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EU Justice and Home Affairs Agencies: Securing Good Governance

STUDY FOR THE LIBE COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

EU Justice and Home Affairs Agencies: Securing Good Governance

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, examines the governance structures of EU Justice and Home Affairs agencies. Specifically, it maps and analyses across-the-board agencies' relationships to the main institutional actors in terms of core reporting and scrutiny mechanisms. Drawing on agency founding acts and interviews, it looks closely in particular at management boards' composition and operation, ranging from voting allocation to institutional and Member State representation to issues of board expertise. The study further considers some of the implications of the current governance set up with respect to ensuring co-operation from corresponding national structures, identifying existing structural shortcomings inherent to current mandates and proposing suggestions for improvement.

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LIST OF ABBREVIATIONS

- AD** Administrative Director
- CEPOL** European Union Agency for Law Enforcement Training
- COM** European Commission
- EASO** European Asylum Support Office
- EIGE** European Institute for Gender Equality
- EMCDDA** European Monitoring Centre for Drugs and Drug Addiction
- eu-LISA** European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
- Eurojust** European Union's Judicial Cooperation Unit
- Europol** European Union Agency for Law Enforcement Cooperation
- FEMM** Committee on Women's Rights and Gender Equality
- FRA** European Union Agency for Fundamental Rights
- Frontex** European Border and Coast Guard Agency
- JITs** Joint Investigation Teams
- JHA** Justice and Home Affairs
- JPSG** Europol's Joint Parliamentary Scrutiny Group
- LIBE** Committee on Civil Liberties, Justice and Home Affairs
- MB** Management Board
- MS** Member States
- TFEU** Treaty on Functioning of the European Union

EXECUTIVE SUMMARY

Background and Aim

The field of Justice and Home Affairs (JHA) has been a prolific terrain for agencification. It currently counts a total of nine agencies: the European Union Agency for Law Enforcement Cooperation (Europol), the European Union's Judicial Cooperation Unit (Eurojust), the European Union Agency for Law Enforcement Training (Cepol), the European Union Agency for Fundamental Rights (FRA), the European Border and Coast Guard Agency (Frontex), the European Asylum Support Office (EASO), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the European Institute for Gender Equality (EIGE) and the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA). These agencies carry out a variety of tasks such as: information exchange and the pooling and sharing of expertise, providing expert input into policy-making, facilitating co-operation among the Member States, providing practical support to national authorities— and more recently, even monitoring Member States (MS)— to stimulate effective implementation.

In an area characterised on the one hand, by strong national sovereignty concerns and an ensuing Member State preference for “lighter” modes of governance (Monar 2006; Rijpma 2014) and on the other, by serious cross-border challenges that demand greater supranational co-operation and centralisation, institutional development has often proceeded in “fits and starts”. Mandates of JHA agencies have been subject to recurrent revisions, changes in legal basis, mandate extensions and re-structuring, including a flurry of initiatives in recent years. These include the coming into force of the Europol regulation¹ and of the Cepol regulation² (ending their status as institutional outliers and signalling a normalisation of their accountability in line with former first pillar agencies), the 2016 Frontex regulation³, the ongoing discussions for a Eurojust regulation⁴ and for the creation of a European Union Asylum Agency⁵, as well as the review of the eu-LISA Regulation⁶, to name only a few of the latest institutional developments and initiatives. In this context, taking a bird’s eye view of the JHA agency governance across-the-board, examining the structures in place and identifying ongoing challenges to good governance becomes particularly relevant.

The current study examines the governance structures of EU Justice and Home Affairs agencies, with a particular focus on five JHA agencies: Europol, Eurojust, FRA, Frontex and EASO. Specifically, it maps and analyses across-the-board agencies’ relationships to the main institutional actors in terms of core reporting and scrutiny mechanisms. Drawing on agency founding acts and interviews, it looks closely in particular at management boards’

¹ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA

² 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

³ 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

⁴ Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) (COM(2013) 535 final)

⁵ Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (COM(2016) 271 final)

⁶ Proposal for a Regulation of the European Parliament and of the Council on the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, and amending Regulation (EC) 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) 1077/2011 (COM(2017) 352 final)

composition and operation, ranging from voting allocation to institutional and MS representation and issues of expertise.

The study further considers some of the implications of the current governance set up with respect to ensuring co-operation from corresponding national structures, identifying existing structural shortcomings inherent to current mandates and proposing some suggestions for improvement. It considers new developments in the field, including the setup of Europol's Joint Parliamentary Scrutiny Group (JPSG), examining promises and pitfalls of the envisaged model for Europol's accountability. It further considers the potential usefulness of expanding such an inter-parliamentary oversight model more broadly to other JHA agencies and suggests concrete gains (also in relation to diagnosed shortcomings) that could arise from such a multi-level parliamentary oversight model.

Key Findings and Recommendations

The study puts forward a set of key recommendations summarised below.

Board composition:

- The legislator should re-consider the structure of the FRA board in terms of the compatibility of the representation of the European Commission in the board with the declared aim of ensuring agency independence not only from Member States governments but also from EU institutions (see discussion pp. 14–15).
- A formalised role for the European Commission in the Eurojust management board meetings on administrative matters, as proposed in the Commission draft proposal for a Eurojust regulation, appears justified (see discussion pp. 15-16).
- It seems relevant to re-assess the necessity of high majority voting thresholds (two-thirds and three-quarter majority) envisaged in JHA agency founding acts and their impact on agency decision-making (see discussion pp. 17-18).

Executive Committees:

Executive boards have been seen as a possible solution to the plethora of size of many EU agency boards and as a way to improve the efficiency of agency decision-making. Proposals for the creation of such sub-structures have however, reportedly proven controversial in many JHA agency boards.

- While the creation of executive committees could provide gains in terms of the efficiency of board processes, it is important to recognise that such structures do come with their own set of potential drawbacks given the resistance among board members to such structures. They come with the risk of Member States potentially perceiving themselves excluded from aspects of agency decision-making or as being in a disadvantaged position in the agency's governance compared to other Member States. In other words, there is a potential trade-off between the efficiency gains in board functioning potentially ensuing from such structures and the gains associated with having Member States fully on board with agency activities (for instance, in terms of effectiveness in implementation) (see discussion p. 20).
- In the specific case of Eurojust however, given its distinctive non-hierarchical structure, there could be a strong case for the setup of an executive board. Given the reported sensitive nature of such a structure for a host of national members, an executive board composition where a small number of national members (as opposed to one member as provided for in the Commission draft proposal for a Eurojust regulation) serve on a rotating basis could be envisaged (see discussion pp. 20-21).

Board expertise on budgetary and managerial matters:

Management boards have important governance responsibilities in terms of overseeing agency performance, adopting key programming documents budgets and verifying their execution, financial rules and monitoring the director. As such, it is necessary to ensure that they collectively have the adequate expertise and skills needed to perform their responsibilities vis-a-vis these public bodies.

- As part of their annual reporting obligations to the budgetary authority, agencies should provide an overview of the management board's profile in terms of experience on administrative and budgetary matters to afford an overview as to whether the founding regulation's requirements on management board expertise are complied with by appointing authorities (see discussion pp. 22-24).

Formal Roles—Some Residual Institutional Incoherence:

Despite communitarisation of the field, the FRA mandate does not explicitly include police and judicial cooperation in criminal matters, with ongoing institutional disagreements as to whether the agency can work in the area on its own initiative.

- It is important that the FRA's Multiannual Framework includes police and judicial cooperation in criminal matters; a mandate revision explicitly allowing the agency to work on all areas of EU competence, including police and judicial cooperation in criminal matters, should be considered (see discussion pp. 24-25). The ability to mobilise the agency's expertise is crucial to fundamental rights protection in this area, as well as to ensuring mandate coherence and continuity to the agency's work in this area.

Director Appointment:

Founding regulations of JHA agencies reveal considerable variation in the role reserved for the European Parliament in the appointment of agency heads.

- There is a need for institutional reflection on the extent to which variations present across JHA agencies in terms of the role reserved for the EP in the appointment of the agency director are justified and correspond to variations among agencies in the span of power exercised—i.e., whether a stronger role for the EP in this respect is a reflection of the need for stronger parliamentary oversight for some JHA agencies as opposed to others—or rather “accidents” of design (see discussion pp. 30-32).

Accountability concerns itself with power. Variations in the EP role (a weaker or stronger say in the appointment process) should be linked to/reflect actual variations in agency powers, requiring therefore greater or lesser parliamentary oversight.

Member State Co-operation:

Co-operation with the Member States' authorities has been challenging along the years for a host of JHA agencies. Well-documented challenges in this respect, which in some cases have significantly adversely impacted their ability to operate effectively, have ranged from inadequate resource and staff commitments to insufficient information exchange. In response to challenges of co-operation, in recent years, the legislator has taken to stating in founding acts a clear obligation on the part of Member States to co-operate with the agency in question. Provisions for instance, on an explicit duty to exchange information on the part of national authorities are now included in several JHA agencies' founding acts.

- Command is not enough: The EU legislator should move away from simply mandating co-operation (command-type fixes) in JHA agencies founding acts as a strategy to address chronic co-operation challenges and focus on designing incentives for co-operation in founding acts—on designing structures that provide enhanced incentives to co-operate to national authorities (see discussion pp. 35-40).

This requires greater consideration of how the structure of the transnational regime will impact national authorities' (resources, capacity, bureaucratic interests and priorities) and how EU-level structures can be better designed to alleviate sources of reluctance i.e., how incentives (e.g. resources, reputational etc.) can be harnessed for co-operation.

Providing for Credible Sanctions for Non-Compliance:

While founding acts mandate Member States compliance with a number of obligations (for instance, on information provision), mechanisms for follow up at the political level in the case of systematic non-compliance in this respect by a Member State are often lacking or are inadequate.

- Where specific obligations to co-operate are provided in founding acts, meaningful mechanisms for follow-up by the EP, the Council or the Commission in cases of non-compliance should be explicitly envisaged in founding acts (see discussion 40-42).

Europol's Joint Parliamentary Supervisory Group:

- While not explicitly provided for in the Europol regulation, it is imperative that JPSG political oversight function extends to national authorities' co-operation with Europol. Member State cooperation has been an area where Europol has faced considerable challenges along the years and the involvement of national parliaments could play an important role in this respect. Such a JPSG oversight focus would meaningfully complement the scrutiny role of the European Parliament.
- It is important to ensure that the JPSG is not relegated to exercising only a symbolic oversight role but that it can carry out meaningful, effective oversight of Europol activities. Given the cumbersome composition that has been agreed for the JPSG, the setup of a small-scale, compact sub-structure of stable membership, which prepares JPSG meetings should be envisaged (see discussion pp. 42-44).

Joint Parliamentary Oversight, beyond Europol:

JHA agencies are heavily dependent on co-operation from national authorities, and the provision of information, staff, resources and capacity. The manner in which national authorities discharge their roles and responsibilities (individually and collectively) in the functioning and governance of EU bodies— ranging from their management board responsibilities to the extent to which they provide required information or resources— is critical to these agencies' functioning.

- The legislator should consider expanding the oversight role of the joint parliamentary group beyond Europol to the other JHA agencies. Inter-parliamentary oversight structures (i.e. JPSG-type oversight structures) can be important settings for national parliaments to not only become well-familiar with, and scrutinise, EU JHA agencies' work but also to gain insights into the activities of their respective national executive actors in this context and their inputs to the performance of specific JHA agencies (including, if relevant, the extent to which these inputs fall short of assumed responsibilities).
- Should the JSPG mandate be expanded to other JHA agencies beyond Europol, the current format should be amended to allow for its effective operation through the setup of a small-scale sub-structure and strong scrutiny prerogatives.

Meaningful accountability requires the ability to enact consequences when undesirable activities are exposed. The JPSG is limited in this respect to adopting summary conclusions, which are sent to the European Parliament and national parliaments. Therefore, how these forums in turn respond to these conclusions – the extent to which they become actively engaged in taking these conclusions into account in their own account-holding/in extracting

accountability or to the contrary, remain passive recipients—will also be an important part of the effectiveness of this mechanism (see discussion pp. 42-46).

1. INTRODUCTION: A STUDY OF JHA AGENCY GOVERNANCE

1.1. Background and Overview

The rise of EU-level agencies, set up to address specific common problems through improved trans-national co-operation among Member States' bureaucracies, has been a significant – and growing— institutional development at the EU level for the past four decades (Curtin 2007; 2009; Groenleer 2009; Busuioc, Groenleer and Trondal 2012; Busuioc 2013; 2016; Rijpma 2012; 2014; Heims 2016; Bach et al. 2016). These agencies operate in a variety of policy areas—ranging from aviation safety or financial supervision to police co-operation— and are heavily reliant on co-operation from national structures (both horizontally, amongst each other as well as vertically, with the EU level) in order to function and fulfil their mandates.

The Justice and Home Affairs (JHA) domain has been a particularly prolific terrain for agencification. It currently counts a total of nine agencies: the European Union Agency for Law Enforcement Cooperation (Europol), the European Union's Judicial Cooperation Unit (Eurojust), the European Union Agency for Law Enforcement Training (Cepol), the European Union Agency for Fundamental Rights (FRA), the European Border and Coast Guard Agency (Frontex), the European Asylum Support Office (EASO), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the European Institute for Gender Equality (EIGE)⁷ and the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA). These agencies jointly account for a budget of approximately 416.7 million euro and 1,742 staff.⁸

In an area defined by strong national sovereignty concerns, policy development has been patchy and incremental (Walker 2004; Den Boer 2015; Monar 2015), characterised by a preference for lighter instruments of governance (see Monar 2006), punctuated by “spasmodic” efforts at integration, often in response to and driven by crises. Agency mandates in this area have been subject to recurrent revisions, changes in legal basis, mandate extensions and re-structuring, often in an ad hoc fashion (see also Rijpma 2014). In this context, taking a bird's eye view of the JHA agency governance across-the-board, examining the structures in place and identifying ongoing challenges to good governance becomes particularly relevant. This is precisely the aim of the current study.

