

# **Regulatory governance through EU agencies?**

## **The implementation of transport directives**

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*‘(Re)Regulation in the Wake of Neoliberalism*

*Consequences of three decades of privatization and market liberalization’*

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**Work in progress – Comments are welcome!**

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### **Abstract**

In line with the recent trend of ‘agencification’ in Western societies, EU-level agencies have been put forward as an instrument expected to improve the way rules are applied in the Union. So far evidence for this expectation is lacking, however. By assessing liberalization in the transport sector, this paper provides new empirical insights into the role played by two EU agencies, the European Maritime Safety Agency and the European Aviation Safety Agency, in the implementation of rules. The analysis shows that agencies – especially via their inspection tasks – do play a role in ensuring the application of European legislation, but have to manoeuvre gently between member states, the Commission and related international organizations in order to fulfil this role.

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## 1. Introduction

The European Union (EU) is a regulatory political system (Majone, 1996). Over the last decades it has been a driving force in liberalization, opening up traditionally state-regulated markets to competition. The production of EU legislation, regulating these liberalized markets, has increased dramatically since the single market project was launched in the 1980s. A considerable amount of the legislation now in force in the ‘EU 27’ has been produced by ‘Brussels’.

Compliance with the EU *acquis*, however, is far from complete. The gap between the number of Internal Market laws adopted at EU level and those in force in the member states – known as the ‘transposition deficit’ – has risen. A 2007 fragmentation factor of 8% means that nearly one in twelve directives is not transposed in all member states. In absolute terms, 129 Internal Market directives have not been transposed on time in at least one member state with the consequence that the internal market is not a reality in the areas covered by those directives.<sup>4</sup>

Implementation problems potentially lead to the impression of a Union that is not delivering. In recent years, the reform of the EU’s system of regulatory governance has therefore gained momentum. In its 2001 White Paper on European Governance, the Commission emphasized that ‘[m]ore effective enforcement of Community law is necessary not only for the sake of efficiency of the internal market but also to strengthen the credibility of the Union and its Institutions’ (COM(2001) 428: 5).<sup>5</sup>

In order to improve the way rules and policies are applied across the EU member states, it affirmed the use of independent regulatory agencies. In recent years, the number of these EU-level agencies has been burgeoning (Kreher, 1997; Vos, 2000; Kelemen, 2002; Groenleer, 2006). EU agencies are supposed to encourage the harmonization of regulatory practices in the member states (Kelemen, 2004), while at the same time contribute to the efficient and flexible implementation of Community legislation and policies, particularly in areas requiring decisions based on technical or scientific considerations (Majone, 1997a; 1997b; 2000). Evidence for their effectiveness in improving implementation is lacking, however.

This paper addresses this gap in the literature. Starting from the point that EU regulatory governance increasingly relies on independent regulatory authorities, it focuses on the creation of two such agencies invested with wide-ranging powers – the ‘European Maritime Safety Agency’

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<sup>4</sup> European Commission Internal Market Scoreboard December 2007 no. 16bis (2008).

<sup>5</sup> Several Communications outlining the Commission’s efforts in improving the application of rules and policies in the member states have followed the White Paper. E.g. ‘European Governance: Better lawmaking’ (COM(2002) 275); ‘Better monitoring of the application of Community law’ (COM(2002) 725); ‘A Europe of results – Applying Community law’ (COM(2007) 502).

(EMSA) and the ‘European Aviation Safety Agency’ (EASA) – in a policy field which is exemplar for the EU’s liberalization efforts. Assessing the role played by the two EU agencies in the implementation of maritime and aviation directives, this paper asks how and to what extent EU-level agencies contribute to the implementation of rules in the EU in practice.

After setting the scene by analyzing why and how agencies are expected to contribute to implementation (section 2), the transport sector is introduced as a case (section 3). The liberalization, implementation and agencification developments in this sector form a good example to demonstrate the actual role of agencies in the implementation of European legislation at the street level. Hereafter, the paper provides empirical insights into the role played by two agencies in the maritime and aviation sector (section 4). Based on the analysis of agency documents (e.g. activity reports) and news reports as well as semi-structured interviews with key actors in the field<sup>6</sup>, we find that these agencies actually play a considerable role in improving implementation, but only in cooperation with member states authorities, the European Commission and related international organizations (section 5). The paper concludes with an outlook on EU regulatory governance and the role of agencies (section 6).

## **2. Setting the scene: Why and how are EU agencies expected to contribute to implementation?**

### *2.1 Implementation problems*

The prime responsibility for the implementation of European legislation lies with the member states, who ‘shall take all appropriate measures (...) to ensure fulfilment of the obligations arising out of this Treaty [Treaty Establishing the European Community, TEC] or resulting from action taken by the institutions of the Community’ (article 10, TEC). The European Commission is entrusted with the responsibility to ‘oversee’ the member states in this respect. As ‘guardian of the treaties’ (article 211, TEC), the Commission is – together with the European Court of Justice and via the infringement procedure (articles 226 and 228, TEC) – responsible for ensuring the proper application of Community law.

While the legal powers available to the Commission and the Court of Justice mean that member states do not have absolute freedom to ‘do as they please’, all actual activities needed to

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<sup>6</sup> A preliminary set of interviews was conducted in the fall of 2007. More interviews are planned. References to interviews in the text are indicated by “#” and the number of the relevant interview.

ensure proper implementation, including the transposition of legislation, the establishment of tools and instruments, the setting up of administrative agencies, the monitoring and inspection by national regulators and the actual adherence to the law by the regulated sectors, take place at the member state level.<sup>7</sup>

Member states do not always comply with their obligations under the TEC, however. Scholars have demonstrated the existence of a ‘transposition deficit’ and recently more and more evidence is found for problems in the practical implementation phase as well. The main problems identified that lead to the ‘deficit’ are transposition being late (timeliness), incomplete and incorrect (Mastenbroek, 2003; Berglund et al., 2006; Haverland et al., 2007; Kaeding, 2008). And even if transposition problems are tackled, rules do not automatically lead to harmonized practices (Versluis, 2007; Falkner et al, 2005). Case studies have shown lacking enforcement by regulators and an absence of compliance by regulated industries.

## 2.2 Agencies as solution

The creation of EU-level agencies is seen as a solution to tackle implementation problems. In its White Paper on European Governance, the Commission stated that ‘[t]he creation of further autonomous regulatory agencies in clearly defined areas *will* improve the way rules are applied and enforced across the Union’ (COM(2001) 428: 24; italics added – authors). Scholars also assume the added value of agencies in securing compliance (e.g. Kreher, 1997; Vos, 2000; Kelemen, 2002; Faure, 2004; Williams, 2005). Particularly in areas requiring frequent decisions based on technical or scientific considerations and where uncertainty is great, agencies are expected to contribute to the efficient and flexible implementation of Community policies (Majone, 1997a; 2000).

