The External Dimension of EU Agencies and Bodies

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Law and Policy

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Ghent, Luxembourg and Maastricht, 30 January 2019

Herwig CH Hofmann
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1. Introduction: EU agencies going global

Merijn Chamon, Herwig CH Hofmann and Ellen Vos

1. EU AGENCIES RESEARCH: TAKING STOCK

More than 40 years' experience with the EU decentralized agencies has made clear that the agencies are part and parcel of the EU's institutional structure. These agencies can broadly be defined as bodies governed by European public law that are institutionally separate from the EU institutions, have their own legal personality, enjoy a certain degree of administrative and financial autonomy, and have clearly specified tasks. 'Agencification' of EU executive governance has thus become a fundamental feature of the EU's institutional structure. Today there are around 40 EU decentralized agencies, which assist in the implementation of EU law and policy, provide scientific advice for both legislation and implementation, collect information, provide specific services, adopt binding acts and fulfil central roles in the coordination of national authorities. Agencies are part of a process of functional decentralization within the EU executive and operate in various policy fields, such as food and air safety, medicines, environment, telecommunications, disease prevention, border control, trademarks and banking, to name just a few.[1]

Thus far, research on agencification has mainly focused on identifying and understanding agencies' function as contributing to the proper implementation and further development of the EU *acquis*.[2] In a recent review article taking

[1] E Vos, 'European agencies and the composite EU executive' in M Everson, C Monda and E Vos (eds), *European Agencies in Between Institutions and Member States* (Alphen aan den Rijn: Wolters Kluwer, 2014), 11–47.

[2] See, among others, Michael Kaeding and Esther Versluis, 'EU Agencies as a Solution to Pan-European Implementation Problems' in Michelle Everson, Cosimo Monda and Ellen Vos (eds), *European Agencies in Between Institutions and Member States* (Alphen aan den Rijn: Kluwer Law International, 2014) 73, 73–86; Marco

stock of the burgeoning agencification literature, Trondal and Egeberg conclude that:

> agencification of the EU administration may be regarded as a compromise between functional needs for the supply of more regulatory capacity at the European level, on one hand, and Member States' reluctance to transfer executive authority to the European Commission on the other.[3]

In the traditional terms of EU integration studies, agencies are a compromise between supranationalism and intergovernmentalism. On the one hand, Member States realize that in order to give proper effect to commonly agreed EU policies (at the legislative level), some common EU action in the implementation phase (ie, administrative integration) is required. On the other hand, Member States resist the default option prescribed by the EU Treaties to this end, since this would require expanding the supranational Commission.[4]

Focusing on the functional reasons for resorting to agencies shows that because EU agencies have been established to ensure a more proper and uniform implementation of EU law, EU agencies essentially have an inward function. As a result, academic research on agencification has also focused almost exclusively on issues internal to the EU legal order. This by now incredibly rich body of research in areas such as public administration, political science and law has focused on a breadth of topics.

For example, questions have been raised as to how subsidiary bodies such as agencies should be properly conceptualized in both the EU multi-level legal order[5] and the EU administration or the European administrative space.[6]

Scipioni, 'De Novo Bodies and EU Integration: What is the Story behind EU Agencies' Expansion?', [2018] *JCMS* 4 768, 768–784.

[3] Morten Egeberg and Jarle Trondal, 'Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?', [2017] *JCMS* 4 675, 675.

[4] The Treaties (Article 291 of the Treaty on the Functioning of the European Union) also allow the Council to take on an implementing role, but – apart from the fact that this is only so in exceptional cases – the Council lacks the governance structure to fulfil the functional need of a more uniform implementation of EU law.

[5] Morten Egeberg and Jarle Trondal, 'EU-level agencies: new executive centre formation or vehicles for national control?', [2011] *JEPP* 6 868, 868–887; Ellen Vos, 'European agencies and the composite EU executive' in Everson, Monda and Vos (eds), *European Agencies in Between Institutions and Member States* (Alphen aan den Rijn: Kluwer Law International, 2014) 11, 11–47; Eva Heidbreder, 'Strategies in multi-level policy implementation: moving beyond the limited focus on compliance', [2017] *JEPP* 9 1367, 1367–1384; Torbjørg Jevnaker, 'Pushing administrative EU integration: the path towards European network codes for electricity', [2015] *JEPP* 7 927, 927–947.

[6] Herwig Hofmann, Gerard Rowe and Alexander Türk, *Administrative Law and Policy of the European Union* (OUP, 2011), 977; Alie de Boer, Miriam Urlings, Ellen Vos and Aalt Bast, 'Enforcement of the nutrition and health claim regulation', [2015]

Other authors have focused on the question of why agencies are sometimes preferred over looser forms of administrative integration such as networks (or vice versa).[7] The fact that the EU agencies are semi-detached from the main EU institutions raises questions as to the actual degree of their autonomy[8] – an issue which has as its corollary the question of their accountability.[9]

In legal research, the main topic has been the question of how to conceptualize the delegation of powers to the EU agencies and how to fit the agencies into the EU's constitutional framework.[10] This links with political science

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EFFLR 5 334*,* 334–344; Jarle Trondal and Lene Jeppesen, 'Images of Agency Governance in the European Union', [2008] *WEP* 3 417, 417–441; Rik Joosen and Gijs Jan Brandsma, 'Transnational executive bodies: EU policy implementation between the EU and member state level', [2017] *Public Administration* 2 423, 423–436.

[7] Daniel Kelemen and Andrew Tarrant, 'The Political Foundations of the Eurocracy', [2011] *WEP* 5 922, 922–947; Mark Thatcher, 'The creation of European regulatory agencies and its limits: a comparative analysis of European delegation', [2011] *JEPP* 6 790, 790–809; Sarah Wolff and Adriaan Schout, 'Frontex as Agency: More of the Same?', [2013] *Perspectives on European Politics and Society* 3 305, 305–324; David Levi□Faur, 'Regulatory networks and regulatory agencification: towards a single European regulatory space', [2011] *JEPP* 6 810, 810–829; Michael Blauberger and Berthold Rittberger, 'Conceptualizing and theorizing EU regulatory networks', [2015] *Regulation & Governance* 4 367, 367–376.

[8] Martijn Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development* (Delft: Eburon, 2009), 432; Maria Martens, 'Voice or Loyalty? The Evolution of the European Environment Agency (EEA)', [2010] *JCMS* 4 881, 881–901; Arndt Wonka and Berthold Rittberger, 'Credibility, complexity and uncertainty: explaining the institutional independence of 29 EU agencies', [2010] *WEP* 4 730, 730–752; Ellen Vos, 'EU agencies and independence' in Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford: OUP, 2016) 206, 206–227.

[9] Madalina Busuioc, 'European agencies and their boards: promises and pitfalls of accountability beyond design', [2012] *JEPP* 5 719, 719–736; Madalina Busuioc, *European Agencies – Law and Practices of Accountability* (Oxford: OUP, 2013); Michael Buess, 'Accountable and Under Control? Explaining Governments' Selection of Management Board Representatives', [2015] *JCMS* 3 493, 493–508; Nuria Font and Ixchel Pérez Durán, 'The European Parliament oversight of EU agencies through written questions', [2016] *JEPP* 9 1349, 1349–1366; Miroslava Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (Brill, Leiden, 2014); Christopher Lord, 'The European Parliament and the legitimation of agencification', [2011] *JEPP* 6 909, 909–925; Julia Jansson, 'Building resilience, demolishing accountability? The role of Europol in counter-terrorism', [2016] *Policing and Society* 4 432, 432–477; Michael Buess, 'European Union Agencies' Vertical Relationships with the Member States: Domestic Sources of Accountability', [2014] *Journal of European Integration* 5 509, 509–524.

[10] Herwig Hofmann and Alessandro Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"', [2012] *ELRev* 4 419, 419–443; Michelle Everson and Ellen Vos, 'European Agencies: What about the

research on the relation between the EU agencies and the Commission[11] or stakeholders,[12] and the role of specific agencies in the EU's policies.[13] In still other research, the EU agencies are the object of case studies in their own right or are used as case studies to test a number of hypotheses deduced from general theories on regional integration.[14]

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institutional balance?' in Blockmans and Lazowski (eds), *Research Handbook EU Institutional Law* (Cheltenham: Edward Elgar Publishing, 2016) 139, 139–155; Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford: OUP, 2016); Katja Michel, *Institutionelles Gleichgewicht und EU-Agenturen* (Berlin: Duncker & Humblot, 2015); Andreas Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen* (Tübingen: Mohr Siebeck, 2017); Jacopo Alberti, *Le Agenzie dell'Unione europea* (Milan: Giuffrè, 2018); Carlo Tovo, *Le agenzie decentrate dell'Unione europea*, (Naples: Editoriale Scientifica, 2016).

[11] Daniel Fiott, 'The European Commission and the European Defence Agency: A Case of Rivalry?', [2015] *JCMS* 3 542, 542–557; Morten Egeberg, Jarle Trondal and Nina M Vestlund, 'The Quest for Order: Unravelling the Relationship between the European Commission and European Union Agencies', [2015] *JEPP* 5 609, 609–629.

[12] Sarah Arras and Caelesta Braun, 'Stakeholders wanted! Why and how European Union agencies involve non-state stakeholders', [2018] *JEPP* 9 1257*,* 1257–1275; Ixchel Pérez Durán, 'Political and stakeholder's ties in European Union agencies', [2017] *JEPP*.

[13] Martijn Groenleer, Michael Kaeding and Esther Versluis, 'Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation', [2010] *JEPP* 8 1212, 1212–1230; Esther Versluis and Erika Tarr, 'Improving Compliance with European Union Law via Agencies: The Case of the European Railway Agency', [2013] *JCMS* 2 316, 316–333; Gabriel Toggenburg and Jonas Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?', [2016] *JCMS* 5 1093, 1093–1104; Alicia Hinarejos, 'A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis', [2016] *ELJ* 1 61, 61–73.

[14] For learning theory and principal agent theory, see Anthony Zito, 'European agencies as agents of governance and EU learning', [2009] *JEPP* 8 1224, 1224–1243; On principal agent theory, see Daniel Keleman, 'The Politics of "Eurocratic" Structure and the New European Agencies', [2002] *WEP* 4 93, 93–118; Florian Trauner, 'The European Parliament and Agency Control in the Area of Freedom, Security and Justice', [2012] *WEP* 4 784, 784–802. For institutionalization theory, see Jon Pierre and Guy Peters, 'From a club to a bureaucracy: JAA, EASA, and European aviation regulation', [2009] *JEPP* 3 337, 337–355. For structural choice theory, see Jørgen Grønnegaard Christensen and Vibeke Lehmann Nielsen, 'Administrative capacity, structural choice and the creation of EU agencies', [2010] *JEPP* 2 176, 176–204. For rational choice theory, see Björn Fägersten, 'Bureaucratic Resistance to International Intelligence Cooperation – The Case of Europol', [2010] *Intelligence and National Security* 4 500, 500–520. For socialization theory, see Semin Suvarierol, Madalina Busuioc and Martijn Groenleer, 'Working for Europe? Socialization in the European Commission and Agencies of the European Union', [2013] *Public Administration* 4 908, 908–927; Arndt Wonka and Berthold Rittberger, 'Perspectives on EU governance:

2. EU AGENCIES RESEARCH: THE EXTERNAL DIMENSION

Without pretending to have presented an exhaustive or even representative overview of this vibrant research field, it was already noted that the existing research has almost exclusively focused inward. This is unsurprising in view of the fundamental role played by the agencies in various EU policies. However, the agencies are becoming increasingly active at the international level, as it has become very clear that in order for them to fulfil their mandate, they need to interact with third countries, international organizations and other non-EU bodies. Indeed, most agencies' establishing acts refer in one way or another to the agency's external action, although the relevant provisions governing this action are remarkably succinct even for those agencies that have developed elaborate external relations.

Hence, for a few years, there has been growing interest among scholars in the external dimension of agencification. Consequently, pioneering research has been carried out by various scholars to gain an understanding of what it is precisely that agencies do at the global level, in both functional and legal terms.[15] The current practice of the agencies on the international stage, as revealed by this research, involves a variety of actions that are closely linked with their mandate and powers in their respective founding regulations. For example, the agencies collaborate in training matters, organize common events to share know-how and capacity-building activities, while also developing common procedures, exchanging information and personal data and carrying out joint operations.[16] The agencies are further active in setting standards and ensuring mutual recognition and incorporation of international best practices and standards of scientific knowledge. In order to do so, the agencies enter into

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an empirical assessment of the political attitudes of EU agency professionals', [2011] *JEPP* 6 888, 888–908.

[15] For pioneering work, see, among others, Martijn Groenleer and Simone Gabbi, 'Regulatory Agencies of the European Union as International Actors', [2013] *EJRR* 4 479, 479–492; Andrea Ott, Ellen Vos and Florin Coman Kund, 'European agencies on the global scene: EU and international law perspectives' in Everson, Monda and Vos (eds), *European Agencies in Between Institutions and Member States* (Alphen aan den Rijn: Kluwer Law International, 2014) 87, 87–122; Sandra Lavanex, 'The external face of differentiated integration: third country participation in EU sectoral bodies', [2015] *JEPP* 6 836, 836–853; Florin Coman Kund, *European Union Agencies as Global Actors* (Basingstoke: Taylor & Francis, 2017).

[16] Andrea Ott, Ellen Vos and Florin Coman Kund, 'European agencies on the global scene: EU and international law perspectives' in Everson, Monda and Vos (eds), *European Agencies in Between Institutions and Member States* (Alphen aan den Rijn: Kluwer Law International, 2014) 87, 87–88.

more or less binding arrangements of a sometimes not entirely well-established legal nature.

In view of this diversity of activities, this book contributes in an inter-disciplinary way to fostering and showcasing research on the external dimension of the EU agencies, as well as developing questions for further research. The different chapters present a cross-section view of the different research strands currently developing in political and legal science on the external relations of the EU agencies, at the same time giving a taste of the breadth of issues where knowledge remains thin or non-existent and suggesting that these gaps be filled in order to contribute to a future research agenda.

3. BOOK CHAPTERS

In Chapter 2, Chamon and Demedts sketch out the constitutional framework that governs, or ought to govern, the external action of the EU agencies. To this end, they first analyse the positive law, including Treaty provisions, norms resulting from the agencies' establishing acts, the Common Approach on Decentralised Agencies and the working arrangements concluded between agencies and their parent Directorates General. They then deduce limits from the principles of conferral and institutional balance, as well as the *Meroni* doctrine and more recent jurisprudence of the Court. Bringing together these elements, Chamon and Demedts identify preliminary findings that raise new questions for future research – one of the main questions today being whether the specific administrative agreements concluded by individual agencies with third country counterparts (or international organizations) conform to the identified composite legal framework.

Chapter 3 by Coman-Kund takes up part of this research agenda by scrutinizing the revised Frontex Regulation (recast following and in light of the migration crisis) and the working arrangements concluded by Frontex against some of the constitutional limits identified by Chamon and Demedts. Frontex is indeed one of the (few) EU agencies for which external action is part of its core mandate, as reaching out to the EU's neighbours is necessary to properly secure the Schengen zone's external borders. Coman-Kund shows how the new 2016 Frontex Regulation has not radically altered the international mission of the agency and how its external action is generally compliant with the constitutional limits. At the same time, Coman-Kund identifies some salient issues – notably the possibility for Frontex to conduct operational activities on third countries' territories, which merits further scholarly attention.

In a second chapter on the Area of Freedom, Security and Justice (AFSJ), Brière addresses in Chapter 4 the cooperation of Europol and Eurojust with external partners in the fight against crime and discusses the recently revised legal frameworks organizing the modalities of Europol's and Eurojust's

external cooperation. She finds that the revision was necessary to modernize the agencies' frameworks following the entry into force of the Lisbon Treaty and to come to a greater degree of harmonization. The chapter identifies two challenges of the agencies' external activities: the diversity in their relations with external partners, and the need to ensure an appropriate balance between efficient cooperation and protection of fundamental rights. Brière thereby identifies two further parts of the future research agenda in this field: first, whether the new legal framework allows the EU agencies to produce sufficient policy output; and second, whether the new legal framework and the possibilities for data transfer in the absence of an adequacy decision strike the right balance (in practice) between the right to privacy on the one hand and security cooperation on the other.

In Chapter 5 by Ekelund, Manner's 'Normative Power Europe' is applied to Frontex through a critical analysis of the agency's founding regulation and working arrangements. As Ekelund notes, her findings are preliminary. However, on the basis of her ongoing research, she concludes encouragingly that fundamental rights take a central role in Frontex's relevant legislative framework, and that there is a high level of consistency within the provisions relating to fundamental rights. However, the author notes herself that her research is necessary as to how the agency implements its mandate on the ground in conformity with its own 'discourse' and how it manages possible conflicting expectations. Evidently, it would be useful to make a similar horizontal assessment for the other agencies working in the AFSJ.

Chapter 6 by Chatzopoulou relies on organization theory to study EU policy promotion beyond the EU's borders by the EU agencies and suggests that they acquire organization structural characteristics that enhance the agencies' role in the international arena with respect to the diffusion of policy ideas, principles, practices and policy models. The EU agencies develop their own capacity, interests and strategies; organize international arrangements; and become actors with the intention to diffuse policy ideas and standards beyond the EU. Chatzopolou's findings raise the questions of whether the structural characteristics have general predictive value and whether a relationship can also be established between the actual impact of the agencies' external activities and the structural characteristics identified by Chatzopoulou.

In Chapter 7 De Bellis analyses in essence a case study in the – for the EU agencies – traditional area of tension between formal legitimacy and output legitimacy: in the area of financial standards, a number of key international bodies are active. These bodies adopt soft law which is later incorporated into domestic law. To ensure that the EU can effectively contribute to shaping international norms, it should be represented in these forums by the most appropriate actors, which typically would be the EU agencies. However, in addition to the problematic formal legitimacy of the reception of international

soft law standards, the EU is also confronted here with the problematic formal legitimacy of the EU agencies involved. While De Bellis rightly stresses the need to ensure accountability and transparency of these processes in the short term, the questions implicitly raised by De Bellis highlight the need to address this area of tension in a more sustainable and long-term manner.

In Chapter 8 Van Cleynenbreugel notes a trend whereby the agencies are increasingly called upon to assess in one way or another the equivalence of third country legal regimes. Van Cleynenbreugel offers an overview of the equivalence procedures in place before reflecting on the accountability challenges specific to those procedures. One of the challenges identified is that of a particular gap in the accountability features. The chapter ends by elaborating a future research agenda to overcome the identified gap, centred on three main questions.

Inglese focuses in Chapter 9 on the role which the European Ombudsman can play in securing good administration in the EU agencies' external relations. His finding of a positive influence of decisions of the Ombudsman – so-called 'ombudsprudence' – on the EU agencies' external actions generally contributes to our understanding of the relationship between the European Ombudsman and the EU agencies, and how the EU agencies perceive this relationship themselves. This picture, which focuses on accountability at the EU level, should be complemented by future research in order to sufficiently take into account the multi-level nature of EU administration. Indeed, given the composite nature of many EU administrative procedures, a holistic view of good administration should add the cooperation between the European Ombudsman and the Network of European Ombudsmen into the equation.

In Chapter 10 Rimkutė and Shyrokykh address the question of how the EU agencies can fulfil a role in exporting the EU *acquis* to third countries. They focus on the European Neighbourhood Policy and build a theoretical argument explaining the varying degrees of third country cooperation by the EU agencies. They contrast a foreign policy dynamic with a functional interdependence dynamic. Further empirical research is needed to test these findings. The authors themselves also note that further research should seek to review whether third country norms are actually subject to change due to the influence exercised in the context of cooperation mechanisms, and whether the results of such cooperation end up aligned with EU norms. A further follow-up question is then whether such norms are also properly implemented and enforced in third countries.

Chapter 11 by Öberg changes the perspective and looks at the EU agencies from the perspective of third countries: what is their interest in participating as third countries in an EU body and under which constellations is this possible? Can third countries, through their participation, actually influence (or 'shape') the EU *acquis* which they either unilaterally or contractually (through

an international agreement with the EU) agree to adopt themselves? Öberg explores this issue and puts forward the hypothesis that the possibility to shape is a function of both the agency's capacity to influence the *acquis* and the third country's possibility to contribute to the work of the agency. This finding calls for empirical case studies aimed at falsifying and refining this hypothesis.

4. SETTING A RESEARCH AGENDA

The chapters in this book outline a fascinating research agenda in a nascent field of research dealing with the external relations of the EU agencies. The chapters clearly confirm the need for further research on many aspects of the agencies' role in the international arena and on their mandates, organizational structures and behaviour, as well as what might be called their 'actorness'. It is also true that there is still a lack of raw information on how the EU agencies operate in the relevant policy areas at the international level. Chapters thus stress the need for more in-depth and empirical research on the activities of agencies such as Frontex, Europol and Eurojust, as well as the cooperation between the EU agencies and European Neighbourhood Policy countries.

Moreover, the findings put forward in the chapters raise a set of general legal questions which remain largely unresolved. These include, *inter alia*, the exact understanding of constitutional limits of agency powers in the international sphere, the specific nature of administrative arrangements that agencies conclude and the criteria for assessing the legality of agencies' activities (eg, operational activities conducted by Frontex in third countries' territories). Other areas that require further in-depth research include the tension between fundamental rights, data protection and security cooperation in the fight against terrorism and organized crime.

More generally, the chapters in this book point to the need to deepen research into questions of legitimacy and accountability of the external actions of EU agencies. One example is the question of the formal legitimacy of the reception of international soft law standards into EU law. Here the EU agencies may effectively contribute to shaping international norms; however, how this may be done and how this impacts on the legitimacy of agency action at the EU level is still unclear. Another example is the cooperation that the agencies will undertake in the context of today's generation of free trade agreements, which include requirements of regulatory cooperation and mutual recognition of standards. Accountability of agency action is a matter to be studied not only in relation to inward activities, but also in relation to external actions, as various chapters in this book show. It is therefore unsurprising that the right to good administration is mentioned throughout this book as relevant also for the external actions of agencies. At the same time, it is apparent that the various procedures to establish the equivalence of third country legal rules or regimes

with EU regulatory standards also need further reflection on the accountability challenges specific to those procedures.

The ongoing scholarly debate on the EU agencies to which this book contributes is thus only one step towards illuminating this fascinating field of EU external action and EU administrative law scholarship. We hope it will inspire and encourage scholars to do further research in relation to the external dimension of the EU agencies activities, as set forth in this research agenda.

PART I

EU agencies' external action: the legal framework

2. Constitutional limits to the EU agencies' external relations

Merijn Chamon and Valerie Demedts[1]

1. INTRODUCTION

In order to effectively fulfil their mission, the EU agencies need to develop and maintain contacts with their international counterparts – be they international organizations or third country authorities. Indeed, most of the agencies' establishing acts instruct the relevant agency to cooperate internationally and recent scholarship has charted the actual external actions in which the EU agencies engage.[2] However, the extent to which the EU agencies can act in the international sphere should be circumscribed by the general constitutional limits that apply to any exercise of power in the EU. The purpose of this chapter is to identify these constitutional limits, focusing on the principles of conferral, proportionality, institutional balance and the *Meroni* doctrine.

The chapter first tries to identify the positive law framework as it is now in place. It then identifies the most important constitutional limits and subsequently scrutinizes the former in light of the latter. To do so, the chapter looks at recently adopted legislative acts establishing the EU agencies, recent jurisprudence of the Court of Justice on the EU's general external relations regime, and the external relations' working arrangements concluded between most EU agencies and their parent Directorates General (DGs) as required under the 2012 Common Approach on Decentralised Agencies.[3]

[1] We would like to thank Prof Dr A Ott for her valuable comments on an earlier version of this chapter. Any errors or omissions remain those of the authors.

[2] Florin Coman-Kund, *European Union Agencies as Global Actors – A Legal Study of the European Aviation Safety Agency, Frontex, and Europol* (Universitaire Pers Maastricht, 2015).

