Common Market Law Review **46**: 1395–1442, 2009.

AN IMPORTANT PART OF THE EU'S INSTITUTIONAL MACHINERY: FEATURES, PROBLEMS AND PERSPECTIVES OF EUROPEAN AGENCIES

EDOARDO CHITI*

1. Introduction

In a communication in March 2008, the European Commission called for "a genuine inter-institutional dialogue on a vision for European agencies" and for "a political assessment" of their experience;[1] this was in connection with the eighteenth birthday of the agencies.[2] In addition to being the expression of an obvious need to adapt European agencies to the changing exigencies of the European Union, such a call also suggests that the purpose and function of European agencies are not institutionally clear. European agencies represent "an important part of the EU's institutional machinery". So far, however, their establishment "has not been accompanied by an overall vision of the place of agencies in the Union" and "the lack of such a global vision has made it more difficult for agencies to work effectively and to deliver for the EU as a whole".[3]

This paper aims to contribute to the discussion on the overall assessment of European agencies and their possible developments. Three main questions will be tackled: (i) what are the European agencies' distinguishing features, as have emerged and consolidated in the almost two decades long process of agencification in the EU legal order? (ii) how can such features be assessed and what problems do they raise? (iii) what perspectives can be envisaged in the development of the agencification process?

The first two questions will be discussed in sections 2 to 7. In each section the European agencies' distinguishing features and the problems that they raise will be considered by focusing on one of the main aspects in which the

* Viterbo, La Tuscia. This essay is the result of a research sponsored by the European Central Bank (ECB) under the Legal Research Programme. The views expressed are solely those of the author and not of the ECB.

1. COM(2008)135 final, *The European Agencies – The Way Forward.*

2. Leaving aside the European Centre for the Development of Vocational Training and the European Foundation for the Improvement of Living and Working Conditions, set up in 1975, the origin of the process of establishment of common administrative systems by sector coordinated by European agencies may be traced back to the early 1990s.

3. Ibid., 2.

agencification process can be analysed: the organizational architecture of European agencies (2); the powers conferred on them (3); the relationships between European agencies and national administrations (4); the "global dimension" of the administrative networks coordinated by European agencies (5); the mechanisms for controlling European agencies (6); the legal limits of the establishment of new European agencies (7). The final section of the paper will be dedicated to the third question, namely outlining the possible perspectives of the agencification process in the EU legal order (8).

2. The European agencies' organizational architecture

Despite the many differences between the various establishing regulations, the waves of the agencification process have consolidated a rather uniform organizational framework. European agencies have been characterized under two main profiles, concerning the relationships with the Commission and the national administrations.

First, European agencies have been designed as bodies aimed at establishing and managing a plurality of cooperative relationships involving both the Commission and the Member States' administrations. Such relationships take place within the context of the main internal collegiate offices of European agencies. In particular, European agencies, which are always granted legal personality, are governed by a management board responsible for ensuring that they perform the tasks set out in the establishing regulation, and usually composed of one representative of each Member State and one or two representatives of the Commission. In addition to this, their executive boards, where envisaged, are made up of a limited number of members of the management board and one representative of the Commission.[4] The situation is slightly different in the case of the scientific collegiate bodies provided for in certain European agencies and instrumental for allowing discussion among experts on specific technical matters, such as, for example, the European Centre for Disease Prevention and Control, the European Environment Agency and the European Monitoring Centre for Drugs and Drug Addiction.[5] While, analogously to

4. See e.g. Art. 13 of Council Regulation 168/2007 of 15 Feb. 2007 establishing a European Union Agency for Fundamental Rights, O.J. 2007, L 53/1. See generally von Bogdandy and von Bernsdorff, "The EU Fundamental Rights Agency within the European and international human rights architecture: The legal framework and some unsettled issues in a new field of administrative law" 46 CML Rev. 1035–1068.

5. See, respectively, Art. 18 of Regulation 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for Disease Prevention and Control, O.J. 2004, L 142/1; Art. 10 of Council Regulation 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and

powers by a European institution to an outside body in the same sense as in the *Meroni* case law. In that case, delegation concerned powers clearly falling within the scope of powers of the Commission. In the case of European agencies, a more complex legal phenomenon takes place: the powers which are delegated are sometimes "implied powers"; and it is not always clear that such powers pertain to a field of action falling within the EU competences.[78]

Secondly, even admitting that the delegation of powers framework developed in *Meroni* applies as such to the agencification process, the current interpretation of the limits of delegation of powers seems to misunderstand the principle of institutional balance which represents the essential *ratio* of the *Meroni* judgment. Referred to in *Meroni* as a limit to the modification of the institutional framework provided by the Treaty, in fact, the principle of institutional balance has been subject to a substantive reinterpretation by the Court. In a complex jurisprudence, the Court has redefined the nature and content of the principle of institutional balance, replacing the original character as a static principle, with the features typical of a criterion of relationship and encouraging the institutional inventiveness of Community authorities.[79]

In this respect, it is worth recalling the arguments expressed by the ECJ with reference to conflicts between the various European institutions, composed in the light of the "institutional balance established by the Treaties".[80] On such occasions, the Court has not worked out a stable structure of relationships between the institutions and a set of principles regulating the reciprocal duties of European Parliament, Commission and Council as though set in stone. Even if contributing to define the position and the role of the various institutions, in particular of the European Parliament, the Court of Justice has preferred a case by case approach so as to evaluate the practices of one institution *vis-à-vis* the position of the others. The leading criterion was identified in the respect of the

78. See e.g. the observations of the first Director of the European Monitoring Centre for Drugs and Drug Addiction, who states that "[l]'Observatoire des drogues a été créé dans une situation de non-compétence communautaire et j'oserais dire, pour simplifier, que la création de l'Observatoire, c'est précisement, l'émergence d'une compétence communautaire, dans le domanie des drogues": see Estievenart, "L'Observatoire européen des drogues et des toxicomanies" in Kreher (Ed.), *The EC Agencies between Community Institutions and Constituents: Autonomy, Control and Accountability* (European University Institute, RSC, 1998), pp. 69–71, at p. 70.

