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The European Research Council as Case Study for Agency Design in the EU

Herwig C.H. HOFMANN*

Agencies have become a ubiquitous part of the administrative structure of the EU. They fulfil diverse and important roles in implementing EU policies. As diverse as the tasks of EU agencies are their forms of organization. Few have been established by the Treaties themselves; most have been created on the basis of secondary legal acts. Agency design has, thus, become an important part of EU legislative activity. The future of agencies is, however, very much subject to debate.¹ This article does not analyse agencies in the EU context from an abstract point of view. Instead, it studies possible structural and procedural arrangements for agencies on the basis of a real-life case study, the European Research Council (ERC),² chosen from the area of the EU's research policy. The ERC displays not only a rather unusual structure with creative institutional design. It also stands as an example for many controversies about independence and accountability of agencies in the EU. This short article, after introducing the ERC and before looking at the various options for agency design in the EU in general terms, looks at the options for changing the ERC's legal status and architecture. This is used as a canvas to outline some thoughts on the role and independence of agencies in the EU.

1 THE HYBRID MODEL OF THE EUROPEAN RESEARCH COUNCIL (ERC): A CASE STUDY

The European Research Council (ERC) is the result of the 'Ideas' Programme under the Seventh Research Framework Programme (FP7) of the EU.³ It was created in February 2007 after many years of deliberation with the goal of creating a research support instrument aimed specifically at individual (as opposed to

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¹ Communication from the Commission – The operating framework for the European Regulatory Agencies, COM(2002) 718 final.; Commission communication to the EP and Council of March 2008, European Agencies – The Way Forward, COM (2008) 135 final.

² Its structure is also part of a review initiated by the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Simplifying the implementation of the research framework programmes, COM(2010) 187 final.

³ The budget of this programme was roughly EUR 7 billion for the period of 2007–2013.

consortium-based) high-calibre researchers.⁴ In order to achieve this goal, the ERC was established in a rather unusual structural design. It was not simply an agency charged with the task of implementing a policy. Instead, its institutional architecture consists of three core elements. The first element is the Scientific Council,⁵ which makes suggestions to the European Commission regarding the strategy, the work plan for the implementation of the 'Ideas' Programme, and the criteria for selection and evaluation of research proposals. The Scientific Council is composed of individuals that are appointed by the Commission from a list that was initially established by the Commission itself but is now in the hands of an independent research committee. The Commission, the second element in the ERC's triangular structure, is the central decision-maker and is politically responsible for the implementation of the programme. It is, with the help of a Comitology committee,⁶ obliged to ensure the implementation of the 'Ideas' Programme in accordance with the principles of scientific excellence, autonomy, efficiency, transparency, and accountability.⁷ The Commission formally adopts the work programme for the implementation, the funding, and the timetable for implementation.⁸ In doing so, it is allowed to 'abstain from following the position of the Scientific Council only in exceptional cases, that is, when it considers that the provisions of this specific programme have not been respected'.⁹ The third element of the ERC structure is the ERC Executive Agency (ERCEA).¹⁰

The ERCEA was established by a Commission decision as an executive agency under Regulation 58/2003.¹¹ Within the legal framework of the ERCEA, the Commission appoints the ERCEA's Director and the members of the agency's Steering Committee,¹² adopts the standard financial regulation applicable

⁴ This was in response to other EU programmes that generally not only look at the quality of research but also require that research be conducted in a consortium of participants from various institutions. The ERC was supposed to be different in that the only prerequisite to obtain research funding was the quality of the proposal.

⁵ Established under Art. 5 of Council Decision 2006/972/EC of 19 Dec. 2006 concerning the specific programme: Ideas implementing the Seventh Framework Programme of the European Community for research, technological development, and demonstration activities (2007–2013), OJ 2006 L 400/243 (hereinafter 'Council Decision No. 2006/972/EC').

⁶ Article 8(1) Council Decision No. 2006/972/EC.

⁷ Article 6(5) of Council Decision No. 2006/972/EC.

⁸ Article 6(1) of the Council Decision No. 2006/972/EC.

⁹ Article 6(6) Council Decision No. 2006/972/EC.

¹⁰ See Commission Decision No. 2008/37/EC of 14 Dec. 2007 setting up the European Research Council Executive Agency for the management of the specific Community programme Ideas in the field of frontier research in application of Council Regulation (EC) No. 58/2003, OJ 2008 L 9/15. The first step towards the creation of the ERC executive agency in its present form was a so-called 'dedicated implementation structure' within the Commission.

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

¹² Article 5(1) of Commission Decision 2008/37/EC.

to the ERCEA,¹³ enjoys supervisory powers,¹⁴ and may, under certain circumstances, overrule agency decisions.¹⁵ The ERCEA – as all executive agencies under Regulation 58/2003 – is created only for the duration of the programme it implements.¹⁶ In the case of the ERCEA, this is the period of the Ideas Programme under FP7 that ends in 2013.¹⁷

The Commission thus has a central role with respect to substance and procedure of the implementation of the ‘Ideas’ Programme. This arises not only from its powers to decide which elements of the implementation to delegate to the ERCEA.¹⁸ It also arises from the fact that the ERCEA operates under the Commission supervision and implements its operating budget in accordance with the provisions of the EU’s general financial regulation.¹⁹ Limitations of the role of the Commission in view of the substance of decision-making arise from the obligation to adhere to the Scientific Council and the Comitology committee opinions.