[3] Council of the European Union, Evaluation of European Union Agencies – Endorsement of the Joint Statement and Common Approach, 18 June 2012, Doc 11450/12. The text of the Common Approach is mentioned in Annex II to the Note.

2. A PATCHWORK FRAMEWORK

While this chapter focuses on the domestic (EU) framework for the agencies' external relations, it is useful to point out that international law is in se indifferent to the possibilities of agencies conducting external relations. Apart from the possibility that an EU agency might acquire its own international legal personality, Article 7 of the 1969 Vienna Convention on the Law of Treaties (VCLT) provides that agencies can also bind their states despite lacking full powers if '[i]t appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers'.[4] Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts complements this provision by prescribing that the state remains responsible for the international conduct of its agencies,[5] thus ensuring there are no gaps in accountability. International law therefore essentially refers the issue back to the domestic legal order. Indeed, in several (national) jurisdictions a distinction is made between important agreements requiring legislative approval and less important executive or administrative agreements which may be ratified by the executive.[6]

However, since EU agencies are not provided for under the EU Treaties, there are no specific primary law provisions on their external relations and neither is there any specific jurisprudence of the Court of Justice on the EU agencies' external actions (for case law on the Commission's autonomous external action, see below). The starting point to identify the positive law framework governing the EU agencies' external relations is therefore the agencies' establishing acts.

2.1 The Agencies' Establishing Acts

While every establishing act grants its agency its own legal personality, it is unclear whether this also extends to an international legal personality, which is a prerequisite to enter into binding obligations on the international plane. From the agencies' practice, such a legal personality cannot be readily inferred either, as there is only one type of proper international agreement

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[4] Similarly, see Article 7 of the 1986 VCLT.

[5] The Articles in the Articles on the Responsibility of International Organizations (ARIO) are markedly different, but ensure the same result: international organizations are responsible for acts of their organs or agents, even if they act *ultra vires*. See Articles 6 and 8 ARIO.

[6] Fred Morrison, 'Executive Agreements', in *Max Planck Encylopaedia of Public International Law*, http://opil.ouplaw.com, last accessed 13 June 2018.

which agencies conclude: the headquarters agreements between the agencies and their host Member States. While this could be an element proving some international legal personality for the agencies,[7] the draft Brexit Withdrawal Agreement has undermined this thesis.[8] Article 114 of the draft agreement provides that the EU (and not the EU agencies) will notify the UK of the termination of the headquarters agreements concluded by the European Banking Authority and the European Medicines Agency.

Looking further at the agencies' establishing acts reveals that most of them foresee some role in international cooperation for the agencies; and of the acts that do so, a good majority also spell out which formal instrument (working arrangement, administrative arrangement) the agency can use to engage in international relations.[9] In some establishing acts an (embryonic) framework for conducting these international relations is also spelled out. To keep a sufficient focus, this chapter looks at five different agencies: the European Union Aviation Safety Agency (EASA), Frontex, the European Supervisory Authorities (ESAs), the Academy of European Law (ERA) and the European Union Agency for Law Enforcement Training (CEPOL). A scrutiny of their establishing acts reveals that the EU legislature is increasingly attentive to the issue of the agencies' external relations.

For instance, the regulations establishing the ESAs[10] first show a concern that the administrative arrangements concluded by the agencies will not 'prejudice the competences of the Member States and the institutions' and will not 'create legal obligations in respect of the Union and its Member States'.[11] Remarkably, they also contain a provision pre-empting those arrangements from producing an *ERTA* effect since the agencies' arrangements shall not 'prevent Member States and their competent authorities from concluding bilateral or multilateral arrangements with. . . third countries'.

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[7] Arguing for, Gregor Schusterschitz, 'European Agencies as Subjects of International Law', [2004] *International Organizations Law Review* 1 163, 175; against, see Andrea Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law', [2008] *EFAR* 4 515, 526.

[8] See the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as published on 19 March 2018 on https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf, last accessed 13 June 2018.

[9] See Coman-Kund, supra note 2, 439−441.

[10] These are the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority.

[11] See Articles 33 of Regulation 1093/2010, [2010] OJ L331/12; Regulation 1095/2010, [2010] OJ L331/48; Regulation 1095/2010, [2010] OJ L331/84.

By contrast, the 2008 regulation establishing the EASA did not emphasize the Member States' or EU institutions' competences. Instead, it provided that the EASA shall assist the Community and the Member States and that, rather enigmatically, it may conclude working arrangements 'in accordance with the relevant provisions of the Treaty'.[12] The old regulation further provided that EASA working arrangements should receive prior Commission approval.[13] The new EASA regulation provides that the EASA will assist the Commission, rather than the EU or the Community, and has dropped the above-noted enigmatic provision. Significantly, it has added that the EASA's working arrangements 'shall not create legal obligations incumbent on the Union and its Member States', and has changed the requirement for prior Commission approval into a mere opinion requirement.[14]

Whereas the old ERA Regulation did not contain an enabling clause, the new Regulation contains a rather elaborate one.[15] It provides that the ERA can enter into agreements or arrangements '[i]n so far as is necessary in order to achieve the objectives set out in [the ERA] Regulation' and without prejudice to the competences of the Member States, the institutions or the European External Action Service.[16] The ERA Regulation also explicitly specifies the purpose of such working arrangements: 'to keep up with scientific and technical developments and to ensure promotion of the Union railways legislation and standards.'[17] As regards procedure, the ERA Regulation merely requires prior discussion with and periodic reporting to the Commission. The Regulation further provides that the ERA Management Board must adopt a strategy for the ERA's relations with third countries and international organizations 'concerning matters for which the Agency is competent'.[18] This provision may be construed as also requiring the agencies' working arrangements to be confined to 'matters for which the ERA is competent'. Like the ESAs Regulations, it contains a clause pre-empting any *ERTA* effect.

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[12] Article 27(2) of Regulation 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, [2008] OJ L79/1.

[13] Old EASA Regulation, Article 27(2).

[14] See Article 90 of Regulation 2018/1139 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, [2008] OJ L 212/1.

[15] See Article 44 of Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, [2016] OJ L138/1 ('New ERA Regulation').

[16] New ERA Regulation, Article 44(1).

[17] Ibid.

[18] Ibid, Article 44(3).

The old Frontex[19] Regulation made a distinction between arrangements concluded with international organizations and arrangements concluded with third states. In relation to both, the Regulation contained the same enigmatic provision as the EASA Regulation.[20] For arrangements concluded with third states, it further provided that they 'be purely related to the management of operational cooperation'.[21] Procedurally, the Regulation prescribed that the Commission ought to give its prior opinion and that the Parliament be fully informed as soon as possible (for arrangements concluded with international organizations, Frontex 'shall inform the European Parliament').[22] The new Frontex Regulation adds a number of changes:

- The Commission's prior approval is required before Frontex concludes arrangements with international organizations or third countries.
- The enigmatic provisions on 'arrangements concluded in accordance with the relevant provisions of the Treaty' have been dropped.
- Cooperation with third countries will be pursued in coordination with the Union delegations.
- The working arrangements must be 'in accordance with Union law and policy' and 'shall specify the scope, nature and purpose of the cooperation and be related to the management of operational cooperation'.
- Frontex must inform the Parliament before a working arrangement with a third country is concluded.

Finally, the recent CEPOL Regulation may also be illustrative of a changing practice.[23] Whereas the old CEPOL decision required prior Council approval before cooperation agreements with third country bodies could be concluded,[24]

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[19] European Agency for the Management of Operational Cooperation at the External Borders.

[20] See Article 13 of Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2011] OJ L304/1.

[21] Old Frontex Regulation, Article 14(2).

[22] Ibid, Article 13.

[23] Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL) and replacing and repealing Council Decision 2005/681/JHA, [2015] OJ L319/1.

[24] See Article 8(3) of Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA, [2005] OJ L256/63.

the new Regulation provides that the agreements must be authorized by the Management Board following prior consultation with the Commission.[25]

Already from this small selection of legislative acts, it is clear that the rules on the EU agencies' 'treaty-making power' are very heterogeneous, and that in legislative practice, the institutions are elaborating increasingly detailed provisions on the scope of the agencies' external actions. This increased attention for the agencies' external actions was also reflected in the 2012 Common Approach on EU Decentralised Agencies, which has raised the bar in terms of requirements imposed on EU agencies when engaging in international relations.

Provision / **Legislative act**	Arrangements concluded in accordance with the relevant provisions of the Treaty	Without prejudice to MS', institutions', (EEAS') competences	Shall not bind the EU or MS	Shall not prevent MS from concluding agreements (cf. *ERTA*)	Shall act within agency mandate	In so far as necessary to fulfil mandate	Identification of purpose of the agreements	Prior Council approval	Prior Commission approval	Prior Commission opinion	Parliament information
Old EASA	✓								✓		
New EASA			✓							✓	
Old Frontex	✓						✓			✓	✓
New Frontex					✓	✓	✓ (stricter)		✓		✓ (for 3d countries *prior* to conclusion)
ESAs		✓	✓	✓							
Old ERA											
New ERA		✓	✓	✓	✓	✓	✓			✓	
Old CEPOL								✓			
New CEPOL			✓							✓	

Figure 2.1 External mandate and procedure for a selection of establishing acts

2.2 The Common Approach

As regards the agencies' external relations, the Common Approach contains several novel guiding principles. It provides that agencies cooperating at the international level should establish a strategy for their external relations in their work programme. An agency's external relations strategy and activities must therefore be approved by its Management Board. Moreover, working arrangements with the relevant Commission DGs should ensure that agencies stay within their mandate. Most importantly, agencies should not be seen as representing the EU or committing the EU internationally. Finally, the consistency of the EU's external policy should be ensured by an early exchange of information between the agency, the Commission and the Union delegations.[26]

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25 New CEPOL Regulation, Article 9(1)(r).

26 See the Common Approach, supra note 3, point 25.

2.3 External Relations Working Arrangements Between Agencies and Parent DGs

The working arrangements between the parent DGs and the agencies are not public,[27] but do present a telling picture of the actual autonomy of the EU agencies in their external relations. However, not all EU agencies have concluded a working arrangement with their parent DG, despite the Common Approach requiring this since 2012. This is most remarkable for agencies such as the EASA that have a significant external dimension.[28] For other agencies (eg, Eurojust), the working arrangement is not a dedicated one, but forms part of a more general arrangement between the agency and its parent DG. Where dedicated working arrangements exist, they also at times differ in their level of detail and even in their content. An extensive discussion of the content of the working arrangements falls outside the scope of the present chapter, but it is worthwhile highlighting the following typical provisions that figure in almost every working arrangement:

- Agencies have no international legal personality.
- Agencies have no implied powers to commit the EU.
- Agencies' external activities should be in line with their mandate and the EU institutional framework.
- Agencies' external relations should be in line with the EU's priorities and with EU legislation and policies.
- Agencies can never officially represent the EU to the outside world.
- Agency officials may participate in EU delegations, but only if the head of the delegation (Commission or High Representative (HR)) finds this useful.
- Agencies must consult the Commission before engaging in any external action.

Having briefly sketched the existing positive law framework, that framework may be assessed in light of the constitutional limits to EU agency external action. These are essentially twofold: the general principles of EU law, which apply to any EU action, and the specific principles governing the agencies' functioning. In what follows, we will mainly focus on the principles of conferred powers and institutional balance, as far as general principles go, and the *Meroni* doctrine − that is, the constitutional limit specific to the EU agencies.

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[27] On file with the first author.

[28] Situation as of 22 February 2018 according to information provided by parent DG MOVE.

3. REQUIREMENTS FLOWING FROM THE PRINCIPLE OF CONFERRED POWERS

The principle of conferred powers requires that any act adopted by the EU (institutions, bodies, offices and agencies) finds a legal basis (explicit or implied) in the Treaties. As noted, an explicit Treaty legal basis allowing the EU decentralized agencies to conclude agreements or arrangements is lacking. Because they are not institutions, the agencies also do not come under Article 335 of the Treaty on the Functioning of the European Union (TFEU), which would otherwise allow them to represent the EU by virtue of their administrative autonomy. Insofar as Article 220(2) TFEU refers only to the Commission and the HR, the EU agencies would also be barred from relying on Article 220(1) TFEU to maintain 'relationships as are appropriate with other international organisations'.

As a rule, then, the power of EU agencies to enter into arrangements or agreements with international counterparts should be explicitly foreseen in the agencies' establishing acts (or other EU legislative acts).[29] Although not explicitly foreseen by the Treaty legal basis, it may be assumed that this power comes within the EU legislature's broad discretion. Indeed, as regards Article 114 TFEU, the legal basis most relied upon by the EU legislature in recent agencification, the Court of Justice has a longstanding jurisprudence finding that 'Article 114 TFEU confers on the EU legislature a discretion as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features'.[30] More generally, then, if the EU legislature believes that granting an agency the power to conclude arrangements or agreements is necessary for the agency to fulfil its mandate, and if the latter is covered by the Treaty legal basis relied upon, then so will be the agency's power to enter into international relations.

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[29] The exception here would be when another, explicitly granted, power requires the agency to conclude an arrangement with a third country or an international organization. The European Chemicals Agency (ECHA) Regulation, for instance, does not explicitly foresee that the ECHA can conclude international agreements or (working) arrangements. However, its Article 77(2)(l) does allow it to provide technical or scientific support to improve the cooperation between the EU, its Member States and third countries/international organizations. If a working arrangement between the ECHA and the latter is necessary for the ECHA to provide this support, this should evidently be permissible. Similarly, see Articles 106, 107 and 120 of the ECHA Regulation.

[30] See Judgment of 4 May 2016, *Poland v Parliament and Council*, Case C-358/14, ECLI:EU:C:2016:323, para 68.

4. *MERONI* APPLIED TO EU DECENTRALIZED AGENCIES' EXTERNAL RELATIONS

In the 2014 *Short-selling* case,[31] the Court of Justice confirmed that the exercise of public power by the EU decentralized agencies is governed by the reinterpreted *Meroni* doctrine. Since the Court made this clarification in general terms, it may be assumed that *Meroni* applies whenever an agency acts in a binding manner (see below), regardless of whether it does so internally or on the international plane.

The Court has not been explicit about the ratio of the *Meroni* doctrine; nor has consensus been reached on this ratio or the constitutional values it is intended to protect in legal doctrine. For the purposes of this chapter, it is assumed that *Meroni* aims to ensure that the Treaty-ordained institutions exercise effective control over the EU's functioning. While the *Meroni* doctrine is often confused with the principle of institutional balance,[32] it cannot be assumed thereunder, as the latter is mainly concerned with safeguarding the prerogatives of the institutions. The difference may, for instance, be illustrated with reference to Article 218(5) TFEU, which provides that the Council should authorize the signature of agreements negotiated on behalf of the EU. Such a power to sign is clearly 'precisely delineated' and the Council would exercise full control if it were to designate an EU agency to sign an agreement on behalf of the EU. However, that would arguably violate the Commission's (or the HR's) prerogatives to represent the EU and thus violate the institutional balance. Conversely, and outside the realm of external relations, the Court has recently found that the Council does not exercise an implementing power under Article 291 TFEU when it fines Member States.[33] Since this power cannot be qualified as an implementing power in the sense of Article 291 TFEU, the prerogatives of the Commission and Council under Article 291(2) TFEU cannot be affected when such a power would be granted to an agency. Assuming that there are no other institutional prerogatives at play, the legislature could confer the power to fine Member States on an agency without violating the institutional balance. However, unless such a power is also strictly circumscribed,[34] it could still violate the *Meroni* doctrine.

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[31] Judgment of 22 January 2014, *UK v Parliament and Council*, Case C-270/12, ECLI:EU:C:2014:18.

[32] See Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016) 229–230.

[33] Case C-521/15, *Spain v Council*, ECLI:EU:C:2017:982.

[34] See, for instance, the very detailed instructions which the ESMA must follow up upon when fining credit rating agencies, listed in Annexes III and IV of Regulation 1060/2009.

The *Meroni* doctrine as presently defined subsequently raises the question as to when an agency is sufficiently 'controlled'. Originally, the Court required, *inter alia*, that only 'clearly defined executive' powers have been granted.[35] Following *Short-selling*, it is now sufficient if 'precisely delineated' powers have been granted to the agency.[36] Although caution is in order when general conclusions are drawn from *Short-selling*, a power may be said to be 'precisely delineated' under that jurisprudence when (1) the conferral of powers is exceptional − for example, entrusting a task to an agency may be justified in light of the technical nature of the task; (2) the agency's powers are embedded in decision-making procedures involving other actors − that is, the agency should not be able to make decisions autonomously; and (3) the agency acts pursuant to pre-defined criteria.[37]

5. ADMINISTRATIVE AGREEMENTS AND THE INSTITUTIONAL BALANCE

Before embarking on an analysis of the case law clarifying the principle of institutional balance in EU external actions, the particular issue of 'administrative agreements' (see above) must be briefly revisited.

Despite widespread use, so-called 'administrative agreements' are surrounded by legal ambiguity.[38] The EU Treaties explicitly foresee only a limited set of international cooperation instruments. In the Union's daily external practice, however, the institutions also make use of instruments that do not have a formal Treaty base and for which, subsequently, no separate procedural rules are laid down.[39]

For the EU, this issue acquires constitutional importance in light of the principle of conferred powers.[40] Still, in order not to paralyze the EU's external action, the Court has not inferred from this principle that only those instru-

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[35] See Judgment of 13 June 1958, *Meroni v High Authority*, 9/56, ECLI:EU:C:1958:7, p152. In the French version of the judgment, the Court referred to *'des pouvoirs d'exécution exactement définis'*. See p44.

[36] Adamski is one of the few who notes the repercussion of the Court's change in emphasis from 'clearly defined executive' to 'precisely delineated' powers; see Dariusz Adamski, 'The ESMA Doctrine: A Constitutional Revolution and the Economics of Delegation' [2014] 39 *ELRev* 6 812, 827.

[37] See Chamon, supra note 30, 247. Coman-Kund draws a different set of criteria from *Short-selling*. They are not taken over because they integrate institutional balance concerns in the *Meroni* doctrine and because they still refer to the merely executive nature of agencies' powers; see Coman-Kund, supra note 2, 89.

[38] Coman-Kund, supra note 2, 147.

[39] Coman-Kund, supra note 2, 102.

[40] See Article 5 (2) TEU.

ments explicitly provided for may be relied upon by the EU. As such, the Court has accepted that the EU may also adopt unilateral binding declarations,[41] may intervene before an international jurisdiction,[42] may issue declarations of acceptance of a third country's accession to international conventions[43] and so on. Still, the lack of an explicit Treaty basis for these instruments results in ambiguity concerning their legal nature and effects.[44] This is problematic given that the EU institutions, and the Commission in particular,[45] require recourse to these instruments in order to pursue an effective EU external relations policy.[46]

Turning to administrative agreements, it should be noted that Article 218 TFEU refers to international agreements in a general sense.[47] This means that the formal denomination of an instrument is not relevant and that, for instance, a binding (administrative) agreement taking the form of a memorandum of understanding (MoU) should still be concluded in accordance with Article 218 TFEU. However, can and should the same procedure also be applied to the conclusion of a non-binding administrative arrangement? Is there any scope for the European Commission (or for the EU agencies) to conclude such instru-

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[41] See Judgment of 26 November 2014, *Parliament and Commission v Council*, Joined Cases C-103/12 and C-165/12, ECLI:EU:C:2014:2400.

[42] See Judgment of 6 October 2015, *Council v Commission*, Case C-73/14, ECLI:EU:C:2015:663. On the competence to instigate proceedings before a court of a third country, see Judgment of 15 January 2003, *Philip Morris International e.a. v Commission*, Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, ECLI:EU:T:2003:6.

[43] See Opinion 1/13 of the Court of 14 October 2014 given pursuant to Article 218(11) TFEU on the Convention on the civil aspects of international child abduction, ECLI:EU:C:2014:2303.

[44] Coman-Kund, supra note 2, 103. This is not to say that the lack of a Treaty legal basis necessarily results in the illegality of these instruments.

[45] Some examples of external action instruments regularly used by the Commission that are not explicitly foreseen in the Treaties are opinions, recommendations, declarations, reports, MoUs, working arrangements and so on. Examples of agreements concluded outside of the framework in Article 218 TFEU by the Commission have varying terminology − for instance, financial administrative framework agreement, framework agreement, administration agreement, contribution agreement, monetary agreement and so on. Coman-Kund, supra note 2, 109, 121.

[46] Ibid, 105, 121.

[47] Opinion 1/75 of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty, ECLI:EU:C:1975:145:

> The formal designation of the Agreement envisaged under international law is not of decisive importance in connexion with the admissibility of the Request. In its reference to an 'agreement', the second subparagraph of Article 28(1) of the Treaty uses the expression in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.

ments on behalf of the Union? Alternatively, can the European Commission or another EU entity conclude international agreements binding only on itself? Which legal basis in the Treaties would confer such a power? These questions have been partially addressed by the Court of Justice in the *France v Commission* cases and in the recent *Council v Commission* case.

5.1 *France v Commission*: Keeping the Commission on a Leash

In *France v Commission I* the Court was asked to determine whether the Commission had the competence to conclude administrative agreements on behalf of the EU.[48] The Commission thought it had since the agreement (1) created only limited obligations which could be discharged by the Commission alone; (2) did not have an impact on the EU budget; and (3) did not result in the liability of the Union in case of non-performance.[49] Both Advocate General (AG) Tesauro and the Court of Justice rejected the reasoning of the Commission, finding that no (administrative) agreements binding on the EU could be concluded by EU entities unless the procedure of Article 218 TFEU is used. However, the Court's ruling did not make the need for greater inter-agency cooperation and coordination disappear. As Coman-Kund finds: '[i]n spite of the ban. . . , the Commission practice of concluding international cooperation instruments of a technical-administrative nature. . . has continued.'[50] Since the necessary inter-agency cooperation and coordination could not be formalized (on the EU part) through binding administrative agreements, the question arose as to whether the EU Treaties left any scope for binding or non-binding administrative arrangements concluded by the Commission or other EU entities on their own behalf.

France v Commission II can indeed be read as permitting the latter practice.[51] Ten years after *France v Commission I*, France contested another autonomous Commission action. This time, the Commission had concluded Guidelines on its own behalf with its US counterpart. France argued that the Guidelines were binding and that the Commission had therefore again acted *ultra vires*. The Court found the Guidelines to be non-binding, but immediately added that the Commission must then still respect the 'division of powers and the institutional balance established by the Treaty'.[52] The Court *in casu* accepted the

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[48] Judgment of 9 August 1994, *France v Commission,* C-327/91, ECLI:EU:C:1994:305 (*France v Commission I*).

[49] *Ibid*, paragraph 21.

[50] Coman-Kund, supra note 2, 159.

[51] Judgment of 23 March 2004, *France v Commission*, C-233/02, ECLI:EU:C:2004:173 (*France v Commission II*).

[52] Ibid, paragraph 40.

Commission exercising this competence because it had acted within the policy framework set by the Council and because the Commission had respected the principle of sincere cooperation by keeping the Article 133 EC (now Article 207 TFEU) committee informed.

Strictly abiding by the interpretation of the Court in the *France v Commission* cases would imply that technical-administrative arrangements concluded outside Article 218 TFEU can be valid only if they are non-binding and respect the institutional balance. As noted above, EU agencies could not, differently from the Commission, rely on Article 335 TFEU to enter into binding administrative arrangement on their own behalf since they are not EU institutions.[53]

5.2 Further Delineation of Permissible Commission Action in *Council v Commission*

The limits of the Commission's power to act externally were further clarified in the *Swiss memorandum* case, which marked the first time that the Council challenged the Commission's practice of entering into non-binding arrangements on behalf of the EU before the Court. The Council *in casu* asked for the annulment of the 2013 Commission decision on the signature of an Addendum to the 2006 Memorandum of Understanding on a Swiss financial contribution to the new Member States.[54] The Council in this manner took action against a perceived increased tendency of the Commission to sign non-binding instruments containing EU policy commitments.[55]

While Switzerland is not a member of the EU, it has access to the internal market based on a series of bilateral agreements.[56] In return for this access

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[53] The Council Legal Service has clarified that if the content of an agreement such as an MoU is limited to administrative issues for practical cooperation between an EU institution and a third country or organization, Article 335 TFEU allows an EU institution to commit itself (but not the EU); see Council of the European Union, Contribution of the legal service on the 'Procedure to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisations', 1 February 2013, Doc 5707/13.

