

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **D**
BUDGETARY AFFAIRS

Budgets

Budgetary Control



The income of fully self-financed Agencies and the EU budget

STUDY





DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT D: BUDGETARY AFFAIRS

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STUDY

Abstract

This study analyses the determination of fees, the treatment of budgetary surpluses and the discharge procedure of the two fully self-financed EU agencies, namely the Community Plant Variety Office (CPVO) and the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM). In this regard, it describes the current legal situation and discusses issues such as governance structures and rules on fee determination and the treatment of surpluses. The study presents and examines current proposals for review of the existing rules and procedures for fee determination, treatment of surpluses and budgetary discharge of fully self-financed EU agencies.

This study was commissioned by the European Parliament's Committee on Budgets. It designated Ms Anne Jensen, MEP, and Ms Angelika Werthmann, MEP, to follow the study.

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LINGUISTIC VERSIONS

Original: EN
Translation: Executive summary in DE and FR

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Manuscript completed in September 2013.
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LIST OF ABBREVIATIONS

AIM	European Brand Association
APRAM	Association of Trade Mark and Design Law Practitioners
BusinessEurope	Union of Industrial and Employers Confederations of Europe
CdT	Translation Centre for the Bodies of the European Union
CIOPORA	International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties
CNIPA	Committee of National Institutes of Patent Agents
CPVO	Community Plant Variety Office
CPVR	Community Plant Variety Right
CTM	Community trade mark
DG	Directorate-General
ECA	European Court of Auditors
ECTA	European Communities Trade Mark Association
EFPIA	European Federation of Pharmaceutical Industries and Associations
ESA	European Seed Association
EU	European Union
FFR	Financial Framework Regulation No 2343/2002, as amended
FICPI	International Federation of Intellectual Property Attorneys
GRUR	German Association for the Protection of Intellectual Property
ICC	International Chamber of Commerce
INTA	International Trademark Association
IP	Intellectual Property
MARQUES	Association of European Trade Mark Owners

- MEP** Member of the European Parliament
- OHIM** Office for Harmonisation in the Internal Market (Trade Marks and Designs)
- Plantum** Dutch Association for the Plant Reproduction Material Sector
- TFEU** Treaty on the Functioning of the European Union
- UNION** Union of European Practitioners in Industrial Property
- UPOV** International Union for the Protection of New Varieties of Plants
- WIPO** World Intellectual Property Organization

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EXECUTIVE SUMMARY

Introduction

This study analyses the determination of fees, the treatment of budgetary surpluses and the discharge procedure of the two fully self-financed EU agencies, i.e. the Community Plant Variety Office (CPVO) and the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM).

The study describes the current legal situation and discusses issues such as governance structures and rules on fee determination and the treatment of surpluses. The study also examines the various changes that stakeholders have proposed for a potential review of the existing rules and procedures for fee determination, treatment of surpluses and budgetary discharge of fully self-financed EU agencies. Finally, the study's conclusions propose measures or principles which are relevant to future policy discussions on these agencies.

The study has been prepared by Deloitte for the European Parliament, Directorate General for Internal Policies, Policy Department D: Budgetary Affairs. It is based on a comprehensive literature review and a series of interviews with relevant institutional stakeholders (listed in annex).

Determination of fees and treatment of surpluses of fully self-financed agencies

According to their basic regulations, the fees of the two fully self-financed EU agencies – CPVO and OHIM – must be fixed at levels which ensure that the agencies' budgets are balanced. Consequently, even if not explicitly stated, any (accumulation of) surpluses or deficits should be avoided. Fees are determined via the "comitology" procedure (involving the Council and the European Commission) based on input and proposals from the agencies' management boards. There are currently no additional legal provisions that regulate the treatment of surpluses of fully self-financed agencies.

As a result of repeated positive budgetary outturns, CPVO and OHIM have accumulated significant cash reserves which can be considered as going well beyond the recognised need for a reasonable reserve fund in order to deal with unforeseen drops in income. One may thus consider that the agencies have not complied with the balanced budget principle set out in their basic regulations.

Given the important role played by the management boards of the two agencies in developing fee level policy, and the fact that many management board members or their employing authorities are often also directly involved on behalf of their Member State in determining the definitive fee levels in the "comitology" procedure, the situation creates a clear danger of "divided loyalties" – to the principles of the agencies' basic regulations on the one hand, and the national IP offices on the other. The lack of clear and automatic rules for dealing with fee determination in case a balanced budget is not achieved has also contributed to this situation of building-up of surpluses.

In addition to non-compliance with the balanced budget principle, high levels of fees have also been considered as disguised indirect taxation on the agencies' users. Furthermore, evidence suggests that the high fees charged in order to obtain Community intellectual property rights may hinder SMEs from taking full advantage of the Internal Market.

In order to deal with this situation and reduce the accumulation of surpluses, both CPVO and OHIM have adjusted their fees downwards. In the case of OHIM, the fee reductions of 2005 and 2009 have been insufficient to “eat up” accumulated surpluses, as total annual levels of income have not reduced. Rather, recent efforts to reduce OHIM’s surplus have been essentially focussed on an accelerated consumption of reserves by increasing spending.

Some management board members representing Member State authorities in the agencies have also exhibited a tendency to support measures that redistribute accumulated funds to the Member States and their national IP offices rather than to those who were obliged to pay fees that proved to be excessive (i.e. the agencies’ users) or to the EU. The absence of clear and automatic rules for the treatment of surpluses contributes to this situation. Furthermore, the control and incentive structures of the two agencies have been judged by the European Court of Auditors as being insufficient to fully prevent the risk of agencies wasting accumulated surpluses and excess revenues.

The following measures or principles could be considered in this regard:

- The financial perspectives of fully self-financed agencies could be reviewed annually.
- Fees of such agencies could be determined by the European Commission, with veto rights for the Council of the EU and the European Parliament as foreseen by Art. 290 TFEU (to replace the “comitology” approach).
- Clearer rules for the determination of fees could be developed, including a specific objective to avoid the accumulation of significant surpluses, and potentially the principle of capping fees to the level of full cost recovery (with full costs ideally being defined based on a zero-based budgeting approach).
- Fee adjustment procedures could be automatically triggered in case of recurring surpluses (or deficits).
- Accumulated surpluses could be used to reduce the level of renewal/annual fees in order to reimburse the agencies’ users that have been “overcharged” in the past.
- Transfers of the agencies’ surpluses to the EU budget, to the Member States or their national IP offices should be avoided as they introduce a disguised indirect taxation on companies at EU level which is not foreseen by the Treaties.
- Clear legal rules could be developed on what should be done with significant surpluses – while setting appropriate incentives to avoid the accumulation of such surpluses in future (through a realistic cost-based fee determination).
- The appropriate maximum level of reserve funds that may be held by fully self-financed agencies could be determined. Above the levels the rules for the treatment of significant surpluses would be triggered.
- A review of the governance structures of the agencies could take place in view of better representing both the European rather than national interest (e.g. by strengthening the position of the European Commission) and the interests of the agencies’ users (e.g. by providing them a certain number of permanent seats in the management boards).
- A reflection on the appropriate degree of European integration of the European trademark and plant variety systems could take place, notably in view of fostering the competitiveness of the European economy, in particular of SMEs.

Some of these points are currently considered for OHIM in the framework of the review of the agency's basic regulation based on a legislative proposal of the European Commission of March 2013.¹

Discharge of fully self-financed agencies

Article 208 of Financial Regulation No 966/2012 exempts fully self-financed EU agencies from budgetary discharge by the European Parliament because these agencies, by definition, do not receive any contributions charged to the EU budget.

These agencies' discharge authorities and procedures are defined in their respective basic regulations. Accordingly, the CPVO Administrative Council and the OHIM Budget Committee grant discharge to their respective agencies' Presidents in respect of the implementation of the budget.

The need to secure European-level democratic accountability of fully self-financed EU agencies – which are in charge of implementing EU policies, but are not subject to the European Parliament's discharge – is recognised by all three EU Institutions.² Yet, the views on how this could be achieved differ widely – ranging from changing the current situation to allow the European Parliament to grant discharge to fully self-financed agencies, to varying types of involvement of the European Parliament in the agencies' governance and control structures, but without any formal budgetary discharge powers.

The following measures or principles could be considered in this regard:

- The inter-institutional compromise reached in 2012 in the framework of the Common Approach on decentralised agencies foresees that fully self-financed agencies shall submit to the European Parliament, to the Council and to the European Commission an annual report on the execution of their budget and consider requests or recommendations issued by the European Parliament and Council.
- After reasonable time has elapsed to permit this procedure to take place and to produce evidence of its value, a structural reflection and political debate should take place on the lessons learned and the degree to which democratic accountability of fully self-financed EU agencies has been achieved.

¹ European Commission (2013a): *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark*, COM(2013) 161 final, Brussels.

² European Parliament / Council of the European Union / European Commission (2012): *Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies*, Brussels, point 58.

ZUSAMMENFASSUNG

Einführung

In dieser Studie werden die Festlegung von Gebühren, der Umgang mit Haushaltsüberschüssen und das Verfahren zur Haushaltsentlastung von zwei vollständig selbstfinanzierten EU-Agenturen analysiert und zwar vom Gemeinschaftlichen Sortenamtsamt (CPVO) und dem Harmonisierungsamt für den Binnenmarkt (Marken, Muster und Modelle) (OHIM).

Die Studie beschreibt die gegenwärtige Rechtslage und behandelt Themen, wie z. B. die Führungsstrukturen, die Regeln zur Festlegung von Gebühren und den Umgang mit Überschüssen. Im Rahmen dieser Studie werden ebenfalls die zahlreichen Änderungen untersucht, die Interessenvertreter zur Überarbeitung der bestehenden Regeln und Verfahren zur Festlegung von Gebühren, zum Umgang mit Überschüssen und zur Entlastung des Haushalts von vollständig selbstfinanzierten EU-Agenturen vorgeschlagen haben. Abschließend werden ausgehend von den Ergebnissen dieser Studie Maßnahmen oder Grundsätze empfohlen, die für zukünftige politische Diskussionen über diese Agenturen relevant sind.

Diese Studie wurde von Deloitte im Auftrag der Generaldirektion Interne Politikbereiche der Union, Direktion D – Haushaltsangelegenheiten, des Europäischen Parlaments durchgeführt. Eine umfassende Literaturrecherche und eine Reihe von Gesprächen mit den betroffenen Vertretern der Institutionen (eine Liste befindet sich im Anhang) bilden die Grundlage für diese Studie.

Festlegung von Gebühren und Umgang mit Überschüssen von vollständig selbstfinanzierten Agenturen

Gemäß ihrer Grundverordnung muss die Höhe der Gebühren der beiden selbstfinanzierten EU-Agenturen – CPVO und OHIM – so festgelegt werden, dass ein ausgeglichener Haushalt der Agentur sichergestellt wird. Folglich sind Überschüsse oder Defizite (oder eine Kumulation davon) zu vermeiden, auch wenn dies nicht ausdrücklich angegeben ist. Die Gebühren werden nach dem sogenannten „Komitologieverfahren“ (unter Beteiligung des Rates und der Europäischen Kommission) basierend auf den Beiträgen und Vorschlägen der Agenturvorstände festgelegt. Es gibt derzeit keine weiteren gesetzlichen Bestimmungen, die den Umgang mit Überschüssen von vollständig selbstfinanzierten Agenturen regeln.

Aufgrund von wiederholt positiven Haushaltsergebnissen haben die Agenturen CPVO und OHIM erhebliche Barreserven angehäuft, die weit über den erforderlichen Bedarf an Rücklagen für den Umgang mit unvorhergesehenen Einnahmenverlusten hinausgehen. Man kann deshalb davon ausgehen, dass die Agenturen nicht entsprechend dem in ihrer Grundverordnung verankerten Grundsatz des ausgewogenen Haushalts handeln.

Angesichts der großen Bedeutung, die der Vorstand dieser beiden Agenturen bei der Festlegung der Gebührenordnung spielt, und der Tatsache, dass viele Vorstandsmitglieder oder die Behörden, bei denen sie beschäftigt sind, häufig auch als Vertreter ihres Mitgliedstaats im Rahmen des „Komitologieverfahrens“ an der Festlegung der endgültigen Gebührenordnung beteiligt sind, birgt diese Situation eindeutig die Gefahr eines Interessenkonflikts durch eine „geteilte Loyalität“: gegenüber den Prinzipien in der Grundverordnung der Agentur auf der einen Seite und den nationalen Stellen für gewerbliches Eigentum auf der anderen Seite. Das Fehlen eindeutiger und

automatischer Regeln in Bezug auf die Festlegung der Gebührenhöhe für den Fall, dass kein ausgeglichener Haushalt erreicht werden kann, hat auch zu dieser Situation, d. h. zur Kumulation von Überschüssen, beigetragen.

Neben der Nichteinhaltung des Grundsatzes des ausgewogenen Haushalts gelten diese hohen Gebühren auch als verschleierte indirekte Besteuerung von Nutzern der Agenturen. Darüber hinaus deutet einiges darauf hin, dass die hohen Gebühren zum Erhalt gemeinschaftlicher Rechte des geistigen Eigentums möglicherweise kleine und mittelständische Unternehmen (KMU) daran hindern, die Vorteile des Binnenmarkts uneingeschränkt zu nutzen.

Um dieser Situation zu begegnen und die Anhäufung von Überschüssen zu verringern haben die Agenturen CPVO und OHIM ihre Gebühren dementsprechend verringert. Im Falle der Agentur OHIM waren die Gebührensenkungen in den Jahren 2005 und 2009 jedoch nicht ausreichend, um die angehäuften Überschüsse abzubauen, da das jährliche Gesamteinkommen nicht abgenommen hat. Vielmehr haben sich die jüngsten Bemühungen zum Abbau der Überschüsse seitens der OHIM im Wesentlichen auf einen beschleunigten Verbrauch der Rücklagen durch Steigerung der Ausgaben konzentriert.

Einige Vorstandsmitglieder, die bei den Agenturen die Behörden eines Mitgliedstaats vertreten, unterstützen zudem tendenziell Maßnahmen zur Übertragung von angehäuften Überschüssen an die Mitgliedstaaten und ihre nationalen Stellen für gewerbliches Eigentum anstatt an diejenigen, die zur Zahlung der Gebühren verpflichtet sind (d. h. an die Nutzer der Agenturen), oder die EU. Das Fehlen von eindeutigen und automatischen Regeln für den Umgang mit Überschüssen trägt zu dieser Situation bei. Darüber ist der Europäische Rechnungshof zu dem Schluss gekommen, dass die Kontroll- und Anreizstrukturen der beiden Agenturen nicht ausreichen, um das Risiko einer Verschwendung von angehäuften Überschüssen und überschüssigen Einkünften durch die Agenturen vollständig zu verhindern.

In dieser Hinsicht sollten folgende Maßnahmen oder Grundsätze in Betracht gezogen werden:

- Die finanziellen Vorausschau von vollständig selbstfinanzierten Agenturen könnten jährlich überprüft werden.
- Die Gebühren dieser Agenturen könnten von der Europäischen Kommission festgelegt werden, wobei der Rat und das Parlament, wie in Artikel 290 AEUV (als Ersatz für das Komitologieverfahren) vorgesehen, ein Vetorecht erhalten.
- Es könnten eindeutiger Regeln zur Festlegung von Gebühren definiert werden, einschließlich des speziellen Ziels zur Vermeidung einer Anhäufung signifikanter Überschüsse und möglicherweise dem Grundsatz der Deckelung der Gebühren auf dem Niveau der vollständigen Kostendeckung (wobei die vollständigen Kosten idealerweise anhand einer Nullbasisbudgetierung definiert werden).
- Gebührenanpassungsverfahren könnten im Falle von wiederholten Überschüssen (oder Defiziten) automatisch ausgelöst werden.
- Angehäufte Überschüsse könnten verwendet werden, um die Verlängerungs-/Jahresgebühren zu senken, um die Nutzer der Agentur zu entschädigen, die in der Vergangenheit „zu viel“ bezahlt haben.
- Eine Übertragung der von der Agentur erwirtschafteten Überschüsse an den EU-Haushalt, die Mitgliedstaaten oder deren nationale Stellen für gewerbliches Eigentum sollte vermieden werden, da dies einer verschleierten indirekten Besteuerung von Unternehmen auf EU-Ebene gleichkäme, die in den Verträgen nicht vorgesehen ist.

- Es könnten eindeutige gesetzliche Regeln in Bezug auf die Vorgehensweise bei signifikanten Überschüssen erarbeitet werden und gleichzeitig geeignete Anreize zur zukünftigen Vermeidung einer Anhäufung derartiger Überschüsse festgelegt werden (über eine realistische kostenbasierte Gebührenordnung).
- Es könnte ein angemessener Höchstbetrag für Rücklagen festgelegt werden, den vollständig selbstfinanzierte Agenturen einbehalten dürfen. Bei einer Überschreitung dieses Betrags würden die Regeln zum Umgang mit signifikanten Überschüssen Anwendung finden.
- Die Verwaltungsstrukturen von Agenturen könnten überarbeitet werden, um sowohl die europäischen und nicht die nationalen Interessen (z. B. durch die Stärkung der Position der Kommission) als auch die Interessen der Nutzer der Agenturen (z. B. durch die Bereitstellung einer bestimmten Anzahl an permanenten Sitzen in den Vorständen) besser zu repräsentieren.
- Es könnten Überlegungen über ein angemessenes Maß an europäischer Integration der europäischen Marken- und Sortenschutzsysteme angestellt werden – vor allem im Hinblick auf die Stärkung der Wettbewerbsfähigkeit der europäischen Wirtschaft, insbesondere der KMU.

Einige dieser Punkte werden derzeit für die OHIM im Rahmen der Überarbeitung der Grundverordnung der Agentur basierend auf einem Gesetzgebungsvorschlag der Kommission von März 2013 geprüft³.

Entlastung von vollständig selbstfinanzierten Agenturen

Vollständig selbstfinanzierte EU-Agenturen sind gemäß der Finanzverordnung Nr. 966/2012, Artikel 208 von einer Haushaltsentlastung durch das Europäische Parlament befreit, da sie per Definition keine Zuschüsse zulasten des EU-Haushalts erhalten.

Die für die Entlastung zuständigen Organe und die Entlastungsverfahren der Agenturen sind in deren jeweiliger Grundverordnung festgelegt. Demzufolge erteilen der CPVO-Verwaltungsrat und der OHIM-Haushaltsausschuss dem Präsidenten der jeweiligen Agentur die Entlastung für die Ausführung des Haushaltsplans.

Die Notwendigkeit zur Sicherung der demokratischen Rechenschaftspflicht auf EU-Ebene von vollständig selbstfinanzierten EU-Agenturen (die für die Umsetzung der EU-Richtlinien verantwortlich sind, aber nicht der Entlastung durch das Europäische Parlament unterliegen) wird von allen drei EU-Institutionen⁴ anerkannt. Die Meinungen, wie dies zu erreichen ist, gehen jedoch stark auseinander. Sie reichen von der Änderung der aktuellen Situation, sodass das Europäische Parlament den vollständig selbstfinanzierten Agenturen Entlastung erteilen muss, bis hin zu den unterschiedlichsten Arten der Beteiligung des Europäischen Parlaments an den Verwaltungs- und Kontrollstrukturen der Agenturen, aber ohne die formale Befugnis zur Haushaltsentlastung.

³ Europäische Kommission (2013a): Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates zur Änderung der Verordnung (EG) Nr. 207/2009 vom 26. Februar 2009 über die Gemeinschaftsmarke, COM(2013) 161 final, Brüssel.

⁴ Europäisches Parlament, Rat der Europäischen Union und Europäische Kommission (2012): Gemeinsame Erklärung und Gemeinsamer Ansatz des Europäischen Parlaments, des Rates der EU und der Europäischen Kommission zu den dezentralen Agenturen, Ziffer 58.

Die folgenden Maßnahmen könnten diesbezüglich in Betracht gezogen werden:

- Der interinstitutionelle Kompromiss, der 2012 im Rahmen des Gemeinsamen Ansatzes für dezentrale Agenturen erzielt wurde, sieht vor, dass vollständig selbstfinanzierte Agenturen dem Parlament, dem Rat und der Kommission einen Jahresbericht zur Ausführung des Haushaltsplans vorlegen und etwaige Anfragen oder Empfehlungen seitens des Parlaments oder Rats berücksichtigen müssen.
- Nach einem angemessenen Zeitraum, in dem dieses Verfahren ausgeführt und festgestellt wird, ob es sinnvoll ist, sollte eine strukturelle Betrachtung und politische Debatte über die bisherigen Erfahrungen und das Maß an demokratischer Rechenschaftspflicht erfolgen, das von vollständig selbstfinanzierten EU-Agenturen erreicht wurde.

SYNTHESE

Introduction

La présente étude analyse la fixation des redevances, le traitement des excédents budgétaires et la décharge du budget des deux agences de l'Union européenne entièrement autofinancées, à savoir l'Office communautaire des variétés végétales (OCVV) et l'Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI).

Elle présente la situation juridique en vigueur et porte sur des questions telles que les structures de gouvernance et les règles applicables à la fixation des redevances et au traitement des excédents. L'étude analyse également les diverses modifications proposées par les parties prenantes en vue d'une éventuelle révision des règles et procédures en vigueur pour la fixation des redevances, le traitement des excédents et la décharge budgétaire des agences de l'Union européenne entièrement autofinancées. Enfin, des mesures ou des principes pertinents en vue des futures discussions stratégiques sur ces agences sont proposés dans les conclusions de l'étude.