It examines the governance structures of EU Justice and Home Affairs agencies, with a particular focus on five JHA agencies: Europol, Eurojust, FRA, Frontex and EASO. Specifically, it maps and analyses across-the-board agencies' relationships to the main institutional actors in terms of core reporting and scrutiny mechanisms (see Tables in Annex 1 and 2 for a comparative overview). Drawing on agency founding acts and interviews, it looks closely in particular at management boards' composition and operation, ranging from voting allocation to institutional and member state representation and issues of expertise, fit to agency tasks etc. The study further considers some of the implications of the current governance set up with respect to ensuring co-operation from corresponding national structures, identifying structural shortcomings inherent to current mandates and proposing some suggestions for

⁷ EIGE falls under FEMM (as opposed to LIBE) competence and is therefore not part of this study.

⁸ Calculated on the basis of the European Court of Auditors reports on the annual accounts for the financial year 2015 for each of the 9 agencies.

improvement. It considers new developments in the field, including the setup of Europol's Joint Parliamentary Scrutiny Group (JPSG), examining promises and pitfalls of the envisaged model for Europol's accountability. It further considers the potential usefulness of expanding such an inter-parliamentary oversight model more broadly to other JHA agencies: it suggests concrete gains (also in relation to earlier identified shortcomings) that could arise from such a multi-level parliamentary oversight model in terms of both agency accountability as well as for agency performance and effectiveness, and identifies structural pre-requisites needed for its meaningful operation, beyond a merely symbolic function.

1.2. Methodology

The main sources of data informing the analysis contained in this study consist of the relevant legal documents (agency founding acts as well as pertinent legislative proposals in the pipeline), (evaluation) reports and academic literature. Interviews were carried out with the heads of the five JHA agencies the study focuses on (i.e. Europol, Eurojust, Frontex, FRA and EASO) as well as other key agency respondents from the 5 agencies, 12 respondents in total. The interviews were carried out at the agencies' headquarters throughout June-July 2017. Direct quotes from interviews are provided throughout the text. Interviews were anonymised—quotes are not attributed to specific individuals. The specific agency is at times mentioned in relation to a specific quote –where relevant for the respective argument—but for the most part, the focus of the study is on governance *patterns* across the five JHA agencies. Points raised in the study do not draw on interviews unless explicitly stated. A full list of interviewees is provided in Annex 3.

2. MANAGEMENT BOARDS: STRUCTURE AND OPERATION

KEY FINDINGS

Board Composition and Voting Rules:

- The legislator should reconsider the structure of the FRA board in terms of the compatibility of the *representation* of the European Commission in the board with the declared aim of ensuring agency independence not only from Member States but also from EU institutions. Commission representation is further at odds with the independent capacity of the other board members.
- It seems relevant to re-assess the necessity of high majority voting thresholds (two-thirds and three-quarter majority) envisaged in JHA agency founding acts and their impact on agency decision-making.
- A formalised role for the European Commission in the Eurojust management board meetings on administrative matters appears justified (in light of some of the shortcomings associated with the College's purely intergovernmental structural set up).

Executive Committees:

Executive boards have been seen as a possible solution to the plethoric size of many EU agency boards and as a way to improve the efficiency of agency decision-making.

- While the creation of executive committees could provide gains in terms of the efficiency of board processes, it is important to recognise that such structures do come with their own set of potential drawbacks given resistance among national representatives in the boards to such structures. They come with the risk of Member States potentially perceiving themselves excluded from aspects of agency decision-making or as being in a disadvantaged position in the agency's governance compared to other Member States.
- In the specific case of Eurojust however, given its distinctive non-hierarchical structure, there could be a strong case for the setup of an executive board. Given the reported sensitive nature of such a structure for a host of national members, an executive board composition where a small number of national members (as opposed to one member as provided for in the Commission draft proposal for a Eurojust regulation) serve on a rotating basis could be envisaged.

Board expertise in budgetary and managerial matters:

Most JHA agencies' founding regulations contain specific requirements on knowledge and expertise of board representatives— in the specific field of agency operation as well as often, also on budgetary and managerial experience. With respect to the latter (budgetary and managerial experience), a mixed picture emerged from the interviews, with variations across agency boards or delegations.

- Management boards have important governance responsibilities in terms of overseeing agency performance, adopting key programming documents, adopting budgets and verifying their execution, financial rules and monitoring the director. As such, it is necessary to ensure that they collectively have the adequate expertise and

skills to perform their responsibilities vis-a-vis these public bodies. As part of their annual reporting obligations to the budgetary authority, agencies should provide an overview of the management board's profile in terms of experience on administrative and budgetary matters to afford an overview as to whether the founding regulation's requirements on management board expertise are complied with by appointing authorities.

Formal Roles—Some Institutional Incoherence:

- Despite the high emphasis placed in the agency's founding regulation on the agency's independence, and unlike other JHA agency boards, the FRA board cannot adopt the agency's multiannual programming document (i.e. the Multiannual Framework), which is adopted by the Council. This raises questions as to the ability of the agency to formally set its own priorities, particularly relevant for a fundamental rights body.
- Despite communitarisation of the field, the FRA mandate does not explicitly include police and judicial cooperation in criminal matters, with ongoing institutional disagreements as to whether the agency can work in the area on its own initiative. In practice, the Council has used its power of adopting the FRA's Multiannual Framework to exclude police and judicial cooperation in criminal matters from the agency's Multiannual Framework. As a result, the agency cannot work in this area on its own initiative (but can do so upon request). The ability to mobilise the agency's expertise is crucial to fundamental rights protection in this area, as well as to ensuring mandate coherence and continuity to the agency's work in this area.

Board Focus:

- It is important that national representatives sitting in agency boards come to perceive their role as double-hatted: not only as national representatives but also, as collectively responsible for the good governance, the performance and the reputation of the respective European agency.

2.1. Composition, frequency of meetings and voting practice

While there are important variations, a similar model in terms of board composition can be identified across several JHA agencies. Management boards tend to be made up— in so far as voting members go—of the EU Member State (MS) and the European Commission (i.e., the board of Europol, Cefpol, EASO, Frontex, eu-LISA, EMCDDA). The European Commission has two votes in these boards, except for the boards of Europol and Cefpol, where it has one vote. For the EMCDDA, two additional board representatives are designated by the European Parliament.

Notable exceptions to this board model are the boards of FRA and Eurojust. In the case of the FRA board, in order to ensure the agency's independence, in recognition of its distinctive mandate as a fundamental rights body, the link to the Member States has been severed in terms of board governance. The FRA's management board is composed of one independent expert per Member State, one independent expert appointed by the Council of Europe and two representatives of the European Commission. Member States do not have a role in its board governance, other than in the nomination of board members acting in an independent expert capacity. The absence of national authorities in the board is an uncommon set up not only among JHA agencies, but also European agencies, more generally. Outside the JHA area,

another exception to Member States board representation (with MS appointees similarly acting in an independent expert capacity) is the board of the European Food Safety Authority (EFSA)– a board structure adopted to safeguard the agency's independence and to avoid the politicisation of the risk assessment process in the aftermath of a set of food crises.

At an almost opposite end of the spectrum, in the case of the board of Eurojust an intergovernmental collegial structure has been opted for, with a College composed exclusively of national representatives (i.e., one national member seconded by each Member State), without any supranational institutional representation. Both the board of Eurojust and that of FRA raise some important issues with respect to their composition.

With respect to the FRA, it is interesting to note that while the Member States and the Council of Europe appoint independent experts to the FRA board, the Commission appoints *representatives* to the FRA board. Such a role for the EU executive seems at odds with the emphasis placed on the independent mandate of the agency by its founding regulation (see for instance, Art. 16(1) "The agency shall fulfil its tasks in complete independence") and the explicit provision on board composition in this connection: "the composition of that Board should ensure *the Agency's independence from both Community institutions and Member State governments*" (Recital 20 (preamble) FRA founding regulation). The Commission's representation is further inconsistent with the explicit exclusion of national authorities from the board as a guarantee to FRA independence. Presumably, the strategy adopted towards national executive actors would also be relevant when it comes to the EU executive. What is more, an enhanced role of the Commission in the board is further secured through formal provisions stipulating for a privileged status for the Commission compared to other board members i.e., provisions allowing the Commission to trigger specific management board procedures (e.g. the proposal for the dismissal of the director; the proposal for the revocation of scientific committee members for lack of independence), and which otherwise require one third of board members.

With respect to the board of Eurojust, the Commission's proposal for a Eurojust regulation (COM (2013) 535)⁹ envisages a change to the College set up by providing for the Commission's representation in the College when undertaking its administrative tasks (as well as in the agency's executive board, which would prepare these meetings). The Commission would not be represented in College meetings on policy and operational matters. The justification provided for such changes in the draft proposal refers to: having the "European dimension enhanced through the Commission's participation in the management of the agency" (Recital 6 (preamble)), and providing Eurojust with "an administrative and management structure that allows it to perform its tasks more effectively" (Recital 12 (preamble)). This does appear to echo some of the findings from past external evaluation reports and studies of Eurojust. The 2005 Ramboll meta-evaluation noted with respect to the

⁹ This is separate to the draft Council regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (see Council document 9941/17 of 30.06.2017) as a distinct body, despite Art. 86 TFEU providing that EPPO should be established "from Eurojust". This stipulation has been creatively reworded and reinterpreted in the EPPO draft Council regulation as: "This implies that this Regulation should establish a close relationship between them based on mutual cooperation" (Recital 10, preamble). Importantly, the agreed text of the EPPO draft Council regulation also provides that: "The EPPO may rely on the support and resources of the administration of Eurojust" (Art. 100 (4)). In this connection, it is important that this does not negatively impact Eurojust's ability to fulfil its tasks. Offences against Union's financial interest (so-called PIF crimes) reportedly amount on average to 3-5% of Eurojust cases. The creation of the EPPO would therefore not free up significant Eurojust resources. Provisions requiring Eurojust to provide support and resources to the EPPO will therefore require increases to Eurojust budget to match increased needs.

College's setup that: "The dual role of college members as management board and operational representation of their home MS does not favour long-term strategic planning (...) and it has impeded the emergence of a common identity as a European body and an operational vision within the management board" (Ramboll evaluation 2009, 171). The 2012 study on "The Future of Eurojust" noted: "The College, in its current form (being composed of national members) can be hardly seen as representing any specific European level interest, besides the general mandate to fight serious cross border crime" (European Parliament study 2012, p. 37). Similarly, the 2015 Eurojust independent evaluation noted: "As a result of the collegial process of decision-making, the capacity of the institution to set ambitious strategic priorities and to develop a common vision of what Eurojust should become in the future appears limited" (p. 74).¹⁰

The Eurojust respondents interviewed were generally supportive of an enhanced role for the European Commission towards the agency (with some divergence between respondent views as to whether this required board representation as such or an otherwise enhanced role), provided that a clear separation is maintained between administrative matters on the one hand, and policy and operational matters on the other (i.e. "as long as you have a specific executive board only focusing on administrative matters"¹¹). To illustrate:

"The Commission is, for me, a valid partner. To involve them, on that level, means they have as well a bit more responsibility for the whole. And they know at an early stage when things become difficult, for what reason, and they could help."

And re-iterated by the same respondent:

"Them being there, understanding more, us understanding more how certain procedures in Brussels run, I see it as an advantage."¹²

A formal role for the European Commission in the College administrative meetings could enhance the strategic character of the body, provide a supranational counterpart in board discussions/stimulate greater alignment with EU-level priorities. A clear-cut separation between operational and policy meetings on the one hand, and administrative meetings on the other, will be crucial to ensuring that the proposed setup safeguards the continued independence of the College's substantive work. It is important to note that a formal provision stipulating for Commission representation in Eurojust College meetings on management matters would to some extent codify existing practice. While not provided for in the Eurojust founding act,¹³ the Commission has in practice been attending College meetings on administrative matters (albeit in a non-voting capacity) since 2012. This was agreed as part of the 2012 Memorandum of Understanding signed between the Commission and Eurojust.

JHA agencies' management boards are generally formally mandated to meet two times a year¹⁴ (see Tables Annex 1 and 2). In practice however, most JHA agency boards meet more often. Out of the five agencies interviewed, the management board of FRA is the only agency whose management board meets twice a year.¹⁵ Europol's management board meets four times a year "each time either 1, either 1.5 days, depending on the length of the agenda,

¹⁰ See more generally pp. 74-78.

¹¹ Agency Expert, 19.07.2017.

¹² Agency Expert, 18.07.2017.

¹³ The 2008 Eurojust Council Decision does not provide for Commission presence at Eurojust College meetings. However, Art. 11 (1) provides that "The Commission shall be fully associated with the work of Eurojust" and 11 (3) stipulates that "For the purpose of enhancing co-operation between Eurojust and the Commission, Eurojust may agree on necessary practical arrangements with the Commission."

¹⁴ Exception to this is the EMCDDA board, which is mandated to meet at least once a year.

¹⁵ This excludes exceptional meetings.

sometimes 2". The Eurojust College meetings on *administrative matters*, and which are also attended by the Administrative Director and the Commission, take place on average "once every two months", for a total of 4-6 meetings a year. EASO's board meets "3-4 times a year" and the Frontex board convenes 5 times a year.

Formally, voting rules provide that board decisions are normally to be taken by majority (i.e. FRA and Eurojust: simple majority; Europol: majority; EASO; Frontex: absolute majority) except for a host of key decisions, which provide for a higher threshold two-thirds majority generally.¹⁶ The exact list of decisions requiring two-thirds majority varies across agencies but it can refer to decisions such as: the adoption of the annual work programme, key agency reports, appointment and revocation of scientific committee members, draft and final budgets, director appointment etc. The EASO and Frontex regulations provide for higher thresholds still when deciding on the profiles and the overall number of the experts to be made available for the asylum intervention team (Art. 15(1) - the EASO founding regulation) and on the profiles and the minimum number of border guards for the rapid reaction pool of the European Border and Coast Guard teams (Art. 20(4) - Frontex founding regulation). Unanimity requirements are exceptional and generally provided for in a limited number of agencies (i.e. Eurojust; FRA) and circumstances (e.g. decisions on language arrangements).

Board's practical operation in this respect can differ, however. Whereas some boards rarely use voting and tend to work by consensus (i.e., FRA: "Outside the electoral context, voting is rare"; Europol: "we very rarely use voting. Very, very rarely it would go to a formal vote"; EASO: "our board doesn't like to vote"; "we work with consensus"; "voting is not something that happens very often"), other boards, on the contrary, use formal voting (Frontex: "We always vote"; Eurojust: "decision-making very often with voting").