[54] Commission Decision C(2013) 6355 final of 3 October 2013 on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution.

[55] Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, ECLI:EU:C:2015:787, paragraph 79. The Council, however, refers to only two examples: the Joint Statement on Space Technology Cooperation with China and the MoU on the establishment of a Strategic Partnership between the EU and the International Fund for Agricultural Development of 2012. Another might be the Joint Declaration on relations between the European Union and Greenland and Denmark of 2015.

[56] On these agreements, see Marc Maresceau, 'EU-Switzerland: Quo Vadis?', [2011] 39 *Georgia Journal of International and Comparative Law* 3 727, 729−737.

to the internal market, Switzerland agreed to make a financial contribution to reduce economic and social disparities within the enlarged Union. This commitment was formalized in a (non-binding)[57] MoU with the EU in 2006,[58] in which Switzerland undertakes to conclude (binding) bilateral agreements with the 'new' EU Member States, whereby those agreements 'must be in conformity with the guidelines laid down in the Memorandum'.[59] The MoU was signed on the part of the EU, both by the Council Presidency and by the Commission.[60] A first addendum to the MoU, to include Bulgaria and Romania in the financial mechanism, was concluded in 2008 and signed by the same parties as the original MoU.[61] At the end of 2012, the Commission was again authorized by the Council, and the Member States meeting within the Council, to engage in the necessary negotiations on the adaptation of the Swiss financial contribution in light of the imminent EU accession of Croatia. However, unlike the previous addendum, the 2013 addendum was signed by the Commission alone, on behalf of the EU.

According to the Commission, the Council's 2012 conclusions constituted a political decision in the sense of Article 16 of the Treaty on European Union (TEU).[62] This political decision allowed the Commission to negotiate, and since the result of the negotiations was in line with the authorization, the Commission did not request the Council's approval before concluding the addendum.[63] Throughout the procedure, however, the Commission did keep

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[57] See Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, ECLI:EU:C:2015:787, para 32.

[58] For the text of the MoU, see Conclusions of the Council of the European Union and of the Representatives of the Governments of the Member States meeting within the Council on a financial contribution by the Swiss Confederation, 14 February 2006, Doc 6283/06.

[59] See ibid, 9.

[60] Ibid, 3.

[61] See Conclusions of the Council of the European Union and of the Representatives of the Governments of the Member States meeting within the Council on an Addendum to the Memorandum of Understanding between the President of the Council of the European Union and the Swiss Federal Council of 27 February 2006, 5 May 2008, Doc 8681/08.

[62] Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, EU:ECLI:C:2015:787, para 40.

[63] Ibid, para 42. According to the Commission, the Council had 'exhausted' its policy-making function by adopting the 2012 conclusions which the Commission had fully respected in concluding the addendum. See Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, ECLI:EU:C:2015:787, paras 44, 94–95. Since the Commission was of the opinion that the 2012 conclusions were Council conclusions (hybrid acts not being possible), it did not require the consent of the Member States in any case either.

the European Free Trade Association Working Party of the Council informed. The legal basis cited by the Commission's decision was Article 17 TEU,[64] which gives the Commission a general competence to represent the EU internationally and to perform coordinating, executive and management tasks.

The Council challenged the legality of the Commission's decision on the grounds of lack of competence, infringement of the institutional balance and infringement of the principle of mutual sincere cooperation. The Council thereby invoked the 2004 *France v Commission* case.[65] The Council argued that by unilaterally accepting the Addendum on behalf of the Union, without asking its authorization, the Commission had disregarded the division of powers.[66] Specifically on the institutional balance, the Council argued that Article 218 TFEU reflects the distribution of powers under Articles 16 and 17 TEU, conferring on the Council the power to define Union policy in external relations. The formal inapplicability of Article 218 TFEU would therefore not preclude the Council's involvement. According to the Council, signing an international agreement implies the Union's acceptance of a content that cannot be predicted *ex ante* and there thus cannot be something as an 'established position'.[67]

The Court in its judgment is silent on the application of Article 218 TFEU and whether that Article reflects the general distribution of powers among the institutions. It did emphasize that the 2012 conclusions only authorized the Commission to initiate negotiations, but that this in no way allowed the signature of the resulting addendum on behalf of the Union. It then concluded that 'the Commission cannot be regarded as having the right, by virtue of its power of external representation under Article 17(1) TEU, to sign a non-binding agreement resulting from negotiations conducted with a third country'.[68] The Court thus annulled the Commission's decision for infringement of the principle of distribution of powers and the principle of institutional balance.

It follows from *Council v Commission* that the decision to sign even a non-binding agreement may constitute the making of Union policy and therefore falls under Article 16 TFEU, because it requires an assessment of whether the agreement (as it results from the negotiations) still reflects the

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64 Ibid, para 41.

65 *France v Commission II*, paras 38–46.

66 Thomas Ramopoulos and Jan Wouters, 'Charting the Legal Landscape of EU External Relations Post-Lisbon', Leuven Centre for Global Governance Studies, Working Paper No 156 – March 2015, 14–15.

67 Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, ECLI:EU:C:2015:787, paras 89–91.

68 Judgment of 28 July 2016, *Council v Commission*, C-660/13, ECLI:EU:C:2016:616, para 38.

Union's interests.[69] This holds true even when 'the content of a non-binding agreement negotiated by the Commission with a third country corresponds to the negotiating mandate given by the Council'.[70] Nonetheless, the Court's reasoning may still create some confusion. Although the Court makes clear that the Commission does not derive a power to sign non-binding agreements on behalf of the Union from Article 17 TEU itself, it at the same time suggests that the Council could have conferred such a power on the Commission had it wished to do so.[71]

5.3 Administrative Agreements in the Wake of *Council v Commission*

Council v Commission has further filled in the blanks with regard to the existence of administrative agreements in the EU legal order, and completed the picture painted earlier by the *France v Commission* cases.

In principle, EU entities cannot conclude agreements binding on the Union outside the procedure laid down in Article 218 TFEU or exceptionally under Article 220 TFEU.[72] EU institutions can avoid this situation in the event that Article 335 TFEU applies and conclude agreements binding only on themselves. Even when an agreement is non-binding, only the Council can enter into such an agreement on the EU's behalf. The Court in *Council v Commission* does seem to allow the possibility for the Council to grant the Commission a mandate, but this would have to be done explicitly, since the Commission does not derive such a competence from Article 17 TEU itself. This may be linked with a well-established practice whereby the Commission is empowered in secondary law (international agreements or legislative acts) to conclude agreements with third countries on behalf of the EU. Bartelt and Ott note that the legality of this practice depends, *inter alia*, on continued respect for the institutional balance and on the non-political nature of the commitments

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[69] Ibid, paras 40–42.

[70] Ibid, para 43.

[71] The Council Legal Service's observation in para 20 of its opinion on the signature by the Commission, on behalf of the European Union, of a Joint Statement on Space Technology Cooperation between the European Union and the People's Republic of China could also be read in this light. See Council of the European Union, 6 November 2012, Doc 15809/12.

[72] On the possible use of Article 220 TFEU, see Sandra Bartel and Andrea Ott, '*Die Verwaltungszusammenarbeit der Europäischen Kommission mit Drittstaaten und internationalen Organisationen: Kategorisierung und rechtliche Einordnung*', [2016] 51 *Europarecht* Beiheft 1 143, 150–152.

entered into by the Commission[73] – that is, the EU's policy should be defined by the Council (and Parliament) as confirmed in *Council v Commission*.

6. POSSIBILITIES FOR EU AGENCY ACTION

The extent to which the EU agencies can enter into agreements or arrangements with third countries or international organizations is determined by a combined application of the constitutional limits discussed above. As a result, the limits to the Commission's external powers should at the same time be the outer limits to the agencies' external powers. The latter should furthermore also comply with the *Meroni* doctrine as reinterpreted by the Court in *Short-selling*, meaning that the agencies can only exercise precisely delineated external powers.

Thus, the EU agencies would be precluded from entering into both binding and non-binding agreements on behalf of the Union. It might be argued that the EU agencies could still be empowered to do so under secondary law, analogously to the Commission, but the political institutions have shut this door firmly in the Common Approach.[74] Schütze earlier found the possibility to delegate such a power to be merely theoretical, since the Lisbon Treaty dealt expressly with the issue of delegation in Articles 290 and 291 TFEU, whereby 'international powers fall in between [both Articles]'.[75] As a result, there was no apparent legal basis for such a delegation. In the meantime, however, *Short-selling* has taught us that Articles 290 and 291 TFEU form an open system and even allow delegations or conferrals to EU agencies; while in *Spain v Council* the Court has ruled that there are a species of implementing powers besides the implementing powers foreseen under Article 291 TFEU.[76] As a result, a delegation of international treaty powers to EU agencies can no longer be ruled out; but it would appear difficult to transpose that institutional practice from the Commission to the EU agencies, given that the latter are not provided for under primary law and that the power to bind the EU as a whole is of significant constitutional importance.

Generalizing *France v Commission II*, the institutional balance ought to be safeguarded regardless of whether EU agencies enter into binding or non-binding agreements and on the EU's behalf or on their own behalf. However, whether the limits flowing from the *Meroni* doctrine would also

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[73] Ibid, p158.

[74] Common Approach, point 25.

[75] Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (CUP 2014) 195.

[76] Judgment of 20 December 2017, *Spain v Council*, Case C-521/15, ECLI:EU:C:2017:982, paras 47–49.

apply to non-binding agreements is less apparent. After all, it should be noted that having the EU agencies exercise soft law powers internally (in the EU) has been one way of circumventing the chilling effects of the *Meroni* doctrine.[77] This would mean that when entering into binding agreements, the EU agencies should respect the institutional balance and their powers should be precisely delineated; whereas when they enter into non-binding arrangements, they should respect the institutional balance without necessarily being restricted to exercising only precisely delineated powers. Of course, this does not mean that they could adopt any kind of non-binding agreement. After all, the principles of conferral and proportionality would still apply and require that: (1) the power to enter into agreements (including non-binding ones) should be expressly provided; (2) such agreements relate only to matters covered by the enabling legislative act; and (3) any agreement be entered into only if necessary for the agency to achieve the objectives of its mandate.

Two major questions are raised by the above finding: precisely which requirements flow from the institutional balance and how do they relate to the (*Meroni*) requirement that the powers conferred on agencies ought to be precisely delineated? Indeed, while institutional balance and *Meroni* may be separated from each other in theory (see above), one could still argue that in practice similar requirements flow from them for the agencies' external relations.

Le Bot has argued that the key function of the principle of institutional balance is that of systemic protection, safeguarding the prerogatives of the institutions.[78] In the original *Meroni* ruling this concern was alien to the 'balance of powers', which has the function of protecting private parties and requires that the delegate bodies be controlled by the Treaty mandated institutions. In *Short-selling*, the Court found that the essence of *Meroni* requires that only precisely delineated powers be conferred on agencies; but it was completely silent on the political control exercised by the EU institutions, mentioning only judicial control.

The Court's recent jurisprudence on external relations further reveals the problematic nature of the two requirements. *France v Commission II* requires the institutional balance to be respected even if an administrative body con-

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[77] See, among others, Simone Gabbi, 'The European Food Safety Authority: judicial review by community courts', [2009] *European Journal of Consumer Law* 1 171, 175. Similarly, see Jacopo Alberti, '*L'utilisation d'actes de soft law par les agences de l'Union européenne*', [2014] *RUE* 576 161, 162.

[78] Fabien Le Bot, *Le principe de l'équilibre institutionnel en droit de l'union européenne*, Paris, Université Panthéon-Assas, 2012, PhD thesis, 243. See also Merijn Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?', [2015] *EPL* 2 371, 381.

cludes a non-binding agreement on its own behalf. From *ITLOS*[79] and *Council v Commission*, it follows that respect for the institutional balance requires the Council's prerogatives under Article 16(1) TEU (the policy-making function) to be respected. As a result, whether concluding a binding or a non-binding agreement, EU agencies cannot autonomously work out a policy, but must respect the policy set by the EU institutions. Is there than any practical effect of finding that the agencies' powers ought not to be precisely delineated powers when they enter into non-binding agreements, but that they should still respect the Council's policy function? To put it differently: is there an equation in saying an actor cannot make policy decisions and saying its powers are precisely delineated? It may be argued that this is not the case: under Article 290 TFEU, the Commission is required to respect the policy choices of the EU legislature, but it is still not restricted to exercising only precisely delineated powers.[80] This shows that there is still something in between 'policy making' and 'exercising precisely delineated powers'.

Apart from that, it would seem that the principle of institutional balance is broader since it requires not only that the Council's policy function be respected, but also the Commission's prerogative to 'ensure the Union's external representation'.[81] In addition, although Article 218 TFEU does not apply to agreements concluded by the EU agencies, it could be argued that Article 218(10) TFEU, requiring the 'Parliament [to] be immediately and fully informed at all stages of the procedure', gives specific expression to a general prerogative of the Parliament.

7. SCRUTINIZING THE FRAMEWORK ON EU AGENCIES' EXTERNAL RELATIONS

Taken as a whole, the framework governing the agencies' external relations identified in the first part contains most elements to satisfy the constitutional limits identified in the second part. Thus, the principle of conferral is safeguarded by the requirement that the agencies' external activities be in line with their mandate. Furthermore, most working arrangements between agencies and their parent DGs make explicit that the agencies do not have international legal personality and therefore cannot enter into binding commitments with international counterparts on their own behalf. This would rule out any *Meroni* issues, assuming that *Meroni* is not relevant when agencies act in

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[79] Judgment in *Council v Commission (ITLOS),* ECLI:EU:C:2015:663.

[80] See Merijn Chamon, 'Granting powers to EU decentralised agencies, three years following Short-selling', [2018] *ERA Forum* 4, 597–609.

[81] See Article 17(1) TEU.

a non-binding manner. Part of *Meroni* is also reflected in the new ERA and Frontex Regulations, which spell out that the agencies should act within their mandate and which prescribe the purpose of the agreements. This can be seen as a translation of the *Meroni* requirement that agencies act on pre-defined criteria. However, only the new ERA Regulation contains a provision which reflects the requirement that agency action be exceptional, prescribing that the agency should act externally only insofar as is necessary to achieve its mandate. Alternatively, this requirement can also be seen as ensuring compliance with the proportionality principle. The *Meroni* requirement that other actors be involved in agencies' decision making could be said to be met when the Commission is asked to give an opinion on an agreement. However, while this mere power of opinion would be sufficient to ensure compliance with *Meroni*, this may not be the case for ensuring compliance with the institutional balance. The latter, *inter alia*, requires the Commission's prerogatives to be respected, which begs the question of whether the Commission ought not be granted with a veto power over these agreements, as was prescribed in the old EASA Regulation and the new Frontex Regulation.

The Common Approach and the working arrangements between agencies and their parent DGs also contain institutional balance provisions attempting to safeguard the policy function of the Council by the requirement that the EU agencies cannot commit the EU, and that their external relations should be in line with those of the EU's priorities, legislation and policy. It is unclear, however, whether the restriction on the agencies' capacity to bind the EU and the provisions confirming that the agencies cannot affect the Member States' and the institutions' competences are sufficient in this regard. The Council prerogatives could be further safeguarded here by generalizing the restriction of an agency's external action to what is required in order to fulfil its mandate (as co-defined by the Council in the agency's basic legislative act), and by providing for Council approval of agency's agreements. Alternatively, the Council could also delegate this power of approval to the Commission. After all, if existing institutional practice whereby the Council may delegate treaty-making power to the Commission is constitutionally valid, it should *a fortiori* follow that the Commission may be delegated the power to veto such agreements to be concluded by other bodies. This solution appears more attractive than imposing a heavy requirement such as Council approval for agreements that should essentially be technical or administrative in nature.

The representative function of the Commission is safeguarded in the Common Approach and the working arrangements by ensuring that the agencies cannot represent the EU and because the Commission determines the composition of EU delegations. However, further institutional balance issues in relation to the other EU institutions are not addressed. While the right of information of the Parliament, enshrined in Article 218(10) TFEU, is zealously

enforced by the Court in its (recent) jurisprudence,[82] it is remarkable that only the Frontex Regulation imposes this obligation on an agency. Depending on how the role of the EU agencies and that of the EU Parliament itself are conceptualized, it would seem necessary to generalize such a requirement in light of the institutional balance.

Finally, it is laudable that the new Frontex and EASA Regulations omit the reference to agency action 'in accordance with the relevant provisions of the Treaty', since this provision did not clarify much.

8. CONCLUDING REMARKS AND REMAINING QUESTIONS

In light of the above analysis, it is to be lauded that the institutions in recent legislative practice are devoting more attention to the framework for the agencies' external relations, going beyond the incomplete requirements flowing from the Common Approach.

Simultaneously, the provisions to be found in recent legislative acts are still very much heterogeneous and no single legislative act properly imposes a complete framework on its agency, ensuring respect for all constitutional limits (conferred powers, proportionality, institutional balance, *Meroni*). The same goes for the working arrangements, which are not in place for all agencies (even those with important external activity) and which do not seem the appropriate instrument in the first place to set out constitutional limits to external agency action. Bringing together best practices from the establishing acts and working arrangements in an upgraded (and binding) Common Approach would thus seem advisable.

A pertinent question from this perspective is how detailed such an upgraded framework should be, given that it should not be so rigid that effective external agency action becomes impossible. In this sense, should the legislature make an explicit distinction between binding and non-binding agreements to be concluded by the agency, or should this be left in abeyance?

Further to this, does it indeed make sense to restrict the applicability of *Meroni* to binding agreements concluded by agencies and what are the precise practical consequences of *Meroni* not being applicable to non-binding agreements? Or has the *Meroni* doctrine been hollowed out to such an extent that it does not impose a further limit than those already imposed by the constitutional principles of conferred powers, proportionality and institutional balance?

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[82] See Judgment of 24 June 2014, *Parliament v Council*, C-658/11, ECLI:EU:C:2014:2025; Judgment of 14 June 2016, *Parliament v Council*, C-263/14, ECLI:EU:C:2016:435.

Finally, is it satisfactory and legally correct to represent the Commission's veto power over the agencies' agreements as a power (partially) delegated to it by the Council in order to ensure that the agencies do not intrude on the Council's policy-making function and (partially) conferred on the Commission by the legislature to safeguard its own prerogatives under the institutional balance? These questions merit further study and are not purely academic, since they have important ramifications for the accountability of EU agencies and the EU institutions, and for the role and place of the agencies and institutions in the EU institutional set-up.

3. The cooperation between the European Border and Coast Guard Agency and third countries according to the new Frontex Regulation: legal and practical implications

Florin Coman-Kund[1]

1. INTRODUCTION

Frontex was recently consolidated and rebranded by Regulation 2016/1624[2] as the European Border and Coast Guard Agency. Among other things, 'Frontex reloaded' enjoys a stronger role in returns; it increasingly monitors the management of the Union's external borders and assesses the border management capacities of Member States; it exercises specific powers in situations requiring urgent action; and it has at its disposal a rapid reaction pool of at least 1500 border guards and other staff. Another aspect of Frontex's activities which

[1] This chapter is partly based on Florin Coman-Kund, *European Union Agencies as Global Actors. A Legal Study of the European Aviation Safety Agency, Frontex and Europol* (Routledge 2018).

[2] Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, [2016] OJ L251/1. At the time this chapter was finalised for publication, the Council and the European Parliament had reached agreement on yet another Frontex Regulation that will enter into force in 2019 and replace Regulation 2016/1624; the coming Frontex Regulation will further increase Agency's powers and operational capacitites – see European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, P8_TA-PROV(2019)0415.

was also affected by the recent overhaul is its cooperation with third countries, which is essential for the fulfilment of the agency's core tasks regarding EU border management.[3]

This chapter provides a fresh analysis of the novelties introduced by the New Frontex Regulation as regards cooperation between the agency and third countries. In doing so, it first sketches out the general context for understanding the international dimension of Frontex (section 2), and compares the new legal framework for international cooperation with its predecessor under the old Frontex Regulation (sections 3 and 4). It then identifies several salient issues pertaining to this international dimension (section 5), and advances a set of legal parameters for examining the legal consequences and 'constitutionality' of Frontex's cooperation with third countries (section 6). Based on this approach, the chapter maps out the new legal framework and addresses more specifically several legal and practical issues pertaining to Frontex's working arrangements, the liaison officers (LOs) deployed in third countries, the agency's participation in operations on the territory of third countries and the protection of fundamental rights. While the New Frontex Regulation has introduced several improvements to the agency's cooperation with third countries, it raises a number of problems and concerns as regards the agency's external powers, effective oversight, accountability and legal review of the agency's international cooperation actions (section 7).

2. THE CONTEXT FOR UNDERSTANDING FRONTEX'S INTERNATIONAL DIMENSION

2.1 The Union's External Border Management Area

Frontex should be seen as one element – though an important one – of the overall legal-institutional framework for EU border management, which encompasses a web of legal instruments and actors at both EU and Member State level.

Since the management of EU external borders became a shared competence under the Treaty of Amsterdam, several important measures – including the creation of Frontex – have been adopted at the EU level around a so-called 'three-pillar' model, encompassing common legislation, common operations

[3] In a broader context, Andrade notes that an efficient EU immigration policy cannot be realistically achieved without cooperation with relevant third countries; Paula Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally', [2018] *CMLRev*1 157, 198.

and financial solidarity.[4] These developments are part of the Integrated Border Management system[5] first introduced by the Council in 2006[6] and then integrated in Article 77 of the Treaty on the Functioning of the European Union (TFEU) by the Lisbon Treaty.[7]

However, as concerns execution powers in the border management area, the EU mainly assumes a supportive and coordinating role in relation to the actions and operational prerogatives of Member States, which remain primarily responsible for controlling the Union's external borders.[8] The external dimension of border management is largely shaped through Member States' operational cooperation with third countries, and gradually through the international cooperation activities of the EU (including Frontex).[9] While the exercise of the EU's powers in the area of shared internal competences normally entails exclusive competence for the EU to act externally, based on the longstanding *ERTA* doctrine[10] and Article 3(2) TFEU, things are more nuanced when it comes to external border management issues, as Protocol 23 still allows Member States to conclude their own international agreements with third countries, provided that these are compatible with EU law.[11]

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[4] See European Commission, 'Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)', SEC (2010) 149, 8.

[5] See European Commission, 'Financial statement accompanying Regulation (EU) 1168/2011', COM (2012) 590 final.

[6] Council of the European Union, 'Conclusions on Integrated Border Management', 4–5 December 2006 (15801/06) 27.

[7] See Francesca Ferraro and Emilio Capitani, 'The New European Border and Coast Guard: Yet Another "Half Way" EU Reform?', [2016] *ERA Forum* 3 385, 388–389.

[8] Andrade, supra note 3, 168–169; see also Article 5(1) of Regulation 2016/1624.

[9] Jorrit Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union* (DPhil thesis, European University Institute, 2009), 327; see also Andrade, supra note 3, 168.

[10] Judgment of the Court of 31 March 1971, *Commission v Council*, Case 22/70, ECLI:EU:C:1971:32. For an overview of the Court of Justice of the European Union case law regarding the doctrine of implied powers, see Piet Eeckhout, *EU External Relations Law* (OUP 2011), 70–119.

[11] Protocol No 23 on external relations of the Member States with regard to the crossing of external borders annexed to the Treaties [2012] OJ C326/304. For a more detailed discussion regarding the nature of the Union's external competences and the interplay with Member States' competences in external border management, see Andrade, supra note 3, 165–169.