79. In general terms, Jacqué, "Cours général de droit communautaire" in *Collected Courses of the Academy of European Law* (Dordrecht, 1990), vol. I, pp. 237–359.

80. See Bieber, "The settlement of institutional conflicts on the basis of Article 4 of the EEC Treaty", 21 CML Rev. (1984), 505–523, who criticizes the "empty formula" of the institutional balance and suggests alternative solutions for the composition of the institutional controversies within the Community legal order; see also Guillermin, "Le principe de l'équilibre institutionnel dans la jurisprudence de la Cour de Justice des Communautés européennes", (1992) *Journal du droit international*, 319–346.

institutional balance, meaning a principle requiring that "each of the institutions must exercise its powers with due regard for the powers of the other institutions" and that "it should be possible to penalize any breach of that rule which may occur".[81]

It is not, therefore, a matter of exactly defining the role of each institution, but rather of assessing, in the individual cases, whether the inventiveness of a Community authority correctly takes account the role of the others, examining the effects of its actions in the sphere of the public powers sharing competences concerning the Community functions. Such an orientation has allowed the European Court of Justice, on the one hand, not to inhibit or limit the creation of new institutional practices by the public Community powers, even when this involves setting up new bodies, and, on the other hand, to place this "creative process" in the context of an interinstitutional dialogue aimed at maintaining permanent relations between the various authorities. Examples of the implications of this approach include the case law on the phenomenon of comitology.

In the light of this evolution, one may really wonder whether the principle of institutional balance does really exclude the setting up of bodies provided with powers involving a real margin of discretion. The principle of institutional balance is and will continue to be the key to define European agencies' features and powers. Yet, does the exigency that they do not alter the general balance of the institutions established by the Treaty actually imply that European agencies must be granted non-discretionary powers only? Or is it not rather the case that the rigid, *Meroni* based, interpretation of the legal principle of institutional balance hides a political preference of the Commission? If so, why not justify such (legitimate) preference on political grounds?

8. Perspectives

The previous paragraphs presented a reconstruction of the European agencies' distinguishing features as they have emerged and consolidated in the nineteen year long process of agencification in the EU legal order, as well as a discussion of the main problems that such features raise. Before looking to the future, it is useful to summarize the main distinguishing features.

81. See, in particular, Case C-70/88, *European Parliament* v. *Council*, [1990] ECR I-2024, para 22 For a review of the traditional case law through which the Court has developed the "institutional position" of the European Parliament, see, in particular, Bradley, "Maintaining the balance: the role of the Court of Justice in defining the institutional position of the European Parliament", 24 CML Rev. (1987), 41–64.

Firstly, European agencies have developed as bodies aimed at institutionalizing a plurality of cooperative relationships involving the Commission and Member States' administrations, and enjoying a certain degree of autonomy from the Commission, but not fully insulated from its influence.

Secondly, the various waves of the agencification process have consolidated the tendency to grant European agencies administrative powers which are mainly instrumental to the exercise of final powers conferred on other European and national authorities, although the distinction between instrumental and final powers tends to blur in practice and the relevance of European agencies' tasks should not be underestimated.

Thirdly, European agencies have been designed as co-ordinators of sectoral administrative systems, composed of a plurality of national, mixed and European bodies. In order to make those bodies jointly responsible for the implementation of the relevant EU regimes, certain specific legal techniques have been gradually laid down, which affect Member States' administrations in a variety of ways. In this sense, agencification has consolidated as a process directly and indirectly influencing the structure and functioning of national administrative systems, instead of taking place at the Community level only.

Fourthly, the administrative networks coordinated by European agencies have developed increasing relationships with international regulatory regimes. Such relationships usually have a "horizontal" character; they aim to make more effective both the implementation of EU regulation by the European sectoral administration and the action of the relevant global regimes. This reflects the growing web of interconnections among the various actors in the global legal space and their tendency to cooperate and integrate within the context of wider organizations, polycentric yet interconnected.

Fifthly, a number of instruments have been established so as to control European agencies. The actual combination of these instruments is a matter of pragmatism and adaptation to the functional needs of the various agencies, varying from case to case according to the type of powers granted to the agency. The administrative rule of law and judicial review are prominent where European agencies are granted final administrative powers, while institutional control, internal and external to the sectoral network, becomes more important where European agencies are granted instrumental powers.

Finally, in designing the features and tasks of agencies, the Community legislature has considered itself bound by the legal constraints defined by the *Meroni* doctrine. European agencies may be set up only provided that this does not imply any delegation of powers involving a real margin of discretion.

Each of these features raises specific problems. Thus, the organizational architecture of European agencies seems at times to be excessively baroque and risks being too permeable to private parties.

As for the powers granted to European agencies, the most sensitive issue is that of guarantees, as the strengthening of European agencies' administrative powers has not been adequately accompanied by an expansion and reinforcement of the procedural and judicial rights of affected private parties.

Even the involvement of national administrations in the sectoral European systems coordinated by European agencies presents some shadows. Although Member States' administrations tend to benefit from and positively respond to their aggregation in sectoral European systems, at least three problems linked to such participation emerge. Modification and adjustment of national administrations in function of the exigencies of the European common administrative systems are not always appropriate. It is not demonstrated that administrative competition among national authorities induces the latter to modify their practice in relation to the mobility of the regulatees. And national administrative systems have just begun to tackle the centrifugal tendencies connected to the development of European common administrative systems.

