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EU agencies and their international mandate: A new category of global actors?

Andrea Ott, Ellen Vos and Florin Coman-Kund

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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

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ABSTRACT

This paper provides an overview and analysis of the growing presence of EU agencies on the international plane. These actions need to be analysed under the backdrop of international and European law but also in light of the agencies' international mandate in the founding regulations. The contribution attempts to categorise all of these agencies in light of the nature of powers delegated and the degree of supervision by the EU authorities. It subsequently takes a closer look at three examples out of the three different categories established through the typology and analyses which legal challenges their practice encounters from the international and EU law perspective.[1]

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[1] A revised version of this draft will be published in M. Everson, C. Monda and E. Vos (eds.), *European Agencies in between Institutions and Member States* (The Hague: Kluwer Law Publishing, forthcoming 2014). The authors would like to thank two anonymous reviewers and Bruno De Witte for their valuable comments. The usual disclaimer applies.

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1. INTRODUCTION

Today we observe that together with the EU's ambitions to acquire a more significant and articulated status at the global level, EU agencies are ever more prominently present at the international plane.[2] Already the founding regulations of the first two EU (then Community) agencies created – the European Centre for the Development of Vocational Training (Cedefop) and the European Foundation for the Improvement of Living and Working Conditions (EUROFUND) – instructed the agencies to 'cooperate as closely as possible with specialised institutes, foundations and bodies in the Member States or at international level.'[3] When looking at the current global practice of agencies, we observe a variety of actions closely linked with the mandate and powers that agencies received by their founding regulations. Collaboration varies from a mere cooperation in training matters, the organisation of common events such as workshops, conferences and research and capacity building activities, to more substantial cooperation in the form of the development of common procedures, the exchange of (confidential) information and personal data (European Police Office, hereinafter Europol), cooperation in joint operations (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, referred to as Frontex), and mutual acceptance of the findings of the partner competent authority (e.g. European Aviation Safety Agency, hereinafter EASA) in the context of certification of aviation products and organisation approval. The European Centre for Drugs and Drug Addiction (EMCDDA) has, for example, signed a Memorandum of Understanding with the United Nations Office on Drugs and Crime (UNODC) and, on specific assignments, this agency works together with the Joint United Nations Programme on HIV/AIDS UNAIDS and the World Health Organisation (WHO).[4] EASA has an impressive record of cooperation with air safety and

[2] See generally A. Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law', 13 *European Foreign Affairs Review*, no. 4 (2008), 515-540.

[3] Art. 3(2) of Regulation 1365/75 of the Council of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions *OJ* [1975] L139/1 (Eurofound's founding act). A similar provision is found in Art. 3(2) of Regulation 337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training *OJ* [1975] L39/1 (Cedefop's founding act), that reads '2. In carrying out its tasks, the centre shall establish appropriate contacts, particularly with specialized bodies, whether public or private, national or international, with public authorities and educational institutions and with workers "and employers" organisations.'

[4] See Ramboll, Euréval, and Matrix Insight, 'Evaluation of the EU Decentralised Agencies in 2009 Final Report, Vol. III 'Agency level findings', December 2009, Evaluation for the European Commission.p. 111, available at <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/evaluation_eu_agencies_vol_iii_/evaluation_eu_agencies_vol_iii_en.pdf>, accessed on 12 December 2013. This will be referred hereafter as the 'Ramboll report'.

civil aviation authorities around the globe.[5] Another example is the European Food Safety Authority (EFSA) which cooperates with food agencies from Japan and the US and is active within the Codex Alimentarius Commission.[6]

The international dimension of agencies is threefold.[7] First, agencies have themselves acquired a larger breadth than being 'pure EU' bodies, as third countries may participate in agencies' internal structures. This form of external participation is created to allow EU candidate countries, the European Economic Area (EEA) and the European Neighbourhood Policy (ENP) countries, to familiarize themselves with the EU and its programmes.[8] Second, they increasingly give support to the EU institutions in global fora; an example of which is the support given by EFSA to the European Commission in the context of the Codex Alimentarius Commission.[9] Third, they increasingly cooperate with third states' authorities, international programmes and organisations. Here agencies at times conclude various forms of arrangements such as memoranda of understanding and working arrangements as independent actors. Most often, this global aspect has been explicitly recognized in the founding regulations of the agencies that mention the need for agencies to cooperate with third countries and international organisations.

While the two first aspects of the international dimension of European agencies are certainly of great interest, they do not cause pressing legal problems. The third aspect, however, is more problematic. The issue of European agencies as global actors therefore forms the focus of our analysis. Notably, this aspect has been largely neglected in the debate on European agencies both

[5] See website of EASA at <http://easa.europa.eu/rulemaking/international-cooperation-working-arrangements.php>, accessed on 1 February 2013.

[6] See website of EFSA at <http://www.efsa.europa.eu/en/networks/international.htm>, accessed on 1 February 2013. In relation to the Codex Alimentarius, see M.D. Masson-Matthee, *The Codex Alimentarius Commission and Its Standards* (The Hague: T.M.C. Asser Press, 2007), 127–128.

[7] F. Coman-Kund, 'Assessing the Role of EU Agencies in the Enlargement Process: The Case of the European Aviation Safety Agency', 8 *Croatian Yearbook of European Law and Policy* (2012), p.338.

[8] Commission Communication to the Council, 'Participation of candidate countries in Community programmes, agencies and committees', COM(99) 710 final. See further A. Ott, *supra* note 2, at 528–539; and Coman-Kund, *supra* note 7, at 338.

[9] See E. Vos, 'Responding to Catastrophe: Towards a New Architecture for EU Food Safety Regulation?', in .F. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the EU* (Oxford: Oxford University Press, 2010), 151–176. In relation to the European Medicines Agency (EMA), see, for instance, E. Vos, 'Making Informal International Law Accountable: Lessons from the EU', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds.), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012), 368, and M. Groenleer, 'Linking up Levels of Governance: Agencies of the European Union and their Interaction with International Organisations', in O. Costa and K-E Joergensen (eds.), *The Influence of International Institutions on the European Union* (Basingstoke: Palgrave Macmillan, 2012), p.135.

by the literature[10] and the EU institutions.[11] The global dimension of agencies was indeed not put on the agenda of the institutions in their attempt to rethink and reconceptualise agencies.[12] The recently adopted Common Approach on agencies however finally recognizes the importance of the agencies' international relations and calls for a clear strategy to be adopted to make sure that the agencies remain within their mandate and within the existing institutional framework.[13] Herewith the institutions acknowledge at last that the active involvement of agencies in the areas of the *acquis communautaire* beyond the EU's borders and their cooperation with third countries and/or international organisations may currently be problematic in relation to, for example, the legal nature of the acts that agencies adopt, both from an EU and international law perspective and the EU's institutional balance of powers post-Lisbon.

This paper will therefore attempt to clarify what it precisely is, in legal terms that European agencies do on the global plane. To this end it will address two vital issues: the legal nature of the acts that agencies adopt in the global setting from both a European and international law perspective and the question as to whether agencies' global activities upset the EU's internal institutional balance of powers.[14] How should, for example, agreements and working arrangements, that some agencies are empowered to conclude, be defined both under EU and international law? Does the fact that these agencies are legally mandated to cooperate with third countries mean that the agreements concluded by agencies are legally binding for the whole EU? Adding to this problem is that the conclusion of agreements and working arrangements by the European Commission is already legally questionable.[15] This contribution aims to provide

[10] See however A. Ott, *supra* note 2, at 515; and specifically on EASA and Frontex, Coman-Kund, *supra* note 7, at 358 and M. Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships"', *Merkourious* (2012), p. 20, available at <http://www.merkourios.org/index.php/mj/article/viewFile/URN%3ANBN%3ANL%3AUI%3A10-1-112855/54>, accessed on 1 February 2013.

[11] The Ramboll Report also describes some activities on international cooperation in Vol. III 'Agency level findings', *supra* note 4.

[12] See Commission (EC), 'European Agencies – The way forward' (Communication) COM(2008) 135 final See, however, Commission (EC), 'Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies' COM(2005) 59 final, which touches upon the participation of third countries in the EU agencies (at p. 20), as well as on the international activities of these bodies (at 20–21). It should be noted, however, that the draft interinstitutional agreement proposed by the Commission was not supported by the Council and has been withdrawn consequently by the Commission via COM(2008) 135.

[13] Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies of 19 July 2012, pct. 25, available on the official website of the European Commission at <http://ec.europa.eu/commission_2010-2014/sefcovic/headlines/news/2012/07/2012_07_17_joint_agreement_agencies_en.htm> accessed on 1 February 2013.

[14] Thus, it is beyond the scope of this contribution to give a comprehensive evaluation of the international activities of the EU agencies, as this would require an in-depth analysis of the differences and commonalities in the legal mandates and tasks of EU agencies, in the wording between the specific provisions, as well as the practice of agencies in adopting specific acts, working arrangements and/or agreements.

[15] See already Case C-327/1991 *France* v. *Commission* [1994] ECR I-3641, Opinion of AG Tesauro delivered on 16 December 1993 in Case C-327/1991 France v. Commission, the case note on this judgment by J. Kingston 'External Relations of the European Community. External

for general answers through an analysis of the precise mandate and powers as well as the practices of various agencies. This is not an easy task as the mandate, powers and/or instruments given to agencies vary enormously while, from an international law perspective, the question of international legal personality and treaty-making powers of agencies is ambiguous.[16]

We will aim to find a way through the great variety of external relations' activities of agencies. To this end we will give a typology of the agencies in view of their external relations powers (section 3). This typology will serve both to define the legal nature of acts agencies are empowered to adopt and/or have accordingly adopted in practice, and to examine whether the EU's institutional balance of powers has been upset. We will thus carefully analyze the powers conferred upon various agencies (section 4) and draw some general conclusions (section 5). To understand how the external actions of European agencies can be qualified and how their status in the global scene can be determined, we will first determine how international agreements are defined and how treaty-making in the European Union is organized (section 2).

2. INTERNATIONAL AGREEMENTS IN LIGHT OF INTERNATIONAL AND EU LAW

2.1 **International agreement: definition**

For the purpose of this paper the term international agreement will be used to indicate treaty, agreement or arrangement. According to Fitzmaurice, 'a treaty is an international agreement in a single formal instrument (whatever its name, title or designation) made between entities both or all of which are subjects of international law possessed of an international legal personality and treaty-making capacity, and intended to create rights and obligations, or to establish relationships, governed by international law.'[17] According to international treaty law practice, it is not decisive how the treaty is named[18] and whether the treaty is formally signed but whether the parties have the intention to create obligations under international law.[19] Furthermore it makes no difference whether the treaty is concluded on behalf of states or is concluded on behalf of

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Capacity versus Internal Competence', 44 *International & Comparative Law Quarterly* (1995), 659–670 and Ott, *supra* note 2, at 523–525.

