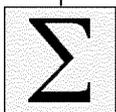


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**SIGMA - A JOINT INITIATIVE OF THE OECD AND THE EUROPEAN UNION,
PRINCIPALLY FINANCED BY THE EU**

**ORGANISING THE CENTRAL STATE ADMINISTRATION:
Policies and Instruments**

SIGMA PAPER NO. 43

The main purpose of the paper is to provide orientations based on a comparative approach to policy makers on drafting legislation on the organisation and functioning of the state administration. It is therefore written in a practice oriented way, although it nevertheless attempts to draw some generalisation.

For further information please contact Francisco Cardona, Sigma; Tel: (33 1) 45 24 13 74 - Email: francisco.cardona@oecd.org

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SIGMA

Support for Improvement in Governance and Management
A joint initiative of the OECD and the European Union, principally financed by the EU

ORGANISING THE CENTRAL STATE ADMINISTRATION: Policies and Instruments

SIGMA PAPER No. 43

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FOREWORD

This paper has been prepared by the Sigma Programme following a request of the Government Office of the Czech Republic. The OECD has worked extensively during the last few years on issues relating to the organisational dimension of the national administration and, in particular, on the phenomenon of “agencification” and its impact on governance structures. It has already produced a significant number of analyses¹, including a comprehensive comparative publication on *Distributed Public Governance (2002)*². Sigma has also published on the topic in the framework of public expenditure management and with reference to transition countries³.

This OECD work was prompted by the problems caused by the increasing administrative-functional deconcentration within its member countries. The main questions posed were along the lines of: Does departmentalisation (keeping the whole responsibility within a ministry) ensure better control and efficient management of administrative and other public services or, on the contrary, does agencification (in the sense of setting up separate bodies) result in better management and de-politicisation?

This paper has been prepared mainly by Professor Jacques Ziller of the Law Department of the European University Institute in Florence, Italy. It takes stock of already published work by the OECD-GOV Directorate, reproducing some of the best descriptive and prescriptive parts of this work in Annexes 1 and 2. Other sources⁴ have been used by the author, who also bases his analysis upon his knowledge of EU Member States’ administrations, acquired in the framework of consultancy and training as well as academic research.

The paper draws from previous published work by OECD, but it deepens and enlarges the scope of work already done by describing the existing European models for organising the central state administration as well as their legal frameworks and by questioning the idea that there is a generally diffused pattern of public services that are usually entrusted to autonomous bodies located “at arm’s length” of governments. Examples are taken mainly from EU Member States and from EU institutions, as the latter are especially relevant in view of the principle of loyalty and the obligations of an EU Member State.

The above-mentioned administrative-functional deconcentration in OECD countries was motivated by the search for efficiency, additional savings and improvement in service delivery, by the need for more transparency and neutrality in bodies regulating markets, and by a willingness to draw “independent” experts, as well as affected citizens, into the decision-making process in specific areas. Observers have also identified other reasons in some countries for creating

¹ Amongst others, “Signposting the zoo — from agencification to a more principled choice of government organisational forms”, paper written by Derek Gill while on secondment to the OECD and published in the *OECD Budgeting Journal*, vol. 2, no. 1 and in the OECD Policy Brief, *Public Sector Modernisation: Changing Organisations*, 2004.

² OECD (2002), *Distributed Public Governance: Agencies, Authorities and other Government Bodies*, OECD, Paris.

³ Sigma (2001), *Managing Public Expenditure: A Reference Book for Transition Countries*, OECD, Paris and SIGMA (2001), *Financial Management and Control of Public Agencies*, Sigma Paper no. 32, OECD, Paris.

⁴ For a comprehensive overview of the literature and Internet sources on the modernisation of public administration in 29 European countries, see Hermann Hill (2006), *Quellen zur Verwaltungsmodernisierung in den Staaten Europas — Bücher, Aufsätze, Internet*, Deutsche Hochschule für Verwaltungswissenschaften, Speyer (Speyerer Arbeitsheft Nr. 183, 266 p.). Amongst the most recent publications, see Annie Chemla-Lafay and Céline Cholf (2006), *25 ans de réforme de la gestion publique dans les pays de l’OCDE : Convergence et systémique*, Institut de la Gestion publique et du Développement économique, Paris (available on the Internet at: http://www.comite-histoire.minefi.gouv.fr/sections/etudes_publication/etudes/bilan_de_25_ans_de_r/view?igpde_lang_redirect=1) and Office parlementaire d’évaluation de la législation (2006), *Les autorités administratives indépendantes: évaluation d’un objet juridique non identifié* (available at: <http://www.senat.fr/rap/r05-404-1/r05-404-11.pdf>).

autonomous bodies, namely escaping from administrative law and reducing legal constraints in recruitment and pay schemes for the staff in such agencies.

Since this deconcentration, concerns have been raised about a possible loss of political control, weakened public accountability (lack of transparency, difficult control by the legislative branch), poor policy co-ordination due to the fragmentation of policy-making, as well as unethical conduct in the public sector and a weakened system of guarantees for citizens' rights. As a consequence the paper is also evaluative and critical of country experiences, because one of its main immediate objectives is to provide policy advice to Czech policy-makers for the drafting of legislation on the organisation and functioning of the state administration.

The critical evaluation of the impact of agencification, which is at the basis of the paper, logically conducts the author to insist more on the questions to be asked and answered by policy-makers than on a detailed description of existing structures, which can easily be found in previous OECD documents, especially in the comprehensive comparative overview, *Distributed Public Governance — Agencies, Authorities and other Government Bodies*, and in the policy paper, "Organising Ministries and Agencies: Recent Trends in OECD Member Countries". The most useful extracts of these two publications are provided as annexes to this paper.

One of the paper's main purposes is to provide bases for policy advice to policy-makers on the drafting of legislation on the organisation and functioning of the state administration. It is therefore written in a practice-oriented way and departs from academic standards in terms of theoretical developments and references to publications and other materials. It attempts nevertheless to draw generalisations.

The paper may also be useful for any country of Central and Eastern Europe, including new EU Member States and other states formerly ruled by communism, where "agencification" was a usual state of affairs long before the transition to democracy began. This has been described (Beblavý, 2001) as the "paradox of the communist autonomy"⁵:

"Since communism (or real socialism as it was officially and, in a way, aptly called in countries themselves) meant a totalitarian system based on collective ownership of all means of production and repressive and intrusive political system, both outsiders and insiders often tend to see it as an environment with very low level of autonomy for individual actors in any area. Such a view tends towards perception of the whole communist society as a centralised, vertically and horizontally integrated hierarchy, where the centre (e.g. central committee of a communist party and its government apparatus) directed resources and activities of sectors, organisations and individuals. Specifically in case of state apparatus, this leads to identification of such structures with vertically integrated ministries of OECD countries before the agency drive began. Consequently, it is easy to perceive a similarity between the fall of communism and beginning of reforms in OECD countries to provide more autonomy to parts of the governmental machinery.

Such approach ignores several important facts. The officially tightly-knit hierarchy contained thousands of organisations with legal autonomy and millions of individuals. While the system could rely to some extent on its ability for arbitrary use of power to resolve conflicts between interests in this hierarchy, arbitrary use of power in itself was an insufficient answer to daily routines of administration in a complex society. The communist system lasted from 40 to 70 years in countries of Central and Eastern Europe as an industrialised economy where citizens were provided with a cradle-to-grave welfare superstate (issues in quality, responsiveness and ability to generate wealth notwithstanding). No economic, political and social system would be able to last so long in these complex conditions unless it developed a relatively predictable system for conflict resolution between both individual and organisational interests.

Since the hierarchy involved not only public sector as understood in the OECD countries, but also the whole corporate sector (enterprises), the well-known problems of information flows and

⁵ Miroslav Beblavý (2001), "Understanding the Waves of Agencification and the Governance Problems they have raised in Central and Eastern European Countries", presentation to the conference organised by the OECD in Bratislava on 22-23 November 2001 and hosted by the Slovak Government.

information asymmetries were even more acute than in public sectors of OECD countries due to span-of-control problems and lack of accountability systems. Managers of organisations were the real masters of the system because of their unique position in the information flows and decision-making. Since the “public” and “corporate” sectors were treated equally under the communist system — both were controlled by sectoral ministries and were subject to similar regulatory environment — this blurring not only led to enterprises behaving like “civil service”, but also to “civil servants” behaving like corporate managers.

The result was that the communist system bestowed to its democratic heirs a system with a very high number of individual organisations both in the “corporate” and “public” sector with dedicated functions. These organisations were often based on a single-purpose agency principle and the communist system had precise rules for their budgeting, management and HR procedures

However, these organisations generally had no accountability systems in addition to their supervision by ministries. On the other hand, they had a number of legal relationships sometimes enforceable in courts with other elements of the government. Since the “public sector” organisations themselves and their ministries saw them on par with “corporations” (as it was unclear anyway what belonged where) and as the regulatory framework was similar, this led to high level of both de iure and de facto autonomy.

During transition, this philosophy was reinforced by “a-need-to-survive” mentality of dramatic cuts in budget allocation, in which public organisations were encouraged and forced to raise revenue regardless of their mission and suitability for such an approach.

All of this has led to a situation where the real heritage of communism is not a hierarchical, disciplined public sector, but a chaotic free-for-all, where organisations often have legally defined autonomy, rights and responsibilities, their staff and particularly managers feel certain informal ownership rights and the distinction between public- and private-sector mentality is blurred or non-existent in eyes of most actors. Such a situation certainly influenced agencification processes during the transition period”.

It is against this backdrop that the Czech Government Office requested from Sigma comparative analyses and knowledge of EU Member States and EU institutions. Consequently, the paper focuses firstly on the organisational dimension of national administrations and relies on a critical evaluation of the impact of “*agencification*” on governance structures. It refers in particular to the accountability mechanisms which EU countries have (or have not) put in place to ensure policy coherence across the state administration, control of public funds, and responsiveness of the government as a whole to the expectations of citizens. These mechanisms are to be examined in the light of obligations of becoming an EU Member State, namely complying with the principles and rules set up in the EU and EC treaties as well as in EU/EC legislation and in accordance with the principle of loyalty, as formulated in article 10 of the Treaty establishing the European Community:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks...They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Secondly, the paper also focuses on the topic from an EU institutional perspective. It is particularly interesting to take into account the case of European Community executive agencies, which constitutes one of the rare attempts to lay down in different ways the elements that are needed for the creation and running of agencies in a general, written regulatory framework that is easily accessible (i.e. *Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes - see Annex 4*)⁶. While this is not to be considered as a model to be necessarily followed, the regulation has the advantage of being very comprehensive in

⁶ The regulation is published in the *Official Journal of the European Communities*, n° L 11 of 16 January 2003, pp. 1-8. Unfortunately, there are no versions in the languages of new EU Member States, as it was published prior to the May 2004 enlargement.

addressing the issues that need to be regulated. Furthermore, it is more than probable that it will be used as a reference in EU Member States as a whole. For that reason the text of the regulation is provided in an annex to the present paper.

Democratic accountability makes it possible to overcome the paradox of communist autonomy in the organisation and functioning of the administration, but at the same time engenders other problems, which the paper describes together with the solutions, realistic or not, envisaged in some of the pre-2004 EU Member States. In those countries one crucial challenge remains, that is, the design of general organisational legal frameworks for the administration which strike a sound balance between managerial autonomy and political and administrative accountability. Such a design must include clear frameworks to avert arbitrariness, while at the same time allowing legitimate discretion in managerial decision-making.

For further information on this paper, please contact Mr. Francisco Cardona, Senior Advisor at Sigma (francisco.cardona@oecd.org).

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1. BEST PRACTICES, MODELS, REFORM AND LABELS

European models of government

As far as administrative organisation is concerned, the consequence is that a often a common understanding of models, institutions, and concepts is taken for granted, whereas in reality clichés and misunderstandings dominate as soon as exchanges between officials and politicians go beyond a very strictly defined and restricted policy area. Management consultants, and also many academics, are not better at using the tools of comparative analysis, and it is therefore necessary to draw attention of policy-makers to certain key concepts and phenomena that need to be taken into account when reflecting upon the reform of public administration.

Practitioners often refer to “models”, while social scientists familiar with Max Weber’s categories refer to “ideal types”. What these two formulations, which refer to a simplified description of reality for the purpose of analysis and evaluation, have in common is that they easily mislead listeners and readers into believing that a description or analysis is to be taken as a prescription (a model that would have to be followed and regarded as the ideal, in the sense of the best form). To avoid this danger, others (academics, as well as politicians, public officials and journalists) use the word “paradigm”, which is only clear to those who know its etymology⁷, whereas it is “a word too often used by those who would like to have a new idea but cannot think of one.”⁸

The term “paradigm” is very often used when addressing what is referred to as a “paradigm shift”⁹, i.e. a change in the dominant concept or model, and is thus especially fashionable in the literature on reform and management of change. Much of the literature about agencification refers to a “paradigm shift” in the organisation of government. Although this might be true for single countries (the UK in the 1980s especially), there is no empirical evidence that it is true for all or even the majority of OECD countries, as many of the organisational forms examined under the topic of “distributed governance” have existed for 50 years or even a century or more.

This notwithstanding, it is important to realise that most western European systems of government indeed were built in the 19th-20th centuries, based on patterns that were similar enough to be considered as a “European standard model of administration”, which is totally different from the Swedish And US models of government¹⁰. The American one is structured at both federal and state levels according to the distribution of powers between the legislative and executive branches of government (presidential/congressional model) and reflects the important role of courts in the US system, which is not replicated in European countries.

⁷ The word paradigm comes from the Greek word παράδειγμα which means “*pattern*” or “*example*”, from the word παραδεικνύει meaning “*demonstrate*”.

⁸ Mervyn Allister KING, former Deputy Governor, Bank of England (source *Wikipedia, the Free Encyclopaedia*, <http://en.wikipedia.org>).

⁹ The Thomas Khun’s discovery of the “Paradigm Shift” as an engine leading to scientific evolution has been abused. “The phrase has been abused in “marketing speak”, and is often considered a meaningless buzzword in this context. This is now so widespread that Larry Trask lists it in his book *Mind The Gaffe* as a phrase never to use, and he advises caution when reading anything that contains this phrase” (source *Wikipedia, the Free Encyclopaedia*, <http://en.wikipedia.org>).

¹⁰ See Jacques Ziller (2001), “European Models of Government: Towards a Patchwork with Missing Pieces” in *Parliamentary Affairs*, pp. 102-119.

France, Germany and the United Kingdom are most often referred to as providing European models of administration, although they are by no means the only countries that may be identified as archetypes of western European systems of government. The Austrian system, which had quite some influence in Central Europe and northern Italy in the 19th century, shows some essential, specific features that differ from the German experience. Furthermore, many features of the administrative systems of the three countries mentioned above relate to their relatively important size — in terms of territory and more importantly in terms of population — and therefore lack relevance for relatively smaller countries. However, although each of the smaller countries has a public administration with a number of very distinct features (especially the Netherlands), as a group they have been influenced to a very wide extent by the systems of their larger neighbours.

Nordic countries are an exception. While Finland and Sweden have kept very specific systems, Denmark and Norway have followed some patterns of the Swedish model and some of the standard European model. Switzerland has a unique system of government, due as much to its federal form as to its constitutional regime — which is neither a parliamentary system, as in the rest of Europe, nor a presidential/congressional system, as in the USA — and to the omnipresence of semi-direct democracy. These unique features make it very difficult to refer to Switzerland as a source of inspiration for the reform of government organisation.

Italy is a particularly interesting case, as the administrative structures of the Kingdom of Italy after unification in 1864 were those of the Kingdom of Piedmont-Sardinia, which in turn had been modelled after the French administrative system since the first decades of the 19th century. These structures were applied in a rather uniform way after Italian unity, but in very different contexts as far as government culture and structures were concerned. In the North, Lombardy and Veneto had the experience of the efficient — but alien and autocratic — Austrian administration. In the South, there was a rather tiny and inefficient government structure under the reactionary, autocratic and corrupt regime of the Bourbons of the Kingdom of the Two Sicilies. The central part of Italy also had very diverse government structures, combining the tradition of city government and the legacy of the old opposition between Guelphs and Ghibellines (i.e. between allies of the Emperor and allies of the Pope), which still accounts to some extent for the persistent weakness of Italian state administration.

Using foreign models and practices for reform

Exchanging “best practices” between policy-makers and public officials of different countries is a major source of inspiration for policy reform, alongside endogenous reform plans of government agencies in charge of the public service, management consultancy, and academic publications in the area of public administration and public management.

The diversity and abundance of these sources of inspiration have the advantage of multiplying the examples and points of view, which may help to achieve a better organisation of government services. However, they also contribute to increasing the fuzziness of concepts as well as to uncertainty about the reality of organisational structures, rules and functioning. This in turn easily becomes a pretext both for hasty reform and for passive resistance to change.

In the framework of EU membership, the exchange of “best practices” is fostered as a major tool of the “Open Method of Coordination”, which plays a central role in the “Lisbon Strategy”, adopted in 2000 with the objective of making the EU “*the most competitive and dynamic knowledge-based economy in the world by 2010, capable of sustainable economic growth, with more and better jobs and greater social cohesion.*”

Without entering into the merits of the Strategy and of the *Open Method of Coordination*, it has to be noted that it has reinforced pressure on public officials and politicians of EU Member States to

present their own achievements and organisation in the most favourable way (especially in the case of “old” member states) and to show a positive attitude towards taking over methods and organisations from other — reputedly more efficient — member states. However, this most often happens without taking the time and using the tools of comparative analysis.

If sound comparative analysis is to lead to institutional reform it is necessary, as Beblavy (2001) puts it, that there is a genuine preoccupation to ensure domestic consistency in the creation of institutions and agencies. Domestic consistency means that the actual rules governing the agency’s activities and behavioural incentives are mutually supportive in search of an effective, effective and accountable functioning of an organisation. In other words, what is relevant is not a sheer cross-border transplant of an institution, but how would any institutional arrangements fit within a particular national legal system as well as with the informal rules in the country where such transposition is to take root.

With regard to institution-building, reform and management of change in public administration, it is necessary to place practices from foreign countries in their legal, political and social contexts, not only to make them understandable but also to determine whether it is worthwhile trying to import or imitate them. It is true that foreign models or practices may be used as an incentive in order to get on board the modernisers in politics, in the civil service and in the segments of the economy and civil society who have a general interest and/or clearly identifiable stakes in the better functioning of public administration, but the use of foreign models and practices has to be incorporated into the overall strategy for reform and management of change and ensure domestic consistence, as we have seen above.

However, the reverse is also true. Using foreign models and practices can result in fostering a reaction from the most conservative elements in society and in the public service, who may instrumentalise nationalistic sentiments in order to reject reforms that might weaken their status. Furthermore, using foreign models and practices may well marginalise the best professionals in the public service and the best experts of a country’s public administration in politics, in the economy and in civil society. The first reaction may occur if the models and practices referred to appear to be too foreign to the established system and culture, and the displacement of national talent may occur if the use of foreign practices rather than national ones generates the impression that national politicians who want to reform the system do not know it well enough. This double-sided aspect of the use of foreign models and practices is clearly even more present when foreign expertise is used in the design and/or implementation of organisational reforms.

If policy-makers consider it useful and appropriate to use a “big bang” process for their management of change, the use of foreign models and practices might indeed be appropriate at the outset in order to design reform plans and blueprints. However, there is still a great danger that some of the essential factors that account for the good functioning of a foreign system have been overlooked or simply cannot be reproduced in the country where the reforms have to take place.

If, on the contrary, the reform process is based on the involvement of all or at least the majority of concerned public officials and other stakeholders, foreign models and practices may still be an asset. A very careful selection must be made of the models and practices; selection on their own merit and even more on their capacity of being transposed, as well as on the similarities in culture and organisational habits of both the “exporter” and the “importer” countries. One of the important problems is that the perceived similarities may well be based on clichés or on historical elements that have evolved too far away from each other for such a resemblance to survive.

Agencies, government “at arm’s length” and linguistic confusions

Some of the literature that is relevant to the main issue of this paper reflects an awareness of the linguistic difficulties involved in analysing and comparing the organisational and operational aspects of systems of government. Papers sometimes try to offer a survey of the labels used in different countries¹¹ or even a set of definitions¹². However, there is no commonly agreed glossary of concepts and terms relating to the organisation of public administration, neither for OECD countries nor for EU Member States — not even for statistical purposes. It is therefore very important to be especially cautious when using any literature on governmental organisation for the purpose of policy reform, and this warning also applies to the present paper.

In addition, the use of foreign models and practices lends itself only too easily to the use of catchwords and fashionable labels. This is especially true due to the use of English as a non-mother tongue in the majority of academic literature and policy reports. It should be stressed that even between native English speakers who are specialists of public administration and government issues, the same words have a very different meaning from one country to the other.