As regards the global dimension of the networks coordinated by European agencies, it is not always clear whether their interaction with the relevant global regulatory regimes determines a process of mutual reinforcement or hides "strategic games" and latent conflicts. Nor is it clear what the boundaries are, beyond which the international cooperation of European agencies becomes unlawful.

Moreover, if several instruments have been made operational to guarantee that European agencies are under control, the link between control instruments and European agencies' functional needs is less certain than one might assume. The choice to limit or to exclude the administrative rule of law and legality review over the action of several European agencies is based on the assumption that the exercise of their instrumental administrative powers cannot directly affect an individual position. But that assumption is no longer convincing, insofar as the distinction between instrumental and final powers tends to blur. And the lack of administrative rule of law principles and judicial review may be seen as a genuine lacuna in the European agencies' legal framework.

A last issue concerns the legal constraints governing the establishment of European agencies. There is no doubt that the principle of institutional balance provides the essential criterion to define European agencies' features and powers. It is much less certain that such principle is to be interpreted as excluding the setting up of bodies provided with powers involving a real margin of discretion. Arguably, the rigid interpretation of the legal principle of institutional balance endorsed by the Commission reflects more a political preference than a fully acceptable legal interpretation of the ECJ's case law.

We now turn to the perspectives of the agencification process.

Building upon current institutional debates and recent reform processes, two main possible lines of development are discussed: first, a substantive

complication of the model, due to the gradual emergence, next to the European agencies of the type consolidated so far, of a "new type" of European agency, genuinely independent *vis-à-vis* the market and EU political institutions, including the Commission (8.1); second, the expansion of agencification beyond the Commission's sphere of influence and the establishment of European agencies serving European bodies other than the Commission (8.2).

The two developments, as it will become clear from the following analysis, are qualitatively very different one from the other. This does not mean that they are reciprocally alternative and that they cannot consolidate in parallel.

8.1. *The complication of the model: Towards a new type of European agency?*

The development of a "new type" of European agency, very different from the model consolidated so far, is suggested by some recent reforms and institutional debates.

An example is provided by the ongoing discussion on the new architecture of financial supervision.

As it is well known, the de Larosière Group, on the basis of a mandate conferred by the Commission within the context of the financial crisis, presented in February 2009 a report containing a number of proposals on the future of European financial regulation and supervision.[82] In line with the overall vision of the report, the Commission set out in a communication the basic architecture for a new European financial supervisory framework.[83] On 9 June 2009, the Economic and Financial Affairs Council agreed with the objectives and structure laid down in the Commission Communication, making a number of adjustments.[84] The mid-June Brussels European Council substantially endorsed the regulatory framework proposed by the Commission, and invited the political institutions to adopt the legislative proposals swiftly, so the new framework for EU supervision is fully in place in the course of 2010.[85]

As for the institutional architecture for supervision, the report suggests a complex reform, based on a (tentative) distinction between macro and micro supervision.

Micro-supervision should be conferred on a new European System of Financial Supervisors (ESFS), an administrative network independent of the politi-

82. The High-Level Group on Financial Supervision in the EU, *Report*, 25 Feb. 2009, is available at ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

83. COM(2009)252.

84. See Council of the European Union, 10737/09 (Presse 168).

85. See the Presidency Conclusions of the Brussels European Council, 18–19 June 2009, § 19 et seq.

cal authorities and composed of the existing national supervisors, three new European authorities replacing CEBS, CEIOPS and the Committee of European Securities Regulators (CESR), and a number of colleges of supervisors. In particular, the three European authorities (the European Banking Authority – EBA, the European Insurance and Occupational Pensions Authority- EIOPA, and the European Securities and Markets Authority – ESMA) would be Community bodies provided with legal personality. Each authority would have a Board of Supervisors composed of the chairpersons of the relevant national supervisory authorities and of the chairperson of the European Supervisory Authority, while a representative from the Commission would participate as an observer. The three European authorities, working together with national supervisors, would be responsible for the preparation of technical standards and guidelines, supervision over the consistent application of EU law, resolution of disputes between national supervisors.

Macro-prudential supervision, however, should be conferred to the existing Economic and Financial Committee (EFC) as well as to a new body, the European Systemic Risk Council (ECRS). The latter would be a body without legal personality, composed of the president and vice-president of the ECB, the governors of the Member States' central banks, the chairpersons of the three new European supervisory authorities, and one representative of the European Commission. The European System Risk Board would continuously assess the stability of the financial system in the context of macro-economic developments and general trends in financial markets. It would not have legally binding powers, and it would provide early warnings and issue, where appropriate, recommendations for remedial action.

Realism should suggest prudence when assessing the proposed architecture. On the one hand, the overall vision of the *de Larosière* report has been specified to a large extent by the Commission, the Ecofin and the European Council. On the other, the envisaged architecture should be further detailed in many regards in order to become ready to use. In particular, one might expect the forthcoming 2009 Commission proposals to clarify the real dimension of the independence of the three new European authorities *vis-à-vis* the EU political institutions and their relationships with the ECB.

Nevertheless, the ongoing discussion on the new governance of financial supervision shows that the EU political institutions are considering the possibility to establish, at the level of micro-supervision, European agencies independent from the market and the political institutions, including the Commission. Although this still needs to be translated into a fully detailed proposal, the option so far developed by the Commission and the other institution is remarkable in so far as the establishment of European independent agencies is envisaged.

The tendency to set up European independent agencies is illustrated even more clearly by a second example, concerning the reform of the governance of the energy sector.

