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EU Administrative Law – What are EU-Level Public Administrators?

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Abstract. This article serves a twofold purpose. It firstly examines the concept of EU administrative law, which has, so far, remained vague despite being widely researched over the last decade. The present research attempts to fill in this gap by elaborating on a conception of EU administrative law adapting the general structure of national administrative law. The article then explores administrative activity as the main criterion for the identification of national public administrators as well as EU public administrators. Therefore, the study looks at the attempts to create a unified EU administrative law code, refers to European Parliament resolutions of 2013 and 2016 and the ReNEUAL Model Rules on EU Administrative Procedure. The article finishes with identifying EU-level public administrators, focusing on issues related to EU agencies. This study defines EU-level public administrators, rules, judge-made law that constitute EU administrative law and encourages EU legislator to finally adopt a unified administrative procedure act.

Keywords: EU administrative law, EU-level public administrators, EU agencies, public administration

1. INTRODUCTION

This discussion begins with the concepts of European and EU administrative law. One of the leading texts on national administrative law states that the simplest way to interpret administrative law is to know that its object is public administration. This can be understood in two ways: An institutional point of view, as a composite of administrative institutions or from a functional perpective as administrative functions/activity. Consequently, the subject of national administrative law is everything related to the organization of public administration and its functions.[1] Therefore, the structure of the general national administrative law is applied in order to understand the concept of EU administrative law.

This article is intended to specifically identify EU-level public administrators, considering the activity of public administrators as the main criterion. The term 'EU-level' is used because, in the broad sense, EU public administrators are not only certain EU-level institutions, bodies, offices or agencies but also Member States' public administrators. Thus, the article focuses on several resolutions of the European Parliament drafting the EU administrative Procedural Law, the Model Rules on EU Administrative Procedure of the Research Network on EU Administrative Law (hereinafter referred to as ReNEUAL) and national legal acts on administrative procedure, since there is no unified EU administrative law code. The article also suggests a definition of an EU-level public administrators.

2. CONCEPTS OF EUROPEAN AND EU ADMINISTRATIVE LAW

The concept of European administrative law is quite new and its initial appearance was in the book *Europäisches Verwaltungsrecht* by the German scholar J. Schwarze[2] published in

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[1] Zimmermann (2014) 39.

[2] Schwarze (2010).

1988 and then for the first time in scientific journal, *Law and Contemporary Problems,* in 2004.[3] A few years later, a British scholar P. Craig published a book *EU Administrative Law*[4] and furthermore, scholars from Central and Eastern Europe[5] have been focused on European and EU administrative law issues.

The concept of European administrative law was used earlier than the concept EU administrative law and this article starts by revealing the former and its link with the latter.

2.1. European Administrative Law

J. Schwarze argues that European administrative law is the result of legislative processes carried out by EU institutions, the agencies and authorities of the Member States.[6] European administrative law consists of 'a large part of unwritten legal principles developed by judges'.[7] Consequently, European administrative law is a branch of law that not only relates to the activities of EU institutions and other EU bodies but also involves the authorities of the Member States.

R. Widdershoven[8] states that 'European administrative law is concerned with the implementation and application of Union law in a broad sense' by means of shared government between the Union and national levels. On one hand, there are important legal instruments such as regulations, directives and jurisprudence of the European Court of Justice (hereinafter referred as ECJ). On the other, European administrative law is related to the application of EU law by national public bodies. R. Widdershoven suggests that European administrative law should be perceived as a shared governance between the EU and national administrations. The author crystallizes two concepts of European administrative law. The first concept is related to 'the administrative law of the Union itself and the EU institutions'. The second one is related to the national application of EU law.[9]

Czech and Slovakian scholars R. Pomahač[10] and A. Martvoň[11] suggest that there are three concepts of European administrative law. The first concept considers that European administrative law is EU administrative law. R. Pomahač explains that:

> EU administrative law is a separate legal system, which differs from other legal systems of European states <…>, as Member States gave certain part of competence to the inclusive project (EU), institutions were established, which have been empowered to legislate, make binding decisions to the Member States and their public administrators, basis of separation of powers was designed, unique legal community was created with an important role played by a court which could solve the disputes and integrate interpretation and application of law.[12]

[3] The special edition was called 'The Administrative Law of the European Union' (2004) 68, LCP.

[4] Craig (2012).

[5] In Czech Republic: Pomahač (2012); Pomahač and Handrlica (2012); in Slovakia: Martvoň (2012); in Poland: Grzeszczak and Szczerba-Zawada (2016); in Lithuania: Deviatnikovaitė (2017).

[6] Schwarze, (2010) cix; Pomahač (2012) 713.

[7] Schwarze (2010) cixiii.

[8] Widdershoven (2012) 245.

[9] Widdershoven (2012) 246.

[10] Pomahač (2012) 713.

[11] Martvoň (2012) 400–02.

[12] Pomahač (2012) 714–15.

According to the second concept, European administrative law is the law of cross-border cooperation, i.e., the law of joint administration space and the law of cooperation at various levels. Three notions are used in this context: *governmentalismus, intergovernmentalismus, infragovernmentalismus.* The first applies to national government, the second to intergovernmental bodies and the third to EU institutions. Therefore, R. Pomahač recognised that European administrative law is the law of administrative cooperation between states, non-governmental organizations and various corporations.[13]

The third concept is that European administrative law is a joint law of the public administrations of democratic states in the sense of general categories, principles and fundamental rights (Latin *ius commune*).[14] L. Klat-Wertelecka,[15] a Polish scholar, states that the concept of European administrative law is also related to the Europeanization of domestic administrative law, which, as defined by A. Wrobel, means certain types of actions and relations between European law and the law of European states.[16] Moreover, A. Wrobel[17] argues that European administrative law includes the law of EU administration, EU administrative law, specialized administrative law and domestic administrative law of the Member States. Klat-Wertelecka states that the main difference between Union administrative law and the law of EU administration lies in addressees. The addressee of the first one is a Member State while the addressee of the second one is the Union.[18]

Furthermore, Klat-Wertelecka notes that it is inappropriate to state that European administrative law includes the domestic administrative law of Member States as it is an autonomous legal system separated from the EU system, despite the fact that they are essentially and functionally related to each other.[19] So, Klat-Wertelecka acknowledges that one of the possibilities to perceive European administrative law is to understand it in the *sensu stricto* way – as EU administrative law. However, a clear definition of EU administrative law is not given.

