Delegation of Powers in the European Union:

The Need for a Multi-principals Model

Renaud Dehousse

Centre d'études européennes de Sciences Po

Abstract: Whereas a principal-agent model has widely been used to analyze the establishment of manifold autonomous agencies at the European level, it fails to capture some key elements of this process, such as the recurrent inter-institutional struggle of agency institutional design or the Commission's basic ambivalence vis-à-vis independent regulators. In contrast, acknowledging the absence of a clearly defined principal in the EU enables us to understand the relative weakness of existing agencies and the multiplicity of controls to which they are subjected. In such a system, strong EU regulators are unlikely to be established.

The creation of autonomous administrative structures is one of the most interesting developments of the past 15 years in European public administration. While only two semi-autonomous agencies had been created prior to the 1990s, their number reaches 28 today. This figure includes the various organisations established under the label of 'decentralised agencies', as well as the 'Union agencies' set up in the second and third pillars, such as the Institute for Security Studies, EUROPOL or EUROJUST. A few others are currently in the process of being established. Although this decentralisation is no longer new, it seems to have accelerated in recent years. Eight autonomous agencies were established during the Delors years, while another ten were created by the Prodi Commission. During the same period (2001-2005), five agencies were created in the second and third pillars of the EU. According to the 2007 budget, 3 588 administrative posts are assigned to these bodies – a significant number when compared to the overall size of the EU Commission (19 370 agents in 2007). Moreover, if one compares the cumulative figure for agencies staff to the number of posts created within the Commission since 1992 (5 886) , we see that over a third of the executive positions created during that period have been assigned to regulatory agencies. The cumulative budget of EU agencies for 2007 amounted to over one billion euros. Several of the most recent structures enjoy powers that were explicitly denied to their predecessors. The European Agency for Reconstruction (EAR) has been entrusted with the task of distributing EU money in the former Yugoslavia, while the aviation safety agency (EASA) enjoys, in practice if not in law, a degree of regulatory autonomy, as we shall see. As noted in a 2005 report by the French Senate, more autonomous organs had been created by the EU in the previous 50 months than in the preceding 50 years (Sénat 2005).

With the benefit of hindsight, it is tempting to regard this development as a long-term trend inspired by the will to reform European public administration and to gloss over the reasons prompting such a shift. The reality, however, is much more complex. As those who have been following the situation know, the creation of European agencies was a fairly haphazard development. None of the main institutional actors deliberately planned or defended it as *the* way forward. Proposals to establish an agency were often met with resistance from one side or the other and usually gave rise to fairly intense inter-institutional bargaining. During the drafting of its White Paper on European Governance, disputes over the path that should be followed by the Commission concerning this very issue resulted in a substantial re-writing of the initial draft, the final version presenting a classical defense of the 'Community method' (interview at the Commission, November 2001) even though this 'hierarchical' approach was someone at odds with the philosophy underpinning the white paper (Scott 2002).

Thus far, the movement that led to the establishment of EU agencies has been analysed mainly along functional lines by taking adaptations of the principal-agent model developed in American literature in order to analyse the delegation of powers by the Congress towards administrative agencies. The necessity of bringing expertise to the public policy process or ensuring its credibility features prominently amongst the motivations attributed to those who promoted this new trend at the European level. However, despite its unquestionable relevance, the principal-agent model, in its standard form, is analytically inadequate as it does not take into consideration some of the peculiarities of the EU setting. The most important of these is the absence of a clearly defined "principal" since European institutional architecture has been carefully designed to avoid any concentration of power. For instance, following a basic interpretation of the principal-agent model, it would be difficult to explain the recurrent tensions between the Commission and the Council of Ministers over the

composition of agency administrative boards or the ambivalence of the Commission, which has long appeared reluctant to accept delegations of power and yet has continued to propose the establishment of new agencies. Nor would one be able to understand the multiplicity of controls to which European agencies are subjected. The main contention of this paper is that in order to make sense of both the decision to delegate powers to and the institutional design of EU agencies, one must keep in mind the absence of a defined hegemon within the EU, which is itself a by-product of the multi-level character of that system.

The paper is organised as follows. Section I reviews the two kinds of principal - agent models that have been used thus far to analyse the delegation of powers either to supranational bodies in general or to European agencies in particular. Section 2 addresses the central issue of who can be regarded as the "principal" within the EU setting and discusses the need for a 'multi-principals' model. Sections 3 and 4 highlight the explanatory potential of this model in relation to regulatory politics and accountability issues. Finally, Section 5 questions the lasting character of this model in light of recent inter-institutional struggles.

I.   Delegation of Powers to Supranational Institutions

Two basic models, both inspired by the rational choice approach of political institutions, seem to be relevant for examining the process whereby specific powers are entrusted to EU administrative agencies.

