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THE PHENOMENON OF AGENCIFICATION IN THE ADMINISTRATION OF THE EUROPEAN UNION

W. M. KÜHN[a]

[a]*Court of Justice of the European Union, Boulevard Konrad Adenauer, Kirchberg L-2925, Luxembourg*

The article offers an analysis of the process known as agencification that has led the EU to rely on numerous agencies in order to fulfill its administrative tasks. The focus lies on the status of these agencies within the EU legal system, the way in which they are established, their internal organization and financing, the decision-making procedures, as well as their operation. Furthermore, a classification of the agencies is carried out by using specific categories. It also explains the challenges that agencies face in their daily activities. It explains their relationship with the EU institutions, especially with regard to the democratic control and the control of legality that the latter exercise.

Keywords: integration process; law of regional economic integration; supranational administration; European agencies; European Union; European Economic Area; Area of Freedom, Security and Justice.

ФЕНОМЕН АГЕНТСТВОФИКАЦИИ В УПРАВЛЕНИИ ЕВРОПЕЙСКОГО СОЮЗА

В. М. КЮН[1)]

[1)]*Суд Европейского союза, бульвар Конрада Аденауэра, L-2925, г. Кирхберг, Люксембург*

Анализируется процесс, известный как агентствофикация, приводящий к тому, что Европейский союз при выполнении административных задач опирается на многочисленные агентства. Основное внимание уделяется статусу этих агентств в правовой системе ЕС, способу их создания, их внутренней организации и финансированию, процедурам принятия решений, а также их деятельности. Кроме того, предлагается классификация агентств по опре-

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Автор:
Вернер Мигель Кюн – доктор права, советник.

Author:
Werner Miguel Kühn, doctor of law, legal advisor.
iuseuropaeum@yahoo.de
https://orcid.org/0000-0001-7677-1803

деленным критериям, анализируются проблемы, с которыми агентства сталкиваются в своей повседневной деятельности. Объясняется их взаимодействие с институтами ЕС, особенно в отношении осуществляемых последними демократического контроля и контроля законности.

Ключевые слова: процесс интеграции; право региональной экономической интеграции; наднациональное регулирование; европейские агентства; Европейский союз; Европейская экономическая зона; Пространство свободы, безопасности и правосудия.

Introduction

The purpose of this article is to explain the so-called agencification in the European administration, a phenomenon that plays an increasingly important role in the activity of the European Union. In fact, there are currently around 30 decentralized agencies, each performing different functions and often replacing the institutions themselves. This diversity entails the risk of chaotic and uncoordinated development, capable of adversely affecting the EU legal order. In order to establish common criteria for the establishment of such agencies, the European institutions adopted in 2012 the so-called common approach, which introduces a number of common principles, thus making it possible to make agencification a more coherent, effective, and accountable process.

The features of any European agency will then be presented, with a view to enabling the reader to better understand the challenges that the EU has had to face in the course of the evolution of its administrative structure.

Agencies within the EU institutional structure

Names of agencies. It should be noted at the outset that the name of an agency as such does not say much about its legal status. Agencies can be called *agencies*, *offices*, *foundations*, *authorities*, etc. without any immediate inference of their precise functions or their situation in the institutional structure of the EU. Rather, it is necessary to analyze its internal rules in detail in order to obtain more information. The aim of this work is to demonstrate that it is possible to describe the main features of agencies despite their great diversity.

The list of agencies mentioned in the article see in appendix.

Legal status. The treaties establishing the EU refer to "institutions, agencies and other bodies", from which it can be inferred that there are significant differences between these categories. Art. 13 of the Treaty on European Union (TEU) contains an exhaustive list of the institutions of this integration system, including the European Parliament (hereinafter – Parliament), the European Council (hereinafter – Council), the European Commission (hereinafter – Commision), and the Court of Justice of the EU (CJEU), to mention only those most important for the purposes of this article. It is worth mentioning that the treaties do not include any similar list of agencies. In fact, apart from certain exceptions limited to EUROPOL, EUROJUST, EDA, and the European Public Prosecutor's Office (EPPO)[1], the treaties do not mention them at all. It is, therefore, feasible to conclude that there is no limit on the number of agencies that can be set up so that the EU can make use of this power whenever it deems it necessary. As regards the modalities of their establishment, it should be noted that, unlike the institutions, agencies are not based on the founding treaties themselves, but on legal acts derived from EU law, namely regulations, which determine the objectives and competencies of each agency. As defined in art. 288(3) of the Treaty on the functioning of the EU (TFEU), a regulation "has general application, is binding in its entirety and directly applicable in all member states". In other words, agencies are created once their founding regulations enter into force in the EU legal order, without the need for any transposition by the member states. The latter will have to apply the regulation as such, in full recognition of the agency created, which is particularly important for cooperation between the agency and the member states. In addition, while the institutions are established by the founding treaties, i. e. legal instruments of public international law concluded by the member states, agencies are established only by the EU legislator in the framework of a regular legislative procedure. This has the advantage of making it easier to change the powers and other characteristics of an agency, without having to resort to the lengthy and politically risky procedure for amending the founding treaties, which requires the approval of the member states in accordance with their constitutional requirements, which may require the agreement to be submitted to a referendum.

Legal personality and capacity. It is important to highlight the fact that agencies have legal personality. They also enjoy in each of the member states the most extensive legal capacity accorded by national law to legal persons. These features enable agencies to act

[1]EPPO (art. 86 of the Treaty on the functioning of the EU); EUROPOL (art. 85, 86 and 88 of the Treaty on the functioning of the EU); EUROJUST (art. 88 of the Treaty on the functioning of the EU); EDA (art. 42 (3) and 45 of the TEU).

alone, i. e. independently of the EU, in the international legal order and to conclude administrative arrangements with institutions, in addition to other EU agencies, member states, third countries, and international organizations. The exercise of such legal personality is, however, limited to what is strictly necessary to enable the agencies to fulfill the tasks assigned by the EU legislator. The scope of such limitations can generally be inferred from the provisions of the founding regulation, which will specify the procedures to be followed, as well as the institutions from which authorization will be required in order to conclude an agreement with the above-mentioned entities. Administrative arrangements will normally be subject to prior authorization by the Commission, which ensures that the agencies do not exceed their powers, while it will be sufficient to inform Parliament once the agreement has been concluded. The requirement of prior authorization implies that the Commission is also entitled to demand amendments to the draft administrative agreement, which it considers necessary. The Commission will therefore be able to impose on the agencies in a certain way their vision of how the agencies should fulfill their tasks.

The role of the agencies in European public procurement. Legal capacity is essential for public procurement. The founding regulations specify that the agency may acquire or dispose of movable and immovable property, which implies concluding contracts for the sale of goods and the acquisition of services. Like the EU institutions, agencies need goods and services to fulfill their tasks. Such contracts may provide for the purchase of mere office supplies or even highly technical equipment. The services purchased may be related to simple aspects such as cleaning up infrastructure or foreseeing activities inherent to their functions, such as the surveillance of the external borders of the Schengen area and transporting illegal immigrants to their country of origin by means of a previously hired private aircraft. Since agencies are part of the EU, they are obliged to apply the public procurement rules set out in the financial regulations[2]. In order to take account of the particular status of agencies, specific rules (laid down in the 'framework financial regulations') apply[3] and are incorporated into the financial regulations of the respective agencies. Agencies may conclude contracts with institutions, other agencies, and economic operators established in the EU or third countries. In certain cases, inter-agency cooperation is expressly provided for in the founding regulations in order to ensure the unity and coherence of the EU legal order, such as cooperation with the CDT and the Publications office, entities entrusted with specific tasks.

In this context, it is important to mention that, when the EU exercises exclusively the competencies of its states in the area of international trade in goods and services[4], the World Trade Organization (WTO) agreements provide that the EU is a full member, together with its 27 member states. It must therefore comply with the obligations arising from those agreements. Given the fact that they are not explicitly listed in the Government procurement agreement (GPA)[5] as public authorities subject to the provisions of this Convention, agencies themselves are not obliged to comply with WTO rules on government procurement, unlike certain EU institutions, such as the Council, the Commission, and the European external action service. This means that agencies have a greater margin of discretion in the area of public procurement as regards acquisition from third countries.

Administrative autonomy. Agencies enjoy administrative autonomy in the sense that they can freely decide on their staff and internal organization in order to respond adequately to their respective needs, obviously provided that compliance with the existing legal framework is ensured. They may recruit and dismiss staff in accordance with the provisions of the Staff regulations of officials and the conditions of employment of other servants (CEOS) of the EU, which apply to officials and temporary (contract) agents respectively[6]. While the institutions employ officials and temporary (contract) staff, the second category of staff in the agencies pre-

[2]Regulation (EU, Euratom) No. 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the union, amending Regulation (EU) No. 1296/2013, Regulation (EU) No. 1301/2013, Regulation (EU) No. 1303/2013, Regulation (EU) No. 1304/2013, Regulation (EU) No. 1309/2013, Regulation (EU) No. 1316/2013, Regulation (EU) No. 223/2014, Regulation (EU) No. 283/2014, and decision 541/2014/EU and repealing Regulation (EU, Euratom) No. 966/2012.

[3]Commission delegated Regulation (EU) No. 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom treaty and referred to in art. 70 of Regulation (EU, Euratom) No. 2018/1046 of the European Parliament and of the Council.

[4]The EU's exclusive competence for external trade in goods and services derives from art. 2(1) of the TFEU in combination with art. 3(1)(e) of the TFEU.

[5]The GPA is a plurilateral agreement within the framework of the WTO, meaning that not all WTO members are parties. The fundamental aim of the GPA is to mutually open government procurement markets among its parties. The GPA 1994 was signed in Marrakesh on 15 April 1994 – at the same time as the agreement establishing the WTO – and entered into force on 1 January 1996. Not long after the implementation of the GPA 1994, the GPA parties initiated the renegotiation. It was concluded in December 2011 and the outcome of the negotiations was formally adopted in March 2012. On 4 April 2012, the GPA 2012 came into force for all those parties to the GPA 1994 that had ratified the GPA 2012, while allowing other parties to the GPA 1994 to continue completing their domestic ratification procedures. The last of those other parties, Switzerland, on 2 December 2020 deposited its instrument of acceptance of the GPA 2012. The GPA 2012 entered into force for Switzerland on 1 January 2021. On the same date, the GPA 2012 replaced the GPA 1994.

[6]Regulation No. 31 (EEC) 11 (EAEC) laying down the Staff regulations of officials and the conditions of employment of other servants of the European Economic Community and the European Atomic Energy Community.

dominates. While officials are appointed by an administrative act, staff members conclude employment contracts with the agency. The duration of such contracts may vary from agency to agency, ranging from 3 years (renewable), as in FRONTEX, to 9 years (non-renewable), as is the case in EUROPOL.

The settlement of labor disputes between EU agencies and their staff falls, in principle, within the jurisdiction of the CJUE pursuant to art. 270 of the TFEU. Within the CJEU as an institution, the competence to deal with labor matters is conferred upon the General Court of the EU (GC). Its jurisdiction is exclusive, hereby ruling out that national courts may deal with those matters. Consequently, any national court would have to dismiss as inadmissible any request to deal with a case brought before it by an EU "official" or a "temporary agent". The EU shows here similarities with other international organizations such as the United Nations that, due to the autonomy and the immunity they traditionally enjoy by virtue of public international law, have their own jurisdictions in labor matters (or have special arrangements with specific international jurisdictions, as is the case of the EFTA Surveillance Authority with the Administrative Tribunal of the International Labor Organization). As already indicated, the principles mentioned above apply unconditionally to EU "officials" and "temporary agents". However, they do not apply to "contract agents", whose contracts are not entirely governed by the EU Staff regulations and CEOS but rather predominantly by national law. Those contracts usually lay down the applicable civil (labor) national law. Consequently, labor disputes related to these contracts fall generally within the competence of national courts.

Having administrative autonomy also means that agencies can set their own specific objectives and take the necessary measures to achieve them, obviously within the limits set by the founding regulation and the political priorities identified by the main EU institutions in this area, i. e. the European Council, the Council of Ministers and the Commission [1, p. 559]. These institutions set out the political priorities to be subsequently implemented by the agencies through an action plan.

