

**THE AGENCIFICATION OF EUROPE:
EXPLAINING THE ESTABLISHMENT
OF EUROPEAN COMMUNITY
AGENCIES**

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Abstract

Governance in the European Union is being transformed through the increased use of agencies to perform a range of functions in a variety of policy areas. The European Commission believes that agencies can add value but admits that their establishment has not been accompanied with a “common understanding” of their roles and purposes. In this thesis, I take the approach that such an understanding is best reached through examination of existing agencies. Focusing on the most common type of agency in the EU, i.e. Community Agencies, this thesis provides a four-level analysis. At the conceptual level, the thesis deals with the ‘agency’ concept. Drawing on public management literature, the empirical level involves classification of these diverse bodies. The contribution of the thesis at the theoretical level is to identify the key driving factors behind agency establishment; following a theoretical framework devised from new institutionalist theories I trace and analyse the establishment process of four case study agencies. The research reveals that to fully understand the establishment of agencies we need to draw on more than one strand of new institutionalism, as they can explain different aspects of agency creation. As a wider outlook the thesis reflects on the role of agencies, relating it to the wider academic debates on the ‘regulatory state’ and its implications for legitimacy.

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List of abbreviations

Cedefop – European Centre for the Development of Vocational Training
CdT – Translation Centre for the Bodies of the European Union
CFCA – Community Fisheries Control Agency
CPVO – Community Plant Variety Office
EC – European Community
ECDC – European Centre for Disease Prevention and Control
ECHA – European Chemicals Agency
EAR – European Agency for Reconstruction
EASA – European Aviation Safety Agency
EEA – European Environment Agency
EESC – European Economic and Social Committee
EFSA – European Food Safety Authority
EMCDDA – European Monitoring Centre for Drugs and Drug Addiction
EMA – European Medicines Agency
EMSA – European Maritime Safety Agency
ENISA – European Network and Information Security Agency
ERA – European Railway Agency
EP – European Parliament
ETF – European Training Foundation
EU – European Union
EUMC – European Monitoring Centre on Racism and Xenophobia
EU-OSHA – European Agency for Health and Safety at Work
EUROFOUND – European Foundation for the Improvement of Living and Working Conditions
FRONTEX – European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GSA – European GNSS Supervisory Authority
OHIM – Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Introduction

1.1 Searching for a common understanding of agencies

Governance in the European Union (EU) is being transformed through the increased use of agencies to perform a range of functions in a wide spectrum of policy areas. In 2008, the European Commission issued a communication inviting the Council and the European Parliament (EP) to an “inter-institutional discussion” on the role of agencies in EU governance. In this communication, which was given the optimistic title “European agencies – The way forward”, the Commission (2008a) argued that agencies can add important value to European governance. At the same time, the Commission (2008a: 2) remarked that a “common understanding” of the purposes and roles of agencies is lacking, and this makes it difficult for the agencies to fulfil their potential. Moreover, if there is no common agreement on what the roles of these agencies are, it is exceedingly difficult control their activities. As more resources are allocated to agencies than ever before, the need to develop common ideas of their roles and purposes has never been greater. To date, agencies have been established on a case by case basis, and there has been no “overall vision” of their role (see Commission 2008a: 2). A logical starting point for developing a common understanding of the role of agencies is to examine existing agencies. By uncovering the motives behind the establishment of previous agencies, we gain an understanding of their desired role, on the basis of which a more coherent plan for the future can be developed. In this thesis I will be examining the most common type of agency in the EU, i.e. Community Agencies, and explain their establishment.

This thesis seeks to contribute to discussions and debates on agencies at four different levels. At the conceptual level, the project deals with the ‘agency’ concept. What are Community Agencies? What are they not? How does the definition of a Community Agency compare with definitions of other types of agencies and agencies in other political settings? The empirical level of the thesis involves mapping and comparing of Community Agencies. What are their tasks and functions? What resources do they have? When were they set up and where? The contribution of the research at the theoretical level is to identify the key driving factors behind agency establishment. Are there different rationales behind the establishment of agencies with different functions? Can we distinguish any changes over time? Based on the findings of the mapping of agencies, I selected four case study agencies: European Centre for the Development of Vocational Training (Cedefop), European Medicines Agency (EMA), European Aviation Safety Agency (EASA) and European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX). Using documentary research and semi-structured elite interviews, I trace the process leading up to their establishment. Finally, as a wider outlook, the project reflects on the role of agencies in the transformation of governance in Europe, relating it to the wider academic discourse on ‘regulatory states’ in general, and the EU as a regulatory state in particular.

1.2 Agencification and its implications

As will be discussed in more detail in chapter 2, the use of agencies has become an increasingly common feature of public management in a wide range of political settings, and the establishment of agencies is seen as an important

aspect of ‘the regulatory state’. The first agencies at the European level were established in 1975, when European Centre for the Development of Vocational Training (Cedefop) and European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) were set up. In the 1980s, no European level agencies were established. The first large wave of agencification came in the 1990s when nine agencies were established, and another eleven agencies were established in the second wave between 2000 and 2006. This must be considered a rapid development towards more agencies. The establishment of Community Agencies follows established decision-making procedures; the Commission presents a proposal, and a decision is made either jointly by the Council and the EP or by the Council following consultation of the EP. The level of EP involvement depends on whether the codecision or consultation procedure is used. The European Economic and Social Committee (EESC) is also consulted. As the case study agencies have been established at different times, the study of the processes leading up to their establishment also sheds light on how the behaviour of the institutions has changed over time. In particular, it is noticeable how the level of influence and confidence of the EP has increased.

Whilst the establishment of agencies has not been part of a wider vision, it is apparent that the Commission puts great faith in agencies. For instance, in the White Paper on European Governance from 2001, the Commission (2001a: 24) wrote that the “[t]he creation of further autonomous **EU regulatory agencies** in clearly defined areas will improve the way rules are applied and enforced”. In 2005, the Commission tried to initiate a discussion leading to the establishment of a common operating framework for

regulatory agencies (see Commission 2005). To an extent, “European agencies – The way forward” can be seen an attempt to rekindle this discussion, but this time the goal is also to move beyond discussions on procedural frameworks and to contemplate the broader question of the role of agencies in governance. This demonstrates that questions on the role of agencies in governance are not only of interest to academics. It is very much an ongoing discussion amongst practitioners at the European institutions.

Of course there are benefits and risks associated with any organisational choice in public management. Commonly cited advantages of delegation to agencies are concentration of technical expertise, facilitation of credible commitment and efficiency gains. Risks include bureaucratic drift in its various forms. Rational choice institutionalism captures well how decisions to delegate functions to agencies are informed by these concerns (see chapter 2). Starting from the assumption that institutions matter (see Przeworski 2004), I also argue that agencies may play a significant role in the institutionalisation and legitimisation of norms, values and working practices (see Kelemen 2002). Sociological institutionalist theory emphasises this aspect of institutional choice. These implications of governance by agencies are relevant to any political setting where agencies are used, and will be discussed in more detail in chapter 2. Historical institutionalist theory broadens the picture further by considering how the wider historical context influences agency creation and development. This makes this theory particularly useful for our understanding of the timing of agency establishment. A contribution of my research project is to carry these existing theories about agency establishment to a new field, i.e. agencies at the European level.

The establishment of agencies can be seen as a move towards an increasingly technocratic society where the influence of unelected technocrats expands on behalf of the influence of elected politicians. This influence may be direct, as in the case of agencies with regulatory powers, or it could be indirect in the sense that the agencies themselves may not hold mandates to make binding decisions but their opinions are nevertheless incorporated into policy. Either way, this raises a series of issues related to bureaucratic control, accountability and legitimacy. For instance, it is reasonable to assume that unelected technocrats employed by agencies, who are more anonymous to the general public than elected politicians, are less open to public scrutiny, which would make them easier targets for corruption. The use of specialist agencies may allow for more stakeholder involvement in policy development. Whilst this is often positive, there is also a real risk of agency capture by stakeholders, which means that the agencies become controlled by the interests they were set up to control. How are unelected officials held accountable for their actions? How could citizens influence policy when they have no, or very limited, influence over who the policy-makers are? Who should be allowed to influence policy, how, when and why? To what extent a political system is deemed legitimate very much depends on the answers to these types of questions about control and accountability.

Whilst these are important considerations for any decision to establish agencies, I argue that they are even more so in the EU setting compared to national settings. It could be argued that the EU, in contrast to its Member States, has evolved into a predominantly technocratic system without first going through the phase of securing widespread support, rather than mere

passive acceptance, for the system itself. There is a widespread concern that the EU is suffering from a ‘democratic deficit’ (see for example Karlsson 2001; Schmidt 2006). As Schmidt (2006: 21) writes, EU democracy is “fragmented”, and “[m]ost see the answer to the problem of the democratic deficit as the development of EU-level institutions that are more participatory and representative”. Given these wide-spread views, why has the EU moved away from the Community method and decided to establish more and more specialist agencies? If the EU wishes to address the alleged democratic deficit by making lines of accountability clearer, and by facilitating citizens’ participation in the policy-making process, is it not counterintuitive to set up these specialist agencies? If, on the other hand, the aim is to make the system more legitimate in the eyes of the wider public by increasing efficiency in terms of what the political system can deliver, then specialised agencies may be advantageous. Advocates of the regulatory state and governance by specialist agencies tend to emphasise this aspect. The implications of viewing the EU as a regulatory state will be discussed in more detail in chapter 2, and I will return to these questions in the conclusion.

Discussions about ‘regulatory states’ focus on the use of regulatory agencies, but, as will be discussed in chapters 2 and 3, there are also other types of agencies. Not all agencies have regulatory powers, and, amongst those that do, the extent of their powers varies. Moreover, agencies vary in other dimensions, such as size, governance structures and financial arrangements. In this thesis, I seek to broaden the understanding of agency establishment by investigating if there are different rationales behind the establishment of different types of agencies, and if there are different rationales behind the

establishment of agencies at different times. Furthermore, I will investigate if different theories can explain different aspects of agency establishment.

1.3 Overview of Research Design and Methodology

The methodology of this project draws on qualitative methods developed in comparative politics (see Gerring 2001). As the number of agencies is not large enough to lend itself to large N research, the chosen research design has a focus on small and medium N research. The first empirical step of this research is to map and classify all 22 Community Agencies established between 1975 and 2006.¹ As the time frame available for this project would not allow for in-depth study of the establishment of all individual agencies, a case study approach was chosen for the second empirical step of the research. Cedefop, EMEA, EASA and FRONTEX were selected as case studies based on the findings of the mapping exercise of the first empirical step of the research. The selection of case study agencies was primarily guided by the functions that the agencies are set up to perform, but size, governance structures and financial arrangements were also taken into account. The rationale behind the selection of these agencies is covered in more detail in chapter 3. To uncover the causal paths behind the establishment of these agencies and gain a deep insight into what has driven this development, the method of process-tracing was selected. As King, Keohane and Verba (1994: 227) explain, process-tracing involves “searching for evidence – evidence consistent with the overall causal theory –

¹ The cut-off point coincides with the start of my empirical research. Since 2006, two more agencies (European Institute for Gender Equality and European Agency for Fundamental Rights) have been established. European Agency for Fundamental Rights has been built on the European Monitoring Centre on Racism and Xenophobia.

about the decisional process by which the outcome was produced” (see also George and Bennett 2004). In this case, the outcome is the establishment of agencies. The decisional process is the EC/EU decision-making process from idea to final legislative decision. The causal theories are rational choice institutionalism, sociological institutionalism and historical institutionalism. As will be explained in chapter 2, hypotheses derived from these three strands of new institutionalism need not be mutually exclusive as they may prove to be able to explain different aspects of agency creation. The rationale behind the decision to devise a framework from new institutionalist theories will be outlined in chapter 2, in which I set out the theoretical framework and the hypotheses to be explored in the thesis. In chapter 2, I will also discuss what evidence will be sought to verify or falsify the hypotheses.

Documentary research was a crucial part of the data-gathering process. To a significant extent, the information needed to map and classify the agencies has been taken from the founding legislations of the agencies (see Appendix 1). However, I have also consulted the official web sites of the agencies, agency work programmes, budget documentation and similar. For the second empirical step essential information was provided by documents from the EU institutions, such as legislative proposals from the Commission, EP reports and debates, Council documentation, opinions from the EESC and, of course, the final legislative texts. To complement the information from these official documents, with a particular emphasis on gaining an understanding of the political climate of the time of the establishment of the agencies, secondary sources in the form of previous studies and news reports have been consulted.

In order to move beyond the story of official documentation, the documentary research was complemented by semi-structured elite interviews. During 2008, I visited each of the four case study agencies and interviewed officials with varying functions. An implication of the regulatory state is that specialist agencies have considerable influence over policy-making. To find out if this is true in the case of Community Agencies, I also interviewed Commission representatives with experience from working with these agencies. Interviews with similarly knowledgeable representatives from the EP (two elected MEPs and two employed officials) further contributed to a more nuanced understanding of the role the agencies play in European governance. In total, I conducted 21 interviews (see Appendix 2).

An important advantage of using semi-structured interviews is that it allows the interviewees to describe, explain and elaborate on their personal experiences freely and in their own words (see for example Bryman 2004: 145).² The choice of semi-structured interviews proved to be very useful. Throughout my research a number of interviewees drew my attention to facts and events that I had not been able to foresee from the initial documentary research. To steer the conversation onto the topics that I wished to find out more about, I prepared a list of topics and questions to be used as a guide for the interview (see Bryman 2004: 321). Some questions were used for all interviews, but in situations where the documentary research had pointed to particular concerns with regards to an agency or institution, special questions on these issues were added to the guide. During the interviews I made notes about key points. In most cases, interviewees did not object to my recording

² Structured interviews are useful for finding out specific facts. This was not my prime concern here as I used documentary research for that purpose.

the whole interview. However, there were exceptions. In particular, some interviewees requested that their names were not mentioned, and some information was given “off the record”. Any wishes the interviewees expressed in these regards were of course granted. To ensure consistency and to avoid inconsistent conventions for referencing, all interviewees have been anonymised in this thesis.

A methodological overview would not be complete without a comment on potential bias and how to avoid it. Any researcher relying on interview data also relies on the interviewees’ giving accurate information. Interviewees may have their own agenda, or they may be hesitant to present opinions that are not compatible with official norms. Wherever possible, I have attempted to avoid bias induced by such concerns through triangulation of information. In other words, I have sought to confirm information from more than one source. When interviewees clearly have presented a personal view, it has been presented as such in the thesis. Needless to say, more detailed information about national positions within the Council could have contributed to a yet more refined picture of agency establishment. However, given the aim to identify the main objectives behind agency creation, and recalling that the Council tend to reach consensus before making decisions even in situations where it is not legally obliged to do so (Lewis 2003a: 997), I argue that a presentation of the final agreement is sufficient.

1.4 Structure of thesis

The chapter immediately following this introduction sets out the theoretical framework of the thesis. In the first major section of chapter 2, I discuss and

engage with previous academic research on ‘regulatory states’ and ‘agencies’. Importantly, this involves disentangling these core concepts, but I also outline observed empirical variation of agency experiences, and reflect on the implications of viewing the EU as a regulatory state. The second major section of chapter 2 is devoted to a discussion of European integration and governance theories, with a particular emphasis on new institutionalist theories. I present arguments for why new institutionalist theories are suitable for the study of Community Agency establishment. The chapter ends with a tabular summary of the hypotheses to be explored in the case study chapters.

The first empirical step of the investigation and the rationale behind the selection of the four case studies are covered in chapter 3. First I present a definition of Community Agencies and relate this to the previous discussion of the ‘agency’ concept. Following this, I map the Community Agencies established between 1975 and 2006, classifying them according to time of establishment, size, functions, governance structures, financial arrangements and location. The chapter reveals considerable variation in all these dimensions within the Community Agency group. To achieve the stated aim of this thesis to further discussions on the EU as a regulatory state, I argue that the variation with regards to functions is the most crucial aspect to explain. This guides the selection of case studies.

The case studies are presented in chapters 4-7. In these chapters, I trace the process leading up the establishment of Cedefop, EMEA, EASA and FRONTEX, respectively. Each chapter follows a largely chronological structure. I first give a brief presentation of the agency, before discussing the context in which the agency was established. Next I present the positions of the

EU institutions and the EESC, and reflect on the agency's role in governance today. The findings are then discussed in relation to the hypotheses set up in chapter 2, and summarised in a brief concluding section.

In the final chapter of the thesis, I first summarise and compare the key findings for each agency. The conclusions drawn are then related to the wider academic discussion of regulatory states, with a particular focus on the implications of viewing the EU as a regulatory state.

Theoretical framework: New Public Management, ‘the regulatory state’, agencies and European governance

2.1 Introduction

In this chapter, I will set out the theoretical framework to be applied in this thesis. The theoretical framework draws on new institutionalist theories, developed as part of the governance approach to European studies, and on public management literature.

Agencification, i.e. the establishment of agencies to which a variety of tasks are delegated, has been observed in a variety of political settings, and has attracted considerable attention from scholars interested in public management and administration. It has been argued that the establishment of agencies is part of a paradigm shift in public management, often referred to as New Public Management (NPM), which is characterised by ideas of “lessening or removing differences between the public and the private sector” (Hood 1995: 94), and by “delegation of managerial and institutional autonomy in a variety of decentralized forms” (Minogue 2002: 653; see also Döhler 2002). One strand of the NPM literature concerns the debate on the idea of ‘the regulatory state’ (see for example Caporaso 1996; Majone 1994; 1997). Other strands seek to conceptualise ‘agencies’ and to identify drivers behind agency creation (see for example Epstein and O’Halloran’s 1999; James 2001; McCubbins and Page 1987; Pollitt et al. 2001; Talbot 2004; Thatcher 2002a).

Due to its ever-changing nature, the “European project” has been the subject of intense academic study, and there is a wealth of literature available on the subject. Whilst early work almost exclusively had an international relations approach and focused on integration, loosely defined as the pooling of sovereignty to supranational institutions, recent studies more often treat the European Union as a political system in its own right, and approach it from a governance perspective. This change can be attributed to Hix (1994) who argued that international relations approaches are appropriate for explaining integration, but approaches developed within comparative politics would be better suited to explain the *politics* of the European Union. In a later article, Hix (1998) went a step further and called for researchers to realise the limitations of viewing the EU as a *sui generis* phenomenon, arguing that comparison with other political systems would significantly improve our understanding of how the EU works. However, there is no such thing as one governance approach, and different scholars have chosen to approach the EU from a number of different perspectives (see Pollack 2005: 36). Rational choice institutionalism, sociological institutionalism and historical institutionalism, collectively referred to as new institutionalism, have been proved to have wide appeal, and can contribute significantly to our understanding of EU politics (see for example Hall and Taylor 1996, March and Olsen 1989; Peterson 1995; Przeworski 2004). Other approaches include multi-level governance and network analysis (see Hooghe and Marks 2001; Kohler-Koch 1999; Marks, Hooghe and Blank 1993).

The chapter is divided into three main sections. The first section deals with NPM literature, and discusses the regulatory state and agencies. The

second section provides a review of European integration and governance literature, and presents a case for why new institutionalist theories are appropriate as a framework. The third section consists of a tabular summary of the hypotheses to be explored and what evidence is needed to verify or falsify the hypotheses.

2.2 New Public Management, the regulatory state and agencies

The establishment of agencies is not a phenomenon unique to the EU context, but can be seen as part of a wider trend in public management, commonly referred to as New Public Management (NPM). Academic studies of NPM often focus on regulatory policy-making, in particular regulation by agencies, and it has been argued that this transformation of public management organisation has led to a major shift in governance patterns. Indeed, the shift is considered significant enough to motivate a new conceptualisation of the 'state'. This part of the chapter is divided into two sub-sections. In the first, I discuss the concept and implications of the 'regulatory state'. The second sub-section deals specifically with agencies, covering definitions of 'agencies', an overview of empirically observed variation between agencies, and an outline how previous studies have sought to explain this variation in practice.

2.2.1 The regulatory state: concept and implications

The concept of the 'regulatory state' was developed in connection to the study of NPM, loosely defined as changing patterns in economic management, public

administration and accountability observed particularly from the 1980s and onwards (see Hood 1991; James 2001; Moran 2002).³ Significant for NPM is a shift in “emphasis from process accountability towards a greater element of accountability in terms of results” (Hood 1995: 94), and it is associated with the increased use of “a particularly Anglo-American form of business organization” (James 2001: 247). In practical terms, this implies more private-sector style management in public administration, and a focus on what the public administration *can* deliver rather than *how* it is delivered.

To understand the link between the idea of the regulatory state and public management in the United States, it is necessary to consider some of the traditional differences in public management between the United States and Europe. Whilst recognising that there are significant differences amongst European countries, it makes sense to speak of an ideological cleavage between the United States and Europe regarding the principles of public sector management. This cleavage can be attributed to differing ideological views on the functioning of the market. The traditional American view is that the market normally functions well, and that interference with market forces is only justified in clear cases of market failure (Majone 1996: 50). This has resulted in a system where the management of public utilities largely has been left in private hands, and the threat of market failure has been addressed by subjecting the private owners to regulation, which is developed and upheld by agencies or commissions (Majone 1996: 15). In Europe, by contrast, the market has traditionally been viewed with more suspicion, and a common belief has been that public ownership gave governments increased ability to regulate their

³ For a more detailed account of the principles of NPM, see Hood (1991; 1995).

economies and to protect public interests (Majone 1996: 11; see Braithwaite 2000: 224).

As public ownership did not appear to deliver the expected benefits, public opinion in Europe swung in the 1980s, and there was a macro-economic paradigm shift from Keynesianism to more neo-liberal solutions (Müller and Wright 1994: 2).⁴ The result of this public management change was privatisation of industries, but also “the creation of new instruments of regulation and the establishment of new regulatory authorities” (Levi-Faur 2005: 19, see Caporaso 1996; Eberlein and Grande 2005; Gilardi 2002; Moran 2001; Thatcher 2002c). Market regulation gained prominence at the expense of macroeconomic stabilisation and income redistribution. This shift in focus of state activities marks a move from the Keynesian to the regulatory state (Majone 1997: 140-141). At the same time, the idea spread that “[a]s economies became larger and more complex, the central state could not acquire the local knowledge to intervene effectively” (Braithwaite 2000: 231). This argument has been applied to wider issues than market regulation, and today the regulatory state also concerns itself with social regulation and the protection of consumer interests (see Moran 2002: 394).

An inventory of the academic literature on the regulatory state reveals that the idea of the EU as a regulatory state is closely linked to the work of one person, Giandomenico Majone. Majone (1997: 159) describes the regulatory state as “characterized by pluralism, diffusion of power, and the extensive delegation of tasks to non-majoritarian institutions like the independent agencies or commissions”. Another important aspect of the regulatory state is

⁴ According to Majone (1997: 142), some of the criticism raised of the traditional form of public management organisation in Europe is not altogether accurate or empirically supported. However, this does not change the fact that voters increasingly expressed support for a change.

that the judicial branch of government has become increasingly involved in policy making and administration (Majone 1997: 156). In his work, Majone presents two lines of arguments for why the EU is a regulatory state, which may be divided into a historic part concerned with the creation of the single market and a structural part concerned with the issue of legitimacy (Kohler-Koch and Rittberger 2006: 35).

In line with neofunctionalism, Majone (1996: 66) argues that the functional needs of the single market have required substantial transfer of policy-making power to the EU-level. Demand for EU-level regulation comes from multi-national and export-oriented companies, public interest groups and member states, all of which have stood to gain from EU-level regulation. Companies tend to favour EU-level regulations over national ones as they make it possible to avoid costs that arise as a consequence of having to adhere to several different national standards. Public interest groups typically call for European regulation if they are unable to make their national government impose the regulation they wish for, as illustrated by the case of environmental or consumer protection groups in countries with low standards of protection (Majone 1996: 67). Member states, finally, could have a lot to gain by having their national standards incorporated into EU law, Majone (1996: 67-68) argues. For example, a country with high standards of health and safety protection in the work place would see the comparative advantage of countries with low levels of said protection reduced if they have their own high standards adopted by the whole EU. European regulation can be supplied by the Commission, which, according to Majone (1996), harbours a wish to maximise its influence by increasing the scope of its competences.

The notion that market regulation is more important than income redistribution and macroeconomic stabilisation is essential for an understanding of the structural part of Majone's (1997: 63) argument. The key difference is that regulatory policy-making is less dependent on budgetary constraints than the other two, and states' budgets are to a large extent dependent on states' ability to tax and level of tax revenues. The EU budget is rigid and small in comparison to the budgets of Member States, and the EU has no independent tax power (Majone 1997: 150). Thus, it is very difficult for the EU to engage in non-regulatory policies, and if the Commission wishes to increase its competencies, which Majone (1996; 1997) assumes that it does, it has to do so through increased regulatory activity. As most costs arising from regulatory policy-making are borne by the regulated and not the regulator, budgetary considerations impose only soft constraints on regulators (Majone 1996: 64). This, as summarised by Craig 1999: 42) "provides the foundation for the vision of the EC as a 'regulatory state'". By characterising the EU as a regulatory state, we presuppose that "the EU polity has achieved a considerable degree of maturity as a political system" and that it "has come to exercise 'classical' functions of political systems, such as the production of public policy" (Kohler-Koch and Rittberger 2006: 35).

The rise of regulatory states, whether it is member states' changing their policies or the EU's engaging in the sort of state-like activities it is able to, has implications for how we conceptualise and achieve legitimacy for the political system. An interesting discussion concerns the notions of input-oriented legitimacy ('government *by the* people') and output-oriented legitimacy ('government *for the* people'). A political system that relies on input

legitimacy is a political system where the focus is on participation and where individuals do not fear majority rule due to the existence of “a pre-existing collective identity” (Scharpf 1999: 10). If democratic legitimacy is defined as “direct responsibility to the voters or to the government expressing the current parliamentary majority”, the regulatory state, where “technocratic experts” employed by various agencies perform a broad variety of tasks, will undoubtedly suffer from a democratic deficit (Majone 1997: 159). However, a political system can achieve output-oriented legitimacy “from its capacity to solve problems requiring collective solutions because they could not be solved through individual action, through market exchanges, or through voluntary cooperation in civil society” (Scharpf 1999: 11). For this to succeed, it is sufficient that individuals in the political system perceive “a range of *common interests* that is sufficiently broad and stable to justify institutional arrangements for collective action” (Scharpf 1999: 11). Here, the Madisonian model of democracy, the goal of which is “to protect minorities from the ‘tyranny of the majority’, and the judicial, executive and administrative functions from representative assemblies and from fickle mass opinion”, provides an alternative model of democracy where delegation is used as a strategy to restrain rule by the majority by giving authority to non-elected officials, who “have limited or no direct accountability to either political majorities or minorities” (Majone 1997: 160). As proponents of the regulatory state focus more on what the political system *can* deliver rather than *how* it is delivered, they would emphasise output legitimacy. Hence, if we characterise the EU as a regulatory state and accept the notion of output-oriented legitimacy we also take a stand on the issue of the democratic deficit of the EU. The lack

of a strong enough sense of a common identity in the EU, which according to Scharpf (1999) makes it exceedingly difficult to achieve input legitimacy, becomes less of a problem.

Given traditional views on political organisation in Europe, it is not certain that political opinion in Europe would accept output legitimacy as sufficient, however. In contrast, as Majone (1996: 15) argues, expertise has always been seen as an important source of legitimacy in the US. In more centralised political systems in Europe there has been more emphasis on public organisation's being accountable to the parliaments (see Bouckaert and Peters 2004: 25). From this it follows, I argue, that delegation to independent agencies will be regarded with more suspicion in Europe. Furthermore, I agree with Majone's (2002: 327) view that, within the EU, there exists a norm of "institutional balance", and EU institutions and national authorities have a "reciprocal duty of loyal cooperation", which in practice makes it difficult to establish accountability for decisions. Delegation to yet other bodies than the ones created by the Treaties could be perceived as a violation of "fundamental, and presumably immutable, principles of the communitarian system" (Majone 2002: 321; see Williams 2005). The US system, by contrast, is characterised by a much clearer separation of powers, and delegation to agencies appears not to upset the fundamental principles upon which the political system rests.

Bearing in mind these difficulties, I argue that what Majone (1997: 160) refers to as "[p]rocedural legitimacy" is of great importance for Community Agencies today. As suggested by the name, this type of legitimacy is derived from the agencies' being created by and following correct procedures. For example, it can imply that the agencies have been created in accordance with

existing rules; that their creation, objectives and legal authority are decided upon by elected officials and that the activities of the agencies are open to review (see Thatcher 2002a: 958).

2.2.2 Agencies

Delegation to agencies is a key characteristic of the regulatory state. However, agencies come in different shapes and sizes, and there are great variations in the functions that they are established to fulfil (see Gilardi 2002: 874). The Community Agencies will be mapped in the next chapter. In this section, I will first discuss the agency concept and disentangle its components. I will then proceed to discuss academic literature on agency design, seeking to explain variation in practice.

There are “numerous oversimplifications, misconceptions, half-truths and sometimes even downright fabrications about various ‘agency’ experiences” (Talbot 2004: 3). This, and the fact that it is difficult to find a universal definition of the term ‘agency’, can be explained by the fact that public law varies between countries (Pollitt et al. 2001: 273). Nevertheless, scholars working on agencies have identified some core elements to make up the ‘agency’ concept and summarise the agency experience. First, for an organisation to be considered an ‘agency’, it ought to be “at arm’s length (or further)” from central ministries and departments (Talbot 2004: 5; see Thatcher 2002b). In other words, “the ‘agency’ programme” is characterised by “[s]tructural disaggregation and/or the creation of ‘task specific’ organisations” (Talbot 2004: 6). Second, it ought to have “its own powers and responsibilities given under public law” (Thatcher 2002b: 956) and be “subject to at least some

public/administrative law procedures” (Talbot 2004: 5). This involves “[g]iving the [agency] a clear ‘constitution’ – in the form of some sort of legislation, or at least a formal (if not statutory) ‘framework document’ – which sets out its purpose, powers and governance arrangements” (Talbot 2004: 8). Third, it ought to be “staffed by public servants” (Talbot 2004: 5) and be “neither directly elected nor managed by elected officials” (Thatcher 2002b: 956). Fourth, the idea of performance contracting is central to governance by agencies (James 2001; Talbot 2004). This does not refer to a contract in the legal sense of the word.⁵ Instead it refers to methods of setting targets, monitoring and reporting performance (Talbot 2004: 6). The purpose is to protect the interests of those affected by agency activities (James 2001: 238). How this is done varies between political settings, but a common practice is to make one individual the chief executive, or the director, of the agency, and make her/him responsible for managing the agency (James 2001: 235-236; Talbot 2004: 8).⁶ Talbot (2004: 8) also draws attention to the practice of setting up “separate accounts” for the agency.

Having identified the unifying features of agency experiences, I will proceed to outline variation in practice between agencies and present explanations for this variation observed in previous academic studies.

The variation easiest to identify, and arguably the most striking variation, concerns the functions which agencies have been set up to perform. A comprehensive overview of activities often delegated to agencies is offered

⁵ As Talbot (2004: 14) explains, in law contracts “are a two-way process in which both parties can default and be held to account for doing so”. Talbot (2004: 14) is not aware of any cases where an agency has tried to use any kind of contract to hold a government accountable for changing the conditions of the agency’s operations, and, for this reason, we can conclude that the legal principle of *pacta sunt servanda* applies only to the agencies but not the central government.

⁶ For examples of how this is dealt with by different countries, see Talbot (2004: 15).

by Bouckaert and Peters (2004: 38-43), who point to seven different types of agency functions. The first is implementation, which could involve “direct service delivery” but it could also involve “the transfer of funds” (Bouckaert and Peters 2004: 38-39). In the latter case, agencies have been set up to “make decisions about grants and contracts as a means of insulating these decisions from direct political control” (Bouckaert and Peters 2004: 39). The second agency activity is regulation of the economy and of society. The perceived advantages of this type of agency are the possibility to isolate or distance regulatory functions from political pressures, and to facilitate input into regulatory activities for those affected by the regulation (Bouckaert and Peters 2004: 40). A third task often delegated to an agency is to provide advice and assist in the development of policies related to the agency’s area of expertise. The idea behind such agencies, according to Bouckaert and Peters (2004: 40), is that they are capable of giving unbiased suggestions on policy issues of major concern, and these agencies involve experts in their policy-making. Fourthly, agencies engage in information-gathering and dissemination. Again, delegation could mean that the gathering of data is at least partially insulated from direct political pressures. This could be particularly important when dealing with socio-economic data such as criminality, poverty and unemployment where it is of uttermost importance that objectivity is maintained (Bouckaert and Peters 2004: 41). Research is a fifth common type of agency activity. The rationale behind delegating research tasks to independent agencies is the wish for objectivity as regards results, but also a desire to give research organisations the opportunity to decide themselves what

to research.⁷ The sixth type of agency listed by Bouckaert and Peters (2004: 42) performs tasks of a judicial nature, and functions as tribunals and public enquiries when the regular court system in welfare states simply cannot cope with the adjudication required for all the many government programmes devised. The seventh type of agency listed is created to provide “representational and participatory opportunities for segments of the civil society” (Bouckaert and Peters 2004: 43).

Agencies also vary in dimensions other than functions. The relationship between the agency and the central government or authority is one such dimension (Bouckaert and Peters 2004: 29). There are also significant variations between agencies in terms of governance structure. This can concern legal status, financial arrangements, appointment of personnel and “degree of managerial involvement of ministries and other political entities or officials” (Bouckaert and Peters 2004: 37; see Gains 2004; Horn 1995; McCubbins and Page 1987; Thatcher 2002b). The concept of agency autonomy is central to all these dimensions, and the autonomy of agencies over issues such as financial matters, appointment of personnel and policy decisions can vary substantially. As Bouckaert and Peters (2004: 29) state, simply concluding that an agency is autonomous “may disguise substantial variation in their ability to act on their own and their capacity to influence public policy”.

A series of explanations for variation in practice has been offered in previous academic studies. Horn (1995: 24) argues that variation in agency design can be explained to an extent by examining transaction costs, and his overarching argument is that “legislators choose those administrative

⁷ This is not without problems. Whilst governments may wish to “prevent the formation of some form of official science”, ultimately they are most often in charge of the money allocated to research and so could influence the research agenda (Bouckaert and Peters 2004: 42).

arrangements that best address the transaction problems they encounter”.

Transaction costs can be determined by “constitutional differences among countries” (Horn 1995: 9) and the level of uncertainty and conflict in a given policy area (Bawn 1995: 63; Horn 1995: 15; McCubbins and Page 1987: 414). Horn (1995: 15) argues that high levels of uncertainty and conflict increases the legislators’ costs of adopting detailed, refined legislation wherefore high levels of conflict and uncertainty tend to lead to vague legislation. Huber and Shipan (2002: 215), on the other hand, argue that legislators tend to devise precise legislation when there is a high level of policy conflict, when legislative capacity is high (i.e. when “the legislative majority is able to afford the costs of writing policy details into statutes”), when there is no conflict between the two chambers in a bicameral system, and when “the political system does not allow the legislative majority to rely on nonstatutory factors to influence policy implementation”. As examples of nonstatutory factors, they mention levels of corporatism and centralization (Huber and Shipan 2002: 218). The perceived risk of regulatory agencies being captured by the regulated interests can also play a part in explaining agency design (see Thatcher 2002b: 958).

Other explanations focus more on how the legal and administrative tradition of the political setting in which the agency operates can also influence agency design (Döhler 2002). For instance, the UK has a tradition of non-statutory political administration organisations, whereas the legal basis of agencies appears to be more significant for agencies established by the American Congress (Gains 2004: 56-58; Bouckaert and Peters 2004: 25; McCubbins and Page 1987). The other line of argument in Horn’s (1995: 11)

work points to “the institutional arrangements faced by administrators”, and holds that “the institutional arrangements faced by administrators are likely to have a systematic influence on the type of person who seeks public sector employment, the type of employee who ends up being promoted to a position of responsibility, and the incentives he or she faces once appointed” (Horn 1995: 11). Levy and Spiller (1996) also belong to this tradition of stressing existing political institutions, but they take a somewhat broader approach, stressing the interaction between political and social institutions, economic conditions and regulatory processes. They argue that in addition to formal governance arrangements and a political system’s “administrative capabilities”, attention must be paid to “[c]ustom and other informal but broadly accepted norms that tacitly restrain the actions of individuals or institutions” (Levy and Spiller 1996: 4). Levy and Spiller (1996: 4) also stress ideology, maintaining that “[t]he character of the contending social interests within a society and the balance between them” may also influence agencies.

