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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL**

European agencies – The way forward

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(Text with EEA relevance)

1. INTRODUCTION

In recent years, using agencies to implement key tasks has become an established part of the way the European Union does its business. They have become part of the institutional landscape of the Union. Most Member States have taken the same path of using agencies to bring a different approach to precisely-defined tasks.

There are various reasons for the growing use of agencies. They help the Commission to focus on core tasks, making it possible to devolve certain operational functions to outside bodies. They support the decision-making process by pooling the technical or specialist expertise available at European and national level. And the spread of agencies beyond Brussels and Luxembourg adds to the visibility of the Union.

With the growth in the number of agencies, they perform a range of important tasks across a spread of policy areas. Significant resources are now devoted to agencies. As a result, it has become increasingly important to have clarity about their role, and about the mechanisms to ensure the accountability of these public bodies.

The importance of agencies in the EU's administrative framework calls for a common understanding between the EU institutions of the purpose and role of agencies. At the moment, this common understanding is lacking. The establishment of agencies case by case – on a proposal from the Commission, but with the decision taken by the European Parliament and/or the Council of Ministers – has not been accompanied by an overall vision of the place of agencies in the Union. The lack of such a global vision has made it more difficult for agencies to work effectively and to deliver for the EU as a whole.

The Commission considers that the time has come to re-launch a debate on the role of agencies and their place in the governance of the EU. A consistent political handling of the approach to agencies would promote the transparency and effectiveness of an important part of the EU's institutional machinery.

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There are two broad types of agency, each with different characteristics and raising different issues. "Regulatory" or "traditional" agencies have a variety of specific roles, set out in their own legal basis, case-by-case[1]. Executive agencies are set up under a Council regulation

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[1] There are now 29 agencies of this type, with proposals having been made for a further 2 agencies – see Annex.

adopted in 2002 with the much more narrowly defined task of helping to manage Community programmes[2].

These two types of agencies are very different. They have a different role, in terms of the tasks they are given, their independence and their governance. The fact that regulatory agencies are spread around the EU, whilst executive agencies are housed in Brussels or Luxembourg, is just the most obvious symbol of their very different relationship with the Commission. Not surprisingly, therefore, the two types of agencies give rise to different issues and need to be tackled differently.

This communication will concentrate on *regulatory agencies* since this is where there is a need for clarification and a common approach.

Executive agencies have a much clearer place in the Union's institutional framework, governed by a single legal base[3]. Working arrangements to govern executive agencies have recently been agreed with the European Parliament Committee on Budgets[4]. Their tasks must relate to the management of Community programmes, they are set up for a limited period, and they are always located close to Commission headquarters. The responsibility of the Commission for executive agencies is clear: the Commission creates them, maintains "real control" over their activity, and appoints the key staff. Their annual activity reports are annexed to the report from their parent Directorate-General. A standard financial regulation adopted by the Commission, governing the establishment and implementation of the budget, applies to all executive agencies.

It is too early to make a general assessment of the success of the executive agencies. They were created only recently and have yet to be submitted to a full evaluation of their performance[5]. At the same time, the recent screening of resources by the Commission suggested that there are no strong candidates for a new executive agency[6]. If new needs appear, the starting point of the Commission will be to explore the option of extending the scope of an existing executive agency to cover a new programme. Under the current circumstances, it is unlikely that new executive agencies will be needed during the period of the current financial framework to 2013.

In addition to agencies, the responsibility of the EU to stimulate research and economic development has led it to set up special *partnership bodies*. It has been recognised that to achieve some goals, the public sector needs to work in partnership with the private sector, providing funding and maintaining a voice but standing aside from key strategic decisions on direction. The result is innovative bodies such as joint undertakings like ITER for nuclear fusion and SESAR for air traffic management, the Joint Technology Initiatives under the 7th Framework Programme, and the European Institute of Innovation and Technology.

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[2]   See Annex.

[3]   Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (OJ L 11, 16.1.2003).