The agencies also have a certain financial autonomy and can decide which projects the funds shall be allocated to. Each agency adopts its own internal financial regulation, which reflects the provisions of the financial regulation applicable to the institutions and requires compliance with EU financial principles[7]. It should be noted in this context that the funding of agencies comes to a large extent from the EU budget, contributions from the member states and associated states participating in the activities of these agencies, as well as services provided. Where third countries participate in the activities of the agencies, they shall be obliged to contribute to the budget of the respective agency, in accordance with the provisions contained in the founding regulations and association agreements with the EU. As will be explained below, Parliament adopts the EU's multiannual budget, which includes the resources to be allocated to the respective agencies. This power gives Parliament considerable power, making it a guarantor of democratic control over the agencies' activities.

A new form of European administration. *The concept of administration.* From a legal perspective, the concept of "administration" means the application and enforcement of EU law by competent authorities. The application involves both a *de facto* activity and the adoption of implementing rules or legal acts [2, p. 87]. It differs from the legislative activities attributed to both the Parliament and the Council and the judicial role assigned to the CJEU. The EU follows in some way the model of the division of powers known at the state level without copying it completely. In the course of its history, the EU has developed various types of administration, making "agencification" a new form, which, as will be seen below, has raised questions as to its compatibility with the founding treaties. Before setting out what this new type of administration consists of, it is useful to briefly describe its more traditional forms.

Traditional forms of administration. One of the traditional forms of administration is the direct application of EU law by the institutions themselves. The role of the Commission as an executive body *par excellence* must be emphasized in this context. Another form of administration consists of its indirect application by the member states, which are called upon to determine the necessary bodies and procedures (procedural autonomy)[8], imposing as the sole condition that enforcement is effective (principle of efficiency) and that the rights granted to individuals are not treated less favorably than the rights guaranteed by national law (principle of equivalence)[9]. Art. 291(1) of the TFEU, according to which "member states shall adopt all measures of national law necessary to implement legally binding EU acts" is based on the premise that this is the standard form of administration [3, p. 523]. EU law generally leaves member states freedom to apply

[7]These are the principles of unity, budgetary accuracy, annuality, equilibrium, unit of account, universality, specification, sound financial management and transparency.

[8]Art. 19(1) of the TEU refers to the procedural autonomy of the member states. However, it refers to a specific area related to "remedies necessary to ensure effective judicial protection in the fields covered by EU law". It is therefore not so relevant in the purely administrative context at issue in this article.

[9]See: judgment of the CJEU of 4 October 2018 in case C-571/16, Nikolay Kantarev v Balgarska Narodna Banka. EU:C:2018:807. Para 124, 125 ; judgement of the CJEU of 8 March 2017 in case C-14/16, Euro Park Service v Ministre des Finances et des comptes publics. EU:C:2017:177. Para 36.

substantive and procedural administrative law, as long as it does not regulate this matter. Within this category of indirect application, it is possible to identify the constellation in which EU law does not give the member states any discretion, requiring its application as such by the national authorities. According to another constellation, EU law confers a margin of discretion on the national authorities, merely determining the objectives to be achieved, as well as certain useful criteria to be taken into account, so that the member states are called upon to adopt their own rules in order to ensure its application at the national level.

Administration through agencies. Administration through agencies, not foreseen at the time of the creation of the EU, is clearly different from the more traditional forms described in the previous paragraph, in that it provides for the creation of joint institutional structures, allowing for the joint participation of supranational and national entities [4, p. 221]. The agencies are supranational entities that, however, require the cooperation of the member states in order to make their actions effective. Member states are represented in the agencies by the members of the management board, who have the right to vote and participate in the preparation of decisions, as well as in the control of the activity of the respective agency. Member states thus become part of the administration in so far as they are called upon to implement the decisions taken by the agency at their national level. The member states, therefore, play a decisive role in the preparation, adoption, and implementation of administrative measures, which has the advantage of ensuring that this form of administration is accepted. This in turn has the consequence of ensuring the effective implementation of EU law at the national level. Through their representation on the board, member states become aware of their responsibility (accountability) in the decision-making process at the supranational level. The need for a dialogue with representatives of other member states and institutions reminds them that there are different realities that need to be taken into account. In some way, member states gain access to the supranational perspective, forcing them to abandon national egoism. It should be noted in this context that the possibility of having an exchange with colleagues from the other member states on essentially technical aspects has the advantage of "depoliticizing" many potentially sensitive issues, which the EU had already achieved at the beginning of the European integration process by assigning tasks to the Commission as a supranational entity.

The agencies thus form an intermediate form of administration between the purely supranational and decentralized ones. As member states are responsible for implementing EU law, often assisted by the agency, the management board can itself verify compliance with this obligation and record this in a regular report of activities. By informing member states of the progress in implementing EU law at the national level, they can put political pressure on those who show compliance deficits, which has the effect of alleviating the work of the Commission, which generally has the role of "a guardian of the treaties" in the EU legal order. Breaches of law by the member states can thus be prevented, making it unnecessary for the Commission to initiate infringement proceedings against them. In addition to the management board, the agency is supported by national experts who can meet at the agency's headquarters and discuss current problems. This representation of the member states allows them to infer that the agency "belongs" to them, which, however, should not lead to the erroneous conclusion that the barrier between the supranational level and the national level ceases to exist. This form of administration aims to achieve greater involvement of member states in decision-making at the supranational level.

Classification of agencies. When talking about "administration" by agencies, it is essential to take account of the type of functions they perform. The variety of functions allows them to be classified more precisely. In order to avoid misunderstandings, it is worth pointing out beforehand that this article deals only with so-called "decentralized agencies", but not with "executive agencies". The second category of agencies comprises administrative entities incorporated in the internal structure of the Commission, without legal personality, which have been entrusted with the task of implementing certain Commission programs. The first category of agencies includes administrative entities having legal capacity, as mentioned above, the functions of which differ from those normally performed by the Commission.

With regard to the tasks generally assigned to agencies, a distinction can be made between the collection and dissemination of information, technical assistance, the regulation of a given area, supervision or control, and the implementation of operations[10].While certain agencies fulfill their role by assisting the Commission and the member states or by producing soft law documents, allowing member states to apply EU law more efficiently, others can directly influence the internal market by making decisions that affect the legal position of economic operators. Some agencies are also responsible for sending staff to the member states or even to third countries, in order to implement European legislation. Some agencies provide services to others, thereby strengthening the cooperation network.

It is also, in principle, possible to classify agencies according to their respective area of competence, the

[10]There are several possible types of classification. See in this regard the report of the Parliament's Constitutional Affairs Committee of 30 January 2019 on the implementation of the legal provisions and the Joint statement ensuring parliamentary scrutiny over decentralized agencies.

pillar in which they were established (Community or intergovernmental, depending on the division that existed before the entry into force of the Lisbon treaty), by the period of creation, size, the circle of beneficiaries of the agency's services, the origin of its resources and funding, the type of administrative board, etc. These classification criteria are less widely used, being the "type of function" exercised by the respective agencies (see the various "tasks" listed above) the most common criterion.

The concept of "administrative law" in the EU legal order. A brief parenthesis should be made in order to explain the concept of "administrative law" in the EU legal order. As in national legal systems, this concept deals with substantive and procedural administrative law. Under "substantive" law, there is a general understanding of the set of rules that articulate EU policies, be it at the supranational or national level, while "procedural" law regulates the way in which EU institutions, member states and individuals interact.

EU administrative law is as old as the integration process itself. Regardless of whether it concerns the rules on aid to agriculture, the provisions relating to the customs union, the authorization of mergers between undertakings, the registration of trademarks, etc., the administrative law of the EU is now omnipresent. The EU was born as a highly bureaucratic organization with a view to fostering cooperation between the member states. As the EU is increasingly assuming competencies previously exercised by the member states, it is clear that the national administrative law is being replaced by a new supranational administrative law of its own. This new supranational administrative law is built on the legal traditions of the member states, incorporating general principles as important as the principle of proportionality and the principle of legal certainty, which in turn knows various expressions, such as legitimate expectations and the prohibition of retroactivity [5, p. 9]. These are supplemented by other essential principles of administrative law, such as the obligation to state reasons for decisions taken by the EU institutions and to grant access to the file.

These principles were often codified in administrative law itself, which could constitute a single regulation. However, it was the CJEU, which, firstly, required that they be taken into account even if they were not expressly codified and, secondly, developed other principles that the legislator had not initially envisaged. The CJEU has therefore played a major role in the development of supranational administrative law. Many of these principles created by case law were subsequently incorporated into the EU administrative codes. More importantly, some of these principles have even been codified in the Charter of fundamental rights[11] (if not already found in the founding treaties themselves[12]), which has the status of primary law in the EU legal order[13]. It should be borne in mind that this does not prevent the CJEU from further developing principles of administrative law. On the contrary, the CJEU has the power to interpret the principles already recognized in the Charter of fundamental rights and to make them evolve, while at the same time creating new principles[14]. The CJEU's competence to develop EU law through its case law has been recognized even by the constitutional courts of the member states[15], leaving aside specific cases of opposition by national courts (see [6]).

The term "codes" should be used in the plural, as there is no single EU administrative code to date. The applicable administrative law may vary considerably depending on the subject matter. Although there are often general principles, which, as the term itself states, are of "general" (or "universal") application, they may find a different expression, depending on the requirements of administration. For example, the obligation to state reasons may depend on the administrative context and the interest, which an individual may have in knowing the reasons for the adoption of a particular administrative decision affecting him[16].

[11]See: art. 41 of this charter, which refers to the principle of good administration, according to which everyone has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the EU. This right includes in particular: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions. In addition, everyone has the right to compensation by the EU for damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the member states. Finally, any person may contact the EU institutions in one of the languages of the treaties and must receive an answer in the same language.

[12]See: art. 5 of the TEU, which refers to the principles of subsidiarity and proportionality, as well as art. 296 of the TFEU on the obligation to state reasons for legal acts adopted by the EU institutions. Furthermore, art. 298(1) of the TFEU states that "in the performance of their tasks, the institutions, bodies, offices and agencies of the EU shall rely on an open, efficient and independent European administration".

[13]See: judgment of the CJEU of 19 January 2010 in case C-555/07, Seda Kücükdeveci v Swedex GmbH & Co KG. EU:C:2010:21. Para 22.

[14]This is mainly due to the fact that art. 6 of the TEU distinguishes between the rights, freedoms and principles set out in the Charter of fundamental rights of the EU, on the one hand, and the general principles of EU law, on the other, which are influenced by the interpretation given to the European convention for the protection of human rights and fundamental freedoms.

[15]See: judgment of the German Federal Constitutional Court of 6 July 2010 in case 2 BvR 2661/06, DE:BVerfG:2010:rs2010-0706.2bvr266106. Para 62.

[16]See: judgment of 15 November 2012 in case C-539/10 P and case C-550/10 P, Stichting Al-Aqsa v Council of the European Union and Kingdom of the Netherlands v Stichting Al-Aqsa. EU:C:2012:711. Para 139 ; judgment of 11 July 2013 in case C-444/11 P, Team Relocations and others v Commission (not published). EU:C:2013:464. Para 120 ; judgment of 28 March 2017 in case C-72/15, PJSC Rosneft Oil Company v Her Majesty's Treasury and others. EU:C:2017:236. Para 122.

Such a decision may also be subject to a less strict legal review in the light of the principle of proportionality, depending on the discretion enjoyed by the administration. Furthermore, considerations of public security may require a nuanced application of these principles[17] (see, to this effect [7, p. 1099, 1103]). The time limits for submitting an application or lodging an appeal may be shorter than for other cases, depending on the interest of the administration in creating legal certainty. Certain remedies may provide for a full review of legality or be limited to preventing arbitrary decisions[18].These considerations prevent the creation of a single administrative code.