2.3 European integration and governance theory

Traditionally, the fault line in European integration studies has been between neofunctionalists, who emphasise the role of supranational actors in driving integration forward, and intergovernmentalists, who argue that integration is driven by member states. As these theories are “the intellectual precursors of any theory of EU politics” (Hix 2005: 15), the first sub-section of this part of the chapter covers them before moving on to discussing the attempt to bridge the gap between them made by Stone Sweet and Sandholtz (1998:1). The second sub-section presents the multi-level governance approach (MLG),

which provides a good description of the polity in which Community Agencies function. The third sub-section, which is the most important for our understanding of the establishment of Community Agencies, discusses the three strands of new institutionalist theory: rational choice institutionalism, sociological institutionalism and historical institutionalism. It also includes an overview of drivers behind delegation observed in previous studies.

2.3.1 European integration theory: neo-functionalism, (liberal) intergovernmentalism and supranational governance

Neofunctionalists, headed by Haas (1968), were the first to theorise European integration (see also Lindberg 1963; Lindberg and Scheingold 1970, 1971). The importance attributed to the role of actors other than state governments in furthering integration, and the assumptions that states are neither unitary actors nor the only actors on the international stage are crucial to neofunctionalist theory (see Craig 1999:3). This pluralist theory of integration holds that European integration is determined by elites, which Haas (1968:17) defines as “the leaders of all relevant political groups who habitually participate in the making of public decisions”. It predicts that elite groups could form links across state borders, which allows them to surpass their respective national governments and have an impact on international politics (see Cornett and Caporaso 1992; Craig 1999).

The concept of spillover is central to neofunctionalist explanations of European integration (Haas 1968; Lindberg 1963). A widely cited explanation is offered by Lindberg (1963: 10), who writes that “‘spill-over’ refers to a situation in which a given action, related to a specific goal, creates a situation

in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more action, and so forth”.

Such a situation can arise due to the interconnectedness of economies. To reap maximum benefits of the integration of one sector of the economy it could prove necessary to integrate yet another sector (see Haas 1968: 103). Spillover can also occur as a result of interest groups’ shifting their loyalties from national to supranational institutions, or as a result of deliberate attempts by supranational institutions to cultivate support for further integration through interaction with non-governmental actors.

Several scholars have remarked that neo-functionalism provided fruitful explanations of European integration in the 1950s, whereas it ran into difficulties in explaining the slow-down of integration in the 1960s (see Craig 1999; Hix 2005; Moravcsik 1993). The apparent failure of neofunctionalism paved way for intergovernmentalism, which holds that although the state is not the only actor in international affairs, it is the most prominent one (see Hoffmann 1966). Assuming that states act in their own self-interest, and that their actions are determined by geopolitical interests, intergovernmentalists argue that integration is more likely to take place in low politics sectors than high politics sectors.

In the early 1990s, Moravcsik presented a version of intergovernmentalist theory, which he termed liberal intergovernmentalism. This theory differs from traditional intergovernmentalism in that it does not view the state as a unitary actor, and it disputes the claim that the state has a fixed set of preferences based on geopolitical concerns (see Moravcsik 1993: 481). Liberal intergovernmentalists argue that decisions made by state

governments to pool sovereignty to supranational institutions are taken following a two-level game, where the domestic arena constitutes the first level and the international bargaining table constitutes the second level (Moravcsik 1993; 1998). At the first level, the preferences of the state, or its “bargaining space”, is determined following a period of interest aggregation by the domestic government which, driven by an urge to remain in power, weighs up the interests and relative influence of societal groups within that state (Moravcsik 1993: 496). At the second level, a government’s bargaining leverage is largely determined by “the relative intensity of national preferences”, which implies that “[t]he more intensely governments desire agreement, the more concessions and the greater effort they will expend to achieve it” (Moravcsik 1993: 499). To make accurate predictions about bargaining outcomes in the EU context, Moravcsik (1993: 498; 1998: 60-61) argues, we must also assume that cooperation is voluntary, that governments can find out other governments’ preferences relatively easily, and that the institutional arrangements lead to low transaction costs of intergovernmental negotiation. Moravcsik (1998: 9) argues that national governments determine integration, and that delegation to EU institutions is “best explained as efforts by governments to constrain and control one another – in game-theoretical language, by their effort to enhance the credibility of commitments”.

In an attempt to add a nuance to debates on European integration, Stone Sweet and Sandholtz (1998:1) proposed a theory of European integration that focuses on “the process through which supranational governance – the competence of the European Community to make binding rules in any given policy domain – has developed” (see also Stone Sweet and Sandholtz 1997).

The theory has been referred to as “supranational governance” (Branch and Øhrgaard 1999), but this is not a name that Stone Sweet and Sandholtz (1997) used. Rather, they object to having their theory labelled supranational governance (Sandholtz and Stone Sweet 1999: 144). The core ideas of this theory are to study the mode of governance of different EU policy areas, and that each one then can be placed at different positions along an imagined continuum the stretches from an ideal-type intergovernmental mode of governance, which functions as described by Moravcsik (1993; 1998), to a supranational one, where supranational institutions are the key actors (Stone Sweet and Sandholtz (1998: 8). Stone Sweet and Sandholtz (1998: 11) argue that the more intense transnational activity there is in a given policy area, the further towards the supranational pole of the continuum it will be located, and a policy area’s movement along the continuum occurs because “increasing levels of cross-border transactions and communications by societal actors will increase the perceived need for European-level rules, coordination, and regulation”. The importance of transnational interests is emphasised also by Kohler-Koch (1999: 27), who, similarly to Stone Sweet and Sandholtz, argues that EC policies “are highly sector specific”. Once European rules have been introduced into a policy area, they begin to define the roles of actors as well as to shape the context in which they pursue their interests. Stone Sweet and Sandholtz (1998: 16) call this dynamic “institutionalization”. Stone Sweet and Sandholtz have been criticised by Branch and Øhrgaard (1999: 136) for creating a mirror image of liberal intergovernmentalism by downplaying the importance of grand bargains of integration and overemphasising everyday decision-making. Sandholtz and Stone Sweet (1999: 150) replied to this

criticism by saying that they “explicitly argue that intergovernmental bargaining is ubiquitous in the EU”, and that what they have achieved with their theory “is to place intergovernmental bargaining in its institutional and political context”.

As the theories discussed above are useful for our understanding of European integration, it follows naturally that they would be considered in a thesis that concerns the European project. However, I argue that none of them holds explanatory value for an analysis of the establishment of Community Agencies. Importantly, the fact that agencies are set up in policy areas where sovereignty is already pooled calls into question the applicability of any theory that focuses the transfer or pooling of sovereignty to supranational institutions. Moreover, neofunctionalism explains well how integration spills over from one area to another, in particular when it comes to day-to-day decision-making, but it does not account for choice of institutional form. Intergovernmentalism, which arguably is best suited to explaining the outcomes of treaty negotiations, is inappropriate due to its state-centred nature. Community Agencies are set up by an act of secondary legislation within the first pillar, which means that individual member states do not have the final say, and cooperation is not voluntary. Finally, Stone Sweet and Sandholtz (1998: 16) claim to explain why integration has proceeded faster in some policy areas than others, but they clearly state that their theory “does not tell us what specific rules and policies will emerge, nor what organizational form supranational governance will acquire”.

2.3.2 Multi-level governance

The multi-level governance approach (MLG) was developed by Marks, Hooghe and Blank (1996), and concerns the functioning of the European polity rather than integration *per se*. As this is an approach for how to view governance in the EU, rather than a theory from which hypotheses can be derived, it is not used for the theoretical framework of this thesis. However, I argue that its description of how policy is made provides a useful background to the environment in which Community Agencies function, and it helps to keep this background in mind when mapping out what actors were involved at what stage in the process leading up to agency establishment. For these reasons, MLG merits coverage in this review chapter.

Crucial to the MLG approach is the rejection of any assumptions of a separation between domestic and international arenas (Marks, Hooghe and Blank 1996: 346-347). According to the MLG model, “political arenas are interconnected rather than nested”, and “decision-making competencies are shared by actors at different levels” (Marks, Hooghe and Blank 1996: 346). Furthermore, MLG makes a clear distinction between institutions, i.e. the state and the EU “as sets of rules”, and actors, i.e. individuals, organisations and similar that act within these institutions (Marks, Hooghe and Blank 1996: 348). In their article, Marks, Hooghe and Blank (1996) provide several examples of what they see as evidence of MLG in day-to-day decision-making in the European polity, and I will briefly mention some of their main points here.

As regards the agenda-setting stage, the Commission’s formal right of initiative clearly makes it powerful, but the ideas behind proposals do not always originate in the Commission, but can come from national governments

or even subnational organisations. Moreover, as a thinly staffed organisation, the Commission is dependent on consultation with various other bodies in order to elicit expertise. Regarding the legislative stage, power has been increasingly shared between the Council and the EP since the introduction of the consultation and co-decision procedures. The introduction of qualified majority voting (QMV) has further weakened the ability of individual member states to control the outcome of decision-making. At the implementation stage, contacts between different levels of government is required “[t]o the extent that EU regulations affect policy areas where authority is shared among central and subnational levels of government” (Marks, Hooghe and Blank 1996: 368). Finally, Marks, Hooghe and Blank (1996) argue that MLG is present in adjudication within the EU, as manifested in the co-existence of national and EU law.

In the case study chapters of this thesis, we will see that the ideas behind the creation of Community agencies do not always originate in the Commission, that the Council and the EP have to reconcile their views, and that the agencies have to cooperate with actors at various levels.

2.3.3 New Institutionalisms

As the EC/EU has become more established, researchers increasingly analyse the polity from a comparative politics perspective. New institutionalism, the central belief of which is that “[p]olitical democracy depends not only on economic and social conditions but also on the design of political institutions” has proved to be useful to understand EU decision-making (March and Olsen 1989: 17). New institutionalists believe that institutions shape outcomes by

influencing the norms and actions of political actors, and that the functioning of institutions “depend[s] on the conditions under which they emerge and endure” (Przeworski 2004: 527). Common to new institutionalist analyses is a wish “to elucidate the role that institutions play in the determination of social and political outcomes” (Hall and Taylor 1996: 936). However, the aim is not merely to show that institutions matter, but “to guide inquiry into which of many more-or-less stable features of collective choice settings are essential to understanding collective choice behavior and outcomes” (Diermeier and Krehbiel 2003: 124). Within the institutionalist camp, scholars have made somewhat different assumptions of how politics works, and, for this reason, it makes sense to speak of three strands of institutionalist theory: rational choice institutionalist theory, sociological institutionalist theory and historical institutionalist theory.

I argue that new institutionalist theories are suitable for the analysis of the establishment of Community Agencies for two key reasons. First, as will be demonstrated shortly, these theories have been used to analyse questions of delegation and institutional design in a variety of political settings, and are not restricted to analysis of the EU as a *sui generis* phenomenon (see for example Bell 2002; Helgøy 2006; Lodge 2003; Therkildsen 2001). This suits my purposes as I see the establishment of Community Agencies as part of the wider trend of public management change described in the first section of this chapter. The use of these theories also allows for comparison across systems. Second, as previous research has shown that, since the introduction of the codecision making procedure, cleavages in EU policy debates are increasingly “*interinstitutional*” rather than intergovernmental, we can assume that theories

that highlight the importance of institutions in a wide sense would contribute considerably to our understanding of the processes behind the establishment of Community Agencies (Peterson 2001: 300). As will be outlined in the case study chapters, a number of actors are involved in the processes leading up to agency establishment, but their room for manoeuvre is circumscribed by detailed procedures and more or less established praxis. This leads me to conclude that the institutionalist presumption that institutions do matter and shape outcomes is a fruitful starting point for the analysis of the establishment of Community Agencies.

As the three strands of new institutionalism make different assumptions about how decisions are reached, a framework constructed from the three of them makes it possible to set up several competing hypotheses, which can be tested, verified or falsified. By using all three, I avoid having to accept categorical assumptions about the behaviour of relevant actors from the start but can test the theories against each other. The goal is not to prove one wrong for definite, but to find out if one is better suited for explaining the establishment of Community Agencies. It is also plausible that not all agencies can be explained by the same logic, and that the theories are able to capture different aspects. Below, I will discuss each of the three new institutionalist strands. For each one, I will begin by outlining its core assumptions. This will be followed by an overview of previous academic studies using the theoretical strand in question to identify drivers behind agency creation. Finally, I will spell out what hypothesis/hypotheses we can deduce with regards to the establishment of European Community Agencies and what evidence is needed to verify or falsify the hypothesis/hypotheses.

Rational choice institutionalism was developed in connection to studies of American congressional behaviour primarily in the 1980s and 1990s. Finding that the majoritarian decision-making style used in Congress did not lead to policy instability as rational choice theory would predict, analysts began to seek explanations for policy outcomes in institutions (Hall and Taylor 1996; Pollack 2001). The insights and models developed in this political setting proved apt to travel to other political settings, and were soon taken up by scholars working on the EU (Pollack 2005; Pollack 2003; Tallberg 2002). As discussed by Hall and Taylor (1996: 944-945), rational choice institutionalism assumes that “relevant actors have a fixed set of preferences or tastes (. . .), behave entirely instrumentally so as to maximize the attainment of these preferences, and do so in a highly strategic manner that presumes extensive calculation”. Politics is viewed as a “series of collective action dilemmas” where outcomes are determined by “strategic interaction” (Hall and Taylor 1996: 945). The role of institutions in this process is to structure the interaction between various actors and lead them towards particular outcomes “by affecting the range and sequence of alternatives on the choice-agenda or by providing information and enforcement mechanisms that reduce uncertainty about the corresponding behaviour of others and allow ‘gains from exchange’” (Hall and Taylor 1996: 945). Rational choice institutionalists explain the origin of institutions by a functional logic, which means that “it explains the origins of an institution largely in terms of the effects that follow from its existence” (Hall and Taylor 1996: 952; see Pollack 2003; Tallberg 2002; Thatcher and Stone Sweet 2002).

This functional logic takes its analytical expression in principal-agent models and the notion of transaction costs (see Epstein and O'Halloran 1999; Tallberg 2002; Huber and Shipan 2002). Rational choice institutionalists argue that delegation takes place if the perceived gains from delegation exceed the costs. Costs of delegation are slippage, which refers to situations where the conditions the principals have given the agents lead the agents to behave in ways different from what was intended, and shirking, which refers to situations where the agents begin to pursue their own preferences rather than the ones of the principal (Pollack 2003: 26). The gains of delegation come in the form of lowered political transaction costs. Thus, rational choice institutionalists predict that delegation takes place in order for principals to lower political transaction costs (see Pollack 2003; Tallberg 2002). This can be done by reducing information asymmetries, by facilitating credible commitment and by improving policy-making efficiency.

Rational choice institutionalism is the most common approach for studies of delegation, and it has been proved useful for analysing delegation in a range of political contexts (see for example Franchino 2004; Huber 2000; Pollack 2002, 2003; Tallberg 2002; Thatcher 2002a). In a study of delegation choices by the American Congress, McCubbins and Page (1987) have shown that complexity arguments can be used to explain delegation. They argue that the complexity of many problems that face the American Congress requires considerable resources, and as resources are scarce, legislators decide to delegate legislative powers to agencies (McCubbins and Page 1987: 409). Similarly, Epstein and O'Halloran (1999: 30) argue that "legislators may wish to free up time to spend on constituency service, simultaneously taking

advantage of agency expertise”. Arguments that delegation takes place in order to gather and take advantage of agency expertise as well as to increase efficiency of decision-making can also be found in studies by Bouckaert and Peters (2004), Pollack (2003), Pollitt et al. (2001) and Tallberg (2002), to mention a few examples. Previous studies have also shown that a wish to secure credible commitment by removing responsibility for upholding particular policies from elected politicians and delegate it to agencies is a driver behind delegation (Epstein and O’Halloran 1999; Gilardi 2002; Pollack 2003). Credibility is a problem for elected politicians due to policies being time inconsistent. For instance, the pressure of public opinion might tempt politicians into pursuing a different policy from what was initially agreed, and democratic processes may lead to changes in government and thereby also changes in policy preferences. Research has also shown that politicians tend to wish to commit themselves credibly to policies by delegating to an agency when the policies in question “impose concentrated costs and generate diffuse benefits” (Pollack 2003: 66). As shown by Epstein and O’Halloran (1999: 201), elected politicians are more likely to retain regulatory responsibility when benefits can be targeted to “particular constituents”, i.e. when they can easily claim credit for the policy, and more likely to delegate when costs are incurred by powerful interests, i.e. when they may wish to shift blame for the policy (see Hood 2002).⁸ Large industries can be examples of powerful interests, and Gilardi (2002: 884-888) has indeed found that there is a positive link between market opening and agency creation.

⁸ Some authors, for instance Tallberg (2002), have chosen to present blame-shifting as a separate hypothesis. In this thesis, I take the same line as Pollack (2003) and treat the blame-shifting argument as subsidiary to the credible commitment argument.

Arguably, the large number of actors involved in Community Agency creation (i.e. the Commission, the Member States as represented by the Council, the EP and other consultative bodies such as the European Economic and Social Committee) complicates the use of principal-agent analysis. However, as shown by Franchino's (2004) study, a rational choice institutionalist framework of analysis can be used even when decision-making powers are shared.

Following on from the functional logic presented above, the overarching hypothesis from this perspective is that Community Agencies are established in order for EU decision-makers to lower their political transaction costs. This can be disentangled further into three separate hypotheses about why agencies are created. First, Community Agencies are created because informed decision-making in particular policy areas requires advanced technical or scientific expertise, which cannot be obtained within the existing institutions. The idea is that information asymmetries can be reduced as agencies employ expert staff and develop the necessary expertise, which is then shared with decision-makers. Second, Community Agencies are created because EU decision-makers wish to ensure credible commitment to particular policies. By transferring the responsibility for regulation and/or information gathering to an agency they have the opportunity to isolate it from political pressures. Third, Community Agencies are created in order to increase the efficiency of policy-making.

The policy area in which an agency operates gives an indication about whether specific technical or scientific expertise is needed. However, in order to verify the expertise hypothesis more specific hard evidence in the form of

direct references to such a motive is needed. If an agency is established in order to take advantage of technical expertise, I expect highly technical tasks to have been delegated to the agency and I expect statements indicating that the agency will be the only body having these responsibilities in Europe. It is not sufficient if the agency has been given the role to coordinate technical and scientific work performed by other authorities such as member state agencies and institutes. In other words, the founding legislation and other sources must spell out that the specific competence is to be gathered within the agency itself. The competence demands placed on staff as specified in regulation also serve as indicators for this hypothesis. The absence of specific technical tasks and a unique technical role weakens the hypothesis.

If an agency is established in order to ensure credible commitment, I expect the agency to have a strong, independent mandate. This includes regulatory functions. An agency that has the power to regulate is undoubtedly more powerful than one that does not, and if decision-makers wish to commit credibly to a policy we expect them to decrease their ability to change regulation by delegating responsibility for the regulation in question to an agency. If credible commitment is a motive we would also expect to see direct references to the need for credibility, for instance through an emphasis on the equal application of regulation throughout the territory. If an agency is given the role of arbiter between parties affected by particular policies or decisions, this is also considered evidence in favour of the credible commitment hypothesis. By contrast, if credible commitment is not a key motive behind agency establishment, we might observe a weaker mandate, and we expect the agency to be dependent on other bodies. For instance, the agency may be

dependent on member states to commit resources or information for the effective functioning of the agency. It could also be dependent on the Commission and/or member states in determining its priorities of action as set out in work programmes and similar.

At least in theory the efficiency hypothesis is easy to verify and difficult to falsify. The reason for this is that increasing efficiency has the character of a 'catch all' argument as efficiency is universally regarded as a positive and as nobody would openly declare a wish to decrease efficiency. If increasing efficiency is a key motive behind the establishment of an agency we will expect direct references to a need for efficiency, for instances ideas about streamlining practices, in relevant documents and interviews. Delegation of the task of drafting specific technical regulation would allow time for the Commission to free up time for other activities, which would make decision-making more efficient. As it is not realistic to expect statements directly opposing the efficiency hypothesis, the absence of references to efficiency gains will have to suffice as evidence against the hypothesis.

Sociological institutionalism was developed within organisation theory, and it holds that institutions are created as a response to choices made by individuals, and these choices are made on the basis of socially constructed preferences, which means that they might not necessarily fulfil particular functional needs (see From 2002). This is not to say that sociological institutionalists deny rational action on behalf of individuals. Sociological institutionalists argue that individuals may very well act in a way that they perceive as rational, but the idea that a particular action is rational is itself socially constructed (Hall and Taylor 1996). Sociological institutionalists

employ a broad definition of institutions, arguing that the origin of institutions and institutional change must be seen in a wider social and cultural context where not only organisational structures but also shared ideas, norms and values are taken into account (Hall and Taylor 1996). In contrast to rational choice institutionalism, which regards actors as “utility-maximizers” with exogenously given preferences, sociological institutionalists view actor preferences as endogenous to institutions and argue that the institutions themselves influence the identities, preferences and behaviour of individuals (From 2002: 225; Lewis 2003:107; Jupille and Caporaso 1999: 432; Pollack 2005). In accordance, they argue that actors in a given situation “look to socially constructed roles and institutional rules and ask what sort of behaviour is appropriate in that situation” rather than calculating how to maximise utility (Pollack 2005: 23). These assumptions about the behaviour of actors lead us to explanations for the diffusion of organisational forms across political systems, so-called institutional isomorphism. In the words of McNamara (2002: 59), for sociological institutionalists “the choice of organisational form is linked to social processes that legitimate certain types of institutional choices as superior to others” (see Hall and Taylor 1996: 949). From this follows that “the similarity of organisational form across settings of social interaction, will be the expected outcome, as actors borrow those models collectively sanctioned as successful even though they may be decoupled from or incongruent with functional needs” (McNamara 2002: 62).

Previous academic literature shows that sociological institutionalism with its focus on the importance of ideas and how they are spread across political settings can contribute to our understanding of the spreading of

particular institutional forms. James (2001: 237) puts forward the argument that the idea of letting separate agencies deal with various executive tasks bears resemblance to Woodrow Wilson's late 19th century idea that politics and administration should be separated. Studies by James (2001) and Pollitt et al. (2001) suggest that agencification can be linked to ideas that unbundling of administration by creating smaller agencies with distinct functions may have various benefits. Ideas about the benefits of particular institutional forms can be spread through "policy-transfer", which refers to "voluntary" as well as "coerced" adoption of policies, and "lesson-drawing", which "includes most observation of and reflection on other countries' experiences in order to draw positive and negative lessons" (James 2001: 241; see Dolowitz and March 1996; Rose 1993). Similarly, DiMaggio and Powell (1991: 64, 66) argue that the homogenization of "organizational forms and practices" can be captured by the concept of institutional isomorphism, which can be of a coercive, mimetic or normative character.⁹ Arguments that particular institutional forms spread due to their having become normatively sanctioned are also found in McNamara's (1998; 2002) studies on the spread of independent central banks. As regards agencies, Gilardi (2005: 85) hypothesises that they have spread as a result of countries adopting similar solutions to similar challenges that they have all had to face at about the same time, and that the ability and/or wish of international organisations to promote the spread of agencies plays a role in this development.

⁹ Coercive isomorphism is described as a process that "results from both formal and informal pressures exerted on organizations by other organizations upon which they are dependent and by cultural expectations in the society within which organizations function" (DiMaggio and Powell 1991: 67). Mimetic isomorphism can be described as a form of voluntary lesson-drawing. Normative isomorphism refers to processes in which normative rules about professional behaviour spreads across professional networks in organisations (DiMaggio and Powell 1991: 70-71).

With its different assumptions about the preferences of actors, sociological institutionalism offers an interesting alternative explanation for delegation and it is especially suitable for answering questions about timing and institutional design. The central claim from this perspective is that Community Agencies are created because of the agency form being normatively sanctioned. More specifically, the hypothesis is that Community Agencies are created because EU decision-makers have been led to believe that more or less independent agencies are the best organisational forms through social processes of lesson-drawing and institutional borrowing in which EU decision-makers have learnt and copied from other political settings.

To verify this hypothesis I would need to find evidence that shows that other institutions served as models for the agencies. Direct references to how other institutions would make suitable examples on which to model the agencies constitute strong evidence in favour of this hypothesis. If it could also be proved that the same people were involved with the model institution and the new agency, this would further strengthen the hypothesis. More general statements about the desirability of the agency form are also pieces of evidence to support sociological institutionalist claims.

Historical institutionalist analyses focus on development over time and on the specific context in which institutions develop (see Thelen 1999). Similarly to sociological institutionalism, it takes a broad view of how institutions influence individual behaviour, and includes “normative and cultural dimensions which go beyond rationalist calculations” (Bulmer 1998: 370). It also tends to emphasise the fact that power relations embedded in already existing institutions give some actors or interests more influence

than others over the creation of new institutions (Hall and Taylor 1996: 954). The concept of path dependency, which refers to situations in which previous decisions set up the boundaries for future development, is central to historical institutionalism (see Peters et al. 2005; Hall and Taylor 1996). Sometimes decisions have unintended consequences, and, in extreme cases, path dependency can lead to lock-ins. This is a situation where previous decisions have had such a restrictive effect that there is only one possible development (Pierson 1996). An event or a situation that sets development down a particular path is referred to as a critical juncture or branching point (Hall and Taylor 1996). The periods in between are referred to as “periods of continuity” (Hall and Taylor 1996). Thus, historical institutionalists hold that explanations for delegation can be found through analysis of critical junctures and path dependency.

Analyses of the creation of agencies using this perspective are scarce, but there is evidence that path dependency holds explanatory value. In a study of the so-called ‘Next Steps’ agencies in the UK, Gains (2004) has shown that the pre-‘Next Steps’ organisation of certain British departments has influenced what agencies were set up in connection to the unbundling of these departments and how the agencies came to operate. Döhler’s (2002) study of the establishment of regulatory agencies in Germany has also pointed to the importance of administrative traditions.

The fact that this approach allows for the consideration of specific events, which may serve as critical junctures determining future development through path dependency, contrast it from the other strands of new institutionalism where the preferences of actors play an essential role in

explanations of delegation. Historical institutionalism's fundamental belief that power relations embedded in existing institutions give some actors more influence than others in the establishment of new institutions makes it appropriate for studies of EU decision-making, as the EU decision-making system, where some actors have privileged access to the agenda-setting stage through committee systems and similar, is clearly full of embedded power relations. As regards Community Agencies, the historical institutionalist hypothesis is that these agencies were established as a result of previous decisions and events, which served as critical junctures leading EU decision-makers down a development path leading towards the creation of a particular agency.

An assessment of this hypothesis requires the examination of the political situation around the time of establishment of each case study. To verify the hypothesis it must be possible to construct a strong argument for why a particular event was crucial. If documents related to the establishment process and interviewees make references to specific events and highlight them as particularly important, this is regarded as evidence in favour of the historical institutionalist hypothesis. To falsify or weaken the hypothesis, counterfactual analysis will be used to construct arguments to show why a particular event did not play a critical role in determining the decision to create an agency.

2.4 Theoretical framework: a summary

The table below summarises the hypotheses derived from the three strands of new institutionalism and the type of evidence to be sought to verify or falsify the hypotheses.

Table 2.1 Summary of hypotheses and evidence

Hypotheses:	Evidence in favour		Evidence against	
	Hard	Soft	Hard	Soft
<i>Rational choice:</i>				
Expertise	Highly technical tasks, Unique role as centre of expertise clearly specified, Demands on staff competence regulated	Technical policy area	Absence of positive indicators	Absence of positive indicators
Credible commitment	Regulatory tasks, Explicit references to credibility, Arbitration tasks	Vague references to credibility	Dependence on other bodies for resources and setting of priorities	Absence of positive indicators
Efficiency	Drafting of specific legislation delegated, References to streamlining of practices	Vague references to streamlining of practices	Statements denying importance of efficiency (unlikely)	Absence of positive indicators
<i>Sociological:</i>				
Institutional borrowing	Explicit and specific references to models, Personal linkages between agency and model	Statements about agencies as desirable	Outright rejections of other models	Absence of positive indicators
<i>Historical:</i>				
Critical junctures and path dependency	Explicit direct references to the specific events	Vague references to specific events	Counterfactual analysis	Counterfactual analysis

Mapping European Community Agencies

3.1 Introduction

Agencification has been observed across political settings, and as demonstrated in the previous chapter there is a great deal of variation in practice. Agencies may have very different functions and levels of responsibility. They may have different legal status, governance structures and financial arrangements.

Together, these aspects determine an agency's level of autonomy and ability to influence policy. Furthermore, agencies may vary in size, be set up at different times and in different locations. In this chapter, the Community Agencies established between 1975 and 2006 will be mapped and classified with regards to these aspects. The map and classification will then serve as a starting point for a discussion of the rationale behind the selection of Cedefop, EMEA, EASA and FRONTEX as case studies.

The mapping of agencies is not only necessary in order to make an informed selection of case studies, which is essential for the achievement of this research project's aims to explain the establishment of agencies and investigate if different logics need to be applied to explain different aspects of agencies. Identifying similarities and mapping variation between the agencies also have wider relevance. As explained in the previous chapter, delegation to agencies is an important aspect of the regulatory state. To forward the debate on the EU as a regulatory state, with its wider implications for the conceptualisation of legitimacy, we first need to clarify what roles agencies are expected to play in governance. Literature on the regulatory state emphasises the importance of independent, regulatory agencies and assumes that

technocrats play a significant role in governance. Thus, if this overview of the agencies reveals a large number of agencies with regulatory functions and a high level of independence from central decision-makers, which allows its expert staff significant direct influence over policy, it lends more support to the idea of the EU as a regulatory state than if the opposite is found. At a more practical level, awareness of differences (and similarities) between agencies is important for accurate evaluation of the agency system. In an evaluation of the agency system it is essential to compare like with like. As will be shown, Community Agencies are diverse bodies and what is considered successful for one type of agency may not be so for another, for instance.

The chapter is structured as follows: First, I will define the term ‘Community Agency’ and relate it to definitions of agencies presented in chapter 2. This will be followed by a section in which agencies are mapped and classified with regards to time of establishment, size (as measured by staff and budget resources in 2007), functions, governance structures, financial arrangements and location. The chapter ends with a discussion section where I outline the rationale behind the selection of Cedefop, EMEA, EASA and FRONTEX as case studies.

3.2 How do we define Community Agencies?

Drawing on existing academic literature on agencies, the previous chapter established that for a body to be classified as an ‘agency’ it ought to satisfy the following four conditions.

- It ought to be “at arm’s length” from central government (Talbot 2004: 5).

- Its powers and responsibilities ought to be given under public law (Thatcher 2002b: 956), which means that it must have “a clear ‘constitution’”, either in the form of legislation or “a formal (if not statutory) ‘framework document’” (Talbot 2004: 8).
- It ought to be “staffed by public servants” (Talbot 2004: 5) and not be elected or managed by elected politicians (Thatcher 2002b: 956)
- It must be subjected to performance contracting, i.e. there are methods of setting targets, monitoring and reporting performance (James 2001; Talbot 2004).

According to the official definition a Community Agency is

a body governed by European public law; it is distinct from the Community Institutions (Council, Parliament, Commission, etc.) and has its own legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task, in the framework of the European Union’s “first pillar” (Europa web portal 2007a).

The fact that they are “distinct from the Community Institutions” means that they fulfil the first criterion of being at “arm’s length” from central government. By being “set up by an act of secondary legislation”, being “governed by public law” and having “legal personality”, they fulfil the second criterion. The Community Agencies all enjoy the most extensive legal status given to legal persons under Member State laws, which means that they may take legal action in Member States with all that entails. Furthermore, the protocol on the privileges and immunities of the European Communities applies to all Community Agencies. Thus, we can conclude that there is no variation between the Community Agencies in terms of legal status. The acts of

secondary legislation by which the Community Agencies are established, and subsequent amendments of these texts, outline the powers and responsibilities of the agencies. These documents also reveal that the Community Agencies fulfil the third and fourth criteria of ‘agencies’. The founding legislations show that the agencies are “staffed by public servants” and that they are “neither directly elected nor managed by elected officials” (Thatcher 2002b: 956). They also show that the performance of the agencies is subjected to target setting, monitoring and reporting. For instance, each agency has a work programme where its goals and priorities are set out, and each prepares an annual report on its activities. All agencies are subject to checks by the European Court of Auditors (Europa web portal 2007b), and the anti-fraud office, OLAF, can carry out investigations into the activities of the agencies (Council Decision 1999/394).

As the EU also has other types of agencies, it is necessary to point out in what way Community Agencies differ from these. In addition to Community Agencies, the EU has ‘Common Foreign and Security Policy Agencies’, ‘Police and judicial cooperation in criminal matters agencies’, ‘Executive agencies’ and ‘EURATOM agencies and bodies’ (Europa web portal 2007a). ‘Common Foreign and Security Policy Agencies’ and ‘Police and judicial cooperation in criminal matters agencies’ operate within the second and third pillar, respectively. ‘Executive agencies’ are created by the Commission without involvement of the other institutions (Council Regulation No 58/2003). They are set up for a fixed term to manage Community programmes, and they are always located in Brussels. ‘EURATOM agencies and bodies’ are, as the name indicates, solely associated with EURATOM.

3.3 Community Agencies established 1975 – 2006

Between 1975 and 2006, twenty-two Community Agencies were established. The previous section showed that there is no variation between the agencies in terms of legal status. However, the agencies are very diverse in all other respects. In the following sections, these agencies will be mapped and classified according to time of establishment, size (as measured by budget and staff resources in 2007)¹⁰, functions, governance structures, financial arrangements and location. The variation between the agencies is summarised in the following tables 3.1 and 3.2.

Table 3.1 Summary of key agency information A

Agency	Year	Staff	Budget	Function
Cedefop	1975	~125	16.5	Advisory
EUROFOUND	1975	107	20.2	Advisory
EEA	1990	170	33.7	Advisory
ETF	1990	126	19.1	Advisory
EMCDDA	1993	94	14.2	Advisory
EMEA	1993	440	154.5	De facto regulator
OHIM	1993	600+	275.6	De jure regulator
EU-OSHA	1994	62	14.7	Advisory
CPVO	1994	42	12.9	De jure regulatory
CdT	1994	180	34.7	Implementation
EUMC	1997	37	9.4	Advisory
EAR	2000	~260	24.6	Implementation
EFSA	2002	285	61.1	De facto regulator
EMSA	2002	135	46.1	De facto regulator
EASA	2002	~300	70.5	De jure regulator
ENISA	2004	44	6.9	Advisory
ECDC	2004	~90	27	Advisory
ERA	2004	~90	14.7	De facto regulator
GSA	2004	46	412.3	De jure regulator
FRONTEX	2004	78	42	Advisory
CFCA	2005	38	5	Advisory
ECHA	2006	recruiting	15	De facto regulator

¹⁰ As EUMC ceased to exist in 2006, the information for this agency is from that year.