The Polish scholars acknowledge that European administrative law consists of three essential spheres – structural, material and procedural law. Organisational European administrative law regulates the structure and organization of the European bodies of public administration. There are certain areas, e.g. customs and rights of foreigners, where the structure of administration is multiplex and includes international administration, Union administration and Europeanized domestic administration. The evolution of material European administrative law is related to the sphere of human rights and freedoms. Procedural administrative law is closely connected with the creation of a unified European administrative law code.[20] These scholars do not avoid writing about EU administrative law, albeit they write about the phenomenon of European administrative law. Consequently, it seems that EU administrative law is a part of European administrative law.

[13] Pomahač (2012) 722.
[14] Pomahač (2012) 713.
[15] Klat-Wertelecka (2016) 24.
[16] Klat-Wertelecka (2016) 24.
[17] Wrobel (2014) 25; Klat-Wertelecka (2016) 26.
[18] Klat-Wertelecka (2016) 26.
[19] Klat-Wertelecka (2016) 26.
[20] Klat-Wertelecka (2016) 27–29.

2.2. EU administrative law

EU administrative law, according to the European Ombudsman,[21] can be separated into several distinct issues:

> '*Administrative structures*, that is, institutions and their internal organization; *procedures* for performing administrative tasks of various kinds; *supervision, review and remedies* (both internal and external; and both judicial and non-judicial); *general rights and principles,* which the administration should respect'.
> It follows that EU administrative law covers exclusively EU administrative bodies, their activity and its principles.

P. Craig reviews the evolution of the patterns of EU politics administration saying that EU administrative law 'includes analysis of the main forms of administration through which policy is delivered, as well as the principles of judicial review'.[22]

Although the American authors do not give a definition of EU administrative law, considering to the structure of their research.[23] It may be suggested that they perceive EU administrative law as rulemaking, adjudication in competition, environmental, financial services, food safety services, telecommunications and workplace sectors of EU public administrators (the European Commission, EU agencies, Member States' governments) and the judicial review of this activity by the ECJ. Thus, the American scholars tend to consider the authorities of the Member States as part of the EU administrative law system.

In the light of the definitions presented above, there is no unanimity on the concept of European administrative law or EU administrative law. In the context of EU law, the term 'European administrative law' lacks accuracy. The Author's view is that it is more precise to use this term when it comes to intergovernmental authorities which are established by European countries, regardless of whether they are Members States, or when comparing the national administrative law of various European countries.

The analysis of scholars' teachings and ambiguous definitions allows identifying two main areas that are covered by EU administrative law.

The first area is related to EU-level public administrators, i.e., those who carry out administrative activities (certain EU-level institutions, bodies, offices and agencies) and non-judicial and judicial scrutiny over administrative activities (the European Parliament, the European Ombudsman, the European Commission, the Court of Auditors, the ECJ, national courts). The structure of this first area reflects the structure of national administrative law and this area of EU administrative law could be analysed by applying the concept of general national administrative law. Hence, the first area of EU administrative law covers the analysis of EU-level public administrators enabling acts under which EU-level public administrators are established, their activity and scrutiny over this activity.

The second area of EU administrative law is related to all subjects who participate in the implementation, application and enforcement of EU law (EU and national public bodies, including EU and national courts). It is presumed that proper implementation and application of EU law depends on the effectiveness of the national administrative law of the Member States as the main implementers of EU law are national public administrators.

[21] State of Play and Future Prospects for EU Administrative Law (2011) link 4.
[22] Craig (2012) 3.
[23] Bermann (2008).

Thus, national administrative law is central to the incorporation of EU law into national law. Hence, this area covers the analysis of the issues of regulations, directives, direct and indirect effect of Union law, measures of the enforcement of EU law, fundamental rights, general principles, etc.

However, the evaluation of the second area of EU administrative law is not the goal of the present article. The main purpose of the study is to identify EU-level public administrators.

3. CRITERIA TO DEFINE PUBLIC ADMINISTRATORS, INCLUDING EU-LEVEL PUBLIC ADMINISTRATORS

The term 'public administrators' is common in domestic administrative law. For example, *subjekty veřejné správy* in the Czech Republic, *orgány štátnej správy* in Slovakia, *organy administracji publicznej* in Poland, *viešojo administravimo subjektai* in Lithuania. Sometimes the word 'public' is not used e.g. *Verwaltungsinstitutionen* in Germany and *autorités administratives* in France. In some cases, the word 'administrative' is absent e.g. public bodies, quangos in the UK, agencies and regulatory authorities, executive departments in the US. Nevertheless, all these entities are engaged in similar activities – rule-making, adjudication, making of public contracts, monitoring, gathering information, providing public services. In general, the activities of these bodies are related to the public interest.

In this research, the term 'European administration' or 'EU administration' is presumed to mean the same as public administrators or administrative authorities in national administrative law. Hence, in this study, the concepts 'EU public administrators', 'EU public authorities' or 'EU administration' are used as synonyms. The term 'European administration' was for the first time embedded in Union primary law under art.298 (1) TFEU. However, the content of the term was not revealed but the above mentioned article only provided a list of the institutions, bodies, offices and agencies of the Union. Does it mean that all EU institutions and other bodies should be understood as public administrators of the EU? This issue will be returned to later (see Ch.System of EU-level Public Administrators).

ReNEUAL revealed the term 'European administration' *sensu stricto* and *sensu lato.*[24] *Sensu stricto* means 'the administration of EU institutions, bodies, offices and agencies'. *Sensu lato* includesthe administration of EU institutions, bodies, offices and agencies and also Member States' administrations and courts, i.e. each person, institution that implements EU law.

