism. Most EU agencies simply do not perform tasks that have a potential to affect the position of politicians, thereby attracting their interest (*cf.* Moe, 1984). The Commission and the member states in the Council only realised the effects that agencies could have when the EUMC got caught up in a political affair and Europol was hit with a corruption scandal. The political salience of agencies' tasks thus helps determine the support of political principals and the variation of this support over time ('t Hart *et al.*, 2002).

For its part, the European Parliament has primarily been interested in agencies from a budgetary perspective (*cf.* Rourke, 1984; Fenno, 1966; Seidman, 1998). Although the EP's budget committee has always been critical of agencies, EP support for EU agencies is reflected in the increasing amount of financial resources appropriated to agencies over the years. The EP's legislative committees vary in the interest they take in agency activities, depending for instance on the involvement of the EP in the creation of an agency. Only in recent years, with the increase in the EP's involvement in the creation process (see Chapters 5 and 6) have agencies become a more prominent feature on the political agenda of the EP's legislative committees, particularly in view of contested or salient issues such as Genetically Modified Organisms (GMOs) and terrorism.

In addition to the political salience of an agency's tasks, I expected the type of policy issues that agencies are delegated to be an important factor (Wilson, 1980; Majone, 1996; Meier, 1985; Lowi, 1972). The variation this factor accounts for is limited. None of the existing EU agencies are involved in (re-)distributive policies, and only a few of them have (semi-)regulatory tasks (in my 'sample,' only EFSA and the EMEA). Still, in comparison with the EMEA, EFSA operates in a much more conflictive environment with the scientific knowledge it produces often being questioned, such as information on GMOs, cloning or nanotechnology. EFSA's opinions (still) lack the authority that EMEA opinions have developed, which indicates the difficulty it experiences in generating legitimacy.

More importantly, agencies that produce tangible results, such as the EMEA, EFSA and Eurojust, found it much easier to obtain support from legislative actors than agencies with less concrete products such as the EEA, the EUMC and Europol, which are basically tasked with producing reports to the Commission and the member states. Members of the European Parliament (MEPs) do not always have the same interests as executive actors, such as the Commission (let alone, taxpayers/citizens). Even when MEPs did not only pay attention to the costs of an agency's services rendered to the Commission, but were also interested in the quality of those services, then quality usually meant something else for them than for the Commission, and caused frictions between agencies and the EP. Autonomy is thus enhanced by clear indicators of performance, be it opinions, recommendations, cases, or coordination meetings (Rourke, 1984; Meier and Bohte, 2006). This leads me to the following proposition to be tested in future research:

*Proposition #5:* If a (supranational) organisation makes use of measurable performance indicators and produces tangible results to clients and stakeholders, it is more likely to gain support from its political principals, and its autonomy thus is enhanced.

By deciding on agency design, the type of policy issues and type of tasks delegated, legislative actors have a significant impact on the development of autonomy, perhaps more important than I initially expected. As pointed out above, design clearly constrains agencies' abilities to increase their level of actual autonomy. However, design does not explain differences between the EMEA and EFSA, the EEA and the EUMC, and to a lesser extent, Europol and Eurojust. At least part of the explanation for why some agencies develop more support than others follows from their actual behaviour and the evolution of their organisational identity (see above). Some agencies have somehow been able to garner a higher level of acceptance than others.

Several agencies, such as the EMEA, but also EFSA and the EEA, already had some basis of support, because they built on existing institutional arrangements at the EU level (EMEA), followed established models at the national level (EEA), or for the very fact that they deliberately departed from existing institutional arrangements at the EU level (EFSA). Mere newness thus only partly contributed to the reluctance with which some agencies were regarded (but see Stinchcombe, 1965). Rather, it seemed to be their divergence or 'differentness' from existing structures and arrangements that made it difficult for some agencies to gain acceptance right from the start. The EUMC was supposed to accomplish objectives and tasks that were not only novel at the EU level but also controversial in most of the EU member states, and, at the time of its creation, particularly in its host state Austria. This leads me to the following proposition to be tested in future research:

*Proposition #6:* If a (supranational) organisation's (type of) tasks deviate from those of already existing structures and arrangements in its field of action, the likelihood that it will gain support from its political principals is low, decreasing the organisation's autonomy.

When their political parents broadened the scope of their mandate or expanded the range of their tasks, this did not necessarily increase agencies' autonomy. Europol was repeatedly invested with new tasks, not because it wanted them, but instead as a result of political opportunism in reaction to particular incidents. The same applies to the transformation of the EUMC into the FRA, which can hardly be said to result from the EUMC's own efforts. Instead, agencies were autonomous when their mandate was broadened by their own choosing or when they succeeded in fending off politicians trying to invest them with additional tasks. The EMEA's duties were formally enlarged upon the revision of its founding regulation – in practice, it had already been fulfilling these duties – and the EEA avoided an expansion of its activities with inspection duties because it felt this could impinge on its autonomy.

I found considerable variation in the relationships between agencies and the Commission or the Council. The EEA, the EUMC and EFSA all fought tough battles with their 'parent DGs' in the Commission, respectively DG Environment, DG Employment and DG SANCO, over the interpretation of their mandate, objectives and tasks. As formally autonomous entities, especially EFSA and the EEA tried hard not to be seen as an extension of the Commission. The EUMC and particularly its management board have attempted to raise the agency's profile, to no avail; it was most often seen as part of the Commission. As time went by, however, relations usually became more 'multi-person' on both the agency and the Commission side. Agency staff at various levels in the hier-

archy developed direct contacts with officials in Commission DGs other than their parent DGs.

Whereas during the 1990s, the Commission did not spend much time managing relations with agencies, it has gradually become used to dealing with agencies and has adapted its internal organisation accordingly (*cf.* Schout, 1999). In the case of EFSA, a separate unit was created in DG SANCO to liaise with the agency. Such adaptations of the Commission's internal organisation often come down to an increase in staff and therefore, according to critics, cancel out one of the most important reasons for creating agencies in the first place – instead of relieving the executive burden for the Commission and allowing it more time to concentrate on its policy-making function (see Chapter 5), the creation of an agency for the Commission comes with an increased administrative workload in terms of relation management and supervisory and control tasks.

In most cases it has taken a while before the Commission actually made use of agency products or considered them to be of high quality. While with the EMEA and EFSA the Commission relied on the agencies to supply it with scientific opinions on which to base its decisions, this does not necessarily serve as proof of the legitimacy of these agencies. That the Commission questioned EFSA's opinions not only damaged the agency's reputation, but also put the credibility of the regulatory process at risk. This is something which the Commission (or rather the particular Commission DG) had been more clearly aware of in the case of the EMEA and from which it had therefore refrained. Moreover, when the Commission was not obliged to use agency products, such as in the case of the EEA and the EUMC, it often turned to other sources for better quality or more timely products or services, in effect devaluing the agencies' work.

Even if agencies' added value is often in their autonomous position, forcible demonstrations of their autonomy, as both the EEA and EFSA experienced, backfired. Constant reiteration of its autonomous position in the early years of EFSA led to hostility from the Commission. The EEA and the EUMC also alienated themselves from the Commission by excessively focusing on their autonomy. A moderate approach as adopted by the EMEA and Eurojust appeared much more effective, at least in the short term, resulting in a gradual increase of their actual autonomy (*cf.* Sapolsky, 1972). Over time, the EEA and EFSA changed their attitude towards the Commission, adopting a more conciliatory approach which resulted in improved relations. Some argue that for agencies like the EEA and especially EFSA, a certain amount of conflict with their 'parents' is necessary for their development and adopting a conciliatory approach in their very early years could have meant their demise as independent agencies in the long term (*cf.* Schout, 1999; Boin and Goodin, 2007). This leads me to the following proposition to be tested in future research:

*Proposition #7:* If a (supranational) organisation continuously emphasises its formally autonomous position, this hampers interaction with actors in its environment and has a negative effect on the organisation's autonomy.

EU member states have generally tried to keep agencies on a tight rein through their representation on agencies' management boards. In practice, member states' engagement differed according to their interests in the agencies' activities, the Nordic countries for instance being very active on the EEA's board, whereas the large member states dominate the Europol's board. Often the representatives of only a few countries



call the shots on the management board, putting in question agencies' democratic accountability through board supervision (see also Busuioc, 2009; 2010).

Moreover, even if management board members collectively fulfil their control function, they meet only several times a year and, consequently, lack the detailed information to really control agency activities – a constant concern in Europol. This provides agencies with the opportunity to enhance their autonomy vis-à-vis the member states, but it has also given the Commission, which is generally better informed than member state representatives, the chance to influence board decision making (even when they are formally underrepresented on a board, as in the case of EFSA and the EUMC).

*Relations with bureaucratic actors* Although above I refer to member states as unitary actors, there is a remarkable discrepancy between the official language used by national politicians when meeting in Brussels, for instance agreeing on stricter environmental regulation or increased police cooperation, and the day-to-day affairs at the bureaucratic level in the member states, implementing legislation or executing policies at the local level. Considerable differences exist among national agencies in terms of their capacity and willingness when it comes to the implementation of EU policies. The functioning of EU agencies brings this into the limelight (see also Groenleer *et al.*, 2010).

National (as well as EU) politicians easily blame EU agencies, Europol in particular, for not being able to ensure cooperation from bureaucratic or professional actors at the national level, which is seen as an important condition to 'add value'. This leads to a paradoxical situation. In order to add value, Europol and other agencies alike need to cooperate, but, at the same time, cooperation, especially with national authorities, is only forthcoming if EU agencies demonstrate added value, for EU agencies usually do not have any formal means to make national agencies cooperate. EU agencies can only demonstrate value, however, through cooperation with national agencies, as often their objectives and tasks are not immediately clear from their formal statutes and need to be translated into practice which requires cooperation with national agencies.<sup>5</sup> Not all EU agencies have been able to effectively deal with this paradoxical situation. Yet, some agencies succeeded in enhancing their autonomy through cooperation, thus making a virtue of necessity. How have they managed to do so?

In order to develop a level of legitimacy from executive actors, agencies that have managed to garner support have done so particularly through the following strategies: networking with other organisations in their environments (instead of adopting a strategy of isolation from such organisations), whilst at the same time distinguishing themselves from these organisations (rather than adopting a strategy of acquiescence).

I found that some agencies, in spite of the conventional wisdom that it would decrease their autonomy (see for instance Downs, 1967), entered into partnerships with other organisations, be it national agencies (EMEA), other EU bodies or international organisations (EEA). Indeed, in order for EU agencies to add value to already existing organisations, they do not have much choice other than to take the interests of such organisations into account and to enter into relationships with them (*cf.* Rainey, 1991), for most EU agencies, and certainly the six studied here, were not created in a vacuum. They came into being in an environment replete with other organisations on which they rely for professional expertise (Pfeffer and Salancik, 1978), as with the EMEA's relationship with national agencies, and for the acceptance and credibility that relationships with such organisations therefore confer upon them, as with the EEA's relations with the United Nations Environment Programme (*cf.* Meyer and Rowan, 1977; DiMaggio and Powell, 1983).

Networking is therefore a key strategy (*cf.* Metcalfe, 1994; Dehousse, 1997; Everson *et al.*, 1999; Jordan and Schout, 2006). Some agencies have been active from the start in managing relations with the actors in their environment. Even agencies with a highly scientific or technical function, such as the EMEA or EFSA, that have a certain degree of isolation from other actors by nature, could not simply isolate themselves from the environment, not even in the early years (but see Selznick, 1957).

The EU agencies I studied that incorporated national governments and their agencies in transnational networks, particularly the EMEA, appeared more legitimate than those agencies seeking to displace national agencies (as in a market with competition) or adopting a command and control approach (as in a hierarchy with formal-legal authority). They developed a level of trust among actors that in the previous situation (before the creation of the agency) mistrusted each other, while also becoming accepted as a trustworthy actor in the network (*cf.* De Bruijn and Ten Heuvelhof, 2008). Cooperation and networking with and among national agencies thus resulted in autonomy gains instead of losses. This leads me to the following proposition to be tested in future research:

*Proposition #8:* If a (supranational) organisation cooperates with (potential) bureaucratic contenders, taking their preferences and interests into account, this is likely to have a positive effect on the support for the organisation and, thereby, on its degree of autonomy.

The importance of networking is clearly shown by the case of EFSA in which national food safety authorities, represented in an advisory forum and not on the management board, felt left out of the agency's work, thereby decreasing the legitimacy of the agency. In its early years, EFSA focused on grounding its actions solely on the scientific findings of its 'own' experts, rather than also taking into account the science of agencies with a different regulatory philosophy (but see Shapiro, 1997; Everson, 2001).<sup>6</sup> Afraid of compromising the independent character of its scientific activities, the agency did just that by not actively liaising with national agencies (*cf.* Majone, 1997a; 1997b). The fact that many national food safety agencies were only created after the decision to create EFSA explains the agency's approach towards national agencies and the low level of trust among EFSA and several national agencies (*cf.* Krapohl, 2007b), but only to some extent.

This study demonstrates that a clear distinction has to be made between member states' politicians and their experts gathered in national agencies or government institutes. When agencies were designed as autonomous from the member states, such as in case of EFSA and the EUMC, this often seems to have been interpreted as autonomy not only from national politicians but also from national agencies and government institutes. All cases investigated show that it is of crucial importance for an agency to include its counterparts at the national level into its work, and sometimes to co-opt them in its decision-making processes as well. This is all the more important for agencies such as Europol and to a lesser extent Eurojust, whose clientele is comprised of other agencies. They tried to involve national agencies but, notably in the case of Europol, met a wall of resistance or, at least, reluctance.

Of course, the support of national agencies was heavily dependent on the effectiveness of the activities of EU agencies, or rather the reputation for effectiveness (Sapolsky, 1972; Carpenter, 2001). Agencies have to distinguish themselves from others. The EUMC and Europol, and initially also the EEA, did not deliver results, and actually even built up a reputation for ineffectiveness, for instance through the highly politicised and mediatised shelving and publication of the EUMC's anti-Semitism report and the long

delays, enormous cost overrun and fraud involved in setting up the Europol Information System. The EMEA and Eurojust, and to a lesser extent EFSA, by contrast, quickly developed a reputation for effectiveness, showing a growing number of opinions and an increasing number of coordination meetings, thus distinguishing their products and services from those of national agencies. Differentiation therefore appeared to be another effective strategy. This leads me to the following proposition to be tested in further research:

*Proposition #9:* If a (supranational) organisation develops a reputation for effectiveness and/or demonstrates its unique capacity in its early years, actors in its environment are likely to support the organisation, having a positive effect on its autonomy.

In some cases, international organisations were sources for conflict and rivalry, such as with the EUMC/FRA and Europol. The Council of Europe, in a continuous struggle with the EU over obtaining exclusivity on protecting human rights, and Interpol, which had a shaky reputation, considered these agencies a threat. The EUMC/FRA and Europol, in turn, were not able to clearly set themselves apart from these other bodies let alone demonstrate a unique capacity to monitor discrimination and coordinate police forces. The smooth cooperation between UNEP and the EEA and their common and complementary interests – joining forces in the face of uncooperative member states – shows that international organisations can also be allies for agencies. Both the EMEA and Eurojust do not have to contend with international bodies, therefore only further strengthening their position on the international scene.