Sources: Cedefop (2007); EUROFOUND (2007); European Environment Agency (2007a); European Training Foundation (2007); European Monitoring Centre for Drugs and Drug Addiction (2007); European Medicines Agency (2007); OHIM Human Resources Department (2007); European Agency for Safety and Health at Work (2007); Community Plant Variety Office (2007); Translation Centre for Bodies of the European Union (2007a); European Agency for Reconstruction (2007); European Food Safety Authority (2007); Stimpson (2007); European Aviation Safety Agency (2007b); European Network and Information Security Agency (2007); European Railway Agency (2007); FRONTEX (2007a); European Commission (2006); European Chemicals Agency (2007); Statement of revenue and expenses 2007 for Cedefop, EUROFOUND, ETF, EMCDDA, EU-OSHA, CPVO, EAR, EMSA, ENISA, ECDC and GSA; European Environment Agency (2007b); European Medicines Agency (2006); Office for the Harmonization in the Internal Market (2006); Translation Centre for the Bodies of the European Union (2007b); European Food Safety Agency (2006); European Aviation Safety Agency (2007c); European Railway Agency (2006); FRONTEX (2007b); Community Fisheries Control Agency (2007).

Table 3.2 Summary of key agency information B

Agency	Governance	Financial arrangements	Seat
Cedefop	stakeholders	Subsidy	Thessaloniki, Greece
EUROFOUND	stakeholders	Subsidy	Dublin, Ireland
EEA	EP	Subsidy	Copenhagen, Denmark
ETF	standard	Subsidy	Torino, Italy
EMCDDA	EP	Subsidy	Lisbon, Portugal
EMA	EP+stakeholders	Mixed	London, United Kingdom
OHIM	standard	Self	Alicante, Spain
EU-OSHA	stakeholders	Subsidy	Bilbao, Spain
CPVO	standard	Self	Angers, France
CdT	stakeholders	Self	Luxembourg
EUMC	EP+stakeholders	Subsidy	Vienna, Austria
EAR	standard	Subsidy	Thessaloniki, Greece
EFSA	stakeholders	Subsidy	Parma, Italy
EMSA	standard	Subsidy	Lisbon, Portugal
EASA	standard	Mixed	Cologne, Germany
ENISA	standard	Subsidy	Heraklion, Greece
ECDC	EP	Subsidy	Stockholm, Sweden
ERA	standard	Subsidy	Valencienne, France
GSA	standard	Subsidy	Brussels, Belgium
FRONTEX	standard	Subsidy	Warsaw, Poland
CFCA	standard	Subsidy	Vigo, Spain
ECHA	EP	Subsidy	Helsinki, Finland

3.3.1 Time of establishment

In this dimension, the agencies can be classified according to which wave of agency creation they belong to, i.e. 1970s, 1990s or 2000s. The first group is made up of two agencies, Cedefop and EUROFOUND which were established in 1975. The second group consists of nine agencies, eight of which were established in the first half of the 1990s. Only EUMC was established in 1997. The third group is the largest group with eleven agencies established in the 2000s.

3.3.2 Size as measured by staff and budget resources in 2007

As shown in table 3.1, staff and budget resources vary greatly between the agencies. In terms of staff resources, we can distinguish three groups of agencies: small agencies (up to 100 employees), medium-sized agencies (between 101 and 299 employees) and large agencies (300 or more employees). According to this classification, most agencies are small or medium-size. There are ten small agencies, eight medium-size ones and three large ones (EMEA, OHIM and EASA). ECHA only began recruitment in 2007, but the goal is that this agency is to have over 400 employees in 2010, which would make this one of the largest agencies (ECHA 2007). In terms of budget, we can also distinguish three groups: small budget (up to €15 million), medium-sized budget (€15 000 001- €70 million) and large budget (more than €70 million). Again, most agencies are small or medium-size. There are eight agencies in the small budget category, ten agencies in the medium-size budget category and four agencies in the large budget category. However, we can assume that ECHA, which in 2007 had a budget of €15 million and thus

belonged in the small budget category, will soon acquire a larger budget as its operations are expanded and more people are recruited to the agency.

Staff remuneration is one of the largest expenses for many of the agencies. Thus, it is unsurprising that staff resources and budget resources often are linked. Seven agencies are placed in the small category for staff as well as budget, and eight agencies are similarly classified as medium-sized. Based on figures for 2007, ECDC and FRONTEX are classified as small in terms of staff but medium-sized in terms of budget. However, as a result of recent recruitment these two agencies could now be re-classified as medium-sized also in terms of staff (Statement of revenue and expenditure of the European Centre for Disease Prevention and Control for the financial year 2008; Statement of revenue and expenditure of the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) for the financial year 2008). The three largest agencies in terms of staff resources, i.e. OHIM, EMEA and EASA, all belong to the large budget category. The fourth agency with a large budget is GSA, which is a small agency in terms of staff resources. The large budget in this case can be explained by the high costs associated with tasks the agency is set up to perform.

3.3.3 Functions

An examination of the functions and responsibilities of the agencies shows that the agencies can be classified into four groups: *de jure* regulators, *de facto* regulators, implementation agencies and advisory agencies (see table 3.1). As agencies may have more than one function, this classification focuses on the extent of the agencies' powers and on their most prominent functions. For

instance, an agency with *de jure* regulatory tasks which also has advisory tasks is classified as a *de jure* regulator as the regulatory task defines the agency's policy-making power. As the functions of an agency have the most significant impact on what role the agency can play in governance, it is on this variable that the most emphasis is placed when the case studies are selected.

De jure regulators are the most powerful agencies as they have mandates that allow them to make decisions that are binding for individuals, and sometimes also to draft legislation. These agencies are regulatory agencies in the strictest sense of the word, and their creation is thus closely linked to the argument of the EU as a regulatory state. Four agencies (OHIM, CPVO, EASA and GSA) belong to this group. GSA functions as the EU's licensing authority *vis-à-vis* the private concession holder responsible for implementation and management of the Galileo deployment and operating phases. OHIM and CPVO are property rights agencies. OHIM is concerned with industrial property rights and CPVO with plant variety rights. Within their respective field of activity, these agencies have the tasks of scrutinising, granting and declining applications for property rights valid throughout the EU. In the case of CPVO, the process includes technical examination of the plant in question. With the exception of OHIM, the agencies in this group have mandates that allow them to draft legislation and forward it to the Commission, which retains the sole right of formal initiative in the EU's decision-making process. EASA has been given a particularly powerful position in this regard as its opinions must be sought and cannot be ignored. When the rules concerned are of a technical nature, and especially if they concern construction, design or operational aspects, "the Commission may not change their content without

prior coordination with the Agency” (Regulation No 1592/2002, article 12:2b). GSA drafts legislation in preparation of formal Commission proposals, and CPVO may only propose amendments.¹¹ Certification tasks are important for EASA and GSA. Whereas GSA is responsible for certification of GNSS components, EASA issues and revokes airworthiness and environmental certifications for organisations, appliances, parts and products. EASA’s certification rules are often referred to as “soft law” as they are not mandatory, but actors that do comply get issued a certificate (EASA 2007a). Compliance is monitored either by EASA itself or by other entities that have been approved to carry out these inspections. Of the four agencies in this group, EASA is the one with the broadest variety of tasks, and it has an international role to play. EASA cooperates with international and third country authorities, assists Member States to fulfil their international obligations and assists Member States and the Community in their relations with third countries. The agency may also develop and finance its own studies. Decisions by OHIM, CPVO and EASA can be challenged; complaints are first directed to the agencies’ Boards of Appeal and after that to the European Court of Justice. The founding legislation of GSA, on the other hand, does not mention appeal procedures.

De facto regulators are less powerful than *de jure* regulators as they do not have the right to make decisions that are binding for individuals. However, their mandates are such that it is reasonable to assume that decision-makers nearly always follow the opinions or recommendations of the agencies when making decisions. Five agencies (EMEA, EFSA, EMSA, ERA and ECHA)

¹¹ The President, i.e. the highest official, of CPVO can draft amendments to EU plant variety law and place these before the Board of the agency, which can then decide to forward these with or without amendments to the Commission (Council Regulation No 2100/94, articles 36 and 42).

belong to this group, and they all operate in fields where expert technical and scientific knowledge could be considered necessary for informed decision-making. EMEA and ECHA are concerned with the safety of medicines and chemicals, respectively. A central task of EMEA is to evaluate and form expert opinions on products that producers wish to sell on the EU market. These opinions are then forwarded to the Commission, which formally decides whether or not to grant authorisation on the basis of EMEA's expert opinion. Thus, what distinguishes this agency from the *de jure* regulators is that it does not have the formal decision-making power. The fact that the agency's opinion directly informs the Commission's decision distinguishes it from the advisory agencies, and is the determining factor in the classification of this agency as a *de facto* regulator. At the moment, ECHA is responsible for checking that registration dossiers submitted by manufacturers and importers of chemicals comply with EU requirements, and the agency may also request that chemical products are registered if it may pose a risk to human health (Regulation No 1907/2006, article 7). ECHA is currently under development, but the information available on this agency suggests that it will develop a role very similar to the one of EMEA. Key tasks for ERA are to develop criteria and formats for safety certificates in the field of railway traffic and to recommend safety targets to the Commission. These tasks are similar to the certification tasks of EASA and GSA, but in the case of ERA the mandate is so far limited to making suggestions to the Commission. At first glance, EFSA and EMSA may appear to be advisory agencies. EFSA, which has a focus on risk assessment and risk communication, gathers and analyses scientific and technical data related to food safety in a wide sense and makes sure that the

information gathered reaches Community institutions, Member States, the public and other interested parties.¹² EMSA analyses studies related to maritime safety, maritime security and prevention of ship pollution. What sets these agencies apart from the agencies classified as advisory agencies is that their legislation clearly declares that their advice *will* serve as a scientific basis for Community legislation (see Regulation No 178/2002, article 22; Regulation No 724/2004, article 2a). All agencies in this group also have non-regulatory tasks, including networking with the aim of disseminating information and/or best practice. Important non-regulatory tasks for EMSA include visits and inspections to monitor port state control, classification societies¹³ and the training of ship crews (EMSA 2007).

Only two agencies (CdT and EAR) are classified as implementation agencies. EAR was a temporary agency, and its activities were phased out in 2008. The main objective of EAR was to implement the Community assistance programmes in former Yugoslavia, but the agency also had the task of providing information on the situation in the area (Council Regulation No 2667/2000). CdT is unique in that its main purpose is to provide services to the other decentralised bodies. Its classification into this group follows from the assumption that translation is a service that the agency implements.

The most common type of agency is the advisory agency. The eleven remaining agencies belong to this group. Although these agencies are not regulatory agencies, they may play a significant role in governance through the institutionalisation of norms, values and working practices. It must also be

¹² The agency is to provide advice on plant health, animal welfare and health, human nutrition and crisis management procedures (Regulation 178/2002, articles 22-23).

¹³ “Classification societies are organisations which develop and apply technical standards to the design, construction and assessment of ships (and other marine facilities) and which carry out survey work on ships” (EMSA 2009).

acknowledged that although the EU decision-making bodies are not obliged to follow the advice given by these agencies, they may chose to do so, which could give these agencies more influence than indicated in the formal documents. All agencies active within the social policy and education field, i.e. Cedefop, EUROFOUND, ETF and EU-OSHA, are classified as advisory. The group also includes ECDC, which operates in a highly technical field, and FRONTEX, the activities of which concern a policy area that only recently came under the jurisdiction of the EU. The most common tasks of agencies within this group are the compilation and dissemination of information and best practice. In practice, this often involves networking and the organisation of workshops or conferences. Efforts to make data comparable are particularly prevalent in the information-related work of EEA and EMCDDA. However, Cedefop also has the task to encourage joint approaches such as the approximation of standards and mutual recognition of qualifications. Coordination tasks are important for FRONTEX and CFCA. These agencies have the additional tasks of assisting with training of border guards and fishing inspectors respectively. In most cases, the purposes and tasks of the advisory agencies are not particularly controversial. FRONTEX has proved to be an exception, and some of this agency's tasks were hotly debated during the establishment process. The issues causing the most controversy were the agency's task of providing Member States "with the necessary support in organising joint return operations" and the agency's role in identifying "best practices on the acquisition of travel documents and the removal of illegally present third-country nationals" (Council Regulation 2007/2004, articles 2 and

9). The agency may cooperate with Europol, international organisations and third country authorities with responsibility in the relevant field.

3.3.4 Governance structures

The Community Agencies show many similarities in internal structure. They all have an Executive Director, a Board and one or more scientific committees. The Directors are responsible for the day-to-day running of the agencies and the implementation of the budgets, and they act as the legal representatives of the agencies.¹⁴ The size and composition of the Boards vary, but Member State representatives and Commission representatives are always included. Member State representatives are appointed by the Council and Commission representatives are appointed by the Commission. The Commission representatives can never form a majority on their own. The number of Commission representatives varies between six, as in the example of CFCA, and one, as in the example of EASA. As indicated in table 3.2, the agencies can be classified into four groups in terms of Board structure and Board members with full voting rights.

The largest group, consisting of eleven agencies, have Boards where only Commission representatives and Member State representatives have voting rights. Within this group there is considerable variation between the agencies, however. For instance, several of these agencies also have observers with limited or no voting rights on the Board. EEA, GSA and FRONTEX have provisions for the inclusion of third country representatives and the Boards of

¹⁴ For details on what this may entail, see the founding legal documents for each agency and/or agency work programmes.

ERA, EMSA and ENISA include observers representing stakeholders. The EAR Board included an observer from the European Investment Bank (Council Regulation No 2667/2000, article 4). CFCA and FRONTEX stand out as not all EU Member States need be included on their Board. In the case of CFCA, every Member State has the right to appoint a Board member but the founding legislation does not oblige them to do so (Council Regulation No 768/2005, article 24). Due to the connection between FRONTEX's operations and the Schengen-agreement, the non-Schengen members United Kingdom and Ireland are only observers on the FRONTEX Board.

A second group consists of five agencies the Boards of which include stakeholders in addition to Commission and state representatives. Again, the Boards may include observers. Three of the agencies in this group, Cedefop, EUROFOUND and EU-OSHA, have a tripartite governance structure involving the social partners, i.e. employers' and employees' organisations. In all three cases, the representatives of the social partners are appointed by the Council on proposal from relevant organisations. The other two agencies in this group are CdT and EFSA. The Board of CdT includes representatives of bodies that use the agency's services. In terms of governance structure, EFSA stands out from the other Community Agencies. The Board of this agency consists of fourteen people, four of which are to have a "background in organisations representing consumers and other interests in the food chain" (Regulation No 178/2002, article 25). The Board members are appointed by the Council from a list of potential Board members drawn up by the Commission, and the Council is to consider the opinion of the EP before making appointments. The founding legislation stipulates that appointments ought to be made "in such a

way as to secure the highest standards of competence, a broad range of relevant expertise and, consistent with these, the broadest possible geographic distribution within the Union” (Regulation No 178/2002, article 25).

The third group consists of four agencies (EEA, EMCDDA, ECDC and ECHA) which have Boards made up of Commission representatives, Member State representatives and EP appointees. Each agency has two EP appointees on the Board. In the case of EMCDDA the founding legislation specifies that the people appointed by the EP should be scientists, and in the case of ECHA it is specified that they should be independent. As with the previous groups, agency Boards sometimes include observers. For instance, the ECHA Board include observers representing stakeholders.

The final group of two agencies (EMA and EUMC) have Boards, which, in addition to Commission and state representatives, include stakeholders *and* EP appointees with voting rights. In addition to one representative from each Member State and two representatives from the Commission, the EMA Board includes two representatives appointed by the EP, two representatives of patients’ organisations, one representative of doctors’ organisations and one representative of veterinarians’ organisations (Regulation No 726/2004, article 65). The representatives of the different organisations are appointed by the Council on the basis of a candidate list created by the Commission. The Parliament has the right to be consulted about its views on the candidate list and relevant background documentation. In the case of EUMC, there was one Board member appointed by the EP and one Board member appointed by the Council of Europe, the inclusion of which

served to reinforce the cooperation between the two organisations (Council Regulation No 1035/97, articles 7-8).

In most cases, the terms of tenure for Community Agency Boards are between three and five years. Exceptions are EAR where the term of tenure was only 2.5 years, and EEA and ENISA where the terms of tenure are not specified. In the case of EEA, each Member State nominates their representatives who may then serve for any length of time as long as s/he is still an official in a ministry at Member State level (Stanhardt 2009). Similarly, the Member States decide how long representatives serve on the ENISA Board (Bergström 2009).

In most cases the Boards are responsible for the appointment of the agencies' Directors on proposal from the Commission. The exceptions are EMSA and ERA, where Commission proposals are non-mandatory, OHIM and CPVO, where the Council appoints the Directors, and Cedefop where the Director is appointed by the Commission. The Directors for OHIM and Cedefop, however, are selected from a list prepared by their Boards, and the Board of CPVO is consulted. With the exception of the Director for EAR, who served for 30 months, and the Director of ENISA, whose term is a maximum of five years, the Directors serve for a renewable term of five years.

3.3.5 Financial arrangements

Agencies' financial arrangements are important for their level of autonomy. An agency that is self-financed, i.e. has the right to raise its own revenue, undoubtedly has better opportunities to pursue independent action than an agency that is dependent on subsidies for its finances. The Community

Agencies can be classified into three groups according to sources of revenue: 90% or more from subsidies, 90% or more from fees, and mixed revenue. As shown in table 3.2, as many as 17 agencies depend on subsidies for 90% or more of their income. ECHA, which currently belongs in this category, is expected to increasingly receive more and more revenue from fees, however. For all of these agencies, the largest sources of revenue are subsidies from the budget of the European Community. In the case of EEA, the EC subsidy makes up 86% of the budget, and the rest of the income comes from third party subsidies. In all other cases, the EC subsidy makes up over 95% of the budget. Other minor sources of income for agencies in this group include third party or voluntary contributions and fees for services rendered. Three agencies, OHIM, CPVO and CdT, receive over 90% of their income from fees paid by users of the agencies' services. OHIM and CPVO are entirely self-financed. CdT receives a grant for interinstitutional cooperation, which makes up about 5% of the budget. In the case of CdT, the fees are paid by other EU bodies, which means that although the agency is not technically subsidised, it is dependent on other EU bodies for its finances. Two agencies, EMEA and EASA have mixed sources of revenue. They can raise their own revenue by charging fees, but they also depend on subsidies. For its budget, EMEA depends on fees for around 70% and on subsidies for 27%. EASA receives 62% of its income from fees and 34% from an EC subsidy. The remaining parts of the budgets of these agencies can be classified as miscellaneous revenue.

Responsibility for the implementation of the agencies' budget rests with their Directors, and the budgetary discharge procedures for the agencies are outlined in their governing legislations. With the exception of OHIM and

CPVO, which are entirely self-financed, all agencies follow the same procedure for budgetary discharge. First, each agency's accounting officer forwards the provisional accounts and reports on budgetary and financial management to the Commission's accounting officer. S/he then consolidates them and forwards them to the Court of Auditors, the Council and the EP. After having received comments from the Court of Auditors, the Director of each agency draws up the final accounts, on which each agency's Board is to deliver an opinion. This opinion together with the final accounts will then be forwarded by the Directors to the EP, the Council, the Commission and the Court of Auditors. The Directors are also obliged to comment on the Auditors' report and send this to the Boards. The final accounts are published, and discharge is given by the EP on recommendation from the Council.

OHIM and CPVO are obliged to forward information on their accounts to the Court of Auditors and the Commission. Their accounts are also forwarded to the Board (CPVO), the Budgetary Committee and the EP (OHIM). Discharge for OHIM's budget is granted by the Budgetary Committee, and discharge for CPVO's budget is granted by its Board.

3.3.6 Location

As shown in table 3.1, the Community Agencies are spread out across the EU. According to official EU sources, agencies are "an answer to a desire for geographical devolution" (Europa web portal 2009). Only one agency, GSA, is located in Brussels. In 2007, the countries with the most agencies were Greece and Spain with three agencies each. However, since EAR was phased out in 2008, Greece now has two agencies. The other countries with two agencies are

France, Italy and Portugal. It should also be noted that Cedefop, another agency located in Greece, was initially set up in West Berlin, Germany, and was moved to Greece in 1995. Poland, which is host to FRONTEX, is the only state joining the EU in 2004 or after to have a Community Agency on its territory. Decisions on where to place Community Agencies are taken by the Council.

3.4 Discussion and case selection

Previous literature has pointed to variation between agencies in terms of size, legal status, governing structures, financial arrangements, functions and responsibilities. Variation can of course also be found in terms of timing of establishment and location. With the exception of legal status, which is the one dimension that unites Community Agencies, this chapter has confirmed that there is significant variation also between Community Agencies. To explain the establishment of these diverse bodies, the variation between them must be reflected in the selection of case studies. In this section, I will discuss the variation observed between the agencies and outline the rationale behind the selection of Cedefop, EMEA, EASA and FRONTEX as the case studies of this thesis. In the selection of case studies, the agencies' functions and responsibilities, timing of establishment, size, governance structures and financial arrangements have been taken into account.

To achieve the aim of contributing to our understanding of how governance in the EU works, the functions and responsibilities of the agencies are crucial. Thus, the most emphasis is placed on this variable when selecting case studies. As discussed previously, the agencies can be classified into four

groups in terms of what functions they are set up to fulfil. *De jure* regulatory agencies are the most powerful agencies as they make binding decisions, and some of them may also draft legislative proposals to be forwarded to the Commission. The *de facto* regulatory agencies play a clearly visible role in European governance as their opinions and recommendations often translate directly into law. The impact of the advisory agencies may appear more subtle, but starting from the assumption that institutions matter I hold the view that these agencies may play a significant role in governance through the institutionalisation of norms and working practices. Moreover, the fact that EU decision-making bodies are not legally obliged to consult these agencies in the decision-making process does not mean that they do not seek agency opinion and incorporate it into law, giving these agencies more influence than suggested in official documents. As indicated by the name, the implementation agencies are predominantly concerned with the implementation of tasks and services devised by central decision-makers. CdT is important in that it provides services that other bodies need to function but, apart from its involvement in interinstitutional cooperation, this agency does not play an active role in governance. More people were affected by work of EAR; however, as this agency was only temporary, it is not a suitable case study for a project aiming to contribute to our understanding of agencies' role in governance at the EU-level. For these reasons, case studies will only be selected from the three groups *de jure* regulators, *de facto* regulators and advisory agencies. The selection of EASA, EMEA, Cedefop and FRONTEX satisfies the selection criterion of at least one agency from each to these three groups.

To address the historical institutionalist hypothesis that specific events and the specific setting in which institutions are created and develop play an important role in explaining the establishment of institutions, agencies established at different times must be selected as case studies. Selection on the timing of establishment variable is also needed to address sociological institutionalist ideas of the importance of institutional borrowing. Three waves of agency creation can be distinguished: 1970s, 1990s and 2000s. The first group includes two advisory agencies: Cedefop and EUROFOUND. As Cedefop was the first Community Agency it was selected from this first group. The groups of agencies established in the 1990s and 2000s include agencies with all types of functions. The *de facto* regulator EMEA was selected from the 1990s group as it was the first Community Agency to be given a regulatory function. EASA and FRONTEX belong to the group of agencies established in the 2000s. By selecting EASA, which is a *de jure* regulator and FRONTEX, which is an advisory agency, I ensured variation in terms of functions between agencies created at roughly the same time.

The chosen case studies also capture some of the variation in term of agency size. The regulatory agencies EASA and EMEA are large in terms of staff as well as budget resources. Cedefop is medium-sized. Based on figures from 2007, FRONTEX was classified as small in terms of staff resources and medium-size in terms of budget. However, the agency has since recruited more staff. The agencies established from 2004 and onwards are classified as small in terms of staff, but, as the case of FRONTEX shows, the small size in 2007 may simply be due to the agencies' still being in the process of building up their organisation. With the notable exception of CPVO, the operations of

which directly affect only a limited number of actors, the regulatory agencies tend to be larger in terms of staff and/or budget than the advisory agencies.

As regards governance structures, the distinction between agencies with a standard Board composition, i.e. where the Board consists of Commission and Member States only, and agencies where additional actors are represented is reflected in the choice of case studies. EASA and FRONTEX have Boards with Commission and Member State representatives. FRONTEX, however, constitutes a somewhat special case in that the United Kingdom and Ireland are allowed as observers only due to their absence from the Schengen agreement. The Board of Cedefop includes stakeholders in the form of the social partners. EMEA's Board includes stakeholders, in this case representatives of doctors', veterinarians' and patients' organisations, as well as two people appointed by the EP. As shown in table 3.2, later agencies tend to have a standard Board composition. Of the agencies established in the 2000s, only EFSA has stakeholders on the Board, and EDCD and ECHA are the only agencies to have EP representatives. In terms of management recruitment, Cedefop is unique in that it is the only agency where the Director is appointed directly by the Commission.

Turning our attention to the financial arrangements of the agencies, we can see that the choice of case studies reflect the division between agencies that rely on subsidies for nearly the entire budget, as exemplified by Cedefop and FRONTEX, and agencies that also rely on fees, as exemplified by EMEA and EASA. All advisory agencies depend on subsidies for their budget. EMEA was the first agency to be given the right to charge fees for its services to any significant extent. Given that the level of an agency's financial independence

determines the level of autonomy an agency can enjoy, one could argue that an entirely self-financed agency ought to have been included as a case study. One of these, CdT, has already been ruled out as a case study due to the nature of its functions, which does not allow the agency to impact on governance in any other way than indirectly through the facilitation of the other agencies' work. OHIM and CPVO were considered and could have been selected on the grounds of being *de jure* regulators as well as self-financed. However, as the aim of this research project motivated a focus on the functions of the agencies, EASA is a more interesting representative of the *de jure* regulators due to the role this agency plays in the legislative process. Here it must be recalled that EASA drafts legislation in preparation of Commission proposals, and that the Commission is legally obliged to consult EASA on technical rules. OHIM does not have this role, and CPVO may only propose amendments to existing legislation.

The locations of agencies have not attracted attention in previous literature. A reason for this could be that previous studies of agency creation often have focused on the establishment of agencies within particular countries. Agency establishment in the EU arguably has an added dimension of intergovernmental tension, which it is worth acknowledging, although it is not emphasised in the thesis. It has been argued that the fact that the agencies are spread out across the territory is related to a desire to decentralise some EU functions. However, it is also reasonable to assume that agencies are spread out to give various states a share of EU jobs and the associated prestige of hosting an agency. It is interesting to note that most powerful agencies, i.e. the regulatory agencies, tend to found in the larger Member States. Examples are

EMEA in the United Kingdom, OHIM in Spain, CPVO and ERA in France, and EASA in Germany. Poland, which was the largest state to join the EU in 2004, is also the only of the Central- and Eastern European states to have an agency. It can also be noted that Cedefop was transferred from Germany to Greece in 1995, which several interviewees at Cedefop indicated had to do with intergovernmental bargaining preceding the decision to locate the European Central Bank in Frankfurt (Interviews Cedefop Official 1; Cedefop Official 3; Cedefop Official 4).

In summary, the selection of Cedefop, EMEA, EASA and FRONTEX reflect the variation between Community Agencies as shown in table 3.3.

Table 3.3 Summary of variation across case studies

Agency	Year	Function	Size	Financial arrangements	Governance structures
Cedefop	1970s	Advisory	Medium	Subsidy	Stakeholders
EMEA	1990s	<i>De facto</i> regulatory	Large	Mixed	Stakeholders + EP
EASA	2000s	<i>De jure</i> regulatory	Large	Mixed	Standard
FRONTEX	2000s	Advisory	Small/ Medium	Subsidy	Standard

Tracing the establishment of the European Centre for the Development of Vocational Training (Cedefop)

4.1 Introduction

The Council's decision to establish the European Centre for the Development of Vocational Training (Cedefop) in 1975 marks the beginning of the agencification of Europe. Cedefop was the first Community Agency to be established, and as such it has served as a precedent for the over twenty Community Agencies that the EU has today. Its founding legislation is Council Regulation EEC No 337/75. Cedefop is classified as an advisory agency, which is medium-sized, dependent on subsidies, and has a tripartite governance structure involving the social partners, i.e. employers' and employees' organisations.

In this chapter, I will trace and analyse the establishment of Cedefop with focus on the central aspects of agency establishment identified in chapter 2, (i.e. timing of establishment, tasks, governance structures and financial arrangements). I will also reflect on the agency's role in governance today.

Three hypotheses about the motives behind Cedefop have been deduced from rational choice institutionalist theory. This perspective suggests that the agency has been created as a response to a need for technical expertise, credible commitment or increased efficiency. I argue that these functional concerns have very limited explanatory value for the establishment of Cedefop. The agency operates in a policy area where objective science is scarce and

where normative reasoning underlies many decisions. This chapter will also show that decision-makers have not provided Cedefop with possibilities to offer employment conditions that can compete with those of the Commission and that there is an element of competition between the agency and Member States when it comes to the employment of experts. Thus, I argue that decision-makers were not primarily concerned with creating Cedefop as *the* centre of expertise. Neither does my research support the idea that a wish for credible commitment was a key driving factor behind the establishment of Cedefop. The agency has no means of enforcing commitment and lacks tasks linked to commitment concerns. Moreover, this chapter will show that whilst there is evidence to suggest that some actors saw the agency as a means to ensure credible commitment to the social dialogue through making social partner representation on the Board a legal requirement, decision-makers were not willing to go far enough to make such a commitment credible in the long term. The social dialogue has declined over time. As to the hypothesis that the agency has been created to increase efficiency, I have not found any evidence for this being an important argument for decision-makers in this case.

Sociological institutionalist theory suggests that the agency has been created following a convergence of ideas about the desirability of the agency form, which has resulted in institutional borrowing from another political setting. Based on substantial empirical evidence, I will make a case that institutional borrowing indeed occurred and that Cedefop was modelled on a German vocational training institute.

Historical institutionalist theory claims that the origin of Cedefop must be sought in the historical context in which it was created and that the

establishment of the agency was preceded by specific events (critical junctures) which led decision-makers down that path of development. I argue that this hypothesis holds true with regards to Cedefop. The agency was created at a time of economic crisis, rising unemployment and social unrest. Enlargement of the EC to the United Kingdom and Ireland, which were heavily affected by industrial decline, was also a contributing factor to vocational training being placed on the political agenda. At the same time, trade unions gained prominence at the European level through the establishment of the European Trade Union Congress (ETUC), which is to be regarded as a critical juncture in the history of trade union influence in Europe.

The chapter will show that in order to explain in the establishment of Cedefop, we need to look to sociological institutionalism *and* historical institutionalism. Whereas the former helps us to understand the choice of a body independent from central authorities, the latter explains well the timing aspect.

4.2 Background and the establishment process

4.2.1 Cedefop – a brief presentation

Initially set up in West Berlin, Germany, the agency moved to Thessaloniki, Greece, in 1995. The key functions have remained the same, however. Within the policy field of vocational training, the core tasks are to compile and disseminate information, to contribute to research, to act as a forum and to encourage joint approaches such as mutual recognition of qualifications and the approximation of standards. In practical terms, this means that the agency

publishes reports, organises workshops and engages in a number of networks (Cedefop 2005 Annual Report).

The social partners play a crucial role in the governance of Cedefop. The Governing Board of the agency consists of three representatives from the Commission and one government representative, one employers' organisations representative and one employees' organisations representative from each Member State. The Commission appoints its own representatives whereas the other representatives are appointed by the Council on the basis of candidates lists drawn up by Member States and employers' and employees' organisations. Council Regulation No 2051/2004 clearly states that a list of members must be published in the *Official Journal* as well as on the agency web site, and all actors involved in the governance of the agency are obliged to strive for gender balance when making appointments. The Board members serve for a renewable period of three years. In comparison with the Boards of several other agencies, the Board of Cedefop comes across as more dependent on the Commission; when adopting the annual work programme of the agency, they must do so in agreement with the Commission. Council Regulation EC 2051/2004, article 1.4 also states that the annual work programme "shall take into account the priority needs indicated by the Community institutions". In addition, albeit from a list of candidates compiled by the Board, the Commission appoints the Director of the agency (for a renewable term of five years).

In October 2007, the agency employed around 125 staff (Cedefop 2007). The agency's budget for the same year was around € 16.5 million, with over € 16 million being a subsidy from the EC budget (Statement of revenue

and expenditure of the European Centre for the Development of Vocational Training (Cedefop) for the financial year 2007).

4.2.2 Setting the context: attitude change to social policy, active trade unions, social dialogue, EESC and Maria Weber

Given the political situation and the commitments of the European Community (EC) in the late 1960s and throughout the 1970s it is hardly surprising that the first Community Agency was established in the social policy field. At the creation of the EC, only limited attention was given to social policy and the impact of economic integration on social affairs was initially largely left to be dealt with at Member State level. Varsori (2004: 66) points to the lack of an identified “conceptual framework”, and, with Italy as a possible exception, each Member State’s desire to follow its own national path as reasons for the initial lack of cooperation. This attitude is further expressed in article 118 of the Treaty, which gave the Commission the task of promoting cooperation in the field but did not include a mechanism for intervention at the Community level (Guasconi 2004: 55). The fact that the Treaty includes provisions concerning free movement of workers, equal pay for men and women and the creation of the European Social Fund need not be seen as evidence of a pan-EC commitment to these policies, and Guasconi (2004: 55) refers to them as “a concession on the part of the European governments to the strong pressure exerted by Italian representatives”. This is not to say that there was no European level activity in the field. As will be explained shortly, there was considerable activity, in particular on behalf of certain individuals, within the European Economic and Social Committee (EESC). We can also note that the

Council lay down “general principles for implementing a common vocational training policy” in 1963 (Commission 1974: 17).

Ideas and opinions amongst key European decision-makers about the need for cooperation on social policy in general, and vocational training in particular, shifted radically in the late 1960s and 1970s for a number of reasons. Needless to say, the economic crisis of the 1970s, and the rise in unemployment levels which followed, had a role to play in prompting political leaders to seek new solutions (see Varsori 2004: 57-58). Of the current Member States, Italy was particularly affected by unemployment and looked to the Community for help in tackling the Mezzogiorno question in particular (see Varsori 2004: 67). Furthermore, the imminent enlargement of the EC to include Ireland and the United Kingdom, two countries affected by industrial decline, drew the attention of European leaders to social policy and the idea of cooperation in the vocational training field (Guasconi 2004: 58; Varsori 2004: 67). The student revolts of 1968 also forcefully highlighted the emergence of new social forces and brought politicians’ attention to the educational systems throughout Western Europe (Guasconi 2004: 57; Varsori 2004: 66; Wollschläger 2000: 6). In terms of major EC events, Guasconi (2004: 57) identifies the 1969 The Hague summit and the Werner Plan, which included references to the need for social partner dialogue in order to create a monetary union, as turning points in the development of social policy. Guasconi (2004) and Varsori (2004) argue that, at the time of the 1972 Paris summit, social policy had become a goal in its own right.

In the early days of European cooperation, social dialogue, i.e. consultation between the European institutions and the social partners, was

carried out in advisory committees. According to Guasconi (2004: 56), this was in part due to divisions and political differences within the trade union movement.¹⁵ The opportunities for trade union influence improved significantly in 1973 when the European Trade Union Confederation (ETUC) was established. The formation of ETUC united the fragmented trade union movement and ensured a “role as a social interlocutor in the eyes of the European institutions” (Guasconi 2004: 58). I argue that the active, strong and influential trade union movement was crucial for the establishment of Cedefop as vocational training was often the interest and responsibility of trade unions (see Varsori 2004: 66; Wollschläger 2000: 6).

The EESC serves as a channel for trade union influence on European policy, and scholars interested in the development of European social policy, including vocational training, have claimed that this committee was instrumental in the early development of social policy (Guasconi 2004: 55; Varsori 2004: 65, Dundovich 2004). This was also confirmed in my interviews of people with long experience from Cedefop. According to Varsori (2004: 67), Germozzi, an Italian member of the EESC, made the suggestion in 1969 that the EESC was to engage itself in the issue of vocational training, and in early 1970 the issue was discussed in the EESC’s Social Affairs Section. At this meeting, a study group, chaired by Germozzi, was set up to look into vocational training in Europe and its work was presented in the form of a report

¹⁵ Guasconi (2004: 56) also attributes this to employers’ organisations “relative lack of interest” for trade union cooperation, and what she describes as “the Commission’s desire to retain control of the still embryonic development of social policy”.

signed by Maria Weber (Dundovich 2004: 46). This report suggested the establishment of a vocational training centre.¹⁶

In the period from November 1970 to July 1971, Council initiatives were taken to step up cooperation in vocational training. For instance the Commission was asked to draft policy and the issue of vocational training was discussed in the Standing Committee on Employment (Varsori 2004: 67). At this meeting, Maria Weber, vice-President of Deutscher Gewerkschaftbund and member of the EESC, stated that

the organisation has long hoped to see the creation of a European Institute that might promote research in the domain of training and establish the framework for fruitful collaboration among national institutions. It should be possible to finance the creation of such an institute out of the Community budget (quoted in Varsori 2004: 67 from BAC 64/84, 970, Standing Committee on Employment – Draft minutes of the second meeting of the standing Committee on employment – Brussels, 27 May 1971).

