ERC StG EUDAIMONIA (GA: 948473) WORKING PAPER SERIES

The Working Papers published in this series are directly based on research conducted in the framework of the ERC EUDAIMONIA project based at the University of Liège. Papers cover topics related to the different Work Packages of the project and are made available to enhance discussion even prior to formal publication of scientific articles. Comments are most welcome via pietro.mattioli@uliege.be

Working Paper 2023/1

EU institutional design of Member States' authorities responsible for medicinal products: still room for improvement.

Pietro Mattioli[1]

1. Introduction

The implementation of EU law is primarily a competence of Member States and their administrations.[2] Institutionally, while each Member State has its own administrative system for enforcing both national and EU policies, the EU relies on its national counterparts.[3]

This dependency has implications on how the EU defines its relationship with the Member States' institutional space.[4] In fact, EU secondary legislation imposes multiple institutional obligations in order to design the structure and functions of national authorities competent for the enforcement of EU law at national level (hereafter 'national competent authorities' or 'NCAs').[5] EU law lays down rules on establishment and designation of national competent authorities, appointment of their members, and on their independence. Additionally, it contains norms defining tasks and the procedures that these authorities must follow in the exercise of their tasks.

In the realm of EU health law, national competent authorities responsible for human medicines (hereafter 'national medicines agencies') stand out as an exception. In contrast to other sectors, most notably, competition, telecommunications, energy, railways, data protection, and digital services, where EU legislation imposes structural requirements, EU pharmaceutical legislation does not lay down such requirements for national medicines agencies. Nevertheless, these authorities are entrusted with significant responsibilities.

In order to better explore the validity of this claim, the second section of the paper reflects on EU pharmaceutical law and its specificities. Subsequently, the third section will investigate the existence and content of institutional design obligations within EU pharmaceutical law. The fourth section is dedicated to the case study of France and Romania to investigate how these two Member States have reacted to these administrative obligations. This paper concludes by reflecting on the institutional impact that EU pharmaceutical law has on Member States' administrative space. In addition, it submits some recommendations to improve the EU institutional design of national medicines agencies.

2. EU pharmaceutical law: what does it make a unique policy field?

[1] This paper relies on research being conducted in the framework of the ERC Starting Grant EUDAIMONIA (GA: 948473). This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement n° 948473).

[2] Article 4(3) TEU.

[3] Jürgen Schwarze, *Droit Administratif* européen, (2nd edn, Bruylant 2009) 67; Herwig Hofmann, Gerard C. Rowe, and Alexander Türk. *Administrative Law and Policy of the European Union* (Oxford University Press, 2011); and Paul Craig, *EU Administrative Law* (3rd eds, Oxford University Press, 2019).

[4] Jan H. Jans, Roel de Lange, Alexandra Prechal, and Rob Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing, 2007) 18; Hussein Kassim, 'Meeting the Demands of EU Membership: The Europeanization of National Administrative Systems', in Kevin Featherstone, and Claudio M. Radaelli (eds), The Politics of Europeanization (Oxford, 2003).

[5] This paper will employ the term 'national competent authorities' in order to refer to Member States' authorities responsible for the implementation of EU law, regardless of the policy field in which these bodies operate. At the same time, when referring to national competent authorities in the field of medicinal products, this paper will use the term 'national medicines agency',

The EU regulation of medicinal products stands out as relatively distinct compared to other sectors, evident in how the EU exercises its competence and in the variety of regulatory instruments.[6]

EU pharmaceutical law is that specific branch of EU health law that establishes rules in order to guarantee quality, safety, and efficacy of medicines to be placed both in the EU and Member States' market.[7] In this policy field, the primary interest to protect public health interfaces with other policies concerns, especially internal market interests.[8] Indeed, the Union health competence, including medicinal products, is primarily set out in Art. 168 TFEU, which through the horizontal clause contained in the first paragraph of this article makes the protection of human health a cross-policy interest.[9] Therefore, beside the *per se* public health action, which is in principle a supporting competence complementary to national policies,[10] EU can also pursue public health objectives through *inter alia* the integration of the internal market, having Article 114 TFEU as its legal basis.[11]