In summary, the specificity of the current set-up of the ERC is a result of the agency being established within the context of a triangle structure with the Commission, the Scientific Council, and the ERCEA, each being independent entities. In this triangle, the Commission is in a central position negotiating between scientific expertise and the administrative implementation. The Scientific Council, while possessing the know-how with respect to substance and procedure of scientific reviewing and the specificities of high-level research projects, has no genuine decision-making and implementation powers. The Commission formally takes all relevant decisions. It is not only in charge of establishing the executive agency, its budget, and procedures. In addition, it takes the funding decisions for research grant awards. The Scientific Council and the ERCEA do not have formal links and are not linked by chains of command.

After two years of existence, the ERC was first evaluated in 2009 by a high-level review panel under the chairmanship of former Latvian President Vaira Vīķe-Freiberga. The panel report was, however, critical about the ERC’s institutional structure and deplored the fundamental problems it found in

¹³ Under Art. 15 of Regulation No. 58/2003 on Executive Agencies, such a standard financial regulation ‘may deviate from the financial Regulation applicable to the general budget of the European Communities only if the specific operating requirements of the executive agencies so require’.

¹⁴ Article 20(1) of Council Regulation No. 58/2003 and Art. 7 of Commission Decision 2008/37/EC.

¹⁵ Articles 22(2) and (3) of Regulation No. 58/2003 on Executive Agencies.

¹⁶ Article 3(1) of Council Regulation No. 58/2003.

¹⁷ Article 3 of Commission Decision 2008/37/EC.

¹⁸ Article 4(1), second indent of Commission Decision 2008/37/EC.

¹⁹ Commission Regulation (EC) No. 1653/2004 of 21 Sep. 2004 on a standard financial regulation for the executive agencies pursuant to Council Regulation (EC) No. 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community.

‘governance, administration and operations of the ERC’.²⁰ The ERC risked, in view of the report’s authors, not being able to maintain in the future its scientific independence vis-à-vis the Commission. Further, the interface between the Scientific Council and the ERCEA was suboptimal in separating content from process. Criteria for a successful future reform of the ERC should be, in view of the report, first, the establishment of a permanent research structure, not linked to a temporary programme, and, second, the most far-reaching autonomy of the institution from political influence of all kinds and interests other than excellence of the proposal. Additionally, the report called for a flexible institutional and procedural structure that should allow for specific procedures necessary for supporting high-calibre scientific research.

Therefore, the calls for reform of the ERC expressed by the review panel, as well as by the specialized legal literature, included demands to establish a more permanent body that would, *inter alia*, overcome the disadvantages of the structural set-up of the existing ERC. Arguments were also made in favour of a structure built to defend the notions of academic freedom and scientific independence, including independence from political wishes of the Commission as well as from Member States.²¹ A possible future body should, in these views, be independent, unite the various functions of the current ERC triangle structure, and be capable of deciding about the types of research grants to be established and creating tailor-made procedures adapted to the needs of scientific research. A new structure, one might add, would require sufficient oversight and accountability in making decisions about the distribution of vast amounts of public money and taking an important position in a key element of the EU’s research strategy.

2 OPTIONS FOR THE DESIGN OF EU AGENCIES

Possibilities of future structural design for the ERC need to be considered in the context of the legal framework of EU law in general and specifically its provisions on agency design. There is an abundance of studies in the public choice line of literature on how, generally speaking, agencies should be designed to allow for accountability and compliance with the political will of delegating legislators.²²

²⁰ Report of 23 Jul. 2009.

²¹ For example, Von Bogdandy and Westphal warned against Member States having the tendency of demanding their *juste retour*, i.e., the demand by Member States that a sufficient amount of research money is allocated to researchers from their country. Such demands would run counter to a selection criteria based purely on the criteria of scientific excellence. See A. Von Bogdandy & D. Westphal, ‘The Legal Framework for an Autonomous European Research Council’, *European Law Review* 29 (2004): 788–807.

²² See, e.g., with many further references: J.E. Gersen, ‘Designing Agencies’, in *Research Handbook on Public Choice and Public Law*, eds D.A. Farber & A.J. O’Connell (Cheltenham: Edward Elgar, 2010), 333–362 who recalls that administrative agencies have long been part of government structures in the

Real-life design options to achieve these tasks, however, depend on the specific context of a legal system. In addition, when thinking of design possibilities for agencies, it needs to be taken into account that the extent of powers of an agency will not only depend on their formal notions but also on practical aspects such as the degree of expertise it will be able to unite within its services and its relations with regulated interests and the public in general.

