1) State of play \textit{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;
- 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\(^3\).

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 toward 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 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\(^4\).

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.

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\(^1\) OJ L 248, 16.09.2002  
\(^3\) OJ L 56, 04.03.1968  
\(^4\) 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
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 1st 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\(^5\), in others the annual work programme is adopted after receiving the Commission's opinion\(^6\), while in two cases the Commission agreement is necessary before an annual work programme can be approved\(^7\). 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.

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\(^8\) have to receive the Commission's opinion before adopting the multi-annual staff policy plan\(^9\). 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.

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\(^5\) ACER, EAR, EFSA, EIGE, ETF, EU-OSHA, CEPOL

\(^6\) 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

\(^7\) CEDEFOP, EUROFOUND

\(^8\) 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.

\(^9\) See Fiche 23 on the process of adopting a multi-annual staff policy plan.
Examination of legality

In the case of four agencies\(^\text{10}\), 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 EU 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 EU contribution or to the authorised establishment plan to the budgetary authority, entered in a draft amending budget\(^\text{11}\).

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 its 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

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\(^{10}\) CEDEFOP, ECDC, EU-OSHA, EUROFOUND

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 EU contributions, the rules defined in the agency specific financial regulation have to be consistent with the Commission Regulation (EC, Euratom) No 2343/2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 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 as he/she does in respect of Commission departments". For further information on internal audit, please refer to Fiche 26.

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. In particular, the Commission is often requested to take "remedial" action without having the actual competence to do so (see fiche 28).

The weight of the Commission is certainly relevant in many respects and it often takes place on an informal, operational basis, 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

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12 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."

13 Evaluation, Volume I, point 4.3.5

14 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.
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. 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, while preserving agencies' autonomy. The Commission should be clearly answerable 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 work programme, staff policy plans, implementation of the Financial Regulation and Staff Regulations, possible allocation of additional tasks).

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. 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. 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

15 Evaluation, Volume I, point 4.3.5
16 Experience shows that compliance burden diminishes with agency's age
17 Commission regulation EC, EURATOM No 652/2008
ABAC system could be further tailored to agencies' specificities (e.g. by creating new modules) in cooperation with agencies themselves.\textsuperscript{18}

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.

\textbf{Staff Regulations and implementing rules to the Staff Regulations}

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 \textit{fiche} 15.

\textbf{Audit}

The Commission’s Internal Audit Service (IAS) is responsible for the internal audit function in all Bodies (including 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 given the significant rise in the rate of creation of agencies and bodies subject to internal audit by the Commission.

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\textsuperscript{19}: 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 \textit{Fiche} n° 26.

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\textsuperscript{18} EP study on common support, point 3.1.2, p. 49-50
\textsuperscript{19} Evaluation, Volume I, point 3.7
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