Furthermore, it is important to bear in mind in this context that EU administrative law includes not only general principles with legal force, breach of which may lead to the unlawfulness (or even nullity) of the administrative decision, apart from a right to compensation for the prejudice suffered by the person concerned, but also other principles whose observance is merely recommended in order to ensure "good administration". There are certain requirements for "good administration" which, if not fulfilled, do not necessarily lead to the unlawfulness of an administrative decision. Failure to comply with those requirements is simply an instance of maladministration, which must be avoided. The distinction between these requirements and legal defects is not always easy, especially as certain legal defects may be remedied by the administration itself because they are not considered to be so serious. This is generally the case for certain formal errors, which do not affect the substance of the administrative decision. However, it is important to be able to differentiate between different cases, as this depends on the competence of the EU bodies responsible for enforcing legality. Thus, while the CJEU is solely responsible for examining defects in the law, the European Ombudsman (EO) also deals with cases of maladministration, in accordance with art. 228 of the TFEU[19]. Its competence is therefore much broader, regardless of the very specific instruments that the latter has at its disposal, which essentially consist in the possibility to publicly denounce instances of maladministration and to ask the authorities to remedy them.

Despite the difficulty in creating a single EU administrative code, there have already been some attempts to at least codify procedures. It is worth mentioning the Parliament's resolution of 15 January 2013 recommending to the Commission the creation of an EU Law on administrative procedure[20]. For its part, the Court of Auditors in its opinion No. 1/2015 called for the same idea[21]. On 13 January 2016, a proposal for a regulation on administrative procedure for the EU was published, after being adopted by the Parliament's Committee on Legal Affairs the previous week.

The codification of EU administrative law has important consequences, as it has the effect of complementing or even replacing national administrative law. This means that national authorities will have to apply autonomous concepts in accordance with the requirements of the EU legal order. Where the EU legislator does not provide for specific administrative procedures, substantive law must be applied in accordance with the procedures known under national administrative law while respecting the procedural autonomy of the member states referred to above. However, should the EU legislator decide to regulate itself the procedures to be followed when applying substantive administrative law, this will obviously have as a consequence that the said procedural autonomy will be diminished.

Institutional openness. The EU is very concerned about the integrity of its legal order, and the CJEU has on many occasions stressed the need to preserve its unity, coherence, and primacy[22]. While it is true that the European integration process has evolved to the point of accepting "multiple speed integration", allowing member states to join the various integration projects offered by the EU (e. g.: the monetary union, the Area of Freedom, Security, and Justice, the establishment of the Unified Patent Court (UPC) through the "enhanced cooperation" mechanism under art. 329 of the TFEU[23], the security and defense cooperation in the

[17]See: judgment of 15 February 2016 in case C-601/15 PPU, J. N. v Staatssecretaris van Veiligheidlen Justitie. EU:C:2016:84. Para 53. See, to this effect: *Van Drooghenbroeck S.*, *Rizcallah C.* Charte des droits fondamentaux de l'Union européenne – commentaire article par article. Brussels, 2018. P. 1099, 1103.

[18]See: opinion of Advocate General Pikamäe of 9 September 2020 in joint case C-225/19 and case C-226/19, R.N.N.S. and K.A. v Minister van Buitenlandse Zaken. EU:C:2020:679. Para 99.

[19]The EO and the Commission have separately developed codes of good administrative conduct, which have no legally binding force. However, they have some authority in the administrative practice of the European institutions and other entities in so far as they incorporate principles recognized by the case law of the CJEU, the founding treaties of the EU, as well as the Charter of fundamental rights.

[20]European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of administrative procedure of the European Union.

[21]Opinion No. 1/2015 of the Court of Auditors of the EU on a proposal for a regulation of the European Parliament and of the Council amending regulation (EU, Euratom) No. 966/2012 on the financial rules applicable to the general budget of the union (2015/C 52/01).

[22]Opinion 2/13 of the CJEU of 18 December 2014 on EU accession to the European convention on human rights. Para164 et seq.

[23]The UPC is not incorporated into the CJEU, but constitutes a separate jurisdiction, created on the initiative of most member states (Poland, Spain and Italy were opposed at an inception) and some third states on the basis of an international agreement. Despite its origin in international law, the UPC will have to apply the substantive patent law created by the EU through two regulations. Patents issued will have a dual effect, in the sense that they are supranational and national in nature (in all participating states). The seat of the UPC will be located in Paris, with sections in London and Munich, and regional and local divisions (see [8, p. 89]).

framework of the so-called permanent structured cooperation provided for in art. 42(6) and 46 of the TFEU (see for further details [9, p. 1075], etc.) where they consider it appropriate, it is clear that certain limits to such flexibility have been established. As recently seen during the negotiations between the EU and the UK related to the withdrawal of the latter and the conclusion of a partnership agreement that still needs to be defined in contractual terms, the EU is opposed to any kind of segmentation of the internal market (on the Brexit process, see [10, p. 64]). The EU, therefore, rejects the UK's proposal to remain in the internal market after becoming the third country, whilst totally excluding or at least significantly limiting the free movement of workers.

With the exception of this particular case, the EU has on certain occasions accepted, that third countries voluntarily join the integration process without having to join the EU and obtain full membership status. This is the case for internal market integration with certain member states of the European Free Trade Association (EFTA)[24], achieved through the conclusion of the Agreement on the European Economic Area (EEA). This agreement allows for an extension of the EU internal market freedoms to these states (see on the EEA [11]). Another example illustrating the openness of the European integration process is the participation of EFTA states in the Schengen legal acquis, i. e. the set of rules allowing the free movement of persons exempted from border controls in the geographical area made up by the participating states[25]. This participation is possible thanks to the agreements concluded between the EU and the respective EFTA states.

Due to the high degree of integration in the above areas and taking into account the need to ensure uniformity in the application of EU law, it is necessary to provide for a very close institutional cooperation. It is precisely in this context that the administrative aspect becomes essential. It is important to stress that the manner in which the EFTA states have joined the internal market and the Schengen area is quite different. While in the first case, rather complex parallel institutions have been set up within EFTA (the so-called two-pillar structure), thus ensuring formal autonomy, in the second case, the EFTA states have joined the EU individually on the basis of bilateral agreements providing only for basic institutionality, in the form of joint committees. The participation of the EFTA states in both projects raised some problems, due to the fact that the phenomenon of agencification exists in both areas. Because several agencies operate in the field of the internal market and the Schengen area, the way in which the EFTA states can participate in the work of these agencies had to be established. Otherwise, it would have been very difficult to ensure that the decisions taken within the agencies would be implemented in those states. It would also have been difficult to resolve the sensitive problem of the democratic legitimacy and the validity of EU law in the legal systems of the EFTA states. In addition, it would have been a waste of resources not to benefit from the technical expertise of experts from these countries. It should be borne in mind that art. 100 of the EEA agreement itself requires the participation of those states in the phase preceding the legislative procedure, which is influenced by the opinions of experts (decision sharing). This form of participation is perfectly compatible with the EU treaties as it does not mix up the status of a member state and that of an associated state. It should be recalled that under EU law, the status of associated state is generally granted fewer privileges compared to the status of "member state", as the first status mentioned does not provide for any participation in the EU legislative process within the Council. Instead, the associated states must accept legislative acts adopted by the EU legislator and, if provided for in the association agreements, transpose them into their national legal order[26]. It is obvious that the autonomy of the EU legal order is not undermined by a simple "technocratic" participation in the good functioning of the EEA. The founding regulations of certain agencies provide for the participation of EFTA states as voting members (in matters concerning them) in the management board, while in other agencies at least one observer status is provided for [12, p. 136].

Institutional openness in agencies is not limited to third countries but extends even to international organizations. Since the agencies constitute genuine centers of technical competence [13, p. 589], it would be inconceivable to disregard the support of international organizations and non-governmental organizations operating in the same field. The founding regulations of the various agencies take account of this by providing for the participation of specialized entities within the consultative bodies of the respective agencies, which allows for a useful exchange of ideas. In certain cases, international organizations are even represented in the management board, but without having the right to vote. The participation of international organizations, of which the EU itself is not a member (but its member states) – such as the UN Refugee Agency (UNHCR) in EASO's management board and FRONTEX's consultative forum – is a remarkable fact demonstrating the EU's commitment to the international community.

The consequences of Brexit. *Possible future participation of the United Kingdom in the activities of EU*

[24]EFTA member states are Iceland, Norway, Liechtenstein and Switzerland. The first three are part of the European Economic Area.

[25]All EFTA member states are part of the Schengen area.

[26]However, this does not preclude ad hoc adaptations to EU legislative acts in the framework of the Joint Committee (the Association's decision-making body) in order to take into account the needs of the associated state.

agencies. The institutional openness of EU agencies is likely to be put to the test in the aftermath of Brexit. On 31 January 2020 at midnight, the United Kingdom ceased being an EU member state. As a consequence thereof, it has become a third country, irrespective of the fact that the Withdrawal agreement[27] provided that some of its obligations derived from EU law would continue to be in force throughout the year 2020. This means that the United Kingdom is no longer entitled to participate in the activities of EU agencies unless otherwise provided. Having said this, it is worth noting that by the time of publication of this article, the EU and the United Kingdom have concluded and declared provisionally applicable a so-called Trade and cooperation agreement[28] (an association agreement from the perspective of EU law). It certainly does not compensate for the loss of EU membership, as it is less ambitious in scope, which means that the United Kingdom will not be required to seek participation in all EU agencies.

This is certainly true for the EPPO, as this agency safeguards the financial interests of the EU (although it cannot be ruled out that the EPPO might have to address British authorities on a bilateral basis in certain circumstances). Other examples of agencies that might not be relevant for the United Kingdom are those entrusted with specific aspects of the internal market. The reason is that the said association agreement explicitly recognizes the autonomy of both parties in regulatory matters. This was a specific request from the United Kingdom that the EU has agreed with. In other terms, the United Kingdom is now allowed to adopt its own rules, in particular in the area of labor and environmental protection, without having to participate in the EU norm-setting process (either within a regulatory EU agency or in the framework of EU legislative procedures). This is a significant difference to the association with the EFTA or EEA states already explained above.

Nevertheless, both parties will have to assess carefully whether the implementation of the said association agreement makes it mandatory or at least desirable for the United Kingdom to join a specific agency. For that purpose, the United Kingdom would certainly have to conclude administrative arrangements with individual agencies, obviously with the approval of the EU. The future cooperation between the EU and the United Kingdom would be strictly bilateral in nature, similar to the type of relations with other third countries. EUROPOL provides a classic example of bilateral cooperation with third countries (involving countries such as Albania, Australia, Colombia, Georgia, etc.), made possible by numerous agreements. At this stage, it is too early to say with certainty how this cooperation might evolve, given that the said association agreement has been concluded not long ago and various aspects still require closer scrutiny and further implementation through specific bilateral agreements. From that perspective, Brexit must still be considered an unfinished process.

Employment of British nationals in EU agencies. For British staff working at EU agencies, the new third country status of the United Kingdom entails certain disadvantages with regard to their colleagues. They are more likely to be treated differently, as the principle of geographical balance might require agencies to privilege EU nationals when it comes to filling positions. It cannot be ruled out that British staff might be gradually replaced by the latter in the long term. However, it is worth pointing out that according to the Staff regulations and CEOS, agencies may actually keep British staff if this course of action is "in the interest of the service" (*dans l'intérêt du service*), in other words, if they are "indispensable" for the functioning of the agency. This is a strict requirement every agency, due to the autonomy that agencies enjoy in staff matters, will have to assess whether it is met in the respective case. This derogation has already been applied by analogy in other cases, in which the recruitment of the third-country nationals was deemed necessary by the EU institutions in order to benefit from the experience and expertise of highly qualified professionals. Against that background, the Staff regulations and CEOS already provide for adequate solutions in order to ensure a seamless transition to a post-Brexit era.

Inter-agency cooperation. Being part of the EU's institutional structure, it is consistent that agencies are called upon to cooperate in areas of common interest. The agencies' cooperation with the CDT and the Publications office in the area of public procurement, which is expressly provided for in the founding regulations, has already been mentioned above. Apart from this, agencies operating in a similar field or interested in a given category of services can cooperate and acquire them jointly (joint procurement). The EU financial regulations provide for such cooperation in order to reap the benefits it brings, i. e. saving financial resources and benefiting from synergy effects. This type of cooperation generally requires that two or more agencies agree on the services or goods to be procured (e. g. the purchase of aerial surveillance services between FRONTEX, EFCA, and EMSA), the modalities of inter-party cooperation (internal allocation of resources or goods purchased according to the needs of each agency), as

[27]Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, signed on 24 January 2020. It entered into force on 31 January 2020 at midnight, when the United Kingdom left the European Union.