Respondents from both groups (voting and seldom voting boards) however, reported that the higher majority thresholds requirements can slow down and act as an impediment to effective decision-making:

"You don't move. (...) Europe needs to take decisions and some decisions have to be taken urgently and if you don't have, either a quorum so you can't have a discussion leading to decision-making, and if at each time you're blocked because you need a two-third majority and this is definitely too difficult to reach, then we don't move at all."¹⁷

"It's too high a bar and it delays in particular elections [within the management board]. They run through too many rounds of voting because of the need to achieve such a high number in order to be deemed elected."¹⁸

Furthermore, it can reportedly also affect the quality of decisions thus adopted:

"That can actually block or it waters down proposals. Any proposal has then the problem of being so watered down that the aspect of efficiency and effectiveness is questionable and you actually delay the hard-core discussions."¹⁹

¹⁶ The EASO regulation makes reference to three-quarters majority instead e.g. for the adoption of the work programme Art. 29(1)(f) and for the adoption of the management board's rules of procedure Art. 29(1)(a).

¹⁷ Agency Expert, 19.07.2017.

¹⁸ Agency Expert, 03.07.2017.

¹⁹ Agency Expert, 18.07.2017.

Recommendations:

The legislator should re-consider the structure of the FRA board in terms of the compatibility of the *representation* of the European Commission in the board with the declared aim of ensuring agency independence not only from Member States governments but also from EU institutions. Commission representation is further at odds with the independent capacity of the other board members.

It seems relevant to re-assess the necessity of high majority voting thresholds (two-thirds and three-quarter majority) envisaged in JHA agency founding acts and their impact on agency decision-making.

A formalised role for the European Commission in the Eurojust management board meetings on administrative matters appears justified.

2.2. Board Size and Operation

In practice, the actual size of management board—in terms of actual presence in the room—can be very large. For Europol for instance it was noted: “We have a room of about maybe 80 people-maybe 100 people, plus the interpreters.”

In the case of Frontex the board presence is also considerable:

“In practice, we have 2 people per Member State, sometimes they also use the possibility to have one more expert (...) So we have 28 EU Member States, then we have 4 Schengen associated countries so that means we have 32 national authorities, each delegation has a minimum of two persons so that means we have at least 64 people from the Member States, plus some experts so it could be we have 70 people let’s say in the room coming from Member States... we have of course the chair and the vice-chair and there is a small secretariat. *So more or less we have I would say 75 people in the room, including the headquarters of the agency.*”

In the case of EASO: “Persons in the room can be close to 100, but voting members only 30: 28 Member States and 2 from the Commission.” Board presence at management board meetings in this specific case comes close to the overall agency staff numbers.²⁰ For FRA, the numbers are smaller (reportedly “thirty something people around the table”).

The JHA agency directors interviewed generally felt that the size of the board does not impede the board’s ability to reach decisions. Board size can however, reportedly have implications for some agencies in terms of the formality of discussions and/or efficiency and length of board meetings. In the words of one director: “the size of the management board affects the formality of the discussion and generally makes it rather well not spontaneous, not fluid.”²¹

²⁰ According to the latest (2015) ECA report EASO has a staff of 93 people (2016/C 449/12).

²¹ Agency Expert, 07.07. 2017.

In the words of another agency director:

"We have very long meetings (...) In our management board we have long discussions sometimes on topics that could be prepared before the plenary session but I know that the management board members had discussions some months ago and the members rejected the idea to have an executive board (...) that could make some decisions on behalf of the board."²²

A large board presence is also not necessarily always reflected in large board *participation* in discussions. While not characteristic across all boards, a small number of delegations can reportedly dominate discussions in some agency boards. In the words of an agency director: "Typically the discussions are dominated by approximately only 6 delegations on most agenda items."²³ In the case of this particular agency it was reported that: "It's mainly related to the largest member states and those that have a strong tradition of being active in the security arena". For other Member States representatives however, it's reportedly "very rare that they would initiate a discussion." And reiterated, by the same director: "I think only a third of the members of the management board ever speak with any kind of regularity."

This can have implications in terms of representativeness, with the more vocal Member States or the Commission potentially gaining more influence as a result: "They [vocal members] lead the debate so they have necessarily more influence on the outcome."²⁴

2.3. Executive boards: A Sensitive Matter

Executive boards have been seen as a possible solution to the plethoric size of many EU agency boards and as a way to improve the efficiency of agency decision-making. Proposals for the creation of such sub-structures have however, reportedly proven controversial in many JHA agency boards. From the five agencies interviewed, FRA is the only agency with an executive board in operation. For Eurojust, an executive committee is being discussed in the context of the proposal for a Eurojust regulation. Europol, Frontex and EASO lack such structures and their board members have explicitly opposed its set up. To illustrate:

"It has been considered before by the management board on at least two occasions (...) I think Member States couldn't agree in the end on the mechanism for which ones would be represented and how they would rotate that membership."²⁵

"There are some attempts to put some committees here and we don't like committees."²⁶

The representation of national authorities in management boards can serve as an important bridge in terms of securing a strong link with national authorities and support for, and trust in, agency activities. When excluded from management boards, national authorities can become alienated from the agency, lack investment in/ownership of the agency's output and are more likely to be distrustful of its output (e.g. EFSA; see for instance, Groenleer 2009). **Therefore, while the creation of executive committees could provide gains in**

²² Agency Expert, 05.07.2017.

²³ Agency Expert, 07.07. 2017.

²⁴ Ibid.

²⁵ Agency Expert, 07.07. 2017.

²⁶ Agency Expert, 27.06.2017.

terms of the efficiency of board processes, it is important to recognise that such structures do come with their own set of potential drawbacks given resistance among national representatives in the boards to such structures. They come with the risk of Member States potentially perceiving themselves excluded from aspects of agency decision-making or as being in a disadvantaged position in the agency's governance compared to other Member States. In other words, there is a potential trade-off between the efficiency gains in boards functioning potentially ensuing from such structures and the gains associated with having Member States fully on board with agency activities (for instance, in terms of effectiveness in implementation).

The matter has also proven very sensitive in the case of Eurojust, as visible in the discussions brought on by the proposal for a Eurojust regulation (COM(2013) 535). An initial suggestion for the Eurojust Presidency Team to act as a form of an "embryo" executive board, endowed with delegated decision-making powers has been met with resistance by national members: "We have proposed to have the Presidency Team preparing the work to see this as an embryo of an executive board, including giving them delegated powers. That so far was not acceptable." The respondent ascribed this to national members wanting to maintain a say in all aspects of decision-making: "It's not really trust, it's: 'I want to have a say in this. I really want to have it.'"

The interviewees from Eurojust expressed divergent views in this regard, illustrative of differences among national members on this and the controversial nature of an executive structure. Whilst one respondent mentioned that "in a setup like ours you need to preserve the final say with the College", another Eurojust respondent however, expressed the opposite view:

"You cannot have the College preparing everything, then you have constant College meetings (...) That does not work. You need to leave this to a delegated group."

In the specific case of Eurojust however, there could be a strong case for the setup of an executive board. The intergovernmental structure of the Eurojust College in which the President is *primus inter pares* –the President has "no additional powers over and above those of other college members" (Ramboll evaluation 2009, p. 171)–lacks any hierarchy. While EU agency heads have the power to implement (the specifics of) board decisions and are responsible for day-to-day management, the College structure "without a clear leadership role for the President" means that *everything* is decided through the College. This is a highly cumbersome way to run an organisation. As noted by a Eurojust respondent:

"If you want to move on, you need to have delegated powers. You can't, at all times, with every single document, where the content is acceptable, start to discuss the dots and the commas, and the structure of the document. If you do this with 28 colleagues (...) that should be an easy process by delegation and this is very, very hard."

And reiterated:

"At least somebody must have a possibility to decide and be delegated to make that decision by a bigger group. You cannot have that bigger group constantly deciding on everything. On dots and commas..."

The Commission's proposal for a Eurojust regulation envisages the setup of an executive board (Art. 16) composed of the President and Vice-Presidents of the College, one representative of the European Commission and one other member of the College (Art. 16 (4)). **Given the sensitive nature of such a structure, an executive board composition where a small number of national members (as opposed to one member as provided for in the Commission proposal) serve on a rotating basis could be envisaged.**

2.4. Board Expertise

Most JHA agencies' founding regulations contain specific requirements for knowledge and expertise of board representatives— in the specific field of agency operation as well as often, also on budgetary and managerial matters. For instance, the Frontex founding act specifies that board members shall be "appointed on the basis of their degree of high level *relevant experience and expertise in the field of operational cooperation on border management and return and their relevant managerial, administrative and budgetary skills*" (Art. 63(2)). Similar expertise requirements are also contained for instance, in the Europol regulation— including with respect to alternate members (i.e., Recital 18 (preamble) provides that "The members and the alternate members of the Management Board should be appointed taking into account *their relevant managerial, administrative and budgetary skills and knowledge of law enforcement cooperation*"; see also Art. 10(2)). Specific expertise requirements are contained in other JHA agency founding acts e.g. Art. 25(3) of the EASO founding act; Art 13(3) eu-LISA founding act; Art. 12(1) of the FRA founding act; Art. 8(3) Cepol founding act.

Some founding regulations even provide guidelines on seniority/rank of national representatives present in the board: e.g. the EASO founding act: "where possible, consist of the operational heads of the Member States' asylum administrations or their representatives" (Recital 17 (preamble)); the Frontex regulation: "where possible, consist of the operational heads of the national services responsible for border guard management or their representatives" (Recital 52 (preamble)); the FRA founding act, speaks of Member State appointed independent board members "having high level responsibilities in an independent national human rights institution or other public or private sector organisation"(Art 12 (1)(a)).

Agency respondents reported that overall, management board representatives have the relevant experience. In some agencies, appointees to the board are very senior (e.g. "Many representatives of the MB are very senior, they are the heads of national services, the directors"²⁷; "It's not uncommon to see them sitting just behind the ministers in the Council, a great number of board members sitting behind the ministers"²⁸).

In terms of managerial and administrative and budgetary skills however, there is more of a mixed picture, with variations across agency boards or delegations. While some agency directors noted the presence of budgetary expertise across many of their board delegations (e.g. "Yes, there is that level of expertise, at least in many of the delegations."²⁹;"Within the board we've always found members with the relevant expertise who then take prominent

²⁷ Agency Expert, 05.07.2017.

²⁸ Agency Expert, 27.06.2017.

²⁹ Agency Expert, 07.07.2017.

roles in let's say the budget committee."³⁰), in contrast, other respondents noted that the level of knowledge and interest in budgetary matters varied considerably across the board or that board expertise was related to the field of agency operation rather than management/administration.

To illustrate:

"There is a great variation, great variation in appetite and expertise."³¹

"The skill and the professional background is related to the core skill of the agency, not to budget management and administration." And reiterated: "the members of the board are not experts in budget matters."³²

To ensure adequate budgetary oversight, some agencies have set up a budget committee. For instance, Eurojust has set up a budget committee composed of a group of national members/delegations working together with the Administrative Director. Similarly, Frontex has set up a budget committee, composed of the Commission and a small subset of national representatives (or in some cases experts on budgetary matters, nominated by the Member State). FRA too, has a budget committee composed of three board members and the European Commission.

In the case of EASO, a Commission proposal for the setup of a budget committee proved controversial among national members, perceived as potentially creating a "private club" in the agency's governance. An agency respondent summarised arguments voiced in the board as follows:

"So you are saying that by meeting as a small group you guarantee a bigger participation and the others will learn more. In practical terms, what you will be doing is telling us we've already discussed in a private club so the big club in the plenary does not need to worry about this anymore. So it's exactly the opposite result. You are saying that there is not enough discussion but you are creating a committee to discuss it even more privately than in the board meetings themselves."

All in all, the above indicates that despite explicit requirements in this respect (and while noting that some agencies have set up purpose-specific budget committees) there is still a mixed picture with variations across agencies and within delegations as to whether national representatives possess budgetary/managerial expertise.

Management boards have important budgetary governance and oversight responsibilities in terms of overseeing agency performance, adopting key programming documents, adopting budgets (and verifying their execution) and financial rules. As such, it is necessary to ensure that they collectively have the adequate expertise and skills to perform their responsibilities vis-a-vis these public bodies. As part of their annual reporting obligations to the budgetary authority, JHA agencies should provide an overview of the management board's profile in terms of experience on administrative and budgetary matters to afford an overview as to

³⁰ Agency Expert, 03.07.2017.

³¹ Agency Expert, 19.07.2017.

³² Agency Expert, 05.07.2017.

whether the founding regulation's requirements on management board expertise are complied with by appointing authorities.

Where such expertise is deemed insufficient, compensatory measures could be considered such as requiring Member States to supplement that expertise within their board delegation (either in their choice of alternate or experts dispatched).

2.5. Board Roles and Focus

2.5.1. Formal Roles: Some Residual Institutional Incoherence

Boards are mandated to carry out a broad array of strategic, management and oversight functions ranging from supervisory roles in terms of budgetary and planning matters, monitoring the work of the director and agency performance, to tasks such as setting the strategic direction of the agency, approving the multiannual and annual programming documents, the annual report, adopting implementing rules etc.

Most JHA agency founding acts contain explicit provisions, in similar language, stipulating the director's accountability to the board – often stipulating both board and director responsibilities in this respect (e.g. Europol: for the board: The Management Board shall: "establish performance indicators and oversee the Executive Director's performance" (Art. 11 (1)(k), for the director: "He or she shall be accountable to the Management Board" (Art. 16 (1); Frontex: "the management board shall exercise disciplinary authority over the executive director" Art. 62(2)(m), "The executive director shall be accountable for his or her activities to the management board" Art. 68(4)).

Moreover, most JHA founding acts endow management boards with powers of appointment and dismissal of the executive director, with some exceptions. For instance, in the case of Europol these decisions are made by the Council³³. This appears to be an institutional path dependency inherited from its former third pillar status.