One of the best examples is the use of the word “agency”, which is at the heart of this paper’s concern with the phenomenon of “agencification”. In the United Kingdom, and to a large extent in English-speaking Commonwealth countries, the use of the term “agency” has become fashionable in the last two decades as a general concept applying to organisational structures of the state administration that are supposed to have some degree of managerial autonomy. The catchword here is being at arm’s length from the minister. It might be worth pointing out that being at arm’s length physically means being so close to someone else as to be able to be caught, captured or hit, which is probably not the best qualification for independence. Indeed, some chief executives of British agencies make a point of emphasizing how they indeed feel as if they are at arms’ length of the Treasury when the latter cuts their credits. This being said, the use of the word agency in the British context implies an organisational structure that differs from the “traditional” hierarchy of a ministerial department. Only recently has a distinction between “executive agencies” on the one hand and “non-departmental public bodies” on the other gained ground and somehow reduced the scope of the term “agency”.

In the United States, however, especially at the level of the federal government, the term “agency” is used for all types of administrations. It applies to departments that are organised as hierarchies, with a politician belonging to the President’s executive staff (usually with the title of Secretary), and are thus similar to a traditional European ministerial department (in the UK and on the continent). It also applies to autonomous bodies with a regulatory or executive function, whether they have been created by Congress or by the President. In the United States, the term “agency” thus tells nothing about the degree of autonomy of an administrative structure — which in turn explains that some of the political science and legal literature strongly overestimate the existence of autonomous agencies in the US Government. The type of organisational structures that are often called regulatory or independent agencies (or sometimes authorities) in non-US literature on government and public administration usually bear the title of “Federal Commission” (or “State Commission”) in the United States, while a number of equivalent institutions are called “administrative tribunals” in Canada, which adds to the confusion of concepts.

Another telling example is the usual distinction between delegation, defined as the transfer of authority to entities that remain legally part of the core state, and devolution, defined as the transfer of power to entities that are legally separate from the state¹³. This distinction is perfectly

¹¹ See especially OECD, *Distributed Public Governance...*, see above footnote 2.

¹² e.g. Sigma (2001), *Organisation of the Public Administration*, OECD, Paris.

¹³ e.g. PUMA (2001), *The Governance of the Wider State Sector: Principles for Control and Accountability of Delegated and Devolved Bodies*, OECD, Paris (CNM/GF/GOV/PUBG(2001)4).

acceptable, but it is not based on an overall common understanding of the words devolution and delegation — in the English language as in other languages — and may well be criticised for its too heavy emphasis on legal criteria, such as the legal personality of the organisation or the legal status of the instrument (an act of parliament for devolution as opposed to an administrative act for delegation). It has the advantage, however, of being both clear in its definition and application and immediately related to operational choices for organisational reform.

2. TYPES OF ORGANISATIONAL STRUCTURES RESULTING FROM SPECIALISATION WITHIN GOVERNMENT

This section of the paper examines the typologies of these organisational structures for the purpose of helping policy-makers to make good use of possible foreign models and best practices. Organisational structures within government have developed in different ways from one country to another and from one period to another, as a result of the growth of administrations in size — i.e. in the sheer number of persons having to deal with administrative and governmental functions — and of the diversification of public administrative functions.

On the other hand, a number of organisational structures were, and sometimes still are, the result of personal preferences of those wielding power, be they politicians or civil servants. Typically, European monarchies relied for a long time on governments where the specialisation was mainly based on geographical interests and to a lesser extent on functional interests — with finance being the first area of functional specialisation. In some countries some organisational units (ministerial department or others) are still based on a geographical rather than a functional scope of action.

These circumstances, along with the absence of a common vocabulary on government and public administration, makes it difficult to provide a simple and comprehensive overview of the organisational structures of central government, not to mention local and regional self-governments. However, some conceptual common background may prove to be useful.

a) Conceptual Background of Organisation and Functioning of the Central State Administration

The conceptual background governing the organisation and functioning of the central state administration is usually only an *ex post* reconstruction — in terms of models, ideal-types or paradigms —, not a preconceived concept. In certain cases the structures and procedures can be considered as the result of a specific reformer's plan — as is the case of the Prussian and French administrations, which were reorganised at the beginning of the 19th century by Baron Vom Stein and Napoléon Bonaparte respectively, or the less evident case of the reorganisation of the English civil service under Macaulay's influence in the middle of the same century. It would be wrong to try to look for a general and detailed concept, as these reformers were successful mainly because they were able to embed the sometimes revolutionary changes of their times into the existing societal and governance structures and culture.

More recently, some of the reforms introduced in administrative organisation were presented as being based on a somewhat elaborated concept (such as the executive agencies that followed the Next Steps reform of 1987 in the United Kingdom). In those cases, however, there was not

an overall concept of the organisation and functioning of central state administration, but at best a concept for a specific type of structure. A recent example of such a partial conceptualisation is to be found in the narrative of the EC regulation on executive agencies (see Annex 4). This being said, it is worthwhile going into more detail with regard to the conceptual background of the two European models of government that are most relevant to the issue of agencification.

The *European standard pattern of administration* — provided mainly by the British, French and German systems of public administration, but also observable in other western European countries, with the exception of the Nordic countries and Switzerland — is based on a hierarchical integration within the organisation of a ministry (or department). This type of system is often labelled as the “*Weberian model of administration*”. It is a misleading expression, in that it implies a prescriptive intention, whereas the relevant writings of Max Weber — a century ago — were of an analytical nature and were based on the experiences of the above-mentioned countries and the United States because at the time they were the large modern states. According to this model, the hierarchical line starts with the politician at the top and goes down to the street-level official at the bottom. The overall concept is based on a vertical separation according to policy areas — between ministries and within ministries. The functioning of such an organisational structure relies on clear hierarchical lines in terms of decision-making power and accountability, on the existence of a system of disciplinary powers and sanctions, and on parliamentary scrutiny of the actions of politicians. Its natural complements have been the principle of parliamentary responsibility of the government and ministers, anonymity of persons in charge at the bottom, and a tight system that keeps information within the administration so as to guarantee the minister’s liability for the actions of officials placed under his/her authority. It has to be added that while the model applies to the overall administrative system, it has never impeded the existence of autonomous public bodies (*établissements publics* in France and *öffentliche Anstalten* in Germany, for instance) endowed with specific functions. The logic of the system, however, was found in that hierarchy and was also reflected in the standard composition of the boards of these bodies, the types of officials chosen as chief executives, and the general regulatory environment.

The Swedish model of government, which was constructed mainly at the beginning of the 19th century, shows a very different pattern. It is based on a horizontal separation between two worlds. On the one side, the government and ministers are collectively in charge of defining policy orientations, allocating budgetary resources, monitoring policy implementation and adjudicating on appeals of citizens against administrative decisions. On the other side, autonomous administrative offices or agencies are in charge of implementing legislation and thus of day-to-day application of the policy of the government of the day, and these administrative offices are protected by the Constitution against intrusions of any other public authority in their decision-making (see Annex 3 for more details of the constitutional rules). The accountability of these agencies is ensured not by means of hierarchical and disciplinary powers but especially by means of the direct accountability of their management to parliament and to the public. This scheme in turn rests upon a system of transparency in access to documents and freedom of the press and relies on the institutional guarantee that the Ombudsman provides as an independent delegate of parliament who may initiate civil and criminal proceedings against public officials.

During the last two decades of the 20th century, a growing number of countries whose state administration was organised along the lines of what we have called the *standard European pattern* were to some extent implementing reforms that had been conceived along the lines of a clear separation between policy-making at one level and policy execution or management at the other. Policy-making was supposed to be the main task of the ministry/department, while policy execution or management was the responsibility of a series of “agencies”. This kind of system has often been referred to as the “paradigm shift” that we have criticised above. Whereas it may well be useful to relate existing systems of government either to the *standard European pattern*

or to the *Swedish model* in order to understand the different respective underlying logics of organisational patterns and proceedings for policy implementation, there is a great danger, when reorganising public administration, of oversimplifying reality and thus missing some fundamental elements. Taking only the three major historical examples of the *standard European pattern* of government, it suffices to point out a few features that differentiate France, Germany and the UK from each other to show that a series of caveats are needed if the exchange of practices between them and between third countries and those three has to be useful.

The French system of administration has been based for the past one and a half centuries on the use of “functional decentralisation” organisational structures (*établissements publics*), which have a legal personality that is separate from that of the state or of regional or local governments. While the French *établissement public* has its equivalent in the German *öffentliche Anstalt*, for a very long time their equivalent in the United Kingdom remained both scarce and difficult to identify.

The degree of managerial autonomy varies enormously from one *établissement public* to another, due to the extensive detail of the laws and regulations setting up each body and with which it has to comply. Its autonomy also depends on the scrutiny powers attributed to the officials in charge of the policy sector in the relevant ministries. On the whole, the French state administration cannot therefore be reduced to a simple hierarchical model of ministries.

The British system of administration has been based for more than a century on the delegation of the implementation of government policies to local government. This system relies on a dual accountability of local government officials: to elected councils on the one hand and to the central government in London on the other (with the exception of Scotland and Wales since the devolution Acts of 1998). An essential number of functions that are exercised in France by the central state (or local) *établissements publics* are exercised in the United Kingdom by local government officials. However, it has to be pointed out that the major welfare-state functions of social security have never been exercised by the ministerial administration in France, as opposed to the UK, but by specialised public bodies.

In the case of Germany, it suffices to underline that it is the country of executive federalism. As a matter of principle, the execution of federal law and federal policies is done by the administration of the *Länder*. As in France, the major welfare-state functions of social security have traditionally not been exercised by the public administration. It is nevertheless also useful to remember that whereas both the British and French state administrations have shown a great continuity for two centuries, the German state administration underwent a radical change in 1945 with the dissolution of Prussia, a *Land* which represented about two-thirds of the territory and population of the entire country. Thus with regard to the public administration, German federalism from 1870 to 1933 was very different from German federalism since 1949.

Furthermore, in order to understand why these three systems have performed their functions satisfactorily for such a long time, one should take into account the fact that the French system of public administration has relied very much — since the end of the 18th century — on a strong presence of engineers, builders of roads and bridges and administrators of forests and land, who have been traditionally organised in professional corporations (*corps*) and have had their own schools and career systems. The German system, of Prussian origin, has traditionally relied heavily on lawyers (there has even been talk of a “*juristenmonopol*” in the German civil service). The British system has traditionally relied on a top civil service composed for the most part of “generalists”, who have graduated from the best universities and who have provided policy advice and managed ministerial departments, and to a lesser extent on “specialists”, who have had a specific technical education, including lawyers, and who have executed these policies either in the hierarchy of the department or as local government officials.

These features explain, for instance, the fact that outsourcing and public-private partnerships have been very much used since the first half of the 19th century in France (*concession de service public, concession de travaux publics*, etc.) and much less so in the other two other countries. The explanation for this is that the French civil service has been composed to a very important extent of engineers, who could draft and monitor the execution of the highly technical parts of the contracts between the state administration and private partners, which were then executed by their peers in private undertakings.

For the same reason, after some resistance due to its supposedly “Anglo-Saxon” origin, the model of independent regulators for network industries and services has been easily followed since the middle of the nineteen nineties in the French structure of government, as engineers discovered that the model provided even better protection of their professional skills, ethics and interests than their traditional predominance in line management in ministerial departments or as chief executives of “*établissements publics*”. In Germany, on the contrary, the constitutional obstacles — very much of a legal-theoretical nature — have impeded the generalisation of such independent regulators.

b) Reasons for organisational specialisation and agencification

Specialisation of government functions happens to a large extent — as in any public or private organisation — by splitting tasks and decision-making powers among various persons. These persons are in turn grouped within organisational units, to which groups of tasks and functions are attributed on a relatively permanent basis. Tasks and powers may well be attributed to a single person — a member of government elected directly or by parliament or an appointed official — but their day-to-day exercise, with the exception perhaps of a very small-sized local authority¹⁴, requires some form of delegation to other persons in order to function.

Different forms of organisational structures are available, as well as different ways of running them, which implies more or less autonomy in various aspects. Looking at the experience of EU Member States and beyond at other governmental structures of OECD countries, one may try to sum up the reasons for the choice of one type of organisation rather than another. The need for some degree of organisational autonomy in central government may derive from a number of reasons¹⁵:

i. Search for efficiency:

Sometimes efficiency is understood as a speedy, exact and quasi-mechanical translation into action of the will of the politicians who are in charge of government, and therefore accountable to parliament. This may lead to the definition of precise hierarchical accountability lines, e.g.: rapid and clear transmission of instructions; simple and clear system of feedback from the officials in charge of applying those instructions; appeal mechanisms to bring decisions back to the top if needed; and a system of individual incentives and disciplinary sanctions to foster compliance.

The search for efficiency may also lead to the creation of separate bodies. In this case efficiency is understood as a pristine managerial value whose achievement requires disentangling management from politics. “*Separateness coupled with a differentiated governance structure*

¹⁴ This is the case, for instance, of about 20,000 French communes with fewer than 500 inhabitants, where the executive powers are indeed exercised by the elected mayor, with the help of a “*secrétaire de mairie*”, usually the local elementary school teacher who does a part of the paperwork.

¹⁵ For the authors of *Distributed Public Governance* (see footnote 2 above), behind the “*organisational motives [of providing] bodies with: i) a differentiated governance structure; and/or ii) a differentiated control environment; and/or iii) some management autonomy, three sets of reasons for the creation of agencies*”, there are three series of motives i.e: 1. “*improving the efficiency and effectiveness of government entities with specialised functions,*” 2. “*improving the legitimacy and expertise of decision-making,*” and 3. “*the ‘hidden’ set of reasons for their creation*” (see pp. 14-15).

allows specialisation of functions and a better focus on clients' needs. Managerial autonomy, coupled in some cases with a differentiated governance structure, allows the development of a more managerialist culture and a better focus on outputs and outcomes. A differentiated control environment helps the entity escape some cumbersome administrative and financial rules."¹⁶

ii. Need of a technical/functional specialisation:

The differentiation of functions on the basis of technical specialisation has led in most public and private organisations to what Max Weber called "bureaucracy", describing an organisational system which was — and still is — the most rational way of specialisation. It is based not only on a vertical differentiation of units according to specialisation and on the professional expertise of the persons working in each unit, but also on the existence of sets of general rules, standards and directives for policy implementation as well as mechanisms that enable a departure from those general rules, standards and directives if needed. Two types of functional differentiation of government activity are especially relevant to the identification of differentiated technical/functional needs.

First, a differentiation between policy-making and execution. The more the differentiation between the two functions is perceived, the more autonomy will be desirable for the organisational units responsible for policy implementation. This reasoning is at the basis of the Swedish model of government, as well as of many of the organisational changes that were implemented in the middle of the 1980s, the idea being that policy-making is a matter for elected or appointed politicians and their advisers, while execution is a matter for technicians and managers. An example of this approach is to be found in the EC regulation on executive agencies (see Annex 4).

The distinction between policy-making and execution may be criticised as being too simplistic and as overlooking the fact that the boundary between policy-making and execution is both difficult to define and changing over time. Furthermore, it may be underlined that policy design relies on the involvement of those who know the policy area best, because they are involved in day-to-day policy implementation, and that administrative discretion — necessary for administrative action— implies choices that impact upon policy-making.

The distinction between policy-making and implementation is nevertheless useful due to the fact that it is conceptually at the basis of the difference between political institutions on the one hand, including parliament and government, and administrative and judicial institutions on the other. The degree of autonomy will vary according to the policy area depending on the relative importance of its political and technical components.

In order to avoid creating inappropriate structures, it is important to keep in mind that it is not the form of organisational structures which matters most, but the relation of these structures to a regulatory environment and to a set of working routines designed to ensure both autonomy in everyday work and overall co-ordination of policy design and execution (see section 3 below).

Second, a differentiation between regulatory activities and service or product delivery is gaining more and more ground with the wave of "deregulation" and privatisations which have been taking place since the mid-1980s, especially in western European countries, where large public sectors resulted from both the development of the welfare state and nationalisations after World War II. The ideology based on "rolling back the state" propounds a diminished role for the state. Next to its roles of policy-making and policy execution, the state is considered as being naturally mainly in charge of regulating the market and society, whereas its involvement in the delivery of services or products should be only exceptional and based on contingent temporary reasons, which may be subsumed in the concept of market failure.

¹⁶ *Distributed Public Governance*, p. 14.

Where the state is involved in delivering marketable services or products, it must respect the rules of competition and it is supposed to do this delivery under the same rules as the private sector firms¹⁷. Hence the organisational form which is deemed to be more suitable is businesses-like, which may vary according to the activities to be accomplished. Generally speaking, this is considered as an argument in favour of giving considerable autonomy to the organisational structures involved. According to the programmes of the most liberal-oriented political parties, those organisational units should be pushed into the private sector as soon as possible, which again implies the choice of an organisational model that is found in the private sector.

Where the state exercises a regulatory activity, it uses tools which are usually considered as having a genuinely public nature, such as rule-making, adjudication¹⁸ and monitoring, and incentives and sanctions in order to ensure compliance with the rules. The organisational structure in charge of regulation may vary according to sectoral specificities. This is most visible in the area of network industries and services (telecommunications, railways, postal services, etc.) which have often been privatised fairly recently and where a specific organisation is responsible for regulating the relevant market.

iii. Fostering trust of the public and stakeholders:

The exercise of regulatory functions does not automatically imply autonomy of the unit in charge of regulating. In fact, solutions vary over time and from country to country, ranging from regulation by the relevant ministerial department to regulation by more or less specialised autonomous authorities. Amongst the reasons which have led to more autonomy of the organisational unit in charge of regulation are the technical complexity of the regulated sector and the need to foster confidence of the main stakeholders. The interests of stakeholders, however, have to be countered by the obligations resulting from international agreements and EU law and by the respect of constitutional principles.

In the case of the EU administration, the increase in autonomy of regulatory bodies is illustrated by the development of a series of agencies (Environment, Food Safety, Medicines, etc.)¹⁹, to which the EC regulation on executive agencies (see Annex 4) does not apply and which are not incorporated in a general regulatory framework since their activities and stakeholders, as well as their organisational structure and powers, vary widely and do not follow a general, common pattern.

In the standard European model of administration, which is based on a parliamentary system, the main line of accountability is from public officials to members of government, from the latter to parliament, and from members of parliament to the electorate. The Swedish model of government relies on a different regime of accountability because of the lack of confidence of the Swedish bourgeoisie in the king at the turn of the 18th century, which nevertheless did not result in the confinement of the king to honorary functions and the invention of the cabinet system, as had happened in England a century earlier, nor in the abolition of monarchy, as had happened in France with the Revolution of 1789. In Sweden it resulted in a strong separation between

¹⁷ This is not a novelty of the end of the 20th century, as demonstrated by the fact that as early as 1921 the French Supreme Court decided that “*services publics industriels et commerciaux*” had to be run on the basis of civil and commercial law and of private business practice (*Tribunal des Conflits*, 22 January 1921: *Société commerciale de l'Ouest africain*, known as the *Bac d'Eloka* case).

¹⁸ In administrative law in the US and UK, “adjudication” means deciding on individual cases outside the context of litigation, whereas in general the word adjudication is used to designate the activity of judges and courts. The first meaning of the word is used in this paper.

¹⁹ See: http://europa.eu/agencies/community_agencies/index_en.htm.

administrative authorities which, having to decide on individual cases, were deemed to enjoy the trust of the bourgeoisie because they were independent of the king.

The same reason — the need for trust of the public and stakeholders independently from the orientation of the government of the day — re-emerges later in the creation by the US Congress of independent regulatory authorities in sensitive areas, such as that of the Federal Communications Commission, and more generally in the establishment of independent regulatory authorities, which either regulate a specific sector — e.g. network industries or services — or are in charge of protecting specific rights of citizens, such as the right to privacy, against invasion by both private organisations and public authorities.

The authors of OECD's *Distributed Public Governance* have nicely put these reasons under the general heading of "*Improving the legitimacy and expertise of decision-making*"²⁰, where three sub-sets of reasons are distinguished:

"Policy independence: For some functions (such as the allocation of grants or benefits, economic regulation, professional oversight of some professions, or when the government's actions are subject to the jurisdiction of the body) and in some institutional settings, differentiating organisational form can help increase independence from on-going political or bureaucratic influence, and signal change. In general, this change will require a differentiated governance structure and a degree of managerial autonomy and a differentiated control environment.

A differentiated governance structure coupled in some cases with managerial autonomy allows citizens or specialised professionals into the public decision-making process.

A differentiated governance structure, often coupled with some management autonomy, enables the establishment of collaborative partnerships between organisations within national government and between organisations belonging to different levels of government."

iv. *Responding to international obligations:*

In a growing number of cases, the most obvious reason for setting up specialised organisational units is linked to international obligations resulting from a country being party to a multilateral treaty. This is obviously the case in a number of technical fields, such as civil aviation or meteorology, where being party to a multilateral treaty results in the obligation to set up the corresponding agency, endowed with a number of specific powers, but also in the area of civil rights, where international agreements often imply setting up a monitoring agency, or in the environmental field. As far as EU Member States are concerned, a growing number of sectoral policy instruments — regulations or directives — implicitly or explicitly oblige governments to set up specific organisational units in order to implement the corresponding common policy or in order to regulate a sector that has to be opened to competition from other Member States' operators.

The exact organisational form of the specialised unit or agency which has to be set up as a result of international or EU obligations is rarely specified in the relevant multilateral treaty, EC regulation or directive. In most cases, and especially in the case of EC legal instruments, what is specified are the objectives to be achieved, the type of powers to be exercised, sometimes the type of tools to be used (especially when it comes to managing funds going into or coming out of the EU budget), and the type of guarantees to be given to the public and to stakeholders. Sometimes these procedural obligations do not stem from a written clause in a treaty, regulation or directive, but from the jurisprudence of the European Court of Justice²¹. Sometimes these obligations are specific and numerous enough to imply the necessity of setting up an

²⁰ *Distributed Public Governance*, p. 14.