Art.298 (2) TFEU enables Union legislators to establish provisions for an open, efficient and independent European administration and the European Parliament has adopted several resolutions to that end.[25] The resolution of 9th June 2016 for an open, efficient and independent European Union administration (hereinafter referred to as the 2016 resolution) defines 'Union administration' and not 'European administration'. The Union's administration, according to art.4 (a) of the resolution, means the administration of the Union's institutions, bodies, offices and agencies. Thus, this definition only includes

[24] Model Rules on EU Administrative Procedure (2014) link 2.

[25] European Parliament, *Resolution for an open, efficient and independent European Union administration,* (2016/2610(RSP); European Parliament, *Resolution with recommendations to the Commission on a Law of Administrative Procedure of the European Union*, (2012/2024(INL).

EU entities, Member States' administrations are excluded. It should be noted that the European Parliament adopted the resolution with recommendations to the Commission on a Law of Administrative Procedure of the EU in 2013 (hereinafter referred to as the 2013 resolution). Here, in terms of institutions, the meaning of the term 'Union administration' is the same as defined in the 2016 resolution. However, such definitions do not allow identifying EU public administrators. To know them, abstract listing is not enough. Therefore, this article relies on the national administrative law of different foreign countries. It then follows that the activity of public administrators is the main criterion for identifying domestic public administrators and, to as the Author believes, European Union public administrators as well.

There is a big variety in the activities of public administrators. The experience of different countries (the UK, Germany, France, the US, the Czech Republic, Slovakia, Lithuania, Poland) shows that most of the activities of domestic public administrators are related to rule-making, adjudicatory powers, making of public contracts, i.e. to the powers which can cause legal consequences or establish the new rule of conduct. Moreover, they are named in different sources – laws[26] or case-law.[27]

For example, according to the Law on Public Administration of the Republic of Lithuania (Lithuanian *Viešojo administravimo* įstatymas) the main spheres of activity of the Lithuanian public administrators are administrative regulations (both regulatory and individual), control of the implementation of laws and administrative decisions, provision of administrative services (issuing of authorizations, granting licenses, etc.), administration of the provision of public services (social services, services in the spheres of education, science, culture, sports, etc.), internal administration of the entity of public administration. Under the Administrative Procedure Act of the Czech Republic (Czech *Zákon č. 500/2004 Sb. správní* řád) and according to Czech scholars,[28] administrative acts are the main form of public administration. However, there are other forms of activities, such as public law contracts (administrative contracts), factual instructions, coercive measures, direct intervention in life-threatening situations, provision of information, imposition of administrative sanctions, administrative supervision, state supervision, public service control, financial control, etc.

Delegated legislation or secondary/subordinate legislation (orders, regulations, rules, warrants, schemes, directions, etc.) and public contracts could be mentioned as the activity of the UK public bodies under the Statutory Instruments Act 1946 and Public Contracts Regulations 2016. According to the US Administrative Procedure Act ss551, 553 and 554, rulemaking and adjudication make the core of agency action. German Administrative

[26] France: Loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations; Germany: Verwaltungsverfahrensgesetz 1976; United Kingdom: Statutory Instruments Act 1946, Legislative and Regulatory Reform Act 2006; United States of America: Administrative Procedure Act 1946; Austria: Verwaltungsverfahrensgesetz, 1991; Czech Republic: Zákon č. 500/2004 Sb. správní řád 2004; Slovakia: Zákon o správnom konaní (správny poriadok). Predpis č. 71/1967 Zb.; Poland: Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego; Lithuania: Law on Public Administration of the Republic of Lithuania 1999, etc.

[27] France: French Court of Jurisdictional Conflict: 1908 *Feutry* case; State Council: 1938 *Caisse primaire aide et protection* case, 1963 *Narcy* case. The summaries of these cases were found in Bottini (2018).

[28] Sládeček (2013) 114–39; Staša (2012) 193–237.

Procedure Act (German *Verwaltungsverfahrensgesetz*) ss35 and 54 sets out provisions on administrative acts and public service or public administration contracts.

A question arises:what are the administrative activities of the subjects of EU administration, what is the functional meaning of EU administration? There are no codified legal acts describing the administrative activity of EU-level public administrators.

The answer could be found in the above-mentioned 2016 resolution, namely, in the definition of 'administrative activities'. Art.4 (b) of the resolution defines the term 'administrative activities'. Here the functional meaning of Union administration is laid down. Thus administrative activities mean 'those carried out by the Union's administration for the implementation of Union law' with certain exceptions. These exceptions cover legislative procedures (the European Parliament, the European Council), judicial procedures (ECJ), and the European Commission's power to adopt non-legislative acts (delegated acts and implementing acts). However, the 2016 resolution gives a perplexing and abstract perception of administrative activities by defining it as activities for the implementation of EU law. Is this definition sufficient to understand the specific activities of EU administration? Does the implementation of law mean rule-making and adjudication? Does it include any other administrative activity? Obviously, the 2016 resolution is only devoted to individualized decisions. Here administrative acts mean decisions of individual nature whereas ReNEUAL is more specific in this respect and classifies administrative action into six types.

In 2014, ReNEAUL delivered Model Rules on EU Administrative Procedure[29] (hereinafter referred to as the Model Rules). In this model, researchers give several important concepts which help to identify the functional meaning of EU administration. Some of them, especially the concept of 'administrative action', could even serve as criteria for determining the subjects of EU administration.

EU authority means a public authority (an institution, body, office or agency of the Union, natural or legal person when they are entrusted with administrative action on behalf of the EU) responsible for the performance of administrative action. *Public authority* means an EU authority or a Member State authority. *Administrative action* means activities of a public authority intended for the *administrative rule-making* (delegated acts, implementing acts under arts 290 and 291 TFEU, non-legislative acts of general application, private regulatory acts, interinstitutional acts, 'plans', guidelines, etc.), *single case decision-making* (investigation, inspection, hearing, participation, consultation, conclusion of the procedure, etc.), making of *contracts* (binding agreements between an EU authority and a Member State authority or private party, etc.), *mutual assistance* between an EU authority and a Member State authority when executing administrative tasks and *managing administrative information* (inter-administrative information exchange activities).