A number of scholars have examined the reasons that push states to transfer either more or less extended powers to supranational bodies.   Adopting an international relations perspective, they argue that delegation is a way to reduce the transaction costs that are associated with the adoption and implementation of transnational policies. More specifically,

supranational agents may solve problems resulting from incomplete information by providing decision-makers with the technical information they need, in particular when complex technical issues are at stake. They may also help to ensure the credibility of commitments adopted at the supranational level by monitoring states' compliance with joint decisions, enforcing the latter if needed, or exerting independent regulatory powers over powerful economic principals (in the case of competition policy) or in strategic policy sectors, such as monetary policy (Majone, 1996; Moravcsik 1998, Pollack 2003). From this perspective, the EU member states are naturally regarded as principals, and the key question is to what extent supranational agents may take advantage of their discretionary powers to pursue their own policy preferences and promote integration against the wishes of national governments – an issue which, as is known, occupies a central place in European integration literature (Pollack 2003; Bauer 2002). Extrapolating from this perception, one may of course ask what motivations have propelled the same principals, i.e. national governments, acting in their capacity as members of the Council of Ministers, to transfer a growing number of powers to EU administrative agencies.

This interpretation of the delegation problem, however, is confronted with radically different alternatives. Adopting a comparative politics perspective, other analysts have suggested that delegation may be regarded as a process whereby directly-elected legislatures transfer policy-making authority to non-majoritarian structures for reasons akin to those mentioned above. To the extent that this model may be applied to the EU, the principals are the EU institutions sharing legislative power: the Council of Ministers, acting together with the Parliament in cases where co-decision is required (Kelemen 2002). A variant of this model has been advanced by the European Commission. In its White Paper on Governance and in the various position papers that followed, the Commission has – implicitly, but nonetheless clearly – presented itself as the principal that must evaluate the possibility of delegating a share of its powers to autonomous bodies, which will assist in completing its

tasks. It has repeatedly stressed the necessity to preserve 'the unity and integrity of the executive function' to ensure 'that it continues to be vested in the chief of the Commission if the latter is to have the required responsibility of vis-à-vis Europe's citizens, the Member States and the other institutions' (Commission 2002: 1). Similarly, in the 2005 draft Inter-institutional Agreement, agencies are described as mere auxiliaries of the Commission. They must "provide the Commission, in particular, with the experience and expertise it needs so that it can fully meet its responsibilities as the Community executive." From this viewpoint, agencies are only supposed "to *help* regulate a particular sector at European level and to *help* implement a particular Community policy" (Commission 2005: 5 ; my underlining). In a speech delivered at a meeting of agency directors, Commission President Jose Manuel Barroso made it clear that the Commission regards itself as a political principal that agencies must assist, while also acknowledging that this partnership may entail some responsibilities on the part of the Commission (Barroso 2006).

The same vision has been forcefully defended by the Commission's legal service. It finds support in the celebrated *Meroni* ruling, in which the European Court of Justice narrowly defined the range of powers that may be delegated to other actors. Delegation, the ECJ stated, is permissible only when "it involves clearly defined executive powers, the exercise of which can, therefore, be subject to strict review in light of criteria determined by the delegating authority." Conversely, the delegation of "a discretionary power, implying a wide margin of discretion" is to be excluded in all cases (*Meroni v. High Authority*, [1957-58] ECR 133, at 151-52). Not surprisingly, therefore, the legal community tends to reason as if the creation of autonomous administrative agencies should be mainly regarded as a transfer of authority from the Commission to these bodies (Chiti 2000; Géradin, Munoz and Petit 2005 ; Lenaerts 1993; Yataganas 2001).

Confronted with alternative models, one may be tempted to solve the contradiction by arguing that both of them may be relevant, although in distinct cases. Thus, the 'intergovernmental' model is clearly helpful for making sense of 'history-making' decisions, such as the establishment of the Commission itself, the ECJ or the European Central Bank, whereas the 'comparative politics' version might be used to analyse the problems surrounding the establishment of administrative bodies by the EU legislature.

However, in practice, both models appear to be relevant for understanding the logic that has led to agency creation. First, the role of the European Commission in the agency-creation wave of the 1990s cannot be ignored. The Commission proposed the establishment of the agencies, greatly shaped their structure and powers, and often provided them with their first director (Hauray 2006) And in recent times, Parliament's influence greatly shaped the politics of agency design (Kelemen 2002). In other words, contrary to what a purely intergovernmental model would suggest, supranational institutions have played a substantial role in that process. Conversely, more often than not, the powers entrusted to European agencies were previously held by national authorities rather than by the Commission. Prior to the establishment of the European Medicines Agency (EMEA) or the Office for Harmonisation in the Internal Market (OHIM), marketing authorisations for medicinal products were delivered and trademarks were registered by national bodies rather than the Commission. To the extent that there was a delegation, it entailed a vertical transfer of powers (from the national to the EU level) rather than a horizontal one (from Community institutions to specialised agencies). Outside of the 'executive agencies' created in the wake of the Kinnock reform to relieve the Commission of routine executive tasks, instances of actual transfers of powers from the Commission to bureaucratic structures remain very rare. The European Agency for Reconstruction is an exception in that it enjoys budget implementation powers that are normally vested in the Commission, according to the EC Treaty.

