

## Inter-institutional Working Group on regulatory agencies

### Analytical fiches 31-33

#### Analytical *Fiche* N° 31

<b>Commission role</b>
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#### 1) State of play *de jure* and in practice

The European Commission's role vis-à-vis European regulatory agencies is mainly governed by:

- The provisions of the agencies' constituent acts;
- Art. 185 of the Council Regulation (EC, Euratom) N° 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities<sup>1</sup>;
- The Commission Regulation (EC, Euratom) N° 2343/2002 of 23 December 2002, as last modified by Commission Regulation (EC, Euratom), N° 652/2008 of 9 July 2008 on the framework Financial Regulation for the bodies referred to in Article 185 of the above-mentioned Council Regulation (EC, Euratom) No 1605/2002<sup>2</sup>.
- **The Staff Regulations of Officials of the European Communities and the Conditions of Employment of other Servants of the European Communities (Council regulation (EEC, Euratom, ECSC) N°259/68 of 29 February 1968<sup>3</sup>.**

In addition, a number of agencies have signed a Memorandum of Understanding with the Commission "parent DG", which governs specific aspects in their working relation.

The Commission has a dual role to play towards agencies – supervision and assistance in different areas. This role is defined through its right of initiative, its representation on the Management Board, nomination power, political supervision, examination of legality, implication in the budget procedure and in the agencies' audit via the Internal Audit Service, as well as through its agreement to agencies' implementing rules under the Staff Regulations.

#### Right of initiative

The European Commission has the right of initiative concerning the creation of European Union regulatory agencies and draws up proposals establishing such agencies. Together with

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<sup>1</sup> OJ L 248, 16.09.2002

<sup>2</sup> OJ L 357, 21.12.2002

<sup>3</sup> OJ L 56, 04.03.1968

the proposal for the creation of an agency, the Commission provides detailed information on the multi-annual budgetary and staffing consequences of the proposal in a so-called legislative financial statement. In the areas of judicial cooperation in criminal matters and police cooperation, the right of initiative is shared with the Member States<sup>4</sup>.

### Representation on the Management Board

The Commission has its representatives in the Management Board and, where existing, in the Executive Board of all but former third pillar agencies. The number of Commission representatives varies from 1 to 6. In some cases, Commission representatives are without voting rights. In some agencies the Commission representative chairs the Management Board. Further details on the composition and designation of the Management Board can be found in Fiche 5.

### Nomination power

The Commission plays a role in the nomination procedure of the Director in all former 1<sup>st</sup> pillar agencies, except for OHIM. Notably, in most cases, the Commission prepares a short list of candidates for the post of Director, who is then appointed by the Management Board or by the Council. In other cases, the Commission appoints the Director upon a proposal of the Management Board. Further details on the appointment and dismissal of the Director can be found in Fiche 7.

The Commission plays an important role during the agency's establishment, by appointing the Interim Director from within its organisation.

The Commission is involved in the appointment procedure for members of other bodies of most agencies - scientific committees, boards of appeal, working parties and others - or has its representatives at those bodies.

### Political supervision

In most agencies, the Commission is involved in the process of adopting the annual work programme. In some cases the Commission is consulted<sup>5</sup>, in others the annual work programme is adopted after receiving the Commission's opinion<sup>6</sup>, while in two cases the Commission agreement is necessary before an annual work programme can be approved<sup>7</sup>. Some agencies' founding regulations do not impose an annual work programme and some do not specify the role of the Commission concerning the adoption of the annual work programme. In this case, there are often informal consultations between the agency and the Commission "parent DG". Further details on the agencies' annual work programme can be found in Fiche 13.

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<sup>4</sup> Article 76 TFEU foresees that acts in those areas shall be adopted on a proposal from the Commission or on the initiative of a quarter of the Member States

<sup>5</sup> ACER, EAR, EFSA, EIGE, ETF, EU-OSHA, CEPOL

<sup>6</sup> CFCA, EASA, EEA, EMCDDA, EMSA, ENISA, ERA, FRA, FRONTEX, GSA, EUROPOL, Agency for Operational Management of large-scale IT systems in the area of freedom, security and justice (as per amended Commission proposal), EASO

<sup>7</sup> CEDEFOP, EUROFOUND

The Commission receives the annual activity report of agencies. Providing such information to the Commission can be either an obligation stemming from the founding regulation or a voluntary practice.

Most agencies<sup>8</sup> have to receive the Commission's opinion before adopting the multi-annual staff policy plan<sup>9</sup>. The Commission is also consulted during the process of drafting and/or approval of some agencies' rules of procedure of the Management Board.

For most agencies, the Commission can request an independent external evaluation of agencies' activities, assessing, *inter alia*, the degree of implementation of the founding regulation, the results obtained by the agency and its working methods. In some cases, following the evaluation, the Commission can present, if necessary, a proposal for revision of the agency's founding regulation. Further details on evaluation of agencies can be found in Fiche 29.

### Examination of legality

In the case of four agencies<sup>10</sup>, Member States, members of the Management Board and third parties directly and personally involved may refer to the Commission any act of the agency, whether express or implied, for the Commission to examine the legality of that act.

In the case of CPVO and OHIM, the Commission shall check the legality of those acts of the President in respect of which Community law does not provide for any check on legality by another body and of the acts of the Administrative Council relating to the Office's budget and of the Budget Committee respectively. In the case of CPVO, Member States, any members of the Management Board or any persons directly and personally involved, may refer to the Commission the abovementioned acts of the President, whether express or implied, to examine the legality of those acts. The same goes for OHIM, but in this case only Member States and any person directly and personally involved are entitled to proceed.

### Budget and accounts

For the non self-financed agencies, the Commission receives an agency's estimate of revenue and expenditure, which includes a draft establishment plan. This estimate is then forwarded by the Commission to the European Parliament and the Council, together with the draft general budget of the European Union. On the basis of the statement of estimates, the Commission enters in the draft general budget of the European Union the estimates it considers necessary for the establishment plan and the amount of the contribution to be charged to the general budget, which it places before the budgetary authority in accordance with Article 314 of the Treaty on the Functioning of the European Union.

Similarly, during the financial year itself, to the extent it considers necessary, the Commission forwards agency requests for changes to the authorised amount of the Community

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<sup>8</sup> Agencies dealing with Common Foreign and Security Policy do not adopt the staff policy plan, as the Staff Regulations do not apply to these agencies.

<sup>9</sup> See Fiche 23 on the process of adopting a multi-annual staff policy plan.

<sup>10</sup> CEDEFOP, ECDC, EU-OSHA, EUROFOUND

contribution or to the authorised establishment plan to the budgetary authority, entered in a draft amending budget<sup>11</sup>.

Moreover, in the framework of the competence for implementing the general budget, the Commission is also responsible for executing the Commission budget line related to the contribution to the agency. The transfer of that contribution must follow the principle of rigorous cash management and rules provided for in an agreement (e.g. in the form of a Memorandum of Understanding) signed with each agency. Beyond this responsibility, the Commission is not accountable for the execution of the budget of the agency. Given agencies' budgetary autonomy, the person with ultimate and sole responsibility for executing the budget of the agency is its director, who is its authorising officer, and not the delegated or sub delegated authorising officer of the Commission.

The Commission accounting officer receives the provisional accounts of an agency together with a report on the budgetary and financial management for that financial year. The Commission consolidates the provisional accounts of the institutions and decentralised bodies. The Commission forwards then the provisional accounts to the Court of Auditors, together with a report on the budgetary and financial management for that financial year. The report on the budgetary and financial management for that financial year is also forwarded to the European Parliament and the Council. The Commission, together with the European Parliament, the Council, and the Court of Auditors receives the final accounts with the Management Board's opinion.