[28]Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.

well as the organization of the procurement procedure (publication of a call for tenders, evaluation of tenders, award of the contract).

Many agencies are meant to collaborate with each other because they operate in the same field. The EU legislator has often even provided for complementarity of tasks, making certain agencies natural allies. This is the case for agencies such as FRONTEX, EUROPOL, and EUROJUST, which are responsible for fighting crime in the so-called area of freedom, security and justice set out in art. 3(2) of the TEU. The eu-LISA agency could also be added to this list due to its IT support to the above-mentioned agencies operating in this area. Where the treaties do not provide for explicit cooperation, such cooperation is regulated in an abstract manner in the founding regulations by conferring the respective agencies the power to conclude administrative arrangements between them, in which the terms of cooperation are laid down in detail. The requirement to submit such administrative arrangements to the Commission for approval (and to inform Parliament thereof) ensures that the requirement of compatibility with EU rules is respected, as will be explained below.

Cooperation between agencies can also be achieved through an exchange of knowledge and experience in areas, which may cover issues as diverse as civil service matters, public procurement, litigation, as well as the creation of a European school for the children of civil servants in the host member state. Knowledge sharing can happen either directly between agencies or in a more institutionalized framework such as the EU agencies network, to which the Commission is also usually invited. As agencies face very similar challenges, it is understandable that such close cooperation has been developed. The younger agencies thus benefit from the experience gained by the older agencies. The meetings of the EU agencies network take place in different formats, according to the respective topics to be dealt with. Of particular interest is the network of lawyers, where topical legal issues are discussed. They are usually organized at the seat of the agency holding the rotating presidency.

Creation and legal basis

Method of creation. As stated at the outset, agencies are created through the adoption of founding regulations that set out the objectives and competencies of every agency, as well as the organizational structure and decision-making procedures. They also regulate fundamental aspects of EU law, such as legal personality and capacity, non-contractual liability, the power to conclude agreements, the seat of the agency, immunities, the application of financial and staff regulations, language arrangements, provisions on public access to documents and data protection. The use of the regulation as a legal instrument allows for a swift establishment as well as a flexible modification of the functioning of the agency, as the EU legislator may, if necessary, make a punctual amendment to the relevant provisions. This is how the legislator has repeatedly responded to crises, such as the migration crisis that led to an extension of competencies of the FRONTEX and EASO agencies [14, p. 150]. It also ensures immediate and uniform application by the member states, without the need for transposition into national law.

While it is true that, hypothetically, recourse could be had to other legal instruments referred to in art. 288 of the TFEU, such as a directive or a decision, it should be noted that only the regulation ensures that the constituent act has sufficient normative value to regulate matters as important as legal personality, as well as of a substantive and procedural nature, thus completely dispensing with a legislative complement at national level which could jeopardize legislative and administrative uniformity. These are the main reasons why the regulation is the primary legal instrument for setting up agencies. The establishment of EUROPOL confirms this since this agency was initially set up (in 1992) on the basis of an international agreement (which entered into force only in 1998), which was subsequently replaced by a framework decision and finally by a regulation. EUROPOL thus underwent a transformation from an intergovernmental to a supranational agency [15, p. 53]. EUROJUST experienced a similar evolution due to the fact that cooperation in criminal matters began to take place within a strictly intergovernmental framework. With the dissolution of the supranational and intergovernmental pillar structure (commonly known as the Greek temple structure) following the entry into force of the Lisbon treaty, criminal cooperation has been placed on a new legal foundation, which, however, retains certain particularities.

Although this article focuses on the establishment of agencies, it is also necessary to take into account the competence of the legislator to close them, following the same legislative procedure that led to their creation. It also has the power to amend founding regulations and to merge agencies. It should be noted that to date none of the agencies has been closed, merged, or significantly modified in their scope, except for the European agency for reconstruction, which was set up in 1999 and wound up in 2008. Over the past ten years, the Commission has twice proposed to merge agencies for reasons of coherence but did not obtain Parliament's agreement[29]. In 2007, the Commission's impact assessment accompanying the proposal for a European electronic communications market authority (which became BEREC office in 2009) suggested merging

[29]Future of EU agencies – reinforcing flexibility and cooperation : special report of the Court of Auditors. 2020. P. 22.

ENISA with the new authority, but the legislator chose instead to create a separate new body that would coexist with ENISA. CEPOL provides online and face-to-face training sessions for police officers and is closely linked to EUROPOL. In 2013, the Commission presented a legislative package, based on an impact assessment, proposing to merge EUROPOL and CEPOL for reasons of efficiency. However, Parliament rejected the proposal. This is why the agencification process seems to be moving forward rather than being reverted.

The headquarters agreement concluded with the host member state. In a certain way, European agencies reflect the idea of a federal and decentralized EU, due to the fact that they have their headquarters outside Brussels, Luxembourg and Strasbourg, informally referred to as EU capitals. To some extent, agencification in the EU is inspired by similar processes that have taken place in other parts of the world, especially in federally structured states such as the USA and Germany. The idea of decentralization responds to the need to create an institutional structure that is closer to the citizen. Agencification is thus a reaction to resentment towards Brussels, which is widely cultivated by certain groups of eurosceptics and nationalists. On the other hand, the idea of becoming the seat of an agency has become very popular among the member states, which even compete to be granted such status. This has been the case recently for EMA, which, after years in the UK, has had to look for another home state following Brexit. Several member states submitted proposals for cities that could provide suitable conditions for hosting this agency, with Amsterdam being eventually selected. The same was true for EBA, which was also based in London before Brexit and ultimately moved to Paris. There are various reasons for such a positive stance towards agencies, such as the reputation of being a host state, the expected benefits of public procurement and the employment of nationals of that member state, the hope of being able to influence in some way the policy of the agency, among others. The seat of an agency is determined by the common agreement of the member states within the Council. Recently, it was the Commission that has been proposing possible headquarters, based on applications previously submitted by the member states, which highlight the advantages of their respective cities, e. g. geographical location, connectivity, infrastructure, availability of buildings, quality of life, etc. All these criteria play an important role in the choice of the city where the seat is located.

Although the founding regulations (complemented by the provisions of the treaties) contain legal provisions allowing an agency to operate autonomously immediately after its creation by regulating essential aspects such as finance, immunities, employment, functions, etc, it is inevitable in practice to conclude headquarters agreements with the host member states[30]. Indeed, the founding regulations expressly require this. There are several aspects that need to be regulated in more detail in a headquarters agreement, such as relations with national authorities, the respect of the inviolability and the immunity of the agency (infrastructure, archives, telecommunications) and its staff, the availability of a multilingual school for staff children, the construction and availability of infrastructure, the protection of the agency's premises, exemptions of taxes and customs duties, access to the national health system, entry and stay permits, etc. All these aspects require negotiations between the agency and the host member state, which in some cases have even lasted for years. From a legal point of view, the host agreement is an instrument of public international law, which can be concluded by the agency itself because of its legal personality. At the same time, it cannot be denied that it is also part of the EU legal order, as it implements provisions of primary and secondary law. Although it is concluded and amended in accordance with the rules of public international law (and the constitutional law of the seat state), it is impossible to interpret its provisions without taking into account the objectives of EU law. It can therefore be concluded that the host agreement is a necessary complement to ensure the proper functioning of any agency. The existence of a headquarters agreement ensures legal certainty in the host state, as the national authorities are sometimes not fully aware of the prerogatives of the EU agency on their territory. The possibility of being able to consult a legal document drafted in the official language of that member state is an aspect of immeasurable value in administrative practice.

Conflict with the principles of conferral of powers and institutional balance. The existence of a large number of agencies suggests that their creation does not face obstacles that are difficult to overcome. This is precisely a major problem that needs to be discussed below. In so far as agencies are increasingly entrusted with powers, there is a risk that the EU institutions, which are expressly created by the founding treaties, may interpret this phenomenon as an implicit delegation of powers and, consequently, reject any liability for the infringement of the rights of individuals. Indeed, the possibility cannot be ruled out that the creation of agencies endowed with sovereign powers might blur the division of powers provided for in the treaties. Uncertainty as to the extent of the respective agencies' competencies may even lead to an agency unduly exceeding its power to act ("ultra vires" activity) ([1, p. 708]. The examples mentioned above suggest that the phenomenon of agencification could be incompatible with two core principles of EU law: conferral of powers and institutional balance.

[30]Report from the Commission to the European Parliament and the Council on the implementation of the Joint statement and Common approach on the location of the sites of decentralised agencies. COM (2019) 187 final. Brussels, 2019. P. 8.

The principle of conferral. The EU has only the competencies conferred by the treaties. In accordance with this principle, laid down in art. 5(2) of the TEU, the EU may act only within the limits of the competencies conferred by the member states in the treaties to attain the objectives set out therein. Competencies not attributed to the EU by the treaties remain with the member states. The Lisbon treaty clarifies the division of competencies between the EU and EU countries. These competencies are divided into three main categories: exclusive competence; shared competencies; and supporting competencies. In principle, by not providing for the possibility to set up agencies other than those explicitly mentioned in the treaties, it could be argued that only the institutions listed in art. 13 of the TEU can exercise the powers conferred on the EU.

On the other hand, it should be noted that there is no provision in the treaties expressly prohibiting the conferral of powers on other entities, be they agencies or bodies, especially if these powers are only specific and if this is done voluntarily. As will be explained below, the creation of agencies does not occur in a legal vacuum, but recourse is made each time to a legal basis in the treaties allowing the adoption of the corresponding founding regulation, following a legislative procedure for this purpose, which reflects as far as possible a consensus between the relevant institutions, i. e. the Council and the Parliament. Since the Commission is responsible for presenting legislative proposals, it has already happened that it and the Council, which is a co-legislator, have had divergent views on the choice of the appropriate legal basis. The fact that the Council has opted on certain occasions to amend the legislative proposal, by referring to a different legal basis, demonstrates how controversial this issue can be. Ideally, the treaties should be amended in order to introduce a specific legal basis for the creation of agencies. This would help to ensure legal certainty and avoid litigation before the CJEU. However, there is currently no indication of political will for reform.

The principle of institutional balance. According to art. 13(2) of the TEU, each EU institution is to act within the limits of the powers conferred on it by the treaties and in accordance with the procedures, conditions and objectives set out therein. This provision is the expression of the principle of institutional balance, characteristic of the institutional structure of the EU, which implies that each of the institutions must exercise its powers without encroaching on those of the others[31]. In view of this principle, it could be argued that, by taking on certain powers, agencies "usurp" the powers originally conferred on the institutions. In addition, it could be argued that by creating new entities other than the institutions, the democratic and legality control that the treaties impose on the institutions is avoided. Agencification would therefore be an attack on the sophisticated institutional balance established by the treaties.

However, this argument would ignore the fact that the agencies only have ad hoc powers, in highly specialized areas, without depriving the institutions of the possibility of exercising their original powers. In fact, agencies operate in a highly technical area, into which an institution would hardly venture, unless the treaties were amended. Thus, far from "usurping" powers, the agencies occupy new areas of competence on the basis of an express conferral, specified in the founding regulation. As regards the argument relating to the alleged lack of democratic control and legality referred to in the previous paragraph, it is important to mention that the agencies do not operate arbitrarily and without any control. On the contrary, as will be explained below, agencies are required to submit detailed reports of their activities to the main institutions as well as to the general public. There are also transparency obligations they must comply with, such as public access to documents. As regards the necessary review of legality, it must be borne in mind that the acts adopted by agencies having legal effects for individuals may be challenged by the latter before internal judicial bodies and the CJEU [1, p. 709]. It can therefore be rightly stated that the EU legislator has developed appropriate mechanisms to ensure that agencies do not avoid their democratic and legal accountability.