[16] See G. Schusterschitz, 'European Agencies as Subjects of International Law', *International Organisations Law Review* (2004), 163–188; A. Ott, *supra* note 2, at 526.

[17] G.G. Fitzmaurice, 'Third Report on the Law of Treaties', *Yearbook of the International Law Commission* II (1958), p. 24. The definition under Art. 2 of the 1969 Vienna Convention on the Law of Treaties (1155 U.N.T.S. 331, 8 I.L.M. 679) of an international agreement is straightforward: an international agreement is concluded between states in a written format; see further A. Aust, *Modern Treaty Law*, 2nd edn. (Cambridge: Cambridge University Press, 2007), 16–23.

[18] Names such as treaty, agreement or arrangement, code or statute have been used in state practice, see D.P. Myers, 'The Names and Scope of Treaties', 51 *American Journal of International Law* (1957), p. 575 and J. Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer Law International, 1996), 42–44.

[19] Aust, *supra* note 17, at 20.

governments, ministries or state agencies as these actions will bind the state.[20] The 1969 Vienna Convention on the Law of Treaties between States (VCLT) and 1986 Vienna Conventions on the law of Treaties between States and International organisations are silent on the question which state branches can conclude international agreements. Article 7 of both Conventions only presents the assumption that the state is represented by the head of state, head of government and ministers of foreign affairs. It furthermore depends then on the constitutional practice of the respective state. A party can be a state, a state agency or an intergovernmental organisation;[21] however, this excludes public bodies which have a legal personality separate from the state.[22] International organisations or any other subject of international law can conclude international agreements based on their mandate of their founding treaty.[23]

2.2. **Inter-agency Agreements**

For a good understanding of the role of agencies in EU external relations, we need to highlight another aspect of international treaty-making, namely that states and international organisations can also engage in executive or administrative agreements. Such agreements are characterized as binding international agreements between the executive branches which do not require ratification by parliament. In a comparative law approach, comparing national constitutional law provisions and practice, this has been structured by the literature into treaties concluded in the name of the state, treaties concluded in the name of the government and treaties concluded in the name of a government department and a ministry.[24] For example, Switzerland, United Kingdom and USA recognize so-called agency-to-agency agreements as international agreements.[25] Such executive or agency-to-agency agreements regulate detailed technical cooperation and do not necessarily include political obligations which require ratification through parliaments.[26] Generally these inter-agency agreements are concluded between a state agency or local government and

[20] Ibid., at 58 and Klabbers, *supra* note 18, at 103.

[21] See for the US practice: Circular 175 Procedure of the US State Department, 1 U.S.C. §181.2, available at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title22/22cfr181_main_02.tpl>, accessed on 1 February 2013.

[22] Aust, *supra* note 17, at 58.

[23] This is also confirmed in the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations which however has not entered into force yet. See further Aust, *supra* note 17, at 400.

[24] D. Hollis, 'A Comparative Approach to Treaty Law and Practice', in D. Hollis, M.R. Blakeslee and L.B. Ederington (eds.), *National Treaty Law and Practice. The American Society of International Law* (Leiden: Martinus Nijhoff, 2005), p.1.

[25] Ibid., at 17.

[26] See F. A. Mann, 'Zur Auslegung von Verwaltungsabkommen durch den Bundesgerichtshof', 35 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1975): 723 and Klabbers, *supra* note 18, at 97.

an agency of a foreign state or an international organisation but also can be concluded between international organisations.[27]

The US State Department has clarified explicitly that agency-level agreements are international agreements if they satisfy the necessary criteria such as identity of parties, significance of the arrangement and its form.[28] In practice, ministries, but also independent agencies, can be engaged in these activities depending on the constitutional framework. Federal agencies in the United States are also able to conduct international activities and can conclude international agreements, although this requires prior consultation with the US Secretary of State.[29] In Germany the involvement of agencies in the conclusion of executive agreements also has a long tradition and is explicitly mentioned in Article 59(2) of the German Constitution (*Grundgesetz)*. For example, the German Federal Aviation Office was empowered to represent the German Ministry of Transport to conclude an agreement on the implementation of aspects of the International Civil Aviation Code with the Danish Ministry of Transport, which was also represented by an agency, the Danish Centre for Aviation.[30]

In Estonia, such inter-agency agreements are also considered as international agreements and are concluded on behalf of a state authority in the area of its competences.[31] The Republic of Kosovo has agreed on a law on international agreements in which ministries and state agencies may conclude, within their competence, agreements or memoranda with institutions of other states and international organisations only if such agreements do not contain legally binding obligations on the government.[32] In France, government agencies are able to conclude *arrangements administratifs*, which are defined as government agency agreements, to implement existing treaties or to deal with matters within the scope of the agency's jurisdiction. However, such agreements only bind the agency on the national level but not the French government interna-

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[27] See J. Erne, 'Primary and Secondary Law-making in the Renewed EU', *Trames* 14, no. 3 (2010), p. 265.

[28] See Art. 181.2 b of the Circular 175 Procedure of the US State Department (*supra* note 21) ('the fact that an agreement is concluded by and on behalf of a particular agency of the US government, rather than the US government, does not mean that the agreement is not an international agreement') and see discussion by J. Pauwelyn, R. Wessel and J. Wouters, 'Informal International Lawmaking: An Assessment and Template to Keep it Both Effective and Accountable', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds.), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012), p. 500.

[29] D.J. Kuchenbecker, 'Agency-level Executive Agreements. A New Era in U.S. Treaty Practice', 18 *Columbia Journal of Transnational L*aw, no. 1 (1979–1980), p. 20.

[30] Agreement between the Federal Ministry of Transport, Building and Urban development of the Federal Republic of Germany and the Ministry of Transport of the Kingdom of Denmark on the implementation of Art. 83bis of the Convention on International Civil Aviation, represented by the Federal Aviation Office and the Danish Transport Authority, Centre for Aviation, available at <http://www.icao.int/secretariat/legal/83bis/5267-E.pdf>, accessed on 12 December 2013.

[31] As example an agreement between ministries is mentioned, see Erne, *supra* note 27, at 265.

[32] Art. 12, Republic of Kosovo, Law No. 04/L-052 on international agreements, available at <http://www.mfa-ks.net/repository/docs/Ligji_per_marreveshjet_nderkombetare_(anglisht).pdf>, accessed on 3 February 2013.

tionally.[33] Also in Japan government agencies generally have no independent authority to negotiate and conclude international agreements.[34] The European Commission has argued in light of this – though inconsistent – state practice that it would be able to conclude internationally binding administrative agreements. This view, however, has been rebutted (and without further discussion) in the ruling *France v. Commission* by the Court that stated that international agreements binding the Union are concluded solely by the Council.[35]

To summarize, an international treaty can be concluded by a state agent on behalf of the state or international organisation with another international party if the conditions are met that this agent can represent the state/international organisation according to the constitution and the interpretation of the respective text gives rise to the intention that both parties want to be bound. Moreover, if an entity within a state or international organisations has separate international legal personality, this entity can conclude international agreements in its own right. Hence, in order to establish whether an act is an international agreement, it is important to identify who is able to conclude such agreements on behalf of the European Union and whether at the executive level, for example the Commission or even EU agencies, could be considered to be able to conclude binding international agreements.

2.3 **International Agreements According to EU Law**

2.3.1 *Multiple International Legal Personalities*

International agreements thus require the ability to act on the international plane which is determined by international legal personality. International organisations can acquire international legal personality according to their founding treaties and in the case of the EU this is now codified by Article 47 TEU.[36] In this way, it is beyond doubt that the different institutions (Commission, Council or European Parliament) of the Union do not have separate international legal personality.

International law literature is however undecided whether multiple international legal personalities of international organisations can at all be considered as also having individual organs of an international organisation endowed with such legal personality.[37] Practice in EU law, however, shows a careful tendency to recognize the European Central Bank and the European Investment Bank as having a separate international legal personality, with reference to

[33] Hollis, *supra* note 24, at 18. However, see for Bulgaria the Law for the International Agreements of the Republic of Bulgaria, November 2001 where a minister or head of an administrative body can be mandated to conclude such an international agreement, see Art. 9(2), available at <http://ciela.sliven.net/laws/Law_for_the_international_agreements_of_the_republic_of_Bulgaria.htm>, accessed on 3 February 2013.

[34] Hollis, *supra* note 24, at 21.

[35] Case C-327/91 France v. *Commission*, *supra* note 15.

[36] H. Schermers and N. Blokker, *International Institutional Law: Unity within Diversity,* 5th rev. edn. (Leiden: Martinus Nijhoff Publishers, 2011), p. 991.

[37] Schermers and Blokker refer in this regard to the European Investment Bank, ibid.*,* at 994.

their independence, practice and powers under their founding acts.[38] In a further consecutive step, literature sources have argued for an international legal personality of EU agencies by referring to the general provisions in all founding regulations that agencies have legal personality.[39] These provisions however refer to the agencies' *internal* legal personality. Yet international legal personality of agencies cannot *per se* be excluded but could only be established by a case-by-case analysis of agencies' external relations mandate, and their practice and powers to act externally, as we will see below (sections 4 and 5).

2.3.2 *International agreements and the EU Institutional Balance*

International legal personality is therefore closely linked to the ability to conclude international agreements.[40] It needs to be determined, within such an international organisation, which competent organ is able to conclude international agreements on behalf of the organisation. This is usually the supreme organ but this does not preclude other organs from acting when powers have been delegated to them.[41] According to the wording of Article 218 TFEU, the power to conclude international agreements for the Union is conferred upon the Council. This entails that the Commission cannot conclude binding international agreements with third countries, as the CJEU has held in its case law. Thus, as the Court held in the above mentioned case *France v. Commission*, the Commission's attempts to conclude administrative agreements of a binding nature[42] with the US government on the application of competition rules were a violation of the distribution of powers in external relations. In this case the CJEU was confronted with a dilemma that such an agreement could be interpreted as an internationally binding agreement according to international customary law but would violate the balance of powers established in Article 218 TFEU. The Court however ruled that Article 218 TFEU assigns the Council with the power to make international agreements while the Commission is empowered to prepare this treaty-making in negotiations under the guidance of the Council.[43]

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[38] Especially on the European Central Bank, see C. Zilioli and M. Selmayr, 'Recent developments in the Law of the ECB', *Yearbook of European Law* (2006), p. 1, with extensive references to literature in n. 362 at p. 78.

[39] R. van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and Institutional Balance', in D. Curtin and R. Wessel (eds.), *Good Governance and the European Union* (Antwerp: Intersentia, 2005), p. 132.