It becomes clear when considering the 2016 resolution and the Model Rules, that the concept of administrative action/activity differs. The 2016 resolution, contrary to the Model Rules, excludes the European Commission's power to adopt non-legislative acts from the concept of administrative activity. However, the Model Rules and the 2013 and 2016 resolutions crystallize at least one of the main spheres of the EU public authority's administrative activity – adjudicatory powers (or single case decision-making). There are still some difficulties as regards rule-making, i.e., the power of issuing regulatory decisions, in both resolutions. The 2013 and 2016 resolutions deny the rule-making power being a

[29] Model Rules on EU Administrative Procedure (2014) link 2.

power of a Union agency. In the 2013 resolution, it is stated that the Law of Administrative Procedure of the EU,

> 'should regulate the procedure to be followed by the Union's administration when handling individual cases to which a natural or legal person is a party, and other situations where an individual has direct or personal contact with the Union's administration'.

For the purpose of this study and with reference to the national administrative law practice in explaining the concept of the public administrator,[30] a definition of EU-level public administrator is developed. An EU-level public administrator may be defined as any authority of the EU which is responsible for the performance of administrative action (as defined in the Model Rules) excluding:

a) the European Parliament
b) the European Council
c) the Court of Justice of the European Union
d) the Court of Auditors
e) Member States authorities

4. SYSTEM OF EU-LEVEL PUBLIC ADMINISTRATORS

At the domestic level, public administrators are usually national governmental bodies, ministries, agencies under ministries, local authorities or natural and legal persons when they are entrusted with public administration activities.

So what are EU-level public administrators? There are seven institutions of the EU as stipulated by art.13 TEU but do all of them belong to the system of EU-level public administrators? It was mentioned that the European Parliament, the European Council, the ECJ and the Court of Auditors are not EU public administrators. The reasoning behind this assertion and a review of each of the EU institutions is briefly presented below.

The European Parliament is not considered an EU public administrator as it fulfils legislative powers. It is a political formation and does not administer policy, i.e., no adjudicatory or rule-making powers are granted to the European Parliament.

The European Council, under art.15 (1) TEU, should provide the Union with the necessary impetus for its development and define the general political directions and priorities.[31] Hence, it is a political rather than administrative formation. The European Council does not carry out any administrative activities, it neither makes binding rules nor adjudicates.

[30] For example, s.551 of the US Administrative Procedure Act 1945, where 'agency'is defined, art.5 of Polish Kodeks postępowania administracyjnego 1960, where organs of public administration (pl. *organ administracji publicznej*) are defined, Art.1 of French Loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations, where administrative authorities (fr. *autorités administratives*) are defined.

[31] For example, setting the EU Political Agenda(2014) link 1.

The European Parliament shares its legislative powers with *the Council.* However, this institution is not only a legislative body as A. Rosas and L. Armati stated that it 'competes in some areas with the Commission for the role of chief executive'[32] and enumerate these areas. Under art.291 (2) TFEU, in duly justified specific cases and in the cases provided for in arts 24 and 26 TEU, implementing powers could be conferred on the Council. Secondly, art.126 TFEU enables the Council to decide after an overall assessment whether an excessive deficit exists. To that end, it can adopt recommendations addressed to a Member State. If a Member State fails to put into practice the recommendations, the Council may decide to give notice to the Member State. Finally, the Council may decide to apply certain measures in respect of the Member State, including the imposition of fines.[33]

The European Commission, as G. Majone noticed, has 'no analogue either in parliamentary or presidential democracies'.[34] However, following the above-mentioned Model Rules, it could be claimed that this is a pure public administrator of the EU, because it participates in all spheres of administrative activity, i.e., it adopts binding rules (delegated acts, implementing acts under arts 290 and 291 TFEU), adjudicates (it can impose sanctions on undertakings on the basis of arts 101, 102 TFEU), enters into contracts, mutually assists and manages administrative information. Moreover, it fulfils 'coordinating, executive and management functions (an executive role)'[35] as it executes the budget, manages various programmes, projects, administers the European Structural and Investment Funds, etc.

Under art.19 of the Rules of Procedure of the Commission[36] a number of *Directorates-General* (over 30) and various *departments* e.g. Eurostat, the Press Service of the Commission, the European Anti-Fraud Office, the European Group on Ethics in Science and New Technologies, the Office for the Administration and Payment of Individual Entitlements, assist the Commission in the performance of its tasks. *Cabinets* of commissioners and *interinstitutional entities* such as the Publications Office of the EU, the European Personnel Selection Office, the European Strategy and Policy Analysis System, etc. could also be mentioned. Directorates-General, other departments and cabinets do not possess separate legal personalities.

The Structure of the European Commission[37]

College (Members of the Commission and the President of the Commission)
Cabinets of commissioners
Directorates General, Secretariat General, departments, representatives in each Member States DAP
Interinstitutional entities

[32] Rosas and Armati (2012) 96–97.

[33] It is detailed in Regulation 1177/2011 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L 306/33.

[34] Harlow and Rawlings (2014) 19.

[35] Harlow and Rawlings (2014) 97.

[36] Commission, 'Rules of Procedure of the Commission' COM (2000) 3614 OJ L 308/26.

[37] Deviatnikovaitė (2017) 435.

ECJ is a judicial body. It is not a political or administrative entity. *The European Central Bank* is a public administrator of the EU as it makes binding decisions[38] and exercises certain adjudicatory powers.[39] *The Court of Auditors* is a body which plays a certain role in non-judicial control of public administrators.

Thus, not all EU institutions can be considered public administrators. Undoubtedly, the Council, the European Commission (with its directorates-general, various departments) and the European Central Bank can be considered as public administrators at the EU level. Moreover, these are mentioned in primary law. However, are there any other bodies that are not mentioned in the primary law of the EU but could be considered as EU public administrators? In this context, special attention should be paid to EU agencies.