In the EU, the nature and role of agencies and their governance structure defining independence and accountability depend first and foremost on their legal basis and act of delegation. Various possibilities exist: EU agencies can be established by a Treaty provision, such as the European Defence Agency in Articles 42(3) and 45 TEU or Europol in Article 88 TFEU.²³ If an agency is not created directly by a Treaty provision, legislation establishing an agency requires a legal basis permitting the establishment of an independent legal person. Such legal bases exist in some policy-specific Treaty provisions.²⁴ The majority of EU agencies, however, are created by a legislative act, which has as legal basis either Article 114 TFEU²⁵ or the subsidiary Article 352 TFEU.²⁶ The use of Article 114 TFEU has been accepted for harmonization of the internal market, which makes this the most common legal basis for creating agencies.²⁷ Agencies created by Treaty

western world and have been analysed over the centuries by some of the most famous political theorists including Montesquieu, Tocqueville, and Weber. In turn, Egeberg and Trondal mostly centre on the issues of delegation of powers, technical expertise, and decision-making procedures, as well as supervision and accountability. See M. Egeberg & J. Trondal, 'EU-Level Agencies – New Executive Centre Formation or Vehicles for National Control?', Arena Centre for European Studies Working Paper 12/2010. See also E. Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', *Common Market Law Review* 46 (2009): 1395–1442, 1396–1402.

²³ Their structural details and procedural provisions are fleshed out by the legislative act. See, e.g., Council Joint Action 2004/551/CFSP of 12 Jul. 2004 on the Establishment of the European Defence Agency, OJ 2004 L245/17.

²⁴ Examples are in the area of research in Arts 182(5) and 187 TFEU as well as several other policy areas.

²⁵ For example, the European Network and Information Security Agency (ENISA) established by Regulation (EC) 460/2004 of the European Parliament and the Council of 10 Mar. 2004 establishing a European Network and Information Security Agency, OJ 2004 L 77/1, as amended, on the basis of Art. 114 TFEU.

²⁶ Basically, and with one exception only (the European Environmental Agency), the first and second 'waves' of EU agencies have been initially established on the basis of what is now Art. 352 TFEU. See, for instance, Regulation (EEC) No. 337/75 of the Council of 10 Feb. 1975 establishing a European Centre for the Development of Vocational Training, OJ 1975 L39; Council Regulation (EEC) No. 1360/90 of 7 May 1990 establishing a European Training Foundation, OJ 1990 L131; Council Regulation (EEC) No. 2309/93 of 22 Jul. 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products. Recourse to the subsidiary instrument of Art. 352 TFEU was largely abandoned in order to ensure that agencies set up to pursue specific regulatory purposes were established following the same legal basis concerning the regulatory area at stake. See P. Craig, *EU Administrative Law* (Oxford: OUP, 2006), 148–152.

²⁷ See for an illustration the disputes underlying Case C-66/04, *UK v. Parliament and Council (Smoke Flavourings)* [2005] ECR I-10553; Case C-217/04, *UK v. Parliament and Council (ENISA)* [2006] ECR I-3771, discussed in greater detail, e.g., by K. Bradley, 'Comitology and the Courts: Tales of the

provisions or on the basis of a legislative act are mostly designed to support Member State implementation of EU policies by means of coordinating national implementing activities, facilitating information exchange, as well as advising on best practices.²⁸ Other agencies are designed to take implementing decisions in a given policy field with external effect vis-à-vis individuals.²⁹ Some agencies only assist the Commission in taking decisions, for example, by preparing single-case decisions and the Commission's regulatory acts.³⁰ Finally, agencies may also be designed to enter into a partnership with public and private bodies to execute a certain policy or project such as some of the joint undertakings developed in the area of research.³¹ These legal bases can be seen as an exception to the general rule of Article 291(1) TFEU under which the EU may exercise implementing powers, unless explicitly delegated to the Commission.

Despite varying legal bases, tasks, and structure of the EU agencies, their internal organization is roughly comparable. Details of governance structures are established in the basic act creating the agency. An administrative or management board adopts the agency's work programme. Agency boards are normally comprised of majority representatives from the Member States, in most cases one per Member State. The legal representative of an agency is normally its executive director who is responsible for the implementation of the work programme and the day-to-day management and activity. The executive director will, in most cases, be nominated either by the administrative board or by an institution such as the Council (in the case of Treaty-based agencies) or the Commission (in the case of executive agencies under Regulation No. 58/2003). Often an agency will also

Unexpected', in *EU Administrative Governance*, eds H.C.H. Hofmann & A. Türk (Cheltenham: Elgar Publishing, 2006), 417–447 and H.C.H. Hofmann, 'Which Limits? Control of Powers in an Integrated Legal System', in *The Outer Limits of EU Law*, eds C. Barnard & O. Odudu (Oxford: Hart Publishing, 2008), 45–62.

²⁸ For instance, the European Environmental Agency; see Arts 1 and 2 of Regulation (EC) No. 401/2009 of the European Parliament and of the Council of 23 Apr. 2009 on the European Environment Agency and the European Environment Information and Observation Network, OJ 2009 L 126/13.

²⁹ For instance, the Office of Harmonization for the Internal Market (OHIM) and the European Aviation Safety Agency (EASA): see, respectively, Council Regulation (EC) No. 40/94 of 20 Dec. 1993 on Community trade, OJ 1994 L11 and Regulation (EC) No. 1592/2002 of the European Parliament and of the Council of 15 Jul. 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2002 L240.