[4]   Letter dated 16.10.2007 of D. Grybauskaitė, member of the Commission, to R. Böge, Chairman of the Budgets Committee, DGE/ef (2007)585.

[5]   However, a positive evaluation of the work of the Executive Agency for the management of the Intelligent Energy was conducted in 2006.

[6]   SEC(2007) 530 "Planning & optimising Commission human resources to serve EU priorities".

Arrangements for the financial and administrative governance of these bodies are governed by special rules under the Financial Regulation, and they are directly responsible to the discharge authority for budget implementation. Their *raison d'être* is explicitly to work differently to a normal "public sector" body: though supported by public funds, they should make decisions from the perspective of commercial edge or expertise. These are therefore not agencies, and are not covered by this communication.

2. REGULATORY AGENCIES TODAY

Regulatory agencies each have their own basic sectoral regulation, often adopted by co-decision[7]. They are sometimes called "traditional agencies", because of their long standing, and sometimes "decentralised agencies", because they are spread around Europe. They are independent bodies, with their own legal personality. Most are funded by the EU budget[8] – as well as, in some cases, by the direct receipt of fees or payments. The general Financial Regulation contains certain essential rules concerning in particular agencies' establishment plan, the application of the framework financial regulation for agencies, the consolidation of their accounts with those of the Commission, and the discharge by the European Parliament. In addition, the framework financial regulation lays down common rules governing the establishment and implementation of their budget, including control aspects. The 20 agencies funded from the EU budget receive budgetary discharge directly from the Parliament. With respect to human resources, the Staff Regulations define the principles permitting the establishment of a staff policy for agencies. In requiring agencies to adopt general provisions for implementing the Staff Regulations in agreement with the Commission, that Regulation aims at ensuring a consistent staff policy and avoiding unnecessary differences in approach among the agencies on recruitment processes and career prospects. However, there are no general rules governing the creation and operation of regulatory agencies.

The first regulatory agencies, CEDEFOP (Vocational training) and EUROFOUND (Improvement of living and working conditions), were set up in 1975. During the 1990s, the deepening of the internal market led to a series of new agencies with roles more focused on tasks of a technical and/or scientific nature, such as authorisation of plant varieties and medicines. Extra tasks led to further agencies, offering opportunities for different Member States to host different agencies.

There are currently 29 regulatory agencies, with proposals on the table for two others (see annex). Three of these are agencies under the Common Foreign and Security Policy, and three are agencies dealing with issues under Title VI of the EU Treaty on Police and Judicial Cooperation in Criminal Matters. The regulatory agencies employ some 3800 staff, with an annual budget of around € 1 100 million, including a Community contribution of around € 559 million[9]. The agencies vary widely in size, from under 50 people monitoring plant varieties to over 600 in the agency monitoring trademarks.

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[7]   Out of the 23 agencies under the EC Treaty, 12 of them have their legal basis under article 308EC, the other ones being created under a sectoral Treaty basis, 8 agencies' basic acts being adopted under co-decision. See complete list of regulatory agencies in Annex.

[8]   The agencies created under Common Foreign and Security Policy are funded directly by Member States.

[9]   Figures only for Agencies created under the EC Treaty and under Police and Judicial Cooperation in Criminal Matters excluding EUROPOL, which is funded by member States under its present legal status. The Agencies created under Common Foreign and Security Policy are under full control of the Council (full financing of these agencies by Member States).

The roles of the regulatory agencies are very varied. Some can adopt individual decisions with direct effect, applying agreed EU standards; some provide additional technical expertise on which the Commission can then base a decision and some focus more on networking between national authorities.

Agencies have proved particularly relevant in field of shared competences, when the implementation of new policies at Community level needs to be accompanied by close cooperation between the Member States and the EU. The establishment of agencies can make possible a pooling of powers at EU level which would be resisted if centred on the institutions themselves.

Finally, these agencies have played a role in helping certain third countries become more familiar with the EC *acquis* and best practices. Candidate countries have been participating in Community agencies since 2000[10], and this possibility has since been extended to the Western Balkan countries and the partner countries of the European Neighbourhood Policy.