### Financial regulation and Implementing Rules

The Commission is consulted on the agency's specific financial regulation. Where agencies receive Community contributions, the rules defined in the agency specific financial regulation have to be consistent with the Commission Regulation (EC, Euratom) N° 2343/2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) N° 1605/2002 unless specifically required for the agency's operating needs and with the Commission's prior consent.

The Commission is also consulted on the agency's implementing rules of their financial regulations when the Management board has considered necessary to adopt such rules.

### Audit

Art. 185 par. 3 of the Financial Regulation stipulates that: "The Commission's internal auditor shall exercise the same powers over the bodies referred to in paragraph 1<sup>12</sup> as he/she does in respect of Commission departments". For further information on internal audit, please refer to Fiche 26.

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<sup>11</sup> During the financial year, the agency may make transfers within the limits laid down in Article 23 of the Framework Financial Regulation (Commission Regulation (EC, Euratom) No. 2343/2002 of 23 December 2002, as last amended by Commission Regulation (EC, Euratom) No. 652/2008 of 9 July 2008).

<sup>12</sup> Art. 185 Par. 1. "The Commission shall adopt a framework financial regulation for the bodies set up by the Communities and having legal personality which actually receive contributions charged to the budget. The financial rules of these bodies may not depart from the framework regulation except where their specific operating needs so require and with the Commission's prior consent."

## Implementing rules to the Staff Regulations

Agencies shall adopt implementing provisions for giving effect to the Staff Regulations and Conditions of Employment for other servants. Pursuant Article 110 of the Staff Regulations, agencies shall do so in agreement with the Commission. The implications of that provision for agencies are reflected in *fiche* 15.

## **2) Critical analysis of the issue at hand**

### Commission's institutional role and accountability

The Commission is often requested to take responsibilities in relation to agencies in a way which is not proportionate to its institutional role and influence in respect of agencies.<sup>13</sup>

The weight of the Commission is certainly relevant in many respects and it often takes place on an informal, operational basis<sup>14</sup>, well beyond its formal powers. However, other key actors also have an important say. In fact, the Commission's representation in the agencies' Management Boards is always a minority role, with a limited and uneven number of members across agencies, and in some cases its representatives do not have the right to vote. The directors of agencies are not accountable to the Commission, but to the Management Board and the discharge authority. In addition, the Commission's involvement in the preparation and adoption of agencies' work programmes, which is one important tool used by the Commission to exercise its supervision role, takes place in different ways, according to different arrangements, without any overall coherence. Finally, although the Commission plays an important role in the budgetary process of agencies, throughout the budgetary procedure, the final decision on the agencies' contribution charged in the general budget and establishment plan is taken by Parliament and Council; and the agency's Board is responsible for the final adoption of the agency's budget.

The above shows that, given the current agencies' governance and the importance of the functions exercised by other institutional actors, the common assumption that the Commission has a special, or even a main, responsibility for the activities of agencies must be seen as misplaced.<sup>15</sup> In this respect, it seems that the role of the Commission would greatly benefit from an overall clarification and, if necessary, harmonisation of its various powers towards both agencies and the other actors concerned. The Commission should be clearly accountable for activities over which it has authority, but cannot be held accountable for work over which its influence is heavily diluted. For those elements of agencies' operation for which the Commission has at least a part responsibility, a key aspect is to ensure that it has adequate monitoring and supervision mechanisms at hand (e.g. competencies linked to the agency's

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<sup>13</sup> Evaluation, Volume I, point 4.3.5

<sup>14</sup> For instance through Agencies' requests addressed to the Commission HelpDesk (Central Financial Service of DG Budget) – see also Fiche 16 – which increased very substantially in recent years, more than doubling from 102 to 229 requests between 2005 and 2009. In 2009, Agencies represent 26% of the HelpDesk activity, as compared to a mere 8% in 2005.

<sup>15</sup> Evaluation, Volume I, point 4.3.5

work programme, staff policy plans, implementation of the Financial Regulation and Staff Regulations, possible allocation of additional tasks), while respecting agencies' autonomy.

### Assistance provided to agencies

Experience shows that agencies often request stronger coordination among Commission services, notably concerning horizontal issues, in order to provide agencies with relevant and consistent assistance. The Commission has made efforts in this direction by setting up an inter-service network of desks responsible for agencies, which addresses issues of common interest, with a view to ensuring coherence. Furthermore, in 2008 an internal network of Commission representatives in the agencies' Management Boards was established, which proved to be a valuable tool to enhance consistency among Commission services on a number of horizontal issues, as well as to launch initiatives aimed at rationalising and streamlining the Commission's relations with agencies.

### Financial Regulation, budget and accounts

The Financial Regulation applicable to the EU budget, the Framework Financial Regulation (FFR) for EU agencies, as well as their implementing rules, provide for relevant control but also set administrative requirements, which sometimes hinder agencies' capacity to mobilize internal resources flexibly and are seen as unnecessarily rigid<sup>16</sup>. This problem is partly solved by using the available possibilities for derogation, with prior approval of the Commission, which have been further enhanced with the recent modification of the FFR<sup>17</sup>. Yet, some problems remain, also because the room for manoeuvre is far from being fully used. (*see also fiche 24*).

One of the advantages of agencies using the ABAC system provided by the Commission is that all updates concerning changes in the regulations, procedures or nomenclatures are done by the Commission, thus ensuring that the agencies' accounts will be accepted. However, the ABAC system could be further tailored to agencies' specificities (e.g. by creating new modules) in cooperation with agencies themselves.<sup>18</sup>

As regards the annual budgetary procedure, the Commission plays an important role in assessing agencies' needs, in particular in the preparation of the Draft Budget. This also applies to possible amending budgets or transfers modifying the EU budget contribution. Without prejudice to the ultimate responsibility of the agency, the Commission also plays a role in the implementation phase, in analysing agency cash needs on the basis of forecasts of revenue and expenditure which are coming from the agency, with a view to balancing agency budgets ("cash approach"). For more details in this regard, see fiches 20 and 22.

### Staff Regulations and implementing rules to the Staff Regulations

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<sup>16</sup> Experience shows that compliance burden diminishes with agency's age

<sup>17</sup> Commission regulation EC, EURATOM No 652/2008

<sup>18</sup> EP study on common support, point 3.1.2, p. 49-50

The application of the Staff Regulations produced advantages but also disadvantages. The advantages are those that derive from having the agencies' staff being part of a single European civil service with common rules being applied to all institutions and bodies. The disadvantage is that the Staff Regulations and the implementing provisions are not fully adapted to the reality of agencies. Further details can be found in *fiche 15*.

## Audit

The Commission's Internal Audit Service (IAS) is responsible for the internal audit function in all Agencies and Bodies (thereafter "Agencies") receiving a contribution from the EU budget, thus ensuring a professional, harmonised and independent approach to auditing the agencies. Since 2008, the IAS covers all Agencies annually on the basis of a risk based audit approach. The audits conducted by the IAS target all activities and processes of Agencies and aim to provide assurance and/or advice to the Executive Director and the Management Board. The internal audit resources (IAS) are free of charge for the Agencies as all costs (staff, mission expenses...) are currently financed by the Commission. The resource implications of this approach are becoming more acute: at a time when the Commission is committed to a freeze in staffing levels, there has been a significant rise in the rate of creation of agencies and bodies subject to internal audit by the Commission. However, it is hard to see how such a 'service', on the provision of which the agencies have no say, could be paid for by the agencies, especially when they have set up their own internal audit function.