²¹ One may cite, as one of the oldest procedural obligations, the duty to provide reasons for decisions of public authorities and to establish remedies enabling judicial review of those decisions to enable European citizens to exercise their rights deriving from the principle of non-discrimination on the basis of nationality, which was established in 1987 (15/10/1987 case 222/86 *Unectef / Heylens*).

independent authority of some kind, but the relevant provisions still leave a large possibility of choice to policy-makers.

This possibility of choice is often underestimated, or not even perceived in new EU Member States. The reason for this is that, during the pre-accession period, representatives of the European Commission and their national counterparts in the candidate countries often applied pre-defined models of agencies or public authorities, as if it had been mandatory to choose one model rather than another. This method had some benefits in terms of allowing rather rapid decision-making and establishment of the relevant bodies, but it also resulted very often in “creating formal structures without substance”²².

v. *Responding to constitutional requirements:*

There are cases where constitutional requirements apply to the organisation of the administration (see section 3a below); such requirements either resulted from a given historical experience or reflected the views of the drafters of the Constitution on how to best organise the administration. Depending on the date of the constitutional text, the precision of the constitutional provisions, and the relative rigidity of its amendment process, constitutional requirements may be simply the translation in the country’s fundamental law of the issues and criteria addressed in the preceding paragraphs, or they may be detached from the real or perceived needs of policy-makers. Constitutions may thus serve as a tool for good administration or be used as a pretext for resistance to change or even be a hurdle impeding reform. It is nevertheless wrong to deduct from this possibility that “law” or “public law” as such is an impediment to reform²³.

vi. *Responding to the contingencies of party politics or trying to bypass budgetary rules and staff regulations:*

Among the reasons leading to the choice of a particular organisational structure rather than another there may be found responses to the contingencies of party politics — to a variable amount depending on the country and the date of the decision. The authors of OECD’s *Distributed Public Governance* have placed these reasons under two headings.²⁴

Under “*Improving the legitimacy and expertise of decision-making*”, the OECD authors point to the fact that the choice of an autonomous agency as organisational structure may be a way of diminishing the impact of party politics on public administration: “*Policy continuity: A differentiated governance structure helps ensure policy continuity for some government functions, as nominations for the head of the governing body (chief executive and, in some cases, board members) may be insulated from the political cycle.*” On the other hand, as noted by the same authors under the heading “*The ‘hidden’ set of reasons for their creation*”, it may well be that the choice of an autonomous structure is the haphazard consequence of party political choices:

“It seems that only in recent years have creation of agencies resulted from a well-thought through process of power delegation to separate government bodies. In certain cases, ‘when the texts are silent on the reasons for agencies, it may be [...] simply because they were created in response to a particular political circumstance at the time, and not as part of some coherent review of governance. On the other hand, reasons given may not reflect the real political dynamic which led to agency

²² The formula is by Bojan Bugarič (2006), ‘*The Europeanisation of National Administration in Central and Eastern Europe: Creating formal structures without substance?*’ in : Wojciech Sadurski, Jacques Ziller and Karolina Žurek (eds.), *After Enlargement: Legal and Political Responses in Central and Eastern Europe*, Florence, Robert Schuman Centre for Advanced Studies, European University Institute, pp. 195-223. See also Miroslav Beblavý, “*Understanding the Waves of Agencification and the Governance Problems they have raised in Central and Eastern European Countries*”, cited above.

²³ See Jacques Ziller, (2005) “Public Law: a Tool for Modern Management, Not an Impediment to Reform”, *International Review of Administrative Sciences*, vol. 71, no. 2 June 2005, pp. 267-277.

²⁴ *Distributed Public Governance*, pp. 14-15.

creation. Agencies may be created to pay off political allies, to create power bases for specific factions, or to provide opportunities for sequestration of public assets or resources’.

vii. Escaping administrative law constraints

Finally, a traditional reason for choosing autonomous structures, which has been repeatedly condemned by auditing and reviewing bodies, is the will to bypass the general budgetary and financial rules as well as staff regulations applying to state administration. This may be justified by apparently good reasons, as noted again by the authors of OECD’s *Distributed Public Governance*²⁵: *“In transition and developing economies, which have been through a wave of creation of such bodies in recent years, creating ‘islands of excellence’ within the public service has also been an important reason for creating these bodies. Separating bodies from traditional, vertically integrated ministries has been seen as a way to bypass traditional civil service rules for promotion, allowing relatively more junior and committed management greater autonomy in managing bodies more directly focused on client needs.”*

In the medium or long term, however, this is a risky endeavour, as it undermines the value of compliance to the law. It is therefore better to try to reform the instruments containing these general rules in such a way that they allow for flexibility if it is really necessary.

viii. Coherence between function, form and managerial autonomy

While it is useful to have a clear view of the reasons which led to the choice of a particular organisational structure, and of a given degree of autonomy, it has to be stressed that in practice there is no clear and automatic correspondence between the invoked reasons and certain types of organisation. Once again it has to be warned that foreign models and practices have to be taken with caution. The following assessment by the authors of OECD’s *Distributed Public Governance*²⁶ should be taken as a warning against ready-made solutions and blueprints based on hastily acquired foreign models and best practices, and it is therefore worthwhile quoting it in its entirety (emphasis added by the author of the present paper):

²⁵ Ibid., p. 15.

²⁶ Ibid., pp. 19-20.

The myth of the match between organisational form, government function and managerial autonomy

It is tempting to try to classify agencies, authorities and other government bodies according to their organisational forms, the type and extent of their managerial autonomy, the financial, management and personnel rules that apply to them and their function. While all of these groupings are legitimate for policy advice purposes, none is really satisfactory.

First of all, government functions do not match specific organisational forms within and across the nine countries studied. For example, non-commercial services to citizens can be delivered directly by ministries, entities separate from central ministries or government enterprises in company or non-company forms.

The only positive conclusions we can draw are that: 1) sovereignty functions of central government are usually carried out by central ministerial departments; 2) arm's-length bodies tend to carry out relatively coherent, focused and measurable functions; and 3) entities that carry out more commercial functions tend to function under legal, employment and budgeting rules that are close to, or the same as, those of the private sector. *The more an entity's tasks constitute a "public service", the more the entity has to conform to general public law, which tends, in many countries, to favour more process- compliance and input-oriented management than the private sector.*

Second, managerial autonomy and a differentiated control environment do not match specific organisational forms across countries. In some countries, and especially in countries with constitutional or organic rules applying to all state entities, providing a separate legal identity to a government body is the only way to differentiate the control environment that applies to it. In other countries, this is not the case. Similarly, the ability to provide managerial autonomy within ministries varies from one country to another depending on the legal and cultural context, and this ability will in part determine the need to separate some bodies institutionally or legally from ministries. This explains why entities within ministries in some countries might have more managerial autonomy or policy independence than entities that are legally separate from the state in other countries.

The problem of policy independence

Many have also tried to classify organisational forms according to the level of policy independence they provide. Again, while this is legitimate for policy advice purposes, the issue is more complex than as usually described in the literature. The trend in public management literature over the last few decades has been to encourage the removal from core government of many functions requiring policy independence. The general idea was to reduce direct ministerial and political influence by providing a differentiated governance structure (with for example, a governing board, and representation from different stakeholders), and sometimes a differentiated control environment and a degree of management autonomy. The creation of separate bodies for policy independence purposes has proven successful for certain functions. However, in some cases, new dangers have appeared, threatening the very reason for their creation, including the lack of representativity of the governing board and of guarantees to protect its independence (from the unbalanced influence of the various stakeholders as well as from political influence), and the lack of control resulting from a differentiated control environment and management autonomy.

In fact, bodies with policy independence can be found in organisational forms that spread across government. For example, the police in most countries has independence in the pursuit of individual cases, yet is one of the functions least removed from core government. Similarly, we find that some regulatory or quasijudicial functions, which, again, exercise important independence in respect of individual cases, might be carried out by either private law bodies or public law administrations. In some cases policy independence is actually ensured by a traditional ministerial hierarchy, applying traditional public sector and civil service rules, which include strong guarantees for independence of judgement (such as the guarantees against the dismissal of civil servants, remuneration and promotion rules, procurement rules, etc.). It seems that separateness is most justified when the state or the government of the day, as a special stakeholder, has a particular political interest in the outcome of individual decisions, such as for many regulatory functions."

These conclusions are based on solid evidence from nine different OECD countries; they are also confirmed by other interesting and relevant OECD studies as well as by the corresponding literature that is based on empirical evidence rather than on *ex ante* conceptualisation. They have some important implications in terms of policy advice:

1. The formal aspects of a given organisational structure sometimes mismatch the functions it exercises. In particular, the reasons for choosing between an organisation that has a legal

personality and one that does not differs greatly from one country to another. In most cases there is a set of cumulative reasons that have led to the choice of a specific organisational structure, i.e. an agency of some kind, and these reasons are not necessarily all rendered public.

2. To attempt to answer the question “What evidence is internationally available in Europe that agencies or independent authorities in fact fulfil their goals?” one has to be extremely cautious. The answer is that there is little evidence either way, for a number of reasons: a) As surveys have shown that there is no clear and obvious link between the reasons for setting up these agencies and the form chosen, evidence has also shown that the success of an agency does not necessarily mean that the agency in fact fulfils its goals; b) Assessing the impact of the organisational structure on the basis of its success would require a comparative analysis between two different structures, which is rarely possible due to the fact that the alternative organisational structure does not coexist with the chosen one — at least not in the same environment; c) There is in any event little independent evidence, i.e. evidence gathered by bodies other than the relevant organisation and stakeholders, which is assembled to substantiate a demonstration rather than to answer a research question.

This does not mean that agencies and other autonomous organisational structures are not successful. It simply means that it is illusory to expect scientific evidence to sustain a given choice of a structure. Policy-makers are better advised to invest time in an in-depth analysis of the functions they want to be exercised and of the organisational elements that seem — *ex-ante* — to be required to ensure optimal policy execution in the given context, rather than in looking for evidence from foreign systems in order to support their choices.

3. The legal personality of an organisational structure should not be considered as a primary dividing line between different types, and especially not between agencification and other types of organisational structures. Indeed, the consequences of having a legal personality are numerous and not all are necessarily presented in a specific form (possibility to enter into legally binding contracts; possibility to be a party to a judicial procedure; possibility to exercise property rights on specific assets; possibility to receive gifts; possibility to receive grants, etc.). Even the choice between a legal personality under public law or under private law has different consequences from one country to another. As an illustration, it should be underlined that the reason for the mention of a legal personality in the EC regulation on executive agencies (see Annex 4, article 4, para. 2) is justified by the very specific context of the European Community, which has, generally speaking, a legal personality in its Member States, meaning that only the European Commission or the European Council are allowed to sign contracts in the name of the European Community.

Furthermore, the legal and political conditions for creating an organisational structure with a legal personality or for devolving powers to such a structure are not necessarily more difficult to achieve than conditions for creating structures without a legal personality or for delegating powers to the latter. Therefore, there is no generally applicable and clear distinction between devolution, which would apply to agencies that are separate from the state in the legal sense and would necessitate an act of parliament, and delegation, which would apply within the hierarchy of ministerial departments and would be at the discretion of the government.

Legal personality is relevant for regulatory agencies only if in a certain legal system it is indispensable for specific guarantees of independence. However, it suffices to point to the fact that courts do not have a separate legal personality to show that this is of little relevance to the exercise of regulatory functions. In the case of the delivery of goods and services, on the other hand, the issue of legal personality may indeed matter, but only to the extent where legal personality allows a more efficient exercise of the relevant function in terms of contracting, mobilising assets, etc. The more the activity is inserted in a competitive environment, the more these elements will be relevant and will lead to the choice of a specific form of public law body or

civil or commercial law body. It may also happen that the choice of the appropriate form results from the requirements of international or EU law — which will nevertheless rarely be so precise as not to leave room for choice.

c) Types of specialised organisational units, agencies and authorities

There is no convincing general typology of organisational forms of central government administration for the purpose of policy analysis and policy advice. Existing typologies are either only valid in the framework of a specific country or international organisation or only useful for pedagogical purposes (i.e. for education and, to a lesser extent, for clarification of one's own thoughts as a preparatory stage to policy advice or policy-making). For the latter purpose, the classifications proposed, on the one hand, by the authors of OECD's *Distributed Public Governance* and, on the other hand, by the OECD/GOV paper, "Organising Ministries and Agencies — Recent Trends in OECD Member Countries", drawn from various OECD publications (see Annex 2), are the most satisfactory.

Distributed Public Governance uses a typology based on four types of structures (see details in Annex 1): 1) ministerial departments; 2) departmental agencies; 3) public law administrations; and 4) private law bodies. For each category the paper provides a short description of the institutional and legal foundations; the governance structure and control; the financial, management and personnel rules; and the function, adding examples from different countries.

The paper "Organising Ministries and Agencies" uses a binary typology (see details in Annex 2), which distinguishes between: 1) Core ministries, which traditionally are vertically integrated; and 2) Arm's length government, comprising three sub-categories: a) departmental agencies; b) indirectly-controlled bodies, which are again subdivided into: public law administrations and government enterprises (which may be commercial government enterprises or non-commercial other private law bodies); and 3) quasi-governmental entities. For each category and sub-category, the paper gives an overview of the organisational structure and regulatory environment, including indications on rules and control, and indications of functions. The paper concludes with "Conditions of success of arm's length government" by indicating:

"the basic conditions for a successful and sustainable distributed governance system [...] include:

- 1. A sound legal and institutional framework that would limit the number of types of arm's length bodies, give them a clear legal basis and justify any exceptions to the stated rules [...];*
- 2. A well-thought through structure for individual institutions is also important, including a gradual move to arm's length systems [...];*
- 3. Organisation of the necessary constant interface between arm's length organisations and central parent ministries;*
- 4. Accountability of and reporting by delegated managers, and need for a strong oversight of bodies, including by parliament.*

A closer reading of both papers shows that the functional perspective and the legal-organisational perspective do not necessarily match in the existing types of organisational structures. From a functional perspective, the main distinction is between the regulatory functions and the executive functions, which may be analysed in service or goods delivery, if one understands producing certificates or giving grants, etc. as service delivery. While there is no comparative analysis of how regulatory functions are exercised in the framework of hierarchical structures within ministerial departments, the distinction between regulatory agencies and executive agencies corresponds to this divide. None of the two functions necessarily has a form that entails legal personality or even a high degree of formal and immediately visible autonomy.

Rather than trying to follow a general international typology of structures, which does not exist in the real world, policy-makers should base their choices on an inventory of the legal and political

constraints and existing general regulatory frameworks on the one hand and, on the other, on the examination of the requirements that they have set for the exercise of a given function in terms of autonomy and overall co-ordination.

d) Administrative delegation as an alternative to agencification?

As mentioned above, OECD literature sometimes makes a distinction between *delegation* and *devolution*²⁷. This distinction is not based on a general common understanding of the words devolution and delegation. Expressions like devolution, delegation and decentralisation — to take only three commonly used expressions in the English language — have a variable signification in legal and political terms, as well as from one country to another. When they are used in the framework of an international organisation, they usually entail a definition which is made for the purpose of a specific policy or even a paper, but they are rarely used in a consistent manner across time and policy areas.

Delegation, as used in the previously mentioned literature, may be defined as the transfer of authority to entities that remain legally part of the core state, and *devolution* may be defined as the transfer of power to entities that are legally separate from the state. This distinction may well be criticised for its too heavy emphasis on criteria such as the legal personality of the organisation or the legal status of the instrument (act of parliament for devolution, as opposed to administrative act for delegation).

Another distinction may be made, which is to be found in administrative law in many countries, and in management analysis and practice. It opposes *delegation of powers or competencies* on the one hand to *delegation of signature or of daily decision-making* on the other. The word devolution might well be used for the delegation of powers or competencies, and the word delegation reserved to delegation of signature or of daily decision-making. In this sense, the difference between devolution and delegation does not depend on the legal personality of the structure to which functions are devolved or delegated, but upon the type of hierarchical mechanisms that may be used.

Delegation of signature or of daily decision-making is temporary and may be repealed by the authority who has delegated; appeal is normally to the authority who delegated, and the latter may decide in lieu of the structure that made the decision. Such delegation can only be exercised in the framework of a hierarchical structure — a ministerial department in most cases — which includes the power to give instructions and a system of disciplinary sanctions. Delegation of power, on the other hand, may operate just as well in the framework of a hierarchical structure — a ministerial department — as in the framework of devolution to an external body.

Delegation of signature or of daily management decisions normally improves managerial efficiency, as it makes it possible to avoid the delays linked to waiting for a formal act of the minister or head of the ministry. It enables decisions to be made by those persons who are most familiar with the daily routines of administration, while still allowing the top officials in the ministry to make decisions in exceptional or particularly salient political circumstances. Where the general conditions of delegation are laid down in a framework document and where the minister or head of ministry accepts to review the actions of the persons or units to whom they have delegated signature or daily decision-making power only ex-post and on the basis of predetermined benchmarking criteria, the conditions of most “executive agencies” or “departmental agencies” are met. Such a document may take the form of either a framework document delineating the general powers and organisation of the structure or a more specific performance contract, setting out quantified objectives and a time frame for both the structure and its chief executive(s).

²⁷ e.g. PUMA (2001), *The Governance of the Wider State Sector: Principles for Control and Accountability of Delegated and Devolved Bodies*, OECD, Paris (CNM/GF/GOV/PUBG(2001)4).

Delegation of signature or of daily decisions is indicated in all cases where decisions on individual cases are based on routine assessments. It is also indicated for the delivery of services and products, and it may well be an alternative to agencification (in the sense of setting up separate bodies). It has the advantage of usually being far easier to set up and to suppress — assuming, however, that the general principles and rules of administrative decision-making permit it, whether codified or simply based on the jurisprudence of courts in charge of judicial review of administrative action.

On contrary, delegation of signature or of daily decisions is not indicated whenever there are special reasons for guaranteeing the autonomy of the decision-maker from party-political interference, or if the decision-making procedure includes interaction with various stakeholders contributing to the ultimate decision — as is usually the case for regulatory function. The possibility for the delegating authority to act in place of the holder of the delegation would create a worrying short-circuit in the decision-making process.

Delegation of powers or competencies is also known as decentralisation. It is given on a permanent basis and may not be repealed. It is usually accompanied by appeal mechanisms, which allow either government or independent third bodies (such as courts or tribunals) to review a specific decision and to quash it or — more rarely — to issue an injunction to the structure to which the power has been delegated as to how to apply the decision.

While agencification (in the sense of setting up separate bodies) necessarily implies a delegation of powers, a delegation of powers may well be realised without agencification, even when there is a special need to avoid party political interference or interaction with various stakeholders. Indeed, what matters is far more the kind of appeal mechanisms that are in place than the form of the structure that is delegated the powers. It is perfectly possible to keep such a structure within a ministry and to provide for an appeal to be made to the government as a whole, to a parliamentary commission, or to an independent body or court. In order to function, a very clear framework is required, laying down the conditions of delegation of power, appeal mechanisms, and a system of civil service law and staff regulations that excludes the possibility of disciplinary sanctions or their equivalent (termination of an employment contract, transfer of a public official, etc.) resulting from the exercise of discretionary power in the areas where those powers have been delegated. Here again, the general principles of administrative and constitutional law clearly need to permit such mechanisms so that these solutions are available.

It follows from the above that agencification (in the sense of setting up separate bodies) and departmentalisation are not necessarily opposed. Agencification may provide a clearer view of the formal framework or may be more suitable due to the general system of principles and rules of administrative or constitutional law. It might also be an illusion, if appeal mechanisms and the civil service law are ill-defined, permit too much party political interference or — on the contrary — impede accountability.

3. CREATING SPECIALISED ORGANISATIONAL STRUCTURES

The creation of a specialised organisational structure for the exercise of functions pertaining to central government is conditioned by the specific political, legal, and cultural environment, an environment that varies from country to country and over time. It is therefore not possible to give indications, *ex ante*, of the way in which such structures should be created, as this type of policy

recommendation can only be made after having analysed precisely the function to be exercised, the need for its exercise, and the options available in theory and in practice for the organisational structure — the latter being dependent on a good knowledge of the country's political and administrative system as well as of its constitutional and legal order. This paper therefore can only point out the main elements that need to be taken into account when trying to make use of other countries' experiences, as available through the literature referred to in this paper or through other sources.

a) Constitutional and political constraints

The constitutional framework for the organisation and functioning of the central state administration differs considerably from one country to another. It is particularly important to have a good understanding of the various existing patterns of relevant constitutional rules and principles in order to: 1) understand the formal and political constraints which conditioned and still constrain the choices to organising and/or reforming the organisation of the central state administration; 2) identify the constitutional preconditions for possible reform of the central state administration; 3) identify the constitutional amendments which might be necessary for the implementation of a given reform; and 4) opt for second best solutions in the event that the existing constitutional constraints cannot be overcome due to the political salience of the rule or principle in question or to the lack of consensus for reform amongst political parties.