Consequently, drawing a clear line between the two strands of analysis would cause us to ignore an important part of the story. In truth, the creation of agencies requires an agreement between actors of various types, each with their own interests. A proposal to this effect must be tabled by the Commission and accepted by national governments and, to an increasing extent, by the European Parliament. Failing to acknowledge the wide variety of actors that participate in the final decision would make it difficult to account for the manifold tensions surrounding agency creation. It would also lead the current debate on inter-institutional agreement regarding agencies, proposed by the Commission in 2005, to seem incomprehensible. Why would a single principal want to codify delegation practices? In contrast, I would argue that recognising the multiplicity of principals enables us to understand some key structural features of the decentralised bodies that have been established and the variety of controls to which they have been subjected.

The difficulties that may be encountered when trying to precisely identify the principals and the agents have been noted in the literature on delegation. Thatcher and Stone Sweet (2002) have stressed, for example, that principals are not always unified, which increases the complexity of dealing with changes in preferences. 'Composite principals', they write, 'that is, a principal comprised of multiple actors whose collective makeup changes periodically through, for example, elections, -- may not possess stable, coherent preferences over time. Instead, they may be competitive with one another over some or many issues, as when member states in the EU disagree on matters of policy that fall within the agent's mandate' (at 6). They also discuss the case of multiple agents, i.e. situations in which 'the initial act of delegation may parcel out – among multiple actors – the functions normally associated with the principals' (ibid.). Interesting as they may be, neither of these hypotheses actually corresponds to what actually occurs when autonomous administrative structures are established at the EU level. The problem here is not the time consistency of principals' preferences, but rather the fact that different principals, each with their own preferences, must

agree in order for the new body to be created. In Kelemen's words, the issue lies in understanding 'how conflicts between the EU's primary legislative actors – the Council and the Parliament – and its primary executive actor – the Commission – have influenced the design of new bureaucratic agencies' (Kelemen 2003: 93).

2. A Political System Without a Principal

The delegation issue cannot be analysed without considering the basic principles that underpin the European Union's institutional architecture.

European integration is an unprecedented attempt to build a form of continental order without re-creating the hierarchical power structure of states. Balance and compromise are the main features of this system. Balance among the various countries that joined the Community, and later the Union, was a key concern for the founding fathers. No country, large or small, was to be in a position to be able to impose its own views. Hence, the elements that explain the originality (and, arguably, the effectiveness) of the European model.: Significant powers have been delegated to an independent executive and an independent judiciary, the composition of which, however, is conceived in such a way that national interests cannot be ignored, and weighted voting has been allowed in the main decision-making body, the Council of Ministers, with a high majority threshold, which makes decisions by consensus well-neigh unavoidable. Balance amongst the institutions is another way to further the same goal. Many of the original features of EU decision-making are also inspired by the same anti-hegemonic objective. The much-criticised monopoly of initiative bestowed upon the Commission, for example, was requested by the smaller member states in order to counteract the influence of larger countries within the Council of Ministers (Küsters 1990). Equally important, if one intends to preserve the decentralised character of the system, is the fact that national governments, through their role in the European Council and the Council of Ministers, play a central role in EU decision-taking. In other words, there is a direct link between the distribution of powers at the EU level and its character as a system of multi-level governance. Because the institutions of the Union had been deliberately designed to be able to represent a variety of interests, preserving the distribution of power effectuated by the Treaty of Rome was necessary to avoid any kind of capture by specific interests. The attention given

to the principle of 'institutional balance' in the case-law of the Court of Justice therefore appears quite justified (Majone 2005).

In sum, the absence of a principal within the EU institutional scenario is not an accident; rather, it is a corollary of the spirit that inspired European construction itself. Even today, with a directly-elected European Parliament, it would be incorrect to regard the Commission as enjoying a type of popular mandate authorising it to implement a political programme of some sort. European election campaigns continue to be dominated by national issues. Despite the steady growth since the Maastricht Treaty of the Parliament's role in appointing the Commission, the composition of the executive still seems to owe more to national government preferences than to the decisions of the legislature (see however Hix 2006 for a contrasting view). The implications of this situation for the issue of delegation are twofold. First, the multiplicity of principals should not be viewed as an anomaly or a transitional situation. Quite the contrary; this is perfectly in tune with the central, anti-hegemonic principle that represents the cornerstone of the European institutional architecture. Second, our interpretation of the principal-agent model must be adapted to this situation. As a rule, delegation decisions require the support of several principals, each with their own preferences and each anxious to exert some degree of control over the agent. The problem of control will therefore present itself in an atypical fashion. Given the variety of the principals' preferences, the link between the former and the agent's performance, as well as the principals' capacity to control the agent, is likely to be diluted. Our attempts to understand the politics of delegation and to evaluate their outcome must take these elements into account.

