



**L-Università
ta' Malta**

**PROGRAMMING OBLIGATIONS OF EUROPEAN AGENCIES: AN
EFFECTIVE INSTRUMENT FOR THE EUROPEAN COMMISSION
TO EXERCISE CONTROL?**

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Abstract

The prevailing view in academic literature highlights the independence of European agencies as the rationale for their creation. Contrary to this perception, this work demonstrates that the Commission exercises considerable control through its opinions on an agency's Single Programming Document.

Being part of the budgetary procedure, European agencies are obliged to draw up a 'Single Programming Document' comprising an annual and multiannual work programme together with corresponding planning of human and financial resources. Based upon performance-budgeting principles, the Framework Financial Regulation (FFR) hereby sets out detailed rules on the programming procedure and defines the Commission's role in this respect. Apart from proposing the number of contributions from the EU budget, the Commission has the competence to give its opinion on an agency's draft single programming document. To examine the Commission's exercise of control, the European Border and Coast Guard Agency (Frontex) and the European Chemicals Agency (ECHA) were part of the case study. For both agencies, the draft single programming documents for the years 2019-2021 were analysed and compared with their final programming version. It was noticed that the Commission's comments frequently appear as instructions rather than recommendations and that the majority of their requests were observed by the agency.

To establish the Commission's role in a broader context, its opinions are analysed in terms of their content and quality of comments. Hereby, it is noticed that the Commission's role depends on external factors and is thus a flexible one. Acting mainly as a legal supervisor, the Commission also addresses efficiency-related aspects and ensures that policy directions are properly considered in the programme. Several instances are noted where the Commission pursues its own interests that are outside the scope of the programme procedure. Even though, it exercises considerable powers over an agency's programming content, the relationship between the Commission and European agencies is not yet comparable with ministry-agency constellations found at the nation-state level.

Nevertheless, it is regarded that the Commission transgresses its competences as its opinions go beyond the limited scope of the Framework Financial Regulation. Possible legislative improvements are discussed in the last chapter of this work. It concludes that the Treaties lack an appropriate basis for the adoption of secondary legislation that regulates the programming procedure comprehensively. Therefore, Treaty amendments are required in addition to secondary EU legislation that sanctions today's programming practice. Suggestions for legislative proposals are made to this end.

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Regulation (EU) 2019/128 of the European Parliament and of the Council of 16 January 2019 establishing a European Centre for the Development of Vocational Training (Cedefop) and repealing Council Regulation (EEC) No 337/75 [2019] OJ L30/90

Regulation (EU) 2019/473 of the European Parliament and of the Council of 19 March 2019 on the European Fisheries Control Agency (EFCA) [2019] OJ L83/18

Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council [2019] OJ L122/1

Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast) [2019] OJ L158/22

Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (recast) [2019] OJ L169/45

Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1

Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/355/EU, Euratom [2020] OJ L424/1

Council Regulation (EU, Euroatom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L433 I/11

Definitive Adoption (EU, Euratom) 2021/417 of the European Unions general budget for the financial year 2021 [2021] OJ L93/1

List of Abbreviations

ABB	Activity-Based Budgeting
ABM	Activity-Based Management
ACER	Agency for the Cooperation of Energy Regulators
AFSJ	Area of Freedom, Security and Justice
BEREC	Body of European Regulators for Electronic Communications
BEREC Office	Office of the Body of European Regulators for Electronic Communications
BPC	Biocidal Products Committee
BPR	Biocidal Products Regulation
CdT	Translation Centre for the Bodies of the European Union
Cedefop	European Centre for the Development of Vocational Training
CEPIC	The European Chemical Industry Council
CEPOL	European Police Office
CHESAR	Chemical Safety Assessment and Reporting tool
CJEU	Court of Justice of the European Union
CLP	Classification, Labelling and Packaging
GNSS	Global Navigation Satellite Systems
CoRAP	Community Rolling Action Plan
CPVO	Community Plant Variety Office
DG	Directorate General (European Commission)
EASA	European Aviation Safety Agency
EASO	European Asylum Support Office
EBA	European Banking Authority
EBCG	European Border and Coast Guard
EC	European Community
ECDC	European Centre for Disease Prevention and Control
ECHA	European Chemicals Agency
EDA	European Defense Agency
EEA	European Environment Agency
EEAS	European External Action Service
EEC	European Economic Community
EFCA	European Fisheries Control Agency
EFSA	European Food Safety Authority
EFSF	European Financial Stability Facility
E.g.	For example
EIGE	European Institute for Gender Equality
EIOPA	European Insurance and Occupational Pensions Authority
EMA	European Medicines Agency
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMSA	European Maritime Safety Agency
ENES	Exchange Network on Exposure Scenarios
ENISA	European Network and Information Security Agency

ePIC	Prior Informed Consent IT system
ERA	European Railway Agency
ESA	European Supervisory Authority
ESDC	European Security and Defence College
ESMA	European Securities and Markets Authority
ETF	European Training Foundation
ETIAS	European Travel Information and Authorisation System
EU	European Union
eu-LISA	Agency for the operational management of large-scale IT systems in the Area of Freedom, Security and Justice
EU-OSHA	European Agency for Safety and Health at Work
EUIPO	European Union Intellectual Property Office
Eurofound	European Foundation for the Improvement of Living and Working Conditions
Eurojust	European Union's Judicial Cooperation Unit
Europol	European Police Office
FR	Financial Regulation
FFR	Framework Financial Regulation
FRA	Fundamental Rights Agency
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
FTE	Full-time Equivalent
GSA	European GNSS Agency
IGC	Intergovernmental Conferences
IIA	Inter-institutional Agreement
IP Chem	Information Platform for Chemical Monitoring
IUCLID	International Uniform Chemical Information Database
JHA	Justice and Home Affairs
JPSG	Joint Parliamentary Scrutiny Group
LFS	Legislative Financial Statement
MB	Management Board
MSCA	Member States' Competent Authorities
OECD	Organisation for Economic Co-Operation and Development
OHIM	Office for Harmonisation in the Internal Market
OJ	Official Journal
OLAF	European Anti-Fraud Office
OUP	Oxford University Press
PBT	Persistent, Bioaccumulative and Toxic
PIC	Prior Informed Consent
POP	Persistent Organic Pollutants
RAC	Committee on Risk Assessment
REACH	Registration, Evaluation, Authorisation and Restriction of Chemicals
SEA	Single European Act

SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SCIP	Substances of Concern In articles as such or in complex objects (Products)
SEAC	Committee for Socio-economic Analysis
SME	Small and Medium-sized Enterprises
SO	Specific Objective
SPD	Single Programming Document
SRB	Single Resolution Board
SRM	Single Resolution Mechanism
SVH	Substance of very high concern
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Chapter 1: Introduction

1.1 Introduction

Increasingly, the EU legislature confers executive tasks on European agencies.¹ The process of *agencification* began to proliferate at the beginning of the 90th and was noticeable not only in respect of the number of European agencies established but also in terms of the powers conferred on them. Today, 35 European agencies cover a wide range of policy areas, including for example financial supervision, safety-related aspects such as the authorisation of medical and chemical products, aviation safety, and border and coast guard functions. Hereby, the quality of agencies' powers has expanded from mainly information-gathering and other assistance functions to genuine decision- and quasi rule-making competences. Furthermore, today European agencies operate in policy areas that have high political relevance. Most noticeably, this is in the area of freedom, security and justice where the European Border and Coast Guard Agency (Frontex) is responsible for the implementation of the European integrated border management. In charge of the operability of a standing corps and the acquisition of its own technical equipment, contributions from the EU's general budget amount to an incredible EUR 575 million in 2021.²

Thus, European agencies have become 'an established part of the way the EU operates'³ and the need for the EU to resort to agencies is 'beyond question'.⁴ However, even though the evolution of agencies is considered as one of the most significant developments in the institutional structure of the EU,⁵ they are not

¹ In this work, the term European agencies, EU agencies, decentralised agencies and agencies are used interchangeably.

² Commission 'Draft General Budget of the European Union for the financial year 2021' (Working Document Part III) COM (2020) 300 final, p. 23 and pp. 33-34

³ Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies of 19 July 2012 (Common Approach on European agencies), p. 1

<https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf> accessed 23 June 2021

⁴ M. Everson and E. Vos, 'European Agencies: What About the Institutional Balance?' (2014), Maastricht Faculty of Law Working Paper No.4, p.4 <

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2467469> accessed 23 June 2021

⁵ F Coman-Kund, *European Agencies as Global Actors* (Routledge 2018) p.1

recognised as an EU institution and neither is a comprehensive framework on European agencies established. Instead, agencies are either founded upon sector-specific provisions of the Treaty on the Functioning of the European Union (TFEU) or based upon Article 114 TFEU.⁶

In light of its unstable institutional setting, controversial views on its nature and how control over them is exercised have subsequently accompanied the agencification process. Established as supranational bodies under EU law, Member States retain influence in the agency's governance through their membership of the management board. Because of its hybrid nature, agencies are neither viewed as purely supranational nor as intergovernmental entities but considered to embody a three-dimensional understanding of the EU administration. Resulting from this perception, no clearly defined principal-agent structure can be established.⁷ The Commission being responsible for the exercise of executive functions under the Treaties is from its institutional setting closest to European agencies,⁸ but its role as a supervisor of agencies is seen to be controversial. The Commission is regarded as being too politicised to function as an independent supervisor and it has also been noted that agencies themselves prefer to liaise directly with the European Parliament in order to protect their independence from the Commission.⁹ Moreover, agencies are supposed to be independent of direct influence which precludes measures of ongoing control by the Commission.¹⁰

However, contrary to the agency's perceived independence, the Commission exercises considerable influence in the course of an agency's programming procedure. An agency's programme is the primary document where an agency establishes its strategic objectives and programmes the activities for the coming year accompanied by a proposal of the human and financial resources required. Thus, the

⁶ Frontex, for example is founded upon Articles 77(2)(b) (d) and Article 79(2)(c) TFEU

⁷ R Dehousse 'Delegation of Powers in the European Union: The Need for a Multi-Principals Model' (2008) 31(4) *West European Politics*, 789-805, p. 801

⁸ Article 17 para 1 TEU

⁹ F Jacobs, 'EU Agencies and the European Parliament', in *European Agencies in between Institutions and Member States*, eds. M. Everson, C. Monda and E. Vos (Kluwer Law International, 2014) 201-228, at p. 204

¹⁰ M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 13 447-468, p. 454

programme is not only important for accountability purposes as it provides the basis for the activity report but is also linked to the budgetary procedure of the agency. For agencies that receive contributions charged to the Union budget, the programming requirements set out under the Framework Financial Regulation (FFR) have to be observed.¹¹ In May 2019, a revised Framework Financial Regulation entered into force which intensified the agency's programming obligations. Now titled as the 'Single Programming Document', it requires detailed information to be provided by the agency in the programming document.¹²

This work presumes that the Commission is capable of exercising considerable control over an agency's programming content to an extent that goes beyond legal and budgetary aspects. In formal terms, the competence of the Commission is limited to the provision of an opinion on the agency's draft Single Programming Document but the fact that it is also in the position to propose an agency's budget indicates agencies' dependence on the Commission's approval.¹³ Also, the Framework Financial Regulation obliges an agency to provide adequate explanations in case it does not fully take into account the Commission's opinion and any updated versions of the Single Programming Document shall 'notably reflect the Commission's opinion and the outcome of the annual budgetary procedure'.¹⁴

To explore how intensively the Commission influences an agency's programming content, Frontex and the European Chemicals Agency's (ECHA) Single Programming Documents of 2019-2021, 2020-2021 and 2021-2023 were examined in accordance with the procedural sequences of its adoption: These are that the agency sets up a draft programme which is sent to the Commission that comments on it through its opinion. 'Taking into account' the Commission's opinion, the agency then adopts its final programme. Without anticipating its results, the cases-study reveals the strong

¹¹ Presently, only four European agencies are fully self-financed: These are the European Union Intellectual Property Office (EUIPO), the Community Plant Variety Office (CPVO), the Single Resolution Board (SRB) and the Translation Centre for Bodies of the European Union (CdT)

¹² Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council [2019] OJ L122/1 (Framework Financial Regulation)

¹³ Articles 32 (7) and 33 (2) FFR

¹⁴ Articles 32 (7) and (9) FFR

position of the Commission. Frequently, comments have appeared as instructions rather than opinions and addressed not only programmed activities but also an agency's strategic direction. The fact that in most instances agencies have followed these requests indicates that the Commission is in the position to exercise a kind of 'factual power' that goes beyond the competences explicitly conferred on the Commission by legislation.

That the Commission exercises control over agencies that are not explicitly covered by its legislative mandate leads to a lack of transparency of the programming procedure and possibly to arbitrary decisions. Against this background, the aim of this work is not limited to proving that the Commission exercises control over agencies and to establish its extent but also to make suggestions on how the factual powers the Commission exercises could be incorporated into EU legislation. To this end, the research topic of this work is to investigate whether

'Programming obligations of European Agencies are an effective instrument for the Commission to exercise control and to make suggestions how the factual powers exercised by the Commission should be incorporated into EU legislation'.

No work has addressed the agency's programming obligations and the Commission's role therein. Therefore, this work aims to fill the gap of knowledge in the academic literature and also explores the relationship between the Commission and agencies from a broader constitutional perspective. By establishing that the Commission is capable of exercising control over agencies, this work challenges the perceived independence of agencies which is understood to exclude measures beyond accountability purposes. It also has repercussions on the institutional balance of the European Union as control of the Commission might lead to an imbalance in respect of the interests other EU institutions (and the Member States) have in European agencies. Thus, by demonstrating that agencies are controlled at the supranational level, the prevailing view of a three-dimensional image of agencies is relativized. Consequently, this work takes the view that agencies facilitate the development of a more direct EU administration. To underline the urgency for a legal framework that

governs the relationship between the Commission and agencies, the final chapter discusses whether this relationship already converges towards a ministry-agency kind of relationship and makes suggestions for legislative improvements to this end.

The structure of this work is as follows: Chapter 1 comprises a literature review, an examination of the legal- and institutional framework relevant for agencies and the methodology of this work. Chapter 2 establishes the theoretical background of this work; apart from examining agencies' programming obligations (2.3.), it assesses activity-based budgeting and management principles which are held to be crucial for an understanding of today's pattern of EU administration (Section 2.2.).¹⁵ Furthermore, in light of agencies' financial dependence on the EU budget, the budgetary procedure and the Commission's influence in determining an agency's budget is examined (Section 2.4).

Chapter 3 (for Frontex) and chapter 4 (for the European Chemicals Agency) comprise the case studies of this work. Despite, certain differences in the structure of the programming document, a common pattern is adopted in order to facilitate comparability of the results. Apart from its respective legal and policy context, the agency's Single Programming Documents for three consecutive years are analysed in respect of the topics addressed (3.4.2. and 4.4.2.), followed by a quality-focused analysis of the Commission's opinions (3.4.3. and 4.4.3.) and the degree of the agency's compliance in its final programmes (3.4.4. and 4.4.4.). Chapter 5 evaluates the findings of the case study from a broader perspective. Here, it is established what impact the findings of the case study have on the perceived independence of agencies and how the Commission's exercise of control affects the institutional balance of the European Union (5.4.). In this context, it is also discussed whether the relationship converges towards a ministry-agency kind of relationship (5.5.). This chapter finally examines whether the Commission transgresses its competences under the present legal (Treaty) framework and makes suggestions for legislative improvements (5.6.).

¹⁵ P Craig, *EU Administrative Law* (8th edition OUP 2016), p. 35

1.2. Literature Review

While European agencies have attracted significant academic attention, studies that specifically address their programming obligations are almost non-existent. Apart from the few contributions outlined below, academic contributions usually have a wider scope and address how the evolution of European agencies 'contributes to the transformation of the EU's political-administrative order'.¹⁶ This discussion is embodied under the conceptual images of agencies, the rationale for its creation, the question of how agencies should be controlled and how agencies affect the institutional balance of the European Union.

Even though, an agency's programme is deemed as 'one of the most important documents for the agency on all accounts as it sets out which activities will develop in the coming period',¹⁷ even larger works on European agencies or EU administrative law consider agency's programming obligations in only one or two pages.¹⁸ Chamon acknowledges from an autonomy perspective that 'it is highly relevant to ascertain which procedure applies to the adoption of the work programme and which actors are involved' but does not address the Commission in this respect.¹⁹ Hofmann, Rowe and Türk consider that the adoption of the agency's work programme 'often provides the Commission with an opportunity to incorporate its views into it'.²⁰ With reference to some founding Regulations of agencies, they also note that the Commission is sometimes entitled to object to the programme, the agency then being obliged to re-examine it and adopt the programme possibly amended.²¹ As this work presumes that the powers exercised by the Commission go beyond those explicitly covered by

¹⁶ M Egeberg and J Trondal, 'Researching European Union Agencies: What have we learnt (and where do we go from here)?' *Journal of Common Market Studies* (2017) 55(4) 675-690 (675)

¹⁷ M Chamon, *EU Agencies Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016) p. 82

¹⁸ M Chamon *ibid*; M Busuioic, *European Agencies: Law and Practice of Accountability* (Oxford University Press, 2013); H Hofmann, G Rowe and A Türk, *Administrative Law and Policy of the European Union* (Oxford University Press, 2013); P Craig, *supra* n 15

¹⁹ *ibid*

²⁰ Hofmann, Rowe and Türk, *supra* n. 18, p. 302

²¹ *ibid.*: This refers to the Regulations of the European Maritime Safety Agency (EMSA), the European Agency for Railway (ERA) and the European Fishery's Control Agency (EFCA). These, however, exemptions and the Framework Financial Regulation does not envisage an objection right for the Commission.

EU legislation, Craig's remark is interesting. He briefly addresses the Commission's capability to influence the agency's work programme and notes that 'empirical evidence indicates that the formal legal provisions are an imperfect guide as to the extent of the Commission's influence over the agency work programme'.²² Hofmann, Rowe and Türk take a similar viewpoint, noting that 'written primary law establishes a significant, but incomplete basis for framing and assessing the legality of administrative activity in the EU' as powers might be exercised without an explicit legal basis.²³ Even though Busuioc does not specifically address the agency's programming obligations, she acknowledges the Commission's advantageous position to propose an agency's budget and its power to exercise ongoing control through evaluation reports.²⁴ Curtin, on the other hand, highlights the budgetary competence of the European Parliament's role and its 'ultimate power' to discharge an agency's budget.²⁵

That academic contributions on agencies' programming are scarce might raise the impression that a 'blind eye' is turned on the consideration that the Commission is capable of controlling agencies. This, however, is not the case: the question of what role the Commission should play in the governance of agencies has always accompanied scholarly discussions on the rationale for creating agencies and their nature. These can be described under three conceptual images.

1.2.1. Conceptual Images of European Agencies

Three conceptual images describe the possible variations of 'governance dynamics within and among EU agencies'.²⁶ The first one is the *intergovernmental* image of European agencies: the fact that competences are conferred on agencies (and not on the Commission) serves as proof for the unwillingness of the Member States to enlarge the EU's prerogatives in terms of administrative competences.²⁷ Also, the fact

²² Craig, *supra* n 15, pp. 164-165

²³ Hofmann, Rowe and Türk *supra* n 18 p. 71

²⁴ M Busuioc, *supra* n 18 p. 102-103;

²⁵ D Curtin, 'Holding (Quasi-) Autonomous EU Administrative Actors to Public Account' (2007) 13(4) *European Law Journal*, 523-541 (p. 539)

²⁶ M Egeberg and J Trondal, *supra* n 16 p.676

²⁷ C Bickerton, D Hodson and U Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2015) *Journal of Common Market Studies*, Vol. 53 No 4, pp. 703-722 (713)

that competences conferred on agencies were previously exercised at the national level serves as proof for its intergovernmental image²⁸ as well as the fact that agencies frequently evolve from transnational networks and committee structures.²⁹ It is thus presumed that agencies' powers are delegated from national governments who have 'a strong intergovernmental strand to their governance structure that facilitates Member States control and prevents "mission creep"'.³⁰ That national governments insist on exercising control over European agencies becomes visible in their representation on the agency's management board.

By contrast, under the *supranational image*, European agencies are regarded as integral components of the EU administration. European agencies are thus 'instruments of centralisation of regulatory functions at the Union level' and for uniform implementation at the national level.³¹ In particular, Hofmann, Rowe and Türk promote the idea that European agencies are supranational bodies when they note that 'agencies undertake these decentralised functions not as autonomous and independent bodies, but rather by providing a unitary administrative framework within which they integrate, usually through committees, a network of national and supranational bodies'.³² These authors also attribute an important role to the Commission in respect of administrative activities conducted at European level and emphasise on the Commission's function as the 'central executive body'.³³ Their close collaboration with agencies is highlighted in this respect citing that they 'generally work in conjunction with, and indeed as part of or for, the Commission so that the timing of their activities is also closely related to that of the Commission'.³⁴

A similar view take Egeberg and Trondal, who note 'a move from a multilevel polity based on indirect administration towards a polity characterized by somewhat more

²⁸ R Dehousse, *supra* n 7, p. 793

²⁹ E. Vos, 'European Agencies and the Composite EU Executive', in *European Agencies in between Institutions and Member States*, eds. M. Everson, C. Monda and E. Vos (Kluwer Law International, 2014) 11-45, p. 23

³⁰ R Kelemen & A Tarrant, 'The Political Foundations of the Eurocracy' (2011) *West European Politics*, 34:5, 922-947 (929); C Bickerton, D Hodson and U Puetter *supra* n 27 p. 714

³¹ G Majone, *Dilemmas of European Integration* (Oxford University Press 2005), p. 97

³² Hofmann, Rowe and Türk *supra* n 18, p. 241

³³ *ibid*, p. 30

³⁴ *ibid*

direct administration`.³⁵ In terms of its governance, agencies `find themselves closer to the Commission than to any other institution or actor`.³⁶ Also, agencies themselves `tend to lean more towards the Commission than to any other potential master`.³⁷ Recent observations of these authors conducted from an organisational approach perspective even indicate that the institutional environment in which the Commission and agencies operate is similar to ministry-agency relationships found at the national level.³⁸

Even authors who do not directly advocate the supranational image of agencies make concessions to this end. Buess, for example, notes that the members of the management board do not necessarily act as national representatives but are much more independent and less accountable to their particular governments than expected.³⁹ Similarly, Chiti remarks that the representation of the Member States on the management board mainly reflects `the functional need to compensate for the shift of competences from the Member States to the European Union`.⁴⁰ In light of the prohibition to confer discretionary powers on agencies, Everson notes that `European Agencies might as a consequence never be fully independent. They must instead remain within the administrative domain of organs such as the Commission`.⁴¹

With regard to the alert/warning system established under the Common Approach,⁴² Vos remarks that the political responsibility for agencies' acts might point towards an `embryonic ministerial` responsibility of the Commission.⁴³ Also, Chamon

³⁵ M Egeberg and J Trondal, *supra* n 16 p. 684

³⁶ *ibid* p. 676

³⁷ *ibid*, p. 684

³⁸ M Egeberg, J.Trondal and N. Vestlund, `The quest for order: unravelling the relationship between the European Commission and European Union agencies`, (2015) 22(5) *Journal of European Public Policy*, 609-629 (614)

³⁹ M Buess, `European Union agencies and their management boards: an assessment of accountability and demoi-cratic legitimacy` (2015) 22(1) *Journal of European Public Policy* 94-111 (106)

⁴⁰ E. Chiti, `Is EU Administrative Law Failing in Some of Its Crucial Tasks?` (2016) 22(5) *European Law Journal* 576-596 (591)

⁴¹ M Everson, `Independent Agencies: Hierarchy Beaters?` (1995) 1(2) *European Law Journal* 180-204 (197)

⁴² Paragraph 59 Common Approach on European Agencies, *supra* n 3 1; The Common Approach is a non-binding interinstitutional agreement on the role and position of the agencies in the EU's institutional landscape, the creation, structure and operation of these agencies, together with funding, budgetary, supervision and management issues.

⁴³ E. Vos, *supra* n 29 p. 32

acknowledges that the Common Approach introduced the idea that it is the Commission that provides a link between the agency and the Council and Parliament.⁴⁴ He remarks that the agencification process has placed the Commission in a defensive position and predicts that the Commission will attempt to advance new practices that are more congenial to its interest and subsequently try to codify them.⁴⁵ Finally, his suggestions on how to incorporate a Treaty provision on agencies consider that ‘agencies come under the Commission’s natural authority’ and thus suggests locating such a provision within the section of the TFEU that deals with the Commission.⁴⁶

Between these contrasting views of either intergovernmental or a supranational image, the majority of academics still endorse a *three-dimensional* understanding of European agencies. Agencies are considered to embody a political compromise between the preservation of national sovereignty and the necessity for administrative integration: created as supranational bodies and permanently established under EU public law through secondary legislation, they are endowed with their own legal personality.⁴⁷

On the other hand, its organisational structure allows for a strong ‘intergovernmental’ participation with the representation of the Member States on the management board considered to be the key feature of the decision-making organ’s composition.⁴⁸ Also, that agencies not only assist EU institutions but also the Member States is regarded as an indication of their hybrid nature.⁴⁹ Against this background, agencies can neither be viewed from a purely intergovernmental perspective nor regarded as Communitarian ‘instruments of centralisation of regulatory functions at the Union level’.⁵⁰ Instead, agencies are described as ‘floating’ between these intergovernmental and supranational levels of governance,⁵¹ or that

⁴⁴ Chamon *supra* n 17 pp. 125-126

⁴⁵ *ibid*

⁴⁶ *ibid* p. 380

⁴⁷ This is how Chamon defines EU agency; *ibid* p. 10

⁴⁸ M. Busuioc, *supra* n. 18 p. 78, E. Vos, *supra* n. 29 p. 24

⁴⁹ E. Vos *ibid*

⁵⁰ G Majone, *supra* n 31 p. 97

⁵¹ M. Egeberg and J. Trondal, ‘Agencification of the European Union Administration: Connecting the Dots’ (2016), TARN Working Paper No.1/2016

they embody a 'three-dimensional understanding of the European administrative space' which has developed through 'a gradual de-territorialisation of the exercise of public power in the EU'.⁵² Similar to this three-dimensional perception of agencies, Chamon regards the process of agencification as an 'atypical form of administrative integration since the typical form would be further reliance on direct administration by the Commission or the Council'.⁵³

1.2.2. The Rationale for its Creation

The enthusiasm for European agencies cannot be fully explained with the expansion of the Union's competences because a direct correlation between new powers conferred by the Treaties and the creation of new agencies has rather been the exemption. Instead, most agencies have been established on an ad hoc basis in response to specific problems that had arisen in a policy area that required coordinated administrative action at the supranational level.⁵⁴ In some instances, scandals have preceded their creation, as was the case with the predecessor of the European Medicines Agency,⁵⁵ the European Food Safety Authority⁵⁶ and the European Maritime Safety Agency.⁵⁷ More recent examples are the three European Supervisory Authorities (ESAs), established in 2010 with the purpose to strengthen the regulatory control over the banking and financial service sector. Its background was the financial crisis of 2008 that exposed the shortcomings of a solely nationally based supervisory model and called for a more integrated European supervision of the banking and financial sector.⁵⁸

⁵² H. Hofmann, 'Mapping the European administrative space' (2008) 41(4) *Western European Politics* 662-676 (663)

⁵³ Chamon, *supra* n 17 p. 51

⁵⁴ R Dehousse 'Regulation by networks in the European Community: the role of European agencies' (1997) 4(2) *Journal of European Public Policy* 246-261, p. 246

⁵⁵ The Committee on Proprietary Medicinal Products was established in 1975 in response to the Thalidomide scandal through Council Directive EEC/75/318 and subsequently the European Medicines Evaluation Agency (EMA) by Council Regulation EEC/2309/93.

⁵⁶ EFSA was established through Regulation (EC) No 178/2002 in response to the BSE crisis

⁵⁷ EMSA was established through Regulation (EC) No 1406/2002 after the accident of the oil tanker Erika had occurred in 1999.

⁵⁸ For example, Recital (1) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L331/12

The Treaty of Rome established the European Economic Community (EEC) with the primary objective to create a common market amongst its Member States. Apart from negative integration rules, since then harmonisation measures have been the main vector of Community intervention.⁵⁹ In this regard, harmonisation was (and is) primarily understood as a legislative exercise leaving it to the national authorities to decide on the form and method on how harmonisation directives are to be implemented.⁶⁰ However, the expectation that disparities between national administrative practices would approximate over time without the intervention of the European Court of Justice, did not prove true.⁶¹ Since the mid-1970s, the Court of Justice has played an important role in delineating the boundaries of what is now Article 34 TFEU.⁶² The *Cassis de Dijon* case in particular,⁶³ where the Court obliged the Member States to mutually recognise lawfully produced and marketed products of another Member State, fostered the development of an integrated administration at the EU level for the following reason: mutual recognition meant in practice that administrative and legislative decisions of one Member State could develop `trans-territorial` effects throughout the European Community.⁶⁴

This in turn raised the awareness of the Member States that closer cooperation for implementing Community policies was desired to prevent that different regulatory policies distorting the competition between the Member States' products.⁶⁵ Network structures between the Member States evolved to this end. These were valuable for an exchange of views amongst the Member States, but less sufficient `to bring about a true community of views, let alone a community of action`.⁶⁶ European agencies also rely on networks, `both inside and outside their formal institutional structure

⁵⁹ R. Dehousse *supra* n 54 p. 247

⁶⁰ *Ibid* p. 248

⁶¹ This is an observation made by the Court of Justice in Case 178/84 *Commission v Germany* ('Reinheitsgebot') [1987] EU:C:187:126 para 32

⁶² The first judgment delivered in this regard was *Dassonville* where the Court established that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions", Case 8/74 *Procureur du Roi v Dassonville* [1974] EU:C:1974:82

⁶³ Case 128/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECLI:EU:C:1979:42 para 14

⁶⁴ H. Hofmann *supra* n 52, p. 665

⁶⁵ R. Dehousse *supra* n 54 p. 250

⁶⁶ *ibid*, p. 254

with national authorities, experts, and /or stakeholders` involved,⁶⁷ but their advantage is that `common rules, which lay down the rights and duties of all members` are solidly established under an agency`s founding Regulation.⁶⁸

Like network and comitology structures, European agencies are regarded as a `subsidiary-friendly alternative` to the complete conferral of implementing powers on the Commission.⁶⁹

In this regard, European agencies are described as `a compromise between the functional need for the supply of more regulatory capacity at the European level and the Member States` reluctance to transfer executive authority to the European Commission`.⁷⁰

They are meant to foster administrative integration amongst the Member States but do not replace national authorities as they primarily facilitate its cooperation.⁷¹ For the Member States, European agencies have the advantage that influence over its governance is retained through its representation on the management board.⁷² Moreover, scientific committees, composed of experts from national authorities, foster the achievement of credible policy commitments detached from short-term political considerations.⁷³ The conferral of power on agencies is also meant to allow the Commission to concentrate on its core tasks, even though, instances are known where the Commission regarded the creation of agencies as the `second-best option

⁶⁷ E. Vos `European Agencies and the Composite EU Executive` in Everson M, Monda C and Vos E (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014) 11-47 (12)

⁶⁸ Dehousse *supra* n 54, p. 254

⁶⁹ M. Chamon, `Agencification In The United States And Germany And What The EU Might Learn From It` (2016) 17(2) *German Law Journal* 119-152, p. 120

⁷⁰ E. Chiti, `An Important Part of the EU`s Institutional Machinery: Features, Problems and Perspectives of European Agencies`, *Common Market Law Review* 46 (2009) 1395-1442, p. 1398

⁷¹ A Kreher `Agencies in the European Community- a step towards administrative integration in Europe` (1997) 4(2) *Journal of European Public Policy* 225-245, p. 228

⁷² H. Hofmann, G Rowe, A. Türk *supra* n 18, p. 286 with reference to A. Kreher, *ibid* p. 242

⁷³ G. Majone `The regulatory state and its legitimacy problems` (1999) 22(1) *West European Politics* 1-24, p. 4

after it had realised that national governments were unwilling to enlarge the Commission's prerogatives'.⁷⁴

From a functional rationale perspective, it is held that European agencies increase the effectiveness of the EU administrative governance through its technical expertise, 'allowing the Commission to focus on its core tasks'.⁷⁵ Its independence from direct political influence is meant to enhance the credibility and legitimacy of the decisions taken.⁷⁶ Finally, the representation of the Member States on the management board facilitates coordination and collaboration between the Member States which enhances the efficiency of administrative governance at the national level. Even more pertinent is the political rationale for creating agencies. As noted by Busuioc, 'a central rationale for agency creation is the need to remove these areas from political interventions, guided by short-termism, to ensure credible policy commitments'.⁷⁷

1.2.3. Oversight over Agencies: Beyond Accountability

Within democratic systems, the principal-agent model of delegation is employed to ensure that any delegation of administrative power is, in the final analysis, traceable to the democratically elected parliament as the superior source of legitimacy.⁷⁸ In parliamentary democratic systems, 'the bureaucracy can be depicted as a part of a clear chain-of-command extending from the people to the parliament to the government to the bureaucracy'.⁷⁹ Governmental ministries function as a bond between the parliament and the public administration: they are responsible for the actions of their subordinated administrative body before the parliament, but in turn 'they have the power to direct and control the work of those under their command'.⁸⁰

⁷⁴ D. Curtin and R. Dehousse, 'European Agencies: Tipping the Balance', in Busuioc M, Groenleer M and Trondal J (eds) *The Agency Phenomenon in the European Union* (Manchester: Manchester University Press, 2013), 193-205, p. 195 with reference to the creation of the European Food Safety Authority (EFSA).

⁷⁵ M. Busuioc *supra* n 18,, p. 24

⁷⁶ G Majone, *supra* n 73, p 4

⁷⁷ M. Busuioc *supra* n 18, p. 114

⁷⁸ D. Curtin and R. Dehousse, *supra* n 74, p. 200

⁷⁹ F. Bignami, 'From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law' (2011) 59(4) *American Journal of Comparative Law*, 859-907, p.881

⁸⁰ *ibid*

In the presidential system of the United States, the principle-agent model is also employed but constructed differently as administrative powers are directly delegated from Congress to the Independent Regulatory Agencies.⁸¹

The principle-agent model in its standard form cannot directly be applied to the political system of the EU as there is no clearly defined principle-agent structure.⁸² From an intergovernmental perspective of the European Union, the Member States are regarded as the main principals especially because the tasks being delegated to agencies may be those previously exercised by the Member States at national level.⁸³ Under the Communitarian image, on the other hand, the EU institutions, exercising their legislative powers, can be regarded as principals of the agencies as well as the Commission, which for the sake of 'the unity and integrity of the executive function', traditionally has considered itself as the principal of European agencies at the supranational level.⁸⁴ As agencies are neither purely intergovernmental nor supranational entities but are rather 'floating in-between' these levels, it is held that agencies are governed by 'multiple principals'⁸⁵ which is prominently featured in the composition of its management board, where, with few exceptions, all Member States are represented, as well as one or more representatives of the Commission, and exceptionally also representatives of the European Parliament.

The existence of multiple principals involved in its governance bears the question of how agencies are controlled. In the literature, there is a strong tendency to emphasise the notion of *ex post* accountability rather than on instruments of *ex ante* and ongoing control for two reasons. The first reason is that accountability as defined by Bovens, who regards accountability as 'a relationship between an actor and a forum in which the actor has the obligation to explain and justify his or her conduct, the forum can pose questions and pass a judgement, and the actor may face consequences',⁸⁶ does not depend on a delegation relationship but potentially refers

⁸¹ R. Dehousse *supra* n 7, p. 790

⁸² *ibid*

⁸³ D. Curtin *supra* n 25, p. 525

⁸⁴ Commission 'The operating framework for the European Regulatory Agencies' COM (2002) 718 final, p. 2

⁸⁵ R. Dehousse, *supra* n 7, p. 801

⁸⁶ M Bovens, *supra* n 10, p. 450

to any kind of accountability forum.⁸⁷ In this regard, accountability does not depend on a specific principal-agent structure but allows for multiple accountability forums which reflects the composite nature of agencies. The second reason is that especially the notion of ongoing control implies the right of the principal to command the agent which seems to contradict the requirement for the independence of an agency from political influence.⁸⁸ This right to command can involve very proactive means of directing the conduct of the agent, for example through orders, directives, financial incentives or laws and regulations.

However, accountability, again as defined by Bovens, has limited scope for the following reasons:⁸⁹

First, Bovens definition of accountability requires three stages to be fulfilled cumulatively. It requires in the first stage an obligation for the actor to inform the forum about his or her conduct. In the second stage, the forum must have the right to question the actor who in turn must be answerable to the forum. In the third stage, which Bovens regards as an indispensable element of accountability, the forum must have the power to impose sanctions upon the actor.⁹⁰ This last element is problematic as it arguably contradicts the presumed advantage of accountability, which is to safeguard an agency's independence. Furthermore, this narrow definition of accountability excludes methods aimed to enhance 'good governance' as these methods lack the possibility to impose sanctions.⁹¹ In particular, openness, transparency and participation, as envisaged under Article 11 of the Treaty on European Union (TEU), are excluded from Bovens definition, even though they are

⁸⁷ D Curtin and M Egeberg, 'Tradition and innovation: Europe's accumulated executive order' (2008) 31(4) *West European Politics*, 639-661, p 653

⁸⁸ M Busuioc *supra* n 18, p. 53

⁸⁹ E. Chiti *supra* n 40, p.590

⁹⁰ M Bovens, *supra* n 10, p. 451 with reference to R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Pelgrave, 2003) and K Strom, 'Parliamentary Democracy and Delegation', in K. Strom *et al.* (eds) *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press, 2003), pp.55-106, p. 62

⁹¹ M Bovens, *supra* n 10, p. 450; M Busuioc, *supra* n 18, p. 45

considered to `embrace a participatory understanding of democracy` for the EU's executive rule-making procedures.⁹²

Secondly, accountability is in its nature retrospective, which excludes *ex ante* and ongoing instruments from the concept of control.⁹³ Regarding accountability of agencies, the mechanisms in place are manifold and, depending on the type of forum, have to be rendered within different actor-forum relationships. For example, the director is obliged to present an annual report to the management board for assessment which is then submitted to the Court of Auditors, to the Parliament and Council and the Commission.⁹⁴ Under the budgetary discharge procedure, the EU Parliament is responsible for giving its approval to how the EU budget for a specific year has been implemented. Also, judicial accountability is an important means to exercise *ex post* control as agency's acts, which have legal effect vis-à-vis third parties, can be challenged under Article 263 TFEU. Nevertheless, the notion of control over agencies cannot be reduced to an accountability dimension. It does not reflect the reality of how agencies are controlled as an `intriguing mix of control and accountability mechanisms` is already operative.⁹⁵ For example, *ex ante* control is exercised by the EU legislature which decides on the creation of an agency and determines in its founding Regulations the tasks of an agency, its powers, and the accountability obligations such agency must render. Also, the appointment of an agency's director, who is elected by the management board based on a shortlist drawn up by the Commission, can be regarded as a measure of *ex ante* control.⁹⁶

Compared with *ex ante* and *ex post* control, the exercise of ongoing control over agencies is more controversial as `it implies a decrease in the original mandated discretion of the agent to accomplish the delegated tasks and implicitly, its decision-making autonomy`.⁹⁷ Ongoing control thus bears a possible conflict with the

⁹² D Curtin, H Hofmann and J Mendes `Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda` (2013) 19(1) *European Law Journal*, 1-21, p. 5

⁹³ M Bovens, *supra* n 10, p. 454: "Accountability is a form of control but not all forms of control are accountability mechanism"

⁹⁴ Paragraph 49 of the Common Approach on European agencies, *supra* n 3

⁹⁵ E Vos, *supra* n 29, p. 34

⁹⁶ Paragraph 16 of the Common Approach on European agencies, *supra* n 3

⁹⁷ M Busuioc, *supra* n 18, p. 51; similar D Curtin, *supra* n 25, p. 525: "Ongoing control by the principal will restrict or eliminate the agent's discretion"

independence of an agency. Furthermore, the absence of a clear principal-agent structure raises the question of who should be primarily responsible for the exercise of ongoing oversight over agencies and what instruments should be available for this purpose.

From the side of the Member States, ongoing control is primarily exercised through its representation on the management board, the main governing body of an agency. The tasks of the management board are, *inter alia*, to provide the general orientation for the agency's activities and to exercise the disciplinary authority of the director. Also, the Commission is represented on the management board as well as, exceptionally, the European Parliament.⁹⁸ Their influence on agencies, however, is not limited to their participation in the management board as they are also capable to take influence on the 'Single Programming Document' of an agency. The Framework Financial Regulation obliges an agency, that is not fully self-financed, to draw up such a programming document where an agency sets out its multi-annual objectives as well as the activities for the coming year together with the human and financial resources required.⁹⁹ Whereas only a few Regulations require consultation with the European Parliament prior to the adoption of the multiannual programme,¹⁰⁰ the Framework Financial Regulation obliges all agencies not fully self-financed to take into account the opinion of the Commission before its adoption. Insofar, it is arguably the Commission that is in the primary position to influence the programme of an agency, and hereby exercises ongoing control, an assumption that will be further examined in the next chapter as well as the case studies of this work.

⁹⁸ Presently, the European Parliament is represented in the European Training Foundation with three Members, the EMCDDA, EMA, ECDC, ACER, ECHA with two representatives, and Gnss-Agency with one representative.

⁹⁹ Article 32 Framework Financial Regulation

¹⁰⁰ Article 52(5) of Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004 [2016] OJ L138/1; Article 102(1) of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 106'52/2013 and (EU) 2016/1624 [2019] OJ L295/1; Article 10(1) of Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL) and replacing and repealing Council Decision 2005/681/JHA [2015] OJ L319/1

1.2.4. How do Instruments of Ongoing Control over Agencies Coincide with the Requirement of Independence?

The independence of the European administration is established under Article 298 TFEU.¹⁰¹ Its purpose is to ensure the effective implementation of supranational law and to protect administrative governance from short-term political gains.¹⁰² Generally, the concept of independence is understood comprehensively for agencies, including its independence from political and industry interests,¹⁰³ its independence from particular national interests¹⁰⁴, and EU institutions including 'governmental' instructions.¹⁰⁵

However, not all agency's founding Regulations address the independence requirement equally, and is not always clear 'from which actors exactly agencies' employees, boards and/or committees are intended to be independent'.¹⁰⁶ For example, the Regulations establishing the three European Supervisory Authorities (ESAs) impose upon its organ-members the far-reaching obligation to 'act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or any other public or private body'.¹⁰⁷ The founding Regulation of the Agency for the Cooperation of Energy Regulators (ACER) is similar. It imposes upon the agency the general obligation to carry out its tasks

¹⁰¹ Article 298 TFEU states that "in carrying out of their missions, the institutions, bodies, offices, and agencies shall have the support of an open, efficient, and independent European administration"

¹⁰² M Everson, *supra* n 41, p. 57

¹⁰³ D Geradin and N Petit, 'The Development of Agencies at EU and National Level: Conceptual Analysis and Proposals for Reform' (2005) 23 Yearbook of European Law 137-197, p. 139

¹⁰⁴ E Vos, *supra* n 29, p. 37

¹⁰⁵ T Gross, *Die Legitimation der polyzentralen EU-Verwaltung* (Tübingen: Mohr Siebeck, 2015), p. 89

¹⁰⁶ M Busuioac and M Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives', in *European Agencies in between Institutions and Member States*, eds. M. Everson, C. Monda and E. Vos (Kluwer Law International, 2014) 175-200, p. 181

¹⁰⁷ Articles 42, 46, 49, and 59 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010, and Regulation (EU) No 1095/2010 respectively.

‘independently, objectively, and in the interest of the Union’.¹⁰⁸ Decisions of ACER shall be taken ‘independently of private and corporate interests’.¹⁰⁹

By way of contrast, the ‘Frontex’ Regulation limits the scope of the required independence to the ‘implementation of its technical and operational mandate’ and the mandate of its executive director.¹¹⁰ Also, the EASA Regulation does not include a provision on the independence of the agency in general, but only imposes upon its executive director the obligation ‘to be independent in the performance of his or her duties’ and not to take ‘instructions from any government or from any other body’.¹¹¹

These examples illustrate that the scope of independence varies between agencies’ founding Regulations. Insofar, the independence of agencies is not a self-standing institutional concept. In particular, independence cannot completely substitute the requirement of democratic legitimation of administrative governance, especially against the background that agencies are increasingly engaged in highly political areas.¹¹² One challenge underlying EU agency governance is therefore to find the balance between the independence of agencies and its democratic control.¹¹³ An example is the representation of the Member States on the management board whose members are linked to a democratic delegation chain at the national level, being either delegates of their national ministries or national administrative authority.¹¹⁴ While this enhances the democratic legitimacy of the agency’s governance, at the same time it potentially stays in conflict with the requirement of an agency’s independence because the national representatives are also accountable to its national authority.¹¹⁵

¹⁰⁸ Article 1 (3) of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast) [2019] OJ L158/22

¹⁰⁹ *ibid*

¹¹⁰ Articles 93(3) and 106(1) Regulation (EU) 2019/1896

¹¹¹ Article 104(1) of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of aviation and establishing a European Union Aviation Safety Agency [2018] OJ L212/1

¹¹² T Gross, *supra* n 105, p. 93

¹¹³ M Busuioc and M Groenleer, *supra* n 106, p. 199

¹¹⁴ M Buess, *supra* n 39, p. 513

¹¹⁵ *ibid*

1.2.5. Agencies from an Institutional Balance Perspective

More than sixty years ago, the Court in the *Meroni* case imposed the prohibition on the High Authority 'to delegate discretionary powers [...] other than those which the Treaty has established to effect and supervise the exercise of such powers'.¹¹⁶ The underlying principle established in the case is the institutional balance whose prohibition has served as a justification for limiting the conferral of far-reaching powers on agencies for decades. In 2014, with its *Short Selling* judgment, the Court confirmed the institutional balance principle to be applicable for agencies but refrained from delineating its objectives and dimensions in a more general manner. This leaves it to the literature to reflect on these judgments and to evaluate how agencies affect the institutional balance, in particular against the background that the Treaty of Lisbon has introduced 'new institutional balance on executive rule making' under Articles 290 TFEU and 291 TFEU.¹¹⁷

Commonly, the institutional balance is approached from an analysis of the separation of powers principle as it is held that both principles have the same historical and intellectual roots and that the Court in the *Meroni* case established the institutional balance as a substitute for the principle of the separation of power.¹¹⁸ Yet, it is no coincidence that in *Meroni* the Court of Justice chose the term 'balance of powers' and later in *Chernobyl* the term 'institutional balance' instead.¹¹⁹ The reason is that

¹¹⁶ Case 9/56, *Meroni & Co, Industrie Metallurgische S.P.A. v High Authority* [1957-1958] ECR 133, p. 152; The case concerned a decision of the High Authority establishing mechanism for the equalization of ferrous scrap imported from third countries. Its implementation was delegated to two agencies. After *Meroni* ignored the agency's request to provide statistical returns on his input and output of scrap, the High Authority adopted a decision requesting *Meroni* to pay a sum for the contributions due which *Meroni* contested before the Court.

¹¹⁷ M Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation following the Lisbon Treaty' (2016) 53(2) *Common Market Law Review* 1501-1544, p. 1501

¹¹⁸ J-P Jacqué 'The Principle of Institutional Balance' (2004) 41(2) *Common Market Law Review*, 383-391, p. 384; H Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology meets Reality' (2009) 15(4) *European Law Journal* 482-505, p. 483; similar, K Lenaerts and A Verhoeven 'Institutional Balance as a Guarantee for Democracy in EU Governance' in Joerges C and Dehousse R (eds), *Good Governance in Europe's Integrated Market* (OUP 2002) 35-88, p.40

¹¹⁹ K Michel, *Institutionelles Gleichgewicht und EU-Agenturen*, (Berlin, Duncker & Humblot 2015), p. 74; also, M Chamon 'The Institutional Balance, an Ill-Fated Principle of EU Law?' (2015) 21(2) *European Public Law* 371-392, p. 375

the separation of powers principle calls for an organic division of government between the three branches with the primary aim to protect the interest of the individual against arbitrary rules. This principle is not directly applicable for the EU's constitutional order, because the functional division of powers between the institutions does not match its organisational structure.¹²⁰ Instead, the EU institutions represent different interests united in the EU polity.¹²¹ Moreover, in delineation with the separation of powers principle, the institutional balance cannot be reduced to a fixed structure of interaction between the EU institutions because for each subject matter the legal basis in the Treaty decides whether the Union can act, and how the institution must be involved.¹²²

1.2.5.1. The Traditional or Legal Notion of the Institutional Balance

In its traditional understanding, the institutional balance has mainly developed as a judge-made or legal principle,¹²³ but the objectives underlying the *Meroni* prohibition to delegate discretionary powers to a body outside the Treaty, are less clear.

Chamon notes that *Meroni* emphasised 'the importance of a system of effective judicial protection'¹²⁴ while other authors have stated that it reflects a wider dimension including the notion of democratic legitimacy¹²⁵ and the preservation of the interests of the Member States as the Masters of the Treaties.¹²⁶ The lack of a proper review by the High Authority on the assessments of the Brussels agencies was a major contention of *Meroni* who argued that contrary to 'decisions proper' which are contestable before the Court of Justice, in the mind of the High Authority 'the Brussels accounts are unassailable and almost sacrosanct'.¹²⁷ The Court followed this

¹²⁰ M Chamon *ibid*; Chamon also states that the absence the organisational separation of powers does not exclude that the principle of functional separation of powers should apply.

¹²¹ i.e. the European Parliament as representatives of the Union's citizens, the Council representing the interests of the Member States, and the Commission as a promoter of the general interest of the Union.

¹²² K Lenaerts and A Verhoeven, *supra* n 118, p. 38

¹²³ M. Everson, 'European Agencies: Barely Legal?' in Everson M, Monda C and Vos E (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014) 49-84, p. 49

¹²⁴ M. Chamon, 'EU Agencies between Meroni and Romani or the Devil in the Deep Blue Sea' (2011) 48, *Common Market Law Review*, 1055-1075, p. 1060

¹²⁵ D Curtin and R Dehousse, *supra* n 75, p. 200

¹²⁶ M Everson and E Vos, *supra* n 4, p. 11

¹²⁷ Case 5/56 *supra* n 116, p. 146

argument and established that any procedure for assessment must be subjected to precise rules to exclude any arbitrary decisions, and may only relate to clearly defined executive powers which are subject to supervision by the delegating authority.¹²⁸ However, apart from protecting *Meroni* against arbitrary decisions, another concern of the Court was that the High Authority itself could transgress its powers and delegate powers 'different from those which the delegating authority itself received under the Treaty'.¹²⁹ In this respect, the Court noted that the Treaty imposed certain obligations upon the High Authority which are subject to review by the Court of Justice.¹³⁰ By delegating powers detached from these obligations, the High Authority not only tried to escape judicial review but also transgressed its powers received by the Member States, the 'Masters of the Treaties', which were at that time the only source for democratic legitimisation.

While this notion of the *Meroni* judgment arguably reflects a wider dimension of the institutional balance 'as a means to contain and sustain the inherent tension between its supranational and national characteristics',¹³¹ subsequent judgments delivered by the Court of Justice do not explicitly support this assumption.¹³²

Particularly in *Short Selling*, where the United Kingdom (UK) had raised the plea, that the direct intervention powers conferred on ESMA violated the principles established under *Meroni*, the Court emphasised the protection of the individual rather than on the interest of a Member State. While the Court acknowledged that the *Meroni* principles apply to European agencies, it concluded that the powers conferred on the

¹²⁸ *ibid.*, p. 151

¹²⁹ *ibid.*, p. 150

¹³⁰ *ibid.*, p. 149; The obligations the Court refers to are the duty to state reasons for its decisions and to refer to any opinions which were required to be obtained, the duty to publish annual report on its activities and its administrations, and the duty to publish such data

¹³¹ M Everson and E Vos, *supra* n 4, p. 9

¹³² In Case C-95/97 *Region Wallone v. Commission* [1997] ECR I-1787, the Court included Member States into the notion of the institutional balance and held that regional entities are not entitled to bring an action before the Court of Justice because 'it would undermine the institutional balance provided for by the Treaties, which, inter alia, govern the conditions under which the Member States [...] participate in the functioning of the Community institutions'. However, this case does not concern the relationship between the Member States and EU institutions and in other cases, where the Member State relied on the institutional balance as a supportive argument, the Court refrained from specifically commenting on it; see for example, Case C-491/01 *The Queen v. Secretary of State for Health ex parte: British American Tobacco (Investments) Ltd and others*, [2002] ECR I-11453, para 110; Case C-38/06 *Commission v. Portugal* [2010] ECR I-1569, para 49

European Securities and Markets Authority (ESMA) comply with these principles because they are 'precisely delineated' and 'amendable to judicial review'.¹³³ The Court held that the *Meroni* principles were not violated because the powers conferred on ESMA were circumscribed by various conditions and consultation requirements which limited ESMA's discretion.¹³⁴ Hereby, the Court relaxed the *Meroni* prohibition to delegate discretionary powers into 'limited' discretionary powers.

There are three explanations for this *de facto* relaxation of the *Meroni* standards. The first one is that discretionary powers have been conferred on agencies already before *Short Selling* was delivered. Insofar, *Short Selling* only recognised the 'new realities of European governance'.¹³⁵ Secondly, the Treaty has changed considerably since *Meroni*; judicial remedies against agencies' acts are now available under Articles 263 TFEU and 277 TFEU and the Member States are not the only sources of democratic legitimation anymore. Thirdly, there was the political urgency to address the threat of financial instability in the EU at the supranational level. Against this background, it was not the outcome of the judgment that has led to criticism in the literature, but rather that the Court missed the opportunity to address the question on agencies' setting within the institutional balance in a more general manner, particular with regard to the institutional balance established under Articles 290 TFEU and 291 TFEU.

While *Short Selling* implies that the Member States' interests are excluded from the institutional balance principle's protection, *Chernobyl* and *France v Commission* indicate that EU institutions are included. In *Chernobyl*, the Court held that 'the Treaties have created an institutional balance [...] assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community'.¹³⁶ Despite the absence of an enabling Treaty provision, the Court acknowledged the European Parliament's right to bring an action for annulment against acts of the Council, because otherwise 'it would be

¹³³ Case C-270/2012 *United Kingdom v Parliament and Council (Short-Selling)* [2014] EU:C:2014:1, para 53; For the facts of the case, see Section 1.3.4. of this chapter

¹³⁴ *ibid*, para 45

¹³⁵ M Everson and E Vos *supra* n 4, p. 14

¹³⁶ Case C-70/88, *European Parliament v Council* [1990] ECR I-2041, para 21

incompatible with the fundamental interest in the maintenance and observance of the institutional balance'.¹³⁷ In *France v Commission*, the institutional balance was invoked in order to ensure that the Commission exercises its powers with due regard for the powers of the other institutions.¹³⁸ With reference to the institutional balance established under Article 228 EEC (now Article 218 TFEU), the Court prohibited an administrative agreement between the Commission and the US government on competition rules. In a second ruling, the Court sanctioned the adoption of non-binding guidelines because the parties had no intention of entering into legally binding commitments, but further noted that the non-binding nature of a measure was not 'sufficient to confer on that institution the competence to adopt it'.¹³⁹ In this regard, the Court held that the Commission, when concluding guidelines on regulatory cooperation with third countries, must also observe 'the division of powers and the institutional balance established by the Treaty'.¹⁴⁰

1.2.5.2. A Broader Perspective of the Institutional Balance

The disregard of composite administrative structures under the Treaty, such as European agencies, illustrates that the value of the institutional balance as a guiding principle, viewed from a purely legal perspective, is limited. The reason is that the institutional balance is basically reduced to a manifestation of the rule of law under which the institutions have to respect the limits of their competences conferred on them under the Treaty.¹⁴¹

Already the end of the 90th, with the emergence of new governance structures and the gradual development of formal and informal bodies beyond recognised institutions, exposed that 'the gap between institutional reality and formal constitution as expressed by the institutional balance had become so obvious that

¹³⁷ *ibid*

¹³⁸ Case C-327/91, *France v. Commission* [1994] ECR I-3641; Case C-233/02, *France v. Commission* [2004] ECR I-2759

¹³⁹ *France v. Commission* [2004], *supra* n. 138, para 40 and para 43

¹⁴⁰ *ibid*

¹⁴¹ J-P Jacqu , *supra* n 118, p. 383; K Lenaerts and A Verhoeven, *supra* n 118, p. 44-45 who note that within its legal dimension, the institutional balance comprises three principles: (1) Each institution should enjoy sufficient independence in order to exercise its powers; (2) Institutions should not unconditionally assign their powers to other institutions; (3) Institutions may not, in the exercise of their powers, encroach on the powers and prerogatives of other institutions.

one can question whether the latter can (still) be assumed to ensure the rule of law and the legitimacy of European governance'.¹⁴² It was the rise of the Comitology and its reliance on (informal) transnational network structures which facilitated the 'deliberative turn' in integration theory. Comitology is a procedure whereby implementing powers are conferred on the Commission but control over these implementing tasks is reserved to committees which are composed of Member States' representatives. While Comitology procedures have subsequently been recognised under the Treaty, agencies still exemplify that formal constitution and institutional reality do not coincide which continues with the non-recognition of agencies even after the Treaty of Lisbon.¹⁴³

The concept of a 'modern institutional balance' has developed in literature to take into account these political realities. It acknowledges that governance structures are established outside the Treaty framework and that its 'transnational activities', which can no longer be attributed to either nation-states or supranational state-like entities, require the establishment of more non-hierarchical governance structures.¹⁴⁴ Its focus lies on fair interest representation and fair procedure affiliated to the accomplishment of the general good of the Union rather than the reliance on the hierarchical structures of the Treaty.¹⁴⁵

To this end, institutional balance is not limited to the finding of an 'ideal' dispensation of competences between the institutions already recognised under the Treaty but also allows for the consideration of participatory rights of non-political actors,¹⁴⁶ the consideration of the interests of the Member States,¹⁴⁷ and the 'newer institutions' of the Union.¹⁴⁸ However, the concept of fair interest representation requires further

¹⁴² S Smismans, 'Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven', in Joerges and Dehousse (eds.), *Good Governance in Europe's Integrated Market*, (OUP 2002) pp 89-108, p. 92

¹⁴³ H Hofmann, *supra* n 118, p. 482

¹⁴⁴ C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology' (1997) 3(3) *European Law Journal*, 273-299, p 292 and p 298

¹⁴⁵ S. Smismann, *supra* n 142, p. 92

¹⁴⁶ C Joerges and J Neyer, *supra* n 144, p. 298

¹⁴⁷ E Vos, 'The Rise of Committees' (1997) 3(3) *European Law Journal*, 210-229, p. 223; H Hofmann *supra* n 52, p. 671; P. Craig, 'The Nature of the Community: Integration, Democracy, and Legitimacy', in Craig P and de Burca G (eds), *The Evolution of EU Law* (OUP 1999) p. 37-38; K Lenaerts and A Verhoeven, *supra* n 118, p. 44;

¹⁴⁸ M Everson, *supra* n 93, p. 68

substantiation, especially in respect of how 'interest representation' actually applies in practice and who should decide on the aspect of fairness in this context. These problems, particularly concerning participatory rights of non-political actors, could be solved by way of adopting procedural rules,¹⁴⁹ but it is also not clear what role the 'traditional EU institutions' play under the modern concept of the institutional balance.

Jacqu ¹⁵⁰ as well as Lenaerts and Verhoeven¹⁵¹ address this question and regard institutional balance from its political perspective as a normative tool that should guide and complement the legal basis requirement. They regard the institutional balance as a dynamic principle that takes into account the evolution in the balance of the institutions since the origins of the Community.¹⁵² The evaluation of the institution's role within the institutional balance is here addressed within a two-stage process: first, it requires a consideration of the particular role of the institution in the decision-making process and to question what (or whose) interest the institution represents.¹⁵³ Secondly, it involves a reflection on how the European Treaties call on the institutions to interact in the decision-making process, bearing in mind 'that the current European Treaties only concern part of the institutional balance as it exists in practice'.¹⁵⁴

1.3. The Legal Background of European Agencies

The absence of a general vision on European agencies is also apparent in the Treaty, which still lacks a solid legal framework. This does not call into question the legality of agencies in general but has led to dogmatic uncertainties especially in respect of agencies' role under the EU's constitutional architecture. In particular, its position

¹⁴⁹ P Craig, *supra* n 147, p. 41

¹⁵⁰ *supra* n 118

¹⁵¹ *supra* n 118, p. 47, who hold that the institutional balance as a political principle 'must guide and complement the shaping of the legal basis requirement which prescribes the objective and nature of the measure that can be adopted, as well as the procedural requirements for its adoption and the institution competent to adopt it'

¹⁵² Jacqu , *supra* n 118, p. 383

¹⁵³ Lenaerts and Verhoeven, *supra* n 118, pp. 47-48

¹⁵⁴ *ibid*

within the institutional balance and how control over them is exercised is still discussed with controversy.¹⁵⁵

1.3.1. Defining Agencies

In the absence of a legal framework for European agencies, it is not surprising that an official definition is not in place. Nevertheless, in the literature, there is consensus about `who they are`,¹⁵⁶ even though different definitions for agencies have been developed by the literature. These differences appear to be rather marginal as they result from the different scopes a definition takes rather than from conceptual discrepancies.

The general problem of defining agencies is that the tasks and the powers conferred on them can vary considerably. These variations cannot be captured by way of a definition but are subject to its classification (Section 1.3.2.). The difficulties in finding a generally applicable definition for all agencies might also explain why the Common Approach on decentralised agencies, signed between the European Parliament, the Council, and the Commission in 2012, does not include a definition of agencies at all.¹⁵⁷ Instead, its section on `definition and classification of agencies` only remarks that the standard term `European Union agency for ...` should be used for future agencies. Also, Hofmann, Rowe, and Türk refrain from defining agencies but focus on the description of their characteristics to set them apart from other organisational structures.¹⁵⁸

Against this background, the most credible method to define agencies is by way of distinguishing them at a purely formal level from other bodies operating at the EU

¹⁵⁵ R. Dehousse *supra* n 54 p. 247

¹⁵⁶ M Busuioc, *supra* n 18 p. 21

¹⁵⁷ The Common Approach on European Agencies, *supra* n 3

¹⁵⁸ H. Hofmann, G. Rowe, A. Türk, *supra* n 18, p. 298: These are that agencies have been set up by EU legislation, which also entrusts them with specific administrative tasks and grants them legal personality

level, even if the informative value of such a definition is limited.¹⁵⁹ Chamon takes this approach when he defines agencies as

‘permanent bodies, under EU public law, established by the institutions through secondary legislation, and endowed with their own legal personality’.¹⁶⁰

With this definition, Chamon excludes executive agencies as non-permanent bodies,¹⁶¹ and those created by way of an international agreement, such as the European Financial Stability Facility (EFSF).¹⁶² With the requirement that agencies need to be established through secondary legislation, Chamon additionally rules out bodies that are directly established by the Treaties, such as the European Central Bank (ECB) or the European Investment Bank (EIB). Finally, the requirement that agencies shall be endowed with their own legal personality delineates agencies from bodies without legal personality.¹⁶³ Chamon indicates that the legal personality of agencies is also meant to highlight their autonomy or independence.¹⁶⁴ Legal personality, however, is not reserved to independent or autonomous bodies, as the case of executive agencies illustrates. These bodies are also endowed with legal personality but are clearly dependent on the Commission. Insofar, as noted by Ruffert, legal personality is granted less on a conceptual basis but for pragmatic reasons in order to enable the relevant entity to perform legal activities.¹⁶⁵

Other authors include characteristics that highlight an agency’s autonomy and the powers conferrable on them. For example, Busuioc identifies agencies as ‘specialised, non-majoritarian bodies’.¹⁶⁶ She does not explain why this characteristic should be

¹⁵⁹ A. Kreher *supra* n 71, who notes at p. 227 “that these elements do not tell us anything about the functions of agencies or their organizational position within the EC structure”

¹⁶⁰ M Chamon, *supra* n 17, p. 10

¹⁶¹ *ibid*, p. 10

¹⁶² *ibid*, p. 11

¹⁶³ For example, the European Security and Defence College (ESDC), the European Anti-Fraud Office (OLAF), and the European External Action Service (EEAS), see Chamon, *supra* n 17, p. 14

¹⁶⁴ *Ibid*, p. 13

¹⁶⁵ M Ruffert, ‘Personality under EU Law: A Conceptual Answer towards the Pluralisation of the EU’ (2014) 20(3) *European Law Journal* 346-367, p. 350

¹⁶⁶ M. Busuioc, *supra* n 18, p. 20; she defines agencies as ‘specialized, non-majoritarian bodies, established by secondary legislation, which exercise public authority and are institutionally separate from EU institutions and are endowed with legal personality’.

part of the definition, but it features an agency's isolation from direct political influences in the performance of their tasks.¹⁶⁷ To detach agencies from short-term political considerations is meant to achieve more credible policy commitments and is thus one important rationale for resorting to agencies in general.¹⁶⁸ However, against the background that usually all Member States are represented on the management board, the complete detachment from its political influence is debatable,¹⁶⁹ and it seems more credible to highlight an agency's institutional separation from the EU's institution instead. Busuioac includes this characteristic in her definition as well as Vos who defines agencies as

'bodies governed by European public law that are institutionally separate from the EU institutions and have their own legal personality. They are created by secondary legislation by the Council and/or European Parliament, they have clearly specified tasks and have a certain degree of administrative and financial autonomy'.¹⁷⁰

In this regard, institutional separation illustrates that agencies are not subordinated under one of the EU institutions, most notably not under the Commission. However, institutional separation does not automatically imply that agencies are completely independent of the EU institutions. As noted by Chiti, even if agencies have been designed as bodies enjoying a certain degree of autonomy from the Commission, 'such autonomy does not imply that they are fully insulated from the Commission influence'.¹⁷¹ This is considered in the definition by Vos where administrative and financial autonomy is attributed to agencies only to a 'certain degree'.

¹⁶⁷ G.Majone 'Independence vs. Accountability? Non-Majoritarian Institutions and Democratic Government in Europe' (1994) EUI Working Paper SPS No 94/3, p 1

¹⁶⁸ *ibid*, p. 4

¹⁶⁹ M. Shapiro 'The problems of independent agencies in the United States and the European Union' (1997) 4(2) *Journal of European Public Policy* 276-291 who states at p. 281 that 'the member states composed management board were no doubt a political necessity'

¹⁷⁰ E Vos *supra* n 29, p. 19; the words underlined here are to emphasise the characteristics to be discussed.

¹⁷¹ E.Chiti *supra* n 70, p. 1397

1.3.2. Classification of Agencies

All agencies have been established on a `case-by-case` basis. Insofar, they vary considerably in terms of the powers conferred and the functions they perform. The classification of agencies is meant to structure different types of agencies according to the powers and functions they share. The benefit of classifying agencies may be debatable. While Craig has expressed his concerns about forcing `agencies into categories that are ill-fitting`,¹⁷² other authors have pointed out that the classification of agencies helps `to bring structure and insight to an otherwise disorderly reality`.¹⁷³

The quest for order is the main argument why classification is important. Already the Commission Communication of 2002 on the operating framework for European Regulatory Agencies acknowledged the need to classify agencies.¹⁷⁴ It did so by distinguishing between executive and regulatory agencies. As the former type is subject to a specific framework Regulation, where it is left to the authority of the Commission to decide upon their creation and its supervision,¹⁷⁵ there is no question about its dependence from the Commission, the latter having merely outsourced certain management tasks to them.¹⁷⁶

More interesting are those agencies which have been termed by the Commission as `regulatory agencies` and, since the Common Approach of 2012, as `decentralised agencies`. Those agencies are `actively involved in exercising executive functions by enacting instruments which contribute to regulating a specific sector`.¹⁷⁷ A distinction is made between those types of agencies that perform assistance tasks, for example through technical or scientific opinions and recommendations,¹⁷⁸ or inspection

¹⁷² P Craig *supra* n 15, p. 148

¹⁷³ Chamon, *supra* n 17, p. 18

¹⁷⁴ Commission, `The operating framework for European Regulatory Agencies`, COM (2002) 718 final, p. 3

¹⁷⁵ Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of community programmes [2003] OJ L11/1

¹⁷⁶ Examples for executive agencies are the Executive Agency for Competitiveness and Innovation (EACI), the Executive Agency for Health and Consumers (EAHC), and the European Research Council Executive Agency (ERCEA)

¹⁷⁷ COM (2002) 718 final, p. 4

¹⁷⁸ Examples are the European Medicine Agency (EMA) and the European Food Safety Authority (EFSA)

reports,¹⁷⁹ and those which are conferred with decision-making powers, thereby distinguishing between the power to adopt individual decisions which are legally binding on third parties, or the power to adopt non-legislative measures of general application.¹⁸⁰

The preference for instrumental classification also prevails in the literature, even though other classification criteria are conceivable. Apart from classifying agencies according to their functions,¹⁸¹ agencies can be distinguished in structural terms which are meant to reflect the pre-Lisbon pillar division. Under the structural division, agencies are described as either `Community or Commission agencies` or `Council agencies`.¹⁸² These `old pillar imprints` are meant to indicate the stronger role of the Council and the Member States for those agencies that have been established under the former second or third pillar.¹⁸³

The instrumental classification models developed in the literature vary slightly,¹⁸⁴ but there is a consensus that `true regulatory powers` are not conferrable on agencies under the present constitutional order of the EU.¹⁸⁵ `True regulatory powers` would mean that agencies are enabled to translate broad legislation into concrete instruments of general application which requires either an explicit overruling of *Meroni* (and *Romano*) or a modification of the Treaty which distinguishes European

¹⁷⁹ For example, the European Maritime Safety Agency (EMSA) and the European Aviation Safety Authority (EASA)

¹⁸⁰ Examples for agencies with decision-making powers are the Office for Harmonisation in the Internal Market (OHIM), the Community Plant Variety Office (CPVO), and the more recently established three European Safety Authorities EBA, ESMA and EIOPA.

¹⁸¹ For example, M Chamon *supra* n 17, p. 22 makes a functional distinction between `service agencies`, `information agencies`, `assistance agencies`, and `internal market agencies`

¹⁸² Examples for former Council agencies are CEPOL, EASO, Eurojust, Europol, and Frontex

¹⁸³ M Busuioc, *supra* n 18, p. 22

¹⁸⁴ For example, P Craig, *supra* n 15, pp 149 distinguishes between regulatory agencies, decision-making agencies, quasi-regulatory agencies, and information and co-ordinating agencies; M Busuioc, *supra* n 18, p. 37, classifies agencies into those with quasi-regulatory powers, information providing agencies, management agencies, operational cooperation agencies, and agencies with decision-making powers; M Chamon, *supra* n 17 distinguishes between agencies with decision-making powers, non-decision-making powers (including quasi-regulatory tasks), and operational tasks.

¹⁸⁵ See for example, D Geradin and N Petit, *supra* n 103, p. 183, M Busuioc, *supra* n 18, p. 40, P Craig, *supra* n 15, p. 149

agencies from the classic regulatory agencies of the United States or those found at national level.¹⁸⁶

However, individual decision-making powers can be conferred on agencies as well as operational tasks, the latter including co-ordinational and inspection performing powers. Apart from these two categories, agencies can also perform quasi-regulatory powers.¹⁸⁷ These powers are termed `quasi-regulatory` because of their high recommendatory impact.¹⁸⁸ Their tasks comprise the drafting of general decisions or implementing rules with the final adoption reserved to the Commission under Articles 290 TFEU or 291 TFEU, but particularly in areas that require pronounced technical or scientific expertise these recommendatory powers can, *de facto*, amount to rulemaking powers.

From an accountability perspective, the assumption has been made that those agencies which are conferred with a high degree of powers are also subject to a higher degree of accountability.¹⁸⁹ Such a link cannot be identified for the intensity of control the Commission exercises over an agency's programming procedure. For example, the Regulations of the three European Supervisory Authorities, agencies that exercise decision-making powers, do not even envisage that the opinion of the Commission must be given prior to the adoption of the programme (Chapter 2, Section 2.3.4). Neither has the structural division between former Council agencies and Commission agencies influence on the degree of control exercised, as the case of Frontex will illustrate. Insofar, classifying agencies is meaningful for accountability purposes, but has less relevance on the degree of control exercised over an agency's programming procedure.

¹⁸⁶ P Craig *ibid* p. 149

¹⁸⁷ Examples for agencies who perform quasi-regulatory powers are EMA, EFSA, and the EASA

¹⁸⁸ P Craig, *supra* n 15 p. 150

¹⁸⁹ M Busuioc, *supra* n 18, p. 38

1.3.3. The Corporate Structure of Agencies

The main governing bodies of all agencies are the (executive) director and the management board.¹⁹⁰ The management board is usually composed of one representative per Member State plus one or two representatives of the Commission.¹⁹¹ Only a few agencies do not follow this 'one member per Member State rule', namely EFSA, ACER, EIGE, EUSHA, and the three ESAs.¹⁹² The European Parliament is only sporadically represented in the management board.¹⁹³ Additionally, several agencies¹⁹⁴ have advisory or scientific committees which are responsible for providing scientific opinions,¹⁹⁵ or advising the management board and the director.¹⁹⁶ Also, for some agencies, there is either a Board of Regulators or a Board of Supervisors established. The Board of Regulators comprises senior representatives of the national regulatory authorities with the function to provide opinions and guidance to the director and to approve the work programme of the agency for the upcoming year.¹⁹⁷ Similar is the role of the Board of Supervisors of the

¹⁹⁰ Most agencies' Regulations use the term 'Management Board' but EFCA, ACER, EMSA, and the GNSS-Agency use the term 'Administrative Board' instead; the ETF and CEDEFOP have a Governing Board; as the Framework Financial Regulation refers under Article 2 (Definitions) solely to the term 'management board', the same terminology is used here. Also, some Regulation use the term 'executive director' and some 'director' without differences as to its meaning.

¹⁹¹ EFCA and ECHA's Regulations provide for 6 representatives of the Commission.

¹⁹² EFSA has 14 representatives in the management board which are appointed by the Council after consultation with the European Parliament; ACER has in total 9 representatives in the management board: 2 are appointed by the Commission, two from the European Parliament, and 5 by the Council; EIGE has 18 representatives in the management board who are appointed by the Council; EUOSHA has 12 members representing national governments, 6 members representing employer organisations, 6 members representing employee's organisations, and 3 members representing the Commission; the management board of ESMA, EBA, and EIOPA comprises 6 Member of the Board of Supervisors plus a Chairperson and a representative of the Commission.

¹⁹³ ETF with three and Gns-Agency with one representative who have not voting rights, EMCDDA, EMA, ECDC, ACER, ECHA with two representatives,

¹⁹⁴ For example, the Regulations establishing FRA, EMCDDA, CEPOL, EMA, EFSA, EASA, EUROFOUND, GNSS-Agency, and ECHA envisage either Scientific Committees or additional advisory bodies.

¹⁹⁵ For example, the Scientific Committee and Scientific Panels of EFSA, see Article 28 of Regulation (EC) No 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002], OJ L31/1 (EFSA Regulation)

¹⁹⁶ For example, the Scientific Committee for Training of CEPOL, see Article 16 of Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL) and replacing and repealing Council Decision 2005/681/JHA [2015] OJ L319/1 (CEPOL Regulation)

¹⁹⁷ Article 21 of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulations [2019] OJ L158/22 (ACER Regulation)

three ESAs and the Body of European Regulators for Electronic Communication (BEREC). It is composed of the heads of the competent national public authority with the competence to adopt the annual and multiannual work programmes.¹⁹⁸

The management board provides the general orientation for the agency's activities and ensures that the agency carries out its mission and performs the tasks assigned to it in accordance with the Regulation. It establishes the organisational structure of the agency and adopts its internal rules and procedures, including its financial rules.¹⁹⁹ The management board appoints and dismisses the director and exercises disciplinary authority over them.²⁰⁰ Additionally, some agency's Regulations additionally provide that the management board shall oversee the director's performance and shall establish performance indicators to this end.²⁰¹

The director manages the agency and is its legal representative.²⁰² They shall be independent in the performance of their duties and shall neither seek nor take instructions from any government or any other body.²⁰³ The director is responsible for the day-to-day administration, the implementation of decisions of the management board, the implementation of the work programmes and the budget.²⁰⁴ Primarily, they are accountable to the management board, although several Regulations also provide that 'the European Parliament or the Council may invite the executive director to report on the carrying out of his or her tasks'.²⁰⁵

¹⁹⁸ For example, Articles 40 and 43 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331/12 (EBA Regulation)

¹⁹⁹ For example, Article 100 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulation (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1 (Frontex Regulation)

²⁰⁰ *ibid*

²⁰¹ For example, Article 11 (1) (k) of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union for Law Enforcement (Europol) and replacing and repealing Council Decision 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L135/53 (Europol Regulation)

²⁰² For example, Article 14(4) CEPOL Regulation *supra* n 196

²⁰³ For example, Article 106 (1) Frontex Regulation *supra* n 199

²⁰⁴ For example, Article 26(2) EFSA Regulation *supra* n 195; Article 14 (5) (e) CEPOL-Regulation *supra* n 196

²⁰⁵ For example, Article 106 (2) Frontex Regulation *supra* n 199

1.3.4. The Legal Basis for Creating Agencies

Initially, the inclusion of a specific Treaty provision, allowing for the creation of agencies and conferral of powers thereon, was discussed during the 2000 intergovernmental conference (IGC). Proposals were made to either insert a new paragraph under what is now Article 13 TEU or to add a new Article 256a EC to the Treaty as a legal basis for the creation of agencies under the co-decision procedure.²⁰⁶ Neither proposal has made its way into the Constitutional Treaty of 2004 and subsequently into the Treaty of Lisbon.²⁰⁷ While the absence of a solid foundation under the Treaties does not call the legality of agencies into question, the literature has concordantly noted that '[f]or reasons of legal certainty and coherence, a legal basis for the creation of agencies and the delegation of authority should [...] be introduced in the Treaties'.²⁰⁸ To this end, suggestions have been made on how the Treaty should be amended,²⁰⁹ but there is no indication that Treaty amendments will take place in the near future.

The Treaty of Lisbon introduced Articles 290 and 291 TFEU which replaced in substance the third indent of Article 202 EC. With its distinction between the modification of formal legislative acts under Article 290 TFEU and the implementation of EU legislative acts under Article 291 TFEU, it established 'a new institutional balance for executive rule making'.²¹⁰ To this end, Article 290 TFEU reserves the delegation of powers to adopt non-legislative acts of general application to the EU legislator without envisaging any additional supervision of the Member States through comitology procedures. The recipient of the powers delegated under Article 290 TFEU can only be the Commission. This derives from the prohibition, established in *Romano*, to delegate powers 'having the force of law' to bodies outside the Treaty

²⁰⁶ See Chamon, *supra* n 17, pp 373-375 with further references to the respective IGC documents.

²⁰⁷ Treaty establishing a Constitution for Europe of 29 October 2004, C2004/310/01

²⁰⁸ E. Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?' (2000) 37(2) *Common Market Law Review* 1113-1134, p. 1124; see also R. van Gestel, 'European Regulatory Agencies Adrift? Case C-270/12' (2014) 21(1) *Maastricht Journal of European and Comparative Law*, 187-196, p. 196; M. Chamon, *supra* n 17, p.372

²⁰⁹ For example, M. Scholten, *The Political Accountability of EU Agencies: Learning from the US Experience* (Universitaire Pers Maastricht 2014), p. 303; D. Geradin, 'The Development of European Regulatory Agencies: What the EU Should Learn from the American Experience' (2004) 11(1) *Columbia Journal of European Law*, p. 15; M. Chamon, *supra* n 17, p. 373

²¹⁰ M. Chamon, *supra* n 117, p. 1501

framework.²¹¹ Therefore, agencies are precluded from the Article 290 TFEU delegations of power because ‘the principle of democracy [...] necessarily dictates that any power to adopt an EU measure that can alter the non-essential elements of an EU legislative act must be exercised by an EU institution that is democratically accountable, in other words, the Commission, which is ultimately accountable to the European Parliament’.²¹²

Thus, in the light of the *Romano* limitations, Article 291 TFEU could be considered as the most suitable position for a legal basis on agencies. In this regard, AG Jääskinen suggested in his Opinion on the *Short-Selling* case to regard agencies as a kind of ‘midway-solution’ between Articles 291 (1) TFEU and 291 (2) TFEU, which would have allowed reference to these provisions by way of analogy or for the sake of orientation.²¹³ However, the Court did not adopt his view and instead held that Articles 290 TFEU and 291 TFEU did not establish a single legal framework for executive rule-making in areas ‘which require the deployment of specific technical or professional expertise’.²¹⁴ Hereby, the Court sanctioned the formation of agencies outside the legal framework of Articles 290 TFEU and 291 TFEU and approved that the powers conferred on ESMA could be based upon Article 114 TFEU.

Article 114 TFEU is one of the flexibility clauses of the Treaties. It allows for the adoption of measures ‘for the approximation of the provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market. Whereas until 1994 agencies have mainly been founded upon what is now Article 352 TFEU,²¹⁵ the

²¹¹ Case 98/80 *Giuseppe Romano vs Institut National D`Assurance Maladie-Invalité* [1981] ECLI:EU:C1981:104, para 20; The case concerned an individual who contested the adjustment of his Belgian pension on the basis of a calculation scheme adopted by the Administrative Commission. The Court held that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law.

²¹² Opinion of Advocate General Jääskinen in Case C-270/12, *UK v. Parliament and Council*, ECLI:EU:C:2013:562, para 85

²¹³ *ibid* para 86

²¹⁴ Case C-270/12, *United Kingdom v. Parliament and Council*, [2014] ECLI:EU:C:2014:18 at para 86 where the Court held that ESMA’s power could not be “regarded as undermining the rules governing the delegation of powers laid down in Articles 290 TFEU and 291 TFEU”

²¹⁵ These are the Translation Centre for the Bodies of the European Union (CdT), the European Centre for the Development of Vocational Training (CEDEFOP), the Community Plant Variety Office (CPVO), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the European Training Foundation (ETF), the European Agency for Safety and Health at Work (Eu-OSHA), the

legislator's reliance on Article 114 TFEU for more recently established agencies has become the current practice as well as the subsequent approval of the Court of Justice.²¹⁶ The reason is that for relatively few agencies sector-specific Treaty provisions exist.²¹⁷

Arguably, Article 114 TFEU is not a solid base for the creation of agencies and the conferral of powers thereon but repeatedly the Court of Justice has approved the legislator's reliance upon Article 114 TFEU. In *Tobacco Advertising I*, the Court established that 'a measure adopted under Article 114 TFEU must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market'.²¹⁸ It held that 'measures, adopted under Article 114 TFEU, must actually contribute to eliminating obstacles to the free movement in the internal market',²¹⁹ but also that recourse to Article 114 TFEU is possible for the prevention of future obstacles if its emergence 'is likely and the measure is designed to prevent such obstacles'.²²⁰

In *Smoke Flavourings*, the Court of Justice approved a Regulation²²¹ to be based upon Article 114 TFEU which established a Community procedure for the evaluation and authorisation of smoke condensates used in foods.²²² The Court emphasised the EU legislator's discretion to choose the harmonisation techniques deemed to be most appropriate, especially for areas that are characterised by complex technical features.²²³ This idea was further developed in *ENISA*, where the Court established that 'nothing in the wording of Article 95 EC [now Article 114 TFEU] implies that the

European Foundation for the Improvement of Living and Working Conditions (Eurofound), the Office for Harmonisation in the Internal Market (OHIM), but also the more recently established European Union Agency for Fundamental Rights (FRA)

²¹⁶ Agencies established under Article 114 TFEU are ACER, BEREC, EBA, ECHA, EFSA (partially based on Article 114 TFEU), EIOPA, EMA (partially based on Article 114 TFEU), ENISA, ESMA

²¹⁷ These are Europol which is founded upon Articles 87 and 88 TFEU; EASA on Article 100 (2) TFEU; EASO on Article 78 (1) (2) TFEU; ECDC on Article 168 TFEU; EEA on Article 192 TFEU, EFCA on Article 43 TFEU, EMSA on Article 100 (2) TFEU; ERA on Article 91 TFEU, Eurojust on Article 82,83, and 85 TFEU; Frontex on Articles 77(2) and 74 TFEU

²¹⁸ Case C-476/98 *Germany v. Parliament and Council* [2000] ECR I-8419, para 82

²¹⁹ *ibid*, para 95

²²⁰ *ibid*, para 86

²²¹ Regulation (EC) No 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for in in or on foods [2003] OJ L309/1

²²² Case C-66/04 *United Kingdom v Parliament and Council* [2005] ECR I-10553

²²³ *ibid*, para 45

addresses of the measures adopted by the Community legislature on the basis of that provision can only be individual Member States'.²²⁴ It thus approved for the first time the creation of an agency under Article 114 TFEU, namely the European Network and Information Security Agency (ENISA).²²⁵

In *Short-Selling*, the Court delivered its most far-reaching judgment.²²⁶ The case concerned Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps, adopted under Article 114 TFEU. Its Article 28 conferred on ESMA direct intervention powers, including the competence to prohibit natural or legal persons to enter into a short sale transaction. The same provision additionally envisaged that, under exceptional circumstances, ESMA's decision should prevail over any previous measure taken by the national authority. One plea of the UK was that the powers conferred on ESMA could not be regarded as a harmonisation measure, covered by Article 114 TFEU, but rather as a direct regulatory measure addressed at individuals of Member States.²²⁷ This view was supported by Jääskinen who held that the powers vested in ESMA went beyond the limits of Article 114 TFEU.²²⁸ However, the Court did not adopt Jääskinen's view and regarded Article 28 of Regulation No 236/2012 as a measure of harmonisation 'intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States'.²²⁹

In the literature the reactions to *Short-Selling* were controversial. The necessity to endow ESMA with these far-reaching powers has been widely acknowledged.²³⁰ These were conferred in order to prevent that short selling could aggravate the

²²⁴ Case C-217/04 *United Kingdom v Parliament and Council* [2006] EU:C:2006:279, para 44

²²⁵ *Ibid*, para 44

²²⁶ Case C-270/2012 *United Kingdom v Parliament and Council* [2014] ECLI:EU:C:2014:18

²²⁷ *ibid*, para 90

²²⁸ Opinion Case C-270/12, *supra* n. 226, para 52

²²⁹ Case C-270/2012, para 114

²³⁰ See, for example, M Everson *supra* n 123, p.50, who noted that any other outcome would be "a victory of law over common sense"; similar H Marjosola 'Bridging the Constitutional Gap in EU Executive Rule-Making: The Court of Justice Approves Legislative Conferral of Intervention Powers to European Security and Markets Authority' *European Law Review* (2014) 10, 500-527, p. 501, who noted that the Court has "eased constitutional tensions"

financial crisis of 2008.²³¹ Moreover, a different outcome of *Short-Selling* would have had severe consequences for another legislative proposal to be adopted under Article 114 TFEU, namely the Single Resolution Mechanism, which was under the current legislative procedure when the judgment was delivered. However, while the outcome of the judgment was reasonable, it also made 'painfully clear that we are lacking a solid normative framework in the Treaties'.²³²

1.3.5. Conclusions

In *Short Selling*, the Court clarified that the *Meroni* principles apply for European agencies, but the value of the institutional balance as a guiding principle remains less clear after this judgment. Apart from sanctioning the conferral of 'limited' discretionary powers on bodies not recognised under the Treaty, the judgment predominantly indicates what is excluded from the notion of the institutional balance rather than giving guidance on the role of agencies therein. Without further explanation, the Court seems to exclude the Member States from the institutional balance protection which is remarkable against the background that it was a Member State that had invoked the violation of the institutional balance in the proceedings. The Court also excluded agencies from the scope of Articles 290 TFEU and 291 TFEU by stating that the powers conferred on ESMA 'do not correspond to any of the situations defined under those provisions'.²³³

While the role of the EU institutions was neither addressed in *Short Selling*, *France v Commission* and *Chernobyl* give more guidance in this respect. In particular *Chernobyl*,²³⁴ where the institutional balance served as a gap-filling principle to protect the prerogatives of the European Parliament, indicates a wider understanding of the institutional balance as it required a reflection of the constitutional role of that institution beyond the interpretation of single Treaty provisions. This wider

²³¹ This rationale is explicitly mentioned in Recital (1) of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/1

²³² R. van Gestel, *supra* n 208, p.195; similar H. Howell 'The European Court of Justice: Selling us Short' *European Company and Financial Law Review* (2014) 11(3) 455-477 who notes at p. 477 that the judgement introduces new uncertainties in relation to the boundaries of Article 114 TFEU.

²³³ Case C-270/2012 *supra* n 226, para 83

²³⁴ Case C-70/88 *European Parliament v Council* [1990] ECLI:EU:C:1990:217

understanding of the institutional balance is similarly endorsed by Jacqu  as well as by Lenaerts and Verhoeven who include the interests an institution represents into their concept of the institutional balance.

This wider understanding of the institutional balance is also adopted in this work because it guides the interpretation of structures that are not comprehensively established under the Treaty or secondary legislation. This is the case with the control exercised over agencies through their programming obligations. These are regarded as a measure of ongoing control the institutions exercise over an agency. Even though these obligations are established under the Framework Financial Regulation where the right to give its opinion on the draft programme and to subsequently propose an agency's budget is conferred on the Commission, the Commission is not the only institution involved in this procedure. In particular, the right of the European Parliament to be consulted on the multiannual draft programme bears a potential conflict of interests between these institutions which will be addressed from an institutional balance perspective in the concluding Chapter of this work.