There are clear and strict limits to the autonomous power of regulatory agencies in the current Community legal order. Agencies cannot be given the power to adopt general regulatory measures. They are limited to taking individual decisions in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions and without genuine discretionary power. In addition, the agencies cannot be entrusted with powers which may affect the responsibilities which the Treaty has explicitly conferred on the Commission (for example, acting as the guardian of Community law).

For agencies playing a role in preparing or taking decisions, one of the goals has been to give those decisions extra credibility and authority: with agencies helping to demonstrate that decisions are based on technical/scientific grounds. This requires the agencies to take decisions on the basis of reliable information and expertise, making transparency and scientific competence essential requirements. It also creates a challenge, with the need to balance this technical dimension of agencies with the need for all public bodies to be properly accountable.

Regulatory agencies are usually governed by a Management Board responsible for ensuring that the agency performs the tasks set out in its basic act, with a Director appointed to ensure the operational working of the agency. The Management Board normally nominates the Director and has authority over the agency's work programme, budget and annual report.

There are different rules on the size and composition of the Management Board, but though the Commission is normally represented, it is always in a minority, sometimes even without the right to vote. This raises issues about the extent to which the Commission can be held accountable for decisions taken by agencies. The issue of accountability is complicated by the Commission's involvement in other aspects of agencies' work – which can include producing a shortlist of names for the Director of an agency, being consulted on work programmes, and conducting evaluations. In addition, the Commission's internal auditor performs the same role in respect of agencies as for Commission departments[11].

The need for clear lines of accountability to govern agencies' actions is at the core of the debate about agencies. Questions have also been raised about particular aspects of the

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[10]   Communication of 20 December 1999 - COM(1999) 710 final.
[11]   Article 185(3) of Financial Regulation (EC, Euratom) No 1605/2002.

relations between other institutions and agencies, including the role of the European Parliament in the appointment of Directors and the roles and responsibilities of Management Board members nominated to represent particular interests.

Regulatory agencies have made a significant and useful contribution to the effective operation of the EU. In many cases they have built up a highly-respected scientific or technical know-how and have thereby helped the institutions to take effective decisions. In others, they have shown their capacity to analyse and stimulate public debate at both European and international level. As a consequence, the Commission has been in a position to concentrate on core tasks.

3. A COMMON FRAMEWORK FOR REGULATORY AGENCIES

As the number and diversity of regulatory agencies has grown, the Commission decided that a common framework would help to clarify and standardise their functions and working methods. In 2005, it proposed an interinstitutional agreement on the operating framework for the European regulatory agencies[12]. The goal was to agree conditions relating to the creation, operation and control of regulatory agencies under the first pillar. Though targeted on new agencies, these ground rules could also be used to review, formally or informally, how existing agencies were working. Despite general support from the European Parliament, negotiations on this draft agreement unfortunately stalled during 2006, with the Council not ready to give attention to the issue and with doubts raised over the use of an inter-institutional agreement as a vehicle.

However, the issues which the inter-institutional agreement sought to address remain. The varied role, structure and profile of regulatory agencies make the system untransparent, and raise doubts about their accountability and legitimacy. The diverse role of agencies fuels concerns that they might stray into areas more properly the domain of the policy-making branches of the EU. The responsibilities of the other institutions toward agencies, and of the Commission in particular, suffer from the lack of a clear framework and defined lines of responsibility.

3.1. Issues to include in a common approach

Whatever form it takes, the Commission considers that there should be a common approach to the governance of regulatory agencies. There will always be variations between agencies: their different functions, ways of working and sizes have not developed by chance, but reflect an attempt to define the best way to allow each agency to discharge its responsibilities effectively. A balance must be struck between the need for an approach sufficiently standardized that agencies have a coherent place in European governance – and the need to respect agencies' specific characteristics. As public bodies of the EU, all agencies must be organised in the right way to respect basic principles of accountability and sound financial management. While the Financial and Staff regulations remain applicable to agencies, their small size compared to EU institutions would seem to justify appropriate adaptations.