Of course, agencies are not unique to the EU system. States regularly create agencies. In the United States, the first agencies were established more than a century ago, and agencies have proliferated in most Western European countries as well (see f.i. Pollitt and Talbot, 2004; Pollitt et al., 2004; Thatcher, 2002; Van Thiel, 2001). Pollitt et al. (2001) go as far as to identify a trend of ‘agencification’. According to Majone, the growing use of agencies indicates the transition from the ‘interventionist state of the past to the regulatory state of the future’ (Majone, 1997b: 1).

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<sup>7</sup> In a few specific policy areas, of which competition is the most crucial example (article 85, TEC), the Commission is entrusted with directly overseeing the application of Community legislation.

Especially since the 1990s, we witness a trend of delegating specific tasks to independent agencies at the EU level.<sup>8</sup> Just as with national agencies, the choice for EU agencies lacks a universal rationale: ‘[t]he decision to grant regulatory duties to EC-wide regulatory agencies (...) has often been based on ad-hoc political considerations rather than on any coherent reflection’ (Geradin and Petit, 2004: 6). Indeed, the creation of each agency has been motivated by the need to respond to the particular circumstances of the moment.

Adopting a principal-agent (PA) approach, the delegation of powers can be explained through its functional advantages. Agencies are expected, amongst others, to reduce political transaction costs; to organize independent expertise; to increase transparency; and to enhance credible commitment (e.g. Kreher, 1997; Majone, 1997a; Kelemen, 2004; Coen and Thatcher, 2005). Agencies can be more efficient than the Commission because they are usually smaller organizational entities with more specialized expertise, which allows them to respond to complex and emerging issues.

Furthermore, by facilitating networks of national authorities, EU agencies can diffuse regulatory practices and styles (Kelemen, 2004: 170-173). Despite the development of European-wide standards and benchmarks, practices continue to diverge among the different member states. Particularly the recent privatization of industries such as telecommunications, public utilities and transport and the enlargement of the EU with formerly Communist countries in Central and Eastern Europe have highlighted the need to harmonize regulatory styles for the proper functioning of the single European market (Majone, 2002: 388).

While both the Commission and scholars have indicated that agencies are to be expected to contribute to the implementation of rules in the EU, this is not a grounded expectation. So far, empirical evidence of this presumably positive impact is lacking and vision and strategy on *how* exactly European agencies are supposed to improve implementation is absent (compare COM(2005) 59). In order to contribute to the debate on the value that agencies actually add when it comes to their role in implementation, we first need to look at their formal mandates and tasks.

### *2.3 Formal mandates and tasks*

As it had announced in the White Paper on European Governance, the Commission has drawn up a framework for what it calls ‘regulatory agencies’. Such agencies are ‘required to be actively

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<sup>8</sup> See the EU’s website for a complete list of all agencies: [http://europa.eu/agencies/index\\_en.htm](http://europa.eu/agencies/index_en.htm). For a more detailed overview and analysis of the history of agency-creation within the European Union, see Kelemen, 2002; Vos, 2000; Groenleer, 2006).

involved in exercising the executive function by enacting instruments which contribute to regulating a specific sector' (COM(2002) 718: 4; see also COM(2005) 59). Most current agencies have a limited mandate, however, laid down in their founding Regulation together with their objectives and tasks. They differ from agencies in the EU member states and other countries, particularly the United States, because they are not granted broad regulatory powers (Majone, 1997; Yataganas, 2001; Geradin, 2005).

In order to ensure that rules are transposed and enforced effectively and uniformly, EU agencies have been invested with a variety of tasks related – either directly or indirectly – to implementation. We group these tasks into four categories: decision-making, inspection, training, and research tasks. First, some EU agencies, in application of regulatory measures, are granted *decision-making* tasks. On behalf of the Commission or the member states, they take, as requested by the regulated industries or as required by EU law, decisions in individual cases. Second, some EU agencies have been granted *inspection* tasks. They monitor whether EU rules are applied at the national level, either indirectly, through inspecting national inspection authorities ('inspecting the inspectors'), or directly, by inspecting the regulated sectors ('inspecting the inspectees'). Monitoring may include visits to and investigations in the member states.

Third, some EU agencies have been endowed with tasks concerning *training*. In order to improve the capacity to monitor, they for instance provide courses and seminars to national inspectors and other personnel involved in monitoring and inspection activities, and they establish common training standards or core curricula for the training of the instructors of the inspectors of the Member States. Fourth, some carry out tasks with regard to *research*. They collect and analyze data to assist the Commission in updating and developing Community legislation and help the member states in improving the transposition and enforcement of rules, for instance through the development and dissemination of best practices, therewith encouraging the harmonization of rules and their application across the EU.

When performing some or all of these tasks, agencies could thus be expected to contribute to the way rules are applied and enforced across the EU. The next sections of this paper examine liberalization, implementation and agencification in the transport sector, and discuss the actual role of the 'European Maritime Safety Agency' and the 'European Aviation Safety Agency' in implementation at the 'street level'.