Existing literature on agencies is very disappointing on this issue, often because it ignores the constitutional constraints, and sometimes because it tends to either overestimate the consequences of legal aspects — forgetting the impact of the political environment on the functioning of the Constitution — or, on the contrary, to underestimate the importance of formal rules and the constraints they represent — for better or for worse — for politicians.

This paper proposes the examination of a limited number of national cases to examine the issue of constitutional constraints: France, Germany, Italy, the Netherlands, Sweden, the United Kingdom, and the European Union as a whole. These cases have been chosen partly because the precise nature of constitutional rules is usually ignored (e.g. the royal prerogative in the UK) and more generally because they are very different in terms of possibilities and constraints. The EU is particularly relevant as both a possible model and a source of constraints for its member states.

A comparative overview of these national cases (see Annex 3) clearly shows the following: 1) There is no general pattern of constitutional constraints with regard to the organisation and running of the central state (or EU) administration, apart from the constraints derived from commonly shared general budgetary and financial rules, according to which the budget and the financial management require the approval of parliament and include the principles limiting the effect of a financial law to one year. 2) The weight of constitutional constraints with regard to the organisation and running of the administration varies not only according to the distribution of powers between government and parliament (which varies from one country to another), but also and probably in a more decisive manner according to the stability of government coalitions and the existence and depth of judicial review of acts of parliament and governmental regulation (which in turn depend on the more or less open access to courts, which also varies from one case to another). 3) In cases where there is a difference between devolution to an independent body that has a legal personality different from that of the state (or the EC), on the one hand, and delegation to departmental units or executive agencies that remain embedded in the central government on the other, there is no general pattern according to which delegation may be effected by way of government regulation or decision, whereas devolution would require an act of parliament. 4) Beyond the constitutional constraints, governments are also restricted by the

necessity to involve stakeholders insofar as possible when reorganising their administration as well as by the search for coherence and ultimately for efficiency.

b) Legal framework for creating specialised organisational structures

The legal requirements for creating specialised organisational structures in central administration depend on constitutional constraints. A general legal framework may or may not already exist at the moment when the issue arises for policy-makers to set up such structures or to delegate functions to them. This general legal framework may be embedded in a series of rules, principles and regulations which form an easily accessible coherent body of written rules. They may, on the contrary, be dispersed in various constitutional provisions, statutory and regulatory instruments, and in the jurisprudence of administrative and constitutional courts, and sometimes civil or commercial courts as well.

It is also possible for such legal requirements to be embedded in European Community regulations or directives or in European Union framework decisions, or to be the consequence of EC and EU treaty provisions, as interpreted and applied by the European Court of Justice. Generally speaking, it has to be taken into account that under EU/EC law as well as under international law, a state is responsible for the functions exercised in its name, regardless the organisational structure that is taking the action (it is responsible not only for state authorities, but also for intermediary and local governments as well as private persons acting on its behalf).

In the absence of pre-existing legal requirements in a given country, the question has to be addressed as to whether policy-makers want to try to first set up this kind of general framework, an operation which might be extremely time-consuming for both technical and political reasons, or whether it is feasible — politically and legally — to adopt the necessary ad hoc rules and principles in an experimental manner, so as to draw lessons from experience prior to setting up a general legal framework. In the latter case, legal expertise is also necessary in order to set up an experimental framework that is in line with the rest of the country's legislation and — if applicable — with the requirements of European Union law. Relying on appropriate legal expertise is a fundamental necessity for policy-makers, and it is not obvious that one person or even a small group of persons — however brilliant — will possess all of the required legal expertise.

Whatever the situation might be in a given country and at a given moment, the following points need to be examined to obtain an overview or an assessment of the existing legal framework in a given country at a given point in time. It might also be used as guidelines for the establishment of a general legal framework or even an experimental legal framework for a given set of functions. The following checklist is not exhaustive:

1. Who is competent to set up a particular organisational structure?: parliament? the government acting collectively? individual ministers? units within existing administrative structures within the ministerial department? other existing public bodies?
2. If the functions to be exercised result from an EC regulation or directive or an EU framework decision, are there specific requirements in the relevant instrument with regard to guarantees such as independence and involvement of stakeholders? Do the functions to be exercised fall under the heading of implementation of EC law? May they have an impact on the freedoms of circulation of persons, goods, services and capital or could they lead to discrimination between nationals and other EU citizens?
3. What is the procedure to be followed within the authority that has the competency to set up a particular organisational structure? Is the approval of the head of state necessary? Which bodies or representative groups need to be consulted and to what extent is their opinion binding? Is there any obligation to provide notification of the creation of this structure internally (to

parliament or other national bodies) or externally (to the European Commission, international organisations in the framework of multilateral treaties, or another government on the basis of a bilateral treaty)?

4. Is there a general legal framework of administrative procedure and if so, is it codified or not? Does it allow for exceptions and if so, under what conditions? Do the functions to be exercised fall under the heading of implementation of EU/EC law and if so, are there mechanisms to ensure that the elements of the “right to good administration” (as formulated in the EU Charter of Fundamental Rights and further developed by the European Ombudsman’s European Code of Good Administrative Behaviour²⁸) are known and applied by the organisational structure?

5. Are there legal principles or rules that impede the delegation of powers from one authority to another? Are there legal principles or rules that impede the delegation of signature or day-to-day decision-making? Are there principles or rules that impose appeal mechanisms against decisions that have been delegated? If there is no relevant written provision in the Constitution, in statutes or in general regulations, is there any relevant case-law from the courts? Have the consequences of state liability in international and European law been taken into account in order to have a mechanism that obliges decision-makers to comply with international or European law?

6. Are there general principles and rules relating to the adoption of the budget and to financial management? Do they allow for exceptions and if so, under what conditions? Have the consequences of the country’s membership of the EC — including the European monetary system and present or future participation in the European Monetary Union (EMU) — been taken into account so as to have mechanisms that comply with the criteria of accession to the EMU and to the Growth and Stability Pact?

7. Does the activity to be exercised fall under the powers of scrutiny of the national Ombudsman (if such an authority exists) and/or other administrative authorities in charge of the protection of data, privacy, competition, etc.? Are the powers of these authorities defined according to the nature of the decision-making body or according to the nature or aim of the decisions to be taken?

8. Is there a general system of judicial review of administrative action? If so, are grounds provided in the relevant administrative decisions, and are there remedies allowing for judicial review that comply with the requirements set up by the jurisprudence of the European Court of Justice?

9. Are there specialised tribunals or courts and if so, what are the criteria establishing the jurisdiction of these courts? Is the formal structure of the decision-making body relevant to the courts’ jurisdiction and to what extent?

c) Designing institutional frameworks and governance tools of specialised organisational structures

As it happens regarding the legal framework, the institutional frameworks and governance tools of specialised organisational structures may or may not already exist at the moment when the issue arises for policy-makers to set up such structures or to delegate functions to them. They may be embedded in a number of rules, principles and regulations that are more or less easy to adapt. It is also possible for such institutional frameworks and governance tools to be embedded in EC regulations or directives or in EU framework decisions, which represent legal obligations for member states, or in non-binding instruments issued by the European Commission, i.e. green

²⁸ See: <http://www.ombudsman.europa.eu/code/en/default.htm>.

books, white books or communications. Relying on appropriate managerial and legal expertise is thus a fundamental requirement for policy-makers in order to understand what margin of manoeuvre they have, and to determine the extent to which existing national models may simply be used or slightly adapted, or the extent to which innovations are needed. Here again, a general paper on policy advice cannot give precise indications that can be immediately applicable and that go beyond already existing sets of recommendations of the OECD (see Annex 2).

Whatever the situation in a given country and at a given moment, the following points nevertheless need to be examined, although they do not by any means constitute an exhaustive list. As for the previous paragraph on legal requirements and procedures, the following checklist may be used to obtain an overview or assessment of the existing models in a given country at a given time; it might also be used as a guidelines for the establishment of a general legal framework or even an experimental legal framework for a given set of functions. The following may complement the checklist contained in the preceding section:

1. What are the consequences of choosing an existing institutional structure in terms of application of general regimes on decision-making, financial management, staff regulations, auditing, and judicial and non-judicial review?
2. What are the structure's mission, role and objectives? Do they depend on constitutional requirements, sectoral policy requirements, EC/EU obligations? Who are the stakeholders relevant to this mission, role and objectives (parliament, government as a whole, ministers in charge of the policy sector or of other sectors, European Commission, providers of resources, operators in a given policy sector, their clients, interest groups, citizens, etc.)? The answer to these questions should not be based on a simple examination of the written statements in legislation, regulations and/or European regulations, directives or framework decisions, but should be the result of consultations with policy-makers in government and parliament, as well as with experts and representatives of organised or diffuse interests. Once the stakeholders have been identified, the various suitable options for accountability mechanisms should be examined (political accountability to parliament or directly to citizens; specific accountability mechanisms towards different stakeholders; accountability to peers for highly professionalised bodies, etc.). This will in turn lead to choices in terms of structures and procedures: accountability to parliament may best be organised through hierarchy within a ministry or through specific accountability mechanisms to a body that is entirely separated from ministerial departments. Accountability to stakeholders may be achieved through the composition of a board, reporting mechanisms, external auditing or review, or through a combination of all of these.
3. What will be the top functions of the structure? a chief executive and/or a collegial body? A sole executive will enable quicker decision-making and will be less costly and cumbersome than a collegial body. It will also enable clearer accountability to the sectoral ministry. A collegial body, on the other hand, will allow better communication with the various stakeholders and could be a guarantee against the consequences of conflict of interest or even corruption. How are the top functions appointed? Is it useful to have them appointed by different bodies and/or according to different procedures in order to create a system of checks and balances in the structure? What are the options to ensure both checks and balances and to avoid any blockage of the system? Are the top functions simply complementing each other on the basis of specialisation in a coherent body? What are the options to ensure that the right expertise is present while preserving the unity of management?
4. What are the criteria to assess whether the structure is achieving its mission and role and whether it performs well? Is it possible to set up such criteria *ex ante*? Is it possible to quantify these criteria beyond those of good financial management, or is quantification too difficult to be set up or even counterproductive because it focuses only on minor aspects? In those cases where the action of the structure can be quantified — and provided that the quantified elements

are significant enough for the efficiency of the function to be exercised — quantitative objectives may be publicised (in terms of date of achievement) and may result in financial compensation for the addressees. While this may be a way of fostering the confidence of the public, it is not obvious that it is necessarily the right incentive for more efficiency, which depends on the type of resources of the structure and its impact on the individual situation of its staff. When there is a possibility to quantify objectives, an appropriate tool might be what is usually called a *performance contract*, which specifies the objectives to be achieved and the time frame for their achievement. The contract is usually signed by the chief executive(s) of the structure, by the minister or top official of the ministry with sectoral responsibility, and by the ministry of finance. It serves as a tool for assessing the performance of the structure and its chief executive(s), and it may have financial implications (positive or negative) or result in a promotion for those officials. This has to be counterbalanced by a commitment to provide resources on a pluri-annual basis. Such contracts, which exist in legal settings as different as those of the United Kingdom (mainly for departmental agencies) and France (for *centres de responsabilité*) are considered as non-legally binding, i.e. they cannot be enforced through a court decision; they are in fact “gentlemen’s agreements”. The main flaw of these performance contracts is that they cannot derogate from the principles of budgetary law; in times of budgetary growth this is not a problem, but in times of restrictions the promised resources do not necessarily follow. Once an answer has been given to these questions, it is possible to set up reporting mechanisms, which should foresee who reports to whom (in line with the choices made for accountability): in what form (written or oral, with what kind of complementary documentation)? when and how often? what are the consequences of reporting?

5. A framework needs to delineate the decision-making process. It might be the straightforward application of a general code of administrative procedure or a specific set of arrangements. Specific arrangements might be useful or needed because of the lack of a general code. They might be useful or needed either because the function to be exercised requires specific arrangements which simplify the decision-making process or to foresee a more complex decision-making process because of the specific set of stakeholders. The decision-making process has to be consistent with the arrangements for the governance of the structure. If there is no general code of administrative behaviour, standards of behaviour need to be set up and publicised, including clear indications of possible appeals and remedies.

6. A framework also needs to be delineated for the budget process and financial management. Here again it might be the straightforward application of the general budget procedure and rules of financial management or of specific rules linked to the particular functions. Principles of sound financial management obviously need to be applied.²⁹

7. A framework for auditing also needs to be delineated. As far as external auditing is concerned, if the country has a general system of auditing for public administration (especially courts of auditors and inspectorates), it will probably apply to all specialised state structures, whatever their form, function and legal nature. Exemptions from the general system should be carefully scrutinised if they result in less demanding auditing mechanisms. If they result in tighter auditing mechanisms — and this might be a requirement stemming from international or EC/EU obligations — they should be welcomed, provided that they do not slowdown or impede the good functioning of the structure (for instance, because too much time would be devoted to assembling documentation for auditors). Once again, this could be considered as a good opportunity to experiment with mechanisms of external auditing with a view to a later generalisation, provided that this experimentation does not become a primary aim in setting up a structure. As far as

²⁹ See Sigma (2001), *Managing Public Expenditure: A Reference Book for Transition Countries*, OECD, Paris, and “*Financial Management and Control of Public Agencies*” (cited in footnote no. 2), which cannot be summarised in a few sentences.

internal financial control is concerned, the alternative is once again between applying a possible general scheme and setting up specific mechanisms. For both external audit and internal financial control mechanisms, the choice to be made needs to take into account the nature of the function to be exercised, as it might require very different expertises. Besides auditing mechanisms that focus mainly on good management, especially financial management³⁰, there might very well be a need for expert auditing of the way in which the function itself is exercised. In the framework of EC/EU policies, there are elements of external auditing (in the framework of structural funds and common agricultural policies, for instance) which involve Commission officials or others. One of the questions to be asked is whether these elements are sufficient for a given country's or whether they should be further complemented by other auditing mechanisms.

8. Staffing arrangements for recruitment, promotion and pay schemes need to be delineated. Once again, it might be the straightforward application of the general law on the civil service, which, if well designed, should include mechanisms ensuring the necessary insulation of public officials from party political changes, while allowing for periodic changes in those functions that require turnover in decision-making structures. The latter is especially important in order to avoid the capture of the relevant public officials by some stakeholders and the consequential loss of their necessary independence in this regard. If there is no general law on the civil service, or if it does not apply to the envisaged structure, careful attention needs to be devoted to staff regulations. A distinction between top officials and general staff has to be made, especially as the latter, generally speaking, should be submitted to the usual rules concerning civil servants. However, the decision to make exceptions to the general civil service rules should not be made with only a view to setting up the specific structure. If the general civil service rules are considered to be too inflexible for the needs of a specific structure, it is worthwhile asking whether the general civil service rules are not too rigid as a matter of principle and need to be reformed, or whether the reasons pushing policy-makers to look for exceptions are not too short-sighted or even illegitimate. If, on the other hand, the reason for making exceptions to general staff regulations is that the latter are too complex, too variable and too unpredictable, setting up a specific structure with its own staff regulations might very well be a good opportunity for experimenting with a revised system of staff regulations, which might later be extended to the entire civil service. Experimenting with such a system, however, should not be the primary aim of selecting such a structure, which would then be diverted from its genuine role and function.

By way of illustration, annex 4 reproduces the EC regulation on executive agencies, which gives a recent example of how to address the issues mentioned here. However, they cannot be applied and certainly not copied without a deeper analysis of the EC's financial regulation and of its more general institutional and legal framework³¹.

d) Ensuring managerial co-ordination of specialised organisational structures

Agencification is often seen as leading to the fragmentation of administrative structures and hence as a major reason for problems of co-ordination of government action and policies. Whether this is true varies very much from one country to another. Where policy co-ordination functions well in the framework of a hierarchical system of ministerial departments, agencification may indeed provoke a breakdown of established routines and lines of communication. It may also lead relevant officials to seek more autonomy, thereby changing the culture of the civil servants concerned, especially in systems where interdepartmental mobility is not customary. Where policy co-ordination does not function well, agencification will probably not change the

³⁰ See n. 27.

³¹ For a detailed comment of both the regulation on executive agencies and the EC financial regulation to which it is linked, see Paul Craig, *A New Framework For EU Administration: The Financial Regulation 2002*, 68 *Law & Contemporary Problems* 107, available on <http://www.law.duke.edu/journals/lcp/articles/lcp68dwinter2004p107.htm>;

situation either way. Whatever the case, maintaining or establishing the right system of co-ordination is not a direct result of the institutional design of specialised organisational structures and of the government apparatus as a whole. It is the result of a good understanding of the notion and tools of policy co-ordination.

The Metcalfe scale of policy co-ordination³² is a tool that can be used to rationalise co-ordination strategies, with particular regard for the relationships between various mechanisms. It is also a device by which co-ordination can be measured (on a nine-level scale) and bottlenecks identified³³. Ensuring co-ordination between specialised government structures requires setting up the necessary tools for the good functioning of the first five levels of this scale (the four other levels address aspects of co-ordination that go beyond the purpose of this paper). The first five levels are the following:

Level 1: Independence (each unit retains autonomy within its own policy area, irrespective of the spillover effect on associated units/areas): This is a premise for any system of co-ordination and relies on a good and clear definition of the functions and powers to be exercised by a unit, irrespective of its formal degree of autonomy. If the delimitation of functions and powers is somewhat fuzzy or if overlaps between units' functions and powers are either unavoidable or even required (for instance, in cases of experimentation), the governance structure and/or functioning routines of the relevant units have to be adapted in order to ensure constant co-ordination of levels 2 through 5. If, on the contrary, the separation between units' functions and powers are clear and there is no overlap, it will be sufficient to provide for channels of communication of a very general nature to enable these units to identify any changes that might lead to an unclear delimitation of functions or to overlap, thereby fostering action by central levels of government.

Level 2: Communication (units inform one another of activities in their areas via accepted channels of communication): This communication is based on formal tools, such as periodic meetings of chiefs of units and distribution lists of units' documents, as well as informal tools, such as discussions between officials who are responsible for the relevant units.

Level 3: Consultation (units consult one another in the process of formulating their own policies to avoid overlaps and inconsistencies): This consultation is again based on formal tools, such as periodic meetings of chiefs of units and sending documents to other units with a requirement to take a position, as well as informal tools, such as discussions between officials who are responsible for the relevant units.

Level 4: Avoiding policy divergence (units actively seek to ensure that their policies converge): At this level co-ordination is also based on meetings, but with the clear aim of not only informing each other but also of overcoming possible divergences, and on a decision-making process which incorporates the reactions of other units as a necessary step.

³² See Les M. METCALFE, 'International Policy Coordination and Public Management Reform' in *International Review of Administration Sciences*, 60, 1994, p. 271 — 290; Les M. Metcalfe, 'Reforming the Commission: Will Organizational Efficiency Produce Effective Governance', in *Journal of Common Market Studies* 2000, 38(5), p. 817-841.

³³ For a recent use, see Duncan RUSSEL and Andrew JORDAN, 'The United Kingdom', *Cambridge EPI Workshop 12th-13th October 2005*, available on http://www.uea.ac.uk/env/cserge/events/epi/russel_jordan.pdf.

Level 5: Seeking consensus (units move beyond simply hiding differences and avoiding overlaps/spillovers to work together constructively through joint committees and teams): This is again based on far more formalised tools, such as periodic meetings at the initiative of central co-ordinating units, the creation of task forces, and possibly decisions on leadership in given policy areas.

What is important is to understand that a good functioning of the policy tools at a particular level requires the presence and routine use of the tools of the immediately preceding levels. Information technologies make a substantial contribution to those instruments, especially as software enables the creation of distribution lists, the distribution of documents with specific flagging (*for your information, forward, read, no response necessary, reply, review* — instructions that correspond to the needs at the various levels of co-ordination), or even the setting up of impediments to finalising a document or making decision before having incorporated the views of various units. However, one has to realise that the smooth functioning of these mechanisms depends to a large extent on a shared culture, which — if not already existing — in order to develop requires considerable training efforts as well as mobility from one unit to another. Trying to realise co-ordination through formal arbitration from a central position is doomed to fail if the culture and certain routines are not in place.

All this is to say that the creation of a specialised structure, due to the growth and diversification of government functions, generates serious difficulties of co-ordination. These functions have to be taken into account in institutional design, as one of the many factors to consider, but co-ordination is not mainly the direct result of a general regulatory framework, but of the administrative or managerial capacity available.

e) Capacity to reform or eliminate specialised organisational structures as conditions change

A legitimate concern of policy-makers — a duty for them, one might add — is to make sure that specialised organisational structures that have ceased to correspond to the needs they are supposed to fulfil may be reformed or eliminated when conditions change. There is a tension between this need and the need for stability inherent in a good government system, and this tension may be at variance with the decision-maker's need for independence. The right balance between stability and possibility to reform is difficult to find and must take into account not only the changing needs of policies but obviously the contingencies of party politics as well.

Constitutional and legal frameworks may thus be more or less well adapted to fit the balance between these conflicting objectives, but they must also be assessed from two other points of view: compliance with international and EC/EU obligations and, more generally, conformity to the principles of the rule of law and separation of powers. There is a tag price to be paid for the rule of law and democracy, which may include a certain degree of rigidity of the state's administrative organisation. The focus should therefore be not only on changing conditions and allocation of resources, but should include the broader values of the rule of law and democracy.