1.4. Methodology

1.4.1. Research Aim

Two main research questions are addressed in this work. The first one is to establish how the Commission exercises control over agencies' programming content. Based on these findings, the second assesses what improvements to EU legislation are necessary in order to reflect the factual powers exercised by the Commission. Both of these questions have an underlying purpose and also require intermediate steps to be taken. For the first question, the underlying aim is to evaluate the Commission's role within a broader context, i.e. to describe whether the Commission is predominantly acting as a legal or budgetary supervisor or even beyond this actively interferes with the material programming content of an agency. For ascertaining the Commission's role in this regard, it is also of interest whether an underlying rule can be established that explains the degree of control the Commission exercises over the programme. Depending on the result of the case study, the role of the Commission

vis-à-vis agencies might even be comparable to ministry-agency constellations found at the nation state level. Also relevant for answering the first research question are aspects that do not directly relate to the Commission's comments but are important for assessing other factors that might influence the programme. In particular, these are how agencies establish their multiannual objectives being the top layer of the whole programme and also who is primarily responsible for assessing the budgetary needs of an agency. After all, the programming is part of the budgetary procedure and it is assumed that budgetary considerations might be the primary incentive for an agency to comply with the Commission's requests. This also raises the question of what impact performance has on an agency's budget and whether any consequences arise if targets are not met.

The second research question relates to the legal framework on which the agency's programming and the Commission's comments are based. Its underlying aim is to highlight that the powers exercised are not always covered by existing legislation. To establish what additional legislative instruments are necessary, the first step is to evaluate what competences of the Commission are presently covered under the EU legislative framework. Secondly, it is discussed what competences should be covered (and where its limits should be), taking into account the role of the other institutions that might also be affected. It includes evaluating whether Treaty amendments are required, or improvements of secondary legislation are sufficient such as the agency's founding Regulations and the Framework Financial Regulation.

1.4.2. Research Methods

To address these research questions, this work combines two research methods. The first part (Chapter 2) analyses from a theoretical (doctrinal) perspective the legal framework relevant for agencies' programming whereas the second part of the work (Chapters 3 and 4) adopts the case-study approach and addresses the programming procedures of selected agencies from a more practical point of view, hereby focussing on the instances where the Commission actually influences an agency's programming content. The reason for combining these two research methods is that a purely theoretical approach will not show the 'full picture' of the agencies' programming

obligations and in particular an agency's motives to adhere to the Commission's requests made in its opinions.

1.4.2.1. Doctrinal Approach

Arguably, the extent agencies follow the Commission's opinions go beyond the legal requirements of the Framework Financial Regulation which only obliges Union bodies to 'take into account' the programming guidelines developed by the Commission and its opinion on the draft Single Programming Document.²³⁵ This discrepancy between the comparably weak legal competences conferred on the Commission and the factual powers the Commission exercises makes it necessary to address both the legal framework on agencies' programming as well as its practical application.

Against this background, the theoretical part of this work establishes the basis for the subsequent case study but its scope goes beyond the examination of the legal framework governing the programming of agencies. For an understanding of today's programming practice of agencies, the rationale of these programming obligations needs to be addressed and the factors that influence an agency's programming content have to be established. This includes an understanding of the historical roots that have shaped today's programming procedure which started in 2002 with the introduction of activity-based management and budgeting principles which were initially established for the Commission and then subsequently transposed into the programming procedures applicable for agencies. Apart from the principle that human and financial resources must be allocated for each activity programmed, with subsequent amendments of the Financial Regulation and the Framework Financial Regulation, also performance aspects have become an important budgetary and programming principle.

Consequently, a strong link between an agency's programming and the establishment of its budget, which is part of the Commission's budgetary cycle, is ascertainable and therefore addressed in this work. As the majority of agencies are wholly or partially dependent on the EU budget, it is deemed that its financial

²³⁵ Article 32 (1) and (7) Framework Financial Regulation

dependence is a major incentive for an agency to comply with the Commission's opinions and that budgetary constraints imposed on agencies are an effective means to exercise control. This in turn, raises the question of how much influence the Commission actually has in determining an agency's budget. For this reason, a separate section of this work is dedicated to the budgetary procedure relevant to agencies.

Besides, the question of what motives determine how agencies establish their multiannual objectives accompanies the whole work and is also addressed from a doctrinal point of view. Hereby, it is observed that the programming procedure applicable for agencies and the programming cycle of the Commission are similar. Each department of the Commission establishes for its policy area multiannual strategic plans and annual management plans that establish multiannual objectives and programme the annual activities. In addition, policy papers of the Commission shape the strategic direction for a specific policy area.

1.4.2.2. Case Study Approach

The approach of the case study is quite simple and comprises a comparison of the draft Single Programming Document of selected agencies with its final programming version to demonstrate to what extent an agency follows the Commission's opinions. To this end, the structure of the case study largely follows the logical sequences of the programming procedure:

First, the draft Single Programming Documents of Frontex and the European Chemicals Agency (ECHA) are examined. Of particular interest is to establish what factors influence how agencies determine their programming content. The focus of the examination lies on the most recent programme (2021-2023) but also takes into account that each programme has its specific situational context. To this end, the Single Programming Documents of three consecutive years (2019-2021, 2020-2022, 2021-2023) have been studied, whereby reference to the previous two programming years is only made where it is deemed necessary for the sake of validating the results and to achieve a more representative outcome of this work. As such, the

programming documents are first examined in terms of their compliance with the formats established by the Commission's guidelines and the Framework Financial Regulation.

As the multiannual objectives constitute the top layer of the whole programme that should determine all annual programmed activities, coherence between the multiannual programme and the annual work programme is not only important for the fulfilment of the requirements set out in the Framework Financial Regulation but also for an understanding of the whole programming content. Yet, whereas Frontex's programme was coherent in this respect, for ECHA's Single Programming Document it was rather difficult to establish how its annual activities were derived from the multiannual objectives established. Also, it is not always clear how multiannual objectives are established, an aspect that was also criticised by the Commission in its opinions.²³⁶

Notwithstanding these challenges, the focus of examination is on the programming content and establishing the factors that influence an agency's decision process in this regard. First and foremost, the respective EU Regulations that confer tasks on agencies frame the programming content. In the light of budgetary constraints, however, not all tasks can be addressed with the same intensity and sometimes the Regulations define an agency's tasks rather broadly. This leaves a degree of discretion on which topics to focus on and the prioritisation of activities. A self-contained autonomy of agencies would presuppose that these decisions are taken independently by an agency. However, as agencies frequently operate in policy areas with high political relevance, various policy documents of different actors impact its programming content.

In some instances, secondary legislation provides its legal basis such as the multiannual strategic policy cycle for European integrated border management to be

²³⁶ Commission, 'Commission Opinion of 29.11.2019 on the Single Programming Document containing the draft multiannual programming for 2020-2022 and the draft Annual Work Programme for 2020 ('Single Programming Document 2020-2022') of the European Border and Coast Guard Agency' C(2019) 8715 final, para 56

adopted by the Commission under Article 8 of the Frontex Regulation.²³⁷ Some Communications of the Commission that shape the policy direction transpose its political guidelines into concrete action plans. Others appear rather as semi-formal `co-productions` between the Commission and agencies that comprise performance-orientated action plans and roadmaps. Sometimes the European Council shapes an agency's strategic direction, most notably in the area of freedom, security and justice where the Treaty establishes that the European Council adopts the strategic guidelines for legislative and operational planning.²³⁸

Not only agency refers in its programming to policy documents, but also the Commission frequently addresses these policy documents in its opinions especially in terms of the targets set out in action plans and roadmaps to an extent that it resembles performance contracting. As these policy documents clearly influence an agency's programme, their impact needs to be addressed in detail. Apart from that, the contributions from the EU budget which allocate human and financial resources to specific areas of activities also influence the programming content. However, comments by the Commission on an agency's financial programming leave little room for interpretation as they appear as instructions rather than opinions with no discretion left for the EU agency concerned.

The second step of this case study analyses the Commission's opinions on the draft Single Programming Document. To characterise the Commission's role in this respect, the comments are examined from two perspectives. The first is to analyse the content of the Commission's comments, i.e. on what topics the Commission focuses its opinion on. The comments are then analysed in terms of their quality, hereby asking how intensively a comment affects an agency's programming autonomy. For its assessment, it is considered that the language used by the Commission is not a suitable indicator as, for example, an `invitation` can in practice be as forceful as an explicit request. Instead, a determining factor is the object of a comment. In this

²³⁷ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1

²³⁸ Article 68 TFEU

respect, a comment that requests the alteration of a multiannual objective, being the top layer of the programme, is considered to be more incisive than a comment on a specific activity. Another suitable indicator to measure the quality of a comment is to classify its legal quality. Thus, comments that criticise formal aspects of the programme or address legal or competence issues of the programme are considered to be less intensive than autonomous considerations where the Commission exceeds its role as a legal supervisor of agencies.

To establish to what extent agencies follow the requests of the Commission, a comparison between the draft Single Programming Document and its final version is the third step of the examination. It includes an assessment of the instances where an agency follows the Commission's requests and the evaluation of the possible reasons for non-compliance. Hereby, the classification method developed for the examination of the Commission's comments is adopted and thus distinguishes between formal aspects of the programme, legal- or competences related issues and autonomous considerations of the Commission. While it was observed that the tendency is for agencies to follow the Commission's requests to a large extent, the motives for non-compliance remain to a certain degree speculative. Possible reasons are discussed. Potentially, these are time pressure under which the final programme generally is adopted,²³⁹ that sometimes requests are not sufficiently specific to be transposed into actions or deliberate considerations of the agency not to follow a Commission's comment (unwillingness).

1.4.3. Selection of Agencies for the Case-Study

Word count limitations preclude the examination of all agencies' Single Programming Documents. Instead, this work makes use of a case study approach that has the purpose to derive from an 'intensive study of a single unit or a small number of number of units (the cases)' to an understanding of 'a larger class of cases (a

²³⁹ For example, while Article 32 (7) Framework Financial Regulation requires the Commission to send its opinion to the Union body "in a timely manner in any case not later than 1st July of the year N, the opinion on Frontex draft Single Programming Document 2021-2023 was delivered on 4.1.2021.

population of cases)'.²⁴⁰ For this work, such generalisation is not unconditionally possible: just as agencies have been established on a 'case-by-case' basis, so too the length of the Commission's opinions and the intensity of the comments vary considerably and not all opinions on an agency's programmes are as far-reaching as the ones selected for this case study.

The 'traditional' classification models developed in the literature did not facilitate the selection of agencies for this case study. These models classify agencies either according to the degree of powers conferred on them or according to their functions. Even though it could be expected that the Commission's control intensifies with the increase of powers conferred on agencies, apparently these classification criteria do not influence the quality of comments. Also, as the case of Frontex illustrates, the distinction between former Council agencies and Commission agencies has no relevance in this respect. Instead, it is rather the high political priority of the policy area in which an EU agency operates (and consequently the amount of EU contributions allocated) that determines how actively the Commission is engaged. Insofar, it is not surprising that the opinions delivered on Frontex Single Programming Document are more comprehensive than on any other agency's programming.

Against this background, Frontex and ECHA were not selected with the primary expectation of obtaining results that are representative for all agencies, but rather because of the rich material the study of these agencies offers for the purpose of this work. Furthermore, Frontex and ECHA cover a wide spectrum as they operate in different policy areas, are contrasting from their institutional setting, perform different types of tasks and are dependent, albeit to a different extent, on EU budget contributions. It is anticipated that this diversity becomes visible in the Commission's opinions and facilitates the discussions in the concluding chapter of this work.

The following brief introduction of the agencies selected for the case study will explain the motives for their choice:

²⁴⁰ John Gerring (2011), *The Case Study: What it is and What it Does*, (Oxford: Oxford Handbook of Political Science) p. 1141

1.4.3.1. Frontex

The European Border and Coast Guard Agency (Frontex) operates in a policy area that has the highest political priority in the European Union. Since its creation in 2004, various amendments of its founding Regulation have expanded its tasks. Hereby, Frontex has developed from an agency with mere co-ordinating functions into an agency with its `own` standing corps and technical equipment for operational activities as well as supervisory and decision-making tasks.

The importance of the policy field in which Frontex operates also becomes visible by the steep rise of EU contributions received. Whereas, in its first year of operation in 2007 approximately EUR 40 million was allocated to Frontex, in 2021 the subsidies from the EU budget amounted to an incredible EUR 575 million.²⁴¹ Even though all agencies concerned with migration and border management receive comparably high contributions, no other agency receives as much financial support as Frontex.²⁴²

The expectations that arise from this high funding are visible in the Commission's opinions. With an average length of 15 pages, the opinions on the Frontex draft Single Programming Document are the most detailed ones and thus offer manifold material for examination. It is striking how detailed the requests for amendments are phrased. Frequently, the Commission even dictates the wording of the programme which facilitates the method of this case study. However, while the opinion on the Frontex programme 2020-2021 focuses on legal aspects of the programme, seemingly intended to ensure the correct implementation of the new Frontex Regulation, the opinion on the draft programme 2021-2023 also addresses efficiency-related aspects.²⁴³

²⁴¹ Commission `Draft General Budget of the European Union for the financial year 2021` (Working Document Part III) COM (2020) 300 final, p.23 and pp.33-34

²⁴² Other agencies covered under Heading 4 of the EU's general budget are EASO and eu.LISA

²⁴³ Commission `Opinion of 4.1.2021 on the Single Programming Document containing the draft multiannual programming for 2021-2023 and the draft Annual Work Programme for 2021 of the European Border and Coast Guard Agency (Frontex)` C (2021) 1 final

1.4.3.2. ECHA

The European Chemicals Agency (ECHA) also operates in a policy area that has high political relevance. With the Commission's 'Green Deal', the safe and sustainable use of resources has gained political priority and policy papers subsequently adopted by the Commission influence the ECHA's strategic direction. Yet, the main incentive for selecting ECHA is that it provides a good contrast to Frontex's case study in several respects. These are, first, that apart from protecting human health and the environment, ECHA's tasks have the objective to facilitate the free movement of chemicals. As an 'internal market agency' it thus contrasts Frontex's policy area of freedom, security and justice that traditionally has been dominated by the Council. Secondly, ECHA's tasks are mainly of a regulatory nature. Even though it does not have final decision-making powers, its technical and scientific opinions have a significant influence on the authorisation and restriction of chemicals. Third, traditionally ECHA is a mainly fee financed agency, even though, for the coming years a considerable decrease of its fee income is expected. Whether the dependence on EU subsidies leads to an increase of the Commission's influence is a question to be addressed in the case study. Another difference that was observed is the format of the Commission's opinions. Contrary to the ones on the Frontex programme, a strong focus is on efficiency-related aspects of the programme.

1.4.4. Sources of Data

The legislative sources used for this work are, apart from the Treaties, the agencies' founding Regulations, especially those that established and regulate Frontex and ECHA. Other legislative sources referred to are the Regulations that are relevant for the budgetary procedure of agencies and the budget of the European Union in general. These are in particular the Financial Regulation²⁴⁴ and the Framework Financial Regulation.²⁴⁵

²⁴⁴ Regulation (EU, Euratom) 2018/1046 of 18 July 2018 on the financial rules applicable to the general budget of the Union [2018] OJ L193/1

²⁴⁵ Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for bodies set up under the TFEU and Euratom Treaty and referred to in Article 70

However, legislation alone cannot provide a comprehensive picture on the programming procedure of agencies. Frequently, reference is made to sources provided by the Commission, especially Communications published for the respective policy areas that are relevant for the agencies studied as well as action plans, roadmaps and guidelines. Where necessary, reference is also made to policy documents and resolutions adopted by the European Parliament and the Council.

For the case study, the programming documents published by Frontex and ECHA served as the primary source for examination. These are, apart from the draft and final versions of the Single Programming Documents, the opinions of the Commission thereon. As the Commission's opinions are not published in the official journal of the EU, the opinions on Frontex and ECHA's draft Single Programming Documents for the past three years have been annexed to this work.

Academic literature was mainly used for the literature review and to examine Frontex and ECHA's policy background. Only a few judgements of the General Court and the Court of Justice are quoted as no cases so far specifically address the programming procedures of agencies.

1.4.5. Limits of this Work

The governance of European agencies is complex and goes beyond its programming procedures. Other instruments of control are the discharge of an agency's budget and the annual activity reports where the achievements of an agency are scrutinised *ex-post*. Also, instruments of overview take place at an unofficial level. In this regard, as noticed on ECHA's website 'a variety of interactions between ECHA and the Commission results in daily contact at all hierarchical levels and in different contexts

of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council [2019] OJL122/1

– be it on an informal working level, as part of formal regulatory activities, or in the administrative field²⁴⁶.

Despite these limitations, this work intentionally focuses on the programming procedures of agencies to demonstrate that ongoing control is exercised and that the Commission is in the primary position to exercise control to an extent that might come close to ministry-agency relationships found at nation state level.

²⁴⁶ ECHA 'EU institutions and bodies' available at <https://echa.europa.eu/about-us/partners-and-networks/eu-bodies> accessed 26 June 2021

Chapter 2: Programming Obligations of European Agencies

2.1. Introduction

Programming obligations can be found in virtually all agencies' constituting Regulations. Even the founding Regulations of the two oldest European agencies,¹ the European Centre for the Development of Vocational Training (CEDEFOP) and the European Foundation for the Improvement of Living and Working Conditions (Eurofound), both established in 1975, have already imposed upon its management board the obligation to adopt annual work programmes² and to submit an estimate of its revenue and expenditure to the Commission.³

What has changed over the decades are the requirements on the content of the programming document. For agencies receiving contributions 'charged to the Union budget', the Framework Financial Regulation (FFR) applies.⁴ Article 32 FFR obliges agencies to submit by 31 January a draft Single Programming Document including a multiannual work programme, an annual work programme, an estimate of its revenue and expenditure and a resource programming document. Additional information to be provided is information on an agency's building policy, its strategy for cooperation with third countries/and or international organisations, its strategy for achieving efficiency gains and synergies, and its organisational management. As a

¹ The term 'European agencies' comprises interchangeably 'decentralised agencies', 'decentralised agencies' and 'agencies'

² See Article 8 of Regulation (EEC) No 337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training [1975] OJ L39/1; and Article 12 of Regulation (EEC) No 1365/75 of the Council of 26 May on the creation of a European Foundation for the improvement of living and working conditions [1975] OJ L139/1

³ Article 11 of Regulation (EEC) No 337/75; Article 12 (1) of Regulation (EEC) No 1365/75

⁴ Article 1 of the Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council, OJ 2019 L122/1 (in the following Framework Financial Regulation (FFR))

result, the programming document of an agency nowadays can comprise more than 150 pages.⁵

Not only the amount of information to be provided but also the requirements regarding its substance have increased with successive amendments of the Framework Financial Regulation. Like the Commission's planning and programming cycle, an agency's programme is nowadays strongly linked to activity-based management and activity-based budgeting principles. To this end, agencies have to establish in their overall strategic programme objectives, expected results, performance indicators and need to indicate, per activity, the financial and human resources required. The annual work programme has to outline the expected outputs and explain how these outputs will contribute to the achievement of the objectives set in the overall strategic programming.⁶

While these requirements are listed in detail under Article 32 FFR and further specified under the Commission's Guidelines,⁷ the purpose of the Single Programming Document is not explicitly explained. According to the Commission, it has two main functions. It ensures transparency of the agency's activities towards the European Institutions and citizens and is the instrument through which the management board instructs the executive director on the multiannual objectives for an agency and, by virtue of the annual work programme, on the activities to be undertaken in the coming year.⁸

⁵ For example, the Programming Document of the European Border and Coast Guard Agency (Frontex) 2021-2023 comprises 161 pages, Frontex, 'Management Board Decision 1/2021 of 13 January 2021 adopting the Single Programming Document 2021-2023 including the Multiannual Plan 2021-2023, the Programme of Work 2021 and the Budget 2021 (the Establishment Plan as part of it)' (January 2021) (Frontex Single Programming Document 2021-2023) available at https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_1_2021_adopting_SPD_2021-2023.pdf accessed 25 June 2021

⁶ Articles 32 (2) and 32 (3) Framework Financial Regulation

⁷ Commission, 'Communication from the Commission on the guidelines for programming document for decentralised agencies and the template for the Consolidated Annual Activity Report for decentralised agencies' C (2014) 9641 final (in the following Commission's Guidelines for programming document); for Single Programming Documents as from 2022-2024 new Guidelines have been developed, C (2020) 2297 final

⁸ Commission, 'Opinion of 4.1.2021 on the Single Programming Document containing the draft multiannual programming for 2021-2023 and the draft Annual Work Programme for 2021 of the European Border and Coast Guard Agency (Frontex)' C (2021) 1 final, para 10

This statement is correct in formal terms, but it is deceptive in that it implies that agencies have a considerable degree of discretion when they decide on their programming content. In reality, an agency's freedom is limited by budgetary constraints and other consequential measures of control the Commission exercises over the agency's programme.

This is because most agencies are entirely funded from contributions from the EU budget which classifies an agency's budget as 'a subsidy from the Commission'. Only 10 out of 35 agencies are partially or fully self-financed through fees or co-financed by national public authorities.⁹ This dependence on the EU budget has implications on an agency's programme.

Since the introduction of activity-based budgeting with the Financial Regulation in 2002, human and financial resources must be allocated for each activity programmed. This means that only those activities where resources are made available in the budget can be pursued. Insofar, the establishment of an agency's budget has a significant influence on its activities. How closely budgeting and programming are interconnected can be seen from the positioning of Article 32 FFR (Chapter 1, Title III) concerned with the establishment of the budget. Furthermore, Article 33 FFR provides, that the Single Programming Document 'shall become definite after the final adoption of the Union budget setting the amount of the contributions and the establishment plan'.¹⁰ In consequence, the estimate of revenue and expenditure and resource programming must be submitted with the draft Single Programming Document by 31 January each year to the Commission, the European Parliament and the Council.¹¹ From these institutions, it is only the Commission that has the power to give its opinion on the draft Single Programming Document.¹² If the

⁹ Fully self-financed are the Community Plant Variety Office (CPVO), the Single Resolution Board (SRB), the Translation Centre for the Bodies of the European Union (CdT); partially self-financed are the European Chemicals Agency (ECHA), the European Aviation Safety Agency (EASA); agencies that are partially co-financed by national authorities are the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EOPA) and the European Securities and Markets Authority (ESMA).

¹⁰ Article 33 (4) FFR

¹¹ Article 32 (1) FFR

¹² Article 32 (7) FFR

agency does not fully take into account the Commission's opinion, it needs to provide the Commission with adequate explanations.¹³

Even though Article 32 FFR does not explicitly empower the Commission to request amendments to the draft programme, it seems to have a considerable degree of 'factual power' to influence the final programme of an agency. How intensively the Commission is capable to exercise control over an agency's programming content is addressed in the case studies of this work where the Single Programming Documents of Frontex and ECHA as well as the opinions of the Commission are examined in detail. Hereby, it is assumed that the Commission's factual power predominantly derives from its competence to propose the amount of the contributions for the budgetary authority.¹⁴ This assumption needs to be further substantiated throughout this Chapter. It also requires to ascertain how independent the Commission is when it proposes an agency's budget or whether it merely transcribes what the European Parliament and the Council have determined beforehand. Hereby it has to be considered that the Commission is not the budgetary authority but also that its Communication on the programming of human and financial resources for decentralised agencies 2014-2020 serves as a baseline for the assessment of the annual budget during the term of the Multiannual Financial Framework (MFF).¹⁵ How strong the position of the Commission is concerning the European Parliament and the Council is addressed in Section 2.4. of this Chapter.

While budgetary constraints are probably the main incentive for an agency to comply with the Commission's opinion, it is also possible to conceive other means of influencing an agency's programme conceivable. The first one relates to the question of how independent agencies are in establishing their objectives in their multiannual programme. Apart from legislative prerogatives, it can be expected that agencies orientate on the specific objectives established under the strategic plan of its 'parent' Directorates-General. For both documents, the EU political priorities serve as a

¹³ *ibid*

¹⁴ Article 33 (2) FFR

¹⁵ See Commission, 'Programming of human and financial resources for decentralised agencies 2014-2020' COM (2013) 519 final, p. 18

reference whereby the new Framework Financial Regulation explicitly requires that an agency shall demonstrate how its strategic programming will contribute to the achievement of the EU political priorities.¹⁶ The second one is what impact performance has on an agency's programme. Under the principle of sound financial management, the Financial Regulation of 2018 explicitly includes performance as a budgetary principle.¹⁷ For agencies, this means, that the multiannual objectives and activities need to be accompanied by performance indicators suitable to monitor the progress on the objectives set. However, the existence of performance measurement tools alone does not automatically mean that performance has consequences. For agencies, there are no explicit incentives for 'good' performance in place, but conversely, budget results of the preceding year, in particular a high budget sur-plus, can have repercussions on the budget for the next year.

Against this background, this chapter is divided into three sections. The first Section (2.2.) outlines the origins of activity-based budgeting and -management principles as it is held that 'an understanding of these developments is crucial to appreciate the current pattern of EU administration'.¹⁸ These principles have been developed primarily for the planning and programming cycle of the Commission but similarly, they apply for agencies' programming obligations similarly. The programming obligations of agencies with a focus on instances where the Commission can influence an agency's programme is addressed under Section 2.3. The role of the Commission in the establishment of an agency's budget under the budgetary procedure is then examined under Section 2.4. of this chapter.

¹⁶ Article 32 (2) FFR

¹⁷ Article 33 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, repealing Regulation (EU, Euratom) No 966/2012 OJ 2018 L 193/1 (in the following Financial Regulation 2018)

¹⁸ Paul Craig, *EU Administrative Law* (OUP 2016), p. 35

2.2. The Origins of Activity-Based Budgeting and Activity-Based Management: The Reform Process of the Commission as a Blueprint for European Agencies

Today, the Organisation for Economic Co-operation and Development (OECD) considers the EU budgetary system in terms of its performance and results orientation to be more advanced than any other OECD country surveyed.¹⁹ This finding is explained by the fact that the EU budget largely depends on financial contributions from its Member States (investment-focused budget) which link their investment with the legitimate expectation of verifiable results.²⁰

However, this high ranking is the result of a longsome development and, as the recent amendments of the Financial Regulation of 2018 demonstrate, is still an ongoing process. Historically, the shift towards activity-based budgeting and subsequently activity-based management procedures was rooted in the scandal surrounding the resignation of the Santer Commission on 15 March 1999 which is considered as the 'defining moment'²¹ for triggering off fundamental reform of the EU administration. A Committee of Independent Experts was assigned by the European Parliament to examine grievances of the Commission and subsequently to make recommendations for reforming the Commission and the Financial Regulation.

This section addresses the development of planning and programming procedures of the Commission before turning to agencies' programming in the next section of this chapter. One reason is that an understanding of these developments 'is crucial in order to appreciate the current pattern of EU administration'.²² Activity-based budgeting and management principles that have been developed in the aftermath of the Santer Commission's resignation and subsequently incorporated in the Financial Regulation of 2002 are still valid today and are also relevant for agencies. The programming obligations of agencies under Article 32 of the Framework Financial

¹⁹ OECD, 'Budgeting and Performance in the European Union, A Review in the context of the EU Budget Focused on Results' (2017) 1 OECD Journal of Budgeting, p. 2 (in the following OECD Report 2017)

²⁰ OECD Report 2017, p. 4

²¹ Anchrit Wille, *The Normalization of the Commission, Politics and Bureaucracy in the EU Executive* (2013 Oxford University Press) p. 33

²² Craig, *supra* n. 18, p. 35

Regulation follows a similar pattern as the planning and programming cycle of the Commission. Moreover, the Commission's Guidelines of 2013 on performance budgeting of decentralised agencies, where the Commission described its experience in view of providing orientation to agencies, even indicate that the Commission nowadays regards itself as a 'role model' in terms of performance budgeting for agencies.²³

Regarding the comparability between the Commission and agencies' programming, there is however one reservation to be made. The distinction between political planning and operational programming does not apply to agencies as they have no political function. The Commission's governance structure is unique insofar as it distinguishes between political and administrative oversight structures.²⁴ Separate roles are assigned to the College of Commissioners which takes collegial political responsibility for the work of the Commission and the Directorate-General and Heads of Services who lead the Commission's administration. This division between political and administrative responsibility is also visible under the strategic planning and programming cycle of the Commission. The political guidelines adopted by the President at the beginning of his term as well as the Commission's annual work programme (till 2009, the annual policy strategy) set out political policy priorities in broad terms whereas the Directorate-General is responsible for the multiannual strategic plan and the annual management plan.

There is another reason for addressing the Commission's planning and programming procedures within this section. It relates to the central question of this work which aims to establish how the Commission takes influence over an agency's programme. Like the Commission, agencies have to submit a multiannual work programme where they set out the overall strategic programming for the coming three years including their medium-term objectives. This raises the question of where these objectives are derived. The 2018 amendments to Article 32 of the new Framework Financial

²³ Commission, 'Performance Budgeting and Decentralized Agencies' (2013) (Guidelines) available at https://europa.eu/european-union/sites/default/files/docs/body/2013-12-10_guidelines_performance-budgeting_en.pdf accessed 25 June 2021

²⁴ A Wille, *supra* n. 21, p. 146

Regulation add the requirement that an agency has to demonstrate in the overall strategic programming how its objectives will contribute ‘to the achievement of the EU political priorities’, which indicates an increasing link between the Commission and the agencies` programmes.

2.2.1. The Work of the Committee of Independent Experts

Faced with allegations of mismanagement, fraud and nepotism, the European Parliament refused to discharge the Community’s budget for 1996 and appointed a Committee of Independent Experts to ‘examine the way in which the Commission detects and deals with fraud, mismanagement and nepotism, including a fundamental review of Commission practices in the awarding of all financial contracts’.²⁵ The Committee examined different projects entrusted to the Commission since 1990, which had in common that significant funding was appropriated to these projects and that the Commission, being in charge of the execution of these programmes, did not have sufficient human resources for administering these projects appropriately.²⁶ The report noted the fact that contractors could act fraudulently without the Commissioner being aware of these activities revealed ‘a significant loss of control by the Commissioners over the Administration that they were supposed to run’.²⁷

The First Report thus recommended that the Commission should refrain from launching ‘new, political important and highly expensive programme without having the resources- especially staff- to do so’²⁸ and to put forward ‘whatever proposal it sees fit with regard to its Establishment Plan when it submits its preliminary draft

²⁵ European Parliament, ‘Resolution of 14 January 1999: Refusal of 1996 to discharge’ available at http://www.europarl.europa.eu/experts/press/resol14_en.htm accessed 25 June 2021

²⁶ However, as the Committee noted in its second Report of 10 September 1999 “Generally, there are grounds for believing that the Commission’s current difficulties are due not only to a lack of human resources but also to a lack of management tools and the inadequacy of the contracting system, which have made it difficult to contract out to reliable partners”; see Committee of Independent Experts, ‘Second Report on Reform of the Commission: Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud, Vol. II, para. 2.05 (10. September 1999), available at <www.europarl.europa.eu/experts/pdf/rep2-2en.pdf> accessed 25 June 2021 (in the following Second Report)

²⁷ *ibid*, para 9.2.2.

²⁸ *ibid*, para 9.4.6

budget to the budgetary authority'.²⁹ The Committee also criticised the Commission for lacking organisational methods to ensure the efficient use of the staff that it possessed and noted that 'the Commission did not try to lay down in advance how each new policy would have to be implemented and to make necessary arrangements accordingly'.³⁰ Hereby, the Committee pointed out the Commission's duty to set priorities in order 'to ensure a match between the objectives to be achieved and the resources to be employed', a duty which the Commission had not fulfilled'.³¹

Shortly after the publication of the First Report, the European Parliament mandated the Committee with a Second Report to review the Commission's culture, practices and procedures and to give recommendations for reforms.³² This Second Report recommended providing for a functional distinction between direct and shared management,³³ a suggestion that was subsequently embodied under Article 53 of the Financial Regulation 2002.³⁴ As an alternative to contract out tasks, the Committee encouraged the Commission to give greater consideration to the establishment of a 'new category of bodies based on Community law'.³⁵ In its Action Plan on Reforming the Commission in 2000, the Commission expressed its intention to elaborate a framework for externalisation of certain activities to 'transnational' public bodies,³⁶ and subsequently, Article 53 (2) of the Financial Regulation of 2002 introduced the possibility to implement the budget indirectly through 'bodies set up by the Communities as referred to in Article 185'.³⁷

²⁹ *ibid*, para 9.4.2.

³⁰ *ibid*, para 9.4.9.

³¹ *ibid*, para 9.4.3.

³² Specifically, it mandated the Committee with "a more wide-ranging review of the Commission's culture, practices and procedures and in particular its concrete recommendations for strengthening these procedures and any other appropriate reforms to be considered by Commission and Parliament"; European Parliament, Resolution of 23.03.1999, para 4

³³ Two Chapters of the Second Report are dedicated to these modes of budget implementation: Chapter Two deals with Direct Management, Chapter Three with Shared Management.

³⁴ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [2002] OJ L248/1

³⁵ Second Report, Volume I, *supra* n 25, para 2.2.31.

³⁶ Commission, 'Reforming the Commission: A White Paper- Part II, Action Plan' COM (2000) 200 final; even though, the Commission did not explicitly refer to decentralised agencies, under action 17 it refers to the European Medicines Evaluation Agency (now EMA) and the Food Authority (now EFSA) as examples.

³⁷ These are bodies set up by the Communities and having legal personality, including decentralised agencies

Another central recommendation of the Committee was to fundamentally revise the budget structure of the Financial Regulation.³⁸ The Committee suggested an activity-based budget structure that identified the activities to which each Directorate-General was devoted and allocate the budget accordingly. Such an activity-based budget structure would facilitate the assessment of a cost and benefit analysis as it allowed for the ascertainment of the real cost of each measure making it comparable with the results achieved.³⁹ Through this, the management of Community programmes would gain coherence and transparency and enable the budgetary authority to exercise its decision-making power over the allocation of the resources for any given measure.⁴⁰

Following these recommendations, the Financial Regulation of 2002 introduced two activity-related provisions. Regarding the structure and presentation of the budget, Article 41 of the Financial Regulation established that the Commission's statement of expenditure had to be classified according to its purpose whereby 'a title shall correspond to a policy area and a chapter shall, as a rule, correspond to an activity'.⁴¹ This activity-based budget nomenclature is still valid today under Article 47 (2) of the Financial Regulation of 2018. The second provision introduced performance-related budgeting principles. Article 33 of the Financial Regulation of 2002, concerned with the formal structure of the preliminary draft budget, required the Commission to attach 'information on the achievement of all previously set objectives for the various activities as well as new objectives measured by indicators'.⁴² Subsequent amendments of the Financial Regulation in 2006 added the requirement to attach activity statements to the preliminary draft budget,⁴³ which has, since the 2014 budget procedure, been replaced by programme statements.

³⁸ Second Report, Recommendation No 2; however, in consideration of the ongoing process of the "SEM 2000" initiative, the Committee refrained from providing its own systematic review of the Financial Regulation but limited its Report to "indicating its ideas on specific reforms", see Second Report, Volume I, *supra* n 26, para 4.2.2.

³⁹ *ibid*

⁴⁰ Second Report, Volume I, *supra* n 26, para 2.1.19

⁴¹ Article 41 (2) Second Sentence

⁴² Article 33 (2) (d)

⁴³ Article 33 (2) (d) provides that the activity statements must contain "information on the achievement of all previously set objectives for the various activities as well as new objectives measured by indicators, full justification and cost-benefit approach for proposed changes in the level

2.2.2. The Commission's White Paper: 'Reforming the Commission'

Shortly after the Second Report was published, the Commission set up a Task Force for Administrative Reform (TFAR) for the development of a reform strategy and to oversee its practical implementation. Its work resulted in the Commission's White Paper of March 2000 with the title 'Reforming the Commission'.⁴⁴ Inter alia, it addressed the transposition of activity-based budgeting principles into the Commission's strategic planning and programming procedure. The Commission identified three strategic areas for action. Apart from its decision to focus more on its core functions and to delegate activities which could be 'usefully and efficiently executed by other bodies',⁴⁵ these strategic areas concerned the establishment of activity-based management procedures within the Commission (2.2.2.1) and to develop performance-orientated working methods to measure the results accomplished with the available funding (2.2.2.2.).

2.2.2.1. The Introduction of Activity-Based Management Structures: Its Objectives

The White Paper defined activity-based management as 'a tool for delivering policy priorities',⁴⁶ which has the primary objective to 'allow the Commission to set political priorities each year, to translate them into operational terms, and to allocate resources accordingly'.⁴⁷ Apart from raising cost/benefit awareness, another reason for developing activity-based management structures was the necessity to integrate the new activity-based budgeting structure of the Financial Regulation into the Commission's planning and programming cycle.⁴⁸ Activity-based budgeting meant in practice, that the Commission could no longer plan activities separately from the allocation of human and financial resources and had to discontinue activities where

of appropriations, clear rationale for intervention at the EU level in keeping, inter alia, with the principle of subsidiarity, information on the implementation rates of the previous year's activity and implementation rates for the current year".

⁴⁴ COM (2000) 200

⁴⁵ COM (2000) 200, Section I, Section III.2, and Action Plan Section IX

⁴⁶ COM (2000) 200, Part I, p. 5

⁴⁷ Commission, 'Implementing Activity Based Management in the Commission' SEC (2001) 1197/6 & 7, p. 3

⁴⁸ The Financial Regulation of 2002 entered into force on 01 January 2003. The first Annual Policy Strategy was adopted on 21 February 2001 in preparation of the Preliminary Draft Budget 2002, and of the 2002 Commission Work Programme

resources were not specifically allocated in the budget.⁴⁹Insofar, implementing activity-based management structures was more than a matter of modernising the Commission's administration: It is a planning and programming procedure where the Commission decides on policy priorities, defines its objectives, translates policies into action and allocates financial and human resources to planned activities which need to be linked with the budgetary cycle.⁵⁰

Insofar, three connecting elements define the 'logical sequence' of activity-based management:⁵¹

- The definition of *objectives*,
- The selection of *activities* to pursue them, and
- the allocation of *resources* to carry out these activities.

2.2.2.2. The Implementation of Activity Based Management: An Integrated Planning and Programming Cycle

The aforementioned elements and the division between its political and administrative functions predetermined how activity-based management principles had to be implemented within the Commission.

Resource allocation for each activity necessitated a synchronisation of the Commission's planning and programming with the budgetary cycle of the EU. To this end, the White Paper envisaged a strategic planning and programming cycle (SPP) timely adjusted with the budgetary cycle. Subsequent Communications of the Commission further developed this cycle⁵² which became fully operational in 2003;⁵³

⁴⁹ COM (2000) 200, Sec. III.

⁵⁰ Commission, 'Implementing Activity Based Management in the Commission' SEC (2001) 1197/6&7, p. 3

⁵¹ *ibid*

⁵² See the Commission, 'European Governance: A White Paper' COM (2001) 428 final, Commission 'Progress Review of Reform' COM (2003) 40 final; Commission 'Completing the Reform Mandate: Progress Report and Measures to be Implemented in 2004' COM (2004) 93 final.

⁵³ COM (2004) 93, p. 5

in the same year, the first EU budget, based entirely on activity-based budgeting tools, was prepared for the financial year 2004.⁵⁴

In addition, the strategic planning and programming cycle provided for a distinction between the strategic planning at the College's level and the operational programming at DG's level: Launched by a political orientation debate of the College of Commissioners, the annual policy strategy (APS) hereby marked the first step of the Cycle. It was meant to transform the Commission's five-year strategic objectives into an annual planning document that established the main policy objectives, prioritised activities for the coming year and allocated corresponding financial and human resources to them.⁵⁵ As such, the annual policy strategy was regarded as the 'natural place' for strategic decisions on resource orientation and provided the basis for the preparation of the preliminary draft budget.⁵⁶ Due to its political nature and its dependence on the EU budget, from the beginning on the annual policy strategy was therefore accompanied by an inter-institutional dialogue with the Parliament and Council. Annual work programmes existed in parallel but had a rather hybrid function in the initial stage. Adopted by the College of Commissioners, the purpose was to translate the operational programming of the management plan (adopted at DG's level) into a concrete action plan and served as the basis for the adoption of the final budget of the EU.⁵⁷ In 2009, with the last adoption of an annual policy strategy, this distinction between strategic and operational planning at the political level was abolished. From this point on, only the Commission's work programmes provide for the annual planning at the political level.

The Management Plan, adopted by each Directorate-General, on the other hand, was described as 'the vehicle for planning and programming at service level' and provided for the annual operational programming of the Commission.⁵⁸ Its purpose was 'to translate the Commission's political priorities into concrete actions' and to provide

⁵⁴ COM (2003) 40, p. 4

⁵⁵ SEC (2001) 1197/6&7, p.6

⁵⁶ *ibid*, p. 11

⁵⁷ *ibid*, p.6

⁵⁸ *ibid*, p. 13

the basis for performance management through the required presentation of objectives and performance indicators.⁵⁹

2.2.3. Today's Planning and Programming Structure of the Commission

Today's planning and programming structure likewise distinguishes between political planning and operational programming, the latter now comprising a multiannual strategic plan and an annual management plan. At the beginning of each mandate, the President of the Commission issues political guidelines for the Commission's term of office. Presently these are President von der Leyen's six political priorities adopted in July 2019 where the long-term objectives of the Commission are presented.⁶⁰ Following a 'State of the Union' speech before the European Parliament in September, each year these objectives are translated into annual deliverables in the Commission Work Programme which are annexed by an overview of new legislative initiatives and priority pending proposals.⁶¹

At the Directorate-General's level, every service of the European Commission prepares a multiannual strategic plan and an annual management plan. The strategic plan is defined as a planning document where each department describes how it will contribute to the Commission broader political goals and defines its specific objectives for five years.⁶² To this end, the strategic plan reflects the political priorities relevant to its specific policy area. For example, the strategic plan of DG Migration and Home Affairs for the period 2020-2024 sets out as the general objective 'promoting our European way of life'.⁶³ Built on this general objective, the strategic plan establishes specific objectives which are based on Framework Strategies adopted by the Commission for a particular policy area. The specific objectives of DG

⁵⁹ COM (2003), at p. 4

⁶⁰ Ursula von der Leyen 'A Union that strives for more – My agenda for Europe', Strasbourg 16 July 2019 available at https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf accessed 25 June 2021

⁶¹ For example, the Commission Work Programme for 2021: Communication 'Commission Work Programme 2021: A Union of vitality in a world of fragility' COM (2020) 690 final

⁶² Commission, 'Strategic plans/Management plans', available at <https://ec.europa.eu/info/strategy/strategy-documents/strategic-plans-management-plans_en> accessed 25 June 2021

⁶³ Which corresponds with the fifth priority of von der Leyen's political guidelines

Migration and Home Affairs, to strengthen internal security, an effective asylum and migration management policy, stronger cooperation with partner countries and a fully functioning area of free movement, are mainly based on the Commission's EU Security Union Strategy and the New Pact on Migration and Asylum.⁶⁴ Annexed to each strategic plan are performance tables whose purpose is to allow the assessment of the progress towards the achievement of the specific objectives and for this reason comprise result indicators, interim milestones and targets.⁶⁵

Whereas the strategic plan defines the overall strategy and long-term objectives for the Commission's term of office, the management plan's function is to list the deliverables for the given year.⁶⁶ These are based on the specific objectives of the strategic plan but their focus lies on programming the main 'outputs' for the upcoming year, i.e. what will be directly produced or supplied through EU intervention.⁶⁷ Like the objectives of the strategic plan, these outputs are accompanied by performance indicators, targets and an explanation on how these outputs will contribute to the achievement of the specific objective.

2.2.4. Performance-Orientated Working Methods

2.2.4.1. The Concept of Performance-Orientated Working Methods and its Legal Framework

Under the principle of sound financial management, the Financial Regulation of 2018 now explicitly includes performance as a budgetary principle.⁶⁸

⁶⁴ Commission, 'Strategic Plan 2020-2024 DG Migration and Home Affairs' Ref. Ares (2020) 4617446, p. 3

⁶⁵ For example, the strategic plan of DG Migration and Home Affairs sets out as a specific objective 'A fully functioning area of free movement'; one result indicator to this end is 'a well-protected external border, measured by the gradual establishment of the European Border and Coast Guard standing corps', interim milestones are the increase of the standing corps members with the target of 10,000 standing corps members by 2024

⁶⁶ Commission, 'Governance in the European Commission' (Communication) C (2020) 4240 final, p. 6-7

⁶⁷ See for example, Commission 'Management Plan 2021 of DG Migration and Home Affairs' Ref. Ares (2021) 161749, p. 3

⁶⁸ Article 33 Financial Regulation 2018 *supra* n. 17

Performance budgeting goes further than activity-based budgeting: while the latter requires that resources for each activity are allocated in the budget, performance budgeting is a method that outlines the expected results to be accomplished with the available funding.⁶⁹ Against this background, the OECD defines performance budgeting as ‘the systematic use of information about the outputs, results and/or impacts of public policies in order to inform, influence and/or determine the level of public funds allocated towards those policies in the budgetary context’.⁷⁰

Already the Commission’s White Paper of 2000 had outlined the necessity to evaluate the costs and anticipated benefits of a measure.⁷¹ In its 2001 Communication on implementing activity-based management, the Commission envisaged that Annual Management Plans should set out the objectives for each programmed activity and identify the indicators suitable for monitoring the progress on the objectives set. These two elements of performance budgeting were subsequently embodied under Article 27 (3) of the Financial Regulation of 2002 which established that ‘*specific, measurable, achievable, relevant and timed [SMART] objectives shall be set for all sectors of activity covered by the budget*’ and that the ‘*achievement of those objectives shall be monitored by performance indicators for each activity*’.

Since then, the presentation of objectives and performance indicators in the Strategic and Management Plans constitute main elements of performance budgeting together with milestones as action ‘checkpoints’ and targets that define the goal to be reached by a specific date.⁷² Performance indicators shall establish quantitative or qualitative information on how the progress in achieving the desired outcome can be measured. Yet, the Financial Regulation does not specifically predetermine these indicators;⁷³ instead, Article 33 (3) of the Financial Regulation requires in terms of its

⁶⁹ Commission’s Guidelines (2013) *supra* n 23, p. 4

⁷⁰ OECD, *Performance Budgeting in OECD Countries*, (2007 Paris: OECD Publishing), p. 5, accessible under <https://read.oecd-ilibrary.org/governance/performance-budgeting-in-oecd-countries_9789264034051-en>

accessed 25 June 2021

⁷¹ COM (2000) 200, Action Plan, p. 21

⁷² Commission’s Guidelines (2013), *supra* n. 23, p. 6

⁷³ *ibid*, p. 8

quality that performance indicators shall be relevant, *accepted, credible, easy and robust* (RACER) for measuring performance.

Whereas objectives, indicators, milestones and targets are set *ex-ante* for programmes and activities of the Commission, the reporting on achieved results is another essential feature of performance management as it facilitates the review of the proper use of public funds and the achievement of objectives.⁷⁴

Already the Financial Regulation of 2002 obliged the Commission to provide information on the achievement of previously set objectives in its preliminary draft budget.⁷⁵ Since 2006, the Financial Regulation obliges the Commission to include activity statements into the draft budget. These activity statements require the Commission, *inter alia*, to give 'information on the implementation rate of the previous year's activity and implementation rates for the current year'.⁷⁶ With the amendments of the Financial Regulation of 2018, activity statements have been replaced by programme statements.⁷⁷ The type of information to be provided is the same but focuses on spending programmes, which represent about 95% of the total operational spending. Therefore, performance information on activities pursued by the Commission which are not directly related to spending programmes, such as legislative proposals or recommendations, are only available in the relevant management plans.⁷⁸

Apart from programme statements, the annual activity reports submitted by the Directorate-General constitutes an important reporting tool aimed to measure performance. As a kind of 'mirror image' to the management plan, the annual activity report contains an *ex-post* overview of the results achieved by each service.⁷⁹ The information so provided is subsequently consolidated in the Commission's annual

⁷⁴ OECD (2007) *supra* 70, p. 5

⁷⁵ Article 33 (2) (d) Financial Regulation 2002

⁷⁶ Article 33 (d) Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 amending Regulation (EC, Eurotom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [2006] OJ L390/1

⁷⁷ Article 41 (3) (h) Financial Regulation 2018

⁷⁸ Commission Guidelines (2013), *supra* n. 23, p. 17

⁷⁹ *ibid* p. 18

management and performance report to be communicated to the European Parliament and the Council under Article 247 (1) FR.⁸⁰

2.2.4.2. Does Performance have Consequences?

Even though, reporting obligations vis-à-vis the European Parliament and the Council indicate a political responsibility placed on the Commission for the efficient and effective use of the budget, the existence of a performance framework alone does not automatically mean that budgetary (or other) consequences derive from performance.

According to the OECD, the following three factors determine the extent to which performance budgeting is implemented across OECD countries:⁸¹

1. Framework: The existence of a performance budgeting system;
2. Use: The use of performance information; and
3. Consequences: Consequences if the performance is not in line with the targets.

Depending on how strong the link between performance and its consequences for future budget allocations is, the OECD distinguishes between three categories of performance budgeting:⁸²

The first model, 'presentational performance budgeting', requires that performance information is presented together with the annual budget, but previous performance has no direct relevance to budgetary decisions. Under the second model, titled 'performance-informed budgeting', performance information is presented systematically alongside the financial allocations and is meant to facilitate policymakers to take this information into account when deciding upon future budget allocations.⁸³ The 'direct performance budgeting' model expects that performance,

⁸⁰ Financial Regulation of 2018.

⁸¹ OECD (2017) *supra* n 19, p. 8

⁸² More recently, the OECD identified a fourth category titled 'managerial performance budgeting'; for the sake of simplification this work only addressed the original three categories.

⁸³ OECD (2017) *supra* n 19, p. 6

relative to previously stated objectives, has direct consequences for budget allocations.⁸⁴

Only the third model, direct performance budgeting, presupposes that performance on previously stated objectives have direct budgetary consequences, whereas the second model, performance-informed budgeting to a lesser extent assumes that performance *can* have relevance for future budgetary decisions. The OECD has left open which model applies for the European Union and noted that the 'EU model may be characterised as sharing several of the features of each category of performance budgeting'.⁸⁵This relativizes the high ranking of the EU system scored by the OECD in its Performance Budgeting Index in 2016. It resulted from the EU's well-developed existence of a performance framework rather than the *use* of performance measures and the consequences performance has on the budget. In these areas, the EU was rather average compared to other countries and the OECD even concluded that 'in practice the budgetary responses under the EU model tend to be limited in scope'.⁸⁶

Indeed, direct performance budgeting is rather the exemption at the EU level. Examples outlined in the OECD report are performance conditionalities which are sometimes built into spending programmes or performance reserves which ensure that resources are only paid in full to the Member States after a programme is implemented.⁸⁷However, already the fact that the estimated budget result of an agency shall be repaid to the Commission can be regarded as a direct consequence performance has for the next budget.⁸⁸

Another aspect that points towards performance budgeting for agencies beyond mere information providing qualities derives from Article 17 (4) of the new Framework Financial Regulation where it is established that the estimate of an agency's budget result 'shall be duly taken into account by the Commission when assessing the financial needs of the Union body for the year N+1'. This provision

⁸⁴ *ibid*

⁸⁵ *Ibid*, p. 7

⁸⁶ *Ibid*, p. 10

⁸⁷ E.g. the European Structural and Investment Funds (ESIF)

⁸⁸ Article 17 (1) FFR

refers to the resource programming of an agency and its estimated budget result. Even though a similar provision was already established under the previous Framework Financial Regulation,⁸⁹ now the explicit reference to Article 17 FFR under Article 33 (2) FFR indicates how important performance results are for the Commission's proposal on the number of contributions for the next budget. Equally important is that `consequences` for performance budgeting are not necessarily limited to budgetary repercussion but can comprise any consequence as long as there is a causal link to previous performance. Consequences so conceivable are the publication of poor performance or more intense monitoring in the future.⁹⁰ Regarding agencies, these `non-monetary` consequences could be expressed in evaluation reports or the Commission's opinions on an agency's draft programming document.

2.2.5. Findings

Activity-based budgeting principles have been incorporated under the Financial Regulation since 2002 and require that human and financial resources are allocated in the EU budget for each programmed activity. To this end, activity-based management principles have evolved for the planning and programming of activities at the Commission's level which requires that policy priorities are set and its objectives are identified which are translated into concrete activities with an allocation of the resources required.

At the operational level, the strategic plan defines the overall strategy and long-term objectives for the Commission's office whereas the annual Management Plan set out the deliverables (i.e. outputs) for the given year. These are based on the long-term objectives of the strategic plan.

⁸⁹ Article 20 (1) of Commission Delegated Regulation (EU) No 1271/2013 of 30 September 2013 on the framework financial regulation for the bodies referred to in Article 208 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council (Framework Financial Regulation 2013) [2013] OJ L328/42

⁹⁰ OECD (2017) *supra* n 19, p. 10

Performance measurement has always been an indispensable part of activity-based budgeting but with the Financial Regulation of 2018 performance is now explicitly acknowledged as a budgetary principle. Performance measurement goes further than activity-based budgeting as it requires establishing the expected results to be accomplished with the available funding. To this end, for each planned activity objectives, performance indicators, milestones and targets need to be established

The OECD considers the EU budgetary system in terms of performance and result orientation to be more advanced than any other OECD country surveyed. This high ranking results mainly from the existence of a highly developed framework rather than performance has direct consequences for budget allocations. For agencies, however, the explicit reference to Article 17 FFR under Article 33 (2) FFR of the new Framework Financial Regulation indicates a development towards `direct performance budgeting` as budget results of an agency in the previous year `shall be duly taken into account by the Commission when assessing the financial needs of the Union body for the year N+1`. Yet, no incentives for good performance are in place so far.

2.3. Programming of Agencies

Regarding the preparation and adoption of an agency's work programme and its budget (now the Single Programming Document), all agencies' founding Regulations follow a similar pattern. It is generally the director who is responsible for its preparation whereas the management board is responsible for the final adoption of the programming documents, the budget of the agency and the establishment plan. The dominance of Member States' representatives on the management board raises the expectation that the adoption of the programmes is, first and foremost, an intergovernmental issue. This assumption, however, does not hold for the following reasons:

First, Article 33 (4) of the Framework Financial Regulation imposes a limitation on the management board's freedom by stating that the single programming document `shall become definite after final adoption of the Union budget setting the amount of

the contribution and the establishment plan'. Insofar, it is the budgetary authority and the Commission that proposes the contributions for an agency which have the last say over the final version of the programming document.

Secondly, agencies are not free to programme activities as they wish but are, first and foremost, bound by its legislative mandate. Thus, only tasks conferred on agencies through legislation can be the subject of an agency's programme. However, this legislation will not always provide agencies with detailed objectives.⁹¹ This raises the incidental question of how independent agencies are in determining their medium-term objectives and programme their annual activities. More specifically, the question is to what extent agency's programmes are influenced by the Strategic and Management Plans of their 'parent' Directorate-General, other policy documents of the Commission and/or the opinion the Commission gives on an agency's draft Single Programming Document.

Third, legislative instruments and the Guidelines of Commission adopted under Article 32 (1) of the Framework Financial Regulation establish rules on the format and the required content of the programming document. Apart from the agency's founding Regulation, it is especially the Framework Financial Regulation that determines the programming procedure, establishes the participation of the Commission and other institutions as well as the deadlines for submission of the programming document which are closely linked to the budgetary cycle.

Against this background, this section begins with an outline of the programming obligations established under the Financial Framework Regulation (Section 2.3.1.), followed by an examination of the Commission's Guidelines (Section 2.3.2.). These findings will be compared with the agency's founding Regulations in Section 2.3.3.. These Regulations are not consistent and only a minority of them is in line with the requirements set out under the Framework Financial Regulations.

Even though Article 1 FFR establishes that agencies have to adopt their own financial rules, these are not specifically addressed. This is because Article 1 provides that

⁹¹ Commission's Guidelines (2013) *supra* n 23, p. 22

these financial rules shall not deviate from the Framework Financial Regulation except where its specific needs require so and with the Commission's prior consent. As in practice, all financial rules adopted literally replicate the Framework Financial Regulation, a discussion on them would not bring any valuable findings.

2.3.1. Programming Obligations under the Framework Financial Regulation

On 11 May 2019, the new Framework Financial Regulation entered into force.⁹² For agencies, the new Regulation applies for Single Programming Documents from 1 January 2020 onwards.⁹³

The Framework Financial Regulation is adopted as a Commission's Delegated Regulation under Article 70 of the Financial Regulation.⁹⁴ Like the Framework Financial Regulation, the Financial Regulation was revised in 2018 and replaced the Financial Regulation of 2012. The new Financial Regulation has repercussions on the programming of agencies in two respects. First, the element of 'performance' is now explicitly incorporated under the principle of sound financial management.⁹⁵ Secondly, Article 37 of the former Financial Regulation, concerned with the estimate of an agency's budget, is replaced by Article 40. By 31 January each year, agencies have to send the Commission, the European Parliament and the Council its *draft single programming document containing its annual and multi-annual programming with corresponding planning for human and financial resources*. Thus, apart from an alteration of the submission deadline, the substantial change lies

⁹² Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (Framework Financial Regulation 2019) [2019] OJ L122/1

⁹³ See Article 114 of the new Framework Financial Regulation 'Entry into force'

⁹⁴ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, [2018] OJ L193/1

⁹⁵ Article 33 (2) FR which states that "in line with the principle of sound financial management, the use of appropriations shall focus on performance"

in the requirement to submit a `single` programming document that combines the human and financial resource planning with the annual and multi-annual programme.

The Framework Financial Regulation lays down the essential financial rules based on the which the `Union body`⁹⁶ not fully self-financed, has to adopt its own financial rules which shall not depart from that Regulation `except where its specific needs so require and with the Commission's prior consent`.⁹⁷The Framework Financial Regulation of 2013 replaced the Framework Financial Regulation of 2002 in view of taking into account the Common Approach on decentralised agencies of 19 July 2012.⁹⁸ The most salient feature was the introduction of an obligation for agencies not fully self-financed `to draw up programming document containing multiannual and annual programming taking into account guidelines set by the Commission`.⁹⁹This obligation, imposed under Article 32 FFR, resembles the strategic and management plans of the Commission insofar as agencies programming documents likewise comprises a multiannual and annual programming. This division is maintained under the new Framework Financial Regulation but, in addition, further information is now part of the Single Programming Document, most notably the estimate of revenue and expenditure which under the previous Framework Financial Regulation was submitted as a separate document.

2.3.1.1. Multiannual Work Programme (Multiannual Programme)¹⁰⁰

Article 32 (1) (a) FFR obliges an agency to draw up a multiannual programme that shall set out the overall strategic programming including its objectives, expected results and performance indicators for three years.¹⁰¹ It begins with an outline of the long-term goals which are termed in agencies' programmes either as strategic

⁹⁶ `union body` means any body referred to in Article 208 of Regulation (EU, Euratom) No 966/2012 and includes decentralised agencies.

⁹⁷ Article 1 FFR

⁹⁸ See Recital (2) of the Framework Financial Regulation 2019

⁹⁹ By contrast, Article 27 (2) of the FFR (2002) only required that an agency had to submit to the Commission an estimate of its revenue and expenditure together with the work programme.

¹⁰⁰ Under Article 32 (1) (a) of the Framework Financial Regulation 2019, the terminology has changed from `multiannual programme` into `multiannual work programme`

¹⁰¹ Article 32 (2) of the Framework Financial Regulation 2019 requires that the multiannual work programme shall cover the years N+1 to N+3 whereas under the 2013 Regulation the minimum resource planning required the *minimum* resource planning of three years.

direction, strategic statement or strategic priorities.¹⁰² Frontex multiannual work programme sets out three strategic objectives that are broken down into specific focus areas and into more detailed key activities which constitute the base for the annual programme. ECHA's programming structure is slightly different. Its multiannual work programme sets out three strategic priorities with corresponding objectives. The activities programme under the annual work programme, however, is not directly derived from these priorities but structured according to the different legislation that confers tasks on ECHA.¹⁰³

Already, the Framework Financial Regulation of 2013 established that agencies have to include resource programming with an indication of the multiannual budget and staff required. The new Framework Financial Regulation of 2019 adds the obligation to outline *per activity* the indicative financial and human resources necessary to attain the objectives and to describe how these activities will contribute to the achievement of the EU *political priorities*. Regulation (EU) 2019/1896 is interesting in this regard as it provides that Frontex multiannual work programme shall set out overall strategic programming 'in line with the multiannual strategic policy cycle for European integrated border management' that is adopted by the Commission.¹⁰⁴ So far, it is the only Regulation that establishes a direct link between Commission's policy strategies and an agency's programming.

Apart from that, a clear connection between the strategic direction of an agency's programming and that of its parent Directorate General cannot be ascertained. For example, the strategic plan 2020-2024 of DG Migration and Home Affairs has the general objective of 'Promoting our European way of life'.¹⁰⁵ Thereunder, four specific objectives are set out. They are strengthened internal security, an effective asylum and migration management policy, a fully functioning area of free movement

¹⁰² Frontex uses the term strategic direction, EASA strategic statement and ECHA the term strategic priorities.

¹⁰³ See Section 4.4.1. of this work

¹⁰⁴ Article 102 (1) of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (Regulation (EU) 2019/1896) [2019] OJ L295/1

¹⁰⁵ Commission, 'Strategic Plan 2020-2024 DG Migration and Home Affairs' *supra* n 64, p. 7

and stronger cooperation with partner countries.¹⁰⁶ Frontex, in turn, sets out the strategic objectives to reduce vulnerability of the external borders based on comprehensive situational awareness, safe, secure and well-functioning EU external borders, and sustained European Border and Coast Guard capabilities.¹⁰⁷

A reason why these objectives do not overlap is their different scope. While Frontex overarching objective is to facilitate European integrated border management,¹⁰⁸ the strategic direction of DG Migration and Home Affairs covers a wider range of topics. After all, not only does Frontex operate under its umbrella but also five other agencies are established in the area of home affairs.¹⁰⁹ Thus, it is the specific objective of a fully functioning area of free movement that is most relevant for Frontex. Under this objective, the management of the EU external borders is addressed with the intended result of 'a well-protected external border, measured by the gradual establishment of the European Border and Coast Guard Standing corps'.¹¹⁰

For ECHA, it is even more challenging to discover a link between the Commission's strategic plan and ECHA's programming. The reason is that three Directorate-Generals have a stake in ECHA's governance: These are the DG for Internal Market, Industry, Entrepreneurship and SME's (DG GROW) as the 'official partner DG', the DG Environment (DG ENV) as well as DG Health and Food Safety (DG SANTE).

The multiannual work programme 2021-2023 for ECHA sets out three strategic priorities but similar to Frontex's programming, no congruence with the relevant strategic plans of the Directorates Generals can be established.¹¹¹ Under the general objective 'a European Green Deal', the strategic plan of DG GROW envisages the development of a circular economy. The adoption of a new chemicals strategy under

¹⁰⁶ *ibid*

¹⁰⁷ Frontex Single Programming Document 2021-2023 *supra* n 5, pp. 15-16

¹⁰⁸ Article 1 (1) of Regulation (EU) 2019/1896

¹⁰⁹ Europol, CEPOL, (EMCDDA), eu-LISA, EASO

¹¹⁰ Commission, 'Strategic Plan 2020-2024 DG Migration and Home Affairs' *supra* n 64 pp. 22-24

¹¹¹ These are the identification and risk management of substances of concern, the safe and sustainable use of chemicals by industry and the sustainable management of chemicals through the implementation of EU legislation; ECHA, 'ECHA Programming Document 2021-2024' (2020) MB/56/2020 final available at

https://echa.europa.eu/documents/10162/13609/programming_document_2021-2024_en.pdf/fdc0a236-696b-b2a8-a6fb-523066cadf30 accessed 26 June 2021

the REACH and Classification, Labelling and Packaging (CLP) Regulation is regarded to be of 'prime importance' in this respect.¹¹² Similarly, DG ENV sets out a circular economy as one specific objective and both DG's have developed a Circular Economy Action plan to this end to ensure sustainable resource use, notably in resource-intensive and high-impact sectors.¹¹³ Also, DG SANTE lists the general objective of a European Green Deal and sets out as one specific objective food and feed safety. Its target is to ensure market access to safe substances and products where DG SANTE manages the legal framework for placing them on the EU market for *food-related* uses.¹¹⁴

2.3.1.2. Annual Work Programme

As part of the Single Programming Document, an agency establishes its annual work programme. In coherence with the multiannual work programme, it sets out the activities an agency will pursue in the coming year and the human and financial resources required. In two respects, the Framework Financial Regulation 2019 has altered the programming obligations for the annual work programme that indicate a development towards stronger performance and efficiency-based programming requirements. The first one is that, instead of indicating the expected result, the Framework Financial Regulation 2019 focusses on the expected outputs of an action:

Article 32 (3) 1st Sentence Framework Financial Regulation 2013: *The annual work programme of the Union body shall comprise detailed objectives and **expected results** including performance indicators.*

Article 32 (3) (a) Framework Financial Regulation 2019: *The annual work programme shall set out for the year N+1 the **expected outputs** that will*

¹¹² Commission, 'Strategic Plan 2020-2024 Directorate-General for Internal Market, Industry, Entrepreneurship and Small and Medium-Sized Enterprises (DG GROW) Ref. Ares (2020) 7470664, p.21 and p. 24

¹¹³ Commission, 'Strategic Plan 2020-2024 DG Environment' Ref. Ares (2020) 4902415, p. 8; Commission, 'Circular Economy Action Plan' (2020) available at https://ec.europa.eu/environment/pdf/circular-economy/new_circular_economy_action_plan.pdf accessed 26 June 2021

¹¹⁴ Commission, 'Strategic Plan 2020-2024 DG Health and Food Safety (SANTE)' Ref. Ares (2020) 4618565

contribute to the achievement of the objectives in the overall strategic planning.

`Outputs` are defined as the deliverables generated by an action whereas `results` is a more comprehensive term intended to measure the effects of an action.¹¹⁵ Thus, outputs are what are directly produced or supplied through the EU intervention,¹¹⁶ for example, the number of certificates or authorisations an agency issues. Results, on the other hand, relate to the immediate or short-term changes in a situation,¹¹⁷ which could be an increase in customer's satisfaction or an improved infrastructure between the Member States.

The benefit of relying on `outputs` is that it is easier to verify than results. However, some agencies` are difficult to measure in terms of output as they consist of work through an incentive nature such as giving recommendations or establishing networking.¹¹⁸ These difficulties in measuring output can be exemplified by the annual work programme of Frontex for 2021. One of its activities is to extend the assistance to the Member States in all stages of the return process.¹¹⁹ As an expected result, the agency indicates 300 return operations which can be regarded as an output as it is directly produced or supplied through the EU intervention. By way of contrast, another agency activity is to recruit, train and equip standing corps category 1.¹²⁰ Here, one expected result is to `ensure recruited, trained and equipped category 1 staff of the standing corps is delivered [...]`. This is a change in the situation which cannot directly be translated into an output. It will require a change of the programming content, for example, by replacing the result of trained officers through the hours of training provided.

¹¹⁵ See Article 2 (46) and (56) Financial Regulation 2018

¹¹⁶ Commission's Guidelines for programming documents (2014) *supra* n. 7, p. 4

¹¹⁷ *ibid*

¹¹⁸ See Commission's Guidelines `Performance Budgeting` (2013) *supra* n. 23, p. 22

¹¹⁹ Frontex Single Programming Document 2021-2023, *supra* n 5, p. 41

¹²⁰ *ibid*, p. 44

The second change of the Framework Financial Regulation 2019, regarding the annual work programme, is that financial and human resources need to be allocated per activity instead of being based on actions:

Article 32 (3) 2nd Sentence Framework Financial Regulation 2013: *It shall also contain a description of the **action(s)** to be financed and an indication of the amount of financial and human resources allocated to each action.*

Article 32 (3) (b) Framework Financial Regulation 2019: *The annual work programme shall set out for the year N+1 a description of the **activities** to be financed together with an indication of the amount of financial and human resources, showing the number of officials, temporary and contract staff as defined in the Staff Regulations, as well as Seconded National Experts.*

Neither the term 'actions' nor 'activities' are defined under the Framework Financial Regulation or in the Financial Regulation. The Commission` Guidelines 2014 on the programming document for decentralised agencies defines activities as 'a coherent area of action with objectives and resources'.¹²¹Insofar, the term activity is broader than an action as a series of actions constitutes one activity. That a material change of the agency's programming obligations is accompanied by this amendment cannot be ascertained. Rather, the shift towards activity-based programming seems to facilitate the alignment of the annual work programme with the structure of the general budget of the EU.

2.3.1.3. Estimate Revenue and Expenditure

The Framework Financial Regulation 2013 distinguished between an agency's programming document and its estimate of revenue and expenditure.¹²² The Framework Financial Regulation of 2019 integrates these documents within a Single Programming Document under Article 32 FFR which demonstrates the connectivity between programming and budgeting of agencies.

¹²¹ Commission Guidelines for programming documents (2014), *supra* n. 7, p. 4 of Annex 1

¹²² Article 32 and Article 33(4) Framework Financial Regulation 2013

The importance of the statement of estimates is that it provides the basis on which the Commission ‘shall propose the amount of the contributions for the Union body and the number of staff it considers that the body needs’.¹²³ To this end, the estimate of revenue and expenditure shall include an establishment plan setting the number of permanent and temporary posts by grade and by function authorised *within the limits of the budget appropriations*.¹²⁴ Where there is a change in the number of establishment plan posts requested, *a statement justifying the request for new posts* shall be provided.¹²⁵ Also, the Framework Financial Regulation 2013 required a quarterly estimate of cash payments and receipts¹²⁶ and information on the achievement of all previously set objectives for the various activities, and reference to evaluation results.¹²⁷ Under the Framework Financial Regulation of 2019, the latter is part of the resource programming,¹²⁸ and reference to evaluation results shall be made within the annual work programme.¹²⁹ Furthermore, the 2019 Regulation requires a more stringent alignment of the estimate of revenue and expenditure with the formal structure of the EU budget. To this end, agencies have to structure their estimates on revenues broken down by title, indicating fees and charges separately,¹³⁰ and estimates of expenditure (commitment and payment appropriations) broken down by expenditure title and chapter.¹³¹

2.3.1.4. Resource Programming

As stated under Article 32 (5) Framework Financial Regulation 2019, the main function of resource programming is to provide qualitative and quantitative information on human resource and budgetary matters for *reporting purposes*.

¹²³ Article 33 (2) Framework Financial Regulation 2019

¹²⁴ Article 32 (4) (d) Framework Financial Regulation 2019

¹²⁵ *ibid*

¹²⁶ Article 33 (4) (c) Framework Financial Regulation 2013

¹²⁷ Article 33 (4) (d) Framework Financial Regulation 2013

¹²⁸ Article 32 (5) (d) Framework Financial Regulation 2019

¹²⁹ Article 32 (3) Framework Financial Regulation 2019

¹³⁰ Article 32 (4) (a) Framework Financial Regulation 2019

¹³¹ Article 32 (4) (b) Framework Financial Regulation 2019

Consequently, its focus lies on the presentation of the estimated budget results from the preceding year (N-1).¹³²

In addition, resource programming has an impact on an agency's budget for the next financial year for the following reason. If the estimated budget result of the preceding year is positive, it shall be repaid to the Commission up to the amount of the contribution paid during the year.¹³³ As a result, the allocated budget not spent may not be carried over into the next year. Apart from the consequence that these financial resources are 'lost' for the agency concerned, it also indicates an overbudgeting. This is an argument that was raised especially by the Council during previous budgetary procedures where it requested to reduce contributions for 'agencies which did not fully implement the contributions received from the Union budget in the past [...]'.¹³⁴

In this spirit, Article 17 (4) Framework Financial Regulation 2019 requires that the estimate of the budget result from year N-1 'shall be duly taken into account by the Commission when assessing the financial needs of the Union body for the year N+1'.¹³⁵ A similar provision was already established under the Framework Financial Regulation of 2013,¹³⁶ but the explicit reference to Article 17 under the new Regulation indicates how important budget results of the previous year will be for the Commission's proposal on the amount of the contributions for the agency under Article 33 (2) FFR. The importance of performance for the agency's next budget is further substantiated in Article 32 (5) FFR, which requires that resource programming shall also include 'information on the achievement of all previously set objectives for

¹³² Article 32 (2) Framework Financial Regulation 2013 included for the year N+1 an indicative budget and staff resource programming, as well as an estimate of the number of officials, temporary and contract staff as defined under the Staff Regulation. This 'outlook' to the following year N+1 is abolished under the Framework Financial Regulation 2019.

¹³³ Article 17 (1) Framework Financial Regulation 2019

¹³⁴ Council, 'Decision of 4 September 2017 adopting the Council's position on the draft general budget of the European Union for the financial year 2018', 2017/C 303/03, p. 9

¹³⁵ Article 17 (4) Framework Financial Regulation 2019

¹³⁶ Article 20 (1)

the various activities for year N-1, showing the actual use of the human and financial resources by the end of the year split between activities'.¹³⁷

2.3.1.5. Opinion of the Commission

Article 32 (2) of the Framework Financial Regulation 2013 limited the Commission's competence to give its opinion on aspects of the multiannual draft human resource programming. The same provision obliged an agency, in case the opinion was not fully taken into account, to provide the Commission with adequate explanations. The Framework Financial Regulation 2019 extended the scope of the opinion that now comprises the whole Single Programming Document.¹³⁸

Yet, neither the Framework Financial Regulation nor the agency's founding Regulations address the limits of the Commission's competences. Potentially, the comments can range from addressing formal aspects of the programme, legal- or competence issues, performance or efficiency-related aspects or even pro-actively interfering with the programming autonomy of agencies. Also, the Framework Financial Regulation does not formally oblige agencies to adhere to the Commission's comments except for 'to take [them] into account' and to submit any updated version of the Single Programming Document, '*notably to reflect the Commission's opinion*' to the Commission, the European Parliament and the Council'.¹³⁹

As analysed in the following chapters, the programming practice is different from this vague obligation. Already, before the Regulation was amended in 2019, the Commission's opinion went beyond commenting on multiannual human resource issues and addressed all aspects of the programming document including the agency's quality of performance indicators, the agency's multiannual objectives, resource programming and also very detailed requests to alter the programming content. Due to its detailedness, the Commission's opinion can comprise up to 15

¹³⁷ Under the Framework Financial Regulation 2013, this information had to be included in the estimate of revenue and expenditure under Article 33 (4) FFR

¹³⁸ Article 32 (7) FFR establishes that the Commission 'shall send its opinion on the draft Single Programming Document to the Union body in a timely manner in any case no later than 1st July of the year N'.

¹³⁹ Article 32 (9) FFR

pages with over 100 paragraphs of comments.¹⁴⁰ Also, the agency's reaction goes beyond merely 'taking into account' the Commission's opinion as the vast majority of comments is transposed in the final programming version.

2.3.2. Programming Obligations under the Commission's Guidelines

Article 32 (1) FFR of the Framework Financial Regulation requires that programming documents shall be drawn up taking into account the guidelines set up by the Commission. The first guidelines were adopted in 2014 together with templates for the financial and human resource programming.¹⁴¹ With the amendment of the Framework Financial Regulation in 2019, the Commission has revised its guidelines accordingly.¹⁴²

Like Article 32 FFR, but in a more detailed manner, the guidelines set out the formal structure of the programming document and provide suggestions for the information to be provided. Regarding its formal structure, the guidelines expect that the programming document shall comprise the main body comprising that sets out the general context of the programme, the multi-annual programming, and the annual work programme. Besides, based on templates provided by the Commission annexes shall be attached that outline the resource allocation per activity for the years N+1-N+3 (optional template), human and financial resources for the years N+1-N+3, and staff population and its evolution together with the multiannual staff policy plan for the years N+1-N+3.¹⁴³

The use of the templates and conformity with the structure of the guidelines is compulsory for an agency. This derives from the wording of the Commission's Communication, 'the guidelines *should* be used for the first time for the agencies'

¹⁴⁰ For example, Commission, 'Opinion of 29.11.2019 on the Single Programming Document containing the draft multiannual programming for 2020-2022 and the draft Annual Work Programme for 2020 ('Single Programming Document for 2020-2022') of the European Border and Coast Guard Agency' C (2019) 8715 final

¹⁴¹ Commission's Guidelines for programming document (2014), *supra* n. 7; The templates annexed to these guidelines are on the programming of financial resources (Annex II), on human resources (Annexes III and IV), on building policy (Annex V), and on privileges and immunities (Annex VI). However, no templates are provided for the resource allocation per activity.

¹⁴² C(2020) 2297 final

¹⁴³ Commission's Guidelines for programming document (2014), *supra* n. 7, p. 2

2017 programming (i.e. submitted in 2016)'¹⁴⁴ as well as from the Commission's guidelines directly ('Templates for the annexes [...], as *required* by the Commission').¹⁴⁵ Not compulsory, however, are the guidelines in respect of the information to be included under each section: Here, the Commission only makes *suggestions*.¹⁴⁶

There is an explanation for this distinction. Regarding the information to be provided under each section, it is primarily in the interest of an agency to substantiate its human and financial resource needs by demonstrating its medium-term objectives and the annual activities planned to this end 'as best as possible' to convince the Commission and the budgetary authority on its financial needs. Conversely, the mandatory formal structure of the programming document facilitates the comparability between agencies' programming documents. Also, the templates to be used mirror the structure of the draft general budget. For agencies, it is the Working Document Part III of the draft general budget which 'presents key budgetary information' as well as 'detailed budgetary financial statements for each EU body individually'.¹⁴⁷ Its structure is identical with the templates of the guidelines and one column of the Working Document III indicates the budgetary requests made by an agency. Insofar, these annexes serve as the basis for the draft general budget, even though not all requests made by an agency are eventually adopted by the Commission.

2.3.3. Programming Obligations under the Agencies' Founding Regulations

At the beginning of this chapter, it was noted that all agencies' founding Regulations include provisions that oblige its management board to adopt work programmes. This seems to be the only common feature as no consistency amongst these Regulations

¹⁴⁴ *ibid*, p. 1

¹⁴⁵ *ibid* p. 9 where it is stated that the 'templates for the annexes II-V, as required by the Commission, are in section F'

¹⁴⁶ *ibid*, p. 4

¹⁴⁷ Commission, 'Draft General Budget of the European Union for the Financial Year 2021 (Working Document Part III)' COM (2020) 300 final p. 7

is noticeable in terms of its programming content and procedure. Furthermore, by far, not all of these Regulations comply with the requirements set out under Article 32 of the Framework Financial Regulation. Strictly speaking, such compliance is not formally required as the Framework Financial Regulation only establishes that the financial rules of an agency must be consistent with the framework set out there.¹⁴⁸ This is the case as all agencies have adopted rules which replicate the text of the Framework Financial Regulation. Nevertheless, the fact that the majority of the agencies' Regulations are not in line with the Framework Financial Regulation is at the least confusing. It also raises the question of what purpose the programming provisions under the agency's founding Regulations serve against the background that these obligations are already comprehensively established under the Framework Financial Regulation.

In tendency, those agencies whose founding Regulations have been amended recently are more in line with the Framework Financial Regulations than others.¹⁴⁹ This indicates that discrepancies might be caused by a delay of the legislator to adjust them in accord with the requirements of the Framework Financial Regulation. On the other hand, the recently amended Regulation of the European Medicines Agency (EMA) does not envisage the agency's obligation to take into account the opinion of the Commission before the adoption of the work programme nor does it require the adoption of a multiannual work programme.¹⁵⁰ Nevertheless, EMA's programming document 2020-2022 comprises multiannual programming and was adopted after the Commission had given its opinion thereon.¹⁵¹ As a 'legal basis'

¹⁴⁸ Article 1 FFR

¹⁴⁹ For example, Regulation (EU) 2019/1896 on the European Border and Coast Guard [2019] OJ L295/1; Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol) [2016] OJ L135/53; Regulation (EU) 2015/2219 on the European Union Agency for Law Enforcement Training (CEPOL) [2015] OJ L319/1; Regulation (EU) 2018/1726 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) [2018] OJ L295/99

¹⁵⁰ See Article 65 (9) of Regulation (EC) No 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L136/1; last amended by Regulation (EU) No 2019/5 [2019] OJ L4/24

¹⁵¹ European Medicines Agency, Final programming document 2020-2022, EMA/9529/2020; Commission Opinion of 9.10.2019 on the draft programming document 2020-2022 of the European Medicines Agency, Brussels 9.10.2019 C(2019) 7137 final

for delivering its opinion, the Commission referred to Article 32 Framework Financial Regulation rather than on the provisions of EMA's founding Regulation.

Thus, the situation is peculiar. In practice, the Framework Financial Regulation appears to be superior to the agency's founding Regulations. Formally, such a 'hierarchy of norms' cannot be established. Furthermore, the Framework Financial Regulation is only a delegated Regulation, adopted by the Commission under Article 70 of the Financial Regulation, which concerns the financial rules applicable to the general budget of the Union. However, the delegation of power is limited to the duration of the multiannual financial framework. An extension and the power delegated to the Commission may be revoked by the European Parliament and the Council at 'any time'.¹⁵²

Against the background that the competencies of the Commission under the Framework Financial Regulation are fragile, the provisions that address programming obligations under the agency's founding Regulations cannot be disregarded. Also, the Commission refers to the agency's programming obligations under its founding Regulation when it is favourable for the Commission.¹⁵³ To highlight the disparities amongst these Regulations, a comparison is made and further illustrated in Appendix A. Here, the focus of the examination is on three programming aspects. First, to what extent do Regulations include envisaging the participation of the Commission before the adoption of the programme? Secondly, it refers to the required programming content and, in particular, to what extent activity-based budgeting and -management principles are incorporated under the respective Regulations. Thirdly, it relates to instances where the agency's founding Regulations go beyond the obligations established under Framework Financial Regulations.

¹⁵² Article 269 (2) and (3) FR

¹⁵³ In case of Frontex, the requirement that the Commission has to give its 'positive' opinion is established under Article 102 of its founding Regulation and referred to by the Commission in its opinion on Frontex draft Single Programming 2021-2023.

2.3.3.1. Regarding the Opinion of the Commission

Several Regulations do not oblige the management board to take into account the opinion of the Commission before the adoption of its programming document. These are the Regulations establishing the European Chemicals Agency (ECHA),¹⁵⁴ the Regulations of the three European Supervisory Authorities (ESAs),¹⁵⁵ and EMA's founding Regulation¹⁵⁶ which only require that the programming document be forwarded to the Commission for information. Conversely, the Regulations establishing the European Maritime Safety Agency (EMSA), the European Union Agency for Railways (ERA), and the European Fisheries Control Agency (EFCA) go beyond the requirements of the Framework Financial Regulation. Its provisions oblige the management board, in case the Commission expresses its disagreement, to re-examine the draft programme and adopt it, possibly amended, in a second reading.¹⁵⁷

All other Regulations provide that the Commission's opinion must be obtained but differences arise with regard to the impact the opinion shall have on the final programme. A considerable number of Regulations only require the management board to adopt the work programme 'after having received the opinion of the Commission'.¹⁵⁸ Other Regulations oblige the management board or the director to 'consult' the Commission before the adoption of the work programme. Such consultation requirements can be found in the founding Regulations of the European Institute for Gender Equality (EIGE) and the Agency for the Cooperation of Energy Regulators (ACER).¹⁵⁹ Similar are the Regulations establishing the European Food Safety Authority (EFSA) and the European Union Agency for Cybersecurity (ENISA), which oblige its director to draw up the proposal of the Work Programme in

¹⁵⁴ Article 78 of Regulation (EC) No 1907/2006 (last amended by Council Regulation (EU) 2018/589)

¹⁵⁵ Article 43 (4) of Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010

¹⁵⁶ Regulation (EC) No 726/2004 (last amendment through Regulation (EU) 2019/5)

¹⁵⁷ Article 10 (2) (g) of EMSA's Regulation (EC) No 1406/2002 (last amended by Regulation (EU) No 2016/1625; Article 52 (2) of ERA's Regulation (EU) 2016/796; Article 32 (2) of EFCA's Regulation (EU) 2019/473

¹⁵⁸ For the GNSS Agency, Article 6 (b) of Regulation (EU) No 912/2010; for the EEA, Article 8 (4) of Regulation (EC) No 401/2009; for EASO, Article 29 (1) (f) of Regulation (EU) No 439/2010; for the EMCDDA, Article 9 (4) of Regulation (EC) No 1920/2006; for the FRA, Article 12 (6) of Council Regulation (EC) No 168/2007; for the ETF, Article 9 of Regulation (EC) No 1339/2008.

¹⁵⁹ For EIGE: Article 10 (6) of Regulation (EC) No 1922/2006; for ACER: Article 13 (5) of Regulation (EC) No 713/2009

consultation with the Commission.¹⁶⁰ Only eight agency's founding Regulations contain provisions that are coherent with the requirement under Article 32 FFR and explicitly oblige the management board to take into account the opinion of the Commission before the adoption of the programme. These agencies are EUROFOUND,¹⁶¹ EU-OSHA,¹⁶² the CEDEFOP,¹⁶³ EASA,¹⁶⁴ the European Union Agency for Law Enforcement Cooperation (Europol),¹⁶⁵ the European Union Agency for Law Enforcement Training (Cepol),¹⁶⁶ and the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA).¹⁶⁷ The new Frontex of 2019 even requires that the agency shall take into account a `positive` opinion of the Commission¹⁶⁸

2.3.3.2. Programming Content: Incorporation of Activity-Based Budgeting and Management Principles

Nearly half of the Regulations stay completely silent regarding the necessary programming content.¹⁶⁹ Only the Regulations establishing eu-LISA, Eurofound, EU-OSHA, and CEDEFOP explicitly refer to Article 32 FFR and oblige the director to draw up the draft programming document in accordance with that provision.¹⁷⁰ Similar are the founding Regulations of Frontex, Europol, Cepol, EASA, ERA, and the Global Navigation Satellite System (GNSS) Agency.¹⁷¹ Even though they do not specifically refer to the Framework Financial Regulation, their respective provisions on the

¹⁶⁰ For EFSA: Article 26 (2) of Regulation (EC) No 178/2002; for ENISA: Article 11 (2) (c) of Regulation (EU) No 526/2013

¹⁶¹ Article 5 (1) of Regulation (EU) 2019/127

¹⁶² Article 5 (1) of Regulation (EU) 2019/126

¹⁶³ Article 5 (1) of Regulation (EU) 2019/128

¹⁶⁴ Article 98 (2) of Regulation (EU) 2018/1139

¹⁶⁵ Article 11 (1) (a) of Regulation (EU) 2016/794

¹⁶⁶ Articles 9 (1) of Regulation (EU) 2015/2219

¹⁶⁷ Articles 19 (1) (q) and 19 (1) (r) of Regulation (EU) 2018/1726

¹⁶⁸ Article 102 (1) of Regulation (EU) 2019/1896

¹⁶⁹ These are the Regulations of ECHA, EBA, EIOPA, ESMA, ACER, EEA, ECDC, EFSA, EMA, EMCDDA, FRA, EIGE, and EASO

¹⁷⁰ For eu-LISA, Article 44 of Regulation (EU) 2018/1726; for EUROFOUND, Article 6 (1) of Regulation (EU) 2019/127; for EU-OSHA, Article 6 (1) of Regulation (EU) 2019/126; for CEDEFOP, Article 6(1) of Regulation (EU) 2019/128.

¹⁷¹ For Frontex, see Article 102 of Regulation (EU) 2019/1896; for Europol, Article 12 of Regulation (EU) 2016/794; for CEPOL, Article 10 of Regulation (EU) 2015/2219; for EASA, Article 117 of Regulation (EU) 2018/1139; for ERA, Article 52 of Regulation (EU) 2016/796; for the GNSS Agency, Article 8a of Regulation (EU) No 912/2010 (this provision was inserted by Regulation (EU) No 512/2014))

multiannual and annual work programmes reproduce the content of Article 32 FFR and require that the multiannual programme shall set out the overall programming, including objectives, expected results, performance indicators and resource planning. Also, these Regulations require that the annual work programme shall contain a description of the activities to be financed comprising detailed objectives, expected results including performance indicators and an indication of the resource allocation per activity.

The remaining Regulations address the programming content but do not fully comply with the requirements under Article 32 FFR. For example, EMSA's Regulations only establishes that the draft statement of revenue and expenditure shall be based on activity-based budgeting principles.¹⁷² The Regulation for the European Training Foundation (ETF) addresses the content of the annual work programme but does not include activity-based budgeting or management principles.¹⁷³ ENISA's founding Regulation provides that the work programme shall be organised in accordance with the activity-based management principle, including tailored performance indicators and a multiannual outlook, but stays silent in respect of activity-based budgeting principles.¹⁷⁴ Finally, EFCA's Regulation envisages a multiannual work programme that establishes, contrary to Article 32 FFR, the agency's overall objectives for a five-year period.¹⁷⁵

2.3.3.3. Regulations that go beyond the Requirements of the Framework Financial Regulation

Few Regulations establish obligations that go beyond those established under the Framework Financial Regulation.

These are, first, provisions that envisage reaching an agreement with the Commission on performance indicators. The EMSA Regulation is an example where the director shall establish performance indicators in agreement with the Commission and the

¹⁷² Article 18 (3) of Regulation (EC) No 1406/2002 (this provision was inserted by Regulation (EU) No 100/2013)

¹⁷³ Article 12 of Regulation (EC) No 1339/2008

¹⁷⁴ Article 13 of Regulation (EU) No 526/2013

¹⁷⁵ Article 24 of Regulation (EU) 2019/473

Administrative Board.¹⁷⁶ The EASA Regulation provides that the draft establishment plan shall, concerning posts financed from fees and charges, be based on a limited set of indicators approved by the Commission to measure the agency's workload and efficiency.¹⁷⁷

Secondly, several Regulations provide that the work programme shall be consistent with the Union's legislative and *policy priorities* of the respective area of the agency. These are the Regulations of ENISA,¹⁷⁸ the European Centre for Disease Prevention and Control (ECDC),¹⁷⁹ and EFSA.¹⁸⁰ Seemingly, this obligation goes beyond Article 32 (2) Framework Financial Regulation which only expects that the overall strategic programming shall demonstrate the contribution of the agency to the achievement of the EU political priorities.