Given the sheer amount of actors they interact with, agencies were often unable to deal with all these actors in the same way and at the same time. Some agencies, aware of their political role, therefore paid attention to the wishes and demands of the political actors in their environment selectively or sequentially (*cf.* Moe, 1985; 1989; Pfeffer and Salancik, 1978; Oliver, 1991b). The EEA realised that it had to differentiate among the products it delivered and services it rendered: those for the Parliament (e.g. concerned with conciseness and timeliness of reports), the Commission (e.g. concerned with quality and comprehensiveness of reports), and the member states (e.g. concerned with complementarity of reports to national reports). Having satisfied different actors in different ways, the EEA has been able to gain a level of legitimacy from these actors as well as the general public. This leads me to the following proposition to be tested in future research:

*Proposition #10:* If a (supranational) organisation attends to the wishes and demands of external actors selectively or sequentially, it is likely to gain support from a variety of actors, which has a positive effect on the organisation's autonomy.

### *Public support: serving clients and citizens?*

In addition to political and bureaucratic actors, agencies also relate to the broader public and stakeholders such as non-political or bureaucratic clientele and interest groups. Public support is likely to have a positive effect on agencies' degree of autonomy. However, I neither found evidence testifying to the need for EU agencies to mobilise public support, nor evidence on the effects of clientele and stakeholder activity on agency autonomy.

*Support from the general public* It is difficult to elaborate on the support that individual agencies derive from the public. EU-wide opinion polls such as the Eurobarometer do not ask citizens about the performance of specific EU agencies.<sup>7</sup> And if they would, it would be difficult for citizens to determine the impact of the products or services of an EU agency for their well-being – even more difficult than measuring the costs from their perspective as taxpayers.

However, this does not necessarily mean public support for EU agencies is lacking. The general functions of agencies, such as combating organised crime, protecting the environment, and ensuring food safety, are usually judged positively by the European public, which often even favours an expanded EU role as shown in Eurobarometer surveys. Moreover, individual agencies vary in their public visibility, often due to the saliency of their tasks (*cf.* Rourke, 1984; Ellison, 1995; 't Hart *et al.*, 2002; Pollitt *et al.*, 2004; Meier and Bohte, 2006), which, in turn, has an effect on the attention and support of political actors for the agency. Some agencies attracted a lot of media attention in the early years of their establishment, particularly EFSA in the wake of the BSE crisis and the dioxin scandal, and during outbreaks of contagious diseases, such as Avian Influenza and Bluetongue.

After a while, public attention for individual EU agencies usually wanes. To be sure, most agencies rarely make the front pages. And when they do, it is usually because they have been implicated in some affair or scandal, as in the EUMC and Europol cases. In contrast to the US, where agencies have a public image (be it positive or negative), most EU citizens do not know their own national agencies, let alone the European counterparts of these agencies, not even when they are located in their hometown. The argument that agencies give practical visibility to the EU in the member states can therefore be questioned: "Many agencies do not even fly the European flag outside their premises."<sup>8</sup> Seeking publicity is, almost by tradition, not something agencies in Europe do. Most EU agencies have not aspired a public role. Instead of focusing on public attention, the agencies I studied have generally concentrated on their clientele.

*Relations with clientele and other stakeholders* Agencies differ in the kind of clients they have and the extent to which they depend on these clients. The EEA, the EUMC, Europol and Eurojust serve a clientele as wide as the Community and the member states. These agencies strongly depend on their clients, mostly European and national politicians and bureaucrats. Conversely, the clients of semi-regulatory agencies – the regulated industries – rely on these agencies because, for instance, they want their medicinal products authorised or food additives allowed. That is why we see significant lobby activities organised by powerful interest groups at the EU level. For interest groups representing the regulated industries, but also for patients and consumers, there is indeed much to gain.<sup>9</sup>

There is variation between the two semi-regulatory agencies studied. An important difference between the EMEA and EFSA is that support for the EMEA is more uniform than for EFSA (*cf.* Long, 1949). Both the pharmaceutical industry and patients want new medicines to be authorised quickly, whereas food companies and environmental groups or consumer organisations often have contradictory interests when it comes to allowing, for instance cloned food products or additives on the market. EFSA's regulatory environment is thus much more conflictive than the EMEA's, which has almost a single-interest constituency.

Supposedly, interest groups exert an external check to ensure the autonomy that EU agencies wield is not excessive. I found few instances in which interest groups exposed abuses or wrongs (the media played a more significant role). This might have to do with the lack of such abuses, but could also be caused by the symbiotic relationship

between many agencies and their clientele and interest groups, which some claim is particularly the case for the EMEA. Whereas the EMEA's clientele challenged the opinions of the agency in some cases, at least some of the agency's expansion is due to support from both industry and patient groups for further centralisation of EU level tasks.

I also found no evidence that agencies deliberately played their different clients off against each other in an attempt to enhance their autonomy, as EFSA could have possibly done with industry and environmental groups or consumer organisations (Pfeffer and Salancik, 1978; Oliver, 1991b). Nor did I find evidence that agencies relied on information from non-governmental organisations to reduce their dependence on the regulated industry, or, in turn, provided information to lobby groups that could then lobby on their behalf with governmental actors (*cf.* Rourke, 1984; Carpenter, 2001). By contrast, EFSA, especially in recent years, has increasingly come under attack from both environmental groups and industry.

Apparently in order to avoid being captured by their clientele, EU semi-regulatory agencies have deliberately set out to organise interest groups (*cf.* Rourke, 1984). By including stakeholders on their management boards or by creating a stakeholder platform as EFSA has done, these agencies have given external groups, although represented by a member acting in an individual capacity or only engaging them in a consultative way, at least some influence on decisions. On paper, these semi-regulatory agencies therefore sacrificed some autonomy, which they in practice regained in the form of increased legitimacy. This leads me to the following proposition to be tested in future research:

*Proposition #11:* If a (supranational) organisation involves its clientele and interest groups in the decision-making process, this is likely to have a positive effect on its support from such actors and thus adds to the agency's autonomy.

By both formally and informally incorporating various interests in the decision-making process, agencies have been able to manipulate, to a certain extent, the demands and wishes of their clientele (Selznick, 1957; Sapolsky, 1972; Rourke, 1984). In order to develop a level of legitimacy from public actors, cooptation thus showed an effective strategy. But there is a risk, as I noted above, that semi-regulatory agencies focus on industry and non-governmental organisations only, whilst overlooking the need to also ensure the support of national agencies, which to some extent has happened in EFSA's early years.

### 13.6 The leadership of EU agencies as crucial link

Above, I explained why certain agencies end up in particular boxes of Table 13.1. I have also pointed to specific factors and conditions that affected the developmental trajectory of agencies over time. The remainder of this chapter discusses the leadership of EU agencies in their early years.

Except for the EUMC, the six agencies I studied have been led by at least two directors at the end of 2007, when the empirical research for this study was concluded. Most of these directors served one term and several of them served the maximum of two terms. Three of the directors resigned before the end of their term, but in none of the instances because of a conflict with staff or external stakeholders. Northern European countries were generally best represented among agency directors. The majority of the directors had at least some professional and educational background in the field of

activity of the agency; with some exceptions, they were career civil servants with experience in managing public organisations (for an analysis of agency directors' behaviour, see Busuioc and Groenleer, 2008).

Their leadership was found to be an important intervening factor in the extent to which EU agencies formed a distinct identity and gained a substantial level of organisational legitimacy (*cf.* Selznick, 1957; Wilson, 1978; 1989; Kimberly, 1980; Rourke, 1985; Terry, 2002). Leaders, or those individuals exercising leadership tasks, essentially serve as links between the internal and external dimensions of institutionalisation. They have the dual task of facilitating a strong organisational culture and a distinct organisational identity while managing environmental dependencies through establishing friendly relations with external actors, as will be shown in the next two sections.

### *Internal leadership*

The various agency directors influenced the development of their agency's identity in different ways. The tasks for first directors differed from those of subsequent directors. The first director, usually the first agency official appointed after the management board is installed, is involved in setting up the agency and making it operational, whereas subsequent directors enter the agency when it has already reached the consolidation phase. Given that leadership is situational, directors influencing the agency's identity formation and legitimacy acquisition in the early years, such as the EMEA's, EFSA's and the EEA's first directors, would not necessarily have been able to do so at a later stage in the agency's development, and vice-versa (*cf.* Doig and Hargrove, 1987; 1990).

Directors, particularly those in the early stages, had considerable leeway in deciding on the internal set-up of 'their' agency. Some tried to create an organisational culture by selectively recruiting staff. The hiring of talented youngsters by the EMEA's first director contributed to the innovative character of the agency. But only in a few cases did directors promote specialised training once staff was recruited. Social interaction, especially in the case of Europol and Eurojust, was hindered by the formal design of the organisation, in essence distinguishing between a supranational and an intergovernmental part. Some directors stimulated social cohesion by building restaurants and sports facilities at the agency, such as the EMEA and EEA directors, and others organised social gatherings such as national parties in order for staff to interact beyond their formal job descriptions, as was done by Europol's first director.

Directors differed in the level of detail by which they led the agency. Some, such as the first EEA director, gave their staff a lot of freedom in the execution of their tasks, whereas others, including the second EEA director and the second director of Europol, were closely involved in their agency's day-to-day operations. Some directors, occasionally pushed by the management board, spent a lot of time away from the agency resulting in insufficient attention to the needs and wishes of employees (*cf.* Barnard, 2002 [1938]). Disputes and conflicts within the agency simmered and, in the case of the early EEA and the EUMC, led to the departure of members of the directorate and the management team. Furthermore, the lack of internal control exerted by some agency directors, notably the first EUMC and first Europol directors, manifested itself in internal irregularities becoming public and seriously damaging the reputation of the organisation.

Both the EUMC and Europol director were caught between Scylla and Charybdis. The EUMC management board pushed the director to concentrate on campaigning against racism and xenophobia in Brussels and the member states, while, at the same

time, the Commission demanded that she focus the agency on collecting comparable data. Europol's director, heavily constrained by the formal limits on his remit, could often do nothing more than accept the additional tasks shoved on the agency's plate by member state politicians, while getting criticised by the members of the board for a lack of focus. Other agency directors, such as those of the EEA, instead managed to fend off opportunistic politicians, in order to keep their agency focused on what they themselves had defined as critical tasks.

Leadership tasks in EU agencies are not only exercised by the executive director. Although the executive director formally is leading the agency, leadership has also been exercised by the management board, in particular its chairperson. In agencies such as EFSA, where the board was appointed before the director, the chairperson of the board initially also assumed common functions of the director. I found that the management board in several agencies, particularly in those agencies with a board containing independent experts such as EFSA and the EUMC, actually formed part of the agency rather than being an element in its environment, which has serious consequences for the supervisory role boards can play.

### *External leadership*

Whereas in the early years the director was usually one of the few (senior) agency officials and therefore had to concentrate on both the internal organisation and external environment, after some time, the growth of most agencies enabled differentiation between hierarchical levels and the division of tasks (*cf.* Rourke, 1984; Simon, 1997). As a result, leadership tasks concerning the internal dimension could often increasingly be exercised by staff at lower levels within the organisation, spreading leadership over the agency and the agency head therefore progressively focusing on the external dimension.

Most directors sought to present their agency externally as having a unique capacity from the start (Carpenter, 2001). The EMEA's first director emphasised the speed with which agency opinions were rendered (as opposed to the slow national authorisation procedures for medicines in the past) and EFSA's first director stressed the scientific independence of the agency's work (as opposed to the previous political considerations involved in policy making on food safety issues). This made their agencies, as well as other agencies, direct contenders of national agencies. The EMEA's first director, acknowledging the complex interdependencies of EU politics, therefore engaged in active networking with bureaucratic actors at the national level, thereby significantly contributing to the effectiveness of the agency's operations (*cf.* Everson *et al.*, 1999: 15). The second director of EFSA realised that the agency had to earn its acceptance from others, in particular national authorities, and concentrated more attention on the agency's external relations.

Some agency directors possessed the political skills to campaign for the agency's objectives and tasks, putting their agency on the map in Brussels and promoting it in the member states. The EMEA director was not only quick to liaise with national agencies, but also met the high expectations set for the first years in terms of reducing the time needed for authorisation of medicinal products. For EFSA and the EEA directors, it was more difficult to produce immediate and tangible results. The EUMC director was very active at campaigning for the agency's objectives and tasks, but paid less attention to the agency's internal functioning, and therefore had nothing to show when reaching out to external actors, notably the Commission and the member states.

The first directors of EFSA, the EEA, and the EUMC had a difficult relationship with the Commission. Soon after she had been appointed, the second EEA director focused her attention on establishing closer relations with the Commission. She did so with the help of a new DG at the Commission, thereby also highlighting the importance of personal relationships in the developmental trajectories of EU agencies. Europol's first director sometimes experienced difficulty in his relations with the Council, or at least with particular member states. A 'charm offensive' aimed at the Council and those member states was started by Europol's second director, realising that without the authority brought to bear by national politicians with regard to the cooperation of their police agencies, Europol would never be able to perform its tasks.

Most agency directors did not immediately discover the need and value of lobbying with the European Parliament. In the early 1990s close relations with the EP were also not that necessary, given the limited role of the EP with regard to agencies. But with the EP's increasingly enhanced role, particularly in relation to budget and personnel, a number of agency directors realised the importance of cultivating its support. Some agency directors became well respected among MEPs, which helped them to take on the Commission. Still, MEPs are not always interested in the work of agencies and often complain about agencies' lack of political intuition. In general, contacts with the EP remain limited.

Even though the above might suggest that external leadership follows internal leadership in time, so sequentially, the internal and external tasks of leaders cannot be seen separately. In practice, both internal and external leadership was exercised concurrently in the early years of, for instance, the EMEA's existence. Agency directors simply could not afford to focus on their own organisations first or only, *de facto* isolating them from their environments in order to infuse the internal organisation with value, as EFSA to a certain extent did. They also had to position their agency towards all or most different actors (not simply one of them) in their environments from the start, demonstrating that they somehow add value to the activities of these actors (as was difficult in Europol's case).

By studying agency leadership over the years, I found that it mattered for an agency's autonomy what kind of leadership is exerted in which phase of an agency's development (*cf.* Doig and Hargrove, 1990; Terry, 2002; Kimberly, 1980; but see Collins and Porras, 2002). Arguably the type of leadership that several agency directors exerted had worked in the early years, turning their agencies from mere formal organisations with an easy acronym, physical premises, specialised staffs and technical tasks, into more or less social institutions, but would probably not have fitted the next stage in their agencies' development, that is, consolidating the distinct identity and the relations with external actors. It thus seems that the type of leadership exerted has to fit the agency's developmental stage, which leads me to the following proposition to be tested in future research:

*Proposition #12:* If a (supranational) organisation's type of leadership fits the organisation's developmental stage, the organisation is more likely to become institutionalised, and its autonomy increases.