One has to add that organisational theory, empirical studies and experience all point in the same direction: once a specific structure has been established, those who hold positions in the structure have a natural tendency to make it survive and grow even if it does not seem reasonable to outsiders. The only remedies to this tendency are to be found in periodic assessments by external and independent persons or bodies (with a possibility to recommend changes), limitations in time of the mandates of chief executives and their main collaborators, and possibly a "sunset clause" in the legislation or government regulation establishing a structure which makes it obligatory a periodical assessment for the renewal of the mandate. Here again there might be tensions. The impact of these mechanisms depends on the overall system of state

authorities and civil service: a well-functioning senior civil service system³⁴ might be a good resource allowing the necessary turnover in executive functions, which is necessary to keep the government system adapted to changes in circumstances while constantly providing it with the necessary expertise.

³⁴ See Jacques Ziller (1995), *Top Management in Central Government — Introducing a System for the Higher Civil Service in Central and Eastern European Countries*, Sigma Papers no. 1, OECD, Paris.

ANNEX 1

Extract from:
Distributed Public Governance Agencies, Authorities and other Government Bodies
 OECD, Paris, pages 17 19

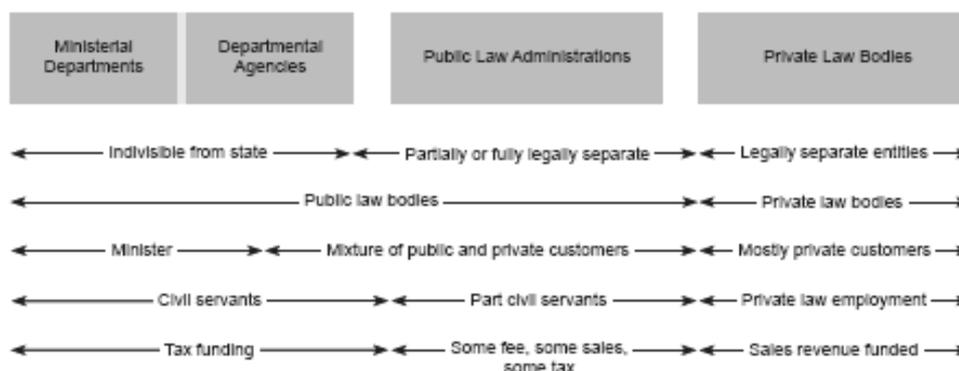
Classifying agencies, authorities, and other government bodies

In his paper, Derek Gill has developed a typology of government organisational forms that mixes both institutional and legal features with judgement about the financial, management and personnel rules that apply to them. Data from the country reports shows that most government bodies fit this classification which adds significant value in the understanding of issues governments are currently facing with the governance of this wide set of bodies (issues according to the various types of organisational forms are described in section 1 of this report). According to this classification, there are three main types of bodies covered by our study (please note we will use the terminology outlined below in the rest of the synthesis report):

1. Departmental agencies

Institutional and legal foundations: They are part of ministries, and do not have their own separate legal identity from the state. They function under public law, generally under quasi-contractual relationship with their line ministry.

Executive Central Government¹



1. This graph is a simplified version of the graph presented by Derek Gill in his paper (see Footnote 10).

Governance structure and control: They do not have a governing board (although they might have management or advisory boards), and the chief executive is directly appointed by the minister. The minister has formal (but less direct) control, while the chief executive has operational control.

Financial, management and personnel rules: Their staff are employed under general civil service rules, in terms of appointment, promotion and removal, but input controls on the price and quantity of labour are generally relaxed. Most are funded through allocations from the state

budget, and their budget is annually reviewed through the state budget process. Some are partially user-fee financed.

Function: usually delivery of non-commercial services to citizens and support services to other state sector bodies.

Examples: Germany: Direct federal administration; Netherlands: Agencies; New Zealand: Semi-autonomous bodies; Spain: Autonomous organisms; United Kingdom: Executive agencies; United States: Performance-based organisations.

2. Public Law Administrations (PLAs)

Institutional and legal foundations: They function mostly under public law, but they are partially or completely institutionally separate from ministries and/or can be partially separate or fully separate legal bodies.

Governance structure and control: They may have a governing board, an advisory board, or under a one person rule. Control is devolved to governing body (with or without a governing board), and the minister has indirect control.

Financial, management and personnel rules: Staff rules vary between full civil service controls, differentiated controls, and general common employment rules, but employees often remain subject to a general framework for state servants. Most PLAs are tax-revenue financed, and their budget is part of the general budget law, although they are often allowed to carry forward surpluses.

Function: They are created to provide: *i*) a differentiated governance structure (governance board) — allowing more management autonomy or policy independence in some cases; and/or *ii*) a differentiated control environment; and/or *iii*) some managerial autonomy. Specific functions range widely from service delivery to regulatory and quasi-judicial functions.

Examples: France: Administrative public establishments (“*Etablissements publics administratifs*”), professional public establishments (“*Etablissements publics professionnels*”) and autonomous administrative authorities (“*Autorités Administratives Indépendantes*”); Germany: Indirect public administrations; Netherlands: Public law ZBOs; New Zealand: many Crown entities (including “statutory corporations”, “corporations sole”, “Crown agents”, schools, “autonomous Crown entities”, “independent Crown entities”); Spain: OA administrations and selected regulatory bodies; Sweden: agencies and boards; United Kingdom: many executive non-departmental public bodies.

3. Private Law Bodies (excluding government companies) (PLBs): quasi-corporations and non-commercial private law bodies

Institutional and legal foundations: They are not companies, but function mostly under private law, usually with a full separate legal identity from the state.

Governance structure and control: They usually have a governing board, and the minister has indirect control.

Financial, management and personnel rules: Staff are usually employed under general employment law, with no, or limited, control on inputs. They are usually mostly sales revenue financed, and can carry forward surpluses, borrow and lend. Their budgets are separate from those of ministries.

Function: They might have a full profit objective or mainly a service objective function subject to a clear cost constraint. Many, but not all, function in the commercial sector according to the Systems of National Accounts (SNA) definition, others are government bodies on their way to privatisation.

GOV/SIGMA(2007)7

Examples: France: Industrial and commercial public establishments (*Etablissements publics industriels et commerciaux*); Germany: Private law administrations and charged administrations; Netherlands: Private law ZBOs; United Kingdom: Some NDPBs.

ANNEX 2

Extract from:

Organising Ministries and Agencies — Recent Trends in OECD Member Countries,
(paper prepared by Elsa Pilichowski drawn from various OECD publications), pages 13-23

II. The organisational forms of government organisation-provided public services³⁵

As described in part I of this paper, OECD governments have redefined public services by divesting in commercial activities that could be undertaken by the private sector without the involvement of government, while at the same time, increasing the private sector involvement in the provision of public services. In spite of these important trends, the core of public services are still delivered by government organisations, both through traditionally vertically integrated ministries, but with an increasing delegation of responsibilities to arm's length government. OECD countries have diversified government organisational forms in order to face the challenges of improved services and improved government. This chapter provides an overview of the different types of government organisational forms for the provision of public services.

II.1 Core traditionally vertically integrated ministries

II.1.a Overview:

The number of government ministries and their structures change constantly. Most new governments shake up the cabinet structure and the number of ministries. But overall, the size and number of ministries in OECD governments grew rapidly from 1950, then stabilised in the mid-1980s and has since even decreased for some sectors of the economy.

It is impossible to draw general conclusions on whether large ministerial organisations are better than small organisations or the other way around. It depends on the nature of the functions, the wider institutional setting, the management goals one is trying to achieve, and the culture of the organisation. In general, however, smaller organisations offer tighter focus and clearer accountability, but make collectivity harder. Larger organisations can offer economies of scale, can merge ill-functioning units into well-functioning ones but may take decisions internally which should be addressed politically.

Rules and controls

Ministries have no separate identity from the state and generally function under public law or general government management laws or general administrative regulations. The minister has a formal, direct hierarchical control while the Director General has operational control. Ministries are tax financed on an annual basis, and have no ability to borrow or lend, and typically have limited ability to carry forward surpluses. They are subject to administrative procedures and process controls (e.g. for purchasing non labour inputs). Traditionally, there have been input controls on the wage bill or on individual salaries and/or on the number of staff. Their staff are subject to process controls for their appointment, their promotion and

³⁵

Drawn mainly from the classification provided in the article by Derek GILL (2002), *Distributed Public Governance*, OECD, 2002, and GOV/PUMA(2003)19;

their removal.

II.1.b Basic functions of ministries:

The main strengths of ministries as an organisational form are that they are multifunctional, relatively insulated from political interference on administrative processes (rules on staff and financial management), responsive to the political context, visible from a democratic point of view, and are durable organisational forms.

Their main weaknesses are their possible lack of core competency, their tendency towards excessive risk aversion, limited innovation and limited implementation of performance management, their culture of managing down with little focus on citizens, and the possible political interference on matters where the stake has a special vested interest (some of the regulatory functions).

They are best used when there is a strong need for direct ministerial oversight and sovereignty functions (defence), a lack of measurability, policy objectives that are ambiguous or subject to rapid and unpredictable changes, and high political relevance. As such, the ministry is the appropriate organisational form for all multifunctional activities, for policy development and preferred for all executive functions except focused cohesive groupings of activities and commercial activities.

II.2 Arm's length government

Overview

Traditionally, in most OECD governments, core government is defined as the ministries and departments of the executive, under the direct hierarchical control of a Minister and/or prime minister in parliamentary systems, or of the head of state in presidential systems. These direct accountability lines provide a simple and stable governance model in which policy making and the delivery of services fall under the responsibility of a government clearly accountable to parliament and ultimately to the people. The same set of financial and management laws and reporting mechanisms generally apply to all of these bodies.

All countries, however, have always had some degree of managerial autonomy for core government bodies that are separate from traditionally structured ministries or departments. Many such bodies are long standing and have been created for a variety of reasons, both political and managerial.

In the past two decades, this picture has been significantly altered by allocating public responsibilities to bodies at arm's length from the direct and constant control of politicians, with different hierarchical structures from traditionally functioning ministries, and in some cases management autonomy or independence from political influence. In some cases bodies have been newly created with new governance structures, in other cases, long standing bodies have been given significantly more management autonomy.

Reasons for change

The reasons for these changes have been two-fold: to improve the efficiency and effectiveness of the system; and, or, depending on the type of the body, to legitimise decision-making by providing some independence from direct political intervention. This is provided by clearer insights in costs and a clear separation of responsibility between policy development and policy execution.

In general, especially in the case of service delivery, governments have felt an increasing pressure to focus on performance, and as such, to better focus staff and individual organisations' accountability. Arm's length bodies have been a favoured form of implementing performance

management as they function better than core ministries under clear performance contracts with their parent ministries, benefit from a relaxation of their input controls, but have a clear accountability line to the minister, and in most cases, remain institutionally part of their parent ministries.

There is no universally accepted classification of arm's length bodies. They differ widely in terms of organisation, legal status, and degree of management autonomy or political independence. But basically governments have used three main methods to distance these bodies from core ministries (not all of them may apply at the same time): 1) the first is a different governance structure and hierarchy from a traditional ministry. 2) The second is a different control environment, in other words partial or complete exemption from management, financial, and personnel rules that usually apply to traditional ministries. 3) And the third is a degree of management autonomy (including a separate financial administration).

These arm's length bodies in central government now account for between 50% and 75% (or even more in very few cases) of public expenditure and public employment in many OECD countries. This new institutional environment has created new challenges for governments to maintain central direction and control. This part of the paper will examine the different types of organisational forms for arm's length government and the conditions that need to be met for these entities to function properly and bring the expected results.

II.2.a Departmental agencies

Overview

Departmental agencies are a relatively new organisational form. Departmental agencies are direct subsidiaries of ministries and function under public law or general administrative processes applying to all ministries. Their main difference from traditionally vertically integrated ministries is that they are given more managerial freedom and function within a management and performance contract on targets and performance negotiated with the traditionally vertically integrated ministry. This means that good reporting on outputs and outcomes by departmental agencies and detailed controlling outputs and outcomes by ministries is crucial for the functioning of the system.

Rules and controls

Departmental agencies do not have a governance board. The minister has formal control but less direct than in a ministry, while the director general has operational control. Departmental agencies are fully tax or partly tax/partly user fee financed. They have an annual budget and they can often carry forward surpluses. They may be subject to process controls or not. Their staff are part of the civil service but often with some relaxation of civil service staff processes and numbers. They usually have no power to borrow or lend funds, but the proceeds from their assets sales may be retained.

The UK has created 131 departmental agencies since 1988, employing more than three-quarters of the civil service. In the Netherlands, it is expected that by 2004, 80% of the civil service will be working in departmental agencies. Other more limited reforms, such as the performance-based organisation programme in the United States or the *Centres de Responsabilité* in France have concerned a more limited number of organisations. Important reforms were also carried out for example in Korea, where 23 departmental agencies have been created since 1999, and now employ more than 5 000 staff and account for 7% of the government budget.

Functions

Departmental agencies can be very varied and can cover a lot of functions that some traditionally-vertically integrated ministries usually carry out, in particular, the delivery of non-commercial services to citizens or support services to other state sector bodies. For

example, regulatory compliance services (e.g. issuing drivers licences), support services to ministries. This organisational form is most likely to apply to the delivery of tangible administrative services (e.g. issuing drivers' licenses), where key information is not tacit but can be transformed into data (e.g. revenue collection, and supply of support services where, for some reason, contracting out to the private sector or privatisation are not an option).

The departmental agency form can improve performance through better focus and more performance contracting when there is a cohesive functional grouping of administrative tasks, predominantly delivering tangible services. The departmental agency form allows focus on one or a few related services to citizens or government clients, better insulation from politics and a better focus on serving citizens and clients rather than the minister, performance contracting with management autonomy and accountability, improved management expertise in service delivery.

However, like other organisational forms, departmental agencies are not fit to all public services. Where interconnectedness among policies is high, the agency form may result in difficulties in coordination. Where political salience is high, they may lead to a loss of political control. Also, only some government activities are measurable and poor specification may undermine the organisational model. Focused agencies may also resist resource reallocation, a particular problem where policy settings not stable or durable. Finally, management has less expertise in working in the political and government context.

Organisational classification of government bodies [...]

			Legal separation from the state	Rules applying to the entity	Customers	Status of staff	Funding
Traditional ministries			Indivisible from the state	General rules applying to ministries/public law	Minister	Civil servants	Tax funded
	<u>Departmental agencies</u>		Tax funded (possibility of small fees)	General rules applying to ministries. Relaxation of some input controls	Mixture of public/private customers	Civil servants	Tax funded
Arm's length government	<i>Public law administrations</i>		Partially or fully legally separate from the state	General rules applying to government entities/public law Relaxation of some input and process control rules	Mixture of public and private customers	Partly public servants	Some fee, some sales, some tax
	<u>Indirectly controlled bodies</u>	Commercial government enterprises	Legally separate entities from the state	Private law bodies	Private customers	Private law employments (sometimes some specific status)	Sales revenue funded /subsidies
		<i>Government enterprises</i>	Non-commercial other private law body	Id.	Id.	Id.	Id.
				Id.	Id.	Id.	Id.
		<u>Quasi governmental entities</u>		Id.	Id.	Id.	Id.

II.2.b Indirectly-controlled bodies

Indirectly-controlled bodies are separate from ministries and often are separate legal entities. Having a separate legal entity has allowed some countries to provide these bodies with a very different governance structure (most notable with the existence of a relatively independent board) and different management rules from traditionally vertically integrated ministries. In all cases, like for departmental agencies, the key to the good functioning of indirectly-controlled bodies lies in the management of a contract on outputs designed by the parent ministry in collaboration with the indirectly-controlled body, and in the overall accountability and governance mechanisms that apply to the body.

Most OECD countries report a significant number of non-departmental public bodies and all distinguish different types within this general heading. These in turn can be classified into: 1) public law administrations (mainly functioning under general administrative rules applying to all government entities--often undertaking administrative functions), 2) government enterprises (mainly functioning under general law--often undertaking commercial, industrial or financial activities).³⁶

II.2.b.i Public law administrations (PLAs)

Overview

These bodies are separate from ministries and operate at arm's-length from ministers so that control is exercised indirectly rather than directly.

PLAs can be significant government employers. In Germany, ministries employ only 6% of civilian federal employees compared to 51% in PLAs³⁷. By contrast, in France 70% of central government staff are employed by ministries (66% excluding defence).

With some exceptions, PLAs are a reasonably stable well-established group, which in some cases have histories dating back to medieval times. The notable exceptions are New Zealand, which created a large number of Crown Entities in the 1980s and 1990s, and the creation of specialised separate utility regulators in most countries.

³⁶ The distinction between public law and private law bodies is not meant to imply that each body will be completely in one of these legal jurisdictions. For example, private law bodies can be incorporated under private law but still may be created by statute and subject to the budget law or administrative law with respect to the exercise of certain administrative powers. Similarly, public law bodies may be subject to private law (and treated as separate legal entities for those purposes) when conducting certain transactions with third parties (entering leases, etc).

³⁷ 40% of employees in federal ministries work in the defence sector.

Rules and controls

PLAs are characterised by their diversity. Within any one country, a wide array of governance regimes and legal forms may be used to undertake a wide variety of functions. Across countries the legal status, control regimes, powers, size, functions, internal governance and administrative cultures vary even more.

PLAs function mostly under general rules applying to government entities. Their main difference with ministries lies in their separate legal entities from the state and their different governance structure. They may have a full governance board, an advisory board, or be a one person rule. Their control is given to the governing body, which generally delegates to director general. Minister retains indirect control. They can be solely tax financed, some may be part tax/part user fee financed. They are often allowed to carry forward their surpluses. The status of their staff varies between full civil service controls, partial controls, or general labour laws (but subject to a general framework for state servants on standards of conduct, merit EEO etc.). There are varying controls on the appointment of the director generals depending on the status of the board. Finally, controls on borrowing, lending and retention of proceeds from assets sales vary.

Examples vary tremendously from one country to another, but may include entities for the financing of arts and culture, sport, sciences, regulatory bodies for health security or environment, public universities, museums, some hospitals etc.

Roles and functions

PLAs can improve performance for a cohesive grouping of functions where: 1) a governance board provides strong leadership and effective monitoring: In many countries, PLAs have a governance board. A good board adds expertise in management, provides leadership, sets an ethical tone, and acts when performance monitoring shows a problem. A governance board is likely to have a particularly important role for commercial activity where, for regulatory or other policy reasons, the company form has not been used. Similarly, a PLA with a governance board could be used to undertake a group of cohesive administrative activities suitable for a departmental agency. However, the appointment/removal mechanisms of board members need to be transparent and ensure the legitimacy of those appointed. 2) the control environment can be better tailored to the entity's status and functions. This means that in many cases, the financial management, accounting, civil service and procurement rules are different to some extent from those that apply to vertically integrated ministries. This is most likely to be useful for organisations where measurability is high and political relevance is low

PLAs are thus best used when they focus on only one or a few related services to citizens or government clients; when they can insulate activities from politics to allow the development of a culture focused on serving citizens/members interests; when they have a governance board which provides expertise in management, leadership, and "tone", and oversees performance; when a differentiated control environment can be tailored to the body's status and functions; when they can better attract staff from outside the civil service; when they increase legitimacy for decision making by involving stakeholders (private sector, civil society) and those with specialist knowledge and expertise.

PLAs also have important weaknesses as an organisational form: They can result in a loss of co-ordination and thus in a resistance to resource re-allocation where interconnectedness is high, in a weakening of the ethos of public service and staff mobility, and increases in pay differentials. In addition, they involve a risk of patronage in board appointments undermining the quality of the board.

11.2.b.ii Government enterprises

All countries have government enterprises, generally established under private law and undertaking commercial, industrial or financial activities. In addition, governments in some few countries have some non-commercial private law bodies.

1) *Commercial government enterprises*

Overview

Government enterprises—grouping government-owned companies (which are incorporated in a corporation under private law) and also quasi-corporations (they are not separate legal entities but act as if they were a government corporation)—have played a significant role in a wide-range of countries. Although countries differ significantly in the level of activity undertaken in government enterprises, there is a remarkable similarity in the industries in which historically they have been concentrated (postal services, railways, airlines, telecommunications, electricity generation and distribution, and gas reticulation, radio and TV provision). The widespread privatisations undertaken in a number of countries in recent years have changed this pattern.

Nevertheless, across OECD Member countries an average of 7% of GDP is still produced by government enterprises. A number of countries are corporatising quasi-corporations and unbundling regulatory and commercial activities and placing the latter in government companies. The company form developed in the private sector to undertake commercial activities and almost all the features (role of governance board, etc.) are equally applicable in the state sector. This form is, however, unsuited to policy advice or regulatory functions.

The use of government companies often requires separating out the government’s overall interests — as owner, regulator, or service user — and designing governance arrangements that work best for each interest. Particularly in cases where the government is able to clarify its public policy objectives and use other policy instruments (such as explicit subsidies and regulation), significant gains have been realised by moving commercial functions into SOEs established as companies.