This reform has been carried out autonomously from the Commission's Communication of March 2008.[86] In the latter, the Commission called for an inter-institutional dialogue on a vision for European agencies, committing itself to propose no new agencies until the work of the evaluation is complete, i.e. end of 2009. At the same time, however, the Commission has explicitly stated that its own previous proposals for the establishment of European agencies should go ahead as planned. Thus, in 2008–2009 the 2007 proposal to establish an Agency for the Cooperation of the Energy Regulators has gone through the various steps of the co-decision procedure, where the overall architecture envisaged by the Commission has been substantially endorsed, and developed in several regards, by the Council and the European Parliament.[87]

The Agency for the Cooperation of the Energy Regulators, in the process of being established, presents some differences and some similarities with the existing European agencies. The main difference concerns its organizational features. The Management Board is composed of members appointed partly by the Council, partly by the Commission and partly by the European Parliament. Moreover, a board of regulators is envisaged, aimed at allowing and structuring the cooperation among the national regulatory authorities. Most importantly, while existing European agencies are external to the Commission but at least partly subject to its influence, the new European agency is granted a certain degree of independence *vis-à-vis* producers, consumers and political institutions, including the Commission. The proposal put forward by the Commission was based on the assumption that the agency "should have the necessary powers to perform the regulatory functions in an efficient and above all independent manner", as independence represents an essential condition to

86. Cited *supra* note 1.

87. See the European Parliament's opinion on second reading, 22.4.09, A6-235/2009; and the Commission opinion on the European Parliament's amendments to the Council's Common Position, COM(2009)312, accepting "the compromise package as it is in line with the overall purpose and the general characteristics of the proposal"; the European Parliament's second-reading amendments were approved by the Council on 25.6.2009 (see PRES/2009/190). As is well known, the proposal concerning the energy sector was accompanied by a parallel proposal for the establishment of a European agency in the electronic communication field (COM(2007)699 final). That proposal, however, has been significantly modified by the Council and the European Parliament. The latter have excluded the possibility to set up a European Electronic Communications Authority, provided with legal personality, and have opted for a two-tier structure: a Body of European Regulators for Electronic Communications (BEREC), composed of a Board consisting of the national regulators; and an Office, composed of a Management Committee and of an Administrative Manager (see European Parliament's opinion on second reading, A6/2009/271; and COM(2009)422 final).

ensure market confidence. Accordingly, in the final version of the establishing regulation, the members of the administrative board are not qualified as "representatives" of the appointing EU institutions and they have to act "independently and objectively in the public interest, without seeking or taking any political instructions"; and the members of the board of regulators and the Director are called to act independently and not to seek or take instructions from any government, the Commission or other public or private entity.

The Agency for the Cooperation of the Energy Regulators is more in line with the current model of European agencies as far as its powers are concerned. The Agency is provided with powers that are considerably more incisive than those conferred on the existing European Regulators Group for Electricity and Gas. For example, the Agency would acquire the power to adopt individual decisions on several technical issues and it would strengthen its advisory function with respect to the Commission and the other EU political institutions, national regulatory authorities and private parties. However, the powers to be granted to the European agency still fall within the boundaries of the traditional understanding of the *Meroni* doctrine on which the agencification process has been based so far. Moreover, the reinforcement of the Agency's powers is balanced by the provision of a number of powers of the Commission, expressly conceived as "safeguards to secure the Commission's position and role as a guardian of the Treaty". The Commission, for example, is the only body which may take decisions implying the exercise of a discretionary power, while the agency carries out a preparatory and advisory role and may be called to adopt decisions binding for specific technical situations explicitly foreseen in the relevant regulation and directives.

As for the involvement of Member States' administrations in the implementation of the European legislation, the new governance strengthens the position and the powers of the national regulatory authorities. The latter are provided with more effective regulatory powers. They are required to be legally distinct and functionally independent of any other public or private entity, and their staff and any member of their decision-making body is called to act independently of any market interest and neither seek nor take instruction from any government or other public or private entity. This is on the assumption that a full and effective independence of the regulatory authority, with regard both to the political majority and to the regulatees, is a necessary requirement for the good functioning of the market.

The new governance of the energy sector and the proposed reform of financial supervision could be read simply as an attempt to provide a number of adjustments to the consolidated practice of European agencies. Analogously to the existing European agencies, both the European supervisory authorities to be established in the field of micro-supervision and the Agency for the Coop-

eration of the Energy Regulators are designed as mechanisms for administrative cooperation and are provided with non-discretionary powers. Their novelty would be represented essentially by a clarification of their powers and an accentuation of their autonomy, within the context of a simultaneous and complementary reinforcement of the position of national regulatory authorities and of the Commission, particularly clear in the field of energy.

However, it is unsatisfactory to interpret the energy arrangements and the financial supervision proposals as a set of mere adjustments to the existing practice of European agencies. The new regulatory frameworks encapsulate a more complex design, implying not only a revision of the current practice, but a move towards a genuinely different arrangement.

The peculiarity of the design derives from three main elements. Firstly, the European agency gives voice, at the Community level, to national independent regulators and it is granted independence *vis-à-vis* the Commission and the other political institutions. Secondly, national independent regulators enjoy significant powers in the implementation of the sectoral European legislation. Thirdly, the Commission is fully involved in the exercise of the regulatory function. This is true, in particular, in the energy sector: while the European agency is conferred tasks requiring a highly specialist competence and the collaboration of experts from the national regulatory authorities, the Commission is granted the tasks that are considered necessary in order to pursue the general interest of the Community.