Since 2009, the dissemination of the IAS audit reports is limited to Executive Director and the Management Board. When the Commission is a member of the Board of the Agency, it receives the IAS audit reports.

However, two serious problems remain on the ownership and use of audit information<sup>19</sup>: audit reports are insufficiently discussed and followed up in the Boards, and there is not an established instance to discuss an audit work at Management Board level (audit committees), as is the case in the Commission. For further details, see *Fiche n° 26*.

- 3) Possible solution(s) for addressing identified weaknesses**
- 4) Possible ways for implementing the viable solution(s)**

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<sup>19</sup> Evaluation, Volume I, point 3.7

<b>Parliament role</b>
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1) **State of play *de jure* and in practice**

**I. Introduction**

**European Parliament's role in the supervision of European agencies** is mainly governed by the provisions of the constituent acts, Article 185 of the Financial Regulation 1605/2002 applicable to the general budget, the Framework Financial Regulation 2343/2002, and by Parliament's internal rules and guidelines in force<sup>20</sup>. These have developed in practice and can be looked at through traditional Parliament's roles and prerogatives: co-legislator, arm of the budgetary authority, nomination power, political supervision, user of expertise.

**1. Co-legislator**

When it is co-legislator:

- Parliament can **create or prevent the creation** of a new agency, although it has never prevented the creation of an agency so far.
- Parliament can influence the scope of tasks, competencies, activities, objectives, structures and accountability mechanisms of agencies, including possible parliamentary supervision.

**2. Arm of the budgetary authority**

**a) Budget**

The Lisbon Treaty puts the two arms of the budgetary authority on equal footing, for the whole budget. This includes the EU contribution to the agencies and the establishment plans which from now on will have to be agreed upon by Parliament and Council at the latest in conciliation. Currently 25 agencies are (fully or partially) funded by the EU budget<sup>21</sup>.

- Since the 2006 Inter-institutional Agreement on **budgetary discipline** (Article 47), Parliament can ensure that no agency is created before an agreement on its funding is reached.
- The **budgetary procedure boosts bilateral contacts** between Parliament's Committees on Budgets and on Budgetary Control (BUDG/CONT) and the agencies (see their annual meeting with agencies), as well as between the specialised committees and the agencies in order to identify and clarify budgetary needs of the

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<sup>20</sup> Decision of the Conference of Presidents of 5 March 1998 concerning rules on the designation by the EP of members of the management board of the specialised agencies and bodies; Conference of Committee Chairs' "Guidelines on cooperation between the committees with competence concerning the decentralised Community agencies" of 14 July 1998; Rule 119 of the Rules of Procedures on requests to European Agencies.

<sup>21</sup> See, for more details, PDB 2010 Working Document III ("agencies"), COM (2009) 300.

agencies.

- In the annual budget procedure, by putting a certain amount of agencies' budget in **the reserve** (as it did so in 2007 and 2009), it can possibly contain the evolution of their cost but also impose extra information requirements. In accordance with Articles 23 and 24 of the Financial Regulation applicable to the general budget, the Commission has to send a request for lifting the reserve to BUDG. The reserve will only be released if BUDG agrees to such a request<sup>22</sup>.

## b) Discharge

The European Parliament, on a recommendation from the Council of the EU, gives the Commission a **discharge** for the implementation of the general budget pursuant to Article 319 TFEU . The discharge procedure applicable to the agencies' budget is laid down in the financial regulations and in the specific financial regulation of each agency<sup>23</sup>.

These rules require Parliament to give a discharge to the decentralised agencies which actually receive grants charged to the EU budget. CONT monitors the implementation of the EU budget by the agencies through the discharge procedure.

During the discharge procedure CONT may organise hearings with the agencies' directors or ask them to answer written questions. The directors of the agencies are required to submit to Parliament any information required for the smooth application of the discharge procedure. In addition, the directors of the agencies must act on Parliament's observations accompanying the discharge decisions. At Parliament's request, they shall report on the measures taken. CONT regularly follows up on these observations in the next discharge exercise.

Through the discharge exercise CONT regularly highlights accountability issues such as the need for the publication of performance indicators and for regular evaluation of the agencies by the Commission.

## 3. Nomination power

### a) Management Board

The rules and procedures for the **nomination of Management Board members**<sup>24</sup> of

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<sup>22</sup> Before releasing the reserve for the 2007 budget, BUDG required a positive evaluation of the specialised committees on the basis of agencies' work programmes; in this context, the Committee on Industry, Research and Energy (ITRE) required additional information from ENISA and GSA, and held an exchange of views with the Executive Directors in the frame of the ordinary committee meetings. Before considering releasing the reserve for the 2009 budget, the Committee on the Environment, Public Health and Food Safety (ENVI) required EFSA to provide evidence of full operability and efficient working methods; in this context, ENVI required additional information from EFSA, and held an exchange of views with the Executive Director in the frame of the ordinary committee meetings.

<sup>23</sup> Council Regulation (EC, Euratom) No 1605/2002 applicable to the general budget, Article 185(2); Commission regulation No 2343/2002 on the Framework Financial Regulation for the bodies referred to in Article 185 of the Financial Regulation applicable to the general budget, Articles 94-96

<sup>24</sup> Terminology differs, e.g. use of the term "Governing Board" (ETF) or "Administrative Council" (CPVO) instead of "Management Board".

regulatory agencies differ to a large extent<sup>25</sup>:

- The **number, as well as the composition** of Management Board members **differ** (for details, see *Fiche 5*).
- Parliament is **involved in the nomination process** of some (see below) members of the management boards of eight agencies (ACER, ETF, ECDC, EEA, EFSA, EMCDDA, EMEA, ECHA) which fall under the remit of four committees (LIBE<sup>26</sup>, EMPL<sup>27</sup>, ITRE and ENVI).
- Two members of ACER, EMCDDA, ECDC, ECHA, EEA and EMEA management board are **directly designated by the European Parliament**. For ETF, European Parliament appoints three non-voting experts to the "Governing Board". In addition, European Parliament is to be **consulted** in the nomination of all members of EFSA management board and of four specialist members of the EMEA management board.
- When negotiating EFSA's founding regulation, Parliament accepted to give up its nominees in the Management Board if the Member States dropped the usual practice of "one representative per Member State". **EFSA's board** is then composed of only **14 members** appointed by the Council in consultation with the European Parliament from a list drawn up by the Commission, plus a representative of the Commission.

Where the European Parliament is involved in the nomination of management board members<sup>28</sup>:

- As a principle, those members should never be "representatives" of the Parliament - in order not to commit *a priori* the EP in agencies' activities: they are **independent** and have no formal mandate.
- Committees may organise **hearings** of the candidates in order to select them and clarify Parliament's expectations.
- As the "**eyes and ears**" of Parliament, they constitute a valuable source of information for the competent committee (e.g. circulation of meeting documents, feedbacks).
- They may report about Parliament's positions inside the management board.
- They may be directly involved in EP's activities (e.g. presence or participation in hearings of experts, support to the organisation of a committee delegation to the agency).
- The more they are active in the board, the more they are a useful interlocutor for Parliament (for instance, the EP-nominee for the ECDC management board has been appointed vice chair of the management board).
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## **b) Executive Director**

Usually the Executive Directors<sup>29</sup> of the regulatory agencies are appointed by the

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<sup>25</sup> EUROFOUND shall transmit the rules of procedure of the Governing Board for information to the European Parliament.