Placing commercial activities in government companies can improve performance, particularly when accompanied by budgetary and regulatory reform.³⁸ The strengths of government enterprises lie in their focus on one or a few related services to customers; in the existence of a board which insulates the organisation from politics thus allowing the development of a commercial culture; and in the possibility to measure financial performance. However, the governance board can be undermined where public policy objectives dominate/ political interference is high. Government enterprises imply some political risk of weak performance which resides with the minister.

Rules and controls

Government enterprises function under private law and have a separate legal entity from the state. Their overall control is devolved to a board which delegates to the Chief executive. The minister only has indirect control. They usually have a governance board. Their staff are employed under general labour laws. They are sales revenue financed and they may borrow, carry forward surpluses or lend funds. There are no staff or other input controls. The proceeds from the sales of their assets and depreciation are retained.

Types and functions

Government enterprises as a group are a rather diverse clump: quasi-corporations that emerged from other non-commercial government bodies; public organisations en route to privatisation;

³⁸

The World Bank, for example, emphasises that changes in legal form alone are not sufficient. In “*Bureaucrats in Business*” it reports that what distinguished successful from unsuccessful reforms of government enterprises was that the successful countries introduced a package of reforms that included: wide-ranging divestment (where state ownership was higher); introducing competition (including unbundling large enterprises, and easing entry restrictions); applying a hard budget constraint (eliminating direct and indirect subsidies); introducing financial sector reforms (making access to finance on a commercial basis); institutional reform (oversight bodies, management autonomy, performance agreements).

privately incorporated companies that are government-owned (but which otherwise behave to maximise profits within the political context just as does any for-profit private enterprise); organisations more akin to private not-for-profits that maximise another objective function (service, output, etc.) subject to a cost constraint.

Government enterprises usefully can be subdivided using the distinction (per SNA) between for-profit and not-for-profit. Accordingly two sub-types are proposed: i) state-owned enterprises, which have a for-profit objective function and; ii) not-for-profit government enterprises, which aim to maximise a service objective function (output, services delivered etc.).

SOEs are superior to not-for-profit government enterprises for undertaking commercial activities where the measurability of the public policy interest is high because this allows a government to pursue its public policy objectives through other policy instruments (such as explicit subsidies and regulation), and assign a relatively unambiguous strategic objective to the governance board of the organisation.

2) *Non-commercial other private law bodies (PLBs)*

A good number of countries report government bodies incorporated under private law but which are not commercial as defined by SNA. While government enterprises undertake significant commercial activities, other private law bodies are found in fewer countries and even there operate on a much smaller scale. They undertake a wide-range of functions including providing membership services to defined groups, regulatory enforcement and providing support services. It is unclear that this is a sensible category for choosing among organisational forms.

II.2.c *Quasi-governmental entities*

In all jurisdictions there is a range of bodies outside the reporting entity that undertake public policy functions (deliver services, regulate, etc.). They are usually private law bodies with private owners, with a governance board with some government appointees, they are partially financed on government grants and have no government controls on staff or others. In this category we find some of the government-created foundations for example.

There are significant governance risks for government with these privately-owned bodies, particularly when government appointed members sit on the board. Even though they are outside the consolidated general government, the line between public and private sector is blurred rather than sharp. In some countries, the courts have sometimes found the government responsible for the actions of bodies that the government did not own (which is why they are outside the financial reporting entity) but were deemed to control. This deemed control could arise in the absence of a clear residual claimant, most obviously through a power to appoint or dismiss members of the governing body.

Thus, there are a range of legal bodies established by statute but not owned or fully controlled by government and which are charged, in part, with performing some public policy functions. The government has an interest in how the body performs some of its functions and a contingent liability if it is deemed to have control. This risk suggests the need to use an extreme caution in establishing quasi-government instrumentalities.

II.2.d *Conclusion: Conditions of success of arm's length government*

It is possible to draw conclusions from OECD countries' experience as to the basic conditions for a successful and sustainable distributed governance system. They include:

1) A sound legal and institutional framework that would limit the number of types of arm's length bodies, give them a clear legal basis and justify any exceptions to the stated rules. This

legal and institutional framework should take into account the following.³⁹ 1) grouping organisations into classes, establishing strict principles for the creation and removal of new entities; 2) assigning specific governance responsibilities; 3) providing a generic law for organisations; 4) establishing policy agreements with the different bodies; 5) establishing principles of public finance for these bodies; 6) specifying rules under which staff function; 7) specifying the external reporting and auditing procedures as well as the planning and control cycle; 8) assigning individual responsibilities; 9) establishing sound procedures for accounting on the use of public resources, the results achieved and good governance standards; for accounting to and consulting with stakeholders; 10) establishing standards of behaviour; 11) establishing control and audit procedures and principles

2) A well-thought through structure for individual institutions is also important, including a gradual move to arm's length systems. Not all bodies will be ready at the same time to function at arm's length from government, not least because governments need to make sure they have enough managers available to work at arm's length in an outcome-based environment. One problem is that the ministries who are responsible for monitoring the arm's length bodies may be slower to adapt to performance-based management than the newly-created organisations, and dealing with this is a key challenge in establishing a well-functioning distributed governance system.

3) Organisation of the necessary constant interface between arm's length organisations and central parent ministries.

4) Accountability of and reporting by delegated managers, and need for a strong oversight of bodies, including by parliament.

In any case, building capacity takes time. It takes months, and often years, to transform part of a traditional ministry hierarchy into an arm's length body that functions well, and for the supervisory ministry to be able to steer it well. The process of getting things right cannot be entirely driven by the top but depends on co-operation and learning from both parties.

³⁹

Drawn from "Distributed Public Governance: principles for Control and Accountability of Agencies, Authorities and other Government Bodies", by Rob Laking, in *Distributed Public Governance*, OECD, 2002;

ANNEX 3

Constitutional Constraints to Organisational Specialisation and Agencification

Jacques Ziller

Unpublished survey written for SIGMA for the purpose of the present paper

A selected number of cases are being examined here, both taking into account the relative weight of the chosen countries and the type of reforms that have been accomplished or envisaged in their central state administration. The order followed for this presentation is from the more flexible to the least flexible pattern — a concept which remains relative, as very inflexible constitutional provisions might still allow for easy reform if there is a strong enough political consensus concerning their necessity.

The Case of the United Kingdom

It is often said — by British as well as non-British authors, politicians and practitioners — that the United Kingdom has no constitution or at least no written constitution. This is wrong, however, and it is therefore worthwhile going into more detail with regard to the principles and rules of the British Constitution which are relevant to the organisation and functioning of public administration, and especially to the issue of agencification in central government.

The Constitution of the UK is made up of a certain number of unwritten principles and practices (the “conventions of the constitution”) as well as written texts, including a number of more or less recent acts of parliament, to which a constitutional nature is recognised by statute (act of parliament), by the courts and by doctrine. The fact that parliament (i.e. the Crown, the House of Commons and the House of Lords) may change these statutes by way of ordinary legislative procedure does not contradict their constitutional nature, and sometimes only confers the illusion that they are easy to change (e.g. it is possible to change the composition and powers of the House of Lords, but probably not to suppress it). A number of constitutional principles, rules and procedures are relevant to the issue of agencification in the United Kingdom and need to be explained, although they are very often totally ignored by the relevant official reports or academic literature.

The royal prerogative

The most relevant set of constitutional rules as regards the organisation and functioning of the British government is the notion of royal prerogative and its scope. Whatever powers fall under the royal prerogative enable the executive to regulate and decide without any act of parliament. The government of the day remains accountable to parliament for its own decision under the royal prerogative — and indeed the parliamentary majority strongly influences these decisions — but in order for these decisions to be taken, an order in council — i.e. a decision of the Cabinet — is sufficient. If, however, parliament has legislated on a field which is in the scope of the royal prerogative, another act of parliament is needed in order to modify said legislation or to suppress it and thus restore the full freedom of the executive.⁴⁰ The scope of the royal

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This is the case, for instance, where general legislation on working conditions or industrial relations is passed, which is specifically considered to also apply to employment in the civil service.

prerogative has been reduced in the course of British history but remains rather broad, covering on the one hand foreign affairs or external relations⁴¹, and on the other the organisation and running of the civil service — i.e. central state administration⁴².

The fact that the organisation and running of the civil service falls under the royal prerogative accounts for both the flexibility (and sometimes rapid changes in management of the British central government) and the lack of legal status of the instruments for implementing reform. These instruments are usually not legally binding acts (acts of parliament or orders in council) but reports to the government (e.g. the Next Steps Report of 1987, the major reform leading to agencification), white books or other non-legally binding instruments⁴³. It also explains the fact that staff regulations for “Crown servants” (i.e. the state civil service) need not be embedded in an act of parliament, and not even in an order in council. For the major part of the 20th century these regulations were the result of agreements between representatives of ministerial departments and staff representatives in the framework of the “Whitley Councils”, which were the locus for discussion and agreement on working conditions of the civil service. These agreements were then laid down in “codes” without a binding legal nature, which were totally ignored by the courts until the 1980s. Even though the courts now take them in cases of litigation between civil servants and their employer, there is little relevant jurisprudence, because traditionally these kinds of litigation were not submitted to courts for two major reasons: the absence of specific procedural remedies and the cost of court litigation.

Legally speaking, the Cabinet is entirely free to organise and run the civil service in the way it wants, provided it respects, on the one hand, the relevant competencies of parliament in matters of budget and legislation and, on the other, the jurisprudential principle of reasonableness. No principles or rules of procedure apply to the process of reform, which explains that some of the recent reforms of the British civil service have been put in place very rapidly and implemented as soon as technically and politically possible. Politically speaking, the Cabinet is obviously bound by its political responsibility to parliament, i.e. it needs the political support of its own party. However, most of the questions relating to the organisation and functioning of the civil service have only a reduced political salience, and this in turns explains why prime ministers, such as Margaret Thatcher or Tony Blair, have been able to foster major reforms of the civil service at a quite rapid pace, which is usually envied by governments of continental European countries (as well as by the US Government), which do not have such a flexibility in introducing and implementing government reform.

Budgetary and legislative competencies of parliament

Two other constitutional rules, which are not written but are at the basis of the entire British legal system, are the principle according to which only parliament has the power to raise taxes and the principle of the sovereignty of parliament.

As a consequence of the first constitutional rule, all of the principles, rules and procedures relating to raising taxes and spending public money have to be set by an act of parliament, or by delegated legislation based on an act of parliament. For this reason, any agency with financial means dependent on raising taxes or involving the expenditure of funds from the general budget

⁴¹ This explains why an international treaty may be ratified by the UK without parliamentary approval, but also why an act of parliament is necessary in order to give effect internally to such a treaty.

⁴² Regulating local government, on the other hand, necessitates an act of parliament, although there are hardly any constitutional principles that could oppose centralisation of decision-making in the hands central government, as long as parliament approves of it in the form of a statute.

⁴³ This has nothing to do with the features of common law legal systems: in the United States, due to the existence of a written Constitution, which defines the powers of Congress and of the President, the instruments for implementing reforms of the civil service are legally binding, i.e. bills of Congress or regulations of the executive.

needs to obtain the relevant authorisation in an act of parliament, which might be the annual budget. This means, however, that the freedom to set up an agency by a mere decision of the executive encounters boundaries as soon as the agency's budget is not entirely based on income generated by the agency's activity.

As a consequence of the second constitutional rule, parliament is free to legislate as it thinks necessary. If needed, parliament may thus legislate on a matter which enters the realm of the royal prerogative. The parliamentary nature of the British political system, and even more the fact that the prime minister is the leader of government MPs, excludes any conflict between parliament and the executive on legislation that might impact upon the royal prerogative, which has necessarily been adopted with the consent of government. Hence an agency might well be set up by an act of parliament. Whether such an act is necessary in order to give legal personality to an agency depends very much on the exact scope of legal personality — which might also be conferred by a royal charter.

What is more important to the issues discussed in the present paper is that acts of parliament have to give a precise indication as to which authority is empowered to adopt the decisions necessary for its execution. Generally, such an act names the minister — or secretary — to whom this power is delegated, while the *royal prerogative* enables the executive to arrange the structures that relate to the minister in the way it wants, including setting up an executive agency if it considers that this is appropriate. However, if executive power has to be devolved to an agency that is independent from the government, this can only happen if the said agency has been set up by an act of parliament or by delegated legislation on the basis of an act of parliament. The constitutional rules on delegated legislation — which are written down in an act of parliament — ensure that parliament approves the content of delegated legislation *ex post*, explicitly or by implicit consent. Any independent agency which would not have been set up by an act of parliament and which would not be taking decisions on the basis of an explicit devolution of powers by an act of parliament would act *ultra vires*, and the courts would quash these decisions.

Parliamentary responsibility of government

The aforementioned constitutional principles and rules explain that as long the British government wants to keep its freedom to shape and reform agencies without passing through parliament, it has to restrict this freedom to agencies that are directly accountable to a minister, who in turn is accountable to parliament.

Accountability has two facets in British constitutional law: one is the main characteristic of its parliamentary regime, namely that parliament may dismiss the executive or force a member of the executive to resign. This mechanism only works as a virtual sanction, as British governments are usually based on a single party having the majority of members of parliament in the House of Commons⁴⁴. The last prime minister to be defeated on a motion of confidence in the House of Commons was James Callaghan in 1979, whose Labour Government had to rely on the support of the Scottish Nationalist Party, and before him Ramsay MacDonald in 1924. The second facet of accountability is that government has to give all requested information to parliament on its actions and especially on the way it uses the powers delegated to ministers by acts of parliament. This implies an organisational structure in which, even if civil servants may have to give account to parliament (which happens regularly with both Houses' standing and ad hoc committees), it is ultimately the minister who has to endorse decisions and be able to explain them.

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The executive is not responsible to the House of Lords, which has powers of scrutiny but no power to sanction the government.

Judicial review

Another constitutional principle of utmost importance to the issue of the organisation and functioning of public administration is the principle that all decisions of public authorities other than parliament — i.e. courts, tribunals and government — are submitted to judicial review by the courts. Although an unwritten principle, it is one of the foundations of the rule of law in the United Kingdom.

For a very long time the courts restrained their scrutiny to ascertaining that public authorities had not acted *ultra vires*, that is, to ensure that these authorities had been given competence to take decisions by an act of parliament, but the courts did not examine the merits of these decisions. After World War II, courts began to review what they called the rationality of public authorities' decisions, using the "Wednesbury reasonableness test"⁴⁵, according to which a decision would be unreasonable if "...no reasonable authority could ever have come to it" (Lord Greene). This has been one of the bases of the development of modern British administrative law, alongside the reform of judicial review at the end of the 1970s and more recently the Human Rights Act of 1998, which came into force on 2 October 2000. Until 1985 the courts did not accept to review decisions made under the royal prerogative, but this has dramatically changed with the famous GCHQ case⁴⁶, in which the House of Lords (the UK's supreme court) decided that these decisions were reviewable.

The standards of review of administrative decisions remain to a large extent based on sectoral legislation and on jurisprudence as there has not been any general codification of administrative procedure in the UK. The Freedom of Information Act 2000 may be considered as a first piece of general legislation on administrative procedure, which applies to all public authorities. When public authorities are implementing European Union law, the standards of review and tools of judicial protection include the use of principles that are typical of European administrative law, such as proportionality or legitimate confidence.

The case of France

France has a written constitution since 1791, presently the Constitution of 4 October 1958. Not all constitutional principles relevant to the organisation and functioning of public administration, and especially to the issue of agencification in central government, are expressly written down in the constitutional text. Some principles were established by the case law of the *Conseil d'Etat*, the French supreme administrative court, as long as two centuries ago, and were acknowledged recently as constitutional principles by the *Conseil constitutionnel*, the French constitutional court, amongst which the principle of separation of judicial and administrative authorities, which normally entails that judicial review of executive decisions is to be exercised by administrative courts — as opposed to ordinary civil and criminal courts⁴⁷.

Of particular relevance to the issues addressed in this paper is article 20 of the Constitution of 1958, according to which:

The Government shall determine and conduct the policy of the Nation.

It shall have at its disposal the civil service and the armed forces.

It shall be responsible to Parliament in accordance with the terms and procedures set out in articles 49 and 50⁴⁸.

⁴⁵ After the name of the case, *Associated Provincial Picture Houses, Limited vs. Wednesbury Corporation*, decided by the Court of Appeal on 7 November 1947.

⁴⁶ *Council of Civil Service Unions vs Minister for the Civil Service* [AC 347, 1985].

⁴⁷ See Decision 86-224 DC of 23 January 1987 — *Conseil de la concurrence*.

⁴⁸ Official translation by the Assemblée Nationale, available on the latter's internet site <http://www.assemblee-nationale.fr>.

This article is the basis of a fundamental power of the government to organise state administration by way of decrees — as opposed to statutes that are necessarily acts of parliament, as confirmed by article 34, according to which:

Statutes shall be passed by Parliament.

Statutes shall determine the rules concerning: [...]

- *the base, rates and methods of collection of taxes of all types ; [...]*

Statutes shall likewise determine the rules concerning: [...]

- *the creation of categories of public establishments;*
- *the fundamental guarantees granted to civil and military personnel employed by the State;*
- *the nationalization of enterprises and transfers of ownership in enterprises from the public to the private sector. [...]*

Statutes shall determine the fundamental principles of:

- *the general organization of national defence;*
- *the self-government of territorial units, their powers and their resources;*
- *education; [...]*

Finance Acts shall determine the resources and obligations of the State in the manner and with the reservations specified in an institutional Act.

Social security finance Acts shall determine the general conditions for the financial balance of social security and, in the light of their revenue forecasts, shall determine expenditure targets in the manner and with the reservations specified in an institutional Act.

[...]

Thus the government is free to regulate state administration without having to pass through parliament, with the exception of the rules and principles referred to in article 34, which require an act of parliament. This being said, the adoption of government regulations is not necessarily easier or quicker than the adoption of legislation, as a number of consultations usually have to be undergone before the adoption of the regulation. Even though government is not bound by the opinions of the organisations and boards which it has to consult, the procedure has to be followed and may result in considerable delays and generate public debates, with consequences that are not always easy to foresee. Therefore, it often happens that government prefers the instrument of an act of parliament, especially if it can rely on a stable coalition of parties, which is usually the case. Acts of parliament have furthermore the advantage that once in force they can no longer be submitted to the scrutiny of courts, contrary to government regulations, which may be annulled on the basis of a claim introduced within two months of their adoption, or declared illegal, and therefore deprived of application, without any limitation in time.

The Constitution may be amended with a reinforced majority (two-thirds of the total members of both houses of parliament) or by referendum. This means that in practice the possibility to amend the Constitution depends on the configuration of the parliamentary majority⁴⁹ and on the relationship between the President of the Republic and the parliamentary majority.

The precise boundaries of those rules and principles have been consolidated by the jurisprudence of both the *Conseil d'Etat* and the *Conseil constitutionnel*, the first by ruling on the constitutionality of government regulations that are not based on a statute, the latter by deciding, following a request of the government, whether a particular piece of a statute may be modified by government regulation. It has to be underlined that, while the possibility of having a statute reviewed by the *Conseil constitutionnel* as to its conformity with the Constitution is restricted to statutes that have not yet entered into force (on the basis of applications by at least 60 members of parliament, the chairmen of both houses, the President of the Republic or the Prime Minister),

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Centre-right coalitions have more facilities to amend the Constitution because they usually can rely upon a majority in both houses, contrary to centre-left coalitions.

the judicial review of governmental regulations by the *Conseil d'Etat* is very broad, due to very open standing rules and to the fact that the *Conseil d'Etat* has broad powers of annulment and injunction against the government. As far as agencification is concerned, the freedom of the government is rather broad, including setting up agencies with legal personality, provided they fall into existing categories of *établissements publics*. The staff regulations and budgetary and financial regulations, on the other hand, need to be based on acts of parliament, and some of their elements cannot even be adopted by delegated legislation based on a parliamentary authorisation.

There is no general codification of administrative procedure, although a number of general acts regulate some important aspects, such as the statute n°2000-321 of 12 April 2000 *relating to the rights of citizens in their relations with public administrations*, which contains some principles that might be considered of constitutional value by both the *Conseil d'Etat* and the *Conseil constitutionnel*. The rules applying to setting up and executing the budget are set up by a *loi organique*, which requires the approval of both houses (as against ordinary legislation, which only needs final approval by the National Assembly), and are applicable to the finances of all public authorities. These rules were deeply reformed by the *Loi organique* n°2001-692 of 1 August 2001 relating to financial statutes, generally known as the *LOLF*. Due to the major changes involved, the application of the law was gradual, and the first budget to be fully passed under LOLF was the 2006 budget, passed in late 2005.

Generally speaking, the government is rather autonomous, as opposed to parliament, with regard to setting up agencies, and in any case the government usually can count on relatively stable coalitions to support it in parliament and to pass the necessary legislation. There is also a rather high level of consensus amongst political parties on organisational issues other than privatisations. Limitations to the freedom of government stem rather from legal principles, which are very often the result of jurisprudence and not easily modified, and from the strength of some corporations of public officials, the "*grands corps*", which traditionally dominate the organisation and running of state administration, i.e. on the one hand, members of the *Conseil d'Etat* and the Court of Auditors, as well as the General Inspectorate of Finance (most of them educated in the *Ecole nationale d'administration*), and on the other hand, corporations of engineers (educated in the *Ecole polytechnique*). Politicians (an important number of whom are former civil servants coming from these "corps") have to rely on their support in order to draft and implement reforms that impact on the organisation and functioning of public administration.