The principle of subsidiarity. Another principle that plays an important role in setting up agencies is the principle of subsidiarity, as laid down in art. 5(3) of the TEU and Protocol No. 2 on the application of the principles of subsidiarity and proportionality. In areas which do not fall within the exclusive competence of the EU, the principle of subsidiarity aims to protect the decision-making and policy capacity of member states and legitimizes EU action where the objectives of an action cannot be sufficiently achieved by the member states, but can rather be better achieved at EU level "by reason of the scale or effects of the proposed action". Thus, the purpose of including that principle in the EU treaties is to bring the exercise of powers closer to the citizen, in accordance with the principle of proximity laid down in art. 10(3) of the TEU. As EU law provides for various forms of administration, it would be possible to claim that the creation of an agency is an unnecessary act of centralization. Indeed, as explained above, EU law can be implemented in a decentralized manner by the member states, while the Commission and the CJEU are responsible for ensuring that member states comply with their obligations.

On the other hand, it could be put forward against this argument that agencification does not necessarily have the effect of centralizing administration. As

[31]See: judgment of the CJEU of 13 November 2015 in case C-73/14, Council v Commission. EU:C:2015:663. Para 61 ; judgment of 14 April 2015 in case C-409/13 Council v Commission. EU:C:2015:217. Para 64.

mentioned above, agencification does not deprive member states of the right to apply and enforce EU rules themselves at national level. The administration remains significantly in the hands of the member states, with agencies generally limited to coordination and performance assessment tasks in the achievement of the objectives set. It is precisely this task of coordination and evaluation that is one of the main reasons for the creation of agencies, since they have the technical expertise and impartiality necessary to verify that those objectives have been met. The creation of a supranational body ensures the efficiency of the administration, as it can put healthy pressure on member states to ensure compliance with their obligations. The founding regulations generally justify in detail how the legislature has taken account of the principle of subsidiarity. The aim behind such justification is to comply with the requirements of art. 8 of Protocol No. 2 to the TEU, according to which member states (on the initiative of their national parliaments) may bring an action for annulment of a given legislative act before the CJEU, alleging an alleged breach of the principle of subsidiarity. To date, the CJEU has been very cautious in its assessment of compliance with this principle.

The legal basis in the treaties. Since the first agencies were set up, the EU has made use of several legal bases that will be presented below. In fact, it is commonly referred to as "generations" of agencies, depending on the type of legal basis used for their establishment. Each legal basis has its own requirements and functions and is therefore not merely interchangeable. The choice of the appropriate legal basis is very important in EU law. In view of its status as a "Union of law", as repeatedly recalled by the CJEU[32] the choice of legal basis ensures that the EU legislator acts in accordance with the rule of law and respects the basic principles mentioned above, i. e. conferral, institutional balance, and subsidiarity. Consequently, if it did not comply with this requirement, the legislator would exceed its powers, risking the annulment of the ultra vires act by the CJEU as a sanction. This could occur in the context of an action for annulment (art. 263 of the TFEU), a reference for a preliminary ruling to verify the validity of a legal act (art. 267 of the TFEU), or an action for inapplicability (art. 277 of the TFEU) [1, p. 709]. In order to allow for an effective judicial review of the legislative activity, EU law provides that each legislative act must state the legal basis that has been applied and explain in its recitals the reasons, which led the legislator to adopt such an act.

The flexibility clause in art. 352 of the TFEU. The first legal basis used by the EU for the purpose of setting up agencies was the so-called flexibility clause in art. 352 of the TFEU[33]. This provision authorizes the EU to adopt an act necessary to achieve the objectives assigned by the treaties where the treaties have not provided the necessary powers to achieve those objectives. Art. 352 of the TFEU can serve as a legal basis only if the following conditions are met: the envisaged action is "necessary to achieve, within the framework of the policies defined by the treaties (with the exception of the common foreign and security policy), one of the EU's objectives"; nothing in the treaties provides for actions to achieve that "objective"; the planned action should not lead to the extension of EU competencies beyond what is provided for in the treaties.

This legal basis was widely used at the beginning of the integration process[34] and this practice was also considered compatible with EU law by the case law of the CJEU[35]. However, this practice has the drawback of encouraging an overly extensive use due to the somewhat ambiguous wording of the legal basis. It is not too difficult to find in the treaties an objective that would serve as a justification for setting up an agency. Perhaps this was not a real problem at an early stage. However, as the number of agencies increases, there is a risk of proliferation even undermining the role of the institutions. Furthermore, art. 352 of the TFEU is based on the "implied powers" theory, according to which it is assumed that an international organization must have the powers necessary to attain its objectives, even if its constituent agreement does not expressly confer such powers. While it is true that the "implied powers" theory originates in public international law[36], it must

[32]See: judgment of 26 June 2012 in case C-335/09 P, Republic of Poland v European Commision. EU:C:2012:385. Para 48 ; judgment of 29 June 2010 in case C-550/09, Criminal proceedings against E and F. EU:C:2010:382. Para 44. The CJEU has emphasized that the EU "is a Union based on the rule of law whose institutions are subject to review of the conformity of its acts, in particular with the treaty and with the general principles of law".

[33]It is equivalent to art. 308 of the Treaty establishing the European Community and ex art. 235 of the EEC.

[34]The evolution of the legal history of the Economic and Monetary Union and the use of art. 352 of the TFEU go hand in hand. Both the management of the first balance-of-payments support mechanisms and the establishment of the European Monetary Cooperation Fund (EMCF) and the European Monetary Unit were based on the flexibility clause. This provision could be applied in order to bring the Economic and Monetary Union to its following logical stage: a European Monetary Fund under the treaties, through the incorporation of the current European stability mechanism (ESM) into EU law. Thus, the integration of the ESM into the EU framework could be achieved through a regulation based on art. 352 of the TFEU. In order to ensure a smooth continuation of activities, member states would agree that the ESM capital is transferred to the European Monetary Fund through individual commitments or a simplified multilateral act.

[35]See: judgment of 27 November 2012 in case C-370/12, Thomas Pringle v Government of Ireland and others. EU:C:2012:756. There the CJEU did not explicitly rule out the possibility of establishing the ESM by using art. 352 of the TFEU as a legal basis. However, it did not need to comment the fact that it had been created on the basis of an international agreement originally outside the EU's founding treaties. It should be noted that the treaties were subsequently amended by a simplified procedure to provide for the creation of the ESM.

[36]See: Reparation for injuries suffered in the service of the UN : advisory opinion of the International Court of Justice of 11 April 1949. [1949] ICJ Rep 174. ICGJ 232 (ICJ 1949).

be pointed out that such a presumption is difficult to reconcile with the principle of conferral, which is inherent in EU law. Moreover, the idea of allowing the legislature to "fill up" on an ad hoc basis a legal vacuum left unintentionally in the treaties by means of an allocation of powers based on art. 352 of the TFEU reflects that principle in some way. We can thus conclude that, although the flexibility clause can, in principle, serve as a legal basis, it is not the most appropriate choice. This is perhaps the reason why this practice was abandoned over time, giving preference to other legal bases. The agencies established under art. 352 of the TFEU include Cedefop, EUROFOUND, ENISA, European Union Agency for Fundamental Rights, and CPVO.

The internal market harmonization clause in art. 114 of the TFEU. Another legal basis used for the purpose of setting up agencies was the internal market harmonization clause in art. 114 of the TFEU. That provision allows for the adoption of "measures for the approximation of the provisions laid down by law, regulation or administrative action in the member states which have as their object the establishment and functioning of the internal market" (other integration systems such as the Eurasian Economic Union and the Andean Community of Nations also provide for the harmonization of national legislation with a view to establishing an internal market (see [16, p. 268]). While it is true that this legal basis was very useful in its days, it poses a number of legal problems today because its application is limited to only one sector, the internal market. Although it was indispensable in the formation phase of the internal market, its relevance has now diminished after this objective was essentially achieved in 1993. This obviously does not rule out the possibility that art. 114 of the TFEU may continue to be used as a legal basis since the EU internal market continues to evolve in response to current requirements, for example by taking account of technological development and the need to protect consumers. However, in the absence of recourse to art. 114 of the TFEU, if the agency does not operate in the field of the internal market, the legislator will have to rely on art. 352 of the TFEU, which is a subsidiary legal basis. Another problem is the restriction to "measures for the approximation of the provisions laid down by law, regulation or administrative action in the member states". To what extent the establishment of an agency itself must constitute an approximation of provisions or whether it is sufficient that its creation constitutes a measure that "facilitates" or "contributes" to that objective is still a matter of controversy. The case law of the CJEU seems to favor a rather broad interpretation of the scope of art. 114 of the TFEU, in recognition of the discretionary power of the legislator, by requiring only that the activity of the agency contributes to the approximation of laws with a view to ensuring the functioning of the internal market. The agencies established under art. 114 of the TFEU include ECHA, ACER, EBA, ESMA, EMA, EIOPA, EUIPO, and ENISA.

Sectoral provisions of the TFEU. More recently, the legislator has been using as a legal basis those provisions in the treaties, which confer competencies on the EU in certain areas. Although these provisions do not expressly provide for the establishment of agencies, they authorize the EU to adopt "measures" to achieve specific objectives. The term "measure" is generally construed as meaning that the power conferred also allows the adoption of legislative acts, including regulations establishing agencies. As administrative entities, agencies are undoubtedly appropriate measures to address the problems encountered in the integration process. This practice can be considered established and endorsed by the case law of the CJEU. It is also the one which raises the least doubts as to its legality since it is the one which seeks most to satisfy the requirement of pursuing a legitimate objective, as well as the requirement to rely on a competence specifically provided for in the treaties. Indeed, the term "measure" is sufficiently broad to include the creation of agencies, particularly in the light of the wide discretion that the legislator enjoys in the choice of measures to achieve the objectives set out in the treaties. Agencies that were set up under sectoral provisions include EEA, ECDC, EASA, FRONTEX, EASO, and EFSA.

Organizational structure

Because an agency is an autonomous entity, it cannot rely on the Commission or another institution for the purpose of defining its policy. Moreover, the founding regulations generally state that the work programs of the agencies should be compatible with the priorities defined by the Commission or the EU in general. As a result, each agency has a body that defines its policy. In addition, that body will also be responsible for taking the necessary administrative measures, thus enabling the agency to function. The overall organizational structure of the agencies will be briefly explained in what follows, although it should be mentioned that important differences may exist from one agency to another, as a result of the somewhat uncoordinated proliferation that has taken place in recent decades. Indeed, it was not until the adoption of the so-called "Common approach"[37], in which the main EU institutions agreed on the common features that the new agencies should present, that a certain order in the agencification process was created. In principle, each

[37]Joint statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies [Electronic resource]. URL: https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf (date of access: 10.01.2021).

agency has an organizational structure consisting of its management board and executive director. However, it may also provide for other bodies with consultative functions.

The management board. The organizational structure of the agencies provides for the creation of boards, which have two different types of functions: the definition of the agency's policy and the exercise of administrative functions. While in some agencies it is the same board that exercises these functions, others provide for a division of functions between two different types of boards. In order to take into account the role of the respective board, the most recently created founding regulations of agencies foresee that members will have to meet certain requirements, more specifically, they will need to have knowledge and experience in the field of activity of the agency. The names of such bodies may vary from one agency to another, even if the functions are similar. In order to facilitate understanding, the general term "management board" shall be used. According to the relevant provisions in the agencies' founding regulations or the rules of procedure of the boards, these bodies convene meetings of their members on a regular basis, at least once a year, or when a certain percentage of their members so request. The purpose of these meetings is to discuss aspects related to the agency's activity, in particular as regards the strategy to be pursued and to take the necessary decisions to ensure its functioning.

In general, each management board is composed of representatives of all member states. However, there are a few exceptions, where there is a representation of the Commission, the Council, and the Parliament respectively. The boards generally provide for representation of the Commission through at least one (up to six members) with voting rights. In some agencies, the Commission has only observer status. In any event, the Commission has tried in vain to extend its influence on administrative boards by requiring equal representation with the Council. Indeed, the Commission's presence in the management board is indispensable in order not to deprive the agency of its supranational character. A representation of only the member states would risk eliminating the distinction between the institutions of the EU and those of the member states. The agency could become an intergovernmental entity through national authorities, which is irreconcilable with the idea of EU supranationality. Taking into account the experience and technical expertise of the Commission, it is, therefore, necessary to require a commensurate representation of the Commission.