2.2 The Legal Design of Frontex

Like other EU agencies,[12] Frontex has its origins in a more ad hoc EU-level cooperation structure: the External Borders Practitioners Common Unit, which brought together Member State authorities with competence for border management issues.[13] In response to calls for enhanced coordination of operational cooperation between Member States, Frontex was originally set up as an EU agency by Regulation 2007/2004.[14] Frontex was initially designed as a 'network agency' which established, managed and promoted a network of Member State border authorities.[15]

Article 1(1) of Regulation 2007/2004 made clear that Frontex's essential mission was to contribute 'to improving the integrated management of the external borders of the Member States of the European Union'. To this end, the initial version of Article 2(1) of the former Frontex Regulation tasked the agency with coordinating operational cooperation between Member States, assisting Member States in various ways (in specific situations requiring increased technical and operational support, joint return operations and training of border guards), and carrying out risk analyses.

Frontex's mandate was extended several times over the years, before the agency became 'Frontex reloaded' under Regulation 2016/1624. Its initial mandate was expanded for the first time by the so-called 'RABIT Regulation',[16] which enabled the agency to deploy rapid border intervention teams to Member States. Shortcomings and limitations on the operational side of the agency in particular, together with an insufficient level of support and solidarity from Member States,[17] led to the further amendment of the former Frontex Regulation by Regulation 1168/2011.[18] The main changes introduced

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[12] See Ellen Vos, 'EU Agencies on the Move: Challenges Ahead', [2018] *SIEPS* 1, 14.

[13] European Commission, 'Towards integrated management of the external borders of the member states of the European Union', COM (2002) 233 final, 13–14.

[14] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1.

[15] Rijpma, supra note 9, 259–260.

[16] Regulation (EC) 863/2007 of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L 199/30.

[17] See Commission, supra note 4, 11–12.

[18] Regulation (EU) 1168/2011 of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1.

concerned Frontex's operation of information systems, including within the European border surveillance system; a strengthened coordinating role in joint return operations;[19] a co-leading role in joint operations and pilot projects;[20] and a new possibility for Frontex to buy equipment alone or in co-ownership with a Member State.[21]

Frontex's information-related tasks were further expanded by the Eurosur Regulation;[22] while Regulation (EU) 656/2014 tasked the agency with specific coordination functions within the context of operational cooperation pertaining to the surveillance of external sea borders.[23]

Regulation 2016/1624 built on these previous developments by introducing enhanced tasks and powers on both the operational and the monitoring/coordination sides of border management.[24] 'Frontex reloaded' enjoys a greater role in return operations and interventions;[25] monitors the capacities of Member States to address challenges at external borders;[26] exercises specific powers in external border 'hotspots'[27] and in urgent situations;[28] has the power to deploy LOs in Member States; has enhanced functions regarding the establishment and deployment of European Border and Coast Guard teams;[29] and has at its disposal a rapid reaction pool of at least 1500 border guards.[30]

These amendments undoubtedly confirm the growing importance of Frontex in managing the Union's external borders, and could arguably be seen as a 'quantum leap' that has transformed the agency from a rather horizontal network into part of an increasingly integrated hierarchical structure.[31] However, the status quo in this field, featuring a prominent role for Member States, has not fundamentally changed. Thus, without underestimating the operational role of Frontex, it is important to observe the legal limits set out in

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19 Article 2(1) of Regulation 2007/2004.
20 Ibid, Article 3(a).
21 Ibid, Article 7.
22 Regulation (EU) 1052/2013 of the European Parliament and of the Council establishing the European Border Surveillance System (Eurosur) [2013] OJ L 295/11.
23 Regulation (EU) 656/2014 of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ 2014 L 189/93.
24 Ferraro and Capitani, supra note 7, 392–393.
25 Articles 27-33 of Regulation 2016/1624.
26 Ibid, Article 13.
27 Ibid, Article 18.
28 Ibid, Article 19.
29 Ibid, Articles 20–25.
30 Ibid, Article 20.
31 Ferraro and Capitani, supra note 7, 392.

the agency's mandate, as well as the division of tasks between Frontex and its national counterparts. First, both old and new Frontex Regulations clearly stipulate that the primary responsibility for the control and surveillance of external borders lies with the Member States.[32] It is true that Frontex may co-finance such operations and may now assist Member States with its own technical equipment, is involved in the planning phase and may participate in missions; but the brunt of the operational work still lies with Member States. Second, both Regulations explicitly recognize the possibility for Member States to pursue their own operational cooperation with third countries, without necessarily involving Frontex;[33] though when doing so, Member States must observe the principle of loyal cooperation.[34]

3. FRONTEX'S COOPERATION WITH THIRD COUNTRIES UNDER THE FORMER FRONTEX REGULATION

3.1 Legal Framework

The international dimension of Frontex must be seen against the background of EU external border management policy, and in particular as 'a key component of the integrated border management model',[35] as well as a means to fulfil its core mandate. Accordingly, its international cooperation activities are mainly geared towards facilitating cooperation between Member States and third countries,[36] and supporting the Union's policies and actions in the field.

While specific aspects of cooperation with third countries were succinctly mentioned in several provisions of the former Frontex Regulation,[37] the

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[32] See Article 1(2) of Regulation 2007/2004 and Article 5 of Regulation 2016/1624.

[33] See Article 2(2) of Regulation 2007/2004 and Article 8(2) of Regulation 2016/1624. See also Steve Peers, *EU Justice and Home Affairs Law* (OUP, 2011), 217–218.

[34] According to Article 8(2) of Regulation 2016/1624, Member States 'shall refrain from any activity which could jeopardise the functioning of the Agency or the attainment of its objectives'.

[35] European Commission, supra note 4, 14.

[36] Violeta Moreno-Lax, 'Frontex as a Global Actor: External Relations with Third Countries and International Organisations' in M Dony (ed), *La Dimension Externe de l'Espace de Liberté, Sécurité et de Justice au lendemain de Lisbonne et de Stockholm: un Bilan à Mi-parcours,* (Éditions de l'Université de Bruxelles 2012) 172, 173.

[37] For example, Articles 3a(k) and 8e(1)(k) in the context of joint operations and rapid interventions, Article 9(2) in the context of returns and Article 5 as regards training.

general legal framework for cooperation with third countries was set out in Article 14 of Regulation 2007/2004.

Article 14 is a good illustration of Frontex's position 'in between' Member States and the European Union in the area of border management.[38] While the agency acted mostly for the benefit of Member States, it was required to do so insofar as was necessary for the fulfilment of its core tasks and within the framework of the EU's external relations policy, including the protection of human rights.[39] In the same vein, Member States could include provisions concerning the role and competence of Frontex in their bilateral agreements with third countries, but such agreements had to be complementary to the agency's activities.[40]

There were several distinct, though interlinked aspects as concerns direct cooperation between Frontex and third countries. First, the working arrangements which Frontex could conclude with the competent authorities of third countries were qualified as formal cooperation instruments of a technical nature 'purely related to the management of operational cooperation'.[41] All working arrangements (1) could cover issues within Frontex's mandate and (2) had to be concluded 'in accordance with the relevant provisions of the TFEU'.[42] Next, as from 2011, the agency was able to deploy its own LOs in third countries that comply with minimum human rights standards, with the approval of the Management Board.[43] The main task of the LOs is to establish and maintain contact with the competent authorities of third countries in order to help combat illegal migration and promote the return of illegal migrants.[44] Both the conclusion of working arrangements and the deployment of LOs entailed the prior opinion of the Commission and a duty to inform the European Parliament.[45] Another novelty introduced by the 2011 Amending

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[38] On EU agencies as 'in-betweeners' positioned between EU institutions and the Member States, see generally Vos, supra note 12, 6, 8, 10, 20, 45–46; for a discussion on EU agencies as factors fostering 'pluralisation of the EU executive' through the exercise of powers extracted from the Member States and through the coordination of Member States' administrations within the framework of EU policy implementation, see Herwig CH Hofmann and Alessandro Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"' [2012] *ELRev* 1 419, 436–438 and 441–443.

[39] Article 14(1) of Regulation 2007/2004.

[40] Ibid, Article 14(7) referring to Article 2(2).

[41] Ibid, Article 14(2).

[42] Ibid, Articles 13 and 14(2). Mostly, the provisions of Part 5 of the TFEU on the Union's external action were envisaged as 'relevant' for this purpose.

[43] Ibid, Article 14(3).

[44] Ibid, Article 14(4).

[45] Ibid, Article 14(8).

Regulation was the possibility for Frontex to launch and finance technical assistance projects in third countries as a means for the agency to 'more proactively support capacity building in those countries'.[46]

From this overview, the instrumental nature of Frontex's international cooperation with third countries becomes obvious. Hence, any international cooperation pursued by Frontex must properly respect the agency's core mandate and its position within the EU legal-institutional framework.

3.2 International Cooperation Practice

Frontex's cooperation with third countries materialized in various actions and instruments under different legal and policy frameworks.[47] These range from participation in regional dialogues on migration and mobility partnerships to the implementation of tailored technical assistance projects in third countries, participation in joint operations within the framework of bilateral agreements between Member States and third countries, the establishment of direct partnerships with third countries and the exchange of LOs with third countries.[48] In particular, when pursuing direct cooperation with third countries, Frontex's preferred option was to conclude working arrangements.

According to the Frontex website,[49] 18 working arrangements have been concluded so far with competent authorities from third countries. These working arrangements are by and large rather brief documents. With some variations, they list the following core areas for cooperation: risk analysis; training; research and development; joint operations (including in some cases joint return operations); and operational interoperability between the competent authorities of the Member States and those of the relevant third countries. The practical modalities for implementing this cooperation cover exchanges of information (especially in relation to risk analysis); exchange of analytical products and training tools; exchange of best practices; participation of observers from one competent authority (usually the third country authority) in various activities of the other authority;[50] secondment of personnel to focal

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[46] European Commission, supra note 4,18.

[47] Frontex, Non EU countries; https://frontex.europa.eu/partners/non-eu-countries/ , last accessed 12 October 2018.

[48] The agency has so far approved the deployment of LOs in Turkey, Serbia and Niger; https://frontex.europa.eu/partners/liaison-officers-network/.

[49] Russian Federation, Ukraine, Moldova, Georgia, former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, US, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey, Azerbaijan, and Kosovo; https://frontex.europa.eu/partners/non-eu-countries/, last accessed 12 October 2018.

[50] For example, meetings of the Frontex Risk Analysis Network; return operations.

point offices; and participation in various projects launched by Frontex. Some working arrangements cover financial aspects of the cooperation between the agency and its counterpart;[51] whereas others prescribe the conclusion of separate security agreements with respect to information exchanges between the parties.[52] Interestingly, the working arrangement with Kosovo is the first to mention explicitly the possibility to exchange personal data between the agency and its third country counterpart.[53]

The final provisions of the working arrangements cover entry into force, amendment procedures and termination of the cooperation instrument. Most working arrangements with third countries include a standard provision explicitly noting that they are not considered an international treaty or a document having effect under international law, and that their implementation shall not be regarded as the fulfilment of international obligations by the EU, its institutions and Member States in relation to the third country concerned. However, this seems to contrast with the 'human rights' and 'respect for international law' clauses inserted in most recent working arrangements.[54]

As regards the negotiation and conclusion of working arrangements with third countries, the Frontex Management Board played an important role at the beginning (approving the start of negotiations and setting the negotiation mandate) and the end (approval of the draft working arrangement) of this process. Negotiations were conducted by the Executive Director and the Commission gave its opinion on the draft working arrangement.[55] Moreover, it appears that in practice, the Commission was involved throughout the whole process, having a much more authoritative voice than the mere consultative role mentioned in Article 14(8) of Regulation 2007/2004.[56]

The implementation of Frontex's working arrangements with third countries normally required the adoption of cooperation plans, setting out more detailed actions to be carried out by the agency and its partners.

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51 With Armenia, Nigeria and Turkey.

52 With Armenia, Nigeria and Kosovo.

53 Subject to a specific arrangement/agreement between the parties to the working arrangement.

54 Azerbaijan and Kosovo.

55 Decision of the Management Board of Frontex 11/2006 of 01 September 2006 laying down the procedures for negotiating and concluding working arrangements with third countries and international organizations.

56 Coman-Kund, supra note 1,190−191.

4. FRONTEX'S COOPERATION WITH THIRD COUNTRIES ACCORDING TO REGULATION 2016/1624

Regulation 2016/1624 essentially maintains the international cooperation framework under the former Frontex Regulation, and confirms the instrumental nature of the agency's international dimension and its obligation to act in compliance with the EU legal and policy framework, particularly in the field of the Union's external relations. The main formal instrument for international cooperation remains the working arrangement. Additionally, the provisions regarding Frontex LOs in third countries,[57] the participation of observers from third countries and international organizations in its activities,[58] the possibility to launch and finance technical assistance projects in third countries,[59] and the involvement of Frontex in the implementation of bilateral agreements between Member States and third countries[60] are similar to those in the former Frontex Regulation.

Regulation 2016/1624 also features a number of refinements and novelties. Thus, the role of Frontex in supporting cooperation between the Member States and third countries is more clearly articulated, both on a general level[61] and in the specific context of search and rescue operations under Regulation 656/2014.[62]

Regarding Frontex's main formal international cooperation instruments, a novel procedural element makes working arrangements subject to the Commission's prior approval.[63] The New Frontex Regulation also provides explicitly for the Management Board's approval of working arrangements with third countries.[64] While the agency's internal procedures already included this step, this provision formally aligns the agency with the Common Approach on EU Agencies in this respect.[65] Another refinement aimed at increasing Frontex's democratic accountability imposes a duty on the agency to inform the European Parliament before a working arrangement with a competent third

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57 Article 55 of Regulation 2016/1624.
58 Ibid, Articles 52(5) and 54(7).
59 Ibid, Article 54(9).
60 Ibid, Article 54(10).
61 Ibid, Article 8(1)(u).
62 Ibid, Articles 8(1)(f) and 14(2)(e).
63 Ibid, Articles 52(2) and 54(2).
64 Ibid, Article 62(2)(z).
65 See Council of the European Union, Evaluation of European Union Agencies – Endorsement of the Joint Statement and Common Approach, 18 June 2012, Doc 11450/12, para. 25.

country authority is concluded.[66] These elements are reflected accordingly in the new Management Board Rules of Procedure.[67]

Other developments include express provisions compelling the agency and its LOs to coordinate with the EU delegations to increase consistency between Frontex's activities and EU external actions.[68] The New Regulation also elaborates further on the agency's human rights duties by stipulating explicitly its duty to respect fundamental rights and the principle of non-refoulement in its cooperation with third countries.[69] Yet another formalization of existing practice consists of the duty imposed on the agency to contribute to the implementation of relevant international agreements between the EU and third countries within the framework of the Union's external relations policy.[70] Next, stricter formal requirements are stipulated with regard to the possibility for Member States to 'use' Frontex in their cooperation with third countries based on bilateral agreements.[71] Other changes aimed at making Frontex more democratically accountable concern the extension of the scope of its duty to inform the European Parliament of all aspects of international cooperation with third countries, and the imposition of an obligation to include an assessment of the cooperation with third countries in its annual reports.[72] This latter provision again formalizes existing institutional practices.[73]

The New Regulation also extends the agency's international dimension on the operational side of cooperation with third countries. Frontex can now carry out, as part of the coordination of joint operations, rapid border interventions and return operations – actions on the territory of a (neighbouring) third country[74] – subject to a status agreement concluded between the EU (not Frontex) and the third country concerned where teams are deployed to that third country.[75] This has been praised as an instrument that will ensure better

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66 Article 52(2) of Regulation 2016/1624.

67 See Article 19 of Management Board Decision 11/2017 of 30 March 2017 adopting the Rules of Procedures of the Management Board.

68 Articles 54(8) and 55(3) of Regulation 2016/1624.

69 Ibid, Articles 54(1)–(2).

70 Ibid, Article 54(8).

71 Ibid, Article 54(10). Member States may include provisions on the role and tasks of Frontex in their bilateral agreements with third countries conditioned on the agency's agreement, compliance with the Frontex Regulation and notification to the Commission.

72 Ibid, Article 54(11).

73 See, for instance, Frontex, General Activity Report 2015 16 http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2015/General_Report_2015.pdf, last accessed 12 October 2018.

74 Articles 54(3)–(4) of Regulation 2016/1624.

75 Ibid, Articles 54(4)–(5).

operational cooperation with priority third countries[76] and is based on a draft model agreement elaborated by the Commission in November 2016.[77] The first EU status agreement was concluded with Albania and entered into force on 1 May 2019; while procedures for concluding status agreements with Serbia, the Former Yugoslav Republic of Macedonia, Bosnia and Herzegovina and Montenegro are pending[78]

Overall, while the New Regulation reinforces the agency's international profile, it also maintains the basic principles and instruments for international cooperation under the former Frontex Regulation, updating them by formalizing various practical developments and addressing certain legal concerns.

5. SALIENT ISSUES RELATING TO FRONTEX'S COOPERATION WITH THIRD COUNTRIES

The legal nature and effects of the agency's working arrangements with third countries are not entirely clear. The legal qualification of working arrangements has implications as regards legal review and protection in a field characterized by particularly high human rights sensitivities.[79] Additionally, one may wonder whether Frontex's working arrangements with third countries are subject to sufficient scrutiny by the EU institutions.

Another sensitive aspect of Frontex's cooperation with third countries concerns the status and tasks of LOs, as well as the framework and conditions for their deployment in third countries.

The newly introduced possibility for Frontex to participate in operations on the territory of third countries also raises intricate legal questions as to its specific tasks, its application of the national law of the third country concerned, safeguards regarding respect for fundamental rights and overall compliance with the relevant EU legal framework. Similar legal concerns apply where the

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[76] Commission, 'Report on the operationalization of the European Border and Coast Guard', COM (2017) 42 final, 4.

[77] Commission, 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard' (Communication) COM (2016) 747 final.

[78] Commission, 'College Meeting: Strength in unity: Commission makes recommendations for the EU's next strategic agenda 2019-2024' (Press release – MEX/19/2336), 30 April 2019, http://europa.eu/rapid/press-release_MEX-19-2336_en.htm, last accessed 13 May 2019.

[79] Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns regarding Technical Relationships', [2012] *Utrecht Journal for International and European Law* 1 20, 33–34.

agency cooperates with third countries within the framework of international agreements concluded by Member States.

One may further wonder whether Frontex's legal framework and international cooperation practice offer adequate safeguards to ensure that the principle of non-refoulement and fundamental rights are observed in the agency's cooperation with third countries. In this respect, tensions may arise in practice where there is an operational need to cooperate with third countries with a 'sensitive' human rights record.

6. LEGAL PARAMETERS FOR ASSESSING FRONTEX'S COOPERATION WITH THIRD COUNTRIES[80]

Parameters from EU and international law are proposed with a view to assessing Frontex's cooperation with third countries. While from a broader perspective, Frontex's legal design and actions must also observe general EU legal principles such as conferral, subsidiarity and proportionality,[81] in this chapter the focus lies on institutional balance and the *Meroni* doctrine, as these are considered to have direct and immediate relevance for assessing Frontex's international cooperation. The concept of 'international agreement' clarifies the legal nature of Frontex's working arrangements with third countries. Additionally, as illustrated both by the Frontex Regulations and by the agency's practice, fundamental rights represent a valid legal standard for assessing the agency's international cooperation with third countries.[82]

6.1 The Principle of Institutional Balance and the Doctrine of Delegation of Powers

Developed gradually in the case law of the Court of Justice of the European Union (CJEU)[83] and enshrined in Article 13(2) of the Treaty on European Union (TEU), the principle of institutional balance is regarded as a tool that

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[80] Based on the legal-analytical framework for assessing the international dimension of EU agencies developed by Coman-Kund, supra note 1, 55−111. See also Florin Coman-Kund, 'The International Dimension of the EU Agencies: Framing a Growing Legal–Institutional Phenomenon', [2018] *EFAR* 1 97, 100–106.

[81] See Chapter 2.

[82] See also Ferraro and Capitani, supra note 7, 395–396.

[83] See, for instance, Judgment of the Court of 13 June 1958 *Meroni & Co, Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, Case 9/56, ECLI:EU:C:1958:7; Judgment of the Court of 4 October 1991, *Parliament v Council. Radioactive contamination of foodstuffs (Chernobyl),* Case C-70/88, ECLI:EU:C:1991:373.

performs a similar function at EU level to the principle of separation of powers in state constitutional systems.[84] With respect to the EU agencies, institutional balance requires that they not encroach upon the powers conferred by the Founding Treaties on the EU institutions.[85]

The main tool ensuring that the EU agencies do not affect the institutional balance is the delegation of powers, or the so-called *Meroni* doctrine.[86] In the *Meroni* cases the CJEU established that EU institutions may delegate to external bodies executive powers that they themselves possess, but only if such powers are 'clearly defined' and subject to their supervision.[87] In the *ESMA* judgment, the CJEU confirmed the application of the *Meroni* doctrine to the EU agencies,[88] but it opened the path for quite wide-ranging powers being entrusted to these bodies via secondary legislation.[89] While stating that only 'clearly defined executive powers' may be delegated, exercise of which is subject to 'strict review in the light of objective criteria'[90] when applying these requirements to the European Securities Market Authority (ESMA), the CJEU advanced two rather relaxed standards for review: (1) ESMA may not be granted autonomous powers that go 'beyond the bounds' of its regulatory framework established by its founding act; and (2) the exercise of its powers must be 'circumscribed by various conditions and criteria'.[91] Thus, the CJEU only denied ESMA a 'very large measure of discretion' that is incompatible

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[84] Sacha Prechal, 'Institutional Balance: A Fragile Principle with Uncertain Contents' in T Heukel, N Blokker and M Brus (eds), *The European Union after Amsterdam. A Legal Analysis*, (Kluwer Law International 1998) 280; Jean-Paul Jacqué, 'The Principle of Institutional Balance', [2004] *CMLRev* 2 383, 384.

[85] Regarding the relevance of institutional balance as a standard for assessing the lawfulness of EU agencies' powers, see Stefan Griller and Andreas Orator, 'Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine', [2010] *ELRev* 6 3, 31. For an elaborated analysis of the principle of institutional balance in the context of EU 'agencification', see Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016), 258–296.

[86] See Koen Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community', [1993] *ELRev* 1 23, 27 and 40–49.

[87] Case 9/56, *Meroni*, 152 and Case 10/56, *Meroni*, 173.

[88] Judgment of the Court (Grand Chamber) of 22 January 2014 *United Kingdom v Parliament and Council (ESMA),* Case C-270/2012 EU:C:2014:1 para. 41.

[89] *ESMA*, paras 44–45. For a detailed analysis of the *ESMA* judgment, see Merijn Chamon, 'The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom v Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism' [2014] *ELRev* 39 381, 381–403.

[90] *ESMA,* para 41.

[91] Ibid, paras 44–45. According to Chamon, the *Meroni* doctrine was reduced by the CJEU in *ESMA* to a single criterion: 'the single prohibition of delegating discretionary powers'; Chamon supra note 89, 393.

with the Treaties.[92] What seems to matter in light of the revamped *Meroni* doctrine is the legal design of the agency's powers and the system of controlling mechanisms established with regard to the exercise of such powers in order to preserve the system of checks and balances.

As standards relevant for assessing the overall powers of the EU agencies, the principle of institutional balance and *Meroni* are also applicable to the agencies' international cooperation tasks and activities

6.1.1 Institutional balance and delegation of powers in the EU external action area

While various actors are involved in different ways in the Union's external actions, it may be inferred from Articles 17(1) and 21(3) TEU, as well as Article 220 TFEU, that the Commission is mainly in charge of the Union's external representation and of the daily management of its external relations.[93] In Case C-660/13,[94] the CJEU confirmed that EU external action is based on an institutional system whereby: the European Council is in charge of defining the strategic interests and objectives of the Union; the Council is responsible for making policy, further elaborating the Union's external action and ensuring its consistency; whereas the Commission exercises executive and management functions and ensures the Union's external representation.[95]

Regarding the Union's binding international agreements, Article 216 TFEU lists a number of scenarios in which such instruments may be used. Article 218 TFEU features a standard procedure according to which the Council formally decides on the opening of negotiations and the signing and conclusion of international agreements, whereas the Commission, in principle, can only recommend and negotiate such agreements. The CJEU took a rather strict stance on this division of tasks in Case C-327/91, *France v Commission*,[96] essentially arguing that the Treaties establish a particular institutional balance with regard to the Union's international agreements prescribing that such agreements are

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[92] Case C-270/2012, *ESMA*, para 54. In this respect, Chamon maintains that the CJEU introduced a *Meroni*-light doctrine; Chamon supra note 89, 393.