<sup>26</sup> Committee on Civil Liberties, Justice and Home Affairs

<sup>27</sup> Committee on Employment and Social Affairs

<sup>28</sup> In relation to the following political approach see: "Decision of the Conference of Presidents of 5 March 1998 concerning rules on the designation by the EP of members of the management board of the specialised agencies and bodies".

<sup>29</sup> Terminology differs, e.g. "President" (OHIM) instead of "Executive Director".

management boards on the basis of a list of candidates proposed by the Commission. The founding acts of eleven agencies (ACER, BEREC, ETF, EFSA, ECDC, EMEA, ENISA, ECHA, EMCDDA, Gender Institute and FRA) however provide - with every time a comparable wording - that, before appointment, the candidate nominated by the Management Board shall be invited without delay to make a **statement before the European Parliament** and to answer questions put by members of this institution<sup>30</sup>. This presentation is generally without legal consequences except for the Director of the FRA where a so-called "**cooperation procedure**" is foreseen: on the basis of a list drawn up by the Commission, applicants are asked to address the Council and the competent EP committee. Parliament and Council then give their opinions and state their orders of preference, and the Management Board appoints the Director taking these opinions into account.

Parliamentary committees developed the practice to organize a formal **hearing** of the Executive Directors designated in order to give some political and parliamentary inputs to the nomination procedure. Recent examples show that the hearing is not purely ceremonial (e.g. hearing of the nominated ECHA's Executive Director or hearing of the newly appointed ENISA's Executive Director).

**Parliament can indirectly and informally influence** the nomination of an Executive Director when it has nominees in the Management Board.

#### c) Other agency bodies

Parliament also nominates two members of the Experts Forum of the Gender Institute and is consulted on the composition of the Scientific Committee of the FRA.

In some cases, European Parliament may also intervene in the nomination process of agency body members if this is not explicitly foreseen in the founding regulation but considered as being politically appropriate<sup>31</sup>.

## 4. Political supervision

Political supervision is based on practical arrangements between Parliament and the relevant agencies rather than on legal requirements:

- A general obligation to ensure **information flow** on a regular basis from the agencies to the relevant Committees in the Parliament;
- A "**standing rapporteur**" or "**contact person**" for agencies is appointed under the committee's responsibility (e.g. contact persons in ENVI for EMEA, EFSA, EEA, ECDC and ECHA, also ITRE opted to appoint standing rapporteurs for GSA and ENISA);
- Parliament administration gives a specific administrator the task of following-up one or several agencies;
- Sometimes Parliament formalises its relations to agencies through an **exchange of letters** (e.g. ENVI-EEA);

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<sup>30</sup> Some agencies have specific rules for reappointment of the Executive Director (e.g. FRA and ETF).

<sup>31</sup> In 2008, e.g., ENVI commented on the short list of candidates for the ECHA Board of Appeal.

- Parliament generally receives agencies' **work programmes and activity reports** which are most often drawn up on an annual basis, although some agencies provide longer programmes or more frequent reporting. Such information to Parliament can be an obligation stemming from the founding regulation or rather a voluntary practice<sup>32</sup>;
- Parliamentary committees **monitor** agencies' activities but can also **influence** the agencies' working agenda, notably by an annual discussion **with the Executive Directors**<sup>33</sup>;
- Committees may win additional influence by linking the presentation of the work programmes to the budgetary procedure; the specialised committee assesses the annual programme and send an **evaluation letter** to the BUDG Committee;
- Committees may obtain the creation of an extra budget line to allow an agency to start work on a given topic (e.g. OSHA on the implementation of health and safety regulations in the SMEs);
- The FRA's founding regulation provides for **Parliament's consultation** on its 5-year multi-annual framework (which is adopted by Council). Such provision resulted in a LIBE report and a plenary resolution on 17 January 2008 proposing a number of amendments. In addition, the framework must take into account the EP resolutions in the field of fundamental rights;
- **Parliamentary committees organise visits to agencies**. Since January 2008, the revised rules on travel by committee delegations has extended to all agencies the possibility to send, every two years, a three-member delegation outside the quota normally available for committee delegations. Committees tend to consider these committee delegations as an important way to keep a link with their agencies<sup>34</sup>.

## 5. User of agencies' expertise

Some founding regulations explicitly require agencies to provide the Community institutions with scientific or technical advice (e.g. EMEA, EFSA and ECHA), whereas other agencies' tasks are mainly focussed on data collection or comparable functions. Parliament may be a direct beneficiary of agencies' expertise:

- Parliament may use the information (e.g. **reports, studies, scientific opinions**) published by the agencies in the framework of its usual activities;
- **Parliament may submit requests** to agencies, where the founding regulation provides for it (e.g. EFSA and ECHA) and pursuant to the Article 119 of the Rules of Procedure. In practice, Parliament's requests are also expressed where it does not formally have this right, and they can be formulated in a different manner, for instance in the context of a debate on an agency's work programme (see point 4 above);
- **Executive Directors** may come to committee meetings for an **exchange of views** on a report published by their agency;
- Agency experts may be invited to address the committee during **hearings** or

<sup>32</sup> See, e.g. legal requirements for EU-OSHA and CDT to send annual reports on Agency's activities to the European Parliament.

<sup>33</sup> The Executive Director of EFSA may invite representatives of the European Parliament to take part in the work of the EFSA Advisory Forum.

<sup>34</sup> ITRE, e.g., visited ENISA with a delegation in 2008 when the legislative proposal on extending the mandate of the agency was being discussed in the committee in order to gather an in-depth view on the functioning of the agency. This delegation visit took place under the special quota set aside for visiting agencies.

**seminars** on a particular topic. They can also be invited to **brief a rapporteur** in the context of an ongoing parliamentary procedure;

- Individual MEPs may be associated to an agency's activity in specific circumstances (e.g. internal working groups on disease surveillance networks within the ECDC).

## 2) Critical analysis of the issue at hand

### Practical implementation of point 47 of the Inter-institutional Agreement on budgetary discipline: agency creation / modification – agreement on the financing

Point 47 of the Inter-institutional Agreement on budgetary discipline and sound financial management<sup>35</sup> foresees a procedure for the two arms of the budgetary authority (Parliament and Council) to assess the budgetary impact of the creation of new agencies and to arrive at a timely agreement on the financing of the agency, as proposed by the Commission.

The three Institutions have clarified the practical application of point 47 in a joint declaration in November 2009, by applying three procedural steps to arrive at agreement. Accordingly, the Commission has proposed to include the text of the joint declaration in the Inter-institutional Agreement on cooperation in budgetary matters<sup>36</sup>, as follows:

- ❖ Firstly, the Commission will systematically present any proposal for setting up a new agency to the first trilogue following the adoption of its proposal, and will present the financial statement accompanying the legal act proposing the creation of the agency and illustrate its consequences for the remaining period of the financial programming;
- ❖ Secondly, taking into consideration the progress made in the legislative process, and provided that each arm of the budgetary authority is in a position to take a stance on the financial consequences of the proposal in advance of the adoption of the legal act, the creation of the new agency will be placed on the agenda of a subsequent trilogue (in urgent cases, in simplified form), in view of reaching an agreement on the financing;
- ❖ Thirdly, the agreement reached during a trilogue will be confirmed in a joint declaration, subject to the approval by each arm of the budgetary authority in accordance with its own rules of procedure.

Such an approach would offset the current weaknesses with regard to this aspect of implementation of point 47 of the above mentioned IIA.