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[12]   COM(2005) 59 final du 25.2.2005.

The building blocks for a common approach to agencies should cover the following areas:

- *The tasks of regulatory agencies*
  The varied roles of agencies today show that there will never be a single model for what an agency should do. But agencies fall into different categories. A clear explanation of these different types of function would improve clarity and understanding about their role.

Different types of regulatory agencies

Agencies can be classified in different ways. One useful way is to try to look at the key functions they perform. Although agencies often perform a number of different roles, an analysis of the centre of gravity of agencies' activities suggests the following categories[13]:

- Agencies adopting individual decisions which are legally binding on third parties: CVPO, OHIM, EASA[14] and ECHA[15]

- Agencies providing direct assistance to the Commission and, where necessary, to the Member States, in the form of technical or scientific advice and/or inspection reports: EMSA[16], EFSA, ERA and EMEA

- Agencies in charge of operational activities: EAR, GSA, CFCA, FRONTEX, EUROJUST, EUROPOL and CEPOL

- Agencies responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information / networking: CEDEFOP, EUROFOUND, EEA, ETF, EMCCDA, EU-OSHA, ENISA, ECDC, FRA and European Institute for Gender Equality

- Services to other agencies and institutions: CDT

- *The structure and working of agencies*
  A more standard approach to the governance of agencies would allow for certain standard rules to apply to the Management Board, the Director and to the programming and reporting of the agency's work. It would also help to clarify their relationship with the EU institutions and with the Member States.

- *Accountability and regulatory agencies' relationship with the other institutions*
  The mechanisms in place to ensure accountability for the actions of regulatory agencies should be clear to both the agencies and the Institutions. This should include reporting and auditing requirements, relations with stakeholders, and responses to parliamentary questions. The management of the agencies must also respect basic standards of good stewardship to mitigate possible risks. There should also be coherent rules for evaluation of the agencies.

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[13] Agencies created under Common Foreign and Security Policy (CFSP) are not included.
[14] EASA also provides direct assistance to the Commission and, where necessary, to the Member States, in the form of technical or scientific advice and/or inspection reports.
[15] ECHA also provides assistance to the Commission and, where necessary, to the Member States, in the form of technical and scientific advice and/or opinions.
[16] EMSA has also in its mandate important operational activities (in particular maritime anti-pollution activities).

In particular, the degree of accountability of the Commission cannot exceed the degree of influence of the Commission on the agency's activities. At the same time, the Commission will look at its own internal organization to ensure that the link with agencies and the role of its own services are on the right footing. There are also questions concerning the relationship between agencies and the European Parliament and the Council, beyond their role in agreeing the legal basis for an agency in the first place, and the budgetary process, such as the involvement of the European Parliament in nominations to the Board and Director.

- *Better regulation and the work of agencies*
  As part of the governance structures of the Union, it is important that agencies apply modern principles of better regulation. This includes concentrating on their core business; factoring in the need to consult properly with and provide feedback to stakeholders; and organizing their business in such a way that transparency is assured and that performance can be effectively monitored by institutions and stakeholders alike.

- *The process for establishing and ending regulatory agencies*
  The process for setting up agencies could usefully be set out – to include the need for an impact assessment to be undertaken before a Commission proposal is presented, as well as clarification of the role of the host country, including the need for the host country to ensure appropriate schooling facilities for children of staff[17]. Criteria could also be set out to assess when an agency has served its purpose and can be disbanded.

- *Communication strategy*
  Ground rules for the communication strategy to be followed by agencies would help to improve public understanding of their role, and ensure that agencies' communication policies are consistent with the Union's overall approach.

3.2. Making progress towards a common framework

The proposed inter-institutional agreement has not been able to make progress. The Commission therefore intends to withdraw its proposal for an inter-institutional agreement, and to replace it by an invitation to an inter-institutional discussion which should lead to a common approach.