[40] Aust, *supra* note 17, at 16.

[41] H. Schermers and N. Blokker, *supra* note 36, 1136–1137, see also Art. 7 of the 1986 Vienna Convention, *supra* note 23.

[42] In his Opinion, AG Tesauro gives a good description as defining them as 'agreements in a simplified form, without parliamentary action, and normally concern technical and administrative matters, whose implementation does not entail legislative amendments or which supplement or define pre-existing agreements concluded in accordance with the usual procedures' (para. 32) – Opinion of AG Tesauro in Case C-327/91 *France* v. *Commission*, *supra* note 15.

[43] Case C-327/91 *France v. Commission*, *supra* note 15, paras 24-37. In a subsequent case, the Court did accept that the Commission can agree on non-binding guidelines, considering that

With this rather strict interpretation of the institutional balance in treaty-making, the Court failed in this case to engage in the discussion on administrative agreements raised by Advocate-General Tesauro in his opinion. The latter had argued that certain arrangements by specific administrative entities, with a view to establishing forms of cooperation with the authorities of other states, would be not be governed by international law. However, he further concluded that a comparison could not be made to the executive power to conclude administrative arrangements by Member States' governments since an independent and general executive function carried out by the Commission could not be identified.[44] The Court however did not go along with this argument. As a result the Commission has been clearly denied a mandate to conclude executive agreements in light of Article 218 TFEU. Yet, where it is clear throughout the negotiations that the intention of the parties is not to enter into a legally binding commitment, the Court has held in its second ruling in *France v. Commission* that Article 218 does not preclude the adoption of 'guidelines' by the European Commission together with an international partner.[45] Furthermore, it has not been clarified by the Court whether the extensive practice of the Commission to engage in contractual relations with international organisations is infringing Article 218 TFEU.

The Commission has over the years developed an extensive practice to organize the EU's relations *with international organisations*[46] through such examples as exchange of letters,[47] a financial administrative framework agreement,[48] a framework agreement,[49]

such actions would not violate Treaty provisions – see Case C-233/02 *France* v. *Commission* [2004] ECR I-2759.

[44] Opinion of AG Tesauro in Case C-327/91 *France* v. *Commission*, *supra* note 15, paras. 22 and 32.

[45] In the guidelines on regulatory cooperation and transparency agreed between the US and the Commission it is expressively worded that it 'intends to apply on a voluntary basis', Case 233/02 *France* v. *Commission*, *supra* note 43, para. 2.

[46] See generally R. Frid, *The Relations between the EC and International Organisations: Legal Theory and Practice* (The Hague: Kluwer Law International, 1995), 127–129.

[47] E.g., Arrangement in the form of an exchange of letters between the European Economic Community and the International Council for the Exploration of the Sea, *OJ* L149/14-16 of 10 June 1987, (where the Commission represented the Community); Exchange of letters between the World Health Organisation and the Commission of the European Communities concerning the consolidation and intensification of cooperation, *OJ* [2001] C1/04 of 4 January 2001.

[48] E.g., Financial Administrative Framework Agreement between the European Community, represented by the Commission of the European Communities and the United Nations (2003) information available at <http://ec.europa.eu/europeaid/work/procedures/implementation/practical_guide/previous_versions/2003/fafa_en.htm (visited on 3 February 2013). The agreement itself is available at <http://ec.europa.eu/echo/files/partners/humanitarian_aid/fafa/agreement_en.pdf>, accessed on 3 February 2013.

[49] E.g. Framework Agreement between the European Commission (the 'Commission') and the World Organisation for Animal Health ('OIE') of 2010 available at <http://ec.europa.eu/europeaid/work/procedures/financing/international_organisations/other_international_organisations/documents/framework_agreement_oie_signed.pdf>, accessed on 3 February 2013; Framework Agreement between the Commission of the European Communities (the 'Commission') and the International Monetary Fund ('IMF') of 2009 <http://ec.europa.eu/europeaid/work/procedures/financing/international_organisations/other_international_organisations/documents/fa_ec_imf_signed_12_january_2009.pdf>, accessed on 3 February 2013.

an administration agreement[50] and a contribution agreement.[51] Looking at the content of some of the agreements concluded by the Commission with international organisations, they are intended to be considered legally binding. Taking the Financial and Administrative Framework Agreement with the United Nations[52] as an example, it states that the European Union is represented by the Commission and establishes rules in its text about the entry into force and the termination of the Agreement. In its content it regulates the details of cooperation such as reporting and other related matters. Other agreements with international organisations have similar provisions.[53]

As regards the question as to whether the Commission is able to represent the Union such a text constitutes an international agreement the literature is divided. In principle, two opposing views can be observed. The first view relying on the argument of the cooperation of administrations[54] argues that the Commission is able to conclude binding international agreements with international organisations according to Article 220 TFEU ("1. The Union shall establish all appropriate forms of cooperation with the organs if the United Nations and its specialised agencies, the Council for Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The Union shall maintain such relations as are appropriate with other international organisations. 2. The High Representative of the Union for Foreign Affairs and Security Policy and the Commission shall be instructed to implement the Article") under the condition that such agreements do not touch upon the realm of political and legal commitment under treaty-making norm of Article 218 TFEU and only cover technical and manage-

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[50] See, for instance, Article 3 of the Trust Funds and Cofinancing Framework Agreement between The European Community represented by the Commission of the European Communities and the International Bank for Reconstruction and Development, The International Development Association and the International Finance Corporation (2009), available at <http://ec.europa.eu/europeaid/work/procedures/financing/international_organisations/other_documents_relating_world_bank/documents/signed_contract_20_march_2009bis_en.pdf>, accessed on 3 February 2013.

[51] See 'Guide on relations with international organisations, Member States, beneficiary countries and other donors: Delegated cooperation and co-financing', (2011), available at <http://ec.europa.eu/europeaid/work/procedures/financing/international_organisations/documents/guide_on_relations_with_ios+na+bc_en.doc>, accessed on 3 February 2013. See also 'General conditions on contribution agreements with international organisations', available at <http://ec.europa.eu/europeaid/work/procedures/financing/international_organisations/documents/c2_contribution_agr_gc_en.pdf>, accessed on 3 February 2013.

[52] Financial Administrative Framework Agreement between the European Community, represented by the Commission of the European Communities and the United Nations (2003), *supra* note 48.

[53] Framework partnership agreements [FPAs] and contribution agreements are concluded routinely by the Commission on behalf of the EU with international organisations in the area of humanitarian aid, see more info on the following links <http://ec.europa.eu/echo/partners/humanitarian_aid/fpa_en.htm> and <http://ec.europa.eu/echo/partners/humanitarian_aid/fpa_int_en.htm>; see for an example of a FPA concluded with IOM in 2011, <http://ec.europa.eu/europeaid/work/procedures/financing/international_organisations/other_international_organisations/documents/framework_agreement_iom.pdf>, accessed on 3 February 2013.

[54] B. Dutzler, 'Representation of the EU and the Member States in International Organisations', in S. Griller and B. Weidel (eds.), *External Economic Relations and Foreign Policy in the European Union* (Vienna: Springer Publishers, 2002), p. 159.

ment tasks in relations with international organisations under the mandate of Article 220 TFEU.[55] These agreements, based on Article 220 TFEU, will consequently also bind the Union.[56] If such agreements would touch upon the political content with clear-cut obligations, this would nevertheless violate Article 218 TFEU and the assigned powers of the Council, as it stipulates clearly that the 'Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them' and thus infringe the institutional balance of powers as laid down in Article 13(2) TFEU.

Whether such international agreements are invalid under international law is a different question. The agreements concluded by the Commission will have to be considered in light of Article 46 of the 1969 VCLT.[57] This Article stipulates that violations of internal rules can only be invoked by a contracting party in order to invalidate its consent to be bound by a treaty in cases that the violation of the internal rule results in manifest infringement and the violation concerns an internal rule of fundamental importance. Article 218 TFEU could be considered to be such an internal rule but the CJEU acknowledged in its ruling C-327/91 that in practice it will be difficult to prove that such a norm (internal rule) is of fundamental importance.[58] That the internal rule is of fundamental importance would need to be objectively evident to any state conducting itself in the matter in accordance with normal practice and good faith.[59]

The second view maintains that any binding international agreement is a violation of the powers of the Council in EU external relations and such Commission arrangements will not qualify as international agreements and therefore only include a political commitment and are informal arrangements between the Commission and the international organisation.[60]

When we look at the above-mentioned example of the Commission's Framework agreement with the United Nations, it is clear that the latter interpretation of denying international binding status for these Commission agreements concluded under Article 220 TFEU is contradicted by the very content of this Framework Agreement which indicates with its wording a clear intention by both parties to be bound. Consequently it is correct to argue that certain but limited treaty-making powers rest inherently with the Commission in Article 220 TFEU.[61] Furthermore, it is too restrictive and impractical to deny the Commission the use of international agreements in the management of relations with international organisations and such practice may be permitted as long these agree-

[55] See R. Frid, *supra* note 46, at 127; Dutzler, *supra* note 54, at 159; K. Schmalenbach, 'Article 220 TFEU, para. 8', in Ch. Calliess and M. Ruffert (eds.), *EUV/AEUV commentary*, 4th edn. (Munich: Beck Publisher, 2011).

[56] A. Ott, *supra* note 2.

[57] This provision is also binding on the EU as customary international law. See generally Schmalenbach, *supra* note 55, para. 8.

[58] See *supra* note 15.

[59] A. Watts, *The International Law Commission 1949-1998* (Oxford: Oxford University Press, 1999), p. 898.

[60] I. MacLeod, I.D. Hendry and S. Hyett, *The External Relations of the European Communities* (Oxford: Clarendon Press, 1996), p. 167.

[61] See B. Dutzler, *supra* note 54 and K. Schmalenbach, *supra* note 55.

ments respect the limits set by Article 220 TFEU and Article 218 TFEU. Article 220 TFEU gives the Commission together with the High Representative the possibility to maintain relations with international organisations and such relations should not be restricted to soft law instruments but should enable them to conclude international agreements covering only the management and technical aspects between the EU and the international organisation. This limitation would also respect the institutional balance of powers in the field of external relations where that the treaty-making powers rest with the Council, as laid down in Article 218 TFEU. Hence the Council is responsible for binding international agreements to which the European Parliament needs to give its consent since Lisbon. The Commission has no power to conclude international agreements with *third countries*; however, it can be argued that managerial tasks in coordination *with international organisations* can be regulated by international agreements according to Article 220 TFEU. In the framework of a *cooperation of administrations* the Commission can also engage in international agreements which will also bind the Union only with international organisations (and not with third states). In addition, the Commission is always able to conclude non-binding arrangements with third parties as long as it becomes clear in the text of such an arrangement cannot be considered legally binding.