At this time, the Commission still did not have the creation of a vocational training agency as an objective, and, as will be discussed in the section on the Council, not all Member States were entirely convinced of its benefit (see Guasconi 2004: 59; Varsori 2004: 68). According to Guasconi's (2004: 59) analysis, the change in attitude amongst Member State leaders

was shaped by an explicit request from the European unions, which, in June 1972, presented a memorandum for the Summit calling on 'the Community governments and institutions to give practical support to the creation of a European labour institute aimed to train and prepare union leaders for their task of representing workers in terms of the European dimension'.

¹⁶ Notes from the EESC's Social Affairs Section meeting shows that Weber also here spoke out in favour of the creation of a vocational training centre (Varsori 2004: 67).

My sources indicate that the importance of Maria Weber for the establishment and design of Cedefop cannot be underestimated. In 1969, the Bundesinstitut für Berufsbildungsforschung was set up in Germany, and Weber was involved in this organisation (Wollschläger 2000: 10). Thus, it is reasonable to assume that she would have been inspired by this organisation when drafting the report that suggested the creation of Cedefop. As Wollschläger (2000: 10) puts it, the proposal clearly had “la ‘signature de l’Allemagne” and in terms of organisation and tasks the agency bore clear similarities with the German vocational training centre.¹⁷ Indeed, an interviewee at Cedefop said that Cedefop could be called Maria Weber’s “child” (Interview Cedefop Official 2).

In summary, the economic and social climate in the late 1960s to mid-1970s was such that advocates of common efforts in social policy more easily than previously could find an audience for their ideas. There was an emphasis on social dialogue, and the trade union movement, which was strong at the time, formed a European-level organisation.

4.2.3 The proposal from the Commission

The official proposal from the Commission to establish Cedefop was submitted to the Council in April 1974. In the proposal, the Commission (1974: 18) stated that “[t]he general objective of the Centre shall be the promotion and development of vocational training and continuous training at Community level”. The idea was that Cedefop would “encourage the development of a

¹⁷ Similar centres were set up also in France, Austria and Italy at about the same time (Wollschläger 2000: 7)

concerted approach to problems of common interest” (European Commission 1974: 18).

The proposed tasks of the agency focused on activities related to the collection and dissemination of information. In particular, the Commission emphasised networking and cooperation with organisations concerned with vocational training. It was suggested that the agency was to “collaborate as closely as possible” with specialised bodies, public administrations and “the organizations of workers and employers” (European Commission 1974: 18). Although vocational training is not a technical field in the traditional sense of the word, the Commission (1974: 17) argued that the agency’s tasks, in particular “the search for and implementation of the new policy guidelines for vocational training”, were of a “specialized and technical nature”, and required “the establishment of a body distinct from the departments of the Commission”. This suggests that the Commission thought that there was some need for the pooling of expertise, which would support the rational choice institutionalist hypothesis that agencies are created to gather technical expertise. However, the emphasis on networking with other specialised bodies equally suggests an acknowledgement of the fact that the agency was not likely to be *the* centre of expertise in the field, at the least not in the short term.

Regarding the management of the agency, the Commission (1974: 18) proposed a Board consisting of fifteen members appointed by the Commission. Five of these were to be “designated by the Commission”, five were to be suggested by workers’ organisations and five were to be suggested by employers’ organisations. The inclusion of the social partners was a response to a concern that the implementation of a common policy on vocational

training would give rise to yet more complex issues (see European Commission 1974: 17). Board members would serve for a period of three years, which could be renewed. It was suggested that the Board, in collaboration with the Commission, would decide on financial and staff regulation. The Commission further proposed that the Board would appoint the Director and the members of an Experts Committee, the role of which would be to answer questions related to agency activities, including the appointment of the Director (European Commission 1974: 19). In terms of the agency's work programme, it was proposed that the Board would draw it up but that suggestions made by the EESC and "priority needs" indicated by the Community institutions were to be taken into account. According to Varsori (2004: 68), some Commission officials were very cautious when it came to the level of independence of the agency, and thought that the agency ought to be a "satellite" of the Commission.¹⁸ The Commission's proposed management arrangements clearly indicate that, rather than seeking to insulate vocational training from political pressures, wide consultation was deemed necessary. This weakens the rational choice institutionalist hypothesis that the agency was created to secure credible commitment.

The Commission proposed that the agency was to be financed by a subsidy from the EC budget, and that the budget was to be checked by the EC Audit Board (Commission 1974: 20). The Commission also proposed that the Board ought to forward annually the accounts to the Commission, which ought to forward the accounts together with the report of the Audit Board to the Council and the Parliament.

¹⁸ Varsori makes a reference to BAC 64/84, 1001, Note for the attention of Mr Shanks by G . Schuster, 18.2.1974.

4.2.4 The European Parliament

The EP was consulted in January 1974. The Committee on Social Affairs and Employment was assigned the role of committee responsible, and Ferruccio Pisoni, a Christian Democrat, had the role of rapporteur. The report was debated and adopted in September 1974.¹⁹

A widely held view within the EP was that Community efforts within the field of vocational training to date had been disappointing and characterised by a lack of activity (see European Parliament 1974a: 20; European Parliament 1974b: 10; European Parliament 1974c). The rapporteur and most of the speakers in the EP debates indicated that the establishment of Cedefop, as a potential remedy to this problem, was worthy of support. The Communist and Allies group disagreed on the grounds that “doubts and obscurities subsist on the conception and content of vocational training at the European level” (European Parliament 1974c: 20). These reservations aside, the EP viewed harmonisation of vocational training standards as beneficial, and indicated that these ideas were already accepted at Community level as a means to the end of “full and better employment” (European Parliament 1974b: 10). Overall, the documents and debates from the EP strongly suggest that the establishment of Cedefop cannot be seen in isolation but must be viewed as part of an ongoing strategy to harmonise vocational training policy. Thus, we can conclude that the historical context and a convergence of ideas around certain ideals are essential for our understanding of the EP’s views on establishment of this agency.

¹⁹ Three suggested amendments to the report were also debated. Two of them were approved.

To pursue the general objectives discussed above, the EP argued that the harmonisation of standards ought to be a crucial task of Cedefop. Interestingly, the EP wanted to grant the agency more political influence than what the Commission did. In the EP report it was suggested that Cedefop should submit “practical proposals to the Commission” and that the agency’s suggestions could be immediately translated into formal proposals from the Commission (European Parliament 1974b: 11).

The question of how the agency was to be managed was a source of disagreement between the EP and the Commission and within the EP itself. Whereas the Commission wanted free hands in suggesting its Board representatives, the EP suggested that two of the Commission representatives on the agency Board must be “qualified educationalists” and one must be a “delegate from the European Youth Forum” (European Parliament 1974a: 22).²⁰ The inclusion of the social partners in the governance of the agency through representation on the Board was widely regarded as positive. The Communist and Allies Group went as far as to table an amendment suggesting that the workers and trade unions ought to make up the majority on the agency’s board (European Parliament 1974e). This was rejected. In addition, the EP proposed that the agency’s Experts Committee be doubled. The EP Committee on Budgets, however, disagreed as it thought the effectiveness of the committee would be hampered if this suggestion was put into practice (European Parliament 1974b: 22). The EP discussions of the agency’s governance demonstrate the prevalence of the idea of the benefit of social dialogue, which, arguably, was a product of its time.

²⁰ This idea was not part of Pisoni’s original report. It was added as amendment following the EP debates.

As regards the budget and financial arrangements of the agency, the EP was dissatisfied with the proposed budget, which was regarded as too small. The EP Committee on Budgets, however, was pleased with the level of budgetary control and argued that the EP would have “full control over budgetary management” (European Parliament 1974b: 23; see EP Debates 25 September, 1974).

4.2.5 The Council

In January 1974, the Council approved a social action programme, a goal of which was to achieve “approximation of training standards” (European Commission 1974: 17). Another prioritised objective was the establishment of a vocational training agency, and the Council argued that the agency “is necessary for the effective implementation of [the common vocational training] policy” (Council Regulation No 337/75, recitals).

With regards to the tasks of the agency, there are no major differences between the Council’s view, as expressed in the founding legislation, and the proposal from the Commission. However, Guasconi (2004: 60) implies that it was not easy for the Member State governments to agree on the functions of the agency, and she claims that “the UK delegation expressed strong reservations about the creation of Cedefop” during a meeting of the Council’s social group. Indeed, according to Varsori (2004: 68), the UK delegation was even prepared to veto the legislation had it not been made clear that Cedefop was to be an assistant body and not a policy-maker in its own right. This view that Cedefop was to be an advisory agency appears to have become the dominant one. Varsori (2004: 68) writes that “[t]he Council’s intention was

certainly not to promote the creation of a body making policy choices”;
Cedefop was to support choices made by the Council and the Commission.

As to the governance structure, the Council legislated in favour of a larger Board than the Commission suggested, deciding that the Board should be composed of thirty members.²¹ This can be attributed to the fact that the German delegation, which was hostile to the idea that the social partners would be in majority, “exerted pressure” on the other delegations to change the Board structure so as to ensure a majority vote for governments (Guasconi 2004: 60). There is reason to believe that the other states were relatively easily persuaded. According to Varsori (2004: 69), “most Member States were keen to limit the powers of the Commission, placing the emphasis on the predominantly intergovernmental nature of European integration”. In connection to the change of Board structure, the Committee of Experts, which was a source of conflict between the Commission and the EP, was removed (Varsori 2004: 69).

The Council largely followed the Commission’s proposal about the agency’s financial arrangements. It was decided that the agency was to be financed by a subsidy, and that budgetary discharge was to be given to the Board by the Council and the EP (Council Regulation No 337/75, articles 11-12).

4.2.6 Opinion of the European Economic and Social Committee

The EESC was consulted by the Council in April 1974, and finalised its opinion in July the same year. Mrs Weber, whose influence has already been

²¹ Three members from the Commission and then nine from each of the following groups: employers’ organisations, employees’ organisations and Member States. In later revisions, the size of the Board has been increased to accommodate for the inclusion of more Member States.

highlighted, served as rapporteur. The opinion was adopted by 60 votes to 37 (6 abstentions).

The EESC (1974: 42) claimed to welcome the proposal to establish Cedefop “with particular approval”, and pointed out that it had pressed for the creation of this type of agency for about fourteen years. The main reason why the EESC (1974: 42) wanted to see the establishment of Cedefop was a belief that “only a central institute of this sort” would be able to assemble the information required to enable relevant bodies “to draw the right conclusions and take the proper policy decisions with a view to the practical harmonization of education and training systems for young people and adults”. The indication of the influence of the trade union movement can be seen in that the EESC pointed specifically to the agency’s role in improving workers’ conditions.

As a first task for the agency the EESC suggested making an inventory of vocational training research. Other important tasks for the agency, according to the EESC, would be the standardisation of terminology and statistics as well as the coordination of research regarding the comparison of different national systems. The EESC was clearly focused on harmonisation. Arguably, this provides some support for the rational choice institutionalist hypothesis that the agency was created to increase efficiency in policy-making.

The EESC (1974: 45) wished to see a Board composed of four members from each of the Commission, employers’ organisations, employees’ organisations and four members “representing various activities”, supposedly with connection to the vocational training field. Great emphasis was given to the involvement of the social partners and other actors associated with vocational training. For instance, the EESC (1974: 45) held the view that the

Commission representatives need not necessarily be Commission officials working in relevant fields but could be “leading independent figures in the education and vocational training world”. The EESC thought that the Board ought to appoint its own Chair, rather than having the Commission do it, as the Commission proposed. At the same time, the EESC was of the opinion that the agency’s Board ought to update the Commission regularly with its activities, and that priority needs indicated by Community institutions and bodies ought to be included in the agency’s programme of work.

The EESC did not comment in detail on the financial arrangements. However, the committee issued a few words of caution, arguing that decisions to establish “new Community agencies with their own staffs and budgets are not to be taken lightly”, and that agency establishment must be subjected to cost-effectiveness analysis (European Economic and Social Committee 1974: 42). This shows that the EESC was concerned about efficiency.

4.2.7 Cedefop’s today: declining social dialogue, successful initiatives and a focus on control

One cannot analyse the role of Cedefop in European governance without commenting on the status of the social dialogue. The documentary research and interviews with officials at Cedefop clearly show that, at the time of the agency’s establishment, trade unions were confident, the social dialogue was active and there was faith that this would continue to be the case. Maria Weber saw the establishment of Cedefop as a “commitment of the European unions towards promoting a Community social dialogue”, and argued that the agency had been established as a result of the hard work of trade union representatives

in various advisory committees (Guasconi 2004: 61). That Cedefop was created to serve as a forum for social dialogue was confirmed by officials at the Commission and Cedefop (Interview Commission Official 2, Interview Cedefop Official 4).

From interviews with officials at Cedefop it became clear that the social dialogue is not as active as it used to be. In particular, the influence of the social partners is not as strong as it once was. An important reason for this, according to an official with extensive experience from Cedefop, was the breach of a gentlemen's agreement concerning the appointment of the Director (Interview Cedefop Official 1). Although the Commission has always been in charge of the appointment of Director, tradition had it that the appointed person was close to the social partners. According to Cedefop Official 1, in the 1990s the Commission began to want more influence, and, as a consequence, in 2004 the Commission invited candidates who had not been recommended by the social partners for the post of Director. This, Cedefop Official 1 argued, was the end of social partner influence over recruitment. Another interviewee with long experience from Cedefop confirmed that the appointment of Director is politicised, and that the change of directors has a significant impact on the functioning of the agency (Interview Cedefop Official 2).

There are, however, other factors that can explain limited social partner cooperation. For instance, sometimes the social partners have other priorities than cooperation with Cedefop (Interview Cedefop Official 2). The same interviewee also raised language issues as a hindrance for social partner involvement. To an extent this is due to the use of technical language that is not easily accessible for social partner representatives who may not have the same

level of education as the Cedefop officials. Another issue is the increased use of English in communication, which the interviewee implied leads to the exclusion of non-English speakers and gives some representatives, in particular the British, a comparative advantage.

Cedefop is an advisory agency and it does not have a mandate to make decisions binding for individuals. Having said that, an official at the Commission stated that more and more work done by Cedefop is taken up by the Commission (Interview Commission Official 2). The European CV and the European credit system in VET are important Cedefop “products” that are now well spread (see Interview Cedefop Official 5). Clearly, Cedefop has proved to be in a good position to engage in what some academic writers have referred to as “norm diffusion” (see Acharya 2004; Manners 2006). When talking to Cedefop employees, however, one could tell that there was a feeling that the agency perhaps is not as visible as it ought to be; that its work is often taken up by the Commission although the agency does not always receive what agency personnel would regard as due credit (see in particular Interview Cedefop Official 7).²² Cedefop reports are produced on the basis of information received through the agency’s constantly active *ReferNet* network (Interview Cedefop Official 3).

Although several of interviewees described the relationship between the Commission and Cedefop as good or improving, it is apparent that there are some tensions. As previously mentioned, the Commission’s strong influence over the appointment of Director was a somewhat sensitive spot for some of the interviewees. Some interviewees also drew attention to the differences in

²² Interviews carried out in March and April 2008.

economic resources between the two organisations. For instance, as the Commission is able to offer higher salaries, available outside experts are more likely to offer their services to the Commission rather than to Cedefop. This indicates that EU decision-makers are not committed to making Cedefop an agency where all top expertise is gathered. At the same time, it appears that the two organisations now cooperate more closely as a result of the Copenhagen process's bringing their agendas closer together (Interview Commission Official 2).

The issue of control is central to the relationship between Cedefop and the EP. It must be remembered that the EP itself has been, and still is to an extent, struggling to assume a more prominent position within the Community. Varsori (2004: 70-71) argues that the EP had some concerns about the amount of control it would be able to exercise over Cedefop once the agency was created. As a result, Varsori (2004: 71) argues, Cedefop made attempts at cultivating good links with the EP over the coming years. The most important way in which the EP can control the agency is through its control of the Community's budget from which Cedefop receives nearly all its revenue. A few interviewees at Cedefop stated that the agency's financial resources are not adequate, and some implied that the EP has a lot to do with this. Commission Official 2 confirmed that the EP has used its power to put some of the agency's budget in reserve. This appears to be a hindrance for the agency. Another budget related issue, brought to my attention by an official at Cedefop, concerns the fact that the budget functions according to a cameralistic principle, which means that it is difficult to carry money over from one year to the next (Interview Cedefop Official 3). As the agency's projects are not

cameralistic, it is at times difficult to implement the budget. It has happened that the agency has not spent the entire budget at the same time as the agency has asked for more money the year after. The EP has reacted by asking why the agency asks for more money when it does not spend what it already has. As regards the EP' view on agencies in general, one interviewee said that the EP complains about agencies but then it says yes to the establishment of new ones anyway (Interview Cedefop Official 2).

Interviewees at Cedefop emphasised the importance of the relationship between Cedefop and Member States, which was generally described as good. Needless to say, though, there are differences between states. There also appeared to be an issue with Member States' wanting to protect their national authorities, which at times leads to their not sending the top people as seconded experts to Cedefop. This also shows that Member States are hesitant towards making Cedefop a centre of expertise in the way foreseen by rational choice institutionalist theory.

Returning to the issue of control, we can note that numerous control mechanisms are imposed on the agency, and transparency has become increasingly important. The goals of the agency are specified in official work programmes, and procedures for budgetary discharge are outlined in the founding legislation. Moreover, the agency is required to follow very similar procedures to those of the larger EU institutions on issues such as procurement. Interviews with staff at Cedefop made it clear that it is no secret that these rules are sometimes problematic for the agency. Interviewees openly stated that this bureaucracy is burdensome (Interview Cedefop Official 5; Interview Cedefop Official 1). One interviewee pointed to the trade off between efficiency in

control and the efficiency to get things done (Interview Cedefop Official 1). However, another interviewee saw no real way around it and said that the control is necessary (Interview Cedefop Official 2).

It is reasonable to assume that the increased focus on transparency and control can be related to a very bad audit report a few years back (Phone Interview Cedefop Official 8; Interview Cedefop Official 1). The report is not a confidential document, and interviewees did not object to speaking about it. However, some interviewees were reluctant to have their comments recorded or requested to speak off the record. Since these irregularities were discovered, things have changed. For instance, following her appointment in 2005, the current Director, Aviana Bulgarelli, made a conscious decision to strengthen the agency's internal audit system (Interviews Cedefop Official 5, Cedefop Official 6). In addition, an interviewee mentioned that the recruitment procedures have become more professional over time (Interview Cedefop Official 2).

4.3 Discussion

As Cedefop was the first Community Agency to be created, its establishment in 1975 marks the beginning of the agencification of Europe. The agency was created at a time of intense trade union activity. The inclusion of the social partners on the agency's Board is a defining feature, which Cedefop shares with EUROFOUND and EU-OSHA. Although the agency is advisory, there is evidence that products of its work have become widespread, the European CV being one example. In this chapter, I have traced the process leading up to the establishment of Cedefop and reflected on the agency's role in governance

today. In the following sections, I will discuss the findings in relation to the theoretical framework outlined in chapter 2.

4.3.1 Rational choice institutionalist theory

From rational choice institutionalist theory the hypotheses were derived that Cedefop was created in order to lower transaction costs by becoming a centre of expertise, and/or by ensuring credible commitment, and/or by increasing efficiency (see Pollack 2001; Thatcher and Stone Sweet 2002).

Considering first the hypothesis that Cedefop was established to gather expertise, I conclude that there is not much evidence in favour of this idea. The agency operates in a policy field where there is very limited undisputed science. The fact that Member States have such different arrangements for vocational training is a testament to that. No doubt, Cedefop officials have considerable knowledge, and at the time of the establishment of the agency, the Commission argued that the specialised nature of the tasks required a body separate from the Commission (European Commission 1974: 17). However, my research has revealed that decision-makers have not been willing to grant the agency the conditions necessary to become a centre of expertise in the sense presumed by rational choice institutionalist theory. For instance, the agency cannot compete with the Commission in terms of salaries, which means that top experts may be more likely to offer their services to the Commission instead. Furthermore, there appears to be an element of competition between Member State authorities and Cedefop; arguably in order to protect their own status, Member State authorities may be reluctant to send their top experts as seconded experts to Cedefop. It must also be noted that Cedefop to a

significant extent is dependent on information provided by other authorities through the *ReferNet* network.

The usual interpretation of the credible commitment argument is that delegation takes place in order to uphold commitment of all actors involved to a particular policy or decision. Given that there was no single agreed common policy on vocational training in 1975, Cedefop cannot have been established to ensure commitment to a particular policy. Moreover, the agency lacks regulatory and arbitration tasks. However, I argue that the credible commitment cannot be completely disregarded, and with a somewhat modified interpretation it can contribute to our understanding of Cedefop establishment. My research has shown that Cedefop can be seen as part of a series of initiatives in the social policy field, and that some actors were disappointed with the previous lack of activity in the field. Furthermore, the trade union movement was a strong driving force. There is evidence that the influential trade unionist Maria Weber saw the establishment of Cedefop as a commitment to social dialogue. Thus, the establishment of this agency can be seen as a commitment to *engagement of some sort* in the social policy field and to a particular form of governance, in this case the involvement of the social partners. This said, with the benefit of hindsight we can see that the commitment to social dialogue was not that strong as it has not been completely honoured. Interviewees at Cedefop stated that the influence of the social partners has declined, the breach of the gentlemen's agreement concerning the appointment of Director being a tangible example.

A key predicted role for Cedefop was to contribute to the harmonisation of standards in vocational training. Whilst an argument can be made that

harmonised standards could increase the efficiency of the common market by facilitating movement of labour, it is noteworthy that my research does not provide any evidence that an efficiency concern was a major factor behind the decision to establish an agency. When outlining their rationales for the creation of Cedefop, decision-makers did not emphasise efficiency. However, budget related queries tended to focus on cost effectiveness, which indicates that there may have been some concern about efficiency even though it was not a major factor.

4.3.2 Sociological institutionalist theory

Sociological institutionalist theory would predict that Cedefop was created as a result of institutional borrowing, which occurs when the ideas of decision-makers have converged around the notion that a particular institutional form is desirable. The emphasis of this theory makes it very helpful in explaining the choice of a body separate from the central institutions.

As will be discussed in more detail in the next section on historical institutionalism, the political climate in the 1970s was conducive to the establishment of an agency in the social policy field. My research has pointed to the strength of the trade union movement, and showed that there was a widespread idea that social partner involvement in social policy was desirable and legitimate. Indeed, all institutions and the advisory body EESC were positive to the involvement of the social partners in the management of the agency. This was confirmed by interviewees with long experience from Cedefop, who emphasised the importance attributed to the social dialogue. In addition, social dialogue was emphasised at the Hague Summit, and within the

Werner Plan, clearly showing that this idea was widely approved. Thus, I argue that there is convincing evidence for stating that sociological institutionalist theory holds significant explanatory value for the management aspect of Cedefop establishment. Moreover, documents and debates from the EP point to a widespread idea of the benefit of harmonisation in the vocational training field.

There is also hard evidence in favour of institutional borrowing being at work. In the years preceding Cedefop establishment, a number of European countries established vocational training institutes, and especially the German Bundesinstitut für Berufsbildungsforschung came to serve as a model for Cedefop (Wollschläger 2000: 7). When Cedefop was set up it came to be similar to the German institute in terms of functions and organisation (see Wollschläger 2000). A crucial reason for this was that there was a personal linkage between the two organisations; Maria Weber, whose influence on Cedefop establishment was strongly emphasised by agency staff, was involved also in the creation of the German institute.

4.3.3 Historical institutionalism

From historical institutionalism I deduced the hypothesis that explanations for the establishment of Cedefop must be sought in the particular historical context in which it was established. This includes looking to specific events serving as critical junctures leading development down a particular path. I argue that this hypothesis holds true in the case of Cedefop, and that an understanding of the political and economic climate of the time is essential for explaining the establishment of the agency.

The period around the establishment of this agency was marked by economic crisis and rising unemployment, which pressured political leaders to seek new solutions to social issues, such as unemployment (see Varsori 2004: 57-58). Moreover, the student revolts of 1968 signalled the emergence of new social forces and drew attention to the systems of education found in Western Europe (Guasconi 2004: 57; Varsori 2004: 66; Wollschläger 2000: 6). This climate led to strong and active trade unions throughout Europe. Trade union representatives were present in the consultative EESC, and, as previously mentioned, their involvement was actively encouraged at the Hague Summit and in the Werner Plan. The ability of the trade union movement to influence European policy formation was further strengthened by the formation of ETUC, which unified the movement and is to be seen as a critical juncture for trade union influence on European level politics. In agreement with Guasconi (2004), I argue that the fact that trade unions were influential, which was also confirmed in interviews with Cedefop staff, was crucial for the establishment of Cedefop, as vocational training tended to be an important interest and responsibility of trade unions. Documentary research and interviews with experienced Cedefop staff pointed specifically to the influence of one individual from the trade union ranks, Maria Weber. She strongly advocated the establishment of such a centre, for instance in an EESC report, and she drafted the EESC report on the Commission proposal.

Another critical event that played an important role for the establishment of Cedefop was the imminent enlargement to the United Kingdom and Ireland. These two countries were affected by industrial decline, and, as this is often linked to increased need for vocational training, the

inclusion of these two countries played a part in raising the profile of the issue of cooperation in the field of vocational training.

4.4 Conclusion

This case study has shown that hypotheses derived from the three new institutionalist strands need not be mutually exclusive. In the case of Cedefop, sociological institutionalism has proved useful to explain the choice to establish a vocational training centre separate from the central institutions. This had already been done in a few European countries. The creation of the German vocational training institute played a particular role as the driving EESC figure, Maria Weber, was involved in the establishment of this body as well as Cedefop. Sociological institutionalism can also help us explain the management aspect of Cedefop. I have argued that the inclusion of the social partners in management was legitimised by the fact that the Werner Plan as well as the Hague summit had already endorsed the notion of an active social dialogue. Historical institutionalism can explain the timing of the establishment of the agency. My research has pointed to the importance of the political climate at the time. Enlargement and the formation of ETUC were important events, which served to increase the focus on vocational training and trade union influence.

Tracing the establishment of the European Medicines Agency (EMA)

5.1 Introduction

In 1993, the Council legislated on authorisation and supervision procedures for medicinal products for human and veterinary use and on the establishment of a European Agency for the Evaluation of Medicinal Products (EMA) (Council Regulation No 2309/93). In connection to a change of legislation in 2004, the name of the agency was shortened to the European Medicines Agency although the abbreviation EMA was kept. As EMA was the first Community Agency to be given a regulatory role, its establishment represents a significant change to the governance structures of the EU. EMA is a *de facto* regulatory agency, which means that although the agency does not have the formal right to make decisions, the Commission nearly always follows agency opinion. Its extensive influence over which medicinal products will become available on the common market makes EMA one of the most powerful agencies. Decisions made by the agency have an impact on Europe's large and financially important pharmaceutical industry, as well as any EU resident who may be in need of the products evaluated by the agency.

In this chapter, I will trace and analyse the establishment of EMA with focus on the aspects central to agency establishment identified in chapter 2, (i.e. timing of establishment, tasks, governance structures and financial arrangements), and reflect on the agency's role in governance today.

Rational choice institutionalist theory would suggest that the establishment of EMA can be explained by politicians' wish to lower political

transaction costs by the gathering of technical expertise, by ensuring of credible commitment, and by increasing efficiency (see Epstein and O'Halloran 1999; Pollack 2003). In this chapter I argue that although EMEA works in a highly technical field, the gathering of technical expertise was not the primary motive behind EMEA creation. The actual technical evaluations of medicines are carried out by national authorities, which report to EMEA. Moreover, to a significant extent, expertise had already been gathered in expert committees established before EMEA, and the agency was built on these existing structures. The hypothesis derived from rational choice institutionalism to find the most support throughout my research on EMEA is the credible commitment hypothesis; throughout the establishment process, there are numerous references to the importance of ensuring commitment to common standards. Moreover, arbitration tasks have been delegated to the agency. Efficiency concerns also hold significant explanatory value; in particular, there are several references to how harmonisation could be beneficial to the pharmaceutical industry.

Sociological institutionalism emphasises the convergence of ideas and norms, and argues that delegation takes place when there is an ideological consensus, or near consensus, that delegation to an agency is the best way of organising public management (see McNamara 2002). This theory also emphasises institutional borrowing. In the case of EMEA, there is evidence to suggest that the existence of agencies in similar policy areas at national level served to legitimise the establishment of an agency at the European level. However, I have found no evidence to suggest that EMEA was modelled on another institution. In important respects, the structure of EMEA is different to

the previously established Community Agencies Cedefop and EUROFOUND, which could have served as models. Furthermore, my research shows that the US Food and Drugs Administration was rejected as a model.

Historical institutionalism regards the specific context in which institutions are created and develop to be very important (see Thelen 1999). This theory explains delegation through the analysis of critical junctures and path dependency. The study of documents related to the EMEA establishment process revealed that the harmonisation of marketing authorisation procedures for medicines has developed alongside the development of the single market. My research suggests that the actual completion of the internal market may explain the timing of EMEA establishment. However, to understand the wider process of harmonisation we must look further than the individual event of single market completion.

Thus, I argue that to fully understand EMEA establishment we must draw on the three strands of new institutionalist theory; the acceptance of one hypothesis does not mean that another must be refuted. The rational choice institutionalist credible commitment hypothesis is useful for explaining the agency's regulatory and arbitration functions. The efficiency hypothesis is also useful for explaining why particular functions were delegated. Sociological institutionalism explains the establishment of an agency in EMEA's particular policy area. Historical institutionalism is useful to explain the precise timing of agency establishment.

5.2 Background and the establishment process

5.2.1 EMEA – A brief introduction

In order to understand the role of EMEA it is necessary to have a basic understanding of the European authorisation procedures for medicines. To be sold on the EU market, medicinal products first need to be authorised, and this can be done in accordance with the following three procedures: the national procedure, the decentralised procedure and the centralised procedure.²³ EMEA has important roles to play in the last two.

EMEA's role in the centralised procedure is to evaluate medicinal products. The centralised procedure must be used for products produced by certain methods and for products that contain new active substances.²⁴ Companies can also choose to use the centralised procedure if they wish to have the medicine approved everywhere in the EU simultaneously with the same trade mark. In the centralised procedure, producers have to submit applications for authorisation directly to EMEA.

The decentralised procedure builds on the principle of mutual recognition, i.e. the idea that a medicine that is deemed to live up to the standards in one Member State ought to be considered safe in another. Here a company submits an application to the national authorities in one Member State, which will perform an evaluation of the product. In the event that the company would like to have the same product authorised in another country, a

²³ A market authorisation via the national procedure is only valid in the state where the application was filed. This procedure is used by pharmaceutical companies that only wish to sell its product in one Member State. The authorisation is granted by relevant national authorities.

²⁴ For instance, products produced using biotechnology must be authorised via the centralised procedure. The types of products that need authorisation are listed in the annex to Regulation (EC) No 726/2004.

request is made to the relevant authorities in the second state to grant the authorisation based on the evaluation done in the first state. EMEA's role in this procedure is to serve as an arbiter when conflict occurs between national authorities.

Much of the agency's work is concentrated in its six scientific committees: the Committee for Medicinal Products for Human Use, the Committee for Medicinal Products for Veterinary Use, the Committee on Orphan Medicinal Products, the Committee on Herbal Medicinal Products, the Paediatric Committee and the Committee for Advanced Therapies. Each Member State appoints a member and an alternate to each committee after consultation with the EMEA Board. The committee members are to be appointed on the grounds of relevant experience and expertise, and they "shall represent the competent national authorities" (Regulation 726/2004, article 61). This means, as confirmed by Commission Official 4, that EMEA does not have its own personnel to carry out evaluations of products. Whilst working *on behalf of* EMEA, the experts who evaluate the products are employed by national authorities, not by EMEA itself (Interview Commission Official 4).

Within its field of expertise, each committee is responsible for scientific evaluations of medicinal products that are to be authorised according to the centralised procedure. The opinion formed after such an evaluation forms the basis for a marketing authorisation to sell the product on the EU market. The final decisions about authorisation are taken by the Commission, however (Regulation 726/2004, article 10). If a marketing authorisation is granted, the product may be sold all over the Community (Regulation 726/2004, article 13). By contrast, if authorisation is not granted, the product may not be placed on

the EU market (Regulation 726/2004, article 3).²⁵ Although the Commission has the final say on authorisation, EMEA clearly has significant influence over which medicinal products will become available within the EU. Thus, EMEA has *de facto* regulatory powers. In addition to evaluating medicinal products, EMEA has obligations to provide scientific advice and to make information available about evaluated products, including reported adverse effects.

The Management Board of EMEA is composed of one representative per Member State, two representatives of the Commission and two representatives appointed by the European Parliament. In addition to this, there are two representatives from patients' organisations, one representative from doctors' organisations and one representative from veterinarians' organisations. These stakeholders' representatives are appointed by the Council in consultation with the EP and on proposal from the Commission (Regulation No 726/2004). Board members are appointed for a renewable three year term and "shall be appointed on the basis of their relevant expertise in management and, if appropriate, experience in the field of medicinal products for human and veterinary use" (Regulation No 726/2004, article 65). The Board appoints the Director on proposal from the Commission, and is responsible for the adoption of an annual work programme and an annual report of the agency's activities.

In June 2007, EMEA had about 440 employees, which makes it one of the largest Community Agencies (EMEA 2007). The budget for 2007 was € 155 million. Most of the revenue came from services rendered (€ 106 million) and the second largest source of income was the European Community, which contributes with a subsidy of € 41 million. Other income

²⁵ Neither EMEA nor the Commission has the authority to decide on the pricing of products, (see Regulation 726/2004, article 1).

included third country contributions and income from administrative operations (EMA 2006).

5.2.2 Setting the context: successive harmonisation and building on existing structures

EMA undoubtedly plays a crucial role in the governance of medicinal products in the EU today. However, cooperation in the field has a much longer history than the agency. European states have been concerned about harmonisation of legislation related to medicinal products since the 1960s, when a form of the decentralised procedure for authorisations of products began to be phased in (see European Commission 1990a: 52). According to Abraham and Lewis (2000: 84), these first activities can be described as being “a gradual alignment of national rules and procedures”. Council Directive 65/65/EEC of 26 January 1965 laid down the first provisions of harmonisation in the form of “criteria for quality, safety and efficacy” for medicines for human use, and further harmonisation was brought in by Directives 75/318/EEC and 75/319/EEC, which also created the Committee for Proprietary Medicinal Products (Council Regulation No 2309/93, p. 1-2). This committee was the predecessor of the Committee for Medicinal Products for Human Use (CPMP). The Committee for Veterinary Medicinal Products (CVMP) was established in 1981 by Directive 81/851/EEC. In 1993, another Council Directive stated that

in the event of a disagreement between Member States about the quality, safety or efficacy of a medicinal product which is the subject of the decentralized Community authorization procedure, the matter should be resolved by a binding Community

decision following scientific evaluation of the issues involved within a European medicinal product evaluation agency (Council Regulation No 2309/93, recital).

Thus, when EMEA was formally established, there had been several rounds of harmonisation of policy, and the Council had already agreed that an arbiter at the European level was needed in the event of conflict between Member States. To an extent, the establishment of EMEA was a formalisation of already existing arrangements (Interview Commission Official 4).