Cette étude a été préparée par Deloitte pour la direction générale des politiques internes de l'Union, département thématique D: Affaires budgétaires, du Parlement européen. Elle se fonde sur un examen complet de la littérature et sur une série d'entretiens conduits avec les parties prenantes institutionnelles compétentes (énumérées en annexe).

Fixation des redevances et traitement des excédents des agences entièrement autofinancées

En vertu de leur règlement de base, les redevances des deux agences européennes entièrement autofinancées – l'OCVV et l'OHMI – doivent être fixées à des niveaux qui garantissent l'équilibre de leur budget. Par conséquent, il convient d'éviter toute accumulation d'excédents ou de déficits, même si ce principe n'a pas été mentionné explicitement. Les redevances sont fixées par l'intermédiaire de la "comitologie" (impliquant la participation du Conseil et de la Commission européenne) sur la base de la contribution et des propositions des conseils d'administration des agences. À l'heure actuelle, il n'existe pas d'autres dispositions juridiques régissant le traitement des excédents des agences entièrement autofinancées.

À la suite de plusieurs résultats budgétaires positifs, l'OCVV et l'OHMI ont accumulé d'importantes réserves de liquidités qui peuvent être considérées comme étant bien supérieures à la nécessité avérée d'un fonds de réserve raisonnable afin de faire face aux baisses de recettes imprévues. Il peut donc être considéré que ces agences ne se sont pas conformées au principe de budget en équilibre établi dans leur règlement de base.

Étant donné le rôle important joué par les conseils d'administration des deux agences dans l'établissement d'une politique relative au niveau des redevances et au vu du fait que de nombreux membres des conseils d'administration ou les autorités qui les emploient participent aussi souvent directement, au nom de leur État membre, à la fixation des niveaux de redevance définitifs en "comitologie", il existe un risque évident de "loyauté divisée" – d'une part, envers les principes établis dans les règlements de base des agences et, d'autre part, envers les offices nationaux de propriété intellectuelle. L'absence de règles précises et automatiques pour fixer les redevances en cas de budget non équilibré a également contribué à cette situation d'accumulation d'excédents.

Outre le non-respect du principe de budget équilibré, les niveaux élevés de redevances ont également été considérés comme un impôt indirect déguisé sur les utilisateurs des agences. De plus, il a été démontré que les redevances élevées facturées pour l'obtention de droits communautaires de propriété intellectuelle peuvent empêcher les PME d'exploiter pleinement le marché intérieur.

Pour faire face à cette situation et réduire l'accumulation d'excédents, l'OCVV et l'OHMI ont revu leurs redevances à la baisse. Dans le cas de l'OHMI, les réductions des redevances de 2005 et de 2009 n'ont pas suffi à absorber les excédents accumulés, puisque les niveaux annuels totaux des recettes n'ont pas baissé. Les efforts récemment déployés pour réduire les excédents de l'OHMI ont plutôt été axés sur l'utilisation accélérée des réserves en augmentant les dépenses.

Des membres des conseils d'administration représentant les autorités des États membres au sein des agences ont également affiché une certaine tendance à soutenir des mesures visant à redistribuer les fonds accumulés aux États membres et à leurs offices nationaux de propriété intellectuelle plutôt qu'aux personnes qui étaient contraintes de verser des redevances qui se sont avérées excessives (c'est-à-dire les utilisateurs des agences) ou à l'Union européenne. L'absence de règles claires et automatiques relatives au traitement des excédents contribue à cette situation. En outre, les structures de contrôle et d'incitation des deux agences ont été considérées par la Cour des comptes européenne comme étant insuffisantes pour prévenir le risque de voir les agences gaspiller les excédents accumulés et les recettes excédentaires.

À cet égard, les mesures ou principes politiques suivants pourraient être envisagés:

- les perspectives financières des agences entièrement autofinancées pourraient être révisées sur une base annuelle.
- les redevances de ces agences pourraient être fixées par la Commission européenne, avec un droit de veto pour le Conseil de l'Union européenne et le Parlement européen, comme le prévoit l'article 290 du traité FUE (afin de remplacer l'approche de type "comitologie").
- des règles plus claires pour la fixation des redevances pourraient être établies, fixant un objectif spécifique visant à éviter l'accumulation d'excédents significatifs et appliquant éventuellement le principe qui consiste à plafonner les redevances au niveau du recouvrement de la totalité des coûts (la totalité des coûts étant idéalement définie sur la base d'une approche de budgétisation à base zéro).
- des procédures d'ajustement des redevances pourraient être automatiquement déclenchées en cas d'excédents (ou de déficits) à répétition.
- les excédents accumulés pourraient être utilisés pour réduire le niveau des taxes de renouvellement/redevances annuelles afin de rembourser les utilisateurs des agences qui ont été "surfacturés" par le passé.
- il convient d'éviter les transferts des excédents des agences au budget de l'UE, aux États membres ou à leur office national de propriété intellectuelle, car ils créent un impôt indirect déguisé pour les entreprises européennes qui n'est pas prévu par les traités.

- des règles juridiques claires pourraient être établies en ce qui concerne l'utilisation des excédents significatifs – tout en mettant en place des incitants appropriés en vue d'éviter cette accumulation d'excédents à l'avenir (au moyen d'une fixation des redevances réaliste, fondée sur les coûts).
- il convient de définir le niveau maximal approprié de fonds de réserve pouvant être détenu par des agences entièrement autofinancées. Les règles relatives au traitement des excédents significatifs seraient déclenchées une fois ces niveaux dépassés.
- les structures de gouvernance des agences pourraient être révisées afin de mieux de représenter tant les intérêts européens, au lieu des intérêts nationaux (par exemple en renforçant la position de la Commission européenne), que les intérêts des utilisateurs des agences (par exemple en leur offrant un certain nombre de sièges permanents au sein des conseils d'administration).
- il convient d'engager une réflexion concernant le degré approprié d'intégration dans l'Union des régimes européens d'obtention de marques et de variétés végétales, notamment en vue d'encourager la compétitivité de l'économie européenne, et en particulier des PME.

Plusieurs de ces points sont actuellement envisagés pour l'OHMI dans le cadre de la révision du règlement de base de l'agence fondée sur une proposition législative de la Commission européenne de mars 2013.⁵

Décharge des agences entièrement autofinancées

L'article 208 du règlement financier n° 996/2012 exempte les agences de l'Union entièrement autofinancées de la décharge budgétaire donnée par le Parlement européen, car, par définition, ces agences ne reçoivent pas de contributions à la charge du budget.

Les autorités et procédures de décharge de ces agences sont définies dans leur règlement respectif. En conséquence, le conseil d'administration de l'OCVV et le comité budgétaire de l'OHMI donnent décharge à leur président respectif pour l'exécution du budget.

La nécessité de garantir la responsabilité démocratique au sein d'agences entièrement autofinancées – chargées de mettre en œuvre les politiques de l'UE, mais qui ne sont pas soumises à la décharge du Parlement européen – est reconnue par les trois institutions.⁶ Cependant, les avis concernant la manière d'y parvenir diffèrent fortement et vont du changement de la situation actuelle afin de permettre au Parlement européen de donner décharge aux agences entièrement autofinancées à différents types de participation du Parlement européen dans les structures de gouvernance et de contrôle des agences, mais sans compétence officielle de décharge budgétaire.

⁵ Commission européenne (2013a): *Proposition de règlement du Parlement européen et du Conseil modifiant le règlement (CE) n° 207/2009 du Conseil du 26 février 2009 sur la marque communautaire*, COM(2013) 106 final, Bruxelles.

⁶ Parlement européen / Conseil de l'Union européenne / Commission européenne (2012): *Déclaration commune du Parlement européen, du Conseil de l'UE et de la Commission européenne sur les agences décentralisées*, Bruxelles, point 58.

À cet égard, les mesures ou principes suivants pourraient être envisagés:

- le compromis interinstitutionnel obtenu en 2012 dans le cadre d'une approche commune sur les agences décentralisées prévoit que les agences entièrement autofinancées remettent au Parlement européen, au Conseil et à la Commission européenne un rapport annuel sur l'exécution de leur budget et tiennent compte des exigences ou des recommandations formulées par le Parlement européen et le Conseil.
- après un délai raisonnable permettant de mettre en place cette procédure et d'en démontrer la valeur, il convient d'engager une réflexion structurelle et un débat politique sur les leçons tirées et le degré de responsabilité démocratique obtenu au sein des agences entièrement autofinancées.

1. INTRODUCTION

This study analyses the determination of fees, the treatment of budgetary surpluses and the discharge procedure of fully self-financed EU agencies.

Fully self-financed EU agencies are EU agencies that raise all their income from fees charged to their users (i.e. clients) and do not receive any contributions charged to the EU budget. These criteria are currently fulfilled by two EU agencies, namely the Community Plant Variety Office (CPVO) and the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM). Fully self-financed EU agencies are currently exempted from budgetary discharge by the European Parliament because these agencies, by definition, do not receive any contributions charged to the EU budget.

Both agencies were set up in order to provide a single service linked to the private interest of their users: the EU-wide protection of their intellectual property (IP) rights. More specially, the CPVO grants Community plant variety rights (CPVRs) against fees charged to the rights holders. CPVRs provide EU-wide protection for new plant varieties for up to 25 years.⁷ Likewise, OHIM grants Community trade marks (CTMs) as well as Community design rights against fees charged to the rights holders. CTMs and Community design rights provide EU-wide protection for trademarks and designs with no limitation in time, if the rights are regularly renewed (against renewal fees).⁸ The IP rights granted by both CPVO and OHIM provide their holders with exclusive rights to use the plant variety / trademark / design concerned and aim to prevent any third party from using it anywhere within the European Union. The IP rights protect against both deliberate copying and the independent development of similar plant varieties / trademarks / designs.

The three following chapters of this study focus specifically on the determination of fees of fully self-financed EU agencies (chapter 2), the treatment of surpluses accumulated by these agencies (chapter 3) as well as their discharge procedure (chapter 4). In each of the following chapters, the study describes the current legal situation and discusses issues such as governance structures and rules on fee determination and the treatment of surpluses. The study also examines the various changes that stakeholders have proposed for a potential review of the existing rules and procedures for fee determination, treatment of surpluses and budgetary discharge of fully self-financed EU agencies. Finally, the chapter's conclusions propose measures or principles which are relevant to future policy discussions on these agencies.

The present study has been prepared by Deloitte for the European Parliament, Directorate General for Internal Policies, Policy Department D: Budgetary Affairs. It is based on a comprehensive literature review and a series of interviews with relevant institutional stakeholders.

⁷ More information is available on CPVO's website: <http://www.cpvo.europa.eu>

⁸ More information is available on OHIM's website: <http://oami.europa.eu>

2. DETERMINATION OF FEES OF FULLY SELF-FINANCED EU AGENCIES

KEY FINDINGS

- According to their basic regulations, the fees of the two fully self-financed EU agencies – CPVO and OHIM – must be fixed at levels which ensure that the agencies’ budgets are balanced. Fees are determined via the “comitology” procedure (involving the Council and the European Commission) based on input and proposals from the agencies’ management boards.
- In particular in the case of OHIM, the fee income has created significant accumulated surpluses and the agency has thus not complied with the balanced budget principle set out in its basic regulation.
- Given the important role played by the management boards of the two agencies in developing fee level policy, and the fact that many management board members or their employing authorities are often also directly involved on behalf of their Member State in determining the definitive fee levels in the “comitology” procedure, the situation creates a clear danger of “divided loyalties” – to the principles of the agencies’ basic regulations on the one hand, and the national IP offices on the other. The lack of clear and automatic rules for dealing with fee determination in case a balanced budget is not achieved has also contributed to this situation of building-up of surpluses.
- In addition to non-compliance with the balanced budget principle, high levels of fees have also been considered as disguised indirect taxation on the agencies’ users. Furthermore, evidence suggests that the high fees charged in order to obtain Community intellectual property rights may hinder SMEs from taking full advantage of the Internal Market.
- The following measures or principles could be considered in this regard:
 - An annual review of the financial perspectives of fully self-financed agencies;
 - A determination of fees of such agencies by the European Commission, with veto rights for the Council of the EU and the European Parliament as foreseen by Art. 290 TFEU (to replace the “comitology” approach);
 - Clearer rules for the determination of fees, including a specific objective to avoid the accumulation of significant surpluses, and potentially the principle of capping fees to the level of full cost recovery (with full costs ideally being defined based on a zero-based budgeting approach);
 - An automatic triggering of fee adjustment procedures in case of recurring surpluses (or deficits);
 - A review of the governance structures of the agencies in order to better represent both the European rather than national interest (e.g. by strengthening the position of the European Commission) and the interests of the agencies’ users (e.g. by providing them a certain number of permanent seats in the management boards); and
 - A reflection on the appropriate degree of European integration of the European trademark and plant variety systems, notably in view of fostering the competitiveness of the European economy, in particular of SMEs.

This chapter discusses the determination of fees of fully self-financed EU agencies, i.e. of CPVO and OHIM. A first sub-section presents the current legal situation with regard to fee determination. The second sub-section provides a brief overview of fee structures and levels at CPVO and OHIM. The third sub-section discusses issues identified with regard to fee determination at fully self-financed agencies, namely perceived high levels of fees, governance structures as well as (a lack of clear) rules for fee determination. The fourth sub-section analyses the two main proposed changes with regard to fee determination at fully self-financed agencies, i.e. the review of governance structures for fee determination and the implementation of a rules-based fee determination process. The fifth sub-section concludes.

There is a close and inherent link between this chapter and chapter 3 on the treatment of surpluses of fully self-financed EU agencies insofar that fees charged at levels above full costs typically lead to the accumulation of surpluses.

2.1. THE CURRENT LEGAL SITUATION

This sub-section presents the current legal situation with regard to fee determination at fully self-financed agencies in general and specifically at CPVO and OHIM.

2.1.1. General principles of fee determination

According to the basic regulations of fully self-financed EU agencies (i.e. CPVO and OHIM), *“the amounts of the fees shall be fixed at such a level as to ensure that the revenue in respect thereof is in principle sufficient for the budget of the [agency] to be balanced”*⁹.

The fee setting rules that will potentially be introduced by the successor of the Financial Framework Regulation (FFR) No 2343/2002 (which is currently under review) will not be applicable to fully self-financed agencies as a result of their exclusion by Art. 208 paragraph 1 of the Financial Regulation No 966/2012.¹⁰

The European Commission DG Budget announced in an interview that its legislative proposal for the review of the FFR will provide clarity with regard to fee determination and the treatment of surpluses for partially self-financed agencies. Notably, in line with point 38 of the Common Approach¹¹, *“fees [of self-financed agencies] should be set at a realistic level to avoid the accumulation of significant surpluses”*. Furthermore, the European Commission DG Budget explained that where the FFR rules do not conflict with the nature and specificities of fully self-financed agencies, these rules could be considered as best practice for fully self-financed agencies – even if no legal obligation for compliance exists.

⁹ Art. 144 para 2 of Council Regulation No 207/2009 on the Community trade mark;

Art. 113 para 3 of Council Regulation No 2100/94 on Community plant variety rights.

¹⁰ Art. 208 paragraph 1 of Financial Regulation No 966/2012 states *“The Commission shall be empowered to adopt a framework financial Regulation by means of a delegated act in accordance with Article 210 for bodies which are set up under the TFEU and the Euratom Treaty and which have legal personality **and receive contributions charged to the budget.** [...]”*

As fully self-financed agencies by definition do not receive any contributions charged to the EU budget, they are excluded from the scope defined by Art. 208 paragraph 1 sentence 1 of Financial Regulation No 966/2012.

¹¹ European Parliament / Council of the European Union / European Commission (2012): *Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies*, Brussels.

2.1.2. Fee determination at CPVO

The core principle for fee determination at CPVO is defined by Article 113 paragraph 3 of the CPVO basic Regulation No 2100/94: *“The amounts of the fees shall be fixed at such a level as to ensure that the revenue in respect thereof is in principle sufficient for the budget of the Office to be balanced.”*

The fee determination procedure is defined by Article 113 paragraph 4 of Regulation No 2100/94 in combination with Article 115 of Regulation No 2100/94 and Articles 5 and 7 of Decision 1999/468/EC. In essence, the CPVO fees are determined on an ad hoc basis by “comitology” *“after consultation of the [CPVO] Administrative Council on the draft of the measures to be taken”*.

CPVO explained that, in practice, proposals for fee changes are presented by the CPVO President to the Administrative Council. Once approved by the Administrative Council, the fee adjustment proposals then pass through the “comitology” system. Due to the fact that Member State representatives in the CPVO Administrative Council often are the same than those in charge of the “comitology” procedure, the negotiations on fee adjustments are, however, mainly held within the CPVO Administrative Council. Agreed fee changes are finally legally adopted through an amendment to the CPVO Fee Regulation No 1238/95 by an Implementing Regulation issued by the European Commission.

The CPVO Administrative Council is composed of one representative from each Member State (one vote per Member State) and the European Commission (without voting rights). Breeders’ organisations are consulted informally by CPVO in the fee determination process; they are not officially represented in CPVO’s governance bodies.¹² According to CPVO’s written response, *“issues regarding the fee levels are treated openly and with full input from the CPVO, the Administrative Council members and the stakeholders.”*

CPVO furthermore explained that *“the challenge is to establish fees which lead to a balanced budget since the number of applications constantly changes. For this reason the fees will need to be adapted periodically to ensure that excessive surpluses are avoided. At the same time the fees should not change too often since this would create uncertainty for the industry. [...] The CPVO uses available market intelligence gained through its permanent contact with the breeders and their representative organizations in order to ensure that the [fee adjustment] proposals are coherent and balancing the needs of [stakeholders, notably the breeders and national examination offices, as well as the overall European interest].”*

In practice, CPVO is undertaking an annual review of its financial situation in view of applying sound financial management principles. If the agency faces repeated positive financial outturns leading to a “free reserve” (see section 3.2.1 below) of more than 5 million EUR, an adaptation of the CPVO fees is envisaged. In case of too high accumulated surpluses, some fees may also be set at a level below full costs in order to eat up accumulated excess reserves.

¹² In this regard one may note that at OHIM, the users are represented both in the Administrative Board and in the Budget Committee with a certain number of observer seats (without voting rights). See section 2.1.3 below.

2.1.3. Fee determination at OHIM

The core principle for fee determination at OHIM is defined by Article 144 paragraph 2 of the OHIM basic Regulation No 207/2009: *“The amounts of the fees shall be fixed at such a level as to ensure that the revenue in respect thereof is in principle sufficient for the budget of the Office to be balanced.”*

The fee determination procedure is defined by Article 144 paragraph 3 of Regulation No 207/2009 in combination with Article 163 of Regulation No 207/2009 as well as Articles 5 and 7 of Decision 1999/468/EC. In essence, the OHIM fees are determined on an ad hoc basis by “comitology”. Article 124 paragraph 2 (b) of Regulation No 207/2009 empowers the President of OHIM to *“place before the Commission any proposal to amend [...] the fees regulations [...] after consulting the Administrative Board and the Budget Committee”* of OHIM.

In practice, proposals for fee changes are presented by the OHIM President or the European Commission to the OHIM Administrative Board and Budget Committee. Once approved by the Administrative Board and Budget Committee, the fee adjustment proposals then pass through the “comitology” system. Agreed fee changes are finally legally adopted through an amendment to the OHIM Fee Regulation No 2869/95 by an Implementing Regulation issued by the European Commission. The latest OHIM fee adjustment process (finalized in 2009) was accompanied by a preparatory European Commission impact assessment study.¹³

The OHIM Administrative Board and Budget Committee are both composed of one representative of each Member State and one representative of the European Commission (without voting rights), and their alternates. Typically, the Member State representatives come from the national trademark offices. Since 1995, the Administrative Board has invited representatives from the World Intellectual Property Organization (WIPO) and the Benelux Trademark Office to participate in its meetings as observers and in 2009 the board extended observer status to five organisations representing users – INTA, BusinessEurope, MARQUES, ECTA and AIM. Since 2010 the Budget Committee has invited representatives from the WIPO, the Benelux Trademark Office and the five aforementioned user organisations to participate in its meetings as observers. As of 2011, two additional observer seats have been added to the Budget Committee, which are shared by the user associations APRAM, CNIPA, EFPIA, FICPI, GRUR, ICC and UNION on a rotational basis.

In its trademark package of March 2013, the European Commission proposes various legislative amendments to Council Regulation 207/2009, which would inter alia impact the principles and procedures of fee determination at OHIM.

The new recital no 45 in the European Commission’s legislative proposal suggests that *“in order [...] to guarantee an appropriate and realistic level of fees to be charged by the Agency, while complying with the budgetary principles set out in Regulation (EC) No 207/2009, the power to adopt delegated acts in accordance with Article 290 of the Treaty should be delegated to the Commission in respect of [...] the amounts of the fees to be paid to the Agency and details related to their payment.”*¹⁴

¹³ European Commission (2009): Impact Assessment accompanying the proposal for a Commission Regulation on the amendment of Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs), SEC(2009) 419, Brussels.

¹⁴ European Commission (2013a): *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark*, COM(2013) 161 final, Brussels.