Whereas for starting up an agency, visionary, entrepreneurial leadership is necessary, for running a well-established agency, a consolidator-type leader is needed. The EMEA's second director, for instance, mainly sustained the organisational culture already established and the external relations already built up by its predecessor (which does not mean that this is a less difficult task). Whether and to what extent a second (or



third, etc.) director can be a consolidator in terms of both the internal organisation and the external environment of course also depends on the administrative behaviour of the first director, as the case studies have shown.

### 13.7 Conclusion: between variation and similarity

EU agencies vary in terms of their creation and design, as well as development. This chapter has sought to explain this variation by applying an analytical model to study six selected agencies. The official reasons for their creation and their formal design features had a considerable impact on the agencies' evolution (see also Chapters 5 and 6). But their ability to choose among different behaviours pertaining to what their critical tasks are, how and with what resources they perform these tasks, and how they, in the performance of their tasks, relate to other actors in their environments, was clearly also a function of institutional development, or institutionalisation.

The analytical model of institutional development proved helpful to explore and explain the process by which *actual* EU agency autonomy developed. The empirical evidence found in the six case studies largely supports the theoretical argument set out in Chapter 3. Both dimensions of institutional development affect the degree of actual EU agency autonomy, which, in turn, has an effect on the formal autonomy of individual agencies. Expertise and political support were the most important determinants of the actual autonomy of the EU agencies studied, whereas cohesion and public support appeared less significant sources. Specifically, I revealed the importance of specialisation and professionalisation (when it comes to expertise), and differentiation, moderation, networking and cooptation (when it comes to support) as mechanisms driving autonomy development.

In contrast to what Meier (1980; see also Meier and Bohte, 2006: 73) found in his studies of bureaucratic power (conceptualised as resources *plus* autonomy), I find that agency leadership does have an impact on agency autonomy. The slightly divergent findings might be explained by the fact that this research looked at the early years of agencies in particular. My findings do confirm the general findings of scholars such as Selznick (1949; 1957), Wilson (1978; 1989), Rourke (1984), and more recently, Carpenter (2001) in that I also found that a combination of internal and external factors and conditions accounts for variation in the development of actual agency autonomy. No one single factor or condition is necessary or sufficient; only in combination are factors or conditions necessary and sufficient for EU agency autonomy to develop and for variation among agencies to occur (see also Chapter 4).

Notwithstanding this variation, it is striking to see the similarities in institutional development among very different agencies in terms of their legal status, mandate and tasks, formal structure and composition, and sources of funding (see also Chapter 6). For all agencies it seems important to form a distinct organisational identity and generate substantial levels of legitimacy in the multi-level and multi-actor environment of which they are part. In that sense, there is limited room to manoeuvre: agencies seem to have no choice other than to develop into internally and externally valued social entities. The value that EU agencies as such add to European governance is the central theme of the final chapter of this study.

**Notes**

<sup>1</sup> That is why it is impossible to talk about correlation, for this usually – at least in the statistical meaning of the word – concerns linear relationships.

<sup>2</sup> Therefore, if we really want to understand the institutionalisation process, intensive longitudinal research has to be conducted into the development of these organisations after their early years.

<sup>3</sup> This does not preclude these differences do not exist. But they were very difficult to gauge.

<sup>4</sup> For reasons outlined in Chapter 6, this is slowly changing, however.

<sup>5</sup> The situation is similar to when someone trying to get a job needs five years of work experience. The only way to get such experience is by having a job, but no one will hire him or her without the five years of experience. I owe this example to Maureen Donnelley.

<sup>6</sup> This may explain why in recent years the agency has attempted to increase the diversity of views in its expert panels.

<sup>7</sup> This in contrast to opinion polls in the United States, which do inquire about people's opinion about individual agencies.

<sup>8</sup> According to Kristian Schmidt, European Commission, Deputy Head of Cabinet to EU Commissioner Kallas, during a debate 'The European Agencies: Who Needs Them', organised by Friends of Europe, 29 January 2007.

<sup>9</sup> Throughout this study, minimal attention was paid to the autonomy from such interest groups and industry, however, as this only concerned two of the six cases studied in depth. The interaction between EU agencies and interest groups may be explored in further research.



# CHAPTER 14

## BEYOND EXPLORATIONS AND EXPLANATIONS: UNDERSTANDING THE AGENCIFICATION OF EUROPE

Effective global governance, it appears, is a joint effort. It requires sustained collaboration among many organisations at different levels of government rather than being merely a matter of handing over existing national responsibilities to an international body. New multi-level systems and structures of governance have to be deliberately designed and developed.

– Les Metcalfe (2000: 122)

### 14.1 Introduction: the consequences of autonomous EU agencies

This chapter goes beyond explorations and explanations for EU agency development and looks into the consequences of EU agencies' actual autonomy (or the lack thereof) for the multi-level system of European governance. As such, the chapter seeks to understand what has been the outcome of the creation of semi-autonomous agencies at the EU level on the basis of what we know about their development.<sup>1</sup>

The chapter raises the question of whether the creation of agencies, as new forms of governance, fulfilled the promises of better regulation and improved implementation within the EU, including the de-politicisation of the EU policy process and the closer involvement of interest groups and EU citizens. Or, has agencification led to an increase of Eurocratic power, to the detriment of other actors, notably the member states? Or, perhaps, has the creation of agencies added to the emergence of a European administrative space, with national and European administrations becoming more and more intermingled, and possibly even resulted in a single European administrative model? (Section 14.2)

The chapter examines the practical implications of this study. What lessons can be drawn from the development of EU agencies over the last two decades? And what implications do these lessons have for the creation and design of new agencies? Should new agencies be created at all, and if so, what should their design look like? The chapter offers suggestions to those involved in the creation and design of agencies regarding what a future approach to the governance of European agencies could look like (Section 14.3). It ends with reflections on the future of EU agencies (Section 14.4).

### 14.2 Putting the development of EU agencies into perspective

#### *From solution to problem?*

Modern government heavily relies on organisational means to implement legislation and execute policies. In western and industrialised countries, semi-autonomous public organisations are now responsible for performing a wide range of tasks such as holding prisoners, investigating accidents, regulating telecom markets, providing social bene-

fits, registering vehicles, authorising educational programmes, and supervising data protection. And when existing organisations cannot handle the problem at hand, such as with international terrorism, global warming, risky technologies, and most recently, financial supervision, government often does not hesitate to create new ones and invest them with independent powers.

This 'agency reflex' not only holds at the national level, but also, increasingly, at the European level, as the evolution of the EU and, in particular, the proliferation of EU agencies clearly shows. In less than twenty years the EU and its member states have created more than thirty EU agencies placed at arm's length of the main EU institutions and endowed with increasingly significant tasks in a wide range of policy fields.

In recent years, however, the proliferation of EU agencies has been considered a problem in itself in view of its assumed effects on the multi-level system of European governance. For example, the *ad hoc* basis on which agencies were created and the specific needs they were supposed to serve has led to a level of heterogeneity in terms of their design, which is said to hamper their practical development and make it difficult to control them. That is why in 2008 the Commission announced a 'pause for reflection' during which no new EU agencies were created and existing agencies were evaluated.

### *Agency development and the consequences for the multi-level system of European governance*

From this research, three broad sets of questions on the consequences of EU agency development for the multi-level system of EU governance have arisen that help reflect on the process of agencification. These questions were only partly addressed in this study and will have to be explored in further research. They relate to the functional, political and institutional reasons for autonomous agency creation as introduced in Chapter 3 and applied in Chapter 5 and concern: (1) agencies' *performance* given the problems they are supposed to solve, (2) their *power* vis-à-vis other actors, notably political ones, and (3) the *pressure* EU agencies exert on their environments.

#### *Performance*

Officially, agencies are created for functional reasons, that is, when the EU and its member states face problems they, for whatever reason, cannot otherwise address. The first set of questions thus asks whether the creation of agencies (or the decision to delegate) actually led to better regulation and improved implementation within the EU (*cf.* Groenleer *et al.*, 2010). Does the development of more or less autonomous EU agencies increase the EU's effectiveness in dealing with complex problems when compared to the situation before their creation as well as other forms of governance such as networks or the committee system? What are the implications of delegating powers to more or less autonomous agencies for the efficiency of EU policies and programmes? Or, put differently, in what way do EU agencies contribute to the EU's 'capacity to govern' (*cf.* Dror, 2001)?<sup>2</sup>

Although the autonomy of agencies is often assumed to be key to their effectiveness (see, for instance, Szapiro, 2005: 5), it is not at all clear whether institutionalisation and the results thereof (that is, increased actual autonomy) really improve performance (*cf.* Wendt, 2001). A meta-evaluation of the 'first pillar' or Community agencies conducted by the Commission's Directorate-General Budget on the basis of agencies' external

evaluation reports found that EU agencies generally contribute to better regulation and improved implementation in the EU.<sup>3</sup> A European Court of Auditors report titled 'EU agencies – Getting Results' concluded, however, that the reports produced by agencies to account for their work "provided little information on results apart from indicating the amount of activity", whilst noting that "[i]t is clear that measuring the performance of legal entities exercising powers that are so difficult to identify is indeed a considerable challenge".<sup>4</sup>

Devising indicators to measure a public organisation's performance not only, for instance, in terms of appropriations used or human resources deployed, but also in terms of its added value to society when it comes to dealing with complex problems, is notoriously difficult. More importantly, the question can be raised whether the effort is fruitful in the first place (*cf.* De Bruijn, 2007). The added value of EU agencies rests very much on whether they are *perceived* to fill a gap, thus whether they are considered to be necessary in the given context. In other words, their added value largely depends on whether they have developed a distinct identity and if public and, above all, political actors believe agencies possess "the capacity to carry out important tasks that would otherwise be left undone or would be done poorly."<sup>5</sup> More in general, "[t]he legitimacy of EU institutions, including regulatory agencies, rests on public and member state acceptance of the need for them" (Randall, 2006: 405).

Hence, further investigations must establish what relation – if any – exists between the process of institutionalisation, the actual autonomy of an agency as a result thereof, and its performance. Some characteristics of organisations that have undergone a process of institutionalisation relate positively to their effectiveness (*cf.* Boin, 2001). The common drive among staff members and the professional values they share may contribute to achieving organisational objectives; expertise as well as cohesion may help organisational members to deal with complexity and uncertainty in the agency's environment; routinisation may facilitate some tasks allowing organisational members to be creative and innovative with regard to other tasks; and the incremental adaptation to actors in their environment may help agencies gain support for their activities.

The process of institutionalisation – here not only seen as infusing the organisation with value (Selznick, 1957) but also as adding value to the activities of other organisations – might improve the adaptability of agencies in view of the pressures from their environments. But it does not necessarily mean that EU governance is becoming more efficient. Only in rare circumstances did the creation of EU agencies mean that existing capacities elsewhere, either at the EU or national level, were significantly downsized. For example, comitology committees continued to exist and networks of national regulators were not abolished. The consequences of agencification for the (complementary) use of other means of EU governance by the European institutions and the member states, in particular the committee system (Joerges and Neyer, 1997a; Joerges and Vos, 1999), but also European networks (Eberlein and Grande, 2005; Tarrant and Kelemen, 2007; Coen and Thatcher, 2008), are therefore difficult to determine.

Moreover, it appears – precise figures are lacking – that the creation of EU agencies has increased the total workload of the Commission as delegation, in fact, comes with new control and oversight tasks. Some in the Commission have therefore posed the question of whether it would be more efficient to 'relegate' certain tasks back to the Commission. While this question is a valid one, it ignores the fact that, in many cases, tasks entrusted upon EU agencies were novel (Eberlein and Grande, 2005; but see Majone, 1996; 1997a; Dehousse, 2002). Often, EU agencies have not simply taken over work from the Commission or the member states, but instead had to interpret their mission and role, prioritise their objectives and tasks, choose their clients or target

audience, determine their working methods, draw their own conclusions or formulate their own opinions and recommendations, allocate their budget and deploy their staff, and develop relationships with other actors.

The proliferation of EU agencies, together with other (new) forms of executive governance at the EU level, thus seems to indicate the growth of EU executive capacity (Egeberg, 2006; Egeberg and Curtin, 2008; Trondal, 2007; Trondal and Jeppesen, 2008). This growth is not merely quantitative. This study of a selected number of EU agencies has shown that at least some EU agencies add value to the activities of the EU institutions and the member states, their unique competence not (easily) being denied. Moreover, the six EU agencies that I studied have not been inhabited by 'Eurocrats' plotting against the EU and its member states to 'bureaucratise' (in the negative sense of the word) European life. When EU agencies have a supportive environment and the organisational capabilities (including leadership) necessary to make use of opportunities offered by the environment, they develop a degree of actual autonomy from the EU and its member states. Just like many agencies in the member states or in other countries.

### *Power*

Similar to national agencies, EU agencies, whilst formally 'speaking truth to power', are not free from politics. Quite the opposite. The creation of agencies reflects the political struggle among the different EU institutions. Furthermore, as soon as they are created, agencies become, using Moe's (1989: 282) words, "political actors in their own right". A second set of questions regarding the effects of more or less autonomous EU agencies therefore relates to whether the creation of agencies has resulted in an increase of Eurocratic power. What are the implications of transferring competences to agencies for the constitutional set-up of the EU and the balance of power between the Commission, the Council, the Parliament, and the member states? To what extent does the proliferation of EU agencies affect 'Euro-democracy'? And, in view of their increasing size and growing powers, how can agencies be held accountable, and what control mechanisms are available to their political principals?

From an organisational point of view, a degree of autonomy as a result of a high level of institutionalisation is usually considered desirable (*cf.* Boin, 2001; Boin and Goodin, 2007; Selznick, 1957). 'Under-institutionalisation' may make organisations vulnerable to capture by one particular actor with a specific interest in the agency's functioning. From a legal and political perspective, however, autonomy might be regarded as less desirable. Delegation to independent agencies, and the loss of democratic control this usually involves, leads to a legitimacy problem. Especially so, as institutionalisation and autonomy typically evoke images of unaccountable officials and bureaucrats wielding excessive power (think of Edgar J. Hoover in the case of the FBI) and uncontrolled and rigid organisations that are overly routinised, too much relying on past successes (consider the example of NASA), and unable to adapt to changed circumstances (*cf.* Goodin, 1996; Boin, 2001; Boin and Goodin, 2007).

Thus, further research must determine what relation exists – again, if any – between the process of institutionalisation, the actual autonomy of an agency as a result thereof, and the distribution of power. Most EU agencies, even those that have become institutionalised to a certain extent, have neither been delegated extensive autonomous powers of decision nor do wield such powers in practice. And even then, whether a degree of autonomy is 'good' or 'bad' depends not only on the value that agencies add to the activities of EU institutions and the member states but also on the values reflected and advanced by agencies. EU agencies, like other kinds of organisations, may be infused

with socially or politically inappropriate values, as Williams (2005: 96) fears. The low level of 'like-mindedness' found in most of the agencies studied for this research may, from an accountability perspective, therefore be comforting. For, a certain level of internal fragmentation as a result of diversity of view might actually mean that (individuals in) the different parts of the organisation serve as each others' watchdogs (*cf.* Lindblom, 1959).