[93] Commission, *Vademecum on the External Action of the European Union*, SEC (2011) 881/3, 18–19.

[94] Judgment of the Court of 28 July 2016, *Council v Commission*, Case C-660/13, EU:C:2016:616, paras 33–34 ('*Council v Commission*'). For a more detailed analysis of this judgment, see Merijn Chamon and Valerie Demedts, 'The Commission back on the Leash: No Autonomy to Sign Non-binding Agreements on behalf of the EU: Council v. Commission', [2017] *CMLRev* 1 245, 245–262.

[95] *Council v Commission,* paras 33–34.

[96] Judgment of the Court of 9 August 1994, *France v Commission*, Case C-327/91 EU:C:1994:305.

concluded by the Council, not the Commission.[97] This view now seems to have been codified by Article 218(1) TFEU, suggesting a single procedure for the negotiation and conclusion of the Union's agreements with third countries and international organizations.[98]

However, the delegation of specific treaty-making powers to the Commission or other actors, such as the EU agencies, should not be ruled out, provided that the prerogatives of the institutions involved in the procedure set out in Article 218 TFEU are not affected.[99]

Thus, a delineation[100] can be made between agreements concluded according to the ordinary procedure laid down in Article 218 TFEU and international agreements concluded by the Commission and by various EU institutions and bodies. The former category encompasses the most important legal-political commitments made by the Union on the international plane, corresponding to a sort of 'external law making' and requiring the participation of the EU institutions that are also involved in the legislative process.[101] The latter category encompasses agreements of a technical-administrative nature regarding the implementation of Article 218 TFEU agreements and EU legislation, and the daily management of EU external policies or the external dimension of its internal policies.[102] As for the Commission, in addition to explicit delegation by the legislature, its competence to enact agreements could be based on its role of ensuring the Union's external representation under Articles 17 TEU and 220 TFEU, in combination with its role as the main EU implementing body.[103]

6.1.2 EU agencies and institutional balance in external relations

The possibility for the EU agencies to pursue international cooperation has been acknowledged in the Common Approach on EU Agencies,[104] and has arguably been sanctioned by the CJEU with regard specifically to Europol in Case C-363/14, *Parliament v Council*. In its judgment, the CJEU seems not to

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[97] Ibid, para 36. See also James Kingston, 'External Relations of the European Community: External Capacity versus Internal Competence', [1995] *ICLQ* 3 659, 659–670.

[98] Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis* (CUP 2010) 87.

[99] See Robert Schütze, *Foreign Affairs and the EU Constitution. Selected Essays* (CUP 2014), 392–399.

[100] For a similar view, see ibid, 392–396.

[101] For a parallel between the Union's international law making and the making of its 'internal' legislation, see Eeckhout, supra note 10, 193–194.

[102] For a more detailed analysis of the concept of 'international administrative agreement', see Coman-Kund supra note 1, 92−104.

[103] Articles 290, 291 and 317 TFEU.

[104] Common Approach on EU Agencies, supra note 5, para 25.

question the 'constitutionality' of Europol's international dimension as long as it is ancillary and necessary for the performance of the agency's core tasks, and it takes place within the framework defined by the EU legislature.[105]

Unlike the Commission, the EU agencies may get involved in international cooperation as sectoral actors insofar as is necessary to fulfil their core mandate entrusted by the legislature in a certain policy area. Entrusting certain international cooperation tasks to EU agencies is acceptable, but the *Meroni* requirements and the institutional balance in the EU external action area must be observed.[106]

Arguably, the EU agencies can also be granted limited powers, by an act of secondary legislation, to conclude binding international agreements inherent to the fulfilment of their mandate. Similarly to the Commission's administrative agreements, such agreements concluded by the EU agencies could be seen as a special form of EU external administrative action which does not automatically disturb the institutional balance laid down in Article 218 TFEU.[107] In this regard, it is essential that: (1) administrative agreements remain within the core mandate of the agency and are consistent with Article 218 TFEU agreements and EU legislation; and (2) the agency is subject to sufficient supervision and control, ensuring that the powers of the main actors involved in the Union's external action area are not affected. In particular, the Council and the Commission should be involved in view of their roles under Articles 16(6), 17(1) and 21(3) TEU, as well as Articles 218 and 220 TFEU. The participation of the European Parliament – for instance, in the form of *ex ante* or *ex post* information duties – is also desirable with a view to enhancing the agencies' democratic accountability.

6.2 The Concept of 'International Agreement'

The two Vienna Conventions on the Law of Treaties[108] define a 'treaty' as 'an international agreement' concluded in written form and governed by international law, regardless of whether it is embodied in one, two or more instruments

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[105] Judgment of the Court of 10 September 2015, *Parliament v Council*, Case C-363/14, ECLI:EU:C:2015:579, paras 49–50.

[106] For a view questioning the application of *Meroni* to the EU agencies' non-binding international instruments, see Chamon and Demedts, supra note 94.

[107] In Case C-363/14, the CJEU highlighted Europol's capacity to conclude cooperation agreements as an essential element of the agency's legal framework.

[108] Vienna Convention on the Law of Treaties between States, 27 January 1980, 1155 UNTS 331, 8 ILM 679 ('the 1969 Vienna Convention') and Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 25 ILM 543 ('the 1986 Vienna Convention').

and whatever its particular designation.[109] This definition is widely accepted by the international law scholarship[110] and is supported by the International Court of Justice[111] as reflecting customary international law.

Based on this definition, an essential criterion for assessing the legally binding character of international instruments is the genuine intention of the parties to create binding effects governed by international law, regardless of the name or form of the instrument.[112] The factors most commonly used to this effect include the wording and substance, as well as the particular circumstances (context) surrounding the negotiation, conclusion and implementation of the instrument.[113] The determination of the legal nature of international cooperation instruments requires a careful analysis combining the abovementioned factors.[114] This requires not only an examination of explicit provisions in the instrument, but also a consideration of more objective manifestations of intent[115] resulting from the overall structure and system of the agreement, as well as from actions and procedures carried out in the making or implementation of the instrument.

6.3 Human Rights

Adherence to fundamental right**s** represents an inherent concern in the management of the Union's external borders. Non-refoulement, the right to life, prohibition of inhumane or degrading treatment, protection of personal data and the right to property are some of the rights that might be potentially infringed during Frontex's operations and activities, including cooperation with third countries.

Within the EU, respect for human dignity and respect for human rights are listed among the fundamental values upon which the Union is founded (Article 2 TEU). A detailed catalogue of rights is provided in the Charter of Fundamental Rights of the European Union (CFR), which is given primary

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[109] Article 2(1)(a) of the 1969 Vienna Convention and of the 1986 Vienna Convention.

[110] See Duncan B Hollis, 'Defining Treaties', in DB Hollis (ed), *The Oxford Guide to Treaties*, (OUP 2012), 12.

[111] *Cameroun v Nigeria: Equatorial Guinea Intervening* (2002) ICJ 303, [263].

[112] Oscar Schachter, 'The Twilight Existence of Non-binding International Agreements', [1977] *The American Journal of International Law* 2 296, 296. See also *Qatar v Bahrain* (1994) ICJ 112, 23–25.

[113] See Kirsten Schmalenbach, 'Article 2. Use of Terms', in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (Springer 2012), 40–41.

[114] Hollis supra note110, 27.

[115] Ibid, 27–28.

law status (Article 6 TEU). Moreover, Article 6 TEU codifies previous CJEU case law by explicitly recognizing as general principles of EU law fundamental rights resulting from the European Convention on Human Rights and the constitutional traditions of Member States.[116]

While the direct application of international human rights instruments to Frontex is less clear, the agency is bound by the EU human rights regime. Frontex is bound by the provisions of the CFR[117] and is subject to human rights obligations binding on the EU as such. The CJEU should ultimately review the compliance of Frontex's legal framework and actions with EU human rights standards.

There are some difficulties when it comes to assessing Frontex's cooperation with third countries in light of fundamental rights. First, the precise scope and obligations resulting from various fundamental rights are not always clear. While the CJEU often follows the relevant European Court of Human Rights jurisprudence closely, it does not always do so. In addition, difficulties arise where the CJEU distils the content and threshold of human rights protection reflecting the common constitutional traditions of Member States.[118] Furthermore, the CJEU does not seem to follow a consistent approach with regard to the protection of fundamental rights by balancing this on a case-by-case basis against other considerations such as ensuring the autonomy and effectiveness of EU law and policy.[119]

Second, a particular aspect of Frontex's cooperation with third countries is the consideration of their human rights record. While it can be argued that the EU human rights regime compels the agency to take into account adherence to human rights in the third countries with which it pursues cooperation,[120] there is less clarity on the criteria for assessing human rights standards in those countries. There are thus certain challenges involved in determining whether a potential partner third country offers sufficient or EU-equivalent protection of human rights.

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[116] See Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases and Materials* (OUP 2015), 384–386.

[117] Articles 1–6, 8, 17–19 and 51 CFR are relevant in the context of Frontex's cooperation with third countries.

[118] Craig and de Búrca, supra note 116, 388–389.

[119] See, for instance, Judgment of the Court of 15 February 2016, *J.N. v Staatssecretaris van Veilgheid en Justitie*, Case C-601/15 PPU, ECLI:EU:C:2016:84, paras 47–48 and 78–81. For an insightful and critical analysis of CJEU's approach to fundamental rights in this case, see Joyce De Coninck, '*Rétention de Demandeurs d'Asile dans l'Union Européenne et Instruments Parallèles de Protection des Droits Fondamentaux: Enseignements de l'Arrêt N.*', [2017] *Cahiers Droit Européen* 1 83, 102–106.

[120] See Fink, supra note 79, 33–35.

Third, one may wonder how legal review of Frontex's cooperation with third countries in light of human rights can be effectively ensured. While the CJEU is competent to review the legality of Frontex's legal framework for international cooperation, as well as any legal acts intended to produce legal effects *vis-à-vis* third parties,[121] judicial review becomes problematic with regard to international cooperation instruments, which are non-binding or have an unclear legal nature.[122]

7. ASSESSMENT

Frontex is embedded in the institutional architecture of the Union as a technical-operational agency entrusted with certain tasks in the field of EU border management; Member States retain a primary role, including as regards operational cooperation with third countries. The international cooperation tasks and instruments entrusted to Frontex by its former Founding Regulation were limited by and instrumental to its subject-matter competence and tended to take place within the framework of the EU external relations policy.

Frontex's working arrangements with third countries suggest quite a low level of cooperation and bespeak a concern to avoid regarding them as binding international agreements. However, while the prevailing view of their nature is that they are not treaties under international law,[123] an overall analysis of their wording and content suggests that they are still capable of giving rise to limited legal rights and obligations. Most of these rights and duties would become active upon the conclusion of subsequent agreements between the parties; but such instruments nevertheless arise within the framework and with a view to implementing the existing working arrangements.

Frontex's working arrangements have established cooperation on a technical level with third countries to facilitate full implementation of the agency's regulatory framework. The Commission was involved in the negotiation and conclusion of these arrangements from the very beginning, and was capable of steering the agency through this process. These controls seemed sufficient to ensure the necessary consistency with the overall priorities in the EU external

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[121] Article 263 TFEU.

[122] It seems that the CJEU also tends to assert jurisdiction in cases involving non-binding acts where the issue under consideration concerns the competences of the EU institutions and the principle of institutional balance; see *Council v Commission*.

[123] See Rijpma, supra note 9, 333; Fink, supra note 79, 27. Vara appears to take a somewhat mixed view, emphasizing that Frontex working arrangements have important implications for human rights and should thus be subject to the prior approval of the European Parliament; Juan S Vara, 'The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls', [2015] *EFAR* 1 115, 136.

action area and to preserve the Commission's role under Article 17 TEU. They also arguably provided an effective guarantee that Frontex's working arrangements were in line with its legal framework and with Article 218 TFEU agreements. Considering the qualification of Frontex's working arrangements as a form of EU external administrative action, the duty placed on the agency merely to inform the European Parliament about working arrangements concluded with third countries did not *per se* affect the European Parliament's powers under Article 218 TFEU.

The legal design of other aspects of Frontex's international cooperation with third countries also suggests that the agency would likely pass the '*Meroni*-light' test. This seemed to be the case regarding the agency's deployment of LOs, subject to approval by the Management Board, to the Commission's prior opinion, and to a duty to inform the European Parliament.[124] The old Frontex Regulation also required that the roles and tasks of LOs be aligned with the Union's external policy, comply with EU law and observe fundamental rights. Together, this suggests that the agency's discretion was sufficiently limited. In addition, the agency's power to finance technical assistance projects in third countries seemed sufficiently restricted by legal design, as such projects were explicitly confined to matters which fell under the Frontex Regulation and subject to the provisions governing the relevant financial instruments.[125]

One element of the agency's international dimension that raised greater concerns in light of *Meroni* relates to Member States' entrustment of powers to Frontex via their bilateral agreements with third countries. Although the old Frontex Regulation stipulated that such Member State cooperation with third countries must not affect the agency's mandate and must be complementary to the Agency's activities,[126] the lack of formal provisions regarding safeguards and oversight could have led to situations where Frontex was delegated powers in breach of the *Meroni* requirements.

The New Frontex Regulation further limits the agency's discretion and slightly reinforces the supervisory and accountability mechanisms as regards cooperation with third countries. It does so by explicitly establishing the agency's general accountability towards the European Parliament and the Council,[127] compelling Frontex to coordinate with the EU delegations, and formally enhancing the Commission's and European Parliament's roles regarding

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[124] Articles 14(3) and (8) of Regulation 2007/2004.

[125] However, the potential mismatches between border management aims and the objectives of various external policies (eg development cooperation) within which financial instruments accessed by Frontex are set up might be legally problematic; see Andrade, supra note 3, 178−182.

[126] Article 2(2) of Regulation 2007/2004.

[127] Ibid, Article 7.

Frontex working arrangements. In addition, the formal duties imposed on Frontex to inform the European Parliament of the bulk of its international cooperation and include an assessment of its cooperation with third countries in its annual reports can be seen as increasing scrutiny of its international dimension.[128] The New Frontex Regulation also addresses concerns relating to the possibility for Member States to include provisions on the competence of Frontex in their bilateral agreements with third countries that require the agency's agreement to such provisions and notification of the Commission.[129] These elements of the new legal regime suggest that the agency's international cooperation with third countries, including its working arrangements, would likely comply with *Meroni* and institutional balance in EU external relations.

Regarding human rights protection, the former Frontex Regulation included a number of specific instruments and safeguards intended to guarantee the observance of fundamental rights in the agency's activities. These were the Frontex Code of Conduct and the Fundamental Rights Strategy, the establishment of the Frontex Consultative Forum and the appointment of the Frontex Fundamental Rights Officer (FRO) and the Data Protection Officer. The New Frontex Regulation takes further steps to address human rights concerns, including multiple provisions that refer to fundamental rights and non-refoulement.[130] Notably, Article 34 explicitly imposes a general obligation on the agency to act in accordance with EU and international human rights law in all its activities. Moreover, a Fundamental Rights Complaint Mechanism, open to anyone directly affected by the agency's actions,[131] and a duty to consult the FRO concerning joint operations have been added to the human rights protection arsenal.[132] This suggests that the New Frontex Regulation requires adherence to human rights in the agency's cooperation with third countries; although some have criticized these improvements as 'very mild' in comparison to the agency's increased powers.[133]

However, several questions concerning Frontex's cooperation with third countries remain to be addressed. One of the most significant new elements of the agency's international dimension – the possibility to carry out actions in

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[128] However, unlike the former regulation, which limited the scope of the agency's information duties to the European Parliament, but required that the European Parliament be 'fully informed', the New Frontex Regulation simply stipulates a duty to inform the European Parliament.

[129] Article 54(10) of Regulation 2007/2004.

[130] See, for instance, Articles 14, 16, 21, 25, 27−28, 34, 40, 54−55 of Regulation 2016/1624.

[131] Ibid, Article 72.

[132] Ibid, Article 71(3).

[133] Ferraro and Capitani, supra note 7, 396.

third countries – raises some serious legal concerns. While specific aspects of the agency's actions on the territory of (neighbouring) third countries must be regulated through a status agreement concluded by the EU with the respective third country under Article 218 TFEU, it is not very clear how this will affect the agency's tasks and powers under the Frontex Regulation. For instance, could such an agreement grant extended or additional powers to Frontex, or could it weaken some elements of the agency's 'normal' legal framework? Although status agreements must ensure overall respect of fundamental rights, their scope is rather vaguely defined as covering 'all aspects that are necessary for carrying out the actions' on the territory of third countries,[134] which includes intricate issues such as receiving instructions from third country authorities and exercising powers according to the law of the respective third country. And while an Article 218 TFEU agreement (ie, a status agreement) may in principle derogate from secondary legislation, one may wonder whether the general commandment that the agency also comply with EU law when cooperation with third countries takes place on their territories entails that there should be consistency between the general framework laid down by the Frontex Regulation and a status agreement concluded under that regulation. In any case, the Commission's draft status agreement with third countries includes clauses that seem to deviate from the provisions of the Frontex Regulation (eg, suspension/termination of operations; processing of personal data).[135]

Moreover, it is unclear what the threshold of 'minimum human rights standards' means in the case of Frontex LOs in third countries and how this should be assessed. For the time being, Frontex has posted LOs in Serbia, Turkey and Niger − the latter country having arguably a questionable human rights record. Moreover, one may wonder whether compliance by third countries with minimum human rights standards is sufficient to establish cooperation in light of the Union's human rights *acquis*. A similar concern exists with regard to the agency's possibility to cooperate under working arrangements and to carry out and finance technical assistance projects in third countries with questionable human rights records. In any case, there seems to be a tension between promoting European border management standards abroad and the effective need for operational cooperation with third countries on the one hand, and the isolation of certain third countries because of doubtful human rights

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[134] Article 54(4) of Regulation 2016/1624.

[135] See supra note 77; see also Articles 5 (suspension/termination of operations) and 9 (processing of personal data) of the Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania (OJ L 46/3, 10 February 2019, pp 3−10) by comparison with Articles 25 and 45 of Regulation 2016/1624.

records on the other. Furthermore, going beyond the declaratory provisions in the New Frontex Regulation concerning full respect for fundamental rights and non-refoulement, one may wonder whether the legal framework offers sufficient legal safeguards regarding the agency's activities on the territory of third countries or within the framework of agreements between Member States and third countries. While the New Frontex Regulation consolidates supervisory and accountability mechanisms for international cooperation with third countries, only time will tell how effectively the agency's activities will be scrutinized and what the ensuing legal and practical consequences will be. For now, Frontex has been criticized for failing to provide its FRO with adequate resources and for limiting access to information to the Frontex Consultative Forum on Fundamental Rights, thereby hindering effective scrutiny of the agency's performance in light of its fundamental rights obligations.[136]

One striking gap in the new Frontex Regulation is the lack of explicit provisions on judicial scrutiny of the agency's actions. In this respect, the Regulation merely maintains the provisions of the former Frontex Regulation regarding the agency's non-contractual liability. Even in the case of the Fundamental Rights Complaint Mechanism, the new Regulation does not explicitly provide for the possibility of recourse to the CJEU. While this gap is partially closed by the general system of judicial remedies in the Founding Treaties,[137] one may wonder whether judicial review of the agency's working arrangements and subsequent agreements with third countries is possible. While the main EU institutions and the Member States could in principle challenge such acts if they are intended to produce legal effects towards third parties − and even in cases where this is not so obvious,[138] as shown in the CJEU's latest case law on the Union's international cooperation instruments[139] − the possibility for individuals to challenge Frontex's international cooperation instruments is likely to remain quite limited.[140]

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[136] Frontex Consultative Forum on Fundamental Rights, *Fifth Annual Report* (2017) 5−7.

[137] In particular, Article 263 TFEU (annulment action) is relevant here and perhaps also Article 267 TFEU (preliminary ruling procedure), provided that there is a national measure (eg, adopted by a national border guard authority) that can be challenged before a national court, and which would require an interpretation or assessment of the validity of an act of Frontex.

[138] For example, in cases involving potential breach of institutional balance or lack of competence.

[139] See *Council v Commission*.

[140] Obvious reasons for this include the challenges that individuals face in meeting various admissibility requirements, which flow from the blurred legal nature of such instruments (eg, are they legally binding acts? Intended to produce effects towards third parties? Regulatory acts entailing implementing measures?). In these circumstances,

8. CONCLUSION

An examination of the legal framework and practice of Frontex's international cooperation reveals that the international dimension of Frontex is instrumental to the agency's core mandate and is embedded in the external dimension of the EU border management area. Both the former and current Frontex Regulations explicitly make the scope of the international cooperation pursued by the agency subject to its technical-operational role and tasks, and dependent upon the EU's external relations policy.

This analysis suggests that the agency's international cooperation tasks and actions remain within the scope of its mandate and are subject to sufficient supervision and conditions, in line with the *Meroni* requirements. The working arrangements that Frontex has concluded thus far as technical-administrative agreements also seem to be generally in line with *Meroni* and the principle of institutional balance.

The New Frontex Regulation largely maintains the design of the agency's international dimension based on the previous legal framework, but also extends its external powers while reinforcing the system of safeguards and controls over its international activities. It arguably makes further improvements by ensuring that the agency pays due consideration to fundamental rights in its cooperation with third countries. Nonetheless, the Regulation also raises a number of unresolved questions regarding the agency's operations in third countries and effective scrutiny of its international cooperation, including monitoring compliance with fundamental rights, legal review and legal protection.

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the legal avenues most likely open to the individual are the indirect avenues under Article 267 TFEU (where a case before a national court would require an interpretation or assessment of the validity of a Frontex international cooperation instrument) or under Article 277 TFEU (in the context of a direct challenge to an act of Frontex based on an international cooperation instrument that qualifies as an 'act of general application').

4. Cooperation of Europol and Eurojust with external partners in the fight against crime: a legal appraisal

Chloé Brière[1]

1. INTRODUCTION

Security and the fight against crime have always been topical issues in European affairs, and mechanisms to promote cooperation between national authorities in this field date back to the late 1970s. Introduced on a purely intergovernmental basis in 1993 as part of the Third Pillar of the EU, police and judicial cooperation in criminal matters (PJCCM) has become one of the fastest-growing domains of EU action. While deepening cooperation between EU Member States, the EU has also sought to extend its cooperation with third countries and international organizations in order to better investigate and prosecute transnational forms of crime, with connections beyond the EU territory.

The EU's activities in criminal matters were given new impetus with the entry into force of the Lisbon Treaty. The latter enshrined, as one of the objectives of the EU, ensuring 'a high level of security through measures to prevent and combat crime' (Article 67(1) of the Treaty on the Functioning of the European Union (TFEU)). It also abolished the pillar structure, thus subjecting EU criminal law instruments to the Community method (albeit with some exceptions),[2] and granted the EU new competences to develop its activities in the field of PJCCM. The Lisbon Treaty also singled out the two EU agencies

[1] The author would like to thank Ian Cooper and Federico Fabbrini for their valuable comments and remarks on this chapter.

[2] These exceptions include, for instance, the right of initiative shared between the Commission and a quorum of Member States, and the emergency brake procedure allowing a Member State to refer to the European Council draft directives that 'would affect fundamental aspects of its criminal justice system' (Articles 82(3) and 83(3) TFEU).

active in this field, Europol and Eurojust, which are the only EU agencies whose mandates are defined in EU primary law (Articles 88 and 85 TFEU).