Accordingly, the European Commission proposed an amended Article 144 to include the following: *“The amounts of the fees [...] shall be fixed at such level as to ensure that the revenue in respect thereof is in principle sufficient for the budget of the Agency to be balanced while avoiding the accumulation of significant surpluses. Without prejudice to Article 139(4), the Commission shall review the level of fees should a significant surplus become recurrent.”*¹⁵

With regard to the fee determination process, a new proposed Article 144a stipulates that *“the Commission shall be empowered to adopt delegated acts in accordance with Article 163 in order to establish: [...] (d) the system of fees and charges payable to the Agency in accordance with Article 144, including the amount of fees [...].”* In this regard and in line with Article 290 TFEU, a new Article 163a clarifies that *“a delegated act adopted pursuant to [Article] [...] 144a shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.”*¹⁶

In essence, the proposed legal amendments would (1) clearly define the avoidance of the accumulation of significant surpluses as a core principle for fee determination at OHIM, (2) empower the European Commission to set OHIM fees by delegated acts, (3) trigger an automatic fee review process by the European Commission in case of recurring significant surpluses, (4) restrict the Member States’ involvement in the fee determination process to a veto right on the European Commission’s delegated acts, and (5) involve the European Parliament in the fee determination process by conferring it a veto right on the delegated acts.

2.2. THE CURRENT LEVEL OF FEES OF FULLY SELF-FINANCED AGENCIES

This sub-section provides a brief overview of fee structures and levels at CPVO and OHIM.

2.2.1. Fee structure and levels at CPVO

CPVO has three main types of fees: an application fee due for new CPVR registrations, examination fees which depend on the type of plant species to be examined as well as an annual fee due for the renewal of existing CPVRs¹⁷. In case the species for which the CPVR is filed for was previously examined by another (i.e. national) plant variety office, the existing examination reports can be taken over at a fee of currently 240 EUR and thereby avoiding another examination (as well as the corresponding examination fees).

¹⁵ European Commission (2013a): *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark*, COM(2013) 161 final, Brussels.

¹⁶ European Commission (2013a): *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark*, COM(2013) 161 final, Brussels.

¹⁷ A CPVR is valid up to a maximum of 25 years if it is renewed on an annual basis.

The table below provides an overview of CPVO's main fees.

Table 1: CPVO's main fees (since 01/01/2013)

FEE	AMOUNT
Application fee	650 EUR
Examination fees (depending on the species of examined plant variety)	1,160 EUR – 2,500 EUR ¹⁸
Fee for taking over reports	240 EUR
Annual fee	300 EUR

Source: CPVO (2013); Commission Regulation (EC) No 1238/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards the fees payable to the Community Plant Variety Office, OJ L 121, 1.6.1995, as amended by Commission Regulation (EC) No 329/2000 of 11 February 2000, Commission Regulation (EC) No 569/2003 of 28 March 2003, Commission Regulation (EC) No 1177/2005 of 20 July 2005, Commission Regulation (EC) No 2039/2005 of 14 December 2005, Commission Regulation (EC) No 572/2008 of 19 June 2008, and Commission Implementing Regulation (EU) No 510/2012 of 15 June 2012.

The annual renewal fees account for more than 50% of the CPVO income. Their relative importance is expected to further grow until 2019 when the first CPVRs will begin to expire (after 25 years of registration).

According to the written response received from CPVO, "there is a current discussion in the Administrative Council on the fee structure. During the November 2011 meeting of the Administrative Council, the CPVO presented its analysis on the evolution of the free reserve¹⁹. In the opinion of the CPVO key considerations regarding adjustments to fees are:

- *Fostering innovation: the fee structure should incite development of the Community PVR System.*
- *Stability of budget income: the fees should be set to the extent possible to shield the CPVO from fluctuations in demand while accepting that there would be years of positive and negative outturns beyond the control of the CPVO.*
- *Budget outturn: the CPVO recalled [...] its over-riding aim of keeping the budget outturn as close as possible to zero in the long run.*
- *Level of free reserve: the CPVO underlined the need to avoid 'shock' reductions to the level of the reserve which would risk affecting its ability to continue as a going concern and promoted a soft-landing approach to returning to a lower level of free reserve."*

Following a CPVO proposal, the application fee was reduced from 900 EUR to 650 EUR with effect from 01/01/2013²⁰ "as part of a 'stepped approach' to bring the reserve to a lower level".

¹⁸ Detailed examination fees for the different categories of plant species are available under: <http://www.cpvo.europa.eu/main/en/home/methods-of-payment/applicable-fees/83-annex-costs-groups>

¹⁹ See section 3.2.1 of this report.

²⁰ CPVO (2012): *Announcement n 4/2012* of the Community Plant Variety Office, New application fee, Angers.

Furthermore, the CPVO reported that “in its February 2013 meeting the Administrative Council decided to propose to the legislator to lower the annual fee as from January 2014, in line with the objectives stated above.” The reduction of annual renewal fees is considered as a particularly fair measure by CPVO because those breeders that have been overcharged in the past would be “reimbursed” through lower fees for the renewal of their CPVR. As a result of this proposed fee adjustment, CPVO expects a “1 million EUR reduction in annual budget outturn as from 2014” and a shrinking of the “free reserve” “to a level of EUR 5 million by 2017”.

2.2.2. Fee structure and levels at OHIM

OHIM has two main types of trademark fees: a basic fee due for the registration of a new trademark and a renewal fee due every ten years for the renewal of the CTM rights. The current fee regulation provides for a discount of 150 EUR for the electronic filing of registration and renewal requests. By default, a CTM currently includes three classes of goods or services; an extra fee has to be paid for each additional class.

The table below provides an overview of OHIM’s main trademark fees.²¹

Table 2: OHIM’s main trademark fees (since 01/05/2009)

FEE	AMOUNT
Basic fee for an individual mark (incl. three classes)	1,050 EUR
Basic fee for an individual mark – e-filing (incl. three classes)	900 EUR
Fee for each class of goods and services exceeding three for an individual mark (for registration)	150 EUR
Basic fee for the renewal for an individual mark (incl. three classes)	1,500 EUR
E-renewal fee (incl. three classes)	1,350 EUR
Fee for each class of goods and services exceeding three for an individual mark (for renewal)	400 EUR

Source: OHIM (2013); Commission Regulation (EC) No 2869/95 of 13 December 1995 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJ L 303, 15.12.1995, as amended by Commission Regulation (EC) No 781/2004 of 26 April 2004, Commission Regulation (EC) No 1042/2005 of 29 June 2005, Commission Regulation (EC) No 1687/2005 of 14 October 2005, and Commission Regulation (EC) No 355/2009 of 31 March 2009.

In the framework of its trademark package of March 2013, the European Commission proposed “lowering the application fee, covering one class proportionally (so as to be € 775), but leaving the price of a CTM application covering three classes of goods or services unchanged, [arguing that this] constitutes a necessary and fair adjustment to the reduced range of goods or services covered by a CTM application.”²² The European Commission admitted in its impact assessment of the proposed OHIM fee review that “it is true that this further fee cut [following those of 2005 and 2009] would bring the CTM application fee

²¹ OHIM also charges fees for Community design registrations. However, these fees only account for about 10% of OHIM’s fee income and are therefore not assessed in detail in this report.

²² European Commission (2013b): Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark and the Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast), SWD(2013) 95, Brussels, p. 51.

level closer to the application fee level of national offices for domestic filings." This has been considered as an issue in the past because "the level of OHIM fees is generally considered to be one of the key elements for a balanced coexistence of [national and European trademark] systems, as stressed by a number of national offices in their contributions to the [Max Planck Institute] study (publicly not available)." Yet, the European Commission argued that "taking into account that the average fee to be paid in the Union for a national application covering one class only accounts for € 143, a further reduced CTM application fee would still keep a clear and sufficient distance from the comparable fee at national level. The aforesaid also applies if one considers the highest current national fees for one class applications which exceed € 200. Those national offices currently charging an application fee including three classes of goods and services would be free to follow the example of the OHIM and of other national offices and to adjust their fee levels accordingly (by reducing the basic application fee covering one class) and ensure a more favourable ratio compared to the OHIM basic application fee."²³

The table below compares the current OHIM fee structure with the one proposed by the European Commission in March 2013.

Table 3: European Commission proposal for a new OHIM fee structure (March 2013)

		Current OHIM fee structure	European Commission proposal
Application fee		900 EUR (3 classes)	775 EUR (1 class)
Class fees	2 nd class	-	50 EUR
	3 rd class	-	75 EUR
	4 th and subsequent classes	150 EUR	150 EUR
Total amounts	Application fee (1 class)	900 EUR	775 EUR
	Application fee (2 classes)	900 EUR	825 EUR
	Application fee (3 classes)	900 EUR	900 EUR
Renewal fee		1,350 EUR (3 classes)	1,000 EUR (1 class)
Class fees	2 nd class	-	100 EUR
	3 rd class	-	150 EUR
	4 th and subsequent classes	400 EUR	300 EUR
Total amounts	Renewal fee (1 class)	1,350 EUR	1,000 EUR
	Renewal fee (2 classes)	1,350 EUR	1,100 EUR
	Renewal fee (3 classes)	1,350 EUR	1,250 EUR

Source: European Commission (2013b): Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark and the Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast), SWD(2013) 95, Brussels, p. 52.

²³ European Commission (2013b): Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark and the Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast), SWD(2013) 95, Brussels, p. 51.

According to a budgetary forecast by the European Commission, the proposed fee adjustment “would lead to negative budgetary results in 2013-2015 and OHIM budget would be in balance again in 2016” (see table below). However, “taking into account the financial reserve that the Office has accumulated over the past years short-term negative budgetary results would not be critical for OHIM operations, notably, as is the case below, if they were of temporary nature and not leading to long-term, structural deficits.”²⁴

Table 4: Impact of the European Commission fee adjustment proposal on OHIM budget

in million EUR	2012	2013	2014	2015	2016
Budgetary revenue	174.9	160.7	167.1	177.8	202.8
Budgetary expenditure	202.0	216.5	223.0	198.7	186.5
Operating result	-27.1	-55.8	-55.9	-20.9	16.3
To be excluded from the above result: Ad hoc expenditure ²⁵	32.4	29.6	35.3	18.7	6.2
Operating result excluding ad hoc expenditure	5.3	-26.2	-20.6	-2.2	22.5

Source: European Commission (2013b): Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark and the Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast), SWD(2013) 95, Brussels, p. 52.

In addition, the European Commission considered an additional discount of 50 EUR to reward the use of a common electronic classification tool. This measure is, however, not included in the above forecast.

The fee adaptation proposed by the European Commission is subject to approval by the Member States through the “comitology” procedure as described in section 2.1.3. It is, however, probable that the decision on the proposed fee adjustment will be linked to the adoption of the 2013 trademark package which is subject to approval by the EU legislator.

²⁴ European Commission (2013b): Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark and the Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast), SWD(2013) 95, Brussels, p. 52.

²⁵ “There will be a number of ad hoc costs, related to the implementation of OHIM's strategic plan, e.g. construction of a new building, and of the Cooperation Fund which can be covered from the accumulated surplus. Accordingly, these specific investments should not be included when considering the impact [...] and have been excluded from the below figure. [...] In budgetary terms, this spending will be part of a single expenditure heading together with the “regular” operational expenditure. As a result, the operating result (annual income/annual expenditure) is expected to be negative for a couple of years. However, given the accumulated surplus (which appears in the budget on the revenue side as “title 3: balance from previous financial year”) the total budget will remain balanced.”

2.3. ISSUES IDENTIFIED

This sub-section discusses issues identified with regard to fee determination at fully self-financed agencies, namely perceived high levels of fees, potentially unbalanced governance structures as well as (a lack of clear) rules for fee determination.

2.3.1. Perceived high levels of fees

The level of fees charged by both fully self-financed agencies – i.e. CPVO and OHIM – has been subject to discussions and divergent viewpoints basically since their establishment more than 15 years ago. In view of significant surpluses accumulated by fully self-financed agencies (see section 0 below), the levels of fees charged by these agencies have regularly been considered as being (unnecessarily) high.

For instance, the European Court of Auditors (ECA) has repeatedly voiced concerns with regard to the level of OHIM's fees and the resulting excess surplus. In its report on OHIM's 2010 annual accounts, the ECA stated that that "over successive years, fees charged by the Office for its services have been in excess of the Office's real costs, giving rise to this significant and growing surplus."²⁶ The ECA also asserted the insufficiency of the last fee adaptation effective from 1st May 2009: "Although amendments to the Fees Regulation came into effect on 1 May 2009, the year-end surplus has increased by more than 50 million euro in 2009. The long-term impact of these amendments should be carefully evaluated by the Office and, if necessary, further adjustments to the fees should be proposed to the Commission in order to reach a more balanced budget in the near future."²⁷ Nonetheless, no further fee adjustments have been enacted for OHIM since then.

Several interviewees have considered the accumulation of significant surpluses by fully self-financed agencies as a clear **breach of the balanced budget criterion for fee determination** as defined in the agencies' basic regulations according to which "the amounts of the fees shall be fixed at such a level as to ensure that the revenue in respect thereof is in principle sufficient for the budget of the [agency] to be balanced"²⁸. The ECA also acknowledged that users of fully self-financed agencies may file complaints at the European Court of Justice in order to enforce fees being set at levels in accordance with the agencies' basic regulations.²⁹

Furthermore, it has been argued by several interviewees that fees substantially exceeding full costs (and therefore leading to the accumulation of surpluses) would correspond to a **disguised indirect taxation of the agencies' users** who are overcharged for the services provided by the agencies. For instance, OHIM argued in 2010 that "payment of fees is the correct mechanism in the case of a public operation targeted at a specific economic community – trade mark owners – and there is good reason not to have the general tax payer pick up the bill for that. [However,] the condition of course, less well respected in the past, is that fees reflect the real cost of the operation and do not introduce a quasi-taxation on trade mark owners."³⁰

²⁶ European Court of Auditors (2011b): Report on the annual accounts of the Office for Harmonization in the Internal Market for the financial year 2010, together with the Office's replies, OJ 2011/C 366/30, Luxembourg.

²⁷ European Court of Auditors (2010b): Report on the annual accounts of the Office for Harmonization in the Internal Market for the financial year 2009, together with the Office's replies, OJ 2010/C 338/30, Luxembourg.

²⁸ Art. 144 para 2 of Council Regulation No 207/2009 on the Community trade mark; Art. 113 para 3 of Council Regulation No 2100/94 on Community plant variety rights.

²⁹ While such legal complaints have not been filed yet, the ECA expects OHIM users or their interest representations to take legal steps as soon as any significant share of the accumulated surpluses of OHIM would be unconditionally transferred to third parties (e.g. the EU, the Member States or the national trademark offices), thus de facto introducing an indirect tax on CTMs.

³⁰ OHIM (2010b): Contribution to the study on the overall functioning of the trade mark system in Europe, Alicante, p. 5.

The potential **economic effects of (high) CTM fee levels on the Internal Market** are discussed in the text box below.

BOX 1: EFFECTS OF THE CTM FEE LEVELS ON THE INTERNAL MARKET

It has been argued by the European Commission that “the existence of very significant cash reserves implies that the users of the Community trade mark system are facing fee levels which can be considered structurally too high. Business could have access to Community trade mark protection for a much better price.”³¹

In other words, businesses that want to register CTMs face unnecessarily high financial burdens – an issue that may negatively affect in particular SMEs for whom the affordability of industrial property titles is crucial. Indeed, a representative survey among OHIM users conducted by the Institut für Demoskopie Allensbach³² reveals that “users express little acceptance of OHIM’s current main fees, which suggests that several fees need adjusting – especially the OHIM “renewal” fee. The renewal fee was rejected most strongly by proprietors from SMEs (“far too high”: 51 per cent).” With regard to the impact of OHIM filing fees on CTM applications, “users report that the current OHIM filing fees definitely influence their CTM application decisions, with only a minority stating that the fees have no such impact. Such an impact is primarily reported by SMEs and users with low or medium [use of national trademarks and CTMs] and/or low to medium export [business activities]. To minimize the impact of the OHIM filing fees, more than half of all proprietors limit the number of CTM applications they make. Because of the OHIM filing fees, nearly one third of all proprietors only apply for the absolute minimum number of CTMs. Adjusting the filing fees would probably increase the number of CTM applications by smaller, less active proprietors.”

Inversely, econometric analysis by INNO-tec shows that “the 2005 fee reduction at [OHIM] increased trade mark applications from [all large European countries] substantially. This effect will have counteracted the direct effect of lower fees on the Office’s income from trade mark fees and would do so for any further fee reductions.”³³ This demonstrates that the demand for CTMs is elastic, i.e. that the take-up of CTMs can be fostered by reducing their price. Furthermore, in the OHIM fee reductions of 2005 and 2009, the income losses due to lower fee levels have been overcompensated by the additional income linked to the additional demand for cheaper CTMs.

In view of the potentially negative effects of unnecessarily high fee levels for CTM registrations on the competitiveness of companies in a “knowledge-based” Internal Market, in particular of SMEs, the European Commission argued in its “Small Business Act for Europe” Communication that “the EU and Member States should encourage SMEs to benefit more from the opportunities offered by the Single Market, in particular through [...] facilitating SMEs’ access to [...] trademarks.” The European Commission announced that it would “make the Community Trade Mark system more accessible, in particular by significantly reducing Community Trade Mark fees as part of a comprehensive solution to the financial perspectives of the Office of Harmonisation for the Internal Market (OHIM).”³⁴ In its 2008 “European Economic Recovery Plan” the European Commission urged to “halve the costs for an EU trademark [...]” in order to “promote entrepreneurship”.³⁵

³¹ European Commission (2009): Impact Assessment accompanying the proposal for a Commission Regulation on the amendment of Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs), SEC(2009) 419, Brussels, p. 17.

³² Institut für Demoskopie Allensbach (2011): Survey of market participants who use the CTM system, Munich, p. 81 and p 89.

³³ INNO-tec (2010): Empirical Assessment of the Development of the Community Trade Mark System and its Relationship with National Trade Mark Systems, Munich, p. 2 and p. 12.

³⁴ European Commission (2008b): “Think Small First” – A “Small Business Act” for Europe, COM(2008) 394 final, Brussels, p. 12 and p. 14.

³⁵ European Commission (2008c): A European Economic Recovery Plan, COM(2008) 800 final, Brussels, p. 12.

At CPVO, the debate about the level of fees has been less controversial than at OHIM. Yet, according to the 2010 external evaluation report on CPVO, “some clients interviewed ask for a reduction of the fees [...]. Indeed, the level of fees is often contested. [...] However the CPVO “value for money” is never substantially contested.”³⁶ Similarly, the 2011 external evaluation report on the CPVR acquis acknowledged user concerns with regard to the level of CPVO fees. It inter alia stated that “while a majority of breeders believe that the application costs are appropriate overall, they do not view the annual maintenance costs as proportionate. The industry suggested that maintenance costs should either be lowered or decrease over time so as to better reflect true administrative costs to CPVO for maintaining the right. The CPVO has stated that it works to keep costs as low as possible for applicants. It has reduced maintenance fees in past years, in line with reducing budget surpluses.”³⁷

2.3.2. Governance structures

A large majority of interviewees pointed to inherent potential conflicts of interest in the current governance structures for fee determination at fully self-financed agencies. These were considered as root cause for fees set at levels beyond full costs as well as the resulting accumulation of significant surpluses by these agencies.

For instance, the 2009 external meta-evaluation of EU agencies argued that “a conflict of interest issue appears [in the OHIM governance structure] as the Member State representatives [in the OHIM Administrative Board and Budget Committee] come from national trade mark offices and not from the policy making bodies (ministries). It was particularly visible in the last years during the negotiation of the fee reductions proposed by the Commission (cheaper CTM could render the national trademarks less attractive). Long negotiations took place, which finally led to an agreement in September 2008 on a 40% fee reduction but also on a EUR 50m amount to be invested by OHIM in a Cooperation Fund aimed at the Member States’ national [trademark] offices, and on a share of future CTM renewal fees. The evaluation team assesses this compromise as far from efficient, and as a direct consequence of a governance system in which the balance of powers does not reflect that of the needs which have to be addressed. In fact, the agency contributes to achieving objectives at EU level (internal market), it serves the interests of enterprises (underrepresented in the governance system), and it cooperates with national agencies in the Member States. These three categories of interests are not balanced in the agency governance. Over time, the agency has come, partly because of the governance issue discussed above, to a very uncommon budgetary situation. According to its mandate, OHIM is supposed to have a balanced budget. However, as the office improved its productivity and could not reduce the fees, it has been generating consequent amounts of surpluses (by the end of 2008, the total financial surplus accumulated over several years had risen to EUR 350m). In 2008, for instance, OHIM had an income of around EUR 217m against an expenditure of EUR 143m.”³⁸

In essence, it is argued that the Member States’ representatives in the OHIM Administrative Board and Budget Committee – typically employees of the national trademark offices – face a **potential conflict of interest in the CTM fee determination process** because a certain level of competition exists between (currently cheaper) national trademarks and (currently more expensive) CTMs. There is a risk that measures which would be required in order to ensure the respect of OHIM’s basic regulation – specifically the balanced budget rule – are not taken because Member State representatives in

³⁶ Ernst & Young (2010): Evaluation of activities and functioning of the Community Plant Variety Office (CPVO), Angers, p. 21 and pp. 44f.

³⁷ GHK (2011): Evaluation of the Community Plant Variety Right Acquis, Final Report, Brussels, p. 24.

³⁸ Ramboll / Euréval / Matrix (2009): Evaluation of the EU decentralised agencies in 2009, Brussels, Final Report Volume III: Agency level findings, pp. 214ff.