³⁰ For instance, the European Agency for the Evaluation of Medicinal Products.

³¹ See, for example, JITs such as established by Council Regulation (EC) No. 71/2007 of 20 Dec. 2007 setting up the Clean Sky Joint Undertaking, OJ 2008 L 30/1; Council Regulation (EC) No. 72/2008 of 20 Dec. 2007 setting up the ENIAC Joint Undertaking, OJ 2008 L 30/21; Council Regulation (EC) No. 73/2008 of 20 Dec. 2007 setting up the Joint Undertaking for the implementation of the Joint Technology Initiative on Innovative Medicines, OJ 2008 L 30/38; Council Regulation (EC) No. 74/2008 of 20 Dec. 2007 on the establishment of the 'ARTEMIS Joint Undertaking' to implement a Joint Technology Initiative in Embedded Computing Systems, OJ 2008 L 30/52; Council Regulation (EC) No. 521/2008 of 30 May 2008 setting up the Fuel Cells and Hydrogen Joint Undertaking, OJ 2008 L 153/1.

have technical boards or scientific committees providing the necessary expertise. Financing of agency activities is mostly undertaken through the general EU budget. Some agencies have additional income such as the Office of Harmonization for the Internal Market (OHIM), which also is financed by fees for the registration of trademarks in the EU.

Next to agencies created by legislative act, there is a category of agencies created by Commission decision.³² Regulation No. 58/2003 on 'executive agencies' allows the Commission to establish legal entities and to entrust upon them certain tasks relating to the management and implementation of Union programmes.³³ These executive agencies, however, may not receive delegation of 'discretionary powers in translating political choices into action'.³⁴ In its delegating decision, the Commission must set out both the conditions and procedures to which an agency must conform in performance of their duties as well as the checks that the Commission departments must perform.³⁵ An important means of Commission influence in the context of organizing an executive agency exists in the context of Article 22 of Regulation No. 58/2003 under which 'any act of an executive agency which injures a third party may be referred to the Commission by any person directly or individually concerned or by a Member State for a review of its legality'.³⁶ Further, when the Commission itself initiates the review of an act of an executive agency, under Article 22(2) of Regulation No. 58/2003, it is expressly not limited to the review of legality but can then also review whether the decision was expedient from the Commission's point of view. As a consequence of its review, the Commission can suspend the agency's act, order interim measures, and, in its final decision, require the agency to modify its act wholly or partly if it deems a different outcome in substance

³² Such as the ERCEA itself.

³³ See Arts 1, 2, and 6 (1) of Council Regulation (EC) 58/2003. They may be entrusted with management of some or all of the phases of a project, carrying out the necessary checks, adopting instruments for budgetary implementation, in particular activities related to the award of contracts and grants, and gather, analyse, and transmit to the Commission information for the implementation of the programme.

³⁴ Articles 6 (1) and (2) of Council Regulation (EC) 58/2003 and Arts 54 (2) and 55 of Council Regulation (EC, Euratom) 1605/2002 of 25 Jun. 2002 on the Financial Regulation applicable to the general budget of the European Communities (hereinafter 'the Financial Regulation'), OJ 2002 L 248/1, as last amended by Council Regulation (EC) 1525/2007 of 17 Dec. 2007, OJ 2007 L 343/9. The Financial Regulation contains detailed rules as to the methods of and controls over implementing the Union budget.

³⁵ Article 3(3) of Council Regulation (EC) 58/2003 of 19 Dec. 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1.

³⁶ Article 22(1) of Council Regulation (EC) 58/2003 of 19 Dec. 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1.

more desirable.³⁷ The Commission under this provision of Regulation No. 58/2003 has substantive and procedural powers to review any act of the agency.³⁸

Agency design is further influenced by the specific provisions of the chosen legal basis such as the cross-section clauses in Article 114(3) TFEU, which requires that legislative proposals aim at achieving a high-level of protection in the areas of health, safety, environmental protection, and consumer protection. In addition, fundamental rights and general principles of law may play a role in agency design. In the area of research finance, for example, academic freedom protected under Article 13 of the Charter of Fundamental Rights (CFR) of the EU may be interpreted to require that structures relevant to research must grant as much independence from direct or indirect political or partisan influence as is possible under the legal framework in question.³⁹ Finally, agency powers, procedures, and design are, in reality, influenced by budgetary rules: The Commission, in charge of implementing the Union's budget,⁴⁰ may, under the EU's financial regulation,⁴¹ provide agencies with a specific, tailor-made, and flexible financial rule book. This may be adapted to the requirements of specific policy areas as, for example, academic research.

Limits to delegation of powers to agencies arise from the basic constitutional principle of conferral of powers, which not only delimits the EU powers vis-à-vis those of the Member States (Article 5(1) TEU) but also establishes that powers are conferred to be exercised by specifically designated EU institutions (Article 13(2), first sentence TEU). The limitations to delegation of these powers to bodies that are not explicitly designated by Treaty provisions, such as most EU agencies, are established by general principles of law recognized by the case law of the Court of Justice of the European Union (CJEU). Although the creation of agencies and the transfer of powers on them have been accepted by the Courts,⁴² the limits to

³⁷ Article 22(4) of Council Regulation (EC) 58/2003 of 19 Dec. 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1.