In terms of board prerogatives, an across-the-board comparison reveals an important inconsistency in the case of the FRA board. Despite the high emphasis placed in the agency's founding regulation on the agency's independence, and unlike other JHA agency boards, the FRA board cannot adopt the agency's multiannual programming document (i.e. the Multiannual Framework). Unusually so, the agency's five-year Multiannual Framework, which sets out the agency's thematic areas of activity are adopted by the Council, after consulting the European Parliament, on the basis of a Commission proposal. The Commission consults the management board in preparing the draft. Agency's activities- when acting on its own initiative, as opposed to on a request by an EU institution- are limited to the thematic areas set by the Council. The fact that FRA cannot adopt its own Multiannual Framework raises questions as to the ability of the agency to formally set its own priorities, particularly relevant for a fundamental rights body. **The FRA founding regulation should be revised to empower the agency's management board to adopt the agency's multiannual thematic areas of activity—without the Council setting thematic areas for the agency's activities.** The issue has been raised by both the FRA independent evaluation

³³ Eurojust too has a special setup in this respect: the President, as a national member, is elected by the College from among its members, subject to Council approval.

(2012) and the FRA board's recommendations (2013) to the Commission, adopted following the evaluation³⁴, and has so far not been remedied.

In practice, the Council has used this prerogative to exclude police and judicial cooperation in criminal matters from the agency's Multiannual Framework. Despite communitarisation of the field, the FRA mandate does not explicitly include police and judicial cooperation in criminal matters, with ongoing institutional disagreements as to whether the agency can work in the area on its own initiative. This has led to a somewhat paradoxical situation. While the Commission has included police and judicial cooperation among the agency's thematic activities in its proposal to the Council on the Multiannual Framework, the Council has removed it from the framework.³⁵ At the same time, the agency has received requests from the EP, the European Council and the Commission to carry out work in this area (under Article 4(1)(c) and (d) of the FRA founding regulation) and has published several opinions in this area³⁶, leading to the situation that the agency carries work in this area when requested but cannot do so on its own initiative. This is undesirable as it means that the agency cannot follow up, on its own initiative, on work undertaken on request in this area, it cannot carry out long term research in this area –but can only provide a “snapshot” upon request— as well as leading to a patchy approach to fundamental rights promotion and protection. **The ability to mobilise the agency's expertise is crucial to fundamental rights protection in this area, as well as to ensuring mandate coherence and continuity to agency's work in this area. It is important that the agency's Multiannual Framework includes police and judicial cooperation in criminal matters; a mandate revision explicitly allowing the agency to work on all areas of EU competence, including police and judicial cooperation, should be considered to avoid further ambiguity and institutional disagreements in this respect.**

2.5.2. Practices: Double-Hatted Roles?

In terms of boards practical operation, agency respondents interviewed generally reported that overall balance in terms of board focus was adequate, tilted in favour of strategic matters rather than micromanagement. To illustrate:

“I am happy with my board and the way the board works. They are focusing on strategic matters rather than on managerial ones, which is not the case for all boards.”³⁷

“The management board is focusing on the right topics, on strategic issues rather than micromanaging.”³⁸

Interest among national representatives reportedly also varies per topic and the extent to which this affects the national interest:

³⁴ Available at: https://fra.europa.eu/sites/default/files/fra-management-board-recommendations-external-evaluation_0.pdf

³⁵ See: <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-multiannual-framework-for-the-european-union-agency-for-fundamental-rights>

³⁶ For example, opinions on the framework decision on racism and xenophobia with special attention to the rights of victims of crime (2013), on the proposal to establish a European Public Prosecutor's Office (2014), on the confiscation of proceeds of crime (2012).

³⁷ Agency Expert, 27.06.2017.

³⁸ Agency Expert, 07.07.2017.

"it depends also on the items on the agenda (...) if I knew some numbers on the lottery like I know who will talk next (...) so it's very predictable and others will not talk about certain things and if they do, it's very negative."³⁹

The same expert reiterated:

"sometimes they're too high level, they must be...*but it's almost like a mini-Council, they very much mirror the position of their own government. (...) the argumentation is very similar to what the ministers say at the Council levels because they are very close to that level themselves.*"⁴⁰

One of the directors interviewed noted that there has been an improvement in this regard along the years, with a higher number of board members that adopt an agency-perspective as opposed to strictly a national interest perspective, indicative that they are "taking their governance responsibilities quite seriously."⁴¹

"Of those that even bother to speak it's still a mixture of the two but the proportion of those that also speak on behalf of the governance of the agency is higher than it used to be ...In the past, you could much more typically identify a comment with a national interest."⁴²

The numbers are still quite low in that regard, however:

"Only a third of the members of the management board ever speak with any kind of regularity. And out of those one third, two-thirds of them, express a Union interest. (...). It's still quite a low number but it's enough for me to function."⁴³

Board members have a double-hatted role: on the one hand, they are national representatives, on the other hand, they are part of the governing body of an EU agency, collectively responsible for its effective governance and oversight. The above seems to indicate that a significant number of board members continue to for the most part identify their role towards the agency as national representatives. In the words of an agency director:

"The members of the management board should be aware that they are part of a governing body but very likely they perceive themselves as a mini-Council working group. As a mini-Council where they represent the national interest. (...) *I am not sure that all members of the management board have really the feeling that they are members of the agency and that their role is to make a decision as a governing body of the agency.*"⁴⁴

It is important that national representatives in agency boards come to perceive their role as double-hatted: not only as national representatives but also, as collectively responsible for the good governance, the performance and the reputation of the respective European agency.

³⁹ Agency Expert, 27.06.2017.

⁴⁰ Ibid.

⁴¹ Agency Expert, 07.07.2017.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Agency Expert, 05.07.2017.

One of the directors interviewed also noted a level of disconnect between the board and political expectations agreed at the Council level, effectively a gap between practitioner (board members are the heads of national offices) and political expectations, with board representatives reluctant to follow through on priorities agreed at the political level. In the words of the respondent:

“It’s a bit surprising to see that they are not always aware of positions adopted in the Council or political priorities. There was a clear political priority, given by the Council, repeated by the Commission (...). Sometimes we have to speed up the pace on certain activities because I know there are political pressures, there are political expectations. (...) This has an impact on them because it’s based on data collected by the agency, data that have to be provided by the Member States. (...) Some complained that there was too much data [required], that the speed was excessive, that they should have more time, that they don’t have resources at home to process all these requests from the agency. (...) So what I told them is that their ministers in the Council – a majority, a consensus happened in the Council because this was prioritised.”⁴⁵

And continued, in the words on the same director:

“This was just an example, but the reactions were: ‘it went too fast, we had no time, we had no resources, you request too many details’ but the reason for that was that there was political pressure and the political pressure came from the Council and the Commission.”

This echoes past experiences that have been documented for other agencies (e. g. Europol) of a gap between the political and professional level (Groenleer 2009; Zanders 2002; Den Boer and Bruggeman 2007; European Parliament 2011; Den Boer 2015), where ambitious, top-down political expectations lack/fail to sufficiently cultivate lower-level bureaucratic support among national authorities within Member States. This support however, is crucial for effective implementation and can seriously affect JHA agency ability to deliver on political priorities.

⁴⁵ Ibid.

3. COMMISSION'S ROLE IN JHA AGENCY BOARDS

KEY FINDINGS

- Commission representatives in JHA agency boards are reportedly active and well-informed participants.
- While reportedly the Commission does not dominate the board process for the JHA agencies interviewed, instances of informal Commission influence in the board were also reported. Agency experiences reported are mixed in this respect (see below). The informal power of the Commission is also to some extent a natural residual side-effect of the privileged position granted to the Commission towards agencies on other aspects (e.g. budget proposal, opinion on work programmes) as well as from its intimate knowledge of the EU institutional system.

Reportedly, the Commission representatives tend to be very active members in agency boards. This was reported for all agencies interviewed. To illustrate: "The Commission will have an opinion on almost any agenda item"; "they are more vocal"; "On key elements, the ones that are more controversial the Commission always says something and they are very much listened to"; "It has an opinion on everything which wouldn't be the case for everybody else."

However, reportedly, the Commission does not dominate the board process for the JHA agencies interviewed – i.e., the other board members do not necessarily follow the Commission opinion. In the words of an agency director: "they [Commission representatives] are listened to, they are respected but that does not mean that there is a consensus about what they say."⁴⁶ In the words of another director: "their instinct will sometimes be to go in the opposite direction [than the Commission]."⁴⁷

Some of the respondents interviewed noted the positive role played by the Commission on the board for instance, as a guardian of the Treaty and of the founding regulation:

"I see the Commission first of all, as the guardian of the Treaties so the quality of the interventions made by the Commission has to be understood in that context, that the Commission has to be guardian of the Treaty and guarding of the regulation sometimes."⁴⁸

The Commission can also reportedly step in and support the agency and the director on "difficult topics", when there is reluctance from board members to follow through on politically-endorsed priorities.

In terms of informal Commission influence in the board, the picture that emerged from interviews is mixed and points at different agency experiences in this respect. While one agency director noted that the Commission "plays its role in a way that is respectful of the

⁴⁶ Agency Expert, 27.06.2017.

⁴⁷ Agency Expert, 03.07.2017.

⁴⁸ Agency Expert, 05.07.2017.

proper functioning of the board"⁴⁹, two other directors mentioned Commission attempts at influence, beyond formal powers. In the words of a director:

"there are some political directions where the members of the board have to be cautious and even the executive director sometimes has to say: 'No, this is not in the regulation, this is not Commission power.'"⁵⁰

The respondent recounted a specific example of a Commission attempt to influence agency decision-making:

"The Commission was not happy and wanted to have a prior say, to influence the draft and the wording (...). This was an example where I had to resist the Commission and there was a discussion in the management board and I said: 'Sorry but if you can find the legal basis in the regulation of course, I will comply with the regulation but please give me the legal basis for that. We have not found it.' And they were silent. So I had to resist also."⁵¹

In another case, influence was reported to play out at earlier stages, in budgets and programming documents, during informal discussions with the DG de tutelle, before the board process. The respondent also stressed the legitimacy issues this raises:

"we don't table something in the board— although in the regulation it does not say that we need to do it— but we table it with the positive opinion of the Commission. To get that positive opinion of the Commission on documents like this, there's a lot of negotiation and micro-management from their side. (...) When we say the Commission, sometimes it's a unit inside a directorate-general, two people or three people from that unit trying to dominate an agency that has been doing this job for a decade or two. So every year we have a discussion with them that sometimes is painful. (...) They need to give a positive opinion before the board adopts it [...] but the practice is: 'we tell you what to write in that document and you follow our opinion.' You look at the magnitude of the Commission in Brussels but in the end, for a particular agency, we are talking about 2 or 3 people sitting in a corridor. (...) But those are the ones that try to influence the strategic document of an agency."⁵²

Informal Commission power can also be a residual side-effect of the formal powers granted to the Commission on other aspects (e.g. budget proposal, endorsement of the work programme, see Tables in Annex 1 and 2 for an overview), effectively granting the Commission a privileged status towards agencies compared to other board members:

"The Commission has two votes, so compared to the total number of votes it's not much. But of course, there are some areas where the Commission has a specific role [...] where there is a need to have a prior opinion or even a prior approval by the Commission."⁵³

"In general, I would say I have good working relation with the Commission, I think we need to have trustful cooperation, because the Commission tables the budget, it makes the proposal to the EU budgetary authority, otherwise, I don't get the money. It's my

⁴⁹ Agency Expert, 03.07.2017.

⁵⁰ Agency Expert, 05.07.2017.

⁵¹ Ibid.

⁵² Agency Expert, 27.06.2017.

⁵³ Agency Expert, 05.07.2017.

interest to have a good cooperation with the Commission otherwise I don't get the money, I don't get the budget, I don't get the support."⁵⁴

Commission informal power also stems from their intimate knowledge of the EU institutional system. In the words of an agency director: "they have the full picture; they are the most informed players in the management board". In the words of another director: "there is this belief [among other board members] that whatever they say is absolutely true. Because they are the Commission."⁵⁵

⁵⁴ Ibid.

⁵⁵ Agency Expert, 27.06.2017.

4. DIRECTOR APPOINTMENT

KEY FINDINGS

- Founding regulations of JHA agencies reveal considerable variation in the role reserved for the EP in the appointment of agency heads. There is a need for institutional reflection as to whether variations across JHA agencies in terms of the role of the EP in the appointment process are justified –whether a weaker role reserved for the EP in the appointment of the executive director of specific JHA agencies is a reflection of the need for less strict parliamentary oversight for some JHA agencies as opposed to others.
- The FRA founding act should be amended to clarify the role of the various institutional actors in the appointment process of the director. It is unclear what role the EP and Council ranking are to serve in the appointment process, particularly so when the different institutional actors could presumably put forward different rankings and preferred candidates. Clarification is needed on the legislative intent as to the extent to which EP and Council preferences are binding on the board or simply have recommendatory value as well as how the board is to reconcile between potentially inconsistent rankings.

As noted above, JHA agency heads are generally appointed by their management boards, on the basis of a Commission shortlist (e.g. Frontex, EASO)/proposal (e.g. EMCDDA) or alternatively, on the basis of a shortlist proposed by a selection committee set up by the management board, which includes the Commission (e.g. Cefpol). The appointment of the Europol director is an outlier to this set up: the Europol director is appointed by the Council from a shortlist of candidates proposed by the management board. The Eurojust President is elected by the board (i.e. College) but subject to Council approval.

As part of the appointment process, JHA agency founding acts generally provide for hearings before the European Parliament prior to the director's appointment. In the case of Eurojust and Cefpol no such requirements are foreseen in the founding acts. When hearings are provided for, an important difference is also observable in the type of hearings envisaged and thereby in the say reserved to the EP in the appointment process. Some founding regulations provide for hearings of *shortlisted candidates* (e.g. Frontex, FRA), whereas others for hearings of the *selected candidate* (e.g. EASO, Europol, EMCDDA). This represents an important difference: the former allows for input for the European Parliament in the appointment process, the latter much less so, as it places the EP for the most part before something of a *fait accompli*—there is already a selected candidate. In the case of Europol, the EP's role is symbolic as after having heard the *selected candidate*, the competent EP committee shall issue an explicitly "*non-binding opinion*".

There is a need for institutional reflection as to whether variations across JHA agencies in terms of the role of the EP in the appointment process are justified – whether a weaker role reserved for the EP in the appointment of the executive director of specific JHA agencies is a reflection of the need for less strict parliamentary oversight for some JHA agencies as opposed to others. In other words, are there substantial variations in agency powers so as to warrant a weaker role for the EP in the appointment of the head of Agency X compared to Agency Y—or to the contrary, are the observed variations arbitrary? Accountability concerns itself with power; "responsibility, should, indeed, be commensurate with the extent of the power possessed" (Turpin 1994, p.