Prior to the adoption of the proposal to establish EMEA, the Commission (1990a: 5) outlined that it had consulted intensively for a several years, and found wide support for the establishment of the agency.²⁶ Consultation took place with Member States as well as with stakeholders such as health professionals, consumer groups and industry representatives (European Commission 1990a: 7). When interviewed for this project, an official at EMEA mentioned that it took about eight years from the time when the Commission issued a White Paper to the establishment of the agency (Interview EMEA Official 2).

EMEA was built up around the two existing committees CPMP and CVMP, which were complemented with “substantial additional logistical and administrative support” (European Commission 1990a: 5).²⁷ The Commission (1990b: 12) argued that the creation of “a complex set of new and independent structures at Community level” appeared unfeasible. Instead, the ideas were “to draw heavily on the resources and experience existing within the Member

²⁶ The Commission also declared to have wide support for the centralised procedure (which was a new measure) and the decentralised procedure (which built on the principle of mutual recognition), (European Commission 1990b: 5).

²⁷ Expenses that the Community already had for these two committees were to be brought into the budget of the agency (European Commission 1990b: 190).

States” and to pool resources (Commission 1990a: 12). The Commission (1990a: 13) argued that the administrative support needed was better dealt with by an agency than by the Commission “for managerial and budgetary reasons”. At the time of EMEA establishment, CPMP and CVMP were already involved in the evaluation of products and in pharmacovigilance. The crucial difference brought in by the EMEA legislation was that the opinions of the committees would “also be addressed to the Community institutions for the adoption of binding decisions at Community level” (Commission 1990a: 12). The agency was set up to be “purely advisory” and the Commission (1990a: 21) argued that it was “neither possible or appropriate”(sic) to give the agency the right to make binding decisions. Having said that, the Commission also argued that it was “important to protect the integrity of the Agency by ensuring that all questions of a scientific nature are resolved within the Agency structure and are not subject to a second review during the decision-making process” (European Commission 1990a: 21). Only in exceptional circumstances would the Commission deviate from agency opinion and then detailed motivations would be needed (European Commission 1990b: 22). This confirms that EMEA is a *de facto* regulator.

In its preparatory work, the Commission also remarked that many Member States had already delegated the task of evaluating medicinal products to independent agencies, and that the same arguments used to motivate this at nation state level were valid also at the Community level (European Commission 1990a: 14).²⁸ Abraham and Lewis (2000: 77), who have researched the development of regulatory agencies in the pharmaceutical sector

²⁸ The Commission did not outline what it perceived these arguments to be, however.

in a number of European states, argue that the usual explanations of the need for scientific expertise and credible commitment cannot fully explain the creation of these agencies. Instead, they argue that “[a] crucial part of the establishment of drug regulatory agencies has been a neo-liberal political agenda aimed at increasing the responsiveness of regulators to industrial demands at minimal expense to the state” (Abraham and Lewis 2000: 78). The concern about industry was also shown in a comment from an MEP I interviewed, who remarked that it would not be good for industry if each Member State would have to carry out its own tests of medicines (Interview MEP 1). The constant reference to industry benefits in parallel to the references to public health, suggests that neo-liberal policy concerns may also hold explanatory value at European level.

The objectives behind the creation of EMEA cannot be separated completely from the objectives behind the revised medicinal product regulations more broadly. The objectives for action fall into two categories: public health and industrial policy (European Commission 1990a: 8-9). In short, the public was believed to benefit by having access to safe products, guaranteed by scientific evaluations and harmonised criteria and by having access to consistent information. Industry was to benefit from guaranteed fairness in procedures.²⁹

As to financial concerns, it was believed that the setting up of the agency would lead to increased public expenditure in the short term, but that with a longer perspective the avoidance of duplication of work would lead to savings (European Commission 1990a: 34).

²⁹ For instance, it was suggested that all decisions must be published and that all negative decisions must be motivated (European Commission 1990b: 23)

To sum up, the Community had been concerned with harmonisation in the field since the 1960s. This harmonisation was driven by concerns over public health and industry efficiency. EMEA was built up around existing committees, and it was believed that an agency was needed to provide necessary support for the committees.

5.2.3 The proposal from the Commission

The proposal from the Commission to establish EMEA was published in December 1990.

First, the Commission outlined the objective of “progressively establishing the internal market” and the need for goods, which includes medicinal products, to move freely on the market (European Commission 1990b: 1). The Commission argued that a common market required common criteria for authorisation of medicinal products. This, I argue, suggests that the Commission was driven by credible commitment concerns. In the interest of public health, the Commission (1990b: 1) argued that authorisation should only be granted to products fulfilling “objective, scientific criteria of the quality, the safety and the efficacy”.

A key task for the agency, according to the Commission’s proposal, would be “to provide the Member States and the Institutions of the Community with the best possible scientific advice” (European Commission 1990b: 12). The Commission also proposed that the agency be given the task of acting as an arbiter in the event of differences in opinion between national authorities with regards to products subjected to the decentralised authorisation procedure (European Commission 1990b: 2). The proposed delegation of arbitration tasks

serves as hard evidence in favour of the hypothesis that the Commission was concerned about ensuring a credible commitment to commonly agreed standards.

The agency's structure was built up around the already existing structures for cooperation in the field of medicines. The Commission proposed that all agency opinions on scientific matters should be prepared by the Committee for Proprietary Medicinal Products and the Committee for Veterinary Medicinal Products. The members of these committees were to be appointed by Member States, and they were not to "hold financial or other interests in the pharmaceutical industry which could affect their impartiality" (European Commission 1990b: 13). Above the committee structure that was already in place, the Commission proposed the creation of a Board consisting of two representatives from each Member State and two representatives from the Commission. The Commission suggested that the Board be responsible for the appointment of the agency's Director on proposal from the Commission. Furthermore, the Commission proposed that the Board be in charge of adopting the agency's work programme and producing an annual report on agency activity. These documents, it was proposed, were to be sent to Member States, the Commission, the EP, the Council and the Scientific Council, which was an advisory expert committee that the Commission proposed to set up attached to the agency. The issue of how to control the agency was clearly important. Commissioner Bangemann described the US Food and Drugs Administration as "a bureaucracy no longer subject to political supervision", and stated that the Commission did not want EMEA to be modelled on this agency (European Parliament 1991a: 66).

The Commission proposed a budget made up of a subsidy of the Community and fees paid by users of the agency's services. It was suggested that discharge ought to be granted to the Board.

5.2.4 The European Parliament

The European Parliament was consulted formally in December 1990. The Committee on the Environment, Public Health and Consumer Protection was given the role of committee responsible, and Mr Valverde López was assigned the role of rapporteur. The report was discussed and voted on in June 1991. The EP debates did not solely focus on the issue of EMEA creation, or indeed on regulation related to medicinal products. Critical voices were also heard about the EP working process, in particular the tabling of an unreasonable number of amendments. It is clear from the debates and the comments preceding the vote that some delegates even felt insecure as to what exactly they were voting on.

In the EP debates, more attention was given to the adoption of procedures surrounding the scrutiny and approval of medicinal products to be sold all over the internal market than on the agency itself. Overall, the EP was favourable to a new system for the authorisation of medicines as this was believed to benefit patients as well as industry. However, some MEPs called for vigilance with regards to the practical arrangements of the agency (see European Parliament 1991a; European Parliament 1991b). Other MEPs regarded the procedures as “rather cumbersome” (European Parliament 1991a: 59). The EP's approval of the idea to increase cooperation and concern

about the practical arrangements indicate that the need to solve a practical issue came before the idea of what particular institutional design to approve.

The EP was not satisfied with the Commission's description of the agency's tasks. The rapporteur thought that EMEA's duties "should be better defined and outlined", and a significant number of the EP amendments concern this aspect (European Parliament 1991a: 53). There were serious concerns about over-centralisation. For instance, one MEP explicitly stated that EMEA "must not be a pharmaceutical 'gosplan' nor yet another US Food Administration" (European Parliament 1991b: 177). The rapporteur also thought that "centralizing mechanisms must be reduced to the absolute minimum", and that the agency's role in evaluating products should be "limited to products of great importance and obvious complexity" (European Parliament 1991a: 53). The EP strongly emphasised the agency's *de facto* regulatory function. According to the EP, the norm must be that EMEA's opinions on such products are respected by the Commission.³⁰ The EP was strongly supportive of the agency's role as an arbiter, which suggests a wish to ensure credible commitment to uniform standards (see European Parliament 1991a: 53). Furthermore, the EP called for a more proactive role for the agency with regards to pharmacovigilance and information dissemination.

With regards to the management of the agency, the EP put forward several amendments to enhance its own influence. First, the EP requested the right to approve the Board's choice of Director (European Parliament 1991c: 172). Second, the EP suggested that it be given the right to appoint two

³⁰ Whilst the Commission and the EP were in agreement that the Commission "explain in detail the reasons for any differences" between a Commission decision and an agency opinion, the EP amended the text to emphasise that it would be an exception if the Commission decided not to follow agency opinion (European Parliament 1991c: 151, amendment No 19).

representatives to the agency's Board (European Parliament 1991c: 173). Third, the EP approved an amendment stating that lists of potential expert members of the agency's committees be subject to EP approval (European Parliament 1991c: 170). However, some MEPs disagreed with the third point and argued that expert appointments must "be free from political influence" (European Parliament 1991b: 177). The EP also proposed that two representatives of consumers' organisations be included on the EMEA Board, and emphasised its opinion that Board members "may not have any direct or indirect interests in the pharmaceutical industry which could affect their impartiality" (European Parliament 1991c: 173).

The financial arrangements and budget were not discussed at any length by the EP. However, the EP resented the Commission's suggestion that the agency's fees were to be set by the Council. Instead, the EP wanted the fees to "be established in the Community budget" (European Parliament 1991c: 173).

5.2.5 Amendments from the Commission

In the light of the EP's reading, the Commission decided to amend its proposal, accepting 67 out of the 155 amendments that the EP had voted to adopt (European Commission 1991: 3).

The Commission approved several amendments, the purposes of which were to increase transparency in procedures, to emphasise consumer protection and to encourage cooperation with the World Health Organisation. Moreover, the Commission accepted the EP's suggestion to clearly state that the Commission would only make decisions that contradicted agency opinions in exceptional cases (European Commission 1991: 8). As regards the

management of the agency, the Commission accepted the EP's amendment to grant the EP the right to nominate two representatives to the EMEA Board (European Commission 1991: 2).

5.2.6 The Council

The Council legislated on the establishment of EMEA in July 1993. A comparison between the final legislative text and the Commission proposal shows that, although many of the central aspects of the legislation are similar, the text appears to have been thoroughly reworked. There are also instances where the Council chose to retain the original text proposed by the Commission, ignoring EP amendments which the Commission had declared to accept.

Overall, the Council agreed with the rationale for increasingly harmonised procedures presented by the other institutions. In the articles directly concerned with the establishment of the agency, the Council made a link between the completion of the internal market and agency creation. At the same time, the Council toned down this link somewhat by removing a proposed recital that focused exclusively on the importance of the legislation for the completion of the internal market.

The Council regarded the provision of "scientific advice of the highest possible quality" to be EMEA's most central task, and emphasised the agency's role in the evaluation of advanced products as well as in arbitration in the event of disagreements between Member States (Council Regulation No 2309/93, recital).

As to the agency's management and expert appointments, the Council decided in favour of the EP amendment to include two Board members appointed by the EP (Council Regulation No 2309/93, article 56). The EP's request to influence the appointment of Director was turned down, however. Moreover, the Council stressed that Board members as well as experts working for the agency ought to be impartial, and that any indirect interests they may have in the pharmaceutical industry must be openly declared (Council Regulation No 2309/93, article 54). This can be seen as support for a concern about credible commitment.

The agency's fees are of central importance to the budget, and here, the Council followed the Commission's proposal that the fees ought to be set by the Council on proposal from the Commission (Council Regulation No 2309/93, article 58). As to budgetary discharge, the Council legislated that this should be granted to the EMEA Director by the Board.

5.2.7 European Economic and Social Committee

The EESC was consulted in December 1990. In July 1991, the committee unanimously adopted its opinion.

The EESC was positive to the establishment of the agency, which was described as "the culminating point in the major package of measures to harmonize the market in medicinal products" (European Economic and Social Committee 1991: 84). Whilst the committee only briefly mentioned "the pooling of expertise" as a concern for the agency, considerable attention was devoted to the agency's role in ensuring credible commitment (European Economic and Social Committee 1991: 85). For instance, the EESC (1991: 84)

argued that differing interpretations between Member States “would impede real free movement of medicinal products within the Community”. In addition, it was believed that a number of “safeguard clauses placed at the disposal of Member States ... could seriously encumber the procedures and delay real free movement of medicinal products” (European Economic and Social Committee 1991: 85). This indicates that the EESC did not think that the legislation went far enough to ensure credible commitment to common agreements.

Furthermore, the emphasis on credible commitment is made apparent in statements pointing to the agency’s role in ensuring that products meet the required standards throughout the Community and the importance of ensuring that the industry would know the rules of the game.

The EESC opinion is almost exclusively concerned with the agency’s tasks, and other aspects of agency creation were not discussed at any length. However, the committee noted its support for the Commission’s intention “to ensure the scientific independence of the Agency and the impartiality of its experts, and to avoid interference from industry and intervention by the national authorities” (European Economic and Social Committee 1991: 87). The EESC was also supportive of the Commission’s proposal that the agency would rely mainly on national experts working at relevant institutions at national level. This serves as a further indication that the pooling of expertise to the agency itself was not a concern.

5.2.8 EMEA today: wide support despite tensions

Since the establishment of EMEA, changes have been made to the EU’s legislation on authorisations of medicinal products. The legislation was

substantially revised in the early 2000s. According to an official at the EP, this was done in order to bring legislation up to date, and there was a wish to conclude the matter before enlargement (Interview EP Official 2). The same official informed me that this was the result of a long process, and of pressure from authorities, pharmacopoeia and patient groups.

My documentary research suggests that EMEA may have more regulatory influence than what is stated in the legislation. Information gained in the interviews conducted for this research project confirmed that EMEA has a *de facto* regulatory role. Indeed, this idea was endorsed by representatives of EMEA, the EP and the Commission itself (Interview EMEA Official 1; Interview EMEA Official 2; Interview EP Official 2; Interview Commission Official 4). An official at EMEA remarked that the reason why EMEA cannot make legislative decisions is that the Treaties do not make such provisions (Interview EMEA Official 1).

As predicted in the discussions leading up to EMEA establishment, the agency has come to play an important role for public health as well as for the pharmaceutical industry. Whilst industry pays fees to the agency, an official at EMEA emphasised that the real EMEA customer is the patient and that the system is very strict for industry (Interview EMEA Official 1). At the same time, the official mentioned that there is considerable contact between companies and the agency during the application procedures, and that industry shows an interest in taking advantage of EMEA knowledge (Interview EMEA Official 1). It tends to be larger companies that file applications to EMEA (Interview EMEA Official 1).

The many contacts between EMEA and industry can call into question the independence of the agency. However, an official at the Commission argued that EMEA is carefully monitored (Interview Commission Official 4). An official at EMEA stated that enormous resources are spent on control, and that transparency is increasing (Interview EMEA Official 1). Commission official 4 agreed that the agency has become more open, but he also drew attention to the fact that some of the material handled by the agency is of a confidential nature. Moreover, secrecy laws differ between states and EMEA is in no position to change this (Interview Commission Official 4).

Today, EMEA appears to enjoy widespread support. None of the people interviewed about EMEA could point to any major objections to the agency; its existence is not questioned. Instead, interviewees painted a picture of an agency that has built up a good reputation as a highly professional organisation (Interviews EMEA Official 2; EMEA Official 1; EP Official 2). To illustrate the respect enjoyed by EMEA, the agency has been allowed to have a representative present at Council meetings, and EMEA employees have taken part in staff selection committees for new agencies (Interview EMEA Official 2). Officials at EMEA described the agency's relationship with the EP as good (Interview EMEA Official 1; Interview EMEA Official 2), and EP Official 2 had a very favourable attitude towards the agency. EMEA Official 2 mentioned that industry may have been a bit cautious initially, but today it is very much in favour of the agency. The key to EMEA's success, according one of its officials, has been to keep "a low profile" (Interview EMEA Official 2).

Despite the overall support, there appear to be some tensions in the relationship between national authorities and EMEA. According to an EMEA

official, the system works well now, but that there has been some suspicion from national authorities (Interview EMEA Official 1). EMEA Official 1 argued that, generally speaking, northern Member States tend to be more supportive than southern Member States. Another EMEA official explained that some national authorities are concerned about being suppressed by the European-level agency (Interview EMEA Official 2). As previously explained, evaluations of products are carried out by national authorities on behalf of EMEA. When EMEA needs to have an evaluation done, the job will be given to national authorities in one state. Thus, we can assume that some national authorities are concerned that they will not be called upon, with the risk of expertise slowly withering away. As an EMEA official explained, the national authorities can be seen to be in competition with each other (Interview EMEA Official 1). The Commission representative I interviewed about EMEA argued that we can see an increasing focus on centralisation, which may mean that national authorities will have to become more specialised than is currently the case (Interview Commission Official 4). An EMEA official went a step further, and argued that this development is necessary (Interview EMEA Official 1). The level of funding given to national authorities that perform evaluations is another somewhat problematic issue. According to Commission Official 4, who has experience from the Commission and Swedish authorities, the Swedish authorities, which are often called upon by EMEA, made a loss during the first ten years as a result of not receiving adequate funding for their work.

Tensions appear to exist also in the relationship between EMEA and the Commission. One EMEA official said that the two institutions work together, disagreements, if any, are kept between the two institutions (Interview EMEA

Official 2). Another EMEA official described the relationship as somewhat unclear (Interview EMEA Official 1). EMEA Official 1 was of the opinion that the Commission does not interfere in EMEA's scientific work, but in other areas the Commission wants greater influence. One source of irritation appeared to be that all agencies are expected to perform its administrative functions in similar ways, despite the fact that these prescribed methods may not be suitable for EMEA. EMEA Official 1 went on to describe the Commission as a conservative, hierarchical institution. To illustrate, he argued that agency personnel do not have the same rights as EU officials, and that junior people tend to be appointed to high posts at the agencies despite the fact that these posts require more senior people. This official also mentioned that there are civil servants in the Commission who do not support the existence of agencies.

The role of the Board members appointed by the EP is another aspect of EMEA which is somewhat unclear. An official at the EP informed me that the role of these Board members is unclear and that there are no instructions (Interview EP Official 2). Nobody seems to know for sure whether these Board members are there to represent themselves as independent experts or whether they are there to voice the EP view. Furthermore, EP Official 2 implied that not many people seem to care either way. This is problematic as the agency Board adopts the EMEA budget, and the EP scrutinises it. For a control mechanism to be credible, it is essential that the controlling body and the controlled body are not the same, but currently two individuals may be present within the two bodies. This problem is at least partially avoided by the EP's often appointing ex-MEPs as Board members (Interview EP Official 2). These people, EP

Official 2 argued, possess the important ability to communicate with MEPs. Still, EP Official 2 continued, cultural clashes in terms of working methods can be a problem as the EP representatives tend to be politicians whereas the Member State representatives on the Board tend to be civil servants.

Finally, in its preparatory work, the Commission predicted that budgeting may be difficult (see European Commission 1990a: 34-35). This was confirmed by an official at the Commission (Interview Commission Official 4). Personal budgetary discharge is given to the Director, and an official at EMEA hinted that there are worries that political concerns irrelevant to the issue at hand may play a part in this process (Interview EMEA Official 1).

5.3 Discussion

EMEA was the first agency to be given a regulatory role. Today the agency's role as a *de facto* regulator is widely accepted, and the agency has significant influence over which medicinal products will be sold on the EU market. Over the years, EMEA has built up a good reputation and enjoys support from European institutions and industry. Nevertheless, some tensions remain in the agency's relationships with national authorities and the Commission.

In this chapter, I have traced the process leading up to the establishment of EMEA and reflected on the agency's role in governance today. In the following sections, I will discuss the findings in relation to the theoretical framework outlined in chapter 2.

5.3.1 Rational choice institutionalism

Rational choice institutionalism suggests that EMEA was established to lower transaction costs. The agency could do this by becoming a centre of expertise where technical and scientific knowledge is gathered. Another hypothesis is that EMEA was created as a means to ensure credible commitment. Finally, the agency could lower transaction costs by increasing efficiency. Whilst my research has revealed some evidence to support each one of these hypotheses, I argue that EMEA establishment was driven primarily by credible commitment concerns and a wish to increase efficiency, in particular for industry.

EMEA's field of activity is clearly a scientifically complicated one, and the evaluation of medicinal products requires a high degree of technical expertise. The members of the agency's committees are appointed on the grounds of relevant experience and expertise. This can be seen as indications that EMEA was set up to be a centre of expertise. However, the fact that EMEA was built up around already existing expert committees calls this hypothesis into question. In other words, expertise was already pooled and the establishment of the agency was mainly a formalisation of already existing structures. Moreover, it must be recalled that the most central tasks, that is evaluations of products, are performed by national authorities, and not at EMEA itself. Thus, I argue that, whilst scientific expertise is crucial to EMEA's work, the establishment of the agency was not primarily driven by a wish to gather expertise within one body as predicted by rational choice institutionalist theory.

There is significant evidence in favour of the hypothesis that EMEA establishment can be explained by wishes to ensure credible commitment.

Information provided by the interviewees confirmed the impression gained throughout the documentary research that EMEA indeed has a *de facto* regulatory function. Throughout the legislative process, there are multiple direct references to the importance of upholding common standards. For instance, an MEP thought that “high-level inspection” should be used “in the sense of monitoring compliance with Community rules in the measures adopted by national authorities” (European Parliament 1991a: 53). The EESC argued that authorisation of medicinal products with agency help would enhance “the status of Community-produced medicines on export markets” (European Economic and Social Committee 1991: 85). This suggests that the EESC thought that the agency would enhance the credibility of the Community more generally. The EESC also pointed to the importance of consistent information, including common guidelines and procedures for applications. Another piece of hard evidence in favour of the credible commitment hypothesis is that the agency has been assigned the role of arbiter in cases of conflict between Member State authorities concerning products subject to the decentralised authorisation procedure. Considerable emphasis was placed on this role of the agency throughout the process leading up to establishment.

As to the hypothesis that EMEA was created to increase efficiency, it is apparent that harmonised procedures for marketing authorisations allow products to reach the market faster. Prior to harmonisation, a company wanting to market a medicinal product in more than one Member State would have to file an application for evaluation in each state. The decentralised procedure, which builds on the principle of mutual recognition, increased efficiency by establishing that it was sufficient that a product be evaluated in one state.

However, pharmaceutical companies would still have to file applications in each state where they wished to market the product. The centralised authorisation procedure, which was introduced at the time of EMEA establishment, further increased the efficiency of authorisation. This procedure requires only one application (submitted to EMEA) and one product evaluation before an authorisation can be granted to market the product throughout the EU. This is an obvious direct efficiency gain for industry, which may also benefit patients who could have faster access to new products. Officials interviewed for this research on EMEA claimed that centralisation is increasing, and that national authorities may have to specialise in particular areas more in the future than what is now the case. This signals a concern about avoiding duplication of work efforts and indicates that EMEA's development may be driven by efficiency concerns.

5.3.2 Sociological institutionalism

Sociological institutionalist analysis focuses on the convergence of norms and ideas, and on institutional borrowing. Thus, this theory hypothesises that the establishment of EMEA was legitimised by the fact that similar organisations already existed. I argue that this theory can contribute to our understanding of why an agency was established in this particular policy field. However, evidence to suggest that EMEA was modelled on another organisation has not been found.

As explained in section 5.2.2, the Commission (1990a: 14) remarked that many Member States had already delegated responsibilities for evaluation of medicinal products to independent agencies. The arguments used to

motivate this action at national state levels could be used to motivate the establishment of an agency at Community level also, the Commission argued. This clearly suggests that the establishment of an agency in the field at European level was legitimised by the prior existence of such agencies at Member State level.

By contrast, there is significant evidence to disprove the hypothesis that EMEA was modelled on another body. I have not come across any statements to suggest that the national authorities served as a model for EMEA. The model provided by the US Food and Drugs Administration was outright rejected. In the EP debates, Commissioner Bangemann stated that “[w]e do not wish in particular to imitate the example of the US Food and Drugs Administration” (European Parliament 1991a: 66). An MEP concerned that the EMEA establishment would lead to too much centralisation explicitly stated that EMEA “must not be a pharmaceutical ‘gosplan’ nor yet another US Food Administration” (European Parliament 1991: 177). EMEA displays some similarities with already existing Community Agencies with regards to the role of the agency’s Board and Director, which lends some support for their serving as models. However, EMEA’s structure and working practices, which are built up around the agency’s scientific committees, are very different. We can also note that one of EMEA’s committees was set up before the first two Community Agencies were set up in 1975.

5.3.3 Historical institutionalism

Historical institutionalism suggests that explanations for the establishment of EMEA must be sought in the historical context in which it was created. The

theory also emphasises the importance of specific events serving as critical junctures that determine future development. My research suggests that there is a link between the increasing harmonisation of authorisation procedures for medicines and the development of the single market programme.

The Commission clearly outlined the need for the free movement of medicinal products on the internal market, and that common authorisation procedures were needed for this purpose (see Commission 1990b: 1). Similarly, some MEPs believed that the industry would benefit from the internal market, particularly through having “structural obstacles” removed (European Parliament 1991: 55). A harmonised procedure was also regarded to be efficient and beneficial to exports (see European Parliament 1991b). In its description of the agency’s tasks, the Council also made explicit the link to the internal market. Nevertheless, the Council appeared to attribute somewhat less importance to the individual event of single market finalisation for agency establishment than the other institutions. Whereas the Commission and the EP emphasised the importance of this particular event by making explicit mention of it in the recitals to EMEA’s founding legislation, the Council chose not to.

Whilst acknowledging that there clearly is a link between EMEA and the single market, I argue that that the actual completion of the single market was not a critical juncture in the development of harmonised procedures. In this chapter, it has been shown that efforts to harmonise legislation in the field began in the 1960s. Thus, harmonisation of authorisation procedures for medicines has occurred in tandem with market development; it is not tied solely to the individual event of single market completion. In important respects, the establishment of EMEA was a formalisation of practices and

structures that were already in place. Judging by the emphasis placed on the link between the single market and the founding legislation of EMEA, the completion of the single market may explain the precise timing of this formalisation, however. As explained in section 5.2.8, the update of the EMEA legislation in the early 2000s was preceded by a long process of consultation, but the timing could be linked with a wish to resolve the matter before enlargement. It is reasonable to assume that the finalisation of the internal market had a similar influence on the process leading up to the establishment of EMEA.

5.4 Conclusion

This chapter has shown that none of the new institutionalist strands of theory is sufficient to explain on its own the establishment of this agency. Based on the findings of my research, I have argued that the agency's role in the marketing authorisation procedures for medicines are best explained by credible commitment concerns and wishes to increase the efficiency of procedures. In the decentralised procedure, the agency's role is mainly to ensure credible commitment by serving as a neutral arbiter in the event of conflict. The centralised procedure is clearly more efficient for pharmaceutical companies. EMEA's field of activity clearly requires advanced technical and scientific knowledge, and the founding legislation specifies demands on members of the agency's committees. At the same time we must note that EMEA was built on an existing committee structure, where expertise was already gathered. The fact that the establishment of EMEA was a formalisation of already existing structures suggests that gathering of expertise was not the driving factor behind

the decision to establish an agency. My research has indicated that the establishment of an agency to evaluate medicinal products may have been legitimised by the existence of agencies in the field at national levels, but I have not found evidence to suggest that EMEA was modelled on another body. Thus, in the case of EMEA, sociological institutionalism can explain the agency's policy area but not its institutional design. Finally, the harmonisation of authorisation procedures for medicines has developed in tandem with the building of the single market, and the precise timing of agency establishment may be linked to single market finalisation.

Tracing the establishment of the European Aviation Safety Agency (EASA)

6.1 Introduction

The European Aviation Safety Agency, EASA, was established during what can be referred to as the second large wave of agencification at the EU level by Regulation No 1592/2002. EASA, together with the European Maritime Safety Agency (EMSA) and the European Food Safety Agency (EFSA), were the first Community Agencies to be established by the codecision procedure (European Parliament 2001a: 42). In 2008, the agency's mandate was enhanced by Regulation No 216/2008, which repealed the founding legislation.³¹ As a *de jure* regulator, EASA is the most powerful of the case study agencies discussed in this thesis, and its mandate to charge fees gives it a significant degree of independence. It is also one of the largest Community Agencies.

In this chapter, I will trace and analyse the process leading up to the establishment of EASA, and reflect on the agency's role in governance today. Following the framework set out in chapter 2, the focus will be on timing of establishment, tasks, governance structures and financial arrangements.

Rational choice institutionalist theory holds that delegation takes place in order to lower political transaction costs (see Pollack 2003). The first hypothesis derived from this theory is that EASA was created because informed policy-making in the air safety field required advanced technical or scientific expertise, which could not be obtained within the Commission. The

³¹ As the focus is on the initial establishment of the agency, the 2002 legislation is the one to be considered in this chapter.

second rational choice institutionalist hypothesis to be explored is that EASA was created to ensure credible commitment to commonly agreed policies. The third hypothesis from this perspective is that EASA was established to increase efficiency. Throughout my research, I have found evidence to support each one of these hypotheses. Addressing first the technical expertise hypothesis, it is apparent that the agency is operating in a distinctly technical field. In addition, I argue that EASA deals with issues about which most EU decision-makers cannot be expected to have sophisticated knowledge, and people with the very specific technical knowledge needed cannot be recruited to the Commission. In the chapter, I argue that credible commitment concerns were important as demands were put forward to increase the agency's ability to act without direct political interference. The fact that regulatory tasks were delegated to the agency is further important evidence supporting this hypothesis. Finally, by making the agency responsible for decisions on technical details, time is freed up for the Commission, which leads to more efficiency. The analysis also shows that the previous arrangement for cooperation in the field was criticised precisely due to its lack of efficiency, and the establishment of EASA clearly addressed perceived short-comings of the previous system.

Sociological institutionalism puts its emphasis on the power and diffusion of ideas (McNamara 2002). According to this theory, delegation takes place when the ideas of decision-makers have converged around the ideal that delegation is the best solution to a problem, and it is often a result of institutional borrowing. At the time of EASA establishment, the Community Agency model was already in place. In this chapter I will provide evidence to suggest that EASA was modelled on previous agencies, and that its governance

structures were legitimised through harmonisation with other agencies. A model in the form an aviation safety agency also existed in the American Federal Aviation Authority, and I argue that this agency served as a model for EASA.

Historical institutionalism explains delegation through the analysis of critical junctures and path dependency. This theory puts significant emphasis on the specific context in which institutions are created and develop (see Thelen 1999). In European integration history it is an undisputed fact that the creation of the single market was a major event. Based on findings from documentary research in particular, I argue that the creation of EASA must be seen in connection to this event. By lessening the impact of national regulation in the civil aviation field through liberalisation of the sector, European leaders opened up for demands to re-regulate the sector at the EU level. This is not sufficient to state that the finalisation of the single market was a critical juncture in the historical institutionalist sense, however. Industry pressure was an important factor behind EASA establishment, and I argue that the fact that it would be more efficient for industry to deal with one European agency rather than several national agencies would remain regardless of the existence of the single market.

In this chapter, I will show that the establishment of EASA was a complex process which can be thoroughly explained only by a combination of the three theoretical approaches. The rational choice institutionalist hypotheses can explain the delegation of particular functions. The choice of institutional design is better explained by the sociological institutionalist hypothesis.

Finally, historical institutionalism can contribute to our understanding of the timing of EASA establishment.

6.2 Background and the establishment process

6.2.1 EASA – a brief presentation

In terms of direct policy influence, EASA is clearly the most powerful agency of the four case studies in this thesis. A core role of the agency is to implement common rules on civil aviation set out in the founding legislation. Other central tasks are to issue opinions and to draft legislation to be passed on to the Commission. Crucially, the Commission cannot change the content of certain technical rules without prior coordination with EASA. The agency also develops certification rules on airworthiness and environmental concerns, and is in charge of issuing and revoking such certifications. Although these rules are not mandatory, compliance is monitored by EASA or other entities that have been approved for this purpose and non-compliance could result in certificates' being revoked. Other tasks of the agency are to assist the Community and Member States in third country relations and to help Member States to fulfil their international obligations. Furthermore, EASA plays a role in aviation safety research and develops and finances its own studies. Any person (natural or legal) may appeal against decisions made by the agency; in first instance appeals are presented to the agency's Board of Appeal and then to the Court of Justice.

The Management Board of EASA consists of one representative per Member State and one Commission representative. They serve for a renewable

term of five years. The Board appoints the Director, over whom they exercise disciplinary authority, on proposal from the Commission, and they appoint the members of the Board of Appeal, who ought to be independent. The founding legislation states clearly that members of the Board of Appeal must not take part in appeal proceedings if they have personal interest in them (Regulation No 1592/2002, article 34). The Board adopts the agency's work programme after considering the opinion of the Commission and forwards it to the EP, the Member States, the Council and the Commission. The Board must also adopt an annual report on agency activity, which, following an amendment by Regulation No 1643/2003 must be forwarded to the EP, the Council, the Member States, the Commission and the Court of Auditors.

The agency has been growing in size. In August 2007, the agency employed around 300 staff (EASA 2007b), but in February 2009, this number had grown to some 400 staff (EASA 2009). The budget for 2007 was € 70.5 million, of which € 44.1 million was income from fees and charges and € 24 million was a subsidy from the European Community (EASA 2007c). Other income included third country contributions and income from administrative operations. Fees and charges are paid by those who use the agency's services, and cover the costs of issuing certifications and similar. The public money given to the agency pays for the employment of technical experts. These two lines are separated in the budget (Interview Commission Official 1).

6.2.2 Setting the context: importance of the single market and intergovernmental failure

International cooperation regarding minimum safety standards in civil aviation is not new. The Convention on International Civil Aviation, also known as the Chicago Convention, to which EU states have agreed to adhere, dates back to 1944. Cooperation at the European level, however, began in earnest in the early 1990s when discussions on air safety and how a stringent European-level certification system could be achieved were held. Initially, the idea was to set up “an air safety authority which would take the form of an international organisation” (Council of the European Union 2001: 65). In 1990, a number of aviation authorities of European states formed an informal organisation called Joint Aviation Authorities (JAA), and the year after, the Community agreed on some harmonisation in the civil aviation field.³² Eight years later, the Council made a decision which authorised the Commission “to open negotiations with the JAA States that are not members of the EU with a view to establishing an international organisation” (European Commission 2002: 3). According to the Commission, “numerous difficulties were encountered in pursuing this initiative” and, as a result of this, the Commission prepared the proposal to establish EASA after having been invited to do so by the Council (European Commission 2002: 3).

The perceived problems with the JAA arrangements are outlined in the explanatory memorandum to the Commission proposal on EASA establishment. One problem was that transparency and democratic control could not be ensured through this intergovernmental cooperation. A second

³² The relevant regulation is Council Regulation (EEC) No 3922/91.

related problem was that the rules worked out through JAA were not always compatible with Community law. Due to these issues, rules worked out by the JAA needed to be processed again through the Community legislative process and this was deemed too inefficient. According to the Commission, these problems persisted despite JAA efforts to make their working methods more efficient (European Commission 2000: 3). Thus, we can conclude that a wish to increase efficiency was a driving factor behind the establishment of EASA. Similarly, the Council (2001) drew attention to issues concerning the adoption of *binding* rules for affected parties, and argued that discussions had highlighted the problem of “lengthy ratification procedures”, which “were not calculated to meet demands from the industry” (Council of the European Union 2002: 65). There was a belief amongst decision-makers that a single body would be useful for harmonisation, and, according to a Commission official, agencies were “fashionable” at the time (Interview Commission Official 1). The fact that industry was in favour of EASA establishment was confirmed in interviews with representatives of the Commission, the EP and EASA itself (Interviews MEP 2; EASA Official; Commission Official 1).