5. EU AGENCIES

In this section of the article, EU agencies (decentralized, executive and agencies under the Common Security and Defence Policy) are analysed as EU-level public administrators. The development of EU agencies, their legal status, classification, functions, compatibility with the Treaties, the terms 'decentralized', 'executive', and 'regulatory' agencies are dealt with in this section as well.

5.1. European or EU agencies?

It seems that sometimes the special status of the agencies determines them being called 'European agencies' rather than 'Union agencies'. E. Busuioc[40] does not even use the category 'EU agencies'; she uses the term 'European agencies' and classifies them into four main groups: Commission agencies, Council agencies, regulatory agencies and executive agencies. Commission agencies are set up at the initiative of the Commission under the first pillar (three communities). Council agencies are set up under the second and third pillar (after the Lisbon Treaty – in the area of freedom, security and justice and in the area of common security and politics), e.g., Europol, the European Defence Agency, Eurojust, CEPOL.

The Author's supposition is that it is more precise to use the term 'EU agencies' than 'European agencies' as there are bodies not belonging to the system of EU agencies but called 'European', for example, intergovernmental entities (such as European Space Agency) which were not established by an EU institution.

5.2. Decentralized agencies

Decentralized agencies have been mushrooming over the last three decades. The first EU agencies are called 'first-generation agencies'.[41] Later, in the following fifteen years, no agency was established. It is stated that most of the agencies were established in the

[38] For example, Regulation 2015/534 on reporting of supervisory financial information (ECB/2015/13) [2015] OJ L86/13.

[39] See: Regulation 2532/98 concerning the powers of the European Central Bank to impose sanctions [1998] OJ L 318/4.

[40] Busuioc (2013).

[41] These were the European Center for the Development of Vocational Training and the European Foundation for the Improvement of Living and Working Conditions.

1990s[42] – 'second-generation agencies'.[43] At the beginning of this century, new agencies[44] were established and some consider them 'third-generation agencies'.[45] The new financial supervisory authorities dealing with the economic crisis started operating in 2011.[46] The most recently established agency is the Single Resolution Board (2014) which also deals with financial supervision – more specifically, with the banking union. It is planned to establish a European Public Prosecutor's Office. Nowadays, there are more than thirty EU agencies and they receive more and more money:

> 'The combined EU contribution covering expenditure of decentralised agencies increased by eight times, from EUR 95 million in 2000 to EUR 775 million in the 2013 budget. Likewise, the total number of posts in agencies increased by four times from 1 486 in 2000 to 6 050 in 2013.'[47]

The founding treaties do not contain provisions directly related to the establishment of decentralized agencies. They are believed to be based on arts 114 and 352 TFEU.[48] There is no official definition of agencies. However, there are several documents related to the reasons for the establishment of agencies and their possible definition.[49] Several of them reveal the meaning and the main features of an EU agency. For example, according to Communication from the Commission on the Operating Framework for the European Regulatory Agencies,[50] an agency should be created by a regulation i.e. secondary law, its goal is to perform tasks specified in founding regulations, it has a legal personality, and certain degree of organizational and financial autonomy. M. Chamon defines agencies as 'permanent bodies, under EU public law, established by the institutions through secondary legislation, and endowed with their own legal personality'.[51] C. Scott, with reference to the already mentioned European Commission communications and papers, emphasizes that

[42] Vos (2003) 114; Paulikas (2004) 182.

[43] The European Environment Agency, the European Training Foundation, the European Monitoring Center for Drugs and Drug Addiction, the Office for Harmonization in the Internal Market, the European Agency for Safety and Health at Work, Community Plant Variety Office, the Translation Center for the bodies of the EU, the European Monitoring Center on Racism and Xenophobia.

[44] Such as the European Food Safety Authority, the European Maritime Safety Agency, the European Aviation Safety Agency, and the European Union Agency for Railways.

[45] Geradin and Petit (2004).

[46] The European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority.

[47] Commission 'Communication from the Commission to the European Parliament and the Council' COM (2013) 519 final, 3–4. See also: Saint Martin (2016) 280–87.

[48] Chamon (2016) 142–49.

[49] Commission 'White Paper on European Governance' COM (2001) 428 final; Communication from the Commission 'The operating framework for the European Regulatory Agencies' COM (2002) 718 final; Communication from the Commission to the European Parliament and the Council – European agencies – The way forward (2008) 135 final; Commission 'European Financial Supervision' COM(2009) 252 final; Joint Statement and Common Approach of the European Parliament, the Council of the EU and Commission on decentralized agencies, 2012, etc. More: //https://europa.eu/european-union/about-eu/agencies/overhaul_en.

[50] Communication from the Commission 'The operating framework for the European Regulatory Agencies' COM (2002) 718 final, 3.

[51] Chamon (2016) 10.

agencies are established to perform technical, scientific or managerial tasks.[52] Another feature that could be added is the staff of agencies are governed by the provisions of the EU Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union,[53] except for the members of management, governing or administrative boards of the agencies.

These agencies are usually called decentralized or regulatory. The author believes that not all agencies could be identified as regulatory, because not all of them carry out regulatory functions, i.e. quasi-legislative (rule-making) or quasi-judicial (adjudicatory). Only a few fall into the scope of regulatory agencies, e.g., the European Union Intellectual Property Office,[54] the Community Plant Variety Office,[55] the Agency for Cooperation of Energy Regulators,[56] the European Aviation Safety Agency,[57] the European Chemicals Agency[58] and the European Securities and Markets Authority.[59] Therefore, for the purpose of this article the term 'decentralized agencies' is used. Besides, they are decentralized since they carry out tasks separately from the Commission activities and they are set up in different Member States, not in Brussels or Luxembourg.

EU primary law lacks provisions related to the status and functions of agencies. Consequently, a question arises whether the establishment of agencies which carry out regulatory functions and possess discretionary powers[60] is in conformity with the

[52] Scott (2005) 71.

[53] Regulation 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ 45/1385.