Point 47 of the above-mentioned Inter-institutional Agreement, taken literally, applies to the "creation of a new agency". However, a modification of the founding regulation of an existing agency may also have a budgetary impact, for instance when new tasks are added to the tasks initially assigned to the agency.

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<sup>35</sup> OJ C 139 of 14.6.2006.

<sup>36</sup> Draft Interinstitutional Agreement on cooperation in budgetary matters, COM (2010) 73 of 3.3.2010, point 21.

The joint declaration of Parliament and Council of 13 July 2007<sup>37</sup> refers, in the context of the Inter-institutional Agreement, explicitly to "the creation or modification of the scope of an agency".

However, the broader interpretation given to point 47 of the Inter-institutional Agreement in the joint declaration of 2007 has in practice not been applied systematically. In order to do so, the scope of the changes to the mandate of an agency which are required to trigger the procedure foreseen in point 47 would need to be clarified. In particular, it should be reflected whether in the future this procedure should also be applied to:

- All changes to the basic act;
- Extension of the mandate (= additional tasks) only, or also to a (geographic / thematic) shift of activities, or to a reduction of activities;
- Requests for additional posts for (partially) self-financed agencies, which are to be covered by additional revenue from fees, as a result of which no additional EU funding would be required;
- Requests for additional posts for EU funded agencies which do not see an extension of their mandate, for instance due to additional workload.

#### Budgetary procedure

Parliament's attitude in the context of budgetary procedure is described in fiche 22. It notably considers agencies initial budgetary requests to define its position and introduced the consideration of assigned revenue to determine the year's EU budget contribution, but for fee collecting agencies. The draft Parliament report on priorities for the 2011 Budget (voted in the March 2010 Plenary) suggests that Parliament's position on decentralised agencies will remain generally unchanged.

The decision to put part of agencies' budget in the reserve in 2007 and 2009 (see part 1) fits into the more general use that Parliament makes of reserves (also for the Commission, for example); that is, to use (part of) the appropriations foreseen for an agency as a leverage to obtain more information on a certain topic. However, the actual use of agency reserves has remained exceptional, limited to some individual cases.

One important modification introduced by the entry into force of the Lisbon Treaty is that the Parliament will not have the last say on agencies' budget any more, since it will have to agree on both former 'compulsory' and 'non compulsory' expenditure with the Council.

#### Discharge

The key role of the Parliament, as discharge authority acting on a recommendation from the Council, is clearly defined in the Treaty. As mentioned in fiche 28, however, the practice of giving discharge to (a growing number of) agencies individually does not always enable the Parliament to make an in-depth analysis of individual cases, beyond an examination of the Court's reports.

#### Parliament's information on agencies

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37 Joint statements, ECOFIN (Budget) Council of 13 July 2007, doc. DS 605/1/07 REV 1.

A general issue affecting the exercise of Parliament's roles towards agencies is the access to relevant and updated information on agencies. In this respect, information at Parliament's disposal is not always harmonized and of easy access. The grouping of all relevant documents on the inter-agency website would significantly facilitate the exercise of Parliament's prerogatives. See also fiche n°30.

### Nomination power

In cases where the European Parliament has to be consulted in the nomination process, the lists of candidates drawn up by the Commission tend to be too short to allow sufficient margin for manoeuvre for MEPs, although the founding acts foresee that such list "includes a number of candidates substantially higher than the number of members to be appointed".

**3) Possible solution(s) for addressing identified weaknesses**

**4) Possible ways for implementing the viable solution(s)**

**ANNEX I TO ANALYTICAL FICHE N°32**

	<b>EC, Euratom and EU decentralised agencies</b>	<b>Founding act</b>	<b>Contribution from EU budget</b>	<b>subject to separate discharge from EP</b>	<b>Codecision at the time of creation/revision</b>	<b>Seat</b>	<b>Responsible committee<sup>38</sup></b>	<b>Nominees in the Board</b>	<b>Involvement in the nomination of the Director</b>
1	European Centre for the Development of Vocational Training	10.02.1975	Yes	Yes	No/No	Thessalonique	EMPL*	-	No
2	European Foundation for the Improvement of Living and Working Conditions	26.05.1975	Yes	Yes	No/No	Dublin	EMPL*	-	No
3	European Environment Agency	07.05.1990	Yes	Yes	No/Yes	Copenhagen	ENVI*	2	No
4	European Training Foundation	07.05.1990	Yes	Yes	No/Yes	Turin	EMPL*	(3) ?	No
5	European Monitoring Centre for Drugs and Drug Addiction	08.02.1993	Yes	Yes	No/Yes	Lisbonne	LIBE*	2	Yes
6	European Medicines Agency	22.07.1993	Yes	Yes	No/Yes	Londres	ENVI*	2/(4) ?	Yes
7	Office for Harmonisation in the Internal Market	20.12.1993	No	No	No/No	Alicante	JURI*	-	No
8	European Agency for Health and Safety at Work	18.07.1994	Yes	Yes	No/No	Bilbao	EMPL*	-	No
9	Community Plant Variety Office	27.07.1994	No	No	No/No	Angers	AGRI*	-	No
10	Translation Centre for the Bodies of the European Union	28.11.1994	No	Yes	No/No	Luxembourg	-	-	No
11	Europol	18.07.1995 and 6 April 2009 <sup>39</sup>	No/ Yes <sup>40</sup>	No/Yes <sup>41</sup>	No	The Hague	LIBE*	1 <sup>42</sup>	No
12	Fundamental Rights Agency <sup>43</sup>	15.02.2007	Yes	Yes	No	Vienne	LIBE*	-	No
13	European Agency for Reconstruction <sup>44</sup>	05.12.2000	Yes	Yes	No/No	Thessalonique	AFET*	-	No

<sup>38</sup> Committee responsible as set out by Annex VI of the Rules of Procedure

<sup>39</sup> Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121, 15.5.2009, p. 37. This Decision applies as of 1 of January 2010.

<sup>40</sup> As from 2010.

<sup>41</sup> As from 2010

<sup>42</sup> As from 2010.

<sup>43</sup> European Monitoring Centre on Racism and Xenophobia prior to 28.02.2007.

<sup>44</sup> Due to end in 2008.

	<b>EC, Euratom and EU decentralised agencies</b>	<b>Founding act</b>	<b>Contribution from EU budget</b>	<b>subject to separate discharge from EP</b>	<b>Codecision at the time of creation/ revision</b>	<b>Seat</b>	<b>Responsible committee<sup>38</sup></b>	<b>Nominees in the Board</b>	<b>Involvement in the nomination of the Director</b>
14	European Police College	22.12.2000	Yes	Yes	No	Bramshill	LIBE*	-	No
15	European Institute for Security Studies	20.07.2001	No	No	No	Paris	AFET*	-	No
16	European Union Satellite Centre	20.07.2001	No	No	No	Madrid	AFET*	-	No
17	European Food Safety Authority	28.01.2002	Yes	Yes	Yes	Parma	ENVI*	-	Yes
18	Eurojust	28.02.2002	Yes	Yes	No	The Hague	LIBE*	-	No
19	European Maritime Safety Agency	26.06.2002	Yes	Yes	Yes	Lisbonne	TRAN*	-	No
20	European Aviation Safety Agency	15.07.2002	Yes	Yes	Yes	Cologne	TRAN*	-	No
21	European Network and Information Security Agency	10.03.2004	Yes	Yes	Yes	Héraklion	ITRE*	-	Yes
22	European Centre for Disease Prevention and Control	21.04.2004	Yes	Yes	Yes	Stockholm	ENVI*	2	Yes
23	European Railway Agency	29.04.2004	Yes	Yes	Yes	Valenciennes	TRAN*	-	Yes
24	European Global Navigation Satellite System Supervisory Authority	12.07.2004 <sup>45</sup>	Yes	Yes	No/No	Bruxelles (provisoire)	ITRE*	-	No
25	European Defence Agency	12.07.2004	No	No	No	Bruxelles	AFET*	-	No
26	European Agency for the Management of Operational Coordination at the External Borders of the Member States of the European Union	26.10.2004	Yes	Yes	No	Varsovie	LIBE*	-	No
27	Community Fisheries Control Agency	26.04.2005	Yes	Yes	No	Bruxelles (provisoire) - Vigo	PECH*	-	No
28	European Chemicals Agency	18.12.2006	Yes	Yes	Yes	Helsinki	ENVI*	2	Yes
29	Institute for Gender Equality	20.12.2006	Yes	Yes	Yes	Vilnius	FEMM*	-	Yes
30	European Agency for the Cooperation of Energy regulators	13.07.2009	Yes	Yes	Yes	Ljubljana	ITRE		
31	Body of European	25.11.2009	Yes	Yes	Yes	Riga	ITRE	-	Yes