The EU pharmaceutical legal framework resembles a patchwork of different legislative (and not) instruments, mainly based on Articles 114 and 168 TFEU. In this framework, Directive 2001/83[12] and Regulation 726/2004[13] constitute the general legislations that govern authorisation, manufacture, and distribution of medicines in the EU. In addition, to guarantee medicinal products' quality and safety, and preserve the good functioning of the internal market of medicinal products, other pieces of EU secondary legislation refer and regulate specific types of medicinal products.[14] At the same time, a

---

[6] Federico Forni, 'Free Movement of Medicines and Protection of Public Health: Case C-178/20, Pharma Expressz Szolgáltató és Kereskedelmi Kft v. Országos Gyógyszerészeti és Élelmezés-egészségügyi Intézet, Judgment of the Court of Justice (Fourth Chamber) of 8 July 2021, EU:C:2021:551' 2022 *European Journal of Health Law*, 1; Marcus Pilgerstorfer 'EU law and policy on pharmaceuticals marketing and post-market control including product liability' Tamara Hervey, Calim Alasdair Young and Louise Bishop, Research Handbook on EU Health Law and Policy (Edward Elgar Publishing 2017); Anniek de Ruijter, *EU health law & policy: expansion of EU power in public health and health care*, (1st edn, OUP 2009).

[7] For a definition of 'EU health law' *see* Wolfram Lamping and Monika Steffen, 'European Union and Health Policy: The 'Chaordic' Dynamics of Integration' (2009) 90 Social Science Quarterly 1361.*;* Mary Guy and Wolf Sauter, 'The history and scope of EU health law and policy' in Tamara Hervey, Calim Alasdair Young and Louise Bishop, *Research Handbook on EU Health Law and Policy*, (Edward Elgar Publishing 2017) 17. For a definition of the term 'medicinal products for human use' *see* Directive 2001/83 of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, p. 67–128, Article 1(2). For an understanding of the distinction between medicinal products for human use, on the one hand, and veterinary use, on the other hand, *see* Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC, PE/45/2018/REV/1 [2019] OJ L 4/43, Recital 4.

[8] Vincent Delhomme, 'Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health' (2020) 11 European Journal of Risk Regulation 747.

[9] Tamara Hervey, 'Mapping the Contours of European Union Health Law and Policy' (2002) 8 European Public Law 69.

[10] Article 6 TFEU "*The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; […]*".

[11] *See* Case C-376/98, *Germany v European Parliament and Council*, EU:C:2000:544, paras. 77-78. For instance, Article 114 TFEU is used as legal basis in Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices, PE/76/2021/REV/1 [2022] OJ L 20/1.

[12] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, p. 67–128.

[13] Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, [2004] OJ L 136/1.

[14] *See* Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products, [2000] *OJ L 18/1;* Regulation (EC) No 1901/2006 of the European Parliament and of

large part of the EU regulatory framework for medicinal products is composed of guidelines, recommendations, and other instruments of soft law.[15] In that sense, research shows how pharmaceutical law reflects a predominance of soft law over hard law and that the majority of these regulatory instruments is issued by the European Medicine Agency (EMA).[16]

Moreover, ahead of the limited EU health competence, the sector of medicinal products remains incisively regulated by each Member State. Despite the EU legislator's longstanding interest in medicinal products since the beginning of the internal market, a single market for these products has yet to materialise.

In parallel to a such diversified legislative landscape, EU pharmaceutical law is also characterised by a complex administrative structure, which develops both at EU and Member States level.

In the field of health, the progressive build-up of EU institutional actors, as described by de Ruijter, is interconnected with the expansion and specialisation of Union's health competences. The creation of new EU health-related institutional actors has also increased the EU policy-making capacity and powers.[17] In the realm of medicinal products, alongside the European Commission Directorate-General for Health and Food Safety (DG SANTE), the European Medicines Agency and its various committees, working parties, and specialised groups play a pivotal role in designing and enforcement of EU policies on medicinal products.

The institutional architecture regulating medicinal products also includes each Member State's medicines agency. Even before the EU started creating specialised and sectorial agencies, Member States had already started a process of 'agencification' at national level, often associated with the creation of the 'regulatory state'.[18] National competent authorities were established within the administration of the state, while remaining in part independent from it.[19] These entities have progressively become dominant actors as regards Member States' primary responsibility in terms of EU policies implementation.[20] In that sense, they are defined as 'double-hatted', given their manner of serving both their respective national ministerial departments and the EU.[21]

---

the Council of 12 December 2006 on medicinal products for paediatric use and amending Regulation (EEC) No 1768/92, Directive 2001/20/EC, Directive 2001/83/EC and Regulation (EC) No 726/2004, [2006] OJ L 378/1.