[54] The OHIM is empowered to rule on the compliance of applications for the registration of trademark with the established requirements. It makes decisions on the registration of trademarks. See: Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark. L78/1.

[55] The CPVO is given the authority to make decisions on the legal safeguarding of plant varieties after formal and technical examination. See: Regulation 2100/94 on Community plant variety rights [1994] OJ L 227/1.

[56] The ACER makes individual decisions on technical issues, decides upon those regulatory issues that fall within the competence of national regulatory authorities. See: Regulation 713/2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L 211/1.

[57] The EASA certifies aircrafts, approves their airworthiness and compatibility with environmental protection, carries out company inspections and determines the amounts and methods of taxes and fees. See: Regulation 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency [2008] OJ L 79/1.

[58] The ECHA makes individual decisions. For example, it can decide to set conditions to ensure that a substance or the product is only handled by the personnel from the relevant list of users, so that the substance is not made available to the public and its residues are collected and removed. See: Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L 396/1.

[59] The ESMA is granted intervention powers in exceptional circumstances. See: Regulation 236/2012 on short selling and certain aspects of credit default swaps [2012] OJ L 86/1.

[60] Discretionary powers mean 'execution of actual economic policy', i.e. agency does not only administer certain policy, but shapes it. See: *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* (Case 9/56) EU:C:1958:7; [1958], 152.

Treaties. A possible answer can be found in the jurisprudence of EU courts. [61] The most comprehensive analysis of literature on jurisprudence related to the delegation of powers has been carried out by M. Chamon[62] and the the most noteworthy illustrious cases in this context are the *Meroni* case (1958), the *Romano* case (1981) and the *ESMA-Short Selling case* (2014). Each will now be looked at in short.

The *Meroni*[63] case revealed that the establishment of agencies which enjoy a wide margin of discretion is incompatible with the requirements of the Treaty. M. Chamon summarizes all literature on the *Meroni* case and identifies seven limits in the delegation of powers to agencies in the *Meroni* doctrine,

> (i) the nemo plus iuris rule [the authority cannot delegate powers other than its own], (ii) the rule that delegations should be explicitly provided for, (iii) the rule that only executive, non-discretionary powers may be conferred, (iv) the rule that the delegating authority should continue to supervise the delegate, (v) the rule prescribing that review by the Court should be maintained, (vi) the rule that the balance of powers or the institutional balance may not be upset, and (vii) the rule that the delegation at issue must be necessary for the performance of the tasks assigned to the delegating authority.[64]

In the *Romano*[65] case, the Court ruled that 'a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law'.[66] There are two reasons for this conclusion. First, under art.155 EEC the Council can confer powers on the Commission but not on the Administrative Commission of the European Communities on Social Security for Migrant Workers (hereinafter referred to as the Administrative Commission). Secondly, according to arts 173 and 177 EEC, the Administrative Commission's act is not under judicial scrutiny:[67]

> Article 173 of Treaty gives this Court jurisdiction to review the legality of acts of the Council and of the Commission, whilst Article 177 gives it jurisdiction to rule on the validity and interpretation of acts of the institutions of the Community. The Administrative Commission is not an institution of the Community as defined by the Treaty.[68]

[61] It was analysed in Scholten and van Rijsbergen (2014) 389–405; Lenaerts (1993) 23–49; Craig (2012) 60–162; etc.

[62] Chamon (2016) 175–258.

[63] *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* (Case 9/56) EU:C:1958:7; [1958].

[64] Chamon (2016) 191.

[65] See: *Giuseppe Romano v Institut national d'assurance maladie-invalidité* (C-98/80) EU:C:1981:104; [1981]; Regulation (EEC) 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 74/1; Decision 101 of the Administrative Commission of the European Communities on Social Security for Migrant Workers [1976] OJ C 44/3.

[66] *Romano* case, para.20.

[67] These two reasons are crystalized by Merijn Chamon. See: Chamon (2016) 252.

[68] Chamon (2016) 251; Opinion of AG Warner in Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité,* 1264–65.

In the light of the *Romano* case, it seems that delegating regulatory powers to the bodies established outside the Union's institutional structure is incompatible with the Treaty.

In the *ESMA-Short Selling*[69] case, the Court, in relation to the *Meroni* case, ruled that art.28 of Regulation 236/2012[70] 'does not confer any autonomous power on that entity that goes beyond the bounds of the regulatory framework established by the ESMA Regulation'[71] as 'the exercise of the powers under art.28 is circumscribed by various conditions and criteria which limit ESMA's discretion'.[72] Besides, the Court stated that the powers which enjoys ESMA under art.28 of Regulation 236/2012 are under the judicial scrutiny. 'Accordingly, those powers comply with the requirements laid down in *Meroni* v *High Authority*'.[73]

In relation to the *Romano* case, the Court ruled that under art.28 of Regulation 236/2012 ESMA adopts measures of general application.

> However, that does not mean that art.28 <...> is at odds with the principle established in *Romano*. It should be recalled that the institutional framework established by the FEU Treaty, in particular the first paragraph of Article 263 TFEU and Article 277 TFEU, expressly permits Union bodies, offices and agencies to adopt acts of general application.[74]

Afterwards, the Court ascertained that the treaties have no provisions 'that powers may be conferred on a Union body, office or agency',[75] however, 'a number of provisions in the FEU Treaty none the less presuppose that such a possibility exists'. The Court, in that respect, refers to arts 263, 265, 267, 277 TFEU. The Court continues, that:

> Those judicial review mechanisms apply to the bodies, offices and agencies established by the EU legislature which were given powers to adopt measures that are legally binding on natural or legal persons in specific areas, such as the European Chemicals Agency, the European Medicines Agency, the Office for Harmonization in the Internal Market (Trade Marks and Designs), the Community Plant Variety Office and the European Aviation Safety Agency.[76]

It follows, form all the foregoing considerations, that the Court changes its attitude towards agencies with the regulatory powers. It seems that the establishment of agencies, in the post-Lisbon era, with decision-making powers is compatible with primary law.

[69] *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* (C270/12) EU:C:2014:18; [2014].