OHIM's governance bodies may fear that lowering OHIM fees could lead to a situation where national trademarks would become less and less attractive to users compared to the CTM (which provides protection in all Member States). In their position as employees of national trademark offices they face the potential conflict of interest of having to vote on measures (lowering OHIM fees), which could potentially endanger the business and eventually the existence of their own organisation, in view of guaranteeing the respect of OHIM's basic regulation.

The text box below further discusses the issue of the co-existence and potential competition between national and Community trademarks as well as, in more general terms, subsidiarity in the European trademark system. It is essential to take this context into account when assessing the potential conflict of interest in the fee determination process at OHIM as described above.

BOX 2: SUBSIDIARITY IN THE EUROPEAN TRADEMARK SYSTEM

The co-existence of national and Community trademarks within the Internal Market is enshrined in the OHIM basic Regulation No 207/2009 (recital 6) which stipulates that "the Community law relating to trade marks [...] does not replace the laws of the Member States on trade marks. It would not in fact appear to be justified to require undertakings to apply for registration of their trade marks as Community trade marks. National trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at Community level." The principal of co-existence was re-confirmed in 2007 by the Council of the EU³⁹ and is not questioned by the European Commission's trademark package of March 2013.

Nonetheless, several interviewees argued that a full centralisation of the European trademark system – e.g. with a single European trademark registration system coordinated by OHIM and with national offices functioning as local subsidiaries of the EU agency – would lead to significant efficiency gains and cheaper trademarks in the Internal Market and would overcome the current potential conflicts of interest in OHIM's governance structure.

While such a stronger centralisation of the European trademark system may appear as most appropriate from a functional subsidiarity perspective⁴⁰, there currently seems to be no political support for such a wide-ranging structural review of the system.

On the contrary, the principle of co-existence is regularly used as an argument for not lowering OHIM's fees. For instance, the Max Planck Institute argued in a study for the European Commission that "as regards the relation of coexistence between the Community and the national trade mark systems it has to be considered that an excessive lowering of the OHIM's fees resulting in a too strong approximation with the fees demanded by national trade mark offices could have the undesired effect that businesses to a large extent feel "forced" to apply for the registration of their trade marks at Community level regardless of their actual business needs. This would go against the intention of the Community legislator whereby national trade mark systems shall not be replaced by the Community trade mark regime."⁴¹ Similarly, OHIM has argued in 2011

³⁹ Council of the European Union (2007): Financial Perspectives of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) and the further development of the Community trade mark system, Adoption of Council Conclusions, 8905/07 PI 17 + COR1, Brussels, recital 7.

⁴⁰ For a methodological approach to functional subsidiarity tests, please refer to:

Pelkmans, J. (2006a): European Integration – Methods and Economic Analysis, 3rd edition, Harlow, pp. 36ff.

Pelkmans, J. (2006b): Testing for subsidiarity, in: Bruha, Th. & Nowak, C. (eds.): Die Europäische Union: Innere Verfasstheit und globale Handlungsfähigkeit, Baden-Baden, pp. 57-88.

⁴¹ European Commission (2009): Impact Assessment accompanying the proposal for a Commission Regulation on the amendment of Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs), SEC(2009) 419, Brussels, p. 17.

(in reply to the ECA) that “the Office believes that indiscriminate fee reductions [...] may put at risk the survival of the National Offices.”⁴²

The Max Planck Institute therefore argued that the fee determination at OHIM should not only take into account the balanced budget criterion as defined by the basic regulation, but also other considerations such as the balanced co-existence of national and Community trademarks. The Institute stated that “if one would take the mandate of the Regulation that the OHIM’s budget must be balanced literally as meaning that the fee income must not exceed expenses, including a reasonable reserve, reducing the fees further would be mandatory. However, the Study takes the view that the fee income may be higher than expenses plus a reasonable reserve, and may take into account the value of the rights obtained by a CTM registration as well as concerns related to the coexistence of national systems and the CTM system.”⁴³ “The basic issue can also be put somewhat differently: must the overall level of fees paid for the protection of CTMs (and Community designs) only reflect the costs of the Office for executing its tasks whatever they are, or may (or must) they also take into account other considerations, such as the overall functioning of the CTM system, the function of facilitating the choice between national protection and Community-wide protection, or the value of the right conferred on the proprietors of these rights? This value of the right is reflected by the fact that CTM protection covers a territory comprising 27 Member States. Establishing trade mark protection via the Madrid system⁴⁴, even in only some Member States, would amount to considerably higher costs. Furthermore, it is a common feature in trade mark practise that fees are normally set in proportion to the size of the territory or country to which the protection extends. It is therefore our view that a “fee policy” that takes into account additional considerations, such as a “selection function” or the “value” of the right is indeed possible and legitimate, and perhaps even necessary, not least in view of the situation where national trade mark protection continues to exist alongside the Community trade mark system.”⁴⁵ The Max Planck Institute concludes that “there is no objection in principle to setting the fees at a level which takes into account additional considerations, such as a “steering function” facilitating a choice between CTMs and national marks, or the actual and potential value of the intellectual property right granted by the Office, even if this should lead to a permanent surplus. Overall, under this perspective, the current fee levels appear to be appropriate, and could even be increased.”⁴⁶

In contrast to the argumentation of the Max Planck Institute, the European Commission stressed that “a significant annual surplus which causes structural year-on-year increases in the accumulated cash reserves is not acceptable in the long run. It goes against the spirit of the Community legislation to fix the OHIM’s fees at a level which results in the revenue and the expenditure not being in balance.”⁴⁷

In essence, a conflict exists between the objective of keeping OHIM’s budget balanced and the objective of maintaining the current co-existence of fully independent national trademark

⁴² European Court of Auditors (2010b): Report on the annual accounts of the Office for Harmonization in the Internal Market for the financial year 2009, together with the Office’s replies, OJ 2010/C 338/30, Luxembourg.

⁴³ Max Planck Institute for Intellectual Property and Competition Law (2011): Study on the Overall Functioning of the European Trade Mark System, Munich, p. 277.

⁴⁴ The Madrid system for the international registration of trademarks was established in 1891 by the Madrid Agreement and renewed by the Madrid Protocol of 1989. It is administered by the International Bureau of the World Intellectual Property Organisation (WIPO) located in Geneva, Switzerland. More information on the Madrid system is available under <http://www.wipo.int/madrid/>.

⁴⁵ Max Planck Institute for Intellectual Property and Competition Law (2011): Study on the Overall Functioning of the European Trade Mark System, Munich, pp. 188f.

⁴⁶ Max Planck Institute for Intellectual Property and Competition Law (2011): Study on the Overall Functioning of the European Trade Mark System, Munich, p. 191.

⁴⁷ European Commission (2009): Impact Assessment accompanying the proposal for a Commission Regulation on the amendment of Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs), SEC(2009) 419, Brussels, p. 15.

offices and OHIM (ensured by significant price differences between national and Community trademarks). In the political choices of the past, the second objective has been privileged as evidenced by OHIM's growing surplus (being a result of the resistance against fee adjustments to the level of full costs). This preference is also evidenced in OHIM's governance structure which gives broad decisional powers to the Member States – de facto represented by national trademark offices – in fee determination decisions for the CTM. Reconciling the level of CTM fees with OHIM's budgetary reality may require a certain degree of re-organisation / re-balancing of the European trademark system, which is, on the other hand, also expected to lead to significant efficiency gains and lower costs for trademarks for businesses across Europe and beyond.

The strong position of national trademark office representatives in the OHIM governance and the related potential conflict of interest became also apparent in the September 2008 agreement⁴⁸ of the OHIM Administrative Board and Budget Committee, which was subsequently endorsed by the Competitiveness Council in 2010⁴⁹. It proposed "distributing to the National Offices of Member States an amount equivalent to 50% of the [OHIM] renewal fees in accordance with distribution criteria to be defined in a way which would guarantee a minimum amount for each Member State". With regard to this proposal OHIM stated that "there is a clear potential conflict of interest in Member States on the one hand setting the level of the renewal fee and on the other hand their national offices having a direct benefit from those decisions."^{50 51}

Concluding on the governance issues at OHIM, the agency itself argued in 2010 that "there is [...] a fundamental institutional aspect that urgently needs to be addressed. [The] extremely large reserve came about because of protracted inaction by the competent authority to adapt fees to the reality of operating expenses. This allowed the reserve to grow far beyond any reasonable need. No action could be taken because of the governance provision concerning the setting of fees. The role given to the Member States by the current legislation in the fee-setting process led to paralysis to the detriment of users of the system. If this institutional arrangement is not changed, there is a real risk of a repeat of such paralysis. Further, now that it has been agreed that Member States will receive a 50% share in renewal fees, the need for change in OHIM's financial governance is all the more necessary. **Beneficiaries should never be in the position to vote on the level of fees in which they have a direct interest** should a further reduction of the fees need to be undertaken in the – not unlikely – event of the reappearance of substantial annual surpluses."⁵²

In the case of CPVO, the governance structures for fee determination are very similar to those of OHIM and there is also a co-existence of national plant variety offices and the EU agency. However, the potential competition between national and European plant variety systems is limited by three structural differences when compared to the case of OHIM:

- First, the national plant variety offices are carrying out the plant examinations for the CPVR under service contracts with the CPVO. The CPVO is not carrying out any examinations itself. Consequently, the CPVR system is also generating business and revenues for the national

⁴⁸ OHIM (2008): Joint Meeting of the Administrative Board and the Budget Committee of the OHIM on 18 and 19 September 2008, Conclusions of agenda item "How to better balance OHIM's budget – the way forward", Alicante.

⁴⁹ Council of the European Union (2010): Conclusions on the future revision of the Trade Mark system in the EU, 3016th Competitiveness Council meeting, 25 May 2010, Brussels.

⁵⁰ OHIM (2010b): Contribution to the study on the overall functioning of the trade mark system in Europe, Alicante, p. 29.

⁵¹ The potential flow of OHIM fee revenues and/or accumulated surpluses to the Member States and/or their national trademark offices is discussed in section 3.4.5 below.

⁵² OHIM (2010b): Contribution to the study on the overall functioning of the trade mark system in Europe, Alicante, p. 4.

offices; even though a certain limited degree of competition between CPVR and national plant variety rights remains.

- Second, under the UPOV convention⁵³ of 1961 national plant variety rights and technical examination reports were already mutually recognised internationally before the implementation of the CPVR. Thus, the introduction of the CPVR has not led to major changes with regard to the examination business of national plant variety offices. Currently 23 out of 27 EU Member States have ratified the UPOV convention.
- Third, national plant variety offices are typically not only in charge of registering national plant variety rights, but also of granting market access permissions for new varieties. Such market access permits are currently not granted at European level. This task provides a secure revenue stream and *raison d'être* for the national offices (besides the granting of national plant variety rights).

As a result of these structural differences, the fee determination process at CPVO has proven to function in a relatively smooth way. While a potential conflict of interest in the governance structure exists (i.e. representatives of the national offices, which are in a potential, even though limited, competition with CPVO, are in charge of determining the fees for the CPVR), this has in practice not led to manifest impacts on the fee determination decisions at CPVO.

With regard to CPVO's governance structure, the 2009 external meta-evaluation of EU agencies explained that "the evaluation team has done a systematic analysis of governance arrangements across all agencies by looking at the various needs that have to be addressed and how these needs are reflected in the balance of powers. CPVO belongs to the agencies where discrepancies have been found. The agency contributes to achieving objectives at EU level. It serves the interests of plant breeders, and it cooperates with national agencies in the Member States. These three categories of interests are not balanced in the agency governance which is mainly inter-governmental. [...] Regarding the board ("Administrative Council"), all Member States and the Commission have a representative and one alternate. The Commission has no voting right. Breeders are not represented. This last point seems to remain a problem, as most of its budget comes from the fees paid by users, and this brings them to claim being part of the board."⁵⁴ Yet, in 2011 the Administrative Council of the CPVO has decided to grant the status of observers to three breeders' organisations (CIOPORA, ESA and Plantum).

⁵³ Convention of the International Union for the Protection of New Varieties of Plants; see http://www.upov.int/upovlex/en/upov_convention.html

⁵⁴ Ramboll / Euréval / Matrix (2009): Evaluation of the EU decentralised agencies in 2009, Brussels, Final Report Volume III: Agency level findings, pp. 44f.

More specifically, the 2010 external evaluation of CPVO reported that “some **clients ask for more transparency [in the fee determination process]**. They want to know how fees are calculated (cost figures). They have access to the fee structure but not to [the] specific data” that is used by CPVO to prepare proposals for fee adjustment decisions.⁵⁵

Finally, the ECA pointed to another potential conflict of interest embedded in several EU agencies’ governance structure, notably where “the Management Board is composed mainly of representatives of the national authorities or Member States [and] at the same time, [the agencies] outsource part of their activities to relevant national authorities and take other decisions affecting national authorities [...]”⁵⁶ This potential conflict of interest is apparent at CPVO where **Member State representatives from national plant variety offices are “both a management representative and a supplier of services”** (i.e. plant examination services for the CPVRs). This conflict of interest could lead – in case of abuse – to overpriced examination service contracts with national offices and, ultimately, also to too high CPVO fees (because these fees provide the income stream to fund the examination service contracts).

The remuneration for CPVO examination service contracts with national offices are agreed among all Member States in advance (i.e. there is no competition on price between national offices) – a situation that has been interpreted by different interviewees either as functioning peer-review preventing abuses or as a forum for potential price collusion. CPVO, however, stressed that the costs and quality of sub-contracted examinations are regularly audited by CPVO. In addition, various “entrustment requirements” have been defined, which need to be fulfilled if national offices want to sign examination service contracts with CPVO.

2.3.3. Rules for fee determination

The third issue identified with regard to fee determination at fully self-financed agencies refers to the perceived **lack of clear rules for fee determination**.

As discussed in section 0 above, the core principle for fee determination at fully self-financed agencies is the balanced budget criterion as laid down in the agencies’ basic regulations. However, it has been argued that, notably in the case of OHIM, this general rule has been insufficiently clear and strong to overcome potential conflicts of interest inherent to the agencies’ governance as well as conflicts with other policy objectives, specifically the maintenance of national intellectual property offices (see section 2.3.2 above). As a result, fees have been maintained at levels above full costs leading to repeated positive economic outturns and the accumulation of significant surpluses.

Already in 1997 the European Commission argued that fully self-financed agencies “are not, and should not become, profit-making bodies. If their revenue is structurally higher than an appropriate level of expenditure, then urgent proposals should be made to reduce the level of fees charged to their “customers”.”⁵⁷ Similarly, the European Commission stated in 2006 in the context of the review of the financial perspectives of OHIM that “an ad hoc approach with an occasional adjustment of fees may be a difficult route to follow as this may lead to long and repetitive debates in “comitology” context” and therefore urged for “a detailed and structural solution”.⁵⁸

⁵⁵ Ernst & Young (2010): Evaluation of activities and functioning of the Community Plant Variety Office (CPVO), Angers, p. 21 and pp. 44f.

⁵⁶ European Court of Auditors (2012d): Management of conflict of interest in selected EU agencies, Special Report n° 15, Luxembourg.

⁵⁷ European Commission (1997a): Proposals for Council Regulations (EC) amending the basic regulations of certain decentralized Community agencies, COM(97) 489 final, Brussels.

⁵⁸ European Commission (2006): The Financial Perspectives of the Office for Harmonisation in the Internal Market (Trade Marks and Designs), COM(2006) 865 final, Brussels, pp. 8f.

2.4. PROPOSED CHANGES

This sub-section analyses the two main proposed changes with regard to fee determination at fully self-financed agencies, i.e. the review of governance structures for fee determination and the implementation of a rules-based fee determination process.

2.4.1. Review of governance structures for fee determination

In view of the potential conflicts of interest identified in the governance structures for fee determination in fully self-financed agencies, several propositions for review have been made by the different actors that were consulted in the framework of this study.

Firstly, CPVO has proposed that all fee adjustments should be decided and adopted by the CPVO Administrative Council upon proposition of the CPVO President. The CPVO proposal mainly entails **dropping the necessity to pass through the “comitology” procedure and to adopt a Commission Implementation Regulation for every fee adjustment**. Yet, CPVO explained that the European Commission should hold a veto right in order to be able to block inappropriate fee adjustments which would go against the balanced budget criterion.

While this first proposition, which mainly aims at streamlining the fee determination procedure, would lead to more flexibility and the possibility to adopt fee adjustments more rapidly, this proposition does not contribute to the management or limitation of the potential conflicts of interest which were identified in section 2.3.2 above.

The second proposition concerns a **centralisation of decision making powers on fee determination at the European Commission**.

The European Commission’s legislative proposal of March 2013 for the review of the OHIM basic regulation proposed to empower the European Commission to set OHIM fees by delegated acts, restricting the Member States’ involvement in the fee determination process to a veto right on the European Commission’s delegated acts. Furthermore, the European Parliament would be involved in the fee determination process by a veto right on the delegated acts. This proposed review of the governance structure for fee determination may be considered as an improvement insofar that the fees are determined by an independent authority at European level that does not face a potential conflict of interest. Furthermore, democratic accountability would be ensured by the involvement of the European Parliament.

However, the European Commission DG Budget argued that a fee determination by delegated act would not dramatically change the status quo at OHIM. This is because the European Commission’s delegated acts could be vetoed by the Council (i.e. the Member States’ representatives). As a result, it would be probable that the European Commission DG MARKT – i.e. the partner DG of OHIM – would avoid proposing radical fee adjustments for OHIM (for instance, an adjustment of fees to the level of full costs), which would anyway be blocked by the Council. The European Commission DG SANCO – i.e. the partner DG of CPVO – confirmed this view.

The CPVO agreed in general terms with the idea that its fees might be set by the European Commission through a delegated act. CPVO, however, noted that the European Commission should determine fees based on objective criteria and should also consult the various stakeholders (CPVO, CPVO Administrative Council, breeders, national plant variety offices, etc.) during the fee determination process.

The third proposition concerns the **involvement of all different interests, notably the interest of the agencies' users and the European interest, in the governance structures for fee determination.**

For instance, in 2010 OHIM urged for “ways [to] be found to establish a better institutional equilibrium by guaranteeing proper representation of all interests at stake especially when setting the fees.”⁵⁹ Furthermore, the 2009 external meta-evaluation of EU agencies pointed out that “[OHIM] contributes to achieving objectives at EU level (internal market), it serves the interests of enterprises (underrepresented in the governance system), and it cooperates with national agencies in the Member States. These three categories of interests are [however] not balanced in the agency governance.”⁶⁰

Similarly, the 2009 external meta-evaluation of EU agencies noted with regard to CPVO that “the agency contributes to achieving objectives at EU level. It serves the interests of plant breeders, and it cooperates with national agencies in the Member States. These three categories of interests are not balanced in the agency governance which is mainly inter-governmental. [...] Regarding the board (“Administrative Council”), all Member States and the Commission have a representative and one alternate. The Commission has no voting right. Breeders are not represented. This last point seems to remain a problem, as most of its budget comes from the fees paid by users, and this brings them to claim being part of the board.”⁶¹

More generally, an interviewed MEP, member of the European Parliament’s Committee on Budgets, argued that the governance structure of CPVO and OHIM should be adapted in order to bring them in line with the business reality and to weaken existing conflicts of interest by implementing new checks and balances. She argued that the European Commission may receive voting rights in the administrative boards of CPVO and OHIM in order to better represent the European interest. In addition, the users of CPVO and OHIM may be empowered with voting rights because they are those who pay the agencies’ fees and have an interest in a realistic fee determination and efficient budgetary management by the agencies.⁶² In order to keep the management boards at a manageable size, she proposed that the number of Member State seats may be reduced to a number below 27 by introducing a rotation system.

⁵⁹ OHIM (2010b): Contribution to the study on the overall functioning of the trade mark system in Europe, Alicante, p. 8.

⁶⁰ Ramboll / Euréval / Matrix (2009): Evaluation of the EU decentralised agencies in 2009, Brussels, Final Report Volume III: Agency level findings, pp. 214ff.

⁶¹ Ramboll / Euréval / Matrix (2009): Evaluation of the EU decentralised agencies in 2009, Brussels, Final Report Volume III: Agency level findings, pp. 44f.

⁶² In this context one may note that currently seven EU agencies (CEDEFOP, EU-OSHA, EUROFOUND, ECHA, EMSA, ERA, and FRA) have users and/or stakeholders represented with full seats – yet typically without voting rights – in their management boards. For more information, please refer to: European Commission (2010a): Composition and designation of the Management Board, Analytical fiche on decentralised agencies n° 5, Brussels.

2.4.2. Rules-based fee determination

In view of the perceived lack of clear rules for fee determination going beyond the existing balanced budget criterion defined by the agencies' basic regulations, it has been proposed to introduce clearer and more detailed rules in order to ensure the determination of fees at realistic levels and, as a consequence, to avoid the accumulation of significant surpluses.

