

Analytical *Fiche* Nr° 2

Creation of agencies

1) State of play *de jure* and in practice

The first agencies were created in 1975 with a view to producing and disseminating information of European interest.¹ Agencies established later on in the 1990s, were predominantly meant as instruments for implementing EU policies such as the internal market.²

Most of the agencies created from 2000 onwards were vested with two key new tasks: providing independent scientific/technical advice/information, sometimes in response to serious safety crises,³ and fostering Member States cooperation in different areas⁴. However, there is often more than one incentive triggering the creation of an agency and the rationale of some agencies cuts across the different functions mentioned above, e.g. EFSA, EEA, EIGE, FRA, ECHA, FRONTEX.

Legal basis for creation of an agency

Twelve agencies⁵ have their legal basis under the former Article 308 EC (new Article 352 TFEU)⁶, whereas 21 agencies⁷ are created on the specific sector legal basis.

The constituent acts of ten agencies from the former 1st pillar were adopted under co-decision procedure⁸. The two most recent proposals establishing EASO and the Agency for the Operational Management of SIS II, VIS and EURODAC are also subject to codecision.

The remaining fifteen agencies from the former 1st pillar were created on the basis of a Council Regulation.⁹ However, Parliament subsequently gained co-decision in the revising acts of four of these agencies¹⁰.

¹ CEDEFOP, EUROFOUND

² e.g. CPVO, EMA, OHIM

³ e.g. EASA, ECDC, EFSA, EMSA, EU-OSHA, GSA

⁴ CFCA, EFSA, CEPOL, EUROJUST, EUROPOL

⁵ CdT, CEDEFOP, CPVO, EAR, EMCDDA, EMA, ETF, EU-OSHA, EUROFOUND, FRA, GSA, OHIM

⁶ Article 308 EC: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

Article 352(1) TFEU: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament."

⁷ ACER, BEREC Office, CFCA, EASA, ECHA, ECDC, EEA, EFSA, EIGE, EMSA, ENISA, ERA, FRONTEX, CEPOL, EUROJUST, EUROPOL, EDA, EUSC, ISS, EASO, Agency for Operational management of SIS II, VIS and EURODAC

⁸ ACER, BEREC Office, EASA, ECDC, ECHA, EFSA, EIGE, EMSA, ENISA, ERA

⁹ CdT, CEDEFOP, CFCA, CPVO, EAR, EEA, EMCDDA, EMA, ETF, EU-OSHA, EUROFOUND, FRA, FRONTEX, GSA, OHIM

¹⁰ EEA, EMA, ETF and EMCDDA

The three former 2nd pillar agencies, EUSC, EDA and ISS, were created with a Council Joint Action.

Two of the former 3rd pillar agencies, EUROJUST and CEPOL, were created on the basis of a Council Decision. EUROPOL was created on the basis of the Council Act drawing up the convention based on Article K.3 of the Treaty on European Union. However, on 1 January 2010 the new legal basis of EUROPOL became applicable - a Council Decision.

Funding - legislative financial statement

Along with the proposal for the creation of an agency, the Commission provides information on the multi-annual budgetary and staffing consequences of the proposal in a so-called legislative financial statement for the initial years of operation. This legislative financial statement provides an estimate of the budgetary impact of each operation, including administrative, management and support expenses and changes in the number of posts. The legislative financial statement for the founding period also includes a statement referring to the compatibility of the proposal with the financial programming, and thus provides a link between the legislative and budgetary procedures.

Funding – point 47 IIA

Since the 2006 Inter-institutional Agreement (IIA) on budgetary discipline (point 47), Parliament can ensure that no agency is created before an agreement on its funding is reached.

The practical application of this point 47 in regard to agencies has functioned through the ad hoc addition of an agenda point to budgetary trilogues whenever an agency dossier is sufficiently mature for the two arms of the budgetary authority to seek agreement on the financing of the agency. For more details on the application of IIA point 47 see *fiches* 32 (Parliament role) and 33 (Council role).