Thus, in line with the model of European agencies consolidated so far, the proposed bodies in the fields of energy and financial supervision are mechanisms for administrative cooperation. Yet, unlike the practice of existing European agencies, such cooperation takes place among independent, extra-ordinary authorities. Moreover, the agency's autonomy *vis-à-vis* the Commission shifts towards genuine independence. The Commission's tasks, particularly clearly in the energy sector, give way to a model centred on a clear "regulatory dualism" at the Community level, where two regulators operate: on the one side, a strictly supranational regulator, the Commission, which does not represent national administrations but expresses the Community point of view; on the other side, a European but composite or mixed regulator, which gives voice to the various Member States' regulators.

Of course, even admitting that the proposed agencies are qualitatively different from the existing practice of European agencies, one could nuance the possibility to derive from these specific cases empirical evidence of a general process of emergence of a new type of European agencies, characterized by genuine independence. After all, they are only sectoral regulatory frameworks. And the next inter-institutional discussion on a general vision of European agencies could lead to a different understanding of the European agency

model. Yet, it would be a mistake to minimize the general relevance of the reform of the energy sector and of the discussion on a new regime of financial supervision. Both reform processes reiterate, in two highly important sectors of EU action, some of the points made by the Commission in its 2005 proposal of an inter-institutional agreement. The decision-making processes have gone ahead despite the commitment of the Commission not to propose any new European agency before the end of the inter-institutional discussion. A political agreement among the EU institutions on the features of the relevant agencies has emerged in the energy sector and it is in the process of being formed in the financial supervision field.

Time will tell whether the new governance of the energy sector and the institutional debate on financial supervision reflect a general orientation of the EU political institutions for a new type of European agencies, independent from political institutions. In the meanwhile, the problems inherent in such possible development should be highlighted.

First of all, a clarification by the EU political institutions on the functional rationale behind the establishment of European independent authorities would be desirable. So far, the model of European agencies has accomplished a specific function. It has allowed the carrying out of technical tasks through the coordination of national administrations and under a limited supervision by the Commission. For this reason, the agency option has proven to be politically acceptable both to the Member States and to the Commission. It raises a number of problems, which have been highlighted earlier in this article. But such problems may form the object of adjustments and improvements, without touching the overall organizational and functional rationale of the model. If the Commission and the other political institutions are directly or indirectly promoting a different model, centred upon independence, they should explain in which sectors and on which grounds agencies characterized by independence are to be preferred to traditional, only partially autonomous European agencies, and they should clarify in which sectors "ordinary" agencies may be envisaged. Without such clarification, the move towards independent agencies is likely to further confuse the institutional debate over the future of European agencies that the Commission is trying to foster.

Secondly, even assuming that such a criterion is developed, the model that seems in the process of emerging may be considered rather ambivalent.

The main issue deals with the composite and plural nature of the European regulator. The new governance of the energy sector is a very clear example. As has been previously highlighted, the design laid down by the Commission aims at making possible and fruitful the co-existence of two regulators: a strictly supranational one (the Commission), expressing the Community point of view; on the other side, a European but mixed regulator, giving voice to the

various Member States' regulators. The former is granted the tasks that are considered necessary in order to pursue the general interest of the Community. The latter is conferred the tasks requiring a highly specialist competence and the collaboration of the experts of the national regulatory authorities, on the assumption that the Commission is not able to catch all national expertise and resources in the same manner as a body where national regulators are represented.

One may wonder, however, whether the choice for a double regulator at the Community level is really a sound one. There are, of course, several technical reasons which could justify the path taken by the Commission. The main one is the constraint that the *Meroni* doctrine is usually considered to impose on the European legislator when establishing new bodies. There are also obvious reasons for political compromise. Moreover, one should consider the preferences of the Commission itself, which is clearly reluctant to renounce to its own prerogatives in certain crucial sectors of the European socio-economic space, in the name of the need to preserve "the unity and integrity of the executive function".[88] However, some of the arguments presented by Majone for true European regulatory agencies can be referred to when assessing the new energy governance.[89] In particular, it is not clear whether it is actually possible to distinguish in these areas between technical issues, dealt with by the relevant agency, and policy issues, implying the exercise of a discretionary power, reserved to the Commission. In addition to this, it is not certain that the Commission can adequately deal with such issues and that recourse to a stronger European regulatory agency would not be a better option.

8.2. *Agencification beyond the Commission?*

The gradual emergence of a new type of European agency, fully independent *vis-à-vis* the market and EU political institutions, is not the only possible development of the agencification process. A different line of development deals with the possible expansion of the agencification process beyond the Commission's sphere of influence and the establishment of European agencies serving European bodies other than the Commission.

What we are referring to is the possibility to set up European agencies designed as mechanisms fostering administrative integration among the Member States' administrations and between the latter and a Community body other

88. The reference to the unity and integrity of the executive function was first made in the Commission communication *The Operating Framework for the European Regulatory Agencies*, COM(2002)718 final, 1.

89. See, e.g., Majone, *Regulating Europe*, op. cit. *supra* note 15.

than the Commission; subject to a limited supervision by a Community body other than the Commission; and granted with administrative powers mainly instrumental to the administrative action of national authorities and of Community bodies other than the Commission.[90] Would the establishment of such bodies be legitimate? If so, could they be set up by European bodies other than the Community legislature?

The issue may violate a taboo of the European institutional discourse on the possible evolutions of the Community administration. Yet, it is not a merely academic question. In fact, the functioning of the internal market and the implementation of EU policies may require the setting up of administrative bodies responsible for the execution of European regulation and serving European bodies other than the Commission. Such bodies may take a variety of forms, the main one being a simple collegiate body. However, one cannot exclude that a more complex organization would pursue more effectively specific EU objectives. And the European agency model would certainly represent an attractive option in several sectors.