In some agencies, Parliament is also represented or can appoint scientific personalities. Apart from exceptions where they are only granted the observer status, these representatives are generally full members of the management board. The Commission's legislative proposals did not initially provide for a representation of Parliament. However, the latter amended them in order to ensure their presence in the agencies. On the one hand, this presence has the advantage of allowing Parliament to assume its role of democratic scrutiny of the agencies' activities. On the other hand, involving Parliament in the agencies' activities risks mixing up its influence over the agencies' activities with its democratic scrutiny. Parliament already has effective means of ensuring that the agencies comply with the applicable rules and are accountable for their actions. In the future, it would be preferable for the Parliament to simply insist on preserving its traditional means of control rather than directly influencing the activities of the agencies, which is rather a matter for the executive.

The management boards of certain agencies allow for the representation of entities other than the EU institutions and the member states. The participation of third countries and international organizations in management boards has already been discussed in the context of the openness of the agencification phenomenon. In addition, certain agencies provide for the representation of non-voting interest groups, which are appointed according to specific procedures.

In the common approach, the institutions agreed that the management boards would be composed of one representative per member state, two representatives of the Commission, one from the Parliament and, if appropriate, a limited number of interest groups. This agreement can be seen as a defeat for the Commission, who had insisted on a parity with the Council. It is, in turn, an important victory for the Parliament, which has a legitimate right to require representation on all boards of directors despite the aforementioned doubts about its specific role.

Executive director. The executive director is the most important body in the agency after the management board. Like the latter, the executive director does not have a harmonized name but is often referred to in the terminology introduced by the founding regulation. He represents the agency externally and is responsible for its day-to-day administration. Its role is also to assist the management board in the preparation of the agency's essential documents. In order to perform his or her duties, the executive director should ideally have sound knowledge of public administration, management, and even professional experience in the area in which the agency operates. However, it is interesting to draw attention to the fact that the founding regulations do not contain any specification as to the conditions which every candidate must satisfy in order to take up that post, so that, in practice, it is for the management board to choose the appropriate candidate.

The executive director is appointed by decision of the management board on the basis of a proposal from the Commission. Although this is the regular procedure in the vast majority of agencies and is also in line with the common approach, there are important exceptions, with some agencies providing for an appointment by

the Council, on the basis of a proposal from the management board, or a decision of the management board itself, on the basis of a list of candidates drawn up by a selection panel (or the Commission) and approved by the Council and the Parliament. It should be noted that, although only the founding regulations of CEPOL and EUROJUST explicitly mention the involvement of a selection panel, this is normally required by the EU civil service legislation. The differences in the appointment process that still exist from one agency to another are the result of an uncoordinated process in agencification, which results from the struggle between the institutions for obtaining control and are therefore not justified on objective grounds. The most consistent approach would be for the executive director to be appointed only by the management board, to which the executive director is normally accountable. While it is true that the Commission has a certain power to propose a number of candidates for the post of executive director, the fact remains that the Parliament has been able to extend its influence. In fact, the founding regulations of the agencies most recently created foresee that candidates should appear before the Parliament and answer questions, following a procedure similar to the appointment of members of the Commission[38].

Some of the most recently created agencies' founding regulations emphasize the independence of the executive director of the institutions in their management of the agency. Of course, this does not mean that the executive director is not accountable for his or her actions. On the contrary, as indicated above, the executive director is accountable to the management board and may therefore be dismissed by the latter on the grounds of a breach of his duties, in accordance with the procedure laid down in the respective founding regulation. The regulation of such a procedure may be detailed or leave a certain margin of discretion, thus varying from one agency to another.

Advisory bodies. Depending on its specific role, the institutional structure of the agency may include a number of advisory bodies, which will enjoy relative independence despite their formal membership in the agency. FRONTEX'S consultative bodies include the data protection officer, the consultative forum, and the human rights officer. The advisory bodies may be the forum for bringing together international organizations, invited to participate in the work of the agency if membership of the management board is not foreseen. Other agencies may provide for bodies composed of technical experts, specialized in the area in which the agency operates. Depending on their respective role, these advisory bodies may submit opinions, deal with requests from private individuals, as well as encourage the agency to act in a specific way.

Decision-making procedures and the adoption of other acts

The various bodies of the agency take decisions in their respective areas of competence. While the management board deals with strategic aspects, the executive director is responsible for the day-to-day operation of the agency, as well as for taking the measures necessary to ensure the implementation of the decisions of the management board where the founding regulation or the decisions of the management board themselves provide for such implementation. The management board may also delegate certain tasks of an administrative or implementation nature to the executive director. Decisions are taken in accordance with the respective procedures laid down in the founding regulations, governed in more detail by the rules of procedure, which the agency is responsible for adopting. While it is true that the executive director and the management board have different competencies, it cannot be doubted that there will always be a certain thematic overlap. However, it should be noted that there is a hierarchical relationship between the two types of decisions. In so far as it ensures the implementation of decisions of the management board and acts on the basis of a delegation of powers, the executive director merely acts in accordance with the terms of reference given by the management board. The hierarchy of norms must therefore be taken into account when examining the legality of a decision. This implies that the executive director's implementing and delegation decisions must comply with the instructions given in the decisions of the management board. The decisions of the agency must, in turn, comply without exception with the provisions of the founding regulation, as well as with all relevant EU legislation, i. e. applicable by the agency.

In addition to the decisions in the strict sense, agencies may adopt administrative acts with binding effects on the member states or individuals, with the possibility of varying terminology from one agency to another. The question of whether an administrative act adopted by the agency produces legal effects must be answered by an interpretation of the legal bases enabling the bodies of the agency to adopt those acts, account being taken of the objective to be achieved by

[38]This is a remarkable fact, as not all procedures for appointing senior EU leaders provide for a duty to appear before Parliament. It should be noted in this context that, under art. 255 of the TFEU, judges of the CJEU must appear only before "a panel composed of seven persons chosen from among former members of the CJEU and the GC, members of national supreme courts and lawyers of recognised competence, one of which shall be proposed by Parliament". The appointment is thus based solely on the knowledge and experience of a candidate. Therefore, unlike the procedure foreseen in the US for appointing the members of the Supreme Court, the appointment of judges of the CJEU is not subject to the vote of a parliamentary assembly. However, Parliament has requested at more than one opportunity that the procedure be changed in order to allow it to play a more important role.

that act. The answer is of the utmost importance since it makes it possible to determine whether an administrative act may be the subject of legal review, a matter which will be discussed below. Another important category of administrative acts adopted by agencies is the "soft law" mentioned above, which includes all kinds of manuals, circulars, guidelines, etc. whose role is essentially to give some guidance to national and supranational bodies on how to apply and interpret the EU rules correctly. While the interpretative monopoly of the law lies with the CJEU, it should be pointed out that agencies, like the Commission, have a high level of technical knowledge, so that the importance of these soft law instruments should not be underestimated. Indeed, those instruments often fill up the loopholes left by secondary legislation, as well as giving guidance to the administration as to how best to make use of the margin of discretion that the EU legislator may have conferred on it. Nowadays, the soft law instruments developed by both the Commission and the agencies must be regarded as indispensable in the EU administrative practice.

Control measures on agencies

General aspects. The proliferation of agencies in so many areas of EU competence raises doubts as to the feasibility of genuinely controlling their administrative activity. This concern is understandable when comparing administration through agencies with other types of administration mentioned above. When member states implement EU law, it will generally be up to the Commission and the CJEU to monitor compliance with their obligations. If EU law is applied by the Commission, institutions such as the CJEU, Parliament[39] and the Court of Auditors will normally have a duty to verify the correct implementation. For agencies, this is much more complicated. In the absence of any provision in the treaties which explicitly provides for the establishment of agencies, it is clear that there will be no provisions governing such important aspects as the control of their administrative activity. Aware of this problem, the legislator has had to introduce specific mechanisms to fill this gap in the EU legal order. The control mechanisms are of a variety of types and are applied by several institutions, as will be explained below. The aim is always the same, i. e. to ensure that agencies take responsibility for their actions by acting in a transparent manner and in accordance with the legal framework.

The requirements imposed by the chosen legal basis. The most elementary control mechanism is linked to the choice of the appropriate legal basis in order to create an agency. As stated at the outset, the legal basis determines the legislative procedure to be followed and thus the requirements to be met by the institutions involved in that procedure. If unanimity is required in the Council, as would be the case with the application of art. 352 of the TFEU as a legal basis, member states may object to the establishment of the respective agency. That is also the case if the adoption of the founding regulation requires a majority of votes among the member states meeting within the Council, as required by the legal basis of art. 114 of the TFEU. If the Parliament is a co-legislator in this process, it may also oppose or require legislative amendments that reflect its interests. Obviously, once the agency has been set up, this control is lost, unless the founding regulation requires subsequent amendments, so that the legislative process should be re-launched. Since this is not so often the case, the institutions involved will have to make wise use of their influence in the legislative process.

Preparation, negotiation and adoption of the budget. Another important control mechanism is the possibility to allocate financial means to agencies through the adoption of the EU budget. The Council provides for the means deemed necessary, while it is for the Parliament to adopt the budget. Both member states and Parliament can achieve the desired changes to the agency's activity by exerting political pressure. By virtue of its power of initiative, the Commission has the task to submit a budget proposal, suggesting to allocate financial resources to the activities it deems appropriate to achieve the objectives set.

The influence of the Commission on the activities of the agencies. Of all the EU institutions, it is the Commission that is likely to have the greatest influence on the activities of the agencies due to the fact that they are entrusted with an administrative activity. Moreover, while it is true that agencies are specialized entities, the Commission is the institution with policy development and implementation powers. It also has coordination, implementation, and management functions, in accordance with art. 17(1) of the TEU. To illustrate an example, although FRONTEX is the agency responsible for protecting the EU's external borders, it is the directorate-general for justice and home affairs that develops a policy in this area and, after approval by the Council, ensures that FRONTEX operates within the framework of this policy. As "guardian of the treaties", the Commission will intervene to ensure that the agency acts within its mandate and the respective EU policies. In addition, the Commission will be formally (or informally) consulted by the various services of the agency on aspects related to the legality of its activities, notwithstanding the institutional independence

[39]See: European parliamentary research service "EU agencies, common approach and peer review – implementation assessment".

enjoyed by the agency. The Commission seems to be aware of this relationship of "semi-subordination" when considering the agencies openly as their "satellites". The Commission will also normally require that its prerogatives be respected in certain areas, for example in the field of external relations. The Commission will therefore object to agencies acting independently when dealing with third countries. The development of administrative arrangements with these countries will generally require the authorization of the Commission before they can be concluded. In order to prevent an agency from trespassing its powers – or of the EU itself – at the international level, the Commission starts from the premise that administrative arrangements concluded between agencies and third states do not constitute treaties of public international law. It will also deny its legally binding effect, reducing it to mere "expressions of intent". However questionable this interpretation may be from a legal point of view, it makes much sense for the EU in political terms, since it avoids the risk of international liability towards third countries as the result of an uncoordinated activity by a large number of agencies.

Moreover, it should be noted that the influence that the Commission may exert on the internal decision-making process, that is to say in the management board, is not sufficient to be able to speak of a "control" of the agency's activity. As explained above, the Commission generally does not have more than a couple of representatives on that board, with its influence being reduced with each accession of new member states to the EU. Although the Commission endeavors to highlight its technical knowledge and experience in the field, this should not lead to the conclusion that this will be sufficient to make its opinion prevail over the views of the other members of the management board. Much less the Commission will be able to exert a decisive influence on the day-to-day work of the agencies by being able to propose or reject candidates for the post of the executive director. The position of the Commission within the management board remains that of a minority.