Given their role of supporting and strengthening cooperation between EU Member States in criminal matters, Europol and Eurojust are key actors in preserving the EU's internal security and combating crime. They possess complementary mandates and competences. The two agencies – like other EU agencies, such as Frontex[3] – also participate in the EU's efforts to promote cooperation in criminal matters with external partners. Europol and Eurojust have developed within their respective mandates tools and expertise that are crucial for the success of cross-border investigations and prosecutions, and which make them interesting partners from the perspectives of third countries and international organizations. Both agencies have concluded agreements with external partners, establishing the basis for diverse forms of cooperation.

The research objective of this chapter is to assess the recently revised legal framework organizing the mandate and work of Europol and Eurojust, and more particularly the provisions regulating their external activities. Their cooperation with external partners faces political challenges, as the agencies remain relatively new actors which are still in the process of gaining the trust of national authorities. Similarly, a third country may prefer not to cooperate with the agencies and instead conclude bilateral cooperation agreements with individual Member States, which remain the only actors with operational capabilities in the sense of deployable personnel and technical means.[4] However, such political challenges will not be addressed in this chapter. Instead, this chapter conducts an appraisal of the legal frameworks under which the two agencies develop their external activities. It focuses on two challenges that the agencies must address: (1) the need to accommodate the diversity that exists among third countries, while preventing a situation in which differentiation compromises smooth cooperation; and (2) the importance of upholding the rule of law, the protection of fundamental rights and data protection rules enshrined in EU primary law and applicable to the EU's external relations (Article 20 TEU).

Assessing the appropriateness of the legal frameworks governing their external activities in meeting the abovementioned challenges is of crucial importance, considering the emphasis placed by the EU institutions and Member States on strengthening and deepening cooperation in criminal

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[3] For a discussion of Frontex's external activities, see Chapter 3 by Florin Coman-Kund.

[4] Jörg Monar, *The External Dimension of the EU's Area of Freedom, Security and Justice* (Swedish Institute for European Policy Studies 2012), 59.

matters with external partners – for instance, in relation to counter-terrorism or combating migrant smuggling.[5]

This chapter is structured as follows. After analysing the legal framework under which EU agencies develop their external activities (section 2), the two main challenges faced by Europol and Eurojust will be examined (section 3). Finally, accountability mechanisms for the external activities of the two agencies will be reviewed (section 4).

2. LEGAL FRAMEWORK APPLICABLE TO COOPERATION WITH EXTERNAL PARTNERS

From a very early stage of their existence, Europol and Eurojust sought to cooperate with external partners operating in the field of criminal justice. Their constitutive instruments foresaw the possibility for the two agencies to conclude agreements[6] that inserted themselves into the EU's efforts to develop closer cooperation with certain countries, such as the Member States of the European Economic Area or States participating in the Stabilization and Association Process. Both agencies, as EU agencies, were also bound by the rules guaranteeing the protection of fundamental rights, and the existence of an adequate level of data protection was a prerequisite for cooperation.

The Lisbon Treaty introduced several changes to the legal framework governing the EU's external relations, which impacted on the legal frameworks under which Europol and Eurojust conduct their external activities. The Treaty enshrined the single legal personality of the EU, thus bringing together different external policies previously carried out under two different regimes (EC versus EU) under a single framework; it also imposed on the EU institutions a duty to ensure consistency and coherence between the different areas of the EU's external actions (Article 21(3) TEU). This duty of coherence is also applicable to the external dimension of the Area of Freedom, Security and Justice (AFSJ). These constitutional changes partially explain why the Commission in

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[5] See, for instance, Council of the European Union, Conclusions on EU External Action on Counter-terrorism, 19 June 2017, Doc 10384/17.

[6] The Europol Convention established Europol as a fully fledged international organization, with the ability to enter into binding international agreements; and after its transformation into an EU agency, Europol retained the ability to conclude cooperation agreements. As an agency of the EU, Eurojust also obtained the ability to conclude agreements. However, the capacity to conclude agreements is provided not in the basic treaties, but in secondary instruments. This may cast doubt on the constitutionality of such agreements; see Piet Eeckhout, *EU External Relations Law* (Oxford University Press, 2012), 163. However, the Court of Justice has not questioned this point (see Judgment of the Court of 10 September 2015, *Parliament v Council*, Case C-363/14, ECLI:EU:C:2015:579, paras 49–50). Analysed in Coman-Kund, supra note 3.

2013 made two proposals for Regulations.[7] Whereas the Europol Regulation was adopted in May 2016 and entered into force on 1 May 2017,[8] the Eurojust Regulation was only adopted in November 2018 and will enter into force in December 2019.[9] The provisions contained in the Regulations indicate a move towards harmonization of the legal frameworks applicable to the two agencies.

A first sign of such harmonization is found in the provisions establishing the general framework for cooperation with external partners. For the Commission, the changes introduced by the Lisbon Treaty also affect the agencies, which can no longer negotiate international agreements themselves.[10] The revision of the texts governing Eurojust's and Europol's external activities was an opportunity for the EU legislature to insert mirroring provisions, drafted in almost identical terms, in the two instruments, improving the coherence of the agencies' and the EU's external activities. Both agencies may establish and maintain cooperative relations with the competent authorities of third countries and international organizations. They may also conclude working arrangements and exchange all information with these entities (Article 23 of the Europol Regulation and Article 47 of the Eurojust Regulation). The Council retains a primordial role, since it authorizes the opening of negotiations, addresses directives to the negotiators and authorizes the conclusion of agreements. However, the conclusion of cooperation agreements is now subject to the standard procedure defined in Article 218 TFEU applicable to the conclusion of all the EU's international agreements.[11] This grants new powers to the Commission, which can submit recommendations to the Council; and to the European Parliament, which must give its consent to the conclusion of future agreements.

A second sign of this harmonization can be found in the provisions regulating the transfer of strategic and operational data[12] to third countries and

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[7] Commission, Proposal for a regulation on the EU Agency for Law Enforcement Cooperation and Training (Europol), 27 March 2013, COM (2013) 173 final. Commission, Proposal for a regulation on the EU Agency for Criminal Justice Cooperation (Eurojust), 17 July 2013, COM (2013) 535 final.

[8] Regulation (EU) 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) [2016] OJ L 135/53.

[9] Regulation (EU) 2018/1727 of the European Parliament and the Council of 14 November 2018 on the European Agency for Criminal Justice Cooperation (Eurojust) [2018] OJ L 295/138.

[10] European Commission, supra note 6, 6.

[11] See on this point chapter 2 by Merijn Chamon and Valerie Demedts.

[12] Personal data processed, stored and transferred by the agencies may concern persons suspected or accused of committing a criminal offence under national law, but it may also be personal data of victims of a criminal offence, witnesses or other persons

international organizations. The rules regulating the transfer and receipt of strategic data are less strict: the two agencies are authorized to process and exchange such data as long as this is necessary for the performance of their missions (Articles 17(1)(b) and 23 of the Europol Regulation and Article 47(2) of the Eurojust Regulation). In contrast, the possibility to transfer operational data, including personal data, is strictly circumscribed.[13] Both texts foresee three 'normal' situations in which personal data can be transferred to external partners: (1) on the basis of a cooperation agreement concluded before the entry into force of the Regulations; (2) on the basis of an international agreement concluded between the EU and the external entities pursuant to Article 218 TFEU; and (3) on the basis of a Commission adequacy decision adopted in accordance with Article 36 of Directive (EU) 2016/680[14] (Article 25(1) of the Europol Regulation and Article 56(2) of the Eurojust Regulation). In addition to these 'normal' situations, personal data may be transferred on a case-by-case basis in 'exceptional circumstances' (Article 25(5) of the Europol Regulation and Article 59 of the Eurojust Regulation).

The process of harmonization nevertheless acknowledges the specificities of each agency and differences linked to their respective mandates are apparent. For instance, the Europol Regulation foresees that Europol may establish and maintain cooperative relations with 'private parties', defined as entities and bodies established under the law of a Member State or third country (Article 23(1), read together with Article 2(f), of the Europol Regulation) – a possibility not foreseen for Eurojust. This possibility is justified by the fact that 'companies, firms, business associations, non-governmental organisations and other private parties hold expertise and information of direct relevance to the prevention and combating of serious crime and terrorism' (Recital 30 of the Europol Regulation). Europol's cooperation with private parties may even

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who can provide information concerning criminal offences, or in respect of persons under the age of 18. See in this regard Article 30 of the Europol Regulation and Article 27 of the Eurojust Regulation.

[13] 'Strategic data' refers to classified data used to review current and emerging trends in the crime environment and to prepare, for instance, threat assessments; while 'operational data' refers to data linked to a specific case, including personal data, whose analysis assists with the conduct of criminal proceedings.

[14] Directive (EU) 2016/680 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, [2016] OJ L 119/89. Although Directive 2016/680 does not apply to the processing of personal data by EU agencies (Article 2(3)), some of its provisions are relevant, especially Article 36 defining the modalities under which the Commission prepares and adopts adequacy decisions.

– under strict conditions – cover the receipt and processing of personal data obtained from them (Article 26 of the Europol Regulation). This possibility is in line with legislative and policy developments at the national and European level,[15] under which private parties are increasingly called upon to collaborate with competent authorities and agencies in the prevention and combat of serious crime.[16]

Concerning Eurojust, most of the specificities build upon the previous legal framework and refer to its specific judicial competences. For instance, Eurojust retains the competence to post liaison magistrates to third countries (Article 53 of the Eurojust Regulation). These magistrates will act on behalf of all EU Member States, something which has important symbolic value and will facilitate even further judicial cooperation with third countries. Eurojust may also coordinate, with the agreement of the Member States concerned, the execution of requests for judicial cooperation issued by a third country where these requests require execution in at least two Member States as part of the same investigation (Article 54 of the Eurojust Regulation).

The legal frameworks governing the external activities of Europol and Eurojust have evolved from *sui generis* regimes to their integration into the EU's general external relations regime. A certain harmonization has been highlighted, reinforcing consistency and coherence in their external activities. Both agencies obtained new legal bases for intensifying their cooperation with third countries, including in exceptional circumstances; this change has been particularly welcomed by practitioners, since it allows for the exchange of data with third countries on a more flexible basis.[17] This better suits operational needs, particularly in emergency situations. Nonetheless, these changes also present several significant legal challenges.

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[15] See, for instance, the EU Internet Forum to reduce access to terrorist content and prevent radicalization.

[16] On the cooperation of private parties in the prevention and combat of trafficking in human beings, see, for instance, Chloe Brière, 'Combatting trafficking in human beings: moving beyond labels with the EU's multidisciplinary, integrated and holistic approach', in Francesca Galli and Anne Weyembergh (eds), *Do Labels Still Matter?* (Editions de l'Université de Bruxelles, 2014), 19–42.

[17] See, among other things, the intervention of B de Buck, Europol, during the European Criminal Law Academic Network (ECLAN) 10th Anniversary Conference, Brussels, 25–26 April 2016.

3. CHALLENGES FACED IN THE DEVELOPMENT OF THEIR EXTERNAL ACTIVITIES

The first challenge faced by Europol and Eurojust consists of the need to accommodate their diversity in the provisions defining the degree of cooperation that they can develop with national authorities. This results in a complex legal framework, affecting the efficiency and effectiveness of their cooperation with external partners.

The second challenge concerns their duty to respect and protect fundamental rights, as well as data protection rules, in the conduct of their external activities, while ensuring that cooperation with external partners answers to operational needs and priorities. These two challenges will be examined successively.

3.1 Accommodating Diversity

The development of EU activities in the AFSJ has always been perceived as particularly sensitive with regard to Member States' sovereignty. Furthermore, the competences granted to the EU remain shared with Member States (Article 4 TFEU); and Europol and Eurojust are service providers that assist the competent national authorities upon request and do not have operational powers, but only the power to coordinate operational activities by national authorities.

These considerations affect the external activities of the EU in the field of criminal justice. Complexity first arises because the EU Member States have discretion to develop their own external cooperation in this field – for instance, through bilateral cooperation agreements.[18] These national external activities will not be further discussed in this chapter, which instead will focus on a second factor of complexity residing in the diversity in the two agencies' external cooperation with national authorities.

A first element of diversity results from the nature of the external partner. Cooperation with an international organization will differ from cooperation with a third country, since the former's activities are determined by the mandate it receives from its State parties, while the latter possesses State powers and operational capabilities. The existing agreements that Europol and Eurojust have concluded with international organizations do not allow for the transfer of all types of data and foresee strategic cooperation rather than operational cooperation.[19] The exchange of personal data is never envisaged and

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[18] Monar, supra note 4, 59.

[19] For example, in the Cooperation Agreement between Europol and the United Nations Office on Drugs and Crime, the transfer of information by Europol shall not include data relating to an identified individual or identifiable individuals (Article 4(1)).

their cooperation is far less advanced than cooperation with third countries, thus raising no further comments.

A second element of diversity resides in the modalities of cooperation foreseen. For instance, Europol distinguishes between two types of agreements that it concludes with third countries.[20] Strategic Cooperation Agreements aim to enhance cooperation in preventing, detecting, suppressing and investigating serious forms of international crime. In addition to the designation of a national contact point in the country, these agreements foresee the exchange of strategic and technical information, which is limited to information of a general nature (eg, *modus operandi*, threat assessments), and does not include data relating to an identified individual or identifiable individuals. In contrast, Operational and Strategic Cooperation Agreements represent a more advanced form of cooperation, allowing for the transmission of personal data and classified information and thus including much more detailed measures on data protection. These more advanced agreements are preferred by third countries, as they provide for more extensive cooperation; but signatories must demonstrate that they provide an adequate level of data protection and sufficient guarantees to be allowed to receive personal data. Similarly, Eurojust's modalities of cooperation with third countries are diverse, even though variations – such as the insertion of provisions concerning privacy and data protection – reflect more the evolution of EU law, especially on data protection, than the desire to tailor modalities of cooperation to one specific partner.[21]

Complexity is further increased by the insertion of the agencies' agreements into an extensive, multi-layered framework of legal relationships between the EU and third countries in the field of security.[22] A first additional layer is composed of the agreements on extradition and mutual legal assistance concluded by the EU; another layer consists of agreements characterized as

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See also the memorandum of understanding between Eurojust and Interpol, which refers to the exchange of general information (Article 3) and the exchange of strategic and technical information (Article 4).

[20] For the list of agreements, see Europol's website at www.europol.europa.eu/partners-agreements/operational-agreements and www.europol.europa.eu/partners-agreements/strategic-agreements, last accessed 14 October 2018.

[21] See, for instance, Article 9 of the Cooperation Agreement with Ukraine, or Article 11 of the Cooperation Agreement with Montenegro; whereas such provision on privacy is absent from the Cooperation Agreement between Eurojust and the US.

[22] On such multi-layered legal framework in the EU-US relationship; see Valsamis Mitsilegas, 'The External Dimension of Mutual Trust: the Coming of Age of Transatlantic Counter-terrorism Cooperation' in Chloé Brière and Anne Weyembergh (eds), *The Needed Balances in EU Criminal Law: The Past, the Present and the Future* (Hart, 2017), 217.

'executive'[23] or 'operational' agreements, such as the agreements on the transfer of Passenger Name Record (PNR) data, which also impose obligations on private parties.

The external cooperation between Europol and Eurojust and their partners is thus marked by diversity. From a practitioner's perspective, such diversity requires in each case that cooperation with foreign counterparts be adapted depending on the instruments applicable under international, European and national law. Furthermore, the importance of data protection as a prerequisite for operational cooperation itself contributes to diversity, as it prevents the conclusion of certain agreements with countries or organizations that do not guarantee an adequate level of protection.

3.2 Ensuring Respect for Fundamental Rights – Focus on Data Protection Rights

As EU agencies, Europol and Eurojust are bound by the EU's principles and values, especially the values of respect for the rule of law and respect for human rights (Article 2 TEU). Specific provisions on the respect for fundamental rights apply to them (Article 6 TEU and the EU Charter of Fundamental Rights), as do the requirements regarding data protection (Article 16 TEU). These provisions are essential for agencies competent to intervene in the field of criminal justice, especially considering the increasing use of modern techniques and technologies to combat crime.

Within their activities, Europol and Eurojust store and process data, including personal data, that is transferred from national authorities. Under the conditions described above, they may also transfer data to international organizations and third countries. In conducting these activities, the two agencies must comply with key instruments, such as the EU Charter of Fundamental Rights, the European Convention on Human Rights and EU secondary law on data protection,[24] which protect the rights of individuals, especially their right to privacy and respect for private life. Any interference – even if allegedly justified by the objective of combating crime – must respect the limits set in EU and European laws, as well as in the case law of the European Court of Human Rights and the Court of Justice of the European Union (CJEU).[25]

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[23] This expression is borrowed from Mitsilegas (see note 21), who therefore does not have the same 'executive' agreements in mind as Chamon and Demedts in Chapter 2.

[24] Valsamis Mitsilegas, 'EU Criminal Law after Brexit', [2017] *Criminal Law Forum* 1 219, 238.

[25] See, for instance, Judgment of the Court of 8 April 2014*, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and*

These considerations are reflected in the new instruments applicable to Europol and Eurojust, in which the number of provisions relating to data protection has substantially increased, with the introduction of new rules and procedures for the processing of personal data. Provisions concerning the time limits for the storage of personal data have been introduced (Article 31 of the Europol Regulation and Article 29 of the Eurojust Regulation), together with provisions regarding the rights of access, rectification, erasure and restriction of data subjects (Articles 36–37 of the Europol Regulation and Articles 31–33 of the Eurojust Regulation). A specific provision in the Europol Regulation indicates that any information, received notably from a third country, shall not be processed if it has clearly been obtained in obvious violation of human rights (Article 23(9) of the Europol Regulation).

Specific provisions also govern the transfer of personal data to third countries and international organizations. Such data shall be processed and transferred only to the extent necessary for the performance of the tasks of the agencies (Article 25(1) of the Europol Regulation and Article 56(1) of the Eurojust Regulation) – a wording that may be interpreted as introducing a general proportionality requirement, in line with data protection standards. In addition, exchanges of personal data with third countries shall be based on the adoption of an EU adequacy decision confirming that the country offers an adequate level of data protection[26] in the eyes of the EU.[27] For some authors, these requirements almost equate to the extraterritorial application of EU data protection standards, as they imply that data may be transferred to third countries only if EU legal standards apply to their processing and they result in obligations based on EU law that are directly applicable to parties outside the EU.[28]

A further indication of the importance of data protection standards can be found in the strict wording of the derogations allowing for the transfer of personal data in the absence of an adequacy decision. Such transfers are not applicable to systematic, massive or structural transfers, and are authorized for a specific period on a case-by-case basis (Article 25(6) of the Europol

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Kärntner Landesregierung and Others, Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238; Judgment of the Court of 6 October 2015, *Maximillian Schrems v Data Protection Commissioner*, Case C-362/14, ECLI:EU:C:2015:650; and Opinion 1/15 of the Court of 26 July 2017 pursuant to Article 218(11) TFEU, ECLI:EU:C:2017:592.

[26] On the definition of an adequate level of protection, see *Maximillian Schrems v Data Protection Commissioner,* supra note 24, para 73.

[27] Mitsilegas, *supra* note 23, 244.

[28] See in respect of Articles 25 and 26 of the General Data Protection Regulation, Christopher Kuner, 'Extraterritoriality and regulation of international data transfers in EU data protection law', [2015] *International Data Privacy Law* 4 235, 241.

Regulation and Article 59 of the Eurojust Regulation). Furthermore, personal data may not be transferred if it is considered that the fundamental rights and freedoms of the data subject concerned override the public interest (Article 25(5) of the Europol Regulation and Article 59(1)(d) of the Eurojust Regulation).

These regulatory modifications demonstrate the importance granted to respect for fundamental rights, especially those potentially impacted by the storage, processing and transfer of personal data, and how this has been reflected in the external activities of the two EU agencies. Compliance with data protection standards constitutes a prerequisite for the transfer of personal data to third countries and international organizations. Yet a certain flexibility is foreseen, allowing, for instance, the transfer of personal data without a cooperation agreement or an adequacy decision. This may be welcomed from a practical perspective. The conclusion of such an agreement or the adoption of an adequacy decision by the Commission can be time consuming and may not allow for prompt reactions to urgent operational needs, influenced by quick changes in the criminal landscape.[29] In addition, under the current framework, adequacy decisions can be adapted to the content, nature or purpose of the exchange of information. For instance, a difference could be made between an adequacy decision obtained for an exchange of information in which the data is not stored afterwards in Europol's databases and one concerning the transfer of information which will be subsequently stored in Europol's databases.[30]

However, this flexibility may also cast doubt upon permanent respect for fundamental rights. Before being allowed to receive data from Europol or Eurojust, a third country must demonstrate that it ensures, 'by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union'.[31] This rather high threshold may not be met by all third countries with which the two agencies seek to cooperate and the recourse to derogatory provisions might be preferred in certain cases. The effective implementation of the provisions organizing the agencies' cooperation with third countries and international organizations must thus be closely monitored, and accountability mechanisms are essential in this regard.

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[29] Intervention of B de Buck during the ECLAN 10th Anniversary Conference, Brussels, 25–26 April 2016.

[30] Ibid.

[31] *Maximillian Schrems v Data Protection Commissioner,* supra note 25, para 73.

4. ACCOUNTABILITY OF THE AGENCIES FOR THEIR EXTERNAL ACTIVITIES

As EU agencies, Europol and Eurojust are held accountable for their activities. This chapter will focus on one specific dimension of their accountability: the protection of fundamental rights, based on which the two agencies must demonstrate that they cooperate with third countries without violating fundamental rights. This specific dimension is singled out given the sensitivity of the cooperation of Europol and Eurojust with third countries, particularly in relation to the transfer of personal data. In the previous section, the provisions concerning the protection of fundamental rights were examined, but this analysis is not enough to conclude whether in practice the right balance between the effectiveness of their cooperation and the respect for fundamental rights is ensured.

Given the recent entry into force of the Europol Regulation and the even more recent adoption of the Eurojust Regulation, it is still too early to assess the practical implementation of these provisions. Nevertheless, the accountability mechanisms foreseen in the two instruments are a solid basis for such prospective assessment. They constitute a way to monitor the external activities of the two agencies and to identify and correct violations of fundamental rights. In the current multi-level architecture of the PJCCM, it is important to stress that there is a multiplicity of applicable mechanisms to hold the competent authorities accountable for their activities, including their cooperation with third countries. A first step in holding them accountable is to identify which authority is responsible for an activity. In this regard, the inclusion in both the Europol and Eurojust Regulations of provisions allocating responsibility and liability between the agencies and national authorities is to be welcomed. Further attention will be devoted to the mechanisms governing their political and judicial accountability.

4.1 Political Accountability

Political accountability refers, from a democratic perspective, to the possibility granted to democratic forums to effectively monitor the exercise of governmental power. That is, 'public accountability is an essential precondition for the democratic process to work, since it provides citizens and their representatives with the information needed for judging the propriety and effectiveness of government conduct'.[32]

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[32] Elena Madalina Busuioc, *The Accountability of European Agencies – Legal Provisions and Ongoing Practices*, (Eburon, 2010), 39.

For EU agencies such as Europol and Eurojust, the entry into force of the Lisbon Treaty required the insertion of new provisions allowing for stronger oversight of the agencies' activities by the democratically elected representatives of EU citizens. Their political accountability is thus before the members of the European Parliament, and to a lesser extent before the members of national parliaments. Concerning the European Parliament, this role stems from its general mandate of exercising functions of political control and consultation as laid down in Article 14(1) TEU. For national parliaments, their new mission with regard to Europol and Eurojust is also explicitly provided for by Article 12(c) TEU, which provides that within the AFSJ, national parliaments contribute to the good functioning of the Union 'through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities'.[33]

Both regulations indicate in their preamble the importance of ensuring that the European Parliament and national parliaments are involved in the scrutiny and evaluation of the agencies' activities, which is framed notably by the need to safeguard the confidentiality of operational information (Recital 58 of the Europol Regulation and Recital 62 of the Eurojust Regulation).