My research provides ample evidence to suggest that the establishment of EASA must be linked to a perceived need for uniform rules in the air safety field and that this need can be linked to the finalisation of the internal market (see European Commission 2000: 3; European Parliament 2001a: 61). This link is made apparent in the first recital to the Commission’s proposal to establish EASA where the Commission emphasised the importance of “[a] high uniform level” of citizen and environmental protection and its contribution “to facilitating the free movement of goods, persons and organisations in the

internal market” (European Commission 2001: 1). These ideas also recur in the EP Debates of 4 September 2001 (European Parliament 2001b), and in the Council’s common position (Council of the European Union 2002). Moreover, the EP rapporteur argued that a liberalised market for air traffic, with the competitive pressures associated with this, may lead to compromises on safety, which would then need to be regulated at the Community level (European Parliament 2001b).

My research also shows that pressure to establish the agency came from outside, from the American aviation industry. In the EP report, it is stated that “[i]t is well known that the United States, among others, is very eager for an independent European body to be set up which could be an interlocutor for the Federal Aviation Agency (FAA)” (European Parliament 2001a: 61). When interviewed for this research project, an MEP who has carried out a substantial amount of work on EASA confirmed that the American air industry indeed had an interest in EASA creation (Interview MEP 2). There is also evidence to suggest that the sociological institutionalist hypothesis that agency creation often is a result institutional borrowing holds true with regards to the FAA and EASA. For instance, the Commission (2000: 3) wrote that “it was felt that a body comparable to the Federal Aviation Administration (FAA) in the United States should be created”. That FAA served as a model for EASA was confirmed by an official at EASA (Interview EASA Official).

To sum up, the single market demanded common rules in the European civil aviation sector, national authorities were deemed not adequate to deal with the new situation, and the aviation industries of Europe and America were

in favour of a European aviation safety agency. Agencies were fashionable and the FAA provided a model to emulate.

6.2.3 The proposal from the Commission

The Commission submitted its proposal in December 2000, and it was published in the *Official Journal* in May 2001.

The proposal indicates that the Commission was of the opinion that a high uniform aviation safety and environmental standard as well as common interpretation of the Chicago convention were of crucial importance to the single market. According to the Commission (2001), Member States were not in a position to achieve this to a satisfactory level, and, for this reason, Community action was motivated in the field. In line with the prediction of rational choice institutionalist theory, the Commission (2001, recitals 8 and 11) called for the creation of “a specialised expert body” and claimed that “[p]ublic interest requires the Agency to base its safety-related action solely on independent expertise”.

The Commission suggested that the agency be given the tasks to assist the Commission in preparation of rule proposals, to issue and revoke certifications, to monitor rules, to carry out research and to assist the Commission and Member States in relevant international relations. The proposed working methods, which ought to be characterised by transparency, are outlined in quite some detail. The fact that the Commission proposed highly technical regulatory tasks including the drafting of specific legislation supports the rational choice institutionalist hypotheses that EASA was created to lower transaction costs.

With regards to the governance structures of EASA, the Commission proposed an Administrative Board composed of one representative from the Commission, one representative from the European Parliament and one representative from each Member State. It appears that the Commission was concerned to secure influence over the Board. For instance, the Commission suggested that the Board be responsible for the adoption of EASA's work programme but only after the programme had been approved by the Commission. It was also suggested that the Board would be in charge of appointing the Director on proposal from the Commission and the members of the Board of Appeal from a list of suitable candidates drawn up by the Commission.

The Commission proposed that the agency's budget be composed of contributions from the Community and third European countries, income from fees paid by those who use the agency's certification services and charges for services provided by the agency in the fields of training, publications and similar. In the recitals, the Commission indicated that any subsidies coming from the Community budget would have to go through the usual Community budgetary procedure. However, in article 50 of the proposal the Commission wrote that the Board would be responsible for granting the Director budgetary discharge on the European Parliament's recommendations.

6.2.4 The European Parliament – the first reading

In December 2000, the Commission submitted its proposal to the European Parliament. The Committee on Regional Policy, Transport and Tourism was assigned the role of committee responsible, and Ingo Schmitt of the EPP-ED

group served as rapporteur. A number of other committees were also asked to deliver their opinions. After having been considered at several meetings in committee, the EP report was discussed and adopted in plenum in September 2001.³³

Documentation and debates from the European Parliament suggest that in principle most MEPs were in favour of further integration in the civil aviation sector.³⁴ Indeed, the EP report stated that the creation of EASA was compliant with “a wish first expressed by the EP several years ago” (European Parliament 2001a: 36). As the EP shared the opinion of the Commission and the Council that the JAA arrangements were inefficient, it is hardly surprising that the EP adopted an amendment stressing the need to avoid duplication and emphasised the need to clearly outline the scope of agency activity (European Parliament 2001a: 9). This suggests that a wish to increase efficiency was an important factor behind EP support for the agency. There is, however, also evidence of institutional borrowing playing an important part. In the debates of 4 September 2001, several speakers made reference to the American FAA and the possibility that EASA would become a similar body.

The European Commission is frequently cited as a driver of integration. In the case of EASA, however, it is evident that the EP proposed to take integration further than the Commission. The EP rapporteur stated that most of the members in his EP committee were “in favour of extending the Agency’s areas of responsibility” (European Parliament 2001a: 38). For instance, the EP suggested that EASA take on a more prominent role in assisting Member States

³³ Not all of Schmitt’s proposed amendments were adopted, but as the fallen amendments were not of direct relevance to the analysis conducted in this thesis detailed information about these have been omitted.

³⁴ It must, however, be noted that everybody was not happy with the proposal.

and the Community in relations with third countries. More significantly, the EP voted to extend the agency's mandate to include the drawing up of necessary measures to implement the regulation where the Commission originally proposed that the agency was to assist the Commission (European Parliament 2001a: 15). Recalling that my theoretical framework stipulates that delegation of the task to draft specific legislation is evidence in favour of the rational choice institutionalist efficiency hypothesis, I argue that this is yet another example of the EP's concern with efficiency. In contrast to the credible commitment hypothesis, the EP did not appear to be having any strong desire to insulate decisions from political opinion. Instead, we can note that the EP deemed it necessary that the agency be obliged to consult widely, which would include sampling the opinions of employee and user organisations (European Parliament 2001a: 27). Whilst the EP wished to extend the agency's mandate, it also showed awareness of the ECJ ruling that "a delegating authority may not confer upon the authority receiving the delegation powers different from those which it has itself received under the Treaty" (Meroni/High Authority, Case 9/56 ECR [1957-58] p. 133, see European Parliament 2001b).

As to the governance structure of the agency, the European Parliament (2001a: 21) wished to see a Board made up of one representative per Member State and one member from the Commission (2001a: 21). The EP wanted to grant the agency more independence than did the Commission (see European Parliament 2001a: 38; European Parliament 2001b). For instance, Schmitt called for "a stronger remit" for the Board (European Parliament 2001b), and it was suggested that the Commission's proposed right to propose members to EASA's Boards of Appeal be dropped in order to reinforce the independence

of the agency (European Parliament 2001a: 24). Voices were also heard arguing for the importance of expertise as the grounds for appointment, which supports the rational choice institutionalist idea that agency creation is supported as a means to ensure technical expertise (European Parliament 2001b). Here it is also interesting to note that the EP gave up its own right to appoint a Board member with the justification that it would be “in line with the division of powers” (European Parliament 2001a: 22). Overall, it would appear that the EP was more concerned about securing its supervisory powers than having a role in the governance of the agency.³⁵ Another point to note about the EP’s views on the structure of EASA is that the EP emphasised the importance of agency structure being transparent to the public, and argued that a harmonisation of agency structures would be needed to ensure this (European Parliament 2001a: 64; see European Parliament 2001b, statement by Muermeling). This, I argue, is evidence that there was a concern with institutional borrowing in the sense that the EP wanted European agencies to display similar structures regardless of their field of activity.

The EP’s discussions on the agency’s financial arrangements focused on the issue of control. The EP was careful to ensure some control over the budget and argued that decentralised agencies must follow “*the general budgetary procedures*” (European Parliament 2001a: 7). The fact that a part of the agency’s budget would come from an EC subsidy was seen as a means to achieve political control. Moreover, the EP stated that it must be beyond doubt

³⁵ Evidence to support this can be found in amendments proposing that the EP should have the right to hear the Director and the emphasis on a right of the EP to be kept informed about the effectiveness of civil aviation regulation (see European Parliament 2001a: 17; 23). Following on from this, the EP also wished to see clearer provisions to ensure transparency, insisting that EASA research be published and that the agency’s work programme be available in all official languages (European Parliament 2001a: 17; 19).

that EASA and its staff could be subjected to OLAF checks, something which was not made explicit in the proposal from the Commission.

6.2.5 The Council's common position

In December 2001, the Council adopted a common position on the EASA establishment legislation. Whilst agreeing with the objectives of the Commission's proposal, the Council reworked the Commission's text to quite some extent.³⁶ When drafting its common position, the Council claimed to have considered the EP amendments from the first reading as well as the opinion of the EESC (see Council of the European Union 2001: 66).³⁷

The Council wished to entrust more tasks and powers to the agency than originally proposed by the Commission. For instance, the Council went further in its emphasis on environmental concerns, and gave the agency a larger role to play in assisting Member States with their international obligations (Council of the European Union 2001: 46; 52). In agreement with the EP, the Council was also in favour of giving the agency the right to issue certificates, which shows that, in this instance, it was the co-legislators which made decisions to make EASA a *de jure* regulatory agency. The Commission's statement was much more vague on this issue.

The Council wanted to see a Board consisting of representatives from the Commission and from Member States (Council of the European Union 2001: 54). The Council suggestion was that the Board would be in charge of

³⁶ When comparing the two documents it becomes apparent that the Council common position is much more detailed, in particular with regards to definitions, than the Commission's original proposal.

³⁷ It was also noted that the Committee of the Regions had been consulted but that it did not deliver an opinion (Council of the European Union 2001: 65).

appointing the Director from a list of candidates drawn up by the Commission, not on proposal from the Commission as the Commission suggested (Council of the European Union 2001: 55). Furthermore, the Council suggested that “merit and documented competence and experience relevant for civil aviation” were to be grounds for the Director’s appointment (Council of the European Union 2001: 55), which suggests that the Council were envisaging the agency’s becoming a centre of expertise as suggested by rational choice institutionalist theory.

The Council agreed with the other institutions that the agency’s budget ought to consist of fees paid by users, by a subsidy from the Community budget and contributions from third countries (Council of the European Union 2001: 58). The Council held the opinion that budgetary discharge should be granted to the Director by the EP (Council of the European Union 2001: 58). With regards to combating fraud, the Council was in agreement with the EP.

6.2.6 The European Parliament – the second reading

The Council’s common position was received by the EP in January 2002, and after discussions and debates in committee, the amended common position was adopted in April the same year (European Parliament 2002a).

Throughout the second reading proceedings, the key objective of ensuring a high, uniform level of safety in civil aviation was emphasised, which could be seen as evidence in support of a credible commitment concern being an important motive behind agency establishment. For instance, the EP rapporteur claimed that uniform standards would “promot[e] and enhanc[e] the Community’s position in the world, that is, with especial reference to the

American situation” (European Parliament 2002a). Statements made in the debates also pointed to the benefit of EASA establishment on the aviation industry (European Parliament 2002b). A point which makes EASA stand out from the majority of Community Agencies is that the Commission, which otherwise holds the sole right of legislative initiative, cannot change technical rules in the agency’s field of expertise without coordinating with the agency first. This aspect of EASA was determined during the EP’s second reading (European Parliament 2002a: 10).

In its discussions on the governance structure of the agency, the EP focused on the level of agency independence, in particular from the Commission; several speakers in the debates emphasised this point. Moreover, it was suggested that the position of the Director be strengthened and that s/he would be given the task of proposing the other Directors, who would then be appointed by the Board (European Parliament 2002b: 11). It was also suggested that the Board be given the power to dismiss the Director (European Parliament 2002b: 12).

The issues of the agency’s financial arrangements and budget did not attract much attention. However, the Committee on Budgetary Control was disappointed that its ideas on how to budget EASA’s income were not approved (European Parliament 2002a).

6.2.7 The opinion of the Commission and Council approval

The Commission agreed to all the amendments from the EP’s second reading (see European Commission 2002: 3). All changes related to the authority of the

Director were readily accepted.³⁸ Whilst eventually agreeing to amendments strengthening agency autonomy and increasing the agency's influence over regulation, the Commission made references to its right of initiative guaranteed by the Treaties. In the EP Debates of 9 April 2002, the Commission representative De Palacio explained that his institution had "several reservations with regard to any wording that could interfere with its right of initiative" (European Parliament 2002a). This gives support to the widely accepted statement that the Commission guard this right with jealousy. The Transport/Telecommunications constellation of the Council of Ministers approved the EP's amendments to the common position at a meeting in June 2002.³⁹

6.2.8 The European Economic and Social Committee

The EESC was consulted in December 2000 and adopted its opinion in May 2001.

Overall, the EESC was positive to EASA establishment. The committee agreed with the underlying principles and the idea that collective action would be beneficial. The EESC also had a number of reservations, however.

Most notably, the EESC wanted to give the agency more independence with regards to its "specific technical rulemaking powers" and "technical implementing powers" (European Economic and Social Committee 2001: 44).

In the proposal, the EESC argued, EASA was given a role in preparing legislation but it would be in accordance with Commission recommendations.

³⁸ Already in the debates at the time of the EP's first reading, De Palacio of the Commission declared that his institution would agree to amendments on this issue (see European Parliament 2001b).

³⁹ The item was listed as an 'A' item.

According to the EESC, the agency ought to be given the right to refuse to prepare legislation that it regarded as unsound from an aviation safety point of view. On the other hand, the EESC believed that EASA's role in international relations should be simply to assist the Commission. Overall, this suggests that the EESC wanted the agency to focus on key technical tasks, and that it ought to have independence from political actors in doing so.

In terms of management, the committee thought that whilst the proposal stressed the independence of the agency's Director from governments, the implications of the proposal would be a Director rather heavily dependent on the Commission. Furthermore, the EESC thought that aviation safety expertise should be more clearly emphasised as a criterion for employment. This is an indication that the committee envisaged EASA as a centre of expertise as hypothesised by rational choice institutionalist theory. At the same time, however, the EESC thought that increased involvement of stakeholders in aspects of the agency's work would be beneficial.

The EESC did not comment on the agency's budget and financial arrangements.

6.2.9 EASA today: finding its role in governance

The study of documents and debates surrounding EASA establishment indicated that there were ideas of extending the scope of EASA activity at a later stage. This happened in 2008, when the founding legislation was repealed

and replaced by Regulation (EC) No 216/2008. The agency is now responsible for certification in a wider range of fields than was initially the case.⁴⁰

Safety is the prime concern of the agency (see Interview Commission Official 1). The agency's tasks are of a highly technical nature, which requires specialist knowledge. According to an official at EASA, these tasks cannot be done by generalists in Brussels, and the Commission is not in a position to change this by recruiting personnel with the technical knowledge required (Interview EASA Official). As regards the agency's tasks, interviews with people in possession of expert knowledge of EASA clarified significant differences as to the agency's role in drafting legislation versus the agency's role in certification. A Commission official I interviewed about EASA maintained that although the agency drafts regulations, the right of legislative initiative is still with the Commission (Interview Commission Official 1). Having said that, the same official also mentioned that, in most instances, the Commission follows EASA's ideas. This was confirmed by an official at EASA and an MEP with significant insight into the workings of the agency (Interviews EASA Official; MEP 2). As regards certification on the other hand, the Commission has never had such a role, Commission Official 1 explained. Prior to EASA establishment, the responsibility for certification rested with Member State authorities. These still have some responsibilities and carry out tasks in situations where proximity and knowledge of the local language are important. The agency's role in issuing sanctions as a consequence of non-compliance follows the same logic. The agency carries out inspections in Member States to verify if laws are followed. If not, the agency reports to the

⁴⁰ Initially the agency was responsible for the certification of aeronautical products. The mandate to issue certifications has since been extended to include pilots and their training (see Regulation No 1592/2002; Regulation No 216/2008)

Commission which can then decide to take the Member State to the Court of Justice. In case of non-compliance with certificates, on the other hand, the agency has freedom to act on its own, for instance by withdrawing the certificate.

There appear to be some differences in opinion between the Commission and EASA as regards how much the agency should do. According to Commission Official 1, EASA is a proactive agency with committed staff, but, as a consequence, the agency has a tendency to plan too many tasks. Agencies wish to grow and do things even better, Commission Official 1 continued. An official from EASA mentioned that EASA wants a larger role but thought that maybe the Commission has other considerations (Interview EASA Official).

My study of the process leading up to establishment shows that the Commission's level of influence over the agency was subject to debate. An official at EASA believed that the Commission takes a strong role, whereas an MEP interviewed for this project seemed to be of the opinion that the relationship is rather balanced (Interviews EASA Official; MEP 2). The Commission would like the agency's Board to be more active at times (Interview Commission Official 1). In an interview, Commission Official 1 indicated that that some Member State representatives, usually those from states with large aviation industries, tend to be more active than others.

The budget has been a somewhat problematic issue for the agency. The reason for this is that it has been difficult to find the right level for the fees and charges. Initially, the fees and charges were set too low (Interview Commission Official 1). As a result, the subsidy from the EC had to be used to cover agency

tasks it was not meant to cover, and then there was not enough money to cover the core tasks that ought to have been covered by the EC subsidy. This situation has since been remedied. At the moment, the Commission's view is that the agency enjoys no budgetary luxury, but the resources should be sufficient to cover the core safety tasks (Interview Commission Official 1). At the moment, the agency receives less money than it requests. There are MEPs who wish to see a larger budget for EASA as it is believed that it would improve the situation for small aviation companies (see Interview MEP 2). It is believed that interaction with EASA is easier for larger companies, in terms of coping with fees but also because of language issues. An EASA official mentioned that large industry is happy with EASA whereas small industry is less contented (Interview EASA Official).

Control over EASA is a delicate matter. The agency is subjected to the same type of official control mechanisms as other Community Agencies. However, an official at the Commission thought that daily contact was the best control mechanism (Interview Commission Official 1). The wider public is able to follow many of EASA's activities via the agency's extensive web site. The MEP I interview about EASA said that EASA is more transparent than the Council, and it is difficult to argue with that (Interview MEP 2). As stressed throughout this paper, a significant part of EASA's work concerns the certification of components manufactured by aviation industry. There are, therefore, instances where information must be kept confidential (Interview Commission Official 1). Industry espionage and related activities could be reasons for this. As is the case with other Community Agencies, the extensive regulation around financial matters that must be followed is regarded as a

problem. An EASA official described the rules as a “nightmare” (Interview EASA Official). The Commission is sympathetic to this view, and a representative confirmed that the rules are widely regarded as heavy (Interview Commission Official 1).

6.3 Discussion

EASA, the prime concern of which is to ensure a high level of safety in the civil aviation field, is the most powerful of the Community Agencies included in this study. Its responsibility for certification gives the agency crucial influence over the aviation market, and its right to draft legislation places it in a unique position to influence Community policy. EASA is also one of the first Community Agencies to have been established by the codecision procedure. Established in 2002, its founding legislation has already been repealed and its mandate extended. For each set of changes there is, and will be, another motivation. The focus of this discussion, as of the whole thesis, is on the initial establishment of the agency, however.

In this chapter, I have traced the process leading up to the establishment of EASA and reflected on the agency’s role in governance today. In the following sections, I will discuss the findings in relation to the theoretical framework outlined in chapter 2.

6.3.1 Rational choice institutionalist theory

Rational choice institutionalist theory is frequently used to explain the establishment of regulatory agencies. This theory would suggest that EASA

was created to lower political transaction costs, which could be done in three ways. First, the agency could serve as a centre of expertise. Second, the agency could be a means to ensure credible commitment. Third, the agency could have been established as a means to increase efficiency. Throughout my research on EASA, I have found ample evidence to support each one of these three hypotheses, and no evidence to contradict them.

Aviation safety is a highly technical field, in which advanced technical and scientific knowledge is essential for informed decision-making. When reading the founding legislation of EASA, the technical nature of the agency's field of operation becomes even more apparent. The tasks delegated to the agency, which include drawing up certification rules on airworthiness and drafting technical legislation, are of a highly technical nature. Moreover, the legislation contains a large number of references to technical details. Given the generalist nature of the Commission, it is clear that the Commission cannot recruit and retain the level of expertise required for these tasks within its administration. As mentioned in section 6.2.9, this point was emphasised by an official at EASA, and a representative of the Commission stated that the Commission had never had certification tasks. The Council's suggestion to include more precise requirements for the post of Director also serves as evidence in favour of this hypothesis. Previously, and to an extent nowadays, expertise can be found at Member State level. After EASA establishment, however, advanced specialist technical expertise was gathered within one body for the entire EU. This creates synergies and provides a critical mass of expertise that could not be replicated by an individual Member State. The Commission's proposal refers specifically to the agency as a specialist body,

and the agency's unique role as a centre of expertise is further demonstrated by the fact that the Commission cannot change details of technical regulations in the field without prior coordination with EASA.

Strong support for the credible commitment hypothesis can also be found within my study. The fact that regulatory tasks have been delegated to the agency is the most notable hard evidence in favour of this hypothesis. Throughout the establishment process, the EP, the Council and the EESC also emphasised the importance of agency independence from the Commission. For instance, we can recall the EESC calls for increased agency independence with regards to its "specific technical rulemaking powers" (European Economic and Social Committee 2001: 44). The EESC also questioned whether "the current institutional framework could not accommodate a more independent position for EASA" (European Economic and Social Committee 2001: 40-41). The idea that EASA could play a role in promoting the EU's credibility internationally became apparent in the EP debates at the time of its second reading when the EP rapporteur stated that uniform standards would "promot[e] and enhanc[e] the Community's position in the world, that is, with especial reference to the American situation" (European Parliament 2002a).

The fact that EASA has been given the task of drafting specific legislation serves as hard evidence in favour of the efficiency hypothesis. As EASA drafts the technical details of regulations, the Commission could focus its work elsewhere. Moreover, as EASA has the expertise in house, the agency needs to spend fewer resources gathering the required information than the Commission would need to do. As to certification, it is easy to see why a central European agency would be more efficient. Aviation companies, which

were some of the actors pushing hard for EASA establishment, can now turn to one body rather than twenty-seven different ones, which is clearly more efficient from their point of view. The fact that EASA establishment would be in the interest of industry was alluded to in the EP debates in April 2002. Further support for efficiency as a driver towards EASA creation can be found in the fact that the previous JAA arrangements were widely criticised precisely for their lack of efficiency.

6.3.2 Sociological institutionalist theory

From sociological institutionalism, I deduced the hypothesis that EASA's establishment was a result of institutional borrowing, which resulted from social processes legitimising the creation of this type of body. My research suggests that this hypothesis can explain the institutional design of the agency.

At first, European level cooperation in the air safety field was of an intergovernmental nature, but this institutional form was found wanting. At the time of EASA establishment there were already a significant number of Community Agencies in place on which the new agency could be modelled. In the process leading up to EASA establishment, the EP argued that a harmonisation of agency structures would make them more transparent to the public (European Parliament 2001a: 64). This argument points to a vision that the choice of a particular institutional form is legitimised if it is a replication of an already existing form. The governance structures of EASA are indeed very similar, and often even identical to other Community Agencies established around the same time. In addition, a representative of the Commission mentioned that agencies were “fashionable” at this time (Interview

Commission Official 1). The influence of the American FAA must also be taken into account, and references to this agency were made throughout the EASA establishment process. The aviation industry in particular was keen to see a European authority operating along similar lines as the American authority. Thus, I argue that the idea of having a regulatory agency in the civil aviation field was borrowed from America, and the Community Agency model, developed within the EC/EU provided a model for a specific European body.

6.3.3 Historical institutionalist theory

Historical institutionalism leads to the hypothesis that the establishment of EASA can be explained through careful consideration of the historical context in which it was created. My research provides some support for this.

First we can note that European-level cooperation on air safety began in the early 1990s, which coincides with the final steps towards single market creation. The link between the establishment of EASA and the finalisation of the single market is then made explicit on several occasions throughout the establishment process. For instance, as mentioned in section 6.2.2, the Commission (2001: 1) clearly spelt out the connection between “[a] high uniform level” of citizen and environmental protection, which EASA was created to achieve in the air safety field, and the facilitation of “the free movement of goods, persons and organisations in the internal market”. The same idea was expressed in the Council’s common position. Furthermore, an important aspect of the single market programme was to remove barriers to trade, including “national rules that impede economic exchange” (Young 2005: 102). In short, the finalisation of the single market led to de-regulation.

There is evidence to suggest that de-regulation of the air traffic market raised concerns about potential compromises on safety. To prevent this from happening, the EP rapporteur called for re-regulation at the European level in the EP debates at the time of the first reading. At the same time, we must not underestimate the importance of industry pressure as an explanatory factor behind EASA. The reason industry pushed for the establishment of a European agency was that there are obvious efficiency gains from having to engage with one European level agency rather than several national agencies. This benefit would remain regardless of the existence of the internal market; for this reason we can assume that industry could have influenced EU decision-makers to establish the agency even without the single market. However, as industry most likely was instrumental in lobbying for the creation of the single market itself, it is not straightforward to disentangle the various arguments.

6.4 Conclusion

The establishment of EASA has proved to be a complex process where each of the new institutionalist strands of theory can contribute to our understanding by explaining different aspects of agency establishment.

To explain the tasks delegated to the agency, my research has clearly pointed to the importance of functional needs as emphasised by rational choice institutionalist theory. Due to the highly specialist knowledge required, there was no, or at least very little, opportunity for the Commission to perform the tasks the agency was set up to do. Throughout the establishment process, there was a clear emphasis on the need for agency independence. The Council, the EP and the EESC all voted to strengthen the agency's role as an independent

regulator, which indicates a wish to insulate regulatory decisions from direct political pressure. The previously tried intergovernmental cooperation was found inefficient, and one reason for this was that there was no straightforward procedure to create binding rules.

Sociological institutionalism is better suited to explaining the choice of the agency form. I have argued that previous Community Agencies served as a model for a European level body and that the idea to create an agency in the air safety field can be traced to the US.

Finally, the contribution of historical institutionalism can help us explain the timing of agency establishment. De-regulation at national levels associated with the internal market made some actors call for re-regulation at the European level. At the same time, it must be noted that industry, due to the expected efficiency gains of having to engage with one agency rather than several, most likely would have pushed for the establishment of the agency regardless of the existence of the single market.

Tracing the establishment of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)

7.1 Introduction

The European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) was created in 2004 via the consultation procedure. The founding legislation is Council Regulation No 2007/2004. FRONTEX is an advisory agency, but its area of activity makes it stand out from the other advisory agencies. As issues related to border control are not only strongly associated with the nation state but also politically very sensitive, the fact that the EU has created an agency in the field is a significant milestone in the development of European governance. The speed at which border management cooperation was institutionalised is equally remarkable. The EU took a decision to institutionalise cooperation on border management through the establishment of FRONTEX merely a few years after immigration and asylum issues were transferred to the first pillar in the Treaty of Amsterdam and became subject to the Community method. Despite the close association between border management issues and the nation state, and the highly contentious nature of the policy area, the legislative process was speedy. It took less than a year from the presentation of the Commission proposal to the production of the final legislative text.

In this chapter, I will trace and analyse the process leading up to the establishment of FRONTEX, and reflect on the agency's current role in

governance. Following the theoretical framework set out in chapter 2, the focus will be on timing of establishment, tasks, governance structures and resources, all of which are factors new public management literature has identified as significant for an agency's role in policy formation.

From rational choice institutionalism I deduced the hypotheses that FRONTEX was established in order to lower political transaction costs by serving as a centre of expertise, ensuring credible commitment and contributing to increased efficiency (see Epstein and O'Halloran 1999; Pollack 2003). Out of these three hypotheses, I argue that the hypothesis pointing to efficiency concerns holds the most significant explanatory value with regards to FRONTEX. My research shows that dissatisfaction with the previous system for cooperation in the border management field (SCIFA+), and its perceived inefficiency was an important source of motivation for the creation of an agency in the field. There is significantly less support for the other rational choice institutionalist hypotheses, i.e. that FRONTEX was created to gather technical expertise or to ensure credible commitment. Importantly, FRONTEX does not operate in a technical policy area. Whilst there are no doubt technical issues related to border control, decisions on who may cross a border and how are normative. The current mandate of FRONTEX puts emphasis on the agency's role in coordinating Member State activities, which indicates that the role of the agency is not to become a centre where all relevant expertise is gathered. The agency is also dependent on Member States to contribute resources to the agency's operations, which means that the agency has no, or very limited means, of upholding credible commitment to any commonly agreed policies.

The sociological institutionalist idea that agency establishment can be explained by institutional borrowing, which occurs as a result of the formation of a normative consensus about the desirability of this particular institutional form, has explanatory value for the establishment of FRONTEX. By the time FRONTEX was established, Community Agencies had become established as an institutional form, and my research revealed hard evidence in the form of direct references to previous agencies serving as models.

Historical institutionalism seeks explanations for the establishment and development of institutions in the historical context. As regards FRONTEX, this chapter shows that the historical context plays a crucial role in explaining the establishment of the agency. Based on available sources, I argue that the planned EU enlargement to Central and Eastern Europe led to widespread concern about the protection of the EU's new external borders, which was further fuelled by tragic incidents involving refugees seeking to reach the southern coasts of Europe. The transfer of immigration and asylum to the first pillar opened up the possibility to establish a Community Agency in the field.

In the chapter, I show that the hypotheses are not mutually exclusive, and that several explanations are appropriate. Whereas the rational choice institutionalist efficiency hypothesis could explain the agency's coordination function, the sociological institutionalist hypothesis can explain the choice of the Community Agency form, and historical institutionalism can explain the timing of agency establishment.

7.2 Background and the establishment process

7.2.1 FRONTEX – a brief presentation

The control of the EU's external borders has always been the responsibility of Member States, and the establishment of FRONTEX does not change this; the agency's role is to ensure that present and future management of the external borders runs as smoothly as possible by coordinating the Member States' implementation of Community law on border management. The agency may cooperate with Europol, international organisations and third country authorities with responsibility in the relevant field. Risk analysis is at heart of the agency's activities, which includes the task of following up relevant research. Importantly, the agency also plays a role in assisting Member States in a number of ways. For instance, the agency may help Member States with coordination of operational cooperation (including cooperation with third countries) and with training of border guards. In particular, the agency is to "assist Member States in circumstances requiring increased technical and operational assistance at external borders" (Council Regulation No 2007/2004, article 2). Member States can propose joint operations and pilot projects, but it is FRONTEX's task to evaluate, approve and coordinate such endeavours. What has proved to be more controversial is that FRONTEX has also been given the task to "provide Member States with the necessary support in organising joint return operations" (Council Regulation 2007/2004, article 2), which includes a role in identifying "best practices on the acquisition of travel documents and the removal of illegally present third-country nationals" (Council Regulation 2007/2004, article 9).

The Management Board of FRONTEX is composed of two Commission representatives, and one representative per Member State excluding the United Kingdom and Ireland, which only have observer status due to their not taking part in the Schengen agreement (EC No 2007/2004, article 21). The founding legislation also makes some provisions for the inclusion of representatives from non-EU countries involved with the Schengen agreement. Board members serve for a term of four years, which is once renewable. It is notable that the founding legislation does not specify on what grounds these Board members are selected. The Board appoints the Director based on a list of candidates drawn up by the Commission following advertising of the post in the *Official Journal* amongst other places. Article 26 of the founding legislation specifies that the Director is to be appointed on the basis of merit, documented experience of management and administration, and relevant experience for the agency's field of activity. The Board holds disciplinary authority over the Director (Council Regulation No 2007/2004, article 20). Another of the Board's duties is to produce a general report on the agency's activities each year, and forward it to the EP, the Council, the Commission, the Court of Auditors and the European Economic and Social Committee. It must also be made public.

In August 2007, FRONTEX had 78 employees but there were plans to increase the number of staff to around 140 people by the end of the year (FRONTEX 2007a). Initially, the agency experienced problems with recruitment, which were attributed to the lower wages offered in Poland and the unclear legal status of agency staff (Easton 2007). However, the agency has

managed to grow substantially. According to the agency's web site, the agency now employs 203 people (FRONTEX 2009).

Originally, the budget for 2007 was about € 22 million (FRONTEX 2007b). However, following amendments increasing the subsidy from the European Community the agency had a budget of about € 42 million in 2007. The subsidy from the Community was increased to about € 41 million (to be compared with about € 21 million, which was the original subsidy). The other sources of revenue (contributions from the Schengen associated countries € 400 000, contributions from the UK and Ireland € 400 000 and voluntary contributions from Member States and Schengen associated countries € 200 000) have remained the same.

7.2.2 Setting the context: EU enlargement and migration concerns

The Maastricht Treaty introduced formalised intergovernmental cooperation on justice and home affairs issues. When visa, asylum and immigration issues were transferred to the first pillar and came under the Community method at the Treaty of Amsterdam, the scope for cooperation changed fundamentally. Changing institutional conditions for cooperation coincided with Justice and Home Affairs issues, particularly irregular immigration, becoming hot topics of debate at EU-level. The planned enlargement to Central and Eastern Europe, Malta and Cyprus naturally played a crucial role in raising the profile of these issues as enlargement was widely perceived to result in the EU's having more "vulnerable" external borders. The fact that many of these new Member States also had lower institutional capacity than existing Member States raised further

concerns about what is often referred to as “illegal” or “irregular” immigration. In this context, “illegal”/“irregular” immigration is to be understood as the migration to the EU of non-EU citizens who do not fulfil legally stipulated criteria for entry, who do not cross the border at established points of crossing, and who often lack identification documents.⁴¹

Malta, which was one of the states to join the EU in 2004, had seen the arrival of significant numbers of irregular immigrants for some time. In an interview a Maltese official informed me that the country began to see even larger numbers of so-called “boat people” in the early 2000s, and, as this inevitably put strains on the country’s resources, it was felt that a quick solution was needed (Interview EP Official 1). However, it must be remembered that “old” Member States, such as Italy and Spain, also experienced irregular immigration, and that authorities even here perceived this to be problematic (see Smith 2003; Hughes 2002). Around the same time, the wider public all over Europe became increasingly aware of irregular immigration and the suffering of the refugees involved due to incidents such as *The Monica* where nearly 1000 refugees had to be rescued off the ship and taken to Sicily (BBC News Online 2002). It is thus not surprising that immigration was top of the agenda for the 1999 Tampere Council as well as the 2002 Seville Council.

The explanatory memorandum to the Commission (2003a) proposal on FRONTEX establishment confirms that the idea of coordinating Member State activity in the field of border control was not new. In the previous year, the Commission presented a Communication in which it argued in favour of the

⁴¹ In this thesis, the less loaded terms ‘irregular immigration’ and ‘irregular migrants’ will be used.

setting up of an “External borders practitioners’ common unit” (the Common Unit) to the Council and the EP. This idea was quickly taken up by the Council, which agreed to set up the Common Unit within the framework of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). Soon also national heads of border control were included and the SCIFA+ working group was created. The Common Unit was to take the lead in common policy and the co-ordination and control of operational projects.

However, there appears to have been some dissatisfaction with the functioning of the Common Unit, a major shortcoming of which arguably was “the lack of effective operational co-ordination” (European Commission 2003a: 38). The arrangements at the time were also criticised for their lack of “an adequate legal framework”, guidelines for implementation, evaluation and monitoring mechanisms and clearly defined objective targets (European Commission 2003a: 38). An additional problem with the SCIFA+ arrangement was the reliance on project funding (Interviews FRONTEX Official 1; FRONTEX Official 2; Commission Official 3). Having to acquire funding separately for each initiative made it difficult to plan ahead, and cooperation was more of an *ad hoc* business than a planned strategy. At times, a Commission official said, projects that could have reinforced each other instead competed for the same funding (Interview Commission Official 3). The view that cooperation on irregular immigration between Member States was (and is) needed was endorsed by all those I interviewed about FRONTEX, and, although it was acknowledged that there still is no absolute consensus as to what this cooperation should look like, the interviewees gave me the

impression that there was widespread awareness of the problems with the pre-FRONTEX arrangements.