3. The Politics of Delegation in the EU

How does the multiplicity of principals affect delegation issues? The variant of the principal-agent model proposed here may enable us to understand a number of features which are at odds with the 'standard' delegation model, in which there is (at least for Europe, where parliamentary government is the rule) a clear chain of command leading to governments and political parties, and ultimately to the people. Tensions among principals explain a number of stable elements in the otherwise haphazard process that has led to the mushrooming of various kinds of agencies. These tensions have affected both delegation decisions and the institutional design of the agencies. The existence of several principals also has implications for how the accountability debate must be framed. Lastly, I would argue that in such a context, the creation of strong regulatory agencies is unlikely.

The multiplicity of principals has largely shaped the politics of agency creation. Each of the principals is somewhat reluctant to relinquish power (as with all principals, in general). However, their main concern is not what the P-A literature describes as 'agency drift', that is, the idea that agents will pursue a political agenda that differs from that of its principal. What the principals fear most is the emergence of a variant of 'political drift', in which agencies are somehow 'captured' by one of their institutional rivals in the leadership contest. Thus, as a rule, even where national governments accept the necessity of enhancing European cooperation, they tend to oppose the granting of more significant powers to the Commission. Similarly, when the first European agencies were established, the national governments insisted that they be subject to intergovernmental control so as not to threaten national administrations. EU agencies were therefore established as the hubs of networks bringing together national administrations (Dehousse 1997). The Commission, naturally inclined to maximise its own power like most bureaucratic structures (Majone 1996), fears the emergence of potential rivals that will be more exposed to member states' influence. From the Commission's perspective, delegation is often only a second-best alternative, which it will accept only if convinced that an extension of its own powers is not likely to be approved by

the Council. Thus, in the field of food safety, it supported the establishment of an independent authority only once it realised that the national governments were unwilling to enlarge its prerogatives (Kemelen 2002). The Commission's 2001 White Paper on European Governance clearly illustrates this 'official' point of view. While highlighting in classic fashion the advantages of agencies (sectoral expertise, increased visibility and cost savings), it dwells at greater length on the limits that should surround the delegation of powers if the balance between the institutions is to be respected. 'Agencies can be granted the power to take individual decisions … but cannot adopt general regulatory measures', nor can they "be given responsibilities for which the Treaty has conferred a direct power of decision on the Commission (for example, in the area of competition policy).' They 'cannot be granted decision-making powers in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments.' Finally, of course, 'agencies must be subject to an effective system of supervision and control' (Commission 2001: 24).

This lukewarm view is often shared by the European Parliament, which fears being deprived of its hard-won legislative powers by the regulatory agencies despite the fact that its own influence over the Commission has been growing during the past decade. A Parliamentary report summarises the Parliament's position concerning the issue as follows: Since "the Commission bears ultimate political responsibility for the management of Community activities", it follows that "…the autonomy of the new regulatory agencies should be exercised under the direct supervision of the Commission and monitored politically by the European Parliament on the basis of the powers vested in it by the Treaty" (European Parliament 2003). From this perspective, the 'enemy' is represented by the member states' intergovernmental bias since, unlike the Commission, national representatives are not under the Parliament's authority.

These contrasting fears largely explain the somewhat complex institutional architecture of EU regulatory agencies. First, it explains why agency creation has often led to protracted negotiations and elaborate compromises between the various branches of the legislature. At the time the EASA was established, for instance, some 150 amendments were presented (Schout 2007). The reason is easy to understand since the greater the specifications of agency objectives, the easier it is for its principals to control its action. Similarly, although the establishment of these new structures has been criticised as a somewhat slapdash process (Commission 2005; Sénat 2005), there are a number of recurrent features to be found within their configuration and functioning, all of which appear to be directly linked to a willingness to preserve the existing balance of power in the Union.

In the principal-agent literature, the power to appoint the heads of an agency's executive is regarded as a standard control mechanism. At the EU level, this power is generally fragmented. Most often, directors are appointed by the agency's administrative board based on a proposal from the Commission; in other cases, he or she is appointed by the Commission based on a proposal from the administrative board or by the Council on the basis of a list of candidates drawn up by the administrative board or the Commission. The Council enjoys more autonomy for so-called "Union agencies", created in the fields of foreign policy or justice and home affairs, in which it may be regarded as the main principal (Curtin 2006, Craig 2007: 151). The Parliament's role in the appointment process is less prominent, except for a few agencies whose work is of direct interest to the populace at large, such as the European Food Safety Authority (EFSA) or the European Centre for Prevention and Control of Diseases (ECDC). This is generally justified by referring to the Parliament's nature as a control institution, the Commission being perceived as the main holder of executive power (See e.g. European Parliament 2003: 9). Agency administrative boards are composite structures. While there are several possible variants, they are generally comprised of at least one representative for each member state. This occasionally leads to rather peculiar situations.

For example, Hungary and Malta are entitled to appoint one person on the board of the European Maritime Safety Agency or the European Railway Agency, respectively, even if their representative's expertise in those fields can be assumed to be limited. Likewise, in its first period of activity, EUROFOUND, the working conditions agency, had more board members than staff (Schout 2007: 6). To date, the only exception to the principle of intergovernmental control is the Food Safety Authority, created in 2002 after a series of food-related scares. Given the public's alarm, the Commission was able to successfully invoke the necessity of enhancing the agency's independence to ensure the credibility of the new structure and effectively convinced national governments to do away with the classical 'one state, one vote' rule as regards the administrative board. Yet this is truly the one exception that proves the rule, for even in this unusual case, the members of the management board are appointed by the Council of Ministers from a list drawn up by the Commission. The essence of the compromise is therefore clear: One must avoid concentrating the power to appoint in any one of the would-be 'principals'.