### **3. The European transport sector: liberalization, agencification and implementation**

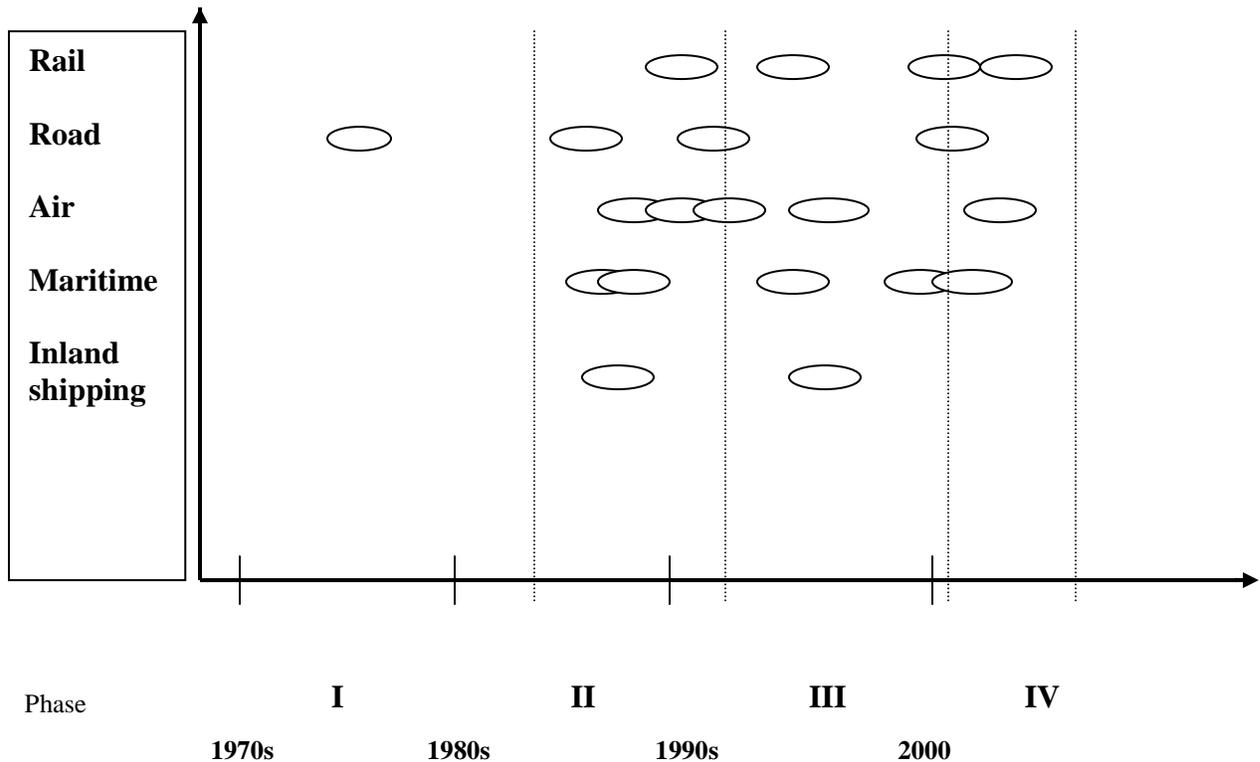
### *3.1 Liberalization*

Transport is a key EU policy area affected by the Lisbon strategy, aiming ‘to make Europe, by 2010, the most competitive and the most dynamic knowledge-based economy in the world’ (Lisbon European Council conclusions, 2000), and linked to the worldwide growth of trade flows. Yet, it is an example of a policy area whose 50-years history is characterized by a recent, gradual, uneven, complex and crisis-driven integration concluding in 2002 with the creation of EU transport agencies covering transport’s different sub-sectors.

We identify four general phases in the development of transport policy from 1957 to 2007: deadlock (1957-84), watershed (1985-1991), new integrated approach (1992-2000), and consolidation (2001-2006) (Kaeding, 2007). Although officially 1992 was the completion date of the Internal Market for transport, in reality it was very much the starting point. Until the early-1990s, the EU did not have a comprehensive approach towards transport policy. Despite the Treaty of Rome’s attention to its importance, the transport sector was one of the great failures of the Single Market. For example, little had been done to deal with problems such as an airline industry split along national lines, time-consuming cross-border checks on trucks, national systems of unconnected motorways, and air traffic control systems using 20 different operating systems or 70 computer programming languages.

From a transport sub-sector specific perspective, the integration process has been complex. Five different modes of transport have undergone varying developments. Driven by crises, the interaction of an ever-growing number of member states with different trajectories in the field of transport and a changing approach by the European Commission, the integration process has been gradual and uneven. Every mode of transport has been de-regulated and regulated by different packages (package approach), and these packages were adopted unevenly (see figure 1).

**Figure 1: Development of EU transport policy: recent, gradual, uneven and complex**



*Note:* Each ellipse indicates a package of EU regulations and directives applying to the model of transport in question. For further detail on the content of ellipses, see Kaeding (2007: 35-61).

### 3.2 Implementation

Transport directives challenge the regulatory frameworks across member states with an EU facing a serious transposition problem, both in terms of delay and too early implementation. Empirical findings suggest that problems in transposition processes occur in almost 66% of all national implementing measures (Kaeding, 2007): 47% of national implementing measures have been notified *late* to the European Commission, of which 70% recorded delays of more than six months, with a maximum delay of 4.8 years. The time length of missed deadlines varies significantly between member states and between transport sub-sectors.

Yet, it is not only the commonness of tardy transposition that raises major concerns about efficient and effective policy-making. Following the discussion of ‘gold plated’ EU legislation in EU member states the picture is even worse. Not only late transposition but also *early* transposition is problematic because it imposes the costs of policy reform on businesses before

other “concurrent” national actors face these costs - leading to a competitive disadvantage towards these other European competitors. In fact, 20% of national implementing measures had been in force more than six months before their deadlines.

Compared to the other transport sub-sectors, maritime and general transport directives perform best with an average delay of 20 weeks or less (Steunenbergh and Kaeding, 2007). Table 1 illustrates that air directives are delayed an average of one year. Road and rail directives range in-between with eight and nine months of delay. Inland waterways directives take the most time. Here, the average transposition delay is 27 months (2.25 years).

**Table 1: Different transposition delays of modes in weeks**

<b>Mode of transport</b>	<b>Transport general</b>	<b>Shipping</b>	<b>Road</b>	<b>Rail</b>	<b>Air</b>	<b>Inland waterways</b>
<b>Mean</b>	-17	20	31	38	49	109
<b>Median</b>	0	6	12	32	23	98

Source: Kaeding (2007: 96).

Besides correctly transposing Internal Market directives, member states must also ensure that the rules contained in them are completely applied and enforced ‘in the field’. Infringement proceedings provide a helpful indicator for the effectiveness of these application and enforcement efforts across member states (see table 2).

**Table 2: Infringement cases brought before the Court of Justice (transport)**

	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>Total %</b>
<b>Total</b>	169	147	214	197	187	204	277	219	433	325	164	100
<b>Transport</b>	10	23	18	15	16	9	23	19	30	25	20	8

Source: Eurostat

Large proportions of infringement proceedings are about member states incorrectly applying EU Internal Market directives that were transposed on time. In 2007, 1285 infringement proceedings have been notified. The transport sector, representing 12% of the total numbers (164), has been the third most important source of infringements in 2007 (next to environment and taxation).<sup>9</sup>

<sup>9</sup> European Commission Internal Market Scoreboard July 2007 no. 16.