[15] For an overview of the non-legislative and miscellaneous acts regulating medicinal products for human use, *see* EudraLex - Volume 1 - Pharmaceutical legislation for medicinal products for human use (https://health.ec.europa.eu/medicinal-products/eudralex/eudralex-volume-1_en#miscellaneous).

[16] Bartolomeo Cappellina, Anne Ausfelder, Adam Eick, Romain Mespoulet, Miriam Hartlapp, Sabine Saurugger, and Fabien Terpan, 'Ever more soft law? A dataset to compare binding and non-binding EU law across policy areas and over time (2004–2019)' 2022 *European Union Politics* 23.

[17] de Ruijter (n) 93

[18] Giandomenico Majone, 'The Rise of the Regulatory State in Europe', (1994) 17 West European Politics 77; Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 Journal of Public Policy 139; Martin Lodge, 'Regulation, the Regulatory State and European Politics (2008) 31 West European Politics 280; and Stéphanie De Somer, *Autonomous Public Bodies and the Law*, (Edward Elgar Publishing, 2017) 30-33.

[19] Leigh Hancher and Pierre Larouche, 'The coming of age of EU regulation of network industries and services of general economic interest' in: P. Craig en G. de Búrca (eds), The evolution of EU law (Oxford, 2011); Elisabeth Lambert Abdelgawad and Michel Hélène, *Dictionnaire des acteurs de l'Europe*, (Éditions Larcier 2015) 39.

[20] De Somer S, Autonomous Public Bodies and the Law, (Edward Elgar Publishing, 2017).

[21] Morten Egeberg and Jarle Trondal 'National agencies in the European administrative space: government driven, commission driven or networked?' (2009) 87 Public Administration 779; Bernardo Rangoni and Mark Thatcher, 'National de-delegation in multi-level settings: Independent regulatory agencies in Europe' (2022) 36 Governance 81.

Considering national competent authorities' relevant role for EU policy implementation and thereby, achievement of policy objectives, from the beginning, EU law has imposed multiple structural and functional design obligations to these entities.[22] By way of example, in some policy fields, such as telecommunications and most recently, data protection, institutional design obligations are evident and predominant. For instance, the sector of telecommunications is generally considered exemplary in terms of 'EU impulse' to the institutional design of national authorities.[23] Quite similarly, in the field of data protection, most recently, Regulation 2016/679 (repealing Directive 95/46/EC) requires Member States to establish one or more supervisory authority and introduces structural conditions of independence, procedures for appointment of the members, as well as rules on competence, tasks and powers.[24]

In the field of medicinal products law, national medicines agencies, conceived as specialised bodies competent in the field of pharmaceutics with different structures and functions among each Member State, already existed before the creation of a specific EU regulatory framework. Within this framework, with the definition of EU rules governing medicinal products, the EU legislation has also progressively intervened to design the structure and functions of national medicines agencies.
Under these circumstances, the next section intends to clarify the characteristics of the EU institutional design of national medicines agencies in the field of pharmaceutical law. To that end, it will examine the institutional design requirements found in key pieces of EU pharmaceutical legislation.

3. Institutional design obligations in EU pharmaceutical law.

This section aims to investigate the existence, scope, and content of structural and functional administrative design obligations within EU pharmaceutical law (*see* **Table 1**) and to investigate the impact that these obligations produce on Member States medicines agencies. It does not claim to exhaustively address every obligation imposing administrative constraints on Member States but rather to highlight the existence and content of these obligations.

Table 1: Types of administrative design obligations.

Structural administrative design obligations.	**Functional administrative design obligations.**
***Establishment**: norms requiring for creation or designation of an authority and appointment of individuals within an already existing authority.*	***Tasks and procedures**: norms entrusting competent authorities or figures within them with new tasks and procedures regulating the exercise of these tasks.*
***Independence and impartiality**: requirements of independence of the authority and its members.*	

[22] Stéphanie De Somer, 'The Europeanisation of the Law on National Independent Regulatory Authorities from a Vertical and Horizontal Perspective' (2012) 5 Review of European Administrative Law 93
[23] De Somer (n) 23. The author uses the term 'EU impulse' to refer to how EU law have progressively required to Member States to entrust the implementation of EU legislation to national authorities Mark Thatcher, 'The Commission and national governments as partners: EC regulatory expansion in telecommunications 1979–2000' (2001) 8 Journal of European Public Policy, 558
[24] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119, Chapter VI.