3. EU AGENCIES: DELEGATION AND TYPOLOGY IN VIEW OF THEIR INTERNATIONAL MANDATE

3.1 **Delegation**

As we set forth in the introduction, the precise reference to international collaboration as well as the nature of and the instruments used vary significantly among the agencies. In view of this great diversity, it is important to clarify what forms of powers have been conferred upon agencies to act at the global level. For our discussion of agencies' global activities, it is therefore decisive to establish whether agencies as part of the EU executive power[62] manoeuvre in a situation comparable to either the Commission or the Council and whether such tasks have been and/or can be delegated to them by the legislator with the observance of the institutional balance enshrined in Article 218 and Article 220 TFEU.

European agencies have the task to assist the Commission and the Council in the implementation of Union policies.[63] They generally have been dele-

[62] D. Curtin, *Executive Power of the European Union* (Oxford: Oxford University Press, 2009), p. 52.

[63] See generally S. Griller and A. Orator, 'Meroni Revisited: Empowering European Agencies between Efficiency and Legitimacy', *NewGov* (2007) 04/D40, aavailble at <http://www.eu-newgov.org/database/DELIV/D04D40_WP_Meroni_Revisited.pdf>, accessed on 4 February 2013; E. Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', 46 *Common Market Law Review* (2009), p. 1395,

gated, in line with the (in)famous *Meroni* case law of the late 1950s,[64] clearly defined limited executive powers[65] which are subject to judicial review, so as to respect the institutional balance of powers.[66] From this we can argue that, in principle, treaty-making is a form of 'external legislation making,' is in the hands of the Council and the European Parliament according to Article 218 TFEU and with limited room of action for the Commission under Article 220 TFEU to arrange organisational matter with international organisations. European agencies cannot be put in the position to conclude binding international agreements or working arrangements without a clear tie to the primary actors in EU external relations law and respecting the boundaries set by EU primary law in form of Article 220 and 218 TFEU.

For our analysis it is therefore important to define the relationship that agencies have with the EU institutions in the exercise of their global activities and whether and what powers have been delegated to them. To this end it is important to define what delegation is. Delegation of powers may generally be defined as the transfer of powers from one organ or institution to another, which the latter exercises under its responsibility. In order to determine whether 'true' delegation has taken place three factors seem decisive: *i)* the nature of powers delegated (wide discretionary or narrowly circumscribed executive powers); *ii)* the amount of control that the delegating authority can exercise over the delegate and *iii)* the actual exercise of the powers (by delegate or delegating authority).[67] In the *Meroni* cases, the Court indeed distinguished between a 'true' delegation of the powers conferred upon the delegating authority and a situation where the authority grants the powers to a delegate, the performance of which remains subject to oversight by the authority which assumes full responsibility for the decisions of the delegate.[68] According to the Court, in the

M. Chamon, 'EU Agencies between Meroni and Romano or the Devil and the Deep Blue Sea', 48 *Common Market Law Review* (2011), p. 1055.

[64] Case 9/56 *Meroni & Co, Industrie Metallurgiche SpA* v. *High Authority of the European Coal and Steel Community* [1958] ECR 133 and Case 10/56 *Meroni & Co, Industrie Metallurgiche SpA* v. *High Authority of the European Coal and Steel Community* [1958] ECR 157; cases where the Court has referred to Meroni in later case law include: Case C-255/04 *Commission* v. *France*, ,[2006] ECR I-5251; Case C-240/03 P. *Comunità montana della Valnerina* v. *Commission*, [2006] ECR I731; Case C-301/02 P. *Carmine Salvatore Tralli* v. *European Central Bank*, [2005] ECR I-4071, Case 98/80 *Giuseppe Romano* v. *Institut national d□assurance maladie-invalidité*, [1981] ECR 1241, see generally, Chamon, *supra* note 63, at 1055–1075; K. Lenaerts 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community', 18 *European Law Review*, no. 1 (1993), p. 23; E. Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?', 37 *Common Market Law Review* (2000), p. 1113; G. Majone, 'Delegation of Regulatory Powers in a Mixed Polity',8 *European Law Journal*, no. 3 (2002), p. 326; E. Vos, 'Agencies and the European Union', in L. Verhey and T. Zwart (eds.), *Agencies in European and Comparative Perspective* (Antwerp: Intersentia, 2003), 129-133.

[65] See very recently, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland* v. *Council of the European Union and European Parliament* on the powers conferred upon ESMA. App 11844/12 on 1 June 2012 (pending).

[66] D. Curtin, *supra* note 62, at 145.

[67] T. Hartley, *The Foundations of European Union Law*, 7th edn. (Oxford: Oxford University Press, 2010), p. 127.

[68] See Case 9/56 *Meroni*, *supra* note 64 at 147–149 and Case 10/56 *Meroni*, *supra* note 64, at 169–171.

latter situation no 'true' delegation takes place. Whether or not delegation has taken place to agencies, which may upset the institutional balance of powers, thus depends on these three factors. At the same time it is helpful to bear in mind that the question of delegation is a matter of degree and does not necessarily have a straightforward yes or no answer. The meaning of delegation in practice will therefore largely be determined by the degree to which real powers have been transferred.[69]

3.2 **Typology**

The above makes clear that it is vital to establish the nature of powers delegated and the degree of supervision by the EU authorities. Hereby it is key to determine whether (and which) powers have been delegated to the agencies. To this end it is important to establish whether some kind of control is exercised by the Council or the Commission. We may observe that various agencies' founding regulations do require some form of control. For the purpose of our analysis, we can divide the agencies into agencies that have obtained explicit powers, and hence a mandate to act internationally, agencies that have not obtained explicit powers in this regard, and, finally, where the founding regulation is completely silent on this point. With respect to the latter it remains unclear whether and/or how these agencies may act at all. Such agencies, i.e. Body of European Regulators for Electronic Communications (BEREC), Community Plan Variety Office (CPVO), European GNSS Agency (GSA), and European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (IT Agency),[70] therefore remain outside of the scope of our analysis. According to the formal powers they have obtained, subjected to various degrees of supervision in a broad sense, we can therefore classify agencies roughly into three types:[71]

1) agencies that, for the conclusion of an act of international cooperation, need to ask prior approval by either the Council or the Commission (category 1);[72]
2) agencies that must ask for the opinion of the Commission prior to concluding an act of international cooperation (category 2);[73] and

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[69] T. Hartley, *supra* note 67.

[70] Regulation 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice *OJ* [2011] L286/1.

[71] Please note that the following EU agencies have been deliberately excluded from this typology: Body of European Regulators for Electronic Communications (BEREC); Community Plant Variety Office (CPVO); European GNSS Agency (GSA); and the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (IT Agency) as their founding acts do not contain explicit provisions on the external powers/tasks of these bodies.

[72] I.e., European Police College (CEPOL), European Aviation Safety Agency (EASA), The European Union's Judicial Cooperation Unit (EUROJUST), European Police Office (EUROPOL).

[73] European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), European Training Foundation (ETF), European Union Agency for Fundamental Rights (FRA), European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX).

3) agencies whose founding acts do not provide expressly for supervision by the Commission or the Council (category 3).[74]

The requirement of prior approval for agency global action is important for our analysis so as to determine whether the EU is bound by an act of an agency as well as who is responsible for the act. The prior approval or consultation by the EU institutions will be decisive to establish whether powers have (lawfully or non-lawfully) been delegated to the agencies and whether the institutional balance has been upset.

Hence, powers and/or obligations have been conferred upon category 1 agencies to cooperate with third countries and/or international organisations but these agencies may conclude an instrument of cooperation only after approval of the Commission or the Council. 'Category 1 agencies' thus refers to four agencies, viz.: EASA, CEPOL, Europol and Eurojust. 'Category 2 agencies' may or must consult with the Commission. This is the case with EMCDDA, FRA, ETF and Frontex. For this category the Commission is associated with external actions of the concerned agencies but cannot prevent the final conclusion of arrangements. Powers and/or obligations have been conferred upon category 3 agencies instead to cooperate with third countries and/or international organisations without further specification of supervision. The vast majority of agencies fall into this category.

Category 1 agencies have thus to be distinguished from category 2 and 3 agencies as, for the former, both the Commission and the Council can prevent the final decision-making process and therefore have to be considered responsible for creating binding obligations on behalf of the Union, should these obligations be considered binding. We will see in sections 4 and 5 what this will mean for the legal nature of the acts of category 1 agencies and the institutional balance.

4. EU AGENCIES' EXTERNAL ACTIONS: EXAMPLES OF PROVISIONS AND PRACTICE

Our analysis reveals that it is important to look at the precise provisions stipulated in the founding regulations and the practice of the agencies on the international plane. Only in this way can we determine the precise nature of the

[74] Agency for the Cooperation of Energy Regulators (ACER), European Centre for the Development of Vocational Training (Cedefop), European Asylum Support Office (EASO), European Banking Authority (EBA), European Centre for Disease Prevention and Control (ECDC), European Chemicals Agency (ECHA), European Environment Agency (EEA), European Fisheries Control Agency (EFCA), European Food Safety Authority (EFSA), European Institute for Gender Equality (EIGE), European Insurance and Occupational Pensions Authority (EIOPA), European Medicines Agency (EMA), European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), European Maritime Safety Agency (EMSA), European Network and Information Security Agency (ENISA), European Railway Agency (ERA), European Securities and Markets Authority (ESMA), European Training Foundation (ETF), European Agency for Safety and Health at Work (EU-OSHA), European Foundation for the Improvement of Living and Working Conditions (EUROFOUND), Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).

agencies' acts, and whether the global dimension of agencies interferes with the institutional balance. Our categorization of the agencies thus helps to identify the powers of agencies and whether they may carry them out autonomously or where there is some kind of control by the EU institutions. For the purpose of our analysis, we will need to look at concrete provisions in the legal foundations of agencies as well as the practice of the conclusion of working arrangements or cooperation agreements. To this end, we will give a few examples of the three categories of agencies that have different powers and instruments and vary in their constraints on the use of these instruments. We will focus on the following agencies: EASA, Europol and Frontex.

4.1 **Category 1: Prior Approval by the Commission or Council**

The general analysis of all EU agencies in view of their external relations powers reveals that only four agencies need to ask for prior approval for their global action. Since the 2008 amendment of its founding regulation, EASA is required to ask for prior approval from the Commission for the conclusion of international working arrangements, while Cepol, Europol and Eurojust need to ask for prior approval from the Council before they conclude agreements with third countries or international organisations. For the purpose of our analysis we will analyse EASA and Europol.