The case of Germany

Germany has had a written constitution since 1870 — as far as a united Germany is concerned; it had been preceded by a number of separate state constitutions since the beginning of the 19th century. The present Constitution is the Basic Law of 23 May 1949. A number of provisions of the Basic Law are directly relevant to the organisation and functioning of public administration, and especially to the issue of agencification in central government; they are complemented by the jurisprudence of the German Constitutional Court, which is quite abundant.

Of particular relevance to the issues addressed in this paper are articles 86 and 87 of the Basic Law, which provide⁵⁰:

Article 86

[Federal administration]

Where the Federation executes laws through its own administrative authorities or through federal corporations or institutions established under public law, the Federal Government shall, insofar as the law in question contains no special provision, issue general administrative rules. The Federal Government

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Translation provided by the German Parliament (*Bundestag*) and available on its website <http://www.bundestag.de>.

shall provide for the establishment of the authorities insofar as the law in question does not otherwise provide.

Article 87

[Subjects of direct federal administration]

(1) *The foreign service, the federal financial administration, and, in accordance with the provisions of Article 89, the administration of federal waterways and shipping shall be conducted by federal administrative authorities with their own administrative substructures. A federal law may establish Federal Border Police authorities and central offices for police information and communications, for the criminal police, and for the compilation of data for purposes of protection of the constitution and of protection against activities within the federal territory which, through the use of force or acts preparatory to the use of force, endanger the external interests of the Federal Republic of Germany.*

(2) *Social insurance institutions whose jurisdiction extends beyond the territory of a single Land shall be administered as federal corporations under public law. Social insurance institutions whose jurisdiction extends beyond the territory of a single Land but not beyond that of three Länder shall, notwithstanding the first sentence of this paragraph, be administered as Land corporations under public law, if the Länder concerned have specified which Land shall exercise supervisory authority.*

(3) *In addition, autonomous federal higher authorities as well as new federal corporations and institutions under public law may be established by a federal law for matters on which the Federation has legislative power. When the Federation is confronted with new responsibilities with respect to matters on which it has legislative power, federal authorities at intermediate and lower levels may be established, with the consent of the Bundesrat and of a majority of the Members of the Bundestag, in cases of urgent need.*

The main thrust of these provisions, for the issue at stake in this paper, is that the federal government may in principle establish agencies by way of government regulation if there is no provision in federal laws or in the Constitution (i.e. mainly in article 87) which requires an act of parliament. It has to be noted that general regulations of the federal government need the approval of the *Bundesrat* whenever they may have an impact on the interests of the Länder; therefore, the adoption of government regulations is not necessarily easier or quicker than adopting legislation through parliament.

To fully understand those provisions, which establish the division of competences between the federal government and parliament as far as the organisation and functioning of federal administration is concerned, one needs to take into account article 30 *[Division of authority between the Federation and the Länder]*, which states: “*Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder.*”

Other specific provisions of the Basic Law which have a direct impact on the issues discussed here are: article 20 (*basic institutional principles; defence of the constitutional order*), which refers to “*the constitutional order of the Federal Republic of Germany as a democratic and social federal state*”; article 33 (equal citizenship; professional civil service), which states in paragraph 5: “*The law governing the public service shall be regulated with due regard to the traditional principles of the professional civil service*”; and article 36 [personnel of federal authorities], which states in paragraph 1: “*Civil servants employed by the highest federal authorities shall be drawn from all Länder in appropriate proportion. Persons employed by other federal authorities shall, as a rule, be drawn from the Land in which they serve.*” Of particular relevance are equally articles 1 to 19, which guarantee fundamental rights and which may not be amended in their substance, as well as articles 70 to 74, which regulate the distribution of legislative competences between the Federation and the Länder and which underwent a quite comprehensive series of modifications in August 2006 (“Federalism reform”).

The Constitutional Court has a particularly important role in Germany as far as the issues dealt with in this paper are concerned. This is due, on the one hand, to the traditional broadness and deepness of legal culture in the German civil service, which is complemented by a very high

standard of judicial review, exercised by the Constitutional Court, which includes an examination of the internal coherence of legislation derived from its understanding of the principle of equality. It is also due, on the other hand, to two specific features of the German system of constitutional review. The first feature is the very extensive system of open remedies, which enables political debates to be brought to the Constitutional Court — a system which has influenced many constitutions in Central Europe and is complemented by the influence of the German Constitutional Court's jurisprudence on its Central European counterparts. The second feature is the existence of technical remedies that enable the Constitutional Court to impede the adoption of constitutional amendments that go against the substance of the fundamental rights embedded in articles 1 to 19 and of the principle of a democratic federal state embedded in article 20 of the Basic Law. The Constitutional Court's jurisprudence on the consequences of the separation of powers is particularly relevant in the context of agencification and supports the doctrinal reluctance to admit the compatibility of certain forms of agencies with the Basic Law.

On the other hand, the Basic Law is very easy to amend when none of these fundamental principles is at stake and when there is a consensus between the major governmental parties, i.e. Christian Democrats and Social Democrats, as demonstrated by the adoption of 51 amendments since 1949.

Beyond the specificities of the German federal system and of its system of judicial review by the Constitutional Court, there are several similarities between the United Kingdom, France and Germany with regard to the use of government regulation — as opposed to an act of parliament — subject to the limitations derived from the budgetary and financial powers of parliament on the one hand and judicial review of administration by administrative courts on the other. Unlike the UK, but similar to France, staff regulations for civil servants in Germany are to a large extent subject to their adoption by acts of parliament and to limitations by constitutional principles. Unlike France and the UK, in Germany a quite extensive codification of general administrative procedure (*Verwaltungsverfahren*) has been accomplished by act of parliament, which is applicable to all public authorities.

The case of the Netherlands

The Netherlands has a written constitution since 1814, which underwent a major revision in 1848 and was rewritten without fundamental changes in 1983. Article 134 of the Constitution is the most relevant provision for the issue of the organisation of the state and agencification:

Article 134⁵¹

1. *Public bodies for the professions and trades and other public bodies may be established and dissolved by or pursuant to Act of Parliament.*
2. *The duties and organisation of such bodies, the composition and powers of their administrative organs and public access to their meetings shall be regulated by Act of Parliament. Legislative powers may be granted to their administrative organs by or pursuant to Act of Parliament.*
3. *Supervision of the administrative organs shall be regulated by Act of Parliament. Decisions by the administrative organs may be quashed only if they are in conflict with the law or the public interest.*

This provision has to be read in combination with articles 81 to 88, which regulate the legislative procedure for passing acts of parliament, and with article article 89, according to which:

1. *Orders in council shall be established by Royal Decree.*
2. *Any regulations to which penalties are attached shall be embodied in such orders only in accordance with an Act of Parliament. The penalties to be imposed shall be determined by Act of Parliament.*
3. *Publication and entry into force of orders in council shall be regulated by Act of Parliament. They shall not enter into force before they have been published.*

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English translation by the Dutch Ministry of the Interior, available on its internet site: <http://www.minbzk.nl>.

4. *The second and third paragraphs shall apply mutatis mutandis to other generally binding regulations established by the State.*

The combination of these provisions means that there is ample freedom for government to organise and run administrative structures. An act of parliament is only needed in order to establish the basis for the establishment of a public body with fully fledged legal personality, and in order to regulate the composition, powers and supervision of such bodies, which may even be granted legislative powers. For all other aspects of the creation, dissolution, organisation and running of central state administration, the instrument of an order in council or other generally binding government regulations is sufficient. This is particularly important, as the legislative procedure is especially long in the Netherlands because of the constitutional rules for the adoption of acts of parliament, and due to the fact that Dutch governments often rely on coalitions of parties, which makes the running of central state administration rather complicated and difficult.

The Netherlands is one of the rare European countries where there is no judicial review of the constitutionality of acts of parliament (expressly prohibited by article 120 of the Constitution); according to article 94 of the Constitution, courts nevertheless have to give precedence to international agreements (including EC law) if acts of parliament contradict them. Orders in council and other generally binding government regulations, on the contrary, are subject to judicial review of their legality and may be annulled by the Council of State acting as a supreme administrative court.

The Constitution also establishes the need for an act of parliament to levy taxes (art. 104), to establish the yearly budget of the state (art. 105), and to regulate the status of public servants, their employment protection and co-determination (art. 109), as well as the right of public access to information.

Although the establishment and running of administrative structures is easily regulated mainly by government regulations, a number of general regulations necessarily apply to them, including budgetary and financial regulations, staff regulations and a comprehensive set of rules and principles codifying the general administrative procedure since 1992 (*algemene wet bestuursrecht*).

On the whole, the situation in the Netherlands could be qualified as being somewhere in between that of France and Germany on the one hand and that of the UK on the other. The use of legally binding instruments for government regulation and the existence of a general regulation of the civil service by means of acts of parliament and government regulations place the Netherlands closer to the two other continental countries.

The case of Italy

Italy has had a written constitution since its unification in 1861 — through the extension to all Italy of the Constitution of 1848 of the Kingdom of Piedmont-Sardinia, the liberal status given to his subjects by King Charles-Albert (*Statuto Albertino*). The present constitution, which replaced the *Statuto Albertino*, is the Constitution of the Republic of Italy of 27 December 1947. The main provision of the Constitution that is directly relevant to the organisation and functioning of public administration, and especially to the issue of agencification in central government, is article 97, which is complemented by the jurisprudence of the Italian Constitutional Court, which is quite abundant.

According to article 97⁵²:

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Translation by the Italian Chamber of Deputies, available on its internet site <http://english.camera.it>.

Public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration.

The regulations of the offices lay down the areas of competence, the duties and the responsibilities of the officials.

Employment in public administration is accessed through competitive examinations, except in the cases established by law.

To be understood, this provision has to be read in combination with articles 76 and 77 of the Constitution, which provide that:

Art. 76. The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes.

Art. 77. The Government may not, without an enabling act from the Houses, issue decrees having the force of ordinary law.

When in extraordinary cases of necessity and urgency the Government adopts provisional measures having the force of law, it must on the same day present said measures for confirmation to the Houses which, even if dissolved, shall be summoned especially for this purpose and shall convene within five days.

The decrees lose effect from their inception if they are not confirmed within sixty days from their publication. The Houses may however regulate by law legal relationships arising out of not confirmed decrees.

The combination of article 97 on the one hand and articles 76 and 77 on the other has led to an interpretation to the effect that any creation of new structures or any change in the existing structures of central government needs to be based on an act of parliament, which may be either an ordinary law or a provisional decree, which in turn is based on the parliament authorising the government to act by decree. While in practice Italian governments tend to use presidential decrees based on arts. 76-77 for both day-to-day legislation and broader reforms in order to be able to act quickly, they still have to go through parliamentary deliberations *ex ante* and *ex post* for the creation and reorganisation of independent public bodies and for the internal reorganisation of existing ministries. This may only be done if there is a sufficiently detailed legal basis in an act of parliament or in a presidential decree which makes it possible to proceed with the intended change.

The legislative procedure is usually long and rather unpredictable in its details due to the combination of two factors. Firstly, Italy is the only European country with a bicameral parliament, where both houses have exactly the same powers, and secondly the combination of electoral law and an extremely fragmented pattern of political parties more than often leads to different patterns of majority in the Chamber of Deputies and in the Senate. The process of administrative reform therefore needs more stability and commitment from top politicians than in any of the other European countries examined in this section.

Legislative acts are submitted to judicial review by the Constitutional Court, with a rather open system of remedies based on questions addressed to the Constitutional Court by any court that has a doubt about the constitutionality of a law that it has to apply to resolve litigation. Administrative courts — and, as a supreme administrative court, the Council of State — may annul governmental decisions and regulations which do not rely on a sufficient legal basis. This system of constitutional and judicial review has as a consequence that more than two years may pass before a problem of constitutionality of an act of parliament appears in court, eventually leading to a partial annulment of a legislative basis for reform. The slowness of this review system is a further factor in the slowing down of the adoption and implementation of administrative reform in the country.

As far as budgetary and financial regulations are concerned, Italy is in a situation which is quite similar to that of the other countries discussed here, whereas its situation in terms of staff

regulation differs. Since 1993, employment by public administration is submitted to general labour law and to collective agreements between trade unions and a central autonomous agency for public employment. Ordinary courts are competent in case of disputes, with one exception: the constitutional provision of article 97 requiring competitive examinations for entry into public employment has to be regulated by specific acts of parliament, and disputes relating to these examinations are to be resolved by administrative courts. Since 1992 a rather comprehensive act of parliament, which is applicable to any kind of administrative authority, has codified the general administrative procedure.

In comparison with the other cases discussed here, Italy is characterised by a system which is far more demanding in that there is a need for acts of parliament — which necessitate a long and complex procedure for their adoption — for the organisation and running not only of public bodies that are independent from ministerial departments, but also for the internal organisation of ministries.

The case of Sweden

Sweden has a written constitution, consisting of four fundamental laws⁵³, which date back to the end of the 18th century and the beginning of the 19th century. The most relevant provision with regard to the organisation of state administration is article 7 of chapter 11 of the “Instrument of Government”, which states:

No public authority, including the Riksdag and the decision-making bodies of local authorities, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis a private subject or a local authority, or relating to the application of law.

This article is the basis of the very specific Swedish system of administration by independent agencies. To be fully understood, it has to be read together with article 6:

Art. 6. The Chancellor of Justice, the Prosecutor General, the central administrative boards and the county administrative boards come under the Government. Other State administrative authorities come under the Government, unless they are authorities under the Riksdag according to the present Instrument of Government or by virtue of other law.

Administrative functions may be entrusted to a local authority.

Administrative functions may be delegated to a limited company, association, collective, foundation, registered religious community or any part of its organisation, or to a private person. If such a function involves the exercise of public authority, delegation shall be made by virtue of law.

Also relevant to the issues discussed here are: article 8, which recalls: “No judicial or administrative function may be performed by the Riksdag”; article 9, according to which “appointments to posts [...] administrative authorities coming under the Government are made by the Government or by a public authority designated by the Government. [...]”; and article 10, according to which “basic rules concerning the legal status of civil servants [...] are laid down in law.”

The main difference between the Swedish and other systems of government — as far as the issues of organisational specialisation and agencification are concerned — is that neither the government nor parliament has the option of administrative functions (in the sense of article 6 above) being exercised within ministerial departments. The only choice is between establishing a specialised administrative authority (or delegating new powers to an existing authority) or delegating them to a legal person or individual according to article 6. Budgetary and financial

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The four fundamental laws in Sweden are the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The Riksdag Act occupies an intermediate position between a fundamental law and ordinary law. See the Internet site of the Swedish Parliament: <http://www.riksdagen.se>.

rules apply to any authority or person in charge of these administrative functions insofar as they are financed by public money, and the law on civil servants applies to administrative authorities.

The case of the European Union

The Treaty of Rome of 1957, now Treaty establishing the European Community (EC), and the Treaty of Maastricht of 1992 on the European Union (EU)⁵⁴ have the function of a constitution as regards the organisation and powers of EU institutions.

A number of provisions of the EC treaty (which applies for the EU treaty) are relevant to the issue of the organisation and running of the EC/EU administration, especially:

Article 211 (ex Article 155)

In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;*
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;*
- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;*
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.*

Article 202 (ex Article 145)

To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:

- ensure coordination of the general economic policies of the Member States;*
- have power to take decisions;*
- confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.*

Article 218 (ex Article 162)

- 1. The Council and the Commission shall consult each other and shall settle by common accord their methods of cooperation.*
- 2. The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate in accordance with the provisions of this Treaty. It shall ensure that these rules are published.*

Article 283 (ex Article 212)

The Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of those Communities.

The provisions relating to the procedures of adoption and execution of Community acts (articles 249 to 256, which are usually based on the power to decide by the Council of Ministers and, in a growing number of fields, on the veto power of the European Parliament), as well as the financial provisions of articles 268 to 280, complement the cited article as a framework for the organisation and running of the EU administration. It derives from the combined reading of these provisions that the Commission only has the power to act on its own as far as the internal organisation of its departments are concerned, with the exception of financial and staff regulations. For the latter, as for any other measure relating to the organisation and running of the EU administration,

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as amended by the Single European Act signed in 1986, and the Treaties signed in Maastricht in 1992, in Amsterdam in 1997 and in Nice in 2000.

regulations have to be adopted with the consent of at least a qualified majority of the 25 (27 as from January 2007) member state governments acting in the Council of Ministers.

Furthermore, these provisions imply that decisions in the name of the EC/EU can only be made by the institutions established by the Treaty (Parliament, Council, Commission, Court of Justice and Court of Auditors, to which one may add the European Central Bank and the European Investment Bank). Any other body, established by way of general regulation or individual decision of these institutions, may only exercise advisory functions, which cannot be binding. This is in a nutshell what the European Court of Justice (ECJ) has established on the basis of the Treaty establishing the European Coal and Steel Community in 1958 in the *Meroni case*⁵⁵, drawing on the necessity of respecting the “institutional balance” of the Community, a jurisprudence which is considered to be applicable to the entire EU/EC institutional system.

The ECJ exercises judicial review of all decisions of EC bodies, either directly by way of proceedings in annulment, which can be easily opened by member states or by the major EC institutions (Council, Commission and Parliament) and — less easily — by the addressees of these decisions, or indirectly by means of questions of validity addressed by national courts regarding regulations, directives or decisions of EC institutions or bodies that are intended to have an effect on the legal system of the member states. The constitutional boundaries deriving from the treaties are therefore easy to enforce.

These premises lead to the following situation: EU bodies with decision-making powers may only be established by way of Treaty revisions — as has happened most recently for the European Central Bank with the Treaty of Maastricht. Other EU bodies may be established by means of regulations, which need the approval of a qualified majority of member state governments, and usually of the European Parliament, but these bodies may not have decision-making powers⁵⁶ — as illustrated by the growing number of EC and EU agencies set up in the last decade⁵⁷. The Commission may organise its own departments without having to obtain the approval of either the member states or the European Parliament, but if it wants to establish executive agencies — which have an even more limited autonomy than the other EC and EU agencies — it has to apply the criteria and procedures laid down in a Council Regulation⁵⁸ which has been adopted with the approval of a qualified majority of member state governments and can only be amended in the same way. The Commission thus has very little room for manoeuvre on its own with regard to agencification.

⁵⁵ Decision of 13/06/1958, *Meroni vs. High Authority*, case 10/56.

⁵⁶ With the sole exception of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) ; see: http://europa.eu/agencies/community_agencies/ohim/index_en.htm.

⁵⁷ For a comprehensive overview, see: http://europa.eu/agencies/index_en.htm.

⁵⁸ Council Regulation (EC) No. 58/2003 (OJ L 11, 16.1.2003).

ANNEX 4

**COUNCIL REGULATION (EC) No 58/2003
of 19 December 2002**

**laying down the statute for executive agencies to be entrusted with certain tasks in the
management of Community programmes**

16.1.2003 Official Journal of the European Communities L 11/1

The Council of the European Union, having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission

Having regard to the opinion of the European Parliament

Having regard to the opinion of the Court of Auditors

Whereas:

(1) An increasing number of programmes are being created in a wide range of fields targeting a variety of categories of beneficiaries, as part of the activities provided for in Article 3 of the Treaty. The Commission is, as a rule, responsible for adopting measures to implement such programmes (Community programmes).

(2) Implementation of the Community programmes concerned is financed, at least in part, from appropriations entered in the general budget of the European Union.

(3) Under Article 274 of the Treaty, the Commission is responsible for implementing the budget.

(4) If the Commission is to be properly accountable to citizens, it must focus primarily on its institutional tasks. It should therefore be able to delegate some of the tasks relating to the management of Community programmes to third parties. Outsourcing certain management tasks could, moreover, be a way of achieving the goals of such

Community programmes more effectively.

(5) Outsourcing of management tasks should nevertheless stay within the limits set by the institutional system as laid out in the Treaty. This means that tasks assigned to the institutions by the Treaty which require discretionary powers in translating political choices into action may not be outsourced.

(6) Outsourcing should, moreover, be subject to a cost-benefit analysis taking account of a number of factors such as identification of the tasks justifying outsourcing, a cost-benefit analysis which includes the costs of coordination and checks, the impact on human resources, efficiency and flexibility in the implementation of outsourced tasks, simplification of the procedures used, proximity of outsourced activities to final beneficiaries, visibility of the Community as promoter of the Community programme concerned and the need to maintain an adequate level of know-how inside the Commission.

(7) One form of outsourcing consists in using Community bodies which have legal personality (executive agencies).

(8) In order to ensure uniformity of executive agencies in institutional terms, their statute should be laid down, in particular as regards certain essential aspects of their structure, tasks, operation, budget system, staff, supervision and responsibility.

(9) As the institution responsible for implementing the various Community programmes, the Commission is best qualified to assess whether and to what extent it is appropriate to entrust management tasks relating to one or more specific Community programmes to an executive agency. Recourse to an executive agency does not, however, relieve the Commission of its responsibilities under the Treaty, and in particular Article 274 thereof.

It must therefore be able closely to circumscribe the action of each executive agency and maintain real control over its operation, and in particular its governing bodies.