³⁸ In German, this is referred to as 'Rechts- und Fachaufsicht'.

³⁹ Article 13 CFR reads: 'The arts and scientific research shall be free of constraint. Academic freedom shall be respected'.

⁴⁰ See Arts 317 and 322 TFEU and the Financial Regulation.

⁴¹ Articles 54(2)(a) and (b) and Art. 185 of the Financial Regulation explicitly provides for the Commission to delegate particular budgetary implementation activities to bodies under EU law such as EU agencies if the budgetary tasks delegated are compatible with the tasks of the specific EU body. See also Commission Regulation 2343/2002 of 23 Dec. 2002 on the Framework Financial Regulation for the bodies referred to in Art. 185 of Council Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 357/72.

⁴² For the latest case law, allowing discretion going beyond the traditional notions of limitation of delegation of discretionary powers in *Meroni*, see, for example, Case C-38/09 P, *Schröder v. Community Plant Variety Office (CPVO)*, Judgment of 15 Apr. 2010.

delegation of powers to agencies are generally understood to lie in the *Meroni* doctrine.⁴³ In *Meroni*, a case from the 1950s, the CJEU had not accepted the sub-delegation of powers of the Commission – more precisely, the then High Authority in the framework of the ECSC⁴⁴ – to a newly created body established under Belgian private law, where such delegation of powers included a wide margin of what one may describe as quasi-legislative discretion allowing a body to develop its own policy decisions outside of the oversight of the Commission.

The case law of the CJEU has, in the past decades, become somewhat more lenient towards delegation to agencies. In 2010, for example, the Court of Justice (CJ) addressed the issues of the required level of oversight with respect to *national* agencies created by means of acts of EU law. Essentially, the Grand Chamber of the CJ held therein that democratic oversight of an independent agency was sufficiently protected if, first, parliaments controlled the appointment of senior management of the agency and, second, the agency was required to submit regular public reports to the former.⁴⁵ Although it is not entirely clear to date whether this dictum is equally applicable to the EU itself, the case paints a more delegation-friendly picture of the current case law allowing for more independence of agencies than is generally regarded to be the case under the *Meroni* doctrine.

In addition, case law of the CJEU now has accepted the possibility of delegation of administrative delegation to agencies. In *Schröder v. CPVO*, the applicant had challenged a final decision of the Board of Appeal of an EU regulatory agency, the Community Plant Variety Office (CPVO), rejecting the registration of a plant variety.⁴⁶ The General Court (GC), confirmed on review by the CJ, had neither discussed the nature of powers conferred on the CPVO nor did it review the legality of the legal basis of CPVO. It indirectly accepted the powers of the CPVO to take externally binding decisions under EU law by submitting the CPVO Board of Appeal's decision only to limited judicial review. It explicitly argued that this limited standard was applicable due to the 'discretion' the agency enjoyed.⁴⁷

⁴³ The *Meroni* doctrine arises from the ruling in Cases 9 and 10/56, *Meroni v. High Authority* [1957/58] ECR 133 – one of the very early cases decided by the Court of Justice of the European Union, still in the context of the European Coal and Steel Community.

⁴⁴ European Coal and Steel Community.

⁴⁵ Case C-518/07, *Commission v. Germany* [2010] ECR I-nyr of 9 Mar. 2010, paras 42–46.

⁴⁶ The legal basis of the CPVO is what is now Art. 352 TFEU. Case T-187/06, *Schröder v. Community Plant Variety Office* (CPVO) [2008] ECR II-3151, confirmed on appeal in Case C-38/09, *P Schröder v. CPVO* [2010] ECR I-nyr of 15 Apr. 2010.

⁴⁷ Case T-187/06, *Schröder v. Community Plant Variety Office* (CPVO) [2008] ECR II-3151, para. 63, confirmed on appeal in Case C-38/09, *P Schröder v. CPVO* [2010] ECR I-nyr of 15 Apr. 2010.

3 OPTIONS FOR CHANGING THE ERC STRUCTURE

Turning now back to the requirements of reforming the ERC, the question is which of these general design features of agencies could be used to contribute to a reorganization of the agency according to the reform agenda proposed by the Vika-Freiberga Review Panel Report of 2009. First, it becomes clear that a starting point for the analysis of institutional reform options is finding the potential legal basis for its establishment. Since the ERC is not one of the agencies established under primary law, unlike Europol or the European defence agency, a more permanent structure and agency more independent from the Commission could be created. This would require a legislative founding act. Possible legal bases that could, for that purpose, be taken into account are the policy-specific legal basis in the TFEU's title on 'research and technological development and space' (Articles 179–190 TFEU). On the other hand, the more general legal basis such as the single market provision under Article 114 TFEU or the general provision of Article 352 TFEU is excluded by the *lex specialis* rules of Article 179(3) TFEU. Such a provision actually holds that all Union activities in the area of research, technological development, and space be decided on and implemented only in accordance with the Treaty rules on this policy. This, however, does not exclude the use of Regulation No. 58/2003 on executive agencies of the EU. As already explained, Regulation No. 58/2003 actually allows the Commission to sub-delegate some of its own implementing powers to an agency, that is, powers that have been conferred on the Commission in the context of the research policy provisions. Possible options for agency design in the context of a new ERC agency, therefore, arise from research-specific powers or as a general executive agency. The research-specific authorizations for creating an agency include, first, Article 182, paragraph 5 TFEU, which gives a legal basis for 'measures necessary for the implementation of the European research area'.⁴⁸ Another possibility is Article 187 TFEU, which allows for setting up of 'joint undertakings or any other structure necessary for the efficient execution of Union research'.