111). Variations in the EP role (a weaker or stronger say) should be linked to/reflect actual variations in agency powers, requiring therefore greater or lesser parliamentary oversight.

On this point, it is also important to note that while the FRA founding regulation falls within the first category, it is ambivalent as to whether this actually entails a more consequential role for the EP in the appointment process. Article 15(b) of the FRA founding regulation provides that: "The European Parliament and the Council of the European Union will then give their opinions and state their orders of preference" [on the shortlisted applicants for the post of director] and Article 15(c) "the Management Board will appoint the Director taking these opinions into account."

The founding regulation is ambiguous as to what "taking these opinions into account" would exactly entail and to what extent the board is bound by these opinions. As mentioned above, the Europol regulation unambiguously provides that while the candidate selected by the Council may be invited to appear before the competent EP committee, the latter will give "a *non-binding* opinion". In the case of FRA, the founding regulation is unclear whether the management board has leeway to make a different appointment than the candidate preferred institutional candidate or to the contrary, whether the preferred institutional candidate would become the default choice. Should the legislative intent be the latter, the founding regulation envisages no procedure in place if the board appointment were to diverge from the stated institutional preferences. For instance, the Frontex regulation similarly provides that the MB shall appoint taking into account the views expressed by the EP but clearly provides that if the MB takes a decision to appoint a candidate other than the candidate whom the EP indicated as its preferred candidate, the MB has to explain, in writing, to both the EP and the Council how the EP's opinion was taken into account.⁵⁶ There is also an inherent lack of clarity in the (not unlikely) event that the European Parliament and the Council put forward different order of preferences.

The FRA founding act should be amended to clarify the role of the various institutional actors in the appointment process of the executive director. It is unclear what role the EP and Council ranking are to serve in the appointment process, particularly so when the different institutional actors could presumably put forward different rankings and preferred candidates. Clarification is needed on the legislative intent as to the extent to which EP and Council preferences are binding on the board or simply have recommendatory value as well as how the board is to reconcile between potentially inconsistent rankings.

⁵⁶ The article provides: "If the management board takes a decision to appoint a candidate other than the candidate whom the European Parliament indicated as its preferred candidate, *the management board shall inform the European Parliament and the Council in writing of the manner in which the opinion of the European Parliament was taken into account.*"

5. ACCOUNTABILITY TOWARDS THE EUROPEAN PARLIAMENT

KEY FINDINGS

- JHA agencies' accountability towards the European Parliament has been on the rise, with consecutive mandate revisions and changes in agencies' founding acts introducing an expanded role for the EP in agency governance.
- What is more, in practice agency accountability goes further than a reading of founding acts would suggest, with JHA agencies also often pro-actively initiating such practices. JHA agencies under study have been actively engaging with the European Parliament, beyond obligations provided by their legal acts through: regular parliamentary visits at agency headquarters, MEP presence at agency events, regular meetings between directors and MEPs and agency heads (and other senior level) presentations in Parliament.
- While there has been a considerable increase in EP prerogatives and pro-active agency account-giving and engagement practices in this respect, it is important to note however, that some inherited peculiarities and shortcomings of evolution still remain in this respect (see for instance, Europol).

JHA agencies' accountability towards the European Parliament has been on the rise, with consecutive mandate revisions and changes in agencies' founding acts introducing an expanded role for the EP in agency governance (see Tables Annex 1 and 2 for an overview). This increase has been a function of the EP's enhanced prerogatives in this area as well as agencies' growing powers and rising demands for effective democratic control (see also Rijpma 2014). This is particularly visible in the case of former third pillar agencies such as Europol. Once an institutional outlier, changes to Europol's basic act (initially from a Convention to a Council Decision) brought significant improvements in the position of the EP towards the agency, culminating with the institutional overhaul brought by the Treaty of Lisbon and the adoption of a Europol Regulation, bringing it in line with other EU agencies. What is more, the creation of the Joint Parliamentary Supervisory Body represents an actual institutional innovation in terms of parliamentary oversight and one which, if adequately tailored (see section 7 below), could stand to make an important contribution also to agency performance and effectiveness. Out of the three former third pillar agencies (i.e. Eurojust, Europol and Cypol), Eurojust most visibly still displays some of its former third pillar pedigree, noticeable for instance, in the rather limited role *formally* foreseen for the EP in terms of its governance compared to other agencies and the strong intergovernmental nature of its governance, more broadly (see for instance, in Table 1 for a comparison). The Commission proposal for a Eurojust regulation contains however, provisions for greater EP involvement—including the explicit provisions for EP to call the President for hearings—as well as national parliament's involvement in evaluating the agency's activities (See Chapter VIII of the proposal).

In practice agency accountability goes further than a reading of founding acts would suggest, with JHA agencies also often pro-actively initiating such practices. JHA agencies under study have been *pro-actively engaging with the European Parliament*, beyond obligations provided by their legal acts through: regular parliamentary visits at agency headquarters, MEP presence at agency events, regular meetings between directors and MEPs and agency heads

(and other senior level) presentations in Parliament. For instance, the President of Eurojust appears before LIBE for the presentation of the annual report of Eurojust (formally not mandated to do so) as well as on specific issues of interest to the committee (on instruments and ongoing legal initiatives, specific topics– e.g. counter-terrorism). The FRA's director's presentation to the LIBE committee of the agency's annual report on the situation of fundamental rights has been an institutional practice since the agency's creation; since this year, the director has also started to present the agency's work programme before the LIBE committee. The Europol's director presents the annual report, Europol's major strategic assessment reports (e.g. on terrorism, on organised crime terrorism) with the director appearing before the Parliament: "10 times maybe, almost on a monthly basis. It depends... formally before LIBE: 8 times maybe and the parliamentary groups also."

While the actual number of presentations/hearings before the EP might vary per agency (e.g. one agency director reported an average of "4-5 times per year"⁵⁷, while another director mentioned: "I turn up about 10 times a year, my colleagues at least 10 more times and not just in LIBE in a number of the different committees"⁵⁸), all agencies reported pro-active account-giving practices that go well beyond formal obligations as provided in founding acts.

Several of the agency heads interviewed explicitly mentioned a sense of obligation/responsibility to give account to the EP and as mentioned above, pro-active practices in this respect:

"So for me (...) we get more resources, the agency gets more power, the executive director gets more power, it's normal to be more accountable. When I get an invitation for a hearing in LIBE or anywhere in the Parliament, of course, I have to go, for me this is not something optional, I have to go. And this is the practice I am developing also with the Parliament. (...)

Accountability for me is a key factor because this is how the agency can be credible."⁵⁹

In the words of another agency head:

"We invest a lot of time in maintaining links with the Parliament. And on almost every visit to Brussels I meet with individual MEPs. (...) it's an important part of my job to maintain those links with the different groups and with individual MEPs with key roles related to fundamental rights."⁶⁰

Beyond a sense of responsibility to give account to the Parliament, some of the agency heads interviewed also stressed the organisational importance (i.e. staff, resources, mandates) of securing the EP's support. To illustrate, in the words of a respondent:

"I dedicate always, religiously, every time now that I go to Brussels I stay an extra day, minimum an extra morning, and I go meet another 3 or 4 rapporteurs and people that vote and have a saying. And I keep a very straight and close connection with them.

⁵⁷ Agency Expert, 05.07.2017.

⁵⁸ Agency Expert, 03.07.2017.

⁵⁹ Agency Expert, 05.07.2017.

⁶⁰ Agency Expert, 03.07.2017.

Because they are the ones that can do amendments and table things and correct crimes that are committed by a couple of people in the Commission.”⁶¹

While there has been a considerable increase in EP prerogatives and pro-active agency account-giving and engagement practices in this respect, it is important to note however, that some inherited specificities remain in this respect, illustrative of Lavanex characterisation of “Communitarisation with hesitation” (Lavanex 2010). For instance, while the Europol Regulation aligned for the most part the agency’s (accountability) structures to that of other agencies, Europol’s governance still displays some of the peculiarities of its evolution, visible for instance, in the appointment of the executive director, still appointed by the Council (rather than by its management board as is the common practice among EU/JHA agencies) and with a limited role for the EU supranational institutions (Commission and EP). Unusually, as noted above, the EP is explicitly granted a symbolic say in the appointment process, explicitly relegated to providing a *non-binding* opinion. Also, the issue of European Parliament’s access to Europol classified information—a much protracted Parliament battle— is still ongoing (the working arrangement between Europol and the EP, setting out the details of EP’s access, is under discussions at the time of writing). It remains to be seen whether the final text allows for real scrutiny powers (as opposed to merely symbolic ones) for the European Parliament on a crucial aspect for any meaningful parliamentary oversight of Europol activities.

⁶¹ Agency Expert, 27.06.2017.

6. CO-OPERATION BY MEMBER STATES AUTHORITIES

KEY FINDINGS

- Co-operation with the Member States' authorities has been challenging along the years for a host of JHA agencies. Well-documented challenges in this respect, which in some cases have significantly adversely impacted their ability to operate effectively, have ranged from inadequate resource and staff commitments or underuse of agency technical capacities to insufficient information exchange. In response to challenges of co-operation, in recent years, the legislator has taken to stating in founding acts a clear obligation on the part of Member States to co-operate with the agency in question. Provisions for instance, on an explicit duty to exchange information on the part of national authorities are now included in several JHA agencies' founding regulations.
- Simply mandating national co-operation by formal design in EU agencies founding acts is a questionable "fix". Mandating co-operation lacks credibility as a strategy to compel co-operation given the dependent nature of the system. In this area, key operational resources as well as critical information and intelligence remain in the hands of national authorities. EU JHA agencies are heavily *dependent* therefore, on national authorities' *willingness* to co-operate and cannot actually enforce co-operation.
- Command is not enough: The EU legislator should move away from simply mandating co-operation (command-type fixes) in JHA agencies founding acts as a strategy to address chronic co-operation challenges and focus on designing *incentives* for co-operation in founding acts—on designing structures that provide enhanced incentives to co-operate to national authorities.
- While founding acts mandate Member States compliance with a number of obligations (for instance, on information provision), mechanisms for follow up at the political level in the case of systematic non-compliance in this respect by a Member State are often lacking or are inadequate. Therefore, where specific obligations to co-operate are provided in founding acts, meaningful mechanisms for follow-up by the EP, the Council or the Commission in cases of non-compliance should be explicitly envisaged in founding acts.
- It is important to note however, that the effectiveness of such measures will be heavily dependent on such agency reports being followed up at the high political level in cases of consistent non-compliance. This therefore also places the onus of responsibility on the European Parliament and the Council to actively follow up on systematic non-compliance.

Co-operation from Member States authorities has been challenging for a host of JHA agencies. Well-documented challenges in this respect, which in some cases have significantly adversely impacted the ability of EU agencies to operate effectively, have ranged from inadequate resource and staff commitments to insufficient information exchange or underuse of agency technical capacities/potential. For instance, with respect to EASO, the Commission's 2015 Communication on the State of Play on the Implementation of the Priority Actions under the European Agenda on Migration (COM(2015) 510) noted that: "So far, the commitments made by Member States fall far short of the real needs". The Commission's Seventh report on relocation and resettlement of 9 November 2016 spoke of "short

deployments and inadequate profiles” and makes reference to “the urgent need to step up Member States’ support in providing experts to EASO” (p. 7), with expert shortages reported in follow up Commission reports (see for instance, Ninth report on relocation and resettlement). In its briefing on the set up of a European Agency for Asylum (2017) the European Parliament noted that: “EASO has been facing difficulties in recruiting and deploying experts.”⁶²

Eurojust too, has encountered co-operation difficulties. For instance, the Eurojust 2015 independent evaluation observed that: “Implementation of Article 13(5)-(7) reporting obligations on the Member State level remains a work in progress” (p. 29). Drawing on national reports, it noted that: “the full spectrum of information subject to Article 13(5)-(7) is not always transferred or transferred in a structured manner” (p. 29), with important implications in terms of the overall effectiveness of Eurojust: “Because greater information sharing is a lynchpin of the underlying “theory of change” of the Council Decision, this has led to a domino effect that has constrained longer-term impacts that were expected” (p. 30).

Europol’s struggles too, in this respect along the years are well-documented. While co-operation efforts in the field have generally benefitted from considerable support at the political level, with recurrent increases in Europol’s mandate and budget, support and co-operation from national law enforcement agencies was less forthcoming. Along the years, the agency has faced a reluctance to cooperate from national offices manifest in significant deficits in information sharing, underuse of the Joint Investigation Teams (JITs) instrument and its counter-terrorism resources (see for instance, Zanders 2002; Den Boer and Bruggeman 2007; Gualtieri 2007; House of Lords 2008; Groenleer 2009; Busuioc *et al.* 2011; Busuioc and Curtin 2011; Den Boer 2015).

In response to documented challenges with MS co-operation, in recent years the legislator has taken to stating in JHA agency founding acts a clear obligation on the part of Member States to co-operate with the agency in question. The 2008 Eurojust Council Decision and the Europol regulation are cases in point. Recital 13 (preamble) of the Europol regulation provides that: “In order to ensure Europol’s effectiveness as a hub for information exchange, clear obligations should be laid down requiring Member States to provide Europol with the data necessary for it to fulfil its objectives.” Article 7(6) (a) provides “Each Member State *shall* [...] supply Europol with the information necessary for it to fulfil its objectives [...]”. Similarly, the Eurojust Council Decision provides for an explicit obligation on the part of national authorities to provide information to Eurojust (changing the language from “may” to “shall exchange”), identifies specific circumstances where MS are obliged to report information (Art. 13(5)-13(7)), and a minimum level of information to be transmitted in a structured manner (Art. 13(10) and Art. 13(11)).

The Frontex founding regulation provides for a “duty to cooperate in good faith and an obligation to exchange information” (Art. 9) on the part of the agency and the national authorities. It further explicitly stipulates that the agency and national authorities “shall [...] share in a timely and accurate manner all necessary information” (Art. 10). Similar provisions are envisaged in the proposal for a European Union Asylum Agency (COM/2016/271 final),

⁶² See: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/595849/EPRS_BRI\(2016\)595849_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/595849/EPRS_BRI(2016)595849_EN.pdf)

which provides for “a duty to co-operate and an obligation to exchange information” (Art. 3(1)).