<sup>45</sup> At the time of writing, EP, Council and Commission are close to a political agreement on the revision of the founding act, under co-decision. Adoption is expected to occur by summer 2010.

	<b>EC, Euratom and EU decentralised agencies</b>	<b>Founding act</b>	<b>Contribution from EU budget</b>	<b>subject to separate discharge from EP</b>	<b>Codecision at the time of creation/ revision</b>	<b>Seat</b>	<b>Responsible committee<sup>38</sup></b>	<b>Nominees in the Board</b>	<b>Involvement in the nomination of the Director</b>
	regulators for Electronic Communications (BEREC) and the Office								
32	Agency for the management of SIS II, VIS and EURODAC <sup>46</sup>								
33	European Support Office for Asylum <sup>47</sup>	19.05.2010	Yes	Yes	Yes	Valletta			Yes
33	European Banking Authority <sup>48</sup>								
33	European Insurance and Occupational Pensions Authority <sup>49</sup>								

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<sup>46</sup> COM (2009) 293

<sup>47</sup>

<sup>48</sup> COM (2009) 501

<sup>49</sup> COM (2009) 502

**ANNEX II TO ANALYTICAL *FICHE* N°32 (Extract from the European Parliament's Rules of Procedure)**

**Rule 126: Requests to European Agencies**

1. Where Parliament has a right to submit a request to a European Agency, any Member may submit such a request in writing to the President of Parliament. Such requests shall be on matters falling within the mission of the Agency concerned and shall be accompanied by background information explaining the issue and the Community interest.
2. The President shall, after consulting the committee responsible, either forward the request to the Agency or take any other appropriate course of action. The Member submitting the request shall be immediately informed thereof. Any request sent by the President to an Agency shall include a time limit for response.
3. If the Agency considers that it is unable to respond to the request as formulated, or seeks to have it modified, it shall inform the President forthwith, who shall take any appropriate action, after consulting the committee responsible as necessary.

**ANNEX III TO ANALYTICAL FICHE N°32**

**RULES ON THE DESIGNATION BY THE EUROPEAN PARLIAMENT OF MEMBERS  
OF THE MANAGEMENT BOARDS OF THE SPECIALISED AGENCIES AND BODIES  
DECISION OF THE CONFERENCE OF PRESIDENTS**

OF 5 MARCH 1998

**DECISION OF THE CONFERENCE OF PRESIDENTS**

OF 5 MARCH 1998<sup>50</sup>

PE339.471/BUR/Rev. 1

The Conference of Presidents,

- having regard to Rule 24(4) of the Rules of Procedure;

HAS DECIDED

**Article 1**

These rules shall be applicable where the regulation establishing a specialised agency or body provides that the European Parliament shall designate one or more members of the management board of the agency or body.

**Article 2**

(a) The European Parliament shall, according to the case, designate the full member(s) and alternate(s) provided for by the regulation setting up the agency or body.

(b) These persons shall be designated for the period specified by the regulation establishing the agency concerned or, where no period is specified, for three years. Their term of office shall be renewable.

**Article 3**

(a) The applications received from persons offering the qualifications required by the regulation establishing the agency or body and holding the nationality of one of the Member States shall be submitted to the committee responsible by a political group or 29 Members.

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<sup>50</sup> Consolidated by the Bureau on 3 May 2004 and amended by the Bureau on 14 January 2008.

**(b)** The committee responsible shall verify that the candidates actually fulfil the abovementioned conditions and that they are willing to accept the appointment. Candidates shall also disclose to the committee their financial or other interests in the area of activity of the agency or body and, where applicable, any incompatibility with other duties they may have taken up in activities in the same area. The committee responsible shall draw candidates' attention to the requirements of impartiality and independence which they will undertake to fulfil, where applicable, pursuant to Article 5(b) below<sup>51</sup>; it shall apprise them of Parliament's general guidelines with regard to the objectives and method of operation of the agency or body. Candidates may be given a personal hearing.

**(c)** The committee responsible shall, by a majority of its members, adopt a list, in the order of votes obtained, of persons eligible to be appointed full members and of persons eligible to be appointed alternate members. This list shall comprise a number of candidates, full members and alternates, equal to at least twice the number of posts to be filled.

#### **Article 4**

**(a)** The list thus adopted shall be forwarded, in the form of a letter accompanied by a standardised communication (see annex), to the President, who shall refer it to the Conference of Presidents. The Conference of Presidents may seek any relevant information it deems useful from the committee responsible.

**(b)** On the basis of the list proposed by the committee responsible, the Conference of Presidents shall, in accordance with Rule 23(3) of Parliament's Rules of Procedure, designate the full members and the alternate members.

#### **Article 5**

**(a)** The President shall inform the persons designated of Parliament's intention to appoint them to the management board of the agency or body.

**(b)** He shall draw their attention to the range of responsibilities inherent in these duties and shall ask them to give a written undertaking to carry out these duties impartially and independently of any private body or public authority throughout their term of office. He shall also draw their attention to Parliament's general guidelines with regard to the objectives and method of operation of the agency or body.

**(c)** On receipt of the above-mentioned undertaking, the President shall, on behalf of Parliament, officially designate the persons to serve as full members of the management board of the agency or body and their respective alternates.

**(d)** The President shall inform the chairman of the management board of the specialised agency or body concerned of these appointments.

#### **Article 6**<sup>52</sup>

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<sup>51</sup> At its meeting of 11 September 1997 the Conference of Presidents decided that the persons designated shall be external experts and not Members of the European Parliament.

<sup>52</sup> Article 6(d) was amended following the Bureau decision of 14 January 2008.

(a) A regular exchange of information may take place between Parliament and the persons designated.

(b) These persons may be invited by the committee responsible to inform it of the activities of the agency or body on which they serve; they may also be requested to submit a report.

(c) Where the persons designated travel to one of Parliament's places of work at the invitation of the committee responsible or of another Parliament body, their travel and subsistence expenses shall be reimbursed by the European Parliament in accordance with the arrangements applicable to hearings of experts and subject to a maximum of two journeys per year for each designated person. Such visits shall not be included in the quota of experts who may normally be invited by the committee concerned to attend its hearings.

(d) Pursuant to paragraph 2a of Article 2 of the rules governing travel by committee delegations outside the places of work of the European Parliament<sup>53</sup>, every two years each committee shall be authorised to send, during weeks set aside for external parliamentary activities and for a maximum of three days, a delegation consisting of three members to the agencies for which it is responsible within the meaning of Annex VI to the Rules of Procedure. These delegations shall not be taken into account when calculating the quota referred to in Article 2(1) of the said rules.