Two examples may illustrate the tendency towards the establishment of administrative bodies serving European bodies other than the Commission. The first example is provided by the administrative practice of European agencies themselves. European agencies have not developed organizational mechanisms of mutual cooperation, but they have envisaged several forms of "vertical" cooperation, establishing a number of bodies aimed at allowing cooperation between the relevant European agency and national administrations.

Among the various hypotheses, the example of Eionet may be recalled. Eionet is an administrative network operating in the field of environmental protection, composed of about 600 national, subnational and mixed bodies, public and private, and coordinated by the European Environment Agency.[91] Its architecture has been laid down by the Community legislator. Although the definition of a number of details is left to the European Environment Agency itself, the overall structure is set by the establishing regulation. The organizational arrangement laid down by the Community legislator, however, has been partially modified in the administrative practice. As a matter of fact, an "Eionet Group", not envisaged in the regulation establishing the European Environment Agency and the Eionet network, was set up in November 1995 with the purpose of assisting the European Environment Agency in preparing and enacting the working programme and developing the Eionet network. It is made up of representatives of a number of organizations making up the Eionet,

90. *Supra* section 2.
91. Council Regulation 1210/90, cited *supra* note 5.

such as national focal points, ETC leaders administrations, a number of services of the Commission (in particular DG XI, the common centre for research and Eurostat), as well as members of the Management Board of the European Agency designated by the European Parliament and a member of the Scientific Committee. Moreover, the European Environment Agency has been assisted, in its coordination activities, by the so-called "Network of Heads of European Environmental Protection Agencies". The network brings together the director of the European Environment Agency, the directors of the authorities for environmental protection of the Member States and the countries associated with the European Agency for the environment, as well as a number of representatives of the Commission. The office works as a forum for the exchange of opinions and of experiments on questions of common interest connected with environmental information. Furthermore, a limited number of topic centres have been established, which, as well as promoting the study of specific issues in the Member States, have gradually become offices keeping actual relationships with the national referents, constituted, in the majority of the cases, by national reference centres.

Thus, the model laid down by the Community legislator has been further complicated on the initiative of the offices composing the Eionet, *in primis* the European Environment Agency. The Eionet organizational architecture has been partially modified through the establishment of bodies aimed at allowing cooperation between the European agency and national administrations. Admittedly, the Commission can be said to indirectly control such development, at least in so far as it participates through its representatives to the internal collegiate bodies of the European Environment Agency, as well as to the bodies established by the Agency itself. But the complication of the Eionet structure, as an example of a wider process characterizing the sectoral networks coordinated by European agencies, nevertheless shows the tendency to institutionalize the implementation of EU regulation beyond the direct control of the Commission and to set up bodies serving bodies other than the Commission.

This tendency is illustrated even more clearly by a second example, taken from the practice of the ECB. In the course of 2008, the Governing Council of the ECB launched the TARGET2-Securities (T2S) project, in order to help overcome the current fragmentation of the EU settlement infrastructure by concentrating linked securities and cash settlements in central bank money within a single technical platform for the use by central securities depositories.[92]

92. While the central securities depositories will maintain exclusive legal relations with their customers, as well as custody and notary functions, T2S aims at providing a single technical har-

The implementation of T2S depends on a complex organizational structure. Firstly, the responsibility of the good functioning of T2S lies with the ECB in particular its Governing Council.[93] Secondly, T2S needs to be developed in close cooperation with the market, including the central securities depositories and their users.[94] Thirdly, since the day-to-day and long-term operational management of T2S requires a high degree of expertise and technical specialization, concentrating and outsourcing of certain T2S implementing tasks may be a way to achieve the T2S objectives more effectively.

This last point is of particular importance for our purposes. In order to achieve the T2S objectives more effectively, the ECB could set up a separate legal entity, working in close cooperation with the establishing institution.

In principle, the establishment of a private body could be taken into consideration. In particular, a European company or a European Economic Interest Group could be set up. Recourse to such private law mechanisms, however, raises at least two issues. To begin with, it is doubtful that the ECB may be a member either of a European company or of a grouping: the ECB is mentioned neither among the potential shareholders of a European company nor among the potential members of a grouping. In functional terms, moreover, it is not certain that the choice for such private law mechanisms is in line with the neutrality that is necessary to carry out the T2S mandate. If supranationalism and independence are unavoidable elements of the management of a Europe-wide settlement infrastructure, such elements need to be preserved and strengthened through administrative law mechanisms and public organizations.

The establishment of an administrative body could therefore be envisaged. In particular, a committee working as an advisory technical body to the executive bodies of the Eurosystem could be established. Such a committee would be a collegiate body, meeting within the premises of the ECB. It could be composed by one representative for each components of the Eurosystem, supported by a limited number of experts independent from the market, appointed by the executive bodies of the Eurosystem on the basis of a procedure to be determined.

monized venue where all EU book-entry securities can be exchanged for euros with standardized communications protocols. Thus, participants will continue to contract with one or more central securities depositories for settlement of securities eligible for settlement there; but each central securities depository is invited to agree to move its settlement in central bank money to T2S and to offer its clients borderless settlement of trading and collateral operations.

93. As the body governing the European System of Central Banks and as a supranational organization with a commitment to financial integration and no economic self-interest, the ECB has to guarantee that a Europe-wide settlement infrastructure in central bank money is built and managed for the benefit of market users.

94. So far, the role of the market has been expressly recognized with the establishment of a T2S Advisory Group, made up of representatives of national central banks, central securities depositories and users.

The setting up of a technical committee would be the simplest organizational option to carry out a number of T2S implementing tasks while preserving the independence of the public action.