### 3.3 Agencification

In line with other policy fields, the transport sector also saw the creation of EU agencies. In 2002, a European Railway Agency (ERA) was set up as part of the second rail freight liberalization package, and a European Maritime Safety Agency (EMSA) and a European Aviation Safety Agency (EASA) were created. This paper centres on EMSA and EASA as these agencies, at least on paper, have more extensive responsibilities with regard to ensuring a uniform level of safety across Europe than ERA.<sup>10</sup>

The European Maritime Safety Agency, based in Lisbon, Portugal, was established after the *Erika* tanker ran aground in December 1999 and caused the pollution of large parts of the French coast.<sup>11</sup> The main objective of this agency is to ensure a ‘high, uniform and effective level of maritime safety and prevention of pollution by ships within the Community’ (article 1, regulation 1406/2002). Its creation was part of the so-called Erika packages, two sets of legislative proposals and measures adopted by the European Commission in 2000.

Ship safety standards are developed and set at the international level by the International Maritime Organization (IMO).<sup>12</sup> They are subsequently applied by both national maritime authorities and the organizations recognized to develop and apply technical standards to the design, construction and maintenance of ships, the ‘classification societies’. EU law clarifies and, sometimes, reinforces these standards. In the past, ship safety standards have not always been effectively enforced by national authorities and classification societies, however. The *Prestige* disaster underscored the importance of the establishment of a ‘specialized expert body’ to ensure the application of Community legislation, ‘to monitor its implementation and to evaluate the effectiveness of the measures in place’ (recital 2, regulation 1406/2002).

The European Aviation Safety Agency is located in Cologne, Germany.<sup>13</sup> The principal objective of this agency is to ‘establish and maintain a high uniform level of civil aviation safety in Europe’ (article 2, regulation 1592/2002). Since 1944 the Chicago Convention on International Civil Aviation (setting up the International Civil Aviation Organization, ICAO) sets out minimum standards for civil aviation safety and environmental protection. Individual member states, as parties to this Convention, implement these standards into national legislation, but often not in a

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<sup>10</sup> Moreover, as ERA is still in the process of organizing itself, not much can be said about its actual functioning.

<sup>11</sup> Council Regulation (EC) No 1406/2002 of 27 June 2002 establishing a European Maritime Safety Agency.

<sup>12</sup> According to an interviewee (# 1), ninety percent of EU regulation actually comes from the IMO.

<sup>13</sup> Council Regulation (EC) No 1592/2002 of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency.

uniform way. This has hampered the activities of the European aeronautical industry. In order to ‘contribute to facilitating the free movement of goods, persons and organizations in the internal market’ (recital 1, regulation 1592/2002), member states thus agreed that it was necessary to harmonize air safety standards.

From 1991 onwards, when it declared that aviation safety rules had to be harmonized, the EU had relied on the Joint Aviation Authorities (JAA), an informal network (or as one interviewee (# 4) put it, ‘club of friends’) of national aviation authorities, to achieve the harmonization of rules, and in particular, the uniform application thereof throughout the EU. The JAA, coordinating different national interests, was unable to produce uniform standards due to a lack of commitment from member states for non-binding legislation (# 3). In 1998, EU transport ministers therefore decided to transfer certain tasks performed at the EU and the national levels to a ‘single specialized expert body’ (recital 11, regulation 1592/2002) that could take binding (individual) decisions by granting EU certificates and by conducting inspections and investigations.

#### **4. Europe at sea and in the air: the role of EMSA and EASA in implementation in practice**

##### *4.1 European Maritime Safety Agency: inspection in combination with training and research*

EMSA plays a potentially significant role in the implementation of maritime legislation. It has inspection, training and research tasks, but does *not* have decision-making tasks. Especially its inspection tasks are varied: (i) monitoring the port state control regime, (ii) assessing classification societies and (iii) checking on the work of notified bodies.

##### *(i) Monitoring the port state control regime*

EMSA has the task to *monitor the overall functioning of the Community port State control regime* (article 2, regulation 1406/2002). In order to ensure that ships in EU waters are in compliance with safety standards, EU port states have systems and procedures in place to inspect foreign ships in their ports. In addition, the EU, in the context of the Paris Memorandum of Understanding on Port State Control, has enacted legislation in accordance with which member states have to inspect at least 25 per cent of the ships entering their ports each year (directive 95/21/EC). As in practice the percentage of inspections is believed to be less than required, EMSA has been entrusted with the task to assess the functioning of the port state inspection

systems and procedures.<sup>14</sup> This task includes visits to the Member States, in accordance with the policy adopted by the Agency's Administrative Board in June 2004 (article 3, regulation 1406/2002). The first visit to a member state took place in November 2004.<sup>15</sup>

Before a visit is undertaken, a substantial amount of preparation and planning takes place. "It is considered important that the visits are carried out on the basis of the guidelines set out for each topic in order to make them consistent in their preparation, execution and to ensure that the findings of the visits may be comparable between Member States."<sup>16</sup> To that end, a methodology was defined and tested in 2004 and an assessment coordinator was recruited in 2005.<sup>17</sup> Importantly, member states do not have to grant permission for inspection visits. Member states are merely informed by the Agency of the planned visit, the EMSA officials that are part of the delegation, and the date on which the visit starts (article 3, regulation 1406/2002). Delegations are usually made up of at least three assessors, who are experts in the field of maritime safety and have often been employed by national maritime authorities.<sup>18</sup>

During the visit the inspected member states typically presents an overview of its inspection system and procedures. EMSA assessors subsequently gather written evidence and conduct interviews with national inspectors at the head offices of the national maritime authorities. They also carry out an analysis of the statistics relating to the ships calling at the member state's ports and the data on the inspection of individual ships. Assessors further spend two to three days witnessing actual inspections of ships.<sup>19</sup>

EMSA reports generic findings to the national maritime authorities immediately after the assessment, on site. Within twenty days an assessment report is submitted to the Commission and copied to the national maritime authorities of the member state in question.<sup>20</sup> EMSA's inspection reports remain confidential. Whereas EMSA's report is produced within several weeks following the visit, the final report of the audit including the Commission's assessment is often a long time coming, sometimes as long as two years. In the meantime, the assessed situation has often already

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<sup>14</sup> In June 2004, for instance, the European Court of Justice ruled that France had been in breach of EU legislation by failing to carry out inspections of foreign ships in its ports. France imputed the failure to a lack of qualified inspectors. *EUobserver*, 'EU names and blames careless skippers', 23 November 2005, available at <http://www.euobserver.com/9/20397/?print=1>, consulted on 26 November 2005.