Third, a recent development is that several Regulations include the obligation to consult the European Parliament on the multiannual programme before its adoption. These are the Regulations of EASA,¹⁸¹ ERA,¹⁸² Frontex,¹⁸³ Europol,¹⁸⁴ and CEPOL.¹⁸⁵ Conversely, not all recently amended Regulations comprise this obligation. Counterexamples are those establishing eu-LISA, Eurofound, EU-OSHA, CEDEFOP, and EFCA.

Special is Frontex's founding Regulation of 2019 that requires a 'positive' opinion of the Commission which implies a kind of formal approval.¹⁸⁶

¹⁷⁶ Article 15 (2) (d) of Regulation (EC) No 1406/2002

¹⁷⁷ Article 120 (6) of Regulation (EU) 2018/1139

¹⁷⁸ Article 13 (4) of Regulation (EU) No 526/2013

¹⁷⁹ Article 14 (5) (d) of Regulation (EC) No 851/2004

¹⁸⁰ Article 25 (8) of Regulation (EC) No 851/2004

¹⁸¹ Article 117 (1) of Regulation (EU) 2018/1139

¹⁸² Article 52 (5) of Regulation (EU) 2016/796

¹⁸³ Article 102 (1) of Regulation (EU) 2019/1896

¹⁸⁴ Article 12 (1) of Regulation (EU) 2016/794 requires a consultation with the Joint Parliamentary Scrutiny Group (JPSG)

¹⁸⁵ Article 10 (1) of Regulation (EU) 2015/2219

¹⁸⁶ Article 102 (1) of Regulation (EU) 2019/1896

2.3.4. Findings

The Framework Financial Regulation obliges agencies not fully self-financed to draw up a Single Programming Document which includes an annual and a multiannual programme with corresponding planning of the human and financial resources. Responsible for its adoption is the agency's management board, an organ that is dominated by the Member States. However, regarding the format and content of the programme, the management board has to observe the requirements set out in Framework Financial Regulation and the opinion of the Commission on its draft programming. The estimate of revenue and expenditure now being part of the Single Programming Document underlines the strong link between an agency's programme and its budget. Also, that the annual work programme now focusses on 'outputs' emphasises the importance of activity-based budgeting principles for agencies.

Another novelty of the new Framework Financial Regulation is the obligation to describe how the agency's multiannual programme contributes to the achievement of the EU political priorities. As political priorities are framed broadly, it is expected that agency's multiannual programme is strongly aligned with the specific objectives set out in the strategic plan of an agency's 'parent' Directorate-General and/or priorities established in policy documents of the Commission.

Regarding the Commission's opinion on the draft Single Programming Document, it was observed that the Commission has a significant influence on the final programme of an agency. The degree of control goes beyond an agency's requirement to take into account the Commission's opinion. It is assumed that the factual power of the Commission derives from its competence to propose an agency's budget.

Quite recent development might relativise the assumed power of the Commission. Several Regulations now include an agency's obligation to consult the European Parliament on the multiannual programme before its adoption. These are the Regulations establishing EASA, ERA, Frontex, Europol and CEPOL. The competence of the European Parliament potentially stays in conflict with the Commission factual power to influence an agency's programme through its opinion. This conflict of

interests between the European Parliament and the Commission is also interesting from the perspective of the institutional balance and is examined further in chapter 5.

2.4. The EU Budget: Influence of the Commission in Allocating Human and Financial Resources to Agencies

In 2021, the total budget of the European Union amounts to EUR 166 billion.¹⁸⁷ With EUR 1,98 billion, a comparably small share is allocated to agencies but most of them owe their financial existence to these contributions.¹⁸⁸ The reason is that the majority of agencies are entirely funded from the EU budget as only 10 out of 35 agencies are partially or fully self-financed through fees or co-financed by national public authorities.¹⁸⁹

In light of agencies financial dependence, this section examines how its budget is established with the underlying intention to evaluate which institutions primarily influence an agency's budget. Like the general budget of the EU, an agency's budget is determined by the multiannual financial framework and further specified through the annual budgetary procedure.

As stated under Article 312 TFEU, the European Parliament and the Council form the budgetary authority. Both institutions play a dominant role in the budgetary procedure, first, in adopting under a multiannual financial framework the maximum annual amount (ceilings) the EU may spend in different policy fields (headings). Secondly, both institutions issue annual guidelines where they give their preferences

¹⁸⁷ In total payments appropriations; see Annex I of Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L433 1/11 (in the following Multiannual Financial Framework Regulation)

¹⁸⁸ Excl. EUIPO, CPVO, SRB, see Draft General Budget of the European Union for the financial year 2021, Working Document Part III, COM (2020) 300, p. 37 (Main budgetary trends 2021)

¹⁸⁹ Fully self-financed are the European Union Intellectual Property Office (EUIPO), the Community Plant Variety Office (CPVO), the Single Resolution Board (SRB) and the Translation Centre for the Bodies of the European Union (CdT); partially self-financed the European Chemicals Agency (ECHA), the European Aviation Safety Agency (EASA) and the European Medicines Agency (EMA); lastly, agency that are partially co-financed by national public authorities are the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA).

on priorities to be taken into account by the EU Commission for the annual Draft Budget.

2.4.1. The Multiannual Financial Framework (MFF)

The EU budget 'is marked by a strong multi-annual dimension which governs the annual process of resource allocation to a degree unmatched in any EU member state or OECD country'.¹⁹⁰ The Multiannual Financial Framework (MFF) is the EU's long-term spending plan adopted to this end. Established by a Council Regulation under Article 312 TFEU,¹⁹¹ it lays down in advance for a period of at least five years the EU budget with the maximum annual amounts (ceilings) the EU may spend in different policy fields (headings).

The Multiannual Financial Framework serves several purposes: first, as the annual budget must be adopted within the ceilings established under the Multiannual Financial Framework, it facilitates programming and budgetary discipline in the longer term.¹⁹² Secondly, it predetermines the annual financial ceilings of the budget and thus makes the adoption of the annual EU budget easier. Thirdly, it transforms the EU's wider political agenda. Its grouping of expenditure in headings and policy clusters is designed to reflect the Union's political priorities.¹⁹³ As such, the Multiannual Financial Framework 2021-2027 is meant to fulfil its political priorities in the light of the Bratislava roadmap, as well as the Rome and Sibiu declarations and the Strategic Agenda for 2019-2024.¹⁹⁴ Fourthly, a practical reason explains why the EU's budgetary framework is negotiated on a multiannual basis. In contrast to budgets of nation-states, which 'genuinely' generate their own revenues mainly by levying taxes, the EU budget depends to a large extent on contributions from its

¹⁹⁰ OECD Report 2017, *supra* n.19, p. 50

¹⁹¹ Article 312 TFEU was introduced with the Treaty of Lisbon and transformed the MFF from an interinstitutional agreement into a legally binding act. The Regulation under Article 312 TFEU is adopted in accordance with a special legislative procedure with the Council acting unanimously after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

¹⁹² European Commission 'EU Budget Focused on Results' of 22.09.2015, p. 15, available at http://ec.europa.eu/budget/library/biblio/documents/2015/2015_eu_budget_focused_on_results_conference_summary_en.pdf (accessed on 08.10.2018)

¹⁹³ European Council, 'Draft Conclusions', 14 February 2020 (5846/20)

¹⁹⁴ *ibid*

Member States. Apart from traditional own resources, such as Common Custom Tariff duties and a standard percentage rate levied on the harmonised VAT base of each country, a new uniform call rate on plastic packaging was introduced with the multiannual financial framework 2021-2027. However, the largest share is born by the Member States through a uniform rate of its gross national income (GNI).¹⁹⁵ It is meant to finance the EU budget not covered by its own resources and has to be negotiated between the Member States for the duration of the multiannual financial framework. The final decision relating to the system of own resources and the determination of the GNI-rate is adopted by the Council unanimously.¹⁹⁶

Resulting from the `Brexit` and the challenge to address the COVID-19 crisis, the present Multiannual Financial Framework was accomplished by extremely difficult negotiations. The initial proposal of the Commission dates back to May 2018.¹⁹⁷ After an agreement could not be reached by the European Council, in May 2020 the Commission presented a revised proposal which envisaged a new recovery and resilience package (Next Generation EU) but also a reduction of the Multiannual Financial Framework by 3% compared to the 2018 proposal.¹⁹⁸ While the European Council could reach an agreement on 21 July 2020,¹⁹⁹ the European Parliament denied its consent as expressed in its resolution of 23 July 2020.²⁰⁰ After some concessions were made in a political agreement between the Council and the European Parliament, the latter finally gave its necessary consent to the MFF Regulation on 16 December 2020.²⁰¹

¹⁹⁵ Council `Decision of 14 December 2020 on the system of own resources of the European Union` (2020/2053/EU, Euratom) OJ L424/1, Article 2

¹⁹⁶ See Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/355/EU, Euratom [2020] OJ L424/1

¹⁹⁷ Commission `Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021-2027` COM (2018) 322 final

¹⁹⁸ Commission, `Amended Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027` COM (2020) 443 final

¹⁹⁹ European Council `Conclusions (Multiannual Financial Framework)`, 21 July 2020, EUCO 10/20 available at ><https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>< accessed 31.05.2021

²⁰⁰ European Parliament `Resolution of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020` P9_TA(2020)0206

²⁰¹ European Parliament `Legislative Resolution of 16 December 2020 on the draft Council regulation laying down the multiannual financial framework for the years 2021 to 2027` P9_TA(2020) 0357

The foregoing not only illustrates that the budgetary negotiations of Multiannual Financial Framework are a lengthy and cumbersome process but also the dominant political position of the European Council in determining the conditions of the Multiannual Financial Framework. This is evidenced by the fact that the overall level of expenditure and the resources for individual headings of the MFF generally follow the specification made by the European Council in its conclusion.²⁰² Striking is the ‘language’ of the conclusion which appear as instructions (the MFF *will have* the following structure) rather than a dialogue with the Commission and the European Parliament, the latter being required to give its formal consent on the MFF Regulation.²⁰³ This is not to say that the European Parliament took a passive role in the negotiations. On the contrary, in its resolution of 23 July 2020 the European Parliament stressed that it will not ‘rubber-stamp a *fait accompli*’ and insisted that it will not give its consent for the MFF ‘until a satisfactory agreement is reached’.²⁰⁴ Yet, the European Parliament main contention that distributions from the EU budget should be conditional on Member States’ observance of the rule of law was not considered. Instead, some minor demands, such as an increase of budgetary flexibility to allow the EU to respond to unforeseen needs and a targeted reinforcement of certain EU programmes found their way into the final Regulation.²⁰⁵

In conclusion, therefore, the strong position of the European Council in determining the general conditions of the MFF can be highlighted while the position of the European Parliament appears comparably weak. Even less significant is the role of the Commission, which indeed proposes the MFF but seemingly has no genuine negotiating power over its final outcome.

²⁰² *ibid*

²⁰³ Pursuant to Article 312 TFEU

²⁰⁴ European Parliament Resolution of 23 July 2020, para 7

²⁰⁵ Council of the European Union Press Release ‘Next multiannual financial framework and recovery package’ 10 November 2020 available at <https://www.consilium.europa.eu/en/press/press-releases/2020/11/10/next-multiannual-financial-framework-and-recovery-package-council-presidency-reaches-political-agreement-with-the-european-parliament/> accessed 17 July 2021

2.4.1.1. The Interinstitutional Agreement Accompanying the MFF Regulation

The Multiannual Financial Framework is accompanied by an interinstitutional agreement between the European Parliament, the Council, and the European Commission.²⁰⁶ Its purpose is 'to implement budgetary discipline and to improve the functioning of the annual budgetary procedure and cooperation between the institutions on budgetary matters as well as to ensure sound financial management'.²⁰⁷

Primarily, the agreement concerns the relationship between the contracting institutions in budgetary matters. A special feature of the agreement accompanying the MFF 2021-2027 is that it includes a roadmap towards the introduction of new own resources that will facilitate the repayment of the funds under the European Union Recovery Instrument.²⁰⁸ Apart from that, it also has relevance for European agencies as a section dedicated to the 'sound financial management of Union Funds' specifically addresses them. It obliges the Commission to give a budgetary assessment in instances where it proposes the creation of new agencies, proposes legal acts concerning an agency, or where a task of an agency is substantially amended.²⁰⁹ In this regard, the Commission is responsible to produce 'a sound, complete and objective impact assessment' on the critical mass of staff required and explain the budgetary implications for the expenditure heading concerned.²¹⁰ This is done through a financial statement which is presented together with the legislative proposal in question. The explicit rationale is to allow the institutions 'to arrive at a timely agreement on the financing of the agency',²¹¹ but it seemingly places the Commission into the primary position to assess the financial needs an agency requires for accomplishing its tasks.

²⁰⁶ Pursuant to Article 295 TFEU

²⁰⁷ Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, OJ L433 I/28, 22.12.2020, para 1

²⁰⁸ Annex II D. of the IIA

²⁰⁹ *ibid* Part III B para 27

²¹⁰ *ibid*

²¹¹ *Ibid*

This can be seen from the legislative financial statement accompanying the proposal for amending Frontex Regulation in 2018 which comprised a very detailed specification of the human and financial resources required for the transposition of the proposed Regulation.

2.4.1.2. Programming of Human and Financial Resources for Agencies under the MFF

The most detailed document on the allocation of human and financial resources to agencies under the Multiannual Financial Framework is the Commission's Communication on the programming of human and financial resources for decentralised agencies 2014-2020.²¹² Its annex specified for all decentralised agencies under the respective headings of the Multiannual Financial Framework budget schedule the allocation of the financial and human resources for each year of the MFF term. Also, the individual budgetary financial statements of the respective annual Working Documents (Part III) of the Draft General Budget explicitly referred to this Communication where the figures of the Communication serve as a 'starting-point' for the estimation of human and financial resources required for decentralised agencies.²¹³ Conversely, human and financial resources proposed by the Commission in addition to those already established under the aforementioned Communication are specifically explained and justified.²¹⁴

Although it is remarkable that for the Multiannual Financial Framework 2021-2027 no comparable Communication exists. Instead, the Commission's proposal for the Multiannual Financial Framework 2021-2027 only sets out the total amounts for the respective headings and does not detail the amounts for agencies.²¹⁵ This aspect is also remarked by the Commission in its proposal for the general budget in 2022

²¹² Commission, 'Communication on the programming of human and financial resources for decentralised agencies 2014-2020' COM (2013) 519

²¹³ Draft General Budget of the European Union for the Financial Year 2020, Working Document Part III, Bodies set up by the European Union having legal personality and Public-private partnership, June 2019, COM (2019) 400

²¹⁴ For example, regarding ACER, for the Financial Year 2020 the Commission proposed human and financial resources in addition to those already established under the Communication and justified this with new tasks conferred to ACER through Regulation (EU) No 1227/2011 (REMIT) and Regulation (EU) No 247/2013 (TEN-E Guidelines), Working Document Part III, COM (2019) 400, p. 266

²¹⁵ COM (2020) 443 final ANNEX; COM ((2018) 322 final ANNEX

where it notes that ‘against the backdrop of the indicative amounts for the agencies by policy cluster in the 2021-2027 Multiannual Financial Framework, the draft budget takes into account new or ongoing proposals to extend the mandates of certain agencies’.²¹⁶

Thus, it is predominantly the legislative financial statements that outline the long-term needs of agencies. A prominent example is the proposal for the ‘Frontex Regulation’ of 2019 where the financial impact of the proposed amendments on the Multiannual Financial Framework 2021-2027 are outlined in detail.²¹⁷ Another example is the 8th Environment Action Programme (EAP) where the estimated impact on expenditure for the European Environment Agency (EEA) and also ECHA are outlined in detail for the whole Multiannual Financial Framework term.²¹⁸

2.4.2. The Annual Budget Procedure of the EU

The Multiannual Financial Framework (MFF) determines in advance the annual financial ceilings for each budget heading and year of the MFF term. Only few ‘special instruments’²¹⁹ allow for additional expenditure during the MFF term and a reallocation of resources is principally not envisaged. As there are limited opportunities to reprioritise among spending programmes, the OECD has noted in its 2017 Report on Budgeting and Performance in the European Union that ‘the annual EU budget is, in effect, a specification of the pre-defined MFF ceiling in the given year and the scope for variation is limited’.²²⁰ The same report further perceived that the inflexible multiannual structure of the EU budget ‘marks a distinct departure from the practice of national budgeting, where annual or periodic reallocation in response to

²¹⁶ Commission ‘Draft General Budget of the European Union Working Document Part III Financial Year 2022’ June 2021 COM(2021)300 final

²¹⁷ Commission ‘Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard, Revised Legislative Financial Statement’ 22 May 2019 8354/19 ADD 1

²¹⁸ Commission ‘Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2030’ 14.10.2020 COM (2020) 652 final

²¹⁹ These special instruments are listed under Chapter 3 of the Multiannual Financial Framework Regulation: The European Globalisation Adjustment Fund (Article 8 MFF), the Solidarity and Emergency Aid Reserve (Article 9 MFF), the Brexit Adjustment Reserve (Article 10 MFF), the Single Margin Instrument (Article 11 MFF) and the Flexibility Instrument (Article 12 MFF)

²²⁰ OECD Report 2017, *supra* n. 19, p. 4

changing priorities- and indeed in response to evaluations of performance and results- is the norm'.²²¹

Still, the annual budgetary procedure is more than just a mere reproduction of the specifications previously determined in the Multiannual Financial Framework, as otherwise one could question the purpose of the annual budget procedure. Also, the fact that there is a strong controversy in the negotiations of the annual budget between the budgetary authorities indicates that not all resource allocations of the Multiannual Financial Framework are 'set in stone'. This controversy will be exemplified with the preparatory documents which reflect the negotiations between the budgetary authorities and the Commission for the EU's general budget for the financial year 2021:

Article 314 TFEU is the main Treaty provision for the annual budget as it sets out the procedural stages, the involvement of the budgetary authorities and the Commission within the budgetary procedure, as well as the time frame the institutions have to respect. Furthermore, Articles 36 to 52 of the Financial Regulation specify how the estimate of revenues and expenditure, the draft budget and the final budget should be structured and presented. In addition, the Interinstitutional Agreement between the European Parliament, the Council, and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, sets out parameters on the institutional cooperation during the budgetary procedure.²²²

2.4.2.1. Guidelines

Before the budgetary procedure starts, 'a triologue shall be convened to discuss the possible priorities for the budget of the coming financial year'.²²³To this end, the Council and the European Parliament issue guidelines where they set out their priorities for the annual budget that are submitted to the respective other budgetary institution and to the Commission.²²⁴Even though, these guidelines do not go into

²²¹ *Ibid*, p. 32

²²² Annex of the Interinstitutional Agreement 2020, *supra* n. 207

²²³ *ibid*, Annex I para 3.

²²⁴ For the financial year 2021: European Parliament Resolution of 19 June 2020 on general guidelines for the preparation of the 2021 budget, Section III- Commission (2019/2213(BUD)); Council,

much detail as they rather reflect the policy preferences in broad terms, both budgetary institutions address the topic of human and financial resources for agencies controversially.

As in previous years, the Council guidelines highlight the need for budgetary discipline and stress the necessity to finance all necessary expenditures through prioritisation. The Council also requested that the level of staff of all agencies should reflect the agreement of the Multiannual Financial Framework and should be kept under continuous monitoring and control. By way of contrast, the European Parliament's attitude towards agencies is much more generous and demanded that the Commission should provide the adequate and necessary funding to agencies in its effort to tackle the COVID-19 pandemic. Furthermore, the European Parliament also insisted that the Commission and the Council refrain from cutting the resources of the ECHA and the EFSA.²²⁵

2.4.2.2. Estimate of Expenditure (Article 314 (1) TFEU)

With the exception of the European Central Bank, Article 314 (1) TFEU obliges the institutions to draw up an estimate of its expenditure for the following year before 1st July each year. Accordingly, also the Commission published in preparation of the 2021 budget an estimate of its expenditure including an estimate of the human and financial resources required for agencies.²²⁶ Agencies, in turn, are obliged to submit their draft estimates as part of the draft Single Programming Document to the Commission till 31 January each year which enables the Commission to take into account these estimates in its own estimation.²²⁷ It is noticeable that the agencies' estimates are not explicitly mentioned in the Commission's section dedicated to bodies set up by the European Union and having legal personality.

²²⁵ Council sets its priorities for the 2021 EU` (Press Release 76/17) 18 February 2020 available at <https://www.consilium.europa.eu/en/press/press-releases/2020/02/18/council-sets-its-priorities-for-the-2021-eu-budget/> accessed 1 June 2021

²²⁶ *ibid*, para 54

²²⁷ European Commission, `Statement of Estimates of the European Commission for the financial year 2021` SEC (2020) 250

²²⁷ Article 32 (1) Framework Financial Regulation

Instead, the Commission merely stated that ‘a thorough and updated assessment of the needs of some decentralised agencies including in the area of border management’ has been made.²²⁸As a ‘starting-point’, the Commission referred to the global amounts set out in its proposal for the Multiannual Financial Framework 2021-2027.²²⁹ The estimate of the required EU contribution is outlined for each agency separately and is identical with the numbers proposed by the Commission in its Draft General Budget (Working Document III). Hereby, the Commission’s estimate of the necessary amount of EU contributions and staffing level of individual agencies is meant to reflect their stage of development. Reference is made to the classification developed by the Commission in the course of the previous multiannual budgetary cycle where agencies were categorised into ‘cruising speed’, ‘new tasks’ or ‘start-up phase’ agencies.²³⁰

However, compared with the Commission’s 2013 Communication on the programming of human and financial resources for decentralised agencies 2014-2020, the estimates remain considerably unspecific.²³¹ Few agencies are explicitly addressed in the Commission’s explanatory part. One of them is Frontex where the Commission explains that the budget increase of EUR 137 million is meant to finance the establishment of the standing corps and Frontex’s support to Member States’ returning activities.²³² Other agencies where the Commission proposed a budget increase are EASO, Europol, EFSA, ECDC and the three ESAs.²³³

2.4.2.3. The Draft General Budget (Article 314 (2) TFEU)

The Working Document (Part III) is part of the Draft General Budget and specifically addresses the programming of the ‘bodies set up by the European Union having legal personality’.²³⁴The Working Document for the financial year 2021 was proposed contemporaneously with the statement of estimates in June 2020. Insofar, it is not

²²⁸ Statement of Estimate, *supra* n. 226, p. 76

²²⁹ COM (2018) 321 final

²³⁰ COM (2013) 519 final

²³¹ *ibid*

²³² SEC (2020) 250, p. 78

²³³ *ibid*, pp 78-79

²³⁴ European Commission, ‘Draft General Budget of the European Union for the financial year 2021 Working Document Part III’ COM (2020) 300

surprising that the budgetary figures for each agency do not deviate from those of the statement of estimates.

The Working Document comprehensively sets out for each agency a budgetary financial statement. Hereby, in general, the structure for each agency is in general identical. It starts with an overview of the relevant legal bases upon which an agency operates, the budget line under which the expenditure will be charged in the final budget, and an overview of the human and financial resources and expenditure. The second part specifies the establishment plan posts and external personnel, hereby allocating establishment posts separately where an agency is partially financed through fees and charges. The third part of the financial statement outlines the financial resources of an agency contrasting its revenues and expenditure. These are further subclassified in instances where revenues are derived not only from EU contributions but also from fees and charges or contributions from third countries. Likewise, expenditure is subclassified and allocated to a specific budget title.²³⁵The justification of needs is explained under part four of the financial statement.

Also, the agency's budgetary forecasts of the respective draft Single Programming Documents are outlined. Similar to its statement of estimates, the Commission does not explicitly explain why these requests are rejected. Instead, the Commission merely noted that 'the Commission considers that there is no need to increase the EU contributions'.²³⁶ Noticeably, the budgetary requests of agencies sometimes are significantly higher than the resources approved by the Commission. For example, the budget forecast for ECHA estimates a reduction of own revenue (fees) from EUR 42 million to EUR 34 million in 2021.²³⁷ The increase of EU contribution only partially compensates for this reduction and proposes a budget increase from EUR 72 million to EUR 76 million whereas ECHA request was EUR 86 million.²³⁸

²³⁵ Under Title 1 refers to staff expenditure, whereas Title 2 refers to infrastructure and operating expenditure, and Title 3-5 to operational expenditure.

²³⁶ *ibid*

²³⁷ COM (2020) 300 p. 190

²³⁸ *ibid* p. 216

Conversely, Frontex's draft budget envisages an increase of 34% compared with the 2020 budget and does not deviate from the EU contributions requested by Frontex in its draft programme.²³⁹ The generous budget is explained by the Commission as the need to achieve the full operationalisation of Regulation (EU) 2019/1896 which is of 'top EU priority'.²⁴⁰ Apart from that, the proposed human and financial resources are in line with the revised legislative Financial Statement of April 2019 and the Commissions MFF 2021-2027 proposal of May 2020.²⁴¹

2.4.2.4. Council's Position (Article 314 (3) TFEU)

On 7 September 2020, the Council adopted its position on the draft general budget.²⁴² Based on the Commission's proposal, it requested an overall deduction of EUR 3,835 billion which was further specified in an Annex.

Except for EASA,²⁴³ the Council did not address specific agencies. However, the Council noted that all EU institutions, including agencies, should conduct a regular staff screening to optimise its staff resources and should continue to seek efficiency gains in non-salary related expenditure, *inter alia*, by expanding interinstitutional cooperation. To this end, the Council requested that the Commission should assess how staff resources could be optimised for agencies. To underline this request, the Council pronounced a provisional reduction of 140 post from the Commission's establishment plan to offset the increase in the decentralised agencies of the EU.²⁴⁴ While this pressure imposed by the Council explains why the Commission is so eager to implement efficiency measures on agencies, it also underlines the authoritative role of the Council in determining the general budget of the EU.

²³⁹ Increase from EUR 459 million in 2020 to EUR 617 million in 2021

²⁴⁰ COM (2020) 300, p. 372

²⁴¹ *ibid* pp 372-373

²⁴² Council, 'Draft general budget of the European Union for the financial year 2021: Council position' 7 September 2020 10378/20; Council, 'Decision adopting the Council's position on the draft general budget of the European Union for the financial year 2021' OJ 2020 C323 I/1

²⁴³ Where the Council requested a deduction of EUR 185 000,00

²⁴⁴ Council Position *supra* n 242, p. 2

2.4.2.5. The European Parliament's Amendments (Article 314 (4) TFEU)

In its resolution of 12 November 2020, the European Parliament rejected the Council's position and adopted amendments to the draft general budget.²⁴⁵ In particular, the European Parliament criticised that the focus of the budget should more strongly lie on the political priorities and thus on climate and biodiversity targets.²⁴⁶ Similar to the Council's position, the resolution addressed in detail all headings of the budget but contrastively requested a budget increase of EUR 15 billion.²⁴⁷

Regarding agencies, the European Parliament also acknowledged the necessity for developing synergies to increase the effectiveness of their work²⁴⁸ but nevertheless requested an increase of its budget for nearly all agencies without detailing these requests in numbers.

2.4.2.6. The Agreed Joint text of the Conciliation Committee and Final Adoption of the EU Budget (Article 314 (7) TFEU)

As the European Parliament did not accept the Council's position and the latter in turn rejected the Parliament's amendments, a Conciliation Committee had to be convened.²⁴⁹ Although a common understanding was reached within the three-week period, in light of the still pending adoption of the Multiannual Financial Framework the Committee was not in a position to agree on a joint text. Instead, based on the parameter of the common understanding, according to Article 314 (8) TFEU, the Commission had to present a second draft budget.²⁵⁰ Overall, the second draft budget builds on the common understanding reached by the Conciliation Committee on 4 December. For several agencies, the EU contributions have increased slightly, but most importantly, for Frontex a significant reduction of EUR 61 million was agreed

²⁴⁵ European Parliament 'Resolution of 12 November 2020 on the Council position on the draft general budget of the European Union for the financial year 2021', available at <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0302_EN.html> accessed 1 June 2021

²⁴⁶ *ibid.*, para 6

²⁴⁷ *ibid.*, para 15; the total budget requested is EUR 181 762 377 716 in commitment appropriations

²⁴⁸ *ibid.*, para 13

²⁴⁹ Pursuant to Article 314 (4) (c) TFEU

²⁵⁰ European Commission, 'Second DRAFT General Budget of the European Union for the financial year 2021' COM(2020) 836 final

upon.²⁵¹ However, as noted by the Commission, the reduction for Frontex in 2021 does not affect the overall top-up of EUR 0.5 billion agreed politically in that context but will be compensated in later years.²⁵²

Based on the second draft budget, the general budget for the financial year 2021 was finally adopted on 17 March 2021.²⁵³

2.4.3. Findings

The fact that most agencies are dependent on contributions from the EU budget raised the question of how agencies financial dependence coincides with its perceived autonomy being the rationale for its creation. Especially, that agencies outline an estimate of revenue and expenditure in their draft Single Programming Document raises the expectation of a certain right of co-determination.

This assumption could not be confirmed in this section; also, the Commission's position in determining an agency's budget is less dominant than initially expected. Formally, the Commission is in the primary position to propose the human and financial resources for an agency through its statement of estimate and the draft general budget of the EU. Yet, the Commission's role is limited to assessing an agency's financial needs and, in particular, to transpose the political will of the budgetary authority. This restriction is underlined by the fact that the Commission had to adjust its draft general budget for the financial year 2021 according to the specifications made in the common understanding between the Council and the European Parliament.

Especially, the dominant position of the Council and the European Council was noticeable throughout this section. While the European Council dominates the conditions of the Multiannual Financial Framework, also the position of the Council on the draft general budget read as instructions and express its authoritative attitude

²⁵¹ *ibid* 3.1.

²⁵² *ibid* 3.2.5.

²⁵³ Definite Adoption (EU, Euratom) 2021/417 of the European Union's general budget for the financial year 2021 [2021] OJ L93/1

towards the Commission. In this regard, the Council requested the Commission to keep agencies' funding under firm control and to limit its budget to substantial needs, whereas the European Parliament's position generally is more generous. Also, the fact that the Council 'decided' in its position on a reduction of the Commission's establishment plan to compensate for an increase of the agency's human resources sheds light on its subordinate position under the budgetary procedure.

2.5. Conclusions of this Chapter

With activity-based management and -budgeting principles incorporated under the Financial Regulation and Framework Financial Regulation, the budgetary system of the European Union is more performance orientated than any other OECD country. Part of the EU's performance framework is the agency's obligation to set up a Single Programming Documents that comprise the multiannual objectives and activities for the coming year and is strongly linked with the budgetary cycle of the EU.

This chapter focused on the legal framework that governs an agency's programming obligations and the factors that influence an agency's programming content. It was observed that the majority of programming obligations established under the agencies' founding Regulation are not in concordance with the specifications of the Framework Financial Regulation. Yet, while frequently the programming requirements under the agency's founding Regulation are less strict than those of the Framework Financial Regulation, agencies adhere to the requirements of the latter (Section 2.3.4.).

How the Commission exercises control through its opinion on the draft programme, is the focus of the case studies. Another effective means to influence the programming content is to predetermine an agency's multiannual objectives. To this end, the new Framework Financial Regulation requires an agency to describe how its activities contribute to the achievements of the EU political priorities. As these are framed broadly, it was expected that agencies orientate on the specific objectives set out in the strategic plan of its 'parent' Directorate General; however, a definite result to this end could not be established.

Also, the Commission's position in determining an agency's budget is less dominant than initially expected. Instead, it is especially the European Council in terms of the Multiannual Financial Framework and the Council for the annual budgetary procedure that decide on the number of contributions to be allocated to agencies. Still, as the Commission proposes an agency's budget and also assesses its financial needs in the context of the legislative financial statement, it plays an important role in the budgetary procedure of an agency.

Chapter 3: Case-Study: Frontex

3.1. Introduction

The European Border and Coast Guard Agency (Frontex)¹ was established in 2004 to improve the integrated management of borders of the Member States of the European Union.² Since then, Frontex has developed from an agency with mere coordinating tasks into an agency with its `own` standing corps and technical equipment for operational activities as well as supervisory and decision-making functions. This transformation and the following considerations make Frontex particularly interesting for this case study.

First, Frontex operates in a policy field with high political relevance. Since the Treaty of Lisbon, the area of freedom, security and justice has become one of the fastest expanding policy domains of the European Union.³ The effective control of external borders is one of the priorities set out in the new strategic agenda of the European Council⁴ as well as the political guidelines of the new European Commission.⁵ These political guidelines aim for a reinforced European Border and Coast Guard Agency with 10,000 Frontex standing corps members to be operational by 2024.

The creation of a European Border and Coast Guard standing corps with executive powers and the increased capability to acquire technical equipment are the main

¹ Since its amendments through Regulation (EU) No 2016/1624, Frontex `official` name is European Border and Coast Guard Agency (EBCGA); for simplification reasons, the term `Frontex` is used throughout this work

² Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1 (Frontex Regulation 2004)

³ F Trauner and A Ripoll Servent, `The analytical framework: EU institutions, policy change and the Area of Freedom, Security and Justice`, in F Trauner and A Ripoll Servent (eds), *Policy Change in the Area of Freedom, Security and Justice* (Routledge 2015) 11-33, p. 11

⁴ European Council `A New Strategic Agenda 2019-2024` (June 2019) available at <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf> accessed 24 June 2021

⁵ President of the European Commission, `Political Guidelines for the next European Commission 2019-2024 `A Union that strives for more` (July 2019) available at https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf accessed 24 June 2021

features of the new Frontex Regulation (EU) 2019/1896.⁶ Hereby, the new Regulation not only extended Frontex's mandate considerably; it also means that significant financial resources from the EU budget are allocated to Frontex. Since its creation, its budget has seen a constant growth with an increase from around EUR 6 million in its first year of operation to more than EUR 500 million for the financial year 2021.⁷

Apart from fostering solidarity amongst the Member States, the budget increase diminishes Frontex's dependence on the Member States' contributions which, in the past, deployed border guards or provided technical equipment predominantly voluntarily. The other side of the coin is an increase of control exercised by the EU institutions. The budgetary specifications are predetermined by the Legislative Financial Statements (LFS) that accompany legislative proposals of the European Commission and the General EU budget.⁸ Insofar, little discretion is left for Frontex to decide on its budget either during its programming phase nor in terms of its spending. The key question here is to what extent this budgetary dependence has repercussions on Frontex's programming freedom beyond budgetary aspects. This would be the case if the Commission can successfully request the programming of specific activities or even objectives.

The second reason is Frontex's legal and institutional context that appears to be more complex than for agencies operating outside the area of freedom, security and justice (AFSJ). Competences in the area of justice and home affairs have traditionally been considered 'to touch upon the core of member states sovereignty'.⁹ For Frontex, this conflict between safeguarding national sovereignty and the need to develop a European integrated border management system explains that the conferral of

⁶ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulation (EU) No 1052/2013 and (EU) 2016/1624, [2019] OJ L 295/1

⁷ Definitive Adoption (EU, Euratom) 2021/417 of the European Unions general budget for the financial year 2021 [2021] OJ L93/1

⁸ Regarding the Legislative Financial Statement (LFS) for Regulation (EU) No 2019/1896, Commission 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard' COM (2018) 631 final

⁹ J. Rijpma 'Hybrid agencification in the area of Freedom, Security and Justice and its inherent tensions: the case of Frontex' in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union* (Manchester University Press 2013) 84-102, p. 84

powers in this policy area has taken place incrementally,¹⁰ but also that even under the new Regulation (EU) 2019/1896 operational activities of Frontex always require the authorisation of the Member State concerned.¹¹

In the literature, Frontex has been identified as a former `Council agency` where the old pillar imprints of Maastricht are still noticeable.¹² In this context, it has been noticed that Frontex's organisational structure and decision-making procedure is more `intergovernmental` than for agencies created under the former first pillar, reserving `a prominent role for the Member States in their overall governance structure'.¹³ As far as Frontex's internal organisational and decision-making structure is concerned, this observation is not endorsed as neither the composition of the management board deviates from those of other European agencies nor its decision-making procedure.

It is rather the prominent role of the European Council that determines the policy direction in the area of freedom, security and justice, which is more `intergovernmental` than other policy areas. This prerogative outlasts the Treaty of Lisbon which Article 68 TFEU states that

` The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice`

Insofar, despite the `communitarisation` of the AFSJ with the Treaty of Lisbon, the right of the European Council to adopt strategic guidelines indicates that the EU

¹⁰ *ibid*

¹¹ Regarding the deployment of standing corps members: Article 54 (2) of Regulation (EU) 2019/1896

¹² S Carrera and E Guild `The European Council's Guidelines for the Area of Freedom, Security and Justice 2020 Subverting the `Lisbonisation` of Justice and Home Affairs?' (2014) CEPS Essay No13/14, p. 3, available at

http://aei.pitt.edu/58408/1/Essay_No_13_SC_EG_AFSJ_Guidelines_2020.pdf accessed 24 June 2021

¹³ M Busuioc, *European Agencies: Law and Practices of Accountability* (OUP 2013) p. 21

supranational institutions do not necessarily play a more powerful role in the policy-shaping of the AFSJ than before.¹⁴

The strong influence of the European Council can also be noticed throughout this work. Whereas at first glance, the Commission seems to have a very dominant role towards Frontex and frequently refers in its opinions to its strategy and action papers, most of these policy papers are based on previous Council Conclusions.¹⁵ This strong role of the European Council has to be born in mind as it might relativise the outcome of this work and the supposed strong role of the Commission over Frontex's programming content.

The third reason for selecting Frontex has practical considerations. Compared with opinions on other agencies' programmes, those on Frontex's Draft Single Programming Documents are particularly detailed. With an average of 15 pages, they offer rich material for a comprehensive analysis of the comments made. To this end, this chapter is structured in three sections: It begins with a section on the legal and policy context relevant for Frontex. Section 3.3. addresses Frontex's legal framework, starting with the rationale for its creation and the evolution of the tasks and powers conferred through various amendments of its founding Regulation. Section 3.4. then examines Frontex's Single Programming Documents for three consecutive years and the Commission's opinion thereon.¹⁶ As it is considered that not all comments have

¹⁴ F. Trauner and A. Ripoll Servent 'The *Communitarization* of the Area of Freedom, Security and Justice: Why Institutional Change does not Translate into Policy Change' (2016) 54(6) *Journal of Common Market Studies* 1417-1432 p.1417

¹⁵ For example, the Commission's European Agenda on Migration is based on the European Council Conclusions of 23.04.2015, 'Back to Schengen: A Roadmap' is based on European Council Conclusions of 18/19.02.2016, the Action Plans on Return are based on European Council Conclusions of 25/26.06.2015 and 20/21.10.2016 respectively

¹⁶ Frontex, 'Management Board Decision 1/2021 of 13 January 2021 adopting the Single Programming Document 2021-2023 including the Multiannual Plan 2021-2023, the Programme of Work 2021 and the Budget 2021 (the Establishment Plan as Part of it)' (January 2021) available at https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_1_2021_adopting_SPD_2021-2023.pdf accessed 24 June 2021 (Single Programming Document 2021-2023); Frontex 'Management Board Decision 31./2019 of 23 December adopting the Single Programming Document 2020-2022, the Programme of Work 2020 and the Budget 2020 (the Establishment Plan as part of it)' (December 2019) available at https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2019/MB_Decision_31_2019_adopting_Programming_Document_2020_2022.pdf 24 June 2021 (Single Programming Document 2020-2022) Frontex, 'Programming Document 2019-2021' (October 2018) available at https://frontex.europa.eu/assets/Key_Documents/Programming_Document/2019/Programming_document_2019-2021.pdf, accessed 24 June 2021 (Single Programming Document 2019-2021)

the same impact on Frontex programming autonomy, the opinions were examined in two directions. The first one is to analyse the topics addressed by the Commission, hereby orientating on Frontex's programme structure in terms of the strategic and horizontal objectives set out in its multiannual programming (3.4.2.). The second direction is to analyse the intensity of the Commission's comments, i.e. what impact these comments have on Frontex programming autonomy (3.4.3.). Following this assessment, it is then examined to what extent Frontex follows the requests made in the Commission's opinions, including the possible motives for non-obeyance. The chapter is finalised by a conclusion where the findings of this chapter are assessed within a broader context.

3.2. The Legal and Policy Context of Frontex

3.2.1. The Treaty Framework

Already the Treaty of Rome identified the right to free movement of persons as one of the foundations of the Community but did not specify the conditions for the exercise of this fundamental right, let alone address justice and home affair matters.

Nevertheless, there was an awareness of the contracting states to find common solutions for the protection of the external borders and to fight cross border crime.¹⁷

To this end, informal cooperation started to evolve in the 70th of the last century with working groups established at the ministerial level of the Member States to address topics such as migration and asylum, as well as criminal justice matters.¹⁸ This cooperation resulted in the conclusion of the Schengen Agreement in 1985 and the Schengen implementing Convention in 1990. Apart from the abolition of border controls among the participating Member States, it set out detailed rules on control at the external borders, police cooperation, a common visa regime and asylum issues.

¹⁷ S Wolff and A Schout 'Frontex as Agency: More of the Same?' *Perspectives on European Politics and Society* (2013) 14(3) 305-324 (310)

¹⁸ R Rijpma *supra* n 9, p. 84

With the Treaty of Maastricht (Treaty on the European Union) formal intergovernmental cooperation on Justice and Home Affairs (JHA) was introduced.¹⁹ The Treaty established a three-pillar structure with legislation on Community matters to be adopted under the co-decision procedure (first pillar–EC Treaty) whereas decisions on Common Foreign and Security Policy matters (second pillar) and Justice and Home Affairs (third pillar) remained with the Council and the Member States. Justice and Home Affairs included matters on asylum and immigration policy, rules governing the crossing of external borders, judicial cooperation in civil and criminal matters as well as customs and police cooperation. Member States were addressed in view of consulting one another within the Council to coordinate their actions in these policy areas. Even though the Commission was entitled to initiate joint positions or actions,²⁰ their adoption was reserved to the Council that had to take decisions unanimously.

With the objective `to progressively establish an area of freedom, security and justice (AFSJ)`,²¹ the Treaty of Amsterdam gave the direction towards a gradual `communitarisation` of justice and home affairs matters. With a Protocol annexed to the Treaty, the Schengen acquis was integrated into the framework of the European Union and matters related to external border controls, asylum and immigration were transferred to the supranational first pillar of the EC Treaty, leaving only police and judicial cooperation in criminal matters under the intergovernmental third pillar of the Union Treaty. With the obligation to adopt within five years measures that ensure the free movement of persons with directly flanking measures on external border controls, asylum and immigration, the Treaty of Amsterdam also marked the beginning of the European Council's political programmes (Section 3.2.2.).

The Treaty of Lisbon identified the development of an area of freedom, security and justice as one of the key objectives of the European Union, this area now falling under

¹⁹ H Ekelund `The Establishment of FRONTEX: A New Institutional Approach` *Journal of European Integration* (2014) 36(2) 99-116 (104)

²⁰ Except for areas falling under judicial, customs or police cooperation: see Article K.3 (2) second intend

²¹ Article 73i TEC

the shared competence between the Union and its Member States.²² It also brought a 'degree of supranational governance into the EU's internal security policy domain'²³ most notably through the abolition of the pillar structure that consolidated the area of freedom, security and justice under a single legal framework covered by the ordinary legislative procedure.²⁴ Nevertheless, despite the Treaty of Lisbon 'elevating the role of the European Parliament into a JHA co-legislator and widening the jurisdiction of the Court of Justice in JHA matters',²⁵ a considerable degree of 'intergovernmentalism' persists, most notably through strategic guidelines and other policy papers (conclusions) of the European Council.

3.2.2. Policy Dimension (Strategic Guidelines and Conclusions of the European Council)

Since 1999, multiannual strategic programmes have been adopted by the European Council on a five-year basis. As now established under Article 68 TFEU, their purpose is to define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice. Five of these programmes have been adopted so far, with the latest one still being at a proposal stage. They vary considerably in terms of their content, detailedness and how they address the other EU institutions. This is owing to the different situational and legal context under which these programmes have been adopted but also that policies in the AFSJ are now increasingly shaped by the European Council outside these strategic guidelines.

The first strategic programme, agreed at the EU Summit meeting in Tampere in 1999, was strongly influenced by the deadlines set by the Treaty of Amsterdam, which addressed the Council to adopt measures within five years that ensured the free movement of persons with directly flanking measures on external border controls,

²² Article 4 (2) (j) TFEU

²³ V Meissner 'The European Border and Coast Guard Agency Frontex beyond Borders-the effect of the Agency's External Dimension' (2017) TARN Working Paper Series 16/2017, p. 3, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3085529 accessed 24 June 2021

²⁴ R Rijpma *supra* n 9 p. 84

²⁵ V Engström and M Heikkilä 'Lisbonising Back and Forth? Strategic Planning and Fundamental Rights in the AFSJ' 2015 *European Yearbook on Human Rights* 295-306

asylum and immigration.²⁶ This obligation placed the development of an area of freedom, security and justice 'at the very top of the political agenda', the Tampere programme thus being described as a highly ambitious programme.²⁷ To fulfil its Treaty obligations, the European Council assigned the Commission with the tasks of overseeing the implementation of the programme through scoreboards and to report to the Council on the implementation process every six months.²⁸ The Commission fulfilled these tasks assiduously and also took its reporting obligations as an opportunity to give its recommendations on future policy orientations, such as the recommendation to establish a European Corps of border guards.²⁹

This division of tasks between the European Council and the Commission evolved further with the Hague Programme, adopted at the end of 2004.³⁰ The programme was impacted by the expectations of the entry into force of the Treaty establishing a Constitution for Europe ('The constitutional Treaty serves as a guideline for the level of ambitions') as well as by the terrorist attacks that had occurred in the United States in 2001 and Madrid in 2004 and was thus security-focused. Regarding the role of the Commission, the programme assigned it with the task to set up an Action Plan where the aims and priorities of the programme had to be translated into concrete actions, including a timetable for its adoption and implementation. The programme also envisaged regular progress and evaluation reports of the Commission every year.

This benevolent relationship between the European Council and the Commission came to an end with the Stockholm Programme, adopted in late 2009.³¹ It focused on promoting citizenship and fundamental rights on the one hand and improving internal security in the Union on the other. However, with a length of 81 pages, it

²⁶ European Council, 'Tampere European Council 15 and 16 October 1999 Presidency Conclusions' (1999) available at https://www.europarl.europa.eu/summits/tam_en.htm#c accessed 24 June 2021

²⁷ H G Nilsson and J Siegl, The Council in the Area of Freedom, Security and Justice, in: Jörg Monar (ed.) *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice* (2010), 53-82, p.70

²⁸ Regarding the last Report of the Commission under the Tampere Programme see: Commission, 'Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations' COM (2004) 401 final.

²⁹ COM (2004) 401 final, p. 9

³⁰ Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (2005) OJ C53/1 (Hague Programme)

³¹ European Council, 'The Stockholm Programme – an open and secure Europe serving and protecting the Citizens' (2010) OJ C115/1 (Stockholm Programme)

went beyond a policy-orientation paper and rather took the form of a `shopping list`.³² Hereby, detailed instructions to the Commission were made, including the request `to present promptly` an Action Plan and to submit a mid-term review before June 2012 of the implementation of the Stockholm Programme.³³

With its `JHA Council-dominant focus`, the European Council hereby disregarded the imminent entry into force of the Treaty of Lisbon and ignored the new position of the European Parliament and the Commission.³⁴ As a consequence, neither the Commission nor the European Parliament adhered to the programme. Instead, the Commission's Action Plan went far beyond the wording and policy priorities of the Stockholm Programme,³⁵ which in turn made the Council remind the Commission to stick to the Stockholm Programme as `the sole framework of reference for operational policy and legislative planning`.³⁶ The conflict between the Council and the Commission further escalated when the Commission refused to perform a mid-term review of the Stockholm Programme.³⁷ Likewise, the European Parliament refused to acknowledge the European Council's programme as a sole reference point and instead developed its own policy priorities and recommendations.³⁸

After the Stockholm Programme came to an end, the relationship between these institutions again eased. The strategic guidelines that followed in June 2014 avoided the mistakes made in the Stockholm Programme.³⁹ It completely abstained from directly addressing the Commission which was neither asked to set up an Action Plan nor to perform a mid-term review.⁴⁰ Also, the programme was kept far more general.

³² S. Léonard and C. Kaunert `Beyond Stockholm: in search of a strategy for the European Union's Area of Freedom, Security, and Justice` (2016) 17(2) *European Politics and Society* 143-149, p. 144

³³ Stockholm Programme *supra* n 31, 1.2.10. and 1.2.11.

³⁴ S Carrera and E Guild *supra* n 12, p. 4

³⁵ Commission, `Delivering an area of freedom, security and justice for Europe's citizens: Action Plan implementing the Stockholm Programme`, COM (2010) 171 final

³⁶ Council, Draft Council Conclusions on the Commission Communication `Delivering an area of freedom, security and justice for Europe's citizens – Action Plan implementing the Stockholm Programme` (2010), 9935/10

³⁷ V Engström and M Heikkilä *supra* n. 25, p. 8-9

³⁸ See S Carrera and E Guild *supra* n 12, p. 4-5 with reference to the European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, P7_TA(2009) 0090, Multi-annual programme 2010-2014 regarding the area of freedom, security and justice (Stockholm programme), para 153

³⁹ European Council, Conclusions, 26/27 June 2014, Brussels 27 June 2014, EUCO 79/14

⁴⁰ Instead, the guidelines under para 13. assign this task to the European Council

Only five pages in length, its overall objective was the consolidation and effective implementation of the existing legal instruments rather than the development of new policy objectives.⁴¹ Important for Frontex, however, the programme envisaged its reinforced operational assistance function and even outlined the possibility of setting up a European system of border guards.⁴² A similar observation can be made for the strategic guidelines covering the period 2019-2024.⁴³ It likewise refrains from directly addressing the Commission and delegates the monitoring of the programme's implementation to the Council. Compared with the Stockholm Programme, the guidelines again are kept fairly unspecific, although they set out important objectives such as the enhancement of the rule of law and mutual trust between the Member States and the development of a new Pact on Migration and Asylum.

Whereas since Stockholm, the practical relevance of the strategic guidelines has seemingly diminished, neither the European Council nor the Commission has relinquished its influence in shaping the policy of the AFSJ. Rather, policy-making has shifted from the five-year strategic programmes, as foreseen under Article 68 TFEU, towards a more topic-related approach. To this end, in recent years the Commission has adopted important policy papers such as the European Agenda on Migration⁴⁴ including the European Integrated Border Management Strategy of 2018,⁴⁵ the Communication 'Back to Schengen: A Roadmap',⁴⁶ and two Action Plans on Return.⁴⁷ Each of these policy papers was mandated by the European Council by respective Conclusions that left the Commission considerable discretion on how to shape these policy papers.⁴⁸

⁴¹ *ibid*, p. 2; insofar, it has been noted that the strategic guidelines lack a 'strategic vision'; see S. Léonard and C. Kaunert *supra* n 32, p. 144

⁴² *ibid*, p. 4

⁴³ Council of the European Union, 'draft strategic guidelines in the field of Justice and Home Affairs' Brussels 31 January 2020, 5636/20 (LIMITE JAJ 65), available at <http://www.statewatch.org/news/2020/feb/eu-council-jha-strategic-guidelines-5636-20.pdf> (accessed 24 June 2021)

⁴⁴ Commission, 'A European Agenda on Migration' COM (2015) 240 final

⁴⁵ Commission, 'Progress report on the Implementation of the European Agenda on Migration ANNEX 6', COM (2018) 250 final

⁴⁶ Commission, 'Back to Schengen – A Roadmap', COM (2016) 120 final

⁴⁷ Commission, 'EU Action Plan on Return' COM (2015) 453 final; 'Renewed Action Plan on Return' COM (2017) 200 final.

⁴⁸ Regarding the European Agenda on Migration COM (2015) 240 final: European Council Conclusions of 23.04.2015; 'Back to Schengen: A Roadmap' COM (2016) 120 final is based on

This indicates a mutual understanding between the European Council and the Commission on the division of tasks whereby the European Council sets out the general objectives but gives the Commission sufficient leeway on shaping its details.

3.3. Frontex

3.3.1. The Rationale for Frontex's Creation

Initially, border protection was regarded as a responsibility falling under the sole competence of the Member States. While Article 6 of the Schengen Convention imposed upon the Member States obligations as regards checks and surveillance at the external borders, its compliance was left to national law and the national authorities. Also, the Schengen Catalogue, presented in 2002, addressed the Member States only with non-legally binding recommendations for the correct application of the Schengen acquis and best practices.⁴⁹ Only in 2006, with the first Schengen Border Code, did the EU legislature adopted a Regulation with rules on the border control of persons crossing EU external borders and on the temporary reintroduction of border control at internal borders.⁵⁰

Nevertheless as noted by the Commission, the problem was not so much a lack of detailed community legislation but rather 'the deficiencies of the Member States to organise themselves at an operational level that permits actions to be better coordinated and that provide for a more homogenous level of security at the external frontiers'.⁵¹ To this end, in 2001 the European Council mandated the Commission 'to work out arrangements for cooperation between services responsible for external

European Council Conclusions of 18/19.02.2016; the Action Plans on Return are based on the European Council Conclusions of 25/26.06.2015 and 20/21.10.2016 respectively

⁴⁹ Council of the European Union, February 2002, available at <https://www.consilium.europa.eu/media/31011/catalogue-en.pdf>; the Schengen Catalogue was updated in 2009, see Council of the European Union, March 2009, Doc. 7864/09

⁵⁰ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105/1; Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L77/1

⁵¹ Commission, 'Towards Integrated Management of the External Borders of the Member States of the European Union' COM (2002) 233 final p. 4

border control and to examine the conditions in which a mechanism or common service to control external borders could be created'.⁵² It followed a Communication in 2002 where the Commission proposed measures aimed to develop integrated management of external borders.⁵³ They included standardised, practical handbooks for border guards, the development of a permanent process of data and information exchange between national authorities, the establishment of a common integrated risk analysis system, inter-operational personnel and equipment sharing (including a common basis for training border guards), and a fair burden-sharing between the Member States, including budgetary support of Member States financed from the EU budget.⁵⁴

Most importantly, the Communication also suggested the creation of a Common Unit of External Border Practitioners (CPU) responsible for the coordination of operational actions between the Member States.⁵⁵ Composed of members of the Council working group, the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)⁵⁶ and heads of national border control services their task was to carry out a common integrated risk assessment, the co-ordination of joint operational actions, the strategic management ensuring a convergence among the national staff and equipment policies and risk assessment inspections in critical cases at the external borders.⁵⁷

However, already one year after the concept of the Common Unit had been endorsed by the European Council,⁵⁸ the Commission identified that structural limits of the Common Unit impaired its capability to effectively coordinate and manage joint operations and pilot projects.⁵⁹ The Commission thus suggested that only strategic

⁵² European Council, 'Presidency Conclusions European Council meeting in Laeken 14 and 15 December 2001' DOC/01/18

⁵³ COM(2002) 233 final

⁵⁴ *ibid*, p. 12

⁵⁵ *ibid*, p. 5

⁵⁶ Strategic Committee on Immigration, Frontiers and Asylum

⁵⁷ COM(2002) 233 final p. 14

⁵⁸ European Council, 'Presidency Conclusions Seville European Council 21 and 22 June 2002' DOC/02/13

⁵⁹ Commission, 'Communication: Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents' COM (2003) 323 final, p.7-8

coordinating tasks should remain with the Common Unit whereas more operational tasks should be entrusted to a new permanent Community structure able to exercise the day-to-day management and coordinating tasks and be able to respond in time to emergency situations.⁶⁰ This idea was taken up by the European Council which mandated the Commission in October 2003 to examine ‘the necessity of creating new institutional mechanisms, including the possible creation of a Community operational structure, to enhance operational cooperation for the management of external borders’⁶¹ and subsequently ‘welcomed the Commission’s intention to submit a proposal for the creation of a Border Management Agency’.⁶² Shortly after, the Commission presented its proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (Frontex) that was finally adopted by the Council in October 2004.⁶³

3.3.2. The Concept of European Integrated Border Management

Ever since its creation, Frontex’s primary mission has been to improve the integrated management of the Member States’ external borders. This key objective was already set out in Frontex’s founding Regulation in 2004⁶⁴ and is now the subject matter of Regulation (EU) 2019/1896 which Article 1 (1) states:⁶⁵

The Regulation establishes a European Border and Coast Guard *to ensure European integrated border management at the external borders* with a view to managing those borders efficiently in full compliance with fundamental rights and to increasing efficiency of the Union return policy.

⁶⁰ *ibid*, p. 8

⁶¹ European Council, ‘Thessaloniki European Council 19 and 20 June 2003 Presidency Conclusions, Brussels 1 October 2003’ 11638/03

⁶² European Council, ‘Brussels European Council Conclusions 16 and 17 October 2003 Presidency Conclusions’, 15188/03

⁶³ Commission, ‘Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the external Borders’ COM(2003) 687 final

⁶⁴ Article 1, Frontex Regulation 2004 *supra* n 2

⁶⁵ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard an repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1 (Frontex Regulation 2019)

Accordingly, the Single Programming Document of Frontex is based on this concept with its three strategic objectives set out 'to implement the concept of European Integrated Border Management'.⁶⁶ Furthermore, the first horizontal objective in Frontex's multiannual programming is dedicated to the implementation and support of European integrated border management to ensure safe and well managed EU external borders.⁶⁷

Despite its importance, it is difficult to capture the concept of European integrated border management in general terms. The reason is that it is a dynamic concept that nowadays is more far-reaching than it was understood in 2002 where the Commission addressed the concept of integrated border management in its Communication for the first time.⁶⁸ In this light, the Treaty of Lisbon includes the policy aim to *gradually* introduce an integrated management system for external borders under Article 77(1) (c) TFEU, which indicates that European integrated border management must be understood as an ongoing process aimed to develop a coherent and coordinated border management system rather than a concept that can be defined.⁶⁹

As such, European integrated border management is a holistic notion that goes beyond border control performed at the external borders. 'It includes measures in third countries, measures with neighbouring third countries, and measures within the area of free movement, including the return of irregular migrants from the EU to their countries of origin'. It is supported by several flanking measures 'such as strong and regular risk analysis, improved inter-agency cooperation and the use of state-of-art technology'.⁷⁰

Falling under the shared responsibility of Frontex and the national authorities responsible for border management, Regulation (EU) 2019/1896 (as well as Frontex's

⁶⁶ See p. 11, Frontex Single Programming Document 2020-2022 *supra* n 16

⁶⁷ *ibid*, Section 2.1.2.1. of Frontex's multiannual work programme

⁶⁸ COM (2002) 233 final

⁶⁹ Which is one of the legal bases of the 2019 Frontex Regulations. Others mentioned in Regulation (EU) 2019/1896 are Articles 77(2) (b) and 79 (2) (c) TFEU

⁷⁰ Commission, 'Communication, A European Border and Coast Guard and effective management of Europe's external borders' COM (2015) 673 final, p.4

previous founding Regulation of 2016) lists the following components of European integrated border management:⁷¹

- Border control, including measures to facilitate legitimate border crossing and measures related to the prevention and detection of cross-border crime at the external borders.
- Search and rescue operations for persons in distress at sea.
- Analysis of the risks for internal security and analysis of the threats that may affect the functioning or security of the external borders.
- Information exchange and cooperation between the Member States including information exchange between Member States and Frontex.
- Inter-agency cooperation among national authorities responsible for border control or other tasks carried out at the border.
- Cooperation among the relevant Union institutions, bodies, offices and agencies, including the regular exchange of information.
- Cooperation with third countries.
- Technical and operational measures within the Schengen area which are related to border control and designed to address illegal immigration and to counter cross-border crime better.
- The return of third-country nationals who are the subject of return decisions issued by a Member State.
- The use of state-of-art technology including large-scale information systems.
- A quality control mechanism, in particular the Schengen evaluation mechanism, the vulnerability assessment and possible national mechanisms, to ensure the implementation of Union law in the area of border management.

⁷¹ Article 3 of the Frontex Regulation 2019, Article 4 of Regulation (EU) 2016/1624 [2016] OJ L251/1; with the exception of cooperation among Union institutions, bodies and offices, a component inserted under the 2019 Frontex Regulation, both provisions are identical.

- Solidarity mechanisms, in particular Union funding instruments.

Furthermore, Regulation (EU) 2019/1896 introduced the concept of a multiannual strategic policy cycle for European integrated border management.⁷² The policy document, to be adopted by the Commission following a discussion with the European Parliament and the Council, shall set out the policy priorities and provide strategic guidelines for a five-year period. Frontex's task is the implementation of the multiannual strategic policy based on a technical and operational strategy. As several comments of the Commission on Frontex's Single Programming Document 2020-2020 illustrate, this division of tasks bears potential competence conflicts and will be addressed in more detail under Section 3.4.2.1. of this chapter.

3.3.3. The Frontex Regulation: Tasks and Powers conferred on Frontex

The fact that Frontex's founding Regulation has been amended so frequently illustrates the pace of development in the Area of Freedom, Security, and Justice. In particular, the complete overhaul of its Regulation in 2016 and 2019 have transformed Frontex from an agency with merely coordinating and assistance functions into a powerful agency with regulatory, supervisory and operational tasks that has its standing corps and technical equipment. The renaming of Frontex into the 'European Border and Coast Guard Agency' in 2016 underlines this development as well as the steep rise in Frontex's budget. In some instances, the expansion of Frontex's tasks can be linked directly to external factors, such as the migration crisis of 2015 to which Regulation (EU) 2016/1624 was one 'key response'.⁷³ More generally, however, the evolution of Frontex's powers must be seen as an expression of the 'progressive Europeanisation of external border management'.⁷⁴

⁷² Article 8 Frontex Regulation 2019

⁷³ S Carrera and L den Hertog 'A European Border and Coast Guard: What's in a name?' (2016) CEPS Paper No 88, p. 2, available at

<https://www.ceps.eu/system/files/LSE%20No%2088%20SC%20and%20LdH%20EBCG.pdf> accessed 24 June 2021

⁷⁴ J Rijpma 'The Proposal for a European Border and Coast Guard: evolution or revolution in external border management' (2016) Study for the LIBE Committee, available at

[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU\(2016\)556934_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf) accessed 24 June 2021

When Frontex became operative in 2004, executive powers were almost non-existent. In its proposal for Regulation (EC) No 2007/2004 the Commission even emphasised that Frontex's role would be strictly limited to assistance functions and 'soft law' instruments which indicate that its weak role was a *sine qua non* for the Council to adopt its founding Regulation.⁷⁵ Apart from conducting risk analysis, research and training, operational tasks of Frontex were thus limited to the coordination of joint activities of the Member States and to providing technical and operational assistance.⁷⁶

Subsequent amendments of Frontex founding Regulation between 2007 and 2013 gradually improved its operational and supervisory role in European Integrated Border Management. In 2007, Regulation (EC) No 863/2007 introduced the concept of Rapid Border Intervention Teams (RABIT).⁷⁷ To strengthen solidarity between the Member States, it established a mechanism where a Member State, 'facing extreme difficulties in controlling their external borders, could request the support of border guards of other Member States on a temporary basis'.⁷⁸ Frontex's task was to decide on the deployment of Rapid Border Intervention Teams and to set up an operational plan detailing its conditions in agreement with the Member State concerned.⁷⁹ However, other Member States only had to communicate the number of border guards available for deployment conditionally to its subsequent revocation, an aspect that diluted the intended purpose of this Regulation.⁸⁰

⁷⁵ COM (2003) 687 final/2 p. 4

⁷⁶ Articles 3 (1) and 8 Frontex Regulation 2004; Articles 8 (2) (b) and 8 (3) envisage operational support of Frontex's experts and the acquisition of technical equipment for the duration of deployment.

⁷⁷ Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guests officers [2007] OJ L199/30

⁷⁸ Commission 'Proposal for a Regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism' COM (2006) 401 final p. 2

⁷⁹ Articles 8a) and 8e) of Frontex Regulation 2004

⁸⁰ Member States were entitled to revoke their commitment if they were themselves faced with an exceptional situation at their external borders, see Article 8b) of Frontex Regulation 2004 *supra* n 2

The 2011 amendments of the Frontex Regulation improved the obligingness of Member States to deploy border guards.⁸¹ The power to decide on its profile and the overall number was conferred on Frontex's management board.⁸² Moreover, with Rapid Border Intervention Teams being renamed into the European Border Guard Teams, its scope was extended for the possible deployment during joint operations and pilot projects, Frontex now being entitled to initiate such operational activities in cooperation with the Member State concerned.⁸³ The 2011 amendments also marked the beginning of the Frontex supervisory role assigning it with the task to carry out risk analysis and to assess the Member States' capacity to face threats and pressures at the external borders.⁸⁴

Risk prevention and assessment was also the subject matter of Regulation (EU) No 1052/2013 which introduced the European Border Surveillance System (EUROSUR).⁸⁵ Now incorporated under the Frontex Regulation, it aims to improve situational awareness and reaction capability at the external borders.⁸⁶ To this end, the Regulation established a common framework for the exchange of information and cooperation between the Member States and Frontex making the latter 'the central hub in a system of information exchange between national border guard authorities'.⁸⁷ Moreover, the Regulation conferred supervisory powers on Frontex with the task to classify external land and sea borders according to their 'impact level' for border security, the Member States then being required to adjust their 'reaction capability' accordingly.⁸⁸

⁸¹ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1

⁸² *ibid*, Article 3b) (1)

⁸³ *ibid*, Articles 1a) and 3 (1)

⁸⁴ *ibid*, Article 2 (1) (c)

⁸⁵ Regulation (EU) No 1052/2013 of 22 October establishing the European Border Surveillance System (Eurosur) [2013] OJ L295/11 ('Eurosur Regulation')

⁸⁶ *ibid*, Article 1

⁸⁷ J Rijpma *supra* n 74, p.12

⁸⁸ Articles 15 and 16 EUROSUR Regulation

Yet, it was the complete overhaul of Frontex's Regulation in 2016 that marked a quantum leap in its increase of supervisory and operational powers.⁸⁹ Most prominently, Regulation (EU) 2016/1624 introduced the concept of the `European Border and Coast Guard` comprising Member States' border guard authorities and Frontex for the deployment in joint operations, rapid border interventions and in the framework of the migration management support teams. For rapid border interventions, a pool of standing corps members with at least 1500 border guards at the immediate disposal of Frontex was established.⁹⁰

The 2016 Regulation also extended Frontex's operational scope, the development of the hotspot approach becoming another key task for Frontex.⁹¹ It allows Member States facing disproportionate migratory challenges at its external borders to request technical and operational reinforcement by migration management support teams composed of experts deployed from Member States, Frontex, EASO and Europol.⁹² Such assistance measures may include the screening of third-country nationals arriving at the external borders, the provision of initial information on international protection to arriving persons and technical and operational assistance in the field of return.⁹³ Enhancing the effectiveness of return procedures is another key objective set out under the 2016 Regulation.⁹⁴ It obliges the Member States to inform Frontex of their indicative planning on return operations and their needs for assistance from Frontex.⁹⁵ Frontex itself may initiate return operations and coordinate and organise them.⁹⁶ Furthermore, European return intervention teams comprising a pool of forced-return monitors, forced-return escorts and return specialists provide technical

⁸⁹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251/1 (Frontex Regulation 2016)

⁹⁰ *ibid*, Article 20 (5): Member States had to deploy border guards within five working days at the request of Frontex based on a distribution key annexed to the Regulation.

⁹¹ COM (2015) 673 final, p. 6

⁹² Article 18 (1) Frontex Regulation 2016

⁹³ *ibid* Article 18 (4)

⁹⁴ COM (2015) 673 final, p. 7

⁹⁵ Article 28 (2) Frontex Regulation 2016

⁹⁶ `Collective Return Operations` where the means of transport and forced-return escorts are provided by a third country of return, see Articles 28 (1) and 28(3) of Frontex Regulation 2016

and operational assistance to the Member States in implementing their return decisions.⁹⁷

The most salient feature of the 2016 Regulation however was the conferral of independent supervisory functions on Frontex leading to a hierarchical relationship between Frontex and its national counterparts in the area of risk analysis.⁹⁸ It allows Frontex to post liaison officers in the Member States to monitor its external border management.⁹⁹ Their findings provide the basis for Frontex's vulnerability assessment which evaluates the capacity and readiness of the Member States to face upcoming challenges at the external borders.¹⁰⁰ Frontex can recommend measures to be taken by the Member State and adopt binding decisions that instruct the Member States in case of non-compliance.¹⁰¹ Where urgent action is required and a Member State has not taken the necessary measures following a vulnerability assessment or has not requested Frontex's support, the 2016 Regulation even confers on Frontex the right to intervene.¹⁰² Based on an implementing act from the Council, possible measures include the deployment of European Border and Coast Guard teams for rapid border interventions or at hotspot areas, to coordinate joint operations with neighbouring third countries, or to organise return interventions.¹⁰³

Despite these significant improvements in the efficiency of integrated border management, two years later the European Council recalled the need for more effective control of the EU's external borders and to increase the financial and material support to the Member States.¹⁰⁴ To this end, the Commission proposed a new Regulation for Frontex that was adopted in November 2019 and replaced the 2016 Regulation.¹⁰⁵ Its highlight is the creation of a European Border and Coast Guard standing corps comprising 10 000 operational staff for possible deployment in joint

⁹⁷ *ibid*, Article 32

⁹⁸ J Rijpma, n 88, p. 14-15

⁹⁹ Article 12 Frontex Regulation 2016

¹⁰⁰ *ibid*, Article 13 (4)

¹⁰¹ *ibid*, Articles 13 (6) and 13 (8) of Regulation (EU) No 2016/1624

¹⁰² *ibid*, Article 19 (1) (b) which refer to initiating joint operations or rapid border interventions at the external borders or to request technical and operational support at hotspot areas from management support teams.

¹⁰³ *ibid*, Article 19 (3)

¹⁰⁴ European Council, Conclusion, Brussels, 28 June 2018, EUCO 9/18

¹⁰⁵ COM (2018) 631 final

operations, rapid border interventions, return interventions or `any other relevant operational activities` in the Member States or third countries.¹⁰⁶ Its need is justified in the light of past experiences where, except for the Rapid Reaction Pool, contributions of the Member States to the European border and coast guard teams had to be planned by Frontex based on annual bilateral agreements with the Member States. The total number of 10 000 standing corps members is an aim to be achieved by 2027.¹⁰⁷ Only a minority of them will be statutory staff members employed by Frontex directly (Category 1).¹⁰⁸ Approximately two-thirds of the standing corps will be contributed by the Member States through long-term secondments (Category 2), short-term deployment for a period of up to four months (Category 3) or taken from the rapid reaction reserve (Category 4). Insofar, the main improvement compared with the situation under the previous Regulation is the Member States` unconditional obligation to deploy a fixed amount of staff to be funded by Frontex.¹⁰⁹

For this purpose, the EU contributions to Frontex for the period 2019-2027 will amount to EUR 3.43 billion.¹¹⁰ Likewise expensive will be to endow Frontex with sufficient technical equipment which shall become `the backbone of the operational deployment`.¹¹¹ The ability to acquire or lease technical equipment is not an innovation of the 2019 Regulation itself but in the past, this possibility was significantly hindered by the lack of necessary budgetary resources.¹¹² How the budget is spent, however, is certainly not left to the sole discretion of Frontex. On the contrary, the new Regulation obliges Frontex to set up a multi-annual strategy on how its technical capabilities are to be developed considering the multiannual

¹⁰⁶ Article 54 (2) of Frontex Regulation 2019

¹⁰⁷ The time-table for the establishment of the standing corps is annexed to Frontex Regulation 2019 but the political guidelines of the new European Commission set out that the standing corps shall be operational already by 2024.

¹⁰⁸ According to Annex I Frontex Regulation 2019, the aim is to employ 1000 statutory staff members by 2021 and up to 3000 till 2027.

¹⁰⁹ Article 61 Frontex Regulation 2019

¹¹⁰ See Commission, `Revised Legislative Statement on the European Border and Coast Guard Regulation` (2019) Institutional File 2018/0330 (COD), p. 6

¹¹¹ *ibid.*, p. 7

¹¹² *ibid.*, p. 6

strategic policy cycle for European integrated border management and after having received the positive opinion of the Commission.¹¹³

This multiannual strategic policy cycle will not only affect the direction of Frontex's technical capabilities but is 'the' new instrument that defines the policy priorities and strategic guidelines for European integrated border management for a five-year period in advance. To this end, it shall set out in a coherent, integrated and systematic manner how the challenges in the area of border management and return are to be addressed.¹¹⁴ The Commission, being responsible for its adoption, will play a central role in shaping the direction of European integrated border management.¹¹⁵ The allocation of competences between the Commission and Frontex under the new Regulation also allows a forecast of their (future) relationship. As the Commission adopts the strategic policy cycle, Frontex's task is limited to its implementation including the adoption of a technical and operational strategy and an integrated planning process for border management and return.¹¹⁶ At the time of writing, the policy paper had not yet been adopted but potential conflicts of competences are especially noticeable from the comments made by the Commission in its opinion on Frontex's draft Single Programming Document for 2020-2022. Here, the Commission repeatedly expressed its concern that Frontex's programme might disregard the limits of its mandate predominantly to the detriment of the Commission itself.¹¹⁷

3.3.4. Financing of Frontex

Like most other European agencies, Frontex is fully financed through EU contributions.¹¹⁸ On average, these contributions are approximately EUR 40 million

¹¹³ Article 63 (2) Frontex Regulation 2019

¹¹⁴ Article 8 (2) Frontex Regulation 2019

¹¹⁵ Article 8(2) and (4) Frontex Regulation 2019, following a discussion with the European Parliament and the Council

¹¹⁶ Articles 8 (5) and 9 (1) Frontex Regulation 2019

¹¹⁷ Commission, 'Commission Opinion of 29.11.2019 on the Single Programming Document containing the draft multiannual programming for 2020-2022 and the draft Annual Work Programme for 2020 ('Single Programming Document for 2020-2022') of the European Border and Coast Guard Agency' C (2019) 8715 final, para 18

¹¹⁸ Only ECHA, EASA, ECHA, and EMA are partially financed through fees; EBA, EIOPA, and ESMA are nationally co-financed; CdT, EUIPO, CPVO, and the SRB are fully self-financed.

per year.¹¹⁹ The EU contributions to Frontex, however, are more than ten times higher and amount to an incredible EUR 505 649 620 for the financial year 2021.¹²⁰

The strong increase of around EUR 215 million between 2019 and 2021 corresponds to the political will of the European Council which recalled in 2018 the need for Member States to ensure the effective control of the EU's external borders with EU financial and material support.¹²¹ Insofar, Frontex's budget increase is an expression of the political intention for a fairer burden-sharing between the Member States, a need that was already realised by the Commission in its 2002 Communication on integrated border management.¹²² In this respect, the financial strength of Frontex cannot be compared with other agencies. Frontex is more than an administrative body as it is increasingly responsible for operational activities at the external borders and especially for its financing. To this end, EUR 223 978 801 from Frontex's budget is allocated to operational activities and the development and implementation of a strategy for the acquisition of its technical equipment.¹²³

While the decision to increase Frontex's budget can be ascribed to previous European Council decisions, the Commission's impact on its budget is also significant. Influencing factors are the Legislative Financial Statement accompanying the Commission's proposal for Regulation (EU) 2019/1896 and the Working Document (Part III) on the draft general budget of the EU.¹²⁴ Both documents detail how the EU contributions shall be allocated in Frontex's budget. Even though they are only

¹¹⁹ See Commission, 'Draft General Budget of the European Union for the financial year 2021, Working Document Part III Bodies set up by the European Union having legal personality' COM(2020) 300

¹²⁰ Definitive Adoption (EU, Euratom) 2021/417 of the European Unions general budget for the financial year 2021 [2021] OJ L93/1

¹²¹ European Council, Conclusions, Brussels, 28 June 2018, EUCO 9/18

¹²² COM (2002) 233 final, p. 11

¹²³ Frontex, 'Management Board Decision 1/2021 of 13 January 2021 adopting the Single Programming Document 2021-2023 including the Multiannual Plan 2021-2023, the Programme of Work 2021 and the Budget 2021 (the Establishment Plan as part of it)' (Frontex Single Programming Document 2021-2023) available at https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_1_2021_adopting_SPD_2021-2023.pdf accessed 24 June 2021, p. 24

¹²⁴ Supra n 119; Legislative Financial Statement accompanying Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action no98/700 JHA, Regulation (EU) no 1052/2013 of the European Parliament and of the Council and Regulation No 2016/1626 of the European Parliament and of the Council' COM (2018) 631 final

indicative subject to the final decision of the budgetary authority, usually the final budget does not deviate from the Commission's draft.

Comparably, Frontex's statement on its estimated revenues and expenditure seems to have little relevance. In the Commission's opinion on Frontex draft Single Programming Document, the impression arises that Frontex's budget programming does not matter at all. Commission comments are brief and appear as instructions rather than suggestions. As such, the Commission 'invites' Frontex to align *all* sections of the programming document with the human and financial resources of the Commission Draft Budget.¹²⁵

3.4. Frontex Single Programming Documents and the Commission's Opinions

For 'Union bodies' receiving contributions from the Union budget the Framework Financial Regulation applies.¹²⁶ The Regulation obliges Frontex to draw up a Single Programming Document including a multiannual programming and annual work programme for the upcoming year and to submit its draft version by 31 January each year to the Commission, the European Parliament and the Council.¹²⁷ Hereof, it is the Commission which is formally entitled to give its opinion on the draft programme, the agency then being obliged to provide an adequate explanation in case that it does not fully take into account the Commission's recommendations.¹²⁸ As each programme has its specific situational context, Frontex's Single Programming Documents of three consecutive years (2021-2023, 2020-2022, 2019-2021) and the Commission's opinions thereon are examined in this chapter.¹²⁹ The focus hereby is

¹²⁵ Commission, Opinion on Frontex Single Programming Document 2020-2022 *supra* n 117, para 91

¹²⁶ See Article 1 of the Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council, OJ L 122, 10.05.2019, p. 15; in the following FFR

¹²⁷ Article 32 (1) FFR

¹²⁸ Article 32 (7) FFR

¹²⁹ Commission, 'Opinion of 4.1.2021 on the Single Programming Document containing the draft multiannual programming for 2021-2023 and the draft Annual Work Programme for 2021 ('Single Programming Document for 2021-2023') of the European Border and Coast Guard Agency', C (2021) 1 final (Opinion on Frontex Single Programming Document 2021-2023); Commission, 'Opinion of 29.11.2019 on the Single Programming Document containing the draft multiannual programming for

on the assessment of the most recent programme, the Single Programming Document 2021-2023, but also the Single Programming Document 2020-2022 is frequently referred to as it is the first programme being adopted under Frontex new founding Regulation (EU) 2019/1896. Reference to the Single Programming Documents 2019-2021 is made where necessary for the sake of validating the results and to achieve a more representative outcome of this study.

The structure of this section starts with an examination of Frontex's Single Programming Documents in terms of the specific legal and policy context under which the programme was adopted, the programme's structure and general remarks on its content (3.4.1.). The opinions of the Commission are then analysed in two directions. First, to analyse the topics addressed by the Commission. Hereby, the examination orientates on Frontex's programme structure in terms of the strategic and horizontal objectives set out in its multiannual programming (3.4.2.). Secondly, to analyse the quality of the Commission's comments, i.e. what impact these comments potentially have on Frontex's programming autonomy (3.4.3.). Finally, it examines to what extent Frontex follows the comments made by the Commission. For this purpose, the draft version of the Single Programming Document and its final version is compared (3.4.4.). The results of these findings and their assessment are then reserved to the conclusions of the chapter under Section 3.5.

2020-2022 and the draft Annual Work Programme for 2020 ('Single Programming Document for 2020-2022') of the European Border and Coast Guard Agency' C (2019) 8715 final (Opinion on Frontex Single Programming Document 2020-2022); Commission, 'Opinion of 8.10.2018 on the Single Programming Document 2019-2021 containing the multiannual programming and Annual Work Programme for 2019 of the European Border and Coast Guard Agency (Frontex)', C (2018) 6390 final (Opinion on Frontex Single Programming Document 2019-2021)

3.4.1. Frontex's Single Programming Documents 2021-2023, 2020-2022 and 2019-2021

Before addressing Frontex's programming content, remarks on its situational and procedural context are made as these aspects are important for the subsequent assessment of Frontex's compliance with the Commission's opinions:

Whereas Frontex submitted its draft Single Programming Document for 2021-2023 on 31 March 2020, the Commission's opinion was delivered nine months later, on 4 January 2021. This delay is not only contrary to Article 32 (7) FFR,¹³⁰ but it also brought Frontex under considerable time pressure as the management board is obliged to adopt the final Single Programming Document before 30th November each year.¹³¹ A similar observation has been made regarding the Commission's opinion on Frontex' draft Single Programming 2020-2022 which was also delivered only a few weeks before the start of the programming year.¹³² While the Commission's advised Frontex 'to focus only on the necessary changes to reflect the essential parts of the mandate and rather to postpone the adaption of the Single Programming Document to the new strategic framework until its next iteration [...]',¹³³ the short time between the delivery of the opinion and the deadline for the adoption of the final programme questions the reliability of the programming procedure in general terms. Especially with regard to more complex issues, such as those on Frontex's objectives or the prioritisation of activities, it cannot be expected that these are processed by Frontex within a few weeks.

Also, the fast pace of policy developments in the area of freedom, security and justice has an impact not only on Frontex's programming content but also on the Commission's opinions. Shortly before the draft Single Programming Document 2020-2022 was presented to the Commission, the new Frontex Regulation (EU)

¹³⁰ Article 32 (7) FFR obliges the Commission to deliver its opinion in a timely manner in any case not later than 1st July of the year N.

¹³¹ Article 102 (1) Regulation (EU) 2019/1896

¹³² On 29.11.2019

¹³³ Opinion on Frontex Single Programming Document 2020-2022, para 16

2019/1896 was adopted and considerably enlarged Frontex's mandate.¹³⁴ Resulting from this, important new steering instruments of the Commission had to be taken into account by Frontex. These were, first, a Roadmap adopted by the Commission in July 2019 to ensure that all activities are in line 'with the letter and spirit of the Regulation 2019/1896 and launched in a timely and effective manner'.¹³⁵ The Roadmap includes a timetable to ensure the 'rapid and full operationalisation' of the European Border and Coast Guard standing corps and the effective use of the budget earmarked to Frontex to set up its technical capabilities.¹³⁶ Several comments of the Commission referred to this Roadmap and requested Frontex to 'make further efforts to align the activities programmed with the content and timelines established in this Roadmap, in particular with regard to the readiness of the standing corps by 1 January 2021'.¹³⁷ Secondly, Regulation (EU) 2019/1896 introduced the concept of a multiannual strategic policy cycle to be adopted by the Commission following a political dialogue with the European Parliament and the Council.¹³⁸ A similar policy paper already existed before namely the Commission's integrated border management strategy of 2018.¹³⁹ However, the multiannual policy strategy now formally recognises the Commission's role to develop European integrated border management policy and conversely limits Frontex powers to implementing tasks. Consequently, Regulation (EU) 2019/1896 confers on Frontex the tasks to establish, in close cooperation with the Member States and the Commission, a technical and operational strategy for European integrated border management that must be in line with the Commission's multiannual policy cycle.¹⁴⁰ Even though the multiannual strategic policy had not yet been adopted when the Commission gave its opinion (and has still not been),¹⁴¹ potential competence conflicts between the Commission and

¹³⁴ See Section 3.3.3. of this Chapter

¹³⁵ Opinion 2019, paragraph 3

¹³⁶ Roadmap for the implementation of the European Border and Coast Guard 2.0; 1 July 2019 (EBCG Agency & DG Home); available at <http://www.statewatch.org/news/2019/nov/eu-com-frontex-roadmap-implementation-1-7-19.pdf> (accessed 16.05.2020)

¹³⁷ Opinion on Frontex Single Programming Document 2020-2020, Para 30

¹³⁸ Article 8 (4) of Regulation (EU) 2019/1896

¹³⁹ European Commission, Communication, Progress report on the Implementation of the European Agenda on Migration, Brussels 14.3.2018, COM (2018) 250 final, ANNEX 6

¹⁴⁰ Article 8 (5) of Regulation (EU) 2019/1896

¹⁴¹ See Commission, 'A strategy towards a fully functioning and resilient Schengen area' COM (2021) 277 final, p. 5. Here, the Commission pronounces that it will "shortly launch discussions with the European Parliament and the Council"

Frontex are already noticeable. Noting that the multiannual strategic policy cycle must be regarded as a 'new dedicated governance mechanism steering all the stakeholders in this policy area', the Commission stated that the long-term strategic framework for the agency can only be defined after the Commission has established the multiannual strategic policy.¹⁴² Hereby, the Commission particularly criticised Frontex's objectives to 'develop and implement the European Integrated Border Management' and to 'design and manage the IBM policy' as a disregard of the EU institution's prerogatives in this respect.¹⁴³ Thirdly, also very recently, the Commission adopted its 'New Pact on Migration and Asylum' together with a Roadmap where Frontex has been attributed a leading role for the implementation of a common EU system for return.¹⁴⁴ Especially, the Commission's most recent opinion of 4.1.2021 on Frontex's Single Programming Document 2021-2023 quotes this policy document and demands that it should be Frontex's priority 'to become the operational arm of the EU return policy'.¹⁴⁵

Resulting from these new steering mechanisms, the structure of the Single Programming Document 2021-2023 and 2020-2022 differ considerably from programmes of previous years. Critically, the Commission noted that the new structure resembles Frontex's technical operational strategy for the European integrated border management.¹⁴⁶ However, contrary to the structure of previous programmes where the relation between multi-annual objectives, the strategic direction¹⁴⁷ and strategic action areas remained unclear,¹⁴⁸ the new structure is comprehensible. As explained in the Single Programming Document 2021-2023, to implement the concept of European integrated border management the strategic framework is built around three strategic objectives that are broken down into

¹⁴² Opinion on Frontex Single Programming Document 2020-2022, para 18

¹⁴³ *ibid*, paras 23 and 24

¹⁴⁴ Commission, 'Communication on a New Pact on Migration and Asylum' COM (2020) 609 final

¹⁴⁵ Opinion on Frontex Single Programming Document 2021-2023, para 9

¹⁴⁶ Frontex, Technical and Operational Strategy for European Integrated Border Management, March 2019, available at https://frontex.europa.eu/assets/Key_Documents/IBM/EU_IBM_Brochure_EN.pdf (accessed 30.8.2020)

¹⁴⁷ A strategic direction is no longer foreseen under Frontex's Single Programming Document 2020-2022

¹⁴⁸ This was also noted by the Commission in its Opinion on Frontex Programming Document 2019-2021, para 33

specific focus areas and in more detail into the key activities which constitute the base for detailed annual planning.¹⁴⁹ On top of the strategic objectives, the programme foresees three horizontal objectives of a cross-cutting nature, that have been designed to provide support and coordination to Frontex’s operational activities.¹⁵⁰

Structure of Frontex Single Programming Document 2021-2023

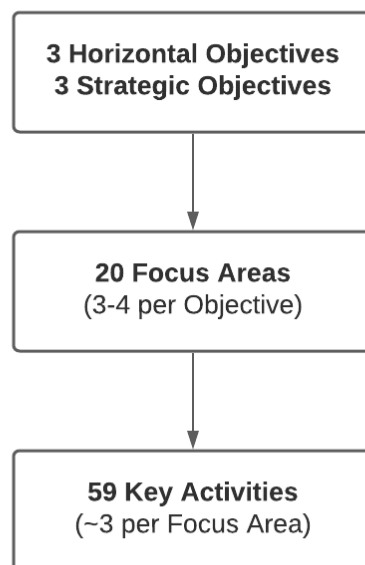


Figure 1: The structure of Frontex Single Programming Document 2021-2023

Less clear is what criteria determine Frontex’s strategic and horizontal objectives.¹⁵¹ Frontex’s multiannual programming explains the significance of its objectives but no comprehensive justification for its selection is provided. In its Single Programming Document 2021-2023, Frontex explains that the Roadmap developed in collaboration with the Commission constitutes a central element for its development but its strategic objectives cannot directly be derived from that document.¹⁵² Also, the Commission noted in its opinion on Frontex Single Programming Document 2020-2022 that Frontex should further elaborate on how the tasks, as defined by

¹⁴⁹ Frontex Single Programming Document 2021-2023 (*supra* n 16) p. 11

¹⁵⁰ *ibid.*, p. 13

¹⁵¹ See also Section 2.3.1.1. of this work

¹⁵² Roadmap for the implementation of the European Border and Coast Guard 2.0. (1 July 2019) available at <https://www.statewatch.org/media/documents/news/2019/nov/eu-com-frontex-roadmap-implementation-1-7-19.pdf> accessed 26 June 2021

Regulation (EU) 2019/1896, relate to its strategic objectives.¹⁵³ A similar comment, however, was not made on the Frontex programme 2021-2023, even though its multiannual work programme is identical with the programme of 2020-2022.

3.4.2. Topic-Related Analysis of the Commission's Opinions on Frontex Single Programming Document

Generally, the Commission's opinions follow Frontex's Single Programming Document structure and begin with general comments, followed by remarks on Frontex's multiannual programming, its annual work programme, the budget and staffing. By trend, general comments hereby refer to the strategic direction of Frontex, whereas comments on the multiannual programming address Frontex's objectives and those on the annual work programme its activities. However, within these sections, the Commission's comments do not always follow Frontex's programming structure. As this section takes a topic-related approach, its structure, therefore, orientates on Frontex's Single Programming Document rather than the structure of the Commission's opinion. Based on the six objectives (three strategic objectives and three horizontal objectives) programmed in Frontex's multiannual work programme 2021-2023,¹⁵⁴ the respective comments of the Commission are analysed. Comments on Frontex's budget and performance aspects are addressed separately at the end of this section.