In similar fashion, principals seem to have found it appropriate to confine agencies to a secondary role, at least formally. The majority of the organisations created since 1990 have an information-gathering mission, such as the European Environment Agency in Copenhagen. They may assist the Commission in implementing programmes and policies, as the European Training Foundation in Turin or the European Reconstruction Agency in Thessaloniki. They may even go so far as to prepare decisions to be taken by the Commission, as is the case for the London-based European Medicines Agency (EMEA). Yet most have been denied any independent decision-making power. At times, the reluctance to delegate was quite explicit, as is demonstrated by the regulation establishing the Lisbon Drug Monitoring Centre: '[T]he Centre may not take any measure which in any way goes beyond the sphere of information and the processing thereof'(Article 1 (4) of Council Regulation EEC 302/93, OJ [1993] N° L36/1). In other cases, the principals' attitude was more ambivalent. As regards the licensing

of pharmaceuticals, for instance, the Commission's initial proposal provided the possibility for the EMEA to make autonomous decisions regarding certain procedural matters, such as the format of the application for marketing authorisations. Yet the regulation that was ultimately adopted denied the Agency even this limited degree of autonomy (Dehousse 2003). Likewise, despite Commission President Romano Prodi's call for the creation of a 'strong' food safety regulator in the wake of manifold food-related scares, the Commission's own proposal demarcated the necessity of drawing a clear distinction between risk evaluation, during which a specialised agency could play a useful role, and risk management, which was to remain in the hands of the EU's 'political power', i.e. the Commission (Lafond 2001).

As a result, only a handful of agencies, such as the Office for Harmonisation in the Internal Market in Alicante, the Community Plant Variety Office in Angers or, more recently, the Aviation Safety Agency (EASA) in Cologne, have been granted the power to take individual decisions on the grounds that such decisions do not entail significant discretionary powers. Needless to say, the power to adopt formal rules of any kind is always denied to those bodies. The EASA, however, has been entitled to adopt non-binding 'guidance material' (Art 13 (b) of Regulation 1592/2002, OJ L 240 of 7 September 2002) which, coupled with the authority to issue individual decisions, approaches independent regulatory power, as demonstrated by the Commission's experience in the field of competition policy. Moreover, when it advises the Commission on the rules to be adopted to implement the air safety regulations, the technical part of its opinions, in particular the part dealing with the construction, design and operation of aircraft, cannot be altered by the Commission without prior collaboration with the Agency (Article 12b). The fact that the Agency's influence has been somewhat disguised, however, strongly suggests there is a strong reluctance against a a formal grant of regulatory authority. As a rule, agency heads themselves are mere executive directors, as the agency's work programme is defined by the administrative board. Indeed, in defining the profile of a good executive director, Fernand Sauer, founding director of EMEA

(widely regarded as one of the 'strongest' EU agencies), indicated that networking skills were essential since directors are engaged in permanent negotiations, be they with the Commission, the Parliament, the member states, or stakeholders of some kind (Sauer 2007).

This reluctance to establish strong regulators is often justified by legal constraints. The *Meroni* doctrine of the European Court of Justice is religiously referred to as a justification for preventing any form of delegation that could undermine the Commission's own executive authority. Although the validity of the *Meroni* precedent in the European Community is questionable in my view (Dehousse 2003), it is nevertheless interesting to note that the Commission has departed from legal orthodoxy on various occasions, as seen earlier. It is therefore tempting to conclude that the law provides a useful (and flexible) pretext for concealing the Commission's deeper motivations, which are linked to an eagerness to assert its authority as *the* EU executive – an authority that has been regularly challenged by national governments.

Be that as it may, the absence of formal authority does not necessarily mean that agencies are deprived of any influence whatsoever. Indeed, in analysing the practice, one notes, for instance, that EMEA recommendations are systemically rubber-stamped by the Commission (Hauray 2006).This is hardly surprising. If an institution pooling the best expertise available at the European level warns against the dangers of a given pharmaceutical, the 'political power' could not ignore its advice without taking substantial risks. Giandomenico Majone has correctly pointed out that, provided the regulatory bodies manage to acquire (and preserve) credibility, they may acquire significant influence, even when endowed with mere advisory or information functions (Majone 1997). But are all European agencies, with their multiple principals, strong enough to acquire that type of influence?