(10) This means that the Commission must have the power to decide to create and, where appropriate, wind up an executive agency in accordance with this Regulation. Since the decision to set up an executive agency is a measure of general scope within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (4), such decisions should be adopted in accordance with Decision 1999/468/EC.

(11) The Commission must also be able to appoint both the members of the Steering Committee of each executive agency and its director, to ensure that in delegating tasks which are its own prerogative to an executive agency, the Commission does not thereby relinquish control of it.

(12) The activities performed by an executive agency must also fully comply with the programming which the

Commission defines for the Community programmes in the management of which the agency is involved. The agency's annual work programme must therefore be subject to the Commission's approval and comply with budgetary decisions.

(13) To ensure that outsourcing is effective and that full benefit is drawn from the expertise of an executive agency, the Commission must be allowed to delegate to it all or some of the implementing tasks for one or more

Community programmes, except for those requiring discretionary powers in translating political choices into action. Tasks which may be delegated include managing all or some of the phases in the lifetime of a given project, implementing the budget, gathering and processing information to be forwarded to the Commission and preparing recommendations for the Commission.

(14) Since the budget of an executive agency is intended to finance only its running costs, its revenue should consist chiefly of a subsidy entered in the general budget of the European Union, to be determined by the budgetary authority, and drawn from the financial allocation to the Community programme in the management of which the agency is involved.

(15) With a view to the application of Article 274 of the Treaty, the operational appropriations of the Community programmes which an executive agency is involved in managing must continue to be entered in the general budget of the European Union and must be implemented by direct charging to that budget. The financial operations relating to these appropriations must therefore be carried out in accordance with Council Regulation

(EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities

(16) An executive agency may be entrusted with implementing tasks relating to the management of programmes which are financed from sources other than the general budget of the European Union. However, this should not lead even indirectly to extra administrative costs, which should be covered by additional appropriations entered in the general budget concerned. In such cases, this Regulation should apply, subject to specific provisions in the basic acts relating to the Community programmes concerned.

(17) The objective of transparency and reliability in the management of executive agencies requires that internal and external checks be made on their operation. To this end, executive agencies should be made accountable for their actions and the Commission should exercise administrative supervision over the executive agency, without ruling out the possibility of an audit by the Court of Justice.

(18) The public should have access to the documents held by the executive agencies, on terms and within limits similar to those in Article 255 of the Treaty.

(19) Each executive agency must collaborate intensively and continuously with the Commission departments responsible for the Community programmes which it is involved in managing. To facilitate such collaboration as much as possible, each executive agency should be located at the place where the Commission and its departments are located in accordance with the Protocol on the location of the seats of the institutions and of certain bodies and departments of the European Communities and of Europol annexed to the Treaty on European Union and to the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community.

(20) For the adoption of this Regulation, the Treaty does not provide for powers other than those conferred by Article 308,

HAS ADOPTED THIS REGULATION:

Article 1

Aim

This Regulation lays down the statute of executive agencies to which the Commission, under its own control and responsibility, may entrust certain tasks relating to the management of Community programmes.

Article 2

Definitions

For the purpose of this Regulation:

(a) 'executive agency' means a legal entity established in accordance with this Regulation;

(b) 'Community programme' means any activity, set of activities or other initiative which the relevant basic instrument or budgetary authorisation requires the Commission to implement for the benefit of one or more categories of specific beneficiaries, by committing expenditure.

Article 3

Setting-up and winding-up of executive agencies

1. The Commission may decide, after a prior cost-benefit analysis, to set up an executive agency with a view to entrusting it with certain tasks relating to the management of one or more Community programmes. It shall determine the lifetime of the executive agency.

The cost-benefit analysis shall take into account a number of factors such as identification of the tasks justifying outsourcing, a cost-benefit analysis which includes the costs of coordination and checks, the impact on human resources, possible savings within the general budgetary framework of the European Union, efficiency and flexibility in the implementation of outsourced tasks, simplification of the procedures used, proximity of outsourced activities to final beneficiaries, visibility of the Community as promoter of the Community programme concerned and the need to maintain an adequate level of know-how inside the Commission.

2. At the date determined when setting up the executive agency, the Commission may extend the duration of its lifetime for a period not exceeding that originally provided for. Such extension may be renewed. Where the Commission considers that it no longer requires the services of an executive agency which it has set up, or that its existence no longer complies with the principles of sound financial management, it shall decide to wind it up. In that event, it shall appoint two liquidators. The Commission shall determine the conditions for liquidation of the executive agency. The net result after liquidation shall be taken up in the general budget of the European Union.

The decision to extend its lifetime, renew such extension or wind up the agency shall be taken on the basis of the cost-benefit analysis referred to in paragraph 1.

3. The Commission shall adopt the decisions referred to in paragraphs 1 and 2 in accordance with the procedure laid down in Article 24(2). They shall be amended in accordance with the same procedure. The Commission shall forward to the Committee referred to in Article 24(1) all the information necessary in this context, in particular the cost-benefit analysis referred to in paragraph 1 of this Article and the evaluation reports referred to in Article 25.

4. When adopting a Community programme, the Commission shall inform the budgetary authority of whether it intends to set up an executive agency to implement the programme.

5. All executive agencies set up under paragraph 1 of this Article must comply with this Regulation.

Article 4
Legal status

1. An executive agency is a Community body with a public service role.

2. An executive agency shall have legal personality. In each of the Member States, it shall enjoy the most extensive legal capacity accorded to legal persons under national law. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings. To this end, it shall be represented by its Director.

Article 5
Location

1. An executive agency shall be located at the place where the Commission and its departments are located, in accordance with the Protocol on the location of the seats of the institutions and of certain bodies and departments of the European Communities and of Europol.

2. It shall organise its departments according to the management needs of the Community programmes for which it is responsible and according to the criteria of sound financial management.

Article 6
Tasks

1. To attain the objective set out in Article 3(1), the Commission may entrust an executive agency with any tasks required to implement a Community programme, with the exception of tasks requiring discretionary powers in translating political choices into action.

2. Executive agencies may in particular be entrusted with the following tasks:

(a) managing some or all of the phases in the lifetime of a project, in relation with specific individual projects, in the context of implementing a Community programme and carrying out the necessary checks to that end, by adopting the relevant decisions using the powers delegated to it by the Commission;

(b) adopting the instruments of budget implementation for the revenue and expenditure and carrying out all activities required to implement a Community programme on the basis of the power delegated by the Commission, and in particular activities linked to the awarding of contracts and grants;

(c) gathering, analysing and transmitting to the Commission all the information needed to guide the implementation of a Community programme.

3. The terms, criteria, parameters and procedures with which an executive agency must comply when performing the tasks referred to in paragraph 2 and the details of the checks to be performed by the Commission departments responsible for Community programmes in the management of which an agency is involved shall be defined by the Commission in the instrument of delegation.

Article 7
Structure

1. An executive agency shall be managed by a Steering Committee and a director.

2. An executive agency's director shall have authority over its staff.

Article 8
Steering Committee

1. The Steering Committee shall consist of five members appointed by the Commission.

2. The term of office of the members of the Steering Committee shall be two years in principle and shall take into account the length of time fixed for implementation of the Community programme, management of which has been entrusted to the executive agency. The appointment may be renewed. On expiry of their

term of office, or should they resign, the members shall remain in office until their appointment is renewed or they have been replaced

3. The Steering Committee shall choose a chairperson and deputy-chairperson from among its members.
4. The Steering Committee shall meet when convened by the chairperson, at least four times a year. It may also be convened at the request of its members, by at least a simple majority, or at the request of the director.
5. Any member of the Steering Committee unable to attend a meeting may be represented by another member specially empowered for the meeting concerned. Each member may represent only one other member. Should the chairperson be unable to attend, the Steering Committee shall be chaired by the deputy-chairperson.
6. The Steering Committee's decisions shall be adopted by a simple majority of votes. In the event of a tie, the chair shall have the casting vote.

Article 9

Tasks of the Steering Committee

1. The Steering Committee shall adopt its own rules of procedure.
2. On the basis of a draft submitted by the director and after approval by the Commission, the Steering Committee shall, no later than the beginning of each year, adopt the executive agency's annual work programme comprising detailed objectives and performance indicators. The work programme must comply with the programming defined by the Commission in accordance with the instruments establishing the Community programmes in the management of which the executive agency is involved. The annual work programme may be amended during the year following the same procedure, in particular to take account of Commission decisions relating to the Community programmes concerned. The projects included in the annual work programme shall be accompanied by an estimate of the necessary expenditure.
3. The Steering Committee shall adopt the executive agency's administrative budget by the procedure laid down in Article 13.
4. The Steering Committee shall obtain the Commission's agreement before deciding to accept any gifts, legacies and grants from sources other than the Community.
5. The Steering Committee shall decide on the organisation of the departments of the executive agency.
6. The Steering Committee shall adopt any special rules needed to implement the right of access to the executive agency's documents in accordance with Article 23(1).
7. No later than 31 March of each year, the Steering Committee shall adopt and submit to the Commission an annual activity report together with financial and management information. The report shall be drawn up in accordance with Article 60(7) of Regulation (EC, Euratom) No 1605/2002. The report shall cover both implementation of the operating appropriations corresponding to the Community programme managed by the executive agency and the implementation of its administrative budget. The Commission shall no later than 15 June each year send to the budgetary authority a summary of executive agencies' annual reports for the previous year, to be attached to that referred to in Article 60(7) of Regulation (EC, Euratom) No 1605/2002.
8. The Steering Committee shall adopt and apply measures to combat fraud and irregularities.
9. The Steering Committee shall perform the other tasks entrusted to it by this Regulation.

Article 10

Director

1. The director of the executive agency shall be appointed by the Commission, which shall to that end appoint an official within the meaning of the Staff Regulations of officials and the conditions of employment of other servants of the European Communities laid down by Council Regulation (EEC, Euratom, ECSC) No 259/68 (1), hereafter referred to as 'Staff Regulations'.

2. The director shall be appointed for a term of four years in principle and shall take into account the length of time fixed for implementation of the Community programme, management of which had been entrusted to the executive agency. This appointment may be renewed. After receiving the opinion of the Steering Committee, the Commission may remove the director from office before expiry of the term of office.

Article 11

Tasks of the director

1. The director shall represent the executive agency and shall be responsible for its management.
2. The director shall prepare the work of the Steering Committee, in particular the draft annual work programme of the executive agency. The director shall participate, without voting, in the work of the Steering Committee.
3. The director shall ensure that the annual work programme of the executive agency is implemented. In particular, the director shall be responsible for performance of the tasks referred to in Article 6 and shall take the relevant decisions to that effect. The director shall act as the executive agency's authorising officer by delegation as regards implementation of the operational appropriations relating to the Community programmes in the management of which the executive agency is involved, where the Commission has delegated powers to the agency to perform budget implementation tasks.
4. The director shall draw up the provisional statement of revenue and expenditure and, as authorising officer, shall implement the executive agency's administrative budget in accordance with the Financial Regulation referred to in Article 15.
5. The director shall be responsible for preparing and publishing the reports which the executive agency must present to the Commission. These are the annual reports on the activities of the executive agency referred to in Article 9(7) and all other reports, of a general or specific nature, which the Commission asks the executive agency to produce.
6. The director shall be empowered under the arrangements applicable to other servants of the European Communities to conclude employment contracts in respect of staff of the executive agency. The director shall be responsible for all other matters relating to personnel management within the executive agency.
7. In accordance with the financial Regulation applicable to the general budget of the European Communities, the director shall set up management and internal control systems adapted to the tasks entrusted to the executive agency to ensure the operations it performs are lawful, comply with the rules and are effective.

Article 12

Operating budget

1. Forecasts of all the executive agency's revenue and expenditure shall be prepared for each financial year, which shall be the same as the calendar year, and shall be shown in its operating budget. The forecasts, which shall include the establishment plan of the executive agency, shall be sent to the budgetary authority with the documents relating to the preliminary draft general budget of the European Union. The establishment plan, consisting only of temporary posts and specifying the number, grade and category of the staff employed by the executive agency during the financial year concerned, shall be approved by the budgetary authority and published in an annex to Section III — Commission — of the general budget of the European Union.
2. The revenue and expenditure of the executive agency's operating budget shall be in balance.
3. The executive agency's revenue shall include a subsidy entered in the general budget of the European Union, without prejudice to other revenue to be determined by the budgetary authority, drawn from the financial allocation to the Community programmes which the agency is involved in the management of.

Article 13

Preparation of the operating budget

1. Each year the director shall draw up a draft operating budget for the executive agency covering the agency's running costs for the following financial year and shall submit it to the Steering Committee.

2. No later than 1 March each year, the Steering Committee shall adopt the draft operating budget, including the establishment plan, for the following financial year and shall submit it to the Commission.

3. On the basis of this draft budget and in the light of the

Commission's programming for the Community programmes in the management of which the executive agency is involved, the Commission shall propose, as part of the annual budget procedure, the annual subsidy to the executive agency's operating budget.

4. At the beginning of each financial year, the Steering Committee shall adopt the executive agency's operating budget, on the basis of the annual subsidy thus determined by the budgetary authority, at the same time as it adopts the annual work programme, adjusting the budget in accordance with the different contributions granted to the executive agency and any funds from other sources.

5. The operating budget of the agency may not be adopted definitively until the general budget of the European Union has been finally adopted.

6. When the Commission contemplates setting up an executive agency, it shall inform the budgetary authority in accordance with the budgetary procedure and respecting the principle of transparency:

(a) of the resources in terms of appropriations and jobs required to run the executive agency;

(b) of planned secondments of officials from the Commission to the executive agency;

(c) of administrative resources freed by transferring tasks from the Commission departments to the executive agency, and the re-allocation of those freed administrative resources.

7. In accordance with the Financial Regulation referred to in Article 15, all amendments to the operating budget, including the establishment plan, shall be submitted in an amending budget adopted in accordance with the procedure provided for in this Article.

Article 14

Implementation of the operating budget and discharge

1. The director shall implement the executive agency's operating budget.

2. The executive agency's accounts shall be consolidated with those of the Commission in accordance with the procedure laid down in Articles 127 and 128 of Regulation (EC, Euratom) No 1605/2002 and in accordance with the following:

(a) each year, the director shall submit detailed provisional accounts of all revenue and expenditure for the previous financial year to the Steering Committee, which shall forward them, by 1 March at the latest, to the Commission's accounting officer and to the Court of Auditors;

(b) the final accounts shall be sent to the Commission's accounting officer and the Court of Auditors by 1 July of the following year at the latest.

3. The European Parliament, acting on a recommendation from the Council, shall grant a discharge to the executive agency for the implementation of its budget no later than 29 April of year n+2 after examination of the report by the Court of Auditors.

Such discharge shall be granted together with that relating to implementation of the general budget of the European Union.

Article 15

Financial Regulation applicable to the operating budget

The standard financial regulation applicable to the operating budget of an executive agency shall be adopted by the Commission. That standard 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.

Article 16

Financial Regulation applicable to the operational appropriations

1. Where the Commission has delegated tasks to the executive agency relating to the budget implementation of operational appropriations for Community programmes in accordance with Article 6(2)(b), such appropriations shall be entered in the general budget of the European Union and shall be implemented by direct charging to that budget under the responsibility of the Commission.
2. The director shall act as the executive agency's authorising officer by delegation as regards implementation of these operational appropriations and shall comply to that end with the obligations laid down in the financial Regulation applicable to the general budget of the European Communities.
3. Discharge in respect of implementation of the operational appropriations shall be given within the framework of the discharge given in respect of the general budget of the European Union, in accordance with Article 276, of which it is an integral part.

Article 17

Programmes financed from sources other than the general budget of the European Union

Articles 13 and 16 shall apply without prejudice to specific provisions laid down in the basic instruments relating to programmes financed from sources other than the general budget of the European Union.

Article 18

Staff

1. The executive agency's staff shall consist of Community officials seconded as temporary staff members by the institutions to positions of responsibility in the executive agency, and of other temporary staff members directly recruited by the executive agency, as well as of other servants recruited by the executive agency on renewable contracts. The nature of the contract, governed by either private law or public law, its duration and the extent of the servants' obligations vis-à-vis the agency, and the appropriate eligibility criteria shall be determined on the basis of the specific nature of the tasks to be performed, and shall comply with the Staff Regulations as well as with current national legislation.
2. Subject to permanent activities and regardless of the type of secondment of the official, the institution of origin:
 - (a) shall not, for the duration of the secondment, fill the posts vacated by that secondment;
 - (b) shall take into account in the standard abatement the expenses of the officials transferred to the executive agencies.

Nevertheless, the total number of posts concerned by paragraph 1 and the first subparagraph of paragraph 2 shall not exceed the number of posts necessary for performance of the tasks conferred upon the executive agency by the Commission.
3. The Steering Committee, in agreement with the Commission, shall adopt the necessary implementing rules for personnel management within the executive agency, if necessary.

Article 19

Privileges and immunities

The Protocol of 8 April 1965 on the privileges and immunities of the European Communities shall apply to both the executive agency and its staff, insofar as it is subject to the Staff Regulations.

Article 20

Supervision

1. Implementation of the Community programmes entrusted to executive agencies shall be supervised by the Commission. Such supervision shall follow the procedures it shall adopt in accordance with Article 6(3).
2. The function of internal auditor shall be performed in the executive agencies by the internal auditor of the Commission.
3. The Commission and the executive agency shall implement the recommendations of the internal auditors, each according to their respective powers.
4. The European Anti-Fraud Office (OLAF) set up by Commission Decision 1999/352/EC, ECSC, Euratom of 28

April 1999 shall enjoy the same powers in respect of executive agencies and their staff as it enjoys in respect of Commission departments. As soon as the executive agency is set up, it shall subscribe to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF). The Steering Committee shall formalise this acceptance and adopt the provisions needed to facilitate internal inquiries conducted by OLAF.

5. The Court of Auditors shall examine the executive agency's accounts in accordance with Article 248 of the Treaty.

6. All acts of the executive agency, and in particular all decisions adopted and contracts concluded by it, must provide explicitly that the Commission's internal auditor, OLAF and the Court of Auditors may conduct on-the-spot inspections of the documents of all contractors and sub-contractors which have received Community funds, including at the premises of the final beneficiaries.

Article 21

Liability

1. The contractual liability of the executive agency shall be governed by the law applicable to the contract in question.

2. In the case of non-contractual liability, the executive agency shall make good any damage caused by the agency or its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.

3. The personal liability of staff towards the executive agency shall be governed by the rules applicable to them.

Article 22

Legality of acts

1. 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.

Administrative proceedings shall be referred to the Commission within one month of the day on which the interested party or Member State concerned learnt of the act challenged.

After hearing the arguments adduced by the interested party or by the Member State concerned and those of the executive agency, the Commission shall take a decision on the administrative proceedings within two months of the date on which proceedings were instituted. Without prejudice to the Commission's obligation to reply in writing giving grounds for its decision, the failure by the Commission to reply within that deadline shall be taken as implicit rejection of the proceedings.

2. On its own initiative the Commission may review any act of an executive agency. It shall decide within two months of the day on which that review, after having heard the arguments adduced by the agency.

3. Where an act is referred to the Commission in accordance with paragraphs 1 or 2, the Commission may suspend implementation of the act at issue or prescribe interim measures. In its final decision the Commission may uphold the executive agency's act or decide that the agency must modify it either in whole or in part.

4. Executive agencies must take the necessary measures within a reasonable period to comply with the Commission's decision.

5. An action for annulment of the Commission's explicit or implicit decision to reject the administrative appeal may be brought before the Court of Justice, in accordance with Article 230 of the Treaty.

Article 23

Access to documents and confidentiality

1. Executive agencies shall be subject to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 on public access to European Parliament, Council and Commission documents (2) when it receives a request for access to a document in its possession.

The Steering Committee shall adopt any special rules needed to implement these provisions no later than six months after the setting-up of the executive agency.

2. The members of the Steering Committee, the director and members of staff and all persons involved in the activities of the executive agency shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

Article 24
Committee

1. The Commission shall be assisted by a committee, hereinafter referred to as the 'Committee for Executive Agencies'.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall adopt its rules of procedure.

Article 25
Evaluation

1. An external evaluation report on the first three years of operation of each executive agency shall be drawn up by the Commission and submitted to the steering committee of the executive agency, to the European Parliament, to the Council and to the Court of Auditors. It shall include a cost-benefit analysis as referred to in Article 3(1).

2. The evaluation shall subsequently be repeated every three years under the same conditions.

3. Further to the evaluation reports, the executive agency and the Commission shall take all appropriate steps to resolve any problems identified.

4. If, further to an evaluation, the Commission finds that the very existence of an executive agency is no longer justified with a view to sound financial management, the Commission shall decide to wind up that agency.

Article 26
Interim measures

As far as executive agencies have already been set up:

(a) the annual activity report referred to in Article 9(7) shall be drawn up for the first time for the 2003 financial year;

(b) the deadline referred to in Article 14(2)(b) for transmission of the final accounts shall apply for the first time to the 2005 financial year;

(c) for the financial years prior to 2005 the deadline for transmission of the final accounts shall be 15 September.

Article 27
Entry into force

This Regulation shall enter into force on the 10th day following that of its publication in the *Official Journal of the*

European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 December 2002.

For the Council

The President

L. ESPERSEN