3.4.2.1. Strategic and Horizontal Objectives

3.4.2.1.1. Strategic Objective 1: Reduced Vulnerability of the External Borders based on Comprehensive Situational Awareness

This strategic objective facilitates an information-led approach to Frontex's operational activities.¹⁵⁵ Accordingly, its focus areas concentrate on the production

¹⁵³ Opinion on Frontex Single Programming Document 2020-2022, para 56

¹⁵⁴ And Frontex multiannual work programme 2020-2022 which is identical with the programme of 2021-2023

¹⁵⁵ Single Programming Document 2021-2023 (*supra* n 16) p. 19

and analysis of information that enables decision-making on border management and -security.¹⁵⁶

- Produce actionable information and analysis to enable the functioning of the European Border and Coast Guard (EBCG) (Focus area 1).
- Create an EBCG environment and community of intelligence-led operational activities (Focus area 2).
- Contribute to the development and implementation of a fully interoperable and efficient European quality control mechanism (Focus area 3).
- Develop and implement the system for providing operational support and reinforcing Member States border control activities through establishing an operational ETIAS central unit (Focus area 4).

The first focus area sets out as a key activity the maintenance of a robust awareness mechanism.¹⁵⁷ As noticed by the Commission, in this context Frontex acquires and processes personal data from operational activities that provide the basis for its subsequent risk analysis. In its opinion on Frontex Single Programming Document 2020-2022, the Commission recommended that Frontex should elaborate on the transmission of personal data and should ‘swiftly implement measures in cooperation with the European Data Protection Supervisor to fulfil the extended possibilities for exchanging personal data with operational partners like Europol and Eurojust’.¹⁵⁸ Frontex followed this request only by inserting a footnote in its final annual work programme that reproduces the comment of the Commission.¹⁵⁹ Conversely, however, the opinion on Frontex programme 2021-2023 now advises that all processing of personal data needs to be in line with the data protection Regulation

¹⁵⁶ *ibid*

¹⁵⁷ *ibid*, Key Activity 1.1.2.

¹⁵⁸ Opinion on Frontex Single Programming Document 2020-2022, paras 72 and 73

¹⁵⁹ Single Programming Document 2020-2022 (*supra* n 16) p. 26, Fn 8 of key activity 1.1.2.

(EU) 2018/1725¹⁶⁰ and that any action programmed by Frontex should not be understood as an enlarged mandate for processing personal data.¹⁶¹

The second focus area emphasises Frontex's support and development of the European Border Surveillance system (EUROSUR).¹⁶² Regulation (EU) 2019/1896 integrated EUROSUR into Frontex' governing Regulation which is now part of the functioning of the European Border and Coast Guard.¹⁶³ Already in its opinion on Frontex's programming 2020-2022, the Commission suggested considering actions related to EUROSUR in a separate section that summarises all actions related to the implementation of EUROSUR and that ensures the full traceability of the human and financial resources allocated to EUROSUR.¹⁶⁴ Even though, Frontex did not alter its programme, in its opinion on Frontex programming 2021-2023 the Commission did not repeat this request. Instead, the Commission suggested ensuring coherency between the indicators on the quality of data and the service for EUROSUR and the key performance indicators of the Single Programming Document in general.¹⁶⁵ These indicators should reflect the overall security of the systems and proper user access.¹⁶⁶ Furthermore, the Commission demanded that Frontex's annual work programme should better reflect the impact resulting from the increased scope of EUROSUR which is no longer limited to border surveillance as well as on the development of the new EUROSUR Fusion Services.¹⁶⁷

The third focus area addresses Frontex's tasks towards 'a fully interoperable and efficient European Quality Control Mechanism'. This concept comprises the vulnerability assessment falling under Frontex's responsibility¹⁶⁸ and also the

¹⁶⁰ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [2018] OJ L295/39

¹⁶¹ Opinion on Frontex Single Programming Document 2021-2023, para 23

¹⁶² Considered under key activities 1.2.1., 1.2.2. and 1.2.3. of Frontex annual work programme

¹⁶³ Opinion on Frontex Single Programming Document 2020-2022, para 62

¹⁶⁴ *ibid*

¹⁶⁵ Opinion on Frontex Single Programming Document 2021-2023, para 43

¹⁶⁶ *ibid*, para 44

¹⁶⁷ *ibid*, para 49

¹⁶⁸ Article 32 of Regulation (EU) 2019/1896

Schengen Evaluation Mechanism coordinated by the Commission.¹⁶⁹ Consequently, competence issues arise. These became visible in the Commission's opinion on Frontex programme 2020-2022 where the draft version to 'develop and implement a fully interoperable and efficient European Quality Control Mechanism' was criticised.¹⁷⁰ As requested by the Commission, Frontex had to rephrase it into 'contributing to the development and implementation of a fully interoperable and efficient European Quality Control Mechanism'. Despite any further alterations, in its opinion on Frontex programming 2021-2023, the Commission pointed to Frontex's obligations under Regulation (EU) 1053/2013 and requested it to address its cooperation activities related to the Schengen evaluation mechanism including additional resources in its annual work programme.¹⁷¹

A similar proactive attitude was observed with regard to the fourth focus area that concerns the establishment and operation of the European Travel Information and Authorization System (ETIAS), a European visa waiver programme that will become operative by 2022. Pointing towards Frontex's important role in the implementation of the New Pact on Migration and Asylum, the Commission requested that Frontex should programme as a specific objective the operability of the ETIAS central unit by 2022. Similarly, the Commission requests that Frontex should reflect its contribution to the upcoming Rapid Alert Process for IT system (RAP-IT), a concept mentioned in the Commission's Pact on Asylum and Migration.¹⁷²

3.4.2.1.2. Strategic Objective 2: Safe, Secure and Well-Functioning EU External Borders

This strategic objective addresses Frontex's operational activities which comprise the following focus areas:

- Provide effect-orientated and flexible operational response (Focus area 1).

¹⁶⁹ See Article 3 of Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* [2013] OJ L295/27

¹⁷⁰ Opinion on Frontex's Single Programming Document 2020-2022, para 26

¹⁷¹ Opinion on Frontex's Single Programming Document 2021-2023, paras 50-52

¹⁷² *ibid.*, para 21

- Position Frontex as an important player in the area of combatting cross-border crime (Focus area 2).
- In the frame of the tripartite working arrangement, reinforcing the cooperation between Frontex, EMSA and EFCA for the development of European cooperation on Coast Guard Functions (Focus area 3).
- Support migration management by ensuring effective returns (Focus area 4).

In the light of its importance, numerous comments of the Commission address this strategic objective. Except for return activities, most comments tend to limit Frontex programming ambitions in the light of potential competence conflicts and other legal issues.

Provide effect-oriented and flexible operational response

Focus area 1 addresses Frontex operational activities, including the planning and implementation of joint operations and the deployment of the standing corps. Already for Frontex's draft Single Programming Document 2020-2022, the Commission requested a clearer distinction between Frontex's tasks and instances where it has only supportive functions towards the Member States.¹⁷³ In this respect, the Commission emphasised that the deployment of the standing corps always takes place under the command and control of the host Member State.¹⁷⁴ A similar direction had the Commission's comment regarding Frontex's intention to establish field offices for the support of the coordinating officers.¹⁷⁵ As the concept of `field offices` is not recognised under Regulation (EU) 2019/1896, the Commission noticed that their legal and operational status and its link with the *command and control* structure of the host Member States is unclear.¹⁷⁶ Also in its opinion on Frontex programming 2021-2023, the Commission emphasised that the programme should

¹⁷³ Opinion on Frontex Single Programming Document 2020-2022, para 21

¹⁷⁴ *ibid.*, para 47

¹⁷⁵ Key Activity 2.1.2.

¹⁷⁶ Opinion on Frontex Single Programming Document 2020-2022, para 49

more clearly indicate that Frontex is not allowed to deploy European Border and Coast Guard teams from the standing corps at the internal borders.¹⁷⁷

Position Frontex as an important play in the area of combatting cross-border crime

There are also indications that sometimes Frontex intentionally programmed activities beyond the scope of its mandate. An example is found in its draft Single Programming Document 2020-2022 where Frontex positioned itself 'as an important player in the area of law enforcement'.¹⁷⁸ Yet, Regulation (EU) 2019/1896 only envisages Frontex's cooperation with Europol and Eurojust and its support to the Member States in circumstances requiring increased technical and operational assistance at the external borders in the fight against cross-border crime and terrorism.¹⁷⁹ This aspect was already criticised by the Commission in its opinion on Frontex's programming 2019-2021, and consequently, the Commission requested to rephrase this focus area into 'position Frontex as an important player in the area of the prevention and detection of cross border crime'.¹⁸⁰ Also, in its opinion on Frontex's draft programme 2021-2023 the Commission underlined the importance that Frontex respects the limits of its own mandate and the competences of other agencies, notably Europol and Eurojust, as well as the competences of the national authorities of the Member States.¹⁸¹ Likewise, Frontex programmed activity to enhance operational cooperation with customs in cross-border crime and customs enforcement raised the Commission's suspicion that Frontex might disrespect the competences of the Commission and that of the Member States.¹⁸²

A similar observation was made with regard to Frontex's third focus area, where its draft programming for 2020-2022 envisaged the reinforcement of Frontex's coordinating role on coast guard functions. Similar to previous comments,¹⁸³ the

¹⁷⁷ Opinion on Frontex Single Programming Document 2021-2023, para 54

¹⁷⁸ Frontex, 'Draft Programming Document 2020-2022' Warsaw 25.10.2019 Reg. No 11825; available at <https://data.consilium.europa.eu/doc/document/ST-14362-2019-INIT/en/pdf> accessed 24 June 2021; Mission Statement, V. Tasks (p. 8)

¹⁷⁹ Article 10 (1) (q)

¹⁸⁰ Opinion on Frontex Single Programming Document 2020-2022, paras 52 and 76

¹⁸¹ Opinion on Frontex Single Programming Document 2021-2023, para 55

¹⁸² *ibid* para 57

¹⁸³ Opinion on Frontex Single Programming Document 2019-2021, para 47

Commission had to remind Frontex that it is only one of the three European agencies that manage EU cooperation in this area. Consequently, the Commission stated that Frontex cannot assume an independent coordinating role on coast guard functions and requested its revision.¹⁸⁴ Frontex corrected its focus area accordingly.¹⁸⁵

Support migration management by ensuring effective returns

There are few instances where the Commission requests the prioritisation of activities. This is especially the case for return related activities where all opinions insist on Frontex to use its new and enlarged mandate on return-related activities ‘to the fullest possible extent which should also be fully reflected in the agency’s mission statement and vision’.¹⁸⁶

In its opinion on Frontex’s programming 2019-2021, the Commission demanded that the programme should be guided by the Commission’s renewed EU Action Plan on return¹⁸⁷ and that Frontex should orientate its mission and vision statement as well as its multiannual objectives on that Action Plan.¹⁸⁸ The opinion on Frontex draft Single Programming Document 2020-2022 more specifically requested that Frontex, when describing its financial needs, should refer to the ‘more urgent need of its return capacity in view of the gradual takeover of return networks or development of new activities under the expanded mandate in the area of return’.¹⁸⁹ For Frontex’s annual work programme, the Commission wanted the programme to reflect more comprehensively on the aspect of training Standing Corps members in the area of return.¹⁹⁰ Both requests were adopted in Frontex final programme 2020-2022 accordingly with the annual work programme 2020 envisaging specialised training products for return.¹⁹¹ Nevertheless, the latest opinion also demanded that Frontex should take a more proactive attitude towards offering assistance to the Member

¹⁸⁴ Opinion on Frontex Single Programming Document 2020-2022, para 27

¹⁸⁵ Single Programming Document (*supra* n 16) p. 36

¹⁸⁶ Opinion on Frontex Single Programming Document 2020-2022, para 33; Opinion on Frontex Single Programming Document 2019-2021, para 18

¹⁸⁷ European Commission, Communication on a more effective return policy in the European Union - A renewed Action Plan, Brussels 2.3.2017 COM (2017) 200 final

¹⁸⁸ Opinion on Frontex Single Programming Document 2019-2021, para 18

¹⁸⁹ Opinion on Frontex Single Programming Document 2020-2022, para 60

¹⁹⁰ *ibid.*, paragraph 81

¹⁹¹ Single Programming Document 2020-2022 (*supra* n 16) p. 41

States on return,¹⁹² and also specifically requested that Frontex should offer a two-day basic training course on the return policy and activities to standing corps members.¹⁹³

3.4.2.1.3. Strategic Objective 3: Sustained European Border and Coast Guard Capabilities

The establishment of a standing corps and acquisition of technical equipment financed from the EU budget is considered as `the biggest game changer` of Regulation (EU) 2019/1896.¹⁹⁴ While operational activities are addressed under the previous strategic objective, this objective focuses on its necessary prerequisites including the operational readiness of the standing corps and the planning of the technical equipment required. The following focus areas were programmed by Frontex to this end:

- Implement Capability Development Planning, including contingency planning as a vehicle for integrated planning of EBCG capabilities (Focus area 1).
- Provide trained and equipped Standing Corps to enable response to current and emerging challenges (Focus area 2).
- Continue to develop and implement Strategy for Acquisition of own technical equipment and establish decentralised logistic system (Focus area 3).
- Research, technology development and innovation to effectively support capability development of the EBCG (Focus area 4).

Implementing Capability Development Planning

In principle, capability development planning falls under the responsibility of the Member States. Article 9 of Regulation (EU) 2019/1896 obliges them to adopt national capability development plans for border management and return following

¹⁹² Opinion on Frontex Single Programming Document 2021-2023, para 58

¹⁹³ *ibid.*, para 60

¹⁹⁴ Single Programming Document (*supra* n 16) p. 13

the methodology and procedure established by Frontex.¹⁹⁵In the course of integrated planning and for the sake of identifying possible synergies, Frontex`s task is to prepare overviews of these national plans together with a multiannual strategy for the acquisition of own equipment and the multiannual planning for profiles of staff for the standing corps.¹⁹⁶ Consequently, the key activities programmed under the focus area include the process and adoption of the methodology for capability planning, to provide guidance to the Member States and to establish a process for the translation of multiannual capability development planning into more specific sub-strategies e.g. recruitment and logistics.¹⁹⁷ The Commission commented on this focus area only by recommending that all activities linked to this focus area require prior adoption by the management board.¹⁹⁸ Frontex followed this recommendation accordingly.¹⁹⁹

Provide trained and equipped Standing Corps

The legal framework for Frontex`s contribution to the standing corps and the Member States` participation is established under Regulation (EU) 2019/1896.²⁰⁰More detailed planning for the readiness of the standing corps is outlined in a Roadmap adopted by the Commission and Frontex, including a timetable for the recruitment, equipment and training of the standing corps.²⁰¹Also, the key activities programmed under this focus area concentrate on these tasks.

Consequently, the Commission`s opinion on Frontex`s Single Programming Document 2020-2022 strongly reflected on the specifications of this Roadmap and requested Frontex`s further effort to align its planned activities with the content and timeline established therein, in particular with regard the readiness of the standing corps by 1

¹⁹⁵ Article 9 (4) of Regulation (EU) 2019/1896

¹⁹⁶ Article 9 (7) of Regulation (EU) 2019/1896

¹⁹⁷ Key Activities 3.1.1.-3.1.3. of Frontex`s Annual Work Programme 2020

¹⁹⁸ Opinion on Frontex Single Programming Document 2020-2022, para 59

¹⁹⁹ Single Programming Document 2020-2022 (*supra* n 16) p. 18

²⁰⁰ Article 55-58 of Regulation (EU) 2019/1896

²⁰¹ EBCG Agency [Frontex] and DG Home, Roadmap for the implementation of the European Border and Coast Guard 2.0, 1 July 2019, available at

<https://www.statewatch.org/media/documents/news/2019/nov/eu-com-frontex-roadmap-implementation-1-7-19.pdf> (accessed 28. July 2021)

January 2021.²⁰²The Commission also commented on training aspects of the standing corps. Here, the Commission demanded that the aspect of training in the area of return should be better reflected in the programming document,²⁰³ a comment that was further specified in the Commission's opinion on Frontex programming 2021-2023.²⁰⁴ Frontex considered these requests accordingly.²⁰⁵Furthermore, the Commission noted that Frontex should take a more proactive attitude towards offering assistance to the Member States and suggested incorporating bilateral negotiations with the Member States for the planning of the Standing Corps Category 3 into its programme. Considerations of these recommendations in Frontex's final programme, however, were not noticeable.

Development and Implementation of a Strategy for the acquisition of own technical equipment

In September 2017, Frontex's management board adopted its first strategy for the acquisition and leasing of Frontex's technical equipment.²⁰⁶ It envisaged an incremental approach, addressing urgent needs for a short-term period covering 2017-2019 and outlined the intention to develop a more comprehensive long-term strategy by 2018. While nothing happened to this end in 2018, Regulation (EU) 2019/1896 now sets out the legal requirements for the development and adoption of such a multiannual strategy.²⁰⁷ Its adoption requires the positive opinion of the Commission and shall take into account the multiannual policy cycle for European integrated border management as well as the budgetary resources available for that purpose under the multiannual financial framework. Consequently, as noted by the Commission, the multiannual strategy and its accompanying implementation plan

²⁰² Opinion on Frontex Single Programming Document 2020-2022, para 30; initially, the draft version of Frontex's SPD 2020-2022 outlined the readiness of the Standing Corps 'by beginning of 2021'. Here, the Commission requested to programme 'precisely on 1 January 2021'. Frontex followed this request accordingly.

²⁰³ *ibid*, para 81

²⁰⁴ Opinion on Frontex Single Programming Document 2021-2023, para 60

²⁰⁵ Single Programming Document 2020-2022 (*supra* n 16), Key Activity 3.2.1. now includes specialised training on return as an expected result.

²⁰⁶ Frontex, Management Board Decision 28/2017 of 27 September 2017 adopting the Strategy for the Acquisition and Leasing of Frontex own Technical Equipment; available at [https://frontex.europa.eu/assets/Management Board/decisions/MB_Decision_28_2017_adopting Strategy for the Acquisition of TE.pdf](https://frontex.europa.eu/assets/Management_Board/decisions/MB_Decision_28_2017_adopting_Strategy_for_the_Acquisition_of_TE.pdf) (accessed 28.07.2021)

²⁰⁷ Article 63 (2) of Regulation (EU) 2019/1896

have to cover the whole period of the next MFF 2021-2027.²⁰⁸ On Frontex's focus area to *continue to develop and implement* a strategy for the acquisition of its own technical equipment, the Commission emphasised the importance 'to timely adopt the multiannual strategy for the acquisition of technical capabilities in March 2020 and then to ensure its effective implementation'.²⁰⁹ Noticeable hereby, this deadline is not foreseen under Regulation (EU) 2019/1896 but only in the Roadmap for the implementation of the European Border and Coast Guard 2.0.²¹⁰ Alterations in this regard were not made by Frontex in its final programme. Despite its importance, the Commission's opinion on Frontex's programme 2021-2023 does not address this focus area at all.

3.4.2.1.4. Horizontal Objective 1: Implement and support European Integrated Border Management to ensure safe and well managed EU external borders

Frontex's Single Programming Documents set out three horizontal objectives that are cross-cutting and designed to support and coordinate its operational activities. The first horizontal objective addresses the implementation of the European integrated border management policy cycle.²¹¹ While the multiannual strategic policy cycle is adopted by the Commission, Frontex's task is to implement this strategy and to adopt a technical and operational strategy in line with the multiannual strategy.²¹²

Only one focus area of Frontex's Single Programming Document 2021-2023 is programmed under this horizontal objective:

- Establish and develop mechanisms for operational cooperation to implement the concept of the European Integrated Border Management.

Its key activities include the support for the establishment of the multiannual strategic policy cycle, to translate the strategic steer of the Commission into a technical and operational EU IBM strategy, and facilitate the implementation of the

²⁰⁸ Opinion on Frontex Single Programming Document 2020-2022, para 45

²⁰⁹ *ibid* para 46

²¹⁰ Roadmap *supra* n 202

²¹¹ Single Programming Document 2021-2023 (*supra* n 16) p. 13

²¹² Article 8 (5) of Regulation (EU) 2019/1896

technical and operational strategy across the European Border and Coast Guard.²¹³ In its most recent opinion on Frontex's Single Programming Document 2021-2023, the Commission specifically commented on these activities and requested that Frontex should in preparation for the Commission's strategic policy cycle complete its strategic risk analysis by 2020 and not as programmed in 2021.²¹⁴

Apart from this specific critique, Frontex programming has always been a continuous issue in all Commission opinions. Already before the Commission's European integrated border management strategy was adopted,²¹⁵ the Commission emphasised Frontex's lack of competence to develop the political dimension of European integrated border management.²¹⁶ Similarly, on Frontex's Single Programming Document 2019-2021, the Commission remarked that 'any activities indicatively programmed under [the] strategic action area "European IBM" should be reassessed to take into account the European IBM strategy adopted by the Commission and the technical and operational strategy to be developed by the Agency'.²¹⁷ While this distribution of competences is now clearly established under Article 8 of Regulation (EU) 2019/1896, in its draft Single Programming Document 2020-2022 Frontex again disregarded the limits of its competences and set out the objective to 'develop and implement European IBM' and to 'design and manage the IBM policy'. Rightfully, the Commission demanded it rephrase its programming into 'implement the European IBM' and possibly to 'support its development', a request that Frontex observed in its final programme version.²¹⁸

²¹³ Key Activities 4.1.1.-4.1.3.

²¹⁴ Opinion on Frontex's Single Programming Document 2021-2023, para 63

²¹⁵ European Commission, Communication, Annex 6 to the Progress report on the Implementation of the European Agenda on Migration, Brussels 14.3.2018, COM (2018) 250 final

²¹⁶ Opinion on Frontex's Single Programming Document 2018-2020, paras 43 and 44

²¹⁷ Opinion on Frontex's Single Programming Document 2019-2021, para 36

²¹⁸ *ibid* para 24

3.4.2.1.5. Horizontal Objective 2: Reinforce the external dimension aimed at multiplying Frontex operational impact through cooperation with the European Commission and EEAS as well as through partnerships with Member States, EU entities, Third Countries and International Organisations

Since Frontex's founding Regulation was amended in 2016, cooperation with third countries has become an essential component of European integrated border management.²¹⁹ Accordingly, the reinforcement of Frontex's external dimension is programmed as a horizontal objective and the following focus areas are established to this end:

- Strengthen resilience of priority third countries and promote European integrated border management standards (Focus area 1).
- Develop the architecture for an effective inter-agency cooperation on integrated border management at EU level, ensuring most efficient use of resources and complementary implementation of mandates (Focus area 2).

Frontex's cooperation activities may relate to any activities covered by Regulation (EU) 2019/1896 including the deployment of border management teams in third countries.²²⁰ Subject to the prior approval of the Commission, Frontex may conclude working arrangements with third countries or international organisations.²²¹ Regulation (EU) 2019/1896 obliges Frontex to develop a strategy for its relations with third countries and international organisations which is annexed to its Single Programming Document.²²² The first international cooperation strategy so

²¹⁹ Article 4(f) of Regulation (EU) 2016/1624; Article 3 (1) (g) of Regulation (EU) 2019/1896

²²⁰ Article 10 (1) (u) of Regulation (EU) 2019/1896

²²¹ Article 52 and 54 of the 2016 Regulation; Articles 68 and 71 of the 2019 Regulation; with the 2019 Regulation a definite list of international Organisations Frontex may cooperate with was introduced under Article 68

²²² Article 102 (3) of Regulation (EU) 2019/1896; Article 64 (3) of Regulation (EU) 2016/1624; see Annex XIII of the Single Programming Document

adopted was under Frontex's Single Programming Document 2018-2020 which has been renewed recently.²²³

Similar to those on European integrated border management, several comments expressed the Commission's concern that Frontex might transgress its competences: On Frontex's programming 2020-2022, the Commission criticised that Frontex's objective to 'reinforce [its] external dimension' disregards the Commission's political steering role and that of the European External Action services.²²⁴ The Commission pointed out that 'an agency may not legally represent the EU in international organisations [but] may only provide operational and technical expertise in international fora and assist the EU representatives in the latter'.²²⁵ The Commission also instructed Frontex to refrain from engaging in new cooperation activities with international organisations not listed under Article 68 of Regulation (EU) 2019/1896.²²⁶ In its opinion on Frontex's programming 2021-2023, the Commission further emphasised that all working arrangements concluded by Frontex require the prior approval of the Commission.²²⁷

Other comments take a more proactive attitude as they aim to influence Frontex's programming direction. On Frontex Single Programming Document 2019-2021, the Commission noted that Frontex's international strategy 'clearly lacks prioritisation' and provided a list of countries to be considered with priority for a 'striving for closer cooperation'.²²⁸ On Frontex's programming 2021-2023, the Commission remarked that Frontex should take 'full advantage of the possibilities offered by its enhanced mandate to help reduce the migratory pressure at the EU's external borders'.²²⁹ Furthermore, the Commission demanded that Frontex's programme should set out

²²³ Frontex 'Frontex International Cooperation Strategy 2021-2023' (February 2021) available at https://frontex.europa.eu/assets/Key_Documents/International_Cooperation_Strategy/Frontex_International_Cooperation_Strategy_2021-23.pdf accessed 4 July 2021

²²⁴ Opinion on Frontex Single Programming Document 2020-2022, para 25

²²⁵ *ibid* para 61

²²⁶ *ibid* para 36

²²⁷ Opinion on Frontex Single Programming Document 2021-2023, para 64

²²⁸ Opinion on Frontex Single Programming Document 2018-2020, para 62: Those countries are, *inter alia*, Serbia, Turkey, and Ghana

²²⁹ Opinion on Frontex Single Programming Document 2021-2023, para 31

strategic objectives and corresponding outputs that reflect its international cooperation strategy.²³⁰

3.4.2.1.6. Horizontal Objective 3: Develop upgraded Management System aimed at ensuring Accountability, Regularity and Legality of all Frontex activities

Since Frontex's budget has been multiplied, the proper administration of resources is of 'utmost importance'²³¹ and should be reflected under the last horizontal objective accordingly. Apart from facilitating accountability, regularity and legality, including sound financial management, its focus areas include a comprehensive fundamental rights framework.

With the increase of Frontex's powers, amendments of its founding Regulation also introduced provisions that safeguard the respect of fundamental rights for all activities carried out by Frontex. To this end, Frontex must draw up a fundamental rights strategy,²³² post a fundamental rights officer and establish a consultative forum that assists the executive director and the management board in fundamental rights matters. Regulation (EU) 2016/1624 further extended the fundamental rights officer's mandate and introduced the concept of a complaint's mechanism open to any person directly affected by operational activities of Frontex.²³³ Accordingly, comments on Frontex's Single Programming Document 2019-2021 focussed especially on the correct implementation of the complaint mechanism especially and further highlighted the need to develop a comprehensive fundamental rights dimension.²³⁴

Regulation (EU) 2019/1896 extended the tasks of the fundamental rights officer and introduced the concept of fundamental rights monitors to be appointed by the fundamental rights officer with the task of constantly assessing the fundamental

²³⁰ *ibid* para 33

²³¹ Frontex Single Programming Document 2021-2023 (supra n 16) p. 14

²³² Adopted in March 2011, the Fundamental Rights Strategy is available on Frontex's website ('Key-Documents') under https://frontex.europa.eu/assets/Key_Documents/Fundamental_Rights_Strategy/Frontex_Fundamental_Rights_Strategy.pdf (accessed 27.07.2021)

²³³ Article 72 of Regulation (EU) 2016/1624

²³⁴ Opinion on Frontex Single Programming Document 2019-2021, para 66

rights compliance of operational activities.²³⁵ Against this background, the Commission's comments on Frontex's Single Programming Document 2020-2022 provide several institutions on how Frontex should implement the new Regulation. The Commission demanded that the independence of the fundamental rights officer should be subject to special rules to be adopted by the management board and further noted the need to appoint a deputy fundamental rights officer.²³⁶ The Commission also remarked that the existing complaint mechanism should reflect the improvements brought by the new Regulation with at least 40 fundamental rights monitors to be recruited within one year after the entry into force of Regulation (EU) 2019/1896.²³⁷ Finally, the Commission requested that a new fundamental rights strategy and an action plan should be adopted by Frontex.²³⁸ Frontex followed all these requests accordingly with new bullet points inserted under key activity 6.4.1. in its final programme.²³⁹ Yet, in its opinion on Frontex's programming 2021-2023, the Commission again complained that the programme insufficiently reflects the requirements to establish an independent mechanism that monitors the compliance of Frontex's operational activities.²⁴⁰ To this end, the Commission requested that more information on the objectives and actions under key activity 6.4.1. should be provided which should aim to 'better promote fundamental rights as an overarching component of the European integrated border management and the implementation of the fundamental rights strategy by the European Border and Coast Guard'.²⁴¹

3.4.2.2. Comments on Frontex's Performance

As required under Article 28 of the Framework Financial Regulation, all key activities in Frontex's Single Programming Document are accompanied by performance indicators and targets. An overview of all key performance indicators is presented in Frontex's multiannual programming where they are classified into input related

²³⁵ Article 110 of Regulation (EU) 2019/1896

²³⁶ Opinion on Frontex Single Programming Document 2020-2022, para 34

²³⁷ *ibid*

²³⁸ *ibid*

²³⁹ Key Activity 6.4.1. of Frontex's final Single Programming Document 2020-2022 (*supra* n 16)

²⁴⁰ Opinion on Frontex's Single Programming Document 2021-2023, para 25

²⁴¹ *ibid*, para 26

indicators,²⁴² indicators for activities,²⁴³ and output related key performance indicators.²⁴⁴

The Commission neither commented on Frontex's targets nor, in general, on a specific outcome nor expected results of programmed activities. Also, no content-related comments performance indicators were made. Only in its opinion on Frontex multiannual programming 2019-2021, the Commission remarked that several indicators had been eliminated and invited Frontex `to reconsider the role and usefulness of these indicators and *possibly* to reintroduce a number of them in the Single Programming Document`.²⁴⁵ Furthermore, in its opinion on Frontex's programming 2021-2023, the Commission remarked that the presentation of performance indicators should become more informative and `invited` Frontex to accelerate its work on performance indicators to allow regulatory reporting to the management board as of 2021.²⁴⁶

At first sight, it thus appears that result-orientated performance does not play a significant role for the Commission. This assumption seems to be supported by the fact that in its opinion on Frontex's draft Single Programming Document 2020-2022 the Commission dedicated only three sentences to this topic where Frontex's efforts to improve the quality of its key performance indicators was positively noticed.²⁴⁷ Yet, any reluctance of the Commission to materially engage in performance-related aspects of Frontex's Single Programming Document does not allow for inferences on the importance of Frontex's performance. It rather indicates the limits of the Commission's competence in this regard.

Especially, performance indicators are important for an EU agency's reporting obligation which assessment does not primarily fall within the competence of the

²⁴² These are the vacancy rate, the turn-over rate, budget utilisation, IT resilience, and compliance

²⁴³ These are the availability and adequacy of Pools, Pool utilisation, Host index, and the flexibility index

²⁴⁴ These are the detection of illegal border crossings between PCPs, refusals of entry, effective returns, satisfaction level, quality level, and usage/implementation level; for an overview of the performance indicators see Frontex's SPD 2020-202, Section 2.1.4.

²⁴⁵ Opinion on Frontex Single Programming Document 2019-2021, para 32; Frontex had eliminated indicators on procurement and on added value and impact of own assets and services in operation.

²⁴⁶ Opinion on Frontex's Single Programming Document 2021-2023, para 27

²⁴⁷ Opinion on Frontex Single Programming Document 2020, paras 40 and 41

Commission. In this respect, Article 48 FFR obliges the management board to submit its consolidated annual activity report to the Court of Auditors, to the Commission, to the European Parliament and the Council. The report includes information on the achievement of the objectives and results set in the Single Programming Document *through the reporting on the set of performance indicators*.²⁴⁸ Discharge of an EU agency's budget is granted by the European Parliament, acting upon a recommendation from the Council, according to Article 319 TFEU.

While the European Parliament is not the only EU institution involved in the discharge of Frontex's budget, the opinions of the Commission repeatedly refer to the European Parliament's resolutions on Frontex's discharge of its budget.²⁴⁹ Regarding a report of the Court of Auditors, the European Parliament noted in its Resolution of 27 April 2017 that 'the majority of Frontex operational programmes lack quantitative objectives and specific target values for the joint operations' and that Frontex should improve its strategic programme planning.²⁵⁰ Accordingly, the Commission's comments on Frontex's Single Programming Documents 2019-2021 and 2018-2020 likewise criticised that the quality of performance indicators required improvement and requested that Frontex should develop quantifiable indicators capable of measuring the progress in the achievement of its multiannual objectives.²⁵¹ Similar comments were made on Frontex's annual work programmes 2018 and 2019 where the Commission expressed its preference for quantitative indicators which it deemed 'to be crucial for assessing the effectiveness of the key activities to which Frontex plans to allocate sizable part of its human and financial resources'.²⁵²

3.4.2.3. Comments on Frontex's Budgetary Programming

²⁴⁸ Article 48 (1) (a) (i) Framework Financial Regulation

²⁴⁹ Opinion on Frontex Single Programming Document 2019-2021, para 24

²⁵⁰ European Parliament, Resolution (EU) 2017/1724 of the European Parliament of 27 April 2017 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (now European Border and Coast Guard Agency ('Frontex')) for the financial year 2016, OJ 2017 L 252/326

²⁵¹ Opinion on Frontex Single Programming Document 2019-2021, para 25; Opinion on Frontex Single Programming Document 2018-2020, para 23

²⁵² *ibid*

Frontex's budgetary programming is addressed in a separate section of the Commission's opinions. Apart from that, a few budget-related remarks are also made in comments on Frontex's multiannual programming and annual work programme.

Generally, budgetary comments address three major topics:

- The request to align Frontex's budget with the (draft) EU budget, the Legislative Financial Statement (LFS) and the Multiannual Financial Framework (MFF).
- Comments on Frontex's (low) implementation rate.
- Specific comments (usually not in the budget section).

As a general observation, comments on the alignment of Frontex's budget with the EU budget appear as instructions rather than opinions to an extent that it questions the purpose of Frontex's budgetary programming. To give an example, in its opinion on Frontex's Single Programming Document 2020-2022, the Commission noted that the proposals concerning the staff and financial resources for Frontex 2020 *will need to be adjusted in line with the draft budget of the Union 2020* and invited Frontex to align all sections of the programming document with the human and financial resources of the Commission's Draft Budget accordingly.²⁵³ Moreover, to bring Frontex's budget in line with the Commission's Draft Budget, the opinion on Frontex's Single Programming Document 2019-2021 even included an annex with detailed specifications on Frontex's budget.²⁵⁴

In Frontex's Single Programming Document 2020-2022, the human and financial resources outlook for the years N+1-N+3 (Section 2.3) was based on the Legislative Financial Statement (LFS) for Regulation (EU) 2019/1896.²⁵⁵ Here, the Commission noted that the forecasts of the LFS are only indicative and without prejudice to the decisions to be taken as regards the next Multiannual Financial Framework.²⁵⁶ Vice versa, the same opinion criticised that 15 additional contract agents, programmed in

²⁵³ Opinion on Frontex Single Programming Document 2020-2022, paras 90 and 91

²⁵⁴ Opinion on Frontex Single Programming Document 2019-2021, para 83

²⁵⁵ European Commission COM (2018) 631 final, Section 3

²⁵⁶ Opinion on Frontex Single Programming Document 2020-2022, para 92

Frontex's budget for 2020 under 'external personnel 2020', were not foreseen in the Legislative Financial Statement and 'requested' its elimination.²⁵⁷ Similarly, the Commission's opinion on Frontex's programming 2021-2023 remarked that Frontex needs to amend its budget assumptions in line with the new Multiannual Financial Framework but also that any statement on its budget cannot prejudice the future revised Legislative Financial Statement.²⁵⁸

These comments not only shed light on the correlation between the Legislative Financial Statements and the Multiannual Financial Framework but also the limits of Frontex's budgetary programming freedom. For its annual budget programming, Frontex has to comply with the (draft) budget of the EU. For its multiannual human and financial resources outlook, Frontex's planning has to follow the specifications made in the Legislative Financial Statement which are conditional to its final determination under the Multiannual Financial Framework.

An insufficient implementation rate is another topic recurrently addressed in the Commission's opinions. It refers to instances where EU subsidies have been allocated to Frontex but were not implemented in Frontex's budget accordingly. As noted by the Commission, budgetary contributions foreseen in the EU budget are based on the assumption that these additional resources are needed to address new tasks.²⁵⁹ For example, the general EU budget for 2019 added more than EUR 6 million to step up Frontex's cooperation with key third countries but only an increase of EUR 1.5 million for international and European cooperation was foreseen under the Frontex budget in 2019.²⁶⁰ Here, the Commission criticised that Frontex's draft budget for 2019 did not clarify how the substantial increase of financial resources foreseen for the implementation of new tasks was allocated [...].²⁶¹ The Commission further requested that Frontex should 'demonstrate without delay that the intended use of these

²⁵⁷ *ibid* para 96; in fact, the comment is more than a request as the Commission noted 'thus, the total number of contract agents is 202 and not 2017'.

²⁵⁸ Opinion on Frontex Single Programming Document 2021-2023, paras 71 and 73

²⁵⁹ Opinion on Frontex Single Programming Document 2019-2021, para 75

²⁶⁰ Thereof, EUR 1 million to cover operational costs for the deployment of 10 liaison officers and EUR 5 million annually to support Frontex's cooperation with two other EU Agencies to support coast guard functions.

²⁶¹ Opinion on Frontex Single Programming Document 2019-2021, paras 72-73

resources is in line with the objectives for which the additional money was allocated. Otherwise, Frontex should adjust the budget accordingly by decreasing the level of needed commitment appropriations'.²⁶² Similar comments were made in the Commission's opinion on Frontex Single Programming Document 2020-2022 where Frontex was advised to take into account its relatively low budget implementation rate in the process of forecasting resources for the multiannual programming.²⁶³ Insofar, it seems Frontex's financial strength is a mixed blessing as it also imposes a considerable burden on the implementation of the allocated budget. Whereas pressure to this end is predominantly exercised by the Commission through its opinions, it has to be borne in mind that the Commission bears the responsibility for the correct implementation of the EU budget.

The third type of comment is specific budget-related remarks on Frontex's programming. For example, on Frontex Single Programming Document 2020-2022 the Commission noted that the multiannual strategy for the acquisition of own technical equipment and the implementation plan has to cover the whole period of the next Multiannual Financial Framework 2021-2027.²⁶⁴ Regarding the EUROSUR framework, the Commission remarked that its functioning will be subject to a specific evaluation and that Frontex should for this purpose ensure the full traceability of the human and financial resources related to EUROSUR.²⁶⁵ In its comments on Frontex's programming 2021-2023, the Commission demanded it addresses the impact of the 2020 COVID-19 health crisis on its financial and human resource planning and,²⁶⁶ furthermore, to reflect expected budget cuts in the strategic priorities for its international cooperation.²⁶⁷

3.4.3. Quality-Focussed Analysis

The previous section analysed the main topics addressed in the Commission's opinions. Especially for Frontex's operational activities, in the area of European

²⁶² *ibid* para 75

²⁶³ Opinion on Frontex Single Programming Document 2020-2022, para 93

²⁶⁴ *ibid* para 45

²⁶⁵ *ibid* para 62

²⁶⁶ Opinion on Frontex Single Programming Document 2021-2023, para 37

²⁶⁷ *ibid* para 42

integrated border management, and Frontex international cooperation activities it was noticed that the Commission focuses on competence issues and the limitations of Frontex's mandate under Regulation (EU) 2019/1896. Built on these findings, this section analyses in more detail the effect these comments have on Frontex's programming autonomy. To this end, this section takes a different perspective and examines the quality of the comments, hereby asking how strong the impact is on Frontex's programming autonomy. Its purpose is to evaluate the role of the Commission when commenting on Frontex's Single Programming Document. Is the Commission acting as a legal supervisor or beyond that take active influence on the material direction of Frontex's programme?

With an average length of 12-15 pages, the opinions on Frontex draft programmes are especially lengthy. This alone does not indicate a particularly dominant role of the Commission. Neither is the language used in these opinions a suitable indicator. Requesting terms, such as 'should',²⁶⁸ and terms of a suggesting nature, such as 'invites' or 'recommends',²⁶⁹ are equally used and sometimes it even seems that an 'invitation' can be particularly forceful. For this reason, it is more expedient to focus on the content of comments. The first distinction to this end classifies the comments in respect of its capability to influence Frontex's programming autonomy in general: These are either comments on

- the formalities of Frontex Single Programming Document,
- the prioritisation of activities or objectives, or on
- the programming contents.

3.4.3.1. Formalities

Comments on formalities address Frontex's compliance with the requirements set out in the Framework Financial Regulation and the Commission's guidelines. They thus refer to Frontex's programming structure and completeness. Only a few comments on formalities were made in the Commission's opinion on Frontex's Single

²⁶⁸ The term 'should' is used in 16 paragraphs, predominantly in the general part of the Opinion.

²⁶⁹ The term 'invites' and 'recommends' is used 26 times throughout all parts of the Opinion.

Programming Documents. This is not surprising as agencies have had to apply these guidelines since 2017 and were able to familiarise themselves with its requirements.²⁷⁰ Notably, Frontex's Single Programming Documents were recurrently criticised in the Commission's opinions for its missing annexes.²⁷¹ However, even though comments on the formalities of Frontex Single Programming Documents sometimes entail an indirect criticism on the programming content as, for example, 'lack of these detailed annexes do not allow the Commission to fully understand and assess the activities planned [...]';²⁷² it is nevertheless presumed that its impact on Frontex's programming freedom is only marginal. For this reason, comments on Frontex's programme formalities will not be addressed further in this work.

3.4.3.2. Prioritisation

Conversely, requests to prioritise activities always have repercussions on Frontex's programming autonomy. The reason is that due to confined human and financial resources prioritisation necessarily entails the subordination of other activities. Notably, relatively few comments were made to this end, especially observed for the area of return where all opinions of the Commission demanded that Frontex should use its new and enlarged mandate 'to the fullest possible extent which should also be fully reflected in the agency's mission statement and vision'.²⁷³ These quests for prioritisation are politically motivated. Frequently, the Commission refers to its policy papers such as the New Pact on Migration and Asylum when it demands that 'it should be a priority for Frontex to become the operational arm of the EU return policy [...]'.²⁷⁴ Also, its renewed Action Plan on Return was quoted to underline the importance of return activities.²⁷⁵ More specifically, several opinions also stressed the political and operational importance of training standing corps members that should

²⁷⁰ C (2014) 9641 final, p.1

²⁷¹ Opinion on Frontex Single Programming Document 2021-2023, para 28; Opinion on Frontex's Single Programming Document 2020-2022, para 38

²⁷² Opinion on Frontex Single Programming Document 2019-2021, para 20

²⁷³ Opinion on Frontex Single Programming Document 2020-2022, para 33; similar Opinion on Frontex Single Programming Document 2021-2023, para 58

²⁷⁴ Opinion on Frontex Single Programming Document 2021-2023, para 9

²⁷⁵ European Commission, Communication, On A More Effective Return Policy In The European Union -A Renewed Action Plan, Brussels 2.3.2017 COM (2017) 200 final; at p. 11

be significantly strengthened in the area of return.²⁷⁶ Consequently, the Commission demanded that the aspect of training standing corps members in the area of return should be better reflected in Frontex's Annual Work Programme.²⁷⁷

Contrarywise, in light of the financial shortcomings to be expected under the next Multiannual Financial Framework the Commission also requested to de-prioritise certain activities, notably with regard to Frontex's international cooperation activities.²⁷⁸

3.4.3.3. Content-Related Comments

Overall, comments on programming formalities or the prioritisation of activities are rather the exception. As the following graphic illustrates, only six of the 68 paragraphs in the Commission's opinion on Frontex Single Programming Document 2021-2023 address these topics.²⁷⁹

²⁷⁶ Opinion on Frontex Single Programming Document 2021-2023, para 60

²⁷⁷ Opinion on Frontex Single Programming Document 2020-2022, para 81

²⁷⁸ Opinion on Frontex Single Programming Document 2021-2023, para 42

²⁷⁹ 74 paragraphs relate to the general comments made in the Commission's, comments on Frontex multiannual programming and the annual work programme

Classification of the Commission's Comments on Frontex Single Programming Document 2021-2023

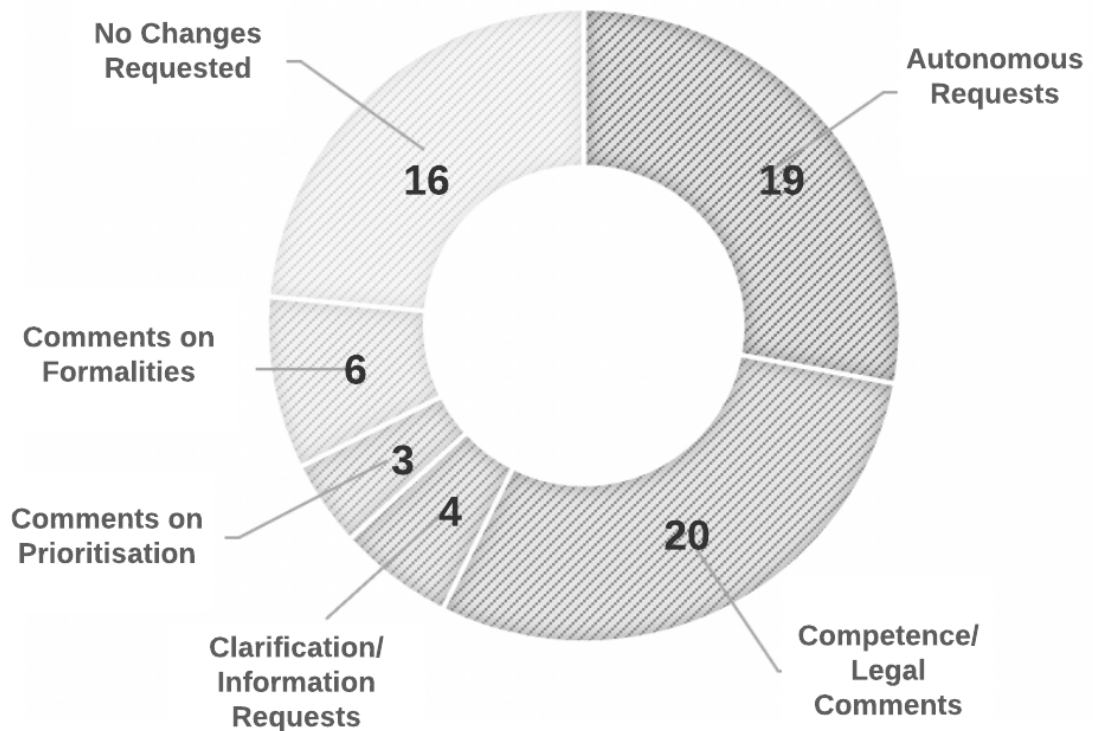


Figure 2: Classification of the commission's comments on Frontex's Single Programming Document 2021-2023

As the graphic further demonstrates, a considerable number of comments do not specifically request alterations to the Frontex programme.²⁸⁰ Mainly found in the opinion's section with general comments on the Frontex programme, they can comprise very critical remarks on the programme but generally are too unspecific to expect Frontex's immediate reaction.²⁸¹ Therefore, the following examination focusses on the remaining comments, namely those where the Commission demands either the

²⁸⁰ 18 comments that are marked as 'No Changes Requested'

²⁸¹ For example, the remark that the Commission believes that many parts of the strategic framework to not recognise the existing legal, institutional and political arrangements in place [...], Opinion on Frontex Single Programming Document 2020-2022, para 20

- clarification of programmed activities or objectives and comments where additional information is requested
- content-related comments of a legal nature, including competence issues and where an extension of activities is requested, or
- autonomous requests on the alteration of the programming content.

These types of comments have in common that they demand the alteration of Frontex's programming content. However, its potential impact on Frontex's programming autonomy varies considerably. The reason is that comments requesting the clarification of Frontex's programming content are less intensive than autonomous requests where the Commission exceeds its function as a legal supervisor and actively demands alterations on its own initiative. Apart from that, for the weighting of its intensity, the object of the comment must be taken into account. In this regard, comments on strategic objectives generally have a stronger impact on Frontex's programming autonomy than comments on programmed activities. The reason is that strategic objectives constitute the top layer of Frontex's programme and provide the base for its detailed annual planning. Consequently, any alteration of a programmed objective necessarily entails the amendments of numerous activities. The following graphic illustrates the correlation between the type of comment made and the object of comment.

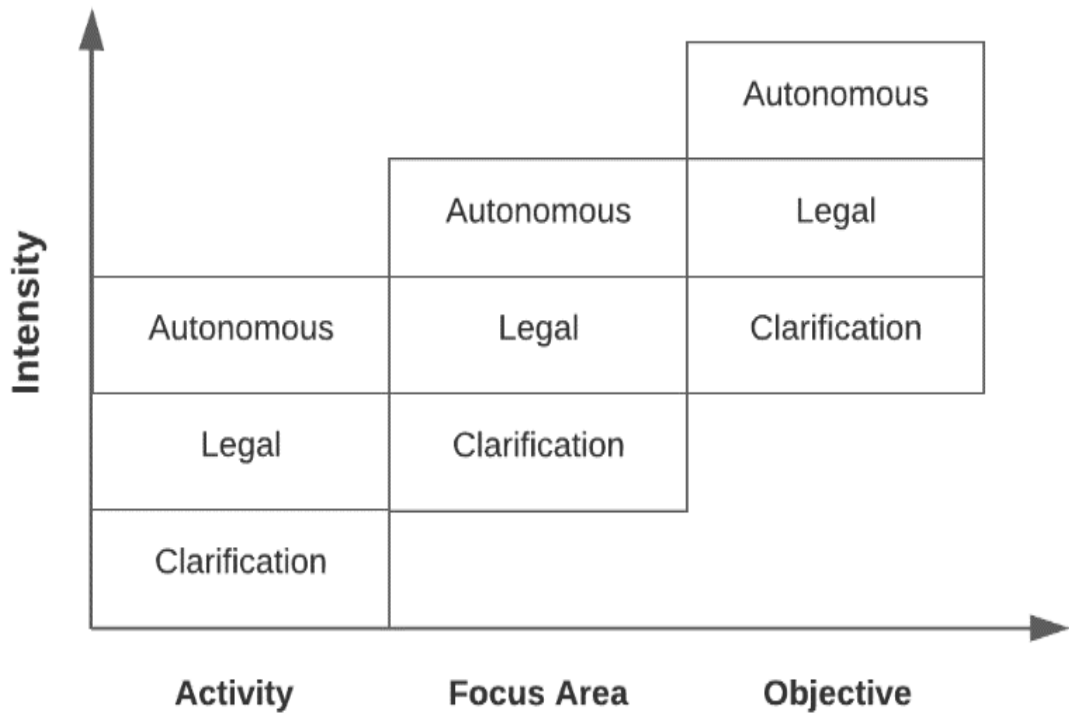


Figure 3: Level of intensity of the Commission's comments

3.4.3.4. Clarification and Requests to provide additional information

Several comments request the clarification of programmed activities or objectives or demand to provide additional information. At first glance, these comments appear to be neutral. As no material change of the programming document is demanded, it seems that those comments are without a material impact on Frontex's programme. This assumption is true for comments on Frontex's annual work programme where the Commission merely requests the clarification of programmed activities.²⁸² As those comments are predominantly technical, such as the request to outline an exact date for the readiness of the standing corps, repercussions on Frontex's programming autonomy are not noticeable.²⁸³

²⁸² Opinion on Frontex Single Programming Document 2020-2022, para 75 regarding activities related to Multipurpose Maritime Operation (MMO); para 77 where the Commission request an exact date for the readiness of the standing corps; specification for uniforms of Category 1 officers in para 78; regarding liaison officers posted in third countries, a reference to the alignment and complementary of this network with the European network of immigration liaison officers in para 85; mentioning of the fundamental rights strategy and complaint mechanism to be aligned with Regulation (EU) 2019/1896 and the role of the Fundamental Rights Officer in para 86; mentioning of Frontex's plans to recruit adequate personnel to assist the Fundamental Rights Officer in para 87.

²⁸³ *ibid* para 77

Other comments ostensibly request the clarification of programmed activities but in effect, the comment is of legal nature. For example, the Commission asked Frontex to `explain in more detail` what is meant with its `revised operational concept` and noted that such a concept is not foreseen under Regulation (EU) 2019/1896.²⁸⁴ Similar is the Commission's request to clarify the concept of `field offices` as only the concept of antenna offices is foreseen under the Regulation.²⁸⁵ Both comments have in common that the request for clarification is, in reality, the demand to bring a programmed activity in line with the Regulation.

Even more far-reaching are those comments where the Commission demands clarification or additional information on programmed objectives as they entail criticism of Frontex's multiannual programming and imply the necessity for its improvement. For example, the Commission noticed that the strategic framework of Frontex multiannual programming seems to apply to the whole European Border and Coast Guard and remarked that Frontex should bring more *clarity* to its objectives, roles and tasks and its supportive function towards the Member States.²⁸⁶ Here, the request for clarification entails a competence issue that requires an alteration to Frontex's multiannual programming. Similar is the request to further elaborate in Frontex's multiannual programming how the tasks, as defined in the Regulation (EU) 2019/1896, relate to the three strategic objectives set out by Frontex.²⁸⁷ While at first sight, this comment seems to demand clarification, factually it is an (indirect) criticism that the strategic objectives do not capture all tasks conferred on Frontex.

3.4.3.5. Legal and Competence Related Comments

Numerous comments are of a legal nature. Most of them address competence issues where the Commission considers that programmed activities or objectives transgress Frontex's competence to the detriment of the EU institutions, other agencies, or the Member States. These are instances where the Commission claims for itself a subordinated function, for example, with regard to the multiannual strategic policy

²⁸⁴ *ibid* para 44

²⁸⁵ *ibid* para 49

²⁸⁶ *ibid* para 21

²⁸⁷ *ibid*, para 56

cycle for European integrated border management.²⁸⁸ Another example is the adoption of the multiannual strategy for acquisition of own technical equipment which requires the prior positive opinion of the Commission.²⁸⁹ Also, for Frontex's international cooperation activities, several comments request Frontex's respect of its competence limits.²⁹⁰

The opinions also address instances where Frontex transgresses its competence to the detriment of the Member States or other agencies. On coast guard functions, the Commission noted that Frontex cannot claim a coordinating role in its own right as Frontex is only one of three agencies to manage the EU cooperation in this area.²⁹¹ Regarding the Member States' competence, the Commission demanded Frontex's respect that the Member States are also part of the European Border and Coast Guard,²⁹² Member States' exclusive right to command and control the standing corps during its deployment, and the Member States' competence in the customs area.²⁹³

Conversely, regarding Frontex's legal obligations, several comments on Frontex's Single Programming Document 2021-2023 requested additional actions to be programmed. Examples are the Commission request that Frontex should include specific actions that address its support of Schengen evaluation missions,²⁹⁴ and in the context of the multiannual strategic policy cycle, the request to complete the strategic risk analysis in 2020.²⁹⁵

3.4.3.6. Autonomous Requests (Pro-Active Comments of the Commission)

A considerable number of comments pro-actively demand the alteration of Frontex's programming content. These comments are particularly far-reaching because the

²⁸⁸ *ibid*; this topic is addressed by the Commission in paras 18,23, and 24.

²⁸⁹ *ibid* para 45

²⁹⁰ *ibid* paras 25, 35, 36, and 61; also, Opinion on Frontex Single Programming Document 2021-2023, para 64

²⁹¹ *ibid* para 27; the other EU agencies are EMSA and EFCA; also, Opinion on Frontex Single Programming Document 2021-2023, para 56

²⁹² *ibid* para 21

²⁹³ *ibid* paras 47 and 20; also, Opinion on Frontex Single Programming Document 2021-2023, para 57

²⁹⁴ Opinion on Frontex Single Programming Document 2021-2023, paras 50-51

²⁹⁵ *ibid*, para 63

Commission exceeds its role as a legal supervisor and intends to materially influence Frontex's programme.

Yet, while several comments requested the clarification of programmed objectives,²⁹⁶ no direct request for the alteration of a strategic objective was made. On Frontex's programming 2021-2023, however, the Commission demanded that a specific objective should consider the implementation of the interoperability of the ETIAS central unit.²⁹⁷ Furthermore, in two instances the Commission recommended the programming of additional focus areas. For Frontex's programming 2020-2022, the Commission recommended considering the Common Integrated Risk Analysis Model (CIRAM), strategic risk analysis and vulnerability assessments within separate focus areas.²⁹⁸ Secondly, in its opinion on Frontex's programme 2021-2023, the Commission asked Frontex to consider the strengthening of operational cooperation, including joint operational activities with third countries as a new focus area.²⁹⁹

Several comments pro-actively recommend alterations to Frontex's annual work programme. Notably, though, they are not phrased as requests but tentatively as advice or recommendations. The comments can be further distinguished between those that actively recommend the expansion of programmed activities and those that suggest its rephrasing.

Examples for the first type are the 'invitation' to programme activities for the implementation of the future voluntary return and reintegration strategy announced in the New Pact of Migration and Asylum.³⁰⁰ Another suggestion for Frontex's programming 2021-2023 is to include a section with a contingency plan and estimated impact of the 2020 COVID-19 health crisis in its programme.³⁰¹ Most comments on Frontex's previous programme relate to the training of standing corps members. An example is the Commission's advice to extend training options for standing corps members to training events on the electronic component of identity

²⁹⁶ For example, Opinion on Frontex's Single Programming Document 2020-2022, para 21

²⁹⁷ Opinion on Frontex's Single Programming Document 2021-2023, para 20

²⁹⁸ Opinion on Frontex Single Programming Document 2020-2022, para 58

²⁹⁹ Opinion on Frontex Single Programming Document 2021-2023, para 40

³⁰⁰ *ibid.*, para 9

³⁰¹ *ibid.* para 37

and travel documents.³⁰² Also, the Commission recommended that the aspect of training in the area of return should be better reflected.³⁰³ Finally, for the pre-deployment induction and specialised training for Standing Corps categories 2 and 3, the Commission advised Frontex to incorporate under this activity other relevant actions foreseen in the Roadmap, including the bilateral negotiations between Frontex and the Member States for the planning of category 3 corps members.³⁰⁴

The second type of comment suggests rephrasing activities but does not necessarily entail its material alteration. An example is a request that Frontex's role in the effective monitoring and support of the new interoperable platform of European IT systems in the area of borders, migration and security should be integrated into the single programming document.³⁰⁵ Other examples are the Commission's recommendation to underline the general advising role of the fundamental rights officer for setting up and developing the complaints mechanism,³⁰⁶ and the suggestion to mention the plans of recruiting adequate personnel that assists the fundamental rights officer.³⁰⁷

Notably, several comments of the Commission fall outside the opinion's scope as they do not directly relate to Frontex's programming obligations. These are instances where the Commission takes its opinion as an opportunity to comment on aspects that concern the cooperation between Frontex and the Commission in more general terms. This is the case with the Commission's request that Frontex should conclude an appropriate working arrangement with DG Home for handling international activities.³⁰⁸ Identical comments had already been made in the previous opinion but Frontex's obligation in this respect cannot be derived from Regulation (EU) 2019/1896. Similar is the Commission's remark on Frontex's cooperation activities in the customs area where the Commission noted that cooperation not only with the

³⁰² Opinion on Frontex Single Programming Document 2020-2022, para 67

³⁰³ *ibid* para 81

³⁰⁴ *ibid* para 79; this comment refers to key activity 3.2.2.: Provide pre-deployment induction and specialised training for Standing Corps category 2 and 3

³⁰⁵ Opinion on Frontex Single Programming Document 2021-2023, para 21

³⁰⁶ Opinion on Frontex Single Programming Document 2020-2022, para 86

³⁰⁷ *ibid* para 87

³⁰⁸ *ibid* para 63

Member States, Europol and OLAF *but also with the DG TAXUD is the key.*³⁰⁹ Other comments of the Commission demand participation in activities or access to information. For example, regarding Frontex activities on developing statistical models for forecasting, the Commission expressed its interest in being involved in the process of its development.³¹⁰ On the development and management of a research and innovation platform,³¹¹ the Commission suggested to include into the programming text that the purpose of this activity is to strengthen assistance to the Commission.³¹² On Frontex's situation monitoring, surveillance and risk analysis, the Commission asked Frontex to have access to all the products of Frontex that could be of interest to the Commission, including those providing actionable operational intelligence'.³¹³

3.4.4. Reaction of Frontex

So far, this examination has been on the Commission's comments. This section analyses to what extent Frontex followed the requests made in the Commission's opinion. For this purpose, the draft of Frontex's Single Programming Document and its final version is compared to filter out instances where Frontex altered its programme following the Commission's opinion but also to identify cases of non-compliance and its possible reasons. Hereby, the draft Single Programming Document 2020-2022 served as a reference. The reason is that the opinion on the most recent programme was delivered on 04.01.2021, thus far behind the deadline established in the Framework Financial Regulation and even four days after the beginning of the programming period.³¹⁴ Accordingly, Frontex had only a few days to adopt its final programme and it is presumed that time constraints prevented it from taking into account the Commission's opinion comprehensively. A similar observation is made with regard to the programming procedure 2020-2022, albeit to a lesser extent.³¹⁵

³⁰⁹ Opinion on Frontex Single Programming Document 2020-2022, para 54

³¹⁰ *ibid* para 68

³¹¹ Key Activity 3.4.2.

³¹² Opinion on Frontex Single Programming Document 2020-2022, para 83

³¹³ *ibid* para 69

³¹⁴ Article 32 (7) FFR envisages that the Commission has to give its opinion not later than 1 st July of the year N.

³¹⁵ Where the opinion was delivered on 29.11.2019 and the final programme was adopted on 23.12.2019.

For this reason, the result on the programming procedure 2020-2022 is more representative than the 2021-2023 procedure with the following observations being made.

As noted already, several comments of the Commission do not specifically request alterations of Frontex's programme.³¹⁶ Even though they comprise very critical comments on Frontex's programming content, they are generally too vague to expect Frontex's immediate response.³¹⁷ A similar observation was made regarding the Commission's request to prioritise activities in the area of return. Whereas specific requests on the prioritisation of activities were transposed in Frontex's final programme, the vague demand that Frontex should use its new and enlarged mandate 'to the fullest possible extent' was not further considered by Frontex.³¹⁸

From the remaining 54 paragraphs of the opinion,³¹⁹ more than two-thirds of the comments have led to alterations in Frontex's final programme. Thus, it can be concluded that in the majority of instances Frontex followed the comments of the Commission, even though it sometimes seemed that modifications of the programme were rather symbolic, intended to satisfy the Commission rather than leading to a material change of the programme. Prominent examples are instances where Frontex inserted footnotes in its final programme that literally replicated comments of the Commission.³²⁰ Apart from that, comments on competence and legal issues, in particular, were largely followed by Frontex with only two requests not being observed.³²¹ These were, first, the recommendation to further elaborate in the Single Programming Document how the tasks, as defined under Regulation (EU) 2019/1896 relate to the three strategic objectives.³²² The second legal comment, not considered

³¹⁶ 18 out of 72 paragraphs

³¹⁷ For example, the remark that the Commission believes that many parts of the strategic framework to not recognise the existing legal, institutional and political arrangements in place [...], Opinion 2019, paragraph 20

³¹⁸ Opinion on Frontex Single Programming Document 2020-2022, paras 33

³¹⁹ This number includes comments made under the sections with general remarks on Frontex's programme, those on the multiannual programming, and the annual work programme.

³²⁰ For example, on the SO1, key activity 1.1.2., the request to elaborate on the transmission on operational personal data was inserted as a footnote without further alterations of the programming content.

³²¹ Opinion on Frontex Single Programming Document 2020-2022 paras 65 and 66 refer to the same activity and were counted as one request.

³²² Opinion on Frontex Single Programming Document 2020-2022, para 56

in Frontex's final programme, concerned the voting rights of Schengen associated countries.³²³ As provided under Article 105(4) of Regulation (EU) 2019/1896, to allow associated countries voting rights on decisions of the management board, Frontex has to detail the agenda for which these limited voting rights shall be granted. Hereon, the Commission noted that Frontex's draft Single Programming Document 2020-2022 was not sufficiently detailed about the participation of certain individual countries in the various training sessions and joint operations.³²⁴

A similar observation was made for comments that demanded the clarification of Frontex's programme. Here, only two out of eight comments were not observed by Frontex. These were the Commission's request to specify the analytical products mentioned under Frontex's first specific objective to be 'significantly reinforced' by Regulation (EU) 2019/1896.³²⁵ The second comment not followed was the Commission's demand for the clarification of the role of the back office of Frontex's liaison officers deployed in third countries.³²⁶

A different outcome was noted for autonomous requests of the Commission where little more than half of the comments led to changes of Frontex's final Single Programming Document.³²⁷ In the following, the instances where Frontex did not comply with the Commission's opinion is examined in more detail. Of interest are in particular the reasons for Frontex's non-compliance. To a certain extent, these motives remain speculative as, contrary to the obligation imposed on agencies under the Framework Financial Regulation,³²⁸ no explanations were provided by Frontex to this end. Comprehensible, however, seem the following types of reasons:

- Comments are not clear or precise enough.
- The aspect of time hindered the alteration of the programme.
- Frontex intentionally refrained from observing the Commission's opinion.

³²³ *ibid* paras 65 and 66

³²⁴ *ibid*

³²⁵ *ibid* para 57

³²⁶ *ibid* para 84

³²⁷ Only 14 out of 24 comments led to alterations of Frontex's programme

³²⁸ Article 32 (7) Framework Financial Regulation

Regarding the first type, it was observed that precise requests of the Commission were more likely to be followed by Frontex than vague comments. Especially in instances where the Commission even dictated the programme's wording, such as the formulation of the first horizontal objective on the implementation of European integrated border management, these were generally complied with.³²⁹In the same vein, comments on activities programmed in Frontex's work programme were seemingly easier to follow as generally, they contained detailed instructions. An example is the Commission demand to outline a specific date for the readiness of the standing corps by 1 January 2021.³³⁰Conversely, cases of non-compliance were found on unspecific comments in the opinion, such as the request to prioritise return activities or the recommendation to further elaborate in the Single Programming Document on how the tasks as defined in the Regulation 2019/1896 relate to the three strategic objectives.³³¹ Despite its eligibility, those comments do not precisely indicate what is expected from Frontex. Insofar, it is comprehensible that Frontex did not consider these requests in the light of the time pressure that existed for the adoption of the final Single Programming Document 2020-2022.

This leads to the second type of explanation for Frontex's non-compliance. The short period left for the adoption of the final programme impeded the transposition of more complex issues. An example is the Commission's demand to provide a summary of the actions related to the implementation of EUROSUR and to ensure the full traceability of the human and financial resources related to it.³³² As a rather complex task requiring greater lead time, presumably Frontex was unable to consider this request in its final programme.

The third type of reason for non-compliance is the most delicate one as it implies Frontex's intention to disregard the Commission's requests or recommendations. Naturally, no explicit references were made by Frontex to this end, but the intention

³²⁹ Opinion on Frontex Single Programming Document 2020-2022, para 23; another example is the focus area 3 of the first strategic objective where the Commission requested to rephrase it into 'Contributing to the development and implementation of a fully interoperable and efficient European Quality Control Mechanism' under para 26

³³⁰ *ibid.*, para 77

³³¹ *ibid.*, para 56

³³² *ibid.*, para 62

of Frontex can be assumed in instances where no other plausible explanations for non-observance are conceivable. Noticeably, the majority of comments not adhered to by Frontex fall under this category. Furthermore, all of these comments were previously classified as autonomous comments, i.e. comments that are neither made for clarification purposes nor on legal or competence issues. Broadly, these comments can be divided into two groups. The first one addresses instances where the Commission demands alterations to the programme to its benefit, for example, the request to be mentioned under a specific activity, and those where the motives of the Commission are not directly identifiable.

Examples for the first group are the Commission's request for the adoption of an appropriate working arrangement with DG Home on international activities in combination with the request to clarify the international cooperation it intends with a number of strategic partners.³³³ Similar is the Commission's comment on Frontex's communication strategy where the Commission suggested that coordination with its respective communication services should take place when external communication relates to major policies of the Union.³³⁴ Also, the Commission invited Frontex to include in its Single Programming Document its activities on developing statistical models for forecasting on which the Commission would like to be involved in the development process.³³⁵ Furthermore, the Commission expressed its desire to have access to all analytical products resulting from Frontex's situation monitoring, surveillance and risk analysis (including those providing actionable operational intelligence).³³⁶ Finally, on Frontex's key activity to 'develop and manage a comprehensive research and innovation platform [...]', the Commission requested to mention the conclusions of the RAND Europe Institute study as the basis for research and that the research aim is to strengthen assistance to the Commission.³³⁷

³³³ *ibid* para 63; the comment refers to Annex XII of Frontex's Single Programming Document 'Plan of Operation Response 2020'

³³⁴ *ibid*, para 53

³³⁵ *ibid*, para 68

³³⁶ *ibid*, para 69

³³⁷ *ibid*, para 83 (refers to key activity 3.4.2.)

Under the second group fall comments where the Commission actively demanded the extension of programmed activities, such as the advice to include training modules on the electronic component of identity and travel documents under the training options for the standing corps.³³⁸ Another example is the recommendation to include the development of a pre-warning mechanism as an action under the key activity to maintain a robust awareness mechanism.³³⁹ Other autonomous requests, not followed by Frontex, addressed either structural or procedural aspects of the programme: An example of the former type is the Commission's recommendation to bundle the Common Integrated Risk Analysis Model (CIRAM), strategic risk analysis and the vulnerability assessment as a separate focus area under the first strategic objective.³⁴⁰ An example of the latter type is the request that Frontex should underline in its Single Programming Document that activities linked to integrated planning, including capability development planning, must be initiated with the adoption of the methodologies and procedures to develop national capability development and contingency plans by the management board.³⁴¹

3.5. Overall Assessment and Concluding Remarks

This chapter analysed the Commission's opinions on Frontex Single Programming Documents and Frontex's reactions thereon. Overall, the authoritative character of the Commission's comments was noted throughout the examination which mainly appear as instructions rather than suggestions. This was especially the case with the opinion on Frontex draft programme 2020-2022, with strongly focused comments on the correct implementation of Regulation (EU) 2019/1896. Examples are the multiannual strategic policy cycle for European integrated border management, the multiannual strategy for the acquisition of own technical equipment, the training and readiness of the standing corps and the integration of the EUROSUR framework under Regulation (EU) 2019/1896. In this context, it was also observed that the Commission

³³⁸ *ibid.*, para 67

³³⁹ *ibid.*, para 70; refers to key activity 1.1.2.

³⁴⁰ *ibid.*, para 58

³⁴¹ *ibid.*, para 59

stressed that Frontex observes the limits of its mandate which points towards the Commission's primary role as a legal supervisor.

On Frontex programming for the period 2021-2023, however, the Commission's focus was slightly different as its comments are not solely concentrated on legal and competence issues but also comprised efficiency-related aspects and autonomous requests.

Apart from that, a considerable number of comments have a political background. An example is the Commission's repeated request that Frontex should use its mandate in the area of return to the fullest possible extent. Such comments underline the political direction of the European Council rather than provide constructive criticism of the Frontex programme.³⁴² A similar observation was made on Frontex's performance programming. Surprisingly, the Commission did not try to influence Frontex's performance directly but, instead, focused on the quality of performance indicators instead. Hereby, reference was made to previous European Parliament's resolutions on Frontex's discharge of the budget.³⁴³

Without exception, the Commission's opinion on Frontex's budgetary programming appeared as instructions and thus underline Frontex's financial dependence on EU contributions where no discretion is left for the agency for self-contained budgetary programming.

To analyse its impact on Frontex's programming autonomy, the content-related comments were classified in terms of their intensity. Three categories were identified to this end. Comments that request the clarification of the programming content, those on legal or competence issues, and autonomous requests. Hereby, the last-mentioned category was considered to be the most intensive one as the Commission

³⁴² For example, the European Council Conclusions of 20-21 October 2016, EUCO 31/16; also, the Malta Declaration of Heads of State or Government of 3 February 2017 where the need to start a critical review of European Union return policy was highlighted.

³⁴³ Opinion on Frontex Single Programming Document 2019-2021, para 24; Opinion on Frontex Single Programming Document 2018-2020, para 22

exceeds its role as a legal supervisor and proactively demands alterations to the programme.

In numbers, the majority of comments were classified as autonomous requests but for assessing its impact on Frontex's programming autonomy also the objects of the comments also had to be considered. Hereby, it was distinguished whether a comment refers to a programmed objective, a focus area, or an activity, the latter having less impact on Frontex's programming autonomy than the former objects. In this respect, it was noticed that the Commission repeatedly requested Frontex to rephrase programmed objectives for legal or competence reasons, but no instance was found where the Commission autonomously requested the alteration or programming of new strategic objectives. Instead, most autonomous requests were made on the programming of specific activities.

For the assessment of Frontex's reaction, its draft Single Programming Document 2020-2022 and the final version were compared. This task was straightforward as, in most instances, Frontex adopted precisely the wording suggested by the Commission. The result is that more than two-thirds of the Commission's comments have led to alterations to Frontex's programme. Hereby, it was noticed that especially comments on competence and legal issues and requests for clarification were largely followed.³⁴⁴ The outcome for autonomous requests was different, whereby little more than half of the comments led to changes of Frontex's Single Programming Document.³⁴⁵ In the absence of justifications provided by Frontex, its motives remain speculative but three explanations for non-compliance are plausible. First, by trend precise requests were more likely to be followed than those which did not accurately outline what was expected from Frontex. The second explanation is that considerable time-pressure for the adoption of Frontex's final Single Programming Document prevented the realisation of more complex issues addressed in the Commission's opinion.³⁴⁶ The third explanation appears profane but is the most significant one as it

³⁴⁴ With two out of 16 legal/competence comments not being followed and 2 out of 8 clarification requests to being observed

³⁴⁵ 14 out of 24 comments led to changes of the programme

³⁴⁶ The Opinion on Frontex Single Programming Document 2020-2022 was delivered on 29.11.2019, Frontex's final Single Programming Document was adopted on 23.12.2019.

expresses Frontex's programming autonomy: where no other explanation for non-compliance is conceivable, the only remaining one is Frontex's unwillingness to follow the Commission's opinion, an observation that was specially made for autonomous requests.

Chapter 4: Case-Study: The European Chemicals Agency (ECHA)

4.1. Introduction

The chemical industry is one of the EU's largest manufacturing sectors, representing around 7.5% by turnover.¹ Furthermore, with over 1.1 million workers directly and 3.6 million indirectly employed, the European chemical industry is a wealth-generating sector of the economy.² While the economic importance of the chemical industry is beyond doubt, substances brought on the market can cause serious damage to human health and the environment. For this reason, at the EU level, there is a broad consensus about the necessity to regulate the conditions under which chemicals shall be placed on the market while also ensuring the functioning of the internal market and the competitiveness of the chemical industry.

Knowledge about the impact chemicals have on human health and the environment is a necessary precondition for regulatory measures. Before the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation entered into force in 2007, the legal framework on chemicals in the European Union was rather fragmented, comprising of four Council Directives and one Regulation.³ Its main detriment was that it only applied for new substances, i.e. those brought on the market after 1981, leaving outside more than 99% of the substances already on the market. This led to a lack of knowledge about existing chemicals but also the allocation of responsibilities was inappropriate because the authorities had to prove

¹ European Commission, 'Internal Market, Industry, Entrepreneurship and SMEs', available at https://ec.europa.eu/growth/sectors/chemicals_en#:~:text=Importance%20of%20the%20EU%20Chemicals%20Industry&text=The%20industry%20is%20a%20solution,17%25%20of%20global%20chemicals%20sales accessed 21 June 2021

² CEFIC, 'Facts and Figures Report 2021' <https://cefic.org/a-pillar-of-the-european-economy/> accessed 21 June 2021

³ Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances [1967] OJ L196; Directive 88/379/EEC relating to the classification, packaging and labelling of dangerous preparations [1988] OJ L187/1; Council Regulation (EEC) 793/93 on evaluation and control of risks of existing substances [1993] OJ L84/1; Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations [1976] OJ L 262/ 201

an unacceptable risk arising from a substance instead of the companies. Against this background, in 2001 the Commission proposed that existing and new substances should be subject to the same procedure under a single system applicable for the registration, evaluation, authorisation and restriction of all chemicals.⁴

Today, the REACH Regulation is the central legal framework for the registration, evaluation, authorisation and restriction of chemicals in the European Union.⁵ The Regulation also established the European Chemicals Agency (ECHA) to manage and carry out the technical, scientific and administrative aspects of the REACH Regulation and to ensure consistency at the Community level.⁶ In this respect, the REACH Regulation determines ECHA's main tasks and shapes its organisational and decision-making structure.

Yet, today's legal framework on chemicals is more complex and additional tasks have been transferred to ECHA through subsequent legislation. These are, first tasks related to the classification and labelling of chemicals under the CLP Regulation, which ensures that chemical hazards are communicated to workers and consumers.⁷ Secondly, in 2013 the Biocidal Products Regulation entered into force that requires the authorisation of biocidal products and the approval of active substances.⁸ Thirdly, the recast Prior Informed Consent (PIC) Regulation of 2014 administers the import and export of certain hazardous chemicals and places obligations on companies who wish to export these chemicals to non-EU countries.⁹ Fourthly, Regulation (EU)

⁴ Commission 'Strategy for a future Chemicals Policy' COM (2001) 88 final

⁵ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/78/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1 (REACH Regulation)

⁶ Article 75 REACH Regulation

⁷ Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 [2008] OJ L353/1 (CLP Regulation)

⁸ Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products [2012] OJ L167/1 (BPR Regulation)

⁹ Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals (recast) [2012] OJ L201/60 (PIC Regulation)

1021/2019 on Persistent Organic Pollutants (POPs) that bans or severely restricts the production and use of persistent organic pollutants in the European Union placed on ECHA the task to support the Commission and the Member States in their scientific and reporting duties under that Regulation.¹⁰ Fifthly, the Waste Framework Directive (WFD) with measures addressing the adverse impact of the generation and management of waste on the environment and human health allocated on ECHA the tasks to establish a database, the Substances of Concern in articles, and as such in complex objects (Products) (SCIP) on the information submitted by suppliers.¹¹

With the Commission's 'Green Deal', the safe and sustainable use of resources has gained political priority and policy papers subsequently adopted by the Commission determine ECHA's strategic direction. Apart from its high political priority, ECHA has been selected as it provides a good contrast to Frontex's case study in several respects. These are, first, that apart from protecting human health and the environment, ECHA's tasks have the objective of facilitating the free movement of chemicals. As an 'internal market agency', it thus contrasts Frontex' policy area of freedom, security and justice that traditionally has been dominated by the Council. Secondly, ECHA's tasks are mainly regulatory. Even though ECHA does not have final decision-making powers, its technical and scientific opinions have a significant influence on the authorisation and restriction of chemicals. While the final decision is reserved to the Commission which adopts implementing Regulations within the comitology procedure, the Commission's dependence on ECHA's expertise is noticeable throughout this work and also was at issue in *Sweden v Commission*.¹² Thirdly, traditionally ECHA is a mainly fee financed agency but for the coming years, a considerable decrease of its fee income is expected. Whether the dependence on EU subsidies leads to an increase of the Commission's influence is a question to be addressed in this chapter.

¹⁰ Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (recast) [2019] OJ L169/45 (POP Regulation)

¹¹ Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste [2018] OJ L150/109 (Waste Framework Directive)

¹² Case C-389/19 P *European Commission v Kingdom of Sweden* [2021] ECLI:EU:C:2021:131

4.1.1. Structure of this Chapter

ECHA's complex legal framework is also visible in the structure of its Single Programming Documents. Unlike Frontex's programming, ECHA's annual work programme does not strictly follow the order of its multiannual programming but is structured according to the legislation relevant for ECHA. Despite the difficulties that arise from these differences, for the sake of comparability, this chapter follows the structure adopted for Frontex's case study as possible.

It thus begins with the legal and policy context relevant for ECHA (Section 4.2.). Apart from the Treaty framework, it addresses the international obligations of the European Union and the Member States as well as policy papers adopted by the Commission and ECHA itself. The tasks of ECHA, its organisational and decision-making structure under the REACH Regulation is addressed in Section 4.3. ECHA's Single Programming Documents and the Commission's opinions thereon are examined in Section 4.4. Like Frontex's case study, it begins with a content-related analysis that orientates on the strategic priorities of ECHA's multiannual programming, the actions of the annual work programme and the comments of the Commission. The quality of the Commission's comments is then analysed and, finally, the extent to which ECHA follows the requests of the Commission.

4.2. ECHA's Legal and Policy Context

4.2.1. The Treaty Framework and International Obligations

The Treaty on the Functioning of the European Union (TFEU) does not specifically address how the manufacturing and marketing of chemicals should be controlled. Instead, more broadly, it confers on the European Union the shared competence for the principal areas of the internal market and the environment.¹³ In this regard, the free movement of chemicals falls under the internal market objective set out in Article 26 TFEU and, consequently, the European Union has the competence to adopt 'measures for the approximation of the provisions laid down by law, regulation or

¹³ Article 4 TFEU

administrative action in the Member States which have as their object the establishment and functioning of the internal market'.¹⁴To this end, Article 114 TFEU served not only as the legal basis for the creation of ECHA but also several other Regulations that define ECHA's tasks are based upon this Treaty base. These are namely the REACH Regulation, the CLP Regulation and the Biocidal Products Regulation.¹⁵

Also important for shaping ECHA's legal framework is Treaty provisions on the protection of the environment. As Article 191 TFEU sets out, the Union policy shall contribute to the attainment of environmental objectives such as the protection and improvement of the quality of the environment, the protection of human health, the objective of prudent and rational utilisation of natural resources and the promotion of measures at international level. Important principles are established under the said Treaty provision such as the precautionary principle and the polluter pays principle. Furthermore, Article 192 (1) TFEU allows for legislative 'actions' to be taken for the attainment of these objectives which served as the legal basis for the adoption of the Prior Informed Consent (PIC) Regulation, the Persistent Organic Pollutants (POP) Regulation, and the Waste Framework Directive (WFD). In addition, the PIC Regulation concerning the export and import of hazardous chemicals was based upon Article 207 TFEU which allows measures to be adopted that define the framework for implementing the common commercial policy of the European Union.

Moreover, the international obligations of the European Union play a significant role in all of these Regulations. Most Regulations' recitals explicitly refer to international obligations such as the CLP Regulation which is based on the United Nation's Globally Harmonised System of Classification and Labelling of Chemicals (GHS).¹⁶ The PIC Regulation mentions as one of its rationale the implementation of the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade.¹⁷ The POP Regulation refers to the European

¹⁴ Article 114 (1) TFEU

¹⁵ Formerly Article 95 EC

¹⁶ CLP Regulation Recital (5)

¹⁷ PIC Regulation Recital (2)

Union's responsibilities under the Stockholm Convention on Persistent Organic Pollutants.¹⁸

4.2.2. Policy Direction from the Commission and ECHA

To transform the European Union's economy for a sustainable future is a political priority of the European Commission for 2019-2024. The Commission's 'European Green Deal' addresses this priority and proposes sector-specific actions to this end.¹⁹ For its transposition, several important policy papers have been adopted by the Commission, most notably the Commission's Chemicals Strategy for Sustainability.²⁰ It envisages a 'new long-term vision for the EU's chemical policy' that aims for a toxic-free environment but likewise recognises the EU industry as a globally competitive player in the production and use of safe and sustainable chemicals.²¹

Major parts of this strategy address the EU regulatory framework on chemicals that, according to the Commission, requires simplification and consolidation. Especially as the 'vast majority of chemicals in the EU are currently regulated on a case-by-case basis and for each specific use' is considered detrimental to the present legal framework.²² Against this background, the Commission proposes a 'one substance, one assessment approach' to ensure that methodologies become more coherent and are harmonised to a possible extent.²³ For this purpose, the REACH and CLP Regulations should be reinforced as EU's cornerstones for regulating chemicals and be complemented by a coherent approach to assess and manage chemicals in existing sectoral legislation.²⁴ Consequently, the Action Plan annexed to the strategy envisages not only proposals for amendments of the REACH, CLP and BPR Regulation but even a proposal for a separate founding Regulation for the European Chemicals

¹⁸ POP Regulation Recital (3); more detailed, the recital refers to approval of 19 February 2004 of the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants and approved on 14 December 2004 the Stockholm Convention on Persistent Organic Pollutants.

¹⁹ Commission, 'The European Green Deal, Brussels 11.12.2019, COM (2019) 640 final

²⁰ Commission, 'Chemicals Strategy for Sustainability Towards a Toxic-Free Environment' COM (2020) 667 final

²¹ *Ibid* p. 3

²² *Ibid* p. 9

²³ *Ibid* p. 16

²⁴ *Ibid* p. 9

Agency by 2023.²⁵ However, as the Chemicals Strategy for Sustainability as well as other relevant policy papers, namely the New Industrial Strategy for Europe,²⁶ the new Circular Economy Action Plan,²⁷ and the Proposal for the General Union Environment Action Programme to 2030²⁸ have been adopted recently, its impact is not yet noticeable in ECHA's Single Programming Documents but rather indicates future developments.

Instead, the strategic priorities and activities programmed in ECHA's Single Programming Document strongly orientate on the Commission's General Report on the operation of REACH (REACH review).²⁹ The REACH Regulation obliges the Commission to review every five years the progress in the achievement of the Regulation's objectives.³⁰ The second evaluation report was presented in 2018 and identified several shortcomings and key issues that impact the achievement of the REACH objectives.³¹ Sixteen actions were proposed to this end. They comprise the quality of registration dossiers, the improvement of evaluation procedures, the substitution of substances of very high concern (SVHCs), coherence between REACH and other EU legislation as well as ECHA's financial situation.

Also, ECHA has adopted policy papers and actions plans that shape its strategic direction. For the implementation of the Commission's REACH review, an action plan has been developed together with the Commission with the aim that by 2027 at least 20% of all registration dossiers in each tonnage band have been checked for compliance.³² For selecting substances for dossier evaluation, ECHA and the Commission have adopted a Joint Evaluation action plan to increase the number of compliance checks and to indicate the groups of substances that shall be prioritised

²⁵ COM (2020) 667 final, Annex, p. 4

²⁶ Commission, 'A New Industrial Strategy for Europe' COM (2020) 102 final

²⁷ Commission, 'A new Circular Economic Action Plan for a cleaner a more competitive Europe' COM (2020) 98 final

²⁸ Commission, 'Proposal for a Decision of the European Parliament and of the council on a General Union Environment Action Programme to 2030' COM (2020) 652 final

²⁹ Commission, 'General Report on the operation of REACH and review of certain elements – Conclusions and Actions' COM (2018) 116 final (REACH Review)

³⁰ Article 117 (4) REACH Regulation

³¹ COM (2018) 116 final

³² ECHA and Commission, 'REACH Evaluation Joint Action Plan'

https://echa.europa.eu/documents/10162/21877836/final_echa_com_reach_evaluation_action_plan_en/0003e9fc-652e-5f0b-90f9-dff9d5371d17 accessed 21 June 2021

for examination. Apart from that, since 2015 ECHA has developed strategic plans that indicate its strategic priorities for the coming years. Presently, the plan covers the period 2019-2023 with content that is identical to ECHA's multiannual programme.

4.3. The European Chemicals Agency (ECHA)

4.3.1. ECHA's Organisational Structure

Compared with other European agencies, ECHA's organisational and decision-making structure is complex. The reason is that ECHA is more than an administrative body that manages the registration process of chemical substances but also provides scientific opinions in the course of the evaluation, authorisation or restriction of chemical substances. To this end, apart from a management board³³ and an executive director,³⁴ a complex committee and network structure is part of ECHA's organisational structure:

The Committee for Risk Assessment is responsible for preparing ECHA's opinions on evaluations, applications for authorisations, proposals for restrictions and classifications and labelling under the CLP Regulation. Its task is the assessment of the risk to human health and/or the environment arising from the use of the substance, including the appropriateness and effectiveness of the risk management measures and an assessment of the risk arising from possible alternatives.³⁵ The Committee for Socio-economic Analysis (SEAC) is responsible for assessing the socio-economic impact a regulatory action on substances might have. To this end, it assesses the socio-economic factors and also the availability, suitability and technical feasibility of alternatives associated with the use(s) of the substance and any third-party contributions submitted under the authorisation procedure.³⁶ Members for both Committees may be nominated by the Member States but their appointment is reserved to ECHA's management board, whereby appointments shall include at least

³³ Composed of one representative from each Member State and a maximum of six representatives appointed by the Commission, Article 79 REACH Regulation

³⁴ Who legally represents ECHA and is responsible for its day-to-day administration, Article 83 REACH Regulation

³⁵ Article 64 (4) (a) REACH Regulation

³⁶ Article 64 (4) (b) REACH Regulation

one member of each Member State that has nominated candidates.³⁷ The committee shall try to reach a consensus on their opinions. If this is not possible, the opinions shall consist of the position of the majority of members, but the minority positions shall also be published.³⁸

By contrast, the members of the Member States Committee are directly appointed by the Member States.³⁹ The Committee is responsible for resolving potential divergences of opinions on draft decisions proposed by ECHA or the Member States and proposals for the identification of substances of very high concern to be subject to the authorisation procedure.⁴⁰ Decisions of the Member States Committee are taken based on a unanimous agreement.⁴¹ The Members of the Biocidal Products Committee are also directly appointed by the Member States.⁴² The Committee is responsible for preparing the opinions on the approval, renewal or review of active substances and the application for Union authorisation of biocidal products.⁴³ As most product authorisation in the biocide area is granted by national authorities, a Coordination Group, for which ECHA provides the secretariat, ensures that a harmonised approach is applied in the Union for national authorisations. Finally, a Forum for Exchange of Information on Enforcement (Forum) is a network of the Member States authorities responsible for enforcement of the REACH Regulation. ECHA provides technical, scientific and administrative support to the Forum and ensures appropriate coordination between them as well as other administrative work.