Both regulations include detailed provisions on the political accountability of Europol and Eurojust. The agencies are both bound to issue an annual activity report on their activities, which is publicly available and sent to the European Parliament and national parliaments, among others. The Director of Europol and the President of the College of Eurojust may be invited to present and discuss the activities of their respective agencies (Article 67 of the Eurojust Regulation and Recital 60 and Articles 54(5) and 55 of the Europol Regulation). Further, the European Parliament can also review *ex post* the activities of the agencies via its budgetary role. Together with the Council, the European Parliament authorizes the budgets of Europol and Eurojust, and on its own approves the budgetary discharge for their implementation (Articles 58(6) and 60(8) of the Europol Regulation and Articles 61 and 63(12) of the Eurojust Regulation).

Europol and Eurojust may also be held accountable before national parliaments, which may also invite them to present and discuss their activities.[34] For instance, this possibility has been exercised by the UK House of Lords,

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[33] For further discussion, see Ian Cooper, 'The Emerging Order of Interparliamentary Cooperation in the EU: Functional Specialization, the EU Speakers Conference, and the Parliamentary Dimension of the Council Presidency', [2017] *Robert Schuman Centre for Advanced Studies Working Paper* 5.

[34] This possibility is not foreseen in their respective instruments and the heads of the agencies are thus not obliged to appear before national parliaments.

which interviewed the Director of Europol,[35] or by the French Senate, which interviewed the President of Eurojust.[36] Although the scrutiny of the national parliaments is not complemented by direct budgetary powers, which reduces the strength of their scrutiny, their oversight role is explicitly provided for in the TEU (Article 12(c)) and reflected in the new regulations.

The Europol Regulation provides for the establishment of a Joint Parliamentary Scrutiny Group (JSPG), in response to a debate that had been ongoing for many years concerning the importance of parliamentary oversight and control over Europol's activities.[37] The JPSG is established by the national parliaments together with the competent committee of the European Parliament, which shall 'politically monitor Europol's activities in fulfilling its mission, including as regards the impact of those activities on the fundamental rights and freedoms of natural persons'. Discussions of general matters relating to the protection of fundamental rights and freedoms of natural persons – in particular, the protection of personal data – shall take place once a year (Article 51 of the Europol Regulation). This new provision constitutes an important step forward.[38] However, it may be too early to determine to what extent it will allow the European Parliament and the national parliaments to conduct *ex post* examination of the respect of fundamental rights in Europol's cooperation with third countries, as the JSPG was only recently established. Some authors have expressed concern about its size, as a large inter-parliamentary forum of 128 participants may face difficulties in effectively monitoring Europol's activities.[39]

The Eurojust Regulation foresees that the President of the College shall appear before an Interparliamentary Committee Meeting once a year for the joint evaluation by the European Parliament and national parliaments of the activities of Eurojust (Article 67(2) of the Eurojust Regulation). At this meeting, the President of Eurojust will discuss the current activities of the agency and present its Annual Report and other key documents. This differ-

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[35] House of Lords, EU Committee, 'Europol: coordinating the fight against serious and organised crime', HL Paper 183 (November 2008), 78–115.

[36] *Sénat*, '*Europol et Eurojust : perspectives d'avenir*', *Rapport d'information* No 477, 17 April 2014, 45.

[37] European Commission, 'Communication on the procedures for the scrutiny of Europol's activities by the European Parliament, together with national Parliaments', COM (2010) 776 final, 4.

[38] Meijers Committee, 'Note on the interparliamentary scrutiny of Europol', CM1702, 1.

[39] Diane Fromage, 'The New Joint Parliamentary Scrutiny Group for Europol: Old Wine in New Bottles?' (BlogActiv, 17 June 2017), http://eutarn.blogactiv.eu/2017/06/17/the-new-joint-parliamentary-scrutiny-group-for-europol-old-wine-in-new-bottles/, last accessed 14 October 2018.

ence in parliamentary oversight may be explained by the different nature of Eurojust's activities, and the fact that the information stored and processed by Eurojust consists of judicial information from national judicial authorities – mainly prosecutors – stemming from and/or relating to judicial cooperation requests, and sometimes from judgments or other judicial acts. Such judicial information will have been collected within a framework that foresees procedural guarantees for suspects and accused persons, and is thus less likely to infringe their fundamental rights. However, this does not mean that there is less democratic oversight of the activities – especially the external activities – of Eurojust. The Regulation also provides that liaison magistrates posted by Eurojust to third countries, who may exchange operational personal data with the competent authorities of their host State, shall report to the College, which shall inform the European Parliament and the Council in the annual report and in an appropriate manner of their activities (Articles 53(2) and (6) of the Eurojust Regulation).

These mechanisms for parliamentary oversight of Europol and Eurojust are not specific to their external activities, and it is too early to speculate on the thoroughness with which the European Parliament and the national parliaments will monitor the agencies to ensure respect for fundamental rights, particularly in the conduct of their external activities. An essential issue will be to ensure that true democratic oversight is not compromised by the argument of preserving the (sometimes necessary) confidentiality of cooperation with external partners in criminal matters.

4.2 Judicial Accountability

Judicial accountability refers to the extent to which acts and measures emanating from Europol and Eurojust can be reviewed by courts, and in particular by the CJEU. The answer to this question is crucial, as the notion of judicial review is at the core of the EU legal order, which prides itself on being based on the rule of law. The CJEU has interpreted this as meaning that neither its Member States nor its institutions can avoid a review of the question of whether the measures they adopt are in conformity with the Treaties.[40]

The existence of judicial review is particularly important for individuals whose data has been collected, stored and processed by Europol and Eurojust, or by national police and/or judicial authorities which have transferred it to the agencies.

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[40] Judgment of the Court of 23 April 1986, *Parti Ecologiste 'Les Verts' v European Parliament,* Case 294/83, ECLI:EU:C:1986:166, para 23, quoted in Busuioc, supra note 31, 167.

Where available, a data subject can first rely on the mechanism set up at national level in accordance with Directive 2016/680 (Articles 52–54), providing for the right to lodge a complaint with a supervisory authority, the right to an effective judicial remedy against a supervisory authority and the right to an effective judicial remedy against a controller or processor. Similar mechanisms, involving the European Data Protection Supervisor (EDPS), are foreseen in the Europol and Eurojust Regulations.[41]

Additionally, Europol and Eurojust are both liable for incorrect personal data processing. Individuals who have suffered damage as a result of such unlawful data processing can bring an action against the agencies before the CJEU (Article 50(1) of the Europol Regulation and Article 37 of the Eurojust Regulation). This liability also extends to Member States which have communicated data to Europol and Eurojust; in such case individuals can lodge a complaint before a competent national court of that Member State (Article 50(1) of the Europol Regulation and Article 46(3) of the Eurojust Regulation).[42]

However, there is one difficulty associated with these mechanisms: in order to exercise these rights, the data subject must know that his or her data has been collected, stored and processed – something which is particularly sensitive in the case of data collected, stored and processed for the purposes of preventing and combating crime. Directive 2016/680, as well as the Europol and Eurojust Regulations, provides for the right of access of the data subject, who is normally entitled to obtain confirmation as to whether personal data concerning him or her is being processed (Article 14 of Directive 2016/680, Article 36(6) of the Europol Regulation and Article 31 of the Eurojust Regulation). However, these instruments also foresee derogations from this right of access (Article 15 of Directive 2016/680, Article 36 of the Europol Regulation and Article 32 of the Eurojust Regulation). While such derogations are understandable for pragmatic and operational reasons, they also undermine the effectiveness of the judicial accountability of national authorities and EU agencies. Still, judicial accountability may also intervene at a later stage – for instance, at the trial stage, where evidence is subject to the contradictory principle and

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[41] See Article 47 of the Europol Regulation and Article 40 of the Eurojust Regulation, foreseeing the right to lodge a complaint with the EDPS and the right to judicial review against decisions of the EDPS.

[42] It is also possible to lodge a complaint before the European Ombudsman, which has indeed received complaints from individuals requiring access to their data stored by Europol and Eurojust. See, for example, Decision of the European Ombudsman on Complaint 183/2006/MF against Europol, 21 February 2007 and Decision of the European Ombudsman closing the inquiry into Complaint 2057/2011/TN against the European Union's Judicial Cooperation Unit (Eurojust), 24 January 2014.

where, according to national procedural rules, its admissibility may be rejected on the basis of a violation of fundamental rights.

The gap in judicial accountability is (even) more pronounced when personal data is transferred to third countries. The provisions on the right of access foresee that the data subject shall be informed of the recipients or categories of recipients to which the data is disclosed (Article 14(c) of Directive 2016/680, Article 36(2)(b) of the Europol Regulation and Article 31 of the Eurojust Regulation). The restrictions and derogations mentioned earlier apply, as well as the possibility for the data subject to be informed at a later stage. In such cases of external transfer of data, the issue is to determine who is competent to review the legality of such transfer and the applicable law. At least theoretically, the data subject may have a right to lodge a complaint in the third country that received his or her personal data. However, this possibility may be difficult to exercise, for practical and/or legal reasons. The data subject can rely on EU law and the provisions contained in the Europol and Eurojust Regulations. These texts foresee the allocation of responsibility in data protection matters and provide for the responsibility of Europol and Eurojust for the legality of personal data transfers by Member States, third countries or international organizations (Article 38(5) of the Europol Regulation and Article 45 (2)(c) of the Eurojust Regulation). These provisions, read together with the provisions granting individuals the right to bring an action before the CJEU, imply that the CJEU is competent to review the legality of the transfer of personal data to a third country, in light of EU law.

In consequence, the CJEU will play a crucial role in assessing respect for fundamental rights in criminal matters, and more particularly in relation to personal data transfers to third countries. The CJEU has already exercised this role in Opinion 1/15,[43] in which it clearly held that the processing of personal data constitutes an interference with the fundamental right to the protection of personal data guaranteed in Article 8 of the European Charter on Human Rights (para 126), which continues to apply where personal data is transferred from the European Union to a non-member country (para 134). When examining the proportionality and adequacy of the processing of personal data in the PNR agreement between Canada and the EU, the CJEU insisted on the importance that the agreement contain clear and precise rules limited to what is strictly necessary, defining the degree of seriousness of the offences concerned (paras 175–177), the authorities responsible for receiving and processing data (para 182), the person concerned (para 186) and the retention and use of data (para 190), as well as the rights of data subjects and the oversight of data protection safeguards (para 228).

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[43] Opinion 1/15, supra note 24.

The Europol and Eurojust Regulations do not contain provisions on all of these aspects. For instance, the retention and use of data once transferred are not governed; and at present it is difficult to assess the compatibility of the Regulations with the criteria set out by the CJEU, given that working arrangements with each country will need to be concluded to further detail the conditions of such transfers. Additionally, data transferred by Europol and Eurojust is different from PNR data: it consists of data collected by law enforcement and judicial authorities, which may be used at a later stage as evidence against individuals in the course of criminal proceedings. This higher degree of interference with individuals' fundamental rights requires an even stricter assessment by the CJEU, which may decide to elaborate specific case law and criteria in this regard.

5. CONCLUSION

In the current security context, cooperation with third countries and international organizations is of crucial importance for the EU's objectives of preventing and combating crime. The EU agencies are fully integrated into the EU's strategy to develop the external dimension of key AFSJ policies. To take the example of counter-terrorism, both the Commission and the Council have recently emphasized that cooperation with third countries is essential in the fight against terrorism and organized crime.[44]

The external activities of Europol and Eurojust form an integral part of the EU's efforts to deepen cooperation in criminal matters with third countries and international organizations. The Commission, for instance, has reported engaging in discussions with specific third countries − such as Turkey, Israel, Algeria, Egypt, Lebanon, Morocco and Tunisia − regarding future cooperation between Europol and national authorities with competence for fighting serious crime and terrorism.[45]

In developing their external activities, the two agencies face certain challenges. The main challenge relates to the sensitivity of data transfers to third countries that are not bound by EU norms on the protection of fundamental rights and data protection, and thus potentially entailing severe violations of fundamental rights. The two agencies are not the only actors facing this controversial issue as to whether the effectiveness of crime prevention shall prevail

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[44] European Commission, 'Eleventh progress report towards an effective and genuine Security Union', COM (2017) 608 final. Council of the European Union, Conclusions on EU External Action on Counter-terrorism, 19 June 2017, Doc 10384/17.

[45] European Commission, "Seventeenth progress report towards an effective and genuine Security Union', COM (2018) 845 final, p. 17.

over the protection of fundamental rights. In today's security reality, which is marked by regular terrorist attacks, some advocate for looser human rights standards. It is suggested, for instance, that information preventing an attack should be used even if it may have been obtained through torture.[46]

In an EU founded on respect for the rule of law, such arguments are difficult to uphold. The references in the Europol and Eurojust Regulations to respect for data protection as a prerequisite for the exchange of data, including personal data, with international organizations and third countries indicate that, on paper, the EU legislature gives precedence to the protection of fundamental rights. Yet the implementation of the Regulations may reveal gaps – for instance, if the derogatory measures are frequently used, thus circumventing the rules protecting individuals' rights. Only close oversight of the agencies' external activities will ensure that an appropriate balance is maintained; and judges and parliamentarians, as well as affected individuals, must be the watchdogs of its respect.

[46] On this issue, see, for instance, Kim Lane Scheppele, 'The Deep Dilemma of Evidence in the Global Anti-Terror Campaign', and Brice Dickson, 'The Extra-Territorial Obligations of European States regarding Human Rights in the Context of Terrorism', in Federico Fabbrini and Vicky Jackson, *Constitutionalism Across Borders in the Struggle against Terrorism* (Elgar, 2016) 146, 146–168.

PART II

EU agencies' external action: a political science perspective

5. ‘Normative Power Frontex?’ Assessing agency cooperation with third countries

Helena Ekelund

1. INTRODUCTION

Without doubt, Frontex is one of most hotly debated EU agencies. Few agencies receive as much media coverage and public attention. Human rights groups frequently criticize Frontex for its activities, and the legality of some of its operations has been questioned in the scholarly literature.[1] At the same time, recent studies[2] have shown that humanitarian concerns have been emphasized

[1] Sergio Carrera, Leonhard den Hertog and Joanna Parkin, ‘The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?’, [2013] *European Journal of Migration and Law* 4 337, 337-358; Efthymios Papastavridis, ‘Fortress Europe and Frontex: within or without international law?’, [2010] *Nordic Journal of International Law* 1 75, 75−111; Anneliese Baldaccini, ‘Extraterritorial border controls in the EU: the role of Frontex in operations at sea’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial immigration control: legal challenges* (Leiden: Martinus Nijhoff Publishers, 2010) 225, 225−251; Johannes Pollak and Peter Slominski, ‘Experimentalist but not accountable governance? The role of Frontex in managing the EU’s external borders’, [2009] *West European Politics* 5 904, 904−924; Juan Santos Vara, ‘The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls’, [2015] *European Foreign Affairs Review* 1 115, 115–136.

[2] See, for example, Katja Franko Aas and Helene OI Gundhus, ‘Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of life’, [2015] *British Journal of Criminology* 1 1, 14; Polly Pallister-Wilkins, ‘The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros’, [2015] *International Political Sociology* 1 53, 53-69; Nina Perkowski, ‘Deaths, Interventions, Humanitarianism and Human Rights in the Mediterranean “Migration Crisis”’ [2016], *Mediterranean Politics* 2 331, 331−335; Giuseppe Campesi, ‘Frontex, the Euro-Mediterranean border and the paradoxes of humanitarian rhetoric’, [2014] *South East European Journal of Political Science* 3 126, 126−134; Karina Horsti, ‘Humanitarian discourse legitimating migration control: Frontex public communica-

in Frontex's official communications. Several studies suggest not only that humanitarian discourse is used to legitimize the agency's existence, but also that there is a genuine 'intensified organizational focus on human rights'.[3] Campesi,[4] however, is less generous in his assessment, arguing that the agency is simply using humanitarian rhetoric to legitimize its existence and gain more resources.

The importance of fundamental rights is enshrined in Frontex's establishing regulation and in its work programme. Respect for fundamental human rights is indeed a key value of the EU, as foreseen in Article 2 of the Treaty on European Union. Commitment to this value − together with other normative values such as liberty, democracy and the rule of law − is repeatedly reiterated in official EU communications. In a series of publications, Manners[5] has advanced the argument that the EU is a normative power in world politics − that it is based on a set of universally accepted normative principles, and that it can and should promote these principles in its external relations. Of course, EU external relations include a wide range of activities that are carried out by various actors. As regards joint EU cooperation with external actors on border management cooperation, Frontex is the prime EU actor.[6]

Frontex has always had an external dimension to its mandate, in the form of cooperation with third countries, but the number of legal provisions relating to this aspect has increased substantially in the period between issue of the founding regulation of 2004 and the 2016 regulation establishing the European Coast and Border Guard Agency. As the EU institutions laid down in the 2012 Common Approach on Decentralised Agencies, the EU agencies must 'operate within their mandate and the existing institutional framework', and must not be 'seen as representing the EU position to an outside audience or as committing

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tion', in M Messer, R Wodak and R Schroeder (eds), *Migrations: Interdisciplinary Perspectives* (Vienna: Springer Science & Business Media, 2012), 297.

3 Aas and Gundhus, supra note 2, 14; see also Pallister-Wilkins, supra note 2; Perkowski, supra note 2.

4 Campesi, supra note 2.

5 See, for example, Ian Manners, 'Normative Power Europe: A Contradiction in Terms?', [2002] *Journal of Common Market Studies* 2 235('[Ian Manners I'); Ian Manners, 'The Normative Ethics of the European Union', [2008] *International Affairs* 1 45, 45−60 ('Ian Manners II); Ian Manners, 'The EU's Normative Power in Changing World Politics' in André Gerrits (ed), *Normative Power Europe in a Changing World: A Discussion* (The Hague: Netherlands Institute of International Relations, 2009), 9 ('Ian Manners III').

6 Member states may also cooperate individually with third country authorities as long as this is in line with Frontex activity.

the EU to international obligations' in their cooperation with third countries.[7] Building on Manners' normative proposition, this chapter starts from the premise that, as an EU agency with a clear external dimension to its operations, Frontex ought to follow the EU's fundamental normative principles. Although the agency does not represent the EU externally in a legal sense, its activities can be conceptualized as expressions of EU normative power.

While Frontex's operations have been examined from various angles, studies of agency interaction with third countries have so far focused only on legal aspects.[8] Through its focus on the ideational dimension of Frontex's cooperation with third country authorities, this chapter contributes new insights to our understanding of Frontex's external dimension. Drawing on Manners'[9] discussion of principles, actions and impact, and parts of the analytical framework developed by Niemann and de Wekker[10] for the empirical study of normative power Europe, this chapter assesses Frontex's cooperation with third countries and concentrates on one norm: respect for fundamental rights.[11] It addresses two questions: to what extent does Frontex have a genuine normative commitment to the implementation of fundamental rights? And to what extent is the agency acting in a normative way − that is, applying universal norms and showing willingness to listen to and learn from the experiences of third countries?

The chapter is organized into six sections. Section 2 describes the agency's cooperation with third countries. Section 3 elaborates on the concept of 'Normative Power Europe' (NPE), and section 4 presents the analytical framework, method and operationalization. The empirical analyses of normative intent and normative process are found in sections 5 and 6, respectively. Section 7 summarizes the main findings and offers some concluding thoughts.

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[7] See Council of the European Union, Evaluation of European Union Agencies – Endorsement of the Joint Statement and Common Approach, 18 June 2012, Doc 11450/12, 8.

[8] Vara, supra note 1; Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships"', [2012] *Merkourios* 75 20, 20−35.

[9] Ian Manners II, supra note 5.

[10] Arne Niemann and Tessa de Wekker 'Normative power Europe? EU relations with Moldova', [2010] *European Integration online Papers* 1 1.

[11] 'Fundamental rights' and 'human rights' are used interchangeably here.

2. FRONTEX COOPERATION WITH THIRD COUNTRIES

Cooperation with third countries has always been part of Frontex's mandate, but has gained in importance since the refugee crisis which began in 2015. The current 2016 Frontex Regulation,[12] adopted in response to the migration crisis, contains significantly more provisions devoted to third country cooperation in comparison with the Founding Regulation of 2004. The cooperation foreseen in the Regulation mainly concerns border management agencies of third countries and is very much an integral part of the EU's integrated border management strategy. Whereas provisions relating to third country cooperation can be found throughout the Regulation, the key points are summarized in Article 54. Details on European integrated border management are in turn found in Article 4.

Article 54, point 2 states that in its cooperation with third countries, Frontex shall 'act within the framework of working arrangements concluded with those authorities in accordance with Union law and policy'; and that these working arrangements 'shall specify the scope, nature and purpose of the cooperation and be related to the management of operational cooperation'. Draft arrangements require the Commission's prior approval and the European Parliament shall be informed in advance of the agency's conclusion of working arrangements.[13] Working arrangements should be approved by the Management Board (Article 62).

To date, Frontex has concluded working arrangements with 18 countries: the Russian Federation, Ukraine, Moldova, Georgia, the former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey, Azerbaijan and, without prejudice to positions on its status, Kosovo. In addition, the agency has arrangements with the Coordination Service of the Commonwealth of Independent States Border Commandants' Council and the Migration, Asylum, Refugees, Regional Initiative (MARRI) Regional Centre in the Western Balkans. All of these working arrangements are available to download from the Frontex website.

Frontex cooperates with third countries in a number of ways. Cooperation is based on risk analysis; '[t]he primary objective is to intensify existing bilat-

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[12] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251/1.

[13] See Chapter 2.

eral cooperation with EU's neighbouring countries, as well as with countries of origin and transit for irregular migration' (Frontex 2017a). Much of the cooperation comes under the heading of technical or operational cooperation. This involves risk analysis, training, information exchange, research and development, joint operations (including return operations) and pilot projects. For instance, the agency has information exchange networks involving third countries and makes its Common Core Curriculum (CCC) on border guard training available to third countries. Examples of joint operations that involved third countries include *Nautilus* and *Hera II*.[14] The agency may deploy liaison officers to third countries.[15]

Another form of cooperation with third countries concerns technical assistance projects funded by the EU. In 2018, Frontex implemented two such programmes: the Eastern Partnership Integrated Border Management Capacity Building Project (EaP) and the Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey (IPA II). The agency has previously (2014−16) participated in 'Promoting the participation of Jordan in the work of EASO as well as the participation of Morocco and Tunisia in the work of EASO and Frontex (ENPI)'.[16]

In addition to cooperation where Frontex is a lead actor, the agency is involved in other EU-led initiatives on border-related activities, such as 'initiatives stemming from the Global Approach to Migration and Mobility, for example the Migration and Mobility Partnerships, the Eastern Partnership Initiative or the Building Migration Partnerships'.[17]

3. NORMATIVE POWER EUROPE

The idea of normative power in the international system has been around for a long time, but the idea of NPE rose to prominence in academic discussions following Manners'[18] article entitled 'Normative Power Europe: A Contradiction in Terms?' This seminal article suggests a need to go beyond conceptualizations of the EU as either a military power or a civilian power, as these conceptualizations focus too much on how state-like the EU is. Instead, Manners[19] claims that the EU's 'ability to shape conceptions of 'normal' in international relations needs to be given much greater attention'. Shifting the focus towards the influence of ideas and away from discussions of economic

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14 Fink, supra note 8.
15 Regulation EU 2016/1624, Article 55.
16 Frontex, General Report 2013, p15.
17 Ibid.
18 Manners I, supra note 5.
19 Ibid, 239.

and military capacities can lead to a better understanding of how the EU exercises power in the international system.