4.1.1 *EASA*

EASA's international cooperation in the form of working arrangements requires prior Commission approval.[75] EASA is assigned with tasks which fall into the categories of rulemaking, certification and standardization. In the field of rulemaking, EASA assists the Commission in drafting legislation, it can adopt soft law in form of non-binding documents (for example assist third countries in setting up common aviation safety standards as regards certification.[76] EASA derives its international mandate from Article 27 of its founding regulation according to which 'the agency may cooperate with aeronautical authorities with third countries and the international organisations competent in matters covered by this Regulation in the framework of working arrangements concluded with those bodies, in accordance with the relevant provisions of the Treaty.'

[75] Art. 27 of Regulation 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670, Regulation No. 1592/2002 and Directive 2004/36/EC, *OJ* [2008] L79/1, as last amended by Regulation 1108/2009 of the European Parliament and the Council of 21 October 2009 amending Regulation 216/2008 in the field of aerodromes, air traffic management and air navigation services and repealing Directive 2006/23/EC *OJ* [2009] L309/51 (hereafter referred to as 'EASA founding regulation').

[76] See especially Art. 19 and 20 of the Basic EASA Regulation. Art. 12 covers the acceptance of third-country certifications.

Though EASA was established already in 2002,[77] it is noteworthy that only the amended 2008 founding regulation has added that such cooperation requires the prior approval of the Commission.[78] EASA has been very active in its international relations and has concluded numerous working arrangements with other aeronautical authorities in third states, both in Europe such as Iceland, Norway, Switzerland and Serbia and elsewhere such as, Australia, Brazil, China, Hong Kong, New Zealand and Vietnam.[79] These working arrangements cover cooperation in the field of civil aviation in the form of the collection and exchange of information on the safety of aircraft using EU airports and airports of the relevant country, airworthiness and environmental type-certification of aeronautical products, parts and appliances, approval of aircraft design organisations and of production and maintenance organisations, coordination of joint (operational) measures and projects, standardization inspections and training.

Due to extensive practice, the international partners of EASA vary and the wording of its working arrangements is not alike.[80] Differences in the wording of the working arrangements would moreover require each and every of the 100 agreements to be studied in order to identify whether there is an intention to legally bind the EU, which falls beyond the scope of this contribution. Here we will give only a few outstanding examples. The international partners of EASA are all involved in the control and management of civil aviation but their international legal status differs. The cooperation with Russia is organized through the Interstate Aviation Committee (IAC) which was established by international agreements between 12 states of the former Soviet Union and is an international organisation.[81]

From this legal status it can be assumed that the IAC has treaty-making powers when it concludes a working arrangement with EASA. In addition, it is noteworthy that in this working arrangement with the IAC the preamble men-

[77] Regulation 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency *OJ* [2002] L240/1.

[78] Art. 18 of Regulation 1592/2002 did not refer to the Commission's approval but only mentioned in very general words that working arrangements must be concluded to 'in accordance with the relevant provisions of the Treaty.'

[79] See generally on this the information available on the official website of EASA in the section 'International Cooperation – Working Arrangements' at <http://easa.europa.eu/rulemaking/international-cooperation-working-arrangements.php>, accessed on 4 February 2013. On the different types of working arrangements used by EASA in the context of EU enlargement, Coman-Kund, *supra* note 7, at 363–365.

[80] According to the information available on the website of EASA, it transpires that up to date the agency has concluded more than 100 working arrangements of different types with international partners all over the world; it should be noted however that about half of these working arrangements have been concluded only with the Chinese competent authority, due to the specific circumstances of the international cooperation framework with China, <http://easa.europa.eu/rulemaking/international-cooperation-working-arrangements.php>, accessed on 11 February 2013.

[81] See the official website of ICAO at <http://legacy.icao.int/icao/en/assembl/a36/wp/wp056_en.pdf>, accessed on 4 February 2013.

tions that EASA explicitly represents the Member States and not the EU.[82] EASA representing the Member States can be traced back to the EASA founding regulation setting common rules on aviation safety at the EU level and entrusting the implementation tasks to the Member States and the Commission together with EASA.[83] A similar or identical provision concerning the Member States' authorization is also included in the preamble or the content of working arrangements concluded with Australia, Brazil, Japan, Vietnam, Singapore and Taipei.[84] The intention to be legally bound is included in all of these arrangements and the wording in the preamble can be understood to mean that EASA concludes an agreement on behalf of the EU Member States. A particular feature of these working arrangements is that they cover certification-related matters and the wording of these arrangements (authorized representation of EU Member States) reflects the regulatory oversight tasks which still belong to Member States.

In other examples in the practice of EASA, the wording of the arrangements indicates whether they should be considered legally binding. The working arrangement between EASA and Armenia states at point 10.2 that 'This working arrangement, of technical and practical nature, regulates the working relations between the Parties. It is not legally binding for the European Union and the

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[82] See working arrangement on the airworthiness between EASA and the Interstate Aviation Committee, available at <http://easa.europa.eu/rulemaking/docs/international/russia/intl_appro_IAC_EASA.pdf>, accessed on 4 February 2013.

[83] Thus recital (13) of the preamble of Regulation 216/2008 already specifies that certification tasks are to be executed at national level, while EASA can also be empowered in certain cases to conduct certification tasks (such empowerment is operated via the founding regulation itself and its implementing rules). Art. 17(2)(c) stipulates explicitly the task of EASA to carry out on behalf of the Member States functions and tasks assigned to them by applicable international conventions, in particular the Chicago Convention. Following this line, Art. 20(1) specifies that EASA is to carry out (where applicable and as specified in the Chicago Convention) on behalf of the Member States the function and tasks of the state of design, manufacture or registry when related to design approval. Furthermore, Art. 23(1)(b) authorizes EASA to issue and renew authorizations proving the capability of third-country operators, unless a Member State carries out the functions and tasks of the state of operator. Last but not least, Art. 27(3) on EASA's international cooperation stipulates that the agency shall assist Member States to respect their international obligations (in particular those under the Chicago Convention). Since airworthiness certification requirements and tasks are covered by the Chicago Convention (to which only Member States are parties, not the EU) but, on the other hand, Member States transferred the competence to the EU to adopt common rules in the area of aviation safety, Regulation 216/2008 (and before that, Regulation 1592/2002) has foreseen the possibility for EASA to act on behalf of the Member States in relation with the outside world. Another interesting situation is that provided for in Art. 12 of Regulation 216/2008, according to which EASA may issue certificates on behalf of any Member State in application of an agreement concluded by one of the Member States with a third country (such an example is the working arrangement concluded between EASA and the Civil Aviation Authority of Israel on the implementation of the Agreement between Israel and Italy concerning the airworthiness certification, approval or acceptance of imported civil aeronautical products and the acceptance of maintenance services entered into force on 2 May 1990, available at <http://easa.europa.eu/rulemaking/docs/international/israel/IP_Israel.pdf>, accessed on 4 February 2013.

[84] For instance working arrangement between EASA and the Civil Aeronautics Administration in Taipei, available at <http://easa.europa.eu/rulemaking/docs/international/taipei/WA%20CAA%20Taipei.pdf>, accessed on 4 February 2013 and in the one with competent aviation authority from Saudi Arabia, available at <http://easa.europa.eu/rulemaking/docs/international/saudi-arabia/GACA-EASA-WA-signed%20Version18.03.08.pdf>, accessed on 4 February 2013.

Republic and Armenia.'[85] It should also be noted that the working arrangements concluded with third countries in order to ensure the transition from the Joint Aviation Authority (JAA) system to the EASA system specify that they do not affect the legal responsibilities of the parties under relevant international agreements (e.g. Albania; Azerbaijan; Georgia, Moldova; San Marino; Serbia; Turkey; Ukraine).[86] Without having analyzed all of its over 100 working arrangements, we can argue that those EASA arrangements concluded with third countries on cooperation in civil aviation, that include a sentence indicating that this working arrangement does not affect or limit in any way the rights and obligations stemming from international agreements, in all likelihood will not be considered to be binding under international law and will be considered soft law under international law.

When applying the criteria whether an international agreement is at issue, the agreement with the IAC can be considered an international agreement. The text provides for the intention to be legally bound and the partner of EASA is able to conclude such an international agreement. However, what does it mean that the authorization to conclude such an agreement is derived not from EU but from the Member States? The Commission's approval on its own would only lead to a binding international agreement in the case of cooperation with an international organisation as in the case of the IAC. This mandate derives from Article 220 TFEU but is limited to technical agreements with international organisations and excludes cooperation with third countries. The Commission might also be active in external relations with third countries but with due respect to Article 218 TFEU only in the form of a non-binding action or through soft law. Under these conditions the institutional balance in EU external relations is observed.

In case of EASA, this approval entails that there is no true delegation as the action remains subject to continuing oversight by the Commission due to mandatory approval. Consequently it could be argued that this form of authorization does not breach *Meroni*.[87] Thus if an international agreement between EASA and an international organisation is concluded it could be considered authorized by Article 220 TFEU and the powers given to the Commission. In case such an agreement would be concluded with a third country, the agency and the Commission have to respect the limits of Article 220 TFEU. Legally binding cooperation with third countries would overstep the mandate inherent in Article 220 TFEU and need to be measured for its binding force under international

[85] Working arrangement between the European Aviation Safety Agency (EASA) and the General Department of Civil Aviation at the Government of Republic of Armenia, available at <http://easa.europa.eu/rulemaking/docs/international/armenia/WA%20ARMENIA.pdf>, accessed on 4 February 2013.

[86] See the official website of EASA in the section 'International Cooperation – Working Arrangements' at <http://easa.europa.eu/rulemaking/international-cooperation-working-arrangements.php>, accessed on 4 February 2013.

[87] Case 9/56 *Meroni*, *supra* note 64, at 150–152 and Case 10/56 *Meroni*, *supra* note 64, at 173. As concerns the application of the Meroni scenario to EU agencies cf. Lenaerts, *supra* note 64, at 40–49; E. Vos, *Institutional Frameworks of Community Health and Safety Regulation. Committees, Agencies and Private Bodies* (Oxford: Hart Publishing, 1999), 200–203; Vos, 'Agencies and the European Union', *supra* note 64, at 129–133.

law by Article 46 VCLT. However, the more likely interpretation is that the authorization of EASA in these cases, as in cases of the IAC and the third countries Taipei and Saudi-Arabia, derives directly from the Member States and their inherent treaty-making powers. EASA not only acts in this area on behalf of the Commission but also on behalf of Member States. When acting on behalf of the Member States, Articles 220 or 218 TFEU will become irrelevant. This analysis leads to a rather novel legal construction as it is different from international agreements concluded by the Member States with international partners in the form of an inter-agency agreement discussed under 2.2. In this case an EU agency concludes an international agreement on behalf of the Member States. The latter situation is quite peculiar as we see that Member States 'borrow' EASA for tasks relating to powers for which they are responsible.[88] Consequently this necessitates more empirical research on this matter.