6.1. Mandating Co-operation—A Questionable ‘Fix’

The above points at a recurrent approach adopted by legislator, in a host of JHA founding acts, to re-state Member States obligations *in less uncertain terms* as a strategy to address co-operation challenges. Such “fixes” however, are necessarily incomplete and are unlikely to be successful: the co-operation deficits mentioned above (e.g. on information provision) do not stem from a lack of legal clarity of MS obligations in this respect and secondly, such commands lack credible possibilities for enforcement by JHA agencies given their dependence on national authorities’ support to be able to function.

JHA is an area of strong national sovereignty. Not surprisingly therefore, efforts at integration and centralisation have recurrently been met with reluctance/scepticism by national authorities, for instance, in policing (Den Boer 2015, 116). Moreover, national reluctance to co-operate can be due to a variety of other reasons ranging from legitimate national political considerations, austerity and budgetary constraints of national administrations, impact of EU-level co-operation initiatives on the workload and mandates of national agencies, divergences within administrative traditions, a resistant/conservative professional culture etc. (see Den Boer 2015 on this point on police co-operation). In this context, simply mandating national co-operation by formal design in EU agencies founding acts fails to meaningfully address these issues.

Moreover, in this context, mandating co-operation lacks credibility as a strategy to compel co-operation given the dependent nature of the system. In this area, key operational resources as well as critical information and intelligence remain in the hands of national authorities. EU JHA agencies are heavily *dependent* therefore, on national authorities’ *willingness* to co-operate and cannot actually enforce co-operation. When faced with co-operation challenges, EU JHA agencies have therefore tended been reluctant to “name and shame” national authorities or to resort to formal mechanisms out of concerns with (further) alienating national authorities and hampering co-operation (see for instance, Groenleer 2009). They have instead preferred to rely on informal mechanisms and attempted to build trust. For instance, Europol has purposefully steered clear of naming and shaming and aimed to engender co-operation through demonstrating added value to national authorities (see Busuioc and Curtin 2011; Busuioc 2016).

6.2. The “Long Game” of Trust-Building

What is more, for reasons outlined above, when such formal obligations mandating Member States to co-operate are provided for in founding acts, as has been the case in recent years as mentioned above, agencies reportedly do not resort to these mechanisms. For instance, the Eurojust external evaluation found that: “Eurojust has developed a highly effective approach based on ‘soft’ persuasion and building trust. Whilst, the 2008 Council Decision sought to provide more formal powers for Eurojust to compel Member States to act promptly

(i.e. Article 8), Eurojust continues to find an approach of encouraging dialogue and discussion preferable to formally binding authorities" (p. 54). And reiterated "Eurojust *finds that exercising those powers outside the formal framework* of Articles 6 and 7 is, in most cases, *more effective*" (p. 8).

Similarly, a Europol respondent interviewed for this study noted in this respect:

"It's not relevant [the obligation to provide Europol with information in the Europol Regulation] frankly, because the obligation does not have any real teeth; it's not backed by any credible powers. And in any event, our experience is that it's very difficult to compel police officers to work with others, you have to convince them, not compel. *So we don't use that, I've never used that and it would actually be counter-productive.*"

Reportedly, in recent years, despite ongoing challenges, there have been important co-operation gains across agencies. At Europol, reportedly information sharing has "significantly improved" in the past five years: "Over that five-year period, the annual rate has increased three-fold, at least three-fold." The Europol respondent interviewed re-iterated: "There are important areas of our operational activities where there are still significant problems—especially on terrorism— but in a whole number of other areas it's a much, much better picture." On terrorism one of the Europol respondents noted: "it's still an issue but less so". Co-operation is reportedly: "so much better with many Member States. There's a number of others where the improvement has still not happened. So it's a fragmented picture. And it's still frustrating that it's not operating in an optimal way and frustrating not in the least because I can see the gravity of the threat is, but it is a lot better." The agency's approach remains focused on trust-building and wary of resorting to formal mechanisms of obliging Member States to co-operate:

"So there is something we are doing right because it's making an impact. *We just have to continue doing that and not reach for solutions that effectively don't work in practice anyway.*"

And re-iterated by the same Europol respondent:

"As we become more and more active in this area, as we become more mature (...) the more we do this, and the more we provide support that is seen as impressive to major counter-terrorist inquiries like the Paris attacks, the more our reputation increases and the trust factor, the awareness factor increases so people, even counter-terrorist investigators, are willing to share with us. So it's the long game of building trust and confidence in the most conservative of communities."

In this context, it is important to recognise that the far-reaching powers recently embedded in specific JHA agencies' founding acts will necessarily place agencies in difficult balancing acts. For instance, the Frontex regulation considerably expanded and reinforced Frontex tasks substantially altering the nature of its relationship with national authorities, essentially introducing hierarchy in the relationship. Provisions on vulnerability assessment (Art. 13)—tasking the agency with a monitoring/supervisory tasks function over national authorities—and relatedly, on the deployment of liaison officers in Member States to monitor their management of the external borders, and the provisions on situations at the external border requiring urgent action (Art. 19) can become politically sensitive in terms of practical implementation. These run the risk of giving rise to frictions between the agency and national authorities on whose co-operation Frontex is in fact dependent for its performance/affecting

mutual trust and will require careful management (see also European Parliament study 2016, LIBE Study, p. 15). Similar observations would also apply with respect to the new powers foreseen in the proposal for a European Union Agency for Asylum, which envisages a monitoring role for the agency as well as the possibility to intervene when the functioning of the CEAS is jeopardised and the Member State in questions fails to take remedial action.

It is important to recognise that such provisions effectively change the nature of agencies' roles in fundamental ways. These bodies are moving from a support role to a policing role – i.e. to the monitoring of Member State application of EU legislation. Such changes will necessarily have implications for and spill-over effects in terms of agency activities in other areas—where these bodies continue to be dependent on Member States trust and good will. Agency respondents are acutely aware of such challenges. To illustrate:

“Members of the board are realising they can even get instructions from the agency. I see that this is disturbing, it's disturbing for many people.”⁶³

“That the agency now will be able to get into a Member State— will change also the nature of the relationship. Plus, this new monitoring role is also something that Member States don't like. Because they would rather see the agency as supporting them rather than monitoring them.”⁶⁴

“So am I welcoming that the pool of experts will be mandatory and the training will be mandatory? ‘Yes, but it's a big challenge.’”⁶⁵

Having national authorities' support is critical to EU agency functioning. Experience with various EU agencies models indicates that top-down centralisation structures tend to be more controversial in terms of implementation and practitioner support than decentralised efforts aimed at pooling national experience and expertise and which draw on incentives (financial and otherwise) and demonstrating added value to national offices to obtain their co-operation (see for instance, Busuioc 2013; 2016; Groneleer 2009). To the contrary, where national offices are co-opted within the EU agencies' work the emerging relationships appear to follow more symbiotic paths.

Command is not enough: The EU legislator should move away from simply mandating co-operation (command-type fixes) in JHA agencies founding acts as a strategy to address chronic co-operation challenges and focus on designing incentives for co-operation in founding acts—on designing structures that provide enhanced incentives to co-operate to national authorities.

This requires greater consideration of how the structure of the trans-national regime will impact national authorities' (resources, capacity, bureaucratic interests and priorities) and how EU-level structures can be better designed to alleviate sources of reluctance i.e., how incentives (e.g. resources, reputational etc.) can be harnessed through design to achieve co-operation. These insights are particularly relevant in the JHA context, where agencies are

⁶³ Agency Expert, 05.07.2017.

⁶⁴ Agency Expert, 27.06.2017.

⁶⁵ Agency Expert, 27.06.2017.

heavily dependent on co-operation from national authorities and, for the most part, cannot actually 'oblige' national authorities to co-operate.

6.3. Providing for Credible Sanctions for Non-Compliance

While founding acts mandate Member States compliance with a number of obligations as discussed above, mechanisms for follow up *at the political level* in the case of non-compliance with such obligations are often lacking or are inadequate. For instance, the obligation, referred to above, for Member States to provide Frontex with all necessary information, envisages no possibilities for follow-up/escalation and/or sanctions in cases of systematic non-compliance by a Member State. While stated as a formal obligation, *de facto* the agency remains for the most part dependent on Member State willingness to comply and share information.

In contrast, the obligation to supply Europol with information contained in the Europol regulation has been given some teeth by requiring Europol to report on information provided by each Member State (Art. 7(11)). This annual report is then sent to the European Parliament, the Council, the Commission and national parliaments. As noted above, information supply has been a significant and persistent challenge for the agency along the years. Such a report has not yet been produced, given that the regulation only recently came into force, but agency expectations are that the added transparency might produce positive effects:

"We have an actual example of how that could work. Over the last year, the counter-terrorism co-ordinator has provided statistics to the ministers personally on the amount of information of counter-terrorism data that MS are sharing with Europol. That data has come from Europol. On his initiative, he's decided to share it with ministers, effectively to name and shame them. But he's done it by providing sealed envelopes in each case of the data just for your Member State so you can't compare and contrast. And that's had quite a positive impact. The graph shows, this is the average for the 28, and this is where you are."⁶⁶

The disciplining potential of this provision however, is significantly watered down by the stipulation that the Europol management board adopts the (quantitative and qualitative) criteria for evaluation. The choice of evaluation criteria and indicators is crucial to shaping evaluation findings. The adoption of evaluation criteria by the board raises questions as to the independence and objectivity of the exercise. Member States are essentially tasked with defining the standards by which they subsequently get evaluated. It is particularly problematic given that this has been an area where historically national authorities have fallen short in respect of complying with their obligations.

Shortcomings are also visible in other follow-up mechanisms. For instance, the Frontex founding regulation foresees in the context of the vulnerability assessment that when a Member State does not implement the director's recommendation for remedial measures within the set time limits, the director *refers the matter to the management board* and notifies the Commission. The management board shall then adopt a binding decision setting out the

⁶⁶ Agency Expert, 07.07.2017.

necessary measures to be taken by the Member State concerned. This mechanism is aimed at harnessing peer pressure at the board level to engender compliance. Escalating Member State non-compliance to the Member States is a mechanism that creates the risk of paralysis in decision-making. Experience outside the JHA area shows that there can be reluctance among board members [often heads of national authorities] to adopt formal decisions against a national authority. European financial supervisory authorities for instance, have adopted very few formal decisions against national authorities through their boards of supervisors, composed of national authorities.⁶⁷

Where specific obligations to co-operate are provided in founding acts, meaningful mechanisms for follow-up by the EP, the Council or the Commission in cases of non-compliance should be explicitly envisaged in founding acts.

Such possibilities for escalation/sounding the alarm in case of MS non-compliance were for instance, explicitly envisaged in the amendments proposed in the LIBE Committee draft report on the proposal for a regulation on the European Union Agency for Asylum⁶⁸. Article 3(a) provided that if the executive director establishes a systematic failure to comply with the duty to cooperate in good faith, including the duty to provide timely and accurate information, he/she could submit a report to the management board and the Commission and state it in the annual activity report on the situation of asylum in the Union, which is sent to the management board, the European Parliament, the Council and the Commission and is presented to the European Parliament. It also required the agency to inform the European Parliament of the number of experts deployed to the asylum support teams and to list the Member States that have invoked the exceptional situation and their reasons for invoking it (Art. 17(8)(a)) and of the number of experts committed as well as deployed by each MS to the asylum intervention pool (Art. 18(3)(d)).

In June 2017, the Presidency of the Council and the European Parliament have reached a broad political agreement on the EU Agency for Asylum⁶⁹. **It is important that the final text of the regulation of the European Union Asylum Agency should explicitly envisage follow up mechanisms in case of non-compliance by national authorities with agreed obligations.**

It is also important to note however, that the effectiveness of such measures will be heavily dependent on such agency reports being followed up at the high political level in cases of consistent non-compliance. This therefore also places the onus of responsibility on the European Parliament and the Council to actively follow up on systematic non-compliance. The European Parliament will be receiving extensive pertinent information on Member State compliance with assumed obligations (e.g. Frontex vulnerability assessment; Europol annual report on information provision by each MS; see Tables in Annex 1 and 2 for an overview). The supply of information however, is a pre-requisite but not sufficient condition for accountability (Bovens 2007). Meaningful accountability requires account-holders to actively engage with the information provided, to ask questions and enact sanctions in cases of non-compliance. Furthermore, it is particularly here – aspects of Member State compliance with their formally assumed obligations - that the setup of joint

⁶⁷ http://www.cep.eu/fileadmin/user_upload/cep.eu/Studien/ESAs/cepStudy_ESA.pdf

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<http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE589.110>

⁶⁹ <http://www.consilium.europa.eu/en/press/press-releases/2017/06/29-eu-agency-for-asylum/>

parliamentary oversight structures could potentially play an important role in terms of overseeing MS co-operation efforts (see further point 7 below).

7. FUTURE PROSPECTS: JPSG, A GENERALISABLE JHA AGENCY OVERSIGHT MODEL?

KEY FINDINGS

- While not explicitly provided for in the Europol regulation, it is imperative that JPSG political oversight function extends to national authorities' co-operation with Europol. Member States cooperation has been an area where Europol has faced considerable challenges along the years and the involvement of national parliaments could play an important role in this respect. Such a JPSG oversight focus would meaningfully complement the scrutiny role of the European Parliament.
- It is important to ensure that the JPSG is not relegated to exercising only a symbolic oversight role but that it can carry out meaningful, effective oversight of Europol activities. Its organisation and rules of procedure should be tailored to that end. Given the JPSG composition envisaged, the setup of a small-scale, compact sub-structure of stable membership, which prepares JPSG meetings should be envisaged.
- The legislator should consider expanding the oversight role of the joint parliamentary group beyond Europol to the other JHA agencies. Inter-parliamentary oversight structures can be important settings for national parliaments to not only become well familiar with, and scrutinise, EU JHA agencies' work but also to gain insights into the activities of their respective national executive actors in this context and their inputs to the performance of specific JHA agencies (including, if relevant, the extent to which these inputs fall short of assumed responsibilities).
- Should the JPSG mandate be expanded to other JHA agencies beyond Europol, the current format should be amended to allow for its effective operation through the setup of a small-scale sub-structure and strong scrutiny prerogatives.