Public relations and public access to internal documents. Agencies do not operate in anonymity, even if the Commission often benefits publicly from the success of their activities. Some agencies enjoy a certain popularity, depending on the scope assigned to them. As a result, agencies are often called upon to answer questions raised by the press or members of Parliament regarding the legality and appropriateness of their actions. Agencies shall take responsibility for their actions, explaining directly or by means of press releases the reasons that led them to take certain decisions. In addition, agencies must provide public access to their documents in accordance with the EU rules, which are generally declared applicable by virtue of the founding regulations. This concerns, in particular, Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to Parliament, Council and Commission[40] documents. Part of the administrative activity consists of processing requests for public access to internal documents, justifying the refusal of access, and, if necessary, defending this decision before the CJEU in the event that such a decision is challenged by an action for annulment[41]. These mechanisms ensure effective control of the activity of agencies by the public.

The responsibility of the executive director and the chairperson of the management board. The agency is also accountable through its executive director, who assumes political responsibility for the agency's actions towards institutions such as the Commission and Parliament. Those institutions may request that the executive director or the Chairperson of the management board appear and answer questions put to them. If Parliament requests their availability, this invitation will usually come from the committee responsible for the matter.

The obligation to submit a work program and an annual report. The main source of information enabling the institutions to exercise their power of scrutiny is the reports that agencies must submit on a regular basis, the work program and the annual report being the most important. The two reports are, in principle, sides of the same medal. While the work program explains the policy and objectives of the coming year, the annual report presents the activities of the previous year. With regard to the work program, it is normally the founding regulations that impose the obligation to submit it. However, the agencies recognise this obligation even if the founding regulations do not explicitly prescribe it. Obviously, the work program should be compatible with the EU policy in the respective field. The annual report enables the responsible institutions to verify whether the agency has achieved its objectives. Generally speaking, the founding regulations do not specify in much detail the requirements to be met by the reports in terms of content, thus giving the agencies a certain margin of discretion. In order to achieve a certain degree of harmonization, the common approach makes some suggestions, proposing that the Commission take the initiative and adopt measures to ensure consistency and comparability of these reports. In any event, the founding regulations determine the institutions to which such reports must be sent, including the Council, the Commission, the Parliament, the Court of Auditors, the Committee of the Regions, and the Economic and Social Committee.

[40]The regulation is published in Official Journal of the European Union Series: L. 31 May 2001. P. 43–48.

[41]See: judgment of the General Court of the 27 November 2019 in case T-31/18, Luisa Izuzquiza and Arne Semsrott v European Border and Coast Guard Agency. EU:T:2019:815 ; judgement of the CJEU of 22 January 2020 in case C-175/18 P, PTC Therapeutics International v European Medicines Agency. EU:C:2020:30.

The control of legality of the agencies' activities

The control measures set out in the previous section ensure first and foremost the democratic control over the agencies' activities and, to a lesser extent, the control of legality, i. e. a review of compatibility with EU law. As regards the second type of control, it should be noted that there are specific mechanisms to achieve this objective, which will be presented below.

Legal review by the boards of appeal. As stated above, it is possible to request the legal review of an administrative act, provided that it affects the legal position of a member state or of an individual. Aware of the need to provide effective legal protection and taking into account the highly technical knowledge of regulatory agencies, the EU legislator has chosen to provide such agencies with so-called boards of appeal (see concerning the boards of appeal [17]). Among the agencies having those boards of appeal are ECHA and EUIPO. The advantage of the boards of appeal lies in the possibility to harness the expertise of the agencies, while alleviating the workload of the EU judicial system. The boards of appeal have inspired the creation of judicial bodies such as the (late) Civil Service Tribunal and the UPC. It cannot be excluded that specialized chambers may be set up in the future in specific fields at the CJEU based on the experience gained in the agencies' practice.

Those boards of appeal allow for a legal review of decisions taken by the agencies themselves. The founding regulations provide for a number of mechanisms to ensure their impartiality and independence, such as requiring their members not to be officials of the agency itself and to be appointed on the basis of external competition, although the requirements and the procedures for their appointment may vary from one agency to another. The founding regulations or procedural rules provide that the members of the board of appeal shall be independent and not bound by instructions when taking their decisions and may not exercise other functions within the agency. The members of the board of appeal may not take part in any appeal proceedings if they have a personal interest in it or if they have acted or participated in the decision under appeal. In order to ensure these general prohibitions, the regulations provide for a system of abstention and recusal. Members of the chamber can normally be removed only due to serious misconduct, following the intervention of the bodies of the agency and upon a decision of the CJEU. The boards of appeal operate as courts incorporated in the agencies, but with a high degree of independence of the administrative bodies.

A common denominator is the requirement to bring together board members specialized in the respective technical field or in EU law, allowing quality decisions to be taken. Generally, the function of chairperson of the board of appeal is exercised by a lawyer specialized in EU law. The term of office of board members lasts several years, usually 5 years, thus enabling a continuous activity free from external interference. The number of members of a board of appeal may vary depending on the agency, with some 3 to 6 members with the respective alternate members.

The legal review carried out by the boards of appeal extends to decisions taken by the agency. The effect of the appeal may be to annul or to amend the respective decision. The board of appeal may also decide itself whether it has all the facts in order to do so or refer the case back to the administrative bodies in order to continue the necessary procedure, providing guidance that shall enable them to take the correct decision from a technical or legal point of view.

The rules governing the procedure before the boards of appeal are generally laid down in the founding regulations of each agency. However, for certain agencies, the procedural law is regulated in legal acts adopted by the Commission as a result of a delegation by the EU legislator. Agencies themselves may adopt administrative acts that further specify procedural law. In any event, procedural law is clearly inspired by the rules applicable to the CJEU, which creates a certain degree of judicial homogeneity.

Depending on the agency, the appeal may be optional or mandatory. The possibility of filing an action prior to bringing a case before a court in the strict sense is not new, as it is a widely known phenomenon at the level of national administrative law. The vast majority of member states provide for some form of administrative appeal before the same body or a higher body in charge of the legal review[42]. Such actions generally enable the administrative body to verify the legality of its own decisions, thus having an effect that could be described as "didactic", as well as being compatible with the principle of procedural economy[43]. Indeed, not all cases deserve to be dealt with by the EU judicial system. The administrative appeal has the advantages already identified, namely the benefit of technical expertise, as well as being the boards of appeal located geographically at the seat of the agency where the contested decision was taken. If an appeal is mandatory, this makes it a condition for the admissibility of any action before the CJEU. In other words, in the absence

[42]See: the comparative law analysis contained in the decision of the EFTA Surveillance Authority of 22 March 2017 (case No. 78421. Document No. 845549. Decision No. 061/17/COL), which contains an account of several national legal systems providing for an administrative review of legality (optional or mandatory) before being able to access the national courts. As is apparent from that decision, the coexistence of a variety of resource systems reflects the legal traditions in Europe.

[43]See: opinion of Advocate General Pikamäe of 22 January 2020 in case C-114/19 P, Commission v Di Bernardo. EU:C:2020:22. Para 93.

of an appeal to the agency before calling the CJEU, the action for annulment brought by the person concerned will be dismissed as inadmissible. Of course, this is not the case where the administrative appeal is merely optional. The GC shall have jurisdiction to rule on an appeal against the decision taken by the agency's board of appeal.

Legal review by the CJEU. The central mechanism for controlling the legality of the agencies' activities is the judicial system created by the treaties, in which the CJEU plays a leading role. As indicated in the previous paragraphs, the GC is generally responsible for examining the compatibility with EU law of decisions taken by the agencies. It should be noted, in order to avoid misunderstandings, that even if the treaties refer to the CJEU, this reference should be construed as a reference to the institution, the GC being generally the competent jurisdiction within the CJEU. This is the case for actions for annulment aimed at examining the legality of the acts of an agency, as will be explained below. However, it will be the CJEU as the higher court that will be solely responsible for examining actions for annulment directed against the founding regulations of agencies, as these are EU legislative acts. This type of procedure generally provides for the intervention of the Council and the Parliament as co-legislators, which will be invited to submit observations on the pleas of illegality raised by the applicant. Therefore, the name "CJEU" can be understood as a reference to the higher institution or jurisdiction, depending on the context.

Action for annulment. Among the legal remedies available, the action for annulment is the appropriate legal remedy to examine the legality of the acts of an agency[44], including the decisions of the boards of appeal. Art. 263(4) of the TFEU provides that "any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is *of direct and individual concern to* them, and against a regulatory act which is of direct concern to them and does not entail implementing measures" (see [18, p. 62] on the action for annulment before the CJEU and other supranational court). This provision excludes, by definition, the *actio popularis*, ensuring that only those who are genuinely prejudiced by a decision taken by an agency may institute proceedings.

As stated in the second sentence of art. 263(1) of the TFEU, the CJEU "shall also review the legality of acts of *bodies, offices or agencies* of the union intended to produce legal effects vis-à-vis third parties" [19, p. 304]. As a rather broad notion, the reference to bodies, offices and agencies is understood to include agencies. That provision contrasts with the first sentence of that paragraph, in which "legislative acts, acts of the Council, the Commission and the European Central Bank, other than recommendations or opinions, and acts of the Parliament and of the European Council intended to produce legal effects vis-à-vis third parties" are referred to as acts open to challenge. In the absence of the second sentence, there would be a gap in the judicial protection of individuals, which would be incompatible with the image of a union of law which the CJEU has established in its case law. The possibility of bringing an action for annulment against "legislative acts" allows for a legal review of the agencies' founding regulations. On several occasions, member states have challenged these founding regulations, claiming that the EU legislator would have exceeded its powers by opting for the creation of an agency with certain competencies[45]. As mentioned above, these occasions allowed the CJEU to confirm the applicability of certain provisions as legal bases. This leads us to the grounds that may justify an action for annulment. Under art. 263(2) of the TFEU, the CJEU "shall have jurisdiction in actions brought by a member state, Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the treaties or of any rule of law relating to their application or misuse of powers".

It follows from art. 264 of the TFEU that "if the action is well founded, the Court of Justice shall declare the contested act null and void". However, the same provision states that the CJEU "shall, if it considers it necessary, indicate which of the effects of the act which it has declared void are to be regarded as definitive". In general, the GC may itself decide on the action for annulment or refer the case back to the agency so that it can rule on certain aspects, in particular of a technical nature. The second case is obvious since the GC will hardly be able to substitute the assessment made by the administration by its own considerations. Appeals before the CJEU shall not have a suspensory effect. However, the CJEU may, if it considers that circumstances so require, order the suspension of the execution of the contested act.

Non-contractual liability. As the founding regulations provide for the non-contractual liability of EU agencies for damage caused by illegal acts committed to third parties, the GC is competent to deal with such disputes pursuant to art. 340(2) of the TFEU. The existence of non-contractual liability of the EU is subject to three conditions: firstly, the unlawful conduct of the institution or a staff member; secondly, the existence of damage suffered by the appellant; and thirdly, a causal link between the conduct of the institution or staff member and that damage. Compensation for such

[44]See: judgment of 8 October 2008 in case T-411/06 P, Sogelma v European Agency for Reconstruction. EU:T:2008:419 ; judgment of 2 March 2010 in case T-70/07, Evropaïki Dynamiki v EMSA. EU:T:2010:55.

[45]See: judgment of 2 May 2006 in case C-436/03, Parliament v Council. EU:C:2006:277 ; judgement of 18 December 2007 in case C-77/05, United Kingdom v Council. EU:C:2007:803 ; judgement of 2 May 2010 in case C-217/04, United Kingdom v Parliament and Council. EU:C:2006:279.

damage shall be made in accordance with the "general principles common to the laws of the member states".

Contractual liability. Unlike in the case of non-contractual liability, referred to above, art. 340(1) of the TFEU provides that "EU contractual liability shall be governed by the law applicable to the contract in question". Therefore, where agencies conclude contracts with third parties, whether they are private or public operators, the cases that will give rise to the agency's liability, for example in the event of non-compliance with the obligations assumed, should be specified in those contracts.