<sup>15</sup> Activity Report 2004, p. 13

<sup>16</sup> Activity Report 2005, p. 13

<sup>17</sup> Activity Report 2004, p. 26; 2005, p. 13

<sup>18</sup> At the same time, this poses a potential danger to national maritime authorities. There are already considerable differences in the availability of expertise across Europe. The 'cherry-picking' by EMSA, that can generally offer higher salaries than national authorities, might even further deplete the knowledge available at the national level (# 2).

<sup>19</sup> Activity Report 2005, p. 23

<sup>20</sup> Activity Report 2005, p. 23

been changed in accordance with EMSA's findings. On the basis of EMSA's audit, the Commission can decide to take corrective action and/or propose sanctions. When deciding on such action or sanctions it strictly assesses whether a member state has effectively applied the rules, not whether the rules applied are effective. It can thus happen that port states have inspection systems and procedures in place that are effective, but, because they are different from those required by EU legislation, are summoned by the Commission to be changed (# 2).

(ii) Assessing classification societies

EMSA, secondly, has the task to support the Commission with regard to the *assessment of classification societies*. The member state under whose law a ship is registered, the 'flag state', is responsible for its construction and maintenance in accordance with safety requirements, but can authorize classification societies to certify ships and carry out inspections. The EU at present recognizes 13 classification societies, including all the large societies.<sup>21</sup> They are assessed once every 2 years by EMSA on behalf of the Commission.<sup>22</sup> The first assessment of a classification society took place in February 2004.<sup>23</sup> EMSA also carries out special assessments when member states request EU recognition of a classification society. Classification societies have an interest in cooperating with EMSA experts auditing them. If they obstruct assessment, they risk losing their right, granted by the Commission, to work on behalf of the member states (# 1).

Assessments of classification societies initially only took place at their offices with an emphasis placed on regional offices, plan approval offices and local survey stations instead of on head offices.<sup>24</sup> They now also include visits to ships detained due to deficiencies found by the classification organizations in order to gather information on their performance.<sup>25</sup> "In practical terms, an assessment covers a period of 6-10 weeks and includes the preparatory phase, the assessment and the reporting phase. On current practice, an average assessment requires a team of 3 assessors. In order to perform the assessment cycles effectively, two operational teams of assessors are required."<sup>26</sup>

After the visits, EMSA organizes a workshop at which the findings are presented to the member states and the classification societies. "This will allow lessons learnt to be shared and

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<sup>21</sup> Commission Decision 2007/421/EC

<sup>22</sup> Directive 94/57/EC

<sup>23</sup> EMSA, *Safer and Cleaner Shipping in the European Union*, 2006, p. 16

<sup>24</sup> Activity Report 2005, p. 19. See EMSA website for a chronological list of inspections and visits to recognized organizations.

<sup>25</sup> Activity Report 2005, p. 19

<sup>26</sup> Activity Report 2005, p. 20

may provide the Commission for any future update to the Directive”.<sup>27</sup> EMSA prepares a report that is sent to the Commission.<sup>28</sup> On the basis of such reports the Commission may initiate an infringement procedure. The first time the Commission did so it failed to inform EMSA thereof in advance. This caused irritation with EMSA as the concerned member state of course looked at EMSA as the one providing the information (# 1).

(iii) Checking on the work of notified bodies

EMSA finally carries out inspection-related tasks with regard to the design and construction of marine equipment. In addition to assessing classification societies, member states are required to monitor the performance of the organizations that they have assigned to undertake the conformity assessment procedures for marine equipment, the ‘notified bodies’.<sup>29</sup> EMSA supports the implementation of the marine equipment directive by *monitoring the notified bodies*. It therefore collects the audit reports produced by the member states of their notified bodies. EMSA findings have shown that marine equipment legislation has not been applied consistently and uniformly across the EU and therefore the Agency, “while working with the Member States”, has recommended additional checks to be carried out.<sup>30</sup> As a large amount of member states kept experiencing problems with the implementation of the marine equipment directive, the directive eventually was found to be the problem (# 1).

Besides undertaking inspection activities, EMSA also provides the Commission with technical assistance in order to help improve EU and international rules relating to Port State Control (PSC). It organizes, in cooperation with the member states, *training courses* in order to enhance the uniform implementation of legislation, for instance ensuring that PSC inspectors use the same inspection criteria and reporting procedures and that they are trained on the basis of similar principles.<sup>31</sup> The Agency publishes the EU list of ships that have recurrently been detained in EU ports because of serious and numerous deficiencies and that have therefore been banned from all EU ports.<sup>32</sup> Finally, EMSA carries out *research* for the improvement of port state control throughout the EU.

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<sup>27</sup> Activity Report 2004, p. 24. See also # 1.

<sup>28</sup> In addition to on-site inspections, EMSA has also developed a system for “continuous monitoring” of the classification organizations that came into operation in 2005. Activity Report 2005, p. 20

<sup>29</sup> Directive 96/98/EC

<sup>30</sup> Activity Report 2005, p. 24

<sup>31</sup> EMSA, Safer and Cleaner Shipping in the European Union, 2006, p. 4

<sup>32</sup> See EMSA website for the EU list of banned ships

#### 4.2 European Aviation Safety Agency: from certification to standardization

Also EASA in theory plays an important role in the implementation of aviation legislation. Differently from EMSA, and as opposed to the Joint Aviation Authorities (JAA, see section 3.3), the agency can take *binding* decisions. EASA's tasks range from certification to standardization.

Whereas before individual member states granted type-certificates for airworthiness and maintenance, EASA now certifies aircraft, engines and parts which means a simplification of procedures and a reduction of bureaucracy. Upon the safety approval of the Airbus A380, the first large European aircraft to be certified by the EASA, in December 2006, the European Commissioner for Transport, Jacques Barrot, therefore said: "This is a milestone for our European Aviation Safety Agency. The A380 is receiving a single certification based on a single set of requirements from a single European authority."<sup>33</sup>

While certification at the same time is supposed to ensure uniformly high safety standards for aviation, it does not mean that these standards are applied and enforced in a harmonious fashion throughout the EU (# 4). EASA therefore provides technical support to the aviation industry, air operators, the national aviation authorities and professional organizations by, for instance, organizing workshops in Cologne and in the member states.<sup>34</sup> Moreover, "as necessary to fulfil its tasks", the agency conducts investigations and inspections (article 12, regulation 1592/2002). We distinguish between two types of implementation tasks: (i) investigations of undertakings, and (ii) inspections of member states.