However, one may wonder whether the T2S objectives would be more effectively pursued through a technical body having its own staff and relying on a more complex internal organization, based on a management board and a director responsible for the overall performance of the body and accountable to the Eurosystem governing bodies. The choice for a technical Eurosystem committee, for example, would raise the issue of the relationships between the committee and the market, including banks and the central securities depositories. Arguably, the market could be represented in a different committee, with advisory tasks *vis-à-vis* the technical Eurosystem committee. Yet, a more complex legal entity could ensure a closer relationship between the Eurosystem and the market. In particular, a complex legal entity could rely on an internal organization based also on a committee composed of representatives of the market, provided with non-binding advisory tasks *vis-à-vis* the management board. To include such a committee within the new body would reinforce the relationship between the Eurosystem and the market without altering the balance between their positions and the neutrality and independence of the European system of central banks.

A body more complex than a simple collegiate office could take the form of an executive agency, strictly dependent on the ECB. Obviously, the ECB could not set up an executive agency under the 2002 Financial Regulation and Council Regulation 58/2003. But, it could consider establishing a body provided with correspondent organizational and functional characters, that is to say a body provided with legal personality and fully subject to the ECB supervision. Provided that a legal basis may be identified and the proposal is in line with the requirements of the *Meroni* doctrine, the executive agency option could fit the T2S needs. It would offer the advantages of a complex organization, relying upon several offices integrated within the context of a single body, provided with legal personality. At the same time, it would guarantee a strong organizational and functional dependence on the ECB. The new entity would act as a centre of technical expertise and would be entrusted with certain implementing tasks relating to the management of T2S. Its establishment, however, would not relieve the ECB of its responsibilities under the EC Treaty.

As an alternative, the establishment of a genuine European agency could be envisaged. The ECB could activate the institutional channels to call upon the EU political institutions to set up a European agency responsible for certain T2S implementing tasks. Analogously to the existing European agencies, the proposed agency would help to manage and finalize administrative cooperation among national administrations in a highly specialized field of action; and

its tasks would be merely technical, without implying any discretionary power. Unlike the other European agencies, the proposed agency would be subject to the influence of the ECB, rather than to that of the Commission.

While the architecture of the T2S governance may be matter for a specific institutional debate, the general point which is illustrated by the T2S case is that the functioning of the internal market and the implementation of the various EU policies promote the setting up of new administrative bodies responsible for the execution of European regulation and serving European bodies other than the Commission. Such bodies tend to take the shape of simple collegiate bodies. And yet, one cannot exclude that a more complex organization, including a European agency, would pursue more effectively specific EU objectives.

If the functioning of the European socio-economic space may request an expansion of the agencification process beyond the Commission's supervision and the establishment of European agencies serving European bodies other than the Commission, would such expansion be legally legitimate? And would the Community legislature have the exclusive power to set up this type of European agencies?

The answer to such questions should be, in our opinion, nuanced. It is certainly difficult to admit that a body established on the basis of a Treaty provision, such as a European agency, may in its turn set up a European agency. In the European legal order, the constitutional foundation provided by the treaties and the existence of a Community executive power exclude the possibility that one or two bodies established on the basis of the Treaty rely on a Treaty provision to establish a new, equal-ranking body. A Treaty provision may under certain conditions enable an EU institution or body set up by the Treaty itself to establish a new administrative body. As for the bodies established on the basis of the Treaty, they can either establish on an informal basis auxiliary committees or activate the institutional channels to call upon the EU political institutions to set up a European body capable of carrying out more effectively part of their tasks.

The case of the bodies or institutions established by the Treaty itself is a different one. An interesting example is provided by the ECB. The possibility for the ECB to establish a European agency in a specific segment of its own field of action seems to be precluded by the lack of a clear legal basis. The ECB could certainly invite the EU political institutions to set up a European agency responsible for certain specific tasks falling within its own institutional mandate, provided that the establishing measure does not result in a limitation of the ECB independence in the exercise of its own tasks. But one might doubt the existence of a legal basis allowing the ECB itself to set up a European agency.

However, such legal basis could be found in a sectoral Treaty provision envisaging specific fields of the ECB's action. In the case of the T2S project, for example, the establishing measure could be an ECB decision based on the first and fourth indents of Article 105(2) EC, as well as on Article 3(1), Article 17, Article 18 and Article 22 of the Statute of the European System of Central Banks and of the ECB. As a matter of fact, a Treaty provision envisaging ECB and European System Central Banks action in specific sectors may be considered to provide an adequate foundation for the ECB to establish a European agency. Since settlement in central bank money is one of the Eurosystem's core functions and the Eurosystem is committed to efficient and integrated financial markets in the EU, the ECB may consider it necessary and appropriate to concentrate and outsource certain technical tasks in order to make the implementation of some specific objectives more effective and standardized.

The possibility to derive institutional implications from provisions laying down material competences is by no means a novelty in the landscape of EU administration. An example is Commission Decision 2002/627 establishing the European Regulators Group for Electronic Communications Networks and Services, which was opened by a generic "having regard to the Treaty establishing the European Community" and by a reference to the "new regulatory framework for electronic communications networks and services".[95]

A similar approach was taken by the Court of Justice in its judgment on the legal foundation of the regulation establishing the European Network and Information Security Agency. As has been previously recalled,[96] the Court held that the Community legislature may deem it "necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonization in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate". However, "the tasks conferred on such a body must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States. Such is the case in particular where the Community body thus established provides services to national authorities and/or operators which affect the homogenous implementation of harmonising instruments and which are likely to facilitate their application".[97]

Although the judgment refers to the "Community legislature", there is no reason not to extend its reasoning to any regulatory body or institution

95. Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, in O.J. 2002, L 200/38.

96. *Supra* note 33 and note 77.