Origin of agencies' tasks

According to a working document produced by the Budget Committee of the European Parliament¹¹, the main tasks entrusted to agencies are either "new"¹² or were previously partially carried out either by the Commission¹³ or by the Member States (to a lesser extent)¹⁴. Some agencies consider that their tasks cover several or all categories (e.g. EEA, EFSA, EMA, EMSA and OHIM).

The tasks to be devolved to an agency are moreover to be defined on the basis of the Meroni case-law¹⁵. The Meroni judgment addresses the limits placed by the Treaties on the delegation of powers by the institutions to other bodies, in view of the balance of powers, a main feature of the Community institutional architecture.

¹¹ See Working document on the European Union and its agencies, European Parliament, Committee on Budgets, 2007

¹² CdT, CEDEFOP, CPVO, EMCDDA, ECHA, EIGE, EMA, ENISA, ERA, EUROFOUND, EUROJUST, FRA, FRONTEX, EU-OSHA, ACER

¹³ EAR, EEA, ETF, CFCA, ECDC, EFSA, EMSA, GSA

¹⁴ CEPOL, OHIM, EUROPOL, EASA

¹⁵ Judgment of the Court of 13 June 1958, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community, Case 9-56; "A delegating authority cannot confer upon the authority receiving the delegation powers different from those which it has itself received under the treaty [...] To delegate discretionary power to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render less effective the guarantee resulting from the balance of powers established by art 3."

Impact assessment/ex-ante evaluation

Since 2004 there are nine agencies whose creation or revision of the founding regulation was preceded by an impact assessment/ex-ante evaluation.¹⁶

Reasons for creating an agency

According to the 2008 meta-study¹⁷, the reasons for creating agencies or for renewing their mandate are the same as the rationale for launching the respective EU policy within which the agency operates.

The 2003 meta-study¹⁸ listed six reasons why agencies had been set up:

- lack of objective, reliable, and comparable data at European level;
- lack of awareness/knowledge of, or research on, a particular issue;
- lack of communication and co-operation between the stakeholders throughout Europe (hindering the exchange of information and good practice);
- need to tackle complex socio-economic problems, the solution of which required the full involvement of concerned stakeholders;
- need to deal with new tasks of a technical and/or scientific nature, where decisions have to be taken on objective scientific criteria;
- need for efficient and flexible implementation of Community policies, in particular in areas requiring frequent decisions based on technical or scientific considerations.

The 2008 meta-study¹⁹ complements with other specific reasons:

- to ensure that legislation is implemented in a systematic, uniform and effective way across Member States;
- to develop a common European knowledge that national training institutes alone could not achieve or could not achieve with the same efficiency and effectiveness;
- to develop a Community regime of industrial property rights valid throughout the Community;
- to adopt common safety rules in the field of transport and ensure that products, persons and organisations in the Community comply with such rules;
- to deal with organised crime affecting two or more Member States.

According to the 2008 meta-study, the need for an agency is justified by one of the following reasons:

¹⁶ ACER, BEREC Office, CFCA, EASA, EASO, ECHA, FRA, Agency for the Operational Management of SIS II, VIS and EURODAC, FRONTEX

¹⁷ Meta-study on decentralised agencies: cross-cutting analysis of evaluation findings. Final Report, Eureval/Rambøll-Management, September 2008

¹⁸ Meta-evaluation on the Community Agency System. Final Report, European Commission, Budget Directorate General, 15 September 2003

¹⁹ Meta-study on decentralised agencies: cross-cutting analysis of evaluation findings. Final Report, Evaluation for the European Commission, September 2008

- stakeholder involvement - need to involve partners/stakeholders in the EU policy;
- provision of highly specific services - only available economic mean for providing the full range of requested services while maintaining the necessary standard and quality;
- independence - need to establish a body which is independent in relation to technical matters and has legal, administrative and financial autonomy;
- networking - need to develop cooperation between the Member States and/or the European Union in certain domain;
- high level of expertise needed.

2) Critical analysis of the issue at hand

There is no single legal framework governing the establishment of agencies and no set criteria for choosing the agency option. This leads to agencies being created on an ad hoc basis. The overall coherence of the agency system has not been sufficiently considered. Furthermore, there is no template with common provisions which is to be used when drafting the proposal for the agency's constituent act. This leads not only to repetition of work each time an agency is created, but also to a wide divergence in agencies' structures and functioning mechanisms. Agencies' creation and set-up is further weakened by the fact that the process is too compartmentalised, i.e. there is no common approach on the various steps and stages.