##### (i) Investigations of undertakings

Investigations concern aeronautical products, parts and appliances or the organizations that design, produce or maintain these products, parts and appliances, and that have been approved or certified by the Agency (article 15, regulation 1592/2002). While the agency continuously monitors the airworthiness of approved products, parts and appliances – in 2005 leading to 489 corrective

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<sup>33</sup> Press and Public Diplomacy Delegation of the European Commission, 'European Union Satisfied with EASA Safety Approval of Airbus A380', News releases, No. 107/06, Washington, 12 December 2006, available at <http://www.eurunion.or/news/press/2006/20060107.htm>, consulted on 30 October 2007.

<sup>34</sup> Activity Report 2005, p. 9

actions<sup>35</sup> – and the compliance with the rules by approved organizations, investigations are random.

Before an investigation is to be made, the member state in whose territory the investigation takes place is informed of the investigation and of the persons authorized to carry out the investigation, which can be both from EASA or the member states. As in the case of EMSA, no permission is needed from the concerned member state. Indeed, “the member state concerned shall submit to such inspections and shall ensure that bodies or persons concerned also submit to inspections” (article 45, para 3, regulation 1592/2002). During the investigation these persons examine the records, data and procedures and “any other material” of the undertakings concerned. They can take copies or extracts and ask for explanation on site. They are also authorized to enter the “premises, lands or means of transport” of undertakings.

For the moment, a large part of the investigations is still carried out by the Joint Aviation Authorities (JAA) and national aviation authorities (NAAs).<sup>36</sup> Pending the drafting and adoption of a Commission Regulation on standardization, working arrangements on the transfer of standardisation activities from JAA to EASA were agreed in 2004 and 2007. Even when investigations are carried out by EASA itself, the agency often asks the concerned member state for assistance. The member state can then designate officials to the audit team (# 4). Indeed, the member states have indicated that investigations of undertakings can only be conducted by EASA in close cooperation with them (# 3).

Due to resistance in the member states, investigations of undertakings have not yet taken place (# 3). Member states, notably those with considerable capacity of their own, are not keen on completely transferring the investigation task.<sup>37</sup> In order to avoid their experts becoming redundant, national aviation authorities in the large member states simply need EASA to make use of them. Moreover, according to an interviewed government official, they are afraid of having to tell their citizens that checking upon aviation safety is no longer their responsibility, particularly at times when stepping up efforts in this regard, for instance after an accident, is felt necessary (# 3).<sup>38</sup>

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<sup>35</sup> Activity Report 2005, pp. 11-12

<sup>36</sup> Available at [http://easa.europa.eu/doc/International/WA\\_JAA\\_EASA\\_Std.pdf](http://easa.europa.eu/doc/International/WA_JAA_EASA_Std.pdf); and [http://easa.europa.eu/doc/S/EASA-JAA%20Standardisation%20Working%20Arrangement%20\(2007\).pdf](http://easa.europa.eu/doc/S/EASA-JAA%20Standardisation%20Working%20Arrangement%20(2007).pdf), consulted on 31 October 2007.

<sup>37</sup> As they have less aeronautical industry and smaller aviation authorities, smaller and recently acceded European countries favor an expanded role for EASA in implementation.

<sup>38</sup> As such the role of EASA and the extension of its tasks to other areas of aviation safety is highly dependent on the process of European integration as a whole. That said, after a series of accidents in the summer of 2005, the European Commission proposed to extend the agency’s tasks. EASA is supposed to take over these tasks from national authorities by 2010. See Communication of 15 November 2005 from

Low point in the relationship with national authorities was reached when in October 2006 the UK House of Commons Transport Committee published a report concluding – on the basis of evidence given by the Chairman of the UK Civil Aviation Authority – that EASA was failing to monitor standards across Europe due to its lack of staff and resources and could therewith even threaten air safety:

We have been concerned by the evidence we have received of the chaos surrounding the establishment of the European Aviation Safety Agency (EASA). It is clear that this organisation is not yet ready to do its job and it is vital that the UK transfers no further responsibilities to it until it has shown itself capable of undertaking its existing responsibilities. The brief history of the founding, planning and implementation of EASA inspires a feeling of despondency about the ability of those minded to make transnational European agencies work either effectively or efficiently. The Commission must examine closely the lamentable history of this half-baked, half-cock project, and apply the lessons learnt to future endeavours. We also hope it will seek to provide evidence of its competence by righting the situation of EASA promptly.<sup>39</sup>

Although an EASA spokeswoman, reacting on the report, said that it had good relations with the CAA and a spokesman for the CAA commented that matters had improved since it gave evidence (in January 2006), the reputation damage for EASA was considerable. Given the reluctant or downright hostile position of national authorities it is likely that the majority (or at least a large part) of the investigations of undertakings in the foreseeable future will be performed by national authorities or their officials as part of an EASA team (# 4).

EASA is also hardly involved in training courses for national inspectors. Member states, especially those with a longstanding tradition in inspecting, consider training to be a national matter. As both the Commission and EASA lack a clear vision on common inspection criteria and similar training principles, it is therefore still possible that inspection practices throughout the EU diverge (# 3). That said, EASA staff itself receive extensive internal training on technical issues (# 4).<sup>40</sup> As quite a number of national experts (either working for the JAA or the NAAs) have been recruited by or seconded to EASA, the agency thus builds up in-house expertise, while it at the same time contributes to the dissemination of knowledge among the member states (# 4).<sup>41</sup>

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the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Extending the tasks of the European Aviation Safety Agency – An Agenda for 2010, COM(2005) 578 final.

<sup>39</sup> UK House of Commons Select Committee on Transport, Thirteenth Report, Session 2005-6, available at <http://www.parliament.the-stationery-office.com/pa/cm200506/cmselect/cmtran/809/80902.htm>, consulted on 31 October 2007.

<sup>40</sup> Activity Report 2004, p. 18; Activity Report 2005, p. 15

<sup>41</sup> Activity Report 2004, p. 8. This holds a potential risk of with regard to the depletion of knowledge available at the national level. As for example the Netherlands experienced. After several (senior) experts had left the national aviation authority for EASA, the agency during a subsequent inspection found that not all inspectors (for they were junior) met the required level of training.