4.3.2. ECHA's Tasks under the REACH-Regulation

4.3.2.1. Registration of Substances

Obtaining information on existing chemicals was the main policy rationale for the adoption of the REACH Regulation. *No data, no market* is the overarching principle of

³⁷ Article 85 REACH Regulation

³⁸ Article 85 (8) REACH Regulation

³⁹ Article 85 (3) REACH Regulation

⁴⁰ Article 55 ff. REACH Regulation

⁴¹ e.g. Article 59 (8) REACH Regulation

⁴² Article 75 (2) BPR Regulation

⁴³ Article 75 BPR Regulation

the registration requirement under the REACH Regulation. For this purpose, substances⁴⁴ on their own, in mixtures or articles may not be manufactured in the European Union or placed on the market unless they have been registered.⁴⁵ By the end of 2017, ECHA received 65 000 dossiers for approximately 17 000 unique registered substances that are available and being used for the assessment and management of chemical risks.⁴⁶

For the registration of substances, manufacturers and importers are required to submit to ECHA a registration dossier. It includes a technical dossier and, for substances manufactured or imported over 10 tonnes per year, additionally a chemical safety report.⁴⁷ The information to be provided is listed in annexes to the REACH Regulation and require, first, the collection or generation of 'all freely available existing information on the properties of the substances for registration purpose'.⁴⁸ Secondly, the registrant has to assess the hazards and potential risks of those substances and, thirdly, has to develop and recommend appropriate risk management measures to control these risks.⁴⁹ Where available data are not sufficient to meet the information requirements under the REACH Regulation, additional testing may be necessary. Such testing, however, is not conducted at the registration stage but the registrant has to develop and submit a testing proposal together with the registration dossier.⁵⁰

ECHA plays a central role in the registration of substances. The procedure starts with a substance identity check where ECHA verifies whether substances are already registered.⁵¹ On the registration dossier, ECHA performs a completeness check to

⁴⁴ Unless explicitly exempted from registration, the term 'substances' is far reaching and includes not only potential hazardous industrial chemicals but every type of chemical substances manufactured or imported in quantities of one tonne or more per year, see Article 3 (1) REACH Regulation

⁴⁵ Article 5 REACH Regulation

⁴⁶ COM (2018) 116 final, p. 5

⁴⁷ Article 10 REACH Regulation

⁴⁸ ECHA, 'Registration Guidance'

⁴⁹ https://echa.europa.eu/documents/10162/23036412/nutshell_guidance_registration_en.pdf/9fda505f-972d-4bbb-b22c-bd71b6941571 accessed 21 June 2021, p. 11

⁴⁹ M de Morpurgo 'The European Union as a Global Producer of Transnational Law of Risk Regulation: A Case Study on Chemical Regulation' (2013) 19 (4) European Law Journal pp. 779-798 (788)

⁵⁰ ECHA Registration Guidance, p. 12

⁵¹ Article 26 REACH Regulation

ensure that all elements required by legislation have been submitted.⁵² If the registration is complete, ECHA registers the substance and notifies the competent authority of the relevant Member State accordingly.⁵³

4.3.2.2. Evaluation, Article 40 ff REACH Regulation

Once a substance is successfully registered, it may circulate freely on the internal market. The registration itself does not include an examination of the quality or adequacy of the data submitted nor does it comprise an assessment of the risk a substance may pose to human health or the environment. These tasks are reserved for the evaluation procedure. Here, the REACH Regulation distinguishes between two types of evaluation procedures: the dossier evaluation and the substance evaluation.

4.3.2.3. Dossier Evaluation, Articles 40-43 REACH Regulation

Within the dossier evaluation procedure, ECHA carries out compliance checks on registration dossiers and examines testing proposals. Testing proposals, submitted with the registration of a substance, always need to be evaluated; for the evaluation of registration dossiers, the REACH Regulation only requires that by 2023 at least 20% of the dossiers must have undergone a compliance check and sets out priority criteria for selection.⁵⁴ ECHA has developed a regulatory strategy to this end which is published on ECHA's website together with dossier evaluation status that informs registrants on upcoming dossier evaluations.⁵⁵

Under the compliance check procedure, ECHA verifies whether the information submitted with a registration complies with the requirements of the REACH Regulation as further specified in various annexes to the Regulation.⁵⁶ Also, chemical safety reports are examined in terms of their compliance with the Regulation and the adequacy of the proposed risk management measures.⁵⁷ Additionally, ECHA checks that the classification and labelling of the substance registered comply with the

⁵² ECHA Registration Guidance p. 9-10

⁵³ Article 20 (3) and (4) REACH Regulation

⁵⁴ Article 41 (5) REACH Regulation

⁵⁵ See ECHA, 'Dossier Evaluation Status' < <https://echa.europa.eu/de/information-on-chemicals/dossier-evaluation-status> > accessed 21 June 2021

⁵⁶ ECHA Registration Guidance, p. 16

⁵⁷ Articles 41 (1) c) and 51 REACH Regulation

registration dossier and the legal classification and labelling rules of the CLP Regulation.⁵⁸ Where ECHA considers that further information is required, it prepares a draft decision that requires the registrant to update the registration dossier. The draft decision is sent to the registrants and the competent authorities of the Member States.⁵⁹ The final decision is adopted by ECHA if no amendments are proposed by the Member States. Otherwise, the case is referred to the Member States Committee, and, if no agreement can be reached it is passed to the Commission that adopts a decision within the comitology procedure.

The REACH Regulation does not envisage consequences in case a registrant does not comply with ECHA's decision. While the registrant has the right to appeal,⁶⁰ ECHA does not have any enforcement powers. However, as noted by ECHA, 'the conclusions from dossier evaluation may be used in other REACH processes, such as substance evaluation, authorisation and restriction', which indicates a subtle pressure ECHA can exert on registrants.⁶¹

The dossier evaluation includes the examination of testing proposals. Testing requirements may arise for the fulfilment of information obligations in the course of substance registration, but also the registration of substance manufactured or imported of 100 tonnes or more impose testing requirements to be submitted with the registration.⁶² The REACH Regulation aims to avoid animal testing and the duplication of tests.⁶³ A testing proposal must be justified by scientific reasoning and technical explanation as to why the required information cannot be met through alternative information.⁶⁴ In particular, proposed tests on vertebrate animals require

⁵⁸ *ibid*

⁵⁹ Article 31 (3) REACH Regulation

⁶⁰ Article 51 (8) REACH Regulation

⁶¹ ECHA Guidance 'How to act in dossier evaluation' (2020)

https://echa.europa.eu/documents/10162/13643/pg_dossier_evaluation_en.pdf/5788b5ee-f6c0-df56-c7ea-c693740acf87 accessed 21 June 2021, p. 6

⁶² REACH Regulation, Annexes IX and X, for example, tests of the stability of substances in organic solvents (7.15. of Annex IX)

⁶³ Article 25 REACH Regulation

⁶⁴ ECHA Guidance 'How to act in dossier evaluation', p. 16

the consideration of other available testing methods to avoid unnecessary animal testing.⁶⁵

4.3.2.4. Substance Evaluation

In principle, all registered substances can be subject to a substance evaluation. Its purpose is to verify whether the use of a substance poses a risk to human health or the environment which is not sufficiently controlled with the measures already in place.⁶⁶ The outcome of the substance evaluation can have severe consequences for manufacturers or importers of chemicals as it may lead to restrictions or its identification as a substance of very high concern that requires authorisation.⁶⁷

The REACH Regulation does not expect that every substance be evaluated. Instead, Article 44 obliges ECHA to establish in cooperation with the Member States criteria for the prioritisation of substances for future evaluation. These criteria are determined on a risk-based approach based on hazard and exposure-related criteria.⁶⁸ Based on this priority list and upon the positive opinion of the Member States Committee, ECHA compiles a Community Rolling Action Plan (CoRAP) which covers a three-year period and specifies the substances to be evaluated each year.⁶⁹ Presently, the CoRAP lists 60 substances to be evaluated between 2021-2022.⁷⁰

There is a responsibility for ECHA to ensure the evaluation of the substances listed on the Community rolling action plan and to coordinate the evaluation process.⁷¹ The evaluation itself is carried out by a Member State which is appointed by ECHA as the competent authority for this purpose.⁷² The outcome of the substance evaluation can

⁶⁵ ECHA 'Registration Guidance', p. 13

⁶⁶ ECHA, 'Substance Evaluation' <https://echa.europa.eu/regulations/reach/evaluation/substance-evaluation> accessed 21 June 2021

⁶⁷ *ibid*

⁶⁸ ECHA, 'Selection criteria to prioritise substances for Substance Evaluation (2011 CoRAP selection criteria)' https://echa.europa.eu/documents/10162/13628/background_doc_criteria_ed_32_2011_en.pdf/67441c3c-75be-4ecd-992e-b90ab2041805 accessed 21 June 2021

⁶⁹ Article 44 (2) REACH Regulation

⁷⁰ ECHA, 'Substance Evaluation -CoRAP' <https://echa.europa.eu/information-on-chemicals/evaluation/community-rolling-action-plan/corap-table/-/dislist/name/-/ecNumber/-/casNumber/-/lec_submitter/-/cse_public_lifecycle/Not+started/haz_detailed_concern/-/> accessed 21 June 2021

⁷¹ Article 45 (2) REACH Regulation

⁷² *Ibid*

be either that further information is requested from the registrant or even lead to an authorisation or restriction dossier of the competent authority.⁷³

4.3.2.5. Decision-Making Procedure for Evaluations

The only difference is that draft decisions for substance evaluations are prepared by the competent authority while those on dossier evaluations are adopted by ECHA, the decision-making procedure for both types of evaluations are identical.⁷⁴ If no amendments to the draft decision are proposed by other Member States, the final decision is adopted by ECHA. Otherwise, the case is referred to the Member State Committee that has to agree unanimously on the draft decision and possible amendments. If this is not feasible, the Commission adopts a decision within the comitology procedure.⁷⁵

4.3.2.6. Authorisation, Article 55 ff REACH Regulation

The purpose of the authorisation requirement is to assure that risks arising from substances of very high concern (SVHCs), namely substances that are carcinogenic, mutagenic, toxic to reproduction, persistent, bioaccumulative, or give rise to a similar level of concern, are properly controlled and progressively replaced by suitable alternative substances or technologies.⁷⁶ To this end, substances listed in Annex XIV of the REACH Regulation require authorisation before they may be placed on the market. Other substances can be added to that annex through an implementing Regulation adopted by the Commission under the comitology procedure.⁷⁷ An important role is played by ECHA in selecting substances that are eventually recommended for inclusion into the authorisation list. Based on proposals of either the Commission or a Member State and taking into account the opinion of the Member State Committee,⁷⁸ ECHA recommends substances for the so-called 'candidate list of substances of very high concern.'⁷⁹ Furthermore, ECHA prioritises

⁷³ Article 48 REACH Regulation

⁷⁴ In fact, Article 52 applicable for substance evaluation refers to Article 51 which regulates the decision-making procedure for dossier evaluations

⁷⁵ Article 51 REACH Regulation

⁷⁶ Article 55 REACH Regulation

⁷⁷ Article 58 (1) which refers to Article 133 (4) of the REACH Regulation

⁷⁸ Which has to be adopted unanimously, see Article 59 (8) REACH Regulation

⁷⁹ Article 59 REACH Regulation

chemicals of the candidate list and proposes to the Member State Committee which chemicals should be recommended to the Commission for inclusion in the authorisation list.⁸⁰

Whereas the Commission is responsible for the final decision on authorisations to be adopted within the comitology procedure, ECHA's Committee for Risk Assessment and Socio-economic Analysis gives its opinion on these applications. Two procedures are in place: the *adequate control procedure* that allows authorisation 'if the risk to human health or the environment from the use of a substance arising from the intrinsic properties specified in Annex XIV is adequately controlled in accordance with Section 6.4. of Annex I and as documented in the applicant's chemical safety report, taking into account the opinion of the Committee for Risk Assessment referred to in Article 64(4)(a)'.⁸¹ If authorisation cannot be granted under the adequate control procedure or for substances listed in Article 60(3) of the REACH Regulation, an authorisation is only possible under the *socio-economic procedure*.⁸² It requires that the applicant can demonstrate that 'the socio-economic benefits outweigh the risk to human health or the environment arising from the use of the substance and [that] there are no suitable alternative substances or technologies'.⁸³ Thus, apart from balancing between the risk posed by the use of the substance and its socio-economic benefits, the absence of suitable alternatives is a decisive factor to be taken into account for the authorisation decision. The term 'suitable' hereby limits the number of relevant alternatives to the number of 'safer' alternatives, i.e. substances or technologies whose use entails a lower risk as compared to the risk of using the relevant substance of very high concern.⁸⁴ The burden of proof falls to the applicant for authorisation who has to show that no alternative is available. If there remains uncertainty on the lack of alternatives, the Commission is not entitled to grant authorisation, even a conditional one.

⁸⁰ Article 58 (3) REACH Regulation

⁸¹ Article 60 (2) REACH Regulation

⁸² Article 60 (4) REACH Regulation

⁸³ Case T-837/16 Kingdom of Sweden v European Commission [2019] ECLI:EU:T:2019:144 (appealed by the Commission: Case C-389-19 *European Commission v Kingdom of Sweden* [2021] ECLI:EU:C:2021:131)

⁸⁴ *ibid* para 72

This was the main issue in *Sweden v Commission*, where the Commission had endorsed the opinions of ECHA's Committees and had granted an authorisation for the use of lead-containing substances in industrial paint, even though the objection was raised that alternatives were already available in the market. The Court held that the opinions of ECHA's Committee for Risk Assessment and ECHA's Committee for Socio-economic analysis have (only) the status of scientific opinions to be taken into account by the Commission when deciding on the authorisation.⁸⁵ Holding that the Commission bears the responsibility for the authorisation decision, it has to verify *ex officio* whether the conditions for granting an authorisation are fulfilled and may not readily endorse the opinions of ECHA's Committees.⁸⁶ The Court considered that the Commission may adopt the opinion of one of the ECHA Committees if the reasoning in the opinion 'is full, consistent and relevant'.⁸⁷ Otherwise, the Commission is obliged to address to the Committee questions intended to remedy any shortcomings found. Conversely, the Court held that the Commission is not bound by the Committee's opinions.⁸⁸ If the Commission opts to disregard an opinion or to alter it concerning technical or economic aspects, specific reasons for its findings must be provided by the Commission.

4.3.2.7. Restriction, Articles 67 ff REACH Regulation

The restriction of substances is considered as the second 'command and control' regime for regulating chemical risks under the REACH Regulation.⁸⁹ In so far, restricted substances may not be manufactured, placed on the market or used unless they comply with the conditions of that restriction.⁹⁰ Different to the authorisation procedure, restrictions are not limited to substances of very high concern (SVHCs) but are imposed if an unacceptable risk to human health or the environment arises from that substance.⁹¹ The REACH Regulation does not define what an unacceptable risk is

⁸⁵ *ibid* para 66

⁸⁶ *ibid* para 64

⁸⁷ *ibid* para 68

⁸⁸ *ibid* para 66

⁸⁹ L Bergkamp and N Herbatschek, 'Regulating Chemical Substances under REACH: The Choice between Authorisation and Restriction and the Case of Dipolar Aprotic Solvents' (2014) 23(2) *Review of European Community & International Environment Law* 221-245 (229)

⁹⁰ Article 67 (1) REACH Regulation; restricted substances are listed in Annex XVII of the REACH Regulation

⁹¹ L Bergkamp *supra* n 89, p. 229

which indicates a degree of discretion for the regulatory authorities but also that the restriction must be tailored to that particular risk.⁹²

Presently, 70 restrictions are imposed under the REACH Regulation.⁹³ The restriction procedures are similar to those for authorisations, which is that except for the ‘fast-track procedure’⁹⁴ that allows the Commission to propose and adopt restrictions for carcinogenic, mutagenic or reprotoxic substances that could be used by consumers,⁹⁵ the restriction process begins with a restriction dossier. Usually, the restriction dossier is drawn up by ECHA at the request of either a Member State or the Commission. If the dossier demonstrates that action on a Community-wide basis is necessary, beyond any measures already in place, ECHA shall suggest restrictions to initiate the restriction process.⁹⁶ But also a Member State can directly trigger off a restriction procedure by preparing a restriction dossier for substances that are not yet on ECHA’s proposal or candidate list.⁹⁷ Finally, ECHA can also start the restriction procedure for substances that have been included in the authorisation list (Annex XIV) but have been granted a transitional sunset date.⁹⁸ After its expiration, ECHA shall prepare a restriction dossier on its own initiative if it considers that the risks arising from that substance are not adequately controlled.⁹⁹

The restriction dossier is referred to the Committee of Risk Assessment and the Committee for Socio-economic Analysis who give their opinions on the suggested restrictions.¹⁰⁰ Based on the restriction proposal and the opinions of the Committees, the Commission prepares a draft amendment to Annex XVII of the REACH Regulation.¹⁰¹ The final decision on the restriction measure is adopted by the Commission under the regulatory comitology procedure with scrutiny.¹⁰²

⁹² *ibid* p. 229

⁹³ See also, ECHA’s Website <https://echa.europa.eu/substances-restricted-under-reach>

⁹⁴ L Bergkamp *supra* n 89 p. 228

⁹⁵ Article 68 (2) REACH Regulation

⁹⁶ Article 69 (3) REACH Regulation

⁹⁷ Pursuant to Article 69 (5) of the REACH Regulation

⁹⁸ Article 58 (1) c) (i) REACH Regulation

⁹⁹ Article 69 (2) REACH Regulation

¹⁰⁰ Articles 70 and 71 REACH Regulation

¹⁰¹ Article 73 REACH Regulation

¹⁰² Article 73 (2) which refers to Article 133 (4) REACH Regulation

The disadvantage of this procedural variety is that the responsibilities for initiating the restriction procedure are not clearly allocated. This aspect was also criticised by the Commission in its REACH review report where it was noted that ‘the number of new restrictions has so far not met the original expectations’.¹⁰³ To raise the number of candidates for restrictions, the Commission called for an increase of the Member States’ involvement, ECHA’s effort to start restriction procedures for substances of very high concern (SVHCs) after its sunset date and promised to step up its own efforts to identify suitable cases for the fast-track procedure.¹⁰⁴

4.3.3. Financing of ECHA

An objective of the REACH Regulation is that cost of ECHA’s service shall be borne by the manufacturers and producers.¹⁰⁵ In this spirit, ECHA has always been a predominantly fee financed agency: Between 2007-2020, 70% of its funding was generated from fees and 30% from balancing EU subsidies.¹⁰⁶ Hereof, ECHA’s primary income source was derived from REACH registration fees.¹⁰⁷

For the future, it is expected that the income from fees, in particular those generated from registration, will drop sharply.¹⁰⁸ A trend can already be observed from the figures outlined in the Commission Draft General Budget. While in 2018 less than one-third of ECHA’s budget had to be financed by EU contributions,¹⁰⁹ since then ECHA’s revenue from fees has dropped significantly from EUR 81 171 836 forecasted in 2019

¹⁰³ COM (2018) 116 final, p. 8

¹⁰⁴ COM (2018) 116 final, p. 8

¹⁰⁵ See Article 74 (3) REACH Regulation which reads “The structure and amount of fees shall take into account the work required by this Regulation to be carried out by the Agency and the competent authority and shall be fixed at such a level as to ensure that the revenue derived from them when combined with other sources for the Agency’s revenue pursuant to Article 96 (1) is sufficient to cover the cost of the service delivered”

¹⁰⁶ COM (2018) 116 final, p. 10

¹⁰⁷ ECHA, ‘ECHA Programming Document(s) 2021-2024’ (2020)

<https://echa.europa.eu/documents/10162/13609/programming_document_2020-2023_en.pdf/0c66d849-2168-8091-c4bb-faeb03245f94> accessed 21 June 2021, p. 27 (ECHA Single Programming Document 2021-2024); while the estimated fee income of EUR 4.6 million for BPR activities is comparably low, see *ibid* p. 28

¹⁰⁸ COM (2018) 116 final, p. 10

¹⁰⁹ Commission, ‘Draft General Budget of the European Union for the financial year 2019, Working Document Part II’ COM (2018) 600, p. 73

to EUR 37 141 278 in 2021.¹¹⁰This means that from 2021 onwards, ECHA will become an agency that is predominantly financed from the EU budget with only one-third of its budget generated from its own income.¹¹¹

The reason for this decrease is that the last registration deadline for existing substances expired in 2018. Consequently, despite the income that will be derived from the registration of new substances, from authorisation fees and the income derived from BPR activities, ECHA will become increasingly dependent on the EU balancing subsidy financing.¹¹² A considerable degree of concern resulting from its uncertain financial situation can be observed in ECHA's (draft) Single Programming Document 2021-2023. Here, ECHA noted with reference to an external consultancy study that a reliable estimation of future fees is presently not possible.¹¹³Against this background, it appears as an urgent request when ECHA calls on the Commission to consider these specific challenges in its budgetary planning and to develop with ECHA a 'new, viable financing model in its post-registration phase of development and is prepared to engage proactively with the Commission services to assist the Commission in ensuring sustainable financing for ECHA for the future'.¹¹⁴

In its opinion on ECHA's Single Programming Document 2021-2023, the Commission requested it to provide by the end of the first quarter in 2021 "a thorough analysis" based on the data available on the correlation between the fees charged and the workload of ECHA for regulatory activities and to 'propose scenarios of adjustments to the Commission to the current fees and charges systems'.¹¹⁵

That ECHA's increasing budgetary dependence has repercussions on the degree of control the Commission has on its programming content, could not be directly ascertained in this work. Rather, budgetary constraints have led to a considerable reprioritisation of certain activities programmed in ECHA's final Single Programming

¹¹⁰ Commission, 'Draft General Budget of the European Union for the financial year 2021, Working Document Part II' COM (2020) 300, p.190 f

¹¹¹ EUR 76 047 824 EU contributions and EUR 34 703 713 own revenue.

¹¹² ECHA Single Programming Document 2021-2024 *supra* n 107, p. 27

¹¹³ *ibid*

¹¹⁴ *ibid*

¹¹⁵ Commission, 'Commission Opinion of 30.9.2020 on the Single Programming Document 2021-2023 of the European Chemicals Agency' C (2020) 6643 final, para 7

Document. This aspect is addressed in more detail in the examination of ECHA's programming content.

4.4. ECHA's Single Programming Documents and the Commission's Opinions

4.4.1. ECHA's Single Programming Document 2021-2024¹¹⁶

As a 'Union body' that receives contributions charged to the EU budget, the Framework Financial Regulation and the Commission's guidelines for the Single Programming Document apply for ECHA.¹¹⁷ As required under Article 32 FFR, on 31 January 2020 ECHA submitted its draft Single Programming Document to the Commission which gave its opinion thereon on 30.9.2020.¹¹⁸ It was noticeable that contrary to Article 32 (1) FFR which requires that the multiannual work programme shall set out the overall strategic programming for the years N + 1 to N + 3, ECHA's Single Programming Document covers the period 2021-2024. Yet, this aspect was not criticised by the Commission which refers in its opinion to ECHA's Single Programming Document 2021-2023 instead.

Compared with Frontex's programming, the opinions on ECHA's draft programme are considerably briefer and appear less authoritative. No critical comments are made on formal aspects of ECHA's Programming Document. The contrary, the Commission positively noted ECHA's compliance with the requirements set out in its guidelines.¹¹⁹ Also, no explicit requests to alter the programming content were made which distinguishes the opinions on ECHA's programming document considerably from the

¹¹⁶ ECHA, 'ECHA Programming Document(s) 2021-2024' (2020) <https://echa.europa.eu/documents/10162/13609/programming_document_2020-2023_en.pdf/0c66d849-2168-8091-c4bb-faeb03245f94> accessed 21 June 2021, p. 27 (ECHA Single Programming Document 2021-2024)

¹¹⁷ Commission, 'Communication from the Commission on the strengthening of the governance of Union Bodies under Article 70 of the Financial Regulation 2018/1046 and on the guidelines for the Single Programming Document and the Consolidated Annual Activity Report' C (2020) 2297 final

¹¹⁸ Commission, 'Commission Opinion of 30.9.2020 on the Single Programming Document 2021-2023 of the European Chemicals Agency' C (2020) 6643 final (Commission's Opinion on ECHA's SPD 2021-2023)

¹¹⁹ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 5

opinions on Frontex's programming where the Commission sometimes even dictated the wording of a programmed objective or activity. Yet, a more lenient tone does not necessarily allow for the conclusion of a less dominant position of the Commission. The fact that ECHA built major parts of its Single Programming Document on the Commission's REACH review indicates a degree of subordination or at least considerable collaboration between the Commission and ECHA in terms of the latter's programming.¹²⁰ In its opinion on ECHA's 2019-2021 Single Programming Document, the Commission requested that ECHA should bring its programming in line with the sixteen actions of its REACH review;¹²¹ ECHA's close orientation on this policy paper in the programming document of the following years was then positively noted in the respective opinions.¹²²

Challenging for this case study is the fact that ECHA's programming structure differs considerably from that of Frontex. Contrary to Frontex's Single Programming Document which comprises strategic objectives on top of the multiannual programming and focus areas and key activities derived from it, ECHA's programming structure is less comprehensive as a direct link between the multiannual objectives and the activities programmed in the annual work programme are more difficult to ascertain. The reason is that the structure of the annual work programme does not directly correspond with the multiannual programming. Instead, the annual work programme is structured according to the different legislations that confer tasks on ECHA rather than the multiannual programme.¹²³ This approach is explainable against the background that ECHA's legal framework is more complex than Frontex's but contradicts the requirements of the Framework Financial Regulation which sets out that 'the annual work programme shall be coherent with the multiannual programme'.¹²⁴ Nevertheless, ECHA's programming structure was not criticised by

¹²⁰ COM (2018) 116 final; ECHA and Commission, 'REACH Evaluation Joint Action Plan' *supra* n. 32

¹²¹ Commission, 'Commission Opinion of 5.9.2019 on the draft Programming Document 2019-2021 of the European Chemicals Agency' C (2018) 5773 final, para 7 (Commission' Opinion on ECHA's Single Programming Document 2019-2021)

¹²² Commission's Opinion on ECHA's Single Programming Document 2021-2021, para 20

¹²³ 1. REACH and CLP which is further sub-classified as to ECHA's different regulatory tasks; 2. Biocides; 3. Export/import of hazardous chemicals and circular economy (including tasks under the POP Regulation and Waste Framework Directive)

¹²⁴ Article 32 (3) FFR

the Commission whose opinions largely follow the structure of ECHA's annual work programme and addresses ECHA's strategic priorities and objectives only in its 'general remarks'. Despite the difficulties that arise from these structural differences, this examination follows the pattern adopted for Frontex's case study and begins with a content-related analysis followed by a quality focussed examination.

4.4.1.1. General Remarks on the Multiannual Programme

A comparison of ECHA's multiannual programmes 2019-2021, 2020-2022 and 2021-2023 discloses that they are entirely identical. This aspect is remarkable as Article 32 (2) FFR requires that the multiannual programming shall 'set out the overall strategic programming for the years N + 1 to N + 3, including the objectives, expected results and performance indicators to monitor the achievement of the objectives and the results'. Insofar, the multiannual programming is a dynamic process that requires that for each programming year at least parts of the multiannual programming are adjusted. Otherwise, a justification could be expected that explains why no changes occurred. The multiannual programming of ECHA, however, reproduces its strategic plan 2019-2023 and insofar questions the purpose of the multiannual programming obligation under the Framework Financial Regulation.¹²⁵ Yet, in its final annual work programme, ECHA states that 'in 2021, ECHA will have implemented its strategic priorities for two years and has adjusted its work towards increased impact. ECHA has thereby given more priority to activities under Strategic Priority 1, and consequently less to Strategic Priorities 2 and 3. This is reflected in this biannual Work Programme'.¹²⁶

The static nature of ECHA's multiannual programming might explain why only a few comments were made by the Commission thereon. One comment repeatedly made is to criticise that ECHA's strategic priorities focus exclusively on the high level of protection of human health and the environment and should also integrate the other main objective of the REACH Regulation which is to ensure the free movement of

¹²⁵ ECHA, 'ECHA Strategic Plan' (2018) <https://echa.europa.eu/documents/10162/26075800/echa_strategic_plan_2019-2023_en.pdf/3457ccff-7240-2c1f-3a15-fa6e5e65ac56> accessed 21 June 2021

¹²⁶ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 34

substances on the EU market while enhancing the competitiveness and innovation of the European industries.¹²⁷ Another comment made in all opinions concerns the quality of ECHA's performance indicators. Here, the Commission requests that ECHA should 'further refine the indicators and review them regularly to allow measurement of its effectiveness and efficiency'.¹²⁸ The Commission further noted that indicators should be developed for all objectives and activities described in the programming document and that indicators were missing for some of the objectives and activities.¹²⁹

4.4.2. Topic-Related Analysis of the Commission's Opinions on ECHA's SPD

ECHA's multiannual programming is built upon three strategic priorities and one 'horizontal' priority, titled 'Actions to invest in enabling components'. It addresses the development of staff competencies, continuous investment in IT and data and a sustainable finance and governance structure. However, neither human resources are allocated to this priority nor are specific actions programmed in the annual work programme. For this reason, the following examination concentrates on the three strategic priorities, the actions programmed in the annual work programme, and the comments of the Commission thereon.

4.4.2.1. First Strategic Priority: Identification and Risk Management of Substances of Concern

From all strategic priorities, the identification and management of the risks arising from substances of concern is the most important one as it addresses ECHA's main regulatory tasks under the respective Regulations. The majority of actions programmed in the annual work programme fall under this strategic priority and consequently engross the largest part of ECHA's operational resources.¹³⁰ In its final

¹²⁷ Commission's Opinion on ECHA Single Programming Document 2020-2022, para 6

¹²⁸ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 6; Commission's Opinion on ECHA's Single Programming Document 2020-2022, para 6; Commission's Opinion on ECHA's Single Programming Document 2019-2021, para 6.

¹²⁹ *ibid*

¹³⁰ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 34

version of its Single Programming Document 2021-2024, ECHA has pronounced to focus even more intensively on this strategic priority that addresses three areas of operation:¹³¹

- Prioritise groups of substances
- Concerted regulatory action
- Induce faster action by the industry

The first area of operation provides the basis for all its regulatory activities. In light of financial and human resource constraints, not all registration dossiers can be examined in terms of compliance with the REACH Regulation. The first area of operation thus sets out the aim to efficiently select substances that raise *potential* concern for subsequent evaluation. To improve the efficiency of the evaluation procedure, the Commission's REACH review proposed the adoption of a 'grouping approach'.¹³² Consequently, in 2019, ECHA moved from a 'substance-by-substance approach' to addressing structurally similar chemicals in groups.¹³³

Based on this selection, the second area of operation addresses all regulatory actions available under the respective Regulations, including the evaluation of dossiers and substances, harmonised classification and labelling, the restriction and authorisation of substances and proposals for POP candidates to the Stockholm Convention in an integrated manner. Insofar it considers not only the main actions proposed in the Commission's REACH Review;¹³⁴ but also, major parts of ECHA's annual work programme related to regulatory activities under the REACH and CLP Regulation (17 pages), followed by the BPR Regulation (4 pages), and the PIC Regulation (2 pages).

¹³¹ *ibid*, p. 22

¹³² COM (2018) 116 final (REACH Review), Action 2

¹³³ ECHA, 'Grouping speeds up regulatory action, Integrated Regulatory Strategy, Annual Report' (2020)

https://echa.europa.eu/documents/10162/27467748/irs_annual_report_2019_en.pdf/bd23e8cb-a55a-24af-4be3-7a29828ebb09#:~:text=ECHA's%20Integrated%20Regulatory%20Strategy%20aims,concern%20as%20quickly%20as%20possible accessed 22 June 2021

¹³⁴ COM (2018) 116 final (REACH Review), Actions 2,7,8,9,10,11, and Action 13 (2)

The third area of operation is to `induce faster action by industry`. It aims to facilitate the compliance of the chemical industry with its legal obligations and includes providing guidance, advice and assistance but also to identify legal obligations and targeted enforcement for the updating of data by the industry.

4.4.2.1.1. Actions Programmed under the REACH Regulation

Comprising of 15 pages, the largest part of ECHA's annual work programme is dedicated to activities programmed under the REACH and CLP Regulations. These activities are addressed in different sub-sections the order of which largely follows the structure of the REACH Regulation. Activities under the CLP Regulation are then programmed separately. The Commission's opinions follow this order and are also adopted in this examination where the activities programmes are addressed first, followed by the comments of the Commission thereon.

4.4.2.1.2. Dossier Preparation

Article 111 of the REACH Regulation requires ECHA to specify formats and to provide software free of charge for any submissions by the industry. To this end, ECHA has developed different IT tools that the industry requires for the preparation of dossiers and the registration of substances including the preparation of chemical safety reports. These are the International Uniform Chemical Information Database (IUCLID) software application¹³⁵ for the preparation of dossiers, the CHESAR application¹³⁶ for the preparation of chemical safety assessments and REACH IT for the submission of registration dossiers. As noted by the Commission, ECHA's IT infrastructure consumes a high share of ECHA's budget and is thus a recurrent topic for the call for more cost-efficiency.¹³⁷

¹³⁵ International Uniform Chemical Information Database

¹³⁶ Chemical Safety Assessment and Reporting tool

¹³⁷ Commission, `General Report on the operation of REACH and review of certain elements, Conclusions and Actions` Annex 6 SWD(2018) 58 final, p. 27 where the Commission compares ECHA's IT budget with similar EU agencies. These are 21.2% of ECHA's total budget in 2015 while EMA's IT budget only takes 10% of the budget and EFSA 11.1%

Apart from the maintenance of these IT systems, the activities programmed include the implementation of an effective data sharing policy between registrants and to promote the industry's compliance with its obligation to submit dossier updates. The latter activity was also addressed by the Commission in its REACH review where one proposed action was to identify the reasons for non-compliance.¹³⁸

This topic was not specifically addressed by the Commission in its opinion on ECHA's Single Programming Document. Instead, the Commission commented on ECHA's activity to assess the feasibility of a cloud service to become the sole delivery model for IUCLID. Here, the Commission demanded that ECHA should finalise its assessment by the first quarter of 2021 at the latest.¹³⁹ While this request was adopted in ECHA's final programme accordingly, the request that ECHA should respond to the outbreak of COVID-19 in assisting and alleviating the burden and impact on duty holders and in particular small and mid-size enterprises (SMEs) was not considered.¹⁴⁰

4.4.2.1.3. Registration and Dossier Submission

Predominantly, the programmed activities address the processing of registration dossiers including updates and chemical safety reports. This comprises, apart from the collection of fees, completeness checks on the information and documents submitted by the registrants. The registration dossiers are submitted via REACH-IT the maintenance and continuous development of which is part of ECHA's activities but, remarkably, a substantial part of the completeness checks is still conducted manually.¹⁴¹

To ensure fair competition, part of the registration procedure is the verification of whether registrants are eligible for SME fee reductions.¹⁴² In its annual work programme, ECHA sets out the aim to have completed the verifications of the 2018 registrations by 2023. This was criticised in the Commission's opinion where it

¹³⁸ COM (2018) 116 final (REACH Review) Action 1

¹³⁹ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 15

¹⁴⁰ *ibid.*, para 14

¹⁴¹ ECHA Single Programming Document 2021-2024 supra n 116, p.41

¹⁴² ECHA, 'SME Verification' <https://echa.europa.eu/de/support/small-and-medium-sized-enterprises-smes/sme-verification> accessed 21 June 2021

requested that ECHA should reduce the time-lag between submission and verification by, inter alia, verifying the SME status at the completeness check stage.¹⁴³ An alteration of ECHA's programme to this end could not be noticed; instead, ECHA included an activity that provides input to the Commission on its review concerning the definition of micro, small and medium-sized enterprises. The Commission's suggestion that ECHA should update its guidance on human health and the environment concerning nanomaterials was considered in ECHA's section on the screening and prioritisation.¹⁴⁴

4.4.2.1.4. Screening and Prioritisation

The tasks of ECHA under the REACH Regulation is to set priorities for selecting substances or dossiers for compliance checks and substance evaluation. To this end, ECHA screens information submitted by companies, generated by ECHA or the Member States competent authorities to decide for each substance whether further information or regulatory risk management is needed.¹⁴⁵

As noted by ECHA, the screening and prioritisation of substances are at the heart of ECHA's Integrated Regulatory Strategy as it provides efficiencies to subsequent regulatory activities such as the evaluation, classification and labelling, restrictions and authorisation.¹⁴⁶ Also, several actions proposed in the Commission's REACH Review refer to the screening and prioritisation of substances.¹⁴⁷ In the light of its high priority, it is thus no coincidence that this is one of the few activities where human resources have been topped up in the final programme.¹⁴⁸ Apart from the identification and prioritisation of groups of substances, other actions programmed are the development of new approaches, the collaboration with industrial sectors to improve the information basis and the work of specific expert groups that address

¹⁴³ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 16

¹⁴⁴ *ibid.*, para 17; ECHA Single Programming Document 2021-2024 *supra* n 116, p. 44

¹⁴⁵ *ibid.*, p. 42

¹⁴⁶ *ibid.*

¹⁴⁷ COM (2018) 116 final (REACH Review) Actions 8,2,1,14

¹⁴⁸ From 47 to 58 FTE's

particular sensitive substances, namely endocrine disruptors, Persistent Bioaccumulative Toxic (PBT) chemicals and nanomaterials.

The Commission positively commented on this programmed activity and noted that it supports ECHA's Integrated Regulatory Strategy with the reservation that ECHA should ensure transparency of the screening methodology and outcomes.¹⁴⁹ This request was considered in ECHA's final annual work programme where it is outlined that it will increase the information published on its website to this end.¹⁵⁰

4.4.2.1.5. Evaluation

There are two pillars to ECHA's evaluation tasks: first, dossier evaluation that examines whether registration dossiers comply with the safety information requirements under the REACH Regulation and the examination of testing proposals. The second pillar is the substance evaluation conducted based on an annually updated Community rolling action plan. The underlying aim of all evaluation activities is to generate primarily hazard data on chemicals which increases the knowledge on them and helps to identify necessary regulatory actions.¹⁵¹

Consequently, the actions programmed address both types of evaluation and set out specific targets to this end.¹⁵² In addition, ECHA reports to the Commission on the progress made and supports the Commission in its policy activities. The Commission positively noted that all actions are linked to the Commission's REACH Review and encouraged ECHA 'to continue coordinating with relevant Commission services to ensure a common understanding of the needs and objectives to be pursued for those actions'.¹⁵³ The Commission further suggested ECHA's prioritisation of compliance checks for the achievement of its strategic target to have addressed all substances of concern by 2030. In this context, the Commission encouraged ECHA to further increase its efficiency, in particular through enhanced working methods of the Member States Committee. ECHA followed this request but also noted that an

¹⁴⁹ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 18

¹⁵⁰ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 43

¹⁵¹ *ibid* p. 45

¹⁵² *ibid* p. 47

¹⁵³ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 20

increase in compliance checks might result in a lower number of substance evaluation cases.¹⁵⁴

4.4.2.1.6. Authorisation

ECHA's main tasks are the identification of SVHCs (Substances of very high concern) for the so-called candidate list,¹⁵⁵ the prioritisation of chemicals to be recommended to the Commission for its inclusion in the authorisation list,¹⁵⁶ and to develop opinions through its Committees of Risk Assessment (RAC) and the Committee for Socio-economic Analysis (SEAC) on applications for authorisations.

These tasks are reflected in ECHA's annual work programme. Regarding the identification of substances for the candidate list, ECHA remarked its expectation of an increase of groups of substances and those with a complex composition that requires an increased involvement of expert groups.¹⁵⁷ For 2021, the ECHA programme sets out the target to provide 50 opinions for substances that have endocrine-disrupting properties, another 50 opinions for substances with other properties, and the evaluation of substitution plans of 12 applicants. This target deviates from the draft annual work programme where 100 opinions on endocrine-disrupting properties were programmed.¹⁵⁸ An explanation for this reduction is not given by ECHA and does not correspond with any requests of the Commission in its opinion. However, in the light of a reduction in the human resources from initially, 43 estimated in the draft to 32 full-time equivalents (FTEs) finally programmed, financial constraints seem to be a plausible explanation.

In the light of the criticism by the General Court in *Sweden v Commission*, the Commission's opinions give special attention to the quality of the Committee's opinions. To this end, the Commission requested that the actions programmed by ECHA shall ensure a high quality of the opinions and comprise the updating of

¹⁵⁴ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 46; consequently, the FTE's were reduced from initially 123 to 110

¹⁵⁵ Article 59 REACH Regulation

¹⁵⁶ Article 58 (3) REACH Regulation

¹⁵⁷ E.g., PBTs (Persistent, bioaccumulative and toxic) and ED's (Endocrine disruptors)

¹⁵⁸ ECHA, 'Draft ECHA Programming Document 2021-2023' (2020), p. 44

application and opinion formats including the assessment of the suitability of alternatives.¹⁵⁹ Another demand of the Commission was that ECHA should ‘draw lessons from review reports of “upstream” authorisation holders to identify how applications for authorisations, and the underpinning supply chain communication, can be further improved in the future’.¹⁶⁰ This remark was adopted in ECHA’s final programme where the consideration of review reports of upstream authorisation holders by the RAC and SEAC as well as the consideration of downstream user notifications is explicitly stated.

4.4.2.1.7. Restriction

In accordance with the tasks conferred on ECHA, the actions programmed comprise the submission of ‘fit-for-purpose’ restriction proposals that address the identified concerns for (groups of) substances and to provide opinions on restriction proposals through the Committee of Risk Assessment (RAC) and the Committee for Socio-economic Analysis (SEAC).¹⁶¹

Apart from that, ECHA specifically addressed the Commission’s request made in the REACH review and promised to work with the Commission on the improvement of the restriction procedure and to enhance the Member State involvement in it.¹⁶² In this context, ECHA also signals that it will continue to speed up the screening of substances on the Authorisation List¹⁶³ for possible action under Article 69 (2) that enables ECHA to propose restrictions on its own initiative, an intention that was positively noted by the Commission.¹⁶⁴ Another focus concern ECHA’s intention to promote the substitution and replacement of chemicals of concern with safer alternatives.¹⁶⁵

Overall, the comments of the Commission remained considerably unspecific. Apart from highlighting the importance that the Committee's opinions are delivered

¹⁵⁹ Commission’s Opinion on ECHA’s Single Programming Document 2021-2023, para 23

¹⁶⁰ Commission’s Opinion on ECHA’s Single Programming Document 2021-2023, para 21

¹⁶¹ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 51

¹⁶² *ibid* p. 50; refers to COM (2018) 116 final (REACH Review) Action 8

¹⁶³ Annex XIV REACH Regulation

¹⁶⁴ Commission’s Opinion on ECHA’s Single Programming Document 2021-2023, para 21

¹⁶⁵ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 50

independent of any policy influence,¹⁶⁶ the Commission addresses the efficiency of the restriction process. To this end, the Commission reiterated that ECHA, when preparing restriction dossiers, should consider the Commission's Better Regulation guidelines for evaluations and impact assessment. This request was followed in ECHA's final programme where explicit reference to these guidelines is made.¹⁶⁷

4.4.2.1.8. Actions Programmed under the Classification, Labelling and Packaging (CLP) Regulation

The CLP Regulation obliges manufacturers, importers and downstream users to classify, label and package hazardous chemicals in accordance with the Regulation before they are placed on the market.¹⁶⁸ To this end, the Regulation sets out classification criteria that have to be ascertained by manufacturers, importers and downstream users and notified to ECHA.¹⁶⁹ The CLP Regulation also provides detailed criteria for the labelling of hazardous chemicals, using, for example, pictograms, signal words or standard statements and sets out safety requirements for its packaging.¹⁷⁰

The Regulation also facilitates a harmonised classification standard across all uses within the EU single market.¹⁷¹ Proposals may be submitted by the Member States or manufacturers, importers and downstream users to ECHA whose Committee of Risk Assessment gives its opinion and forwards it to the Commission for the adoption of an implementing Regulation in accordance with the regulatory Committee procedure with scrutiny.¹⁷² Further tasks of ECHA are to establish and maintain a classification and labelling inventory and to give scientific and technical advice to the Member States and the institutions of the European Union and to guide the industry with advice and application tools on how to comply with the obligations established under the CLP Regulation.¹⁷³ The actions programmed in ECHA's annual work programme address

¹⁶⁶ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 25

¹⁶⁷ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 51

¹⁶⁸ Article 1 (1) (b) CLP Regulation

¹⁶⁹ Article 5 (1), Article 9 (1), and Annex I CLP Regulation

¹⁷⁰ Article 35 CLP Regulation

¹⁷¹ Article 36 CLP Regulation

¹⁷² Article 37 CLP Regulation that refers to Article 54(3) CLP Regulation

¹⁷³ Article 50 CLP Regulation

these support and guidance obligations including support to the Commission in the development of the UN Globally Harmonised System of classification and labelling of chemicals (UN GHS).¹⁷⁴ The focus of actions programmed, however, is on the processing of harmonised classification proposals the increasing numbers of which result from the joint Commission, EFSA and ECHA effort to encourage the timely submission of dossiers, especially those resulting from Plant Protection Products and Biocides.¹⁷⁵

The Commission did not request any alterations to ECHA's programme; instead, ECHA's collaboration with EFSA in this regard was positively noted and it was further remarked that ECHA should further support the Member States relevant authorities in the realisation of their duties.¹⁷⁶

4.4.2.1.9. Actions Programmed under the Biocidal Products Regulation

The Biocidal Products Regulation (BPR) requires that all biocidal products marketed in the European Union are authorised and active substances contained in such biocidal products are previously approved.¹⁷⁷ To this end, the BPR Regulation not only sets out the conditions for the authorisation of biocidal products and the approval of active substances but also establishes the procedures and the respective role of the actors involved.¹⁷⁸ In short, an application for Union authorisation of biocidal products as well as an application for the approval of active substances is submitted to ECHA.¹⁷⁹ The application proposes a Member State's competent

¹⁷⁴ ECHA Single Programming Document 2021-2024 supra n 116, p. 53

¹⁷⁵ *ibid*

¹⁷⁶ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 26

¹⁷⁷ Article 3 of the BPR Regulation defines active substances as "any substances or mixtures, in the form in which it is supplied to the user, consisting of, containing or generating one or more active substances, with the intention of destroying, deterring, rendering harmless, preventing the action of, or otherwise exerting a controlling effect on, any harmful organism by any means other than mere physical or mechanical action" as well as "any substance or mixture, generated from substances or mixtures which do not themselves fall under the first intend, to be used with the intention of destroying, deterring, rendering harmless, preventing the action of, or otherwise exerting a controlling effect on, any harmful organism by any means other than mere physical or mechanical action".

¹⁷⁸ Other procedures falling within the scope of the BPR Regulation are the mutual recognition of national authorisations, the making available on the market and the use of biocidal products within one or more Member States or the Union, and the placing on the market of treated articles, see Article 1 BPR Regulation 'Purpose and subject matter'; for the sake of simplification, these procedures are not specifically addressed in this work.

¹⁷⁹ Article 7 and Article 17 BPR Regulation

authority to be responsible for the evaluation of the application.¹⁸⁰ Based on its conclusions, ECHA's Biocidal Products Committee gives its opinion on the evaluation.¹⁸¹ The final decision is reserved for the Commission to adopt an implementing Regulation within the comitology procedure.¹⁸²

However, biocidal products that contain active substances listed in the Review Programme can be used despite the pending approval of the substance used. The Review Programme is envisaged under Article 89 of the BPR Regulation and concerns existing active substances which were on the market before 14 May 2000. The Commission is responsible for its review but considerable delays hinder its completion. To this end, the deadline foreseen in the BPR Regulation has recently been extended from 2014 till the end of 2024.¹⁸³ To speed up the reviewing of active biocidal substances, ECHA, the national authorities and the European Commission have agreed on an action plan but still, only 40% of all active substances have been finalised in the review programme.¹⁸⁴

In its annual work programme, ECHA admits that 'the biocides active substances review programme has accumulated significant delays over the years which are caused by insufficient resources in the Member States, delays by applicants in the provision of information, complexification of the assessment in particular with the requirements to conclude according to the new criteria for endocrine-disrupting properties since 2018'.¹⁸⁵ Against this background, nearly half of the activities programmed (8 out of 19) aim to accelerate the progress on the active substance review programme and comprise the support to the Member States' competent authorities in the evaluation of applications and the preparation of BPC opinions.

While the Commission welcomed ECHA's Action Plan on the review programme (even though, the Action Plan is not specifically addressed in the annual work programme),

¹⁸⁰ Article 7 and Article 43 (1) BPR Regulation for Union authorisations

¹⁸¹ Article 8 (4) and Article 44 (3) BPR Regulation for Union authorisations

¹⁸² Article 9 and Article 44 (5) BPR Regulation for Union authorisations

¹⁸³ Article 89 (1) BPR Regulation

¹⁸⁴ 250 out of 700; see ECHA, 'ECHA weekly 12 February 2020' https://echa.europa.eu/view-article/-/journal_content/title/echa-weekly-12-february-2020 (accessed 21.2.2021)

¹⁸⁵ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 54

it requested ECHA to continue monitoring the delays in biocides' procedures and together with the Member States identify the causes of the delays and develop actions to address them.¹⁸⁶ Against this background, ECHA included an action that addresses the member states competent authorities (MSCAs)¹⁸⁷ support to provide specific advice on best practices and simplification of approaches (e.g. focussed assessment of safety and efficacy, improved synergy with REACH and CLP).¹⁸⁸ The Commission also remarked that ECHA's action in the context of its substitution strategy has been limited so far as regards biocidal products and requests ECHA to enhance its activities to this end.¹⁸⁹ This request was followed by ECHA and an additional action was inserted that envisages the improvement in the analysis of alternatives as part of the BPC opinions based on the experience gained.¹⁹⁰

Another request by the Commission was to clarify, in cooperation with applicants and the Member States, those factors affecting the quality of opinions, including the quality of the Summary of the Products Characteristics (SPC), and to develop and implement the relevant actions to improve their quality.¹⁹¹ Alterations to this end in ECHA's final programme, however, could not be ascertained.

4.4.2.1.10. Actions Programmed under the PIC Regulation

Regulation (EU) No 649/2012¹⁹² concerning the export and import of hazardous chemicals (PIC Regulation) implements the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade.¹⁹³ As required under the Convention, the Regulation sets out three procedures. These are PIC notification to the Rotterdam Convention Secretariat

¹⁸⁶ Commission's Opinion on ECHA's Single Programming Document 2021-2023, paras 27 and 28

¹⁸⁷ Member States Competent Authorities

¹⁸⁸ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 59

¹⁸⁹ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 30

¹⁹⁰ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 59

¹⁹¹ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 29

¹⁹² Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals OJ L 201, 27.7.2012, p. 60

¹⁹³ The Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade was adopted on 10 September 1998 and entered into force on 24 February 2004; the text of the Convention is available at <http://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.aspx>

for chemicals that are banned or severely restricted in the European Union,¹⁹⁴ the export notification procedure that imposes information obligations on exporters of chemicals listed in Annex I of the PIC Regulation,¹⁹⁵ and finally, the prior informed consent procedure (PIC procedure) that applies for chemicals explicitly listed in the Rotterdam Convention.¹⁹⁶ The prior informed consent procedure obliges importing countries to provide `decision guidance documents` that set out the conditions under which these chemicals may be imported. Exporting countries, in turn, are obliged to comply with these requirements.¹⁹⁷

The PIC Regulation assigns a meaningful role to the Commission which shall act as `a common designated authority for the administrative functions of the Convention with reference to the PIC procedure on behalf of and in close cooperation and consultation with all designated national authorities of the Members States`.¹⁹⁸ ECHA's competences are comparably limited. Its main task is to process and send export notifications to the importing countries outside the EU,¹⁹⁹ to keep a database on the export and import of hazardous chemicals,²⁰⁰ and to prepare reports concerning the operation of the procedures of the PIC Regulation.²⁰¹ At the request or in agreement with the Commission, ECHA may also provide assistance as well as technical and scientific guidance to industry, the designated authorities and the Commission.²⁰² In line with the tasks conferred, the activities of the annual work programme envisage the processing of an increasing number of notifications and related tasks such as stakeholder support.²⁰³ Another focus lies on ECHA's reporting obligations on PIC exports and imports and the collection and exchange of

¹⁹⁴ Article 11 PIC Regulation

¹⁹⁵ Article 10 PIC Regulation

¹⁹⁶ Listed in Annex III of the Convention and Part 3 of Annex I of the PIC Regulation

¹⁹⁷ Article 10 Rotterdam Convention

¹⁹⁸ Article 5 PIC Regulation

¹⁹⁹ Article 8 PIC Regulation

²⁰⁰ Article 6 (1) a) and b) PIC Regulation

²⁰¹ Article 22 PIC Regulation

²⁰² See Article 6 PIC Regulation

²⁰³ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 62

information. In this regard, ECHA sets out as one of its activities to revise its dissemination portal and the maintenance and further development of ePIC.²⁰⁴

In its opinion, the Commission acknowledges ECHA's efforts with regard to the processing of export notification and reporting tasks as well as the smooth operation of the ePIC application. However, the Commission also reminded ECHA that all necessary changes due to the UK's withdrawal need to be carried out in a timely manner to ensure that stakeholders have access to an application that facilitates proper implementation. The Commission also requested that ECHA's dissemination of information relating to the export and import of hazardous chemicals urgently requires an update.²⁰⁵ Both requests were considered in ECHA's final programming.²⁰⁶ Remarkably, while the draft annual work programme considered the actions concerning the PIC Regulation under the first strategic priority, the final version allocates them under the third strategic priority.

4.4.2.2. Second Strategic Priority: Safe and sustainable use of chemicals by industry

Generating knowledge about chemicals and the availability of information on substances in the supply chain are further rationales of the REACH Regulation.²⁰⁷ With the objective of an 'effective communication up and down the supply chain [to become] mainstream', the priority of safe and sustainable use of chemicals by industry addresses ECHA's tasks in this respect.²⁰⁸

At the latest with the European Green Deal,²⁰⁹ the sustainable use of chemical substances has gained political priority. To this end, the Commission's new Circular Economy Action Plan²¹⁰ sets out the objective to retain products for as long as

²⁰⁴ ePIC is an IT tool developed by ECHA dedicated to industry users, authority users and customs officers.

²⁰⁵ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 33

²⁰⁶ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 63

²⁰⁷ ECHA, 'ENES Work Programme to 2020' (2018)

https://echa.europa.eu/documents/10162/23915781/enes_work_programme_to_2020_en.pdf/7862a4b5-0e5b-e4ea-c47c-6caf72cee847#:~:text=This%20ENES%20Work%20programme%20is,are%20described%20in%20section%203.2

accessed 22 June 2021, p. 6

²⁰⁸ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 17

²⁰⁹ COM (2019) 640 final

²¹⁰ COM (2020) 98 final

possible within the economic cycle. This, in turn, bears the question of how to deal with articles that might contain harmful chemicals, a concern that is addressed under the first area of operation programmed. To strengthen the knowledge base on substances in articles ²¹¹ focuses on the support to industry in generating chemical safety assessments, the development of standardised tools and formats to track substances of concern throughout the supply chain. Initially, the actions programmed in ECHA's annual work programme were more comprehensive and included the development of a practical guide by the Forum for the enforcement of duties related to substances in articles and, upon request of the Commission, to provide support in the review of Article 33 of the REACH Regulation.²¹² These actions have been eliminated in the final programming version; instead, the only action that remained is to work further on the strategy to support the safer use of chemical substances in articles.

Another guiding principle of the REACH Regulation is to enhance the substitution of harmful substances. To this end, the Commission's REACH review sets out the aim to promote the substitution of substances of very high concern (SVHCs) and calls on ECHA to step up its support activities.²¹³ To 'support the substitution and sustainable use of chemicals' is the second area of operation in ECHA's multiannual programme that addresses this aim. Like the actions programmed under the first area of operation, the final version of the annual work programme is considerably shorter than the draft programme. The intention to provide supply chain workshops and training on analysis of alternatives have been eliminated; instead, the two remaining actions programmed focus on the support of the Member States and other stakeholders in the organisation of substitution supply chain workshops and to support the relevant services of the Commission. This reduction of programmed actions is in line with the Commission's opinion that welcomed ECHA's cooperation with interested stakeholders but also highlighted that such activities are already

²¹¹ Article: Means an object which during production is given a special shape, surface or design which determines its function to a greater degree than does its chemical composition (see Article 3 (3) REACH Regulation)

²¹² Article 33 REACH Regulation establishes the duty of the supplier to provide the recipient of the article with sufficient information on substances in articles to allow safe use of the article including, as a minimum, the name of the substance

²¹³ COM (2018) 116 final (REACH Review), Action 5

undertaken by other Commission services, in particular in the area of research and innovation. To this end, the Commission requested that the activities of ECHA in this area should be carefully coordinated.²¹⁴

The third area of operation aims to improve supply chain communication. It corresponds with the third Commission's REACH review action which is to improve the workability and quality of extended safety data sheets.²¹⁵ These are required under the REACH Regulation for suppliers of substances that are either classified as hazardous, persistent, bioaccumulate and toxic or persistent, or are listed in the candidate list for authorisation. The information requirements of the safety data sheets shall facilitate transparency in the supply chain and have been extended by adding so-called exposure requirements.²¹⁶ In its REACH review, the Commission expressed the need for the development of harmonised formats and IT tools, including minimum requirements for the exposure scenarios in safety data sheets. The multiannual programming of ECHA considers this request to facilitate that downstream users receive more consistent and useful advice from their suppliers through the (extended) safety data sheets, covering the full-service life and waste stages.²¹⁷ However, while several actions in ECHA's draft annual work programme were programmed in this regard, these have been deleted in ECHA's final version entirely.

4.4.2.3. Third Strategic Priority: Sustainable Management of Chemicals through the Implementation of EU Legislation

As noted in the Commission's Chemicals Strategy, the EU regulatory framework on chemicals is comprehensive and complex and simplification and consolidation of the legal framework are proposed to this end.²¹⁸ With its third priority of sustainable

²¹⁴ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 13

²¹⁵ COM (2018) 116 final (REACH Review), Action 3

²¹⁶ Article 31 REACH Regulation

²¹⁷ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 24

²¹⁸ COM (2020) 667 final, p. 14

management of chemicals through the implementation of EU legislation, also ECHA addresses the aim of consistency of the EU regulatory system on chemical safety.²¹⁹

The areas of operation comprise two pillars. The first one is to ensure consistency and integration of the EU regulatory system for the safety of chemicals. Apart from integrating new tasks conferred on ECHA, it aims to achieve convergence between ECHA's tasks and policy areas related to the safe use of chemicals in more general terms, including ECHA's cooperation with other agencies, national authorities and international partners. The second area of operation is to foster synergies at the international level. To develop OECD standards and tools that can be directly used in the EU, the multiannual programme envisages ECHA contribution to the OECD chemicals programme and other international instruments. Also, the cooperation with international partners for the exchange of experience is addressed under this area of operation.

The actions programmed are cross-cutting, such as ECHA's data management and the dissemination of data, which address the integration of new tasks conferred on ECHA under the Waste Framework Directive and the Prior Informed Consent (PIC) Regulation or have strong international relevance. While the Commission did not specifically criticise ECHA's ambitions in this respect, it raised concerns that it respects the limits of its competence. Rather symbolically, the Commission criticised that ECHA had used the term 'ECHA legislation' instead of the term 'legislation the Agency implements'.²²⁰ ECHA changed the wording of its programme accordingly. Furthermore, the Commission demanded that ECHA should distinguish between regulatory actions falling under its remit and those falling under the remit of the Commission or the Member States, including clarifications on the interface between REACH and other Union legislation.²²¹

²¹⁹ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 24

²²⁰ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 12

²²¹ Similar, Commission's Opinion on ECHA's Single Programming Document 2020-2022, para 10

4.4.2.3.1. Data Management and Dissemination

While most parts of the annual work programme are structured in accordance with the Regulations that shape ECHA's tasks, a separate section addresses ECHA's activities on data management and data dissemination. Significant amounts of data are collected by ECHA, be it either in the context of registration dossiers, data generated by ECHA in the course of regulatory processes or by external data sources. Data generated to this end support ECHA's regulatory tasks but it also means non-confidential data are made available to the public and professional users. The obligation to disseminate data is established under the REACH Regulation as well as the scale of information that has to be made publicly available.²²²

ECHA denominates itself as a 'digital-first organisation'.²²³ In this regard, ECHA's actions programmed are not limited to simple data management but comprise the development of advanced analytical tools (including machine learning) that facilitates subsequent regulatory processes.²²⁴ They comprise the development of a data strategy that includes the integration of different data sources and the re-use of REACH, CLP and BPR data as well as cooperation with other agencies, in particular with EFSA, for the common usage of data by interested partners. Also, ECHA plans to revise and enhance its dissemination approach under a Roadmap which consists of a review of the publication policy, regulatory visibility of substances and processes with potential transparency enhancements, integration of (new) data sources and exploring ways to facilitate the use of data.²²⁵

The Commission did not specifically comment on the actions programmed. It remarked its approval on the collaboration with EFSA but also asked ECHA 'to continuously evaluate and improve the cost-effectiveness of its IT systems and ensure that they are phased out when they have little added value for the operations of the

²²² Articles 119 and 120 REACH Regulation

²²³ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 55

²²⁴ *ibid*

²²⁵ ECHA, 'NGO-ECHA discussion platform Meeting note' (2020)

<https://echa.europa.eu/documents/10162/24416036/ngo_meeting_note_200702_en.pdf/e8c9596d-ca07-7aa6-5585-04b5d91bcb1b> accessed 22 June 2021

Agency'.²²⁶ Noticeable in this context is that in comparison with other agencies, ECHA's IT budget is relatively high.²²⁷ However, alterations of ECHA's programme in this regard are not evident. On the contrary, the human resources allocated increased from an initial 21 full-time posts to 23.

4.4.2.3.2. Actions Programmed under the Persistent Organic Pollutants (POPs) Regulation²²⁸

Already in 1979, with the signature of the Geneva Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, the European Community committed the limitation and prevention of long-range transboundary air pollution.²²⁹ In 2001, the Member States and the European Union signed the Stockholm Convention on Persistent Organic Pollutants which prohibits or restricts the production and use as well as the import and export of Persistent Organic Pollutants (POPs). These are chemicals that persist in the environment, accumulate in the living organism and pose particular risks to the environment and human health.²³⁰ The chemicals concerned are listed in annexes to the Convention whereby the Parties to the Convention may propose additional substances to be included.²³¹ At the Union level, the Regulation on Persistent Organic Pollutants (POPs) was established in 2004 to ensure a coherent and effective implementation of these international obligations.²³² The Regulation frequently refers to the obligations under the Stockholm Convention not only with regard to the prohibitions established but

²²⁶ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 9

²²⁷ 21.2% of ECHA's total budget in 2015

²²⁸ Regulation (EU) 2019/1021 on persistent organic pollutants (recast) [2019] OJ L169/45

²²⁹ 1979 Convention on Long-range Transboundary Air Pollution

²³⁰ ECHA 'Understanding POPs' <[https://echa.europa.eu/understanding-pops#:~:text=Persistent%20organic%20pollutants%20\(POPs\)%20are,our%20health%20and%20the%20environment](https://echa.europa.eu/understanding-pops#:~:text=Persistent%20organic%20pollutants%20(POPs)%20are,our%20health%20and%20the%20environment)> accessed 22 June 2021

²³¹ *ibid*

²³² Article 1 of the POPs Regulation states as its objective "to protect human health and the environment from POPs by prohibiting, phasing out as soon as possible, or restriction the manufacturing, placing on the market and use of substances to the Stockholm Convention on Persistent Organic Pollutants, or the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, by minimising with a view to eliminating where feasible as soon as possible releases of such substances, and by establishing provisions regarding waste consisting of, containing or contaminated by any of those substances"

also in terms of the Member States` and the European Union`s obligation to monitor the application of the Convention and to fulfil reporting duties.

The competence of ECHA under this Regulation is considerably limited. Before the recast of the POPs Regulation entered into force on 20 July 2019, specific tasks were not assigned to ECHA. Now its Article 8 defines ECHA`s tasks but does not comprise self-contained competences. In agreement with the Commission, ECHA gives assistance and scientific guidance to national authorities to ensure their effective application of the POPs Regulation. Upon request, ECHA also gives technical and scientific input and support to the Commission, including the processing of technical dossiers that are used for a Commission`s proposal to add new substances as a persistent organic pollutant under the Convention. Apart from these supporting tasks, ECHA is assigned a prominent role in the development of the new monitoring and reporting platform (IPChem) where ECHA is responsible for compiling, registering, processing and making available all information received under the POPs Regulation to the Commission and the Member States.²³³

The actions initially foreseen in ECHA`s annual work programme included tasks such as the support of the Commission in their participation in the regular meetings of the POPs Review Committee under the Stockholm Convention and to include POPs in the scope of the actions of the Forum for Exchange of Information on Enforcement.²³⁴ Following the Commission`s request,²³⁵ ECHA deleted these actions. Instead, the final programme only sets out two actions which are to support the Commission in their proposals for substances to be included in the Stockholm Convention and to ensure that the platform for data submission and reporting by the Member States is provided in a timely manner.²³⁶

²³³ Article 8 (1) (g) POP Regulation

²³⁴ ECHA, `Draft ECHA Programming Document 2021-2023` (2020), p. 59

²³⁵ Commission`s Opinion on ECHA`s Single Programming Document 2021-2023, para 34

²³⁶ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 64

4.4.2.3.3. Actions Programmed under the Waste Framework Directive (WFD)²³⁷

The Waste Framework Directive (WFD) sets out measures to prevent or reduce the generation of waste, address the adverse impact of waste on the environment and human health, and facilitate the transition to a circular economy.²³⁸ Until July 2018, when the revised WFD entered into force as part of the EU's action plan for the circular economy, specific tasks were not conferred on ECHA.

To help waste operators in sorting and recycling articles and to support consumers in making informed choices on the use and disposal of such articles, the revised Directive obliges the Member States to ensure that suppliers of articles containing substances of very high concern provide sufficient information on them.²³⁹ ECHA has the task to establish a database by 5 January 2021 on the information submitted by suppliers and to maintain that database. It is named Substances of Concern in Products (SCIP)²⁴⁰ and the actions programmed in ECHA's annual work programme focus on its operativeness by 5 January 2021. Hereby, the scope of tasks also comprises the creation of IT tools that allow EU suppliers to submit the required information to ECHA and to provide access to the database to waste treatment operators and, upon request, to consumers.²⁴¹ It also includes exploring the possible exchange of non-confidential data in a structured format within the AskREACH project,²⁴² a request that was already made by the Commission in its opinion on ECHA Single Programming Document 2020-2022.²⁴³

In its opinion on ECHA's draft Single Programming Document 2021-2023, the Commission reminded ECHA of its legal obligation to complete the establishment of the SCIP database within the foreseen deadline and to ensure that suppliers can

²³⁷ Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste [2018] OJ L150/109 (Waste Framework Directive)

²³⁸ Article 1 Waste Framework Directive

²³⁹ Article 9 (1) (i) of the revised Waste Framework Directive refers to Article 33 (1) REACH Regulation

²⁴⁰ SCIP: Substances of Concern In articles as such or in complex object (Products)

²⁴¹ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 60

²⁴² Project that helps consumers and companies to apply the "Right to Know" about substances of very high concern in consumer goods

²⁴³ Commission's Opinion on ECHA's Single Programming Document 2020-2022, para 28

notify information as of 5 January 2021.²⁴⁴As this deadline was already foreseen in ECHA's draft programme, the final version does not deviate in terms of the actions programmed.

4.4.3. Quality-Focused Analysis

In Frontex's case study, three categories were established to distinguish between the intensity of the Commission's comments. These were comments that relate to formalities of the programme, those on the prioritisation of activities and content related comments, the latter being further subclassified into requests for clarification of the programme, legal and competence related comments and autonomous requests.

Two important differences between the opinions on Frontex's programming and those on ECHA's could be observed. The first is that the Commission's comments on ECHA's draft Single Programming Document are less authoritative than those used in the opinion's on Frontex's Single Programming Document. In particular, no requests on the specific wording of a programmed objective or activity were made. The second one is that the opinions on ECHA's Single Programming Document have a different emphasis as they focus strongly on the efficiency of ECHA's work, an aspect that (so far) plays no role in the Commission's opinions on Frontex' programming. Conversely, only one comment addressed the formalities of ECHA's programme and also relatively few comments on legal and competence issues were made.²⁴⁵

The following graphic illustrates the classification of comments:

²⁴⁴ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 32

²⁴⁵ *ibid.*, para 5

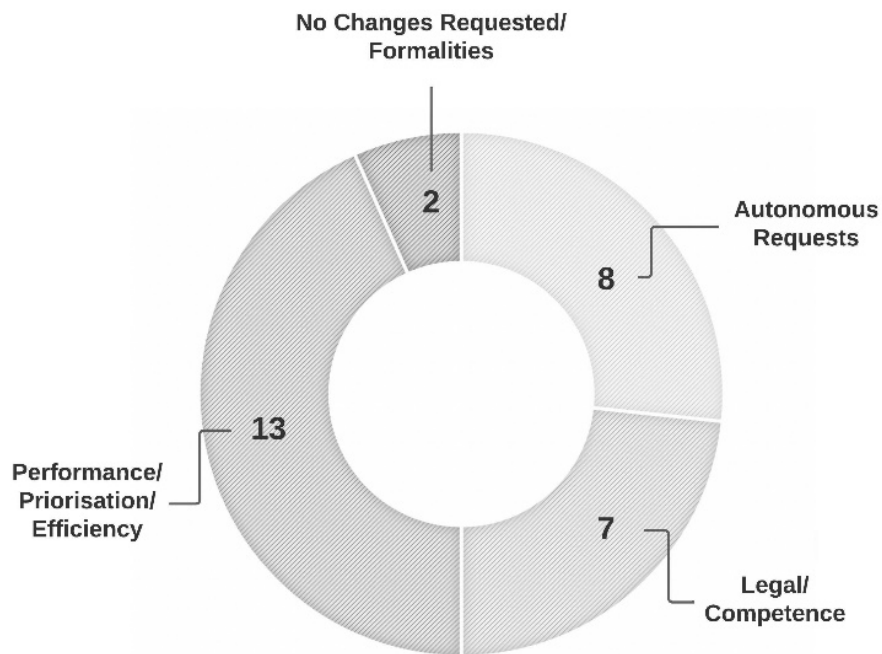


Figure 4: Classification of the Commission's Comments on ECHA's Single Programming Document 2021-2023

4.4.3.1. Performance/Prioritisation/Efficiency-Effectiveness

Similar to the opinions on Frontex's Single Programming Documents, no specific performance is requested. Instead, the Commission demanded that ECHA should further refine its performance indicators and review them regularly to allow measurement of its effectiveness and efficiency.²⁴⁶ Also, only one comment addressed the prioritisation of tasks. With regard to newly conferred tasks and in the light of the general resource constraints, the Commission 'invited' ECHA to 'a more careful prioritisation of all its tasks, identifying clearly which tasks are necessary to fulfil legal obligations and to prioritise those with the existing resources'.²⁴⁷ Apparently, ECHA considered this request as it highlights in its final programme that non-essential regulatory tasks have been deprioritised. Consequently, its multiannual programming outlines that ECHA's work focuses on the implementation of the first strategic priority while the objectives under the second and third strategic priorities

²⁴⁶ *ibid*, para 6

²⁴⁷ *ibid*, para 40

are pursued to a lesser extent than initially foreseen.²⁴⁸ A reallocation of human resources for the tasks programmed under the second and third strategic priorities compared to the first one could be observed to this end.

However, different from Frontex's programming nearly half of the Commission's comments concern the effectiveness and efficiency of ECHA's work especially in terms of the cost and time efficiency of its activities. Those comments include a request for a proposal for the adjustment of the current fees and charges systems that should take into account 'the efficiencies and the synergies the Agency has achieved or will achieve in the future'.²⁴⁹ Also, the Commission demanded that ECHA should improve the cost-effectiveness of its IT system and its SME Cloud Services.²⁵⁰ For the improvement of time efficiency, the Commission requested a reduction of the time-lag between submission and verification of the SME status²⁵¹ and demanded to identify the causes of delays in biocides procedures and develop actions to address them.²⁵² Other comments that address efficiency in more general terms are the request to improve the efficiency of compliance checks on registration dossiers,²⁵³ to assess regularly the effectiveness of its support to competent authorities in the context of the BPR review programme,²⁵⁴ to handle an increasing number of restriction dossiers while maintaining a high quality of the opinions,²⁵⁵ and to enhance its activities regarding the substitution of biocidal products.²⁵⁶

4.4.3.2. Content Related Comments

Different to comments on Frontex's draft Single Programming Documents where the Commission frequently requested the clarification of the agency's programming content, no specific request in this regard was made on ECHA's draft programme. Only once, on the actions programmed under the Biocidal Products Regulation, the

²⁴⁸ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 17

²⁴⁹ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 7

²⁵⁰ *ibid.*, paras 9 and 15

²⁵¹ *ibid.*, para 16

²⁵² *ibid.*, para 28

²⁵³ *ibid.*, para 19: with a deadline at the latest by 2027

²⁵⁴ *ibid.*, para 27

²⁵⁵ *ibid.*, para 25

²⁵⁶ *ibid.*, para 30

Commission asked ECHA to clarify those factors affecting the quality of opinions.²⁵⁷ However, while the comment uses the term `clarification`, it is considered as a material (autonomous) request, intended to improve the quality of ECHA's work.

4.4.3.3. Legal and Competence Related Comments

Also, comparably few comments were made on legal and competence issues of ECHA's programming.

Regarding potential competence conflicts with other agencies, the Commission remarked that it supports ECHA's cooperation with EFSA and EMA to achieve synergies and efficiencies on scientific and organisational aspects. However, the Commission also reminded ECHA to ensure early identification of potential sources of conflict between its opinions and those of other EU bodies.²⁵⁸ Also, 'to avoid the perception that ECHA is acting outside the boundaries of its mandate', the Commission requested ECHA to distinguish in its Single Programming Document between the regulatory actions under its remit and those falling under the remit of the Commission or the Member States.²⁵⁹ In this context, the Commission also requested ECHA to use the term 'the legislation the Agency implements' rather than 'ECHA legislation'.²⁶⁰ Regarding ECHA's cooperation with interested stakeholders to increase the skills base of companies in substitution towards safer substances and sustainable portfolio management, the Commission remarked that similar activities are undertaken by the Commission services. Therefore, ECHA's activities in this area should be carefully be coordinated with any other activities of the EU in this field.²⁶¹

Likewise, relatively few comments address ECHA's programming content in terms of its compliance with legislation. With regard to new tasks conferred on Frontex by the Waste Framework Directive, the Commission 'reminds that the establishment of the SCIP database is a legal obligation that the Agency has to complete within the legal

²⁵⁷ *ibid.*, para 29

²⁵⁸ *ibid.*, para 8

²⁵⁹ *ibid.*, para 12

²⁶⁰ *ibid.*, para 12

²⁶¹ *ibid.*, para 13

deadline, in accordance with the provisions in Directive (EU) 2018/851, to ensure that suppliers can notify information as of 5 January 2021'.²⁶²

Some of these comments address the legality of ECHA's actions in a wider context. An example is the Commission's request that ECHA should review and update its conflicts of interest policy regularly.²⁶³ Others refer to legal aspects that are rather self-evident such as the remark that the Committees should continue 'to deliver their opinions independent of policy influence and based on science and legal provisions as laid down in the REACH and CLP Regulations',²⁶⁴ and the comment that ECHA should ensure the transparency of its screening methodology and outcomes with respect of its Integrated Regulatory Strategy.²⁶⁵

4.4.3.4. Autonomous Requests

Autonomous requests are those which neither relate to competence nor legal issues and are not made for clarification purposes. These comments are particularly far-reaching because the Commission exceeds its role as a legal supervisor that ensures ECHA's compliance with its mandate. Instead, these comments intend to materially influence ECHA's programme. Only a few comments can directly be classified under this category. Examples are the Commission's request that ECHA's guidance on the registration of substances should take into account the outbreak of COVID-19 in particular with regard to necessary assistance towards SMEs.²⁶⁶ Also, the remark that ECHA should draw lessons from review reports of upstream authorisation holders is deemed as an autonomous request,²⁶⁷ as well as the Commission's demand that ECHA should update its guidance on human health and the environment for nanomaterials.²⁶⁸

²⁶² *ibid*, para 32

²⁶³ *ibid*, para 11

²⁶⁴ *ibid*, para 25

²⁶⁵ *ibid*, para 18: The transparency of agencies procedures is established under Article 15 (3) TEU which sets out that "Each institution, body, office or agency shall ensure that its proceedings are transparent [...]"

²⁶⁶ *ibid*, para 14

²⁶⁷ *ibid*, para 21

²⁶⁸ *ibid*, para 17

In this respect, it concerns the Commission request made regarding judgments of the EU General Court.²⁶⁹ Here, the Commission requested that ECHA should continue adopting appropriate measures as regards the opinion-making by the Committee for Socio-Economic Analysis (SEAC) on applications for authorisation to the extent these judgements are not inconsistent with the Commission's position in its appeal of Case T-837/16, that is to say Case C-389/19P, and to take appropriate measures to ensure consistency with the Commission's position in that appeal pending judgment by the Court of Justice.²⁷⁰ The demand that ECHA shall follow the Commission's position instead of the one applied by the EU General Court not only challenges ECHA's independence but also the legality of its actions.

The remaining comments refer to `semi-legal` commitments made by ECHA as they do not directly address its obligations under its respective legislations. Instead, they are based upon guidelines or refer to policy documents and strategies adopted by the Commission alone, developed together with ECHA, or adopted on ECHA's own initiative.²⁷¹ The most relevant example is the Commission's REACH review and the REACH Evaluation Joint Action Plan on which major parts of ECHA's Single Programming Document is built, as requested by the Commission in previous opinions.²⁷² Also, ECHA's programming (and comments of the Commission) under the Biocides Products Regulation orientate on the active substance Review Programme adopted by the Commission together with the national authorities and ECHA to speed up the reviewing of active biological substances. Hereon, the Commission noted that ECHA's activities are `significantly behind schedule`.²⁷³

This raises the question of the legal character these policy documents have. Primarily, the REACH review is a Communication adopted by the Commission in fulfilment of its reporting obligations vis-à-vis the Council and the European Parliament.²⁷⁴ It reports on the operation of REACH including the proposal of further

²⁶⁹ Case T-837/16 *Kingdom of Sweden v. European Commission* [2019] ECLI:EU:T:2019:144 and Case T-108/17 *ClientEarth v. European Commission* [2019] ECLI:EU:2019:215

²⁷⁰ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 23

²⁷¹ *ibid.*, para 24

²⁷² *ibid.*, para 20

²⁷³ *ibid.*, para 27

²⁷⁴ See Article 138 REACH Regulation

actions to be adopted.²⁷⁵ Several of these actions specifically address ECHA to this end.²⁷⁶ An action plan `agreed upon` between the Commission and ECHA transposes these actions.²⁷⁷ From the case study, it is evident that the Commission, as well as ECHA, feel committed to this action plan. Thus, even though no formal legal obligation derives from the action plan, still a contracting element can be observed. Whether this type of `contract` is comparable with performance contracts found in ministry-agency constellations of States is an aspect to be discussed in Chapter 5.

4.4.4. Reaction of ECHA

In its Board Meeting of 16-17 December 2020, ECHA's management board not only adopted its final Single Programming Document but also decided on its reply to the Commission's opinion which was issued on 19 January 2021.²⁷⁸ Such a reply is envisaged under Article 32 (7) FFR in case the agency does not fully take into account the opinion. Nevertheless, the tone of this reply expresses a considerable degree of self-esteem as the rejection of some of the Commission's requests are founded on the lack of resources.²⁷⁹

Also, the fact that considerable parts of ECHA's final annual work programme deviate from its draft version not only complicates the analysis of the extent to which ECHA has adhered to the requests made by the Commission, it also underlines ECHA's assertiveness. In some instances, parts of the actions initially foreseen in ECHA's annual work programme were removed in the final version. An example is the actions programmed under the POPs Regulation which have been reduced from five to two. Another example is the reduction of the envisaged opinions delivered by the Committees for Risk-Assessment and Socio-economic Analysis on authorisation for endocrine disruptors that have been decreased from initially 100 opinions to 50 in

²⁷⁵ COM(2018) 116 final

²⁷⁶ *ibid*, for example Action 8 on the Improvement of the Restriction Procedure

²⁷⁷ ECHA and European Commission, `REACH Evaluation Joint Action Plan` available at https://echa.europa.eu/documents/10162/21877836/final_echa_com_reach_evaluation_action_plan_en/0003c9fc-652e-5f0b-90f9-dff9d5371d17#:~:text=This%20action%20plan%20focuses%20on,all%20evaluation%20and%20enforcement%20processes. Accessed 13. July 2021

²⁷⁸ ECHA, 19.01.2021 D(2021) 0098

²⁷⁹ *ibid* with regard to the Commission's request to step up its efforts to reduce the time-lag between submission and verification for the post 2018 registrations under REACH

2021. In other instances, either the order of the actions or the wording of a specific action was altered. Remarkably also, the actions programmed under the PIC Regulation were initially considered under the first strategic priority whereas the final version programmes these actions under the third strategic priority.

ECHA does not explain in detail why its final programme deviates considerably from its draft version. Instead, its introduction to the annual work programme 2021 remarks that a higher priority to activities under the first strategic priority was given and consequently less to the second and third strategic priorities.²⁸⁰ Regarding its Integrated Regulatory Strategy, ECHA further explains that a more targeted interaction with industrial sectors on groups of substances will take place to address registration dossier compliance issues.²⁸¹

The disparity between the draft Single Programming Document and its final version is not in line with the programming obligations imposed on agencies under the Framework Financial Regulation. In particular, it contradicts the spirit and purpose of Article 32 FFR that requires agencies to submit a draft Single Programming Document to the Commission for its assessment; in this vein, subsequent alterations of the draft programme would require a renewed submission to the Commission for its assessment. This was not deemed necessary by ECHA which implies a considerable self-confident attitude towards the Commission.

Apart from these reservations, nearly all material requests made by the Commission led to alterations. Hereby, it must be considered that 5 out of 21 paragraphs of the opinion on ECHA's annual work programme did not specifically request alterations. Instead, they either comprise the appreciation of ECHA's programming such as its coherence with the Commission's REACH review and ECHA's commitment to continue working collectively together with EFSA for the alignment of CLP processes.²⁸² Other comments are rather self-evident such as the remark that ECHA should ensure that the scientific and technical expertise of its committees is of a high

²⁸⁰ ECHA Single Programming Document 2021-2024 supra n 116, p. 34

²⁸¹ *ibid*

²⁸² Commission's Opinion on ECHA's Single Programming Document 2021-2023, paras 20 and 26

standard and that its opinions are delivered independently from policy influence.²⁸³ Understandably, those comments were not further addressed by ECHA as well as the Commission's comments on the Court ruling in *Sweden v European Commission* and *ClientEarth v European Commission* where the Commission asked ECHA 'to take appropriate measures to ensure consistency with the Commission's position in that appeal pending judgment by the Court of Justice'.²⁸⁴

Only two instances were noted where ECHA disregarded the Commission's requests. The first concerned the demand that ECHA should update its Single Programming Document to take into account the outbreak of COVID-19 in assisting and alleviating the burden on duty holders and in particular SMEs. The second request that was not considered was that ECHA should establish and ensure the operability of the SCIP database by 5 January 2021. However, as could be observed on ECHA's website the database is already in operation.²⁸⁵

The remaining 14 comments led to alterations to ECHA's annual work programme, even though, it sometimes appears that these changes are symbolic rather than they are intended to change the programme materially. Yet, a similar assumption was also made on Frontex's programming. Despite this reservation, the following analysis is made. Two out of 14 comments relate to legal aspects of ECHA's programme. They comprise the Commission's request that ECHA should ensure transparency on the screening methodology and outcomes of its Integrated Regulatory Strategy.²⁸⁶ Accordingly, ECHA included a separate section in its introduction to the annual work programme where it explains its strategy in more detail and also indicates that the information published on its website will be increased.²⁸⁷ The Commission's request that ECHA should ensure that its committees' opinions include an assessment of the suitability of alternatives was also adopted in the final work programme.²⁸⁸

²⁸³ *ibid*, paras 22 and 25

²⁸⁴ *ibid*, para 23

²⁸⁵ <<https://echa.europa.eu/scip>> accessed 22 June 2021

²⁸⁶ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 18

²⁸⁷ ECHA Single Programming Document 2021-2024 *supra* n 116, pp. 35 and 45

²⁸⁸ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 49; Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 23

Four out of five comments that are classified as autonomous requests were considered by ECHA in its final programme. One of them concerns the registration of substances where the Commission requested that ECHA should update its guidance on human health and the environment concerning nanomaterials.²⁸⁹ The second refers to the applications for authorisation covering multiple operators where the Commission encouraged ECHA to draw lessons from review reports from upstream authorisation holders to identify how applications for authorisation and the underpinning supply chain communication can be further improved.²⁹⁰ In this respect, ECHA's final programme now contains that 'the lessons learnt will be communicated, including those learnt from the downstream user notifications'.²⁹¹ Also, the Commission reminder that ECHA should keep considering the Commission's Better Regulation guidelines for evaluations and impact assessment when it prepares restriction dossiers was considered insofar as ECHA's final programme envisages the comparison of its own guidelines with the Commission's guidelines and to adapt them where 'possible and necessary'.²⁹² Finally, regarding ECHA's tasks to process export notifications, the Commission reminded it that its ePIC application needs to be adjusted due to the withdrawal of the UK from the European Union. This comment as well as the Commission's warning that ECHA's dissemination of information on the export and import of hazardous chemicals urgently requires an update led to alterations to its programme accordingly.²⁹³

As noticed before, the majority of the Commission's comments concern performance-related aspects of ECHA's programming in a broader context insofar as they address efficiency related aspects of ECHA's activities. They either request an increase of the cost and time effectiveness or an increase of ECHA's outcome with regard to the screening of registration dossiers and the delivery of opinions. Hereby, the Commission refers to the targets agreed upon in the action plans that have been

²⁸⁹ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 44; Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 17

²⁹⁰ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 21

²⁹¹ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 49

²⁹² ECHA Single Programming Document 2021-2024 *supra* n 116, p. 51; Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 24

²⁹³ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 63; Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 23

developed together with ECHA. However, as requests to increase the performance generally were not accompanied by additional financial or human resources, ECHA's alterations led to a decrease of other activities programmed.

To improve ECHA's cost-effectiveness on the dossier preparation, the Commission requested that it should finalise by the first quarter of 2021 at the latest its assessment whether the SME Cloud Services should become the sole delivery model for IUCLID, a request that ECHA followed accordingly.²⁹⁴ The Commission also demanded that ECHA should step up its efforts to reduce the time-lag of registrations by SMEs by already verifying their status at the completeness check stage. This request was only indirectly considered with an action that outlines to provide input to the Commission on its review concerning the micro, small and medium-sized enterprises.²⁹⁵

On ECHA's Integrated Regulatory Strategy, the Commission requested that ECHA should step up compliance checks on registration dossiers to address all substances of concern by 2027.²⁹⁶ To this end, the Commission demanded that ECHA should enhance its efficiency through improved working methods that ensure the ability of the Member State Committee to cope with an increased workload.²⁹⁷ Several alterations were adopted by ECHA in its final programme in this regard. First, that the human resources allocated to the screening of registration dossiers were increased from 47 to 58 FTEs in 2021,²⁹⁸ which led to a decrease of human resources allocated for evaluation tasks from initially 116 FTEs to 110 FTEs. Secondly, while the draft programme did not set out a specific outcome, the final version indicates the expected number of groups of substances to be screened.²⁹⁹ Thirdly, the actions programmed envisage to prioritise the groups for screening and enhancing the

²⁹⁴ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 38; Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 15

²⁹⁵ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 41; Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 16

²⁹⁶ A target that is set out in ECHA and Commission, 'REACH Evaluation Joint Action Plan' *supra* n. 32

²⁹⁷ Commission's Opinion on ECHA's Single Programming Document 2021-2023 Para 19

²⁹⁸ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 44

²⁹⁹ 70 groups of substances

implementation of the regulatory strategy by continuing to optimise the collaboration structures.³⁰⁰

Regarding ECHA's restriction tasks, the Commission more generally addressed efficiency and effectiveness aspects and welcomed that ECHA's programmed actions under Article 69 (2) of the REACH Regulation are progressing faster.³⁰¹ Even though no specific action was requested, ECHA's final programme noted that it will continue to speed up the screening and added seven FTE's for these tasks.³⁰²

On the Action Plan intended to accelerate the review programme on active substances, the Commission remarked that ECHA is 'significantly behind schedule'. Insofar, the Commission requested that ECHA should continue monitoring the delays in biocides procedures (mutual recognition, national and Union authorisation), identify the causes of the delays and develop actions to address them.³⁰³ The Commission emphasised the importance to move forward with the peer review of the evaluation reports on biocidal active substances submitted by the Member States and to support them in the assessment of whether those substances have endocrine properties.³⁰⁴ Also, the Commission requested that ECHA should assess regularly the effectiveness of its support. Its final programme inserted a separate section on its review programme where it set out its target to increase the peer reviews and Biocidal Products Committee opinions from 29 to 38 opinions in 2021.

4.5. Conclusions

In several respects, the outcome of this chapter is different from Frontex's case study. This is not only that the Commission's opinions on ECHA's draft programme are considerably briefer and appear less authoritative as no explicit requests to alter the programming content were made. In this spirit, ECHA's attitude also appears to be more self-confident. This distinguishes the opinions on ECHA's Single Programming

³⁰⁰ ECHA Single Programming Document 2021-2024 *supra* n 116, p. 43

³⁰¹ Evaluation of substances on the Authorisation List after the sunset-date where ECHA may draw up evaluation dossiers on its own initiative; Commission's Opinion on ECHA's SPD 2021-2023, para 21

³⁰² ECHA Single Programming Document 2021-2024 *supra* n 116, p. 52

³⁰³ Commission's Opinion on ECHA's Single Programming Document 2021-2023, para 28

³⁰⁴ *ibid.*, para 27

Documents considerably from those on Frontex's programming where the Commission sometimes even dictated the wording of an objective or activity.