4.1.2 *Europol*

Europol is a category 1 agency as it needs to ask for prior Council approval in its international activities. Europol was founded originally through a convention between the Member States[89] and was only on 1 January 2010 transformed into an EU agency.[90] Europol's mission is to support its Member States in preventing and combating all forms of serious international crime and terrorism. It facilitates the exchange of criminal intelligence between police, customs and security services. Article 23 of Europol's Founding decision regulates cooperative relations with third countries and international organisations, and foresees the conclusion of such agreements with these countries. Europol's change of legal status from an international organisation to an EU agency is interesting not only from the perspective of international law but also from an EU law perspective. It was considered to have international legal personality in the areas assigned to it,[91] while being, at the same time, under the strict control of the Council, which was approving these cooperation agreements with third countries. The Commission always emphasized, however, the weaknesses of the democratic control of Europol and stressed that this issue could be addressed by limiting Europol's 'own possibilities of concluding agreements with

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[88] See also H.C.H. Hoffmann and A. Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"', 37 *European Law Review*, no. 4 (2012), 419–443, at 431.

[89] Convention based on Art. K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) *OJ* [1995] C316, p. 2.

[90] Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) *OJ* [2009] L121/37, hereafter referred as 'Europol's founding decision'.

[91] See for instance S. Peers, *EU Justice and Home Affairs Law*, 3rd edn. (Oxford: Oxford University Press, 2011), p. 932, and A. Ott, *supra* note 2, at 516. See on this the Australian Federal Police with a legally incorrect but interesting formulation: 'Australia became a member of Europol in 2007 through the signing of an *International Treaty* which allows the Australian Federal Police, State and Territory Police, Customs and Border Protection and the Australian Crime Commission (collectively known as Competent Authorities) to exchange intelligence and interact with other Europol member countries', at <http://www.afp.gov.au/policing/international-liaison/europol.aspx>, accessed on 5 February 2013.

third states and such agreements should be in the future be negotiated on behalf of the European Union.'[92] The Commission subsequently suggested under the heading 'relations with third bodies' that *administrative arrangements* with third bodies might be concluded.[93] The Council did not follow this suggestion, and the 2009 new Council Decision kept the original wording of the Europol Convention and the final text still refers to agreements to be concluded by Europol.

In addition to the founding act, Council Decision 2009/934/JHA of November 2009 covers the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.[94] Article 2 of Council Decision 2009/934/JHA stipulates that Europol should use the instruments of cooperation agreements and working arrangements in the relations with its partners. Article 4 of Council Decision 2009/934/JHA highlights the procedure of concluding cooperation agreements. These agreements are only concluded once the Council has decided, after consulting the European Parliament,[95] to determine a list of third states and international organisations with which Europol shall conclude agreements and after having received final approval of the Council.[96] The list of the international partners with whom Europol was directed to conclude agreements had been adopted in the form of a Council Decision.[97]

Europol has through its separate development under the Convention developed already quite far-reaching cooperation which can be divided into operational and strategic agreements with non-EU States such as Australia, Canada and the US and operational and strategic agreements with three international organisations (i.e. Interpol; the United National Office on Drugs and Crime, and World Customs Organisation).[98] The nature of the cooperation agreements can vary, ranging from operational cooperation, including the exchange of personal data, to technical or strategic cooperation.[99] Looking at the content of these agreements, they have characteristics of international agreements, namely how they are worded, what they cover and how they are put into force. However, it must be noted that many of these agreements and arrangements have been concluded in the pre-agency phase. This is different with the Agreement on operational and strategic co-operation between Monaco and Europol which was concluded as the first agreement after Europol became an agency.

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[92] Commission Staff Working Document, Brussels 20 December 2006, SEC (2006) 1682, p. 17.

[93] Ibid. and further, A. Ott, *supra* note 2, at 531–532.

[94] Council decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information *OJ* [2009] L325/6.

[95] According to Art. 26(1)(a) of Europol's founding act.

[96] According to Art. 23(2) of Europol's founding act.

[97] Council Decision 2009/935/JHA of 30 November 2009 determining the list of third States and organisations with which Europol shall conclude agreements *OJ* [2009] L352/12.

[98] See for details and for the texts of the agreements the official website of Europol, External cooperation section at <https://www.europol.europa.eu/content/page/external-cooperation-31>, accessed on 5 February 2013.

[99] Ibid.

From its wording and structure it does not differ from pre-agency agreements, a lot of factors such as the party involved (government of Monaco), the wording of the text, the provisions on entry into force and validity and termination indicate that this agreement is concluded as a binding agreement.[100] It can also be assumed that the legal status of Europol has not changed since the transformation into an agency. Due to the identical wording of its Founding Decision and the former convention, clearer indications would be needed to deny Europol the ability to conclude international agreements and Europol's limited international legal personality remains unchanged.

Importantly, the specific position of Europol in comparison to other agencies is also expressed in the requirement that external action needs to be approved by the Council, the EU institution, as we noted above, that is mandated to act for the European Union on the international plane. In the case of Europol a strict supervision of treaty-making powers are organized by Council Decision 2009/935/JHA in which the Council determines with which third states and organisations Europol shall conclude agreements. Therefore, both primary EU law and the institutional balance are observed, as it is ultimately the Council that concludes the agreements or is strictly supervising Europol in its action so that no true delegation to this agency takes place.[101] This view is supported by the legal framework[102] and international cooperation practice of Europol, already before becoming an EU agency, where the approval of the Council is explicitly referred to both in the relevant legal acts regulating Europol's international tasks and in the agreements concluded by Europol. A clear example of the practice of Europol after becoming an EU agency forms the agreement that Europol concluded with the principality of Monaco of 2010 where Europol, although signing the agreement in its own name, refers to the fact that the Council gave Europol 'the authorisation to agree to the present agreement between the principality of Monaco and Europol.'[103]

Yet, in this case, the neglect of the role of the European Parliament is problematic under EU law as since Lisbon the role of the European Parliament in Article 218 TFEU has been reinforced with requiring the consent of the European Parliament for international agreements as a rule.[104] Clearly, the Euro-

[100] Agreement on Operational and Strategic Co-operation between the Government of HSH, The Sovereign Prince of Monaco and the European Police Office, done on 6 May 2011, available at <https://www.europol.europa.eu/sites/default/files/principalityofmonaco.pdf>, accessed on 5 February 2013).

[101] Curtin calls this a formal rubber-stamping exercise on behalf of the Council but does not lead to a complete shift of powers to an organ outside the Treaties, D. Curtin, *supra* note 62, at 160.

[102] See Art. 2 of Council Act of 3 November 1998 laying down rules concerning the receipt of information by Europol from third parties (1999/C 26/03) *OJ* [1999] C26/17 and Art. 2 of Council Act of 3 November 1998 laying down rules governing Europol's external relations with third States and non-European Union related bodies (1999/C 26/04) *OJ* [1999] C26/19 adopted under the 1995 Europol Convention.

[103] See preamble to the Agreement on Operational and Strategic Co-operation between the Government of HSH, The Sovereign Prince of Monaco and the European Police Office, *supra* note 100.

[104] Art. 218(6) (a)(v) TFEU (agreements covering fields to which either the ordinary legislative procedure applies or the special legislative procedure where consent by the European Parliament

pean Parliament does not play this role in the agreements concluded by Europol. Here, as with all other European agencies, the Parliament's involvement is restricted to an indirect control by being co-responsible for the budget of agencies. And according to Article 26 of the Europol Council Decision, the European Parliament will be consulted to determine the list of third states and organisations with which Europol shall conclude agreements. It could now be argued that this very limited participatory right of the European Parliament is comparable to the national constitutional system and executive or agency-to-agency agreements. In some EU Member States, as highlighted above, the practice is accepted that government agencies or other government entities conclude international agreements on technical matters which do not require ratification by Parliament. The same practice applies for the Commission agreements concluded on the basis of Article 220 TFEU with international organisations.

However, in the case of Europol it is doubtful whether these agreements are just technical agreements with reference to their content and aims, while it is moreover highly disputable whether such a practice of executive agreements is recognized in EU law. Article 218 TFEU does not foresee that executive agreements exist without the consent by the European Parliament. In Case C-327/91 *France v. Commission*, Advocate General Tesauro denied the practice of administrative agreements,[105] and the CJEU has not further explored this interpretation.[106] The only exception to the participatory rights of the European Parliament foreseen in Article 218(6) TFEU and where the European Parliament will only be informed in case the legal basis does not refer to the ordinary or special legislative procedure or the agreement relates to the CFSP. Hence, the current practice of Europol's international cooperation breaches Article 218 TFEU by disregarding the European Parliament's powers.

The current legal framework of Europol is consequently investigated and the Commission will introduce a new draft Regulation in 2013 which will change the legal base in line with Article 88(2) TFEU, and which should also reflect the primary law demand for greater 'scrutiny of Europol's activities by the European Parliament, together with national Parliaments.'[107]

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is required) in combination of Arts 88 and 84 TFEU in light of the ERTA doctrine.

[105] Opinion of AG Tesauro in Case C-327/91 *France* v. *Commission*, *supra* note 15, paras 33–34.

[106] See Court's judgment in Case C-327/91 *France* v. *Commission*, *supra* note 15.

[107] Art. 88(2) TFEU. Draft Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol), COM(2013) 173 final. See further, Communication from the Commission to the European Parliament and the Council on the procedures for the scrutiny of Europol's activities by the European Parliament, together with the national Parliaments, COM(2010) 776 final, and E. Disley *et al.* (eds.), 'Evaluation of the implementation of the Europol Council Decision and of Europol's activities', *RAND Europe*, available at <https://www.europol.europa.eu/sites/default/files/publications/rand_evaluation_report.pdf>, accessed on 5 February 2013.