(ii) Inspections of member states

In addition to conducting investigations, the Agency assists the Commission in the monitoring of the implementation of aviation legislation by conducting ‘standardisation inspections’.<sup>42</sup> These inspections are carried out in order to monitor whether national aviation authorities apply the rules uniformly; the main aim is to identify how national authorities enforce aviation legislation.<sup>43</sup> The agency’s inspection programme was defined and presented to NAAs in December 2004. The first visits to NAAs took place at the beginning of 2005 “without any disruption to the JAA process which existed before.”<sup>44</sup> As the Commission Regulation on working methods for conducting standardization inspections (the ‘standardisation regulation’) only entered into force in June 2006, the JAA standardization procedures were temporarily applied.<sup>45</sup>

The standardization regulation lays down the principles and procedures for carrying out inspections.<sup>46</sup> Standardisation inspections take place periodically (every 24 months) with a field visit usually taking up to 5 days and being conducted on the basis of a questionnaire (# 3). Before and after the field visit a one-day briefing is held at EASA. Inspection teams comprise around 4 to 5 persons (with a minimum of 2) coming from EASA or seconded by the different NAAs.<sup>47</sup> According to the agency, “[t]he various views from the various team members [...] ultimately ensure a standardized approach to the visited country. Indeed, each team member is encouraged to share the methodology and the results within his NAA which also helps to standardize countries other than the one visited, and allows both to educate and to be educated.”<sup>48</sup>

While standardization inspections are for the largest part a ‘desk job’, interviewing staff of the NAA and examining documents, they also entail on site inspections of undertakings (# 3).<sup>49</sup> Member states assist the Agency in gaining access to undertakings. “Where an undertaking opposes such inspection, the Member State concerned shall afford the necessary assistance to

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<sup>42</sup> Article 16 and 45, regulation 1592/2002

<sup>43</sup> Activity Report 2005, p. 12

<sup>44</sup> Activity Report 2004, p. 18

<sup>45</sup> The Commission Regulation was adopted in line with article 16 of the founding Regulation requiring the Commission to set out the working methods of the agency when conducting standardization inspections.

<sup>46</sup> See Commission Regulation (EC) No 736/2006 of 16 May 2006 on working methods of the European Aviation Safety Agency for conducting standardisation inspections.

<sup>47</sup> Personnel of member states cannot be seconded to teams inspecting the competent aviation authorities of their member state.

<sup>48</sup> Activity Report 2005, p. 13

<sup>49</sup> Activity Report 2005, p. 13

officials authorized by the Agency to enable them to make their inspection” (article 45, regulation 1592/2002).

After the inspection, a report on the findings is drawn up. There are two kinds of findings: those made in relation to the inspection of the NAA and those made in regard of the undertakings checked in order to inspect the NAA. “The latter are only recorded and passed to the NAA for further enforcement. They constitute evidence of failure of the NAA to perform its mission in compliance with the rule”.<sup>50</sup> In the report, the agency can request the NAA to take (immediate) remedial action. The report is confidential and only available to the NAA inspected, the Commission and the member state concerned. The Commission can transmit the report to all NAAs in order to facilitate the exchange of best practices among member states, but in practice rarely does so. In 2005, the agency therefore adopted a more pro-active approach, initiating standardization meetings with all NAAs.<sup>51</sup>

Based on the EASA’s findings, the Commission could decide – as is the case with EMSA – to start the infringement procedure and to take corrective measures and/or propose sanctions. Up until now, standardization inspections have not triggered the infringement procedure. In 2005, a total of 19 visits were performed during which 675 non-compliance findings were raised including findings raised against approved organizations. While the number of visits remained approximately the same as when conducted under the auspices of the JAA, the amount of corrective actions meant a doubling compared to 2004.<sup>52</sup> The European Commission did invoke a ‘safeguard clause’ against Bulgaria in December 2006 – at that time not yet a member of the EU – partially excluding it from the internal aviation market.<sup>53</sup>

## **5. Closing the implementation gap through EU agencies? A comparison of EMSA and EASA’s role in implementation**

Insight into the street-level functioning of two of the European Union agencies – the ‘European Maritime Safety Agency’ and the ‘European Aviation Safety Agency’ – with regard to enhancing implementation uncovers both similarities and differences. According to their founding

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<sup>50</sup> Activity Report 2005, p. 13

<sup>51</sup> Activity Report 2005, pp. 14-15

<sup>52</sup> Activity Report 2005, pp. 13-14

<sup>53</sup> During several inspections in 2005 and 2006 EASA had identified shortcomings in the administrative capacity of the Bulgarian aviation authorities, notably a lack of staff and an inadequate level of training. European Commission, ‘European Commission invokes safeguard clause against Bulgaria on aviation safety’, Press Release, IP/06/1860, Brussels, 20 December 2006, available at <http://europa.eu/rapid/pressreleasesaction.do?reference=IP/061860>, consulted on 30 October 2007.

regulations, both agencies have the responsibility to create an environment of high and uniform safety levels. Apparently ‘European’ involvement is needed in acquiring these safety levels: while the actual activities needed to ensure implementation of Community legislation in most areas traditionally lie at the member state level, the setting up of EMSA and EASA somewhat changed this practice by introducing EU bodies with specific implementation-related tasks. Both agencies have received mandates to try to accomplish these high and uniform safety levels.

We grouped the agencies’ tasks related, either directly or more indirectly, to implementation into four categories: decision-making, inspection, training and research. When comparing the actual roles of EMSA and EASA in implementation, we observe that both agencies have *inspection* tasks, but that EMSA combines this with *training* and *research* activities and that EASA combines this with *decision-making* tasks (see table 3). These decision-making or certification tasks have been referred to by interviewees one of the most important values added by EASA with regard to ensuring harmonization of standards.

**Table 3: Implementation tasks of EMSA and EASA**

<i>Tasks</i>	<b>EMSA</b>	<b>EASA</b>
<i>Decision-making</i>	None	Certification
<i>Inspection</i>	- Monitoring the Port State Control Regime - Assessing classification societies - Checking on the work of notified bodies	- Investigations of undertakings - Inspections of member states
<i>Training</i>	Training courses	Mainly internal
<i>Research</i>	Research to improve port state control	None

A substantial part of the activities of both EMSA and EASA relates to inspections, and especially to ‘inspecting the national inspectors’. EMSA inspects member states to see to what extent they implement the Community port state control regime and EASA monitors how national aviation authorities enforce aviation legislation. The form of these inspections is comparable as well. A small team visits the national authority to check their enforcement activities. Part of this visit is dedicated to visiting the inspectee, but always in cooperation with the national authority: there is no random inspection of the inspectee by either EMSA or EASA. Moreover, EASA does have the competence to start investigations of undertakings without permission from the member states,

but here as well, undertakings are in practice only visited in cooperation with the national authorities.