In June 2003, the Commission presented a communication to the Council and the EP “on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents” (European Commission 2003b). In this communication, the Commission argued that limitations of the Common Unit with regards to the co-ordination and management of joint operations had been demonstrated, and that “the more operational tasks could be entrusted to a new permanent Community structure” (European Commission 2003b: 7-8). The Council Presidency, which at the time was held by Greece, had a similar view and pleaded for an examination of the need for a new “institutional structure” (European Commission 2003a: 2). More specifically, the representatives of the Greek Presidency drew attention to what they perceived to be an evident absence of “a monitoring mechanism and of a method for independent and thorough evaluation as well as for the processing and utilization of results” with regards to joint operations and pilot projects (European Commission 2003a: 2). The European Council endorsed these views to some extent. In June 2003, it advocated a “reinforcement of the Common Unit” and called for the Commission to perform examinations of the need to establish new institutional structures and mechanisms to improve cooperation in operational matters related to border management (European Commission 2003a: 3). It appears that the Commission began work on a proposal to create an agency at about this time, because in the explanatory memorandum to the proposal on FRONTEX establishment it is stated that the European Council at its meeting

on 16th-17th of October 2003 welcomed the intention by the Commission to put forward a proposal on the establishment of an agency. Indeed, several of the people interviewed about FRONTEX confirmed that the initiative for the agency came from Member States as well as from the Commission (Interviews Commission Official 3; FRONTEX Official 1; FRONTEX Official 2).

7.2.3 The proposal from the Commission

In November 2003, the Commission tabled its proposal for the establishment of FRONTEX. The proposal was prepared by the Directorate General for Justice, Freedom and Security, and the intention was “to meet [the] invitation of the European Council” (European Commission 2003a: 3).

In the proposal the Commission stated that “[t]he main objective of Community policy in the field of the EU external borders is to create an integrated border management, which would ensure a high and uniform level of control and surveillance, an essential prerequisite for an area of freedom, security and justice” (European Commission 2003a: 4). The Commission’s idea was that FRONTEX fits into this by working “to improve the operational co-operation between Member States at the external borders and to promote solidarity in this field and equivalent level of protection of all the external borders of the EU” (European Commission 2003a: 36). It was also believed that the establishment of an agency would “lead to increased visibility for the management of external borders in the public” (European Commission 2003a: 7). There is a clear emphasis on the agency as a means to increased efficiency, which supports the rational choice institutionalist hypothesis that agencies are created to lower transaction costs.

The proposed tasks further support the rational choice institutionalist idea of agency creation as a response to a need or wish to increase efficiency. For instance, the Commission (2003a: 19) proposed that the agency be given the tasks of coordinating operational cooperation between Member States “in the field of control and surveillance of the external borders” and “in the field of removal of third-country nationals illegally residing in the Member States”. In addition to this, the Commission proposed the tasks of carrying out risk analysis, following up relevant research and assisting “Member States on training of national border guards” as well as “in circumstances requiring increased technical and operational assistance at the external borders” (European Commission 2003a: 19). According to the Commission (2003a: 7; 37), the coordination of resources was likely to lead to enhanced Member State capacity and the establishment of an agency would be a cost saving measure. Although the emphasis was on efficiency gains, the Commission (2003a: 7) also pointed to a potential role as a centre of expertise arguing that “the Agency will be in a better position than even the Commission itself to accumulate the highly technical know-how on control and surveillance of the external borders”. The Commission (2003a: 5) declared itself to be in favour of a later extension of the agency’s tasks, arguing that the creation of FRONTEX “constitutes a concrete and important step towards achieving solidarity between Member States”. The latter statement could be viewed as evidence in favour of credible commitment concerns.

As to the agency’s governance structure, the Commission proposed a Board with twelve members representing Member States and two representatives of the Commission (European Commission 2003a: 24). Due to

the link between FRONTEX establishment and the Schengen acquis, the Commission (2003a: 8-9) acknowledged that special considerations would have to apply to the United Kingdom, Ireland, Denmark, Norway and Iceland. According to the proposal, the agency's operational structure would be decided by the Board, which would also adopt and forward to the EU institutions the agency's work programme and annual general report (European Commission 2003a: 24). The Commission (2003a: 24) also proposed that the Board be responsible for the appointment of the agency's Director on proposal from the Commission.

As regards the financial arrangements of FRONTEX, the Commission (2003a: 16) suggested that the prime source of revenue of the agency ought to consist of a subsidy from the Community budget, and that this should be subjected to the Community budgetary procedure. Other proposed sources were third country contributions, voluntary contributions by Member States and fees for services (European Commission 2003a: 28). The Commission (2003a: 29-30) proposed that the budget be adopted by the Board and implemented by the Director, who would be granted discharge by the EP upon a Council recommendation.

7.2.4 The European Parliament

Although the EP only had consultation rights with regards to FRONTEX, it took a keen interest in the establishment of the agency. The EP was officially consulted on the proposal in December 2003 (European Parliament 2004a). The Committee on Citizens' Freedoms and Rights was assigned the role of committee responsible, and Christian Ulrik von Boetticher of the PPE-DE

group was appointed as rapporteur.⁴² However, a group of MEPs had already put forward a motion for an EP resolution on the proposal to create a 'Border Management Agency' prior to the official consultation (Bigliardo et. al. 2003). The report from the committee responsible was discussed and voted on by the EP in March 2004 (European Parliament 2004b; 2004c; 2004d).

The majority of MEPs were positive to the establishment of FRONTEX. It was widely believed that previous arrangements for the management of external borders were unsatisfactory, and that the agency would contribute to more effective controls (European Parliament 2004a; 2004b). That efficiency concerns were important is further demonstrated by the fact that the EP opposed the idea of allowing the agency to set up specialist branches on the grounds that it would not be cost-effective (European Parliament 2004a: 16). In line with historical institutionalism, I argue that the perceived need for more effective controls must be seen in its historical context. The EP report points to instances when the EP has called for an integrated management of the EU's borders and for the establishment of an independent agency as a response to challenges resulting from the enlargement of the EU to Central and Eastern Europe (see European Parliament 2004a: 28-29). Some statements made in the debates pointed to the agency's potential role in fostering trust between Member States and to the importance of common policies on border control as a symbol of unity (European Parliament 2004b). This suggests that some MEPs saw the agency as a means to ensuring credible commitment.

⁴² The Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy and the Committee on Budgets were also asked to deliver opinions.

My study of EP documentation and debates reveals that FRONTEX establishment was surrounded by controversy, however. First, we must note that support for FRONTEX was not universal. Severe criticism was voiced by members of the GUE/NGL group, who drew on the notion of “Fortress Europe”, and referred to FRONTEX as “another repressive instrument in the so-called ‘fight against illegal immigration’” (European Parliament 2004a: 32). These MEPs further regarded FRONTEX as “the nucleus of a European border police force which will add to the suffering of refugees and migrants at the EU’s external borders and within the EU” (European Parliament 2004a: 32). We can also note scepticism of agencies in general. Whilst the EP rapporteur was in favour of FRONTEX, he declared the EP to be “regularly underwhelmed by proposals for the setting up of EU agencies”, which indicates that there was an element of agency fascination amongst decision-makers (European Parliament 2004b). Finally, it was apparent that many MEPs felt that their views were not taken into account to a sufficient extent (European Parliament 2004a: 29; 2004c; Interview MEP 1).

A major criticism from the EP concerned the agency’s proposed task of organising joint return operations. There are two key arguments behind the opposition to this task (see European Parliament 2004a; 2004b). First, many MEPs thought that the EU would first have to agree on common policies on visa and asylum, and that “it is premature to set up such an operational structure without harmonised standards on for example the definition of a refugee” (European Parliament 2004a: 31). Second, there was concern that the inclusion of this task would give FRONTEX “the character of an ‘expulsion

agency” (European Parliament 2004a: 12).⁴³ Following on from this, the EP wished to emphasise the agency’s role in the prevention of trafficking, which was expected to show that the establishment of the agency would not “simply represent an umpteenth measure clamping down on asylum-seekers from outside Europe” (European Parliament 2004a: 6). According to the EP, it ought to have been made clearer that border management is a matter for Member States and that the focus of the agency ought to be on ensuring common standards, for instance through ensuring compatibility of technical equipment and leading training sessions with border guards (European Parliament 2004a: 9, 11-12, 28).

As to the management of the agency, opinions diverged on the issue of Board composition. The majority view reflected efficiency concerns, holding that the composition suggested by the Commission was to be preferred and that having each Member State represented would make the Board too unwieldy (European Parliament 2004a; 2004b; Interview MEP 1). However, some MEPs argued that each Member State ought to be represented on the Board (European Parliament 2004a: 40; 2004b). Other opinions on the governance of the agency include wishes to increase the influence and control power of the EP and the Commission (European Parliament 2004a: 30-31; European Parliament 2004b). For instance, the EP suggested that the Commission could be more involved in the recruitment of senior officials, and that no widening of the agency’s mandate ought to take place without EP involvement. The EP also wanted to

⁴³ The Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy did not disapprove of this task in their opinion. However, it made the amendment that the agency “*shall verify that return operations are conducted with respect for the dignity and fundamental rights of the individual*”, which indicates concern about the agency’s reputation (European Parliament 2004: 40).

make relevant expertise a clearly spelt out condition for Board membership (European Parliament 2004a: 18-19).

The EP called for more information and control powers to the EP over the budget and financial arrangements of the agency. It was concerned that the Commission's proposal did not outline in sufficient detail the financial implications of the proposal (European Parliament 2004a).

7.2.5 The Council

The proposal for the establishment of FRONTEX was first debated in the Justice and Home Affairs constellation of the Council in November 2003. As the proposal was linked to the Schengen *acquis*, it was also discussed in several Mixed Committee meetings, i.e. meetings between EU states plus Iceland and Norway (Council of the European Union 2003; 2004a). In October 2004, the establishment of FRONTEX was listed as an "A" item and passed without debate (Council of the European Union 2004b).⁴⁴

At its meeting in November 2003, the Council welcomed the proposal from the Commission to establish a border management agency. The Council concluded that Member States have the responsibility for the management of the EU's external borders, but that there was a need for operational cooperation between Member States and also with third countries. Supposedly, increased cooperation would lead to more efficient border controls. According to the Council, the establishment of an agency was "the most appropriate way to organise and develop the indispensable coordination of operational cooperation

⁴⁴ However, the United Kingdom made unilateral statement in which it claims to have been denied the right to take part in the adoption of the measure in question despite having that right under the Protocols on the position of the UK and Ireland and on the integration of the Schengen *acquis* into the EU framework.

at the external borders” (Council of the European Union 2003). At the same time, the Council clearly wanted to draw on previous experience gained through earlier arrangements by granting the agency the right to set up specialist branches throughout the EU for this purpose. Thus, whilst the Council documents indicate a need for more efficient controls, which supports the rational choice institutionalist efficiency hypothesis, lesson-drawing was at the heart of the arrangements, which shows that sociological institutionalism contributes to our understanding of FRONTEX establishment.

Sociological institutionalism holds significant explanatory value to our understanding of the agency’s governance structure. On this issue, the Council stated that “the provisions on the Agency should consider the precedents offered by other Community agencies” (Council of the European Union 2003: 11). The Council disagreed with the Commission and the EP on the issue of Board structure. At its November meeting, the Council argued that “each Member State should have a representative in the Management Board of the Agency, which should consist of the operational heads of the national law enforcement authorities responsible for border management” (Council of the European Union 2003: 11). However, it was also noted that as the creation of FRONTEX builds on the Schengen *acquis*, the Schengen members Iceland and Norway ought to participate in FRONTEX and special provisions were needed for Denmark, Ireland, the UK and Gibraltar.

Finally, when the proposal was first discussed by the Council in November 2003, the Council stated that it thought that the suggested budget required more analysis (Council of the European Union 2003).

7.2.6 The opinion of the European Economic and Social Committee

After having been consulted by the Council in December 2003, the EESC adopted its opinion in January 2004 (European Economic and Social Committee 2004). The opinion was adopted by seventy-five to one (three delegates abstained).

The main reason why the EESC welcomed the establishment of FRONTEX was that the committee believed that national authorities were not in the position to effectively check that all people who enter the Schengen area do so in a manner compliant with legislated procedures (European Economic and Social Committee 2004: 98-99). In line with rational choice institutionalist ideas of agency establishment as a means to increasing efficiency, the EESC believed that cooperation facilitated by FRONTEX would make border controls more efficient. The EESC also claimed to have urged the Council to speed up the work towards common EU policy and legislation on immigration and asylum on several occasions, and stated that “the Council has not taken proper account” of its view (European Economic and Social Committee 2004: 98).

As regards the agency’s functions, the EESC wished to see not only coordination to make controls more efficient but also coordination of rescue services, particularly at sea. The EESC also insisted that FRONTEX be assigned the task of ensuring that “people are treated more humanely”, which indicates dissatisfaction with the current situation (European Economic and Social Committee 2004: 99). Following on from this, the EESC emphasised its opinion that more efficient controls “must not jeopardise the right to asylum”,

making note of the facts that many asylum seekers use illegal channels in order to arrive at EU borders and that criminal networks engaged in human trafficking exploit the perceived current lack of effective border controls with serious human suffering as a result (European Economic and Social Committee 2004: 98). Moreover, the EESC drew attention to links between irregular immigration, exploitation in the labour market and social exclusion.

The EESC stated that agency Board members ought to “act independently of Governments” (European Economic and Social Committee 2004: 100), which indicates a wish to ensure credible commitment for common policies by isolating agency operations from government pressures. The opinion did not include any comments on the budget and financial arrangements of the agency.

7.2.7 FRONTEX today: between the Council and the Commission

In important respects, FRONTEX is a *sui generis* phenomenon amongst the Community Agencies (Interviews FRONTEX Official 1; FRONTEX Official 2). First, FRONTEX’s task of coordinating work for which Member States are responsible used to be Council work (Interviews FRONTEX Official 1; FRONTEX Official 2). Furthermore, rather than operating within a policy field where competencies clearly belong to the Community, the agency has to negotiate its role within an area where some competencies belong to the Community and others to Member States. For instance, the Commission has the right of initiative within the immigration policy field at the same time as visas for third country nationals is a matter for Member States (Interviews FRONTEX Official 1; FRONTEX Official 2). Moreover, rules concerning

border control are passed at Community level whereas implementation is done by Member States (Interview Commission Official 3). In terms of targets for the agency's work, the agency drafts its own work programme, on which the Commission is consulted, but officials at FRONTEX stated that if the Council calls on the agency to engage in particular activities, these are included in the work programme (Interviews FRONTEX Official 1; FRONTEX Official 2). Similarly, an official at the Commission said that the agency gets its political direction from the Council, and that practical management is handled by the Board (Interview Commission Official 3). The Commission cannot instruct the agency, Commission Official 3 continued.⁴⁵ As to FRONTEX's influence in EU policy-making, officials at FRONTEX implied that in the official story input is not acknowledged in legislation, but in reality proposals for legislation are preceded by informal contacts. Overall, governance in the field of border management control is characterised by complexity, and it is not surprising that FRONTEX officials thought that it is possible that FRONTEX work could be facilitated by increased harmonisation (Interviews FRONTEX Official 1; FRONTEX Official 2).

Information provided by the interviewees strengthened the impression gained through the documentary research that FRONTEX is dependent on the Council and on Member States in many respects. To carry out its operations, including the central task of risk analysis, FRONTEX is completely reliant on Member States' will to cooperate by contributing resources and by forwarding information via networks. This is so because the agency does not have sufficient assets within its own organisation. According to officials at

⁴⁵ According Commission Official 3, the Commission negotiated with the Polish authorities about practical issues concerning the agency's location in Warsaw.

FRONTEX, the agency has no means of forcing Member States to cooperate, and cooperation depends on trust (Interviews FRONTEX Official 1; FRONTEX Official 2). The same officials thought that cooperation between the agency and Member States is good, but they also indicated that this is something that has improved over time and that Member States previously had less trust in the agency. They also pointed to the fact that cooperation is influenced by the number of authorities involved. Since the establishment of FRONTEX, Member States have had one point of contact at the European level, but some Member States have more than one authority dealing with border control issues. A Commission official with good insight into the work of FRONTEX confirmed that Member State authorities tend to be satisfied with the agency, and said that he thought things work fairly well (Interview Commission Official 3).

Having said that, the Commission official also pointed out that Member States that experience problems with irregular immigration may want FRONTEX to do more (Interview Commission Official 3). An interview with a Maltese official confirmed this. His view was that states in southern Europe are more concerned and that FRONTEX has been a bit “sleepy” when it comes to joint return operations (Interview EP Official 1). He also wished to see more attention and activity during the main immigration season, and more permanent patrols to deter irregular immigration. From this interview it became clear that Maltese representatives are of the opinion that other Member States do not deliver as promised, and, when push comes to shove, other states have not shown solidarity towards Malta.⁴⁶

⁴⁶ The Maltese official gave a fairly detailed account of Malta’s problems with on the one hand large-scale irregular immigration organised by criminal networks and on the other Libyan

The documentary analysis showed that the issue of joint return operations was controversial. Judging by statements from officials at FRONTEX and the Commission, the concern that FRONTEX would be an expulsion agency are unfounded (Interviews Commission Official 3; FRONTEX Official 1; FRONTEX Official 2). They all stressed that migrants sent back should have had their legal remedies exhausted at Member State level, indicating that FRONTEX does not make decisions on individual cases. This is not to say that elements of FRONTEX cannot be interpreted as being repressive towards refugees, however. There may be individuals with substantial grounds for asylum which will be kept away by FRONTEX patrols, but no substantial conclusions on the extent of this potential issue can be drawn from my material.

Informal contacts are important in the relationship between FRONTEX and the Commission. A Commission official described the relationship between the two bodies as good, but pointed out that the Commission at times has to remind FRONTEX associates of their mandate (Interview Commission Official 3). Whilst FRONTEX can contribute to security, its role must not be confused with the role of Europol and the distinction is not always clear cut for the border guards on the ground, the official explained. Officials at FRONTEX said that more discussions with the Commission could be beneficial, which suggests that FRONTEX staff also value the cooperation with the Commission (Interviews FRONTEX Official 1; FRONTEX Official 2).

authorities, which do not fulfil their obligations under international law to rescue people within their “rescue and search” zone of the Mediterranean. As a consequence of this Libyan negligence, Maltese authorities have had to deal with migrants for whom Libya ought to have taken responsibility, the official claimed. When the Maltese called on other states to share responsibility for these “Libyan zone” migrants, they were met with silence, the official said with noticeable indignation.

Debates on the state of the art of EU democracy often centre on the directly elected European Parliament's influence. As regards FRONTEX, the EP's major instrument of control is the budget. In 2007, the EP decided to temporarily freeze some of the agency's budget until certain conditions were met but how effective this is as a control instrument is debatable. Both FRONTEX officials and the Maltese official agreed that the EP uses the budget to control the agency, but according to the Maltese official the freezing of the budget was mainly a political signal from the EP, as FRONTEX could work around it. At the end of a budgetary year, the EP exercises control through scrutiny by the Budgetary Control committee and the regular budgetary discharge procedure. A serving MEP stated that agency Directors sometimes have to appear formally in front of relevant EP committees to explain their activities (Interview MEP 1). The EP is given general reports on FRONTEX and there is also informal cooperation (including confidential meetings), but interviewees indicated that the EP still wants to know more (Interviews Commission Official 3; Interview EP Official 1). At times there are strong, valid reasons for confidentiality, though. As a Commission official pointed out, if it were to be made public when and where patrol boats would operate, the boats carrying irregular immigrants would just pick another route (Interview Commission Official 3).

When questioned about how the agency's work is controlled, FRONTEX officials stated that internal checks are made by an internal controller and an internal auditor, who report directly to the agency's Board, and external checks are done by the internal audit of the Commission and the Court of Auditors. As regards finance, there is some room for flexibility as the

responsibility for smaller amounts can be delegated within the agency. The FRONTEX officials also stated that each individual project has targets and is evaluated. The agency's Board can question the Director, and, according to the FRONTEX officials I spoke to, the Board tends to ask many questions. They also said that the chair of the Board enjoys a powerful position as a link between the Board and the Director, and as a representative for the agency. The Commission recently issued a report with an evaluation of FRONTEX as requested by the European Council in the Hague programme from 2004 (Commission 2008b).

7.3 Discussion

FRONTEX is the most recent Community Agency to be included as a case study. This agency may belong to the most common type of agencies, i.e. advisory agencies, but, due to its field of activity, it is truly unique. Immigration issues have only recently been formally integrated, and governance of the border management field is complex. FRONTEX needs to negotiate its role in a policy field where competencies and responsibilities are shared between several institutions at different levels. As a Community Agency financed mainly by a subsidy from the EC budget, FRONTEX is steered by the Commission and the EP. At the same time, much of the work the agency does was previously done by the Council. Border management is traditionally closely associated with the nation state, and immigration is a politically sensitive topic where decisions are often strongly influenced by normative concerns. It is thus not surprising that FRONTEX establishment was surrounded by some controversy. In this chapter, I have traced the process

leading up to the establishment of FRONTEX and reflected on the agency's role in governance today. In the following sections, I will discuss the findings in relation to the theoretical framework outlined in chapter 2.

7.3.1 Rational choice institutionalist theory

Rational choice institutionalist theory predicts that agencies are created to lower political transaction costs. This overarching hypothesis can then be disentangled into three separate hypotheses about the creation of agencies. First, agencies are created to gather and take advantage of technical expertise. Second, agencies are created to ensure credible commitment. Third, agencies are created to increase efficiency.

Although my research provides some evidence in favour of the hypothesis that FRONTEX was established to gather and take advantage of technical expertise, it suggests that this was not the prime motive behind the establishment of the agency. Apart from a statement from the Commission that the agency would be in a better position than the Commission itself to develop know-how, I have not come across any statements clearly specifying a unique role for the agency as a centre of expertise. Neither was the role of the agency in providing expertise emphasised as a prime motive in documents or interviews. The field in which the agency operates cannot be described as highly technical or scientific in the traditional sense, and there is very little established science within the field of border control. Hence, it is hardly surprising that technical or scientific tasks have not been delegated to the agency. There is, however, some support for this hypothesis in the form of demands placed on staff and people involved in the governance of the agency.

As previously mentioned, the EP report suggested that relevant expertise be written into the legislation as a condition for Board membership. This condition is indeed included in the founding legislation (Council Regulation No 2007/2004, article 21). Similarly, the founding legislation states that the agency's Director should be appointed on the grounds of "relevant experience" (Council Regulation No 2007/2004, article 26).

As to the hypothesis of the agency as a means to ensuring credible commitment, I argue that whilst there was an element of people involved in FRONTEX establishment paying lip service to this idea, wishes to ensure credible commitment did not drive the process leading to the establishment of FRONTEX. Considering first the evidence in favour of the agency's playing a role in ensuring credible commitment, we can note that the Commission claimed that an independent body in the form of an agency would lead to strengthened credibility of Community activities in the border control field (see European Commission 2003a: 37). A couple of MEPs voiced similar ideas in the EP debates. For instance, Coelho of the PPE-DE group claimed to be convinced that the establishment of FRONTEX would "be a positive step towards increasing mutual trust between Member States" (European Parliament 2004b). The EESC wished to see Board members acting independently. The founding legislation makes reference to independence, stating that the Director, albeit "[w]ithout prejudice to the respective competencies of the Commission, the Management Board and the Executive Bureau", "shall neither seek nor take instructions from any government or from any other body" (Council Regulation No 2007/2004, article 25).

However, the evidence against FRONTEX being established to ensure credible commitment is stronger. The idea behind agencies to ensure credible commitment is that the activities carried out by the agencies should be isolated from political influence. This is clearly not the case here. The Commission is consulted on the agency's work programme, and more importantly, interviewees at FRONTEX and the Commission declared that FRONTEX takes instructions from the Council. To pursue its tasks the agency is also dependent on Member States to contribute resources and information. As pointed out by officials at FRONTEX, the agency has no means of forcing Member States to cooperate, and cooperation is built on trust. The FRONTEX officials indicated that trust has been built over time, but information gained from my interview with the Maltese official demonstrates that not all Member States have experienced the solidarity some decision-makers implied would be the result of FRONTEX establishment. Of course, FRONTEX has only been in operation a few years. It is still early days and things may change over time. We can also note that FRONTEX lacks regulatory and arbitration tasks, the delegation of which are hard evidence in favour of credible commitment concerns driving agency creation.

The rational choice institutionalist hypothesis to find the most support throughout my research is the hypothesis that FRONTEX was established to increase efficiency. All sources consulted indicate that there was a wish for more effective border control and that there was dissatisfaction with the previous arrangements, which were deemed inefficient due to their *ad hoc* nature. In particular, interviewees pointed to the lack of a single European-level point of contact for Member State authorities and to problems as a result

of the reliance on project funding. It was believed that the establishment of FRONTEX could remedy this situation, playing a crucial role in coordinating Member State activities in particular. As previously explained, the Commission thought that coordination could lead to enhanced capacity, and that the establishment of an agency in the field could save costs. The EP was also concerned about efficiency and cost-effectiveness as demonstrated by its opposition to an agency Board with representatives from each Member State. Moreover, in an *ex ante* evaluation of arrangements for increased cooperation in the field of border control, the Commission concluded that an agency would be “a better and more cost-effective choice” than the alternatives considered, which were reinforcement of the already existing Common Unit and the Commission (2003a: 38).

7.3.2 Sociological institutionalist theory

Sociological institutionalist theory emphasises the role of ideas, and hypothesises that institutional borrowing plays a key role in the establishment of institutions. My research provides solid evidence that institutional borrowing was at work in the case of FRONTEX. Most notably, the Council stated that “the provisions on the Agency should consider the precedents offered by other Community agencies” (Council of the European Union 2003: 11). This statement is an explicit reference to other bodies serving as models, and as such it serves as hard evidence in favour of institutional isomorphism, i.e. a process where an institutional structure developed in one context is transferred to another context (see Di Maggio and Powell 1991). In short, the fact that agencies already existed legitimised the creation of yet another agency. The

Council also pointed to the importance of previous experience in connection to its idea that the agency ought to have the right to establish specialist branches.⁴⁷ Further evidence that lesson-drawing was important is provided by the fact that the Commission considered its White Paper on Governance from 2001 and a number of other reports related to the Community Agencies in general when drafting the proposal to establish FRONTEX.⁴⁸ Interestingly, my research also shows that there appears to have been an element of agency fascination amongst decision-makers at the time, and that agency establishment was not universally applauded within the EU institutions. As mentioned in the section on the EP, the EP rapporteur claimed to be “underwhelmed by proposals for the setting up of EU agencies”. In the EP debates, he continued by stating that “an immense number of new ones is currently sprouting like weeds all over Europe, fragmenting the Commission’s competences and scarcely under control” (European Parliament 2004b).

7.3.3 Historical institutionalist theory

Historical institutionalist theory holds that the establishment and development of institutions must be seen in their particular historical context, and that specific events serve as critical junctures, which lead development down a particular path. There is significant evidence that this was indeed the case with regards to FRONTEX establishment. As explained in chapter 3, Community

⁴⁷ Here we can recall that the EP was against this idea on the grounds that it would not be cost-effective.

⁴⁸ The documents in question, which are listed in the proposal, are: the Meta-Evaluation on the Community Agency System, the Communication from the Commission on the operating framework for the European Regulatory Agencies and the Commission Regulation of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

Agencies operate in the first pillar of the EU. Border management is traditionally closely associated with the nation state, and it would not have been possible to create a Community Agency in this field had it not first been integrated. Thus, the decision to transfer immigration and asylum issues to the first pillar and subjecting them to the community method was a critical juncture for EU cooperation on border management. The speed at which first integration and then agency establishment took place is fascinating. Some of the work FRONTEX does today was until recently carried out by the Council, showing that an agency was established before cooperation on border management had truly become a Community matter.

To understand this rapid development, it is necessary to look at the wider political context. Enlargement to Central and Eastern Europe, Cyprus and Malta was clearly an important event in the history of European integration, and it was crucial to the establishment of FRONTEX. As a result of enlargement, the EU would have longer external land borders and include two Mediterranean island states, which could be deemed to have vulnerable sea borders. There is clear evidence that enlargement was believed to cause challenges to the management of the external borders, and that these ideas were linked to the creation of the agency. The EP report contains an explicit reference to agency establishment as a response to challenges of enlargement and makes reference to previous instances in which the EP has called on increased cooperation in the light of enlargement. For instance, in 1998, the EP adopted a resolution on the implications of enlargement of the European Union for cooperation in the field of justice and home affairs, and in a resolution on the proposal for a Council decision adopting an action programme for

administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO), the EP argued that “[c]ommunitarisation of EU responsibility for controls at the EU’s external borders will become all the more important now that a significant enlargement of the Union is scheduled to take place” (European Parliament 1998; European Parliament 2003: 143). At the Seville summit in 2002, immigration and enlargement were important topics of discussion, although the link between them is not made explicit in the Council conclusions (Council of the European Union 2002).

Whilst enlargement played a crucial role in bringing border management cooperation onto the agenda, it must also be noted that existing Member States, perhaps in particular Italy and Spain, were already experiencing the arrival of irregular migrants by sea, and it is clear that authorities in these countries perceived this to be problematic. Several reports from around this time speak of the arrival of large numbers of migrants to particularly the Canary Islands, the Italian island of Lampedusa and the Spanish enclave of Ceuta (see for example Human Rights Watch 2002; Hughes 2002; Smith 2002). At the same time, the wider public became increasingly aware of irregular immigration and the suffering of the people involved through media coverage of tragic events such as the *The Monica* tragedy.

7.4 Conclusion

My research has shown that one strand of new institutionalist theory is not sufficient to explain the establishment of FRONTEX. The hypotheses derived from each of the theories are not mutually exclusive, and they can all contribute to explaining the establishment of FRONTEX. They are useful for

explaining different aspects, however. The decision to establish an agency to coordinate Member State activities can be explained by a functional logic, following rational choice institutionalism. The choice of the Community Agency form, however, is better explained by sociological institutionalism. Previous agencies provided a model and legitimised the creation of yet another agency. Finally, historical institutionalism explains well the timing aspect of FRONTEX creation. Enlargement caused concerns about the vulnerability of the external borders, and tragic incidents involving irregular migrants raised public awareness.

Conclusion: How can we explain the establishment of European Community Agencies?

8.1 Introduction

In this thesis, I have investigated the establishment of European Community Agencies, with a particular focus on four case studies: Cedefop, EMEA, EASA and FRONTEX. The driving motivation of this investigation was a concern about the rapid establishment of European-level agencies, seemingly without thorough consideration of the implications for bureaucratic control, and, ultimately, the legitimacy of the European political system. Since this research project began, the EU institutions, in particular the Commission (2008a: 2), appear to have realised that the lack of a “common understanding” of the roles and purposes of agencies is indeed a problem, and the future use of agencies in governance is currently a hot topic of debate within the EU institutions as well as in academic circles.

The increased use of agencies performing a range of public management tasks constitutes a major shift in governance patterns, and it is an important aspect of the regulatory state. Delegation to agencies can have important benefits, for instance concentration of technical expertise, facilitation of credible commitment, and efficiency gains. However, there are also risks, such as bureaucratic drift and agency capture. The rise of the regulatory state and the establishment of numerous specialist agencies could be viewed as a move towards an increasingly technocratic society; as the influence of technocrats increases, the influence of elected politicians decreases. This raises a number of questions about bureaucratic control, accountability and

legitimacy. Discussions on the establishment, use and design of agencies are not limited to the European Union; these topics are also subjects of investigation for scholars of new public management more widely as well as for policy-makers at national level, where agencies have become more frequent in recent decades. In the introduction, I argued that the implications of agency establishment are especially important for the EU due to frequent criticisms of its unclear lines of accountability and institutions that are not sufficiently “participatory and representative” (Schmidt 2006: 21). I also questioned whether or not the establishment of agencies is counterproductive to attempts at addressing the alleged democratic deficit, and argued that this is dependent on whether legitimacy is sought through participation or through efficiency in terms of results. I will return to this discussion towards the end of this concluding chapter.

This thesis has sought to contribute to the discussions and debates on agencies at four different levels. In section 8.2, the main findings of the research are summarised. The summary begins with the findings on the ‘Community Agency’ as a concept and variation within this group of agencies, covering the contribution of the thesis at the conceptual level and the first step of the empirical research. This is followed by the findings from the second empirical step of the research, i.e. the case studies. The theoretical contribution of the thesis is considered further in chapter 8.3, in which I compare the findings of the case studies. Finally, in section 8.4, the findings are discussed in relation to the wider debates on regulatory states, with a particular focus on the EU as a regulatory state.

8.2 Summary of results

8.2.1 Concepts and classifications

Due to differences in public law amongst political systems, it is not possible to find one universal definition of the term ‘agency’ (see chapter 2). However, there are four widely agreed core elements of the ‘agency’ concept that make comparative discussion possible. For a body to be considered an agency it ought to be “at arm’s length” from central government (Talbot 2004: 5), has its powers outlined in a “framework document” (Talbot 2004: 8), be staffed by unelected public servants (Talbot 2004: 5; Thatcher 2002b: 956), and be subjected to performance contracting (James 2001; Talbot 2004). Community Agencies fulfil all of these criteria (see chapter 3).

There is significant variation amongst bodies that are considered agencies according to the above criteria. Agencies are of different sizes, and they are set up at different times and in different locations. A review of academic literature seeking to explain variation in practice also pointed to differences with regards to functions, legal status, governance structures and financial arrangements (see chapter 2). This research has confirmed that Community Agencies are a heterogeneous group of bodies; whilst they are united by their common legal status, they differ in the other dimensions.

Whereas the first European-level agencies were established in 1975, the major waves of agencification in Europe occurred in the 1990s and 2000s. Most Community Agencies are classified as small or medium-sized, and they are spread out across the EU territory. The main variation in the governance structures dimension concerns the composition of the agencies’ Boards, but there are also some differences in appointment procedures of Directors.

Financially, most of them are reliant on subsidies from the EC budget, but three agencies are self-financed, and two receive their revenue from a combination of subsidies and fees.

The most striking variation, however, is found in the tasks the agencies are set up to perform. A classification according to functions of the Community Agencies established between 1975 and 2006 revealed four types of agencies: *de jure* regulatory agencies, *de facto* regulatory agencies, *implementation* agencies and *advisory* agencies. To achieve the stated aim of investigating if there are different driving factors behind the establishment of different types of agencies, the main emphasis was placed on functions when selecting the case studies.

8.2.2 Case study 1: Cedefop

Cedefop, an *advisory* agency, was the first Community Agency to be established in 1975. Historical institutionalism, which holds that the context in which institutions are established is essential for understanding the establishment of institutions, has significant explanatory value as regards the timing of the creation of Cedefop. Based on the empirical findings of my research, I argue that an understanding of the political climate at the time of creation is crucial to explain the establishment and institutional design of Cedefop. The establishment of Cedefop must be seen against a backdrop of economic crisis accompanied by rising unemployment and social unrest, as exemplified by the student revolts of 1968. The imminent enlargement of the Community to include United Kingdom and Ireland, which were affected by industrial decline, was also an influential factor behind the placement of social

policy, in particular vocational training, on the European political agenda. The economic and political situation was conducive to trade unions' enjoying widespread influence throughout Europe. Through the formation of the European Trade Union Congress (ETUC), which is to be regarded as a critical juncture in the development of European social policy, trade unions established their position as a force to be taken into account in European level negotiations. Within the European institutional architecture, the social partners were already represented within the EESC, and, at the Hague Summit, and within the Werner Plan, emphasis was placed on social dialogue. This legitimised the inclusion of the social partners on the agency's Board, and meant that there was a good chance that ideas coming from the trade union ranks would attract significant attention, especially if there were a committed and driving figure to push for them. Maria Weber, a German trade union representative and member of the EESC, was such a person, and she came to play a crucial role in the establishment of Cedefop.