Moreover, to facilitate the analysis of these obligations, this paper defines four main phases of medicines' lifecycle – clinical trials, manufacturing, marketing authorisation, and vigilance[25] – and in view of this division, it explores the presence and substance of both structural and functional institutional design obligations within the central regulatory instruments in these phases The results of this analysis are displayed in **Table 2**.

Table 2: Overview: presence of institutional design obligations within EU secondary legislation on clinical trials, manufacturing, marketing authorisation, and pharmacovigilance.

	Clinical trials	**Manufacturing**	**Marketing authorisation – placement on the market**	**Pharmacovigilance**
Establishment.	*yes*	*no*	*no*	*yes*
Independence.	*yes*	*yes*	*no*	*no*
Tasks and procedures.	*yes*	*yes*	*yes*	*yes*

Clinical trials.[26]

The development of new medicinal products, EU pharmaceutical market competitiveness, and patients' access to innovative and safe medicines depend on clinical trials. Commercial concerns related to approval procedures and lack of administrative coordination between Member States have pushed towards the adoption of common standards for conducting clinical trials of medicines within the EU. At present, the regulatory framework of clinical trials is mainly regulated by Regulation 536/2014 (Clinical Trails Regulation or 'CTR'),[27] repealing Directive 2001/20/EC (Clinical Trials Directive or 'CTD'),[28] which was the first instrument regulating clinical research practice at EU level, in particular, by setting the initial common standard procedures for the testing of pharmaceutical products.

In terms of structural institutional design obligations, the EU clinical trials legislation lays down rules on establishment and independence. For instance, Art. 6(1) CTD calls on Member States to take measures for the establishment of ethics committees, defined in Art. 2(1)(k) CTD as '*an independent body in a Member State, consisting of healthcare professionals and non-medical members, whose responsibility it is to protect the rights, safety and wellbeing of human subjects involved in a trial and to provide public assurance of that protection […]*'.

[25] The pharmaceutical chain starts with medicines' manufacturing, and is followed by marketing authorisation, including sale, production, labelling, classification, distribution, and advertising of medicines and finally, pharmacovigilance. Overall, the EU medicinal products framework seeks to regulate, with different degrees of specificity, all phases of the medicines' lifecycle, including clinical trials, which are studies conducted on human volunteers by pharmaceutical companies to investigate the safety and efficacy of medicines. The recipients are Member States and national competent authorities as well as pharmaceutical companies, manufacturers, and wholesale distributors. However, for the purpose of this paper, the provision addressing this latter category of subjects will not be considered.

[26] For an overview of EU regulation of clinical trials *see* Tamara K. Hervey and Jean V. McHale, 'The Regulation of Clinical Research' in Tamara K. Hervey and Jean V. McHale, *Health Law and the European Union* (CUP 2004)

[27] Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC, [2014] OJ L 158/1.

[28] Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use, [2001] OJ L 121/34.

However, there are not structural requirements relating to national competent authorities. Indeed, Recital 18 CTR acknowledges that it is a matter of internal organization of each Member States '*to determine the appropriate body or bodies to be involved in the assessment of the application to conduct a clinical trial and to organise the involvement of ethics committees.'* However, this discretion is contingent upon some conditions, such as the involvement of laypersons, in particular patients or patients' organisations and guarantee necessary expertise when creating these bodies.

As regards functional administrative design obligations, all clinical trials to be conducted in the territory of one of the Member States must be subject to scientific and ethical review, before being approved. In that context, CTR defines the tasks of ethical committees and procedures to follow in the exercise of their tasks.[29]

Manufacturing.