In 2006, the European Commission proposed in the context of the review of the financial perspectives of OHIM "to introduce a **method of regular review of the fees** based on the Office's financial perspectives and to manage the cash reserves **in accordance with a pre-determined formula**. [...] For the sake of legal certainty and to take into account the real budgetary developments over a limited period of time, any necessary adjustment should take place on a regular basis (for example, on an annual basis). Once the estimated surplus (or shortage) has been defined, the basis of the review should be the three most important basic fees: the fees for application, registration and renewal of (individual) trademarks. The reduction or increase of these three fees should be proportionate to their relative weight. The automatic regular adjustments should not take effect outside a fluctuation margin. OHIM's financial autonomy must be secured under all circumstances."⁶³

Furthermore, the European Commission argued that "the introduction of a method of regular review of the trade mark fees [would have] clear advantages:

- Firstly, the financial autonomy of the Office will be safeguarded. On the one hand, structural deficits that risk entailing the consumption of the reserves and a need for subsidies can be avoided. On the other hand, excessive accumulation of reserves can be avoided; a necessity in order to guarantee a reasonable balance between revenue and expenditure.
- Secondly, the use of such formula would better reflect the costs for the users of the OHIM system. Even though a number of elements have to be taken into account when determining fees, the amount charged to the users should reflect the cost of the service rendered.
- Thirdly, the introduction of a formula for handling and absorbing future surpluses or deficits by way of an automatic link to fees does not as such seem to present particular technical difficulties. The Community Trade Mark Regulation states that the fees regulations shall determine in particular the amounts of fees and the ways in which they are to be paid."⁶⁴

The European Commission's proposition of "the introduction of a mechanism of regular and automatic fee review and, a fortiori, an immediate fee reduction [has been supported by an] overwhelming majority of the users associations"⁶⁵ (incl. AIM, AIPPI, BusinessEurope, FICPI, GRUR, INTA, Marques, ECTA) that have been consulted in 2007.

⁶³ European Commission (2006): The Financial Perspectives of the Office for Harmonisation in the Internal Market (Trade Marks and Designs), COM(2006) 865 final, Brussels, pp. 8f.

⁶⁴ European Commission (2006): The Financial Perspectives of the Office for Harmonisation in the Internal Market (Trade Marks and Designs), COM(2006) 865 final, Brussels, p. 8.

⁶⁵ European Commission (2009): Impact Assessment accompanying the proposal for a Commission Regulation on the amendment of Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs), SEC(2009) 419, Brussels, p. 8.

However, the September 2008 agreement of the OHIM Administrative Board and Budget Committee considered a “**regular biannual review**” of the financial situation of the Office by the Commission to be more appropriate [than a formula-based approach] in order to making the necessary proposals in the comitology procedure with a view to balancing the Office’s budget”.⁶⁶

OHIM stressed in 2010 that “to avoid [...] the appearance or reality of a conflict of interest for Member States [...], fees should be set by another **more independent mechanism**. This mechanism should include the two yearly review of Office finances previously proposed by the Commission.”⁶⁷

The European Commission’s legislative proposal of March 2013 for the review of the OHIM basic regulation (a) refines the existing balanced budget principle by explicitly stating that the accumulation of significant surpluses should be avoided and (b) foresees a review of the level of fees by the European Commission in case of significant surpluses in two consecutive years: “The amounts of the fees [...] shall be fixed at such level as to ensure that the revenue in respect thereof is in principle sufficient for the budget of the Agency to be balanced while avoiding the accumulation of significant surpluses. [...] The Commission shall review the level of fees should a significant surplus become recurrent.”⁶⁸

The European Commission’s legislative proposal thereby takes over point 38 of the Common Approach on EU decentralised agencies which states that “for self-financed agencies, fees should be set at a realistic level to avoid the accumulation of significant surpluses.”⁶⁹ A regular review of the fees would be ensured by the empowerment of the European Commission to adopt delegated acts on fee adjustments (see section 2.4.1 above). The European Commission would however only be “forced” to review OHIM’s fees in case of recurrent significant surpluses, i.e. when the budgetary outturns have already proven that fee levels are non-compliant with the balanced budget principle – not in a forward-looking perspective trying to avoid such non-compliance.

The European Commission’s legislative proposal does not include any “pre-determined formula” or rule that would provide additional guidance for the determination of fees. Several interviewees have, however, advocated a rule by which fees would be capped at the level of full costs of the agency. The **full cost recovery approach to fee determination** is also stipulated within the Common Approach (point 39): “For partially self-financed agencies, the clients should pay for the full cost of the services provided to them by those agencies, including the employer’s prorata contribution to the pension scheme”.⁷⁰ Yet, this statement is not applicable to fully self-financed agencies. The European Commission DG Budget pointed out that any fees charged beyond this level of full costs would correspond to a disguised indirect taxation on the agencies’ users.

More generally, an interviewed MEP, member of the European Parliament’s Committee on Budgets, argued in favour of a legal review of the basic regulations of the two fully self-financed agencies in order to include rules on automatic fee adaptations in case of recurring budgetary surpluses (or deficits). She argued that a clear method or formula for fee adaptations in line with the budgetary

⁶⁶ OHIM (2008): Joint Meeting of the Administrative Board and the Budget Committee of the OHIM on 18 and 19 September 2008, Conclusions of agenda item “How to better balance OHIM’s budget – the way forward”, Alicante.

⁶⁷ OHIM (2010b): Contribution to the study on the overall functioning of the trade mark system in Europe, Alicante, p. 29.

⁶⁸ European Commission (2013a): Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, COM(2013) 161 final, Brussels, proposed Article 144.

⁶⁹ European Parliament / Council of the European Union / European Commission (2012): Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, Brussels.

⁷⁰ European Parliament / Council of the European Union / European Commission (2012): Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, Brussels.

reality of fully self-financed agencies is required. Such a mechanic approach ensuring a balanced budget – i.e. “an institutionalisation of fee determination and treatment of surpluses” – would depoliticise the debate on fee and surplus levels and overcome underlying conflicts of interest.

On the other hand, CPVO and the European Commission DG SANCO considered that the balanced budget principle provides sufficient guidance for the fee determination and that any additional pre-determined formula or rule set in legislation would potentially undermine flexibility for future reviews of (fully) self-financed agencies’ pricing models.

2.5. CONCLUSIONS

This chapter has discussed the determination of fees of fully self-financed agencies.

According to their basic regulations, the fees of the two fully self-financed EU agencies – CPVO and OHIM – must be fixed at levels which ensure that the agencies’ budgets are balanced. Fees are determined via the “comitology” procedure (involving the Council and the European Commission) based on input and proposals from the agencies’ management boards.

In particular in the case of OHIM, the fee income has created significant accumulated surpluses and the agency has thus not complied with the balanced budget principle set out in its basic regulation.

Given the important role played by the management boards of the two agencies in developing fee level policy, and the fact that many management board members or their employing authorities are often also directly involved on behalf of their Member State in determining the definitive fee levels in the “comitology” procedure, the situation creates a clear danger of “divided loyalties” – to the principles of the agencies’ basic regulations on the one hand, and the national IP offices on the other. The lack of clear and automatic rules for dealing with fee determination in case a balanced budget is not achieved has also contributed to this situation of building-up of surpluses.

In addition to non-compliance with the balanced budget principle, high levels of fees have also been considered as disguised indirect taxation on the agencies’ users. Furthermore, evidence suggests that the high fees charged in order to obtain Community intellectual property rights may hinder SMEs from taking full advantage of the Internal Market.

The following measures or principles could be considered in this regard:

- An annual review of the financial perspectives of fully self-financed agencies;
- A determination of fees of such agencies by the European Commission, with veto rights for the Council of the EU and the European Parliament as foreseen by Art. 290 TFEU (to replace the “comitology” approach);
- Clearer rules for the determination of fees, including a specific objective to avoid the accumulation of significant surpluses, and potentially the principle of capping fees to the level of full cost recovery (with full costs ideally being defined based on a zero-based budgeting approach);
- An automatic triggering of fee adjustment procedures in case of recurring surpluses (or deficits);

- A review of the governance structures of the agencies in order to better represent both the European rather than national interest (e.g. by strengthening the position of the European Commission) and the interests of the agencies' users (e.g. by providing them a certain number of permanent seats in the management boards); and
- A reflection on the appropriate degree of European integration of the European trademark and plant variety systems, notably in view of fostering the competitiveness of the European economy, in particular of SMEs.

3. TREATMENT OF SURPLUSES OF FULLY SELF-FINANCED EU AGENCIES

KEY FINDINGS

- The basic regulations of fully self-financed agencies define the maintenance of a balanced budget as a core principle. Consequently, even if not explicitly stated, any (accumulation of) surpluses or deficits should be avoided. Fee levels should be set to ensure that the agencies' costs are covered. There are currently no additional legal provisions that regulate the treatment of surpluses of fully self-financed agencies.
- As a result of repeated positive budgetary outturns, CPVO and OHIM have accumulated significant cash reserves which can be considered as going well beyond the recognised need for a reasonable reserve fund in order to deal with unforeseen drops in income.
- In order to deal with this situation and reduce the accumulation of surpluses, both CPVO and OHIM have adjusted their fees downwards. In the case of OHIM, the fee reductions of 2005 and 2009 have been insufficient to "eat up" accumulated surpluses, as total annual levels of income have not reduced. Rather, recent efforts to reduce OHIM's surplus have been essentially focussed on an accelerated consumption of reserves by increasing spending.
- Some management board members representing Member State authorities in the agencies have also exhibited a tendency to support measures that redistribute accumulated funds to the Member States and their national IP offices rather than to those who were obliged to pay fees that proved to be excessive (i.e. the agencies' users) or to the EU. The absence of clear and automatic rules for the treatment of surpluses contributes to this situation. Furthermore, the control and incentive structures of the two agencies have been judged by the European Court of Auditors as being insufficient to fully prevent the risk of agencies wasting accumulated surpluses and excess revenues.
- The following measures or principles could be considered in this regard:
 - Accumulated surpluses could be used to reduce the level of renewal/annual fees in order to reimburse the agencies' users that have been "overcharged" in the past.
 - Transfers of the agencies' surpluses to the EU budget, to the Member States or their national IP offices should be avoided they introduce a disguised indirect taxation on companies at EU level which is not foreseen by the Treaties.
 - Clear legal rules could be developed on what should be done with significant surpluses – while setting appropriate incentives to avoid the accumulation of such surpluses in future (through a realistic cost-based fee determination).
 - The appropriate maximum level of reserve funds that may be held by fully self-financed agencies could be determined. Above the levels the rules for the treatment of significant surpluses would be triggered.

This chapter discusses the treatment of surpluses of fully self-financed EU agencies, i.e. of CPVO and OHIM. A first sub-section presents the current legal situation. The second sub-section provides a brief overview of the current levels of surpluses at CPVO and OHIM as well as the measures that these agencies have taken in order to deal with their surpluses. The third sub-section discusses issues identified with regard to the treatment of surpluses at fully self-financed agencies, namely potentially

unbalanced governance structures, the perceived lack of rules for the treatment of surpluses as well as the risk of inappropriate use of accumulated surpluses. The fourth sub-section analyses the seven main proposed changes with regard to treatment of surpluses of fully self-financed agencies, i.e. the review of governance structures, a rules-based treatment of surpluses, a “flow-back” of surpluses to the EU budget, an earmarked “flow-back” of surpluses to the EU budget, a “flow-back” of surpluses to the Member States as well as a flow-back of surpluses to the users of fully self-financed agencies either based on reimbursements or based on fee reductions. The fifth sub-section concludes.

There is a close and inherent link between this chapter and chapter 2 on the determination of fees of fully self-financed EU agencies insofar that fees charged at levels above full costs typically lead to the accumulation of surpluses.

3.1. THE CURRENT LEGAL SITUATION

This sub-section presents the current legal situation with regard to the treatment of budgetary surpluses of fully self-financed agencies in general and specifically at CPVO and OHIM.

3.1.1. General principles for the treatment of budgetary surpluses

The basic regulations of fully self-financed agencies define the maintenance of a balanced budget as core principle. Consequently, even though not explicitly stated, any (accumulation of) surpluses or deficits should be avoided.⁷¹

There are currently no additional legal provisions that would regulate the treatment of surpluses of fully self-financed EU agencies.

In this context, it is important to note that the “balancing subsidy” principle – which is used to deal with surpluses of EU agencies that are (partially) financed through a Union subsidy – cannot be applied to fully self-financed agencies because they by definition do not receive any subsidy from the EU budget.

However, some features of the “balancing subsidy” mechanism have been discussed in the framework of the proposed solutions for the treatment of surpluses of fully self-financed agencies (see section 3.4 below). For this reason, the “balancing subsidy” principle is shortly presented in the following.

According to the “balancing subsidy” principle, “the EU contribution to the agencies for a given financial year is meant to balance agency revenue and expenditure for that given year (“balancing subsidy”). In turn, an agency surplus for a given financial year has to be repaid to the EU budget (in the following year), up to the level of the total EU subsidy paid. The reasoning behind this provision is that a surplus means that the EU subsidy paid to the agency in order to balance agency revenue and expenditure turned out to be too high, and should therefore be recovered by the Commission as an amount “wrongly paid”.^{72 73}

⁷¹ Article 108 paragraph 2 of the CPVO basic Regulation No 2100/94 and Article 139 paragraph 2 of the OHIM basic Regulation No 207/2009 state that “the revenue and expenditure shown in the budget shall be in balance.”

⁷² European Commission (2010f): Funding and budget revenues of agencies, Analytical fiche on decentralised agencies n° 20, Brussels.

⁷³ In accordance with Article 21 paragraph 3 (c) of the Financial Regulation No 966/2012, “amounts recovered from agencies’ surpluses are entered as assigned revenue on the Commission’s budget line for the agency concerned”. The European Commission explained that the “policy to deduct assigned revenue for year N from fresh appropriations for year N+1 is a practical application of the rule that these assigned revenues, recovered in year N, may be carried over only once, and must be used first, in year N+1. As such, this means that in any year N two annual tranches of assigned revenues exist in parallel: (1) assigned revenues recovered in year N, to be carried over to year N+1, as they in principle have been taken

3.1.2. Treatment of surpluses at CPVO

The core budgetary principle of CPVO is defined by Article 108 paragraph 2 of the CPVO basic Regulation No 2100/94: "The revenue and expenditure shown in the budget shall be in balance."

However, the CPVO basic regulation does not contain any rule on how potential surpluses should be treated.

While acknowledging the balanced budget principle, CPVO underlined in its written response the "necessity [for CPVO] to maintain a reserve" in view of its "demand driven" and thus potentially fluctuating revenue stream and the unavailability of a Union subsidy. The agency declared that "this means that the CPVO, in order to apply the concept of sound financial management, must have in place a reserve to allow for periods when, due to market driven reasons, income is lower than expected."

3.1.3. Treatment of surpluses at OHIM

The core budgetary principle of OHIM is defined by Article 139 paragraph 2 of the OHIM basic Regulation No 207/2009: "The revenue and expenditure shown in the budget shall be in balance."

Similarly to CPVO, the OHIM basic regulation does not contain any rule on how potential surpluses should be treated.

OHIM has conveyed the necessity to establish a reserve fund to cope with potential drops in income as a result of its demand-driven activity. The September 2008 agreement⁷⁴ of the OHIM Administrative Board and Budget Committee, which was subsequently endorsed by the Competitiveness Council in 2010⁷⁵, decided "to allocate around 190 million euros [of OHIM's accumulated surpluses] to [a] Reserve Fund" (corresponding to about one year's revenue).

In its trademark package of March 2013, the European Commission proposed various legislative amendments to Council Regulation 207/2009, which would inter alia provide more legal clarity with regard to the treatment of surpluses at OHIM.

The new recital no 43 in the European Commission's legislative proposal suggests that "in the interest of sound financial management, the accumulation of significant budgetary surpluses should be avoided. This should be without prejudice to the Agency maintaining a financial reserve covering one year of its operational expenditure to ensure the continuity of its operations and the execution of its tasks."⁷⁶

Accordingly, the European Commission proposed an amended Article 144 to include the following: "The amounts of the fees [...] shall be fixed at such level as to ensure that the revenue in respect thereof is in principle sufficient for the budget of the Agency to be balanced while avoiding the accumulation of significant surpluses. Without prejudice to Article 139(4), the Commission shall review the level of fees

into account when calculating the EU contribution for year N+1; and (2) assigned revenues carried over from year N-1, to be used in year N, together with fresh appropriations in the budget for year N."

⁷⁴ OHIM (2008): Joint Meeting of the Administrative Board and the Budget Committee of the OHIM on 18 and 19 September 2008, Conclusions of agenda item "How to better balance OHIM's budget – the way forward", Alicante.

⁷⁵ Council of the European Union (2010): Conclusions on the future revision of the Trade Mark system in the EU, 3016th Competitiveness Council meeting, 25 May 2010, Brussels.

⁷⁶ European Commission (2013a): Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, COM(2013) 161 final, Brussels.

should a significant surplus become recurrent. If this review does not lead to a reduction or modification in the level of fees which has the effect of preventing the further accumulation of a significant surplus, the surplus accumulated after the review shall be transferred to the budget of the Union.”⁷⁷

In essence, the proposed legal amendments foresee (1) a clear rule on the avoidance of the accumulation of significant surpluses, (2) a clear cap to the financial reserves to a maximum of one year of operation expenses of the agency, (3) an automatic trigger of a fee review process by the European Commission in case of recurring significant surpluses, and (4) a transfer of additional surpluses to the EU budget in case the fee review process would lead to insufficient fee reductions resulting in a further accumulation of surpluses.

The European Commission’s legislative proposal does, however, not define any rules on how the existing and potential future surpluses accumulated by OHIM should be treated. Also, the specific modalities of a potential transfer of additional surpluses to the EU budget (following an insufficient fee adaptation) remain unclear in the current version of the legislative proposal.

3.2. THE CURRENT LEVEL OF SURPLUS OF FULLY SELF-FINANCED AGENCIES

This sub-section provides a brief overview of the current levels of surplus at CPVO and OHIM as well as the measures that these agencies have taken in order to deal with these surpluses.

3.2.1. Level of surplus and measures taken at CPVO

The table below shows that CPVO has registered recurring and significant positive net outturns over the last years.

Table 5: CPVO’s economic outturn, 2009-2011

YEAR	INCOME	NON BUDGETARY RECEIPTS ⁷⁸	EXPENDITURE	NET OUTTURN
2009	11,782,981 EUR	274,681 EUR	11,857,429 EUR	200,233 EUR
2010	11,966,371 EUR	156,604 EUR	10,810,671 EUR	1,312,304 EUR
2011	13,005,318 EUR	127,212 EUR	12,304,699 EUR	827,832 EUR

Source: CPVO annual accounts (2009-2011)

As a result of repeated positive budgetary outturns, CPVO has accumulated 17.68 million EUR of cash and cash equivalents in 2011, corresponding to 525 days of expenditure.

When subtracting CPVO’s outstanding budgetary commitments made with third parties from the total amount of cash and cash equivalents, the so-called “free reserve” of the agency amounted to 6.84 million EUR in 2011, corresponding to about 200 days of expenditure.⁷⁹ With regard to the

⁷⁷ European Commission (2013a): Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, COM(2013) 161 final, Brussels.

⁷⁸ Concerns mainly the cancellation of outstanding commitments not settled, not used or cancelled on 31 December.

⁷⁹ For a detailed presentation of CPVO’s “free reserve” concept, please refer to: CPVO Annual Accounts 2011, p. 17, http://www.cpvo.eu.int/documents/Rapportannuel/AA2011_EN.pdf

concept of “free reserve”, CPVO explained in its written response that “the major part of the treasury of the Office has already been earmarked through budgetary and legal commitments for future spending, mainly to pay examination offices for technical examinations carried out on behalf of the CPVO. Accordingly, the funds should not be used for any other purpose than for what they were earmarked.”

Table 6: CPVO’s accumulated surplus, 2009-2011

YEAR	CASH AND CASH EQUIVALENTS	DAYS OF EXPENDITURE	“FREE RESERVE”	DAYS OF EXPENDITURE
2009	15,532,038 EUR	478 days	5,624,009 EUR	173 days
2010	16,870,000 EUR	570 days	6,293,000 EUR	212 days
2011	17,682,272 EUR	525 days	6,837,762 EUR	203 days

Source: CPVO annual accounts (2009-2011); own calculations

CPVO explained that its “Administrative Council has expressed a wish that the “free reserve” (total treasury less outstanding budgetary commitments) for the CPVO [should] be close to EUR 5 million, a figure which in the past represented +/- 50% of the annual budget.” Such “free reserve” levels were justified by CPVO by the need to “weather the difficult years – when applications (demand) are reduced or when the level of surrenders of titles (clients waiving their rights and no longer paying annual fees) falls” – and expected increasing future expenses for IT system developments. In addition, the European Commission DG SANCO stated that the “free reserve” should correspond to about 0.5 to 1 year of expenditure, i.e. the time that would typically be required for an adjustment of CPVO’s fees (in case of a severe drop of income).

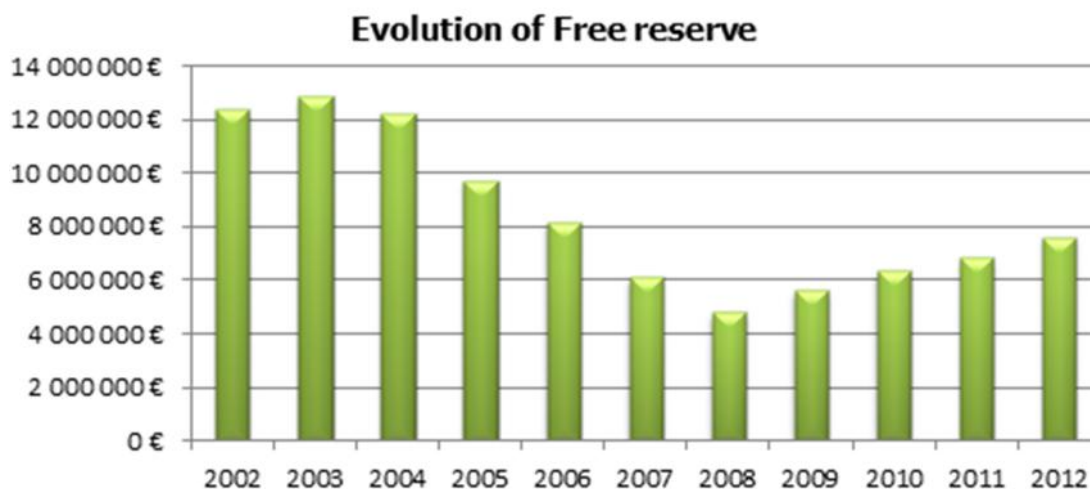
With regard to its “non-free reserve”, CPVO explained that it “is [currently] looking into the option [where] the applicants [would be] paying the fee for the technical examination directly to the examination offices and not through the CPVO [... as it is currently the case]. The effect of this would be that the CPVO would no longer need to make commitments for future examinations and would no longer keep cash in a reserve for this purpose. By adjusting the application fee and the annual fee the total reserve (treasury and the “free reserve”) could eventually be brought down to the reserve agreed upon by the Administrative Council”, i.e. about 5 million EUR.