What is more, the establishment of EU agencies and their development should not be automatically seen as signifying that the EU is increasingly adopting the qualities of a "governmental order" (Skowronek, 1982: 8; Kelemen, 2005: 173). Nor does agencification necessarily constitute the emergence of a supranational Eurocracy. EU agencies, as shown in the case studies, often do not build up significant autonomous capacities, do not centralise executive tasks at the EU level and certainly do not completely take away national governments' tasks. This makes EU agencies different from national agencies. Agencies at the national level – slightly oversimplifying the huge variety that also exists at the national level for the sake of argument – were usually created as independent administrative bodies structurally disaggregated from central ministries and insulated from political processes (OECD, 2002; Pollitt and Talbot, 2004; Pollitt *et al.*, 2004). Through their design, most EU agencies, however, are closely linked to the Commission and are heavily influenced by the member states.

The creation, design and development of EU agencies therefore does not imply the inevitable emergence of a federal Europe – a United States of Europe – similar to the US, Germany or other federal states. "Agencies contribute to more federalism," as an interviewee put it aptly, "but the process is not irreversible."<sup>6</sup> Given the power of pre-existing national agencies, EU agencies have usually been designed as network agencies and at least some have evolved to be complementary to national bureaucracies instead of a substitute to them (Kelemen, 2004: 170-172; 2005). They exist alongside traditional governmental organisations resulting in a multi-layered or multi-level system of governance (Hooghe and Marks, 2001; Egeberg and Curtin, 2008) and do not necessarily amount to the (further) 'hollowing out' of the state (*cf.* Rhodes, 1994; Milward and Provan, 2000).

On the contrary, as is argued by Schout (2008) and confirmed by this study, the development of agencies in practice often means that EU policy processes remain more or less intact, with the member states or their national authorities for instance controlling EU agencies in a way similar to how they control comitology committees or European regulatory networks (Tarrant and Kelemen, 2007). The member states often did not cede sovereignty to the supranational level. And even if they did, they only did so when they or their national authorities were assured of influence over agencies' activities through representation in their decision-making bodies (Kelemen, 2002; *cf.* Milward, 1992; Moravcsik, 1998). At the same time, national bureaucrats residing in sub-units of ministries or agencies may gain power vis-à-vis national politicians, as they often directly interact with European counterparts, bypassing the political level in the member states (Egeberg, 2006; *cf.* Slaughter, 2004).

Hence, when an agency has a degree of autonomy, this does not automatically imply that it is powerful, and certainly not that it is abusing its power. Whether these images reflect reality is an empirical question. This study has demonstrated that such images are an exaggeration when it comes to EU agencies: autonomy and accountability are not mutually exclusive but are closely connected (Majone, 1996) and, in the case of most EU agencies studied here, appear to reinforce each other. Efficient and responsive governance is possible only if EU agencies are allowed some margin of autonomy to fulfil their tasks, within a framework of control and accountability mechanisms. Such



mechanisms only seem to work when they are 'intelligent' and aimed at generating trust and not at micromanaging EU agencies' activities.<sup>7</sup> In the end, EU agencies must be free to serve the public rather than their paymasters (Rourke, 1979: 538).<sup>8</sup>

### *Pressures*

In spite of their general lack of formal power and their often politicised operations, agencies may well have an independent effect on other actors. The third set of questions therefore concerns the pressures agencies exert on their institutional environments. The proliferation of EU agencies has been furthered by the characteristics of the multi-level environment in which they came about (the changing nature of EU politics, the distinct organisation of EU governance). The question, in turn, is whether the practical experiences gained with EU agencies and their actual level of autonomy also have consequences for the emergence of a (single) European administrative space. What are the implications of the execution of tasks by EU agencies for the EU polity's administration? To what extent can we speak of an integration or even homogenisation of national administrations as a result of cooperation through and coordination by EU-level agencies?

Follow-up studies must establish what relation exists among the process of institutionalisation, the actual autonomy of an agency as a result thereof, and the influence on its institutional environment. This study's findings on the subject are mixed. An agency's influence on its environment is highly contingent on the willingness of external actors to cooperate, which in turn is affected by whether these actors are (or feel) involved in the agencies' activities. When the Commission, its DGs, national governments and particularly national agencies are not engaged in the agency's work, they might become unwilling to cooperate and the agency, even though perhaps autonomous, might languish in isolation, without having any impact.

But that EU agencies operate in complex environments, dealing with a multitude of actors operating at various levels of government, does not have to mean they are (or remain) without influence. A summary of external evaluations carried out on EU agencies noted that many of these evaluations "highlight the important role played by agencies in creating and managing networks, thus encouraging the involvement of different stakeholders and the active exchange of information."<sup>9</sup> Some EU agencies, as my research demonstrates, precisely because they are part of transnational networks of knowledge-based professionals having a shared interest in further integration, develop a degree of autonomy from political actors (*cf.* Stone Sweet *et al.*, 2001). At least, if they manage to add value to the activities of already existing institutional arrangements and organisational structures, including not only Commission DGs and national agencies but also the EU's comitology committees and previously created EU-level regulatory networks.

Indeed, supplanting (rather than supplementing) existing organisations could in the end restrict the efficiency of EU collaboration as centralised EU agencies would probably encounter difficulties in working at the national level due to their lack of local knowledge (SAFAD, 1997: 23). "Any new organisation, whatever its legal powers, has to work with other organisations in its policy domain rather than seek to supplant them. A take-over by an international organisation is neither politically feasible nor managerially effective" (Metcalf, 2000: 122; *cf.* Keohane and Nye, 2000). Indeed, centralisation might even be counter-productive in terms of advancing European regulation given that EU agencies – in marked contrast to US federal agencies – will probably never be able

to obtain sufficient resources to operate a centralised regulatory system (*cf.* Eberlein and Grande, 2005: 105; Randall, 2006: 411-412).

As new forms of European governance, EU agencies potentially play a key role in linking up different levels of government, not only establishing connections between organisations at the national and European level but also with international regimes (Jönsson, 1986; Metcalfe, 2000; Eberlein and Newman, 2008; *cf.* Aldrich and Whetten, 1981). They “may play a distinctive role in improving the coordination of the organisational networks through which European policies are managed” both upwards through their relationship with other supranational and global actors in their policy field and downwards in relation to national regulatory authorities (Everson *et al.*, 1999: 214; Flinders, 2006: 232-33; Slaughter, 2004). Instead of federalisation, the creation of most agencies thus leads to sectoral integration in Europe, among civil servants, international officials, scientists, and representatives of business and interest groups. Agencies form an alternative to both national sovereignty, which in the face of globalisation in many areas is increasingly unrealistic, and the centralisation of power in supranational organisations, which often is undesirable in view of the subsidiarity principle.

This does not mean that a single (network) model of EU governance through agencies is emerging (Olsen, 2003; Chiti, 2000; 2004; *cf.* Hofmann and Türk, 2006; Hofmann, 2008). Far from it. This study clearly shows that there is still a huge variety in design due to different traditions, cultures, systems and contexts, not only among EU agencies (as organisations) themselves, but especially among the national authorities that agencies bring together in networks causing problems with regard to cooperation (rather than cooperation being the solution).<sup>10</sup> Indeed, the cooperation challenges faced by agencies such as EFSA and Europol (as described in the respective case chapters) often merely bring to light problems with cooperation at the national level.

Moreover, ‘specialisation’ through bureaucratic EU agencies working through increasingly complex networks of organisations may result in institutional fragmentation. Agencies usually enter crowded policy sectors and dense regulatory fields, which further complicates coordination rather than solve pre-existing problems with cooperation (*cf.* Jordan and Schout, 2006; Flinders, 2006). This at least appears to be the Commission’s fear and seems to inspire many of the recent efforts to come to some kind of overarching framework for EU-level agencies.<sup>11</sup> A debate on ‘the way forward’ with agencies, however, is only sensible as long as it considers the relation between autonomy and coordination, quite similarly as the relation between autonomy and accountability, as a trade-off and not automatically as a contradiction (*cf.* Pollitt and Bouckaert, 2004: 174-175).

### **14.3 Implications for practice: from development back to design and creation**

#### *Lessons from development: towards solutions?*

Apart from one or two exceptions, most agencies have behaved responsibly, in the interest of the Union and its purposes. The existence of agencies was considered “justified by practically all the evaluations”, as shown in a 2007 ‘Summary of evaluations carried out on decentralized agencies’.<sup>12</sup> Agencies’ organisation and management have generally been evaluated as satisfactory, especially in cases where they were capable of

adapting internal structures to external developments, a finding which also emerged from the case chapters in this study.

Many of the problems with individual agencies in the past have resulted from the unfamiliarity with the agency phenomenon at the EU level, and do not necessarily point to the failure of EU agencies as such.<sup>13</sup> Over time, the relationship between agencies and their principals has evolved and the respective roles have been clarified. The Commission learned the hard way that agencies, even though autonomous, fall under its responsibility. The Parliament is becoming more and more aware of its control functions. Furthermore, the relation with clients and stakeholders has changed throughout the years. The (unrealistically) high level of expectations placed on some agencies upon their creation, especially in the wake of crises or disasters, which almost had to lead to a certain degree of disappointment among clients and stakeholders, has been modified.<sup>14</sup>

This does not mean that agencies operate without problems, and that some of these problems are not due to the way agencies are set up. A number of these problems – including the lack of strategic focus of the management board, the difficulty with priority setting through work programmes, the inflexible structure of the internal organisation, the relation with the Commission, and the limitations on mandate and tasks – may be solved through agreeing on some sort of framework for EU agency creation and design. But standardisation and uniformisation can lead to rigidity, whereas flexibility and innovation are required to resolve increasingly complex transboundary problems.

Therefore what is needed is not a comprehensive legal framework for agency creation and design or an agency-wide generic initiative for reform, but, as the Commission has recognised in its Communication *European agencies – The way forward*, “a common vision about the role and functions of [...] agencies”.<sup>15</sup> Such a common vision should be informed by what EU agencies as new forms of European governance *can* do in practice, not by what they *should* do on paper.

### *Coming full circle: maxims for agency design and creation*

Agencies can have a significant impact on the capacity to govern in the EU, if a number of conditions are met. These conditions serve as maxims underlying the efforts of agency founders, designers and reformers (*cf.* Haas, 1990: 200-208). The maxims include avoiding an overly rationalised approach to agencification, refraining from centralisation in the creation, design and development of agencies, and steering clear from hierarchical forms of accountability focused only on input and output.

*Maxim #1:* Do not try to rationalise through deliberate planning or grand design, but allow for adaptation.

EU agencies are supposedly created for functional reasons, with a specific purpose in mind. This assumes it would be clear what problems they should solve, in what way they would have to solve these problems and for whom and with whom they would have to work to solve these problems. In reality, actors rarely agree on whether there is a problem, let alone come to a similar problem definition or a shared conception of the solution, in this case the creation of an EU agency and its design. This is not necessarily problematic, and indeed a fact of political life especially at the European level, but has implications for the development of EU agencies beyond the moment of delegation.

One of the major findings of this study, then, is the predominant role that political actors play, not only in the creation and design, but also in the development of EU agencies. It usually starts with the political negotiations in the Council. Often agencies

are not created out of functional necessity, but for political or institutional reasons. The reasons underlying their creation are reflected in their design. Rather than to minimise the ability of political actors to interfere in the operations of agencies, agencies are often designed in such a way that politicians continue to play an important role in their work and one cannot really speak of de-politicisation at all.

Much of what agencies actually can do, therefore, depends on the actors charged with the operationalisation and consolidation of the agency (as an organisation), that is, the agency director and his staff, and how they relate to political actors. As an agency director, it is not enough to have substantive knowledge of the agency's field of activity. This research has shown that the director, especially in the early years of an agency, has to be both an entrepreneurial leader and a process manager. By combining these roles, the director can have a crucial impact on the agency's development. Through the appointment of the director, the agency's political principals can have a significant influence on the agency's direction as has also been shown in previous research (mostly in the US setting) (e.g. Wood and Waterman, 1991; 1994). Political principals are wise to realise this when selecting candidates and interrogating them on their vision for the agency.

Even though they do not have to be experts, agency directors need expertise to demonstrate that their agency has a unique capacity compared to other existing structures or arrangements. Indeed, it is crucial for the director of an autonomous agency that he or she can flexibly hire the people he or she needs without being hindered by formal restrictions (such as those resulting from the Commission's staff regulations). Employees skilled in building and maintaining networks with other organisations in the agency's environment are necessary. Furthermore, building up expertise does not solely mean the availability of in-house scientific or technical capacity. On the contrary, it could very well be expertise located elsewhere, especially in view of the limited financial resources generally available to agencies and the need to liaise with existing national agencies possessing critical information.

As a result of agencies' network character and their temporary staff contracts, the internal cohesion of agencies is often low. While in the short run a low level of cohesion may hamper an agency's functioning, in the long run it may add to its operations because it helps to create an EU-wide culture making national actors more willing and able to cooperate with the agency without necessarily harmonising identities (Zabusky, 1995; Trondal *et al.*, 2005). Moreover, some discussion on the agency's *raison d'être* within the agency is not necessarily bad as it may ensure the agency's responsiveness to (f)actors in its environment and enrich its decisions and policies as well as keep up energy and excitement among staff.

*Maxim #2:* Do not seek to centralise through rules and hierarchies, but organise horizontally and for cooperation.

While officially being autonomous, agencies depend on the cooperation of a wide variety of actors, notably the member states, to fulfil their tasks. They have to involve the member states in their activities, and national authorities in particular, either through making active use of operational capacity at the national level by networking, or by including national representatives in the decision-making structures of the agency, i.e. cooptation (Selznick, 1949).

The composition of the management board, for instance, has a significant effect on the agency's development. If not all actors who have a stake in the agency's critical tasks but who cannot be formally subjected to the agency's decisions or actions are included

in the board, their involvement in the agency's decision-making process has to be institutionally embedded in other ways. Where national involvement is not designed into the agency's operation, the development of agencies will be impeded by the unwillingness of national authorities to cooperate. So input and output legitimacy (or support) are related (*cf.* Majone, 1996; Joerges and Neyer, 1997a; Scharpf, 1999): actors more easily accept outputs resulting from a process in which they have been able to provide their inputs than from a process in which they have not been able to do so.

Cooperation with other organisations, operating at the international (e.g. UN specialised agencies) or European level enhances rather than diminishes the position of EU agencies, given the intermingling of multiple levels of government. There are of course clear risks of duplication and conflict, but several agencies have shown that these risks can be avoided by pursuing common yet complementary interests with other EU and international bodies, in that way also enhancing effectiveness in global governance. What is more, while from an efficiency point of view redundancies are often considered to be undesirable, a certain degree of overlap, or level of redundancy, usually increases the degree of reliability (Landau, 1969; Bendor, 1985).

It is not at all clear that the participation and involvement of a wide variety of actors in the decisions and actions of EU agencies automatically leads to outputs that are 'better' for European citizens. Indeed, much less important for EU agencies than for instance for US agencies are clientele and interest groups. This is because most EU agencies have other government bodies as their main clientele. A small but increasing number of agencies, notably the semi-regulatory ones, also serve industry or consumer groups. From the perspective of both input and output legitimacy, stakeholder participation then becomes more important. This has been an underdeveloped aspect of agency creation as of yet and deserves more attention in the future (as the Commission has realised and is apparent in its current reform efforts).