Also, ECHA's programming structure differs from Frontex's as a clear link between the strategic priorities and the actions programmed in the annual work programme was not obvious. Contrary to the requirements set out in the Framework Financial Regulation, the structure of the annual work programme does not correspond with ECHA's multiannual programming but orientates on the different legislations that confer tasks on ECHA. Another aspect that questions the conformity of ECHA's programming with the requirements set out under Article 32 FFR is that the final annual work programme for 2021 deviates considerably from its draft version.

Apart from these formal aspects, a strong emphasis on para-legal documents was noticed. Frequently, comments by ECHA as well as the Commission refer to policy papers and strategies developed by the Commission itself or with ECHA's participation. To this end, as requested by the Commission, the majority of ECHA's programming orientates on the actions proposed in the Commission's REACH review. Likewise, ECHA's programming and also the Commission's comments referred repeatedly to the targets set out in action plans.

Consequently, it was observed that the Commission's opinions strongly focus on efficiency-related aspects of ECHA's work either in terms of requests that ECHA should improve its cost and time effectiveness or that the increase of the outcome for a specific action was demanded. In this respect, nearly half of the Commission's comments addressed the efficiency of ECHA's work which distinguishes the quality of comments considerably from those on Frontex's programming where the majority of comments addressed legal and competence issues.

These observations have repercussions for the assessment of the Commission's role when it comments on ECHA's programming. Different to Frontex's case study, where the Commission mainly acts as a legal supervisor, a similar conclusion cannot be established in ECHA's case. Instead, the constellation where targets are set out that ECHA transposes in its Single Programming Document on which the Commission

subsequently comments, resembles performance contracting used in ministry-agency relationships. However, one reservation has to be made. A necessary element of performance contracting is that consequences arise if the agreed outcome is not achieved. This requirement is not met as no direct consequences arise if ECHA does not meet the targets established. Instead, it is the negative comment of the Commission and, potential budgetary consequences in subsequent years that can be considered as a consequence. Whether this is sufficient to establish a kind of ministry-agency relationship is a topic that needs to be examined further in the next (concluding) chapter.

Chapter 5: Reflections on the Case-Study and Suggestions for Legislative Improvements

5.1. Introduction

This chapter evaluates the findings of this work to answer the research questions posed at the beginning. For this purpose, the results of the case study are assessed from two perspectives. The first is to evaluate the intensity and effectiveness of control exercised by the Commission over an agency's programming. This depends not only on the quality of the comments but also on how effective they are, i.e. to what extent the Commission's requests are observed by the agency in its final programme. Also, the motives for an agency to comply with the Commission's requests are of interest as well as the question of how independent agencies are in their programming. These aspects are addressed in Section 5.2.

Section 5.3. evaluates the Commission's role from a broader perspective. In this respect, it is considered to make a difference whether the Commission merely acts as a legal supervisor that ensures that an agency's programme is in line with the tasks conferred or beyond that actively interferes with the material programming content of an agency. As the latter not only affects the agency's independence but potentially also the interests of other institutions and that of the Member States, its outcome has relevance for the institutional balance of the European Union (Section 5.4.). In light of the considerable degree of control exercised by the Commission, the question of whether the relationship between the Commission and agencies converges towards a ministry-agency kind of arrangement is addressed in Section 5.5. Apart from highlighting already existing similarities, its purpose is to illustrate the need for a legal framework that governs the relationship between the Commission and agencies comprehensively. To this end, Section 5.6. assesses whether the present legal framework allows for measures of control exercised by the Commission and makes suggestions for legislative improvements.

The answers to the research questions are provided in the conclusions of this work (Chapter 6).

5.2. Intensity and Effectiveness of the Commission's Comments

The Framework Financial Regulation does not specify the scope of the Commission's opinions nor does it indicate what quality the Commission's opinion shall have. Nevertheless, as noticed in the case study, the opinions addressed every aspect of the programme and included even topics that were not directly related to the agency's programme.¹

As not all comments have the same impact on an agency's programming freedom, they were classified in terms of their intensity.² Herby, it was noticed that its impact on an agency's programming autonomy is less intense when made on activity than on a multiannual objective, the latter constituting the top layer of the whole programme. However, while several comments of the Commission criticised the phrasing of a multiannual objective for legal and competence reasons, no direct requests for the material alteration of a strategic objective were made. Especially on Frontex draft programming 2020-2022, which was the first one adopted under the new Regulation (EU) 2019/1896, the Commission recurrently dictated the wording of activities and even requested the rephrasing of multiannual objectives and focus areas for competence reasons.³ Also, several instances were noted where the Commission pro-actively asked for the programming of new activities. However, it was noted that these comments were not phrased as requests but as recommendations.⁴

The case study of ECHA was different as the majority of comments related to the efficiency of its work.⁵ Overall, comparably few comments specifically requested the

¹ For example, the request that Frontex should conclude a working arrangement with DG Home for handling international activities; Opinion on Frontex Single Programming Document 2020-2022, para 63

² See Figure 3 in Section 3.4.3.3.

³ Most prominently, the request to change the horizontal objective 'develop and implement the European Integrated Border Management' into 'implement the European Integrated Border Management'; see Opinion on Frontex Single Programming Document 2020-2022, para 23; also, for Frontex focus area in the area of combatting cross border crime the Commission requested to rephrase it.

⁴ For example, the 'invitation' to programme activities for the implementation of the future voluntary return and reintegration strategy announced in the New Pact of Migration and Asylum; see Opinion on Frontex Single Programming Document 2021-2023, para 9

⁵ See Section 4.4.3.1.

prioritisation of activities and for both case studies, no comment was found where the Commission demanded a specific outcome for an activity.

The question of how effective the Commission's exercise of control is depends on the implementation rate. Even though the Framework Financial Regulation does not explicitly require that an agency adopts the comments of the Commission, throughout the case study it was observed that agencies followed the Commission's requests to a large extent and adjusted their final programme in accordance with the comments made. A similar high implementation rate was noticed in the case of Frontex and ECHA.⁶ In particular, precise requests, where the Commission dictated the wording of an activity or commented on formal and legal aspects, were implemented in the majority of cases.⁷ Conversely, it was noticed that comments of a rather vague nature were frequently not considered in the final programme. A similar observation was made with regard to autonomous requests where it was noticed that Frontex only considered 10 out of 24 of the Commission's requests in its programming 2020-2022.⁸ Remarkably, however, the majority of comments on ECHA's programme, which strongly focussed on efficiency-related aspects, were noticed, even though its implementation was more demanding than comments on formal or legal aspects.⁹

Despite the high implementation rate, it is not entirely clear what the motives for an agency are to comply with the Commission's requests. As no direct consequence arises in case of non-compliance, the agency is, apart from taking the comment 'into account', legally not obliged to follow the Commission's requests. Allegedly, budgetary considerations of the agency are its main incentive as the Commission is in the position to propose an agency's budget. As now enshrined under Article 17 (4) of the Framework Financial Regulation, 'the estimate of the budget result shall be duly taken into account by the Commission when proposing an agency's budget'.

⁶ See Section 3.4.4. (for Frontex) and Section 4.4.4. (for ECHA)

⁷ In Frontex's case study, 14 out of 16 comments on competence or legal issues and 6 out of 8 on clarification aspects.

⁸ See section 3.4.4.; however, ECHA's programme considered four out of five comments in its final programme

⁹ 14 out of 16 comments on the annual work programme led to alterations and even four out of five comments that are regarded as autonomous requests.

Likewise, it was not possible to establish what impact changes of the final programme have on the practical work of an agency. In some instances, it appeared that alterations of the final programme were of a symbolic nature, intended to please the Commission rather than that they comprised material changes of the programming content. An example is the Commission's request to elaborate on the transmission of operational personal data which appeared in Frontex's final programme only as a footnote.¹⁰

Another aspect that relativises the high implementation rate is the increasing influence of the European Parliament and the Council on the programming procedure. Like several other founding Regulations, Article 102 of Regulation (EU) 2019/1896 now obliges Frontex to consult the European Parliament and the Council on its multiannual work programme and to give a 'thorough justification' on elements raised during the consultation. Yet, so far, no documents are available to verify the involvement of these institutions, however, this does not exclude that collaboration takes place in a rather informal setting.

Furthermore, even though the Commission may comment on an agency's draft programme, it is not in the position to dictate an agency's programming content. The content remains the responsibility of the agency which distinguishes the programming procedure from performance contracting where the ministry department issues the letter of instruction.¹¹

Therefore, a question recurrently addressed in this work was how agencies establish their multiannual objectives being the top-layer of the Single Programming Document. The programming documents do not explain sufficiently what motives guide their programming. Noticeable though, neither Frontex nor ECHA make explicit reference to programming documents of its 'parent' Directorate-General. More broadly instead, they list all potentially relevant legislation and political frameworks

¹⁰ Frontex Single Programming Document 2021-2023, SO1, key activity 1.1.2. Frontex, 'Management Board Decision 1/2021 of 13 January 2021 adopting the Single Programming Document 2021-2023 including the Multiannual Plan 2021-2023, the Programme of Work 2021 and the Budget 2021 (the Establishment Plan as Part of it)' (January 2021) available at https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_1_2021_adopting_SPD_2021-2023.pdf accessed 24 June 2021 (Single Programming Document 2021-2023); pp. 11-13

¹¹ See Section 5.5. of this chapter

(including policy papers of the Commission) as influencing factors. That this does not facilitate an understanding of how multiannual objectives are developed illustrates Frontex single programming document for 2021-2023 where 34 legislative influencing factors and 28 political frameworks are quoted.¹²

Whereas the Commission noted that the multiannual objectives should reflect all tasks an agency performs,¹³ the fact that an agency's single programming document only sets out three or four multiannual objectives indicates that prioritisation is involved. In the future, Frontex's multiannual work programme will be influenced by the Commission's multiannual strategic policy cycle for European integrated border management.¹⁴ However, as this strategy has not been adopted yet, for the time being, Frontex's multiannual work programme orientates on its technical and operational strategy for European integrated border management, the strategic objectives of which are identical with those of the programming document.¹⁵ Similarly, ECHA's multiannual work programme is 100% identical with its strategic plan 2019-2023,¹⁶ but it is also evident that major parts of its strategic priorities are derived from the Commission's General Report on the operation of REACH (REACH review).¹⁷

5.3. Evaluation of the Commission's Role within a Broader Context

In the absence of a legal framework that shapes the relationship between the Commission and agencies, its motives to exercise control over an agency's

¹² Frontex Single Programming Document 2021-2023 *supra* n 10, SO1, key activity 1.1.2.

¹³ Commission, 'Commission Opinion of 29.11.2019 on the Single Programming Document containing the draft multiannual programming for 2020-2022 and the draft Annual Work Programme for 2020 ('Single Programming Document for 2020-2022') of the European Border and Coast Guard Agency' C (2019) 8715 final, para 56

¹⁴ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulation (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1 (Frontex Regulation 2019), Article 102 (3)

¹⁵ Commission, 'A strategy towards a fully functioning and resilient Schengen area' COM (2021) 277 final, p. 5 where the Commission announces that these discussions will be launched shortly; Frontex, 'Technical and Operational Strategy for European Integrated Border Management' (May 2019) available at ><https://op.europa.eu/en/publication-detail/-/publication/2123579d-f151-11e9-a32c-01aa75ed71a1>> accessed 16 June 2021

¹⁶ ECHA, 'ECHA Strategic Plan 2019-2023' (December 2018) https://echa.europa.eu/documents/10162/26075800/echa_strategic_plan_2019-2023_en.pdf/3457ccff-7240-2c1f-3a15-fa6e5e65ac56 accessed 24 June 2021

¹⁷ Commission, 'Commission General Report on the operation of REACH and review of certain elements, Conclusions and Actions' COM (2018) 116 final

programme are not clearly spelled out. Nevertheless, from the results of the case study it is possible to determine the influencing factors that shape the Commission's respective roles when it comments on an agency's programme.

Initially, it was expected that the selection of two contrasting agencies, operating in different policy areas and performing different tasks, has repercussions on the outcome of the case study. Particularly, it was anticipated that ECHA as an internal market agency is more under the Commission's control than Frontex as a former 'Council agency'. Surprisingly, the aforementioned factors had no evident influence. The contrary, it was even noticed that the Commission is more lenient with ECHA than with Frontex, the former agency also demonstrating a more self-confident attitude towards the Commission throughout the programming procedure.¹⁸

Insofar, factors that are not inherent to the agency's 'personality' determine the degree of control exercised by the Commission over an agency's programme. This was evident in the Frontex case study where the quality and intensity of the Commission's comments varied amongst the programming years examined. Hereby, it was observed that in light of the new responsibilities conferred by Regulation (EU) 2019/1896, the Commission's opinion on Frontex Single Programming Document 2020-2022 focused strongly on legal and competence aspects underlined by particular authoritative comments. By way of contrast, in its opinion on Frontex's Single Programming Document 2021-2023, the Commission's focus shifted towards more efficiency-related aspects. Apart from that, the Commission's focus on legal aspect was also noted in ECHA's case study albeit to a lesser extent than it was observed for Frontex.¹⁹

5.3.1. The Commission as a Legal Supervisor

In general terms, the Commission's role as a legal supervisor can be described as follows: Where new tasks have been conferred on an agency, the Commission takes the responsibility that these are considered in the agency's programme, both with regard that all new tasks are addressed in an agency's programme and also that the agency does not transgress its competences.

¹⁸ See Section 4.4.1.

¹⁹ See Section 4.4.3.

Yet, to establish that the Commission frequently comments on legal aspects does not fully explain its motives, especially as there is no explicit legal obligation for the Commission in this respect: The Framework Financial Regulation obliges the Commission to give its opinion on an agency's draft programme but there is no indication that the Commission bears the legal responsibility for an agency's programme. In some instances, specific responsibilities for agencies derive from the agency's founding Regulations, even though its nature is not purely legal. For example, Article 59 of Regulation (EU) 2019/1896 obliges the Commission to provide a report to the European Parliament and the Council in respect of the expertise and professionalism of the standing corps and its training, which explains the recurrent comments on Frontex's programme address training aspects of the standing corps.²⁰

An inter-institutional obligation also arises from the Common Approach which obliges the Commission to inform the European Parliament and the Council where the management board is about to make a decision that may not comply with the agency's mandate, violates EU law or is in manifest contradiction with EU policy objectives.²¹ Nevertheless, as the Treaties do not specifically address European agencies, a universal legal responsibility of the Commission for agencies is not apparent. Apart from Article 17 TEU which confers on the Commission the obligation to ensure the application of the Treaties and executive functions, the Treaty framework is incomplete in terms of the agency's governance.²²

5.3.2. The Commission as a Budgetary Supervisor

Also, budgetary aspects influence the Commission's opinions and its role as a budgetary supervisor is the most evident one under an agency's programming procedure.

The Commission is not only responsible for the execution of the EU budget,²³ but also the Single Programming Document and thus the whole programming procedure

²⁰ For example, Opinion on Frontex Single Programming Document 2021-2023, para 60; Opinion on Frontex Single Programming Document 2020-2022, para 67

²¹ Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies (Common Approach on European Agencies) 2012, Paragraph 59

²² See Section 5.6.1.

²³ Article 17 TEU

including the Commission's involvement therein is part of the establishment of an agency's budget.²⁴ Furthermore, budgetary contributions allocated to agencies are part of the Commission's expenditure of the EU's general budget.²⁵ The Commission's responsibility for efficient use of agency's human and financial resources is highlighted in the Council's position on the draft general budget for the financial year 2021 where it requested that the Commission should assess how staff resources for agencies could be optimised and pronounced a reduction of 140 posts from the Commission's establishment plan to offset the increase on side of the agencies.²⁶

It was noticeable that the Commission's budgetary comments are comparatively brief but authoritative and apparently not subject to discussions with the agency. Yet, in its comments, the Commission referred repeatedly to the Multiannual Financial Framework and highlighted the dominant position of the European Council.²⁷ This aspect underlines that the Commission's role is limited to supervisory functions and that the Commission does not have its own discretion on the allocation of human and financial resources for agencies.

Apart from its role as a budgetary supervisor, financial aspects are also relevant in other respects. Major contributions from the EU budget indicate the political salience of the policy field in which the agency operates. This aspect is most noticeable for Frontex whose budget has increased more than for any other European agency from EUR 40 million in 2007 to EUR 575 million in 2021. These high contributions impose considerable expectations on all actors involved regarding the successful transposition of the objectives linked to this spending and explains why the Commission is particularly strict with Frontex. Conversely, budgetary aspects also have relevance where the budgetary contributions are rather limited. An example is ECHA that has to cope with comparably low contributions from the EU budget

²⁴ Article 32 FFR is part of Title III Chapter 1 of the Framework Financial Regulation

²⁵ See for the financial year 2021: Definite Adoption (EU, Euratom) 2021/417 of the European Union's general budget for the financial year 2021 [2021] OJ L91/1

²⁶ Council, 'Draft general budget of the European Union for the financial year 2021: Council position' 7 September 2020 10378/20; Council, 'Decision adopting the Council's position on the draft general budget of the European Union for the financial year 2021' OJ 2020 C323 I/1, p. 2

²⁷ See for example, Opinion on Frontex Single Programming Document 2021-2023, para 71; also, Opinion on ECHA's Single Programming Document 2021-2023, para 41

accompanied by a decrease in its own fee income. These shortcomings explain the Commission's focus on efficiency aspects in ECHA's programming.

To a lesser extent, efficiency also played a role in the Commission's opinion on Frontex's Single Programming Document 2021-2023. Hereby, budgetary shortcomings were not the primary motive for requesting the prioritisation of activities but were because of their high political relevance. In this respect, for both agencies, the Commission repeatedly referred to policy documents to highlight the political importance of certain activity areas.

5.3.3. The Commission as a Political Supervisor

Increasingly, agencies operate in policy fields with high political relevance. Especially Frontex's area of operation, the area of freedom, security and justice, has gained the highest political priority. The effective control of external borders is one of the top priorities set out in the strategic agenda of the European Council and is also reflected in the political guidelines of the European Commission.²⁸ Various policy documents adopted by the Commission to this end specifically address Frontex in this regard.²⁹ Also, the Commission's opinion on Frontex's draft programme takes a political connotation when it demands that Frontex should use its mandate in the area of return to the fullest possible extent.³⁰ To a lesser extent but also with high political priority is the policy area in which ECHA operates. Following its Communication on the 'European Green Deal', the Commission adopted a new Chemicals Strategy for Sustainability which envisages a 'new long-term vision for the EU's chemical policy'.³¹

²⁸ European Council 'A New Strategic Agenda 2019-2024' (June 2019) available at <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf> accessed 24 June 2021; President of the European Commission, 'Political Guidelines for the next European Commission 2019-2024 'A Union that strives for more'' (July 2019) available at https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf accessed 24 June 2021

²⁹ For example, Commission, 'Progress Report on the Implementation of the European Agenda on Migration Annex 6' COM (2018) 250 final; also, Commission, 'On a more effective Return Policy in the European Union- the Renewed Action Plan' COM (2017) 200 final.

³⁰ Opinion on Frontex Single Programming Document 2020-2022, para 33; with regard to the European Councils critical review of the Union's return policy: European Council Conclusions of 20-21 October 2016, EUCO 31/16; also, the Malta Declaration of Heads of State or Government of 3 February 2017 where the need to start a critical review of European Union return policy was highlighted.

³¹ Commission, 'Chemicals Strategy for Sustainability Towards a Toxic-Free Environment' COM (2020) 667 final

Thus, for the fulfilment of its political commitments, the EU's institutions rely on agencies but vice-versa the political relevance of agencies' activities indicate its dependence on political considerations. The 'politicisation' of agencies also becomes visible under the new Framework Financial Regulation where it is expected that agencies demonstrate how their strategic programming contributes to the achievement of the EU political priorities.³²

5.3.4. The Commission's Role as a 'Judge'

Apart from these legal, budgetary, and political motivated comments, in several instances the Commission does not specifically request alterations to the programme. Instead, these comments assess the programme rather than they comprise constructive criticism. Especially on Frontex programming, a relatively large share of comments does not explicitly request alterations of the programme.³³ Other comments of the Commission are held to be too vague to expect the agency's observance. An example is the Commission's remark on Frontex Single Programming Document 2020-2022 that 'many parts of the strategic framework do not recognise the existing legal, institutional and political arrangements in place, notably do they not reflect the competences of EU institutions or other EU agencies as well as competences of Member States in the customs area'.³⁴

Contrary to the notion of Article 32 FFR, these types of comments judge the programming content. As Article 32 FFR expects the agency to reflect the Commission's opinion in its final programme, comments should be phrased in a manner that enables agencies to follow these requests. Instead, these comments are either intended to demonstrate to the Council and the European Parliament the Commission's awareness of potential shortcomings of the programme or that the Commission simply wishes to demonstrate its superiority towards the agency concerned.

³² Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (Framework Financial Regulation) [2019] OJ L122/1, Article 32 (2)

³³ For the Commission's Opinion on Frontex Single Programming Document 2021-2023 sixteen comments (out of 68) were counted in this respect; see figure 1

³⁴ Commission Opinion on Frontex Single Programming Document 2020-2022, para 20

5.3.5. The Commission's Role as an 'Influencer'

Also, challenging is the significant number of autonomous requests.³⁵ These comments are particularly far-reaching because the Commission exceeds its role as a legal, budgetary or policy supervisor and intends to materially influence an agency's programme. With autonomous requests, the Commission pro-actively tries to interfere with the programming autonomy of an agency and asks for the inclusion of activities that were so far not considered in the agency's draft programme.³⁶ Other comments fall outside the scope of the Commission's competences under Article 32 FFR as they do not relate to the agency's programming but address the relationship between the Commission and agencies in more general terms. An example is the Commission's request that Frontex should finalise an appropriate working arrangement with DG Home for handling international activities.³⁷ In few instances, it was even noticed that the Commission challenged an agency's scientific independence. The most significant example is the Commission's request that ECHA should adopt its position in the pending case *Sweden v Commission*.³⁸

Whereas all previous motives of the Commission have been mainly to support the interests of the European Union, with these types of comments the Commission also pursues its own interests. Such a development was already expected by other authors who predicted that the conferral of competences on agencies will lead to attempts by the Commission to 'recuperate lost terrain' through practices that are 'congenial to its interests'.³⁹

5.3.6. Conclusion

In conclusion, therefore, the Commission's role when commenting on an agency's draft Single Programme must be described as a flexible one that depends on the legal, budgetary and political circumstances under which the programme was developed.

³⁵ See Section 3.4.3.6.

³⁶ Such as the Commission's invitation to programme activities for the implementation of the future voluntary return and reintegration strategy in Frontex Single Programming Document 2021-2023, Opinion para 9

³⁷ Commission Opinion on Frontex Single Programming Document 2020-2022, para 63

³⁸ See Section 4.4.3.4.

³⁹ M Chamon, *EU Agencies Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016) p. 126

In this regard, the Commission simultaneously can act as a legal supervisor and a budgetary supervisor or ensure the implementation of policy objectives into the agency's programme. Also, the Commission sometimes takes the opportunity to pursue its own interests when commenting on the programme.

5.4. Effect of the Commission's Control on the Institutional Balance

Holding that the Commission exercises control over European agencies raises the question of what impact these findings have on the institutional balance of the European Union. Especially for agencies, the institutional balance principle has attracted considerable academic attention as they are not formally recognised under the Treaties, but have far-reaching powers are conferred on them. In this work, however, the perspective is different, as it is not the conferral of powers on agencies that is at stake but what impact the Commission's exercise of control might have on the institutional balance.

More than sixty years after *Meroni*,⁴⁰ the institutional balance remains an 'enigmatic' concept as neither is its constitutional purpose entirely clear nor how the principle is applied in practice. In *Meroni*, the Court prevented the delegation of discretionary powers to a body not institutionally recognised under the Treaties. However, the Court's primary intention to protect an individual against arbitrary decisions has lost its practical relevance since the Treaty of Lisbon introduced judicial remedies against unlawful acts of agencies.⁴¹ This raises the question of what purpose the institutional balance still has. In its traditional notion, the institutional balance expects that institutions act within the limits of the competences conferred, a principle that is already safeguarded under Article 5 TEU. It is only in exceptional circumstances that the institutional balance might serve as a gap-filling principle to protect the prerogatives of an institution.⁴²

⁴⁰ A Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] EU:C:1958:7

⁴¹ Article 263 (1) TFEU

⁴² Such as in *Chernobyl* where the Court of Justice granted the European Parliament an active locus standi; see Case C-70/88, *European Parliament v Council* [1988] ECLI:EU:C:1990:217

For the Union's executive governance, Articles 290 TFEU and 291 TFEU established a new institutional balance. Under Article 291 TFEU, Member States are primarily responsible for the implementation of Union acts; only where uniform conditions require, implementing powers may be conferred on the Commission which is then subject to the Member States' control through comitology. Thus, nothing in Article 291 TFEU indicates that the Commission is entitled to exercise control over agencies. Conversely, however, it cannot be inferred from Article 291 TFEU that the institutional balance is affected when the Commission exercises control over agencies as the latter's governance is not addressed under Article 291 TFEU.

In this light, it is rather the spirit that derives from Article 291 TFEU which is that the Member States exercise control over the Commission and not vice-versa. This notion cannot be considered under the traditional institutional balance which relies on the written Treaty framework. Only the modern view on the institutional balance as proposed by Jacques as well as by Lenaerts and Verhoeven takes into account that the constitutional reality of the European Union is more complex than the Treaties and adds the element of 'fair interest representation' to the notion of the institutional balance.⁴³

Fair interest representation acknowledges that control over agencies affects various interests involved in the governance of agencies. Even though this work promotes the idea of a supranational image of agencies, it is also acknowledged that Member States' interest in agencies' governance not only derives from its membership of the management board but also Article 291 TFEU. As the Commission exercises control through formally non-binding opinions, the transposition of the comments requires the cooperativeness of the management board that finally adopts the programming document. Against this background, the high implementation rate is remarkable and indicates that the management board accepts the Commission's strong position in the course of the programming procedure.

⁴³ J-P Jacqué 'The Principle of Institutional Balance' (2004) 41(2) *Common Market Law Review* pp 383-391 p 384; K Lenaerts and A Verhoeven 'Institutional Balance as a Guarantee for Democracy in EU Governance' in Joerges C and Dehousse R (eds), *Good Governance in Europe's Integrated Market* (OUP 2002) 35-88, p. 40

An explanation for this high degree of compliance is the Member States' interest in the effective functioning of agencies. After all, agencies are predominantly financed from the general budget of the EU and the Member States thus have an interest that 'their money' is spent economically. This explains that efficiency plays a significant role in the Commission's opinions as well as budgetary aspects in general. Therefore, while the interests of the Member States are affected through the Commission's exercise of control, the Commission also safeguards Member States' interests through its opinions. That the Commission even acts as a 'guardian' of national interests is apparent from comments on Frontex's programming document 2020-2022 wherein several instances the Commission expressed its concern that Frontex might transgress its competences to the detriment of the Member States.⁴⁴

Also, the EU institutions have an interest that the Commission takes oversight over agencies. After all, the European Parliament and the Council impose upon the Commission the political responsibility for agencies.⁴⁵ Furthermore, the European Parliament, responsible for the discharge of the budget, is responsible to control agencies in this respect. However, this control is exercised *ex-post* whereas the Commission already ensures at an early stage that an agency's programme complies with the budgetary requirements of the Framework Financial Regulation. Insofar, the Commission also safeguards the interests of the European Parliament when it requests Frontex and ECHA to improve the quality of its performance indicators, an issue raised by the European Parliament in its Resolution of 18 April 2018 on the discharge of Frontex budget for 2016.⁴⁶

In conclusion, it is presumed that the Member States and the institutions accept possible transgressions of the Commission's competences in the course of the programming procedure as long as their interests are safeguarded and they benefit from the Commission's exercise of control. This requires that their interests are affected in a positive manner which is seemingly the case. Furthermore, as determinable in its opinions, the Commission also acts as a 'guardian' of national

⁴⁴ Commission Opinion on Frontex Single Programming Document 2020-2022, paras 20 and 47

⁴⁵ Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies (Common Approach on European Agencies) 2012, Paragraph 59

⁴⁶ Commission Opinion on Frontex Single Programming Document 2020-2022, paras 24-25

interests and aims to `rebalance` a possible shift of control from the Member States towards the Commission.

5.5. The role of the Commission: Towards a Ministry-Agency Kind of Relationship?

For two reasons, it is not possible to reach a definite conclusion on the question of whether the relationship between the Commission and agencies converges towards a ministry-agency kind of constellation: First, the question presupposes a state-like constellation which the European Union is not. Secondly, legal traditions have shaped distinctive administrative structures and a great variety of agency types have evolved at Member States' level ('administrative zoo').⁴⁷ Thus, generally applicable parameters on what constitutes a ministry-agency relationship, are not available. In light of these limitations, this section aims to take a comparative view of the elements that have shaped ministry-agency relationships at the national level and to evaluate them in light of the findings of the case study.

In both case studies it was observed that to a large extent Frontex and ECHA follow the requests of the Commission's opinions which frequently appear as instructions rather than recommendations. Thus, by highlighting the supranational image of European agencies in the case study, it is only consequent to address the similarities between the Commission-agency relationship and ministry-agency constellations of nation-states. While this idea has only been promoted sporadically in the literature,⁴⁸ the most detailed study is a survey conducted by the European Parliament in 2008.⁴⁹ Intending to identify best practices in the governance of agencies, the study compared the `public organisations outside core government' of seven Member States and European agencies.⁵⁰ Hereby, it is not surprising that the study did not

⁴⁷ European Parliament, `Best practice in governance of agencies – A comparative study in view of identifying best practices for governing agencies carrying out activities on behalf of the European Union' 30.01.2008, p. 3, available at [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JOIN_ET\(2008\)392953](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JOIN_ET(2008)392953) accessed 3 August 2021

⁴⁸ M Egeberg and J Trondal, and N. Vestlund, `The quest for order: unravelling the relationship between the European Commission and European Union agencies', (2015) 22(5) *Journal of European Public Policy*, 609-629 (614)

⁴⁹ European Parliament, *supra* n 47 p. 5

⁵⁰ *ibid*

specifically address agencies programming obligations which, at that time, were not as far developed as they are under today's Framework Financial Regulation. Nevertheless, the governance dimensions addressed remain relevant: These are the institutional design and set-up of agencies and their management and steering.

Hereby, in practice, no legal system relies solely on one of these governance instruments as 'it is the characteristic interplay of these elements which enables efficient and effective agency governance'.⁵¹ Yet, certain preferences of legal systems are ascertainable. In particular, it is the contrast between constellations that are characterised by a distinctive hierarchical relationship between the ministry department and its subordinated agencies and those where the relationship appears to be more 'collegial'.

An important aspect for determining how strongly an agency is dominated by its ministry department is its institutional design and setup, including the agency's internal organisation and its legal personality. The most striking example is the German administrative system where the Basic Law establishes a strong hierarchical relationship between ministries and its subordinated agencies the latter not having its own legal personality.⁵² Typically, they have been portrayed to involve strict internal hierarchies 'with a more or less closed system in which all activities of public administration (whether focused on command and control or in the delivery of public services and infrastructure) take place entirely within government departments and ministries'.⁵³ Consequently, this type of ministry-agency constellation might even include ministerial interference into single decisions of agencies but also that ministries are held responsible for wrongful acts of their subordinated agency.

Even though paragraph 59 of the Common Approach likewise envisages a political responsibility of the Commission for the agency's acts, this strict model of ministerial oversight is not suitable to describe the relationship between the Commission and agencies. First, European agencies' structural autonomy is underlined by the fact that these are endowed with their own legal personality. Secondly, its internal

⁵¹ *ibid*, p. 27

⁵² Article 83 ff. Basic Law for the Federal Republic of Germany

⁵³ H Hofmann, G Rowe and A Türk, *Administrative Practice and Policy of the European Union* (Oxford University Press, 2013), p. 39

organisational structure is not purely supranational as the Member States, through representation on the management board, have a stake in the governance of agencies. Thirdly, apart from a few instances where sector-specific legislation confers on the Commission the prerogative to adopt the policy direction to be implemented by the agency, EU legislation does not generally envisage a hierarchical subordination of agencies.⁵⁴ On the contrary, the agency's autonomy is considered to be an indispensable element and rationale for its creation which proscribes any interferences into the agency's day-to-day administration. In the absence of a legal framework in the Treaties, this principle is not established under primary law but is consensus amongst EU institutions, the academic literature, and also established in most of the agency's founding acts.⁵⁵ Even though in light of the results obtained in the case study, this work does not subscribe to the view of agency's perceived independence, any attempts by the Commission to interfere into an agency's day-to-day administration, in particular in respect of the agency's scientific independence, was criticised in this work. In particular, the Commission's request that the opinions of ECHA's committees should not be inconsistent with the Commission's position, its appeal of Case T-837/16 was considered to violate an agency's scientific independence.⁵⁶

In contrast to hierarchical ministry-agency constellations, other legal systems focus on less strict management and steering instruments. It is widespread to hold agencies accountable by their ministry department, the latter in turn being answerable to the parliament. Another limitation of the agency's autonomy is to take influence on major human resources and financial decisions and, in general, constraints in budgetary matters of the agency.⁵⁷

Performance contracting is also an instrument to exercise oversight over agencies is performance contracting.⁵⁸ The idea of performance contracting evolved in the 80th

⁵⁴ An example is the multiannual strategic policy cycle for European integrated border management pursuant to Article 8 of Regulation (EU) 2019/1896; see Section 3.3.2.

⁵⁵ See Section 1.2.4. of this work

⁵⁶ See Section 4.4.3.4. of this work

⁵⁷ European Parliament, *supra* n 47, Table 15: Management and control of national agencies, p. 154

⁵⁸ In Denmark, Norway and Sweden performance contracting or 'Management by Objectives and Results' was introduced in the 80s and early 90s, see M.B. Kristiansen, 'One Scandinavian Approach

of the last century in the course of the new public management approaches. Based on an agreement between the government and agencies on the results to be achieved, it involves a departure from strict hierarchical structures of public administration towards a more informal steering mechanism that focuses on the agency's performance.⁵⁹

Scandinavian countries in particular, as well as the UK and the Netherlands, are amongst the European (Member) States that resort to these types of governance structures and have partially replaced hierarchical ministry-agency constellations by agreements where the roles and expectations of both the parent ministry and the agency in the governance process are specified.⁶⁰ Similar to ministry-agency constellations in general, performance contracting is also a flexible concept with a variety of procedures in place.⁶¹ For this reason, the performance contracting procedures are not addressed in detail; instead, the focus is on the rationales and main elements of performance contracting as outlined in the aforementioned study of the European Parliament and other secondary academic sources. These are compared with the main findings of the case study to establish the similarities between European agencies' programming procedures and performance contracting at the nation-state level.

For performance contracting, the Swedish administrative system has served as a role model for other states and is 'considered to be among the leaders regarding both how far MBR [Management by Results] has been developed and in spreading MBR ideas and techniques to other countries'.⁶² Hereby, not only have nation-states gained inspiration from the Swedish model but also the EU administrative governance in terms of its rationales for conferring executive tasks on agencies is based on similar considerations to those for performance contracting.

to Management by Objectives and Results` (2016) *Scandinavian Journal of Public Administration* 20(1): 45-70 (45)

⁵⁹ *ibid*

⁶⁰ European Parliament, *supra* n 47, p. 159

⁶¹ M.B. Kristiansen *supra* n 58 p. 65

⁶² G. Sundström, 'Management by Results: Its Origin and Development in the Case of the Swedish State` (2006) *International Public Management Review* 9(4) 399-427 (400)

These are first, that `typically` a crisis preceded administrative reforms. In the case of the European Union, it was the resignation of the Santer Commission that marked the starting point for the introduction of activity-based management, budgeting principles and the outsourcing of executive tasks to agencies.⁶³ Similarly, it was also in Sweden that a financial crisis occurred in the 70th of the last century and led to the awareness that the public administration was too ineffective, too expensive and thus uncontrollable.⁶⁴ In both cases, the rationale for introducing performance-driven administrative concepts was thus a rationalistic one rather than based on political or ideologic motives.⁶⁵

Secondly, similar budgetary principles guide the programming procedure of European agencies and performance contracting. Like the Swedish performance contracting system which has to follow the SMART criteria (i.e. that targets should be specific, measurable, realistic and timely),⁶⁶ also the whole budgetary cycle of the European Union as well as the programming procedure of European agencies is based on the same budgeting principle as established under the Financial Regulation since 2002.⁶⁷ In this respect, performance budgeting is an important element of the whole programming procedure which is based on activity-based budgeting principle and, consequently, all activities programmed by an agency must be accompanied by an indication of the expected results and targets as well as the human and financial resources required.

Thirdly, instead of relying on one centralistic government, the mode of administrative governance is a dualistic one with the majority of executive tasks `outsourced` to a large number of state agencies. To this end, in Sweden, a large number of semi-autonomous agencies perform central government activities which are typically performed within ministries in other countries.⁶⁸ Similar to European agencies, they

⁶³ See Section 2.2. of this work

⁶⁴ G. Sundström *supra* n 62, p. 400

⁶⁵ *ibid*

⁶⁶ European Parliament, *supra* n 47 p. 136

⁶⁷ Article 27 (3) Financial Regulation; see also Section 2.2.4.1. of this work

⁶⁸ G. Sundström *supra* n 62, p. 406

are organisationally separated from the ministries and the government's competence to issue orders to an agency is constitutionally limited.⁶⁹

Fourthly, resulting from these similarities, the procedures under which performance contracts are adopted and the programming procedures of European agencies are to a certain extent comparable:

In Sweden, performance contracting is titled 'Management by Results'.⁷⁰ Its main element is the letter of instruction which is issued by the government department and sent to the agency after the budget has been passed by the parliament. The letter of instruction sets out the objectives for the coming years and the corresponding reporting requirements imposed on agencies. Similar to the structure of the European agency's Single Programming Documents, the objectives and targets of the letter of instruction are organised in three levels: an overarching objective for the policy field which is broken down into objectives for the fields of activity (focus areas for European agencies) which are subsequently 'translated' into more specific targets and specific annual activities.⁷¹

The objectives of the first two levels are already decided upon in the budget and thus establish the link 'between governance within the government and administration on the one side and the budget passed by the parliament on the other side'.⁷² The programming cycle of European agencies is similar, insofar, as the Framework Financial Regulation likewise ensures its synchronisation with the budgetary cycle of the European Union. The agency's obligation to draw up a Single Programming Document is part of the 'Union body's' establishment of the budget and the programme shall only become definite after the final adoption of the Union budget setting the amount of the contribution and the establishment plan.⁷³

However, while the final say over an agency's programme is reserved to the budgetary authority, no provision of Union law gives the European Parliament the right to determine the agency's multiannual objectives. Furthermore, no instance

⁶⁹ *ibid*

⁷⁰ *ibid*

⁷¹ European Parliament *supra* n 47, p. 136

⁷² *ibid*

⁷³ Article 33 (4) Framework Financial Regulation

was noted in the case study where the European Parliament (or the Council) actively interfered with the programming procedure of agencies. Also, the obligation established under a few agencies' founding Regulations to consult the European Parliament on the agency's multiannual work programme did not lead to any noticeable influence of the European Parliament on the agency's programming content.⁷⁴ This might change for Frontex's future programming cycles where the recently introduced Article 102 of Regulation (EU) 2019/1896 attributes a higher degree of influence to the European Parliament and the Council on Frontex's multiannual work programme.⁷⁵

Notwithstanding these exceptions, after the case study, it remains speculative what factors determine an agency's programming content. The only formal requirement in this respect is set out in Article 32 (2) of the Framework Financial Regulation where it is stated that the overall strategic programming of the multiannual work programme 'shall also demonstrate the contribution of the Union body to the achievement of the EU political priorities'. As these political priorities are framed broadly, strategic documents subsequently adopted by the Commission need to transpose them into concrete actions. Roadmaps and action plans agreed upon between the Commission and agencies are important instruments to this end as they set out specific targets and timelines for the achievement of these policy priorities.

The case study examined numerous of these agreements. Especially in ECHA's case, it was observed that its Single Programming Documents, as well as the Commission's opinions, frequently refer to action plans. In this regard, major parts of ECHA's Single Programming Documents are built on the Commission's REACH Review and the correspondent action plan but also to the BPR Review Programme was frequently referred to. Similar is Frontex's programming and the Commission's opinions thereon. Here, it is especially the roadmap for the implementation of the new tasks conferred by Regulation (EU) 2019/1896 that is frequently referred to in the

⁷⁴ This obligation is found in the founding Regulations of the EASA, ERA, Frontex, Europol, and CEPOL, see Section 2.3.3.

⁷⁵ See Section 3.4.1 (Frontex Single Programming Documents 2021-2023, 2020-2022, 2019-2021)

Commission's opinion.⁷⁶ Other policy documents quoted by the Commission are the roadmap 'Back to Schengen' and the Commission's action plan on return.⁷⁷

As these roadmaps and actions plans comprise an element of agreement between the Commission and the agency on time limits and targets to be met, they resemble performance contracts but are not directly linked with the budgetary cycle. Only the agency's Single Programming Document allocates budgetary resources to specific activities but here it is difficult to ascertain an agreement element between the Commission and the agency.⁷⁸

Also, contrary to performance contracts where the letter of instruction is issued by the ministry department and subsequently negotiated with the agency, the Single Programming Document is drafted and adopted by the agency which indicates a stronger degree of autonomy on the side of the agency. Furthermore, even though the Commission's opinions frequently refer to action plans and roadmaps, the agency is not legally obliged to follow the Commission's requests.

The procedure under Frontex new founding Regulation (EU) 2019/1896 is slightly different. It sets out that the multiannual work programme shall be in line with the multiannual strategic policy cycle and that the positive opinion of the Commission is required before the adoption of the Single Programming Document.⁷⁹ Even though it is not explicitly spelt out, the procedure requires a considerable degree of dialogue and cooperativeness between the Commission and Frontex on the latter's programming content. Also, the European Parliament and the Council are involved as the Commission is obliged to discuss its strategy with them and Frontex has to consult these institutions on its multiannual work programme.

⁷⁶ See Section 3.4.1.

⁷⁷ Commission, 'Back to Schengen – A Roadmap' COM (2016) 120 final; Commission 'Action Plan on Return' COM (2015) 453 final; Commission 'Renewed Action Plan on Return' COM (2017) 200 final.

⁷⁸ Even though, also for performance contracting it is reported that these agreements are reached through informal dialogues rather than official negotiations; see European Parliament *supra* n 47, p. 136

⁷⁹ Article 102 Frontex Regulation 2019

This cycle of dialogue with the Commission, the European Parliament and the Council on Frontex multiannual work programme can be illustrated as follows:

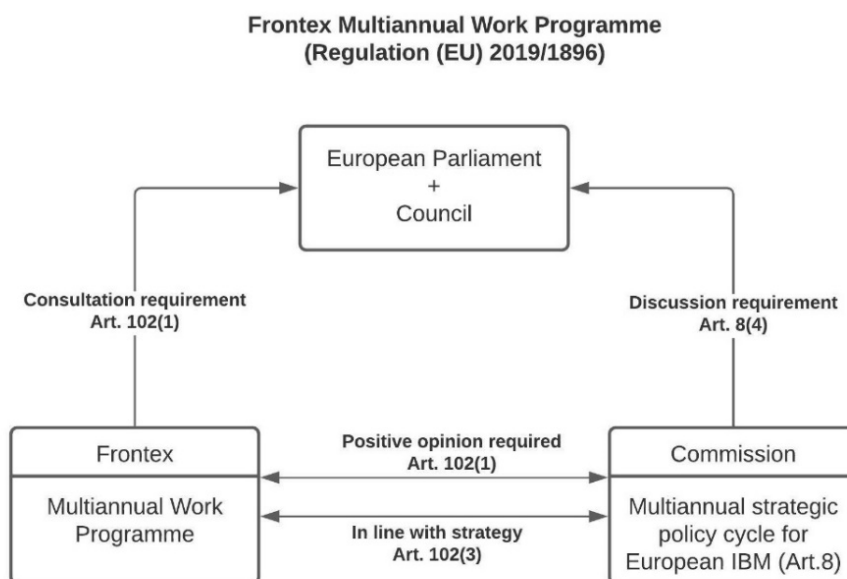


Figure 5: Frontex Multiannual Work Programme (Regulation (EU) 2019/1896)

However, the Frontex Regulation is an exception as no other Regulation is as far-reaching in terms of the institution's participation in the programming procedure. Apart from that, also several other aspects speak against comparability between performance contracting and agency programming.

These are, first, that no comments of the Commission requested a specific result to be achieved by the agency in performing its activities. Especially in the Frontex case study, it was observed that performance aspects play a rather inferior role with most comments related to competence and legal aspects.⁸⁰ The opinions on ECHA's programme, by way of contrast, comprised numerous efficiency-related comments but did not demand a specific result.⁸¹ Instead, the request for more efficiency was underlined by referring to the action plans of the REACH Review and the BPR Review Programme.

⁸⁰ See Section 3.4.3. (Quality-Focused Analysis of the Commission's Opinions on Frontex Single Programming Documents)

⁸¹ See Section 4.4.3.1.: Nearly half of the Comments concern effectiveness and efficiency related aspects of ECHA's work.

In both case studies, the Commission criticised the quality of Frontex and ECHA's performance indicators.⁸² However, the purpose of performance indicators is to facilitate the measurement of performance for reporting purposes.⁸³ Not coincidentally, therefore, the Commission's opinions refer to resolutions of the European Parliament which is the institution to grant the discharge of an agency's budget according to Article 319 TFEU.⁸⁴ This distinguishes European agencies from agencies at the nation-state level where the reporting of performance for the preceding year takes place vis-à-vis the parent ministry once a year in the annual report.⁸⁵

Secondly, as a necessary element of performance contracting it is considered that consequences must arise in case the targets agreed upon are not met by the agency.⁸⁶ This is not the case with programming procedures as no direct reward or punishment for a specific performance arises if the agency does not meet the targets set out in its Single Programming Document or does not follow the Commission's requests. On the contrary, several instances were noted where the agency repeatedly did not follow the Commission's requests, an aspect that was critically noticed by the Commission but did not lead to any visible consequences. In Frontex Single Programming Document 2020-2022 nearly one-third of the requests where the Commission specifically demanded alterations to Frontex's programme was not followed by the latter.⁸⁷ For ECHA, the result was more positive but considerable parts of its final annual work programme for 2021 deviated from the one submitted to the Commission.⁸⁸ Apart from that, it was even observed that sometimes the Commission abstained from repeating its request in the next year's opinion, even

⁸² See Section 3.4.2.2. and Section 4.4.3.1.

⁸³ Article 48 Framework Financial Regulation

⁸⁴ Opinion on Frontex Single Programming Document 2019-2021, para 24

⁸⁵ M.B. Kristiansen, *supra* n 58, p. 55

⁸⁶ European Parliament, *supra* n. 47, p. 159; however, also for other nation states it is observed that consequences are rather the exception and performance information are used in a soft manner; see M.B. Kristiansen, *supra* n 58, p. 55-56

⁸⁷ See Section 3.4.4.

⁸⁸ See Section 4.4.4.

though the agency's programme had not considered the Commission's request again.⁸⁹

Only indirectly, consequences are noticeable for European agencies. These are a budget deduction of 2% for the next year's budget in the case of the under-execution of commitment appropriations of more than 5%.⁹⁰ Other indirect consequences arise from Article 17 Framework Financial Regulation where it is stated that a positive budget result shall be repaid to the Commission and also that the budget result 'shall be duly taken into account by the Commission when assessing the financial needs of the Union body for the year N+1'.⁹¹ The last-mentioned consequence is the most profound one as it addresses the Commission's dominant position that results from its power to propose an agency's budget. Thus, an agency's underperformance and the disregard of the Commission's opinions can have repercussions on future budgets.

Third, no general legal basis backs up the hypothesis that the programming of agencies is comparable with performance contracting except for Article 32 of the Framework Financial Regulation. However, the requirement 'to take into account' the Commission's opinion is not far-reaching enough to consider this provision as the basis for a legally binding performance contracting procedure between the Commission and European agencies.⁹² Even though it has been noticed that other legal systems also rely on informal procedures that are based on dialogues between the ministry-department and agencies rather than formal structures, there is a reason why it is necessary for the EU's legal system to have a proper legal basis.⁹³

Different to nation-states, the EU legal order is based on the principle of conferral and, consequently, the competences of its institutions must be explicitly conferred on them. The fact that powers are conferred on European agencies and not on the

⁸⁹ For example, with regard to its request that Frontex should dedicate a separate section in its programme on the actions related to EUROSUR; see Section 3.4.2.1.

⁹⁰ Commission, 'Draft General Budget of the European Union for the financial year 2021, Working Document Part III' COM (2020) 300 final, p. 27

⁹¹ Articles 17 (1) and 17 (4) Framework Financial Regulation

⁹² The exception of Frontex programming under Article 102 of Regulation (EU) 2019/1896 was addressed in this Section

⁹³ M.B. Kristiansen *supra* n 58, pp. 55-56 who notes that "performance information is primarily used in a soft way, where judgment and decision-making are mediated by interpretation and dialogue".

Commission implies that the exercise of control by the latter is not unconditionally sought. From an institutional point of view, there is no hierarchical relationship between the Commission and agencies evident from the Treaties. This contradicts the observations made in the case study where the Commission often took a superior role vis-à-vis agencies that even resulted in dictating an agency's programming content. The question of how these 'factual powers' can be sanctioned through amendments of the Treaties and/or secondary law is addressed in the next section.

To conclude this section first, it must be admitted that the outcome is ambiguous. On the one hand, striking similarities between an agency's programming and performance contracting are noticeable. These are, apart from its identical structure, that both instruments ensure performance-orientated governance methods and the exercise of oversight over agencies which autonomy incidentally is regarded as an important pillar of a dualistic administrative governance structure.

On the other hand, the programming procedure of European agencies lacks important elements of performance contracting. These are, except for action plans and roadmaps adopted outside the programming procedure, the absence of a performance agreement and that no direct consequences arise if the targets set out in the programme are not reached. This equivocal result indicates that the programming procedure is still an incomplete process with only some elements pointing towards the evolution of a ministry-agency kind of relationship.

5.6. Suggestions for Legislative Improvements

Eventually holding that the present legal framework does not sufficiently reflect the Commission's exercise of control over agencies' programming is not intended to question its necessity per se: Independently from the legal framework in place, there is a strong interdependence between the activities of the Commission and European agencies as they frequently operate in the same policy areas. Hereby, it is necessary that the policy direction of the Commission is not bypassed by an agency and that these bodies speak the same 'language'. Moreover, the Commission depends on the work of agencies especially with regard to its political commitment vis-a-vis the European Council. This is especially apparent in the area of freedom, security and

justice where the political guidelines of the President of the European Commission promise the operability of 10,000 standing corps members by 2024. As it is Frontex and not the Commission that is responsible for selecting and training the corps members, the Commission's success depends strongly on the quality of Frontex's work.

The Treaty only hints at the Commission's responsibility for European agencies when it confers on the Commission executive functions. The Commission's responsibility for the agency's acts can be inferred from that provision, insofar as it attributes to the Commission a role of a legal supervisor and confers on it the responsibility for an agency's correct implementation of the budget. More specifically, political responsibility for agencies can also be derived from paragraph 59 of the Common Approach.⁹⁴ It obliges the Commission to activate an alert/warning system if it has serious reasons for concern that an agency's management board is about to take decisions that may not comply with the mandate of the agency, may violate EU law or be in manifest contradiction with EU policy objectives. While this provision is the most far-reaching one as it establishes a kind of ministerial responsibility of the Commission for agencies' acts, it must be acknowledged that the Common Approach does not have binding force and also, no instance is known where this alert/warning mechanism has been activated. Against this background, the 'ministerial responsibility' imposed under the Common Approach is of a symbolic character rather than it establishes a true political responsibility of the Commission.

5.6.1. Competences covered under the present legal (Treaty-) Framework

While the Treaties address regulatory competences in detail, no coherent framework on the EU's executive governance is in place, let alone does the Treaty clarify the institutional relationship between the Commission and European agencies. Only a few Treaty provisions refer to aspects that marginally relate to EU administration and it seems that the Treaties, as they stand today, are not well prepared for regulating agencies.

⁹⁴ Common Approach on European Agencies

European agencies are not mentioned under Article 13 TEU that lists the formally recognised institutions of the European Union. Suggestions on how to include EU agencies under this provision have a long tradition in academic literature.⁹⁵ Also, during the 2000 intergovernmental conference (IGC) the need for a legal basis allowing the creation of agencies was discussed and a proposal to include European agencies under Article 13 TEU was made to this end. However, it is doubtful what self-standing value the inclusion of agencies under Article 13 TEU would have. Apart from a symbolic benefit that derives from its formal recognition as an institution, Article 13 TEU is not a suitable position to address the conferral of competences on agencies and aspects of its control. The reason is that Article 13 (2) TEU merely clarifies that the institution shall act within the limits of the powers conferred on it in the Treaties. To this end, Article 13 (2) TEU refers to the specific Treaty sections that address the competences, procedures, conditions and objectives of the respective institutions in detail. Just as suggested by Chamon,⁹⁶ it would therefore be more feasible to address EU agencies' competences and how they are controlled under a separate provision of the Treaty.

A certain responsibility for agencies can be derived from Article 17 TEU which imposes on the Commission the obligation to ensure the application of the Treaties and the measures adopted by the institutions according to them. Under Article 17 TEU, the Commission is also responsible for the execution of the budget and for coordinating, *executive* and management functions, as laid down in the Treaties. While executive functions of the Commission might arguably include oversight over agencies, the reservation, *as laid down in the Treaties*, limits the applicability of Article 17 TEU: Neither are executive functions of agencies generally addressed in the Treaties let alone any supervisory powers of the Commission vis-à-vis agencies. An important (negative) inference can thus be derived from Article 17 TEU. If control over agencies is considered as an executive function of the Commission, competences in this respect require a legal basis in the Treaties. Consequently, enabling measures established under secondary legislation is not sufficient.

⁹⁵ See for further reference M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016), pp 372

⁹⁶ *ibid*, pp. 376-377

This reservation does not apply for the Commission's responsibility to execute the budget. Under Article 17 (1) TFEU, the Commission has the legal obligation to supervise how the allocated funds are spent, which includes the budget of agencies as well. Deriving from this responsibility, the Framework Financial Regulation already envisages as part of the budgetary procedure the Commission's opinion on the draft programming document of an agency. Yet, while budgetary and legal aspects of the programme are covered, not all measures of control fall under the Commission's competence to execute the budget. Especially, autonomous requests where the Commission actively interferes with the programming autonomy of agencies beyond legal and budgetary aspects, transgress the competences conferred on the Commission under Article 17 (1) TEU.

Another Treaty provision that has relevance for European agencies is Article 298 TFEU. By stating that 'in carrying out their mission, institutions, bodies, offices and agencies shall have the support of an open, efficient, and independent European administration', the provision at least acknowledges the existence of a European administration and agencies but leaves open what such an administration should consist of. After all, Article 298 TFEU regards institutions and agencies only as of the *object* of such administrative support and not as its actors. Also, Article 298 TFEU leaves unanswered what tasks should be covered by the competence of such administration and how these can be delineated from implementing tasks under Article 291 TFEU.

This limits the remaining search to Articles 290 and 291 TFEU which were introduced with the Treaty of Lisbon in replacement of 211 EC. They established a new institutional balance on executive governance insofar as Article 290 TFEU addresses the distribution of powers between the institutions in case of delegation whereas Article 291 TFEU establishes the competences for the implementation of legally binding Union acts. Surprisingly though, European agencies are not considered under either of these provisions despite having been a 'constitutional reality' for decades. While its disregard under Article 290 TFEU is comprehensible as the provision concerns the delegation of non-essential legislative measures of general

application,⁹⁷ at first sight Article 291 TFEU appears to be the perfect provision where European agencies should be addressed.

Article 291 TFEU provides two options for how legally binding Union acts can be implemented. First and foremost, it is the responsibility of the Member States to adopt all measures of national law necessary (Article 291 (1) TFEU). Only where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases on the Council (Article 291 (2) TFEU). Where implementing powers are conferred on the Commission, the empowering act shall lay down in advance the rules and general principles concerning a mechanism for control by the Member States of the Commission's exercise of implementing powers.

It has been suggested to regard the conferral of implementing powers on European agencies as a kind of midway solution between these two options. In its opinion on *Short-Selling*,⁹⁸ Jääskinen endorsed this perception which reflects the hybrid nature of agencies: Created as supranational bodies on the one hand but with a Member States' dominated management board that safeguards national interests, on the other hand, European agencies embody supranational as well as intergovernmental elements. However, the Court of Justice did not adopt Jääskinen and held instead that the omission of agencies under Article 291 TFEU does not prevent the conferral of implementing powers on them, in the case concerned, upon Article 114 TFEU. That the Court did not engage in discussion how agencies fit into the framework under Article 291 TFEU is understandable in the light of the financial crisis and urgency to strengthen ESMA's supervisory competences; yet, from a dogmatic point of view, *Short Selling* was a disappointment and has rightly been criticised by overwhelming parts of the academic literature for the missed opportunity to clarify the long-awaited institutional setting of EU agencies.

However, even though Article 291 TFEU is not directly applicable for the governance of European agencies, its underlying constitutional notion is still meaningful for

⁹⁷ The conferral of such competences on agencies would violate the *Romano* doctrine which prohibits the EU legislature to empower a body other than the Commission with the adoption of acts "having the force of law"

⁹⁸ Case C-270/12, *United Kingdom v European Parliament and Council*, [2014] ECLI:EU:C:2014:18

ascertaining the Commission's competences in this respect. It can be derived from Article 291 TFEU that, at the supranational level, the Commission has the prerogative to implement legally binding Union acts. This competence, however, is not unconditional as implementing powers need to be conferred explicitly through the EU legislature. Insofar, no universal competence of the Commission derives from Article 291 TFEU but needs to be conferred on a case-by-case basis where uniform conditions for implementing Union acts are needed. Also, nothing in Article 291 TFEU indicates that the Commission should be entitled to exercise control over agencies. On the contrary, even if implementing powers are conferred on the Commission, the Member States always retain an element of control through comitology procedures. Therefore, a contradiction would arise if Article 291 TFEU would be regarded as a competence norm for the Commission's exercise of control over agencies (whose management board is composed of Member States), whereas the spirit of Article 291 TFEU conversely requires that the Member States control the Commission when the latter implements Union acts. For this reason, Article 291 TFEU does not serve as an enabling foundation for the Commission. Also, to add a new paragraph to Article 291 TFEU is not feasible as it would contradict the spirit of that provision.

5.6.2. Are the Measures of Control Exercised by the Commission Justiciable?

Holding that the Commission controls an agency's programming raises the question whether agencies should be eligible to contest the Commission's opinions before the Court of Justice. Two problems arise in this respect:

The first one is that agencies do not have an explicit active locus standi. While its acts intended to produce legal effects vis-à-vis third parties are justiciable,⁹⁹ they are not listed amongst the institutions that can initiate proceedings before the Court of Justice. The second paragraph of Article 263 TFEU reserves this right to the Member States, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of essential procedural requirements, infringement of the Treaties or any rule of law relating to their application, or misuse of powers.¹⁰⁰

⁹⁹ Article 263 (1) TFEU

¹⁰⁰ Article 263 (2) TFEU

The fact that the Treaty of Lisbon introduced a passive locus standi for agencies also indicates that agencies are intentionally not mentioned under that provision.¹⁰¹

Yet, as agencies have legal personality it is possible to acknowledge their active locus standi under the fourth paragraph of Article 263 TFEU. In *Bolivarian Republic of Venezuela v the Council of the European Union* the Court held that `no legal person should be deprived, in principle, of the possibility of bringing an action for annulment provided for in the fourth paragraph of Article 263 TFEU`.¹⁰² As the possibility to initiate court proceedings is an indispensable element of the rule of law principle, the concept of a `legal person` must be interpreted extensively.¹⁰³ Consequently, even agencies can have, in principle, an active locus standi before the Court of Justice.

The problem is rather that the fourth paragraph of Article 263 TFEU sets out additional requirements. These are that an act is either directly addressed to that person or that the act is of direct and individual concern, or that a regulatory act is of direct concern and does not entail implementing measures.

While the opinions address agencies directly, all options under the fourth paragraph of Article 263 TFEU additionally require an `act` which excludes recommendations and opinions from judicial review.¹⁰⁴ However, the distinction between judiciable acts and opinions does not depend on the form of the act contended, but on the Commission's intention to produce legal effects.¹⁰⁵ For example, in *France v Commission*, the Commission's argument that a Communication merely expressed its opinion was dismissed as the Court derived from the imperative wording of the Communication the Commission's intention to produce legal effects.¹⁰⁶ Similarly, in *Federal Republic of Germany v the European Chemicals Agency (ECHA)* the Court

¹⁰¹ See also, M Chamon, *supra* n 95, p. 364, who notes that agencies should not have the possibility to judicially contest the political choices which the EU institutions make when elaborating EU policy.

¹⁰² Case C-872/19 P, *Bolivarian Republic of Venezuela v. Council*, [2021] ECLI:EU:C:2021:50, para 43

¹⁰³ *ibid* para 48

¹⁰⁴ Article 263 (1) TFEU

¹⁰⁵ Case C-57/95, *France v. Commission*, [1997] ECLI:EU:C:1997:164

¹⁰⁶ *ibid* paras 18 and 22

emphasised on the substance rather than the form of a letter issued by ECHA to a national authority and also confirmed ECHA's intention to produce legal effects.¹⁰⁷

Thus, it is decisive what character the Commission's comments on an agency's programme have. The fact that the Commission tolerates that requests are not considered by the agency and repeats them quite patiently in subsequent opinions, speaks against its intention to produce legal effects. However, as observed in the case studies, it is the wording of the comments that frequently go beyond expressing the Commission's view: they comprise instructions towards the agency and sometimes the Commission even dictates the wording of the programming content. In so far, the situation is comparable with the one at issue in *France v Commission* where the Court derived from the imperative wording the Commission's intention to produce legal effect.

In conclusion therefore, even though agencies are not explicitly mentioned under Article 263 TFEU, their contestation of the Commission's opinions should be admissible. Yet, no proceedings have been initiated so far and for practical reasons it is not likely that this happens in the near future. While judicial review of the Commission's opinion would facilitate transparency of the programming and prevent arbitrary procedures, lengthy court proceedings are not feasible for agencies who depend on the final adoption of the programming document as part of the budgetary procedure. For this reason, agencies would rather benefit from a more transparent programming procedure established under secondary legislation which strengthens the role of the management board in objecting the Commission's requests.

5.6.3. Existing Secondary Legislation Shaping EU Administrative Law

Except for the Framework Financial Regulation, there is no comprehensive secondary legislation that addresses the relationship between the Commission and European agencies. Instead, secondary law, that has been established for single policy areas, shape agencies' tasks. These are predominantly its founding Regulations but also

¹⁰⁷ Case C-471/18 P, *Federal Republic of Germany v European Chemicals Agency (ECHA)* [2021] ECLI:EU:C:2021:46

other sources of secondary legislation, such as the Biocidal Products Regulation, which determine the agency's tasks and its relationship with the Commission.¹⁰⁸

5.6.3.1. Agencies' Founding Regulations

All agency's founding Regulations address programming obligations and the Commission's role in this regard. Hereby, a large variety of procedures is established and no coherency amongst Regulations is ascertainable. While several Regulations impose programming obligations below the specifications of the Framework Financial Regulations, others exceed its requirements. Hereof, several Regulations establish procedures that oblige an agency to adjust its programme in accordance with the Commission's opinion. This is the case with the EMSA, ERA and EFCA Regulations where the management board, in case the Commission expresses its disagreement with the draft programming document, has to re-examine it and adopt it, possibly amended, in a second reading.¹⁰⁹ Apart from that, some Regulations either require that the Commission agrees on the performance indicators established¹¹⁰ or that they shall be consistent with the Union's legislative and *policy priorities* of the respective area of the agency.¹¹¹

Frontex's Regulation of 2019 is special in this respect as it is the only Regulation that explicitly requests an agency to align its multiannual programming with the policy direction of the Commission, in Frontex's case with the multiannual strategic policy cycle for European integrated border management.¹¹² The fact that Frontex has to orientate its multiannual programming on this strategy, explains the authoritative

¹⁰⁸ Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products [2012] OJ L167/1

¹⁰⁹ Article 10 (2) (d) of Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (EMSA Regulation) [2002] OJ L208/1; Article 52 (2) of Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004 [2016] OJ L138/1; Article 32(2) of Regulation (EU) 2019/473 of the European Parliament and of the Council of 19 March 2019 on the European Fisheries Control Agency (codification) [2019] OJ L83/18

¹¹⁰ Article 15(2)(d) EMSA Regulation; Article 120 (6) of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency [2018] OJ L212/1

¹¹¹ ENISA Regulation, Article 13(4) of Regulation (EU) No 526/2013; ECDC Regulation, Article 14 (5) (d) of Regulation (EC) No 851/2004; EFSA Regulation, Article 25(8) of Regulation (EC) No 851/2004

¹¹² Article 102 (3) Frontex Regulation 2019; as similar obligation is not found under Frontex preceding Regulation (EU) 2016/1624 [2016] OJ L251/1

character of the Commission's opinion. Even though the multiannual policy cycle is foreseen since the entry into force of Regulation (EU) 2019/1896, it has not been adopted so far. Nevertheless, this does not hinder the Commission from already pointing towards its prerogatives in this respect when it comments on Frontex's draft programme. Furthermore, Article 102 (1) of Regulation (EU) 2019/1896 also requires that the single programming document shall be adopted taking into account a *positive* opinion of the Commission and, as regards the multiannual programming, after having consulted the European Parliament and the Council. It is not explicitly explained what 'positive opinion' means in procedural terms but there are indications that, at least in the Commission's view, its formal approval of the draft programme is required. This can be derived from the opinion on Frontex's most recent programming document, delivered on 4 January 2021, where the closing remark is that the Commission 'thereby delivers a positive opinion on the draft Single Programming Document 2021-2023 of the European Border and Coast Guard Agency subject to account being taken of the above-mentioned comments'.¹¹³ Insofar, the positive opinion is delivered conditionally on Frontex's adjustments of its programme in accordance with the Commission comments. Yet, no procedural enforcement measures are established and, in particular, no direct consequences are in place if Frontex fails to comply. Even the Commission's opinions recurrently point out that similar comments were already made in previous opinions and 'invites' Frontex to duly consider them.¹¹⁴ This leads to the conclusion that, despite the authoritative wording of the comments, the Commission depends on Frontex's 'good will' to transpose the opinion in its final programme.

Strikingly different are ECHA's programming obligations under the REACH Regulation which are literally non-existent.¹¹⁵ Neither is the programming procedure specifically addressed nor is the involvement of the Commission therein envisaged. The only provision that mentions the Commission in this regard is the obligation of the

¹¹³ Commission, 'Opinion of 4.1.2021 on the Single Programming Document containing the draft multiannual programming for 2021-2023 on the draft Annual Work Programme for 2021 of the European Border and Coast Guard Agency (Frontex)' (C (2021) 1, p. 12

¹¹⁴ *ibid.*, para 16

¹¹⁵ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency (REACH Regulation) [2014] OJ L396/1

executive director to forward the work programme and the multiannual work programme to the Commission.¹¹⁶ Noticeable though, the opinions on ECHA's draft programme are not considerably different from those on Frontex's programme. While the case study observed that the Commission's comments generally appear more lenient than those on Frontex, the main parts of the opinion are still authoritative. The prime difference between these opinions is that those on ECHA's programming focus mainly on efficiency-related aspects whereas the opinion on Frontex's programme concentrates on legal and competence issues. Nevertheless, the Commission's opinions on ECHA's programming is not less demanding when they request an increase of ECHA's performance without adjusting ECHA's budgetary resources. For Frontex, efficiency and budgetary constraints play a rather ancillary role so far. For both agencies, it was noticed that the majority of comments are transposed in the final programme. Insofar, the fact that ECHA's founding Regulation does not establish obligations to this end are not decisive for an agency's motive to comply.

5.6.3.2. Framework Financial Regulation

The Framework Financial Regulation is the only legal framework that comprehensively addresses the agency's programming obligations and the Commission's role in this regard. However, while subsequent amendments of the Framework Financial Regulations have expanded the agency's programming obligations and also the scope of the Commission's opinion, the agency's obligations to comply with that opinion have not changed. Still, the Framework Financial Regulation only obliges an agency 'to take into account' the opinion which does not sufficiently reflect the programming practice. The fact that the majority of comments are transposed 'word for word' in the final programme indicates that the Commission is capable to dictate at least parts of the programming content. This factual power cannot be derived from Article 32 FFR which might lead to arbitrary procedures. Apart from that, also in other respects, Article 32 FFR lacks clarity.

¹¹⁶ Article 83 (3) REACH Regulation

First, Article 32 FFR does not indicate what quality the Commission's opinions shall have. In the case study, it was noticed that the comments vary from addressing formal aspects, legal and competence issues and efficiency-related comments, but also comprise autonomous requests where the Commission exceeds its role as a legal or budgetary supervisor. Here, the Framework Financial Regulation should establish the limits of the Commission's competence which is not the case. However, it is adopted as a delegated Regulation based on Article 70 of the Financial Regulation that is concerned with the financial rules applicable to the general budget of the Union. The purpose of the Framework Financial Regulation is to supplement the Financial Regulation. Insofar, both Regulations have the same scope which indicates that the Commission's opinion should primarily address budgetary aspects of the programme. While these might include formal and legal aspects as well as efficiency-related comments, autonomous requests of the Commission are not covered under the delegated competence.

Secondly, the Framework Financial Regulation does not establish procedures in case of conflict between agencies and the Commission. Article 32 (7) FFR only provides that the agency, in case it does not fully take into account the opinion, shall provide the Commission with adequate explanations. What the term *adequate* means and who decides upon the adequacy of the explanation is not defined. Expedient would be to establish a procedure similar to those established in EMSA, ERA and EFCA's founding Regulations: They provide that in case of the Commission's disagreement the draft programme is referred back to the agency's Management Board that formally decides on the Commission's requests.

Thirdly, the Framework Financial Regulation does not envisage any consequences in case of non-compliance. Theoretically insofar, it is possible for an agency to disregard the Commission's opinion. In practice, this is not the case. On the contrary, from the comparison between the draft and final programme, it is ascertainable that agencies make great efforts to comply with the Commission's requests despite the time pressure under which the final programme has to be adopted. This indicates that there are 'unspoken' consequences that arise in case of non-compliance. Hypothetically, these are budgetary disadvantages an agency might expect in the

future. Thus, apart from a lack of transparency, the risk of arbitrary procedures arises under the present legal constellation.

In light of the shortcomings the present Framework Financial Regulation has, the question arises why the Commission does not amend this Regulation accordingly. After all, the Commission would benefit if the respective powers and obligations are clearly defined. Furthermore, as the Framework Financial Regulation is a delegated Regulation, adopted according to Article 70 of the Financial Regulation, an amendment would be possible without the explicit participation of other institutions. The following considerations might prevent the Commission from doing so.

Already in the past, the Commission tried to enlarge its prerogatives on the agency's programming procedure. In 2005, it presented a draft inter-institutional agreement that addressed the agency's programming obligations and the Commission's competences in this respect. The proposal envisaged that where the Commission 'expresses its disagreement with the annual work programme, the administrative board shall re-examine and adopt it, with amendments where necessary, by an enhanced majority to be determined in the basic act'.¹¹⁷ Even though this competence was reserved to agencies that directly assist the Commission through technical or scientific advice and/or inspection reports,¹¹⁸ the proposal exceeded today's obligation 'to take into account' the Commission's opinion. Yet, after the draft was rejected by the Council, the Common Approach of 2012 limited the Commission's competence to a mere consultation obligation.

Insofar, the present formulation of the Framework Financial Regulation might be no coincidence but a matter of the Commission's cautiousness not to provoke any opposition by the European Parliament or the Council. Noticeable in this context is that the delegation of competence to the Commission is limited to the duration of the multiannual financial framework.¹¹⁹ An extension can be opposed by the European Parliament and the Council and the power delegated to the Commission

¹¹⁷ Commission, 'Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies' COM (2005) 59 final, para 20

¹¹⁸ *ibid.*, para 7.2. b.

¹¹⁹ Article 269 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (Financial Regulation) [2018] OJ L193/1

revoked at 'any time'.¹²⁰ Against this background, the competence conferred on the Commission under the Framework Financial Regulation is a fragile one and depends on the continuous courtesy of these two institutions.

5.6.3.3. Relationship between the Framework Financial Regulation and Agency's Founding Regulations

Programming obligations under the Framework Financial Regulation are not always congruent with those of the agency's founding Regulations. This raises the question of which Regulation prevails in case of conflict.

The Framework Financial Regulation only requires that the agency's financial rules shall not depart from its provisions except where specific needs so require and with the Commission's prior consent.¹²¹ Agency's financial rules, however, only replicate the provisions of the Framework Financial Regulation. While the financial rules are adopted by the agency's management board, amendments of its founding Regulations require the involvement of the EU legislature. The result is that even for one agency, conflicting rules between its financial rules and its founding Regulations are noticeable. In Frontex's case, for example, its financial rule neither requires that its multiannual work programme must be aligned with the Commission's multiannual strategic policy cycle for European integrated border management nor that the positive opinion of the Commission is required before the adoption of the final programme.¹²²

While the assumption arises that the agency's Regulations, established as legislative acts, prevail over the Framework Financial Regulation, no general hierarchy of norms results from the Treaty.¹²³ Such hierarchy can only be established with regard to the relationship between a delegated act and the legislative act it supplements 'in the sense that the delegated act is only of equal rank to the legislative act in so far as the

¹²⁰ *ibid.*, Articles 269 (2) and 269 (3)

¹²¹ Article 1 Framework Financial Regulation

¹²² See Frontex, 'Management Board Decision 19/2019 of July 2019 adopting the Frontex Financial Regulation' (July 2019) available at

>https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2019/MB_Decision_19_2019_adopting_the_Frontex_Financial_Regulation_002.pdf< accessed 25 June 2021

¹²³ M Chamon 'The legal framework for delegated and implementing powers ten years after the entry into force of the Lisbon Treaty' (2021) *ERA Forum* 21-38 (23)

limits to the delegated power are respected'.¹²⁴ Even though two conflicting Regulations thus govern the agency's programming procedure, consequential problems do not seem to arise in practice. In principle, the Commission refers in its opinion to the Framework Financial Regulations and not to programming obligations under the agency's founding Regulation. The only exception is the Commission's opinion of 4.1.2021 on Frontex's draft programme where reference is made to Article 102 of Regulation (EU) 2019/1896 to highlight that the Commission's *positive* opinion is required. Apart from that, agencies structure their programme in accordance with the Framework Financial Regulation even if its founding Regulations set out different requirements.

However, that in practice the Framework Financial Regulation prevails, does not mean that programming obligations established under the agency's founding Regulation's do not serve any purposes. For the Commission, they are relevant where agencies' founding Regulations set out a higher standard than the Framework Financial Regulation. Secondly, for the Commission programming obligations established under agencies' founding Regulations might serve as a safeguard as they are not unilaterally revocable by either the European Parliament or the Council. Nevertheless, for the sake of clarity, the Framework Financial Regulation should establish how potential conflicts with the agency's founding Regulations are to be solved.

5.6.4. What Competences should be covered under Legislation?

Legislative improvements that go beyond amending the agency's founding Regulations and the Framework Financial Regulations require Treaty amendments. The reason is that presently no legal basis allows for the adoption of secondary legislation that coherently shapes the agency's programming procedures. Leaving the Treaty as it is would thus require to either amend all agency's founding Regulations and/or the Framework Financial Regulation. As indicated in the previous section, neither are satisfactory options. While the advantage of the former option would be that programming procedures can be established in a flexible manner that

¹²⁴ *ibid.*, p. 24

takes into account the different legal and policy contexts of agencies, the update of 35 Regulations is not practicable and does not foster coherency amongst agencies' programming procedures. Apart from that, potential conflicts with provisions of the Framework Financial Regulation are not solved and would thus require additional legislative clarification.

To address the agency's programming obligations under the Framework Financial Regulation is a design fault and only explainable through its historical background: Initially introduced to implement activity-based budgeting principles, the Framework Financial Regulation of 2002 only required agencies to submit a statement of estimate as part of the budgetary procedure. Following the Common Approach, in 2013 the Framework Financial Regulation introduced programming obligations for agencies which were further extended with its amendments in 2019. The result is that today's provisions on the agency's programming obligations go far beyond the scope of the Framework Financial Regulation which purpose is still limited to the budgetary procedure. Also, as the Framework Financial Regulation is only a delegated Regulation whose legal base is established in the Financial Regulation, it is not possible to formally extend its scope. Thus, the Framework Financial Regulation is not a suitable place for proposing a coherent framework on the agency's programming and the respective roles of the Commission and agencies.

Various suggestions on how a Treaty provision on European agencies could be phrased have been made but their focus is on a legal foundation for the creation of agencies and the conferral of competences on them.¹²⁵

The formal recognition of agencies, possibly as an EU institution, together with a Treaty basis that defines the limits of the competences conferrable and the instruments of control, is desirable. In light of its relevance for the EU's administrative governance, it is incomprehensible that agencies are still disregarded in the Treaties. Even though the absence of a Treaty framework does not hinder the EU legislator

¹²⁵ See for instances K Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community', (1993) 18(1) *European Law Review* 23-49, p. 42; G Majone, 'The Credibility Crisis of Community Regulation' (2000) 38 (2) *Journal of Common Market Studies* 273-302, p. 276; Chamon *supra* n 39, pp 376-381

from creating agencies, for example under Article 114 TFEU, for legal certainty its formal recognition is still necessary.

Yet, in terms of its independence the value of recognising agencies in the Treaties is a rather symbolic one as they still depend from the EU budget where the Commission is in the position to assess their financial needs and where an agency's budget is part of the Commission's budget. Insofar, it is more urgent to establish a transparent procedure that sets out the limits of control exercisable by the Commission and safeguards the interests of agencies.

For the sake of flexibility, it is not expedient to address the programming procedure and the relationship between the Commission and agencies in detail under the Treaties which should be reserved to secondary Regulation. Instead, a broad Treaty foundation that allows for the adoption of a Regulation to this end is sufficient.

5.6.4.1. Proposal for a Treaty Provision and its Positioning

Apart from Articles 290 and 291 TFEU, no Treaty section specifically addresses the EU's executive which underlines that the Treaties are not yet prepared to consider EU administrative law comprehensively. While several other possibilities on where to locate a Treaty base are ascertainable, it is rather challenging to find a suitable option.

As suggested by several authors in the past,¹²⁶ Article 13 TEU could serve as a Treaty base where agencies are recognised as an institution and a legal basis for its creation is established. However, for reasons already mentioned,¹²⁷ to acknowledge agencies as an institution is not essential for regulating them. Beyond that, Article 13 TEU is not primarily designed as a competence norm on which secondary legislation should be adopted. For the same reason, Article 17 TEU is neither suitable to address the creation of agencies but would be the natural place where competence of the Commission to supervise agencies could be addressed. Similar to the Commission's responsibility for the Member States' correct application of Union law, Article 17 TEU could also clarify the Commission's role as a legal and budgetary supervisor of agencies. Chamon suggests addressing agencies under a new Article 250a TFEU.

¹²⁶ *ibid*

¹²⁷ See Section 5.6.1. of this work

Located under the section that addresses the Commission as an institution, it would make clear that agencies ‘come under the Commission’s natural authority’.¹²⁸ Similar to this work, Chamon also proposes that a mechanism for control by the Commission should be part of such a provision.¹²⁹ However, the provisions that precede Article 250a TFEU are solely concerned with organisational and procedural aspects of the Commission. A legal Treaty foundation on agencies would, in this context, appear inept.

Two options remain that are similarly suitable. The first one is to locate a Treaty provision on agencies separately from other institutional provisions under Part Six, Title 1 of the TFEU where bodies not (yet) recognised as institutions are positioned. Agencies would then appear under a separate Chapter 5 after the European Investment Bank.¹³⁰ Likewise, it would be suitable to insert an Article 291a TFEU which would acknowledge that agencies are an important pillar for the executive functions of the Union. Apart from providing a legal basis on which agencies are created through the ordinary legislative procedure and possible limitations to the powers conferrable on agencies, the Treaty provision would, in addition, provide a paragraph that could be phrased as follows:

the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt measures for a general framework on the programming procedure of agencies.

5.6.4.2. Proposal for Secondary Legislation

Based on this Treaty provision, secondary legislation is established that regulates the programming procedure. Different from the Framework Financial Regulation, this Regulation not only addresses the programming procedure in formal terms but also the role of the Commission in more detail. Resulting from the outcome of this work, the following aspects should be addressed: the contents of the programming document, the scope of the Commission’s opinion, the procedure in case of disagreement between the agency and Commission as well as the role of the other institutions.

¹²⁸ Chamon *supra* n 39, p. 380

¹²⁹ *ibid*

¹³⁰ Also, Helfritz proposed to include an Article 267a EC; see V Helfritz, *Verselbständigte Verwaltungseinheiten der Europäischen Union* (Berlin Weissensee Verlag 2000), pp 205-207; also one of Chamon’s proposals envisage the insertion of a new Article 309a TFEU *supra* n 39 p. 380

5.6.4.2.1. Programming Content

This work criticised that the agencies' programming documents do not comprehensively explain what factors determine their multiannual objectives. However, this is not a matter of insufficient legislation as the Framework Financial Regulation already sets out that the overall strategic programming shall 'demonstrate the contribution of the Union body to the achievement of the EU political priorities'.¹³¹ Insofar, the problem is not so much a lack of legislation as a matter of disregard by the agency. As the Framework Financial Regulation already sets out detailed requirements as to the content of the Single Programming Documents, it is not felt that further changes are required.

5.6.4.2.2. Limits of the Commission's Opinion

The Commission's opinion should be entitled to address formal, legal (including competence issues) and budgetary aspects of the programme. Hereby, the category 'budgetary aspects' should also allow efficiency-related comments as these are closely linked to budgetary aspects of the programme. Conversely, it should be clear that the Commission's opinion may not interfere with an agency's day-to-day administration as this would touch upon the core of the (remaining) independence of an agency and the rationale for its creation. In particular, the Commission should not be able to challenge the scientific independence of an agency as it was noticed in comments of the Commission on ECHA's draft Single Programming Document with regard to the (at that time) still-pending case *Sweden v Commission*.¹³² Also with regard to autonomous comments, i.e. those that are not based on legal or budgetary considerations, the Commission should not be able to insist on the consideration of its comments. Problematic for the Commission might be that under the Common Approach it bears the political responsibility for agencies in case its management board is about to take a decision that may not comply with the mandate of the agency, violates EU law or is in manifest contradiction with EU policy objectives.¹³³ This, however, is not an aspect to be addressed in the course of the programming

¹³¹ Article 32 (2) Framework Financial Regulation

¹³² Commission, 'Commission Opinion of 30.9.2020 on the draft Single Programming Document 2021-2023 of the Chemicals Agency' C (2020) 6643 final, para 23

¹³³ Paragraph 59 Common Approach on European Agencies

procedure. Rather, oversight in this respect must be safeguarded through the Commission's membership of the management board.

More difficult to ascertain is whether the Commission should be able to insist on the transposition of objectives and targets that are established in policy documents. Depending on its nature, it must be distinguished between those that are either directly linked to the political direction of the European Council, political priorities of the European Commission including policy obligations that derive from legislation (such as the multiannual policy cycle for European integrated border management) and those that fall under neither of these categories. While for the first type, the obligation to consider these policy documents is a legal one,¹³⁴ the character of other documents is less clear. Examples are action plans and roadmaps that are either established on the Commission's own initiative or in collaboration with the agency.¹³⁵ Comments on them constitute a 'grey-zone' as they are neither of a purely legal or budgetary nature nor can they be considered as autonomous requests. An example is the roadmap for the implementation of Regulation (EU) 2019/1896.¹³⁶ Its purpose is 'the rapid and full operationalisation' of the said Regulation and timelines are agreed between the Commission and Frontex to this end. A performance contract element is thus ascertainable and it seems only consequent that the Commission can remind an agency that its 'contractual' obligations are considered in the programme accordingly.

The following suggestion for a provision on the Commission's opinion is made to this end:

The Commission shall give its opinion on the draft Single Programming Document which shall address all formal, legal and budgetary aspects of the agency's programme. Where applicable, the opinion may also address

¹³⁴ The legal obligation either derives from the respective founding Regulations or from Article 32 (7) Framework Financial Regulation

¹³⁵ Such as the Roadmap on the implementation of Regulation (EU) 2019/1896 and the readiness of the standing corps by 1 January 2021, see para 77 of Commission Opinion on Frontex Single Programming Document 2020-2022

¹³⁶ EBCG Agency & DG Home, 'Roadmap for the implementation of European Border and Coast Guard 2.0' 1 July 2019, available at <https://www.statewatch.org/media/documents/news/2019/nov/eu-com-frontex-roadmap-implementation-1-7-19.pdf> accessed 20 June 2021

obligations that arise from agreements between the Commission and the agency concerned. If no adjustments to the draft programme are requested, the Commission shall give its positive opinion. A positive opinion is deemed to be given if no opinion is delivered by 1st July of the year N. Otherwise, the Commission shall specify its requests for amendments in its opinion.

A deadline for the submission of the opinion needs to be imposed on the Commission. While Article 32 (7) FFR already envisages that the opinion shall be submitted not later than by 1st July of year N, no instance was noticed where the Commission respected this deadline. To allow an agency to examine the opinion and to adjust its programme, an adequate timeframe is indispensable as well as the legal fiction that presumes a positive opinion in case the Commission misses the deadline.

5.6.4.2.3. Procedure in Case of Disagreement

It is suggested to establish a formal procedure that allows the agency to express its disagreement with the Commission's opinion. To reflect the already existing factual powers of the Commission, the agency's obligation should go beyond the obligation 'to take into account' the Commission's opinion but should also allow the management board to reject the Commission's requests. By establishing a procedure where the management board formally decides on the Commission's opinion, the interests of the Member States are safeguarded. The following suggestion for a provision that regulates the procedure in case of disagreement is made to this end:

In the case the Commission requests amendments of the programme, the management board shall re-examine the programme and shall decide on the requested amendments with a two-thirds majority of its representatives. The decision shall be adopted within three a three-months period after receiving the opinion.

Already under the present legal system, the final programme is adopted by the management board. The problem hereby is not so much that the management board does not follow the requests of the Commission. On the contrary, most of them are

implemented in the final programme but only tacitly.¹³⁷ The proposed procedure has the benefit that the management board has to decide on the Commission's opinion in a reproducible manner which would improve the transparency of the programming procedure.

5.6.4.2.4. Role of the other Institutions

Presently, the Framework Financial Regulation only obliges agencies to send the draft Single Programming Document to the European Parliament and the Council for information purposes.¹³⁸ A few founding Regulations, such as the one on Frontex, additionally requires consulting the European Parliament and the Council on the multiannual work programme.¹³⁹ To what extent these consultations actually take place could not be verified in this work. To strengthen its role, a kind of mediator function could be attributed to the European Parliament. However, apart from complicating the programming procedure, arguable executive functions are not foreseen under the Treaties.¹⁴⁰ The interests of the Council, on the other hand, is already safeguarded through the Member States' participation in the management board. For this reason, the participation of the European Parliament and the Council should remain limited to a consultation role.

¹³⁷ An exception is ECHA's reply of 1 March 2021 on the Commission's opinion on ECHA's draft programming document 2021-2023, Reply D(2021)0098

¹³⁸ Article 32(1) Framework Financial Regulation

¹³⁹ Article 102(1) Frontex Regulation 2019

¹⁴⁰ Article 14 TEU attributes legislative and budgetary functions and the exercise of political control and consultation functions to the European Parliament

Chapter 6: Conclusions

By addressing the programming obligations of European agencies, this work demonstrated its supranational image and established that the Commission is capable to exercise considerable control over an agency's programming content. It contrasted an agency's perceived independence with its programming reality where, as part of the budgetary procedure, agencies have to draw up a Single Programming Document with a corresponding planning of the human and financial resources required. As the majority of them depend from contributions of the EU budget and thus have to follow the complex programming procedure established under the Framework Financial Regulation, it places the Commission in the comfortable position to impose its view on the programming content beyond legal and budgetary aspects.

To evaluate the Commission's degree of control, two main research questions were posed in the beginning of this work. The first one was to establish the extent of control the Commission exercises over an agency's programming content. Based on these findings, the second research question addressed the necessary improvements to EU legislation. To this end, the work made use of the case study of two agencies, Frontex and the European Chemicals Agency. They were selected because their distinct policy areas, their contrasting institutional setting and different dependence from budgetary contributions.

By analysing the programming documents of Frontex and ECHA for three consecutive years and the Commission's opinions thereon, the case study was conducted in three steps: The first one analysed the content of the Single Programming Document and the Commission's opinions. Secondly, the quality of the Commission's opinions was determined. For this purpose, the comments were classified in terms of its intensity on an agency's programming autonomy. Thirdly, the work examined the effectiveness of the comments by analysing to what extent agencies implemented the Commission's comments in their final programme.

Contrary to the expectation that ECHA as an 'internal market agency' is more controlled by the Commission than Frontex as a former 'Council agency', the result of the case study was that the degree of control does not depend on the 'personality' of an agency. Instead, it is the political salience of the policy area in which the agency operates and the high contributions it receives from the EU budget that determines how intensively the Commission controls an agency's programme. Another important factor is where new tasks have been conferred on an agency recently.

The overall result of the case study is that the Commission exercises considerable control over an agency's Single Programming Document. With nearly identical high implementation rates, both agencies implemented the majority of the Commission's comments in its final programme. In the absence of explanations provided, its motives to comply are not explicitly spelled out. However, as no legal consequences arise in case of non-compliance, it is the Commission's competence to propose an agency's budget that is an agency's main incentive for compliance.