Article 88 TFEU requires the setup of procedures for the scrutiny of Europol's activities by the European Parliament, together with national parliaments. The setup of such a procedure is now provided for in Article 51 of Europol regulation in the form of a Joint Parliamentary Scrutiny Group (JPSG). The actual establishment of the JPSG was agreed by the Conference of Speakers of the EU Parliaments in Bratislava (23-24 April 2017).

Article 51(2) of the Europol Regulation stipulates that the JPSG "shall politically monitor Europol's activities in fulfilling its mission, including as regards the impact of those activities on the fundamental rights and freedoms of natural persons." The JPSG also has the right to draw conclusions on the political monitoring of Europol's activities and submit those conclusions to the European Parliament and national parliaments (Art. 51(5)).

While not explicitly provided for in the Europol regulation, it is imperative that JPSG political oversight function extends to national authorities' co-operation with Europol. Given the discussion above on co-operation challenges, it seems highly desirable that the JPSG's purview should include how national authorities discharge their responsibilities towards Europol and the extent to which they comply with their obligations, as provided for in the Europol's founding regulation. **As noted above, MS cooperation has been an area where Europol has faced considerable challenges along the years and**

the involvement of national parliaments could play an important role in this respect.

As already mentioned, JHA agencies are heavily dependent on co-operation from national authorities, and the provision of information, staff, resources and capacity. The manner in which national authorities discharge their roles and responsibilities (individually and collectively) in the functioning and governance of EU bodies— ranging from their management board responsibilities to the extent to which they provide required information or resources— is critical to these agencies' functioning. It has fundamental implications for their effectiveness and performance.

Such a JPSG oversight focus would meaningfully complement the scrutiny role of the European Parliament.

EU agencies like Europol are trans-national, multi-level structures, incorporating both EU and national administrations in their work; they are hybrid bodies. An important risk in terms of oversight, stemming from this dual character, is that key aspects of agency activities, or aspects pertinent to such activities, can fall between the cracks. By virtue of its similarly dual character, a joint parliamentary oversight body, can be especially well-suited to exercise meaningful oversight in this context. In fact, it will be argued that an inter-parliamentary scrutiny mechanism –if effectively designed- has the potential to become a generalisable oversight model (beyond Europol) for JHA agencies more broadly (see further below).

Article 51 of the Europol regulation stipulates that the organisation and the rules of procedure of the JPSG are to be determined jointly by the European Parliament and national parliaments (Art. 51(1)). The guidelines agreed in this respect by the Conference of Speakers of the EU Parliaments in Bratislava raise however, some concerns. While acknowledging that JPSG "is meant to be a scrutiny and monitoring body, as opposed to an inter-parliamentary conference and that the JPSG must be able to exercise its rights of scrutiny efficiently" (see Annex I to the Conclusions of the Conference of Speakers of the EU Parliaments), the composition provided for is likely to prove extremely cumbersome in terms of ensuring any meaningful oversight of Europol activities. Each national parliament can nominate up to four members and the European Parliament up to 16 members –bringing the size of this parliamentary scrutiny forum potentially to up to 128 delegates. While the envisaged composition scores high in terms of representativeness through a relatively high representation from each national parliament, its size will necessarily have implications for the quality of discussions/hearings, ability to reach agreement, speak with a coherent voice and extract meaningful accountability.

It is important to **ensure that the JPSG is not relegated to exercising only a symbolic oversight role but that it can carry out meaningful, effective oversight of Europol activities. Its organisation and rules of procedure should be tailored to that end. Given the JPSG composition envisaged, the setup of a small-scale, compact sub-structure of stable membership, which prepares JPSG meetings should be envisaged. What is more, to be able to extract meaningful accountability the provision of: strong scrutiny powers for the JPSG, the power to ask oral and written questions from a variety of witnesses beyond those explicitly specified in Article 51 (e.g. also MB representatives) as well as the power to request external specialist testimony should be envisaged.**

The legislator should consider expanding the oversight role of the joint parliamentary group beyond Europol to the other JHA agencies. Inter-parliamentary oversight structures (i.e. JPSG-type oversight structures) can be important settings for national parliaments to not only become well familiar with, and scrutinise, EU JHA agencies' work but also to gain insights into the activities of their respective national executive actors in this context and their inputs to the performance of specific JHA agencies (including, if relevant, the extent to which these inputs fall short of assumed responsibilities). This type of oversight platform can provide critical information and insights to allow for subsequent follow-up at the national level (according to the constitutional tradition of each Member State and at the discretion of the relevant national parliament). In other words, a joint parliamentary oversight structure across JHA agencies could be an important platform to extract accountability for JHA agencies' activities, to raise concerns of national administrations but also to raise awareness of on-going challenges faced by agencies and shortcomings in national-level inputs/involvement. It can play an important role in overcoming asymmetries of information between national parliaments and their executives in terms of national authorities' activities and inputs to EU agencies' work- by affording direct access to information and possibilities for follow-up questions with JHA agencies, at the European level.

As discussed above, and while there have also been important improvements in this respect, national authorities' co-operation with EU agencies has been an area of well-documented endemic challenges along the years and one where there have been considerable variations in the level of support and co-operation across Member States. A joint parliamentary oversight mechanism could help reduce information asymmetries of national parliaments by providing enhanced access to information on national actions at the EU level, enhancing national parliaments' ability to ask targeted questions at the national level and potentially help galvanise national authorities' support when these fall short of assumed obligations. In other words, oversight could have an important impact for improving performance and effectiveness of EU JHA agencies.

Furthermore, it is also important to note that national inputs to JHA agency functioning go beyond the role of an individual Member State/national authority. From an oversight perspective, what also matters is the *collective* involvement of national authorities to the functioning of the EU body. A joint parliamentary supervisory body for JHA agencies can play an important role in supervising such aspects of agency functioning, which would otherwise likely fall in between the two levels of governance – national and EU – when it comes to oversight. This is precisely an area where a *joint* oversight body can play an important role, closing an important accountability gap. **Should the JSPG mandate be expanded to other JHA agencies beyond Europol, the current format should be amended to allow for its effective operation through the setup of a small-scale sub-structure and strong scrutiny prerogatives, as discussed above.**

Accountability requires the ability to enact consequences when undesirable activities are exposed. The JPSG is limited in this respect to adopting summary conclusions, which are sent to the European Parliament and national parliaments. Therefore, how these forums in turn respond to these conclusions – the extent to which they become actively engaged in taking these conclusions into account in their own account-holding/in extracting accountability or to the contrary, remain passive recipients—will also be an important part of the effectiveness of this mechanism.

To a considerable extent, meaningful accountability will therefore depend on how and to what extent, the provisions contained in founding acts are used actively by account-holders to demand and extract accountability.

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ANNEX 1: KEY GOVERNANCE RESPONSIBILITIES (AN OVERVIEW)⁷⁰

	Europol	Eurojust	FRA	EASO	Frontex
Management board (MB) composition	1 rep. per MS and 1 COM rep. (+non-voting alternate per member) - A representative of JPSG may be invited by the MB to sit in the board as an observer Term of office: 4 years (renewable)	1 national member per MS (+ non-voting deputy and one assistant); - COM attends MB meetings on administrative matters (non-voting capacity) Term of office: "at least 4 years" (renewable)	1 independent person per MS, 1 independent person appointed by the Council of Europe and 2 representatives of the COM (+ non-voting alternate per member) Term of office: 5 years (not renewable)	1 member per MS, 2 COM members and 1 UNHCR rep. (non-voting) and 4 associate countries reps. (+non-voting alternate per member) Term of office: 3 years (renewable)	1 rep. per MS and 2 COM reps. and 4 associated countries reps. (+non-voting alternate per member) Term of office: 4 years (extendable)
De facto presence at board meetings	Approx. 80-100 people	A quorum (otherwise meetings do not take place)	Approx. 30 people	Approx. 70-100 people	Approx. 75 people
Frequency of board meetings	<i>De jure</i> : "at least two ordinary meetings a year"; <i>De facto</i> : MB meets 4 times a year	<i>De jure</i> : not specified; <i>De facto</i> : College administrative meetings take place 4-6 times a year	<i>De jure</i> : MB to be convened twice a year; <i>De facto</i> : MB meets twice a year	<i>De jure</i> : at least two ordinary meetings a year; <i>De facto</i> : MB meets 3-4 times a year	<i>De jure</i> : at least two ordinary meetings a year; <i>De facto</i> : MB meets 5 times a year
Executive Committee	<i>De jure</i> : Set up not explicitly foreseen in founding act (but advisory bodies and internal structures can be set up by MB- Art. 9(c)) <i>De facto</i> : No executive committee established	<i>De jure</i> : Set up not foreseen in founding act <i>De facto</i> : No executive committee established	<i>De jure</i> : Set up foreseen in founding act (Art. 11(b)) <i>De facto</i> : Executive committee in operation	<i>De jure</i> : Set up foreseen in founding act (Art. 29(2)) <i>De facto</i> : No executive committee established	<i>De jure</i> : Set up foreseen in founding act (Art. 62(7)) <i>De facto</i> : No executive committee established
Director appointment	- Appointed by the Council from a shortlist proposed by the MB; - Prior to appointment, the candidate selected by the Council may be invited to appear before the competent EP committee;	- The President is elected by the College from among its members, subject to Council approval. The COM and EP are invited as observers. - The Administrative Director is appointed by	- Appointed by the MB, based on a shortlist drawn up by the COM; - Shortlisted applicants address and reply to questions before the Council and the competent EP committee;	- Appointed by the MB, from a shortlist drawn up by the COM; - Selected candidate makes statement before relevant EP committee(s); - EP may adopt an opinion following statement;	- Appointed by the MB, on a list drawn up by the COM; - Shortlisted candidates make statement before the relevant EP committee(s) & answer questions;

⁷⁰ The table provides an overview of the agencies' key formal governance structures. Where relevant, references to the operation in practice of specific arrangements are explicitly indicated by referring to *de facto* governance arrangements.

	<ul style="list-style-type: none"> - EP committee shall give a <i>non-binding</i> opinion. 	<p>the College from a shortlist drawn up by a selection board, in which the COM is represented. The Council is invited as an observer.</p>	<ul style="list-style-type: none"> - The EP and Council give their opinions and state their orders of preference; - MB will appoint taking these opinions into account. 	<ul style="list-style-type: none"> - MB shall inform the EP of manner EP opinion on selected candidate was taken into account. 	<ul style="list-style-type: none"> - EP shall adopt an opinion following statement and may indicate a preferred candidate; - If the MB decides not to appoint EP preferred candidate, required to notify the EP and the Council in writing of the manner in which the opinion of the EP was taken into account.
<p>Key roles of the European Commission (COM)</p>	<ul style="list-style-type: none"> - 1 MB rep.; - Budget establishment process; - Receives annual report on the information provided to Europol by each MS; - Receives consolidated annual activity report; the multiannual programming and the annual work programme; - COM representative is part of the selection committees set up by the MB, which draws up shortlist for director appointment. - Undertakes, in association with MB, a performance evaluation before the end of the director's terms of office – assessment informs MB proposal to Council on director's mandate extension; - Ensures Europol's 5-year periodic evaluation is carried out (by 1 May 2022 and every 5 years thereafter) & submits report, together with MB observations and COM conclusions, to the EP, 	<ul style="list-style-type: none"> - Budget establishment process; - COM is fully associated with the work of Eurojust; - Memoranda of Understanding between Eurojust and Commission signed in 2012; - COM attends College meetings on managerial/administrative matters (in a non-voting capacity); - COM sits on the selection board which draws up the shortlist of candidates for administrative director and "shall be entitled to participate in the selection process." - Receives the external periodic 5-year evaluation report findings and recommendations; - Internal audit (IAS) 	<ul style="list-style-type: none"> - 2 MB reps.; - Budget establishment process; - COM drafts the proposal for the FRA Multiannual Framework (consults MB in its preparation); - Opinion on draft work programme; - Receives annual work programme; - Receives annual report and annual report on fundamental rights issues; - Draws up short list for director appointment; - Director can be dismissed by the MB on the basis of a Commission proposal; - Scientific committee members can be declared to independence and revoked by MB on a proposal from COM; - MB can establish, based on a proposal of the COM, that a board member or alternate no longer meets the criteria of independence; - Carries out performance evaluation during the last 9 months of director's 5-year term; 	<ul style="list-style-type: none"> - 2 MB reps.; - Budget establishment process; - Opinion on draft work programme prior to MB adoption; - Opinion on multi-annual staff policy plan; - Opinion on MB rules of procedure prior to MB adoption; - Receives annual report and annual report on the situation on asylum in the Union; - May request that the agency presents to COM annual report on the situation on asylum in the Union; - May request the agency to adopt technical documents on the implementation of the asylum instruments of the Union; - Gives agreement to the agency facilitating operational cooperation between Member States and third countries; - Draws up short list for director appointment; - Carries out performance evaluation during the last 	<ul style="list-style-type: none"> - 2 MB reps.; - Budget establishment process; - Opinion on multiannual programming and work programme; - Receives annual activity report, multiannual programming and work programme; - Draws up short list for director appointment; - Director can be dismissed by the MB on the basis of a COM proposal; - When a MS does not implement within time limits the exec. director's recommendation following the vulnerability assessment, the COM is informed; - When a MS does not implement within time limits the MB decision following the vulnerability assessment, the COM is informed; - Receives the results of the vulnerability assessment on a regular basis and "at least once a year"; - Drafts proposal to