[70] Regulation 236/2012 on short selling and certain aspects of credit default swaps [2012] OJ L 86/1.

[71] See: *ESMA-Short Selling* case, para.44.

[72] See: *ESMA-Short Selling* case, para.45.

[73] See: *ESMA-Short Selling* case, para.53.

[74] See: *ESMA-Short Selling* case, para.65.

[75] See: *ESMA-Short Selling* case, para.79.

[76] See: *ESMA-Short Selling* case, para.81.

Furthermore, the *ESMA-Short Selling* case is important in the context of the concept of 'administrative activity'. The Court referred to the concepts as 'measures of general application',[77] 'adoption of acts of general application'.[78] The Court refers to arts 263 (5) and 277 TFEU as they 'expressly permits Union bodies, offices and agencies to adopt acts of general application'. This, according to the Court, 'does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU'.[79] And therefore, it could be deduced that the decision-making powers of agencies (or powers of general application, adoption of acts of general application) are not related to arts 290 and 291 TFEU but are related to 'specific technical and professional expertise'.[80]

5.3. Classification of decentralized EU agencies

There are many different ways to classify EU decentralized agencies.[81] In this article, decentralized EU agencies are classified on the basis of their functions with reference to their founding regulations.[82] How does this classification link with the identification of EU-level public administrators? Such classification helps to perceive the spectrum of the variety of functions agencies perform and contributes to revealing the term 'administrative action' through activities that agencies perform.

Nine types of agency activities can be identified.The first type are agencies that adopt legally binding measures on natural or legal persons in specific areas, such as the European Chemicals Agency, the European Medicines Agency, the European Union Intellectual Property Office, the Community Plant Variety Office and the European Aviation Safety Agency.

Agencies that adopt single-case decisions belong to the second type e.g. the Community Plant Variety Office makes decisions regarding the granting of plant variety rights in the Community; the Agency for the Cooperation of Energy Regulators makes individual decisions relating to the use of cross-border infrastructure and security conditions and the European Intellectual Property Office makes decisions on Community trademarks.

The third type of agencies provide administrative services. For example, the European Medicines Agency approves biotechnology or other high-tech human and veterinary medicines and provides marketing authorizations if a drug is an important therapeutic, scientific and technological novelty; the European GNSS agency performs certification, standardization operations; the European Aviation Safety Agency issues relevant environmental certificates; the European Chemicals Agency carries out registration of

[77] See: *ESMA-Short Selling* case, para.64.

[78] See: *ESMA-Short Selling* case, para.65.

[79] See: *ESMA-Short Selling* case, para.83.

[80] See *ESMA-Short Selling* case, para. 82.

[81] See: Saint Martin (2016) 276–79; Paulikas (2004) 185; Vos (2003) 114–21; Busuioc (2013) 26–27; Chamon (2016) 22–45; Craig (2012) 149–53, etc.

[82] Classification is based on 33 regulations establishing decentralized agencies. For example, Regulation 724/2004 amending Regulation establishing a European Maritime Safety Agency [2004] OJ L 129/1; Regulation 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 31/1; Regulation 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC [2008] OJ L 79/1, etc. See: Deviatnikovaitė (2017) 462–65.

industrial chemicals and the European Intellectual Property Office registers industrial property rights.

The fourth type of agencies are responsible for supervision and imposition of sanctions. For example, the purpose of the Single Resolution Board is to 'ensure the orderly resolution of failing banks, with as little impact as possible on the real economy and public finances of the participating EU countries and others'.[83] The Board may impose penalties on individuals who, either intentionally or through negligence, fail to provide the required information when disagreeing with a general investigation or an on-the-spot check, if individuals do not comply with the decision of the Board, etc. Additionally, the Board can carry out investigations and inspections. Some agencies simply carry out maintenance without the right to impose sanctions. For example, the Agency for the Cooperation of Energy Regulators oversees the internal and external markets for electricity and natural gas, informs them of the findings and monitors that wholesale energy markets are not abusive. Meanwhile, sanctions in this area are imposed by the Member States in accordance with national legislation. On behalf of the Commission, the European Maritime Safety Agency carries out inspections, checks on the training and certification of seafarers in third countries and presents a report to the Commission and the Member State concerned at the end of each inspection. The European Aviation Safety Agency manages inspections and investigations, monitors the implementation of relevant legislation by national aviation authorities and reports to the Commission.

The fifth type of agencies provide scientific and technical advice; recommendations and relevant assistance. These include the European Medicines Agency, the European Food Safety, the European Centre for Disease Prevention and Control, the European Monitoring Centre for Drugs and Drug Addiction, the European Aviation Safety Agency, the European Chemicals Agency, the European Asylum Support Office and the European Agency for Safety and Health at Work. Agencies can monitor research-related developments in relevant areas e.g. Frontex monitors the achievements of research on external border controls and disseminates this information to the Commission and the Member States. Some agencies are set up specifically to provide information and recommendations, such as the EU Agency for Fundamental Rights.

The sixth type of agencies are those collecting information, data, exchanging information such as the European Medical Services Office, the European Centre for the Disease Prevention and Control, the EU Agency for Fundamental Rights, the European Food Safety Authority, the EU Agency for Network and Information Security, Europol.

The seventh type are agencies organizing the provision of services and providing services themselves. Some agencies, apart from all other tasks, organize and conduct trainings, for example, the European Agency for the Operational Management of Large-scale IT Systems, the European Maritime Safety Agency, the European Fisheries Control Agency.

Granting agencies belong to the eighth type. For example, the EU Agency for Fundamental Rights can provide grants for appropriate cooperation and joint action to promote governmental organizations and public bodies active in the field of the protection of fundamental rights, including national human rights institutions, international organizations. Frontex may decide to co-finance joint operations and pilot projects proposed by the Member States through grants from its own budget. Europol can provide financial support for investigations into euro counterfeiting.

[83] Single Resolution Board (2017) link 3.