Differences amongst the agencies examined were observed in terms of the content and the quality of the Commission's comments. On Frontex programme, the Commission's comments were considerably more authoritative than on ECHA's programming and frequently appeared as instructions with parts of the programme's wording being dictated by the Commission. Also, the material focus of the Commission's comments was different: While more than half of the comments on ECHA's programme had an efficiency related context, on Frontex programming for the year 2020-2022 the focus was on legal and competence aspects. It was thus concluded that the Commission's role when commenting on an agency's programme is a flexible one and can comprise the following functions:

First, in the majority of instances on Frontex's programme, the Commission acted as a legal supervisor. In light of the new tasks conferred on Frontex, the Commission's comments focused on Frontex's transposition of its new tasks and that it does not exceed its competences. Secondly, the Commission also functioned as a budgetary supervisor. While, in general, comments on an agency's budget were phrased as instructions, the Commission's concern for the efficient use of an agency's human and financial resources was in particular noted in its opinion on ECHA's programming.

Thirdly, in both case studies it was observed that the Commission frequently referred to policy papers which points towards the Commission's role as a political supervisor that ensures that policy objectives are considered in the agencies' programmes. Fourthly, several of the Commission's comments did not specifically request alterations but rather assessed the programme. Finally, numerous instances were noticed where the Commission exceeded its role as a legal and budgetary supervisor and proactively tried to influence the agency's programme through autonomous requests.

In light of the strong influence the Commission has on an agency's programming content, the work also examined whether similarities with ministry-agency constellations of nation-states are ascertainable. Hereby, the examination orientated on less hierarchical ministry-agency structures that rely on performance contracting rather than strict ministerial oversight modes of governance. The outcome was still ambiguous. On the one hand, similarities between an agency's programming and performance contracting were noted: these are, apart from its identical programming structure, that both ensure performance-orientated governance, are linked with the budgetary cycle and allow for oversight over agencies which autonomy is regarded as an important pillar of a dualistic administrative governance structure. On the other hand, the programming procedure of European agencies lacks important elements of performance contracting. These are the absence of performance agreements and of consequences if targets are not met. This outcome indicates that the programming procedure of agencies is still an incomplete process with only some elements pointing towards the evolution of a ministry-agency kind of relationship.

The light of the results obtained through the case study, the second research question addressed the legal improvements deemed necessary to sanction the programming practice of the Commission. As the Commission's frequently went beyond commenting on legislative and budgetary aspects of the programme and sometimes even dictated the programming content, the work established that the factual powers exercised by the Commission transgress its competences conferred under the Financial Framework Regulation.

However, as the Framework Financial Regulation is primarily is designed to regulate the establishment of an agency's budget, it is not the right position for further amendments. Instead, this work proposes a separate Regulation to be enacted that regulates the programming procedure in detail. Its provisions should also address the limits of the Commission's competences and address remedies available for the agency in case of its disagreement.

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Appendix A

Overview over Agencies' Regulations Regarding its Programming Obligations and Procedures

Name	Management Board	Director	Programming Content	Budget	Further Remarks
<p>(1) ECHA: Regulation (EC) No 1907/2006; last amendment through Regulation (EU) 2019/1148</p>	<p>Article 78: Shall adopt the WP, the multiannual WP, the final budget.</p>	<p>Article 83: Is responsible for the preparation of the draft WP, the draft multiannual WP and the statement of revenue and expenditure. Shall, following approval from the MB forward the WP and multiannual WP to the Commission (<i>inter alia</i>).</p>	<p>No specific provision.</p>	<p>Article 96 (5): MB shall produce an estimate of revenue and expenditure including draft establishment plan and forward it to the Commission by 31.03.</p>	<p>No communication with or opinion of the Commission foreseen.</p>
<p>(2) GNSS Agency: Regulation (EU) No 912/2010; last amendment through Regulation (EU) No 512/2014</p>	<p>Article 6: The AB shall adopt the Agency's work programme by 15.11., after having received the Commission's opinion.</p>	<p>Article 8: Prepares the multiannual and annual WP; draws up a statement of the estimated revenue and expenditure together with the establishment plan (Article 13 (3)).</p>	<p>Article 8a (inserted by Regulation (EU) No 512/2014)</p>	<p>Article 13 (5) and (6): The AB shall produce a statement of estimate including draft establishment plan together with a provisional WP and shall forward it to the Commission by 31.03.</p>	
<p>(3) EUROFOUND: Regulation (EEC) No 1365/75; repealed by Regulation (EU) 2019/127</p>	<p>Article 5 (1): The MB adopts the multiannual WP and the annual WP taking into account the Commission's opinion (Article 6 (2)).</p>	<p>Article 6: The Executive Director draws up the multiannual and annual WP which is, following the approval of the MB, sent to the Commission, EP and Council.</p>	<p>Article 6 (1) explicitly refers to Article 32 Framework Financial Regulation.</p>	<p>Article 14: Executive Director shall draw up provisional draft estimate of revenue and expenditure, which is adopted by the MB and sent to the Commission.</p>	
<p>(4) EU-OSHA: Council Regulation (EC) No 2062/94; repealed by Regulation</p>	<p>Article 5 (1): The MB adopts the multiannual WP and the annual WP taking into account the Commission's</p>	<p>Article 11 (5): Prepares the programming document and submits it to the MB after consulting the Commission.</p>	<p>Article 6 (1) Explicitly refers to Article 32 Framework Financial Regulation.</p>	<p>Article 14: Executive Director shall draw up provisional draft estimate of revenue and expenditure, which is adopted by the MB and sent to the Commission.</p>	

Name	Management Board	Director	Programming Content	Budget	Further Remarks
(EU) 2019/126	opinion (Article 6 (2)).				
(5) CEDEFOP: Regulation (EEC) No 337/75; repealed by Regulation (EU) 2019/128	Article 5 (1): The MB adopts the multiannual WP and the annual WP taking into account the Commission's opinion (Article 6 (2)).	Article 11 (5): Prepares the programming document and submits it to the MB after consulting the Commission.	Article 6 (1) Explicitly refers to Article 32 Framework Financial Regulation.	Article 13: Executive Director shall draw up provisional draft estimate of revenue and expenditure, which is adopted by the MB and sent to the Commission.	
(6) EASA: Regulation (EC) No 216/2008; repealed by Regulation (EU) 2018/1139	Article 98 (2): MB adopts the multiannual and annual programming document taking into account the opinion of the Commission (Article 117).	Article 104 (2) (j): Prepares the programming document and submits it to the MB after obtaining the opinion of the Commission.	Article 117: The annual WP shall comprise detailed objectives, expected results including PI; the multiannual WP shall set out the overall strategic programming including objectives, expected results and PI's ; Consultation with the EP on the multiannual WP.	Article 120 (6): Executive Director shall draw up provisional draft estimate of revenue and expenditure which is adopted by the MB and sent to the Commission.	Article 120 (6): Regarding posts financed from fees and charges, indicators shall be approved by the Commission "to measure the Agency's workload and efficiency"; obligation to consult the EP on the multiannual programme.
(7) EMSA: Regulation (EC) No 1406/2002; last amendment Regulation (EU) 2016/1625	Article 10 (2): Adopts the WP and the 'multiannual strategy' taking into account the opinion of the Commission; in case the Commission expresses its disagreement within 15 days, AB shall re-examine and possibly amend it.	Article 15 (2): Prepares the multiannual strategy and annual WP after consultation with the Commission.	No specific provision, but Article 18 requires that estimate on revenue and expenditure shall be based on activity-based principles.	Article 18 (3) (5): Director shall draw up draft statement of estimate on revenue and expenditure which is adopted by the AB and sent to the Commission.	Article 15 (2) (d) agreement on performance indicators with the Commission.

Name	Management Board	Director	Programming Content	Budget	Further Remarks
(8) ERA: Regulation (EU) 2016/796	Article 51 (1) (b): Adopts the programming document containing annual and multiannual programmes after having received the opinion of the Commission; Article 52 (2): If the Commission expresses its disagreement, the MB shall re-examine and adopt it, as amended if necessary.	Article 54 (4) c): Prepares the programming document after consultation of the Commission.	Article 52: Annual WP shall identify the objectives for each activity and shall be clearly linked with budgetary and human resources required in accordance with ABB and ABM principles; multiannual programme shall set out overall strategic programming (including objectives, results, Pl's); EP shall be consulted on the content of the multiannual WP.	Article 64 (5): On the basis of a draft drawn up by the Executive Director, the MB shall produce statement of estimates and sends it including draft establishment plan to the Commission.	Article 52(5): Consultation with the EP prior to the adoption of the multiannual WP.
(9) ENISA: Regulation (EU) No 526/2013; repealed by Regulation (EU) 2019/881	Article 15(1): MB adopts draft single Programming Document before its submission to the Commission adopts final SPD taking into account the Commission's opinion.	Article 20(3): The Executive Director prepares the draft Single Programming Document and submits it to the Management Board for approval before its submission to the Commission.	Article 24: The draft Single Programming Document shall be drawn up in accordance with Article 32 Framework Financial Regulation and take into account the Commission's Guidelines.	Article 29: MB shall produce statement of estimates including draft establishment plan and send it to the Commission.	
BEREC and BEREC Office (10)					
(11)-(13) EBA EIOPA, ESMA: Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010; last amended by	Article 43 (4): Board of Supervisors adopts work programme and multi-annual programme upon proposal of the MB and transmits it for information to the EP, the	Article 53 (4)-(6): Prepares work programme and multi-annual programmes, prepares preliminary draft budget.	No specific provision	Article 63 (1): Director shall draw up the draft statement of estimates together with draft establishment plan. Board of Supervisors, after approval of the MB, produces statement of estimates with shall be transmitted	Board of Supervisors adopts the WPs; little influence of the Commission.

Name	Management Board	Director	Programming Content	Budget	Further Remarks
Regulation (EU) 2019/2175	Council, and the Commission.			together with the establishment plan to the Commission.	
(14) ACER: Regulation (EU) 2019/942 (recast)	Article 20 (1): The Administrative Board shall adopt the programming document, taking into account the opinion of the Commission, after receipt of a favourable opinion from the Board of Regulators, and after the Director has presented it to the European Parliament.	Article 24 (1) (f): The Director shall prepare the draft programme and shall submit it to the Board of Regulators, EP, and Commission by 31 January every year	Article 20 (2) and Article 20 (4) set out the necessary programming content which is identical with the requirements under Article 32 FFR.	Article 24 (1): Director draws up preliminary draft estimate. Article 33: Each year, the Administrative Board shall on the basis of the provision draft estimate adopt a provisional draft estimate of revenue and expenditure which shall be transmitted to the Commission by 31 January each year.	
(15) EEA: Regulation (EC) No 401/2009; last amendment by Regulation (EU) 2021/1119	Article 8 (4) and (5): MB adopts multiannual and work programme after having received the Commission's opinion.	Article 8 (4) and (5): Shall produce the draft of the multiannual and annual work programme; Article 12 (1): Shall draw up the draft statement of estimate.	No specific provision.	Article 12 (1): MB shall produce statement of estimate including draft establishment plan and shall forward it to the Commission by 31.03. at the latest.	
(16) EFCA: Regulation (EC) No 768/2005; repealed by Regulation (EU) 2019/473	Article 32 (2): Administrative Board adopts the work programme taking into account the opinion of the Commission and the MS; in case of disagreement of the Commission, the AB shall re-examine the programme.	Article 38 (3): Prepares the draft work programme after consultation with the Commission and the MS.	Article 24: Multiannual WP, which shall establish overall objectives, mandate, tasks, PI's and the priorities for each action. Shall be presented in accordance with ABB and methodology developed by the Commission. The annual Programme shall indicate the progress made in the achievement	Article 44 (3) (6): Executive Director shall draw up draft statement; AB shall send statement including draft establishment plan together with provisional WP to the Commission.	Policy Priorities

Name	Management Board	Director	Programming Content	Budget	Further Remarks
			of the overall objectives.		
(17) ECDC: Regulation (EC) No 851/2004	Article 14 (5) (d): Management Board shall adopt the programme of work and a revisable multi-annual programme. The MB shall ensure that these programmes are consistent with the Communities legislative and policy priorities in the area of its mission.	Article 16 (2): The Director shall be responsible for the drawing up of the draft work programmes.	No specific provision.	Article 22 (5): On the basis of a draft drawn up by the Director, the MB shall produce estimate of revenue and expenditure including an establishment plan which is forward to the Commission.	Policy Priorities
(18) EFSA: Regulation (EC) No 178/2002; last amendment Regulation (EU) 2019/1381	Article 25 (8): The MB shall adopt the programme of work including the multi-annual programme. The MB shall ensure that these programmes are consistent with the Communities legislative and policy priorities in the area of food safety.	Article 26 (2): Draws up proposal of the WP in consultation with the Commission; prepares draft budget for the coming year.	No specific provision.	Article 43 (5): MB adopts the estimate of revenue and expenditure including draft establishment plan and provisional WP which is forwarded to the Commission.	Policy Priorities
(19) EMA: Regulation (EC) No 726/2004; last amendment Regulation (EU) No 2019/5	Article 66: MB adopts the annual WP and forwards it to the EP, the Council, the Commission, and the MS.	Article 64 (3): Prepares the draft work programme and draft statement of estimates.	No specific provision.	Article 67 (6): The MB, on the basis of the draft drawn up by the Director, produces an estimate of revenue and expenditure for the following year.	No multiannual programme.
(20) "Frontex": Regulation (EU) 2019/1896	Article 102 (1): Adopts the single programming document taking into account the positive opinion of the Commission and	Article 106 (4): Prepares the draft single programming document and submits it for endorsement before the draft is	Article 102 (3): The multiannual work programme shall be in line with the multiannual strategic policy cycle for	Article 115: Management Board on the basis of the draft of the Director; adopts provisional draft estimates and establishment plan; forwards it to the EP,	Positive opinion of the Commission required; consultation with the European

Name	Management Board	Director	Programming Content	Budget	Further Remarks
	with regard to the multiannual work programme after having consulted the EP and the Council.	sent to the EP, the Council and to the Commission by 31 January.	European integrated border management.	Council and Commission by 31.01. as part of the single programming document.	Parliament and the Council on the multiannual work programme.
(21) Europol: Regulation (EU) 2016/794	Article 11 (1) (a): Adopts the multiannual programme and annual WP taking into account the opinion of the Commission (follows from Article 12).	Article 16 (5) (d): Prepares the draft multiannual and annual programme and submits it to the MB after having consulted the Commission.	Article 12: multiannual and annual programming (objectives, expected results, performance indicators) principle of ABB and ABM; shall indicate the financial and human resources allocated to each action.	Article 58: MB, on the basis of the draft of the Director, adopts provisional draft estimate on revenue and expenditure and establishment plan and sends it to the Commission by 31.01.	Article 12 (1): Consultation with the JPSG regarding the multiannual programme.
(22) CEPOL: Regulation (EU) 2015/2219	Article 9 (1): Adopts the Multi-annual programming and annual work programme taking into account the opinion of the Commission (follows from Article 10).	Article 14 (3) (d): Prepares the draft multiannual and annual programme and submits it to the MB after having consulted the Commission.	Article 10: Multiannual and annual programming (objectives, expected results, performance indicators) principle of ABB and ABM; shall indicate the financial and human resources allocated to each action.	Article 18: MB, on the bases of the draft of the Director, adopts provisional draft estimate on revenue and expenditure and establishment plan and sends it to the Commission by 31.01.	Article 10 (1): Consultation with the EP regarding the multiannual programme.
(23) eu-LISA: Regulation (EU) 2018/1726; last amendment by Regulation (EU) 2019/818	Article 19 (1) (q) and r): Adopts the draft SPD (multiannual and work programme and provisional draft estimate and draft establishment plan) by 31.01.; adopts the SPD in accordance with the annual budgetary	Article 24 (3): Prepares SPD and submits it to the MB after consulting the Commission and Advisory Groups; prepares the agency's draft statement of revenue and expenditure.	Article 44 (5): Refers to the Financial Regulation and the Framework Financial Regulation; includes multiannual, principle of ABB and ABM, performance indicators and resource programming.	Article 45: Director, taking into account the activities carried out by the agency, draws up a draft statement; MB adopts draft estimate on revenue and expenditure and sends it to the Commission by 31.01.	

Name	Management Board	Director	Programming Content	Budget	Further Remarks
	procedure, taking into account the Commission's opinion, before 30.11.				
(24) EASO: Regulation (EU) No 439/2010	Article 29 (1) (f): Adopts the WP after having received the Commission's opinion.	Article 29 (1) (f): Prepares the draft work programme.		Article 34 (3): The MB shall send a final draft estimate on revenue and expenditure including draft establishment plan to the Commission.	
(25) EMCDDA: Regulation (EC) No 1920/2006	Article 9 (4) and (5): Adopts the annual and three-years WP after consulting the Scientific Committee and after obtaining the opinion of the Commission.	Article 11 (3): Is responsible for the preparation of the Centre's work programmes.	No specific provision.	Article 14 (5): The MB (based on the draft of the Director), produces the estimate of revenue and expenditure including a draft establishment plan which is forwarded to the Commission together with the WP by 31.03.	Article 9 (6): If the Commission expresses its disagreement with the WP, MB requires 3/4 voting.
(26) FRA: Regulation (EC) No 168/2007	Article 12 (6): Adopts the annual WP and multiannual framework after the Commission and the Scientific Committee has delivered its opinion; WP shall be in accordance with the available financial and human resources; adopts the annual draft and the final budget.	Preparation of the annual WP.	Article 5: The Council adopts the multiannual framework.	Article 20 (5): The MB (based on a draft of the Director), produces an estimate of revenue and expenditure including a draft establishment plan which is forwarded to the Commission by 31.03.	

Name	Management Board	Director	Programming Content	Budget	Further Remarks
(27) EIGE: Regulation (EC) No 1922/2006	Article 10 (6): Adopts the annual and multiannual WP, after consultation with the Commission, in accordance with the budget and the available resources.	Article 10 (6): WP is adopted `on the basis of a draft drawn up by the Director`.	No specific provision.	Article 14 (5): The MB, based on a draft of the Director, produces the estimate on revenue and expenditure which is forwarded to the Commission by 31.03.	
Eurojust (28)	Left aside because Justice and Home Affairs.				
(29 ETF: Regulation (EC) No 1339/2008	Article 9: Adopts WP after the Commission has delivered its Opinion; draws up annual estimate on revenue and expenditure and forwards it to the Commission; adopts draft establishment plan and definite budget.	Article 10 (4): Prepares on the basis of general guidelines of the Commission the draft annual WP and draft estimate on revenue and expenditure.	Article 12(2): Annual WP is drafted within a framework of a four-years multiannual WP in cooperation with the Commission's services; projects on activities are accompanied by an estimate of expenditure and by allocating staff and budgetary resources.	Article 16: On the basis of a draft produced by the Director, the GB produces an estimate on revenue and expenditure for the financial year including a draft establishment plan and sends it to the Commission by 31.03.	

Annex A



Brussels, 4.1.2021
C(2021) 1 final

COMMISSION OPINION

of 4.1.2021

on the Single Programming Document containing the draft multiannual programming for 2021-2023 and the draft Annual Work Programme for 2021 ('Single Programming Document for 2021-2023') of the European Border and Coast Guard Agency

(ONLY THE ENGLISH TEXT IS
AUTHENTIC)

COMMISSION OPINION
of 4.1.2021

on the Single Programming Document containing the draft multiannual programming for 2021-2023 and the draft Annual Work Programme for 2021 ('Single Programming Document for 2021-2023') of the European Border and Coast Guard Agency

(ONLY THE ENGLISH TEXT IS

AUTHENTIC) THE EUROPEAN COMMISSION,

Having regard to Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard¹, and in particular Article 100(2)(k) and Article 102(1) thereof,

Whereas:

- (1) The mandate of the European Border and Coast Guard Agency (hereinafter: the Agency) is established by Regulation (EU) 2019/1896 (hereinafter: the Regulation).
- (2) The rapid and full operationalisation of the Regulation is a top priority for the European Union.
- (3) The Commission, together with the Agency, have developed a Roadmap framing the implementation of the Regulation in order to ensure clarity, transparency and effective monitoring of the progress of its implementation. The Roadmap's objective is to ensure that all the required activities are in line with the letter and spirit of the Regulation and that they are being launched in a timely and effective manner. In particular it relates to the full readiness of the European Border and Coast Guard standing corps for deployment as of 1 January 2021 and guaranteeing the effective use of the substantial budget earmarked to build the Agency's own technical capabilities.
- (4) The Roadmap defines 13 relevant processes for the timely operationalisation of the Regulation, clearly identifying the deliverables, the corresponding timelines and the responsible lead actors, namely the Agency, the Management Board, the Member States and the Commission.
- (5) In accordance with Article 100(2)(k) and Article 102(1) of the Regulation, the Management Board shall adopt, before 30 November each year, the Agency's Single Programming Document containing the multiannual programming and Annual Work Programme for the coming year taking into account the positive opinion of the Commission. If the Management Board decides not to take into account elements of the opinion of the Commission, it shall provide a thorough justification. The Annual Work Programme has to be in line with the objectives and tasks of the Agency set out in the Regulation.

¹ OJ L 295, 14.11.2019.

- (6) In accordance with Articles 32 and 33(4) of the Framework Financial Regulation², the Agency shall draw up a Single Programming Document containing multiannual and annual programming taking into account guidelines set by the Commission. The Commission draws the attention of the Agency that on 20 April 2020 new guidelines for the Single Programming Document have been issued and attached to the Communication from the Commission³ to facilitate Agencies compliance with the programming and reporting requirements set out in the Financial Framework Regulation 2019/715. The new guidelines have been forwarded to the Agencies and shall be used as from the 2022-2024 programming exercise. The Commission would also like to draw the attention to the Frontex Financial Rules⁴ in this regard.
- (7) The Agency jointly with the national authorities of the Member States responsible for border management and returns, including coast guards to the extent that they carry out border control tasks, constitute the European Border and Coast Guard.
- (8) On 23 September 2020, the Commission proposed a New Pact on Migration and Asylum⁵, covering all elements needed for a comprehensive Union approach to migration. It sets out improved and faster procedures throughout the asylum and migration system and establishes a balance between the principles of fair sharing of responsibility and solidarity. This is crucial for rebuilding trust between Member States and confidence in the capacity of the European Union to manage migration. The Agency is expected to play an important role in the implementation of the several areas defined in the Pact.
- (9) The Agency is expected to play a leading role in supporting the establishment and implementation of the common EU system for return, announced in the New Pact on Migration and Asylum, and in making returns work well in practice. It should be a priority for the Agency to become the operational arm of the EU return policy, with a dedicated Deputy Executive Director and integrating more return expertise into the Management Board. The Agency should support the introduction of a return case management system at EU and national level, covering all steps of the procedure from the detection of an irregular stay to readmission and reintegration in third countries, and cooperate closely with the Commission in the implementation of the future Voluntary Return and Reintegration Strategy announced in the Pact. The Commission invites the Agency to include these activities in the Single Programming Document.
- (10) The Single Programming Document is an essential instrument in the implementation of the Regulation by the Agency. It has two main functions: first, it ensures that the Agency's activities are transparent for the European institutions and the public, and second it is the instrument through which the Management Board instructs the Executive Director on the multiannual objectives for the Agency and, by virtue of the Annual Work Programme, on the activities to be undertaken in the coming year.

² OJ L 122, 10.5.2019, p.15.

³ C(2020) 2297 final.

⁴ Management Board Decision 19/2019 of 23 July 2019.

⁵ COM(2020) 609 final.

The Annual Work Programme also establishes the basis for ensuring the adequacy of the financing decisions on the activities it covers.

- (11) The Single Programming Document, in particular its annual programming component, as already pointed out by the Commission in its Opinions last years,
should be a self-standing document. It should provide a sufficient level of detail to allow stakeholders and the general public to understand how the Agency intends to implement its mandate and how the EU money allocated for this purpose will be spent.
- (12) The Single Programming Document for 2021-2023 was submitted to the Commission by the Agency on 31 March 2020, after endorsement of the Management Board.
- (13) The tables and figures contained in the document, particularly those on human and financial resources, need further validation and adjustment in view of the new multiannual financial framework for 2021–2027.
- (14) The annual programming is an integral part of the Single Programming Document (see Article 102(2)(1) of the Regulation) consequently the programming document is not “serving as a reference for the development of the annual work programme“ as indicated in the Draft (cf. page 4. third indent) and the Agency should adapt the text accordingly.
- (15) The Commission recalls that in the context of the adoption of the single programming document 2020-2022, the Commission delivered a positive opinion subject to account being taken of the comments included therein. Whereas most of the comments have been addressed, the Agency indicated that some elements of the Commission’s opinion would only be addressed in the next single programming document, and notably:
 - (1) the requirement to update the Mission and Vision in order to reflect a new, broader mandate as well as to review the Agency’s values and to support Member States in their return activities;
 - (2) the requirement to ensure that the Agency is engaged in cooperation activities exclusively with those international organisations that are listed in the new Regulation is subject to an internal review. The outcome of this review should be translated in the Single Programming Document.
- (16) The Commission notes that the above comments have not been taken into account in the draft Single Programming Document 2021-2023 and invites the Agency to duly consider them.
- (17) The Commission recalls that the Regulation reinforces significantly the Agency’s capabilities but that the use thereof has to respect the framework and mechanisms foreseen in the Regulation. The Regulation also sets a multiannual strategic policy cycle for the European Integrated Border Management as a new dedicated governance mechanism steering all the stakeholders in this policy area, in particular, the reinforced Agency and the European Border and Coast Guard as a whole. The multiannual policy cycle for the European Integrated Border Management will be set out in a Commission Communication following a political dialogue with the European Parliament and the Council, initiated with a Policy document to

be submitted by the Commission. As announced in the Pact on Migration and Asylum, this process will be established in the course of 2021.

- (18) Once the multiannual strategic policy cycle is in place, it will steer not only the implementation of the Regulation but the whole European Integrated Border Management as implemented by the European Border and Coast Guard, in particular the activities of the Agency. In this context, the Commission recalls that the long term strategic framework for the Agency can only be defined once the new political steering for European Integrated Border Management is established.
- (19) The Commission considers that further modifications are still needed to the draft Single Programming Document to align the proposed text with the enhanced set of tasks of the Agency as laid down in the Regulation as well as the important role for the Agency to play in the implementation of the New Pact on Migration and Asylum.
- (20) Given the role of the Agency in the interoperability of the European Union IT systems in the area of borders, migration and security, and in particular in establishing and operating the ETIAS central unit, the Single Programming Document should provide a specific objective for the implementation of the interoperability as part of the strategic area on Reduced Vulnerability of the External Borders based on Comprehensive Situational Awareness. The ETIAS Central Unit is a key component of the ETIAS system which is expected to be operational by the end of 2022. The Agency will, among others, be responsible for setting up and running the ETIAS Central Unit operating on a 24/7 basis.
- (21) The Commission considers that the role of the Agency in the effective monitoring and support of the preparations at national level and by responsible EU agencies of the new interoperable platform of European IT systems in the area of borders, migration and security should be integrated in the single programming document, in particular to reflect its contribution to the upcoming Rapid Alert Process for IT systems (RAP-IT) launched by the Pact on Asylum and Migration.
- (22) The Commission urges the Agency to take fully into account the use of interoperability as provided in Union law based on European legislation via Regulation (EU) 2019/817 and Regulation (EU) 2019/818 and refrain in the single programming document from any reference to interoperability that could be misleading, such as, and in particular when it comes to False and Authentic Documents (FADO) which is not interoperable with other Union European IT systems or to the interoperability of the vulnerability assessments produced by the Agency with the Schengen evaluation mechanism, the interoperability between return systems, or the interoperability assessment of the Common Core Curriculum.
- (23) The Commission considers as important that all processing of personal data carried out by the Agency has to be in line with Regulation (2018)1725 and the specific data protection provisions laid down in the Regulation. Any action in the Programming Document should not be understood as the Agency enlarging the mandate for processing personal data defined under those regulations. The Commission welcomes the actions announced in

the Programming Document concerning the protection of personal data in particular as planned in “Key Activity 6.4.2. Design and implement the framework for legitimate personal data collection and processing throughout all Frontex activities” including the adoption of 2 Management Board decisions implementing the new Data Protection Regulation .

- (24) The Commission applauds the horizontal objectives set out in the draft Single Programming Document 2021-2023, underlying the importance of accountability, regularity and legality, including sound financial management.
- (25) The Commission regrets that the present draft programming document insufficiently reflects the requirement provided for in the Regulation to establish an independent mechanism in the Agency to monitor the compliance of the Agency’s operational activities with fundamental rights. This mechanism is based on the reinforced role of the Agency’s Fundamental Rights Officer (FRO) who is expected to be assisted by the deputy Fundamental Rights Officer and at least 40 Fundamental Rights Monitors acting under the Fundamental Rights Officer’s hierarchical supervision. It is of utmost importance that the Agency, without any further delay, puts in place all the arrangements provided for in the Regulation in this regard, in particular, to guarantee the full independence of the Fundamental Rights Officer and his or her staff in the performance of their duties which is a cornerstone of the fundamental rights monitoring framework.
- (26) To this end, the Commission invites the Agency to provide more information in objectives and actions under Key Activity 6.4.1 on the setting up of the independent fundamental rights mechanism, in particular the role of the Fundamental Rights Officer and Fundamental Rights Monitors. The Key Activity should also aim to better promote fundamental rights as an overarching component of the European Integrated Border Management and the implementation of the Fundamental Rights Strategy by the European Border and Coast Guard.
- (27) The Commission welcomes the Agency’s efforts to develop key performance indicators in relation to the multiannual objectives and the strategic action areas as well as in the Annual Work Programme for 2021. Following the recommendations on the Single Programming Document for 2020, the Agency has made further efforts to improve the quality of the indicators. However, the Commission invites the Agency to improve the description of the key performance indicators, by making their presentation more informative, i.e. by including for each key performance indicator a) the relevant strategic goal and objective; b) the basis and manner of calculation and measurement, including an example; c) the target range; d) the measurement and reporting frequency. The Commission invites the Agency to accelerate its work on the key performance indicators in order to allow regular reporting to the Management Board as of 2021.
- (28) The Commission regrets that the following annexes are not attached to the version of the Annual Work Programme on which the Commission issues its opinion and they will only be enclosed with the final version of the Programme:

- Annex X Procurement plan 2021,
 - Annex XI Organisation Chart 2021,
 - Annex XIV International and European Cooperation Strategy 2021-2023.
- (29) The guidelines adopted by the Commission clearly set out that all information, including the annexes, should be included in the version of the programming document submitted to the Commission for its Opinion. Given this missing information, the Commission's opinion on these annexes is without prejudice to the future positions of the Commission on these matters.
- (30) As regards Annex XIV International and European Cooperation Strategy 2021-2023, the Commission takes note of its preliminary draft submitted by the Agency on 31 July 2020 giving the Commission the opportunity to comment on this document.
- (31) In the draft Strategy, the Commission invites the Agency to take full advantage of the possibilities offered by its enhanced mandate to help reduce the migratory pressure at the EU's external borders, including by deploying border guards at neighbouring third countries' borders with other third countries earlier in the migration route and by building the capacity of third countries to effectively carry out the return of migrants with a return decision to their countries of origin.
- (32) The Commission would also like to underline the importance of the Agency's advisory role in the Commission-funded project aiming at operationalising the recently-created National Coordination of Joint Risk Analysis Center (NACORAC) in Turkey.
- (33) The Commission invites the Agency to include strategic objectives for its cooperation partners and align this section with the rest of the International Cooperation Strategy by setting strategic objectives and corresponding outputs.
- (34) The Commission would like to stress that it is not certain that a future relationship will be in place in any event, therefore the Agency is invited to review the text in this regard. In particular in the International Cooperation Strategy, Section 5.1 Transatlantic cooperation and other strategic partnerships.
- (35) The Commission recalls that in the context of the adoption of the current Single Programming Document, the Commission invited the Agency to include a reference to the pending Commission proposals to recast the Return Directive and the new Pact on Asylum and Migration, which should be reflected in the 'Political Framework' section.
- (36) In the list of binding acts enumerated in the 'Legal Framework' section, the status agreements in force should be mentioned as well, being international agreements concluded by the EU with third countries.
- (37) The Commission invites the Agency to include a section with a contingency plan and estimated impact of the 2020 COVID-19 health crisis on the Agency's operational activities, including the impact on the financial and human resources of the Agency.

- (38) The Commission reminds the Agency to avoid using acronyms in the text of the document.

Multiannual programming

- (39) The Commission recalls that the deployment of the standing corps needs to always take place under the command and control of the host Member States providing the instructions and supervision to the deployed team members. In this context, the concept of ‘*EU shared responsibility in coordination of the operational activities*’ (Key activity 2.1.2) is unclear, in particular as regards its compliance with the arrangements foreseen in the Regulation for the coordination of the Agency’s activities and the allocation of different responsibilities, especially as regards the framework for defining the civil and criminal liabilities of the team members of the standing corps during their deployments. The relevant parts of the programming document need to be adapted accordingly, in particular as regards the title of Key activity 2.1.2).
- (40) As regards the Strategic Action Areas of the Multiannual Programming, the Commission propose to the Agency to add under point 2.2.5. (*Reinforce the external dimension aimed at multiplying Frontex operational impact through cooperation with the European Commission and EEAS as well as through partnerships with Member States, EU entities, Third Countries and International Organisations*) a new “focus area” on strengthening operational cooperation, including joint operational activities with third countries being it the most prominent form of the Agency’s cooperation with third countries.
- (41) The Agency needs to ensure an adequate integration of the international cooperation strategy for 2021-2023 in the multiannual part of the programming document and by cross-referencing between the strategy and concrete actions planned under the Annual Work Program for 2021.
- (42) Given the financial reality where significant cuts to the budget of the Agency for the coming multiannual financial period 2021-2027 must be anticipated, the Commission recalls that this should be reflected in the strategic priorities for the Agency’s international cooperation. In this regard the Commission stresses that focus should be on main priority areas of cooperation.
- (43) The Commission suggests that the indicators on the quality of the data and of the service in EUROSUR are coherent with the key performance indicators of the Single Programming Document in line with Article 23 of the Regulation.
- (44) The indicators shall reflect the overall security of the systems and a proper user access. There is a risk that indicator 15 that seeks to maximize the number of users could result in security leaks.
- (45) The Commission welcomes the references to the complementarity and coordination between the Frontex Liaison Officers and the European network of immigration liaison officers. The Commission recommends to mention also other relevant liaison officers and Frontex cooperation in the definition and implementation of the Biennial Work Programme of the

network of immigration liaison officers that will be adopted by the Steering Board, as foreseen by Article 8(2) letter a of Regulation (EU)2019/1240. The Commission also stresses the need for the Agency to ensure that all the necessary steps are taken so that Frontex return liaison officers are effectively deployed as of January 2022, when the EURLO programme will come to an end.

Annual Work Programme for 2021

- (46) The Commission regrets that the work programmes 2021 does not address with sufficient clarity the implementation of new activities stemming from the new Regulation. In particular all the new activities related to integrated planning and standardization are not addressed in the work programme but should be implemented as of 2021.
- (47) The Commission welcomes the objectives and corresponding focus areas listed. Nevertheless the Commission would welcome more consistency and details on how the Agency intends to translate all of these activities into action.
- (48) The Commission also welcomes that each section ‘Key Activities’ is cross-referenced with a title on ‘Indicators: targets and baseline’. However, the Commission notes that the content is not consistent and in many instances either the targets or the baseline is not included. The Commission invites the Agency to add those missing elements wherever it is possible.
- (49) While welcoming the references made to EUROSUR, the Commission invites the Agency to further elaborate in the work programme 2021 on the impact on the Agency’s implementation of EUROSUR stemming from the new Regulation, in particular on the increased scope of EUROSUR which covers no longer border surveillance as well as on the development of the new EUROSUR Fusion Services.
- (50) The Commission notes that there is no provision/action/measure related to deployment of different profiles of Frontex experts as observers in Schengen evaluation missions. This is a recurrent activity on the basis of Article 10 (5) of Regulation (EU) 2013/1053, which requires resources (specially trained Frontex staff and financial resources) therefore a specific action should be included in the Single Programming Document.
- (51) The Commission draws the attention of the Agency that it might ask for additional support for the training of Schengen evaluators from Frontex on the basis of Article 13 (1) of Regulation (EU) 1053/2013, including to update the current curricula and possibly cover other policy areas therefore this topic should also be reflected in the document.
- (52) The contribution of Frontex to the preparation and implementation of the Schengen evaluation mechanism has increased consistently, in particular in the area of vulnerability assessment where systematic cooperation and synergies are constantly developed in accordance with Article 33 of the Regulation therefore additional resources should be ensured in the Agency. This action should also be included in the programming document.
- (53) On page 27 and 32, references are made to the situation monitoring and risk analysis with the capacity to monitor EU external borders and the pre-frontier areas and support the set-up and functioning of information

exchange and risk analysis centres and networks, including in third countries. The Commission suggests that in general this possibility should be also open to other relevant priority countries or regions when relevant. Silk Route countries could serve as an example.

- (54) As regards the Strategic Objective 2 (*Safe, secure and well-functioning EU external borders*) Focus Area 2.1. (*Provide effect-oriented and flexible operational response*) and the reference made to the ‘four-tiers access control model under point 2.1.1. the Annual Work Programme should be clear on the fact that the Agency’s mandate as set out by the Regulation, does not allow the Agency to deploy European Border and Coast Guard teams from the standing corps at the internal borders.
- (55) The Commission welcomes the involvement and added-value of the Agency in the EU’s Priorities for the fight against serious international and organised crime under the EU Policy Cycle/EMPACT, as well as the Agency's approach towards cross border crime phenomena from the perspective of integrated border management. The Commission encourages a stronger commitment in both operational activities and Joint Action Days conducted under the EU Policy Cycle/EMPACT, with the aim to support the combined and multidisciplinary efforts of the relevant services of the Member States, EU institutions and EU agencies as well as third countries and organisations.
- (56) However, as regards Key Activity 2.2.2. (Enhance the development of investigation activities supporting Member States in prevention, detection, pre-investigative activities related to cross-border crime by providing technical and operational assistance) the Commission underlines the importance of the limitation of the Agency’s mandate in relation to criminal investigations and the need for due respect of the competences of the relevant union Agencies, notably Europol and Eurojust, as well as of the national authorities of the Member States.
- (57) As regards Key Activity 2.2.3. (Enhance operational cooperation with customs in cross-border crime and customs enforcement area by supporting facilitation and coordination of joint operational activities), while supporting the strengthening of operational cooperation between the border guard authorities and the Agency with the customs authorities, the Commission reiterates that such cooperation is outside the scope of the Regulation and that European integrated border management does not alter the respective competences of the Commission and the Member States in the customs area, in particular regarding controls, risk management and the exchange of information (see Article 68(4) and Recital (14) of the Regulation). Thus such cooperation could only take place within the respective mandates of the European Border and Coast Guard – including the Agency – and of the Commission and, where relevant, the customs authorities of the Member States, where such cooperation among them support each other. In the same vein the Commission reminds that operational cooperation between the Agency and “international customs bodies” (quoted from the Single Programming Document) is not provided for by the Regulation, as the latter include an exhaustive list of international organisations with which the Agency may cooperate. Consequently, customs officers of the Member

States cannot be part of the standing corps unless they meet the requirements attached to specific profiles of the standing corps. The Agency cannot coordinate and co-finance customs operations including the deployment of customs officers. The wording of Key Activity 2.2.3. and Annex XIII (Plan of Operational Response 2021

– Core Elements) Chapter 4.5. (Enhancing the operational co-operation with Customs) must be revised to accurately reflect the EU legal framework, the observance of respective mandates as outlined above, taking into account in particular Art. 68 (4), which, though it provides for possible cooperation on activities relating to the customs area, nevertheless, also specifically provides that these activities are outside the scope of the Regulation. Further DG TAXUD should be added in Annex XIII (plan of Operational Response 2021 – Core Elements) Chapter 4.5 (Enhancing the operational co-operation with Customs) in view of increasing strategic collaboration.

- (58) The Regulation envisages that the Agency should take a more pro-active attitude towards offering assistance to the Member States on return, whether by initiating return operations, strengthening capacity in Member States through return related training, or deployment of return teams with the agreement of the Member State in question. The Commission regrets that this shift of approach, which requires increased monitoring and analysis of Member States' needs as well as adequate resources, has not been reflected in the document.
- (59) The Commission strongly encourages the Agency to continue working towards supporting Member States in the implementation of assisted voluntary returns (currently planned for Q4 2021).
- (60) The Commission considers that the training for standing corps members in the area of return should be significantly strengthened in the programming document (Annex XII: Training plan 2021). A two-day basic training on return policy and activities included in 'the late stage of the border checks' module of nine weeks are not sufficient due to the complexity of the subject. Given the political and operational importance of return, the unpredictable nature of migration crises and growing role of the Agency in the return area, the Commission invites the Agency to develop a dedicated return module within the standing corps basic training with a content and length adequate to prepare them to support carrying out return tasks in times of necessity or crisis.
- (61) The Commission appreciates the efforts of the Agency to take over and improve the False and Authentic Documents (FADO) online system and to create synergies with other similar systems. The Agency should better indicate how the timely start of the system will be matched with sufficient resources assigned to the project.
- (62) The Commission welcomes that the Programming Document and the Annual Work Programme reflect the role of the Agency in assisting the Commission on border security research in the context of the Framework Programmes for Research and Innovation. The Commission encourages the Agency to stress the link between Activity 3.4.3 and Activities 3.4.2 and 3.4.4, where results of EU-funded border security research are key inputs of pilots of new technologies and of dissemination, in order to facilitate

uptake of European innovation by European users; and to more explicitly state the relationship between research and the Capability Development Planning process, which inputs to the identification of research priorities and integrates innovation coming from research. The Commission invites the Agency to make clearer the reference to the Terms of Reference signed in 2020, mentioned under Key Activity 3.4.2.

- (63) As regards Key Activity 4.1.1. (Support the establishment of the Multiannual Strategic Policy Cycle) the Commission stresses that the strategic risk analysis required by Articles 8(4) and 29(2) of the Regulation should be completed and submitted to the Commission by the Agency in the course of 2020, not in 2021.
- (64) As regards, Key Activity 5.2.1. (Establish and maintain appropriate frameworks for cooperation within the EU and with international organisations, in order to make full use of the EBCG mandate) the Commission stresses that in accordance with Article 68(2) of the Regulation, cooperation with the European External Action Service, Union bodies, offices, agencies – including CSDP missions and operations – and with international organisations, shall take place in the framework of working arrangements concluded with prior approval of the Commission. Service-level agreements or other practical arrangements cannot substitute a working arrangement with a view to have the same effect.
- (65) As regards Focus Area 6.3. (Ensure accountability, regularity and legality of all Frontex activities through a comprehensive inspection and control system to guarantee the effectiveness of internal business processes) bearing in mind the significantly increasing tasks, as well as of the corresponding human and financial resources, the Commission suggest to spell out in the Single Programming Document how a constant and efficient risk management would be pursued by the Agency and include a specific chapter of Annex VIII (Strategy for organisational management and internal control systems 2021) on the Agency's Risk Register.
- (66) The Commission invites the Agency to reflect in the document the fact that the supervisory mechanism on the use of force and weapons is expected to be developed during 2020 as a tool to be implemented under focus area 6.3 or 6.4.
- (67) The Commission would welcome to see the overall approach linked to the external dimension captured in one area and not scattered along the different aspects of the document. A reference to Partnership Framework should be added as well as the new Pact on Asylum and Migration. The Agency's cooperation with third countries should be developed in the framework of the EU's dialogues and partnerships supporting their objectives.
- (68) The Commission would welcome a more detailed description in the document on the cooperation with Morocco given that a roadmap has already been developed.

Budget

- (69) The Commission welcomes the disclaimer that tables and figures contained in the document and particularly those on human and financial resources,

might need further validation and adjustment in view of the outcome of the negotiations on the new multiannual financial framework for 2021–2027.

- (70) The Commission invites the Agency to analyse whether the COVID-19 crisis has an impact on the Agency’s operations and resources. Depending on the outcome of said assessment, the Commission invites the Agency to update the draft Single Programming Document to reflect the new reality.
- (71) In relation to the projections for future budgets, the Commission invites the Agency to take into account the Council conclusions on the financial envelope for Frontex. Even though the negotiations on the multiannual financial framework for 2021-2027 are not closed at this point in time, the Council conclusions provide strong indications on the budget evolutions for the coming years. The Commission invites Frontex to amend the Single Programming Document’s budget assumptions downwards to bring them in line with the agreement on the new Multiannual Financial Framework.
- (72) The Commission invites the Agency to align all sections of the Single Programming Document to the human and financial resources allocated to the Agency in the Commission’s Draft Budget 2021, and to consider possible implications for the planning of tasks.
- (73) At this point in time, any statement on the budget of the Agency (2021 and following years) can only be considered as indicative and cannot prejudice a future decision by the Budgetary Authority and the future revised Legal Financial Statement to accompany the implementation of the Regulation. In line with Article 44 (4) of Regulation 1726/2018, the proposals concerning the programming document shall become definitive after the final adoption of the general budget of the Union and, if necessary, shall be adjusted accordingly, in particular the amounts mentioned in Section II, 2.3 ‘Human and Financial Resources Outlook for years N+1 – N+3’ and Section IV Budget.
- (74) The Commission welcomes the information include by the Agency on Section IV, Budget 2021, 4.1 ‘Revenue and Expenditure’, which specifies all revenue streams of the Agency, including an exhaustive listing of all revenues due to ad hoc grant agreements, delegation agreements or contribution agreements.
- (75) The Commission reminds the Agency that it is of a high importance to establish the financing of the standing corps in line with the principle of sound financial management, including appropriate level of lump sums to ensure respect of the *no profit rule* and avoid the current irregular situation of too high unit costs.

Staffing

- (76) The Commission considers that the upgrades requested by the Agency to the establishment plan for 2021 are too high, because they:
 - (1) significantly exceed the reclassification rates laid down in Annex IB of the Staff Regulations, and Article 54 CEOS forbids any exceeding of the Annex IB rates for reclassification of temporary staff 2f).

- (2) cannot be used as an attractively measure to recruit systematically at higher grades, because Article 53 CEOS limits recruitments at AD 9+ to a maximum of 20% of total AD recruitments over 5 years.
- (77) In light of the above, the Commission invites the Agency to adjust the draft proposal for the 2021 establishment plan for the budgetary hearings that is in line with the statutory requirements for recruitments and reclassifications.
- (78) Further the proposed establishment plan includes no provision for AST/SC temporary agents and very few FGII contract agents Section IV – Budget 202, 4.3 External personnel 2021. The Commission invites the Agency to identify positions that involve clerical or secretarial tasks and should therefore be converted in accordance with Annex 1A of the Staff Regulations and Article 80 of the CEOS.
- (79) The Commission welcomes the anticipated increase in the number of human resources involved in activity Focus Area_2.4 Support migration management by ensuring effective returns. However, the Commission believes that the anticipated number of human resources does not fully respond to the growing needs related to the extended mandate in the area of return, strong ambitions of the Pact on Migration and Asylum in the area of returns and the growing role of the Agency in supporting Member States in that respect.
- (80) At the same time, the staffing increase proposed in the Programming Document corresponds only to the number of additional resources necessary in 2021 to ensure takeover of ERRIN activities.
- (81) While the total number of forced return escorts foreseen as Agency staff and categories 2 and 3 may be sufficient to meet the needs related to organising return operations, ambitious operationalisation of the Agency's mandate with regard to pre- return activities is crucial to assist Member States in ensuring sufficient availability of returnees. Unpredictability of migratory crises requires also availability of flexible resources that could be deployed on the ground as needed.
- (82) The Commission invites the Agency to adapt the staffing plan in the area of return to an adequate level to ensure fast development of new activities in the framework of the operationalisation of the expanded return mandate and ensuring sufficient assistance to the Member States on the ground.
- (83) The Commission considers it important to ensure that all the members of the standing corps receive training in accordance with the highest standards, including on fundamental rights.
- (84) Furthermore, the Commission is of the opinion that all standing corps members, in particular the ones with the border guard profile, should be provided with an adequate training in the area of return to enable them to respond to urgent needs if necessary,
- (85) The Commission would also like to signal the absence of a strategy to tackle the gender imbalance among the Agency's staff in managerial responsibilities and more particular in middle management positions. Further the Commission takes note of the persistent significant site effect on the geographical balance among Agency staff (Section V – Annexes,

Annex IV: D Gender and geographical balance).

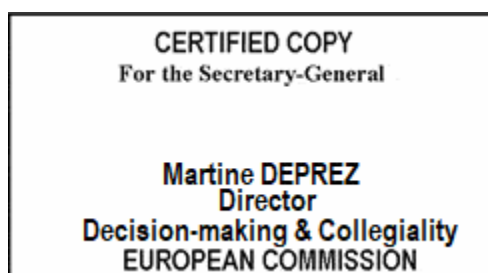
- (86) As regards schooling (Section V – Annexes, Annex IV: E Schooling) the Agency advances measures to assist in the coverage of the school expenses in international schools which exceed the reimbursement ceiling introduced by the HQ agreement in Warsaw as well as for staff deployed to a duty station in a Member State. The Commission would like to stress the need to structure this support through service contracts. Indeed, education allowances provided for in the Staff Regulation may not be increased or modified by a decision of an agency by means of direct payments or reimbursements to staff members of charges related to any educational, pre-, or after-school costs. If the Agency wishes to finance such costs above the ceiling laid down in the HQ agreement, it should cover them via a budgetary procedure and pay the concerned establishments (schools, crèches, etc.) directly via a service contract.

Thereby delivers a positive opinion on the draft Single Programming Document for 2021- 2023 of the European Border and Coast Guard Agency subject to account being taken of the above-mentioned comments.

This opinion is addressed to the Management Board and the Executive Director of the European Border and Coast Guard Agency.

Done at Brussels, 4.1.2021

For the Commission
Ylva Johansson
Member of the
Commission



Annex B



Brussels, 29.11.2019
C(2019) 8715 final

COMMISSION OPINION

of 29.11.2019

on the Single Programming Document containing the draft multiannual programming for 2020-2022 and the draft Annual Work Programme for 2020 ('Single Programming Document for 2020-2022') of the European Border and Coast Guard Agency

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

COMMISSION OPINION

of 29.11.2019

on the Single Programming Document containing the draft multiannual programming for 2020-2022 and the draft Annual Work Programme for 2020 ('Single Programming Document for 2020-2022') of the European Border and Coast Guard Agency

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

THE EUROPEAN COMMISSION,

Having regard to Regulation (EC) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, and in particular Article 62(2)(j) and Article 64(1) thereof [*Article 100(2)(k) and Article 102(1) of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard*], Whereas:

- (1) The mandate of the European Border and Coast Guard Agency (hereinafter: the Agency) is established by Regulation 2016/1624. Regulation 2019/1896¹, which significantly extends the mandate of the Agency, has been adopted and enters into force on 4 December 2019.
- (2) The rapid and full operationalisation of Regulation 2019/1896 is a top priority for the European Union.
- (3) The Commission services, together with the Agency, have developed a Roadmap framing the implementation of Regulation 2019/1896 in order to ensure clarity, transparency and effective monitoring of the progress of the implementation of the new Regulation. The Roadmap's objective is to ensure that all the required activities are in line with the letter and spirit of the Regulation 2019/1896 and that they are being launched in a timely and effective manner. In particular it relates to the full readiness of the European Border and Coast Guard standing corps for deployment as of 1 January 2021 and guaranteeing the effective use of the substantial budget earmarked to build the Agency's own technical capabilities.
- (4) The Roadmap defines 13 relevant processes for the timely operationalisation of Regulation 2019/1896, clearly identifying the deliverables, the corresponding timelines and the responsible lead actors, namely the Agency, the Management Board, the Member States and the Commission.
- (5) In accordance with Article 62(2)(j) and Article 64(1) of Regulation 2016/1624 [*Article 100(2)(k) and Article 102(1) of Regulation 2019/1896*], the Management Board shall adopt, before 30 November each year, the Agency's Single Programming

¹ Regulation (EC) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

Document containing the multiannual programming and Annual Work Programme for the coming year taking into account the [*positive*] Opinion of the Commission. If the management board decides not to take into account elements of the opinion of the Commission, it shall provide a thorough justification. The Annual Work Programme has to be in line with the objectives and tasks of the Agency set out in the regulation.

- (6) In accordance with Articles 32 and 33(4) of the Framework Financial Regulation², the Agency shall draw up a Single Programming Document containing multiannual and annual programming taking into account guidelines set by the Commission. Considering that the Commission Services are currently drafting the guidelines for the Single Programming Document in line with the new Framework Financial Regulation, the Agency is reminded on the need to follow those guidelines in the future.
- (7) The Agency together with the national authorities of the Member States responsible for border management and returns, including coast guards to the extent that they carry out border control tasks, constitute the European Border and Coast Guard.
- (8) The Single Programming Document is an essential instrument in the implementation of the regulation by the Agency. It has two main functions: i) it ensures that the Agency's activities are transparent for the European institutions and the public; and ii) it is the instrument through which the Management Board instructs the Executive Director on the multiannual objectives for the Agency and, by virtue of the Annual Work Programme, on the activities to be undertaken in the coming year. The Annual Work Programme also establishes the basis for ensuring the adequacy of the financing decisions on the activities it covers.
- (9) The Single Programming Document, in particular its annual programming component, as already pointed out by the Commission in its Opinion last year, should be a self-standing document. It should provide a sufficient level of detail to allow stakeholders and the general public to understand how the Agency intends to implement its mandate and how the EU money allocated for this purpose will be spent.
- (10) The first versions of the Single Programming Document for 2020-2022 were submitted to the Commission by the Agency in January and April 2019 but did not take into account the Regulation 2019/1896 which was then still being negotiated. The revised version, taking into account the new Regulation and following earlier discussions between the Agency the Commission's Directorate-General for Migration and Home Affairs ('DG HOME') as well as the discussions in the Agency's Working Group on Budget and Accounts and in the Agency's Management Board at its extraordinary meeting on 2-3 October 2019, was submitted on 25 October 2019.
- (11) The Commission takes note of the revised draft Single Programming Document for 2020-2022, including the Annual Work Programme for 2020

² Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council, OJ L 122, 10.5.2019, p.15.

as prepared by the Executive Director of the Agency and submitted to the Commission on 25 October 2019 on which this Opinion is based.

- (12) The Commission acknowledges that this draft revised Single Programming Document has been prepared on the basis of the extended mandate of the Agency as provided for by Regulation 2019/1896. Taking into account the entry into force of Regulation 2019/1896, the timeframe for this Single Programming Document requires an incremental approach to the programming process, with 2020 oriented towards building up the standing corps as of January 2021.
- (13) The tables and figures contained in the document, particularly those on human and financial resources, might need further validation and adjustment in view of the new multiannual financial framework for 2021–2027.

Thereby delivers a positive opinion on the draft multiannual work programming for 2020-2022 and the draft Annual Work Programme for 2020 subject to account being taken of the following comments:

General comments

- (14) The Commission takes note of the submission by the Agency of the draft Single Programming Document for 2020-2022 and of its sound internal coherence and alignment with the structure of the mandatory template.
- (15) The Commission notes that the version submitted in October substantially deviates from the version sent in April 2019, including the significant change of the document's structure. The Commission underlines that the modification of the structure of the Single Programming Document, in line with the Agency's new operational concept, is not required as such by Regulation 2019/1896 but rather serves to translate the objectives of the technical operational strategy for the European Integrated Border Management adopted by the Management Board in March 2019 without prejudice to the new multiannual strategic policy cycle.
- (16) The Commission recalls that given the challenges for the timely adoption of the Agency's Single Programming Document within the deadline foreseen in the Regulation, it advised the Agency to focus only on the necessary changes to reflect the essential parts of the mandate and rather to postpone the adaptation of the Single Programming Document to the new strategic framework until its next iteration, for 2021-2023, in order to allow sufficient time for the Management Board to discuss the strategic ideas.
- (17) The Commission recalls that Regulation 2019/1896 reinforces significantly the Agency's capabilities but that the use thereof has to respect the framework and mechanisms foreseen in the Regulation. The Regulation also sets a multiannual strategic policy cycle for the European Integrated Border Management (IBM) as a new dedicated governance mechanism steering all the stakeholders in this policy area, in particular, the reinforced Agency and the European Border and Coast Guard as a whole. The multiannual policy cycle for the European IBM will be set out in a Commission Communication following a political dialogue with the Council and the European Parliament, initiated with a Policy document to be

submitted by the Commission. This process will be established in the course of 2020.

- (18) Once the multiannual policy cycle is in place, it will steer not only the implementation of Regulation 2019/1896 but the whole European IBM as implemented by the European Border and Coast Guard, in particular the activities of the Agency. In this context, the Commission recalls that the long term strategic framework for the Agency can only be defined once the new political steering for European Integrated Border Management is established.
- (19) The Commission believes that further modifications are still needed to the draft Single Programming Document to align the proposed text with the enhanced set of tasks of the Agency as laid down in Regulation 2019/1896.
- (20) In particular, the Commission believes that many parts of the strategic framework of the Single Programming Document defined in Section II on Multiannual Programming 2020-2022 do not recognise the existing legal, institutional and political arrangements in place, notably they do not reflect the competences of EU institutions or other EU agencies as well as competences of Member States in the customs area.
- (21) The strategic framework and direction proposed in the document appears to apply to the whole European Border and Coast Guard bringing together the Agency and the Member States' authorities. While this approach is well justified in case of the Technical and Operational Strategy on European Integrated Border Management on which the proposed framework was based, the direct translation of such framework into the Agency's Single Programming Document should require putting more clarity on the objectives, roles and tasks of the Agency itself and its supportive function towards the Member States.
- (22) More concretely, the strategic framework and the corresponding objectives/actions in the draft multiannual and annual programming should be revised as regards the elements explained hereafter.
- (23) In several parts of the Single Programming Document, including in one of the horizontal objectives, the Agency's task is to '*develop and implement the European Integrated Border Management*'. Both Regulation 2016/1624 and Regulation 2019/1896 clearly distinguish the roles to be played by the EU institutions in charge of policy development of the European IBM and the Agency, together with the national component of the EBCG, which is in charge of its implementation. Therefore the formulation of this objective as well as the corresponding parts throughout the text should be adjusted by indicating that the Agency's task is '*to implement the European Integrated Border Management*' and possibly to '*support its development*'. It should also be mentioned that European Integrated Border Management should not alter the competences of Member States and Commission in the customs area.
- (24) Equally, '*designing and managing the IBM policy*' cannot be '*an overarching task for all the Agency's functions*' as it falls within the competences of the EU institutions and not of the Agency. The Agency should rather identify '*the implementation of the European Integrated Border Management*' as its overarching task'.

- (25) The formulation of horizontal objective '*reinforcing the external dimension*' does not recognise the role of political steering from the Commission and European External Action Services, which are by the virtue of the Treaty on the European Union, tasked to ensure the coherence of EU external policy needs. The objective and the corresponding narrative should be modified accordingly throughout the text.
- (26) The formulation of focus area 3 '*Develop and implement a fully interoperable and efficient European Quality Control Mechanism*' should be adjusted, as the Agency is in charge of the vulnerability assessment but not of the entire European Quality Control Mechanism which also includes the Schengen Evaluation Mechanism coordinated by the Commission. The formulation of this focus area as well as the corresponding parts throughout the text should be adjusted by indicating that the Agency is '*contributing to the development and implementation of a fully interoperable and efficient European Quality Control Mechanism*'. The Commission's role in the Schengen Evaluation should be accordingly indicated in the corresponding part of the document.
- (27) On the coast guard functions, the Commission recalls that the Agency is one of three EU agencies to manage the EU cooperation in this area and as reflected in their respective mandates, so the Agency cannot assume the coordinating role on its own within this cooperation. The respective objectives should be revised accordingly.
- (28) The Commission invites the Agency to pay attention to use the exact language and concepts of the new Regulation to avoid unnecessary confusions and possible reopening of sensitive issues.
- (29) The Commission believes that further efforts are needed in the development of the mission and vision of the Agency so that its European nature and specific role in border management and returns are well reflected. When defining those key concepts, the Agency needs to ensure that it clearly distinguishes itself from the European Border and Coast Guard as whole. Moreover, the Agency's staff should be involved in the development of the Agency's values and agree on them.
- (30) The relevant elements of the EBCG 2.0 Roadmap should be reflected in the Agency's Single Programming Document. The Commission considers that the Agency should make further efforts to align the activities planned in the Single Programming Document 2020-2022 with the content and timelines established in the Roadmap for various activities, in particular as regards the readiness of the standing corps by 1 January 2021.
- (31) The Roadmap translates the principle of 'close cooperation' spelled out in the Regulation by foreseeing the full involvement of the Member States and the Commission from the beginning in all the preparations by the Agency in a transparent and cooperative manner. The Single Programming Document should accordingly reflect and explain this approach in the introductory part.
- (32) Regulation 2019/1896 offers to the Agency a new and enlarged mandate to support the development of an integrated planning for border management and return integrating both Member States national plans and Agency's

planning. This aspect needs to be fully reflected in the mission (both mission statement and vision) of the Agency and the multiannual objectives and also in the Annual Work Programme 2020 in line with the Roadmap for the implementation of Regulation 2019/1896.

(33) Regulation 2019/1896 gives the Agency a new and enlarged mandate to support Member States in their return activities, recognising that return now forms an integral part of this new mandate. In line with the Commission's Opinions of the previous two years and the developments and discussions since, this needs to be fully reflected in the Agency's mission (both the mission statement and vision) and its multiannual objectives, where this mandate should be used to its fullest possible extent.

(34) The Commission also recalls that the Regulation 2019/1896 introduces significant changes in the area of fundamental rights. The independence of the Fundamental Rights Officer must be subject to special rules to be adopted by the Management Board. A Deputy Fundamental Rights Officer must be appointed. The existing complaint mechanism must reflect the improvements brought by the Regulation. At least 40 fundamental rights monitors must be recruited and trained by the Agency within one year after the entry into force of the Regulation. A fundamental rights

strategy and an action plan must also be adopted by the Agency. This new approach should be reflected in all relevant parts of the Single Programming Document.

(35) Antenna offices may only be set up in third countries on the basis of status agreements concluded between the Union and those countries. It might be that status agreements do not provide for such antenna offices. This has to be taken into account by the Agency if the latter contemplates establishing a network of antenna offices.

(36) The Commission recalls that the new Regulation lists the Union institutions, bodies, offices, agencies and international organisations that the Agency can cooperate with. The list remains open for institutions, bodies, offices and agencies of the European Union, however the co-legislator decided to establish a closed list for the cooperation with international organisations, including all the agencies of the United Nations. The Agency should assess if it has already engaged in cooperation activities with international organisations that are not listed in the new Regulation and the possible impact of this modified provision. The Agency should also refrain from engaging in new cooperation activities with international organisations that are not listed in Regulation 2019/1896.

(37) The Commission notes that section V. 'Tasks' explains that the tasks of the Agency are listed in Article 8 of Regulation 2016/1624 [*Article 10 of Regulation 2019/1896*], but also in other legislative acts. For the sake of clarity, the Commission suggests to incorporate a list of these tasks in the Single Programming Document.

(38) A reference to Regulation 2019/1896 should be made in Section 1.1 'Legal Framework'. The Commission regrets that the following annexes are not attached to the version of the Annual Work Programme on which the

Commission issues its Opinion and they will only be enclosed with the final version of the Programme or they are not complete:

- Annex IV: B. Appraisal of performance and reclassification/promotion
- Annex X (Annex IX in ‘Contents’) Procurement plan 2020
- Annex XV (Annex XIV in ‘Contents’) Schengen Associated Countries Contributions to ABN 2020

The Commission reminds the Agency of its obligation to draw up a programming document taking into account the guidelines³ set by the Commission. The guidelines adopted by the Commission, clearly set out that all information, including the annexes, should be included in the version of the programming document submitted to the Commission for its Opinion. Given this missing information, the Commission’s opinion on these annexes is without prejudice to the future positions of the Commission on these matters.

The Commission invites the Agency to align the numbering and the titles of the annexes with the contents of the Document, which is not the case as outlined above.

- (39) Given the importance of evaluation activities as one of the internal control standards, the Commission urges the Agency to update Annex VII of the Single Programming Document by clarifying the internal monitoring and evaluation system within the Agency.
- (40) The Commission welcomes the Agency's efforts to develop key performance indicators in relation to the multiannual objectives and the strategic action areas as well as in the Annual Work Programme for 2020.
- (41) Following the recommendations on the Single Programming Document for 2019, the Agency has made further efforts to improve the quality of the indicators. In this regard, the Commission welcomes the ongoing discussions on key performance indicators in the Working Group on Budget and Accounts established by the Management Board.
- (42) The Commission recommends replacing the references to ‘EU subsidy’ with ‘EU contribution’ throughout the document.
- (43) The Commission requests replacing the term ‘new Frontex Regulation’ with ‘the new EBCG Regulation’ or ‘Regulation 2019/1896’.
- (44) The Single Programming Document includes the term ‘operational concept’, and implies that the Single Programming Document needs to be aligned to the ‘revised operational concept’, however, such a concept is not foreseen in Regulation 2019/1896. The Agency is invited to explain in more detail what this ‘operational concept’ is meant to be, and what this alignment entails. Also, the Single Programming Document contains the term ‘revised operational concept’, as well as ‘new operational concept’. The Agency is invited to clarify those terms; In this regard, the Commission also draws attention to Art. 100(2)(1) of Regulation 2019/1896, i.e. that it is the

³ Communication from the Commission on the guidelines for programming document for decentralised agencies and the template for the Consolidated Annual Activity Report for decentralised agencies, C(2014) 9641.

prerogative of the Management Board of the Agency to establish procedures for the Executive Director to take decisions relating to the technical and operational tasks of the Agency. Consequently, the 'new operational concept' might have to be subject to adoption by the Management Board.

- (45) In several parts of the document, including in focus area 2.2.3, it is mentioned that the Agency will continue to develop and implement the strategy for acquisition of own technical equipment. The Commission takes note of the previous version of the acquisition strategy adopted by the Management Board in 2017. However, Regulation 2019/1896 clearly puts new requirements for the development and adoption of such a multiannual strategy, including the need to be accompanied by an implementation plan and the requirement of receiving a positive opinion of the Commission. The multiannual strategy and the implementation plan must cover the whole period of the next Multiannual Financial Framework 2021-2027 in order to ensure the effective use of the significant accompanying financial resources and to provide for effective planning of all acquisition projects, including those with long time cycle such as the procurement of offshore patrol vessels. The timely launch and implementation needs to be closely monitored based on the multiannual strategy.
- (46) The Commission recommends the Agency to revise the formulation of focus area 2.2.3 by alining it with the relevant provisions of Regulation 2019/1896, in particular by emphasising the importance to timely adopt the multiannual strategy for the acquisition of technical capabilities in March 2020 and then to ensure its effective implementation.
- (47) The deployment of the standing corps needs to always take place under the command and control of the host Member States providing the instructions and supervision to the deployed team members. This principle provides also the framework for defining the civil and criminal liabilities of the team members of the standing corps during their deployments. The command and control capability for the EBCG cannot therefore be 'centralised' in the Agency as foreseen in the document. In this context, the development of 'shared responsibility in command and control' (Key activity 2.2.2) cannot be legally supported in relation to the EU Member States. However, Article 54 of the Regulation 2019/1896 envisages for the Agency the possibility to '*develop and ensure the command and control structures for the effective deployments of the standing corps on the territory of third countries*'. Only in the case of deployment of the standing corps in a third country could the Agency consider to develop a Frontex Operational Coordination Centre, pursuant to Article 54, so as to ensure the effectiveness of the deployment. The relevant parts of the programming document need to be adapted accordingly.
- (48) The Commission notes that the Agency intends to build the coordination of the operational activities on the ground around antenna offices and field offices. However, it is unclear what would be the role of the Agency's coordinating officers in the proposed arrangements. In accordance with the Regulation, the coordinating officers are to play the key role in coordinating the Agency's activities and acting on behalf of the Agency in all aspects of the deployment of the teams, including the monitoring of

compliance with fundamental rights in cooperation with the fundamental rights monitors.

- (49) The concept of antenna offices is clearly defined in Regulation 2019/1896 to facilitate and improve coordination of operational activities in the support of coordinating officers. However, the Regulation does not refer to the concept of 'field offices', so it is unclear what would be their legal and operational status, possible functions and the link with the coordinating officers and the command and control structure of the host Member States. Information should be provided on this. The Commission also recommends the Agency to reflect on how the Agency's coordination structure for the field deployments of the standing corps can be built around the function of coordinating officers.
- (50) The Commission draws the Agency's attention to the fact that the correct reference should be to the EU action plan against migrant smuggling (Point II 'Political Framework', p. 8).
- (51) The Commission invites the Agency to consider whether a reference to the pending Commission proposals to revise or recast the Return Directive and the common European asylum system would not be warranted under the 'Legal Framework' or 'Political Framework' (Section I 'General Context', 'Influencing factors').
- (52) Regarding the task entitled 'law enforcement', the Agency is invited to rephrase 'ensuring a high level of internal security within the Union'. This is in line with the Agency's objectives as set out in Article 1 of the founding Regulation, which do not include 'law enforcement' tasks.
- (53) As already stated in its previous Opinions, the Commission points out that, in line with the common approach on decentralised agencies, the Agency should ensure that its communication strategy is coherent, relevant and coordinated with the strategies and activities of the Commission and the other institutions. The Commission suggests that coordination be ensured between the respective communication services when external communication relates to major policies of the Union or its image as a whole.
- (54) The Commission notes the Agency's initiatives to cooperate within the limits of its mandate with other entities, in particular regarding customs cooperation. As regards activities of the Agency in the customs area, such kind of cooperation should only take place under specific circumstances. Moreover, cooperation not only with Member States, Europol and the Anti-Fraud Office (OLAF), but also with the Commission Directorate General in charge of customs matters (Directorate General TAXUD) is key. The Guidelines on further development of the cooperation between Border Guards and Customs issued jointly by the Directorates General TAXUD and HOME is also an important reference point for this cooperation. The Commission considers that future cooperation could potentially include sharing of resources and capabilities, with the aim of supporting such advanced cooperation more effectively within the framework of the operational activities of the Agency. The Commission also

underlines that the World Customs Organisation is not listed as an international organization that the Agency can cooperate with. The Commission recalls that coordination and cooperation between Union bodies must occur in full respect of the respective mandates and double funding must be avoided.

(55) In Annex XIII point 4.5. describing the cooperation in the area of customs, no reference is made to cooperation with Directorate General TAXUD. Such cooperation with Directorate General TAXUD should be mentioned explicitly as follows “*the strategic and operational collaboration with Directorate General TAXUD as well as in the frame of the Customs Cooperation Working Party (CCWP)*”.

Multiannual programming

- (56) Section 2.1 explains that the Agency built its Strategic Framework around the three strategic objectives. The Commission recommends to further elaborate in the Single Programming Document on how the tasks, as defined in the Regulation 2019/1896, relate to the three strategic objectives while taking into account the general comments provided in relation to the strategic framework as provided before.
- (57) The last subparagraph of Section 2.1.1.1 states that Regulation 2019/1896 significantly reinforces the analytical products focusing more than ever on prediction and prevention. The Commission invites the Agency to specify those analytical products.
- (58) The Commission recommends the Agency to include the Common Integrated Risk Analysis Model (CIRAM), strategic risk analysis and the vulnerability assessment in the bullet points in Section 2.2.1 (‘Reduced Vulnerability of the External Borders based on Comprehensive Situational Awareness’).
- (59) Focus area 1 of Section 2.2.3 involves the implementation of capability development planning. The Agency might consider underlining in the Single Programming Document that activities linked to integrated planning, including capability development planning, must be initiated with the adoption of the methodologies and procedures to develop national capability development and contingency plans by the Management Board.
- (60) When describing additional funds needed to cover the Agency’s needs for 2020 (‘Extended mandate, enhanced Financial Resources; p. 24), the Agency refers to the development of cooperation with third countries or a network of antenna offices, but makes no reference to the more urgent development of its return capacity in view of the gradual takeover return networks or development of the new activities under the expanded mandate in the area of return. The Commission invites the Agency to include this element as well.
- (61) Regarding Section 2.2.5 on partnerships with Member States, EU entities, third countries and international organisations, the Commission recalls that an Agency may not legally represent the EU in international

organisations. An Agency may only provide operational and technical expertise in international fora and assist the EU representatives in the latter.

- (62) The Single Programming Document shall no longer refer to the EUROSUR Regulation since EUROSUR is now part of in the functioning of the European Border and Coast Guard. The Commission would like the Single Programming Document to provide a summary of the actions related to the implementation of EUROSUR by the Agency during the programming period. Given that the functioning of EUROSUR will be subject to a specific evaluation, the Agency should ensure the full traceability of the human and financial resources related to EUROSUR. A separate section should be developed in the document to address this requirement.
- (63) As already stated in the Commission's Opinion on the Single Programming Document for 2019-2021, an appropriate working arrangement with DG HOME as a partner DG should be put in place for handling international activities to ensure close coordination with the EU's priorities on external relations and full respect of fundamental rights. The Commission regrets to observe that this has not happened yet and calls again on the Agency to do so as soon as possible. As regards Annex XIII, the Agency may wish to clarify the international cooperation it intends with a number of strategic partners to reflect the Agency's interest to exchange knowledge and explore innovative solutions.
- (64) The Agency needs to ensure an adequate integration of the international cooperation strategy for 2020-2022 in the multiannual part of the programming document and by cross-referencing between the strategy and concrete actions planned under the Annual Work Programme for 2020.
- (65) With reference to Article 67(4) of Regulation 2016/1624 [*Article 105(4) of Regulation 2019/1896*], the Commission recalls the modus operandi agreed by the Agency's Management Board at the beginning of 2013 concerning the voting rights of Schengen associated countries. The training portfolio and the operational portfolio annexed to the draft Annual Work Programme should contain sufficient details about the participation of certain individual countries in the various training sessions and joint operations and the Schengen associated countries could be allowed to cast a vote on those training sessions and operations in which they made a prior commitment to participate.
- (66) The Commission notes that the current draft does not meet those conditions and that the Schengen associated countries could therefore not be allowed to vote should the current draft be submitted to the Management Board for approval.

Annual Work Programme for 2020

- (67) The Commission appreciates the Agency's plans to continue working towards updating and extending the training portfolio. However, as a means to address current trends in document fraud, the Commission advises the Agency to consider expanding the training options to include dedicated modules/training events on the electronic component of identity and travel documents.

- (68) The Commission invites the Agency to include in the Single Programming Document its activities on developing statistical models for forecasting. In addition, the Commission would be interested in being involved in the process of developing those statistical models.
- (69) The Commission welcomes the reinforcement of the analytical capabilities of the Agency in performing situation monitoring, surveillance and risk analysis, including pre-warning and forecasting. In this regard, the Commission would like to have access to all the products of the Agency that could be of interest to the Commission, including those providing actionable operational intelligence.
- (70) Key activity 1.1.2 is about maintaining a robust awareness mechanism based on constant situation monitoring and risk analysis including pre-warning and forecasting. The Commission recommends to examine the necessity of the development of a pre-warning mechanism as one of the Agency's actions.
- (71) Key activity 1.1.2 includes 'Updated CIRAM (version 3.0)'. The Commission suggests that the Agency also mentions the need for the Management Board to adopt the revised CIRAM.
- (72) The Commission takes note of the acquisition and processing of personal data from operational areas, following which risk analysis takes place. The Agency is invited to elaborate on the transmission of personal data (Section 3.1, paragraph 3.1.1, Key activity 1.1.2).
- (73) The Commission would like to recall that the Agency should swiftly implement measures in cooperation with the European Data Protection Supervisor to fulfil the extended possibilities for exchanging personal data with operational partners like Europol and Eurojust, provided under Regulation 2019/1896, in order to prevent and fight cross-border crime more effectively through an inter-agency approach.
- (74) In line with the general comments, the Commission invites the Agency to include in Key activity 1.3.1 and in other relevant activities referring to Schengen Evaluations, the Commission's role in this regard.
- (75) The Commission notes that according to Section 2.3.2 the objective of the Agency is to extend the Multipurpose Maritime Operation (MMO) platform to customs activities. The Commission invites the Agency to specify and clarify how they intend to implement this specific objective, in particular if this would also include the Maritime Analysis and Operation Center of Narcotics (MAOC).
- (76) In Section 3.2.2 'Position Frontex as an important player in the area of law enforcement', the Commission recommends rephrasing it into 'Position Frontex as an important player in the area of the prevention and detection of cross-border crime' and to include the relevant elements defined in the Regulation, namely that the Agency is one of the three EU agencies which should cooperate within their respective mandates.
- (77) In Section 3.3.2, the Agency announces that the readiness of the standing corps will be delivered in two stages: '*Initial Operational Capability*

by end of 2020 with a view of reaching Full Operational Capability (FOC) by beginning of 2021'. It is unclear what the initial and full operational capabilities would mean, therefore the Commission would welcome clarifications in this regard. In any case, the Commission invites the Agency to be more specific on the date of reaching Full Operational Capability, and to replace 'by beginning of 2021', with '1 January 2021'.

- (78) In line with the Roadmap, the Commission invites the Agency to include in Section 3.3.2 the preparations and decisions needed on the design and specifications for uniforms of Category 1 officers, and on the tendering procedure(s) and delivery of the uniforms/personal gear for Category 1 officers.
- (79) Key activity 3.2.2 is about providing specialist and pre-deployment induction training for Standing Corps Category 2 and 3. The Commission suggests to incorporate as well other relevant actions foreseen in the Roadmap in view of the secondment of Category 2 and the planning of Category 3, including the bilateral negotiations between the Agency and Member States for the planning of Category 3.
- (80) In relation to return-related activities, the Commission welcomes the fact that the document reflects the extended mandate of the Agency in the area of return, taking better account of the Regulation 2019/1896.
- (81) Regulation 2019/1896 envisages that the Agency should take a more pro-active attitude towards offering assistance to the Member States, which implies the need for increased needs analysis and related resources among the Agency's staff. The Commission considers that the aspect of training for Standing Corps members in the area of return should also be better reflected in the programming document. While extensive training programmes and curricula are available in the area of border management, the existing training related to return is rather fragmented and limited to specific tasks or deployments.
- (82) The Commission welcomes that the implementation of the False and Authentic Documents Online (FADO) programme is initiated. The necessary resources for the preparations of the FADO takeover should be provided by 2020 once the Regulation on the transfer of FADO to the Agency will be adopted.
- (83) As regards Key activity 3.4.2 'Develop and manage a comprehensive research and innovation platform to enable research and facilitate the dissemination of research information', the Commission stresses that the following would be more appropriate in the context of the Single Programming Document: 'Explore detailed arrangements for setting up/managing border security-related research in Europe, also building on the conclusions of the RAND Europe Institute study, and strengthening assistance to the Commission for the implementation of the framework programmes for research and innovation'.
- (84) The Commission welcomes the support provided by the back office to the Agency's liaison officers deployed to third countries. However, a key role of the back office should also be mentioned, namely the interaction and

coordination with the Steering Board envisaged under the recast European network of immigration liaison officers Regulation (Section 3.5, paragraph 3.5.1, Key activity 5.1.1).

- (85) The Commission takes note of the strategic direction of the Agency to develop a network of the Agency's liaison officers posted in third countries, but recalls the need to include in the Single Programming Document a reference to the alignment and complementarity of this network with the European network of immigration liaison officers.
- (86) As regards the Key activity 6.4.1, the Commission suggests that the programming document mentions that the fundamental rights strategy and the complaint mechanism must be aligned with the Regulation 2019/1896, and underlines the general advising role of the Fundamental Rights Officer for the setting up and development of the complaints mechanism.
- (87) As regards the Key activity 6.4.1, the Agency should also mention its plans to recruit adequate personnel to assist the Fundamental Rights Officer as well as the deputy Fundamental Rights Officer.
- (88) As regards Key activity 6.2.3 'Ensure a secure working environment for Agency's staff, including ICT security challenges' and Key activity 6.5.2 'Design and implement a comprehensive and consistent communication model, involving internal and external communication functions and providing for partial decentralisation of the Agency's functions', the Commission would like to recall that Regulation 2019/1896 envisages the deployment of a communication network managed by the Agency which shall allow for the secure handling, storage, transmission and processing of EU classified information up to the level of CONFIDENTIEL UE/UE CONFIDENTIAL. This should be reflected in the Single Programming Document as it will have an impact on both activities.

Budget

- (89) The Commission notes that the revised Single Programming Document has been prepared taking into account two different scenarios, the first one based on the level of subsidy foreseen for the Agency in the Council's position at the moment of submitting this document to the Commission and the second one based on the level of subsidy as foreseen in the EU draft budget (Commission's position). The Commission notes that at the time of the document's submission, the Parliament's position was also known, so it should have been taken into account as well.
- (90) The Commission considers that the proposals concerning the staff and financial resources for the Agency's 2020 budget will need to be adjusted in line with the draft budget of the Union for 2020. In line with Article 44 (4) of Regulation 1726/2018, the proposals concerning the programming document shall become definitive after the final adoption of the general budget of the Union and, if necessary, shall be adjusted accordingly, in particular the amounts mentioned in Chapter 2, Point 2.3 'Human and Financial Resources Outlook for years N+1 – N+3'.

- (91) The Commission invites the Agency to align all sections of the programming document with the human and financial resources of the Commission Draft Budget and to consider possible implications of the Draft Budget 2020 and the agreement reached on human resources for the planning of future years and eventually the final voted budget 2020 adopted by the budgetary authority.
- (92) The Commission notes that all the forecasts related to the EU budget contribution in 2021 and 2022 as indicated in the relevant Legal Financial Statement for Regulation 2019/1896 are indicative and are without prejudice to the decisions to be taken as regards the next Multiannual Financial Framework.
- (93) The Commission advises the Agency in the process of forecasting resources for the multiannual programming to take into account its relatively low budget implementation rate that results from the current high vacancy rate.
- (94) In Chapter 3, 'Strategic Action Areas', in particular the parts on 'Enhanced Financial Resources' on p. 24 and 'Enhanced Human Resources' on p. 24, the Commission notes that the ultimate figures depend on the final adoption of the general budget of the Union later this year. In addition, the Commission reiterates that the development of 'the new operational concept' is an initiative taken by the Agency and not requirement of Regulation 2019/1896.
- (95) In Chapter 4, Budget 2020, Section 4.1 'Revenue and Expenditure', the Commission reminds the Agency that the Single Programming Document should clearly specify all revenue streams of the Agency, including an exhaustive listing of all revenues due to ad hoc grant agreements, delegation agreements or contribution agreements. In this context, the following should be substantiated:
- (1) Further clarifications should be provided on the topics and beneficiaries of the expenditure included in page 68 under 'ad hoc grants and Copernicus'.
 - (2) Annex XVI of the Single Programming Document refers to a cooperation with other EU agencies (ie European Fisheries Control Agency, European Maritime Safety Agency). If there is any budgetary implication of this cooperation, it should be further developed both in Section IV and in Annex XVI.
- (96) In Chapter 4, Budget 2020, Section 4.3 'External Personnel 2020', the Commission reiterates that the 15 additional contract agents for 2019, which were approved by the Agency's Management Board in 2015, are not supported as they are not foreseen in the Legislative Financial Statement of Regulation 2019/1896. Thus, the total number of contract agents for 2019 related to the current mandate is 202 and not 217 as reported in this section of the Single Programming Document. In addition, the Commission notes that the ultimate figures for 2020 depend on the final adoption of the general budget of the Union later this year.

Staffing

- (97) A significant number of posts have been allocated to the Agency with a view to implementing the additional tasks envisaged by its expanded mandate. The number of staff is expected to reach 1 000 by the year 2020, and a further significant increase in staff will result from the establishment of the standing corps.
- (98) The Commission expects that the allocation of new staff to the different new tasks will generally respect, with some possible variations for justified cases, the indications provided by the Legislative Financial Statement accompanying the Commission's proposal for Regulation 2019/1896.
- (99) The provision of the information missing from the Human Resources Outlook, Annex III and Annex IV, especially as it concerns the current grading of the staff and the last reclassification/promotion exercise, is crucial in order to assess the human resources management at the Agency. A full picture of the situation is especially important in view of the difficulties the Agency has reported with recruitment and retention of staff, and the large number of ongoing and upcoming recruitments. In particular, the recent publications for senior staff at high grades should be properly justified and adequately incorporated into the overall planning.
- (100) The Commission appreciates the overview, including indicators, to measure the achievement at corporate level, including tracking of the vacancy rate and staff turnover, but would recommend defining targets for these indicators.
- (101) The proposed establishment plan includes no provision for AST/SC temporary agents and very few GF II contract agents. The Commission invites the Agency to assess which positions involve clerical or secretarial tasks and should therefore be converted in accordance with Annex 1A of the Staff Regulations/Article 80 of the CEOS.
- (102) The Commission takes note of the persistent significant side effect on the geographical balance among Agency staff.
- (103) Since education allowances are provided for in the Staff Regulations, and as discussed already with the Agency, their amount may not be increased/modified by a decision of an Agency through direct payments/reimbursements to staff members of charges related to any educational, pre- or after-school cost. If the Agency wishes to finance such costs above the ceilings laid down in the Headquarters Agreement, it should cover them via a budgetary procedure and pay the establishments (schools, crèches, etc.) concerned directly via a service contract.
- (104) This opinion is addressed to the Executive Director of the European Border and Coast Guard Agency.

Done at Brussels, 29.11.2019

For the Commission
Dimitris Avramopoulos

Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

Annex C



Brussels, 8.10.2018
C(2018) 6390 final

COMMISSION OPINION

of 8.10.2018

**on the Single Programming Document 2019-2021 containing the
multiannual programming and Annual Work Programme for 2019
of the European Border and Coast Guard Agency (Frontex)**

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

COMMISSION OPINION

of 8.10.2018

on the Single Programming Document 2019-2021 containing the multiannual programming and Annual Work Programme for 2019 of the European Border and Coast Guard Agency (Frontex)

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

- (1) The mandate of the European Border and Coast Guard Agency (hereinafter: the Agency) is established by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard¹ (hereinafter: the EBCG Regulation).
- (2) In accordance with Article 62(2)(j) and Article 64(1) of the EBCG Regulation, the Management Board shall adopt, before 30 November each year, the Agency's Single Programming Document containing the multiannual programming and Annual Work Programme for the coming year after receiving the Opinion of the Commission. The Annual Work Programme has to be in line with the objectives and the tasks of the Agency set out in the EBCG Regulation.
- (3) According to Articles 32 and 33(5) and (8) of the Framework Financial Regulation², the Agency shall draw up and send to the Commission a programming document containing multiannual and annual programming taking into account guidelines set by the Commission.
- (4) The Agency together with the national authorities of the Member States responsible for border management, including coast guards to the extent that they carry out border control tasks, constitute the European Border and Coast Guard.
- (5) The Agency should coordinate operational cooperation between Member States in the field of management of the external borders; assist Member States on training of national border guards, other relevant staff and experts on return, including the establishment of common training standards; prepare general and tailored risk analyses based on a common integrated risk analysis model; carry out the annual vulnerability assessments based on the common methodology, including objective criteria; participate in the development and management of research and innovation activities relevant for the control and surveillance of the external borders; set up and keep centralised records of equipment in a technical equipment pool composed of equipment owned either by the Member States or by the Agency and equipment coowned by the Member States and by the Agency for its operational activities; assist Member States in circumstances requiring increased technical and operational assistance at the external borders; set up and deploy European Border and

¹ OJ L 251, 16.9.2016, p. 1.

² Commission Delegated Regulation (EU) No 1271/2013 of 30 September 2013 on the Framework Financial Regulation for the bodies referred to in Article 208 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council, OJ L 328, 7.12.2013, p. 42.

Coast Guard teams during joint operations and in rapid border interventions; set up a rapid reaction pool and a rapid reaction equipment pool; provide Member States with the necessary support in the area of return including organisation or coordination of joint

return operations; set up three return pools of forced return monitors, escorts and return specialists; develop and operate, in accordance with Regulation (EC) No 45/2001³ and Framework Decision 2008/977/JHA, information systems that enable swift and reliable exchange of information regarding emerging risks in the management of the external borders, illegal immigration and return and provide the necessary assistance for the development and operation of EUROSUR. Moreover, the Agency shall cooperate with the Commission, other Union institutions, bodies, offices and agencies in matters covered by the Regulation and facilitate and encourage technical and operational cooperation between Member States and third countries, within the framework of the external relations policy of the Union.

- (6) The Single Programming Document is an essential instrument in the implementation of the Regulation by the Agency. It has two main functions: it ensures transparency of the Agency's activities towards the European Institutions and citizens and it is the instrument through which the Management Board instructs the Executive Director on the multiannual objectives for the Agency and, by virtue of the Annual Work Programme, on the activities to be undertaken in the coming year. The Annual Work Programme also establishes the basis for the adequate financing decisions on the activities it covers.
- (7) The Commission takes note of the draft Single Programming Document for 2019-2021, including the Annual Work Programme for 2019 as prepared by the Executive Director of the Agency and submitted to the Commission in March 2018 on which this Opinion is based.
- (8) The Commission acknowledges that this draft Single Programming Document has been prepared on the basis of the current mandate of the Agency as provided for by the EBCG Regulation. As on 12 September 2018 the Commission presented a new legislative proposal targeting the future mandate of the Agency, depending on the development and pace of the negotiations' process, it could not be excluded that a revised version of the Single Programming Document for 2019-2021 might need to be prepared to take into account those novelties having a significant impact on the work of the Agency.

General comments

- (9) The Commission welcomes the timely submission of the draft Programming document 2019-2021 by the Agency as well as its sound internal coherence and alignment to the structure of the mandatory template.
- (10) The Commission believes that further modifications are needed to adequately reflect the essential conceptual elements introduced by the EBCG

³ OJ L 8, 12.1.2001, p.1.

Regulation as well as to align the proposed text with the scope of the enhanced set of tasks of the Agency as provided for in Article 8 of the EBCG Regulation.