CPVO and its Administrative Council are monitoring the evolution of the agency’s income, expenditure and reserve levels. In case the “free reserve” deviates significantly from the target level of 5 million EUR, CPVO’s fees are adjusted accordingly. In the past, CPVO fees have also been set at levels below full costs in order to “eat up” accumulated excess reserves.

CPVO explained that “the “free reserve” [...] reached an historic high point in 2003 after which it dropped significantly in the period 2003 to 2008, mainly through fee adjustments. Increasing applications and titles in force meant that the reserve has been steadily rising since 2008. [...] In its February 2013 meeting the Administrative Council [has therefore] decided to propose to the legislator to lower the annual fee as from January 2014, in line with the objectives stated above. The impact of the reduction will be a +/- EUR 1 million reduction in annual budget outturn as from 2014 and should see the free reserve return to a level of EUR 5 million by 2017.”

The figure below illustrates the evolution of CPVO's "free reserve" over the last decade.

Figure 1: Evolution of CPVO's "free reserve"⁸⁰



3.2.2. Level of surplus and measures taken at OHIM

The table below shows that OHIM has registered recurring and significant positive net outturns over the last years.

Table 7: OHIM's economic outturn, 2009-2011

YEAR	INCOME	EXPENDITURE	OUTTURN
2009	193,147,905 EUR	136,699,508 EUR	56,448,398 EUR
2010	180,330,855 EUR	150,931,690 EUR	29,399,165 EUR
2011	185,950,603 EUR	146,265,938 EUR	39,684,665 EUR

Source: OHIM annual accounts (2009-2011)

As a result of repeated positive budgetary outturns, OHIM has accumulated significant cash reserves amounting to 520 million EUR in 2011, corresponding to about 1300 days of expenditure.

Table 8: OHIM's accumulated surplus, 2009-2011

YEAR	CASH RESERVE	DAYS OF EXPENDITURE
2009	474,218,078 EUR	1,266 days
2010	495,367,400 EUR	1,198 days
2011	520,338,633 EUR	1,298 days

Source: OHIM annual accounts (2009-2011); own calculations

⁸⁰ Source: CPVO

OHIM's Reserve Fund as foreseen by the September 2008 agreement was equipped with around 201 million EUR in 2011, corresponding to 502 days of expenses and about one year's revenue.⁸¹ While such reserve levels would correspond approximately to the reserve needs claimed by CPVO in order to cope with unexpected drops in income, OHIM declared in 2010 that "initial work [by OHIM] suggests that the most that the Office would need to cope with a sharp reduction in revenue due to falling volumes would be about €50m"⁸², i.e. about 25% of the agency's yearly revenues.

Similarly to CPVO's concept of "free reserve", OHIM has argued in 2011 (in reply to the ECA) that "the cash of the Office as at 31 December 2010 includes 67 million euro of advanced payments from its clients and carried over appropriations from 2010 to 2011, thus this amount cannot be considered as a surplus of the Office. (The equivalent amount in 2009 amounted to 72 million euro)."⁸³ However, the relative importance of such future outstanding commitments is significantly lower at OHIM when compared to CPVO. OHIM is not specifically reporting its "free reserve" as a strategic ratio within its annual accounts.

While OHIM's fees have been reduced in 2005 and 2009, these fee adjustments have been insufficient to "eat up" accumulated surpluses. On the contrary, the elastic demand for CTMs has led to growing revenues and surpluses (see section 2.3.1 above). More recently, the reflections and measures taken to deal with OHIM's surplus have been essentially focussed on an accelerated consumption of the accumulated surpluses.

Measures taken to consume OHIM's accumulated surpluses include:

- "Investments to implement the strategic plan endorsed by the governing board and budget authority of the Office in May 2011 aiming at organisational excellence and international cooperation, amounting to 129 million euro. The strategic plan includes investments in buildings amounting to 69 million euro [(refurbishment of headquarters, construction of a new wing)], the cooperation fund⁸⁴ of 40 million euro [(financing of projects with national IP offices such as the creation of common databases and IT tools)], 4 million euro on further simplification and modernisation of IT and other important concepts that will contribute to the accomplishment of the referred to goals."⁸⁵
- The European Observatory on Infringements of Intellectual Property Rights – originally set up by the European Commission DG MARKT in April 2009 under the name of European Observatory on Counterfeiting and Piracy – has been fully entrusted to OHIM since 5 June 2012 by Regulation (EU) No 386/2012. The Observatory is fully funded by OHIM resources. "The initial impact assessment of the running cost of this Observatory is between 3,3 and 5,5 million euro per year."⁸⁶
- Directive 2012/28/EU assigned to OHIM the establishment, management and funding of the European online database of orphan works.

⁸¹ Calculated based on OHIM annual accounts 2011.

⁸² OHIM (2010b): Contribution to the study on the overall functioning of the trade mark system in Europe, Alicante, pp. 9f.

⁸³ European Court of Auditors (2010b): Report on the annual accounts of the Office for Harmonization in the Internal Market for the financial year 2009, together with the Office's replies, OJ 2010/C 338/30, Luxembourg.

⁸⁴ OHIM (2010a): Decision No ADM-1 0-18 concerning the implementation of the OHIM's Cooperation Fund programme for joint Projects with EU Member State central industrial property offices, Alicante.

More information on the OHIM Cooperation Fund is available under: <http://oami.europa.eu/ows/rw/pages/OPLUS/cooperationFund.en.do>

⁸⁵ European Court of Auditors (2010b): Report on the annual accounts of the Office for Harmonization in the Internal Market for the financial year 2009, together with the Office's replies, OJ 2010/C 338/30, Luxembourg.

⁸⁶ European Court of Auditors (2010b): Report on the annual accounts of the Office for Harmonization in the Internal Market for the financial year 2009, together with the Office's replies, OJ 2010/C 338/30, Luxembourg.

In addition, there have been reflections and proposals for additional measures for a consumption of OHIM's accumulated and potential future surpluses, e.g.:

- The European Commission's trademark package of March 2013 proposes to extend OHIM's competences in the area of the protection of geographical indications.⁸⁷
- The September 2008 agreement⁸⁸ of the OHIM Administrative Board and Budget Committee, which was subsequently endorsed by the Competitiveness Council in 2010⁸⁹, included a "political agreement to distribute 50 % of the [OHIM] renewal fee to the national offices of trademarks as a basis for cooperation in order to enhance the harmonisation of practices and tools in the field of trademarks and designs for the benefit of users, [... thereby] also contribut[ing] to a more balanced budget"⁹⁰ at OHIM due to the consumption of future OHIM revenues which would have potentially led to a further accumulation of surpluses.
- It has also been considered to fund the European school in Alicante through OHIM resources.

While the European Commission has proposed additional fee adjustments within the framework of the trademark package of March 2013, these appear to be insufficient – according to the European Commission's own projections (see section 2.2.2 above) – to significantly "eat up" OHIM's existing excess surpluses. Even when combining these proposed fee adjustments with the decided surplus consumption measures mentioned above, OHIM's excess cash reserves would still remain significant.

The following sub-sections discuss the potential issues identified with regard to the treatment of surpluses at fully self-financed agencies as well as the different proposed solutions to these issues.

3.3. ISSUES IDENTIFIED

This sub-section discusses issues identified with regard to the treatment of surpluses at fully self-financed agencies, namely potentially unbalanced governance structures, a perceived lack of rules for the treatment of surpluses as well as a risk of inappropriate use of accumulated surpluses.

3.3.1. Governance structures

The potential conflicts of interest inherent to the governance structures of the two fully self-financed agencies discussed in section 2.3.2 above do also influence the potential accumulation and treatment of surpluses at these agencies.

Indeed, it has been demonstrated above that the existing governance structures for fee determination at fully self-financed agencies may lead to a potential deviation from the balanced budget principle by setting fees significantly above full cost levels and, as a result, leading to the accumulation of surpluses.

⁸⁷ European Commission (2013a): Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, COM(2013) 161 final, Brussels.

See also: European Commission (2013b): Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark and the Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast), SWD(2013) 95, Brussels, p. 39f.

⁸⁸ OHIM (2008): Joint Meeting of the Administrative Board and the Budget Committee of the OHIM on 18 and 19 September 2008, Conclusions of agenda item "How to better balance OHIM's budget – the way forward", Alicante.

⁸⁹ Council of the European Union (2010): Conclusions on the future revision of the Trade Mark system in the EU, 3016th Competitiveness Council meeting, 25 May 2010, Brussels.

⁹⁰ European Court of Auditors (2010b): Report on the annual accounts of the Office for Harmonization in the Internal Market for the financial year 2009, together with the Office's replies, OJ 2010/C 338/30, Luxembourg.

With regard to the treatment of existing surpluses, the potential conflicts of interest inherent to the governance structures of the two fully self-financed agencies may potentially lead to a tendency to support measures that would redistribute accumulated funds to those that dominate the agencies' governance (i.e. the Member States and their national offices) rather than to those who initially paid too much (i.e. the agencies' users) or to third parties (e.g. the EU).

The discussions around the treatment of OHIM's surpluses have very well demonstrated this. Indeed, the September 2008 agreement⁹¹ of the OHIM Administrative Board and Budget Committee, which was subsequently endorsed by the Competitiveness Council in 2010⁹², proposed direct transfers of OHIM revenues to the national IP offices as well as surplus consumption programmes that mainly benefit national IP offices. On the other hand, solutions benefiting the users (e.g. fee reductions to full cost levels or below) or the EU (e.g. through transfers to the EU budget) have been less dominant in the on-going debate.

The different proposed solutions are further discussed in section 3.4 below.

3.3.2. Rules for the treatment of surpluses

The second issue refers to the perceived lack of rules for the treatment of surpluses of fully self-financed EU agencies.

As mentioned in section 3.1 above, the fully self-financed agencies' basic regulations define a balanced budget as core principle. Consequently, even though not explicitly stated, any (accumulation of) surpluses or deficits should be avoided.⁹³ However, there are currently no further legal provisions that regulate the treatment of surpluses of fully self-financed EU agencies.

The ECA underlined that no legal procedure has been foreseen for the case of potential budgetary surpluses of fully self-financed EU agencies. The ECA explained that the legislator foresaw the case of insufficient income (which would trigger an EU subsidy), but did not provide any guidance on how to deal with surpluses which have been accumulated as a result of the non-respect of the balanced budget principle.

The need of fully self-financed EU agencies to maintain a certain level of financial reserves in order to be able to cope with unexpected drops in income – typically triggered by unforeseen fluctuations in the registration activities – or unexpected increases in expenditure was acknowledged by all experts and stakeholders interviewed in the framework of this study. However, there were diverging opinions with regard to the appropriate levels of such reserves (above which one would speak of an “accumulation of significant surpluses” and may trigger mechanisms for the treatment of surpluses).

⁹¹ OHIM (2008): Joint Meeting of the Administrative Board and the Budget Committee of the OHIM on 18 and 19 September 2008, Conclusions of agenda item “How to better balance OHIM's budget – the way forward”, Alicante.

⁹² Council of the European Union (2010): Conclusions on the future revision of the Trade Mark system in the EU, 3016th Competitiveness Council meeting, 25 May 2010, Brussels.

⁹³ Article 108 paragraph 2 of the CPVO basic Regulation No 2100/94 and Article 139 paragraph 2 of the OHIM basic Regulation No 207/2009 state that “the revenue and expenditure shown in the budget shall be in balance.”

For instance, the ECA argued that the reserves hold by OHIM and CPVO largely exceed reasonable reserve needs. The ECA suggested that a benchmarking exercise with private businesses and public organisations (with levels of business fluctuation comparable to those of OHIM and CPVO) could provide valuable insights on appropriate reserve levels for the two fully self-financed agencies. Several interviewees called for a structural reflection on the maximum level of reserve funds that should be hold by fully self-financed agencies as well as the definition of clear legal rules in this regard.

3.3.3. Risk of inappropriate use of surpluses

The third issue refers to the risk of inappropriate use of accumulated surpluses of fully self-financed agencies, i.e. the potentially inefficient use of collected excess fees.

Notably, the ECA stressed that the current situation at OHIM creates no incentives for an efficient financial management: There is a relatively secure income stream which is significantly higher than full costs, fee adaptations to the cost reality have proven not to be a political priority to date and there is some degree of legal uncertainty with regard to the treatment of surpluses. According to the ECA, the control and incentive structure seems to be insufficient to fully prevent the risk of agencies wasting accumulated surpluses and excess revenues.

While there is currently no clear indication that accumulated surpluses at fully self-financed agencies have actually been wasted, the ECA monitors the agencies' expenditure closely.

3.4. PROPOSED CHANGES

This sub-section analyses the seven main proposed changes with regard to treatment of surpluses of fully self-financed agencies, i.e. the review of governance structures for the treatment of surpluses, a rules-based treatment of surpluses, a "flow-back" of surpluses to the EU budget, an earmarked "flow-back" of surpluses to the EU budget, a "flow-back" of surpluses to the Member States as well as a flow-back of surpluses to the users of fully self-financed agencies either based on reimbursements or based on fee reductions.

3.4.1. Review of governance structures for the treatment of surpluses

Similarly to the discussions on the review of governance structures for fee determination (see section 2.4.1 above), most governance-related propositions with regard to the treatment of surpluses call for a stronger involvement of all different interests, notably the interest of the agencies' users and the broader European interest, in the decision-making on the use of accumulated surpluses.

More balanced governance structures are expected to contribute to the avoidance of the accumulation of surpluses (through more realistic fee setting) and to prevent a potential inefficient or inappropriate use of accumulated surpluses. This is because in balanced governance structures none of the different types of interests (i.e. users, national offices, the EU agency, and the broader European interest) would be able to seek rents by abusing its dominant position. Checks and balances and the competition between various types of interests would prevent any party from consuming accumulated surpluses in an inefficient or inappropriate manner.

3.4.2. Rules-based treatment of surpluses

In view of the lack of rules for the treatment of surpluses of fully self-financed agencies, it has been proposed to introduce detailed rules on what should be done with significant surpluses – while setting appropriate incentives to avoid any accumulation of surpluses in future (through a realistic cost-based fee determination).

Such rules on the treatment of surpluses would also need to define what level of surplus would have to be considered as “significant” and in excess of recognised reserve needs, thus triggering a procedure for the rules-based “treatment” of these surpluses.

In the context of the Common Approach on EU decentralised agencies⁹⁴, the issues of the treatment of surpluses and agencies’ reserve needs were discussed for partially self-financed agencies. It stated that “concerning the issue of how to deal with a possible shortfall against forecast of fee revenue from the clients and the need to ensure the availability of necessary funding to agencies, the Commission will investigate the necessity and possible modalities of creating a limited ring-fenced reserve fund to be operated in a transparent way” (point 39). Accordingly, the European Commission’s roadmap⁹⁵ foresaw the drafting of “an analytical paper to investigate the treatment of surplus, including the possible creation of a ring fenced fund” in Q3 2013 (point 72). In addition, point 73 of the European Commission’s roadmap foresaw, “if appropriate, [the proposition of] relevant changes in the Framework Financial Regulation” in Q4 2013. However, it is important to note that fully self-financed agencies have been explicitly excluded from these reflections.

With regard to the content of the rules for the treatment of accumulated surpluses various divergent opinions exist. They reach from an automatic “flow-back” of surpluses to the general EU budget, to a transfer of funds to the Member States or to a reimbursement of the agencies’ users. These different propositions are discussed in the following sub-sections.

Finally, the idea of introducing a fine or sanction for budgetary surpluses of fully self-financed agencies has been discarded by most interviewees. For instance, the ECA argued that such a fine or sanction would lead to perverse incentives at the relevant agencies, i.e. encourage the wasting of surpluses in order to formally achieve a balanced budget and avoid the fine or sanction. Sanctions for budgetary surpluses may thus be counterproductive insofar they may create incentives to inefficiently spend unused funds (to avoid the sanction) rather than accumulating them as cash reserves until the legislator has decided upon a solution on how to use these funds.

⁹⁴ European Parliament / Council of the European Union / European Commission (2012): Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, Brussels.

⁹⁵ European Commission (2012): Roadmap on the follow-up to the Common Approach on EU decentralised agencies, Brussels.

3.4.3. “Flow-back” of surpluses to the general EU budget⁹⁶

The European Parliament has repeatedly invited the European Commission “to reflect on how to deal with [a situation in which fully self-financed agencies can accumulate significant surpluses] and whether it might be appropriate for any **excess income [...] to flow back into the EU budget**”.⁹⁷

In this context, the European Commission argued in 1997 that “even Agencies which are mainly self-financing, do not have unlimited budgetary autonomy. Their budgets should be in equilibrium on an annual basis. [...] Thus, these agencies are not, and should not become, profit-making bodies. If their revenue is structurally higher than an appropriate level of expenditure, then urgent proposals should be made to reduce the level of fees charged to their “customers”. Consequently, once they have ensured that they can properly finance their administrative running costs and have built up sufficient funds to ensure that they can cover current liabilities, **any exceptional surplus revenue should be paid into the Community budget**. These contributions would be entered in the general budget as miscellaneous revenue. In other words, **in this way one can avoid certain agencies creating large general reserves and over time becoming uncontrollable**. The possibility of maintaining reserves for future expenditure could be permitted, but in practice this should be limited to reserves for liabilities resulting from identified legal obligations following applications (e.g. registration, examination, translation, publication ...). To reinforce external control it is proposed that the decision to set up such a reserve should be given by the Management Board with the assent of the Commission, which will first consult Parliament.”⁹⁸

Accordingly, the European Commission proposed legislative amendments to the OHIM and CPVO basic regulations in view that “any revenue surplus to expenditure during a particular financial year shall, after account has been taken of the decrease in the Community subsidy, be entered in the general budget of the European Communities as miscellaneous revenue.”⁹⁹ The proposed amendments have, however, not been retained by the legislator. The treatment of surpluses of fully self-financed agencies therefore remains largely unregulated as discussed in section 3.1 above.

The European Commission’s recent Roadmap on the follow-up to the Common Approach on EU decentralised agencies¹⁰⁰ announced a structural reflection on the treatment of partially self-financed agencies’ surpluses. However, fully self-financed agencies are not be covered by this exercise.

The idea of a “flow-back” of fully self-financed agencies’ surpluses to the general EU budget has been criticised by several interviewees. For instance, CPVO argued that “if breeders were asked to pay more [...] than the costs for the services they receive, [this] would most certainly be perceived as a general tax for their activities which the EU is not entitled to collect.” Similarly, the European Commission DG Budget stated that **defining fully self-financed agencies’ surpluses as a new EU own resource would**

⁹⁶ The term “flow-back” is somewhat misleading in a scenario where surpluses would be transferred to the EU budget because the unused funds accumulated as surplus did not come from the EU budget but from fees charged to the users. Therefore the term “flow-back” is used in quotation marks here.

⁹⁷ European Parliament (2008): European Parliament resolution of 18 December 2008 on the draft general budget of the European Union for the financial year 2009 as modified by the Council (all sections), P6_TA(2008)0622, Strasbourg.

⁹⁸ European Commission (1997a): Proposals for Council Regulations (EC) amending the basic regulations of certain decentralized Community agencies, COM(97) 489 final, Brussels.

⁹⁹ European Commission (1997b): Proposal for Council Regulation (EC) amending Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, COM(97) 489 final - 97/0253(CNS), Brussels.

European Commission (1997c): Proposal for Council Regulation (EC) amending Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, COM(97) 489 final - 97/0254(CNS), Brussels.

¹⁰⁰ European Commission (2012): Roadmap on the follow-up to the Common Approach on EU decentralised agencies, Brussels.

With regard to partially self-financed agencies, it foresees the drafting of “an analytical paper to investigate the treatment of surplus, including the possible creation of a ring fenced fund” in Q3 2013 (point 72) and, “if appropriate, [the proposition of] relevant changes in the Framework Financial Regulation” in Q4 2013 (point 73).

correspond to the introduction of a disguised indirect taxation of companies at EU-level. Most interviewees agreed that this would not be desirable, hardly defensible politically, and would most certainly trigger a high number of complaints to be lodged from users.