The last type are agencies carrying out law enforcement functions e.g. Eurojust carries out investigations and may prosecute when a criminal offense involves two or more Member States. Europol staff may participate as facilitators in joint investigation teams if those groups investigate criminal offenses within the competence of Europol.

To summarise on the basis of the Model Rules and the activities of decentralized agencies set out in their enabling regulations, these agencies are to be considered EU public administrators. Some of them adopt binding decisions in specific areas, some make single-case decisions and contracts, some assist and some manage administrative information.

5.4. Executive agencies

There is another kind of agencies called executive agencies at the EU-level, in addition to decentralized agencies P. Craig observes that these were established 'in post-Sander Commission reforms'.[84]

M. Chamon emphasizes that there is no clear distinction between the categories of 'regulatory' and 'executive' agencies.[85] It seems that the use of these categories is influenced by the national administrative law. National ministries or departments, those that are under the national Government, i.e. the highest executive body in parliamentarian states, usually are named as executive bodies at the domestic level. Bodies which are 'at arm's length' from the Government are usually named as 'regulatory' or 'independent' and the Author thinks this is the reason why the European Commission uses these terms.[86] Moreover, regulatory bodies that are executive bodies function just as executive bodies are regulatory. Why? Regulatory bodies regulate, i.e. establish new rules of behaviour and adjudicate whilst executive bodies do the same at the domestic level. The main difference between national regulatory bodies and national executive bodies lies in their interaction with the main executive power in the country. Executive bodies are strictly under the influence of the Government whilst regulatory entities are more isolated from the political influence of the main executive body. However, executive agencies at the EU-level have a different status from those at the national level.

There are six executive agencies at the EU level: the European Research Council, the Innovation and Networks Executive Agency, the Executive Agency for Small and Medium-sized Enterprises, the Research Executive Agency, the Education, Audio visual and Culture Executive Agency and the Consumers and Health, Agriculture and Food Executive Agency.

This group of agencies differs significantly from decentralized agencies. Their legal status is governed by a single Council Regulation[87] laying down the statute for executive agencies, instead of separate founding regulations. Executive agencies are set up under European Commission decisions whilst decentralized agencies are established under Council regulations or Council and European Parliament regulations. Executive agencies, unlike decentralized agencies, are located not in various Member States but in Brussels or Luxembourg, i.e. where the headquarters of Commission departments are established. The purpose of executive agencies is very clear – to assist the Commission in managing

[84] Craig (2012) 148.

[85] Chamon (2016) 5–6.

[86] Communication from the Commission 'The operating framework for the European Regulatory Agencies' COM (2002) 718 final.

[87] Regulation 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes [2003] OJ L 11/1.

EU programmes.[88] Executive agencies do not possess rule-making or adjudicatory powers. Meanwhile, decentralized agencies operate in a wide range of areas and can enact legally binding measures on third parties and can adopt acts of general application related to specific technical and professional expertise. unlike the founding regulations of decentralized bodies, the founding decisions adopted by the Commission contain no provisions regarding institutional, financial or personal independence of executive agencies. On the contrary, executive agencies are usually accountable to certain Directorates General of the European Commission.[89] Executive agencies could be included into the structure of the European Commission which was described in the third part of this article.

5.5. Agencies under the Common Security and Defence Policy

In addition to decentralized and executive agencies, there are agencies under the Common Security and Defence Policy: the European Defence Agency, the European Union Satellite Centre and the European Union Institute for Security Studies. These agencies differ from the previous discussed agencies because they are related to the Council rather than the Commission. Moreover, these agencies are established under Council decisions or joint actions.[90] Some of them are mentioned in primary law, e.g. the European Defence Agency. These agencies do not enjoy rule-making or adjudicatory powers. They assist, support, provide some services or products and observe in carrying out very 'specific technical, scientific and management tasks'.[91] The latter agencies could also be classified as EU public administrators in reference to the term 'agency action' defined in the Model Rules.

6. CONCLUSIONS

The concepts of European and EU administrative law allow the conclusion that the term 'European administrative law' lacks accuracy in the context of EU law. It is more precise to use this term with intergovernmental authorities established by European countries, regardless of whether they are Member States, or when comparing the national administrative law of various European countries. Two main EU administrative areas have been identified after the analysis of national administrative law and academic teachings on European and EU administrative law. The first area is related to the organization of EU public administrators, their activities and scrutiny over these activities. As national administrative law is central to the incorporation of EU law into national law, the second area includes all subjects that participate in the implementation, application and enforcement of EU law.

[88] For example, FP7, Horizon 2020, COSME, Erasmus+, etc.

[89] Differences are written under authors' published textbook in Lithuanian language: Deviatnikovaitė (2017) 470–71.

[90] Council Joint Action 2004/551/CFSP on the establishment of the European Defence Agency [2004] OJ L 245/17; Council Decision 2014/401/CFSP on the European Union Satellite Centre and repealing Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre [2014] OJ L 188/73; Council Joint Action 2001/554/CFSP on the establishment of a European Union Institute for Security Studies [2001] OJ L 200/1.

[91] Under *europa.eu.* 'Agencies and other EU bodies' //https://europa.eu/european-union/about-eu/agencies_en.

It can be concluded that most of the activities of domestic public administrators are related to rule-making, adjudicatory powers, making of public contracts, monitoring, providing public services, etc. However, Parliament resolutions on the EU Administrative Procedural Law are only devoted to individualized decisions. Meanwhile, the ReNEUAL Model Rules on EU Administrative Procedure define administrative action and identify six areas of the activity of EU authorities, including administrative rule-making. Relying on the concept of administrative action crystallized in the Model Rules, an EU-level public administrator is defined as any EU authority responsible for the performance of administrative action excluding the European Parliament, the European Council, the ECJ, the Court of Auditors and Member States' authorities.

In this research, EU agencies have had special attention. Decentralized, executive agencies and agencies under the Common Security and Defence Policy are considered as EU agencies and EU-level public administrators. The question whether decentralized agencies should be granted decision-making powers is still open. However, the latter question is less relevant in identifying agencies as EU-level public administrators as they are involved in other administrative activities.

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