	<p>Council, the national parliaments and the MB.</p> <ul style="list-style-type: none"> - Internal audit (IAS) 		<ul style="list-style-type: none"> - Agrees terms of reference with MB for the agency's independent external evaluation; - COM transmits external evaluation report and board recommendations to EP, Council, EESC, CoR and makes them public. - May submit proposals for amendment of the regulation following evaluation report and board recommendations. - Internal audit (IAS) 	<p>9 months of executive director's 5-year term;</p> <ul style="list-style-type: none"> - Consulted on the agency's financial regulation prior to MB adoption; - Terms of reference for the agency's independent external evaluations are agreed between the COM and the MB; - MB in agreement with COM decide timing of the agency's evaluations; - Internal audit (IAS) 	<p>Council for a decision by means of an implementing act if a situation at the external borders requiring urgent action arises (Art. 19);</p> <ul style="list-style-type: none"> - If a MS does not comply with this Council decision, triggers procedure Art. 29 of Reg. EU 2016/399; - Commissions the agency's independent external evaluation; - Internal audit (IAS)
<p>Key accountabilities to the European Parliament (EP)</p>	<ul style="list-style-type: none"> - Receives annual report on the information provided to Europol by each MS; - Receives the consolidated annual activity report; - Receives Europol's 5-year evaluation report together with COM conclusions and MB observations; - Discharge procedure; - Director appointment (see above); - EP is informed by MB of intention to propose to Council the extension of exec. director's mandate; - Executive director may be invited to appear before the competent EP committee within a month before any extension of term; - Access to sensitive non-classified and classified information processed by or through Europol subject to working arrangement agreed between EP and 	<ul style="list-style-type: none"> - Receives Eurojust's external periodic 5-year evaluation report findings and recommendations; - Receives an annual report on the activities carried out by Eurojust and on the activities of the JSB forwarded by the Presidency of the Council; - Discharge procedure. 	<ul style="list-style-type: none"> - Receives the work programme; - Receives the annual report and the annual report on fundamental rights issues; - Receives FRA external evaluation reports and board recommendation; - Discharge procedure; - Director appointment—EP role (see above); - Director 'may be called at any time' by the European Parliament for hearings; - EP is informed by MB of intention to extend the director's mandate; - Prior to mandate extension, the director may be asked to make a declaration and to answer questions before the competent EP committee; - EP is consulted on the appointment of scientific committee members prior to appointment by the MB; - Receives any information 	<ul style="list-style-type: none"> - Receives the annual report and work programme; - Discharge procedure; - Agency presents to EP the annual report on the situation on asylum in the Union; - Director appointment and extension of his/her mandate -EP role (see above); - May invite the executive director to report on performance of his duties. 	<ul style="list-style-type: none"> - Receives the annual activity report, multiannual programming and work programme; - Opinion on the multi-annual programming; - Discharge procedure; - Director appointment process- EP role (see above); - Receives the external evaluation from the COM; - Article 7 (explicit clause on the agency's accountability to EP and Council); - Receives the results of the vulnerability assessment on a regular basis and "at least once a year"; - Frontex informs the EP annually of the number of border guards committed by each MS, on the number actually deployed, lists MS that invoke exceptional situation and the reasons provided; - Frontex submits annually a report to EP on the

	<p>Europol; - Scrutiny of Europol activities together with national parliaments: Joint Parliamentary Scrutiny Group (JPSG).</p>		<p>relevant to the outcome of evaluation procedures conducted.</p>		<p>technical equipment committed by each MS to the equipment pool, lists MS that invoked the exceptional situation and the reasons provided; - Frontex informs the EP of activities conducted under Art. 54 on cooperation with third countries and includes an assessment of such cooperation in its annual reports; - EP is informed without delay if a situation requiring urgent action arises and of all subsequent measures and decisions taken in response; - EP may invite exec. director to report on the carrying out of his/her tasks; -Exec. director makes a statement before the EP if requested, and reports to EP regularly; -Receives any information relevant to the outcome of evaluation procedures conducted by the agency.</p>
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<p>Accountability to Council</p>	<ul style="list-style-type: none"> - Receives annual report on the information provided to Europol by each MS; - Receives consolidated annual activity report; -Receives the multiannual programming and the annual work programme; - Receives Europol's 5-year evaluation report together with COM conclusions and MB observations; - Appoints the executive director on the basis of a shortlist drawn up by the MB; - May extend the term of office of the executive director acting on a MB proposal; - May dismiss the executive director pursuant to an MB decision. - May invite the executive director to report on performance. 	<ul style="list-style-type: none"> - The President of the College reports in writing to the Council every year on Eurojust's activities and management; - The President shall also submit any report or any other information on the operation of Eurojust required by the Council; - The Council receives the Joint Supervisory Board's annual report; - Receives the external periodic five-year evaluation findings and recommendations; - The appointments of the College President and Vice-Presidents are subject to the Council's approval. 	<ul style="list-style-type: none"> - Council adopts FRA Multiannual Framework, acting on a proposal from the COM and after consulting the EP; - Receives the work programme; - Receives the annual report and the annual report on fundamental-rights issues; - Shortlisted applicants for director address the Council and reply to questions; - Council indicates order of preference among shortlisted candidates for director; - Director 'may be called at any time' by the Council for hearing; - Council is informed of MB intention to extend the director's mandate; - Receives any information relevant to the outcome of evaluation procedures conducted. 	<ul style="list-style-type: none"> - Receives the annual report and the annual report on the situation on asylum in the Union; - Receives annual work programme; - May invite the executive director to report on performance of his duties; - May request that the agency presents annual report on the situation on asylum in the Union; 	<ul style="list-style-type: none"> - Article 7 (explicit clause on the agency's accountability to EP and Council); - Receives the annual activity report, multiannual programming and work programme; - When a MS does not implement within time limits the MB decision following the vulnerability assessment, the Council is informed by MB; - Adopts, on the basis of a COM proposal, without delay a decision by means of an implementing act when a situation at the external borders requiring urgent action arises; - Receives the results of the vulnerability assessment on a regular basis and "at least once a year"; - The Council may invite the executive director to report on the carrying out of his/her tasks; - Receives any information relevant to the outcome of evaluation procedures conducted by the agency.
<p>External audit</p>	<p>- European Court of Auditors</p>	<p>- European Court of Auditors</p>	<p>- European Court of Auditors</p>	<p>- European Court of Auditors</p>	<p>- European Court of Auditors</p>
<p>Other key governance features</p>	<ul style="list-style-type: none"> - Data protection officer; - EDPS (monitors lawfulness of data processing by Europol); - National data protection authorities (monitor the lawfulness of personal data provided by national authorities to Europol); -Cooperation board (a 	<ul style="list-style-type: none"> - Data protection officer; - Joint Supervisory Body (JSB) (monitors Eurojust activities to ensure data processing is carried out in accordance with the Eurojust Decision). 	<ul style="list-style-type: none"> - Scientific Committee, composed of 11 independent persons; - Fundamental Rights Platform (makes suggestions to MB on annual work programme; feedback to MB and follow-up measures on the annual report; 	<ul style="list-style-type: none"> - Consultative forum (makes suggestions to MB on work programme; feedback to MB and follow up measures to annual report and annual report on asylum); - Independent evaluation of EASO (timing of evaluations decided by MB 	<ul style="list-style-type: none"> -Data protection officer; - Fundamental Rights Officer and complaints mechanism; - Consultative forum (consulted on the development of the fundamental rights strategy, the complaints mechanism, codes of

	<p>national authority per MS +EDSP);</p> <ul style="list-style-type: none"> - Joint Parliamentary Supervisory Group; - The chairperson of the MB, the executive director and their deputies appear for hearings before the JPSG at the latter's request; - JPSG receives Europol's multiannual and annual work programmes. 		<p>communicates outcomes and recommendations of conferences).</p>	<p>in agreement with COM).</p>	<p>conduct and on common core curricula).</p>
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ANNEX 2: COMPARATIVE TABLE (CONTINUED)

	EMCDDA	Cepol	eu-LISA
Management board (MB) composition	1 rep. per MS, 2 COM reps. and 2 reps. designated by the EP (+non-voting substitute) Term of office: until a new official nomination is made	1 rep per MS and 1 COM reps. (+non-voting alternate per member) Term of office: 4 years (extendable)	1 rep. per MS and 2 COM reps. (+non-voting alternates) -Associated countries and Europol and Eurojust as observers Term of office: 4 years (renewable)
Frequency of Board Meetings	<i>De jure</i> : "at least once a year"	<i>De jure</i> : Two ordinary meetings a year	<i>De jure</i> : at least one ordinary meeting every 6 months
Executive Committee	<i>De jure</i> : Set up foreseen in founding act (Art. 10)	<i>De jure</i> : Set up not foreseen in founding act	<i>De jure</i> : Set up not foreseen in founding act
Director appointment	- Appointed by the MB, on a proposal from the COM; - Prior to appointment, the candidate selected by the MB shall be invited to make a statement before the EP and answer questions.	- Appointed by the MB from a shortlist drawn up by a selection committee set up by the MB and composed of members designated by the MS and the COM.	- Appointed by MB from COM shortlist; - Prior to appointment, the candidate selected by the MB shall be invited to make a statement before the competent committee(s) of the EP and answer questions. - EP adopts opinion on selected candidate; - MB shall inform EP of the manner in which opinion has been taken into account.
Key roles of the European Commission (COM)	- 2 MB (and executive committee) reps.; - Budget establishment; - Opinion on three-year work programme and on the annual work programme; - Where the COM expresses disagreement, these programmes shall be adopted by three-fourths (rather than two-thirds) majority of MB; - Receives annual and three-year work programmes and annual report (forwarded by MB); - Director appointed on proposal from COM; - COM is consulted on financial rules applicable to the Centre prior to MB adoption; - Initiates the six-year external evaluation of the agency; - In the context of the external evaluation, shall, if appropriate, propose a revision to provisions of the EMCDDA founding regulation; - COM forwards the evaluation report to the	-1 MB rep.; - Budget establishment; - Opinion on annual work programme and multi-annual programmet; - Designates members to the selection committee that draws up the shortlist for director appointment; - By the end of the executive director's term of office, the COM, in association with the MB, undertakes an assessment taking into account an evaluation of the exec. director's performance and CEPOL's future tasks and challenges; - This assessment informs MB decision on the extension of the executive director's term of office; - Consulted on the financial rules applicable to Cepol prior to MB adoption; - COM ensures that Cepol 5-year evaluation is carried out (by 1 July 2021 and every 5 years thereafter) and submits report to the MB; - COM submits final	- 2MB reps.; - Budget establishment; - Opinion on annual and multi-annual work programme; - Consulted on the agency's organisational structure and rules of procedure; - Receives multi-annual staff policy plan and draft work programme; - Receives annual activity report and annual work programme; - Closely consulted by MB on the exec. director's evaluation (precedes the end of the 5-year term); - This evaluation informs MB decision to extend director's term in office; - Appoints 1 member to the Advisory Group relating to large-scale IT system; - Performs, in close consultation with MB, a periodic evaluation of the agency (within 3 years from 1 Dec. 2012 and every 4 years thereafter); - Issues recommendations on evaluation, together

	European Parliament, the Council and the MB; - Internal Audit Service (IAS)	evaluation report, together with MB observations and COM conclusions to the EP, Council and MB; - Internal Audit Service (IAS)	with MB opinion, and proposals for changes to founding regulation and transmits them to EP, Council and EDPS; - Internal Audit Service (IAS)
Key accountabilities to the European Parliament (EP)	- 2 MB reps. are designated by the EP; - Receives the annual and the three-year work programmes (forwarded by the MB); - Receives annual report (forwarded by MB); - Receives annually any information relevant to the outcome of the evaluation procedures; - Discharge procedure; - Director appointment (see above); - Each year the director shall submit to EP the general report on the Centre's activities; - EP may ask for a hearing with the Director and the Chairperson of the MB on any subject related to the Centre's activities; - Receives EMCDDA external evaluation report (forwarded by COM).	-Receives annual work programme and multi-annual programming document (forwarded by the MB); - EP is consulted on multi-annual programming document; - Discharge procedure; - The executive director shall report to the EP on the performance of his or her duties when invited to do so; - Each year the executive director shall send all information relevant to the findings of any evaluation procedures; - Receives Cepol 5-year periodic evaluation report.	-Receives multi-annual staff policy plan and draft work programme; - Receives annual work programme and annual activity report; - Discharge procedure; - Director appointment (see above); - MB shall inform EP of intention to extend the exec. director's mandate; - Within the month before mandate extension, the exec. director shall be invited to make a statement before the competent committee(s) and answer questions; - The EP and the Council may invite the exec. director to report on the implementation of his tasks; - Receives COM recommendations on the agency's periodic evaluation, together with MB opinion, and proposals for changes to founding regulation.
Accountability to Council	- Receives the three-year and the annual work programme (forwarded by the MB); - Receives annual report (forwarded by MB); - Receives EMCDDA external evaluation report (forwarded by COM)	- Receives annual work programme and multi-annual programming document (forwarded by MB); - The Council may invite the executive director to report on the performance of his or her duties; - Receives Cepol periodic evaluation report;	- Receives annual work programme and annual activity report; - The EP and the Council may invite the exec. Director to report on the implementation of his tasks; - Receives COM recommendations on the agency's periodic evaluation, together with MB opinion, and proposals for changes to founding regulation.
External audit	- European Court of Auditors	- European Court of Auditors	- European Court of Auditors
Other key governance features	- Scientific Committee (consists of at most fifteen independent scientists) – assists director and MB.	- Scientific Committee for Training (composed of high level academics and law enforcement practitioners) –an independent advisory body ensuring scientific quality of Cepol's training related work.	- Data protection officer; - Security officer.

ANNEX 3: INTERVIEW RESPONDENTS

Eurojust

Michèle Coninx, President of Eurojust

Ladislav Hamran, Vice-President of Eurojust

Klaus Meyer-Cabri, Vice-President of Eurojust

Europol

Rob Wainwright, Executive Director, Europol

Gregor Wewer, Senior Specialist, Director's Cabinet, Europol

Frontex

Fabrice Leggeri, Executive Director, Frontex

Klaus Rösler, Director of Operations Division, Frontex

Thibault de La Haye Jousselein, Head of Cabinet, Frontex

FRA

Michael O'Flaherty, Director, European Union Fundamental Rights Agency

Andreas Accardo, Head of Director's Office, European Union Fundamental Rights Agency

EASO

José Carreira, Executive Director, European Asylum Support Office

Mark Camilleri, Senior Policy Officer, Executive Office, European Asylum Support Office

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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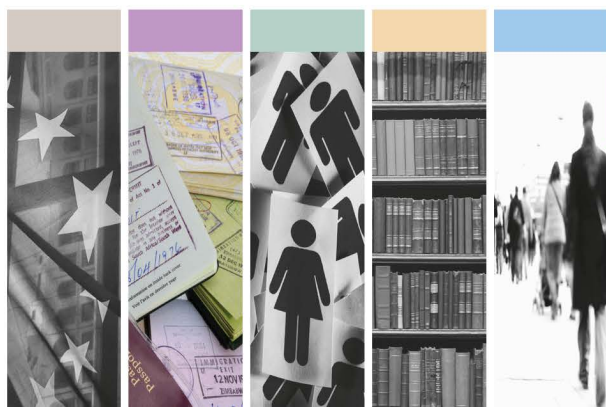
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