As general rule, a manufacturing authorisation for medicinal products is required and applies to every pharmaceutical manufacturer located in a Member State of the EU.[30] Directive 2001/83 lays down rules in that regard. Member States are responsible for the implementation of rules on manufacturing, including the relative authorisation.[31] In that context, national medicines agencies are often in charge of ensuring that manufacturers incorporate the requirements of safety, quality, and efficacy of the products into the medicines' production and development process. In the exercise of those tasks, specific procedural conditions apply.[32]

The EU legislator has also developed an entire framework describing standards that manufacturers of medicines intended to be placed in the EU market shall meet in their production processes, the so-called good manufacturing practice (GMP). Directive 2003/94/EC[33] is the central legislative instruments laying down the principles and guidelines on GMP, which are further specified by Commission delegated Regulation 2017/1569 as regards investigational medicinal products.[34] As well, Directive 2017/1572[35] and Regulation 1252/2014[36] supplement the rules on manufacturing contained in Directive 2001/83. Additionally, various soft law instruments complete the EU framework on medicines' manufacture.[37]

---

[29] For instance, see Regulation (EU) No 536/2014 ( ), Articles 7 and 8.

[30] Directive 2001/83 (n), Article 40.

[31] Directive 2001/83 (n), Article 42

[32] For instance, Directive 2001/83 lays down requirements as to the structure, outcome and review of decision-making of manufacturing authorization and authorisation of wholesale distribution, see Directive 2001/83 (n), Articles 17, 43, and 77.

[33] Commission Directive 2003/94/EC of 8 October 2003 laying down the principles and guidelines of good manufacturing practice in respect of medicinal products for human use and investigational medicinal products for human use, [2003] OJ L 262/22.

[34] Commission Delegated Regulation (EU) 2017/1569 of 23 May 2017 supplementing Regulation (EU) No 536/2014 of the European Parliament and of the Council by specifying principles of and guidelines for good manufacturing practice for investigational medicinal products for human use and arrangements for inspections, [2017] OJ L 238/12.

[35] Commission Directive (EU) 2017/1572 of 15 September 2017 supplementing Directive 2001/83/EC of the European Parliament and of the Council as regards the principles and guidelines of good manufacturing practice for medicinal products for human use, [2017] OJ L 238/44.

[36] Commission Delegated Regulation (EU) No 1252/2014 of 28 May 2014 supplementing Directive 2001/83/EC of the European Parliament and of the Council with regard to principles and guidelines of good manufacturing practice for active substances for medicinal products for human use, [2014] OJ L 337/1.

[37] *See* EudraLex - Volume 4 - Good Manufacturing Practice (GMP) guidelines.

Within this quite elaborate framework, institutional design obligations addressed to national competent authorities are almost inexistent. Exceptionally, Article 23 of Delegated Regulation 2017/1569 specifying principles of and guidelines for good manufacturing practice for investigational medicinal products for human use imposes conditions of impartiality and independence on inspectors.[38] In addition, Article 21 defines competences and powers of national authorities' inspectors, thereby laying down functional design obligations.

Marketing authorisation.

The EU pharmaceutical legislation lays its foundations on the principle that any medicine to be placed on the market must be subject to a marketing authorisation granted by competent authorities.[39]

The EU legislator has regulated in detail the process for granting marketing authorisation. Directive 2001/83 regulates marketing authorisations that can be issued according to a national, decentralised, and mutual recognition procedure. First, national competent authorities can grant a marketing authorisation with limited validity within the issuing Member State, following their national procedures.[40] However, when the applicant aims to obtain an authorisation in several Member States for a medicine that has not yet been authorised in the EU, the decentralised procedure applies. The mutual recognition procedure, instead, refers to the action to extend the marketing authorisation granted in one Member State to another.[41]

Moreover, Regulation 726/2004 introduces a Union centralised procedure which compulsorily applies to medicinal products listed in Annex I and optionally in the cases of Art. 3(2) of that Regulation. The European Commission grants this authorisation, which is valid throughout the Union, following EMA's Committee for Medicinal Products for Human Use's (CHMP) scientific assessment of the quality, safety, and efficacy of the medicinal product under scrutiny.[42]

Within this framework, multiple institutional design obligations can be detected. However, as regards establishment and independence, the marketing authorisation-related framework does not contain any relevant obligation addressed to national competent authorities. Many provisions lay down functional requirements orienting the work and *modus operandi* of these bodies. For instance, this is the case of Chapter 3 of the Directive 2001/83, which regulates the decision-making process of national competent authorities for the evaluation of applications in order to grant a national marketing authorisation.