4.2 **Category 2: Prior Consultation with the Commission: Frontex**

Also category 2 agencies can be counted, namely EMCDDA, FRA, ETF and Frontex. Frontex is one of the category 2 agencies as, subsequent to the 2011 amendment to its founding regulation,[108] cooperation with third states by Frontex requires prior Commission consultation. Yet it should be underlined that as regards its international cooperation with international organisations, no specific provision is made with regard to Commission's involvement, which makes that Frontex also falls into category 3. Frontex is of interest as being an agency that deals with borders and it has a broad range of activities with third countries and international organisations. Frontex was established by Council Regulation in 2004 and became operational in 2005[109] in order to improve 'the integrated management of Union's external borders.'[110] Just like other EU agencies, Frontex represents the institutional substitute of more informal cooperation mechanisms already in place in the management of external borders area.[111]

In order to manage external borders efficiently, international cooperation is a must. This is reflected in Frontex's founding act that stipulates the international dimension of the Agency in two separate articles. Article 13 provides the framework for cooperation with international organisations, while Article 14 regulates the interactions between Frontex and third countries and their competent authorities. In the 2004 founding act, Frontex's international cooperation provisions with international organisations and third countries organisations were drafted similarly. In both cases, international cooperation would be '… in accordance with the relevant provisions of the Treaty', and the 'working arrangement' was the preferred instrument to formalize such cooperation. There were also differences between the two categories of subjects. The working arrangements with international organisations also had to be concluded in compliance with the provisions on the competences of the relevant international organisation. Conversely, in its relations with third countries, the Agency was also asked '… to facilitate the operational cooperation between the Mem-

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[108] Council Regulation 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union *OJ* [2004] L349/1, as last amended by Regulation 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union *OJ* [2011] L 304/1, hereafter referred to as 'Frontex founding regulation'.

[109] 'Parliamentary oversight of security and intelligence agencies in the European Union' (Study), EP 2011, p. 52, available a: <http://www.europarl.europa.eu/document/activities/cont/201109/20110927ATT27674/20110927ATT27674EN.pdf>, accessed on 5 February 2013.

[110] See Art. 1(1) of Council Regulation 2007/2004, *supra* note 108.

[111] See J.J. Rijpma,'Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex', in M. Busuioc and M. Groenleer and J. Trondal (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making* (Manchester: Manchester University Press, 2012), 87-88. See also S. Peers, 'The European Union's Area of freedom, security and justice architecture after the Lisbon Treaty', in *Parliamentary Oversight of Security and Intelligence Agencies in the European Union*, Study European Parliament, 2011, p. 400.

ber States and third countries in the framework of the European Union external relations policy.'

Article 14(1) states explicitly that one of the aims of the cooperation entered into by Frontex with third countries is '…to promote European border management standards.' Next, the scope of the working arrangements concluded with competent third country authorities are clearly limited '…to the management of operational cooperation.'[112] Furthermore, Frontex is allowed to deploy liaison officers in third countries and to receive liaison officers from third countries.[113] Additionally, express provision is made for the Agency to launch and finance, within the scope of its mandate, technical assistance projects in third countries.[114] Next, the peculiar position of Frontex in the management of external border areas is illustrated by Article 14(7). This provision allows the Member States to include provisions on the competence of the Agency in bilateral agreements with third countries on operational cooperation at external borders. Last but not least, the 2011 amendment makes the conclusion of the working arrangements with third countries, as well as the decisions regarding the deployment/receiving of liaison officers, dependent on the prior opinion of the Commission and full information of the European Parliament.[115]

In practice, Frontex has established numerous working arrangements with third countries under different headings. According, to its website and activity reports,[116] by June 2012, Frontex had concluded working arrangements (or similar formalized cooperation instruments) with a number of competent authorities of third countries.[117] Similar to other agencies, the cooperation instruments concluded by Frontex bear various labels.[118] However, in spite of the

[112] Art. 14(2) of Frontex founding regulation, *supra* note. 108.

[113] Ibid., Art. 14(3)(4).

[114] Ibid., Art. 14(5).

[115] Ibid., Art. 14(8).

[116] It appears that a Memorandum of cooperation has been concluded by Frontex with the Swiss competent authority on 4 June 2007, but this is not mentioned on Frontex website. However, this memorandum is considered as redundant because Switzerland is now participating in the Schengen acquis, see J.J. Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union* (PhD thesis, Florence: European University Institute, 2009), p. 333.

[117] Viz. the Russian Federation, Ukraine, Croatia, Moldova, Georgia, the Former Yugoslav Republic of Macedonia (FYROM), Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia and Turkey. Furthermore, the Agency has also concluded working arrangements with the CIS Border Troop Commanders Council and the MARRI Regional Centre in the Western Balkans, but these entities are given apparently a slightly different status as the cooperation instruments are concluded under Art. 13 of Frontex founding act. See the official website of Frontex at <http://www.Frontex.europa.eu/partners/third-countries>, accessed on 5 February 2013. See also Frontex's General Report 2009, available at <http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2009/gen_rep_2009_en.pdf>, 9–10, accessed on 5 February 2013; Frontex's General Report 2010, available at <http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2010/frontex_general_report_2010.pdf>, p. 10, accessed on 5 February 2013; Frontex's General Report 2011, available at <http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2011/General_Report_2011.pdf>, 13–14, accessed on 5 February 2013.

[118] These range from 'working arrangement' (e.g., Ukrainian competent authority) to 'memorandum of cooperation' (e.g. Switzerland), 'memorandum of understanding' (e.g., Turkey), 'terms

diversity in the labels of instruments' it appears that all these instruments are seen by Frontex as 'working arrangements' under Articles 13–14 of the founding act.[119] Furthermore in terms of content, the working arrangements with the competent authorities of third countries explicitly set the framework for cooperation between Frontex and its partners. More specifically, these instruments provide for cooperation in operational activities, the launching of and participation in common projects, technical assistance (e.g. trainings and research), exchange of information and best practices, deployment of liaison officers, etc.[120]

Of great relevance is that the working agreements or memoranda of cooperation concluded by FRONTEX routinely include a sentence stating that they do not constitute an international agreement and they do not fulfill international obligations of the European Union.[121] Consequently, these international cooperation instruments concluded by Frontex with third countries are not legally binding under international law and will be considered guidelines or soft law which do not violate EU primary law.

4.3 **Category 3: General Mandate for International Action: Frontex**

Comparing EU agencies in their international mandate with each other, the vast majority of agencies have a general mandate to cooperate with third countries and/or international organisations without any specification of supervision in the sense of prior consultation or prior approval. Looking at the practice of some of these agencies we find that activities include foremost collaboration on technical and administrative aspects, exchanges of information (including specific confidentiality arrangements sometimes), trainings and workshops.

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of reference' (e.g., Russian Federation) – see Frontex general activity reports 2009, 2010 and 2011, *supra* note 117.

[119] See for instance, Frontex press release on the working arrangement with UNODC where it is stated that that was the sixth international organisation with which the Agency concluded a working arrangements (although in the case of IOM and ICPMD the instruments concluded are labelled differently), available at <http://www.Frontex.europa.eu/news/Frontex-signs-working-arrangement-with-unodc-4JIIBZ>, accessed on 5 February 2013. See also Frontex webpage on cooperation with third countries, where the list of third states with whom working arrangements have been concluded includes all the partners of Frontex regardless of the label used for each specific instrument – <http://www.Frontex.europa.eu/partners/third-countries>, accessed on 5 February 2013.

[120] See also *supra* note 109, at 54.

[121] See for instance, Terms of reference on the establishment of operational co-operation between European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the Border Guard Service of the Federal Security Service of the Russian Federation done on 14 September 2006, pct. 6; Working arrangement establishing operational cooperation between European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the National Security Council of the Republic of Armenia done on 22 February 2012, pct. 6; Working arrangement establishing operational cooperation between European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the Ministry of Internal Affairs of the Former Yugoslav Republic of Macedonia done on 19 January 2009, pct. 7.

Agencies like EFSA and EMA have been very careful in designing their cooperation with their international partners. As far as we can oversee it, all acts of cooperation contain an explicit statement that the acts do not create legally binding obligations.[122] This practice has been formalized for the three European Supervisory Authorities, of which the founding regulations explicitly stipulate that administrative arrangements concluded by the agencies cannot create legal obligations for the EU and the Member States.[123] At the same time, these arrangements cannot prevent Member States and their competent authorities from concluding bilateral or multilateral arrangements with third countries.[124] Accordingly, EBA, ESMA and EIOPA are entitled to establish relations and to conclude formalized cooperation instruments called 'administrative arrangements' with international organisations and with the administrations of third countries but these arrangements cannot create legal obligations for the EU and the Member States. Consequently the international actions taken by the three supervisory authorities with third country authorities cannot be considered as binding international law and consequently do not upset the EU's institutional balance.

As we pointed out above, Frontex has concluded working arrangements or similar formalized cooperation instruments with a variety of international organisations such as with United Nations Commissioner of Refugees (UNHCR),[125] Interpol,[126] International Organisation for Migration (IOM),[127] International Cen-

[122] See for instance, the Memorandum of Cooperation between Food Safety Commission of Japan and European Food Safety Authority, signed on 4–7 December 2009, pct. 1(2) available on EFSA's website at <http://www.efsa.europa.eu/en/networks/international.htm>, accessed on 5 February 2012. As regards EMA, see Cooperation between the Pharmaceutical Inspection Cooperation Scheme and the European Medicines Agency signed on 28 December 2010 available on EMA's website at <http://www.ema.europa.eu/docs/en_GB/document_library/Other/2011/02/WC500102054.pdf>, accessed on 5 February 2012 and the Exchange of Letters between the Food and Drug Administration (FDA) of the United States of America (US), on the one side, and the European Commission (in its pharmaceutical regulation capacity) and the European Agency for the Evaluation of Medicinal Products (EMEA) on 12 September 2003, available on EMA's website at <http://www.ema.europa.eu/ema/index.jsp?curl=pages/partners_and_networks/document_listing/document_listing_000228.jsp&mid=WC0b01ac058003176e>, accessed on 5 February 2012.

[123] See the identically worded Art. 33 of Regulation 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009 and repealing Commission Decision 2009/78 *OJ* [2010] L331/12 (EBA's founding regulation); Art. 33 of Regulation (EU) 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/79/EC (EIOPA's founding regulation) *OJ* [2010] L 331/48; and Art. 33 of Regulation 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009 and repealing Commission Decision 2009/77 of the European Parliament and of the Council of 24 November 2010 establishing a European Securities and Markets Authority *OJ* [2010] L331/ 84 (ESMA's founding regulation).

[124] Ibid.

[125] According to Frontex's General Report 2010, *supra* note 117, at 11.

[126] Ibid.