4. Does the Multiplicity of Control Channels make Agencies more Accountable?

In several respects, the creation of an agency can be seen as an advantage in terms of accountability. The very fact that an administrative body is established, endowed with a legal personality, subject to legal rules and provided with budgetary resources triggers a variety of control mechanisms that would be hard to conceive of with a loose regulatory network or with an intergovernmental committee, which remains the most likely alternative to an agency. Indeed, the number and variety of control devices used to monitor EU agencies action is impressive, particularly when compared to those capable of forcing 'comitology' committees to account for their decisions. Agencies are required to present an annual activity report describing how they implemented their yearly programme. Community subsidies to the agencies are included in the general budget, which is prepared by the Commission and approved by the Council and the Parliament. As of 1 January 2003, the financial discipline governing agencies financed by the EU budget (a large category, since only two, the Office for Harmonisation in the Internal Market and the Plant Variety Office, are entirely self-financing) has been made stricter. Agencies are subject to the authority of the Commission's Financial Controller, whereas the discharge for the implementation of their budgets must be given each year by the European Parliament upon the recommendation of the Council (Financial Regulation 1605/2002 of 25 June 202, OJ L 248 of 16 September 2002). Judicial control mechanisms have been provided for those agencies with the power to adopt individual decisions, such as the OHIM or the EASA. The Ombudsman has also used its powers of control to recommend that agencies adopt rules on transparency and access to documents.

In the principal-agent literature, accountability mechanisms are mostly viewed as a method by which the principal can ensure that the agent follows the instructions it has been given rather than developing its own priorities. As suggested above, in a system with multiple principals one of the main fears is that an agency will be subjected to undue influence by a

rival in the contest for political leadership. The variety of accountability mechanisms is such that it is seems unlikely that this kind of 'capture' would occur. As a rule, national administrations are represented on the administrative board of agencies, as is the Commission, which often plays a role in the appointment of directors and can present its opinion on annual work programmes. Since the setting up of the first agencies in the 1990s, the European Parliament has used its 'power of the purse' to make its voice heard. For example, when unsatisfied with the policy pursued by some agencies, the Parliament did not hesitate to freeze a substantial part of the agencies' budgets until they complied with its demands (Brinkhorst 1996).

Should one conclude from this state of affairs that we are in a situation similar to the description of US agencies offered by Terry Moe, according to whom in many instances "no one controls the agency, and yet the agency is under control" (1987)? While this is a possible conclusion, it is far from certain. Indeed, the sheer complexity of control mechanisms may render improbable their utilisation and therefore diminish their deterring power. Even on the national plane, typical control devices such as the power to dismiss the director, change an agency's enabling legislation or cut its budget are rarely used, for their use may be politically costly (Thatcher 2005). How probable is it that the situation will be different at the European level, where the number of veto players is elevated? As all three political institutions enjoy some influence over agency action in one way or another, the sanction of possible mistakes seems rather unlikely. In its 2005 draft inter-institutional agreement, for instance, the Commission contemplated the possibility of amending or repealing the act establishing an agency if it is unsatisfied with the way the agency accomplishes its tasks. However, for such a threat to be carried out the Commission will normally require the support of the EU legislature, i.e. the Council and the Parliament; the opposition of either of these institutions would prevent the sanctions from being carried out. In other words, agencies remain immune from reform unless faced with a broad consensus (Williams 2005). Likewise, the threat of

reducing an agency's subsidy will not be credible unless it receives a positive echo from within the two branches of the budgetary authority.

This is not to say that agencies are impervious to any control. Indeed, the fact that the Commission and the national administrations contribute to their internal functioning (rather than acting merely as forces of external control) suggests that agencies are unlikely to adopt a policy that would cross any red lines defined by their principals. Yet it is interesting to note that the logic of collective control by multiple principals has been taken to such an extent that it may actually *weaken* the possibility of sanctioning their agent's misconduct.

5. A Lasting Compromise?

It may of course be thought that the 'tug-of-war' between the institutions is merely a transitory phase linked to the relative novelty of the European regulatory system and that the situation will gradually stabilise with the emergence of a hierarchy of sorts amongst the various principals. However, there are many indications to the contrary. First, polycentricity has, if anything, been aggravated by the emergence of the European Parliament, which has used its increasing legislative powers to acquire more influence in the creation and operation of Community agencies (Kelemen 2002). Secondly, attempts to modify the current balance of power generally meet with strong resistance.

The evolution of the European Aviation Safety Agency is quite significant in this respect. Both the Commission and the aviation industry pushed in favour of the establishment of a strong European regulator to discipline member states and to provide a 'one-stop shop' to the industry. As we saw, the agency was endowed with *quasi*-regulatory powers. Yet budgetary constraints and member states' influence have led it to operate as a typical EU agency, i.e.

largely as a network operator in a system that has obvious similarities with comitology (Schout 2007: 5).

Similarly, subsequent to its White Paper on Governance, the Commission issued a communication (Commission 2002), which was then followed by a draft inter-institutional agreement (IIA) on regulatory agencies (Commission 2005). The declared ambition of this proposal is to clarify the framework within which agencies should operate, setting conditions for their creation, operation and control. The Commission's approach may be regarded as confirmation of the relevance of the 'multiple principals' perspective advocated here. As suggested above, the resort to an inter-institutional agreement would hardly make sense if there were but one principal. The rationale offered by the Commission to explain its initiative is that the institutional architecture is so disorganised, given the contrasting views of the various actors that may influence agency creation, that 'the situation … is rather untransparent, difficult for the public to understand, and, at all events, detrimental to legal safety' (Ibid.: 2).