Moreover, Directive 2001/83 contains further rules on labelling, package leaflet, classification, wholesale distribution, and advertising, which overall do not impose any direct institutional design obligation or requirement on Member States. These policy fields are incisively regulated by instruments of soft law issued by the European Commission or EMA. For instance, as regards the whole distribution of medicines, the European Commission issued two guidelines for the good distribution

[38] Commission Delegated Regulation (EU) 2017/1569 of 23 May 2017 supplementing Regulation (EU) No 536/2014 of the European Parliament and of the Council by specifying principles of and guidelines for good manufacturing practice for investigational medicinal products for human use and arrangements for inspections, C/2017/3368, [2017] OJ L 238/12, Article 23.

[39] European Commission, Directorate-General for Health and Food Safety, *EudraBook: compendium of EU pharmaceutical law* (Publications Office 2015) https://data.europa.eu/doi/10.2772/288501

[40] Directive 2001/83 (n), Article 6 (1).

[41] Directive 2001/83 (n), Chapter 4.

[42] Regulation 726/2004 (n), Article 3.

practice (GDP), namely guidelines on GDP of medicinal products for human use and guidelines on principles of GDP for active substances for medicinal products for human use, which however do not put in place any specific administrative design obligations for the Member States. They rather set minimum standards that a wholesale distributor must meet throughout the supply chain.

Pharmacovigilance.

The rules on pharmacovigilance deserve a final mention. Over time, this specific area has been stringly regulated by the EU legislator. The existing rules on pharmacovigilance, contained in Directive 2001/83 and Regulation 726/2004, had been amended firstly in 2010 and then in 2012. Furthermore, guidelines on good pharmacovigilance practices (GVP) have been adopted.[43]

In terms of institutional design obligations, most significantly, this framework requires Member States to designate a competent authority for the performance of pharmacovigilance tasks.[44] The tasks and procedures of these authorities are also defined.[45]

Outcomes.

This analysis highlights the presence of different types of institutional design obligations. In that context, these obligations largely define national authorities' tasks and procedures for the exercise of these tasks. Conversely, the above investigation reveals the lack of requirements of independence for national medicines agencies (hierarchical, political, from market parties, and other external entities), and of norms on the appointment of the members of these authorities and on their budget. This is quite surprising, especially when compared with other policy sectors.

4. The impact of EU institutional design obligations on the French and Romanian medicines agencies.

This section intends to investigate the impact produced by EU medicinal products law on Member States' administrative space. To that end, it will conduct a case study of the national competent authorities responsible for medicinal products for human use in France and Romania.

The choice of focusing on these two EU Member States is motivated by the intention to examine the impact that EU institutional design obligations have on two countries with distinct institutional backgrounds. In fact, France is an EU founding member with a well-known strong administrative culture and influence over the EU process of integration. In addition, traditionally, France had established several independent administrative authorities or agencies (*autorités administrative indépendantes* or AAIs) in many fields of public interests, such public health, even before the 'EU impulse'.[46] Conversely, Romania joined the EU in 2007. Prior to joining the EU, it had an administrative structure that mirrored an administrative culture distinct from that of the countries already part of the Union. In that context, the process towards EU membership had a clear impact on Romanian institutional system. Romania demonstrated the willingness to change its administrative structure in order to smoothly secure its EU membership. For instance, Romania's medicine agency assigned 26

[43] https://www.ema.europa.eu/en/human-regulatory-overview/post-authorisation/pharmacovigilance-post-authorisation/good-pharmacovigilance-practices
[44] Directive 2001/83, Art. 101(1) and (3).
[45] For instance, Directive 2001/84, Articles 104 and 105.
[46] Matthias Ruffert, *Law of Administrative Organization of the EU: A Comparative Approach* (Edward Elgar Publishing 2020) 46.

active observers in EMA scientific committees and working groups before officially joining the EU in 2007. Indeed, the 'General Provisions governing the Agency' contained in Regulation 726/2004 allows for the participation of observers in the work of the Agency 'with an interest in the harmonisation of regulations applicable to medicinal products.[47] This leads to an important consideration, namely the intention to train and shape individuals that will afterwards work within the respective national institutions, facilitating standardisation.

Considering these factors, the next section starts by outlining the creation of national medicines agencies in France and Romania. Subsequently, it will analyse how these two Member States have implemented the above institutional design obligations.

4.1. France and Romania's medicines agencies and EU institutional design.

The process through which Member States have developed public independent institutions, empowered with specific functions in the field of medicinal products follows different steps in the two countries.