[127] Ibid.

ter for Migration Policy Development (ICMPD),[128] Democratic Control of Armed Forces (DCAF) based in Switzerland,[129] and with United Nations Office on Drugs and Crime (UNODC).[130]

It is important to note that the working arrangements Frontex concludes with international organisations – in difference to the ones concluded with third countries discussed above – do not include such a clear statement about their international legal statement and it could be questioned whether some of them can be considered international agreements. This might not be relevant in so many cases as for example the case of a working arrangement, as the Geneva Centre for the democratic control of armed forces demonstrates. The Centre is first of all established under private law and consequently not equipped with international law capacity. This criterion already excludes an international agreement. In the case of a working arrangement with Interpol, this is different. Interpol is an international organisation but its legal status is still disputed as it has not been established by an international agreement between its members.[131] As regards its wording, this arrangement seems to be similar to an international agreement but Frontex's action is not legitimized by the Founding Regulation through an approval by the Commission, just like for actions of category 1 agencies. Instead the Commission is only consulted. Hence, this seems to be a binding action that is breaching EU primary law (Articles 218 and 220 TFEU) and the *Meroni* doctrine, as contrary to the Commission's role vis-à-vis EASA actions, the role of the Commission in these actions is not clarified.

5. AGENCIES' GLOBAL ACTIVITIES FROM AN INTERNATIONAL AND EU LAW PERSPECTIVE

Our analysis of the global practice of the various agencies reveals that not all three categories of agencies will give rise to legal difficulties in the sense that they would or could create international binding agreements. Hereby both our categorization of agencies' activities and powers in the global scene and the differentiation into EU and international law are key. Our analysis of the international mandates of the agencies laid down in the founding regulations reveals that the legislator has over the years become much more aware that a careful drafting of the external relations' tasks of agencies is required to prevent misunderstandings and/or legal uncertainties. This is also recognized by the Joint statement of the European Parliament, the Council of the EU and the European Commission on decentralized agencies added to the Common approach

[128] See Frontex press release on 29 June 2009, available at <http://www.Frontex.europa.eu/news/Frontex-s-cooperation-with-icmpd-enters-into-force-phjFME>, accessed on 5 February 2013.

[129] According to Frontex's General Report 2011, *supra* note 117, at 14.

[130] See Frontex press release on 23 April 2012, available at <http://www.Frontex.europa.eu/news/Frontex-signs-working-arrangement-with-unodc-4JIIBZ>, accessed on 5 February 2013.

[131] H. Schermers and N. Blokker, *supra* note 36, at 40.

to agencies as adopted in June 2012.[132] According to this document the agencies' international relations should be streamlined and the strategy worked out with the partner DGs in the Commission should ensure that agencies are not seen as representing the EU position to an outside audience or as committing the EU to international obligations.

The provisions in relation to the new supervisory authorities in the financial sector, discussed above, clearly indicate that they want to prevent the impression that international agreements are drafted by agencies. For category 1 agencies CEPOL, Eurojust and Europol, the founding regulations have no difficulty in referring to 'agreements.' This could be explained by the fact that this category of agency anyway requires prior approval by the Council and therefore falls under the supervision of the classical organ engaged in EU external relations. Furthermore, in the case of Europol, we are confronted with a former international organisation with an independent international legal status to conclude international agreements.

Importantly, the analysis of all provisions on EU agencies' international cooperation reveals that most provisions reflect the general legal constraint that these actions based on secondary law are not allowed to infringe primary law.[133] As argued above (section 4), such actions cannot violate the institutional balance and especially not the institutional balance established in EU external relations.

5.1 **EU Law Perspective**

From an EU law perspective, agencies' global action needs to be in conformity with the principle of institutional balance of powers and the limits set by the Court in its *Meroni* and *Romano* case law and the Treaty norms of Article 218 and 220 TFEU. The examples of category 2 and 3 agencies show that these actions will not be approved by the Commission or Council but also do not create binding international agreements as this is stated clearly in various working arrangements concluded by Frontex in relation to third countries.

More problematic are the agencies discussed in categories 1 and 3. For category 1, we have argued that this chain of approval could imply that Commission and Council have mandated agencies EASA and Europol to act in the international field. In category 3, Frontex cooperation arrangements with international organisations do not include any statement on their legal status. They could be considered exceptionally as international agreements but then have no mandated chain of approval by the Commission. Frontex would act on its own, while it has no independent international legal personality. Nevertheless, the analysis under international law would depend on the interpretation of Article 46 VCLT.

[132] Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies of 19 July 2012, *supra* note 13, pct. 25.

[133] This is formulated in some of the rules in the founding regulations that international cooperation needs to comply with relevant Treaty norms.

In category 1, Europol constitutes a novel EU agency but develops under a different background than any other agency due to its origins as an international organisation and its approval for its international action deriving from the Council. The Council maintains full responsibility so that we can argue that no true delegation to this agency has taken place.[134] However, when Europol is able to conclude international agreements on behalf of the Union, without restrictions, then this also needs to be controlled further by the Parliament as otherwise it can argued to be a circumvention of the institutional balance enshrined in Article 218 TFEU.

5.2 **International Law Perspective**

In the case of EASA, we have explained that, exceptionally, a few arrangements could be considered international agreements. This is the case for the agreement concluded with the IAC whereas binding arrangements with third countries would at the same time violate EU law principles if it is not argued that these arrangements are mandated directly by Member States. In the case of Frontex, this agency can conclude an international agreement with international organisations under the condition that their international partner is able to act on the international plan and the wording of such an arrangement gives rise to the interpretation that it is intended to be legally binding. The consequences of this discrepancy between the EU law status and international law need to be determined by principles of interpretation developed under the VCLT. Violations of internal rules can only be invoked against a contracting party in cases of manifest infringement and in the case of an internal rule of fundamental importance. However, whether breaches of Article 218 TFEU are of fundamental importance in the sense of Article 46 VCLT is doubtful due to strict criteria established by this paper.

6. CONCLUSIONS

Our analysis shows that external actions of EU agencies can have different implications depending on the wording in the founding regulations, their institutional background and the practice developing with third countries and international organisations. Legal uncertainty exists for the external action of these agencies as they differ in mandate, international partners and instruments of action. Our analysis of some of the provisions and practice shows that the majority of EU agencies does not and cannot conclude international agreements and will make this clear to their international counterparts. This will fall then under some form of administrative or technical cooperation which does not create international legally binding obligations but is treated by both parties (the agency and the third party) as a binding commitment. Consequently, these

[134] See Case 9/56 *Meroni*, *supra* note 64, at 147–149 and Case 10/56 *Meroni*, *supra* note 64, at 169–171. See also Section 3.1. of this contribution.

activities of agencies are not perceived as problematic.[135] However, such non-binding agreements could be considered binding under national or EU administrative law[136] though the current practice under EU law avoids recognition of so-called inter-agency agreements. Also in a few exceptional cases, we are dealing with international agreements as the example of Europol shows. In the cases of EASA and Frontex difficulties persist if these agencies conclude an agreement with an international partner which is mandated according to national constitutional law to conclude international agreements.

The 2012 Common Approach on decentralized agencies recognizes the importance and complexity in these fields and emphasizes a streamlining of agencies' international relations. However, we argue that a general streamlining of agencies in this respect is counterproductive in view of the different tasks and ways of control of agencies laid down in their founding regulations. Therefore, agencies' international activities should be examined on the basis of the typology developed in this contribution in combination with the nature of tasks conferred upon the agencies.

In the case of Europol, the rights of the European Parliament need to be strengthened as required by Article 218 TFEU. As for the majority of the Frontex and EASA working arrangements we concluded that no international agreement is produced but that we are confronted with soft law which is not binding on the parties from the perspective of international law. The past practice in some Member States such as France of creating their own category of administrative agreements of binding nature has been denied for the European Union by literature[137] and Advocate General Tesauro in the case *France v. Commission* until now.[138] According to the evolution in EU and international law, the majority of non-binding arrangements concluded by agencies with third countries and international bodies escape judicial scrutiny for the lack of intent to produce legal effect, while the European Parliament would not be able to monitor them or would a legal review be possible. For the few agreements which can be considered international legally binding, their effect in EU law depends on which institution approves the action. While in case of prior Council approval, this is relatively straightforward and results in no further problem under the condition that the rights of the European Parliament are observed, the approval by the Commission requires a closer in-depth look as exemplified in the example of EASA.

EU agencies with a cross-border dimension have intensified their international relations over the last ten years and have emerged as a new form of global actors which escape classical categorisations of state actors under international law. Such developments are also recognised by the global administrative law debate. Global administration defines practices of public bodies

[135] F. Coman-Kund, *supra* note 7, at 367.

[136] See on this already O. Schachter, 'The twilight existence of nonbinding international agreements', *American Journal of International Law* 1977, 296-304, at 301.

[137] P. Eeckhout, *EU External Relations Law*, 2nd edn. (Oxford: Oxford University Press 2011), 206–207.

[138] Opinion of AG Tesauro in Case C-327/91 *France* v. *Commission*, *supra* note 15.

or international organisations which act internationally outside international law but will produce normative effects in the international sphere.[139] However, this new branch of research is currently primarily busy categorizing the variety of such activities.[140] Hereby global administrative law does not necessarily result in a common approach, but it suggests that experiences in national administrative law need to be taken into account on the global level. This current discussion relates to international administrative law concepts of the nineteenth century in which an idea of transnational governance already appears to which distinctive administrative law principles could apply.[141] And indeed, the vast majority of external actions by EU agencies does not fall under international law but show characteristics of administrative law beyond the national and European system. Hence, the international practice of EU agencies contributes to this new field of research through their inherent complexity. Not only that agencies result from a hybrid legal system of supranational nature which is neither national nor international law but also such agencies participate in networks of international administrative unions and national bodies.[142] These growing activities in global governance will continue to challenge the existing understanding of institutional balance, international legal actors and treaty-making instruments. They consequently require more attention and legal scrutiny with a necessary flexibility in an ever-changing international environment.

[139] B. Kingsbury and L. Casini, 'Global Administrative Law of International Organisations Law', 6 *International Organisations Review* (2009), p. 324.

[140] B. Kingsbury, N. Krisch and R.B. Stewart, 'The Emergence of Global Administrative Law', *New York University Public Law and Legal Theory Working Papers*, 2005, Paper 17, available at <http://lsr.nellco.org/nyu_plltwp/17>, accessed on 5 February 2013; S. Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation', 37 *New York University Journal of International Law and Politics* (2005), p. 663; B. Kingsbury and L. Casini, 'Global Administrative Law Dimensions of International Organisations Law', *New York University Public law and Legal Theory Working Papers*, 2010; E. Chiti and R. Wessel, 'The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?', in R. Collin and R.D. White (eds.), *International Organisations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Oxon: Routledge, 2011), 142–159.

[141] See on this M. Ruffert and C. Walter*, Institutionalisiertes Völkerrecht* (Munich: Beck Publisher, 2009), p. 219 and B. Kingsbury and L. Casini, *supra* note 139, at 327.

[142] See on the definition of International Administrative Unions: 'exercising co-ordinating functions on administrative matters', R.Wolfrum, *Max Planck Encyclopedia of Public International Law*, available at <http://opil.ouplaw.com>, accessed on 2 December 2013.