*Maxim #3:* Do not seek to control through traditional forms of accountability only, but make use of multiple accountability forums.

The network character of EU agencies has important consequences for the way they may be controlled and held accountable. The control and accountability of EU agencies needs to be based on the understanding that agencies – although more or less autonomous – are not operating in isolation but in networks of organisations. A network view of accountability might therefore be more suitable for EU agencies than a traditional hierarchical approach (*cf.* Majone, 1996: 5; Harlow and Rawlings, 2007). Such a view holds that centralising supervision and oversight into one accountability forum does not guarantee better control (*cf.* Khademian, 1996). Instead, it entails reliance on various actors for different kinds of accountability (e.g. financial, legal, administrative, and democratic) throughout the execution of the agency's critical tasks (*cf.* Bovens, 2007; Curtin, 2007; Busuioac, 2009; 2010).

Regarding their development, politicians and policymakers should take into account agency-based differences when developing strategies to hold agencies accountable for their operation and functioning. At the moment, a variety of means are available to check on agencies both *ex ante* and *ex post* (see Chapter 6 and the case chapters). It is up to politicians and policymakers to make appropriate use of these means. This also involves critically following an individual agency's functioning and operation, so exerting ongoing control, and on that basis, if necessary, suggesting improvements, whilst leaving the agency sufficient room to manoeuvre.

Hierarchical control should not be completely dismissed. While none of the currently existing agencies can formally make policy or write legislation, certain agencies do at least have some influence over policy. This does not have to be a problem from an accountability perspective, as long as politicians ultimately decide on legislation and policies (or at least have the formal power to do so), as long as parliamentarians in the end can hold an agency accountable through reporting, hearings or otherwise, and as long as clients and stakeholders are involved to a certain extent in the agency's activities and made aware of the reasons for an agency's decision and can challenge them.

Indeed, network forms of accountability – emphasising horizontal rather than vertical control – would probably function most effectively if applied in the shadow of hierarchy (Scharpf, 1997; Yatahanas, 2001; Coen and Thatcher, 2008; Héritier and Lehmkuhl, 2008; *cf.* De Bruijn and Ten Heuvelhof, 2008; Schillemans, 2008). If such a requirement is fulfilled, agencies may enrich policies on the basis of their expertise, thus contributing to improved policies and more effective EU governance, whilst also being under the continuous control of a multitude of different actors.

#### 14.4 The future of EU agencies

Agencies do not fit within the classic institutional framework of the EU. The Union's constitutional set-up, like that of other political entities, is clearly not fixed, however. Since Jean Monnet brought together a small group of officials from the six founding members of the European Coal and Steel Community, the EU has evolved into a large and complex system. This system is no longer only composed of the main EU institutions (Council, Commission, and Parliament) and the member states but increasingly also of other actors “whose interests and resources alter the political game” (Moe, 1989: 282). The proliferation of agencies at the EU level over the past two decades and the increase in their size and powers testifies to the changes to which the EU continues to be subject.

If politicians and policymakers follow the maxims outlined above, these developments do not have to constitute a danger to the institutional balance within the EU, as sometimes depicted, but may instead add to this balance (see Everson *et al.*, 1999). Agencies (if allowed some leeway to develop effective practices) may enhance the position of EU institutions in various ways by more clearly delineating their competences and carving out their roles. Nor do EU agencies pose a danger to the prerogatives of the member states, as feared by some, if at least member states' interests are somehow included in agencies' institutional designs. Whilst respecting the subsidiarity principle, agencies may then point to the responsibilities of the member states in the implementation of EU legislation and the cooperation required to enforce European policies.

The proliferation of EU agencies is certainly not a panacea for the problems the EU faces with regard to efficiency and effectiveness, accountability and control, and credibility and legitimacy. The agency option is merely complimentary to other means of EU governance, such as comitology and networks (*cf.* Tarrant and Kelemen, 2007; Thatcher and Coen, 2008). It is thus likely that agencies will continue to be created on a case-by-case basis, depending on the functional need underlying cooperation and the distribution of political power and the institutional interactions as a result thereof. There is nothing wrong with that. As long as EU agencies develop a minimal level of autonomy, not only by instilling the organisation with value but also by adding value to the activities of the EU and its member states, the ‘agencification of Europe’ will be more than just the proliferation of agencies at the EU level.

## Notes

<sup>1</sup> In terms of the model presented in Chapter 3, this chapter concerns the feedback-loop from actual agency autonomy to the context in which agencies are created and designed.

<sup>2</sup> Dror considers autonomy, subject to strict democratic oversight and the power of veto, a necessary condition for successful governance.

<sup>3</sup> Commission of the European Communities, Directorate-General Budget, *Meta-evaluation of the Community Agency system*, 15 September 2003.

<sup>4</sup> European Court of Auditors, Special Report No 5/2008 on the European Union's Agencies – Getting Results, Luxembourg: Office of the Publications, 2008, p. 5.

<sup>5</sup> In contrast to US agencies and as with other EU institutions, the operations of most EU agencies go unnoticed by the public.

<sup>6</sup> Interview #9

<sup>7</sup> But see European Court of Auditors, Special Report No 5/2008 on the European Union's Agencies – Getting Results, Luxembourg: Office of the Publications.

<sup>8</sup> Remember the slogan of the EU agencies publicity campaign: 'Whatever you do, we work for you'.

<sup>9</sup> 'Summary of evaluations carried out on decentralized agencies', version 08/10/07

<sup>10</sup> Some EU agencies have played a key role in preparing for the enlargement of the EU in 2004 and 2007 by already integration the new member states into the EU framework well before the official entry date and by offering them technical assistance.

<sup>11</sup> Commission of the European Communities (2008), *Communication from the Commission, European agencies – The way forward*, COM(2008) 135 final, Brussels, 11.3.2008; Commission seeks common approach on the future governance of European Agencies, IP/08/419, Brussels, 11/03/2008.

<sup>12</sup> Summary of evaluations carried out on decentralized agencies, version 08/10/07, pp. 4-7.

<sup>13</sup> The problems with some individual agencies and the lessons learned by the different actors involved in agency creation and design are beneficial for the entire population of EU agencies and could (depending on the application of the lessons) help avoid problems with new agencies in the future.

<sup>14</sup> Summary of evaluations carried out on decentralized agencies, version 08/10/07, p. 11.

<sup>15</sup> Commission of the European Communities (2008), *Communication from the Commission, European agencies – The way forward*, COM(2008) 135 final, Brussels, 11.3.2008; Commission seeks common approach on the future governance of European Agencies, IP/08/419, Brussels, 11/03/2008.

# APPENDIX I: AGENCIES OF THE EUROPEAN UNION

|   | <i>Community (first pillar) agencies</i>  | <i>Mandate/task</i>   | <i>Location</i>        | <i>Constituent act</i>                               |
|---|---|---|------------------------|--|
| 1 | European Centre for the Development of Vocational Training ( <b>CEDEFOP</b> )                 | Provide information on and analyses of European vocational education and training systems, policies, research and practice.                             | Thessaloniki, Greece   | Council Regulation (EEC) No 337/75, 13 February 1975 |
| 2 | European Foundation for the Improvement of Living and Working Conditions ( <b>EUROFOUND</b> ) | Provide social policy makers with information on the developments and trends in living and working conditions in Europe.                                | Dublin, Ireland        | Council Regulation (EEC) No 1365/75, 26 May 1975     |
| 3 | European Environment Agency ( <b>EEA</b> )  | Collect, prepare and disseminate information on the state and trends of the European environment.   | Copenhagen, Denmark    | Council Regulation (EEC) No 1210/90, 7 May 1990      |
| 4 | European Training Foundation ( <b>ETF</b> )   | Support the reform of vocational training in partner countries and translate EU policy into training and labour market instruments for third countries. | Turin, Italy           | Council Regulation (EEC) No 1360/90, 7 May 1990      |
| 5 | European Monitoring Centre for Drugs and Drug Addiction ( <b>EMCDDA</b> )                     | Collect and disseminate information on drugs and drug addiction in Europe.  | Lisbon, Portugal       | Council Regulation (EEC) No 302/93, 8 February 1993  |
| 6 | European Medicines Agency ( <b>EMA</b> )  | Protect public and animal health by evaluating and supervising medicinal products in Europe.  | London, United Kingdom | Council Regulation (EEC) No 2309/93, 22 July 1993    |
| 7 | Office for Harmonisation in the Internal Market ( <b>OHIM</b> )                               | Provide legal protection across all countries of the European Union by registering community trade marks and designs.                                   | Alicante, Spain        | Council Regulation (EC) No 40/94, 20 December 1993   |
| 8 | European Agency for Safety and Health at Work ( <b>EU-OSHA</b> )                              | Promote the development, analysis and dissemination of information that improves occupational safety and health in Europe.                              | Bilbao, Spain          | Council Regulation (EC) No 2062/94, 18 July 1994     |
| 9 | Community Plant Variety Office ( <b>CPVO</b> )  | Grant rights ensuring industrial property protection for eligible new plant varieties.  | Angers, France         | Council Regulation (EC) No 2100/94, 27 July 1994     |



|                          |  |  |                            |   |
|--------------------------|--|--|----------------------------|---|
| 10                       | Translation Centre for the Bodies of the European Union ( <b>CdT</b> ) | Provide translation services for other EU agencies and bodies.   | Luxembourg, Luxembourg     | Council Regulation (EC) No 2965/94, 28 November 1994        |
| 11                       | European Monitoring Centre on Racism and Xenophobia ( <b>EUMC</b> )    | Provide the EU and its member states with information and data on racism, xenophobia and anti-Semitism at the European level.                              | Vienna, Austria            | Council Regulation (EC) No 1035/97, 2 June 1997             |
| <i>Transformed into:</i> |  |  |                            |   |
|                          | European Union Agency for Fundamental Rights ( <b>EFRA</b> )           | Provide the EU and its member states with information, data and advice on issues relating to fundamental rights  |                            | Council Regulation (EC) No 168/2007, 15 February 2007       |
| 12                       | European Agency for Reconstruction ( <b>EAR</b> )                      | Manage the main EU assistance programmes in Serbia and Montenegro and the former Yugoslav Republic of Macedonia.   | Thessaloniki Greece        | Council Regulation (EC) No 2454/99, 15 November 1999        |
| 13                       | European Food Safety Authority ( <b>EFSA</b> )                         | Provide independent scientific advice on all matters with a direct or indirect impact on food safety.  | Parma, Italy               | EP and Council Regulation (EC) No 178/2002, 28 January 2002 |
| 14                       | European Maritime Safety Agency ( <b>EMSA</b> )                        | Provide technical and scientific advice to the Commission in the field of maritime safety and prevention of pollution by ships.                            | Lisbon, Portugal           | EP and Council Regulation (EC) No 1406/2002, 27 June 2002   |
| 15                       | European Aviation Safety Agency ( <b>EASA</b> )                        | Assist the EU and its member states in establishing and maintaining a high, uniform level of civil aviation safety and environmental protection in Europe. | Cologne, Germany           | EP and Council Regulation (EC) No 1592/2002, 15 July 2002   |
| 16                       | European Network and Information Security Agency ( <b>ENISA</b> )      | Assist the Community in ensuring particularly high levels of network and information security.   | Crete, Greece              | EP and Council Regulation (EC) No 460/2004, 10 March 2004   |
| 17                       | European Centre for Disease Prevention and Control ( <b>ECDC</b> )     | Identify, assess and communicate current and emerging threats to the health of European citizens from communicable diseases.                               | Solna, Sweden              | EP and Council Regulation (EC) No 8517/2004, 28 April 2004  |
| 18                       | European Railway Agency ( <b>ERA</b> )                                 | Reinforce safety and interoperability of railways in Europe.   | Lille-Valenciennes, France | EP and Council Regulation (EC) No 881/2004, 29 April 2004   |

|    |  |   |   |  |
|----|--|---|---|--|
| 19 | European GNSS Supervisory Authority ( <b>EGSA</b> )  | Manage the European satellite navigation programmes (such as Galileo and EGNOS).  | Brussels, Belgium<br>( <i>temporarily</i> ) | Council Regulation (EC) 1321/2004, 12 July 2004                |
| 20 | European Agency for the Management of Operational Cooperation at the External Borders ( <b>FRONTEX</b> ) | Assist member states in the implementation of Community legislation on the control and surveillance of the EU's external borders and coordinate operational cooperation between member states.              | Warsaw, Poland                              | Council Regulation (EC) No 2007/2004, 26 October 2004          |
| 21 | Community Fisheries Control Agency ( <b>CFCA</b> )   | Ensure effective use of EU and national means of fisheries inspection and surveillance.   | Vigo, Spain                                 | Council Regulation (EC) No 768/2005, 26 April 2005             |
| 22 | European Chemicals Agency ( <b>ECHA</b> )  | Manage the technical and scientific aspects of the EU's chemical policy (REACH) to ensure the consistency of decision making at the European level.   | Helsinki, Finland                           | EP and Council Regulation (EC) No 1907/2006, 18 December 2006. |
| 23 | European Institute for Gender Equality ( <b>EIGE</b> )   | Support the EU and its member states in the fight against discrimination based on sex and the promotion of equality between men and women, as well as raise awareness of gender equality among EU citizens. | Vilnius, Lithuania                          | EP and Council Regulation (EC) No 1922/2006, 20 December 2006  |
| 24 | Agency for the cooperation of Energy Regulator (ACER)  | Manage the European networks of transmission system operators for gas and electricity   | To be decided                               | EP and Council Regulation (EC) NO 713/2009, 14 August 2009     |
| 25 | Body of European Regulators for Electronic Communications (BEREC) (under negotiation)                    |   |   |  |
| 26 | European Asylum Support Office (proposed)  |   |   |  |

| <i>Union (second pillar) agencies</i> |   | <i>Mandate/task</i>   | <i>Location</i>            | <i>Constituent act</i>             |
|---------------------------------------|---|---|----------------------------|------------------------------------|
| 1                                     | European Institute for Security Studies (ISS)                         | Assist creation of a common European security culture and to enrich the strategic debate in the Union.  | Paris, France              | Council Joint Action, 20 July 2001 |
| 2                                     | European Union Satellite Centre (EUSC)                                | Support European Union decision making, particularly in the context of the European Security and Defence Policy (ESDP) through the collection of space related information. | Torrejón de Ardoz, Spain   | Council Joint Action, 20 July 2001 |
| 3                                     | European Defence Agency (EDA)   | Support the member states in their effort to improve European defence capabilities.   | Brussels, Belgium          | Council Joint Action, 12 July 2004 |
| <i>Union (third pillar) agencies</i>  |   | <i>Mandate/task</i>   | <i>Location</i>            | <i>Constituent act</i>             |
| 1                                     | European Police Office (Europol)                                      | Enhance police cooperation between member states.   | The Hague, The Netherlands | Europol Convention, 26 July 1995   |
| 2                                     | European Police College (CEPOL)                                       | Enhance cooperation in law-enforcement training between member states.  | Bramshill, United Kingdom  | Council Decision, 22 December 2000 |
| 3                                     | European body for the enhancement of judicial co-operation (Eurojust) | Enhance judicial cooperation between member states.   | The Hague, The Netherlands | Council Decision, 28 February 2002 |