In France, the Medicines Agency (*Agence du médicament*) was created in 1993 and afterwards replaced by the French Health Products Safety Agency (*Agence Française de Sécurité Sanitaire des Produits de Santé* or AFSSAPS) in 1998. The current French Agency for the Safety of Health Products (*France Agence nationale de sécurité du médicament et des produits de santé* or ANSM) was set up in 2012.
In Romania, the National Agency for Medicines and Medical Devices of Romania (*Agenția Națională a Medicamentului și a Dispozitivelor Medicale din România* or NAMMDR) was the result of a process of reorganisation of the previous State Institute of Drug Control and Pharmaceutical Research (*Institutul de Stat pentru controlul medicamentelor și Cercetări farmaceutice* or ICSMCF), which was firstly completed in 2010 and eventually renewed in 2019.

Within this framework, the table below (Table 3) describes whether and how these two Member States have implemented the institutional design obligations identified in the previous section within the four areas.

Table 3: France and Romania's implementation of EU institutional design obligations in pharmaceutical law.

	France	**Romania**
Clinical trials.	39 ethics committees competent to assess clinical trials applications, which are independent as regards of membership and sources of funding from the Ministry of Health. Transposition of functional requirements by law.[48]	The National Commission for Bioethics of Medicines and Medical Devices (CNBMDM), which is an independent body without legal personality, carries out the ethical analysis and issue opinions within the meaning of the Clinical Trials Regulation.

[47] Regulation 726/2004, Article 78
[48] *Ordonnance n° 2016-800 du 16 juin 2016 relative aux recherches impliquant la personne humaine, AFSP1608692R, JORF n°0140 du 17 juin 2016*, https://www.legifrance.gouv.fr/eli/ordonnance/2016/6/16/2016-800/jo/texte.

		Transposition of functional requirements by law.[49]
Manufacturing.	Transposition of institutional requirements by law.[50]	Transposition of institutional requirements by law.[51]
Marketing authorisation.	France has fully transposed functional obligations, empowering its national medicines agency with the necessary functions.[52]	Romania has fully transposed functional obligations, empowering its national medicines agency with the necessary functions.[53]
Pharmacovigilance.	The ANSM is responsible for pharmacovigilance. The French system of pharmacovigilance is managed at national level by the ANSM, assisted by its network of 31 regional pharmacovigilance centres (CRPV).	The NAMMDR operates the pharmacovigilance system. To that end, the *Lege nr. 95 din 14 aprilie 2006, privind reforma în domeniul sănătății, publicat în monitorul oficial nr. 652 din 28 august 2015* transposes the EU institutional design obligations.

This case study underscores how France and Romania – despite their different administrative traditions – have equally undertaken the necessary steps to implement the multiple institutional obligations laid down in EU pharmaceutical legislation. This leads to some sort of institutional harmonisation.

In addition, it can be noticed that while the majority of these institutional design obligations lays down tasks and procedures for national medicines agencies, these obligations have fostered a certain level of organisational cohesion amongst these two agencies. In fact, France and Romania's medicines agencies have now similar organisation. The ANSM's organisation chart shows two main operative areas, namely one related to the resources and one to the operations. Within this latter, there are two main directorates, the directorate for authorisation, on the one hand, and the directorate for surveillance, on the other hand. Quite similarly, the NAMMDR has a directorate-general for evaluation and authorisation and one for pharmaceutical inspections.

5. Recommendations.

The implementation of EU pharmaceutical law, like other EU policies, relies upon Member States' administrative system. In this policy field, however, the institutional design of national competent

[49] *Ordonanță de urgență nr. 29 din 23 martie 2022 privind stabilirea cadrului instituțional și a măsurilor necesare pentru punerea în aplicare a Regulamentului (UE) nr. 536/2014 al Parlamentului European și al Consiliului din 16 aprilie 2014 privind studiile clinice intervenționale cu medicamente de uz uman și de abrogare a Directivei 2001/20/CE, precum și pentru modificarea unor acte normative în domeniul sănătății*.

[50] In France, see *chapitre Ier : Services centraux et inspection* (*Articles* L1421-1 à L1421-6).

[51] Information on pharmaceutical inspections in Romania, see https://www.anm.ro/en/medicamente-de-uz-uman/inspectie-farmaceutica/

[52] French has transposed these obligations in Title II of the French public health code (*Code de la santé publique*).

