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;

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 1st pillar agencies were created on the basis of a Council act, while ten former 1st pillar agencies were established through the co-decision procedure. All former 2nd pillar agencies were created by a Council Joint Action. Two of the former 3rd 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 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.

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\(^3\) 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\(^4\), 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.

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\(^5\) the Management Board includes representatives of all Member States who are appointed by the Council. The Management Boards of three agencies\(^6\) 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 2nd pillar agencies (EDA, EUSC, ISS) is chaired by the former Secretary General/High Representative of the Council (now High Representative of

\(^3\) OJ C 139 of 14.6.2006.


\(^5\) CEDEFOP, EU-OSHA, EUROFOUND

\(^6\) ACER, EFSA, EIGE
the Union for Foreign Affairs and Security Policy). The Management Board of CEPOL is chaired by the representative of the Member State holding the Presidency of the Council of the EU, while the Chairman of Europol's Management Board is selected by and from within the group of three Member States who have jointly prepared the Council’s eighteen-month programme. 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 7, 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.

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. 8 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.

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7 CPVO, OHIM, EUROPOL
8 In the case of EUROPOL, according to the new Council Decision establishing the European Police Office, which applies since 1 January 2010, the Management Board will adopt these rules, after consulting the Commission.
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 3rd 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 cases⁹ the Council adopts the agency's staff regulation, following the Management Board's opinion.¹⁰

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 European Council or Council on the basis of political decisions for which no detailed justification is provided.

The Council is centrally involved when the basic regulation is discussed. When an agency is established, the Council's role is limited. In a few agencies the Management Board includes members appointed by the Council¹¹ (see also fiche 5)

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).

**Practical implementation of point 47 of the Inter-institutional Agreement on budgetary discipline: agency modification – budgetary impact**

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 2007¹² refers, in the context of the Inter-institutional Agreement, explicitly to "the creation or modification of the scope of an agency".

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⁹ EDA, EUSC, ISS, EUROPOL  
¹⁰ In the case of EUROPOL, according to the new Council Decision establishing the European Police Office, which applies since 1 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.  
¹¹ ACER, EFSA, EIGE, CEDEFOP, EU-OSHA and EUROFOUND  
¹² Joint statements, ECOFIN (Budget) Council of 13 July 2007, doc. DS 605/1/07 REV 1.
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**

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. To some extent, however, this points to a lack of coordination within Member States: the Council urges the Commission to scrutinise the requests of agencies' Boards, which are mostly composed of Member States' representatives. However, Member States' representatives in agencies' boards have a different responsibility than the members of the Budget Committee of the Council, the COREPER or the ECOFIN. While Member States' representatives have a direct responsibility towards the agency, the role and responsibility of the Council is of a much higher level. Therefore it is logical - and probably even sound - that Member States representatives do not always act in line with the Council's position.

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. As mentioned above, this to some extent points to a lack of coordination within Member States, in regard to the role of Board members, but is also due to different responsibilities.