Considering the treatment of surpluses as an own resource in particular, it has been argued that **fully self-financed agencies' surpluses do not fulfil the criteria which are typically required of new EU own resources.**¹⁰¹ For instance, surpluses are by nature exceptional and cannot be anticipated in the EU budgetary planning (as their existence goes against the provisions of the agencies' basic regulations). Therefore, agency surpluses do not fulfil the stability nor the predictability criteria for new EU own resources. Furthermore, surpluses cannot fulfil the sufficiency criterion because the agencies' basic regulations prescribe their minimisation, or rather their non-existence. Finally, the definition of fully self-financed agencies' surpluses as new EU own resource would de facto introduce an indirect taxation on European IP rights – a situation that is difficultly reconcilable with the criterion of coherence with EU policies. Indeed, such a new form of taxation may be considered as contrary to EU policies fostering the competitiveness and well-functioning of a knowledge-based EU Internal Market (see also box 1 in section 2.3.1 above).

3.4.4. Earmarked “flow-back” of surpluses to the EU budget¹⁰²

According to the European Commission DG Budget, the legally most feasible solution to the treatment of OHIM's large surplus would be an **earmarked¹⁰³ donation**. The donated funds would have to be used by the European Institutions only in policy areas which are as closely as possible related to the activity of OHIM. This would ensure that the users, which have initially been “overcharged” by OHIM, do at least partially benefit of their excess contribution through the better funding of EU policies which are closely related to their business activity. As examples of such closely related policy areas the European Commission DG Budget named counterfeiting and industrial property. The Max Planck Institute study also pointed to costs of the European Court of Justice related to trademark disputes which are not covered by OHIM's users¹⁰⁴ – and may thus potentially be considered for such earmarked donations.

The European Commission DG Budget underlined that such an earmarked donation would not be considered as a new EU own resource. A non-recurring donation would not have the characteristics of an indirect tax. The European Commission DG Budget insisted that such an earmarked donation should be operated as a **one-off solution** to OHIM's unusual financial situation and should therefore necessarily be accompanied with a profound review of the agency's fees in order to avoid any future accumulation of significant surpluses. On the contrary, the European Commission DG Budget explained that in case there would be a general rule of an automatic (earmarked) donation triggered by any surpluses surpassing certain thresholds, the Union would de facto introduce a new EU own resource and thereby circumvent the rules applicable to the introduction of new EU own resources.¹⁰⁵

¹⁰¹ For a discussion of the various criteria that are typically required of new EU own resources, please refer to:

Cattoir, Philippe (2009): Options for an EU financing reform, Notre Europe Policy Paper n° 38, Paris.

Deloitte (2007): Future Own Resources, Study for the European Parliament, Directorate General Internal Policies, Brussels.

European Commission (2011b): Proposal for a Council Decision on the system of own resources of the European Union, COM(2011) 510 final, Brussels.

¹⁰² The term “flow-back” is somewhat misleading in a scenario where surpluses would be transferred to the EU budget because the unused funds accumulated as surplus did not come from the EU budget but from fees charged to the users. Therefore the term “flow-back” is used in quotation marks here.

¹⁰³ The Financial Regulation No 966/2012 uses the term “assigned” rather than “earmarked”. The meaning is the same.

¹⁰⁴ Max Planck Institute for Intellectual Property and Competition Law (2011): Study on the Overall Functioning of the European Trade Mark System, Munich, p. 189.

¹⁰⁵ Interestingly such an automatic surplus transfer rule has been proposed by the European Commission's trademark package of March 2013 in the proposed amendment to Article 144 of the OHIM basic Regulation 207/2009: “Without prejudice to Article 139(4), the Commission shall review the level of fees should a significant surplus become recurrent. If this review does not lead to a reduction or modification in the level of fees which has the effect of preventing the further accumulation of a significant surplus, the surplus accumulated after the review shall be transferred to the budget of the Union.”

An interviewed MEP, member of the European Parliament's Committee on Budgets, voiced serious doubts with regard to a one-off donation of OHIM's surpluses to the EU budget as "assigned/earmarked revenue" for a designated policy area. She argued that the implementation of "assigned/earmarked revenues" has proven to be very intransparent in the past.

Furthermore, the interviewed MEP maintained that if the European Commission DG MARKT (i.e. OHIM's partner DG) would receive OHIM's excess surplus as "assigned/earmarked revenues" for trademark-related policy areas – e.g. counterfeiting –, then the European Commission DG MARKT would probably simultaneously reduce the available budgets from the general EU budget in this policy area (reallocating them to another policy area). She therefore argued that it is probable that the "assigned/earmarked revenues" would not lead to substantial additional funding in the designated policy areas. De facto, the OHIM funds would thus flow into the general EU budget.

Finally, the interviewed MEP stated that in case no solution would be found to bring the fee determination of fully self-financed agencies in line with their budgetary reality, it would be very probable that an initial "one-off solution" would have to be repeated in future – leading to permanent indirect taxation of companies at EU level.

3.4.5. "Flow-back" of surpluses to the Member States¹⁰⁶

As discussed in section 3.3.1 above, OHIM's governance bodies (which are dominated by the Member States and their national offices) have proposed measures that would **redistribute OHIM's accumulated excess surplus as well as future OHIM revenues to the national IP offices**. Indeed, the September 2008 agreement¹⁰⁷ of the OHIM Administrative Board and Budget Committee, which was subsequently endorsed by the Competitiveness Council in 2010¹⁰⁸, proposed automatic and unconditional transfers of 50% of OHIM's renewal fees to the national IP offices as well as the creation of a Cooperation Fund equipped with 50 million EUR from OHIM's surplus for the modernisation and harmonisation of national IP offices.

It has been argued that Member States would be willing to implement at OHIM a **similar surplus and renewal fee regime as at the (intergovernmental) European Patent Office**, where surpluses and 50% of the renewal fees automatically "flow back" to the Member States.

The European Commission DG Budget stated that an automatic redistribution of 50% of OHIM's renewal fees to the national IP offices would correspond to a **disguised indirect tax with no link to the service provision by OHIM**. It has therefore not been included the European Commission's trademark package of March 2013.

Another problematic aspect of an automatic transfer of OHIM revenues to national IP offices has been highlighted by the Max Planck Institute study: "The majority of national offices which run on a state budget have indicated that currently their **domestic law does not provide for a mechanism ensuring**

See also section 0 above.

¹⁰⁶ The term "flow-back" is somewhat misleading in a scenario where surpluses would be transferred to the Member States because the unused funds accumulated as surplus did not come from the Member States but from fees charged to the users. Therefore the term "flow-back" is used in quotation marks here.

¹⁰⁷ OHIM (2008): Joint Meeting of the Administrative Board and the Budget Committee of the OHIM on 18 and 19 September 2008, Conclusions of agenda item "How to better balance OHIM's budget – the way forward", Alicante.

¹⁰⁸ Council of the European Union (2010): Conclusions on the future revision of the Trade Mark system in the EU, 3016th Competitiveness Council meeting, 25 May 2010, Brussels.

that such funds will be used specifically for trade mark related purposes. According to their national law, fees for their activities are an item of income in the state budget and are redistributed by their respective governments according to the approved state budgetary plans.¹⁰⁹ In other words, in many Member States it would be legally impossible to ensure that OHIM funds transferred to the Member States would actually be used for the national IP offices and/or the development and implementation of trademark policies. An “earmarked/assigned” transfer of OHIM funds to the national level is thus not feasible in the actual state of legislation in the Member States.

However, the European Commission DG Budget supported the intention to finance modernisation and harmonisation projects of common interest through an OHIM Cooperation Fund equipped with up to 10% of OHIM’s yearly income. The European Commission’s trademark package of March 2013 proposed a legal basis for such project funding, including provisions on a grants-based funding mode as well as the 10% cap proposed by the European Commission DG Budget. The latter argued that such projects would improve the overall functioning of the CTM system and, therefore, also lead to clear benefits for the companies who pay for these projects through their OHIM fees. The European Commission DG Budget also referred to an analogue situation at Eurostat, where European projects benefitting national statistical offices have helped to overcome (national-level) political resistance against more European Integration in the area of statistics. In this sense, the OHIM Cooperation Fund may also be understood as a means to overcome the resistance against more European Integration of the trademark system, which can be expected to lead to significant efficiency gains and more competitiveness for companies in the Internal Market, notably SMEs (see box in section 2.3.2 above).

3.4.6. Flow-back of surpluses to the users through reimbursements

It has also been considered to **use surpluses of fully self-financed agencies to reimburse the users that have been overcharged** in the past. Contrary to the proposed solutions discussed above, which focussed on a transfer of surpluses to third parties (i.e. the EU or the Member States’ IP offices), this solution would be a genuine “flow-back” of unused funds to their originators. Such an approach is, for instance, currently implemented in the case of the Translation Centre for the Bodies of the European Union (CdT) which “reimburses annual surpluses to its clients (Agencies and other offices set up by the Council, institutions and other bodies of the Union).”¹¹⁰

In 2010, OHIM reflected on a programme to refund accumulated excess surpluses to its users: “We have [...] looked in some detail into the question of whether and how this remaining sum could be returned to users themselves. We believe there is a straightforward and administratively economical way in which the **surplus could be returned to owners of CTM registrations** reflecting the amount by which fees have in retrospect turned out to be too high when their applications were processed. Annex I [of the OHIM note] provides an illustration of how the €300m could be refunded to proprietors of CTMs who have paid “too much” for their registrations [through reimbursement payments], based on the assumption that the current fee levels are “correct” in the sense that they lead to a balanced budget for OHIM.”¹¹¹

Furthermore, OHIM considered that “in the private sector, a company which has built up cash reserves in excess of what is needed for operations or investments usually returns such excess reserves to its shareholders in the form of special dividends, share buyback programmes or other similar devices. If the

¹⁰⁹ Max Planck Institute for Intellectual Property and Competition Law (2011): Study on the Overall Functioning of the European Trade Mark System, Munich, p. 5 and p. 29.

¹¹⁰ European Commission (2010f): Funding and budget revenues of agencies, Analytical fiche on decentralised agencies n° 20, Brussels.

¹¹¹ OHIM (2010b): Contribution to the study on the overall functioning of the trade mark system in Europe, Alicante, p. 10.

management resists doing so, the market will almost always force it to reconsider. OHIM is not a private company, of course. It is an institution dedicated to providing cost-effective registration of trademarks and designs in the EU. Our “shareholders” are the users of the system, that is, the owners who have paid us to have their intellectual property protected. They are well aware of the accumulated surplus and are increasingly expressing concern about the final disposition of these funds, which they reasonably believe should be used for their benefit (rather than for OHIM or National Offices or the general EU budget). Arguably, the **moral imperative for returning part of OHIM's surplus funds to the users** is even stronger than that faced by a private enterprise, regardless of the fact that the Office does not face similar market pressures.”¹¹²

While OHIM's proposition to refund the users that have been overcharged in the past was supported by a majority of interviewees, none of the interviewees was in favour implementing a reimbursement programme as proposed by OHIM. The interviewees pointed to the potentially **very high administrative costs of such an operation** and suggested that, if the surplus should be returned to users, this should be rather done through a (drastic) reduction of CTM renewal fees (below the level of full costs in order to “eat up” surpluses). This proposition is discussed in the next sub-section.

3.4.7. Flow-back of surpluses to the users through fee reductions

A majority of interviewees argued in favour of a **use of fully self-financed agencies' surpluses to reduce renewal/annual fees in order to reimburse the users that have been overcharged** in the past.

CPVO, which has already implemented such a policy, stated in its written response that “CPVO is convinced that the current situation is optimal, particularly as regards ensuring that the surplus flows back to those who contributed in the past.” Such an approach was considered as particularly fair because only those users who have paid too much in the past benefit of the reduction of the renewal/annual fees. Furthermore, it was argued that such a measure would be preferable to a reimbursement programme as suggested by OHIM in 2010 because it would not cause large administrative costs.

In addition, an interviewed MEP, member of the European Parliament's Committee on Budgets, suggested that clear rules should be defined in the basic regulations of CPVO and OHIM in order to trigger automatic adjustments of renewal/annual fees in case of recurrent and significant budgetary surpluses.

3.5. CONCLUSIONS

This chapter has discussed the treatment of budgetary surpluses of fully self-financed EU agencies.

The basic regulations of fully self-financed agencies define the maintenance of a balanced budget as a core principle. Consequently, even if not explicitly stated, any (accumulation of) surpluses or deficits should be avoided. Fee levels should be set to ensure that the agencies' costs are covered. There are currently no additional legal provisions that regulate the treatment of surpluses of fully self-financed agencies.

¹¹² OHIM (2010b): Contribution to the study on the overall functioning of the trade mark system in Europe, Alicante, p. 21.

As a result of repeated positive budgetary outturns, CPVO and OHIM have accumulated significant cash reserves which can be considered as going well beyond the recognised need for a reasonable reserve fund in order to deal with unforeseen drops in income.

In order to deal with this situation and reduce the accumulation of surpluses, both CPVO and OHIM have adjusted their fees downwards. In the case of OHIM, the fee reductions of 2005 and 2009 have been insufficient to “eat up” accumulated surpluses, as total annual levels of income have not reduced. Rather, recent efforts to reduce OHIM’s surplus have been essentially focussed on an accelerated consumption of reserves by increasing spending.

Some management board members representing Member State authorities in the agencies have also exhibited a tendency to support measures that redistribute accumulated funds to the Member States and their national IP offices rather than to those who were obliged to pay fees that proved to be excessive (i.e. the agencies’ users) or to the EU. The absence of clear and automatic rules for the treatment of surpluses contributes to this situation. Furthermore, the control and incentive structures of the two agencies have been judged by the European Court of Auditors as being insufficient to fully prevent the risk of agencies wasting accumulated surpluses and excess revenues.

The following measures or principles could be considered in this regard:

- Accumulated surpluses could be used to reduce the level of renewal/annual fees in order to reimburse the agencies’ users that have been “overcharged” in the past.
- Transfers of the agencies’ surpluses to the EU budget, to the Member States or their national IP offices should be avoided as they introduce a disguised indirect taxation on companies at EU level which is not foreseen by the Treaties.
- Clear legal rules could be developed on what should be done with significant surpluses – while setting appropriate incentives to avoid the accumulation of such surpluses in future (through a realistic cost-based fee determination).
- The appropriate maximum level of reserve funds that may be held by fully self-financed agencies could be determined. Above the levels the rules for the treatment of significant surpluses would be triggered.

4. DISCHARGE OF FULLY SELF-FINANCED EU AGENCIES

KEY FINDINGS

- Article 208 of Financial Regulation No 966/2012 exempts fully self-financed EU agencies from budgetary discharge by the European Parliament because these agencies, by definition, do not receive any contributions charged to the EU budget.
- These agencies' discharge authorities and procedures are defined in their respective basic regulations. Accordingly, the CPVO Administrative Council and the OHIM Budget Committee grant discharge to their respective agencies' Presidents in respect of the implementation of the budget.
- The need to secure European-level democratic accountability of fully self-financed EU agencies – which are in charge of implementing EU policies, but are not subject to the European Parliament's discharge – is recognised by all three EU Institutions.¹¹³ Yet, the views on how this could be achieved differ widely – ranging from changing the current situation to allow the European Parliament to grant discharge to fully self-financed agencies, to varying types of involvement of the European Parliament in the agencies' governance and control structures, but without any formal budgetary discharge powers.
- The following measures or principles could be considered in this regard:
 - The inter-institutional compromise reached in 2012 in the framework of the Common Approach on decentralised agencies foresees that fully self-financed agencies shall submit to the European Parliament, to the Council and to the European Commission an annual report on the execution of their budget and consider requests or recommendations issued by the European Parliament and Council.
 - After reasonable time has elapsed to permit this procedure to take place and to produce evidence of its value, a structural reflection and political debate should take place on the lessons learned and the degree to which democratic accountability of fully self-financed EU agencies has been achieved.

This chapter discusses the discharge of fully self-financed EU agencies. A first sub-section presents the current legal situation with regard to the discharge of EU agencies as well as a brief overview of the current discharge procedures at CPVO and OHIM. The second sub-section discusses the main issue identified with regard to the current discharge procedures at fully self-financed agencies, namely the need to ensure European-level democratic accountability of fully self-financed EU agencies. The third sub-section analyses the two main proposed changes in view of ensuring democratic accountability of fully self-financed agencies, i.e. the definition of the European Parliament as main discharge authority of fully self-financed agencies as well as the involvement of the European Parliament in the discharge procedure. The fourth sub-section concludes.

¹¹³ European Parliament / Council of the European Union / European Commission (2012): Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, Brussels, point 58.

4.1. THE CURRENT LEGAL SITUATION

This sub-section presents the current legal situation with regard to the discharge of EU agencies as well as a brief overview of the current discharge procedures at CPVO and OHIM.

4.1.1. General principles of discharge of EU agencies

By analogy with the general discharge procedure described in Article 319 of the TFEU¹¹⁴ and in accordance with Article 208 of the Financial Regulation No 966/2012 and the agencies' basic regulations (see also Article 94 FFR No 2343/2002), the European Parliament, upon a recommendation from the Council, gives the discharge to the Director of each agency that receives contributions charged to the EU budget in respect of its implementation of the budget.

By definition, fully self-financed EU agencies do not fulfil all criteria for the scope defined by Article 208 paragraph 1 sentence 1 of Financial Regulation No 966/2012: "bodies which are set up under the TFEU and the Euratom Treaty and which have legal personality and **receive contributions charged to the budget.**" Fully self-financed EU agencies do not receive any contributions charged to the EU budget and, as a consequence, are not subject to the provisions applicable to EU agencies defined by Article 208 paragraph 1 sentence 1 of Financial Regulation No 966/2012. Such provisions include the application of the FFR No 2343/2002, the budgetary discharge by the European Parliament on the recommendation of the Council, the internal audit by the European Commission and the external audit by the ECA.

Indeed, Article 208 paragraph 2 of Financial Regulation No 966/2012 states that "discharge for the implementation of the budgets **of the bodies referred to in paragraph 1**, shall be given by the European Parliament on the recommendation of the Council. The bodies referred to in paragraph 1 shall fully cooperate with the institutions involved in the discharge procedure and provide, as appropriate, any additional necessary information, including through attendance at meetings of the relevant bodies." In view of their exclusion by the definition of Article 208 paragraph 1 sentence 1 of Financial Regulation No 966/2012, fully self-financed EU agencies are not covered by the discharge of the European Parliament on the recommendation of the Council.

The exemption of fully self-financed agencies from discharge by the European Parliament is compatible with the European Parliament's Rules of Procedure which state that "the provisions governing the procedure for granting discharge to the Commission in respect of the implementation of the budget shall likewise apply to the procedure for granting discharge to [...] the bodies responsible for the budgetary management of legally independent entities which carry out Union tasks, **insofar as their activities are subject to legal provisions requiring discharge by the European Parliament**" (rule 77).¹¹⁵

With regard to fully self-financed agencies' exemption from discharge by the European Parliament, the ECA noted in 2012 that "each Agency's accounts are audited by the European Court of Auditors. Each Agency, except for the Office of the Harmonisation of the Internal Market (OHIM) and the Community Plant Variety Office (CPVO) is discharged by the European Parliament. The competent institutions may wish to consider whether all Agencies, including **self-financed Agencies**, should be subject to discharge

¹¹⁴ Art. 319 paragraph 1 sentence 1 of the TFEU states: "The European Parliament, acting on a recommendation from the Council, shall give a discharge to the Commission in respect of the implementation of the budget."

¹¹⁵ European Parliament (2013): Rules of procedure, Strasbourg.

by the European Parliament, since their **assets and liabilities comprise part of the balance sheet of the European Union.**"¹¹⁶

In this regard, Article 165 paragraph 1 of the Financial Regulation No 966/2012 states that **"the discharge decision [which is granted by the European Parliament] shall cover the accounts of all the Union's revenue and expenditure, the resulting balance and the assets and liabilities of the Union shown in the balance sheet."** It is interesting to note that until 2011, OHIM had an own budget line with a token entry in the general EU budget (Section 3, Line 12 03 01).¹¹⁷ Since the 2012 general EU budget, this budget line has ceased to exist. CPVO never possessed an own budget line; it is rolled in with the "food safety, animal health, animal welfare and plant health other measures" budget line (Section 3, Line 17 04).

In view of these facts, it has been argued that there is a certain degree of inconsistency between Articles 165 and 208 of the Financial Regulation No 966/2012 with regard to the discharge of fully self-financed agencies.

Fully self-financed agencies' discharge authorities and procedures are currently defined in their respective basic regulations. Article 111 paragraph 3 of the CPVO basic Regulation 2100/94 states that CPVO's "Administrative Council shall give a discharge to the President of the Office in respect of the implementation of the budget." Similarly, Article 142 paragraph 2 of the OHIM basic Regulation 207/2009 provides that "the [agency's] Budget Committee shall give a discharge to the President of the Office in respect of the implementation of the budget."

4.1.2. Discharge procedure at CPVO

Article 111 paragraph 3 of the CPVO basic Regulation 2100/94 provides that CPVO's "Administrative Council shall give a discharge to the President of the Office in respect of the implementation of the budget." The Administrative Council is composed of one representative of each Member State and one representative of the Commission (without voting rights), and their alternates. CPVO's budgetary discharge authority normally meets two times a year.

Furthermore, Article 111 paragraph 2 of the CPVO basic Regulation 2100/94 stipulates that "not later than 31 March each year the [CPVO] President shall transmit to the Commission, the Administrative Council and the Court of Auditors of the European Communities accounts of the Office's total revenue and expenditure for the preceding financial year. The Court of Auditors shall examine them in accordance with relevant provisions applicable to the general budget of the European Communities."

Contrary to OHIM, CPVO is not required to send its accounts to the European Parliament. No European Parliament involvement in CPVO's discharge procedure is foreseen.