Another similarity between EMSA and EASA related to this form of the inspections, is that the reports that are drawn up are confidential and are only available to the Commission and the member state at stake. When trying to reach uniform safety levels, one could imagine that disclosing the inspection reports (at agency level, between the member states) would stimulate discussion on ‘best practices’ and would thus create an opportunity for ‘policy learning’. Through the combination of inspections with research and training, EMSA – as opposed to EASA – explicitly seeks to promote the dissemination of best inspection practices across the member states, therewith enhancing harmonization and standardization.

We further note differences between EMSA and EASA in their relationship with the member states. In the case of EMSA the relationship is much more cooperation-based than in case of EASA in which the relationship is rather hierarchic, or at least that was how the relationship was conceived. But whereas EASA was supposed to replace national aviation authorities, it is now seeking to establish cooperative relations with those authorities as it appeared that the agency not only lacks the necessary capacity but also the support of national authorities to adequately fulfil its tasks. The inspections performed by national experts under the auspices of the JAA are basically being continued but then as ‘EASA inspections’. In that respect, EASA, although able to take binding decisions, is thus still highly dependent on the member states, just like many other EU agencies.

## **6. Putting the role of EMSA and EASA in perspective: limited room for manoeuvre**

Independent regulatory agencies such as the EMSA and the EASA were created because member states not always comply with their obligations with regard to implementation of EU law, the Commission is not in the position to ensure the efficient and flexible implementation itself, and international regimes suffer from their broad membership (often leading to ‘lowest common denominator’ decisions). Crucial for the successful fulfilment of their role therefore is how EMSA and EASA relate to their national, European and international counterpart. The actual practices demonstrate that EU agencies have to manoeuvre gently between (i) member states, (ii) the Commission and (iii) international bodies.

(i) Member states

*Member states* have allowed a part of their implementation tasks to be delegated to the European level, but under tight intergovernmental control, either directly through taking seat in the management boards of the agencies or more indirectly through the international regimes such as IMO or ICAO (to which they are parties). Member states show quite some reluctance in allowing random inspections of the regulatees (inspections are more ‘confined’ to inspections of the national inspectors) and inspection reports remain confidential, thus hampering a potential opportunity for achieving the desired uniform safety levels. It can therefore be questioned what added value the EASA has compared to the JAA. According to Schout (2008: 286): “Enforcement was the JAA’s greatest weakness, but EASA’s inspection regime simply repeated the weaknesses of the previous system.”

(ii) The Commission

Equally strenuous is the relationship with the *Commission*. While the expertise harboured by EMSA and EASA helps to improve the EU’s capacity to monitor policy implementation in the member states, the Commission’s level of expertise has decreased, with only a small group of ‘generalists’ on maritime and aviation safety now left in its DG Transport. Some even argue that moving monitoring tasks from the Commission to agencies potentially “hampers whatever enforcement capacity the Commission had” (Williams, 2005: 92). Others however contend that for instance in the case of the EASA “what actually improved inspections where the powers of the Commission and much less the creation of EASA *per se* (Schout, 2008: 286).

Indeed, the Commission remains the guardian of the treaties. Ultimately, it is the Commission that decides on whether to start the infringement procedure, agencies being highly dependent on the Commission in this regard. The Commission realizes the need for consistency between the agencies’ tasks and the Commission’s executive function (COM(2002) 718: 13), but does not provide clear answers as to how to manage this. What will happen when agency and Commission disagree on the status of an infringement and the necessary action? Much of the value agencies could add when it comes to harmonization of rules and their uniform application could potentially be lost.

(iii) International bodies

Furthermore, cooperation (and conflict) with international regimes is to be observed. International bodies such as IMO and ICAO do not only set the standards that are subsequently implemented

into national legislation by the member states and complemented by EU rules, they also check upon the application of the standards by the member states. In practice, inspection by EMSA thus means that national maritime authorities are inspected twice, by IMO and EMSA. The role of the ICAO in relation to EASA is even more significant. EASA only monitors a small part of the aviation safety rules in place; the majority of the rules are actually still monitored by ICAO. This raises the question to what extent EU agencies complement the work of international bodies. Again, much of the added value when it comes to harmonization of rules and their uniform application could potentially be lost if international regimes work on the basis of different principles as EU agencies or if EU agencies duplicate the work of international regimes.

## **7. Outlook: EU regulatory governance and the role of agencies**

Liberalization in the transport sector has been accompanied by the need for a uniform application of Community rules in this field. One of the ways in which the EU tries to achieve both high and uniform safety levels and a level playing field is the use of European Union agencies. These agencies are expected to ensure that Community rules are applied and enforced effectively and uniformly across the EU. This paper provided an insight into the actual functioning of two of these agencies in the transport sector: the ‘European Maritime Safety Agency’ and the ‘European Aviation Safety Agency’.

While the cases show that these EU agencies have indeed started to employ implementation activities, the application of EU rules does not automatically improve with the introduction of EU agencies. Improvement still depends on the cooperation of a number of actors. First of all, the willingness and capacity of member state authorities to ensure that the rules are transposed and enforced is crucial. Secondly, when infringements are observed, EU agencies are still dependent on the European Commission for taking action. Finally, international bodies established long before EU agencies were created often still play a role at least as important (and usually more important) than EU agencies. More in-depth research is needed into the relationships between agencies, in particularly EMSA and EASA, and these actors.

For EU agencies, we contend, do have an important role to play in terms of improving the application of EU legislation, but only in cooperation with member states, the Commission and international bodies. They cannot and should not aspire to replace these actors. At the same time, these actors, and notably the member states and the Commission have to make sure that EU agencies can rely upon sufficiently qualified staff and are bequeathed with adequate funding (especially in their early years). Until these conditions have been fulfilled the main advantage of

agencies is not so much enhancing harmonized rule application, but, as the case of EASA demonstrates, increasing bureaucratic efficiency by offering cost-savings to industry and business through its certification tasks. The diffusion of regulatory practices and styles now often remains limited to the formerly Communist countries in Central and Eastern Europe as the invoking of safeguards against Bulgaria in the case of EASA also demonstrates.

But by organizing research and training through networks of national authorities, as the case of EMSA shows, EU agencies have started to contribute to the convergence of practices among the different member states. Moreover, whereas the purpose of audits, inspections, investigations, trainings and research is mainly to monitor the application of rules and not so much to assess the effectiveness of those rules, the activities of EMSA have actually led to the improvement of EU legislation. Although for the moment, while perhaps in a different way than expected, EU agencies (or at least the EMSA) thus benefit the functioning of the single European market, in the long term, the mandates of EU agencies (notably EASA's mandate) will probably need to be reviewed so as to create a multi-level inspection system that really is effective in ensuring the uniform application of EU legislation.

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