3.1 A MEASURE AS SPECIFIED IN ARTICLE 182, PARAGRAPH 5 TFEU

One of the key questions of using Article 182, paragraph 5 TFEU is whether the creation of an EU agency could be a 'measure necessary for the implementation' of the European research area. On closer view, it appears that the legislator

⁴⁸ Article 182, para. 5 TFEU: 'As a complement to the activities planned in the multiannual framework programme, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the measures necessary for the implementation of the European research area'.

defining a ‘measure’ under this paragraph has wide discretion. ‘Measures’ can be procedural decisions designing the steps to be taken for reaching a goal. They can also be decisions to finance a certain activity, concept, or research programme. Measures, finally, can also be structural decisions setting up a specific agency or foundation to support the goals of the ERC. In fact, the notion of a ‘measure’ as a legal basis for the creation of a permanent structure in the form of a legal person, such as an agency or foundation, is widely accepted in the legislative practice and by the case law of the Court of Justice. Article 114 TFEU, also granting the right to adopt ‘measures’, for example, is the legal basis of various agencies in the EU including the European Food Safety Agency⁴⁹ and the European Network and Information Security Agency (ENISA),⁵⁰ to name a few.

One essential difference between the ERC and many existing EU agencies is that the latter are generally designed to support implementation of EU policies in cooperation with Member States’ networks. However, agencies designed specifically with a view to implementing and further developing EU policies also exist, for example, in the form of the European Fundamental Rights Agency (FRA). The special nature of the ERC is that its scope of tasks would be broader than that of the FRA in that it would define instruments to implement a European research area and implement these instruments by establishing the abstract general criteria for distribution of research monies, taking individual grant decisions, as well as administering the (significant) financial means allocated to the ERC. The question therefore is whether other more general rules on delegation of powers in the EU would allow for such comparably far-reaching delegations of powers.

Applying the limits of the *Meroni* doctrine to the ERC as a real-life agency example would indicate that if the legislative delegation confers on the ERC the duty to award a certain type of high-level research grant, the substance of the policy decision will have been made on the legislative level. The amount of money to be distributed by the grant schemes (some EUR 1.7 billion per annum under current numbers) would require well-defined structures of institutional responsibility as well as accountability and review mechanisms in budgetary arrangements. A reason to be optimistic about far-reaching delegation to an ERC

⁴⁹ Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 Jan. 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

⁵⁰ See for the CJEU explicit acceptance of what is now Art. 114 TFEU as legal basis for these two agencies: Case C-217/04, *UK v. Parliament and Council (ENISA)* [2006] ECR I-3771 and C-66/04, *UK v. Parliament and Council (Smoke Flavourings, EFSA)* [2005] ECR I-10553. The most frequently applied legal basis for agencies in the EU, Art. 352 TFEU, in the English Treaty version, also speaks of ‘measures’. In German, this is, however, ‘die geeigneten Vorschriften’ and in French ‘les dispositions appropriées’.

agency under the *Meroni* test might also arise from the fact that *Meroni* was based on the idea that the limitations of delegation of powers were designed to protect the institutional balance, that is, the conferral of specific powers to specific institutions in the Treaty provisions. The Treaty provisions on research are indicative of an inherently flexible approach to institutional distribution of powers. Additional support for a delegation-friendly approach in this specific case might come from the requirements of Article 13 CFR on academic freedom, which might be interpreted as demanding a research support structure that gives the utmost independence from political influences. Finally, *Schröder v. CPVO* has made delegation of administrative discretion to an agency an acceptable option in EU law.

In light of this, it appears that Article 182(5) TFEU allows for establishing permanent and independent structures with their own legal personality. A structure set-up under this legal basis may benefit from far-reaching delegation to establish and implement policies necessary to create an ERC. These powers may include defining the types of research finance and establishing the administrative procedures and personnel management within a legislative frame established in the delegating act.