[53] See, *LEGE nr. 134 din 12 iulie 2019 privind reorganizarea Agenţiei Naţionale a Medicamentului şi a Dispozitivelor Medicale, precum şi pentru modificarea unor acte normative EMITENT: Parlamentul PUBLICAT ÎN: Monitorul Oficial nr. 587 din 17 iulie 2019; LEGE nr. 95 din 14 aprilie 2006, privind reforma în domeniul sănătății, publicat în MONITORUL OFICIAL nr. 652 din 28 august 2015.*

authorities is quite peculiar, if compared to other sectors such as telecommunications, energy, railway, data protection, among the others. EU pharmaceutical legislation introduces mainly norms designing the tasks and procedures of national competent authorities. Exceptionally, it requires for the creation of a new body, laying down in that context norms on independence, alongside defining their tasks and procedures (clinical trials). Against this background, requirements of independence of national medicines agencies and their members are almost inexistent.

In that sense, the EU institutional design of national medicines agencies result quite unbalanced. One possible explanation for this imbalance could be the restricted scope of Union competence in this particular area. The allocation of competence by the EU Treaties reflects a specific balance of powers between EU institutions but also a certain degree of sovereignty (control) that Member States decided to delegate to the EU. In the field of public health and pharmaceutical law, this attribution is limited and hence limited is the control over Member States' administrative space.

Within this framework, the independence of national competent authorities responsible for medicines remains however quite crucial. Considering the wide-ranging variety of tasks attributed to these authorities by EU legislation, it important to safeguard their independence from market parties, political influence, and any other interest that might affect the impartiality of their decisions.

Therefore, the question is how the EU legislator could intervene to enhance national medicines agencies' independence - despite its limited competence in health. This article submits that one way forward is the use of soft law instruments to lay down important conditions to safeguard the independence of national medicines agencies and their members (rules for the appointment of key officials, on decision-making, and impartiality).

Although possible, this option faces an important obstacle. Soft law is not binding and thereby, is likely that in practice Member States will not follow the recommendations contained in these instruments. In addition, the use of soft law to regulate important features such as the independence of national competent authorities and the one of its members is problematic. Soft law represents a set of rules which bypasses the legislative process and impacts the institutional balance as determined by the EU Treaties. Equally, judicial control, especially from the Court of Justice of the European Union, remains limited.[54] Moreover, the use of soft law has been criticised for its weak legitimacy, given the lack of democratic, open, and respective of the rule of law processes of adoption.[55] The use of soft law by the European Commission and EMA does not escape these criticisms. Therefore, whether soft law could effectively regulate institutional features of national medicines agencies is only in principle a foreseeable option.

Therefore, an alternative option would be that of stressing/encouraging the definition of common standards of independence within formal or informal institutional frameworks and networks of national competent authorities. These systems are already in place. For instance, at EU level, the European Medicines Regulatory Network (EMRN) brings together all national medicines' regulatory authorities for both human and veterinary medicines from the Member States in the EU and European Economic Area (EEA).[56] As well, the Heads of Medicines Agencies, an informal and voluntary network created in 1995, gathers the heads of the national competent authorities responsible for the regulation

[54] Opinion of Advocate General Bobek on case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*, ECLI:EU:C:2021:294, paras 85-88

[55] Marionalina Eliantonio and Oana Ştefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 European Journal of Risk Regulation 159.

[56] For more information https://www.ema.europa.eu/en/about-us/how-we-work/european-medicines-regulatory-network

of human and veterinary medicines.[57] This network does not directly find its foundation in the EU legislation, but it is the result of the heads of national medicines agencies' willingness to create an informal network to facilitate cooperation between national medicines agencies. Importantly, HMA contributes to the development and enforcement of EU law.

Conclusions

This contribution unveils the presence and content of EU institutional design obligations in EU pharmaceutical law and the impact of these obligations on Member States' administrative systems (France and Romania). In that sense, to some extent, it is possible to claim that also within the policy area of pharmaceuticals, the progressive development of EU legislation has caused a shift in administrative control over Member States' institutions responsible for the enforcement of EU pharmaceutical law. Within this framework, this contribution highlights that pharmaceutical law does not introduce much-required conditions to safeguard the independence of national medicines agencies. In that context, this article submits some recommendations for EU law to tight its grip over national medicines agencies, especially to preserve their independence.

[57] For more information https://www.hma.eu/