In its written response for this study, CPVO declared that "the current structure provides [a] cost effective, open [discharge] system. The Administrative Council [...] provides an independent scrutiny [...] while also maintaining continuity in its membership, thereby developing a necessary minimum understanding of how the [Community plant variety] system works." Furthermore, CPVO stated that with "two audit missions for each year, covering all aspects of the work of the CPVO", the ECA "has proven to be

¹¹⁶ European Court of Auditors (2012c): EU Agencies' governance costs, financial management and operational efficiency: comparative data, Luxembourg, p. 18f.

¹¹⁷ <http://eur-lex.europa.eu/budget/data/LBL2011/EN/SEC03.pdf>

a valuable actor in the control and governance structure of the CPVO". Finally, CPVO concluded that "the current budgetary control and discharge procedures are effective. One might even consider that with a budget of +/- 12 million per year, the CPVO is audited, evaluated and reviewed more per Euro spending than almost all other [EU] institutions and agencies." Consequently, CPVO strongly rejected the idea of involving any additional control layers and actors, including the European Parliament, in its discharge procedure. This view was shared by the European Commission DG SANCO – CPVO's partner DG – which, however, stated that CPVO's budget and annual accounts are openly available to everyone – including the European Parliament – on the agency's website and that such information could also be directly sent to the European Parliament.

The ECA explained that the current discharge procedure at CPVO is functioning well with regard to issues linked to the reliability of the accounts as well as the legality and the regularity of the transactions underlying the accounts.

The ECA however voiced some concern with regard to the fact that it is not invited to the meetings of the CPVO Administrative Council in which the discharge decisions are taken. The ECA's presence at such meetings would enable members of the Administrative Council to ask questions and to better understand the ECA's external audit reports. In this regard, the European Commission DG SANCO stated that the presence of the ECA in the CPVO discharge meetings would typically lead to high (travel and staff) costs and no real additional value.

4.1.3. Discharge procedure at OHIM

Article 142 paragraph 2 of the OHIM basic Regulation 207/2009 provides that "the [agency's] Budget Committee shall give a discharge to the President of the Office in respect of the implementation of the budget." The OHIM Budget Committee is composed of one representative of each Member State and one representative of the European Commission (without voting right), and their alternates. Since 2010 the Budget Committee has invited representatives from the WIPO, the Benelux Trademark Office and the five user organisations (INTA, BusinessEurope, MARQUES, ECTA and AIM) to participate in its meetings as observers. As of 2011, two additional observer seats have been added to the Budget Committee, which are shared by the user associations APRAM, CNIPA, EFPIA, FICPI, GRUR, ICC and UNION on a rotational basis. OHIM's budgetary discharge authority normally meets two times a year.

Furthermore, Article 142 paragraph 1 of the OHIM basic Regulation 207/2009 stipulates that "not later than 31 March in each year the President shall transmit to the Commission, the European Parliament, the Budget Committee and the Court of Auditors accounts of the Office's total revenue and expenditure for the preceding financial year. The Court of Auditors shall examine them in accordance with Article 248 of the Treaty."

Contrary to CPVO, where no such obligations exist, OHIM is thus required to send its annual accounts to the European Parliament. However, no European Parliament involvement in OHIM's discharge procedure is foreseen.

According to the ECA, the current discharge procedure at OHIM is well-functioning with regard to issues linked to the reliability of the accounts as well as the legality and the regularity of the transactions underlying the accounts.

As in the case of CPVO, the ECA criticized the fact that it is not invited to the meetings of the OHIM Budget Committee in which the discharge decisions are taken. According to the ECA, its presence at such meetings would enable members of the Budget Committee to ask questions and to better understand the external audit reports.

In the framework of its trademark package of March 2013, the European Commission proposed several legal amendments to Council Regulation 207/2009¹¹⁸ which would involve the European Parliament in the control procedures at OHIM. The proposed amendments included:

- "The Executive Director [...] shall prepare a draft multiannual strategic programme, including the Agency's strategy for international cooperation, and submit it to the Management Board after consultation of the Commission and following an exchange of views with the relevant committee in the European Parliament" (proposed Article 128 paragraph 4 d);
- "The Management Board [...] shall forward the adopted annual work programme to the European Parliament, the Council and the Commission" (proposed Article 124 paragraph 1 a);
- "The Management Board [...] shall forward the adopted multiannual strategic programme to the European Parliament, the Council and the Commission" (proposed Article 124 paragraph 1 b);
- "The Management Board [...] shall forward the adopted annual report to the European Parliament, the Council, the Commission and the Court of Auditors" (proposed Article 124 paragraph 1 b);
- "The Executive Director shall be appointed by the Management Board, from a list of candidates proposed by the Commission, following an open and transparent selection procedure. Before being appointed, the candidate selected by the Management Board may be invited to make a statement before any competent European Parliament committee and to answer questions put by its members." (proposed Article 129 paragraph 2);
- "A delegated act adopted pursuant to Articles 24a, 35a, 45a, 49a, 57a, 65a, 74a, 74k, 93a, 114a, 144a and 161a shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council." (proposed Article 163a paragraph 5).

In essence, the European Parliament shall (1) be involved in the preparation of OHIM's multiannual strategic programme and the appointment of OHIM's Executive Director, (2) be informed about the adopted annual work programme, the adopted multiannual strategic programme and the adopted annual report, as well as (3) possess a veto right on the European Commission's delegated acts for OHIM, including in the domain of fee determination.

However, these amendments do not extend the European Parliament's involvement in OHIM's discharge procedure (which is currently limited to the reception of OHIM's annual accounts). Interestingly, the European Commission's trademark package of March 2013 also does not transpose the inter-institutional agreement of the Common Approach on decentralised agencies which suggests that "[fully self-financed agencies shall] submit to the European Parliament, to the Council and to the Commission an annual report on the execution of their budget and consider requests or

¹¹⁸ European Commission (2013a): Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, COM(2013) 161 final, Brussels.

recommendations issued by the Parliament and Council"¹¹⁹ (see section 4.3.2 below). While the obligation to submit annual reports on the budget execution to the European Parliament is already contained in OHIM's current basic Regulation No 207/2009, the European Commission's trademark package of March 2013 does not contain any proposed legal amendments that would oblige or encourage OHIM to "consider requests or recommendations issued by the Parliament and Council".

4.2. ISSUE IDENTIFIED

This sub-section discusses the main issue identified with regard to the current discharge procedures at fully self-financed agencies, namely the need to ensure European-level democratic accountability.

4.2.1. European-level democratic accountability of fully self-financed EU agencies

A European Parliament study from 2006 argued that "all agencies act on behalf of the European Union and in the Union's name [and] they should thus all be accountable for their actions and for the way they raise and spend money" through a discharge procedure at European level.¹²⁰ The study further asserted that "a separate parliamentary discharge decision for [all EU] agencies [would help to] enhance the visibility of the agencies, and [to] ensure transparency, accountability and control."¹²¹

In view of OHIM's obligation to send its annual accounts to the European Parliament¹²², the aforementioned European Parliament study maintained that "it is difficult to understand why agencies should send their accounts to the European Parliament if the European Parliament is not able to control those accounts."¹²³

Consequently, the European Parliament has repeatedly "[taken] the view [in resolutions] that there is a ***need to review all texts that go against [...] the principle that all Community agencies, whether or not they are subsidised, are subject to discharge by Parliament***".¹²⁴

While the **need to ensure European-level democratic accountability of fully self-financed EU agencies** was widely recognised among interviewees, the opinions on how this should be achieved differed widely (as will be discussed in the following section).

4.3. PROPOSED CHANGES

This sub-section analyses the two main proposed solutions in view of ensuring European-level democratic accountability of fully self-financed EU agencies, i.e. the definition of the European Parliament as main discharge authority of fully self-financed agencies as well as the involvement of the European Parliament in the discharge procedure.

¹¹⁹ European Parliament / Council of the European Union / European Commission (2012): Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, Brussels.

¹²⁰ European Parliament (2006c): Agencies' discharge, Brussels, pp. 21f.

¹²¹ European Parliament (2006c): Agencies' discharge, Brussels, p. 16.

¹²² Article 142 paragraph 1 Council Regulation No 207/2009 states: "Not later than 31 March in each year the President shall transmit to the Commission, the European Parliament, the Budget Committee and the Court of Auditors accounts of the Office's total revenue and expenditure for the preceding financial year. The Court of Auditors shall examine them in accordance with Article 248 of the Treaty."

¹²³ European Parliament (2006c): Agencies' discharge, Brussels, p. 24.

¹²⁴ European Parliament (2006a): European Parliament decision on the discharge for the implementation of the budget of the European Centre for the Development of Vocational Training for the financial year 2004, P6_TA(2006)0167, Strasbourg.

4.3.1. European Parliament as discharge authority

Already in 1991, the European Parliament called for amendments to the legislative proposal for an OHIM basic regulation in order to **define the European Parliament as discharge authority of the fully self-financed agency**. The amendment n° 9, which was not retained by the co-legislator, inter alia foresaw that “Parliament shall give a discharge to the President of the Office in respect of the implementation of the budget, in accordance with the procedure laid down in Article 206b of the Treaty.”¹²⁵

In 2006, the European Parliament called for an amendment of Art. 185 paragraph 1 of the Financial Regulation No 1605/2002 in order to **withdraw the existing exemption from European Parliament discharge for fully self-financed agencies**.¹²⁶ Yet, this proposition was overruled in the subsequent legislative procedure maintaining the conditionality in Art. 208 paragraph 1 of the new Financial Regulation No 966/2012 (“bodies which [...] receive contributions charged to the budget”).

Pointing to the potential conflicts of interest in CPVO’s and OHIM’s governance bodies¹²⁷ which are also in charge of granting budgetary discharge, an interviewed MEP, member of the European Parliament’s budgetary control committee, argued that the European Parliament is the only body that is **fully independent** and has the **European-level democratic legitimacy** to grant budgetary discharge to fully self-financed EU agencies and secure democratic accountability at these agencies.

4.3.2. Involvement of the European Parliament in the discharge procedure

The second set of proposed solutions envisages an **involvement of the European Parliament in fully self-financed agencies’ discharge procedures while maintaining the CPVO Administrative Council’s and the OHIM Budget Committee’s role as discharge authorities**. This type of solution may be considered as a compromise between the status quo and the first proposed solution, i.e. defining the European Parliament as fully self-financed agencies’ discharge authority.

For instance, in 1997 the European Commission argued that “the agencies that are entirely or largely self-financing from their own resources cannot be dealt with in the same manner [than the agencies that are partially or fully financed from the EU budget]. These agencies operate in a different context, because their system of own resources is governed by a specific regulation of the legislative authority and their revenue and expenditure are to a large extent demand-led. In this case, Parliament would effectively be granting discharge on the use of sums of money derived not from appropriations voted by Parliament but from charges and fees paid by those using the agency’s services. There could be no question of a double discharge according to the origin of the appropriations (one by the Parliament on the use of the subsidy from the budget, another by the Management Board for its own resources), because, by virtue of the

¹²⁵ European Parliament (1991): Legislative Resolution embodying the opinion of the European Parliament on the budgetary provisions of the draft regulation on the Community trade mark and other related provisions, OJ No C 280, 28. 10. 1991, A3-0234/91, Strasbourg.

¹²⁶ European Parliament (2006b): European Parliament amendments to the proposal for a Council regulation amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (COM(2005)0181 – C6-0234/2005 – 2005/0090(CNS)), P6_TA(2006)0085, Strasbourg.

Amendment 132, ARTICLE 1, POINT 94 C (new), Article 185, paragraph 1 (Regulation (EC, Euratom) No 1605/2002), (94c) In Article 185, paragraph 1 is replaced by the following:

“1. The Commission shall adopt a framework financial regulation for the bodies set up by the Union and having legal personality. The financial rules governing these bodies may not depart from the framework regulation except where their specific operating needs so require and with the Commission’s prior consent.”

Note that the condition “which actually receive contributions charged to the budget” has been deleted.

¹²⁷ See sections 2.3.2 and 3.3.1 above for a discussion of potential conflicts of interests in fully self-financed agencies’ governance structures.

principle of universality of the agencies' budgets, execution of the budget is the same no matter where the appropriations come from. In any event, these agencies always retain the assurance that they can request funds from the budgetary authority to meet their obligations." The European Commission concluded thus that "a distinction is therefore made between agencies that depend mainly on a Community subsidy and agencies that finance themselves mainly through their own resources. [...] A **mixed formula linking Parliament with the discharge procedure** is proposed for the agencies which are mainly or entirely self-supporting: **discharge could be granted by the Management Board, on the recommendation of Parliament.**"¹²⁸

Consequently, the European Commission has proposed legislative amendments to the OHIM and CPVO basic regulations in view that "the Budget Committee [or, respectively, the Administrative Council] shall, on the recommendation of the European Parliament, give a discharge to the President of the Office in respect of the implementation of the budget."¹²⁹ However, these proposed amendments have not been retained by the legislator.

An inter-institutional compromise on the issue was reached in 2012 with the "Common Approach on EU decentralised agencies". Point 58 of the (legally non-binding) document states that "the possibilities for **securing democratic accountability for fully self-financed agencies** (i.e. financed by their clients) should be explored, as they are Union bodies in charge of implementing EU policies but not subject to a discharge within the meaning of the TFEU. A possibility could be that **the agencies in question, submit to the European Parliament, to the Council and to the Commission an annual report on the execution of their budget and consider requests or recommendations issued by the Parliament and Council.**"¹³⁰

Accordingly, the European Commission's roadmap on the follow-up to the Common Approach on EU decentralised agencies (point 85) foresaw that fully self-financed agencies shall annually "submit to the EP, Council and the Commission, an annual report on the execution of their budget and consider recommendations."¹³¹ However, similarly to the European Commission's trademark package of March 2013 (see section 4.1.3 above), the European Commission's roadmap does not contain any action point that would foresee an obligation or encouragement of fully self-financed agencies to "consider requests or recommendations issued by the Parliament and Council".

The ECA welcomed the Common Approach's inter-institutional compromise on the discharge procedure for fully self-financed agencies. The proposed solution was considered as an improvement compared to the current situation where the European Parliament is not at all involved in the discharge procedure. The ECA expected that the involvement of the European Parliament in OHIM's and CPVO's discharge procedure may lead to a stronger push for structural reviews of the agencies' fee levels and governance system.

¹²⁸ European Commission (1997a): Proposals for Council Regulations (EC) amending the basic regulations of certain decentralized Community agencies, COM(97) 489 final, Brussels.

¹²⁹ European Commission (1997b): Proposal for Council Regulation (EC) amending Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, COM(97) 489 final - 97/0253(CNS), Brussels.

European Commission (1997c): Proposal for Council Regulation (EC) amending Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, COM(97) 489 final - 97/0254(CNS), Brussels.

¹³⁰ European Parliament / Council of the European Union / European Commission (2012): Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, Brussels.

¹³¹ European Commission (2012): Roadmap on the follow-up to the Common Approach on EU decentralised agencies, Brussels.

However, the ECA underlined that it remains to be seen how effective the proposed solution will be in practice. The ECA stressed that it is unclear if and how fully self-financed agencies will react on requests and recommendations by the European Parliament. According to the ECA, the Common Approach compromise may reveal as a “dog without teeth” or “window dressing”. On the other hand, the European Parliament would in any case be empowered to “name and shame” any inappropriate use of fee revenues and accumulated surpluses or the abuse of powers. The ECA argued that it is probable that MEPs would be able to raise press interest with this new instrument and affect the reputation of non-cooperative agencies, their governance bodies as well as the personal reputation of the agencies’ Presidents. In many cases, this threat may be sufficient to trigger some change.

The European Commission DG Budget took a less positive view with regard to the Common Approach inter-institutional compromise on the discharge of fully self-financed agencies. It maintained that any European Parliament involvement in the agencies’ discharge procedure, notably with rights to issue requests or recommendations, would be legally very difficult to construct and justify. More precisely, the European Commission DG Budget stated that there is no link between the EU budget and fully self-financed agencies that would justify an involvement of the European Parliament in the agencies budgetary discharge procedure. Fully self-financed agencies by definition do not receive any contributions charged to the EU budget.

The European Commission DG Budget emphasized that (democratic) accountability from a political point of view should not be mixed up with (democratic) accountability from a financial point of view. The European Commission DG Budget explained that the European Parliament would have other possibilities than the budgetary discharge procedure at its disposal to ensure democratic accountability of fully self-financed agencies, including:

- Hearings of fully self-financed agencies at the European Parliament;
- Review of the annual reports and annual accounts of fully self-financed agencies;
- Election of the president of fully self-financed agencies;
- European Parliament legislative co-decision on the regular review of the basic regulations of fully self-financed agencies.

With regard to this argument one should, however, note that only OHIM is obliged to forward its annual reports to European Parliament; no such obligation exists for CPVO. Furthermore, there is no formal right of the European Parliament to react on these reports, e.g. through requests or recommendations as foreseen by the Common Approach. Also, the current basic regulations of CPVO and OHIM do not foresee any involvement of the European Parliament in the nomination and election of the agencies’ Presidents.¹³² While the European Commission’s trademark package of March 2013 has proposed legislative amendments to enlarge the European Parliament’s involvement in the control procedures at OHIM, including the appointment of the President (see section 4.1.3 above), it is currently unclear to what extent these proposed amendments will be accepted by the co-legislator and whether similar measures will be introduced for CPVO.

¹³² See Article 43 of Council Regulation 2100/94 for CPVO and Article 125 of Council Regulation No 207/2009 for OHIM.

CPVO and the European Commission DG SANCO strongly rejected the idea of involving any additional control layers and actors, including the European Parliament, in the agency's discharge procedure. They argued that the "cost of additional layers of control should not be underestimated" and predicted that the implementation of the Common Approach inter-institutional compromise would require the hiring of one to two full-time employees at CPVO in order to deal with the European Parliament's recommendations or requests. Furthermore, the CPVO argued that the Administrative Council would have much more (technical) knowledge of CPVO's business reality than the European Parliament, thereby enabling it to better fulfil the role of discharge authority.

4.4. CONCLUSIONS

This chapter has discussed the discharge procedure of fully self-financed EU agencies.

Article 208 of Financial Regulation No 966/2012 exempts fully self-financed EU agencies from budgetary discharge by the European Parliament because these agencies, by definition, do not receive any contributions charged to the EU budget.

These agencies' discharge authorities and procedures are defined in their respective basic regulations. Accordingly, the CPVO Administrative Council and the OHIM Budget Committee grant discharge to their respective agencies' Presidents in respect of the implementation of the budget.

The need to secure European-level democratic accountability of fully self-financed EU agencies – which are in charge of implementing EU policies, but are not subject to the European Parliament's discharge – is recognised by all three EU Institutions.¹³³ Yet, the views on how this could be achieved differ widely – ranging from changing the current situation to allow the European Parliament to grant discharge to fully self-financed agencies, to varying types of involvement of the European Parliament in the agencies' governance and control structures, but without any formal budgetary discharge powers.

The following measures or principles could be considered in this regard:

- The inter-institutional compromise reached in 2012 in the framework of the Common Approach on decentralised agencies foresees that fully self-financed agencies shall submit to the European Parliament, to the Council and to the European Commission an annual report on the execution of their budget and consider requests or recommendations issued by the European Parliament and Council.
- After reasonable time has elapsed to permit this procedure to take place and to produce evidence of its value, a structural reflection and political debate should take place on the lessons learned and the degree to which democratic accountability of fully self-financed EU agencies has been achieved.

¹³³ European Parliament / Council of the European Union / European Commission (2012): Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, Brussels, point 58.

ANNEX: LIST OF INTERVIEWEES/ LIST OF WRITTEN RESPONSES**List of Interviewees**

Organisation	Name	Position	Mission
Court of Auditors	Friedemann ZIPPEL	Head of Unit Chamber IV	Community Agencies and other Decentralised Bodies
Court of Auditors	Mark CRISP	Director Chamber IV	Revenue, research and internal policies, and institutions and bodies of the European Union
CPVO	Martin EKVAD	President	
CPVO	James MORAN	Head of Administrative Unit	
European Commission DG BUDG	Jose MADEIRA	Head of Unit (Dir B / Unit B2)	Revenue Management
European Commission DG BUDG	Olivier WAELBROECK	Head of Unit (Dir D / Unit D1)	Financial regulations
European Commission DG BUDG	Benoit RONGVAUX	Head of Sector (Dir D / Unit D1)	Agencies, Offices, Internal Rules and External Policies
European Commission DG SANCO	Ladislav MIKO	European Commission Member of the CPVO Administrative Council; Deputy Director General DG SANCO	Deputy Director General for the food chain responsible for Directorates E, F and G
European Commission DG SANCO	Dana Irina SIMION	European Commission Member of the CPVO Administrative Council; Head of Unit DG SANCO DDG2.E.2	Plant health
European Commission DG SANCO	Robert VANHOORDE	Head of Unit DDG2.03	Relations with agencies and advisory groups
European Commission SecGen	Estelle BACCONNIER	Policy Officer (Dir G / Unit G4)	General Institutional Issues
European Parliament	Jutta HAUG	MEP	Vice-Chair of the BUDG Committee
European Parliament	Theodoros SKYLAKAKIS	MEP	CONT Committee

List of Written Responses

Organisation	Name	Position	Mission
European Commission DG MARKT	Tereza BILLERAULT VYBORNA	EC Member of the OHIM Budget Committee and Administrative Board; Policy Officer DG MARKT	Industrial Property - Trade marks
OHIM	Susanna PEREZ	Head of Cabinet of the President	

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ISBN 978-92-823-4729-4
doi: 10.2861/33070