3.2 A JOINT UNDERTAKING OR ‘OTHER STRUCTURE’ UNDER ARTICLE 187 TFEU

Under Article 187 TFEU, the Union may set up legal persons as ‘joint undertakings or any other structure necessary for the efficient execution of Union research’. When comparing the possibilities of Article 187 TFEU to those under Article 182(5) TFEU, at first sight, it is not apparent what the difference should be between a ‘joint undertaking’ or ‘structure’ under Article 187 TFEU and a ‘measure’ under Article 182(5) TFEU. Both legal bases appear to allow for the establishment of bodies with their own legal personality. At closer inspection, however, it appears that the possibilities of delegation are more limited under Article 187 TFEU than under Article 182(5) TFEU. One important difference is that a structure under Article 187 TFEU needs to be explicitly ‘necessary’ for the ‘effective execution’ of pre-defined EU research programmes.⁵¹ Delegation under Article 187 TFEU therefore allows predominantly for matters falling into the

⁵¹ Although this interpretation may not seem immediately apparent from the English version of the Treaty, a comparison with other language versions such as German and French confirm this reading: ‘Die Union kann gemeinsame Unternehmen gründen oder andere Strukturen schaffen, die für die ordnungsgemäße Durchführung der Programme für Forschung, technologische Entwicklung und Demonstration der Union erforderlich sind’. ‘L’Union peut créer des entreprises communes ou toute autre structure nécessaire à la bonne exécution des programmes de recherche, de développement technologique et de démonstration de l’Union’ (emphasis added).

range of tasks of putting programmes' specific choices into action. The notion of joint undertakings under Article 187 TFEU focuses on fostering public-private partnerships through special partnership bodies or Joint Technology Initiatives. Unlike Article 45 and the following articles of the Euratom Treaty, there is no definition of a joint undertaking in the TFEU. Their *raison d'être* is to allow for structural involvement of private business know-how and approaches. This involvement of private actors can enlarge the reach of public activity by cooperating with the private sector. In this context, the public sector may initiate an activity and provide a start-up or partial financing with the hope of establishing the structure as a viable private enterprise. The results are innovative bodies such as joint undertakings in charge of establishing the International Thermonuclear Experimental Reactor (ITER) for nuclear fusion,⁵² for an overhaul of the European Air Traffic Management (SESAR),⁵³ as well as Galileo for satellite programmes.⁵⁴ Other public-private partnerships are designed chiefly as partnership and support institution for independent national actors such as universities. The European Institute of Innovation and Technology (EIT)⁵⁵ is an example for the latter.⁵⁶ The EU's financial regulation is adapted to this approach, allowing in Article 54(2)(c) delegation to private bodies pursuing a public sector mission. A joint undertaking under Article 187 TFEU could, thus, be organized in a public-private partnership. The Commission may delegate budget implementing tasks to these bodies subject to the general limitation that the Commission may not delegate to third parties 'the executive powers it enjoys under the Treaties where they involve a large measure of discretion implying political choices'.⁵⁷ This corresponds to the narrow dictum of the *Meroni* doctrine,⁵⁸ under which the

⁵² See Council Decision 2007/198/Euratom of 27 Mar. 2007 establishing the European Joint Undertaking for ITER and the Development of Fusion Energy and conferring advantages upon it, OJ 2007 L90.

⁵³ See Council Regulation (EC) No. 219/2007 of 27 Feb. 2007 on the establishment of a Joint Undertaking to develop the new generation European air traffic management system (SESAR), OJ 2007 L64, amended by Council Regulation (EC) No. 1361/2008 of 16 Dec. 2008.

⁵⁴ See Regulation (EC) No. 683/2008 of the European Parliament and of the Council of 9 Jul. 2008 on the further implementation of the European satellite navigation programmes (European Geostationary Navigation Overlay Service (EGNOS) and Galileo), OJ 2008 L196.

⁵⁵ Regulation (EC) No. 294/2008 of the European Parliament and of the Council of 11 Mar. 2008 establishing the European Institute of Innovation and Technology, OJ 2008 L97.

⁵⁶ Arrangements for the financial and administrative governance of these bodies are governed by special rules under the Financial Regulation, and they are directly responsible to the discharge authority for budget implementation. They are explicitly designed to work differently to a normal 'public sector' body: Though supported by public funds, they should make decisions from the perspective of commercial edge or expertise.

⁵⁷ Article 54(1) of the Financial Regulation.

⁵⁸ Case 9/56, *Meroni v. ECSC High Authority* [1957/58] ECR English Special Edition 133.

Commission may not delegate 'discretionary powers, implying a wide margin of discretion'.⁵⁹

3.3 THE ERC AS A REFORMED EXECUTIVE AGENCY

An alternative legal basis for the ERC would be a Commission decision delegating executive powers to a newly created executive agency in the context of Regulation No. 58/2003.⁶⁰ Delegation in this context, however, is limited. As discussed, under Regulation No. 58/2003, the Commission may, by decision, create executive agencies to administer a specific EU programme under the condition that all discretionary decisions defining a policy are maintained within the Commission.⁶¹ Delegation to an executive agency is, thus, a case of sub-delegation by the Commission of executive powers that it has received in an act of delegation in a specific policy area. The Commission can, by definition, only delegate what it has obtained by explicit delegation in a legal act of the EU.⁶²