| <i><b>Executive agencies</b></i> | <i><b>Mandate/task</b></i>  | <i><b>Location</b></i> | <i><b>Constituent act</b></i>                       |
|----------------------------------|---|------------------------|---|
| 1                                | Intelligent Energy Executive Agency, renamed Executive Agency for Competitiveness and Innovation ( <b>EACI</b> )    | Brussels, Belgium      | Commission Decision (2004/20/EC), 23 December 2003  |
| 2                                | Executive Agency for the Public Health Programme, renamed Executive Agency for Health and Consumers ( <b>EAHC</b> ) | Luxembourg, Luxembourg | Commission Decision (2004/858/EC), 15 December 2004 |
| 3                                | Education, Audiovisual and Culture Executive Agency ( <b>EACEA</b> )  | Brussels, Belgium      | Commission Decision (2005/56/EC), 14 January 2005   |
| 4                                | Trans-European Transport Network Executive Agency ( <b>TEN-T EA</b> )   | Brussels, Belgium      | Commission Decision (2007/60/EC), 26 October 2006   |
| 5                                | Research Executive Agency ( <b>REA</b> )  | Brussels, Belgium      | Commission Decision (2008/46/EC), 14 December 2007  |
| 6                                | European Research Council Executive Agency (ERC)  | Brussels, Belgium      | Commission Decision (2008/37/EC), 14 December 2007  |

| <i>Other agency-like bodies</i> |  | <i>Mandate/task</i>  | <i>Location</i>        | <i>Constituent act</i>                                 |
|---------------------------------|--|--|------------------------|--|
| 1                               | Euratom Supply Agency (ESA)  | Ensure a regular and equitable supply of nuclear fuels for Community users.  | Luxembourg, Luxembourg | Statutes of the Euratom Supply Agency, 6 November 1958 |
| 2                               | Single European Sky ATM Research (SESAR) Joint Undertaking                   | Develop the new generation European air traffic management system  | Luxembourg, Luxembourg | Council Regulation (EC) No 219/2007, 27 February 2007  |
| 3                               | European Joint Undertaking for ITER and the Development of Fusion for Energy | Provide the contribution of EURATOM to the ITER International Fusion Energy Organisation, the 'Broader Approach Activities with Japan and to prepare and coordinate the programme of activities for the construction of a demonstration fusion reactor and relation facilities | Barcelona, Spain       | Council Decision 2007/198/Euratom, 27 March 2007       |
| 4                               | European Institute of Technology (EIT)                                       | Contribute to sustainable European economic growth and competitiveness by promoting and integrating higher education, research and innovation.   | Budapest, Hungary      | Regulation (EC) No 294/2008, 11 March 2008             |

# APPENDIX II: INTERVIEW RESPONDENTS

| <i>Name</i>             | <i>Position</i>   | <i>Organisation</i>   |
|-------------------------|---|---|
| <b>EMA</b>              |   |   |
| Daniel Brasseur         | Chairman, Committee for Medicinal Products for Human Use                    | EMA   |
| Patrick Deboyser        | Commission representative in the Management Board                           | European Commission, Counsellor EC representation Bangkok<br>EMA/EFSA |
| Antoine Cuvillier       | Former EMA Directorate/EFSA Legal Affairs and HR Director                   | EMA   |
| Martin Harvey Allchurch | Head of Sector Executive Support, Directorate                               | Dutch Medicines Evaluation Board                                      |
| Pim van der Giesen      | Former CHMP member, pharmacovigilance coordinator                           | EMA   |
| Marijke Korteweg        | IQM adviser   | EMA   |
| Andreas Pott            | Head of Unit, Administration  | European Commission   |
| Fernand Sauer           | Former EMA Executive Director   | Universidad de Granada  |
| José-Luis Valverde      | Professor, Member of the Management Board                                   | Nefarma   |
| Armand Voorschuur       | Pharmaceutical Affairs  | Maastricht University   |
| Ellen Vos               | Professor   | EMA   |
| Hannes Wahlroos         | Second Chairman of the Management Board                                     | EMA   |
| Noel Wathion            | Head of Unit, Post-Authorisation of Medicines for Human Use                 | EMA   |
| <b>EFSA</b>             |   |   |
| Jan Bloemendal          | International and Institutional Affairs (I&I), Seconded National Expert VWA | EFSA  |
| Patrick Deboyser        | Commission representative in the Management Board                           | European Commission, Counsellor EC representation Bangkok<br>EMA/EFSA |
| Antoine Cuvillier       | Former EMA Directorate/EFSA Legal Affairs and HR Director                   |   |

|                         |  |  |
|-------------------------|--|--|
| Simone Gabbi            | Administrator/Legal Officer                            | European Commission/EFSA   |
| Anne-Laure Gassin       | Director of Communications                             | EFSA   |
| Herman Koëter           | Director of Science, Deputy Director                   | EFSA   |
| Djien Liem              | Head of Team, Scientific Coordinator Scient. Committee | EFSA   |
| Christine Majewski      | Director of I&I  | EFSA   |
| Carl Schlyter           | MEP  | European Parliament  |
| Stuart Slorach          | Former Chair of the Management Board                   | Swedish National Food Administration   |
| Ingela Söderlund        | I&I, Management Board                                  | EFSA   |
| Victoria Villamar Bouza | I&I, Stakeholder Forum                                 | EFSA   |
| Ellen Vos               | Professor  | Maastricht University  |
| <b>EEA</b>              |  |  |
| Mata Aravantinou        | NFP Greece   | Greek Ministry of the Environment  |
| Hans Blokland           | MEP, Vice Chairman Environment Committee               | European Parliament  |
| Philippe Bourdeau       | Member Management Board                                | Université Libre Bruxelles   |
| David Briggs            | Professor, Department of Epidemiology & Public Health  | Imperial College London  |
| Barbara Clark           | Non-member country and international cooperation       | EEA  |
| Galina Georgieva        | Group Leader, Corporate Affairs                        | EEA  |
| Palle Haastrup          | Head, Technology Assessment                            | JRC  |
| Christian Heidorn       | Unit 5 - Environment and Sustainable Development       | Eurostat   |
| Jiri Hradec             | NFP Czech Republic, Director                           | Czech Environment Agency   |
| Stefan Jensen           | Former ETC   | EEA  |
| Jock Martin             | Programme Manager                                      | EEA  |
| Jacqueline McGlade      | Executive Director                                     | EEA  |
| Gordon McInnes          | Deputy Director/Programme Manager                      | EEA  |
| Adriaan Schout          | Professor  | Clingendael Institute of International Relations/<br>Universitat Autònoma de Barcelona |
| David Stanners          | Programme Manager                                      | EEA  |
| Roel Thomas             | NFP Netherlands  | Netherlands Environment Assessment Agency (PBL)  |

|                         |   |  |
|-------------------------|---|--|
| Niels Thyssen           | Project Manager   | EEA  |
| Jan Voet                | NFP Belgium   |  |
| Peter Wicks             | Policy Officer, Relations with EEA                        | European Commission                                |
| Keimpe Wieringa         | ETC Climate Change  | Netherlands Environment Assessment Agency (PBL)    |
| Ronald Witt             | Regional Co-ordinator                                     | UNEP   |
| Kees Zoeteman           | Former Chair Management Board                             | Tilburg University                                 |
| <b>EUMC/FRA</b>         |   |  |
| Jose Alegre Seoane      | Fundamental Rights Unit, JLS                              | European Commission                                |
| Ioannis Dimitrakopoulos | Head of Unit Research and Data Collection                 | EUMC   |
| Jaap van Donselaar      | NFP Netherlands   | Leiden University/ Anne Frank Foundation           |
| Glyn Ford               | MEP   | European Parliament                                |
| Emine Kaya              | Seconded National Expert                                  | EUMC   |
| John Kellock            | Spokesman, Communication and External Relations           | EUMC   |
| Gün Kut                 | EUMC Board Member   | Council of Europe                                  |
| Birgitta Löwander       | Former staff member Unit Research and Data Collection     | EUMC   |
| Thomas Schwarz          | Unit Research and Data Collection                         | EUMC   |
| Ed van Thijn            | Former EUMC Board Member                                  |  |
| Adam Tyson              | Former EUMC Board Member                                  | European Commission                                |
| <b>Europol</b>          |   |  |
| Sjaak Bax               | Former Head Dutch Desk                                    | KLDP/DIN   |
| Monica den Boer         | Professor, Dean   | Vrije Universiteit Amsterdam, Dutch Police Academy |
| Willy Bruggeman         | Former Deputy Director Europol, Professor                 | Benelux University                                 |
| Karin Geuijen           | Assistant Professor                                       | Utrecht University                                 |
| Dick Heimans            | Former Legal Adviser Europol                              | European Commission                                |
| Jens Højbjerg           | Deputy Director, Head of Department, Corporate Governance | Europol  |
| Raymond IJsselstijn     | Analyst, SC7  | Europol  |



|                            |   |                                 |
|----------------------------|---|---------------------------------|
| Jan Janus                  | Former Board member   | Netherlands Ministry of Justice |
| Mogens Lundh               | Deputy Director, Head of Department, Serious Crime Department | Europol                         |
| Jürgen Storbeck            | Former Executive Director                                     |                                 |
| Antoinette Verlaan         | Seconded National Officer, SC5                                | KLPD                            |
| <b>Eurojust</b>            |   |                                 |
| Boudewijn de Jonge         | Dutch Desk  | Eurojust                        |
| Carla Garcia Bello         | Secretary to the College                                      | Eurojust                        |
| Maria Pia Gonzales Pereira | Assistant to the Administrative Director                      | Eurojust                        |
| Roelof-Jan Manschot        | National Member for the Netherlands and Vice-President        | Eurojust                        |
| Ernst Merz                 | Administrative Director                                       | Eurojust                        |
| Hans Nilsson               | Head of Judicial Co-operation                                 | Council Secretariat             |
| Martin Wasmeier            | Principal administrator                                       | European Commission             |
| Charles Williams           | Principal administrator                                       | European Commission             |
| Solveig Wollstad           | National Member for Sweden, Former EIJN contact               | Eurojust                        |
| <b>General</b>             |   |                                 |
| Laurens Jan Brinkhorst     | Former MEP, first rapporteur on agencies                      |                                 |
| Jutta Haug                 | MEP   | European Parliament             |
| Rainer Lau                 | Adviser   | European Commission             |
| Jan Mulder                 | MEP   | European Parliament             |
| Manuel Szapiro             | Desk Officer  | European Commission             |

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# DUTCH SUMMARY

## (NEDERLANDSE SAMENVATTING)

### *Inleiding*

De oprichting van agentschappen van de Europese Unie (EU) – vergelijkbaar met zelfstandige bestuursorganen in de Nederlandse context – geldt als een van de meest prominente institutionele innovaties op het Europese niveau van de afgelopen decennia. Vooral sinds het begin van de jaren negentig hebben de EU en haar lidstaten een groot aantal uiteenlopende (semi-)regulerende, informatieverzamelings- en coördinatie-taken neergelegd bij een groeiend aantal van deze agentschappen.

De oprichting van EU agentschappen past in de trend, zoals die zich heeft voorgedaan in de meeste westerse landen, om bepaalde taken op afstand te plaatsen van centrale overheidsinstellingen. De gedachte is dat autonome organisaties effectiever, efficiënter, flexibeler, objectiever, kundiger en, vooral ook, geloofwaardiger kunnen opereren dan de door politieke overwegingen geleide centrale overheidsinstellingen. Op nationaal niveau hebben de ervaringen met agentschappen inmiddels geleid tot discussies over (te beperkte) politieke controle en veelal geresulteerd in het aannemen van (kader)wetgeving om deze alsnog te regelen. Ook de toename van het aantal EU agentschappen en de uitbreiding van hun bevoegdheden is niet langer vanzelfsprekend. In de afgelopen jaren is de discussie over de toegevoegde waarde van agentschappen op EU niveau in alle hevigheid losgebarsten.

Deze studie beschrijft en verklaart de ontwikkeling van EU agentschappen. Daarbij wordt getracht de mechanismen te identificeren waardoor sommige agentschappen zich ontwikkelen tot relatief autonome entiteiten en vooral ook om de condities te specificeren waaronder deze mechanismen optreden. Op basis van een uitgebreid cross-case en longitudinaal onderzoek naar EU agentschappen in het algemeen en zes verschillende agentschappen in het bijzonder, laat dit boek zien hoe en waarom sommige agentschappen een duidelijke identiteit opbouwen en legitimiteit verwerven voor hun activiteiten onder politici, ambtenaren, lobbygroepen, de media en het bredere publiek, terwijl andere agentschappen dit niet doen of slechts in beperkte mate.

### *Van autonomie op papier naar autonomie in de praktijk*

Autonomie is een centraal begrip in de literatuur over organisaties, met name publieke organisaties. De juridische en politicologische literatuur schakelt autonomie vaak gelijk met discretie: organisaties hebben een zekere discretionaire bevoegdheid om besluiten te nemen of beleid te maken. Deze formele autonomie zit ingebakken in de taken en bevoegdheden die ze van hun oprichters hebben meegekregen. Autonomie in deze studie is meer dan alleen formele autonomie. Het gaat vooral om de autonomie die organisaties in de praktijk hebben en die niet direct blijkt uit de formele relatie met hun oprichters zoals die is neergelegd in hun oprichtingsdocumenten. Autonomie wordt vaak gezien als het tegenovergestelde van controle: als een organisatie veel autonomie heeft, dan is de controle beperkt en vice versa. Ook hier is het van belang een duidelijk onderscheid te maken tussen *de jure* en *de facto* autonomie en controle. *De*

*jure* autonomie kan heel wel samengaan met *de facto* controle; *de facto* autonomie met *de jure* controle. Autonomie en controle sluiten elkaar niet uit.

Autonomie, zoals gebruikt in dit onderzoek, is een multi-dimensionaal en een multi-relatieel begrip. Er kunnen vier dimensies van autonomie worden onderscheiden: autonomie met betrekking tot de juridische status van het agentschap, de financiering, het personeelsbeleid en het beleid dat een agentschap voert. Met name de laatste dimensie speelt een belangrijke rol. Immers, bij de uitvoering van haar taken blijkt pas echt in hoeverre een agentschap autonoom is. De autonomie van een organisatie komt bovendien alleen tot uiting als we die bestuderen in relatie tot andere partijen, zoals de politiek of het bedrijfsleven. In dit onderzoek richt ik me vooral op de relatie met de politiek, omdat het op afstand plaatsen van de politiek een belangrijke reden is om agentschappen in het leven te roepen.

De daadwerkelijke autonomie van een EU agentschap wordt in deze studie bijgevolg gedefinieerd als het vermogen om te kiezen tussen verschillende acties en besluiten met betrekking tot wat de kerntaken van de organisatie zijn, hoe deze worden uitgevoerd en op welke wijze de organisatie (bij het uitvoeren van haar taken) relaties onderhoudt met andere (voornamelijk politieke) actoren in haar omgeving.