The Commission's draft lays down several basic principles that must be respected upon the establishment of an agency. The Commission declares itself committed to a thorough impact assessment in order to analyse any problems to be resolved, whether the regulatory agency is likely to provide an adequate response, and under what conditions. To facilitate the agency creation process, the IIA recommends that a single 'legal policy' be adopted to avoid endless inter-institutional debate. The Treaty provision forming the legal basis of the policy in question should be used as the foundation for establishing an agency rather than Article 308, the EC Treaty's "implied powers" clause. Likewise, the vexing question of the agency seat should be settled in the basic act or in the following six-month period.

While these proposals were the centre of some debates, the majority of the criticism was directed towards the Commission's propositions regarding the structure of the agency, which

were strongly opposed by several member states. The Commission suggested that, in general, not all of the member states should be represented on the administrative board of agencies unless they are "involved in the exercise of executive powers by the Member States." It also recommended that "the two branches of the Community executive", namely the Commission and the Council, should be equally represented on the board. The Parliament, it maintained, should not be involved as this "would cast doubt on the Parliament's ability to perform external controls objectively." Understandably, these proposals were viewed as an attempt to limit the national governments' room for maneuver both during the creation of an agency and in its day-to-day operations. Such an interpretation prompted the legal service of the Council to challenge the legality of the draft IIA on the grounds that it "goes way beyond the establishment of arrangements for cooperation between the institutions: it concerns the adoption of *"supra-legislative"* substantive legal rules, in the sense that their purpose would be to bind the legislator in the future by a procedure not laid down in the Treaties" (Council 2005; emphasis in the original). Several governments also objected to what appeared to them as an attempt by the Commission to modify the current balance of power within the European regulatory system (Assemblée nationale 2006). It appears, therefore, that the current "multi-principals" compromise is here to stay (See Craig 2007, at 183, for a similar conclusion). Whatever one may think of the existing design of EU agencies, it is strongly anchored in the contemporary institutional culture of the Union.

Conclusion: Multiple Principals, Weak Agents?

This article has argued that it is difficult to make sense of the development of a galaxy of European regulatory agencies without analysing the environment in which this development has flourished. The absence of a clear institutional hegemon within the EU system has allowed the three 'political' European institutions to influence the rules governing the

structure and functioning of agencies and their operation. The Commission has played a key role in the establishment of agencies; the European Parliament has acquired significant authority due to the increase in its legislative and budgetary powers; several member states have made it quite clear during negotiations on the draft IIA on regulatory agencies that they do not intend to relinquish the various powers of control that they currently enjoy. The respective influence of these actors may change. The parliament has gained more influence over time, while the Council has reserved itself a more important role in relation to second and third pillar agencies. But the multi-polar character of the process has not been altered. None of the existing agencies can be depicted as a mere instrument in the hands of any one of the 'political' institutions. It is true that this type of polycentricity is not unknown on the domestic plane, where tensions may exist between, for example, the parliament and the executive when the creation of autonomous agencies is debated (see e.g. Shapiro 1997). Yet there is, at the very least, a difference in degree. In a system of multi-level governance such as the EU, it may be regarded as the cornerstone of the structure.

Given the existence of multiple principals, each with their own interests, it would have been quite surprising to witness the emergence of strong regulators. Indeed, the reluctance to delegate far-reaching powers to EU agencies represents one of the cornerstones of the present system, as well as being an essential element of the institutional discourse. Multiple accountability channels have been established in order to ensure that agencies do not overstep the boundaries assigned to them. The weakness of the powers they enjoy often leads some to regard agencies as irrelevant. Formal powers, however, tell us only one part of the story. There is already evidence that some of the existing structures, such as the EMEA, have become highly influential and are indeed the *de facto* decision-makers in their field. Furthermore, external events may create such pressure for change that the principals will find it politically costly to resist. A series of food-related scares have incited national governments to allow more autonomy to be granted to the Food Safety Authority than to other agencies.

Similar future events may raise questions as to the appropriateness of the current status quo. The main limitation of the current arrangement is the extreme dilution of power that it causes. The broad consensus required for both the establishment and the control of EU regulatory bodies has resulted in the creation of bodies in which the formal powers remain fairly limited. The risk is, of course, that this will generate a situation in which no player feels overall responsibility and the avoidance of blame is the main concern of all parties. The future will tell whether the 'multiple principals' system of the EU is as stable as it currently seems.

REFERENCES

Assemblée nationale (2006) . Rapport d'information sur les agences européennes déposé pour la délégation de l'Assemblée nationale pour l'Union européenne par M. Christian Philip, député, N° 3069, 3 mai 2006.

Barroso, José Manuel (2006). Discours prononcé le 23 février 2006 devant les directeurs d'agences, cited in Assemblée nationale (2006) 95-99.