### **Article 7**

The persons designated shall refrain from any act incompatible with or prejudicial to the exercise of their mandates. The Conference of Presidents may withdraw the mandate from any person who fails to fulfil the obligations of his office or violates the principles of impartiality or independence. The person concerned shall be given a prior hearing.

### **Article 8**

The decisions of the Conference of Presidents in the implementation of these rules shall be final.

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<sup>53</sup> PE 352.673/BUR./Rev3 - Rules governing travel by committee delegations outside the three places of work of the European Parliament.

## ORIENTATIONS

### **relatives à la coopération entre les commissions ayant des compétences**

#### **touchant aux organes décentralisés de la Communauté**

Au cours de sa réunion du 14 juillet 1998, la conférence des présidents de commission a adopté les orientations ci-après à l'effet de faciliter l'échange d'informations entre les commissions ayant des compétences différentes en ce qui concerne les organes décentralisés et de contribuer à l'amélioration de l'efficacité du contrôle parlementaire. Ces orientations ne se substituent pas au règlement, pas plus qu'elles ne prennent le pas sur celui-ci.

1. Les commissions qui participent au contrôle des agences peuvent nommer un rapporteur permanent et/ou des représentants pour chaque agence et jouent un rôle d'interlocuteur vis-à-vis de l'organe concerné. Chaque commission veille à l'échange d'informations.
2. Tous les deux ans, la commission compétente envoie une délégation d'un maximum de trois membres en visite auprès de l'agence concernée, pour contrôler ses activités.
3. Les commissions veillent à assurer la transparence, au sein du Parlement, sur toutes les questions de forme touchant aux agences. Si une commission reçoit des informations officielles, la visite officielle de représentants d'une agence ou d'autres services concernés ou si elle inscrit à son ordre du jour des problèmes relatifs aux agences, elle veille à ce que les autres commissions concernées en soient informées. Les documents reçus peuvent être consultés par toutes les commissions intéressées, y compris la commission institutionnelle, sur la base d'une liste de documents diffusée à intervalles réguliers.
4. Les commissions font le nécessaire, au niveau interne, pour examiner avec les représentants des agences l'exécution du programme d'activité de l'année en cours et le projet de programme pour l'année suivante. Les rapporteurs permanents et/ou les représentants de la commission des budgets et de la commission du contrôle budgétaire sont invités à participer à ces réunions.
5. Les rapporteurs permanents et/ou les représentants des commissions concernées sont invités à assister aux réunions qu'organise, le cas échéant, la commission des budgets avec les directeurs d'agence ou leurs représentants au sujet des aspects budgétaires et administratifs des activités des agences, dans la perspective du budget de l'exercice suivant (et vice versa).
6. Les états prévisionnels des agences sont transmis à l'autorité budgétaire, accompagnés des pièces justificatives (projet de programme d'activité, organigramme, justification des augmentations de la subvention, etc.), ainsi qu'aux commissions.
7. Les commissions compétentes peuvent émettre un avis préliminaire sur l'avant-projet de budget et un avis sur le projet ainsi que proposer des amendements, sur la base de l'évaluation des programmes d'activité des agences et des priorités politiques.

8. Avant que la commission des budgets adopte sa recommandation pour la première lecture du budget, le rapporteur général et le rapporteur sur les agences communiquent leurs positions respectives aux commissions spécialisées.

9. Dans le cas où des crédits sont inscrits en réserve, le rapporteur général sur le budget informe la(les) commission(s) concernée(s) de la demande de virement concernant la libération des crédits inscrits en réserve. Cela s'applique aussi lorsque sont proposés des transferts entre lignes ou à destination ou à partir d'une ligne relative à une agence. La commission ou ses rapporteurs permanents et/ou représentants peut/peuvent émettre un avis sur la demande de virement, lequel est dûment pris en considération. La position de la commission est communiquée en temps utile à la commission des budgets et à la commission du contrôle budgétaire, pour que celles-ci puissent respecter les délais prévus à l'article 26 du règlement financier.

10. Les commissions peuvent émettre un avis à l'intention de la commission du contrôle budgétaire sur la rentabilité des agences, à la lumière d'une analyse de l'exécution du programme d'activité.

11. La commission du contrôle budgétaire évalue la rentabilité des agences dans le cadre de la procédure de décharge.

<b>Council role</b>
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### 1) State of play *de jure* and in practice

The Council's role in the supervision of regulatory agencies is mainly governed by:

- The provisions of the agencies' constituent acts;
- Article 185 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities<sup>54</sup>;
- Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002, as last modified by Commission Regulation (EC, Euratom) No 652/2008 of 9 July 2008, on the framework Financial Regulation for the bodies referred to in Article 185 of the above-mentioned Council Regulation (EC, Euratom) No 1605/2002<sup>55</sup>.

The Council supervises agencies in its role of co-legislator and budgetary authority, as well as by exercising its nomination power and political supervision.

#### Legislator

The Council decides on the creation of agencies, on its own or together with the European Parliament. In fact, fourteen former 1<sup>st</sup> pillar agencies were created on the basis of a Council act, while ten former 1<sup>st</sup> pillar agencies were established through the co-decision procedure. All former 2<sup>nd</sup> pillar agencies were created by a Council Joint Action. Two of the former 3<sup>rd</sup> pillar agencies - EUROJUST and CEPOL - were created on the basis of a Council Decision, whereas EUROPOL was established on the basis of the Council Act drawing up the convention based on Article K.3 of the Treaty on the European Union. However, on 1 January 2010 the new legal basis of EUROPOL - a Council Decision - became applicable.

#### Budgetary authority

The agencies' estimates of revenue and expenditure are forwarded by the Commission to the European Parliament and the Council (the budgetary authority) together with the preliminary draft budget of the European Union. The budgetary authority authorises the appropriations for the contribution to the agencies and the establishment plan for the agencies.

The Council receives also the report on the budgetary and financial management for the financial year, as well as the final accounts of an agency with the Management Board's opinion.

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<sup>54</sup> OJ L 248, 16.09.2002, as last amended by Council Regulation (EC) No 1525/2007 of 17 December 2007, OJ L 343 of 27.12.2007, p. 9

<sup>55</sup> OJ L 357, 21.12.2002

### Discharge authority

Article 185(2) of the Financial Regulation foresees that discharge for the implementation of the budget of the agencies is given by the European Parliament, on recommendation of the Council.

### Nomination power

Concerning former first pillar agencies, in three cases<sup>56</sup> the Management Board includes representatives of all Member States who are appointed by the Council. The Management Boards of three agencies<sup>57</sup> includes members who either do not represent the Member States or represent some of them on a rotating basis and are appointed by the Council.

The Management Board of former 2<sup>nd</sup> pillar agencies (EDA, EUSC, ISS) is chaired by the High Representative of the Council, while the Management Board of two former 3<sup>rd</sup> pillar agencies (CEPOL and EUROPOL) is chaired by the representative of the Member State holding the Presidency of the Council of the EU. Instead, the President and the Vice-Presidents of the College of EUROJUST are elected among the national members of the College for a term of office of three years, irrespective of which Member State is holding the presidency of the Council.

Further details on the composition and designation of the Management Board can be found in Fiche 5.

In three agencies<sup>58</sup>, the Council appoints and dismisses the Director and deputy-directors upon a proposal of the Commission or of the Management Board. The Council exercises also disciplinary authority over them. In addition, the Council approves the rules regarding the selection of candidates for the post of Director of CEPOL.