97. *United Kingdom* v. *European Parliament and Council*, cited *supra* note 33, paras. 44–45.

established by the Treaty itself. In this sense, the ECB, which has regulatory powers in its own exclusive sphere of competence, should be included within the scope of the subjects that the Court of Justice allow to establish a new body on the basis of a sectoral Treaty provision, provided that a close link between the body and the subject-matter can be demonstrated.

Even admitting that the ECB may rely upon a sectoral Treaty provision to establish a European agency in a specific segment of its own field of action, one might object that such a development would be in conflict with the *Meroni* doctrine. We have already suggested that the usual interpretation of the limits of delegation of powers seems to misunderstand the principle of institutional balance which represents the essential *ratio* of the *Meroni* judgment.[98] In any case, the compatibility of a European agency possibly established by the ECB should be assessed on a case-by-case basis. And it seems unlikely that such European agency would be granted with powers involving a real margin of discretion. In the T2S case, for example, it would be a matter of managing a European-wide settlement infrastructure based on a single technical platform for the central securities depositories.

Admittedly, the main obstacle to the recognition of an ECB power to establish a European agency comes neither from the legal basis argument nor from the *Meroni* argument. The main obstacle comes from "the unity and integrity of the executive function". The Commission has formulated such notion in the terms of a legal principle. In its 2002 Communication on *The Operating Framework for the European Regulatory Agencies*, the Commission linked the functional and normative foundations of the Community legal order to the unity and integrity of the executive function.[99] Thus "the legitimacy, effectiveness and credibility of the Community depend on preserving, even reinforcing the unity and integrity of the Community executive function and ensuring that it continues to be vested in the head of the Commission, if the latter is to have the required responsibility vis-à-vis Europe's citizens, the Member States and the other institutions". This statement was reiterated in the 2005 proposal for a draft inter-institutional agreement concerning regulatory agencies.

In this perspective, the agencification process at the European level can take place exclusively under the control and the supervision of the Commission, in which the main responsibility for the exercise of the executive function is vested. In the Commission's words, "it is essential to keep this requirement in mind when considering the European regulatory agencies. By virtue of their nature and the tasks assigned to them, these agencies share in the executive function at Community level. Their participation must be organised in a way

98. *Supra* section 7.
99. COM(2002)718 final.

which is consistent and in balance with the unity and integrity of the executive function and the Commission's ensuing responsibilities". And yet, it is questionable whether this approach really corresponds to the overall legal features of the executive function in the European legal order.

The European executive function may be said to be unitary and undivided as compared to other regulatory regimes beyond the State. While the European administrations may be traced back to an executive power governing the whole European legal order, the administrations of global regulatory regimes do not find their anchorage in a government or in a set of higher institutions. Rather, they respond to a plurality of sectoral sub-governments. As a matter of fact, it would be a mistake to under-estimate the process of multiplication and consolidation of the mechanisms of interaction and dialogue among the various sectoral systems: they sometimes open up wider "families" of inter-connected organizations, jointly responsible for the implementation of ever more coherent and unitary functional programmes, as happens in the case of the "United Nations system".[100] Nevertheless, it would be certainly premature to derive from such process the development of an effective dependence of global administrations on a unitary government.[101]

If it may appear to be unitary and undivided where compared to other regulatory regimes beyond the State, however, the European executive function is highly fragmented in comparison with the Member States' experience. In the latter, administrations respond to an executive power organized as a single centre, represented by the government.[102] The EU administration, instead, is not anchored to a unitary centre. It refers to a shared executive power, composed by the Commission, on the one hand, and by the Council and the Member States, on the other, although the relationship between these two components is quite different in the Community and in the intergovernmental pillars. The executive power, in other words, is designed as a composite power, in which two non-homogeneous components participate. Its exercise, in fact, is granted to an intergovernmental institution (the Council of the EU) and, where envisaged by the Treaty or by the Council itself, to a supranational institution (the Commission), as well as to the Member States (to which the administrative

100. See the general reconstruction of Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale* (Giuffrè, 2003), p. 216.

101. In this sense, Cassese, "Oltre lo Stato. Verso una costituzione globale?" in Cassese, *Oltre lo Stato* (Laterza, 2006), pp. 6–37, at 10; and Kingsbury, Krisch and Stewart, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* (No. 3–4/2005), 15–61, at 20–27.

102. An example is provided by the French experience, in which the administration is expressly granted a constitutional anchorage to the executive power: see Art. 20 of the 1958 Constitution, providing that the government "dispose de l'administration".

implementation of EU law and policies is in principle reserved) and to an inter-bureaucratic component (mainly represented by the comitology committees).[103] And to this framework the ECB should be added, as a supranational organization with a constitutional commitment to price stability and financial integration.

Although some will feel that the traditional limits to the agencification process have to be maintained, the considerations developed with reference to the ECB suggest that an expansion of the agencification process beyond the Commission's sphere of influence would be not only possible on functional grounds, but also legally legitimate. Despite the obvious and foreseeable political resistance that such development would raise, it has to be recognized that it could not be opposed in the name of "the unity and integrity" of a Community executive function which is, on the contrary, a shared and composite one.

This conclusion illustrates, more generally, that the European agency model does not only have a respectable position within the context of the EU administration, but it is also destined to an interesting future.

103. The features of the European executive power are discussed by a wide legal literature that cannot be entirely recalled here. Among the less recent contributions, however, see Cassese, "La Costituzione europea", (1991) *Quaderni costituzionali*, 487–508, and Lenaerts, "Some reflections on the separation of powers in the European Communities", 28 CML Rev. (1991), 11–35; recently: Dann, "The political institutions" in von Bogdandy and Bast, op. cit. *supra* note 60.