Bauer, Michael (2002). "Limitations to Agency Control in European union Policy-Making: The Commission and the Poverty Programmes, *Journal of Common Market Studies*, 40: 3, 381-400

Brinkhorst, Laurens J. (1996)."The Future of European Agencies: A Budgetary Perspective from the European Parliament", in Alexander Kreher (ed.), *The New European Agencies*, EUI Working Paper RSC n. 96/49, 75-81

Chiti, Edoardo (2000). "The Emergence of a Community Administration: The Case of European Agencies, *Common Market Law Review,* 37, 309-43

Commission (2001). *European Governance. A White Paper*, COM(2001)428 final 25 July 2001

Commission (2002). Communication on the operating framework for the European regulatory agencies, COM(2002)718 final of 11 December 2002

Council (2005). Opinion 7861/05 of the legal Service on the Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies – choice of legal act and legal basis, 6 April 2005 (08.04)

Craig, Paul (2007). *European Administrative Law*, Oxford University Press

Curtin, Deirdre (2005). "Delegation to EU non-majoritarian Agencies and Emerging Practices of Public Accountability", in Géradin, Munoz and Petit, eds. (2005)

Curtin, Deirdre (2006). "Framing Accountability of EU Administrative Actors", Paper presented at the CONNEX workshop on accountability, Lausanne, July 2006

Dehousse, Renaud, (1997). "Regulation by Network sin the European Community: The Role of European Agencies, *Journal of European Public Policy*, 4:2, 246-61

Dehousse, Renaud(2003). "Misfits: EU Law and the Transformation of European Governance" in Christian Joerges and Renaud Dehousse (eds.), *Good Governance in an Integrated Market,* Oxford University Press, 207-29

European Parliament (2003). *Report on the Communication from the Commission: "The Operating Framework for the European regulatory agencies" (COM(2002) 718 – 2003/2089 (INI)),* drafted by Ms. Teresa Almeida Garrett, EP Doc. 15-1471/2003 final, 4 December 2003

Géradin, Damien, Rodolphe Munoz and Nicolas Petit, eds. (2005). *Regulation through Agencies in the EU. A New Paradigm for European Governance*, Cheltenham: Edward Elgar

Hauray, Boris (2006). *L'Europe du médicament*, Paris : Presses de Sciences Po

Hix, Simon (2006). "Why the EU Needs (Left-Right) Politics: Policy Reform and Accountability are Impossible Without It", Notre Europe Policy Paper No. 19, Paris: Notre Europe.

Kelemen, R. Daniel (2002). "The Politics of 'Eurocratic' Structure and the New European Agencies", *West European Politics,* 25: 4, 93-118

Lafond, François (2001). "The Creation of the European Food Authority: Institutional Implications of Risk Regulation", Notre Europe, European Issues, N. 10, Paris: Notre Europe.

Lenaerts, Koen (1993). "Regulating the Regulatory Process: 'Delegation of Powers' in the European Community ", *European Law Review*, 22-49

Majone, Giandomenico (1996). *Regulating Europe*, London: Routledge

Majone, Giandomenico (1997). "The new European Agencies: Regulation by Information", *Journal of European Public Policy,* 4:2, 262-75

Moe, Terry (1987). "Interests, Institutions and Positive Theory: The politics of the NLRB", *Studies in American Political Development,* 2, 236-99

Moravcsik, Andrew (1998). *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*, Ithaca: Cornell University Press

Pollack, Mark (2003). *The engines of European Integration. Delegation, Agency and Agenda-setting in the EU*, Oxford and New York: Oxford University Press

Sauer, Fernand (2007). "Management Perspectives: Establishing a Focus for EU Agencies", Paper presented at the European Institute for Public Administration, Maastricht, 29 January 2007

Schout, Adrian (2007). "EU Agency: Design or Default?", paper presented at the CONNEX workshop on "European Risk Governance; its Science, its Inclusiveness and its Effectiveness", Maastricht, 14-16 June

Scott, Colin (2002). "The Governance of the European Union: The Potential for Multi-Level Control", *European Law Journal*, 8,: I, March, 59-79

Sénat (2005). "Les agences européennes: l'expert et le politique", Rapport d'information n°58, présenté par Mme Marie-Thérèse Hermange au nom de la délégation du Sénat pour l'Union européenne, 27 octobre 2005

Shapiro, Martin (1997). "The Problem of independent Agencies in the united States and the European Union", *Journal of European public policy,* 4:2, 276-91

Thatcher, Mark (2005). "The Third Force? Independent Regulatory Agencies and elected Politicians in Europe", *Governance*, 18,:3, 347-373

Thatcher, Mark and Alec Stone Sweet (2002). "Theory and Practice of Delegation in Non-Majoritarian Institutions", *West European Politics,* 25:1, 1-22.

Williams, Garrath (2005). "Monomaniacs or Schizophrenics? Responsible Governance and the EU's Independent Agencies", *Political Studies*, 53, 82-99

Yataganas, Xenophon (2001). "Delegation of Regulatory Authority in the European Union: the Relevance of the American Model of Independent Agencies", Jean Monnet working Paper 3/01