Limitations to delegation of powers to an executive agency arise from Article 54(1) of the EU's Financial Regulation, which is a reiteration of the '*Meroni* doctrine'. A legislative act delegating implementing powers to the Commission in a certain policy area may, of course, also create an exception to Regulation No. 58/2003 on executive agencies. This might appear attractive, for example, in the context of creating an atypical executive agency in which the now independent Scientific Council might be integrated. The current independent Scientific Council was established along the model of an expert group of the Commission. The difference however is that the Commission in the current ERC legal framework is legally obliged to take the opinions of the Scientific Council into account when adopting the work programme for the Ideas Programme. It is excused from doing so only where it has reason to assume that the Scientific Council had not respected the provisions of the 'Ideas' Programme.⁶³ However, the *Meroni* doctrine encapsulates also general principles of law limiting *ultra vires* sub-delegation of powers from institutions to other bodies and the violation of the

⁵⁹ *Ibid.*, 152. In the case that wide legislative type discretion was distinguished from an executive 'more limited margin of appraisal', *Meroni* therefore did not exclude the delegation of administrative discretion altogether.

⁶⁰ They can be entrusted with managing any tasks required to implement a Community Union programme but not given 'discretionary powers in translating political choices into action'. See Art. 6(1) of Council Regulation (EC) 58/2003 of 19 Dec. 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1.

⁶¹ Article 6 of Council Regulation 58/2003.

⁶² Under Arts 6(2)(b) and (3) of Regulation 58/2003, the powers delegated by the Commission to the executive agency 'shall be defined by the Commission in the instrument of delegation'.

⁶³ Article 6(6) of Council Decision 2006/972/EC.

institutional balance. In this view, it appears that the current ERCEA structure is already stretching the limits of the possible delegation of powers to an executive agency in that the Commission has delegated powers that it does not really possess, that is, those of deciding to follow the opinion of an expert group.

Therefore, it appears difficult to reconcile one of the central criticisms of the ERC structure forwarded in the 2009 Panel Review Report – the dependency of the ERCEA on the Commission as political master of the ‘Ideas’ Programme and potential source of limiting scientific independence in the choice of research proposals and procedures – with the structural requirements of executive agencies. Central questions for agency reform were the degree and extent of control of a future structure by the Commission or – in other words – the possible degree of independence. Here, the possibilities of structuring a future ERC in the context of an executive agency appear limited at best.

4 LESSONS FOR THE ERC FROM THE REALITY OF EU AGENCIES

For determining the forms of delegation and of organization of an agency, the possibilities and limitations to delegation differ according to the legal basis chosen. Both public and mixed public-private structures are possible. The internal structure of agencies, despite the various legal bases, is generally quite similar. Next to an advisory or management board, there is generally a director and, in many cases, also a list of expert scientific panels. Differences in agency organization exist mainly with regard to reporting duties, rights to nominate personnel, representation on the management board, possibilities of overruling an agency decision, and the forms of financial independence and supervision.

The case study of the ERC allows drawing some conclusions for the more general debate on the future of EU agencies. One of the specificities of the ERC is that it is an agency that does not primarily coordinate Member State administrations or act as a networking body but prepares decisions on the European level. Therefore, atypically, the ERC does not conduct composite administrative procedures, in which procedural steps from various jurisdictions – national and European – lead to a final decision by one of the network participants. The difference between agencies acting within networks and the ERC acting on its own on the European level is not so much its internal organization but more the procedural rules. Requirements of transparency and accountability of the procedures leading to a final administrative decision, however, differ.

A fundamental difference between various agencies exists in the issue of delegation of powers. Executive agencies created on the basis of a Commission

decision under Regulation No. 58/2003 are granted implementing powers as sub-delegation by the Commission. Agencies created as structural 'measures' are established either to further the implementation of a specific policy area and the internal market (Article 114 TFEU) or to ensure that an objective of the Treaty is fulfilled (Article 352 TFEU). Finally, agencies created on the basis of Treaty provisions receive their delegation to implement EU from the constitutional charter of the EU, the Treaties. These different lines of delegation have consequences for accountability and legitimacy structures. In that context, the original choice for the ERC of an executive agency was not entirely misguided. The FP7's programme 'Ideas' was to be implemented solely on the EU level, and thus, the implementing powers were delegated by legislation to the Commission to be sub-delegated to the ERCEA acting under strict supervision of the Commission. The problem with this construction, however, is that scientific independence from political influence from the Commission depends on the Commission's goodwill. The attempt to achieve some scientific independence by the creation of a Scientific Council of experts was creative but not practically viable due to the separation of scientific expertise and administrative capacities. The alternative of setting up an independent agency, which receives delegation of powers in form of a piece of legislation, would ensure some more independence from the Commission but might, in turn, bring the ERC agency as such closer to the Member States. Here, the question arises as to whether this has to mean that individual Member States have decisive influence over decision-making. However, this does not have to be the case. The FRA and the Food Safety Authority are models of agencies without 'one Member State, one vote' representation on the Board of the agency – the main line of influence of Member States. In more general terms, the discussion of the case study on possibilities for recreating the ERC shows that the nature of an agency is not all decisive for its internal structure. Differences will exist regarding the procedures to be applied. More importantly, however, differences will exist regarding accountability and supervision structures. These are relevant when looking at the independence of an agency vis-à-vis the Commission or vis-à-vis the Member States, respectively.

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