### *Mogelijke verklaringen voor de ontwikkeling van autonomie in de praktijk*

Mogelijke verklaringen voor de ontwikkeling van EU agentschappen komen zowel uit de internationale betrekkingen en Europese integratie literatuur als de literatuur over (publieke) organisaties en hun management. De combinatie van deze twee literaturen is niet toevallig. In beide literaturen bestaat veel aandacht voor instituties en hun ontwikkeling. Een belangrijk kenmerk van in hoge mate geïnstitutionaliseerde systemen of organisaties, zo stellen beide literaturen, is de hoge mate van autonomie waarmee dit gepaard gaat. Op basis van de combinatie van beide literaturen verwacht ik dat de ontwikkeling van de autonomie van EU agentschappen de uitkomst is van een proces van institutionalisering, zowel op het systeem- als op het organisatieniveau.

Institutionalisering op het systeemniveau betreft de oprichting en het ontwerp van formeel autonome EU agentschappen. Ze kan het resultaat zijn van functionele 'spillovers', kan een bijproduct zijn van interinstitutionele conflicten en compromissen en/of kan een reflectie zijn van institutionele erfenissen en trends. Bij institutionalisering op het organisationele niveau gaat het enerzijds om het ontstaan van een kenmerkende organisationele identiteit die de organisatie onderscheidt van andere organisaties (waaronder hun politieke 'principalen'). Anderzijds gaat het om de vorming van een zekere mate van organisationele legitimiteit waardoor andere actoren een autonomie-uitbreiding accepteren. De institutionalisering van een organisatie kan het gevolg zijn van vier verschillende factoren: expertise, interne cohesie, politieke steun en maatschappelijk draagvlak.

Hoewel institutionaliseringsprocessen niet noodzakelijkerwijs lineair verlopen en zich niet voltrekken op een en dezelfde snelheid, betekent dit niet dat deze processen niet geleid zouden kunnen worden. Het leiderschap van een agentschap kan, vooral in de eerste jaren, op twee manieren een rol vervullen: door het managen van de afhankelijkheidsrelaties met actoren in de omgeving en het inspelen op de mogelijkheden die de omgeving biedt voor het verstevigen van de positie van het agentschap, en door het opbouwen van interne capaciteiten en het kweken van een agentschap-specifieke cultuur.

De verwachtingen op basis van de bestaande literatuur zijn geïntegreerd in een analytisch model dat het proces waardoor (supranationale) organisaties een zekere mate van autonomie ontwikkelen in beeld brengt. Het model geeft richting aan het empirisch onderzoek van deze studie.

### *De opzet van het onderzoek*

Het empirische deel van dit onderzoek bestaat uit een vergelijkende studie van EU agentschappen. De gehele populatie van EU agentschappen, op dit moment dertig in totaal, is bestudeerd voor het, in algemene termen, beschrijven en verklaren van hun oprichting en ontwerp. Vervolgens zijn drie paren van agentschappen onder de loep genomen voor het beschrijven en verklaren van hun ontwikkeling: het Europees Medicijnen Agentschap en de Europese Voedselveiligheid Autoriteit, het Europees Milieu Agentschap en het Europees Waarnemingscentrum voor Racisme en Vreemdelingenhaat (nu het Europees Bureau voor de Grondrechten), en Europol en Eurojust. Deze paren zijn geselecteerd omdat zij in grote lijnen vergelijkbaar zijn, doch verschillen voor wat betreft bepaalde condities die theoretisch van belang zijn, bijvoorbeeld de manier waarop ze gefinancierd zijn of de reikwijdte van hun mandaat.

Omdat deze studie zich richt op het identificeren van mechanismen en het specificeren van condities is de data voornamelijk verzameld middels kwalitatieve onderzoeksmethoden en -technieken. Het onderzoek richt zich niet op één bepaalde factor of conditie maar traceert het proces waardoor condities worden vertaald in uitkomsten en probeert configuraties van condities te onderscheiden die de ontwikkeling van de autonomie van EU agentschappen beïnvloeden. Daarvoor is gebruik gemaakt van een grote hoeveelheid primaire en secundaire documenten, meer dan tachtig semi-structureerde interviews met belangrijke spelers bij de oprichting, het ontwerp en vooral de ontwikkeling van EU agentschappen, en een beperkte hoeveelheid non-participatieve observatie. Hoewel de bevindingen van deze studie slechts beperkt generaliseerbaar zijn, kunnen ze wel aanleiding vormen voor verder (toetsend) onderzoek naar EU of andere agentschappen.

### *De oprichting en het ontwerp van EU agentschappen: een historisch overzicht en een formele analyse*

De oprichting van agentschappen op Europees niveau is niet nieuw, zo laat deze studie zien. De eerste agentschappen werden gecreëerd in 1975. Sindsdien zijn er twee golven van agentschapvorming geweest – aan het begin van de jaren negentig en aan het begin van deze eeuw.

De oprichting van agentschappen kan op verschillende manieren worden verklaard. Vanuit een functioneel oogpunt is de formele autonomie van een agentschap een belangrijke reden voor creatie. Voor het (toezicht op het) uitvoeren van Europees beleid is organisationele capaciteit nodig op EU niveau. Politiek gezien is de oprichting van agentschappen juist door hun onafhankelijkheid aanvaardbaar. Voor de verschillende spelers in het EU beleidsproces valt er wat te winnen met de oprichting van agentschappen omdat hun ontwerp mogelijkheden biedt tot invloedsuitoefening. Vanuit een (neo-)institutioneel perspectief bouwt de oprichting van EU agentschappen voort op reeds bestaande executieve structuren binnen de EU en past ze binnen de wereldwijde trend om dergelijke organisaties te creëren.

De redenen die ten grondslag liggen aan het besluit om bepaalde taken over te dragen of, in ieder geval, op te dragen aan EU agentschappen (sommige taken uitgevoerd door agentschappen zijn relatief nieuw), bieden een potentieel belangrijk inzicht in hun ontwerp. Omdat agentschapvorming niet alleen is ingegeven door functionele overwegingen, maar ook plaatsvindt op politieke en institutionele gronden, kan dit gevolgen hebben voor de mate van formele autonomie die agentschappen hebben meegekregen. Oftewel, de reden voor de oprichting van een agentschap is een mogelijke verklarende factor voor de mate van formele autonomie die een agentschap meekrijgt.

Uit dit onderzoek blijkt dat EU agentschappen in het algemeen geen hoge mate van formele autonomie hebben, niet vis-à-vis de Commissie, noch vis-à-vis de lidstaten. Dimensies waarop aanzienlijke variatie werd gevonden zijn de procedure voor de aanstelling van de directeur en de bronnen voor financiering, alsook de samenstelling van de management board, en het mandaat, de doelstellingen en taken van EU agentschappen. Hoewel agentschappen er op het eerste gezicht wellicht relatief hetzelfde uitzien, maakt een nadere blik duidelijk dat er grote verschillen bestaan tussen agentschappen voor wat betreft hun ontwerp.

Zowel de reden voor oprichting als hun ontwerp zijn mogelijke verklarende factoren voor de mate van daadwerkelijke autonomie die EU agentschappen ontwikkelen. Agentschappen zijn niet noodzakelijkerwijs passief. Ze kunnen zelf invloed uitoefenen op hun autonomie, althans dat is de veronderstelling van dit onderzoek. Om te zien in hoeverre deze veronderstelling overeenkomt met de werkelijkheid zijn gedetailleerde case studies gedaan naar de eerste jaren van de ontwikkeling van zes van de dertig EU agentschappen.

### *De ontwikkeling van EU agentschappen: de case studies*

Het eerste paar bestudeerde agentschappen betreft twee semi-regulerende agentschappen waarvan op basis van hun taken en bevoegdheden zou kunnen worden verwacht dat ze een relatief hoge mate van autonomie ontwikkelen (zo ze die op papier al niet hebben). Het Europees Medicijnen Agentschap (EMA) wordt in het algemeen beschouwd als een succesverhaal. Meteen na de start van het agentschap in 1995 liet het zien dat het toegevoegde waarde had voor de regulering van de Europese farmaceutische sector. Hoewel het agentschap al relatief autonoom was ten tijde van de formele oprichting, slaagde het er in haar autonomie uit te breiden. Cruciaal hierbij was, en dat klinkt wellicht paradoxaal, de coöperatieve relatie met de lidstaten en hun autoriteiten. Naast het leveren van wetenschappelijk advies binnen een relatief kort tijdsbestek en het daarmee versnellen van het beoordelingsproces van nieuwe geneesmiddelen, lijkt het erop dat juist het zich positioneren als een netwerk agentschap in plaats van het zich afzonderen van andere actoren heeft bijgedragen aan de toename van de autonomie van EMA.

Dit ligt anders voor de Europese Voedselveiligheid Autoriteit (EFSA). Als deze zou worden beoordeeld op basis van het aantal voedselcrises dat sinds de oprichting heeft plaatsgevonden, dan heeft EFSA het goed gedaan. Dat er zich geen voedselcrises hebben voorgedaan wil echter niet zeggen dat EFSA geen moeilijkheden heeft gekend in de eerste jaren. Op papier is EFSA een van de meest onafhankelijke agentschappen, maar in de praktijk is EFSA er (nog) niet in geslaagd haar autonomie substantieel uit te breiden. Integendeel, het agentschap heeft te maken gehad met een aanzienlijke mate van externe bemoeienis. Het is ironisch dat EFSA's hoge mate van formele autonomie juist ter discussie is gesteld door politieke actoren omdat het agentschap zoveel nadruk

legde op haar autonome positie. Dit was tot op zekere hoogte nodig om zich als onafhankelijk risicobeoordelingsagentschap een plaats te verwerven ten opzichte van de risicomangers (de Commissie en de lidstaten). In de laatste jaren heeft EFSA, ook gedwongen door de aanhoudende discussie over de veiligheid van genetisch gemodificeerd voedsel, zich meer integratief opgesteld ten opzichte van haar omgeving. Dit heeft vooral intern nieuwe vragen opgeroepen over de rol van het agentschap en de relatie met de Commissie.

Het tweede paar agentschappen wordt gevormd door agentschappen met een informatieverzamelingsstaak en een op papier beperkte bevoegdheid in vergelijking met bovenstaande semi-regulerende agentschappen. Het Europees Milieu Agentschap (EEA) is er door de jaren heen niettemin in geslaagd een aanzienlijke hoeveelheid autonomie in relatie tot de Commissie, de lidstaten en andere actoren te bewerkstelligen. In de eerste jaren werd het agentschap niet altijd hoog aangeslagen voor de kwaliteit van haar werk en werden soms vraagtekens geplaatst bij de relevantie ervan. Vooral de Commissie was kritisch en heeft meerdere malen getracht het agentschap in te snoeren omdat het zich teveel met beleidsadvies in plaats van informatieverzameling zou bezighouden. Maar sinds haar oprichting is de EEA uitgegroeid tot een herkenbare organisatie met een geaccepteerde positie op het Europese podium.

Dit geldt in veel mindere mate voor het Europees Waarnemingscentrum voor Racisme en Vreemdelingenhaat (EUMC). Ook dit agentschap werd opgezet als een autonome entiteit, maar de mate and reikwijdte van haar daadwerkelijke autonomie zijn beperkt gebleven. Telkens wanneer het agentschap probeerde voorbij haar formele mandaat te gaan, werd het teruggefloten door de Commissie. Voortdurend stond de identiteit van het agentschap ter discussie zowel intern als extern: moest het zich vooral richten op informatieverzameling of moest het ook campagne voeren tegen racisme en discriminatie? Hierdoor was de legitimiteit onder actoren in de omgeving beperkt en de invloed van het agentschap op het beleid van de lidstaten gering. Hoewel het EUMC na verloop van tijd haar activiteiten op de rails begon te krijgen, bleef de toegevoegde waarde van het agentschap in de oorspronkelijke vorm onduidelijk. De lidstaten waren dan ook niet bereid het agentschap van meer middelen te voorzien. Inmiddels is het agentschap, na veel discussie op zowel Europees als nationaal niveau, omgevormd tot een ander agentschap, het Europees Bureau voor de Grondrechten (FRA), dat voortbouwt op de activiteiten van het EUMC.

Het derde paar betreft twee agentschappen die zich bezighouden met het organiseren van samenwerking en het afstemmen van de activiteiten op terreinen waar de EU lidstaten nog steeds een dominante rol spelen, politie en justitie. De autonomie van de Europese politiedienst (Europol) was op papier reeds beperkt, in de praktijk werd deze nog verder ingeperkt. Hoewel de organisatie voortdurend nieuwe taken kreeg toebedeeld op het gebied van informatie-uitwisseling tussen de lidstaten, bleven de basissystemen en procedures om informatie uit te wisselen haperen.

Nationale politiediensten waren aanvankelijk niet of nauwelijks bereid tot samenwerking met een organisatie waarvan de toegevoegde waarde onduidelijk was. Hierdoor raakte Europol (verder) geïsoleerd van de lidstaten en werd het (nog) moeilijker een bijdrage te leveren aan de activiteiten van nationale politiediensten. Een vicieuze cirkel vergelijkbaar met de situatie waarin het EUMC in haar eerste jaren verkeerde. Het moet gezegd dat de autonomie van Europol in relatie tot de actoren in haar omgeving langzaam maar gestaag is toegenomen. De activiteiten van de organisatie sluiten tegenwoordig beter aan bij de activiteiten van nationale politiediensten waardoor samenwerking voor die laatste aantrekkelijker wordt en Europol beter in staat is om toegevoegde waarde te bieden.



De ontwikkeling van Eurojust en haar daadwerkelijke autonomie kende een veel hoger tempo. Reeds bij oprichting was Eurojust relatief autonoom, zowel ten opzichte van de EU instellingen als de lidstaten, en al in haar eerste jaren liet het agentschap zien dat het op effectieve wijze kon bijdragen aan de praktische samenwerking tussen de justitiële autoriteiten van de EU lidstaten. Deze autoriteiten waren door middel van het ontwerp van Eurojust nauw betrokken bij de activiteiten van het agentschap. Het ontwerp van Eurojust is daarom cruciaal voor haar ontwikkeling en heeft er tot op heden mede voor gezorgd dat voorstellen om Eurojust om te vormen tot een Europees 'Openbaar Ministerie' het niet hebben gehaald. Tegelijkertijd zorgt de hybride organisatiestructuur van het agentschap, met zowel intergouvernementele als supranationale kenmerken, ervoor dat de organisatie haar instrumentele karakter nog niet is ontstegen en dat haar autonome invloed op het beleid van de lidstaten voorsnog beperkt is gebleven.

### *Resultaten van het onderzoek: verschillen verklaard*

Het mag duidelijk zijn dat er belangrijke verschillen zijn in ontwikkeling van autonomie tussen de zes geselecteerde agentschappen. In het bovenstaande passeerden al enkele verklaringen de revue. Zoals verwacht speelden het al dan niet ontstaan van een kenmerkende organisationele identiteit en de vorming van een zekere mate van organisationele legitimiteit een belangrijke rol. Belangrijkste factoren voor de ontwikkeling van autonomie in de praktijk bleken inhoudelijke expertise en politieke steun te zijn. Deze factoren hingen bovendien nauw samen.