Weber wished to see the establishment of a European level vocational training institute, had the support of the EESC, and, drawing on her experience from the recent establishment of a German vocational training institute, she drew up the report that suggested the establishment of Cedefop. Weber's involvement in the setting up of the German institute, and the evidence that she was drawing on this experience, support the sociological institutionalist idea of institutional borrowing. We could also note that vocational training institutes had been set up in a number of European countries, not only Germany.

A key feature of the institutional design chosen for Cedefop was to include social partner representatives on the agency's Board, which Weber saw

as a measure to secure credible commitment for the maintenance of the social dialogue. This suggests that the credible commitment hypothesis derived from rational choice institutionalism could explain the management structure of Cedefop. With hindsight, we can conclude that the commitment to an active social dialogue was not honoured. My research reveals that, although the social partners are guaranteed representation on the agency's Board, the social dialogue is no longer as active as it once was. If securing credible commitment to the social dialogue had been the key factor for EC decision-makers they would, most likely, have made an even firmer commitment, for instance by putting into formal legislation the so-called gentlemen's agreement about the appointment of Director to which one of my interviewees referred. This did not happen, and we can thus conclude that the influence of Weber, which in itself was made possible by the political and economic climate of the time, was the key explanatory factor rather than credible commitment concerns.

As to the agency's role in governance today, the focus of the agency's tasks is on networking and information gathering. The fact that there is very little undisputed science in the vocational training field, as illustrated by the prevalence of different traditions and practices in different Member States, weakens the rational choice institutionalist hypothesis that the agency's role would be that of being a place where all scientific expertise is gathered. Having said that, agency staff are, of course, very knowledgeable in the field. There is evidence that work done by Cedefop, such as the European CV, is indeed taken up by the Commission and the other European institutions. This shows that the agency can play a part in norm diffusion across the EU, which lends support to sociological institutionalist ideas about the functioning of institutions. One

could of course argue that increased harmonisation would bring efficiency gains, but, throughout my research, I have not found evidence for this being an important argument for decision-makers.

The autonomy of the agency can be called into question on a number of accounts. Most significantly, the agency is reliant on the EC budget for its finances. It is clear that the EP has used its budgetary powers to secure control over Cedefop, as well as to secure influence for itself in European governance more widely. Following on from this, my research revealed that the relationship between the EP and Cedefop is somewhat contradictory. On the one hand, at the time of establishment the EP seemed to want a more independent agency than what the Commission originally did, but, on the other hand, it has also been argued by Varsori (2004) that the EP was sceptical about the creation of a body over which it would only have limited control. Similarly, the relationship between the agency and the Commission is not free from power struggle. Issues here concern the Commission's power over the appointment of senior personnel, and the Commission's ability to pay higher salaries, which may have the effect that most qualified people would rather work for the Commission than Cedefop. My interviewees indicated that Cedefop tends to have good relationships with Member State authorities. There is, however, also an element of competition as it occurs that Member State authorities are reluctant to send their top people as seconded experts to Cedefop. This could be interpreted as a means for Member State authorities to protect their own standing, and it also further weakens the hypothesis of decision-makers wanting to make Cedefop the single centre for expertise. Here we could also recall the Council's decision to give Member States the majority

on the agency's Board, which shows that Member State actors wished to maintain an intergovernmental structure.

8.2.3 Case study 2 EMEA

EMEA, established in the early 1990s, was included as one of case studies for this thesis because of its being the first Community Agency to be given a *de facto* regulatory role. The establishment of EMEA was preceded by a series of activities to harmonise pharmaceutical legislation throughout Europe. The first efforts to harmonise came in the 1960s. A committee to be concerned with human medicines was set up in the 1970s, and a committee to be concerned with veterinary medicines was set up in the 1980s. When EMEA was created, a decentralised procedure for the authorisation of medicinal products had already been put in place, and provisions had been made for making EMEA the arbiter in the event of disputes between Member State authorities. The finalisation of the single market may have sped up the development in the early 1990s, and it may very well explain the precise timing of EMEA establishment. However, due to the long process of harmonisation preceding EMEA establishment and the fact that some of the core committees and tasks were already provided for, I argue that the finalisation of the single market was not a critical juncture for the development of institutions to regulate medicines in the EU.

The argument on EMEA creation put forward in this thesis is instead that the key objective behind the establishment of EMEA was a wish to ensure credible commitment for the common policies agreed. My research has revealed a number of references to the need of the agency to ensure that the agreed policies are followed. One could argue that the fact that the

Commission is the institution that takes the final decision on authorisation somewhat weakens EMEA's ability to ensure credible commitment. However, during the interviews, it was confirmed that agency opinion is nearly always followed by the Commission. EMEA sees itself as working in the interest of patients. A crucial task in this regard is to ensure the safety of medicinal products that reach the market, and to maintain consumer confidence that standards are maintained. Similarly, the research has shown that industrial concerns, in particular the need to ensure fairness to companies, was a driving factor. The agency's role as an arbiter in the event of conflict between Member State authorities further supports the credible commitment hypothesis.

From rational choice institutionalist theory I have also generated the hypothesis that the agency was created as a response to a need for technical expertise. It goes without saying that EMEA operates in a highly technical field. A study of the agency's structure, however, reveals that product evaluations are not carried out by staff at EMEA. Responsibility for performing this scientific work lies with relevant authorities in the Member States, which refutes the idea that EMEA was created in order to assemble the highest possible technical expertise within the agency itself. EMEA's role is to coordinate and delegate these tasks. At the same time, the research indicates that there is an ongoing trend towards greater centralisation, and that authorities in Member States may have to specialise more, as the same level of expertise in all fields of medicine cannot realistically be maintained within all Member State authorities. Arguably, this implies a development towards centres of concentrated expertise, but my research of the process leading up to

EMEA establishment does not lend support for this being a planned course of action.

Turning to the issue of efficiency, it is apparent that the establishment of EMEA has led to more efficient procedures for market authorisation of medicinal products. This obviously benefits the pharmaceutical industry, and it can also benefit patients as medicines can reach the market faster. The link between EMEA creation and efficiency gains for industry was made explicit; for instance in the EP debates in which the idea removing “structural obstacles” were mentioned (European Parliament 1991a: 55). This could, as suggested by Abraham and Lewis (2000), imply that establishment of EMEA is linked to a neo-liberal political agenda and a situation where decision-makers find themselves under pressure to respond from industry demands at the same time as costs need to be kept down.

The institutional design of EMEA, where the various committees play a crucial role, makes it stand out from other agencies, and suggests that institutional borrowing was not a crucial factor for determining the agency’s design. Indeed, the debates even included statements which actively refuted such claims, stating that EMEA was not to be modelled on a comparable American institution. There are, however, some similarities between EMEA and the previously established Community Agencies in terms of management structure, and we could assume that there was an element of borrowing here. Moreover, there is evidence to suggest that the establishment of an agency in the medicines field was legitimised by the existence of agencies in the same policy field at Member State level.

8.2.4 Case study 3: EASA

The European Aviation Safety Agency, EASA, was established in 2002. It is one of the most powerful Community Agencies in that it can make decisions that are binding, and in that it has the power to draft legislation in the aviation safety field which the Commission cannot change without prior consultation with the agency. This makes EASA a *de jure* regulatory agency.

When EASA was established, the idea of international cooperation in the aviation safety field was not new, and attempts to establish some common European standards had already taken place. The research has shown that there is a link between the wish to regulate on safety in civil aviation in Europe and the liberalisation of the civil aviation market. For instance, in the EP debates, the argument that companies may compromise on safety in order to survive on the free market was voiced. One could thus argue that the creation of the single market, to which the liberalisation of air traffic can be linked, was a significant event in the process towards increased harmonisation of European air safety. Was it a critical juncture in the historical institutionalist sense? Based on the findings of my research I argue that it was not. An important argument in favour of this view is that pressure for harmonisation and the creation of EASA did not solely come from within Europe and those who took the formal initiative to the internal market. The chapter on EASA shows that there was heavy pressure from industry, especially from the very powerful American aviation industry, to set up a single body to regulate the European civil aviation sector. The fact that it would be easier for industry to deal with a single European regulator rather than one regulator for each Member State would remain regardless of the existence of the single market. It is thus reasonable to

assume that this pressure could have influenced EU decision-makers to set up EASA whether the single market had been created or not. It is, however, somewhat difficult to disentangle various arguments here, as industry pressure may also have played a significant role in the establishment of the internal market in the first place. A further argument downplaying the importance of the creation of the single market for the creation of a Community Agency in the air safety field is that another form of cooperation, an intergovernmental cooperation in the form of the JAA, was tried first. This argument does not dispute the importance of the single market for the increased cooperation in the field. It does, however, claim that the choice of a Community Agency as an institutional form cannot be linked to the finalisation of the single market.

To understand why a Community Agency was the preferred option over an intergovernmental organisation we must look to other hypotheses. Rational choice institutionalist theory holds that delegation takes place in order to lower political transaction costs by taking advantage of technical expertise, increasing efficiency and ensuring credible commitment to common policies. It does not take an in depth study to confirm that the tasks EASA deals with require specialist technical expertise, and that expertise is gathered within the agency itself.⁴⁹ There is considerable technical expertise at Member State level, at least within some Member States, but my research shows that the idea was to gather the top level expertise within EASA, and not at Member State level. Here we must also consider the fact that not all Member States have a significant aviation industry, and, without a thriving industry, there are fewer possibilities and less need for authorities within Member States to develop the level of

⁴⁹ This can be compared with EMEA where the expertise required to carry out the evaluations is retained within the Member States.

expertise and capacity required to deal with safety specifications and their equal application throughout the territory. In the interest of safety, it would thus make sense to pool the expertise that is available across the territory, with regards to making the most suitable technical solutions as well ensuring that they are applied equally. The fact that EASA was compared to the American FAA, which gathers the expertise from within US territory within one body, supports this. To gather the required technical expertise within the Commission was not a viable alternative. The Commission does not have the resources to maintain that level of technical expertise as the nature of the organisation requires its personnel to be generalists rather than specialists. Furthermore, by delegating specific tasks, including the drafting of technical legislation, the Commission frees up time to work on other things, which leads to increased efficiency. For these reasons, I argue that when deciding to harmonise European civil aviation safety standards, there was a functional need for EU decision-makers to create a single European body to perform these tasks.

To seek an explanation for the choice of the Community Agency form, let us turn to the sociological institutionalist hypothesis that institutional borrowing plays an important role for the determination of institutional design. There are a number of arguments in favour of this hypothesis. First, prior to EASA establishment, a more intergovernmental form of cooperation was tried and deemed unsatisfactory. Amongst the reasons were lengthy procedures and problems with creating binding measures. It is reasonable to assume that, as one model proved not to work according to plan, decision-makers would be inclined to look to functioning institutions already in place. By the time EASA was created, the Community Agency form had had time to become more

established within the EU institutional framework, and it had become a popular institutional form. As one interviewee remarked, agencies were “fashionable”. However, perhaps even more significantly, the research has shown that the American FAA served as a model for EASA. Several references to this agency were found throughout the legislative process, and an interviewee at EASA confirmed that the American agency did serve as a model.

8.2.5 Case study 4: FRONTEX

FRONTEX, established in 2004, is the most recently established Community Agency to be included as a case study in this thesis. What makes this agency particularly interesting is that it operates within a policy field that traditionally has been within the exclusive competence of Member States, and which can often also be politically sensitive. The most important functions of this agency are to conduct risk analysis and to disseminate the findings, which makes this an *advisory* agency.

The historical institutionalist idea that the context in which institutions are created and develop must be taken into account is useful to explain why Member States agreed to create an agency in a policy area traditionally associated with state sovereignty. Arguably, the completion of the single market and the application of the four freedoms, the free movement of people in particular, necessitated some cooperation on border management. Cooperation, although on a humble scale, was initiated by the Treaty of Maastricht. Recalling that Community Agencies work within the Community pillar, we must conclude, however, that the transfer of immigration and asylum policy to the first pillar in the Treaty of Amsterdam was crucial for the creation

of a Community Agency for border management. In historical institutionalist terms, the transfer of migration and asylum policy was a critical juncture. To fully understand the creation of FRONTEX, we must look at the political situation in more depth and explore why immigration became a much debated topic within the EU from the mid-1990s. The planned enlargement to include eight Central and Eastern European states, Cyprus and Malta, which many people felt would result in the EU's having more vulnerable borders, played a very important role in bringing these issues up on the agenda, and, I argue, was another critical juncture determining the future path of European cooperation in the field. Member States, current and future, were concerned about how to control the borders, and in particular those Member States which were affected by large-scale migration applied considerable pressure on other Member States to take action. Tragic incidents involving refugees attempting to reach Europe in the early 2000s, as well as increased security concerns, further raised public awareness of the situation. Together these events explain why immigration and border management became important topics of discussion at the European summits at Tampere and Seville.

At first cooperation was organised within the framework of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). This was a rather informal model of cooperation, and initiatives were taken at an *ad hoc* basis. This model of cooperation was deemed unsatisfactory due to the lack of a consistent strategy; my research revealed that there was a widespread view that more formalised cooperation, in particular on coordination of activities, would be more effective and efficient. The Commission's proposal on the establishment of FRONTEX included comments of this nature, the EP made

comments that pointed in this direction, and some states, for instance Greece and Malta, were of this opinion. This supports the rational choice institutionalist hypothesis that delegation takes place to increase efficiency. My research indicates that, although everything has not always run smoothly, there has at least been a perceived increase in efficiency. Interviewees remarked that now Member State authorities have one body to contact, rather than several, which was previously the case. As FRONTEX is a relatively new agency, and as it is still trying to find its role in governance, more research is needed to determine to what extent there really have been concrete efficiency gains.

An important point to note about FRONTEX is that its independence is very limited. The agency drafts its work programme in consultation with the Commission, but the Council still calls on the agency to perform various activities, which the agency would then be required to do. Furthermore, the agency is dependent on Member States for resources for its operations, and it has no power to force Member States to cooperate. The agency's tasks and priorities seem to be under development, and the findings of the research imply that there is no established consensus over what the EU's activities in the field should be. At the moment, FRONTEX's tasks concern coordination of activities performed by Member State authorities, which means that, although there is a lot of knowledge and expertise at FRONTEX, the agency does not function as a centre where all the top expertise is gathered. For these reasons, I argue that neither a wish to ensure credible commitment nor a need to gather expertise within one agency were key reasons for the establishment of FRONTEX.

Sociological institutionalism and the concept of institutional isomorphism can help us understand why the Community Agency form was selected after EU decision-makers had found the previous model lacking. At the time of FRONTEX establishment, the Community Agency form had become increasingly common. The Council, which took the initiative for FRONTEX, stated in the preparation stages that precedents set by other agencies were to be taken into account when designing FRONTEX. As previously mentioned in connection to the summary of the findings for EASA, agencies were also considered somewhat fashionable as an institutional form at the time. Comments made in the EP debates on the establishment of FRONTEX, revealed that some MEPs were concerned about the rapid creation of numerous agencies, which indicates that there was an element of agency fascination amongst decision-makers. For these reasons, I argue that institutional isomorphism was at work; an institutional form developed in a different policy field had come to be viewed in a favourable light by decision-makers and was thus transferred into the common border management field.

8.3 Comparative discussion

Agency creation at the European level and national level differ because agency creation at the European level requires an active decision to integrate, or at least harmonise, the policies between different states. Whereas the establishment or change in institutional design of an agency at national level is primarily a matter of public management organisation, the establishment of an agency at European level is equally a matter of integration. The case studies have thus been able to shed light not only on the decision to create agencies but

also on integration at large. An important finding here is that integration, in the shape of agency creation, has been driven by different actors at different times. In the case of Cedefop, the driving force was the trade union movement. As regards EMEA and EASA, we must note a more significant pressure applied by large industry, which could see considerable efficiency gains by the integration of policy and the creation of a central agency. In the case of FRONTEX, Member States played an essential part, and, through the European Council, they took the initiative.

The case studies also shed light on the development of the EP. Studies of EP documentation related to the four case studies show how the institution appears to have got more confidence, but also perhaps developed a more “mature” working culture. The EP had a fairly low key role in the establishment of Cedefop, which followed the consultation procedure. During the process leading up to EMEA creation, the EP was criticised for being irresponsible by tabling an unreasonable number of amendments to the legislation. By the time EASA was established, working practises appeared to have been normalised and cooperation between the EU institutions appeared more cordial. FRONTEX was established by the consultation procedure, which naturally weakened the EP’s influence, but, by this time, we can still notice that the EP was using a more assertive tone than was the case at the time of the establishment of agencies in 1975 and in the 1990s.

Historical institutionalism supports the notion that, to explain the creation and development of institutions, account must be taken of the specific context in which political institutions are created and develop. In terms of the importance of the political situation at large for agency establishment, this

research has shown that a distinction can be drawn between the two regulatory agencies, i.e. EMEA and EASA, and the two advisory agencies, i.e. Cedefop and FRONTEX. The case studies of Cedefop and FRONTEX revealed that the political situation had a fundamental impact on the decision to establish agencies. In the 1970s, economic crisis and industrial decline paved the way for significant trade union support, which rendered the EESC fairly influential, and the establishment of ETUC meant that trade unions got yet another voice in European level discussions. In the early 2000s, the EU was about to undertake the largest enlargement to date, which created considerable concern about the management of the external borders. Tragic incidents involving refugees drew widespread attention to problems of human smuggling and trafficking, and contributed to these issues' being brought up on the European Council agenda. The research could not prove that the political context was of equal importance for the creation of EMEA and EASA. In both of these cases, it is tempting to link their creation to the single market. It is indeed plausible that the completion of the single market led to the need for the EU to perform more tasks, which could be delegated to agencies, and it may have sped up decisions to create EMEA and EASA. However, this does not make it a critical juncture in the historical institutionalist sense. In the case of European policy on medicinal products, harmonisation had been ongoing since the 1960s, which refutes that the creation of the single market was a critical juncture. In several respects, EMEA creation was a matter of formalising structures that were already in place. As regards EASA strong pressure to establish the agency came from the aviation industry, in particular the powerful American aviation

industry, which most likely would favour a single European agency regardless of the existence of the single market.

Another distinction between the advisory agencies (Cedefop and FRONTEX) and the regulatory agencies (EMEA and EASA) is that the latter operate in highly technical fields, whereas there is little undisputed science in the vocational training and border management fields. A reasonable hypothesis would thus be that the rational choice institutionalist idea that delegation takes place in order to concentrate technical expertise would have better explanatory value for EMEA and EASA than for Cedefop and FRONTEX. This proved to be only partially true. Whilst obviously demanding relevant knowledge and expertise from their staff, Cedefop and FRONTEX were not created to be centres of expertise, the work of which were deemed essential for informed policy-making. They were created to coordinate, and are reliant on cooperation with relevant authorities in the Member States. The research has shown that the expertise hypothesis holds significant explanatory value for EASA, which is an agency that seeks to employ the top experts from within the European Union. As EMEA is reliant on authorities within the Member States to carry out the evaluations of medicinal products, this hypothesis does not hold for EMEA, however. An interesting point to note is that interviewees indicated that the prevalence of centralisation has increased over time, and that authorities within different Member States may have to specialise more. This suggests that, although EMEA itself will not become an agency that seeks to employ all of Europe's top experts, the rational choice institutionalist idea of expertise concentration may have gained acceptance. Here we can recall that European

cooperation on the whole was much more intergovernmental in nature when the first cooperation in the medicinal products field was initiated.

Rational choice institutionalist theory could, however, contribute significantly to our understanding of EMEA establishment. There was considerable evidence, for instance the recurring emphasis on upholding common standards and on the agency's role as an arbiter, to support the rational choice institutionalist hypothesis that delegation takes place to ensure credible commitment for policies. Support for the credible commitment hypothesis could be found also in the EASA case study, where the importance of agency independence was particularly emphasised. The findings concerning Cedefop are interesting in that some evidence for a wish for credible commitment was found in relation to the management of the agency. My research indicated a wish from decision-makers to institutionalise, and hence make their commitment credible, to the social dialogue. This shows that the rational choice institutionalist argument about credible commitment need not concern only functions delegated to agencies. It is also applicable to working practices and issues of participation. With hindsight, however, we know the commitment to an active social dialogue has not been completely honoured. Credible commitment was not a driving factor behind the establishment of FRONTEX. The agency is heavily dependent on Member State cooperation, and the agency has no option other than trust to encourage cooperation. If credible commitment had been a concern, we would have expected to see a stronger and more independent mandate for the agency.

Let us turn to the hypothesis that the four case study agencies could have been created in order to lower political transaction costs by increasing

efficiency. Naturally, it would be highly unlikely that agencies would have been created if decision-makers seriously thought that they would lead to less efficiency. Unsurprisingly, the research does not include any strong evidence that efficiency concerns can be completely ruled out. Having said that, the lack of references to efficiency gain as a rationale for agency creation in the case studies of Cedefop was striking, and this leads me to conclude that efficiency gain was not an important motive behind the creation of this agency. There is more evidence in favour of the efficiency hypothesis in the other case studies. As regards EMEA and EASA, references were found to efficiency gains for industry. In addition, the creation of EASA, which drafts highly technical legislation, frees up time for the Commission to work on other things. In the case of FRONTEX, the creation of a single formal border management agency rather than remaining with several more informal units, which sometimes may compete for the same funding, bears witness to a desire to streamline cooperation, thereby making cooperation more efficient. For the two agencies established in the 2000s, i.e. EASA and FRONTEX, I argue, however, that the wish to increase efficiency was secondary to other motives. As to the division of labour between EASA and the Commission, we can conclude that the Commission's striving to attract to itself the number of experts needed to perform EASA's tasks is not a viable option. Thus, the need to acquire within EASA the level of technical expertise needed takes priority over efficiency concerns. Cooperation in the area of border management would not have become reality were it not for enlargement and the transfer of asylum and migration issues to the first pillar. Without these critical events, an issue of increasing efficiency of cooperation would not have arisen.

At the beginning of this research, my expectation was that sociological institutionalist theory would be useful to explain questions of institutional design of agencies. This proved to be correct in three case studies of four. There is evidence that a German vocational training institute provided inspiration for Cedefop. The American FAA was mentioned as a model in the process leading up to EASA creation, and an interviewee also remarked that agencies were fashionable at the time of EASA establishment. In the process leading up to the establishment of FRONTEX, there were calls to draw on the experience gained from other agencies in Europe. Institutional borrowing cannot explain the institutional design of EMEA, however. On the contrary, the research showed that a similar American agency was ruled out as a model in the process leading up to EMEA establishment. There is, nevertheless, evidence to suggest that the establishment of an agency in EMEA's field of operation was legitimised by the existence of agencies with the task of evaluating medicinal products at national levels. As illustrated by these case studies, the EU has drawn lessons from a variety of political settings; bodies at Member State level, previous Community Agencies and American models have been considered.

An important conclusion from the case studies is that the hypotheses derived from the three strands of new institutionalism are not mutually exclusive; in each of the four cases, support could be found for more than one hypothesis, showing that several explanations are at work simultaneously. The three strands of new institutionalism have proved to capture different aspects of agency creation. Whereas rational choice institutionalism holds significant explanatory value for the functions of agencies, sociological institutionalism

tends to explain better questions of institutional design, and historical institutionalism is particularly useful for explaining questions of timing.

8.4 Wider outlook

The establishment of agencies at the EU-level is widely regarded as one of the most significant developments in EU governance in recent years. This research has confirmed that only a minority of Community Agencies hold regulatory powers in the strict sense of the word. This is not to say, however, that the advisory agencies do not have influence in European policy-making. As shown in the case of Cedefop, whose role in norm diffusion is demonstrated by the spread of the European CV, there is evidence that advisory agencies can also have influence in the policy-making process. This means that, to fully comprehend European governance today, one must account for the role of Community Agencies, and the fact that most agencies do not hold regulatory powers is not sufficient to disregard the idea of the EU as a regulatory state.

Discussions about agencies tend to concern issues of control and accountability. Given criticism raised against the EU on issues such as lack of transparency, which, at least in part, is due to the complicated nature of its decision-making processes, I argue that the establishment of agencies, which further complicates the picture, is a counterintuitive choice for decision-makers who wish to improve the public perception of their activities. To address this puzzle, this research has dealt with uncovering the rationales behind agency establishment, and reflecting on their role in governance today. In the remaining part of this chapter, I will discuss the findings of my research in relation to the wider academic debate on regulatory states.

As explained in chapter 2, the rise of the regulatory state is to be understood as market regulation gaining prominence at the expense of macroeconomic stabilisation and income redistribution. This development, which took off in Europe in the 1980s, is accompanied by privatisation and extensive delegation to agencies, resulting in a “diffusion of power” and extended influence of “technocratic experts” (Majone 1997: 159). Rule by experts has since spread beyond the area of market regulation; specialist agencies have been set up also in other policy areas, such as social regulation (see Moran 2002: 394). The prominent role of experts in governance means that the regulatory state will suffer from a democratic deficit if democratic legitimacy is defined as “direct responsibility to the voters or to the government expressing the current parliamentary majority” (Majone 1997: 159). However, the emphasis of the new public management (NPM) trend, of which agencification and the regulatory state are part, tends to be on what public administration *can* deliver rather than *how* it is delivered. In other words, the focus is more on output-oriented legitimacy than on input-oriented legitimacy. There is also often an emphasis on procedural legitimacy, i.e. that institutions follow correct procedures when carrying out their activities.

The findings of this research supports conclusions drawn in previous research that have pointed to a link between the increased use of regulatory agencies and a move towards more neo-liberal solutions. In the cases of the regulatory agencies EMEA and EASA, there are clear linkages between agency establishment and functional needs that have arisen as a result of market liberalisation related to the creation of the single market in particular. With the exception of the first two agencies, Community Agencies have been set up

after the macroeconomic paradigm shift in the 1980s (see Müller and Wright 1994: 2). At the same time, it is noteworthy that the history of agencification at the EU level began before the 1980s, and it did not begin with the establishment of agencies to regulate market activities; the first two agencies were set up in the social policy field. In addition, only a minority of the current agencies are actively involved in market regulation. This leads me to suggest that although the essentially neo-liberal project of the single market is at the heart of EU activities, agencification at the European level has not been driven only by wishes to prevent market failure; the argument that the complexity of modern economies calls for increased use of experts in general appears to be equally important (see Braithwaite 2000: 231). This is puzzling as this argument, with its emphasis on the virtue of more technocratic expert governance, contradicts the rhetoric that the EU seeks to become more representative.

Rather than embracing either the concept of input-oriented legitimacy, which emphasises participation, or the concept of output-oriented legitimacy, which emphasises what the political system can deliver, the EU appears to be attempting to pursue both at the same time. This, I argue, is a problem, which not only hinders agencies from fulfilling their potential, it also hinders the EU from increasing its level of legitimacy in the eyes of the wider public. At the moment, the EU is being criticised for being unrepresentative and inefficient (as a result of overly bureaucratic procedures), at the same time. Starting from the assumption that increased legitimacy is desirable, I argue that the EU could reduce criticism by focusing first on *either* increasing participation *or* increasing efficiency in terms of what the system can deliver.

At the moment, there appears to be a near obsession with procedural legitimacy; the agencies are expected to follow financial and procurement regulations that were set up for the larger EU institutions, and there are numerous control mechanisms to ensure compliance. Whilst this may serve a purpose in terms of holding agencies to account, it is widely regarded to come at the expense of efficiency. My research also suggests that the importance attributed to agencies' being established in accordance with correct procedures has increased over time. The preparatory documents for the later agencies were generally longer, and, where the documents on Cedefop and EMEA focused on a few key reasons for the agencies, the documents on EASA and FRONTEX included longer discussions on the advantages that an agency would bring. A cynical interpretation of this would be that decision-makers have "learnt" the agency literature, and know what type of arguments need to be mentioned in order to raise support. A more generous interpretation could be that transparency and accountability have been increasingly emphasised. Perhaps decision-makers today feel a greater need and/or are under greater pressure to provide motives for decisions that a wider public could appreciate should they decide to look into it in more detail.

At the same time, it is apparent that EU decision-makers are not satisfied with procedural legitimacy only, and attempts are made to add a "participatory element" to the specialist agencies. The inclusion of stakeholders, including the social partners, on the agencies' Boards could be seen as an example to broaden participation beyond the technical experts. Another example is the frequent use of networks to provide the agencies with information. However, neither of these strategies is sufficient to change

drastically the perception that the establishment of agencies leads to more technocratic governance; they tend to open up for participation of certain actors only and not the wider public at large. In addition, as illustrated in particular by the case of Cedefop, not all invited participants can participate on equal terms; current language practices affect negatively the ability to participate of speakers of “small languages” and those who are not familiar with specialist terms.

Whilst EU decision-makers’ attempts at making the agencies appear more participatory can be criticised on several accounts, the findings of my research on EMEA suggest that efforts to achieve output-oriented legitimacy may be more fruitful. Throughout this research, everybody I consulted about EMEA made references to the agency’s good reputation and/or claimed that there is wide approval of this agency’s existence. EMEA Official 2 attributed this to the agency’s keeping “a low profile”, focusing on performing its duties. This, I argue, is a deliberate strategy to emphasise what Hood (1995: 94) has referred to as “accountability in terms of results”; it demonstrates that agencies may achieve a high degree of legitimacy and that this legitimacy is easier to achieve if the focus is on output, for instance in the form of efficient delivery of results, rather than input in the form wide participation in the agency’s decision-making processes. A comparison with the establishment of FRONTEX illustrates further the point about the importance of output-oriented legitimacy; the establishment of this agency was surrounded by more controversy and, to a significant extent, this was due to disagreements about what the results of the agency’s work would be.

In the chapter 2, I referred to the idea of legitimising increased technocratic agency governance by the Madisonian model of democracy, and argued that this could be difficult given traditional European ideas of the importance of public organisation's being accountable to parliament. I also agreed with Majone's view that delegation to agencies is likely to be regarded with suspicion in the EU due to the existing norm of "institutional balance" (Majone 2002: 327), which means that delegation to bodies not mentioned in the Treaties could be perceived as a violation of "fundamental, and presumably immutable, principles of the communitarian system" (Majone 2002: 321). These arguments have been supported by this research on the establishment of Community Agencies.

The Madisonian model of democracy requires a clear separation of powers, and I argue that this neither exists in the EU, nor is there currently any willingness to move in that direction. The idea of an "institutional balance" permeates the agencies themselves; all Community Agencies have Boards including Commission and Member State (i.e. Council) representatives and six Boards even include EP appointees. At the same time, as explained in section 3.3.5, all but two agencies need to receive budgetary discharge from the EP on recommendation from the Council.⁵⁰ This illustrates that the idea of public organisation's being accountable to parliaments, which has been dominant in many national systems in Europe, has been recreated at the European level.

Returning to the starting point of this thesis, the role of agencies is currently subject to debate within the EU. In its communication 'European agencies – the way forward', the Commission (2008: 9) argued that "agencies

⁵⁰ The exceptions are OHIM and CPVO, see section 3.3.5 for details.

can bring real added value to the Union's governance structures", but "this potential is being held back by the lack of a common vision about the role and functions of regulatory agencies". With this document, the Commission aimed to promote dialogue between the different institutions about the role of agencies, and about the crucial questions of accountability and control. This, I argue, certainly is a discussion that needs to take place. This thesis has pointed to problems with the current situation and shown that, whilst the relationships between the agencies covered in this study and other EU institutions often are fairly good, there are also points of disagreement. The financial regulations that the agencies must follow are widely regarded as inappropriate and over-complicated, which leads to inefficiency, thus limiting the ability to achieve output-oriented legitimacy in terms of efficient delivery of results. Often, the agencies wish to receive more funding than the other institutions are willing to grant them. Other questions concern the status and rewards of agency staff, which several interviewees perceived to be lower than for Commission staff and not competitive with the private sector, making it difficult for the agencies to truly become centres of expertise. The research also made apparent that the supranational – intergovernmental debate is very much alive in the debate on the role of agencies. There are sometimes conflicts of interest between agencies and national authorities, where national authorities are sometimes scared of losing out to the European agency. If these problems could be resolved, it would clearly have a positive impact on governance in Europe.

This thesis has shown that rational choice institutionalist arguments with their focus on functional needs appear to have more explanatory value in cases where industry was instrumental in pushing for agency creation, as in the

cases of EMEA and EASA. The research suggests that in policy areas where there is less commercial interest, other logics than a functional logic focusing on transaction costs have more explanatory value, and the establishment of advisory agencies working in policy fields where science is not undisputed, such as Cedefop and FRONTEX, is best explained through analysis of the political situation in which they are created. It has also shown that institutional borrowing takes place; in three cases it had explanatory value for institutions' design and in one case for the area of activity. Whatever the explanation behind the establishment of Community Agencies, they are now part of the European governance structure, and the issues pointed to in the previous paragraph need to be addressed if agencies are to play an efficient role. In 'European agencies – the way forward', the Commission announced its intention to evaluate the current agencies. The findings of this evaluation will, no doubt, give rise to further questions for policy-makers considering agencies as an institutional solution as well as for academics concerned with the emergence and development of institutions.

Appendix 1: Founding Legislation of Community Agencies established 1975-2006

Cedefop: Council Regulation (EEC) No 337/75
EUROFOUND: Council Regulation (EEC) No 1365/75
EEA: Council Regulation (EEC) No 1210/90
ETF: Council Regulation (EEC) No 1360/90
EMCDDA: Council Regulation (EEC) No 302/93
EMEA: Council Regulation (EEC) No 2309/93
OHIM: Council Regulation (EC) No 40/94
EU-OSHA: Council Regulation (EC) No 2062/94
CPVO: Council regulation (EC) No 2100/94
CdT: Council Regulation (EC) No 2965/94
EUMC: Council Regulation (EC) No 1035/97
EAR: Council Regulation (EC) No 2667/2000
EFSA: Regulation (EC) No 178/2002 of the European Parliament and of the Council
EMSA: Regulation (EC) No 1406/2002 of the European Parliament and of the Council
EASA: Regulation (EC) No 1592/2002 of the European Parliament and of the Council
ENISA: Regulation (EC) No 460/2004 of the European Parliament and of the Council
ECDC: Regulation (EC) No 851/2004 of the European Parliament and of the Council
ERA: Regulation (EC) No 881/2004 of the European Parliament and of the Council
GSA: Council Regulation (EC) No 1321/2004
FRONTEX: Council Regulation (EC) No 2007/2004
CFCA: Council Regulation (EC) No 768/2005
ECHA: Regulation (EC) No 1907/2006 of the European Parliament and of the Council

Appendix 2: Interviews

Commission:

Commission Official 1, Brussels, 2.6.2008

Commission Official 2, Brussels, 2.6.2008

Commission Official 3, Brussels, 3.6.2008

Commission Official 4, Brussels, 4.6.2008

European Parliament:

EP Official 1, Brussels, 3.6.2008

EP Official 2, Brussels, 5.6.2008

MEP 1, Brussels, 4.6.2008

MEP 2, Brussels, 4.6.2008

Cedefop:

Cedefop Official 1, Thessaloniki, 31.3.2008

Cedefop Official 2, Thessaloniki, 31.3.2008

Cedefop Official 3, Thessaloniki, 1.4.2008

Cedefop Official 4, Thessaloniki, 3.4.2008

Cedefop Official 5, Thessaloniki, 3.4.2008

Cedefop Official 6, Thessaloniki, 3.4.2008

Cedefop Official 7, Thessaloniki, 3.4.2008

Cedefop Official 8, 7.4.2008 (phone interview)

EMEA:

EMEA Official 1, London, 18.8.2008

EMEA Official 2, London, 18.8.2008

EASA:

EASA Official, Cologne, 10.6.2008

FRONTEX:

FRONTEX Official 1, Warsaw, 11.4.2008

FRONTEX Official 2, Warsaw, 11.4.2008

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