- (11) The Commission believes that the introductory parts of the Single Programming Document (in Introduction and Section I General Context) should be further improved by clearly explaining how the Agency is going to implement its role in the European Border and Coast Guard alongside the national authorities in charge of border management and in the implementation of the EU Integrated Border Management (IBM) in a spirit of shared responsibility with the Member States.
- (12) In particular, the Agency is invited to take into account the objectives of the European Border and Coast Guard as set out in recital 5 of the EBCG Regulation according to which "the European Border and Coast Guard is established to ensure European integrated border management at the external borders with a view to managing the crossing of the external borders effectively."
- (13) Given the above elements, the Agency is invited to develop section 3.2. "Vision" to reflect the Agency's role as the European pillar of the European Border and Coast Guard as well as to describe its role in the implementation of the European integrated border management as a shared responsibility of the European Border and Coast Guard as a whole.
- (14) The Commission takes note of the Agency's efforts to define its mission, vision and values, in particular discussions held by the Management Board at its meeting on 26-27 September 2017. The Commission appreciates the follow-up and the presentation by the Agency during its Management Board meeting on 21-23 November 2017 of the revised vision, mission and values of the Agency that have been added to the Programming document 2018-2020 and repeated in the draft Programming document 2019-2021.
- (15) However, the Commission believes that further efforts are needed in the development of the mission and vision of the Agency so that its European nature and specific role in border management and returns are well reflected. When defining these key concepts, the Agency needs to ensure that it clearly distinguishes itself from any other organisation. Moreover, the Agency's staff should be involved in the development of the Agency's values and agree on them.
- (16) The Commission appreciates the efforts demonstrated to better and more comprehensively reflect the role of the Agency in search and rescue by improving the references to this specific element of its mandate.
- (17) Still, the European Parliament in its resolution of 18 April 2018 on the Agency's discharge for 2016 'welcomes the increase in the Agency's search and rescue capacity' but 'notes, however, that considerable efforts still have to be made in that direction'. Along these lines, the Single Programming Document in all instances should aim to fully highlight the political importance given to this activity while also clearly referring to the existing framework of Regulation (EU) No 656/2014 establishing rules for the

surveillance of the external sea borders in the context of Frontex operational cooperation.

- (18) The EBCG Regulation offers to the Agency a new and enlarged mandate to support Member States in their return activities recognising that return now forms an integral part of this new mandate. Also in line with the Commission's Opinion of the previous two years and the developments and discussions since, this needs to be fully reflected in the mission (both mission statement and vision) of the Agency and the multiannual objectives, where this mandate should be used to its fullest possible limits. In this framework, the revision and further development of the Agency's Fundamental rights strategy should ensure that all return support activities are in line with the requirements of the EU Charter of Fundamental Rights. In the same vein, the new mandate of the Agency on return should, as far as the political framework is concerned, be guided by the EU Action Plan on return, as underlined in the renewed

Action Plan⁴. In this context, the Commission once again calls on the Agency to further continue with its efforts in redefining the mission and vision statements as well as the multiannual objectives in Chapter II in line with the new Regulation.

- (19) The Programming document, in particular its annual programming component, as already pointed out by the Commission in its last year's Opinion, should be a selfstanding document and it should provide a sufficient level of detail allowing different stakeholders and the general public to understand how the Agency intends to implement its mandate and how the EU money allocated for this purpose will be spent.

- (20) The Commission regrets that the following annexes are not attached to the version of the Annual Work Programme on which the Commission issues its Opinion and which will only be enclosed to the final version of the Programme:

- Annex II Human and Financial Resources,
- Annex III with its accompanying tables,
- Annex IV A. Recruitment policy, B. Appraisal of performance and reclassification/ promotion and C. Mobility policy,
- Annex VIII Risks 2019,
- Annex IX Procurement plan 2019,
- Annex XI Training Plan 2019,
- Annex XII Plan of Operational Response 2019 – Core Elements,
- Annex XV Annual Strategic Plan 2018 as part of the Tripartite Working Arrangement EFCA – EMSA - Frontex.

The Commission reminds the Agency of its obligation to draw up a programming document taking into account the guidelines⁵ by the Commission clearly setting out that all information, including the annexes,

⁴ COM (2017) 200 final.

⁵ Communication from the Commission on the guidelines for programming document for decentralised agencies and the template for the Consolidated Annual Activity Report for decentralised agencies, C(2014) 9641.

should be included in the version of the programming document submitted to the Commission for opinion.

The lack of these detailed annexes does not allow the Commission to fully understand and assess the activities planned by the Agency in 2019.

- (21) In particular, the Commission regrets that for the third consecutive year, the Agency's evaluation plan (Annex VII Evaluations) has not been included in the draft Programming Document on which the Commission issues this Opinion. The Commission recalls that in accordance with the Common Approach on decentralised agencies and the relevant provisions of Commission Delegated Regulation (EU) No 1271/2013, ex-post evaluations are mandatory for all programmes/activities. While the Commission is aware that evaluations of some operational activities take place in the Agency (i.e. an annual evaluation of Joint Operation Poseidon), it is unclear whether all the Agency's activities are covered by this important process. Moreover, given that the evaluation plan is a key tool to keep the Management Board up to date on these aspects, the fact that the Agency is not in a position to develop such a plan may affect the accountability of the Agency to the Board as regards its activities.
- (22) Given the importance of evaluation activities as one of the Internal Control Standards, the Commission urges the Agency to update Annex VII of the Programming Document by: 1) including an evaluation plan and 2) clarifying the internal monitoring and evaluation system within the Agency.
- (23) The Commission welcomes the Agency's efforts to develop key performance indicators in relation to the multiannual objectives and the strategic action areas as well as in the Annual Work Programme for 2019.
- (24) However, the Commission notes that the European Parliament in its resolution of 18 April 2018 for the Agency's discharge for 2016 stated "*the majority of Frontex operational programmes lack quantitative objectives and specific target values for the joint operations; notes with concern that this, together with insufficient documentation from cooperating countries, might hamper the ex post evaluation of the effectiveness of joint operations in the long term; calls on the Agency to further set relevant strategic objectives for its activities and to establish an effective result-oriented monitoring and reporting system with relevant and measurable key performance indicators*".
- (25) As indicated in the past years, the Commission believes that further efforts are needed to improve the quality of the indicators. The Agency should aim at developing, when possible, quantifiable indicators allowing monitoring of its activities by the Management Board and measuring the progress in the achievement of its objectives. Only on this basis, will the Agency be able to evaluate the implementation of its activities in the multiannual perspective. For the Annual Work Programme, the inclusion of quantitative indicators is crucial for assessing the effectiveness of the key activities to which Frontex plans to allocate sizable part of its human and financial resources. The Commission suggests that these efforts are undertaken by the Working Group on Budget and Finance.
- (26) As regards point 1 under Section I listing the factors influencing the Agency's work, the Commission believes that the political framework should

be complemented by the development of the European Integrated Border Management Strategy, as adopted by the Commission in Annex 6 of the Progress report on the Implementation of the European Agenda on Migration of 14 March 2018⁶.

- (27) As for the legal framework (point 1.1), a clear reference to Regulation 1053/2013 on the Schengen Evaluation Mechanism should be made separately from the reference to Regulation 2016/399 and a correct reference to the latter should be made (Schengen Borders Code).
- (28) As regards point 3.5 of the Introduction describing the tasks of the Agency, the Commission appreciates the inclusion of a reference to the Agency's tasks under the EUROSUR Regulation and the Schengen Evaluation Mechanism Regulation which should, however, also be included in the list of types of tasks that follows.
- (29) As already stated in its previous Opinion, the Commission recalls that, in line with the Common Approach on Decentralised Agencies, the Agency should ensure that its communication strategy is coherent, relevant and coordinated with the strategies and activities of the Commission and the other institutions. The Commission suggests that coordination is ensured between the respective communication services, when external communication relates to major policies of the Union or its image as a whole.
- (30) The Commission notes the Agency's initiatives to cooperate within the limits of its mandate with other entities, in particular as regards customs cooperation, and considers that future cooperation could potentially include co-sharing of resources
- and capabilities, with the aim of supporting more effectively such advanced cooperation within the framework of the operational activities of the Agency.

Multiannual programming

- (31) The Commission welcomes the efforts made by the Agency to update the multiannual objectives and the strategic action areas in line with its revised mandate, in particular by introducing separate strategic areas "European Integrated Border Management", "Cooperation on Coast Guard Functions" and "Vulnerability assessment", as previously suggested by the Commission.
- (32) The Commission notes that the list of indicators under Section II has been reduced as compared to the Multi-annual programming 2018-2020, taking out a set of indicators on procurement (priorities, execution, efficiency, transparency) as well as indicators on added value and on impact of own assets and services in operations. The Commission invites the Agency to reconsider the role and usefulness of these indicators and to possibly reintroduce a number of them in the Single Programming Document.
- (33) Section II of the draft Single Programming Document includes Chapter 2 "Strategic Direction" which is foreseen neither in the legal basis, nor in the Commission relevant guidelines. In that context, the relation between this "strategic direction" and the multiannual objectives and strategic action areas

⁶ COM(2018) 250 final.

defined in Section II and actions proposed in the Annual Work Programme for 2019 in Section III is unclear. This may bring confusion as regards the actual strategic priorities for the Agency to be followed and endorsed by the Management Board. The Commission therefore urges the Agency to integrate these elements within the adequate framework of the Single Programming Document, namely, by revising the multiannual objectives (Chapter 1 of Section II) or by better prioritising the strategic action areas (Chapter 3 of Section II).

- (34) On 4 June 2018, the Justice and Home Affairs Council adopted Conclusions on the European Integrated Border Management, inviting the Agency to prepare, in close cooperation with the Member States and the Commission, a technical and operational EU integrated border management strategy within the framework of the 11 strategic components, as defined in Article 4 of the EBCG Regulation. That technical and operational strategy should be based on the main elements as described by the Commission in its IBM Policy Strategy⁷ and taking into account the three identified horizontal components fundamental rights, training, research and innovation. The strategy should be established by the end of 2018 and consequently, follow-up actions should be planned and included in the Single Programming Document.
- (35) In line with the aforementioned Council Conclusions and with a view to observing the deadline they set, the Commission invites the Agency to amend accordingly point 3.1 European Integrated Border Management under Chapter 3 Strategic Action Areas.
- (36) The Commission believes that any activities indicatively programmed under strategic action area "European IBM" as well as under other strategic action areas (i.e. training, research) should be reassessed so as to take into account the EU IBM strategy adopted by the Commission and the technical and operational strategy to be developed by the Agency.
- (37) The Commission strongly appreciates the enhanced section on the Agency's responsibilities and activities as regards Search and Rescue and recalls that these responsibilities and activities should be considered in the framework of the border surveillance tasks of the Agency, as provided for in Article 8(1)(f), Article 14(2)(e) and as a component of the European Integrated Border Management indicated in point (b) of Article 4 of the European Border and Coast Guard Regulation.
- (38) The Commission notes that the Internal Security Fund/ Borders and visa (2014-2020) takes into account the needs of the Member States as regards search and rescue that occur in the context of border surveillance operations.
- (39) Similarly, the proposal for a Regulation on the Integrated Border Management Fund⁸, which the Commission adopted on 12 June 2018, also provides for supporting the activities of the Member States in the field of search and rescue that occur in the context of border surveillance operations.

⁷ COM(2018) 250 final.

⁸ COM(2018) 473 final.

- (40) As regards strategic action area “European cooperation on coastguard functions”, the Commission recalls that the new framework is aimed at enhancing the effectiveness and efficiency of the support provided by the EBCG Agency, the European Fisheries Control Agency (EFCA) and the European Maritime Safety Agency (EMSA) to Member States' authorities carrying out coast guard functions at national level.
- (41) The Commission welcomes the Agency’s objective to streamline and coordinate its activities with the partner Agencies in accordance with the Tripartite Working Arrangement (TWA) which entered into force on 17 March 2017.
- (42) In that context, tailored services to the national authorities carrying out coast guard functions should be developed in line with the common Annual Strategic Plan which defines the actions which Frontex, the European Fisheries Control Agency and the European Maritime Safety Agency should implement annually in order to advance the objectives of the interagency cooperation.
- (43) As regards strategic action area “Operational Response”, the EBCG Regulation sets out in Article 8(1)(m) that the Agency shall "*within the respective mandates of the agencies concerned, cooperate with Europol and Eurojust and provide support to Member States in circumstances requiring increased technical and operational assistance at the external borders in the fight against organised cross-border crime and terrorism*". The Commission recalls that the legislators did not intend to create competition or parallelism between Frontex and Europol.
- (44) These new competences should not be considered a *'sui generis'* operational mandate for the Agency in relation to the fight against cross-border crime and terrorism. Any planning in this area should respect the scope of engagement of the Agency in law enforcement activities, in particular as regards the cooperation with other EU agencies concerned.
- (45) In this context, the Commission recalls that while border control as a core component of a European integrated border management may include, where appropriate, measures related to the prevention and detection of cross-border crime, the current legal framework of the Agency does not provide for the possibility to support crossborder crime related investigations.
- (46) The Regulation also clearly states that European integrated border management does not alter the respective competences of the Commission and Member States in the
customs area, whereas coast guards of Member States form part of the EBCG to the extent that they carry out border control.
- (47) Consequently, in relation to Strategic Areas on "European IBM", "European Cooperation on Coast Guard Functions" and "Operational response", while it is appropriate for fostering the Agency's cooperation with Europol, Eurojust, EMSA, EFCA and other Union agencies, international organisations or other bodies, such activities should duly respect the limitations of the Agency's mandate.

- (48) By this same token, for "multi-purpose operations/activities" referred to in many instances of the draft Single Programming Document, the Commission would welcome greater clarity on the scope of the proposed activities so that it is clear that these activities comply with the mandate of the Agency.
- (49) Under Strategic Action Area "Operational response", the Commission invites the Agency to take into account the following comments:
- (50) As regards activity 3.3A, the Commission invites the Agency to clarify what precisely is meant when referring to the EUROSUR impact assessment.
- (51) The Commission welcomes the determination and programmed actions of the Agency to ensure that the EBCG teams guarantee the protection of fundamental rights in the performance of their tasks in all joint operations.
- (52) As regards the planned joint operations in Serbia and the former Yugoslav Republic of Macedonia, while a possibility of such operational activities will be available once the status agreements are concluded between the Union and those countries, the actual deployments in the form of joint operations should be based on the operational needs supported by risk analysis and not decided *a priori* in the multiannual planning.
- (53) For "Operational contingency modules" (3.3F), the Commission believes that the activity should bring results of unified and joint coordination and operational management for all kind of operations, not only in the maritime domain. The reference to the "maritime domain" should therefore be deleted. The Commission regrets to note that the same comment made in its Opinions in the previous two years has not been taken into account.
- (54) The Commission acknowledges the Agency's efforts to better develop the strategic action area for return activities.
- (55) The Commission is of the opinion, as already stated in its Opinion of last year, that the enhanced mandate for returns should be fully reflected also with regard to risks analysis, training (not exclusively to border guards but also other persons involved in return activities) and research and innovation. Regarding training, the Agency should also develop and implement specific trainings for forced return escorts, forced return monitors and return specialists. These training activities should include fundamental rights components covering, inter alia, child protection, gender equality and gender based violence elements. In the same vein, promoting inter-agency activities by the Agency should also include cooperation aimed at increasing return rates throughout the EU.
- (56) In addition, the Commission invites the Agency to better develop the information under point 3.4D "Coordinate the use of relevant IT systems" as well as to provide more clarity on points 3.4 under "Execution of Standard Operating Procedures for short term Identification missions" and 3.4F "Enhancing the operational and HR/technical support to Member States to carry out return operations" by charter and scheduled flights and also on returns by sea with a focus on Member States facing specific and disproportionate challenges. It should be explained that before being implemented, best practices have firstly to be developed. With reference to

- the Strategic Action “Area Risk Analysis”, activity 3.5.1.B, the Commission invites the Agency to clearly indicate that the Commission is included in the other participating EU entities by explicitly listing it in the objectives of the action. The Commission regrets to note that the Agency has not taken into account the same comment made in its previous year’s Opinion.
- (57) As regards activity 3.5.1.D, it should be noted that the Commission is interested in being involved in the process of further developing a pre-warning mechanism.
- (58) The Commission welcomes the updates on the strategic action area of vulnerability assessments, including the Agency’s plans to continue work on the quantification of objective criteria. The Commission considers that putting in place an effective monitoring mechanism is an essential element of ensuring that the vulnerability assessment recommendations are being implemented and the proper functioning of the Schengen area is preserved.
- (59) The Commission notes the inclusion of a new strategic action area "Operational Resource Management" and requests the Agency to clarify or explain more comprehensively its plans under point 3.6D on developing new models for acquiring and managing acquired resources as well as on developing processes for effective requirements management.
- (60) As regards strategic action area "Research and innovation", under point 3.8C, the Commission considers that replacing the last bullet under Expected results with the following suggestion would be more appropriate in the context of the programming document: ‘Explore modalities for setting up/managing border security related research in Europe, also building on the conclusions of the RAND Europe Institute study’.
- (61) Within strategic action area "Situational Monitoring", action 3.9K, the Commission invites the Agency to explain in more detail its plans on creating a Frontexcentralised command and control mechanism to remotely support Third Country operations.
- (62) As regards strategic action area "Media and Public Relations", the Commission invites the Agency to appropriately revise the numbering to avoid confusion.
- (63) As regards strategic action area "Fundamental rights", the Commission underlines that the complaints mechanism has already been set up and that the Agency should ensure its management and good functioning. The expected results should therefore read: 'Ensured compliance with Regulation 2016/1624 in the management of the complaints mechanism'.
- (64) The Commission insists on the importance of the dissemination strategy aiming at raising the visibility of the complaints mechanism as the total number of complaints lodged so far with the Agency is relatively low.
- (65) In general, protecting children's rights is of paramount importance to all activities of the Agency. The Commission calls on the Agency to emphasise children's fundamental rights as a cross-cutting concern in all trainings on fundamental rights organised by the Agency.

- (66) Regarding the Fundamental Rights Officer, the Commission believes that the Agency should prioritise the support to his/her activities to effectively manage the complaints mechanism as well as other new tasks allocated under the EBCG Regulation for which there is a need to develop a comprehensive fundamental rights dimension.
- (67) Along these lines, the Commission underlines the utmost importance of giving the Fundamental Rights Officer the necessary human resources in a way that reflects the enlarged mandate of the Agency.

Annual Work Programme for 2019

- (68) The Commission regrets that the Executive Summary of the Annual Work Programme has not been included in the version of the draft Single Programming Document 2019-2021 on which it issues its Opinion.
- (69) The Commission recalls its comment from its Opinions on the Annual Work Programmes for 2017 and 2018 that by way of introduction to the Annual Work Programme for 2019 the Agency should better demonstrate how, as one of the pillars of the European Border and Coast Guard, it will contribute in 2019 through its enhanced mandate to the ongoing EU efforts for strengthening and sustaining an effective management of the EU's external borders and the proper functioning of the Schengen area. Merely listing in section III.2 on pages 68-69 its new tasks under the Regulation cannot be considered sufficient to address this comment.
- (70) The Commission underlines that the observations made in relation to the multiannual programming are equally applicable to the draft annual programming, especially as regards the integrated border management, cooperation on coast guard functions and the Agency's involvement in law enforcement activities.
- (71) The Commission considers that the draft 2019 work programme does not clarify how the substantial increases of financial resources foreseen for the implementation of new tasks will be allocated, despite the fact that the Agency has indicated in section 2 of the draft annual work programme (p. 69) the general objectives of the increased EU subsidy in relation to the new tasks. For example, more than EUR 6 million was added to step up the Agency's cooperation with key third countries and international partners, including EUR 1 million to cover operational costs for the deployment of 10 liaison officers already as of 2017. In addition, EUR 5 million was foreseen annually to support the Agency's cooperation with two other EU Agencies to support the coast guard functions.
- (72) Against this backdrop, the Commission acknowledges the increase of the budget in 2019 earmarked for International and European Cooperation (around EUR 1.5 million) as compared to the amount of less than EUR 0.5 million in 2018, and the planned deployment of 9 Liaison Officers in priority third countries along with the planned 11 posts of Liaison Officers in Member States.
- (73) However, the Commission considers this increase marginal as compared to the budget initially provided for in the Legislative Financial Statement (LFS) for the EBCG Regulation. Moreover, it is unclear how these

foreseen increased resources related to the additional tasks and activities were incorporated in the draft Agency's budget given that the operational budgets for international cooperation as well as for cooperation on coast guard functions do not reflect the corresponding increases of the EU subsidy.

(74) In Chapter 3 "Strategic Action Areas", in particular, the part on "Enhanced Financial Resources" on p. 69, the Commission invites the Agency to revise the wording by

adding to the subsidy from the Commission (amounting to EUR 12 million) the contributions by the Schengen Associated Countries (amounting to EUR 1 million) which put together amount to EUR 13 million. This breakdown is rightly reflected in Section IV Budget, table Revenue.

(75) Given that the Commission's proposal for the 2019 EU Draft Budget as well as the deliberations of the budgetary authority on the level of EU subsidy for the Agency for 2019 were based on the assumption that the additional resources are needed to address the new tasks, the Agency is invited to clearly demonstrate without delay that the intended use of these resources is in line with the objectives for which the additional money was allocated. Otherwise, the Agency should adjust the budget accordingly by decreasing the level of needed commitment appropriations.

(76) The Commission welcomes that the contingency planning has become one of the guiding principles for the elaboration of the annual work programme. In accordance with Article 75 (13) of the EBCG Regulation, the financial operational reserve should amount at least to 4 % of the allocation foreseen for the operational activities. The Commission appreciates that the amount earmarked for the operational reserve for 2019 corresponds to the required level of 4%.

(77) The comments made on the quality of indicators for the multiannual planning also apply to the annual work programme; in particular, the Commission stresses the requirement to define concrete quantifiable indicators for activities.

(78) Moreover, the Commission expects that the Agency addresses the following observations or introduces the following changes:

- In Chapter 4 "Human and Financial Resources Outlook for years N+1 – N+3", the part "Highlights and main aspects of the past and current situation" (p. 64) should be corrected, so that the first phrase reads as follows: "The Management Board will approve in November 2018 the estimated revenue and expenditure".
- The Commission requests the Agency to better clarify what is meant by 'maritime dimension' (p. 72) as regards point 2.2 "European Cooperation on Coast Guard Functions";
- Regarding all the Concepts, the Commission recalls that the role of the Agency in multi-purpose operations should not go beyond the legal mandate of the Agency. In this context and in particular in relation to the VEGA concept, the Commission requests the Agency to clarify whether the indication of 'detecting and initiating investigations on cross border criminal organisations' refers to the activities of the Agency;

- The Commission recalls that the activities in the area of risk analysis should be in line with the scope of Article 11 of the EBCG Regulation;
- The Commission appreciates the Agency's plans to continue working towards updating and extending the FRAN and EDF-RAN indicators. In this respect and looking ahead on how to improve data collection and information exchange in the specific area of document fraud detection, the Commission advises the Agency to consider the possibilities of expanding EDF-RAN data collection scope to include, e.g. fraudulent documents presented during visa applications, pre-boarding denials as well as breeder documents so as to contribute to reflecting the actual scale of the issues encountered in this area;
- The Commission welcomes the Agency's continued close cooperation with EASO with a view to ensuring complementarity of the actions of both entities. In this context, as regards activity RAU-4 (Chapter 2.5.1. "Risk Analysis" under title "Intelligence coordination including processing of personal data for risk analysis purposes") the Commission requests the Agency to clarify the meaning of "number of hits in EASO" where the programming document cites "number of hits in EASO" as a new activity which will serve as an indicator (p. 89);
- As regards activity RAU-06, the Commission, as similarly indicated in its last year's Opinion, invites the Agency to broaden the scope of the objectives of the activity by including the provision of data and information, along with analytical input and reports, both on regular and ad-hoc basis;
- In relation to section 2.5.2. "Vulnerability assessment", while the Commission shares the Agency's views that vulnerability assessments should be better aligned with the Schengen Evaluation Mechanism as a quality control mechanism and that synergies and complementarities between them should continue to be sought and ensured, the Commission recalls that these two instruments serve different objectives and should therefore remain separate mechanisms;
- As regards the section "International and European Cooperation", the Commission invites the Agency to include as a distinct activity the implementation of the DG NEAR funded project EU4Border Security regional programme covering the Neighbourhood South;
- As regards the deployment of liaison officers in third countries, the Commission recalls that, in accordance with Article 55 of the European Border and Coast Guard Regulation, the decision to deploy such liaison officers is subject to receiving the prior Opinion of the Commission;
- With reference to the Implementation of Technical Assistance Projects in Third countries, the Commission invites the Agency to provide an update on the development of the AFIC Cross-Border Crime project;

- The Commission welcomes the Agency's activities related to compliance with Regulation 45/2001⁹ as well as its plans to provide for a preparation on the introduction of the revised Regulation 45/2001 by organising the relevant training, as pointed out in section 2.12.2. The Commission reminds that the activities of the Agency have to be strictly limited to what is necessary for implementing its mandate. As a data controller, the Agency will have to take measures to establish and maintain a record of all data processing operations, to report data breaches to the European Data protection Supervisor and to data subjects, when required, ensuring the exercise of the data subjects' rights.

Budget

- (79) As regards Section IV Budget, the Commission advises the Agency to rename 'Description' A-900 to 'EU Contribution' (p. 131).
- (80) The Commission advises the Agency to rename 'Description' of budget items and/or corresponding budget amounts in order to establish coherence between the EBCG
Draft budget 2019 and the EBCG Single Programming Document 2019-2021 (p. 132).
- (81) The Commission advises the Agency in the process of forecasting resources for the multiannual programming to take into account its relatively low budget implementation rate that is caused by the current high vacancy rate.
- (82) The Commission requests the Agency to maintain a correlation table, in the form of an Annex to the Single Programming Document so that it is possible to trace budget line descriptions used in previous and subsequent versions of the document.
- (83) Detailed information of required modifications is included in Annex I to this Opinion.

Staffing

- (84) A significant number of posts has been allocated to the Agency with a view to implementing the additional tasks foreseen by its expanded mandate. The number of staff members is expected to reach 1 000 by the year 2020, without prejudice to further increase in the number of the Agency staff members which may result from possible future reform of the European Border and Coast Guard Regulation. For the sake of transparency and in full respect of sound financial management, the Commission regrets to observe that the Agency has not provided in the draft Single Programming Document a comprehensive overview on how different, additional posts were allocated or are expected to be allocated in 2019, to the priority areas of the EBCG

⁹ Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

Regulation and at least some indications on how this will be done in the subsequent years.

- (85) The Commission expects that the allocation of new staff to the different new tasks will generally respect, with some possible variations for justified cases, the indications provided by the LFS accompanying the Commission's proposal for the EBCG Regulation.
- (86) The Commission invites the Agency to align the number of contract agents with the number indicated in the EU Draft Budget for 2019; therefore, it is suggested to modify their number from 217 to 202.
- (87) Additionally, in Chapter 4 "Human and Financial Resources Outlook for years N+1 – N+3", the Commission invites the Agency to correct the Table on Human resources as regards the figures for Total staff, by deducting 15 staff for the period 2018-2021, so as to align the number of staff with the number indicated in the EU Draft Budget for 2019 and the LFS accompanying the Commission proposal for the Agency's mandate from December 2015.
- (88) Pending the final outcome following the budgetary hearings, the Commission takes note of the additional 66 establishment plan posts, 28 contract agents, and 26 seconded national experts requested by the Agency for 2019. The forward planning for 2020 and 2021 should, however, be incorporated into the Single Programming Document.
- (89) The missing information from Annexes III and IV, especially as regards the recruitment policy, the reclassification/promotion exercise, and the mobility policy is crucial in order to assess the human resources management at the Agency. A full picture of the situation is especially important in view of the difficulties the Agency has reported with recruitment and retention of staff, and the large number of recruitments planned for 2018.
- (90) The fact that an Agency is assigned new tasks does not preclude an identification of negative priorities and opportunities for internal redeployment. This exercise should indeed assist in freeing up resources for the planned new tasks. Therefore, the Commission requests a more thorough reflection on potential negative priorities and redeployment opportunities in the Human Resources Outlook.
- (91) According to the Staff Regulations, some functions must be filled in the function group AST/SC. The Agency should consider this in its establishment plans and begin to integrate AST/SC posts into their planning. This recommendation was already included in the Commission's Opinion of last year.
- (92) The proposed establishment plan includes no provision for AST/SC temporary agents and very few GF II contract agents. The Commission invites the Agency to assess which positions involve clerical or secretarial tasks and should therefore be converted in accordance with Annex 1A of the Staff Regulations.
- (93) Relative to the reported occupation figures for 31/12/17, the posts in the AST function group in particular are noticeably over-occupied, with more high-graded staff in activity than posts available; however, no effort has been made

to adjust the establishment plan for 2019 accordingly. The Commission invites the Agency to align its establishment plan more closely with the staff in place.

- (94) The Commission takes note of the persistent significant site effect on the geographical balance among Agency staff. Figures concerning the proportion of women in management positions at the Agency would be useful to complete the gender balance information.

International Cooperation Strategy 2018 – 2020 (Annex XIII)

- (95) The Commission appreciates that the International Cooperation Strategy has been significantly developed.
- (96) The Commission acknowledges that this strategy now better prioritises the international activities of the Agency and establishes a list of priority third countries and international organisations, in line with the Commission's Opinion on the Single Programming Document 2018-2020.
- (97) The Commission reiterates that a reference to cooperation with Russia could be considered, possibly by changing the title of section 4.1.1 to "Eastern Partnership and Russian Federation".
- (98) As already stated in the Commission's Opinion on the Single Programming Document 2018-2020, an appropriate working arrangement with DG HOME as a parent DG should be put in place on the handling of international activities to ensure close coordination with the EU priorities on external relations and full respect of fundamental rights. The Commission regrets to observe that it has not happened until now and calls again on the Agency to do so as soon as possible.
- (99) The Agency needs to ensure an adequate integration of this strategy in the multiannual part of the programming document and by cross-referencing between the Strategy and concrete actions planned under the annual work programme for 2019.
- (100) The Agency should adapt the Single Programming Document and the Work Programme for 2019 accordingly.
- (101) With reference to Article 67 (4) of the EBCG Regulation, the Commission recalls the modus operandi agreed by the Agency's Management Board at the beginning of 2013 concerning the voting rights of Schengen Associated Countries, according to which if the training portfolio and the operational portfolio annexed to the draft Annual Work Programme contain sufficient details about the participation of certain individual countries in the various trainings and joint operations, the Schengen Associated Countries could be allowed to cast a vote on those trainings and operations in which they made in 2017 a prior commitment to participate.
- (102) The Commission notes that the current draft does not meet these conditions and that the Schengen Associated Countries could therefore not be allowed to vote should the current draft be submitted to the Management Board for approval.
- (103) This Opinion is addressed to the Management Board of the European Border and Coast Guard Agency. Done at Brussels, 8.10.2018

For the Commission
Dimitris AVRAMOPOULOS
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

Annex D



Brussels, 30.9.2020
C(2020) 6643 final

COMMISSION OPINION

of 30.9.2020

**on the draft Single Programming Document 2021-2023 of the European
Chemicals Agency**

(Only the English text is authentic)

COMMISSION OPINION

of 30.9.2020

on the draft Single Programming Document 2021-2023 of the European Chemicals Agency

(Only the English text is authentic)

1. The European Chemicals Agency (the Agency) has been established by Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)¹. According to Articles 32(1) of the Commission Delegated Regulation (EU) 2019/715 (the Framework Financial Regulation for EU agencies)², the Agency shall send to the Commission, the European Parliament and the Council the draft Single Programming Document, containing multi-annual and annual programming, no later than 31 January each year as well as any later updated version of that document.
2. According to Article 32(8) and (9) of the Framework Financial Regulation for EU agencies, the Single Programming Document shall be adopted by the Management Board of the EU body. The EU body shall send any later updated version of the single programming document, notably to reflect the Commission's opinion and the outcome of the annual budgetary procedure, to the Commission, the European Parliament and the Council.
3. In accordance with Article 32(7) FFR, the Commission shall send its opinion on the draft Single Programming Document to the Agency. If the Agency does not fully take into account the Commission's opinion, it shall provide the Commission with adequate explanations.
4. On 31 January 2020 the Commission received the Agency's draft Single Programming Document 2021-2023.

General comments

5. The Commission welcomes the draft Single Programming Document which has been drawn up in accordance with the requirements in the Commission guidelines³ established in cooperation with the network of EU Agencies. It

¹ Regulation (EC) No 1907/2006

² COMMISSION DELEGATED REGULATION (EU) 2019/715 of 18 December 2018 on the framework financial

regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council

³ C(2020) 2297 final

provides multiannual strategic objectives and their respective areas of operation until 2023, providing baseline figures estimates, and keeping the focus on further improvement

of processes at the Agency. It also describes the Agency's activities and outputs in 2021, with an allocation of resources per activity.

6. The Commission reiterates the request in its previous opinion on the Single Programming Document covering 2020 to 2022 asking the Agency to further refine the indicators and review them regularly to allow measurement of its effectiveness and efficiency. Indicators should be developed for all objectives and activities described in the programming document and allow for a quantitative and qualitative assessment of the objectives attained. The Commission notes that indicators are missing for some of the objectives and activities.
7. The Commission asks the Agency to provide by the end of the first quarter in 2021 a thorough analysis based on the data in its possession accumulated since it started its operations on the correlation between the fees and charges paid by undertakings and the workload of the Agency by regulatory activity and propose scenarios of adjustments to the Commission to the current fees and charges systems. The fee and charges income should reflect the services rendered by the Agency to undertakings. The adjustments proposed should take account of the efficiencies and the synergies the Agency has achieved or will achieve in the future.
8. The Commission supports the Agency's cooperation with other EU agencies in order to achieve synergies and efficiencies on both scientific and organisational aspects. It encourages coordination and collaboration on crosscutting areas in particular with the European Food Safety Authority (EFSA) and the European Medicines Agency (EMA), respecting the limits set by each Agency's founding act. In addition, the Agency shall take care to ensure early identification of potential sources of conflict between its opinions and those of other EU bodies in accordance with Article 95 of REACH.
9. The Commission asks the Agency to continuously evaluate and improve the cost effectiveness of its IT systems and ensure that they are phased out when they have little added value for the operations of the Agency. It is crucial that the IT solutions reduce the administrative and financial burdens for the industry and that the IT systems developed by the Agency are resilient to incidents or disruptions and provide assurance of data integrity and security.
10. The Commission welcomes the service level agreement signed between the Agency and EFSA for developing IUCLID software to be used in the handling of active substance applications and product authorisations for plant protection products. This is a concrete example of cooperation which maximises the impact of the resources using already existing and sophisticated IT tools in an efficient way, allowing knowledge to be shared.
11. The Commission acknowledges the achievements of the Agency in updating its conflicts of interest policy and calls on the Agency to review it regularly. The appropriate management of (potential) conflicts of interest situations is

key for maintaining the trust of stakeholders and citizens in the work of the Agency and in safeguarding the independence of the Agency.

12. For the interests of clarity and to avoid the perception that the Agency is acting outside the boundaries of its mandate, the Commission requests the Agency to distinguish in the Single Programming Document between the regulatory actions under its remit and those falling under the remit of the Commission or the Member States, including clarifications on the interface between REACH and other Union legislation. The Commission also requests the Agency to consider using ‘the legislation the Agency implements’ rather than ‘ECHA legislation’.
13. The Commission welcomes that the Agency will cooperate with interested stakeholders to increase the skills base of companies in substitution towards safer substances and sustainable portfolio management, but highlights that such activities are also undertaken by other Commission services, in particular in the area of research and innovation. The activities of the Agency in this area should therefore be carefully coordinated with any other activities of EU in this field. For the Agency it would be important also to ensure that the all the necessary guidance for industry/applicants is kept up to date as fast as possible.

Regulation (EC) No 1907/2006 concerning the registration, evaluation, authorisation and restriction of chemicals (REACH)

Registration

14. The Commission welcomes the support to duty holders to have access to data, tools and guidance for preparing complete and compliant dossiers as well as updating their existing registrations to new knowledge or to address data gaps. The Commission asks the Agency to update the Single Programming Document to take into account also the response by the Agency to the outbreak of Covid – 19 in assisting and alleviating the burden and impact on duty holders and in particular SMEs.
15. The Commission reiterates its request to the Agency to finalise the assessment, in cooperation with stakeholders, whether the SME Cloud Services should become the sole delivery model for International Uniform Chemical Information Database (IUCLID) with due regard to efficiency and cost effectiveness of maintaining two parallel models and the Agency’s obligations under Article 111 of the REACH Regulation. The outcome of the assessment shall be provided to the Management Board in the first quarter of 2021 at the latest.
16. The Commission welcomes the efforts by the Agency to reduce the backlog of the SME status of the registrations under REACH. However, the Commission asks the Agency to step up efforts to reduce the time-lag between submission and verification for the post 2018 registrations under REACH by, inter alia, verifying the SME status at the completeness check stage.

17. The Commission asks the Agency to continue to provide guidance and helpdesk support to stakeholders following the revision of REACH annexes addressing nanofom substances, which became applicable on 1 January 2020. The Commission is pleased to note the activities of the Agency, in collaboration with industry, that raise the awareness of companies of the new nanomaterial-specific obligations. The Commission encourages the Agency to update its guidance on human health and the environment with respect to nanomaterials. The Commission recognises that progress in this area also depends on the development of international standards in the Organisation for Economic Co-operation and Development (OECD), the International Organization for Standardization (ISO) and the European Committee for Standardisation (CEN).

Integrated Regulatory Strategy including Evaluation

18. The Commission supports the Integrated Regulatory Strategy and welcomes the Agency's role in contributing to the identification of (groups of) substances with high concern and prioritisation for risk management under the preferred REACH, the classification, labelling and packaging of substances and mixtures (CLP)⁴ Regulations or other regulatory process and generation of data under Evaluation to confirm and address any concerns in close cooperation with the Member States competent authorities and including targeted collaboration with the industry. The Agency shall ensure transparency of the screening methodology and outcomes.
19. The Commission supports the Agency's strategic target to address all substances of concern by 2030 but reiterates that the Agency should further step-up compliance checks as one of the main tools to achieve this aim, ensuring that information in the registration dossiers is compliant and requesting generation of further information where necessary as fast as possible and at the latest by 2027. The Commission welcomes the efficiency improvements realised and encourages the Agency to continue developing further actions to improve the efficiency of compliance check decision-making and ensure through improved working methods that the Member State Committee is able to cope with the increased workload.
20. The Commission welcomes that the activities in the Single Programming Document link as appropriate to the actions in the second review of REACH⁵ and encourages the Agency to continue coordinating with relevant Commission services in order to ensure a common understanding of the needs and objectives to be pursued for those actions.

⁴ Regulation (EC) No 1272/2008

⁵ COM (2018) 116 final and SWD (2018) 58 final

Authorisation and Restriction

21. The Commission acknowledges the Agency's ongoing efforts in improving the workability and streamlining of the restriction and authorisation processes and encourages the Agency to continue these efforts, in particular with regard to applications for authorisation under REACH covering multiple operators. The Commission encourages the Agency to draw lessons from review reports from 'upstream' authorisation holders to identify how applications for authorisation, and the underpinning supply chain communication, can be further improved in the future. In view of the need to ensure a level playing field between economic operators in and outside EU, the Commission welcomes that the action of the second REACH review related to Article 69(2) of REACH is progressing faster.
22. The Commission acknowledges and values the Agency's Committees role in the assessment of the safety of chemicals and the socio-economic implications of authorisations and restrictions under REACH. The Agency should make sure that the scientific and technical expertise in the Agency is of high standards and state-of-the-art in order to meet the different aspects related to the safety of chemicals, in particular in relation to endocrine disrupting and persistent, bioaccumulative and toxic (PBT) – very persistent and very bioaccumulative (vPvB) substances and substances with nanoforms. The Commission encourages the Agency to continue with the timely publication by the Committee for Risk Assessment (RAC) of reference derived no-effect levels and dose-response curves, where possible, of substances subject to the REACH authorisation requirement. In that regard, the Commission encourages the Agency to continue offering its staff specific training for the dose-response assessment on carcinogenic and non carcinogenic substances in order to reduce the use of external expertise. The Commission also encourages the Agency to continue with their efforts to support the development and application of state-of-the-art methodologies including non-animal approaches in order to increase the efficiency and effectiveness of chemical safety assessment.
23. The Commission asks the Agency to continue adopting appropriate measures as regards the opinion-making by the Committee for Socio-Economic Analysis (SEAC) on applications for authorisation following the judgments of the EU General Court (Case T-837/16 of 7 March 2019 – Sweden v. European Commission and Case T108/17 of 4 April – ClientEarth v. European Commission) to the extent these judgements are not inconsistent with the Commission's position in its appeal of Case T-837/16, that is to say Case C-389/19P, and to take appropriate measures to ensure consistency with the Commission's position in that appeal pending judgement by the Court of Justice. In particular, the Agency should ensure that its committees' opinions include an assessment of the suitability of alternatives in general, as well as for the applicant, and, if applicable, the assessment of a substitution plan. Agency opinions should be mindful of the burden of proof and the standard of proof – sufficient weight of evidence – incumbent on the applicant and applicable to the Commission's assessments. Agency opinions should also

take into account the Commission's revised practice and reasoning with regard to findings in its decisions on the technical and economic feasibility of alternatives.

24. The Commission acknowledges the constructive and successful work of the Restriction Task Force and encourages the Agency as well as Member States to implement the related recommendations for improving the efficiency of the restriction process. The Commission reiterates that the Agency should keep considering the Commission's Better Regulation guidelines for evaluations and impact assessment for the preparation of restriction dossiers. In particular, the Commission recalls that the Committees opinions and the accompanying background documents need to uphold to the Commission Impact Assessment standards.
25. The Commission acknowledges the Agency's efforts in ensuring that robust working methods of its committees involved in the risk management processes are in place, namely the Member States Committee (MSC), the Committee for Risk Assessment (RAC) and the Committee for Socio-Economic Analysis (SEAC). The Commission reiterates that it is essential that these Committees continue to deliver their opinions independent of policy influence and based on science and the legal provisions as laid down in the REACH and the classification, labelling and packaging of substances and mixtures (CLP) Regulations. The Commission underlines that the opinions of the Committees on essential elements for decision-making should be clear, timely, complete and conclusive in order to provide a comprehensive and adequate basis for the Commission to swiftly prepare adequate risk management measures. The Commission welcomes the efforts by the Agency to prepare the Committees for handling the increasing number of restriction dossiers and applications for authorisation. In this context, the Commissions requires that the Agency ensures that

the Committees deliver high quality opinions, properly scrutinised by the members of the committees and providing sufficiently detailed scientific justification of all elements necessary for decision-making.

Regulation (EC) No 1272/2008 on Regulation (EC) No 1272/2008 (CLP)

26. The Commission welcomes the Agency's commitment to continue working collectively together with EFSA to align the CLP process with the need of the biocides and plant protection products frameworks. By doing so, the Agency should further support Member States relevant authorities in the realisation of their duties, identify difficulties and develop actions to address them.

Regulation (EU) No 528/2012 concerning the making available on the market and use of biocidal products (BPR)

27. The Commission welcomes the Agency's Action Plan on Active Substances to revive and accelerate the review programme of existing biocidal active substances that is significantly behind schedule. These actions are particularly important to move forward with the peer review of the evaluation reports of biocidal active substances submitted by Member States to the Agency prior to 1 September 2013, so that the opinions can be finalised as soon as possible. The action plan also rightly foresees support to Member States to assess whether those substances can be considered to have endocrine disrupting properties in accordance with the scientific criteria set out in Commission Delegated Regulation 2017/2100. The Agency is invited to assess regularly, together with Member States and the Commission, the effectiveness of its support to competent authorities and its activities to revive and streamline the peer-review process.
28. The Agency is invited to continue monitoring the delays in biocides' procedures, in particular those related to mutual recognition, national and Union authorisation evaluations and, together with the Member States authorities, identify the causes of the delays and develop actions to address them.
29. The Commission underlines the Agency's key role in the process for Union authorisations concerning the delivery of opinions which include a detailed and accurate description of the product to be authorised and its use. The Agency is asked to clarify, in cooperation with applicants and Member States, those factors affecting the quality of opinions, including the quality of the Summary of the Products Characteristics (SPC), and to develop and implement the relevant actions to improve their quality, as well as the quality of the translations of the SPC in all official languages.
30. The Commission notes that the Agency's action in the context of its substitution strategy have been limited so far as regards biocidal products. The Commission asks the Agency to enhance its activities to contribute to consultations related to the possible substitution of substances which meet the exclusion or substitution criteria set out in the Biocidal Products Regulation. This includes, among others, a reinforcement of the Agency's Biocidal Products Committee's opinions on the identification of chemical and non-chemical alternatives to those active substances.
31. Most of the product authorisations in the biocides area are granted by national authorities. The Coordination Group, for which the Agency provides the secretariat, ensures that a harmonised approach is applied in the Union for national authorisations and supports Member States with an effective implementation of their responsibilities. The Commission underlines the importance of this group and asks the Agency to maintain a high level of assistance to ensure its proper functioning.

SCIP database (Art. 9 of the Waste Framework Directive)

32. The Commission reminds that the establishment of the SCIP database is a legal obligation that the Agency has to complete within the legal deadline, in accordance with the provisions in Directive (EU) 2018/851, to ensure that suppliers can notify information as of 5 January 2021. Therefore, the Commission asks the Agency to put in place the necessary arrangements to set up the database and keep the Commission and the Management Board informed of any deviation from the planning that could jeopardise the fulfilment of legal obligations, and to ensure that there is a continuous risk assessment with the relevant scenarios planned.

Regulation (EU) No 649/2012 on export and import of hazardous chemicals

33. The Commission acknowledges the efforts of the Agency to process the export notifications, the numerous helpdesk and other requests and the various reporting tasks in a timely manner. The Commission recognises the smooth operation of the ePIC application, which facilitates in particular the implementation of the legal obligations of exporters and Member State authorities. That application will require adaptations to properly implement the modalities of the withdrawal of the United Kingdom, including the Northern Ireland Protocol. The Commission would like to remind the Agency that all necessary changes need to be done in a timely manner to ensure that stakeholders have access to an application that facilitates proper implementation. In addition, the Commission would like to remind the Agency that the dissemination of information relating to export and import of hazardous chemicals urgently requires an update.

Regulation (EU) 2019/1021 on persistent organic pollutants (POPs)

34. The Commission acknowledges that the Agency started the preparation of the new tasks under Regulation (EU) 2019/1021 in a timely manner. The work on the new monitoring and reporting platform made some progress and should be completed in a timely manner to allow Member States the use of this new tool in line with the objectives and the obligations of the Regulation. In this context, the Commission would like to remind the Agency of the objective to fully integrate the use of IPChem into the reporting of certain monitoring data. The scientific and technical support in relation to proposals for the listing of additional chemicals under the Stockholm Convention is of high importance and, therefore, the Commission would like to urge the Agency to give a high priority to that work and to ensure that sufficient resources are available to provide the necessary input.

Specific comments on human resources

35. The estimation of the structural service providers for the 2021-2023 period should be included in Table 1 of Annex III, especially that the Agency committed explicitly to reduce their number.
36. Table II of Annex III continues to show a significant under occupation of establishment plan posts graded AD 8+ and AST 5+. However, the Agency has made a special note of the fact that it may be modifying its establishment plan to ensure greater flexibility. Even taking future needs for promotion/reclassification into account, there should be no need for any further post upgrades. The Commission asks the Agency to align its establishment plan much more closely with the staff in place.
37. The description of the Agency's Recruitment Policy for temporary agents has still not been updated in accordance with Annex IA of the Staff Regulations. The Commission invites the Agency to assess which positions involve clerical or secretarial tasks and should therefore be converted in accordance with Annex 1A of the Staff Regulations⁶ and Article 80 of the Conditions of Employment of Other Staff of the European Union. Information on recruitment grades for particular profiles should be included.
38. In view of the priorities of the Commission in the area of gender balance, the Commission invites the Agency to develop a specific equal opportunities action plan to address in particular the 10% decrease in the representation of women amongst middle and senior management staff over the last years.
39. The organisation chart in Annex X includes an unstaffed structure for a Deputy Executive Director. This position is not provided for in the Agency's founding act and should be removed.

Specific remarks on 2021 financial resources:

40. The Commission acknowledges that the Agency has been entrusted with a number of new tasks recently. Against the general resources constraints, the Agency is invited to do a more careful prioritisation of all its tasks, identifying clearly which tasks are necessary to fulfil legal obligations and prioritise those with the existing resources. Flexibility of staff is paramount, to be able to re-allocate resources and the expertise when and where needed. In this context the review of the Agency multiannual human resources strategy is welcome.
41. The Commission expects the Agency to align all sections of the SPD to the human and financial resources allocated to the Agency in the Commission's Draft Budget 2021. At this point in time any statement on the budget of the

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20140501&from=EN>

Agency (2021 and following years) can only be considered as indicative and cannot prejudice a future decision by the Budgetary Authority.

42. It should furthermore be noted that all the forecasts related to the EU budget contribution in 2021, 2022 and 2023 are indicative and without prejudice to the decisions to be taken as regards the next Multiannual Financial Framework 2021-2027.
43. The maximum balancing EU contribution for 2021 for REACH / CLP shall not exceed EUR 63 614 564 including surplus from 2019 amounting to EUR 1 353 559. The maximum balancing EU contribution excludes the resources already redeployed (8 contract agents and the related financial resources of EUR 520 000) from REACH/CLP strand of the Agency budget to the Environmental strand. The staff for REACH/CLP shall not exceed 404 establishment plan posts, 94 contract agents and 13 seconded national experts in line with the adopted 2021 Draft Budget.
44. The Commission asks the Agency to put in place the necessary arrangements so that the size of companies registering substances is verified swiftly to avoid backlog and ensure that the companies pay the fees and charges due.
45. The Commission asks the Agency to align the figure for the EU contribution 2021 for the Environment line (PIC, POPs, Waste Framework Directive) with the Draft Budget 2021, which provides for EUR 5 285 100, 10 establishment plan posts and 12 contract agents.
46. As regards activities related to the Biocidal Products Regulation, the Commission notes that 71 posts foreseen for 2021 in the SPD. The Commission considers that there is no need to increase the staffing and thus the establishment plan as well as the number of contract agents and seconded national agents should be maintained at the 2020 level. The total staffing of the Agency for activities related to the Biocidal Products Regulation is set at 69 FTE (52 temporary agents, 15 contractual agents and 2 seconded national experts) in 2021.
47. As regards activities related to the Biocidal Products Regulation, the Commission considers that there is no need to increase the EU contribution except for an adaptation in accordance with inflation, i.e. a 2% increase of the EU contribution compared to 2020. Therefore the Commission asks the Agency to align the figures for the 2021 revenue and expenditure budget to EUR 10 723 476. The Commission asks the Agency to adjust its 2021 revenue budget taking into account an EU contribution of EUR 7 148 160 minus the 2019 Biocides outturn of EUR 134 997 and fee income of EUR 3 150 000 .
48. Annex II containing the Tables on Revenue currently has a column with the 2021 revenue as requested by the Agency. These tables should be completed with a column with the revenue that was proposed in the 2021 Draft Budget. The tables on expenditure should also be updated to reflect the adopted 2021 Draft Budget as well as the adopted Budget for 2020. Done at Brussels, 30.9.2020

For the Commission

Thierry BRETON
Member of the Commission

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director of the Registry
EUROPEAN COMMISSION

Annex E



Brussels, 26.9.2019
C(2019) 6856 final

COMMISSION OPINION

of 26.9.2019

**on the draft Programming Document 2020-2022 of the European Chemicals
Agency**

(Only the English text is authentic)

COMMISSION OPINION

of 26.9.2019

on the draft Programming Document 2020-2022 of the European Chemicals Agency

(Only the English text is authentic)

1. The European Chemicals Agency (the Agency) has been established by Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)¹. According to Articles 32(1) of the Commission Delegated Regulation (EU) 2019/715 (the Framework Financial Regulation for EU agencies)², the Agency shall send to the Commission, the European Parliament and the Council the draft Programming Document, containing multi-annual and annual programming, no later than 31 January each year as well as any later updated version of that document.
2. According to Article 32(8) and (9) of the Framework Financial Regulation for EU agencies, the Programming Document shall be adopted by the Management Board of the EU body. The EU body shall send any later updated version of the programming document, notably to reflect the Commission's opinion and the outcome of the annual budgetary procedure, to the Commission, the European Parliament and the Council.
3. According to the Communication from the Commission C(2014) 9641 of 16 December 2014 on the guidelines for Programming Documents for decentralised agencies and the template for the Consolidated Annual Activity Report, the Commission should adopt an opinion on the Programming Document of EU agencies by written procedure and shall send it to the agencies.
4. On 30 January 2019 the Agency sent to the Commission a first draft Programming Document 2020-2022 and a second draft on 11 April 2019. The present opinion takes into account only the second version of the draft Programming document.
5. The Commission welcomes the Draft Programming Document which has been drawn up in accordance with the requirements in the Commission guidelines established in cooperation with the Network of the EU Agencies. It provides multiannual strategic objectives and their respective areas of operation until 2022, providing baseline figures estimates, and keeping the focus on further improvement of processes at the Agency. It also describes

¹ Regulation (EC) No 1907/2006

² COMMISSION DELEGATED REGULATION (EU) 2019/715 of 18 December 2018 on the framework financial

regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council

the Agency's activities and outputs in 2020, with an allocation of resources per activity.

6. The Commission notes that the Agency's three draft strategic priorities focus exclusively on one of the main objectives of the pieces of legislation covered by the Agency's mandate, i.e. ensuring a high level of protection of human health and the environment. The Commission invites the Agency to integrate within the appropriate boundaries also the other main objective of REACH into its strategic priorities, i.e. ensuring free movement of substances and mixtures on the EU market while enhancing the competitiveness and innovation of the European industry.
7. The Commission reiterates its request in the previous opinion on the Programming Document covering 2019 to 2021 asking the Agency to refine the indicators to allow measurement of its effectiveness and efficiency. The indicators should also allow for a qualitative assessment of the objectives attained. The baseline figures provided in the previous work programmes were regularly exceeded. Therefore, the Agency is invited to revise the targets regularly and adjust them as appropriate. The Agency is also invited to list in a table all the outputs foreseen for 2020.
8. The Commission supports the Agency's cooperation with other EU agencies in order to achieve synergies and efficiencies on both scientific and organisational aspects. It encourages coordination and collaboration on crosscutting areas in particular with the European Food Safety Authority (EFSA) and the European Medicines Agency (EMA), respecting the limits set by each Agency's founding act.
9. The Commission acknowledges the achievements of the Agency in updating its conflicts of interest policy. The appropriate management of (potential) conflicts of interest situations is key for maintaining the trust of stakeholders and citizens in the work of the Agency and in safeguarding the independence of the Agency.
10. For the interests of clarity and to avoid the perception that the Agency is acting outside the boundaries of its mandate, the Commission requests the Agency to distinguish in the programming document between the regulatory actions under its remit and those falling under the remit of the Commission or the Member States, including clarifications on the interface between REACH and other EU legislation.
11. The Commission welcomes that the activities in the Programming Document link as appropriate to the actions in the second review of the Regulation on the registration, evaluation, authorisation and restriction of chemicals (referred to as REACH)³ and encourages the Agency to coordinate with the relevant Commission services in order to ensure a common understanding of the needs and objectives to be pursued for those actions.
12. The Commission acknowledges the Agency's efforts in improving the workability and streamlining of the restriction and authorisation processes and encourages the Agency to continue these efforts, in particular with regard

³ COM (2018) 116 final and SWD (2018) 58 final

to applications for authorisation under REACH covering multiple operators. The Agency should continue to actively support the Commission in identifying areas where further improvement of the quality of applications is needed to allow for an efficient assessment, and where further streamlining and improvement of the procedure is needed, beyond the efforts undertaken so far. In view of the need to ensure a level playing field between economic operators in and outside the EU, the Commission asks the Agency to further proceed with its duties stemming from Article 69(2) of REACH, i.e. the assessment of the need for restriction on uses of substances subject to authorisation in articles.

13. The Commission welcomes that the Agency will collect information by end of 2020 on a number of indicators that would allow for an ex-post evaluation of the most

relevant impacts of restrictions. The insights will help in improving the preparation of restriction proposals by the Agency and Member States and in making the restriction process more effective. The Commission encourages the Agency to duly consider the Commission Better Regulation guidelines for evaluations and impact assessment for the preparation of new restriction proposals as well as for the evaluation of on-going restriction proposals and the ex-post evaluation of past restrictions.

14. The Commission welcomes the Agency's Committees role in the assessment of the safety of chemicals and the socio-economic implications of authorisations and restrictions under REACH . The Agency should make sure that the scientific and technical expertise in the Agency are always state-of-the-art in order to meet the several and different aspects related to the safety of chemicals, in particular in relation to endocrine disrupting and Persistent, Bioaccumulative and Toxic (PBT) – very Persistent and very Bioaccumulative (vPvB) substances and substances with nanoforms. The Commission encourages the Agency to continue with the timely publication by the Committee for Risk Assessment (RAC) of reference derived noeffect levels and dose-response curves, where possible, of substances subject to the REACH authorisation requirement. In that regard, the Commission encourages the Agency to offer its staff specific training for the dose-response assessment on carcinogenic and non carcinogenic substances in order to reduce the use of external expertise. The Commission also encourages the Agency to continue with their efforts to support the development and application of state of the art methodologies including non-animal approaches in order to increase the efficiency and effectiveness of chemical safety assessment.

15. The Commission acknowledges the Agency's efforts in ensuring that robust working methods of its committees involved in the risk management processes are in place, namely the Member States Committee (MSC), the Committee for Risk Assessment (RAC) and the Committee for Socio-Economic Analysis (SEAC). The Commission reiterates that it is essential that these Committees continue to deliver their opinions independent of policy influence and based on science and the legal provisions as laid down in the REACH and the classification, labelling and packaging of substances and

mixtures (CLP)⁴ Regulations. The Commission underlines that the opinions of the Committees on essential elements for decision-making should be clear and conclusive in order to provide a comprehensive and adequate basis for the Commission to prepare swiftly adequate risk management measures.

16. The Commission asks the Agency to adopt appropriate measures as regards the opinion-making by SEAC on applications for authorisation following the judgments of the EU General Court (Case T-837/16 of 7 March 2019 – Sweden v. European Commission and Case T-108/17 of 4 April – ClientEarth v. European Commission) to the extent these judgements are not inconsistent with the Commission's position in its appeal of Case C-837/17, that is to say Case C-389/19P, and to take appropriate measures to ensure consistency with the Commission's position in that appeal pending judgement by the Court of Justice. In this context, the Commission asks the Agency to develop and submit to the Commission a report outlining the Agency's recommendations as objective horizontal criteria and methodologies which should be applied by the Agency and the Commission in the context of an assessment of technical and economic feasibility of alternatives, including a horizontal methodology for the application of objective qualitative and quantitative criteria or thresholds to determine feasibility, objective horizontal criteria and methodologies to be applied in the context of a socio-economic benefit and risk assessment, and objective horizontal criteria to be used to identify an "alternative in general" as referred to by the General Court in Case C-837/17.
17. The Commission welcomes the fact that the Agency has strengthened occupational safety and health (OSH) expertise within RAC, by co-opting more OSH experts, to provide scientific opinions under the Occupational Safety and Health legislation. In this context, the Commission and the Agency have signed a Service Level Agreement providing a temporary legal and financial frameworks for this new task⁵. As concerns this area, the Programming Document shall delimit the role of the Agency, which consists of the provision of opinions at the request of the Commission in line with the terms of the Service Level Agreement.
18. The Commission welcomes the Agency's role in contributing to the identification of new substances for risk management, in close cooperation with the Member States. It is essential that the Agency continues to mobilise authorities and align views. The cooperation and coordination among Member States, the Agency and the Commission is crucial, among others, to support the effective implementation of compliance check and substance evaluation, the implementation of the Substances of Very High Concern (SVHC) Roadmap, as well as to support the integrated implementation of the REACH and CLP Regulation in a consistent and efficient manner.
19. The Commission supports the Agency's strategic target to address all substances of concern by 2030 but recommends to further step-up compliance check as one of the main tools to achieve this aim, ensuring that information in the registration dossiers is compliant and requesting generation of further

⁴ Regulation (EC) No 1272/2008

⁵ COM(2017) 12 final

information where necessary as fast as possible and at the latest already by 2027. The Commission encourages the Agency to apply further actions to improve the efficiency of compliance check decision-making and ensure through the improved working methods that the Member State Committee is able to cope with the increased workload.

20. The Commission notes the importance of the ‘chemical universe’ screening under the Integrated Regulatory Strategy⁶ that informs prioritisation in both the compliance check/information generation and risk management actions and inaction and welcomes the Agency approach to address groups of substances as well as to ensure transparency of the screening methodology and outcomes. The Commission asks that decision on inaction is never made on the basis of information that is wrong or even missing in the registration dossiers.
21. The Commission notes the Agency’s efforts to run all REACH related processes in line with the Integrated Regulatory Strategy and commitment to address groups of chemicals and encourages the Agency not to prioritise mapping and screening exercises which are not legally required by the legislation at the expense of the allocation of the necessary resources to the tasks in the Agency’s mandate.
22. The Commission asks the Agency to provide further guidance and helpdesk support to stakeholders following the revision of REACH annexes addressing substances with nanoform, which enters into application on 1 January 2020. Whereas the Commission is pleased to note the upcoming update of the appendix for nanoforms of the Agency guidance on registration and substance identification, it also notes with concern that the related guidance work on human health and the environment has been postponed. The Commission therefore repeats its request to the Agency to take all necessary steps to enable the implementation of the revised REACH annexes, including the development of international standards in the Organisation for Economic Co-operation and Development (OECD) and the International Organization for Standardization (ISO) and the European Committee for Standardisation (CEN).”
23. The Commission welcomes the Agency's continued implementation of the delegation agreement to develop and manage the European Observatory on Nanomaterials (EUON). It is important that the EUON serves the interested public in general, and business, workers, consumers and authorities in particular. The Commission asks the Agency to continuously evaluate the use of the content already provided, maximize the use of information from the databases it manages.
24. The Commission acknowledges the achievements of the Agency in the area of IT and the satisfaction of the users but underlines that the costs are still relatively high. In consideration of the substantial investment sustained so far, the Agency needs to have a sound business case for future investments in this area as already foreseen in the Agency’s IT governance model. The Commission asks the Agency to continuously evaluate and improve the cost

⁶ <https://echa.europa.eu/substances-of-potential-concern>

effectiveness of its IT systems and ensure that they are phased out when they have little added value for the operations of the Agency. It is crucial that the IT solutions reduce the administrative and financial burdens for the industry and that the IT systems developed by the Agency are resilient to incidents or disruptions and provide assurance of data integrity and security.

25. The Commission reiterates its request to the Agency to assess, in cooperation with stakeholders, whether the SME Cloud Services should become the sole delivery model for International Uniform Chemical Information Database (IUCLID) with due regard to efficiency and cost effectiveness of maintaining two parallel models and the Agency's obligations under Article 111 of the REACH Regulation.
26. The Commission also welcomes the Agency's activities to prepare the implementation of the new Annex VIII on harmonised information relating to emergency health response and preventative measures⁷ of the CLP Regulation and encourages the Agency to continue to develop and make available the one-stop notification portal, including the searchable database, within the agreed timeline.
27. The Commission welcomes the Agency's priority area in supporting substitution and sustainable use of chemicals and invites the Agency to take necessary actions to efficiently implement its Substitution strategy in order to promote successful substitution of hazardous substances, improve chemical safety, further boost innovation and growth. In this context, the Agency should build on existing initiatives, such as the COSME⁸ project on Substitution of Chemical Substances of Potential Concern of the Commission and consider the use of the European Enterprise Network for dissemination purposes.
28. The Commission asks the Agency to ensure that the ongoing work on the database to be developed under Article 9 of Directive 2008/98/EC on waste builds as much as possible on existing work on a database for substances in articles funded by the Commission in the context of the AskREACH LIFE⁹ project, to ensure as far as possible the compatibility of the databases .
29. The Commission acknowledges the activities of the Agency to support Member States competent authorities in the evaluations of biocidal active substances and for the preparation of opinions which are the basis for the Commission's decisions on the approval of active substances. The Agency is encouraged to increase these efforts as after more than fifteen years of the start of the Review Programme only for one third of the active substance-product type combinations the evaluation process has been concluded. The Agency is asked to take further measures so that the opinions on evaluation reports of biocidal active substances submitted by Member States to the Agency prior to 1 September 2013 are finalised as soon as possible, and the progress of the review programme is aligned with the priority lists set in Regulation No 1062/2014.

⁷ Commission Regulation 2017/542

⁸ EU programme for the Competitiveness of Enterprises and SMEs

⁹ <https://www.askreach.eu/>

30. The Commission acknowledges the Agency's role on Union authorisation under the Biocidal Product Regulation¹⁰ (BPR) concerning the delivery of opinions including a detailed and accurate description of the product and its use. It is essential that the Agency continues to coordinate the activities of the Member States competent authorities on Union authorisations in order to align their views. The Agency is encouraged to provide additional support to Member States competent authorities in order to ensure that the conclusions of the evaluation are delivered in a timely manner to the Agency and to increase its efforts to ensure high quality and accuracy of all relevant documents.
31. The Commission welcomes the Agency's role in the development of technical guidance for the implementation of BPR. Having appropriate guidance is key in having a harmonised and proper implementation of the legislation. The Agency is asked, in close collaboration with the Member States authorities and the Commission, to set clear priorities for the development of guidance.
32. The Agency is also invited to identify the possibilities to accelerate the process for adopting opinions on proposals for harmonised classification and labelling of biocidal active substances in accordance with Regulation (EC) No 1272/2008, as these are essential to conclude the evaluation under the Biocidal Products Regulation.
33. The Commission invites the Agency to monitor and report on the respect of deadlines for authorisation procedures as included in BPR.
34. The Commission welcomes the Agency's activities on endocrine disruptors. The Commission invites the Agency to continue providing support to Member States competent authorities, to develop specific IT support tools and to continue its efforts for training and capacity building for experts.
35. The Commission asks the Agency to review the international relations activities in the light of the requirements and boundaries set up in its mandate and as agreed between the Commission and the Agency in the exchange of letters on the handling of the Agency of international activities. In this context, the Commission invites the Agency to dedicate a specific and separate section in the programming document to this work area.

Specific comments on human resources

36. The Commission welcomes the promotion by the Agency of redeployment, leveraging internal skills and increasing overall flexibility of human resources management in a context of limited fee income and the need to contain the EU balancing contribution in light of existing and future budgetary constraints. In this context, the Commission invites the Agency to link the outputs of the programming document with workload indicators to reflect the use of the available financial and human resources.
37. The Commission welcomes that the Agency is continuously seeking efficiencies by prioritising tasks. In this context, the Commission asks the Agency to prioritise and allocate the staff to the implementation of the joint action plan agreed with the Commission services for compliance check under

¹⁰ Regulation (EU) No 528/2012

REACH particularly that the Agency continues resorting to the services of interims for completeness check and confidentiality request under REACH.

38. As regards BPR activities, the Commission notes that 74 posts for 2020 is not in line with the Draft Budget 2020. In order to align with the Draft Budget 2020 the number of temporary agents for 2020 should be reduced by two Full Time Equivalent (FTE) and the number of contract agents for 2020 should be reduced by three FTE. The total staffing of the Agency for BPR activities is set at 69 FTE (52 temporary agents, 15 contractual agents and 2 seconded national experts) in 2020.
39. The Commission asks the Agency to reflect the number of Contract Agents allocated to the activities under Prior Informed Consent Regulation¹¹ (PIC) and the Regulation on persistent organic pollutants¹² (POPs) to reflect the Draft Budget 2020.
40. Table II of Annex III shows very significant under-occupation of establishment plan posts graded AD 8+ and AST 5+. However, upgradings are still requested for these grade levels across the 2020-2022 period. The Agency has also made a special note of the fact that it may be changing its recruitment grades and modifying its establishment plan. While taking future needs for promotion/reclassification into account, the Commission invites the Agency to align its establishment plan much more closely with the staff in place.
41. The description of the Agency's Recruitment Policy for temporary agents has still not been updated in accordance with Annex I A of the Staff Regulations. The Commission invites the Agency to assess which positions involve clerical or secretarial tasks and should therefore be converted in accordance with Annex 1A of the Staff Regulations¹³ and Article 80 of the Conditions of Employment of Other Staff of the European Union. Information on recruitment grades for particular profiles would be welcome.
42. The Commission notes that the organisation chart in Annex X includes an unstaffed structure for a Deputy Executive Director. This position is not provided for in the Agency's founding act.

Specific remarks on financial resources:

43. The maximum balancing subsidy for 2020 for REACH / CLP shall not exceed EUR 62 879 520 including surplus from 2018 amounting to EUR 3 051 863.
44. Annex II containing the Tables on Revenue currently has a column with the 2020 revenue as requested by the Agency. These Tables should be completed with a column with the revenue that was proposed in the 2020 draft budget.

¹¹ Regulation (EU) 649/2012) on import and export of certain hazardous chemicals

¹² Regulation (EU) No 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants.

¹³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20140501&from=EN>

The tables on expenditure should also be updated to reflect the adopted 2020 draft budget as well as the adopted Budget for 2019.

45. Against the backdrop of reduced fee income expected after the last regulatory registration deadline in 2018 under REACH, the Commission asked the Agency to launch a prospective market study in 2019 and draw a forecast of the estimated income from fees and charges for the period 2019 to 2024 based on the current fees and charges model. The Agency must also report to the Commission no later than 30 January 2020 on the outcome of the study launched by the Agency in 2019 for the estimation of the fees and charges income and the consequences on the next Multiannual Financial Framework 2021-2027 financial programming. Inherent uncertainty with respect to the levels of fees and charges income that the Agency may expect in the period 2021-2027 needs to be taken into account in the consideration of the Agency future balancing subsidy level and specifically a mechanism should be put in place to ensure that the Agency is not negatively impacted in year N+2 for higher fees and charges than forecasted received in year N.
46. The Commission invites the Agency to continue monitoring the impact of the last amendments of the Fees and charges Regulation¹⁴ and report back to the Commission concerning applications for authorisation (i.e. insertion of a fee per additional use and annulment of the fee per additional applicant); in particular regarding the number of single applicant downstream applications, joint downstream applications and applications submitted by actors higher in supply chains.
47. The Commission asks the Agency to put in place the necessary arrangements so that the size of companies registering substances is verified swiftly to avoid backlog and ensure that the companies pay the fees and charges due.
48. As regards BPR activities, the Commission asks the Agency to align the figures for the 2020 budget not yet considering the payment of fees by instalments. The Commission also asks the Agency to adjust its 2020 revenue budget taking into account an EU contribution of EUR 7 008 000 and fee income of EUR 5 200 000, and to adapt the expenditure budget accordingly. The amounts for the 2021 Budget will be fine-tuned in the framework of the new Multiannual Financial Framework 2021-2027 negotiations.
49. Bearing in mind the fluctuations in the past years of fee income deriving from the activities of the Agency under BPR, the Commission asks the Agency to continue working on improving the forecasting of fees and charges and on the revision of the fee system.
50. To mitigate uncertainty of fee income in the Multiannual Financial Framework post 2020, the Agency proposes an alternative option in the Programming Document which consists of being fully financed by EU subsidy and the Agency transferring all fees and charges collected to the Commission. In parallel with raising this option in the draft Programming

¹⁴ Commission Regulation (EC) No 340/2008 of 16 April 2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ L 107, 17.4.2008, p. 6.

Document, the Agency has asked to introduce this option in the Agency's financial rules, as derogation to the Framework Financial Regulation. This option is not in line with article 96 of REACH which stipulates that "the revenues of the Agency shall consist of: (a) a subsidy from the Community, entered in the general budget of the European Communities (Commission Section); b) the fees paid by undertakings; (...)." The financial rules of the Agency cannot depart from REACH. The Programming Document shall be modified accordingly.

51. The Commission asks the Agency to align the figure for the EU contribution 2020 for PIC and POPs with the Draft Budget 2020, which provides for EUR 3 057 000. Consequently, the presentation of expenditure should also be aligned with the Agency statement accompanying the 2020 Draft Budget request.
52. In alignment with the Commission, the Agency is asked to seek sustained funding of the work required of the Agency under Article 9 of Directive 2008/98/EC on waste, thus contributing to the Circular Economy Action Plan of the EU, to communicate clearly to the Management Board and the Commission any postponement or deviation from the planning that could jeopardize the fulfilment of legal obligations, and to ensure there is a continuous risk assessment with relevant scenarios planned. Done at Brussels, 26.9.2019

For the Commission
Elżbieta BIENKOWSKA
Member of the Commission



Annex F



EUROPEAN
COMMISSION

Brussels, 5.9.2018
C(2018) 5773 final

COMMISSION OPINION

of 5.9.2018

**on the draft Programming Document 2019-2021 of the European Chemicals
Agency**

(Only the English text is authentic)

COMMISSION OPINION

of 5.9.2018

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(Only the English text is authentic)

1. The European Chemicals Agency (the Agency) has been established by Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)¹, According to Articles 32(1) to (3) and 33(5) of the Commission Delegated Regulation (EU) No 1271/2013 (the Framework Financial Regulation for EU agencies)², the Agency shall send to the Commission, the European Parliament and the Council the draft Programming Document, containing multi-annual and annual programming, no later than 31 January each year as well as any later updated version of that document.
2. According to Article 33(8) of the Framework Financial Regulation for EU agencies, the Programming Document shall be adopted by the Management Board of the EU body and becomes definitive after final adoption of the Union budget. If necessary, the budget of the Union body and the establishment plan shall be adjusted accordingly.
3. According to the Communication from the Commission C(2014) 9641 of 16 December 2014 on the guidelines for Programming Documents for decentralised agencies and the template for the Consolidated Annual Activity Report, the Commission should adopt an opinion on the Programming Document of EU agencies by written procedure and shall send it to the agencies.
4. On 30 January 2018 the Agency sent to the Commission a first draft Programming Document 2019-2021 and a second draft on 13 April 2018. The present opinion takes into account only the second version of the draft Programming document.
5. The Commission welcomes the Draft Programming Document which has been drawn up in accordance with the requirements in the Commission guidelines established in cooperation with the Network of the EU Agencies. It provides multiannual strategic objectives and their respective areas of operation until 2021, providing relevant milestones and baseline figures estimates, and keeping the focus on further improvement of processes at the

¹ Regulation (EC) No 1907/2006

² Commission Delegated Regulation (EU) No 1271/2013 of 30 September 2013 on the framework financial regulation for the bodies referred to in Article 208 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council.

Agency. It also provides the Agency's activities and outputs in 2019, with an allocation of resources per activity.

6. The Commission reiterates its request in the previous opinion on the Single Programming Document covering 2018 to 2020 asking the Agency to further refine the indicators to measure its effectiveness and efficiency. The indicators should also

allow for a qualitative assessment of the objectives attained. The baseline figures provided in the previous work programmes were regularly exceeded which could have translated into an increase of these targets. The Agency is invited to revise the targets regularly and adjust them as appropriate.

7. The Commission asks the Agency to amend the Single Programming Document as appropriate in the light of the the sixteen actions in the second review of the Regulation on the registration, evaluation, authorisation and restriction of chemicals (referred to as REACH)³ and the implementation plan agreed with the Commission services.
8. The Commission acknowledges the Agency's efforts in improving the workability and streamlining of the restriction and authorisation processes and encourages the Agency to continue these efforts, in particular with regard to applications for authorisation covering multiple operators. The Agency should continue to actively support the Commission in identifying areas where further improvement of the quality of applications is needed to allow for an efficient assessment, and where further streamlining and improvement of the procedure is needed, beyond the efforts undertaken so far. In view of the need to ensure a level playing field between economic operators in and outside the EU, the Commission asks the Agency to accelerate the performance of its duties stemming from Article 69(2) of REACH, *i.e.* the assessment of the need for restriction on uses of substances subject to authorisation in articles.
9. The Commission invites the Agency to monitor the impact of the last amendments of the Fees and charges Regulation⁴ and report back to the Commission concerning applications for authorisation (*i.e.* insertion of a fee per additional use and annulment of the fee per additional applicant); in particular regarding the number of single applicant downstream applications, joint downstream applications and applications submitted by actors higher in supply chains.
10. The Commission acknowledges the Agency's efforts in ensuring that robust working methods of its committees involved in the risk management processes are in place, namely the Member States Committee (MSC), the Committee for Risk Assessment (RAC) and the Committee for Socio-Economic Analysis (SEAC). The Commission reiterates that it is essential that these Committees continue to deliver their opinions based on science and the legal provisions as laid down in the REACH and the classification,

³ COM (2018) 116 final and SWD (2018) 58 final

⁴ Commission Regulation (EC) No 340/2008 of 16 April 2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ L 107, 17.4.2008, p. 6.

labelling and packaging of substances and mixtures (CLP) ⁵ Regulations in order to provide comprehensive and adequate basis for decisionmaking.

11. The Commission welcomes the Agency's role in contributing to the identification of new substances for risk management, in close cooperation with the Member States. It is essential that the Agency continues to mobilise authorities and align views. The cooperation and coordination among Member States, the Agency and the

Commission is crucial, among others, to support the effective implementation of compliance check and substance evaluation, the implementation of the Substances of Very High Concern (SVHC) Roadmap, as well as to support the integrated implementation of the REACH and CLP Regulation in a consistent and efficient manner.

12. The Commission welcomes the Agency's continuation of the enhanced completeness check on registration dossiers as well as its retrospective application. It is essential that further measures are taken to ensure the continuous relevance of the registration dossiers and effectiveness of other regulatory measures by inducing updates where relevant.

13. The Commission welcomes the Agency's Committees role in the assessment of the safety of chemicals and the socio-economic implications of authorisations and restrictions under REACH . The Agency should make sure that the scientific and technical expertise in the Agency are always state-of-the-art in order to meet the several and different aspects related to the safety of chemicals, in particular in relation to endocrine disrupting and Persistent, Bioaccumulative and Toxic (PBT) – very Persistent and very Bioaccumulative (vPvB) substances and substances with nanoforms. The Commission encourages the Agency to offer its staff specific training in deriving the dose-response curve for carcinogenic substances in order to reduce the use of external expertise. At the same time, the Commission asks the Agency to use external experts to support the work of the Agency's Committees in particular RAC and SEAC for specific and 'ad hoc' discussions where necessary. Robust mitigating measures should be in place to avoid any conflict of interest and to safeguard the independence of the Agency.

14. As highlighted in the REACH review, the Agency shall enhance the role of its Committee for Risk Assessment (RAC), involving also social partners, to provide scientific opinions under the Occupational Safety and Health legislation while respecting the role of the Advisory Committee on Health and Safety at Work. In this context, the Agency in collaboration with the Commission should also assess the human resources and financial impact of these new tasks⁶. The scientific methodology in the area of carcinogenic and mutagenic substances should take into account the outcome of the mandate to RAC and Scientific Committee on Occupational Exposure Limits (SCOEL) task force.

15. The Commission welcomes the Agency's plans to improve the methods for screening of substances of concern and in particular for the identification of

⁵ Regulation (EC) No 1272/2008

⁶ COM(2017) 12 final

groups of substances for which further actions could be taken in unison, also using further scientific sources and new methodologies.

16. The Commission asks the Agency to provide further guidance and helpdesk support to stakeholders following the revision of REACH annexes addressing substances with nanoform. The Agency should also contribute to the development of international standards in the Organisation for Economic Co-operation and Development (OECD) and the International Organization for Standardization (ISO) / the European Committee for Standardisation (CEN) to enable the implementation of the revised REACH annexes.
17. The Commission welcomes the continued Agency's implementation of the delegation agreement to develop and manage the European Observatory on Nanomaterials (EUON). It is important that the EUON serves the interested public in general, and business, workers, consumers and authorities in particular. The Commission asks the Agency to continuously evaluate the use of the content already provided, maximize the use of information from the databases it manages, and provide advance plans on further services to enable timely support by the data providers.
18. The Commission welcomes the promotion by the Agency of redeployment, leveraging internal skills and increasing overall flexibility of human resources management. The Commission also welcomes the fact that the Agency will prepare in the course of 2018, as requested in the Commission opinion on the Single Programming Document 2018-2020, the multiannual human resources strategy encompassing the period 2019-2023. The multiannual human resources strategy will be set up after a thorough screening of the Agency's human resources and structure in light of the strategic priorities and the outcome of the REACH Review. The strategy should spell out the redeployment of staff and the organisation of the Agency after the final registration deadline in 2018 and should include the actions which will be undertaken for enhancing the technical and scientific expertise and for making an optimal use of the combined resources deriving from the various Regulations under the Agency's remit in a context of limited fee income and the need to contain the EU balancing contribution in light of existing and future budgetary constraints. In this respect, reduced workload in relation to fee-financed activities will need to translate into staff reductions.
19. The Commission acknowledges the achievements of the Agency in the area of IT and the satisfaction of the the users but underlines that the costs are still relatively high. In consideration of the substantial investment sustained sofar, the Agency needs to have a sound business case for future investments in this area as already foreseen in the Agency's IT governance model. The Commission asks the Agency to continuously evaluate and improve the cost effectiveness of its IT systems and ensure that they are phased out when they have little added value for the operations of the Agency. It is crucial that the IT solutions reduce the administrative and financial burdens for the industry and that the IT sytems developed by the Agency are resilient to incidents or disruptions and provide assurance of data integrity and security.
20. The Commission welcomes the timely development of the SME Cloud Services tool which aims at making registration easier for SMEs. The Commission asks the Agency to share with the Management Board the

findings and the conclusions of the planned ex post evaluation of the SME Cloud Services as soon as they are available. The Commission also asks the Agency to assess, in cooperation with stakeholders, whether the SME Cloud Services should become the sole delivery model for International Uniform Chemical Information Database (IUCLID) with due regard to efficiency and cost effectiveness.

21. The Commission welcomes the indication that the Agency will continue to provide reference Derived No Effect Levels (DNELs) and dose-response relationships of substances and notes that this will in particular be important for the forthcoming applications for authorisation for uses of substances having endocrine disrupting properties.
22. The Commission also welcomes the Agency's activities to prepare the implementation of the new Annex VIII on Harmonised information relating to emergency health response and preventative measures⁷ of the CLP Regulation and encourages the Agency to develop a one-stop notification portal, including a searchable database.
23. The Commission asks the Agency to contribute to the operation of the Information Platform on Chemical Monitoring Data (IPCHEM) with a view to operating it as of 2020. The IPCHEM should be used in the Agency's work, both as a source of information to support screening, evaluation, identification of substances of concern, restrictions and authorisations and as a repository for chemical occurrence data used in this work. The Commission asks the Agency to assess the feasibility of making the new database to be developed under the revised Waste Framework Directive⁸ a part of the IPCHEM module on substances in articles.
24. The Commission welcomes the Agency's priority area in supporting substitution and sustainable use of chemicals and invites the Agency to take necessary actions to efficiently implement its Substitution strategy in order to promote successful substitution of hazardous substances, improve chemical safety, further boost innovation and growth. In this context, the Agency should build on existing initiatives, such as the COSME⁹ project on Substitution of Chemical Substances of Potential Concern of the Commission and consider the use of the European Enterprise Network for dissemination purposes.
25. The Commission asks the Agency to improve the support to Member States in execution of their tasks and to ensure respect of legal deadlines, in particular the timelines set in the Biocidal Products Regulation and in the Review Regulation (EU) No 1062/2014 for the Review Programme, so that the work started in 2004 is finished by the end of 2024.
26. The Commission welcomes the Agency's activities on endocrine disruptors in relation to Biocides and its intensive collaboration with the European Food Safety Authority (EFSA) on this particular subject. The Commission invites the Agency to initiate, where appropriate, actions to facilitate obtaining

⁷ Commission Regulation 2017/542

⁸ Directive 2008/98/EC

⁹ EU programme for the Competitiveness of Enterprises and SMEs

alignment of the conclusions of the relevant scientific committees in both Agencies on the endocrinedisrupting properties of the same substance.

27. The same alignment of the conclusions of the relevant scientific committees in the Agency and in EFSA is expected on other hazardous properties of substances: Carcinogens (C), Mutagens (M), Toxic for Reproduction (R), Persistent Bioaccumulative and Toxic (PBT), Very Persistent and Very Bioaccumulative (vPvB), Persistent Organic Pollutants (POP). Wherever an alignment cannot be ensured, the rationale for the different evaluations should appropriately be explained and communicated.
28. The Commission supports the Agency's cooperation with other EU agencies in order to achieve synergies and efficiencies on both scientific and organisational aspects. It encourages coordination and collaboration on crosscutting areas in particular with

the European Food Safety Authority (EFSA) and the European Medicines Agency (EMA), in respect of the limits set by each Agency's founding act.

Specific comments on human resources

29. As concerns REACH/CLP the Agency staffing request is in line with the programming in the Multiannual Financial framework and the Communication COM(2013)519 which provides for a ceiling of 404 Establishment Plan posts for 2019 and 2020 respectively.
30. The Commission takes note of the 30 additional temporary agent posts included in the draft 2021 establishment plan and of the analysis of the growth in existing tasks and the negative priorities in particular. The resources for 2021 will have to be considered in the context of the post 2020 Multiannual Financial Framework. However, the Commission invites the Agency to consider the conclusions of the REACH review and in particular Action 15 of the Commission communication COM(2018)116 final. The Commission encourages the Agency to reflect on redeployment opportunities in the context of its job screening exercise in 2019 and the multiannual human resources strategy requested by the Commission.
31. The human resources requested for the implementation of Annex VIII to CLP will need to be found by redeployment within the resources already allocated to the agency in the official programming of the Commission.
32. As regards the Biocides activities, the Commission notes that the number of total staff of 73 for 2019 is not in line with the Draft Budget 2019. In order to align with the Draft Budget 2019 the number of temporary agents for 2019 should be reduced by three Full Time Equivalent (FTE) and the number of contract agents for 2019 should be reduced by three FTE. The total staffing of the Agency for the Biocides activities is set at 67 FTE (15 contractual agents, 50 temporary agents and 2 national experts) in 2019.
33. As regards the activities relating to implementation of Regulation (EU) No 649/2012 of the European Parliament and of the Council¹⁰, the Commission

¹⁰ Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals (OJ L 201, 27.7.2012, p. 60)

notes that the total number of staff is 8 (7 temporary agents and 1 contractual agent) for 2019 is in line with the Draft Budget 2019.

34. The Commission informs the Agency of the envisaged activities related to the implementation of the amended POP Regulation¹¹ (ISC/2017/02212), for which one additional contract agent FTE equivalent should be added under the section PIC/POP of the Agency in 2019 and 2020.
35. The forecast for structural service providers for the 2019-2021 period should be included in Table 1 of Annex III. The Commission takes note of the Agency's commitment to reduce the number of this type of staff.
36. The description of the Agency's Recruitment Policy as it relates to temporary agents should be updated as according to Annex IA of the Staff Regulations. The clerical duties should fall under AST/SC function group, not the AST function group. The secretarial staff should be recruited in function group AST/SC although the Agency does not plan any recruitments of this type in the upcoming years.
37. The Commission encourages the Agency to more closely align reclassification rates with Annex I B of the Staff Regulations, as some grades continue to have significantly longer average years in the grade.
38. The Commission notes the improvement in gender balance particularly among contract agents as well as the inclusion of information on gender balance among management staff. The provision of information on any existing measures to address geographical imbalance would be welcome.
39. An organisation chart should be included in Annex X, as this is needed to assess whether the situation of the senior management has been adjusted to correspond with the Agency's founding act.

Specific remarks on financial resources:

40. The maximum balancing subsidy for 2019 for REACH/CLP shall not exceed EUR 65 879 520 including surplus from 2017 amounting to EUR 4 522 634. The estimated balancing subsidy for 2020 amounting to EUR 67 682 000 is aligned with that in the communication on the programming of human resources and financial resources for decentralised agencies (COM(2013)519 of 10 July 2013).
41. The financial resources requested for the implementation of Annex VIII to CLP will need to be found by redeployment within the resources already allocated to the Agency in the official financial programming of the Commission or any surplus of revenue deriving from fees and charges. In light of the actual revenues from fees and possible redeployments within its budget, the situation of the agency will be closely monitored.
42. Against the backdrop of reduced fee income expected after the last regulatory registration deadline in 2018 under REACH, the Commission asks the Agency to launch as soon as possible a prospective market study and draw a

¹¹ Draft Proposal for a Regulation of the European Parliament and of the Council recasting Regulation (EC) No 850/2004 of the European Parliament and of the Council on persistent organic pollutants

forecast of the estimated income from fees and charges for the period 2019 to 2024 based on the current fees and charges model.

43. As regards the Biocides activities, the Commission asks the Agency to align the figure for the EU contribution of EUR 5 800 000 and EUR 7 000 000 for 2019 and 2020 with the Draft Budget 2019 which provides for EUR 5 122 104 and with the Commission Communication on the programming of human resources and financial resources for decentralised agencies, which provides for EUR 0 for 2020.
 44. Consequently, following the adoption of Draft Budget 2019, the Commission asks the Agency to align the presentation of its total revenues and expenditure in relation to Biocides at EUR 12 646 764.
 45. As regards the activities under PIC/POP Regulations, the Commission asks the Agency to align the figure for the EU contribution 2019 with the Draft Budget 2019, which provides for EUR 1 564 000 and for 2020 with the financial programming, which provides for EUR 1 405 000. Consequently, the presentation of expenditure should also be aligned with the ECHA financial statement accompanying DB 2019 request.
 46. The Commission asks the Agency to put in place the necessary arrangements so that the size of companies registering substances is verified swiftly to ensure that the companies pay the fees and charges due.
 47. For the activities related to the implementation of Regulation (EU) No 649/2012, the Union contribution for 2019 amounts to a total of EUR 1 195 000.
 48. The Commission asks the Agency to include the annexes on the evaluations, the risk register and a procurement plan in the final Programming Document.
- Done at Brussels, 5.9.2018

For the Commission
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Member of the Commission