Impact assessments

Making compulsory (since 2004) an ex-ante evaluation and an impact assessment before proposing a new agency, has re-enforced the justification for the choice of the agency option. In particular, the most recent impact assessments do address alternative options in a more substantial way.²⁰ However, some weaknesses remain. For example:

- The lack of attention paid to the issue of the critical mass of the future agency leads to creating agencies which are sure to face efficiency problems.
- The little attention paid to the possibility of extending the mandate of an existing agency with similar tasks or in the similar policy area leads to activity overlaps and under-exploited synergies²¹. The proposal to extend the mandate of ECHA to cover biocides is an example of good practice in this area.
- There are no harmonised criteria for judging between different policy options.
- The impact on national budgets, administrations and activities (in particular potential savings) is not part of the assessment.
- The impact on Commission's budget/activities could be presented in a more detailed way.

Political agreement on the agency option

²⁰ Evaluation 2009, Volume I, point 4.2.1, p. 18

²¹ An overall conclusion established in the 2009 agency system evaluation.

Sometimes the political agreement on the creation of a future agency precedes the Commission's proposal and even the impact assessment of the agency option and its alternatives. This was the case with FRA, and most recently with EASO²². In such cases, alternatives to the agency option are disadvantaged when measured up against the prospect of a new agency. These situations raise the question of transparency and objectiveness of the proposals to establish a new agency.

Managing efficiently the setting up of a new agency

On the practical side, once the agency's constituent act is adopted, the process of setting up the agency was often slow and not managed efficiently enough. One reason for that is the lack of adequate reorganisation/support/coordination (creation of a task force with all services concerned for example), so as to ensure sufficient resources for managing the process. Another reason, and related to the first one, is the lack of an established process that ensures a permanent exchange of knowledge and experience in administrative, budgetary and institutional matters. In order to remedy the latter, guidelines on budgetary and administrative matters were adopted over the past few years. In addition, a detailed roadmap for setting up agencies was issued by the Commission in the autumn 2009. This roadmap is aimed at helping the parent DGs in the Commission with the set-up of their new agencies *inter alia* by identifying the major stages of the set-up process, with the indication of the responsible services for individual tasks to be carried out. We already see the added value of this attempt to take stock of existing experience in the preparation for the set-up of several new agencies: the BEREC Office, EASO, the Agency for Operational Management of SIS II, VIS and EURODAC, and EUROPOL. It should be noted that although EUROPOL was transferred into the legal framework of the EU and to that extent was newly established as an EU agency, the authority had of course been in existence before then, and numerous procedures were already firmly established.

Furthermore, the possibility to establish a technical agency support unit either in the Commission or separately has never been considered so far.

Practice has shown also that the set-up process is significantly facilitated when experienced Commission personnel is seconded to the newly created agency. This was an approach chosen in the case of ECHA and has proven to be extremely effective.

The constituent acts of recent agencies provide for the appointment of an interim director until the selection procedure for the post of Director is completed. This practice has significantly facilitated the setting-up process, the interim director being given certain budgetary and administrative powers.

Risks associated with late assumption of financial autonomy

One of the main problems caused by a slow setting-up process is the late assumption of financial autonomy by the agency. In fact, the contribution of the EU budget can be paid by the Commission only if the agency can be considered fully operational, i.e. only if the financial actors have been appointed and their duties and functions effectively segregated, the accounting system and the internal audit control have been established and the bank account has been opened. Until the transfer of the contribution, the Commission remains responsible for the execution of the budgetary lines dedicated to the agency, even if a contribution of the

²² The 2009 agency system evaluation points at this aspect in its analysis of the impact assessment of EASO, where they contest political feasibility as a criterion for choosing the agency option over alternatives.

EU budget to the budget of an agency has been voted by the budgetary authority²³. This can cause some confusion and overlapping in the management of the general budget as happened for EIT, and EIGE.

²³ This concerns only those agencies receiving subsidy from the Union.