- With this goal in mind, the next step should be a forum where the three institutions can make a collective political assessment of experience of agencies and their place in the Union. This would be an opportunity to develop a common understanding of what should be the shape of regulatory agencies and to define clearly the responsibilities of each institution vis-à-vis the agencies. The Commission therefore proposes that an inter-institutional working group should be established with this objective. A first building block for this dialogue would be the available studies and reports on agencies such as the reports which the Commission has already provided the European Parliament in the framework of the 2008 budgetary process[18], and the reports of the European Court of Auditors.

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[17] This requirement is already enshrined in Article 47 of the interinstitutional agreement on budgetary discipline and Articles 27 to 30 of the Better Regulation interinstitutional agreement.

[18] There are two relevant reports: (i) a summary of evaluations carried out on agencies and (ii) state of play and planning concerning evaluation of agencies.

- If the starting point is a genuine inter-institutional dialogue on a vision for regulatory agencies, the natural development would be to follow this up with an instrument to give form and transparency to the conclusions of this dialogue. The Commission remains open to alternatives to the route of an inter-institutional agreement, whether legally binding or not. The overriding objective should be a political understanding – given the varied nature of regulatory agencies, it would not be appropriate to seek to mirror the legal framework agreed for executive agencies. In the meantime, the Commission will continue to use the philosophy and core principles of the proposed interinstitutional agreement as a point of reference for its own approach to agencies.

- At the same time, the Commission intends to launch a thorough evaluation of the regulatory agencies. This evaluation will contribute to the ongoing debate on the future of the Community agency system by taking a horizontal look at all agencies[19]. The new evaluation will allow all the European institutions to examine the real implications of the creation and operation of agencies in the Union. The Commission intends to report on the results of this evaluation by 2009-2010.

- To allow this evaluation to proceed in stable conditions, the Commission has decided not to make proposals for new regulatory agencies until the conclusion of the evaluation. Agencies which are already under inter-institutional discussion would go ahead as planned, including existing proposals in the fields of energy and telecoms, as well as planned agencies in the field of justice and home affairs[20] and changes in the scope of existing agencies would also continue. This commitment should allow all the institutions to fully assess, in view of the results of the evaluation, the implications and consequences for the Union of the creation and functioning of regulatory agencies. The result should be a coherent approach to agencies in the future.

- An agreed approach should apply to all agencies, taking into account their specificities and may entail amendments to the basic acts governing existing regulatory agencies to make them consistent with a new approach.

4. CONCLUSION

The Commission believes that agencies can bring real added value to the Union's governance structures. At present, however, this potential is being held back by the lack of a common vision about the role and functions of regulatory agencies.

The Commission therefore invites the European Parliament and the Council of Ministers to join it in a dialogue on the place of agencies in European governance. An inter-institutional working group would allow the key issues facing agencies to be set out as ground rules to apply to all. At the same time, the Commission intends to:

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[19] More limited horizontal studies on the agency system have been already carried out by the Commission, e.g. the meta-study on decentralised agencies of 2003 and the one currently ongoing, both based on existing evaluation reports on decentralised agencies.

[20] This concerns a possible proposal for an agency for the operational management of SIS II, VIS and EURODAC and for the development and the management of other large-scale IT systems; and a possible proposal for a European Support office for Asylum. Impact assessments and feasibility studies are currently under way.

- Withdraw its proposal for an inter-institutional agreement;

- Undertake a horizontal evaluation of regulatory agencies, by the end of 2009, and to report as soon as possible to the European Parliament and the Council on the results;

- Propose no new regulatory agencies until the work of the evaluation is complete (end of 2009);

- Undertake a review of the Commission's own internal systems governing its relations with agencies, as well as the methodology for conducting impact assessment of agencies.

The effective delivery of services by agencies can make a real contribution to the implementation of EU policy. The Commission believes that the three institutions should agree to work together to develop a clear and coherent vision for the future place of agencies in the Union's governance.