Further details on the appointment and dismissal of the Director can be found in Fiche 7.

### Political supervision

The Council alone or together with the European Parliament, depending on the decision-making procedure, decides on the review of the agency's founding regulation on the basis of a proposal from the Commission. The revision can pertain to the agency's operating rules, its objectives, mandate and functions, as defined in the founding regulation.

The Council receives the annual and, where existent, the multi-annual work programme of the agencies. In addition, the Council approves the annual work programme of CEPOL and the multi-annual framework of FRA.

The Council receives the annual activity report of the agencies and the report on future activities of EDA and EUROPOL.

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<sup>56</sup> CEDEFOP, EU-OSHA, EUROFOUND

<sup>57</sup> ACER, EFSA, EIGE

<sup>58</sup> CPVO, OHIM, EUROPOL

The constituent acts of some agencies give the Council the right to ask at any time for a hearing of the Director on any subject related to the agency's activities and invite the Director to report on the carrying out of his/her tasks.

At present, in the case of EDA the Council adopts the agency's specific financial regulation indicating, in particular, the detailed rules for drawing up, amending and implementing the budget and for monitoring its implementation, as well as for the manner of payment of financial contributions by the Member States.<sup>59</sup> In the case of EUSC and ISS the Council gives its assent for the agency specific financial regulation.

The Council approves the rules of procedure of EUROJUST and EUROPOL on a proposal from the College and the Management Board respectively. The provisions of the rules of procedure which concern the processing of personal data can be the subject of separate approval or modification by the Council.

The Council can set up guidelines for EDA and lays down priorities for EUROPOL, on a recommendation by the Management Board. In addition, it can also instruct EUROPOL to deal with certain issues.

In the case of former 3<sup>rd</sup> pillar agencies dealing with personal data (EUROJUST and EUROPOL), the Council approves the implementing rules for personal data files, in particular the categories of personal data, and provisions concerning the security of the personal data concerned, as well as the internal supervision of their use. The Council can also determine general rules concerning exchange of personal data.

At present, in four cases<sup>60</sup> the Council adopts the agency's staff regulation, following the Management Board's opinion.<sup>61</sup>

For agencies operating in the field of Common Foreign Security Policy, the Council exercises political supervision over the activities of the agencies, without impinging on their independence in carrying out research and seminar activities.

## **2) Critical analysis of the issue at hand**

### Council's institutional role

The Council has been playing an increasing role on regulatory agencies over the years. First of all, many of the agencies were created at the request of the Council in order to deal with specific tasks in certain policy areas. In addition, the seat of the new agencies was always chosen by the Council as a political decision, rather than on the basis of objective criteria. Concerning the functioning of agencies, it is worthwhile noting that Member States (not the Council as such) have played an important role through their representatives in the agencies' boards, although their actual degree of involvement has varied (see also fiche 6).

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<sup>59</sup> In the case of EUROPOL, according to the new Council Decision establishing the European Police Office, which will enter into force on 21 January 2010, the Management Board will adopt these rules, after consulting the Commission.

<sup>60</sup> EDA, EUSC, ISS, EUROPOL

<sup>61</sup> In the case of EUROPOL, according to the new Council Decision establishing the European Police Office, which will enter into force on 21 January 2010, the Management Board will adopt the agency's staff regulations, on a proposal from the Director and after seeking agreement from the Commission.

Practical implementation of point 47 of the Inter-institutional Agreement on budgetary discipline: agency creation – agreement on the financing

Point 47 of the Inter-institutional Agreement on budgetary discipline and sound financial management<sup>62</sup> foresees a procedure for the two arms of the budgetary authority (Parliament and Council) to assess the budgetary impact of the creation of new agencies and to arrive at a timely agreement on the financing of the agency, as proposed by the Commission.

In the past, the application of point 47 has not led to an in-depth discussion of the multi-annual impact of the creation of new agencies, which in turn has meant that the budgetary implications of the creation of new agencies have had to be solved during the respective annual budgetary procedures (and still less the cumulative impact of the creation of agencies over the years).

The three Institutions have recently clarified the practical application of point 47 in a joint declaration in November 2009, by applying three procedural steps to arrive at agreement. Accordingly, the Commission has proposed to include the text of the joint declaration in the Inter-institutional Agreement on cooperation in budgetary matters<sup>63</sup>, as follows:

- ❖ Firstly, the Commission will systematically present any proposal for setting up a new agency to the first trilogue following the adoption of its proposal, and will present the financial statement accompanying the legal act proposing the creation of the agency and illustrate its consequences for the remaining period of the financial programming;
- ❖ Secondly, taking into consideration the progress made in the legislative process, and provided that each arm of the budgetary authority is in a position to take a stance on the financial consequences of the proposal in advance of the adoption of the legal act, the creation of the new agency will be placed on the agenda of a subsequent trilogue (in urgent cases, in simplified form), in view of reaching an agreement on the financing;
- ❖ Thirdly, the agreement reached during a trilogue will be confirmed in a joint declaration, subject to the approval by each arm of the budgetary authority in accordance with its own rules of procedure.

Point 47 of the above-mentioned Inter-institutional Agreement, taken literally, applies to the "creation of a new agency". However, a modification of the founding regulation of an existing agency may also have a budgetary impact, for instance when new tasks are added to the tasks initially assigned to the agency.

The joint declaration of Parliament and Council of 13 July 2007<sup>64</sup> refers, in the context of the Inter-institutional Agreement, explicitly to "the creation or modification of the scope of an agency".

However, the broader interpretation given to point 47 of the Inter-institutional Agreement in the joint declaration of 2007 has in practice not been applied systematically. In order to do so, the scope of the changes to the mandate of an agency which are required to trigger the procedure foreseen in point 47 would need to be clarified. In particular, it should be reflected whether in the future this procedure also be applied to:

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<sup>62</sup> OJ C 139 of 14.6.2006.

<sup>63</sup> Draft Interinstitutional Agreement on cooperation in budgetary matters, COM (2010) 73 of 3.3.2010, point 21.

<sup>64</sup> Joint statements, ECOFIN (Budget) Council of 13 July 2007, doc. DS 605/1/07 REV 1.

- All changes to the basic act;
- Extension of the mandate (= additional tasks) only, or also to a (geographic / thematic) shift of activities, or to a reduction of activities;
- Requests for additional posts for (partially) self-financed agencies, which are to be covered by additional revenue from fees, as a result of which no additional EU funding would be required;
- Requests for additional posts for EU funded agencies which do not see an extension of their mandate, for instance due to additional workload.

### Budgetary procedure

Council attitude in the framework of the budgetary procedure is described in fiche 22. The Council conclusions on the budget guidelines for 2011 urge the Commission to continue to take into account agencies' unused appropriations when establishing the Draft Budget (see fiche 22), as well as to carefully check, and if necessary revise, the requirements of funds and posts as proposed by the agencies. Council's position on 2011 budget consisted in applying standard flat rate abatement on the budget and staff increases proposed by the Commission in its Draft Budget, depending on the agency's stage in its life cycle.

### Discharge authority

The role of Council to recommend to Parliament whether or not to give discharge to an agency is clearly defined in the Treaty. In addition, the Council's discharge recommendation to the Commission generally contains specific paragraphs on agencies. These cover in particular a reminder of the role of Commission and Member States representatives in the agencies' boards, especially on over-budgeting and staffing issues.

### **3) Possible solution(s) for addressing identified weaknesses**

### **4) Possible ways for implementing the viable solution(s)**