Agentschappen verschilden in de mate waarin ze informatie controleren. Dit had voor een deel te maken met de aard en de omvang van de functie van een agentschap en het type informatie dat agentschappen verzamelen. Semi-regulerende agentschappen zoals EMEA en EFSA hadden minder moeite met het controleren van informatie, maar ook tussen agentschappen met dezelfde functies bestaan verschillen. Een andere verklaring is gelegen in het specialiseren op een bepaalde set taken en het concentreren op het opbouwen van bepaalde vaardigheden en kennis. EUMC en Europol zijn voorbeelden van agentschappen die hier niet in slaagden.

Sommige agentschappen maakten gebruik van informatie gecontroleerd door nationale organisaties. Door hier op basis van hun specifieke expertise wat aan toe te voegen of iets mee te doen bleken agentschappen een hogere mate van autonomie te verwerven. Het EEA bijvoorbeeld aggregeerde informatie uit de lidstaten op EU niveau en Eurojust genereerde nieuwe informatie op basis van de informatie aangeleverd door nationale autoriteiten. Hoewel de dominantie van een bepaalde professie onder de medewerkers van een agentschap een belangrijke factor vormt voor de ontwikkeling van autonomie, gaat dit niet op voor bijvoorbeeld de leden van sommige raden van bestuur van agentschappen die zich juist op basis van hun inhoudelijk expertise met het werk van de desbetreffende agentschappen probeerden te bemoeien.

Bij politieke steun ging het zowel om de steun van politieke actoren als bureaucratische actoren. Sommige agentschappen zoals EMEA en Eurojust zijn sinds hun oprichting nooit ter discussie gesteld; de toegevoegde waarde van anderen zoals het EUMC en Europol is voortdurend onderwerp geweest van debat. Het hielp agentschappen om steun te verwerven als ze duidelijke (lees: meetbare) indicatoren hadden voor hun prestaties, zoals opinies, aanbevelingen of coördinatiebijeenkomsten. Het hebben van dergelijke indicatoren hing sterk samen met het type taken dat agentschappen hebben.

Een andere factor betreft de mate waarin agentschappen afwijken van bestaande institutionele arrangementen en de acceptatie van dergelijke arrangementen. Afwijkende agentschappen zoals EUMC hadden het hierdoor moeilijk. Zeker als ook hun relatie

met hun belangrijkste politieke principalen moeizaam verliep. Agentschappen die geforceerd hun autonomie trachtten te demonstreren, zoals EEA en EFSA, isoleerden zich daarmee van hun omgeving. Andere agentschappen, met name EMEA, maar ook Eurojust en EEA, volgden een tweetal, aan elkaar gerelateerde strategieën teneinde een zekere mate van steun en daarmee autonomie te verwerven: ze netwerkten met andere organisaties, terwijl ze zich ook onderscheidden van dergelijke organisaties. Dat laatste deden ze vooral door het opbouwen van een reputatie voor effectiviteit.

Leiderschap bleek een belangrijke invloed op de ontwikkeling van een agentschap te hebben, vooral in de allereerste jaren. Leiders stonden dan voor de moeilijke taak zich parallel te richten op zowel de interne als de externe organisatie. Na verloop van tijd, en met de groei van hun agentschappen, richtten de meeste directeuren zich op de omgeving. Het is niet gezegd dat directeuren die met succes een agentschap runden in het allereerste begin dat ook nog deden na verloop van tijd. Oftewel, het type leiderschap moest passen bij de specifieke tijdsfase in de ontwikkeling van een agentschap. Voor een startend agentschap bleek visionair, ondernemend leiderschap nodig, terwijl een al iets meer gesettled agentschap beter draaide onder consoliderend leiderschap.

Ik concludeer dat zowel interne als externe factoren de variatie in de ontwikkeling van de autonomie van EU agentschappen verklaren. Niet één factor is noodzakelijk of voldoende; slechts combinaties van factoren zijn individueel noodzakelijk en samen voldoende. In dat opzicht verschillen EU agentschappen niet van nationale agentschappen en van publieke organisaties in het algemeen.

### *Voorbij verklaringen: de gevolgen van de ontwikkeling van autonomie*

Verklaringen voor de ontwikkeling van autonomie zijn relevant voor het bevestigen en verfijnen van de theorie, maar wat maakt ze interessant voor de praktijk van agentschappen? Er kan een analytisch onderscheid worden gemaakt tussen drie verschillende gevolgen: die voor het oplossen van problemen met implementatie en regulering, die voor de machtsbalans tussen Europese actoren onderling en tussen Europese en nationale actoren, en die voor de integratie en harmonisering van administratieve systemen in Europa.

De eerste vraag die gesteld kan worden is of min of meer autonome agentschappen daadwerkelijk hebben bijgedragen aan het oplossen van problemen of dat hun oprichting uitsluitend heeft geleid tot een extra bureaucratische laag, bovenop reeds bestaande nationale en Europese organisaties. EU agentschappen, zo blijkt uit eerder onderzoek en uit dit onderzoek, dragen in het algemeen bij aan het oplossen van complexe, grensoverschrijdende problemen zoals milieuvervuiling en criminaliteit. Hoewel er vooralsnog weinig informatie beschikbaar is over de effectiviteit van agentschappen in vergelijkend perspectief, kan wel worden opgemerkt dat er aanzienlijke verschillen zijn tussen individuele agentschappen waar het gaat om hun reputatie voor effectiviteit. Uit efficiency oogpunt is het daarnaast van belang te constateren dat veel van de taken die zijn opgedragen aan EU agentschappen relatief nieuw zijn. De oprichting van EU agentschappen betekent daarom in de praktijk niet dat nationale autoriteiten of de Commissie minder te doen krijgen, maar dat de uitvoerende macht op EU niveau zich uitbreidt, in aanvulling op reeds bestaande instituties.

De tweede vraag is hieraan gerelateerd: heeft de ontwikkeling van EU agentschappen bijgedragen aan het ontstaan van een supranationale 'Eurocratie' of heeft deze ontwikkeling in werkelijkheid een re-nationalisering tot gevolg van eerder door de lidstaten naar het Europese niveau gedelegeerde taken en bevoegdheden? Oftewel, wie

wint en wie verliest door de komst van EU agentschappen? Deze studie heeft laten zien dat de politieke strijd, waarvan zowel de oprichting als het ontwerp van EU agentschappen het gevolg zijn, voortduurt tijdens de ontwikkeling van EU agentschappen en dat EU agentschappen zelf ook deel uitmaken van deze strijd.

Dat agentschappen politieke actoren zijn, betekent echter niet meteen dat ze ongebreidelde macht hebben en zeker niet dat ze daarvan op een verkeerde manier gebruik maken. EU agentschappen zijn en blijven sterk afhankelijk van de lidstaten en de Commissie, en verwerven in de praktijk vooral autonomie door samen te werken in netwerken van nationale actoren. Zo ontstaat een gelaagd overheidssysteem dat niet noodzakelijkerwijs leidt tot het uithollen van de macht van de lidstaten en hun autoriteiten noch van de macht van de Commissie. Integendeel, de machtsverdeling in EU beleidsprocessen blijft vaak ongewijzigd ten opzichte van de situatie voorafgaand aan de oprichting van agentschappen.

Tot slot kan de vraag worden gesteld of EU agentschappen door hun aanwezigheid hebben gezorgd voor verdere administratieve integratie in Europa, of dat door hun toedoen het toch al gefragmenteerde institutionele speelveld nog verder is gedesintegreerd. Uit mijn onderzoek blijkt dat min of meer autonome EU agentschappen een belangrijke rol spelen in het met elkaar verbinden van verschillende overheidsniveaus. Ze vormen een alternatief voor nationale soevereiniteit, die met het oog op complexe, grensoverschrijdende problemen in toenemende mate ontoereikend is, en voor centralisering op EU niveau, hetgeen gegeven de reeds bestaande capaciteiten op nationaal niveau vaak onwenselijk is. Op basis van samenwerking in netwerken dragen ze bij aan een zachte vorm van harmonisering middels leereffecten.

Tegelijkertijd is er nog steeds sprake van een grote verscheidenheid aan tradities, culturen, systemen, en structuren die het opereren van EU agentschappen moeilijk maakt en in sommige gevallen door het optreden van EU agentschappen zelfs wordt uitvergroet. Dus in plaats van een federalisering van het systeem voltrekt zich op dit moment vooral een proces van sectorale integratie, tussen verschillende actoren op meerdere overheidsniveaus maar op één bepaald beleidsterrein. Dit resulteert vervolgens weer in een uitdaging voor coördinatie tussen actoren actief op deze en andere beleidsterreinen, inclusief EU agentschappen.

### *Praktische implicaties van dit onderzoek*

Dit onderzoek is er niet op gericht een oordeel te geven over de oprichting, het ontwerp en de ontwikkeling van EU agentschappen. Er is vooral getracht een beeld te schetsen van de processen van (de-)institutionalisering en deze te verklaren. In tegenstelling tot wat vaak wordt beweerd over agentschappen, en EU agentschappen in het bijzonder, zijn deze er niet op uit samen te spannen tegen de politiek of tegen Europese burgers teneinde de samenleving te bureaucratiseren. In mijn onderzoek ben ik hier in ieder geval geen voorbeelden van tegengekomen.

Integendeel, de meeste agentschappen doen een poging op basis van hun autonomie uit de traditionele (bureaucratische) kaders te breken om zo een innovatieve bijdrage te kunnen leveren aan het oplossen van complexe problemen die de landsgrenzen overstijgen. Dat niet alle agentschappen daar in slagen, betekent niet dat de aandacht daarom vooral moet zijn op het versterken van hun democratische controle en daarmee het inperken van hun autonomie. Waar agentschappen er niet in slagen toegevoegde waarde te bieden, moet, zo laat mijn onderzoek zien, in ieder geval ook (zo niet vooral ook) aandacht zijn voor de institutionalisering van EU agentschappen. Dit

betekent dat moet worden gekeken naar de mate waarin agentschappen zich onderscheiden op basis van hun inhoudelijke expertise en waarin ze steun genieten van politieke en bureaucratische actoren.

EU agentschappen zien zich vooral in hun eerste jaren geplaagd voor enorme uitdagingen in relatie tot het vinden van personeel en financiering, het handen en voeten geven aan hun taken en bevoegdheden, het organiseren en structureren van bestuur en management en het aangaan van samenwerkingsverbanden met reeds bestaande organisaties. Dit onderzoek heeft dan ook belangrijke praktische implicaties voor hen die betrokken zijn bij de oprichting en het ontwerp van nieuwe agentschappen. Wat volgt is een aantal suggesties voor de oprichting, het ontwerp en de ontwikkeling van EU agentschappen.

Agentschappen kunnen een belangrijke impact hebben op de bestuurskracht van de EU, en daarmee op het oplossen van complexe, grensoverschrijdende problemen, mits is voldaan aan een aantal basiscondities. Deze basiscondities dienen als stelregels voor degenen die betrokken zijn bij de oprichting, het ontwerp en de ontwikkeling van EU agentschappen:

- *Probeer niet te rationaliseren door middel van doelbewuste planning of grand design, maar laat adaptatie toe.* Concreet betekent dit dat, omdat veel van wat agentschappen kunnen bewerkstelligen afhangt van hoe hun leiding en staf in de praktijk vorm geven aan het agentschap, het type directeur dat wordt aangesteld moet passen bij de ontwikkelingsfase waarin het agentschap verkeert. Voor wat betreft de staf geldt dat zij niet alleen over inhoudelijke expertise moeten beschikken, maar ook over de competentie om netwerken te bouwen en te onderhouden.
- *Probeer niet te centraliseren door middel van regels of hiërarchieën, maar organiseer horizontaal en met het oog op samenwerking.* Concreet betekent dit dat, hoewel leiding en staf primair vorm geven aan het agentschap in de praktijk, andere actoren betrokken moeten worden in de besluitvormingsprocessen van het agentschap. Anders zullen deze actoren de output van het agentschap niet accepteren.
- *Probeer niet te controleren door middel van traditionele vormen van verantwoording alleen, maar maak gebruik van meerdere verantwoordingsfora.* Concreet betekent dit dat verantwoording van leiding en staf jegens deze actoren plaats moet vinden op verschillende manieren en op verschillende momenten, inclusief achteraf en onder de dreiging van hiërarchische interventie, terwijl leiding en staf in de praktijk vrij worden gelaten om te innoveren.

EU agentschappen zijn geen panacee voor alle problemen waarmee de EU (en daarmee ook haar lidstaten) kampt; de agentschap-optie is 'slechts' complementair aan andere vormen van governance zoals comitologie comités of netwerken. De optie kan daarom het beste worden gebruikt op een case-by-case basis na een afweging op basis van functionele gronden. Het valt echter te verwachten dat politieke belangen een belangrijk rol zullen blijven spelen bij de oprichting en het ontwerp van agentschappen. Dit hoeft geen probleem te zijn als agentschappen een minimale hoeveelheid autonomie kunnen ontwikkelen van de EU instituties en de lidstaten. Want alleen dan kunnen ze een bijdrage leveren aan het oplossen van complexe, grensoverschrijdende problemen en is de 'agentificering' van Europa meer dan alleen een vermenigvuldiging van EU agentschappen.



# CURRICULUM VITAE

Martijn Groenleer was born on 14 January 1978 in Boskoop (The Netherlands). He completed secondary school (Gymnasium) at the Groene Hart Lyceum in Alphen aan den Rijn in 1996. He subsequently studied public administration at Leiden University. During his studies Martijn was a research assistant at the Crisis Research Center and an editorial assistant for the *Journal of Contingencies and Crisis Management*. He did an internship with the United Nations' International Criminal Tribunal for Rwanda in Arusha (Tanzania). After his return, Martijn studied a semester at the Institut d'Etudes Sciences Politiques in Paris (France). In 2002 and 2003 he worked as a policy adviser with the Netherlands Ministry of Foreign Affairs where he was a member of the Task Force responsible for the coordination of the establishment of the International Criminal Court (ICC). He completed his master in 2003.

From 2004 to 2007 Martijn was a Ph.D. fellow at Leiden University's Department of Public Administration. During the winter of 2004/2005 he was a visiting researcher at the Swedish National Defence College and the Swedish Institute of International Affairs in Stockholm. Martijn published in the *Journal of Common Market Studies*, the *Journal of European Integration*, the *International Journal of Emergency Management* and the *Journal of European Public Policy*. In 2008 he was awarded the third prize of the Montesquieu Institute's Europe Awards for an article co-authored with Louise van Schaik on the EU's international actorness in the cases of the ICC and the Kyoto Protocol. Together with Madalina Busuioc he also in 2008 was awarded a grant of the Netherlands Organisation for Scientific Research (NWO) for a study of the administrative behaviour of EU agency heads within the framework of the 'Contested Democracy' research programme.

Since 2007 Martijn works at the Faculty of Technology, Policy and Management, Delft University of Technology, where he currently holds a position as Assistant Professor.