Furthermore, from a procedural point of view, it should be mentioned that art. 274 of the TFEU provides that "without prejudice to the powers conferred on the CJEU by the treaties, disputes to which the EU is a party shall not, for that reason, be excluded from the jurisdiction of the national courts". This provision should be understood as meaning that it cannot be inferred from the mere fact that one of the parties to the contract is an EU agency that the CJEU has original jurisdiction to settle potential disputes. On the contrary, if not specifically provided for in contracts, jurisdiction will lie with the national courts. In the case of contracts concluded in the context of public procurement, such contracts shall generally provide for the jurisdiction of the courts of the state where the agency is located. It shall also stipulate that the law of that host state shall apply where the contract does not provide for specific provisions. As agencies are supranational entities and national law does not always provide for solutions to legal problems that may arise during the performance of the contract, it is not unusual to specify that "EU contract law" will fill any legal loopholes that may arise. The result can be described as a "mixed" contract law, composed of national law and the general principles common to the laws of the member states in matters relating to contracts.

It should be clarified that the contractual liability of an agency for any breach of contract obligations should be distinguished from the legality of the procurement procedure, which, as explained above, is carried out in accordance with the rules laid down in the EU Financial regulations (the provisions contained in the Financial regulations, applicable only to EU institutions and other entities, are very similar to the provisions of the EU public procurement directives that member states are obliged to apply. For a description of those directives, see [20, p. 150]). As it concerns the application of an EU regulation, participants in a public procurement procedure (to which the contract has been awarded or any other participant) claiming that the procedure is unlawful must submit a review procedure to the GC, whose jurisdiction is mandatory [21, p. 50].The remedies available may be an action for annulment or action for non-contractual liability, in accordance with the cited provisions.

Appeal. The CJEU has jurisdiction to hear appeals, which are limited to points of law and are directed against judgments and orders of the GC. The appeals do not have a suspensory effect. If the appeal is upheld, the CJEU shall quash the decision of the GC and itself rule on the dispute, or refer the case back to the GC, which shall be bound by the decision of the CJEU.

Accountability to the Commission. As indicated above, agencies are generally accountable to the Commission for the implementation of EU policies. Agencies usually consult the Commission on a wide range of questions that also include the legality of certain measures. The Commission is the natural contact point for queries on the application of EU administrative law, regardless of the autonomy of the agencies. There is also a liability towards the Commission where administrative law or founding regulations explicitly provide for this, for example in the context of procedures requiring cooperation between the agency and the Commission or the adoption of an act by the latter.

Legal review by other entities. There are also other entities that take on the role of a watchdog when it comes to legal review. Their role can be extended to all the activities of an agency or limited to a specific area. The EO has already been mentioned, whose role is to examine cases of illegality and maladministration. Opinions issued by the EO on matters brought to its attention are not legally binding but have some authority. The EO will include the outcome of its investigations in its report to Parliament, thus creating political pressure. Agencies shall generally take into account the assessment contained in such opinions and seek to remedy any instance of maladministration that has been detected[46].

Mention should also be made of the European data protection supervisor (EDPS), which is an independent supervisory authority whose main objective is to ensure that the EU institutions and bodies respect the right to privacy and data protection when they process personal data and develop new policies. The EDPS is elected for a renewable term of five years. Regulation (EU) No. 2018/1725[47] lays down the tasks and powers of the EDPS as well as its institutional independence

[46]As Advocate General Trstenjak pointed out in her opinion (of 28 March 2007 in case C-331/05 P, Internationaler Hilfsfonds v Commission. EU:C:2007:191. Para 56, 57), the primary purpose of the EO in the performance of his duties is "to optimise the Community administration" and not to guarantee individual legal protection. The EO "shall seek a solution with the institution or body concerned in order to eliminate instances of maladministration and satisfy the complainant's claim, which makes the EO rather administrative".

[47]Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No. 45/2001 and decision 1247/2002/EC.

as a supervisory authority. It also lays down the rules for data protection in EU institutions. In practice, the tasks of the EDPS can be divided into three main functions: monitoring, advice and cooperation. As part of his advisory role, the EDPS advises the Commission, the Parliament, the Council, but also agencies on data protection matters in a number of policy areas. The intervention of the EDPS is generally provided for in the founding regulations, for example when it comes to concluding agreements between agencies on the exchange of personal data, as is the case between FRONTEX and EUROPOL.

The future of the agencification process

The past decades have shown that the agencification of the EU administration is an evolving process. However, some trends can already be observed which makes it possible to predict their future to a certain extent. First of all, the somewhat chaotic proliferation that occurred at an early stage was remedied by the common approach criteria, which provide a clearer framework for setting up agencies. The EU legislator should henceforth be able to use these tools to set a certain order in shaping its internal structure. Furthermore, litigation before the CJEU has enabled the legislator to identify the appropriate legal bases in view of the need to fulfill the administrative tasks lying ahead. The recent creation of ELA on 20 June 2019 shows that there is still a commitment to agencification as an appropriate method of administering the EU.

Obviously, the trend of agencies will be to increase in number, as the EU is being given more powers and the benefits of agencification are not called into question. It cannot be excluded that agencies may be closed or merged and even join the institutions once they lose their *raison d'être*. However, there does not seem to be a clear trend towards such a scenario. It rather appears that certain agencies could evolve to play a decisive role in certain areas, such as FRONTEX in the area of external border protection, which will be equipped with its own border and coast guards. Similarly, it cannot be ruled out that ECDC may become an even more important entity due to the pandemic and the need to support member states' action in the area of public health (on the evolution of public health policy in the EU, see [22]). Consequently, the agencies will remain, hereby decisively influencing the functioning of the EU.

As EU "satellites", the agencies are representatives of the supranational sphere in the territory of the member states. Geographical distance and decentralization are challenges that put at risk the coherence of the administrative action by the agencies. These challenges can only be overcome through the use of telecommunication means, modern technologies, the organization of continuous meetings and staff exchanges, etc. Work in an agency, therefore, requires some effort. The advantages are not obvious, but they respond to a political demand to ensure greater representativeness of the EU in the member states through administrative decentralization.

Conclusion

The phenomenon of agencification in the European administration has various facets. The agencies are far from operating in a legal vacuum. Instead, they are firmly anchored in the EU's institutional structure and subject to strict scrutiny of legality by various actors, including the Commission, the Parliament, the EO, and the CJEU. Agencification has ultimately succeeded in establishing itself as a new form of mixed administration, not initially provided for in the treaties, including the participation of the member states, hereby promoting the acceptance of EU law by the latter. In the future, it would be advisable to assess the synergy effects between the agencies in order to strengthen their cooperation. In the same vein, it should be envisaged to merge some of these agencies or even to dissolve those that have essentially achieved their objectives with a view to increase efficiency. The Commission should be tasked with such an in-depth assessment, enabling the EU legislator to decide as the last instance on the matter.

Appendix

List of agencies mentioned in the article

Name of the agency	Acronym	Headquarters	Year of foundation
Agency for the Cooperation of Energy Regulators	ACER	Ljubljana	2009
The Translation Center for the Bodies of the European Union	CDT	Luxembourg	1994
Center for the Development of Vocational Training	Cedefop	Salonika	1975
Agency for Law Enforcement Training	CEPOL	Budapest	2005

Ending appendix

Name of the agency	Acronym	Headquarters	Year of foundation
Community Plant Variety Office	CPVO	Angers	1994
Aviation Safety Agency	EASA	Cologne	2003
Asylum Support Office	EASO	Valletta	2011
European Banking Authority	EBA	Paris (formerly London)	2011
Center for Disease Prevention and Control	ECDC	Stockholm	2004
Chemicals Agency	ECHA	Helsinki	2007
Defense Agency	EDA	Brussels	–
Fisheries Control Agency	EFCA	Vigo	2005
Food Safety Authority	EFSA	Parma	2002
Insurance and Occupational Pensions Authority	EIOPA	Frankfurt am Main	2011
Labor Authority	ELA	Bratislava	2019
Medicines Agency	EMA	Amsterdam (formerly London)	1995
European Maritime Safety Agency	EMSA	Lisbon	2002
Agency for Cybersecurity	ENISA	Athens and Heraklion	2005
Prosecutor's Office	EPPO	Luxembourg	2020
Securities and Markets Authority	ESMA	Paris	2011
Foundation for the Improvement of Living and Working Conditions	EUROFOUND	Dublin	1975
Office for Intellectual Property	EUIPO	Alicante	1999
Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice	eu-LISA	Tallinn/Strasbourg/ Sankt Johann im Pangau	2012
Office of Justice	EUROJUST	The Hague	2002
Police Office	EUROPOL	The Hague	1999
Border and Coast Guard Agency	FRONTEX	Warsaw	2005
BEREC Office	Agency for Support to the Body of Regulators for Electronic Communications	Riga	2010

References

1. Lenaerts K, Van Nuffel P. *European Union Law*. Oxford: Sweet & Maxwell; 2011. 1344 p.
2. Schwarze J. Judicial review of European administrative procedure. *Law and Contemporary Problems*. 2004;68(1):85–106.
3. Frenz W. Vollzug des Europarechts. In: Frenz W. *Handbuch Europarecht*. Berlin: Springer; 2010. S. 523–524.
4. Callies C. *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*. Munich: [s. n.]; 2011. 3148 S.
5. Widdershoven J. Developing administrative law in Europe: natural convergence or imposed university? *Review of European Administrative Law*. 2014;7(2):5–17.
6. Kühn WM. La responsabilidad extracontractual de la Union Europea. *Revista de la Secretaría del Tribunal Permanente de Revisión del Mercosur*. 2018;6(12):169–199.
7. Van Drooghenbroeck S, Rizcallah C. *Charte des droits fondamentaux de l'Union européenne – commentaire article par article*. Brussels: Bruylant; 2018. 1486 p.
8. Wathelet M, Wildemeersch J. *Contentieux européen*. Brussels: Larcier; 2014. 552 p.
9. Lopez-Jacoiste Diaz E. The new permanent structured cooperation: definitive impulse for a common security and defense policy in Europe. *Spanish Yearbook of International Law*. 2018;34:162–180.

10. Kühn WM. Legal aspects and political prospects of a possible withdrawal from the European Union by the United Kingdom. *Revista de la Secretaría del Tribunal Permanente de Revisión del Mercosur*. 2016;8:64–93.
11. Kühn WM. Reflexiones sobre una posible convergencia regional con la participación de la Comunidad Andina y el Mercosur. Lecciones de la experiencia integracionista europea [Internet; cited 2021 January 5]. Available from: https://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=416102.
12. Oesch M, Lang A. EU-Agenturen und die Schweiz. *Zeitschrift für Europarecht*. 2014;6:131–141.
13. Chiti E. Is EU administrative law failing in some of its crucial tasks. *European Law Journal*. 2016;22(5):576–596.
14. Peers S. *EU justice and home affairs law. Volume 1. EU immigration and asylum law.* Oxford: [s. n.]; 2016. 636 p.
15. Möllers R. *Polizei in Europa:Die Sicherheitsagenturen EUROPOL und FRONTEX im Raum der Freiheit, der Sicherheit und des Rechts*. Frankfurt: Verlag f. Polizeiwissens; 2017. 235 S.
16. Kühn WM. The Eurasian Economic Union (II) – institutions, law and policies for economic integration. *European Law Reporter*. 2016;7:261–279.
17. Arana García E. Los recursos administrativos en la Unión Europea: Hacia un modelo común de justicia administrativa. Madrid: IDIR; 2016. 48 p.
18. Kühn WM. The draft protocol on the creation of the Court of Justice of Mercosur – a new milestone in the judicialisation of regional integration law. *Journal of the Belarusian State University. International Relations*. 2017;2:55–71.
19. Lenaerts K, Maselis I, Gutman K. *EU procedural law*. Oxford: Oxford University Press; 2014.1056 p.
20. Kühn WM. The reform of the EEA rules on public procurement. *Upphandlingsrättslig Tidskrift*. 2015;2:150–179.
21. Poulsen S, Jakobsen P, Kalsmose-Hjelmborg S. *EU public procurement law*. Copenhaguen: Djoef Publishing; 2012. 666 p.
22. Kühn WM. El modelo social instaurado por la Constitución Europea: un análisis desde la perspectiva de la protección de la salud pública. *Agenda Internacional*. 2006;23:327–363.

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