A first point about NPE is that the EU is regarded as different from other political entities. Here, Manners[20] observes that 'the EU's normative difference comes from its historical context, hybrid polity and politico-legal constitution'. Having just come out of a disastrous war, the founding Member States of the EU's predecessor, the European Community, were willing to pool resources in order to preserve peace and liberty.[21] The organization that was to become the EU then evolved into a hybrid polity with supranational as well as intergovernmental forms of governance. As Manners[22] explains, '[t]he constitution of the EU as a political entity has largely occurred as an elite-driven, treaty based, legal order', and '[f]or this reason its constitutional norms represent crucial constitutive factors determining its international identity'. Over time, universal norms and principles have increasingly been placed at the centre of EU relations with member states, third countries and international organizations.[23] Indeed, as Manners[24] points out, the EU's external relations are:

> informed by, and conditional on, a catalogue of norms which come closer to those of the European convention on human rights and fundamental freedoms (ECHR) and the universal declaration of human rights (UDHR) than most other actors in world politics.

The fact that the EU is different from 'pre-existing political forms', and that this difference 'pre-disposes it to act in a normative way', is at the core of Manners'[25] argument.

The EU's normative basis has been successively built up through treaties, declarations and conditions.[26] Manners[27] identifies five core norms, all of which are present in the core legal texts: peace, liberty, democracy, the rule of law and respect for human rights and fundamental freedoms. In addition to these core norms, four minor norms can be identified (although these are more contested): social solidarity, anti-discrimination, sustainable development and

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20 Ibid, 240.
21 Ibid, 240.
22 Ibid, 241.
23 Ibid, 241.
24 Ibid, 241.
25 Ibid, 242.
26 Ibid, 242.
27 Ibid.

good governance.[28] As Manners[29] points out, all of these norms clearly have a historical context to them.

The idea of the EU as a positive normative power has been challenged. Coming from a neo-realist angle, Hyde-Pryce[30] argues that the EU is used by Member States as a means to achieve foreign policy goals that are beneficial to them. Bicchi[31] questions the universality of the norms that the EU promotes, arguing instead that while the EU may claim to promote universal norms, in reality it merely seeks to enforce its own norms on others. Sjursen[32] shares these criticisms, claiming that the EU may seek either to model the rest of the world to fit with its own values or to use its power to promote its own interests under the guise of promoting universal values. Sjursen argues that further empirical work is needed in order to determine whether the EU acts out of self-interest or according to norms.[33] Niemann and de Wekker[34] also point to the fact that the discussion on NPE has been very internally focused, and that a lot of EU 'foreign policy action does not appear to seek change in partner countries, but rather to satisfy certain domestic groups'.

These critiques of NPE in general are also relevant when conceptualizing Frontex activities as expressions of EU normative power. As already noted, recent studies have pointed to an increased focus on humanitarian rhetoric in Frontex's official communications. Given that the agency has received significant criticism, including from domestic interests such as members of the European Parliament,[35] one can assume that it has incentives to satisfy these groups. To investigate whether the agency really does act as a normative power seeking to implement and apply fundamental rights, empirical work is indeed needed.

Niemann and de Wekker[36] developed a framework to empirically examine NPE, distinguishing three levels important to the operationalization of NPE. The first level concerns normative intent − that is, 'the seriousness/genu-

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[28] Ibid, 242−243.

[29] Ibid, 243.

[30] Adrian Hyde-Price, '"Normative" power Europe: a realist critique', [2006] *Journal of European Public Policy*, 2 217, 217−234.

[31] Federica Bicchi, '"Our size fits all": normative power Europe and the Mediterranean', [2006] *Journal of European Public Policy* 2 286, 286−303.

[32] Helene Sjursen, 'The EU as a "normative" power: how can this be?', [2006] *Journal of European Public Policy*, 2 235, 235−251.

[33] See also Niemann and de Wekker, supra note 10.

[34] Ibid, 6.

[35] Helena Ekelund, *The Agencification of Europe: explaining the establishment of European Community Agencies* (University of Nottingham, 2010, unpublished PhD thesis).

[36] Niemann and de Wekker, supra note 10.

ineness of normative commitment'.[37] The second level concerns normative process − that is, 'the extent to which an inclusive and reflexive foreign policy (promoting universal norms) is pursued (v. an 'our size fits all' approach)'.[38] Normative impact − that is, 'the development of norms in third countries' − makes up the third level.

The research questions posed in this chapter relate to the first two levels of Niemann and de Wekker's[39] framework − that is, normative intent and normative process. The operationalization of these two levels is outlined in more detail below.

3.1 Analytical Framework, Method and Operationalization

3.1.1 Normative intent

While norms and interests cannot always be separated,[40] a normative actor for good would be committed to the norms themselves and not merely act out of self-interest while hiding behind normative rhetoric. To assess the extent to which Frontex is a normative actor, we must question the seriousness and genuineness of its normative commitment. Following Niemann and de Wekker, four aspects will be considered here.

First, are the universal norms 'at the centre of relations'[41] with third countries or are they of peripheral importance? This is assessed by qualitative textual analysis of Frontex's governing regulation, with a particular focus on provisions dealing with third countries, and of working arrangements concluded between the agency and third countries. The more emphasis given to fundamental rights and the more prominent the position given to statements of this norm, the more serious the normative commitment of the agency is deemed to be.

Second, do the norms serve or hurt Frontex and/or EU interests? If particular norms are applied despite hurting Frontex or EU self-interests (eg, by bearing significant economic or political costs), this strengthens the case for a genuine normative commitment. Relevant questions to ask here include whether there are there any material interests at stake and whether the agency is implementing and applying norms despite forceful opposition. A full answer to these questions would require studies of agency action on the ground in particular

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37 Ibid, 7.
38 Ibid, 7.
39 Ibid.
40 Thomas Diez, 'Constructing the Self and Changing Others: Reconsidering "Normative Power Europe"', [2005] *Millennium: Journal of International Studies* 3 613, 625.
41 Niemann and de Wekker, supra note 10, 7.

situations, which could be chapter-length in their own right. Rather than exploring this particular aspect in depth, this chapter will provide a discussion around what interests could be reasonably assumed through consideration of agency governance structure and previous research. The tentative answers resulting from this discussion will then have to be seen as part of a wider discussion of normative intent.

Third, does Frontex communicate and act consistently − that is, does it act in accordance with the norms it claims to apply? A textual analysis of legislation, working arrangements and Frontex's Codes of Conduct is used to investigate whether the same standards are applied internally (in this case in cooperation on border control between member states) as are applied externally − that is, towards cooperation with third countries − and whether the same standards are applied to different third countries. A high level of consistency supports the idea of normative power Frontex, whereas a low level of consistency points in the direction of double standards.

Finally, coherence is considered. According to Niemann and de Wekker,[42] '[c]oherence goes beyond consistency', as '[i]t is about the connectedness of claims or actions through shared principles'. If a critical reading of relevant documents shows that claims and actions are connected through value-based principles, this points to a normative power for good.

3.1.2 Normative process

'Normative process' concerns the extent to which the EU has an 'inclusive and reflexive foreign policy' that promotes universal norms.[43] This is analysed by examining working arrangements concluded with different countries and Frontex information material on third country cooperation. To an extent, this is also triangulated with findings from previous research.

Reflexivity concerns the willingness to learn and adapt. For instance, does the agency accept ideas from third countries and adapt its behaviour in response to these? The level of reflexivity can be assessed by investigating the extent to which standard templates and best practice are used in relation to third countries without taking the peculiarities of different countries into account.[44] If the agency does not take peculiarities into account and instead behaves in a routine fashion, this would indicate a low level of reflexivity. If the agency consciously and wilfully modifies its policies following external reviews, this would indicate reflexivity.

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42 Ibid, 8.
43 Ibid, 9.
44 Ibid, 9.

Inclusiveness concerns the extent to which external actors are consulted in the development of policy and whether there is joint ownership of policy. Does the agency take into account the views of those who are affected? Or does it impose its view?

Finally, are the norms applied universal? Or are they Eurocentric? This is assessed by examining whether the norms are 'recognised through the instruments of the UN system'.[45]

4. ASSESSING COOPERATION WITH THIRD COUNTRIES

4.1 Normative Intent

4.1.1 Centrality of fundamental rights norms

Frontex's activities are governed by Regulation (EU) 2016/1624. Whereas Recital 1 refers to strengthening control at the borders and Recital 2 to a large extent deals with how to ensure 'a high level of internal security within the Union', the need 'to act in full respect for fundamental rights' is already stated in Recital 2. Recital 46 deals specifically with third country cooperation. Practical details on what cooperation can entail are followed by a reference to fundamental rights. It provides that '[i]n the cooperation with third countries, the Agency and Member States should comply with Union law at all times, including fundamental rights and the principle of non-refoulement', and 'should likewise do so when the cooperation with third countries takes place on the territory of those countries'. Section I of Chapter III covers general rules that should guide Frontex's work. These general provisions also apply to its cooperation with third countries. The first article of the section (Article 34) concerns the protection of fundamental rights and 'a fundamental rights strategy including an effective mechanism to monitor the respect for fundamental rights in all activities of the Agency'. Reports from the agency's fundamental rights officer and consultative forum must be taken into account with regard to third country cooperation. Respect for fundamental rights and the principle of non-refoulement are mentioned in Article 54, which is the first article to focus directly on cooperation with third countries. The attention to fundamental rights in the 2016 legislation is more prominent than the reference to fundamental rights in the founding legislation from 2004. This suggests that the requirement to respect these rights is indeed given a central role in the agency's cooperation with third countries.

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[45] Niemann and de Wekker, supra note 10, 10; see also Manners II, supra note 9, 76.

However, all working arrangements concluded with third countries were signed before the entry into force of Regulation (EU) 2016/1624, and an analysis of these arrangements paints a different picture with regard to the centrality of human and fundamental rights. All working arrangements emphasize control and/or security as objectives of cooperation. None mentions human rights implementation as an objective. Of the 18 working arrangements concluded with individual third countries, only five explicitly mention human rights.[46] Here respect for human rights is mentioned as a basic or general principle for cooperation. These five arrangements were all concluded after 2012. The arrangements with Nigeria, Armenia and Turkey, which were concluded in 2012, state that Frontex and the relevant authorities 'afford full respect for human rights'. The arrangement with Azerbaijan, concluded in 2013, includes the same phrase, but with an addition: 'afford full respect for human rights, related international laws and principles.' The latest arrangement − the Working Arrangement on establishing operational cooperation between Frontex and the Ministry of Internal Affairs of Kosovo, signed in 2016 − is yet more detailed, stating that the relevant authorities 'afford full respect for human rights, enshrined in international laws and principles, in particular they shall ensure that the rights of persons in need of international protection and other vulnerable groups are respected during all joint activities'. The lack of mention of human and fundamental rights in earlier working arrangements suggests that the implementation and application of these norms were not central to the agency's external relations at the time when most working arrangements were concluded. There appears to have been a change in 2012, which may be a reflection of the first revision to the governing legislation of Frontex in 2011.[47]

4.1.2 Do norms serve or hurt Frontex and/or EU interests?

Arguably, the implementation of human and fundamental rights is in Frontex's interest. Legitimacy is important for all organizations that wish to survive or grow in terms of power and resources. To obtain organizational legitimacy, organizations 'seek to establish congruence between the social values associated with or implied by their activities and the norms of acceptable

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[46] The arrangement with the United States does not mention human rights, although Article 6 states that: 'All activities under this Working Arrangement are to be carried out in accordance with applicable laws, regulations, and policies.'

[47] Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2011] OJ L304/1.

behavior in the larger social system of which they are a part'.[48] Standing up for fundamental rights is socially desirable and could lead to organizational legitimacy. This applies to the EU as an organization at large and to Frontex as a representative of the EU. More specifically, current debates on legitimacy of EU institutions and bodies tend to draw on Schmidt's[49] discussion of input, output and throughput legitimacy. In their examination of Frontex, focusing on legitimacy, Wolff and Schout[50] clearly demonstrated that Frontex, with the mandate it had at their time of writing, experienced legitimacy problems relating to lack of control over agency activities impacting on fundamental rights. It was thus in the interest of EU decision makers to address this issue, and it was in the interest of Frontex to show a firmer commitment to the implementation of fundamental rights. Although scholars differ in their assessment of the extent to which discourses focusing on fundamental rights translate into actual Frontex practice, there appears to be a consensus that humanitarian rhetoric is being used by the agency in order to build legitimacy for the organization and its activities.[51]

In contrast to this, some EU member states claim to be under pressure from large-scale migration and call for strict border control. Indeed, political forces in favour of stricter migration regimes are strong in parts of Europe and decision makers at national as well as EU level can have an interest in satisfying demands by these forces. The priorities of Member States in general feed into the EU political process − for instance, when the agency budget is decided.[52] More directly, Member State representatives channel interests into Frontex decision making through their presence on the Management Board. This can be relevant in situations where cooperation with third countries plays an important part. Commenting on operations in the Mediterranean, organizations such as Human Rights Watch, Statewatch and Frontexit have raised concerns that operations in which Frontex is involved can lead to early detection, interception and pushback of migrants in ways that violate fundamental rights.[53] An

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[48] John Dowling and Jeffrey Pfeffer, 'Organizational Legitimacy: Social Values and Organizational Behavior', [1975] *The Pacific Sociological Review* 1 122, 122.

[49] Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' [2012] *Political Studies* 1 2, 2−22.

[50] Sarah Wolff and Adriaan Schout, 'Frontex as Agency: More of the Same? *Perspectives on European Politics and Society'*, [2013] 3 305, 305−324.

[51] Supra note 2.

[52] Since the migration crisis of 2015, Frontex has seen its budget increase dramatically. See Irina Angelescu and Florian Trauner, '10,000 border guards for Frontex: Why the EU risks conflated expectations', EPC Policy Brief, 21 September 2018, p2.

[53] See, for example, Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece', (2011) , www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf, last accessed 29 June 2018;

analysis of what happens on the ground during Frontex operations is beyond the scope of this chapter. However, it may be forcefully argued that as some interests that feed into agency priorities may rank strict border control enforcement higher than fundamental rights, the question as to what is in the interests of the EU in general and of Frontex in particular becomes highly ambivalent.

4.1.3 Norm consistency

Article 34 of its establishing regulation states that Frontex 'shall guarantee the protection of fundamental rights in the performance of its tasks'. The importance of observing fundamental rights is reiterated numerous times throughout the regulation in connection to provisions detailing individual tasks. Article 54 specifically provides that this also applies in cooperation with third countries. Importantly, Article 54 states that Frontex 'shall comply with Union law, including norms and standards which form part of the Union *acquis* also when cooperation with third countries takes place on the territory of those countries'. An example of such cooperation may be so-called 'collecting return operations' − that is, operations where the agency provides assistance, coordinates or organizes 'return operations for which the means of transport and forced-return escorts are provided by a third country of return' (Article 28). Here it is clear that the agency is expected to apply its values to agents of third countries.

The deployment of liaison officers is another case in point to compare the norms governing the agency's work in cooperation with EU member states and its work with third countries. One task of liaison officers in Member States is to 'contribute to promoting the application of the Union *acquis* relating to the management of the external borders, including with regard to respect for fundamental rights' (Article 12.3.e). Liaison officers to third countries are expected to respect fundamental rights and act 'in compliance with Union law' when they establish and maintain contact with third country authorities 'with a view to contributing to the prevention of and fight against illegal immigration and the return of returnees' (Article 55.3). Article 55.1 states that '[l]iaison officers shall only be deployed to third countries in which border management practices comply with minimum human rights standards'. The same norms apply, but if anything, the demands placed on the agency's internal work are higher.

Statewatch, 'Borders, deaths and resistance' [2014] *Statewatchjournal – reflections on the state and civil liberties in Europe* 3/4 1; Frontexit, 'The new mandate of Frontex agency: The EU obsessed with waging a war against migrants and refugees', press release (2016), http://statewatch.org/news/2016/jul/frontexit-pr-ep-vote-super-frontex-en-7-7-16.pdf, last accessed 29 June 2018.

Furthermore, the governing legislation makes very clear that the agency is required to draw up and develop 'a code of conduct applicable to *all border control operations coordinated by the Agency* and *all persons participating in the activities of the Agency*'.[54] This code 'shall lay down procedures intended to guarantee the principles of the rule of law and respect for fundamental rights'.[55] This has been done and the expectation that anyone involved with Frontex's work ought to follow it is made very clear.[56] There is also a code of conduct especially designed for joint return operations that applies 'during all return operations and return interventions coordinated or organised by the Agency'.[57] In theory, this ensures consistency in terms of what officials involved in the agency's work are expected to adhere to.

The legal provisions on cooperation with third countries apply to all third countries. As no exceptions are provided for, this means that the same fundamental rights norms should apply no matter which third country is involved. However, cooperation is also informed by the working arrangements concluded between Frontex and the relevant third country authorities. Human rights are only specifically mentioned in working arrangements concluded from 2012 onwards. It is not entirely clear to what extent this has any impact on cooperation in practice. However, Article 25.4 of the Frontex Regulation specifies that the executive director shall 'withdraw financing' and 'suspend or terminate, in whole or in part' a range of activities, including working arrangements 'if he or she considers that there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist'.

4.1.4 Coherence

The agency's actions are coherent to the extent that the fundamental rights standards the agency applies are linked to widely acknowledged sources of fundamental rights provisions (see the discussion of universal norms below). However, the fact that respect for human rights is only written into the working arrangements with some third countries shows a lack of coherence between

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[54] Regulation 2016/1624, Article 35, emphasis added.

[55] Ibid, Article 35.

[56] Frontex, '*Code of Conduct for all persons participating in Frontex activities'*, https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code_of_Conduct_applicable_to_all_persons_participating_in_Frontex_operational_activities.pdf, last accessed 28 March 2018.

[57] Regulation 2016/1624, Article 35; see also Frontex '*Code of Conduct for joint return operations coordinated by Frontex*', https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code_of_Conduct_for_Joint_Return_Operations.pdf, last accessed 28 March 2018.

what value-based principles are explicitly stated as guiding for cooperation with different countries. As the most recently concluded working arrangements include such references, this discrepancy can be explained by the fact that the agency's governing legislation has changed over time to put more emphasis on fundamental rights. That said, there is no motivation given as to why the earlier working arrangements have not been revised to reflect the change in the agency's mandate. In turn, the agency's involvement in return operations has always been a controversial point. While the current regulation makes it clear that fundamental rights must be respected throughout the entire operation (Article 8), it is not obvious what happens once the returnees are back in the third country. If the fundamental rights of the returnees can be guaranteed in the third country, the agency's behaviour can be deemed coherent. If, on the other hand, Frontex contributes to returning people to countries where their rights are not guaranteed, the agency's behaviour is incoherent. According to a presentation by Frontex at a meeting of the EU's EaP,[58] Frontex has assisted the return of people to 42 different countries; the three most frequent destinations are Albania, Nigeria and Kosovo. Amnesty International[59] has criticized the human rights situation in all three countries and Human Rights Watch[60] has expressed concerns about Nigeria and Kosovo.[61]

4.2 Normative Process

4.2.1 Reflexivity

According to Article 54.2 of the Frontex Regulation, working arrangements between Frontex and third countries 'shall specify the scope, nature and purpose of the cooperation and be related to the management of operational cooperation'. With the exceptions of the arrangements with Turkey, Russia, CIS and MARRI, the working arrangements appear to follow the same template. However, they all emphasize, in one way or another, aspects such as mutual interest, reciprocity and building trust. This suggests an element of reflexivity on behalf of the agency. Frontex is also obliged to take account of the views of its consultative forum, which includes several civil society

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[58] EaP, 'Mobility and Integrated Border Management', http://eapmigrationpanel.org/sites/default/files/files/frontex_ep_return_readmission_and_reintegration.pdf, last accessed 2 July 2018.

[59] Amnesty International, 'Amnesty International Report 2017/2018: The state of the world's human rights' (2018).

[60] Human Rights Watch, World Report 2017, (2017).

[61] The Human Rights Watch World Report of 2017 does not cover Albania.

organizations with activities in a range of countries, when carrying out tasks in cooperation with third countries (Article 34.4).[62]

Frontex cooperates on risk analysis and information exchange with third countries through information-sharing networks Africa-Frontex Intelligence Community, Eastern European Borders Risk Analysis Network, Turkey-Frontex Risk Analysis Network and Western Balkans Risk Analysis Network.[63] Within each network, the participating authorities use the same methodology. As with any data gathering, this is necessary for comparability, so it is hardly surprising that the same template is used. The results of the risk analyses feed into operational plans for joint operations; and as joint operations 'shall be preceded by a thorough, reliable and up-to-date risk analysis' (Article 15.3), the agency is willing to adapt its actions according to information coming in from third countries. Indeed, Frontex[64] makes strong claims to reflexivity here by stating that '[t]he knowledge generated within these networks feeds into planning of participants' own border management activities but also to higher level strategic and even EU funded capacity building activities'.

Some working arrangements mention training as a potential area for cooperation. While recognizing that countries use different border control systems and have different needs depending on geographical location, the aim of the Frontex-led training is to 'promot[e] the development of a common European border guard culture with high professional and ethical standards'.[65] Fundamental rights training is part of the CCC for basic training of border guards,[66] and according to Horii,[67] a few third countries have integrated 'common training standards into their national training structures'. Although the third countries currently cooperating with Frontex may not have been directly involved in the design of the CCC, several interests external to Frontex itself have been involved in the process of CCC development. Examples of such interests are non-EU Schengen associated countries, the United Nations High Commissioner for Refugees and the International Organization for

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[62] For a list of current member organizations, see Frontex Management Board Decision No 29/2015 of 09 September 2015 on the composition of the Frontex Consultative Forum on Fundamental Rights.

[63] Frontex, 'Strategic analysis', http://frontex.europa.eu/intelligence/strategic-analysis, last accessed 26 May 2017.

[64] Ibid.

[65] Frontex, 'Principles', http://frontex.europa.eu/training/principles/, last accessed 26 May 2017.

[66] Frontex, 'Training manual for fundamental rights training', http://frontex.europa.eu/assets/Publications/Training/Fundamental_Rights_Training_for_Border_Guardsl.pdf, last accessed 15 September 2017.

[67] Satako Horii, 'It is about more than just training: the effect of Frontex border guard training', [2012] *Refugee Survey Quarterly* 4 158, 159.

Migration.[68] The current legislation specifies that Frontex should consult its Consultative Forum when developing the CCC (Article 36.5). Countries that have a working arrangement with the agency may take part in information exchange related to training.[69]

With regard to the deployment of liaison officers to third countries, there appears to be an element of reflexivity in the sense that this can be done on a reciprocal basis (Article 55.2). Turkey was the first country to receive a liaison officer,[70] and in 2016 the Management Board decided to appoint one in the Western Balkans.[71] Priority is given to third countries that, 'on the basis of risk analysis, constitute a country of origin or transit regarding illegal immigration' (Article 55.2). This suggests that the agency takes the peculiarities of countries into account. However, it also implies that the overarching goal of cooperation is to serve the aims of European border control, which may not be the prime concern of third countries.

If the various forms of operational cooperation with third countries have a fair degree of reflexivity to them, the technical assistance programmes in third countries currently implemented by Frontex focus on spreading European standards. The EaP Integrated Border Management (IBM) Capacity Building Project aims to bring the European template for IBM to Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. The aim of the 'Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey' project is 'to introduce and share EU standards and best practices on migration management' in Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Serbia, Montenegro and Turkey.[72]

4.2.2 Inclusiveness

Working arrangements cannot be concluded without the consent of the relevant third country authorities, meaning that a degree of inclusiveness is thus inherent to this process. An important question is how the cooperation turns

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[68] Ibid, 168.

[69] Frontex, supra note 65.

[70] Frontex, 'General Report 2015', http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2015/General_Report_2015.pdf, last accessed 15 September 2017.

[71] Frontex, 'Frontex to deploy liaison officer in the Western Balkans', http://frontex.europa.eu/news/frontex-to-deploy-liaison-officer-in-western-balkans-r8CFKb, last accessed 1 June 2017.

[72] Frontex, 'One year of capacity building in the Western Balkans and Turkey', http://frontex.europa.eu/news/one-year-of-capacity-building-in-the-western-balkans-and-turkey-ojX852, last accessed 1 June 2017.

out in practice once the arrangement is signed. Hernández i Sagrera[73] suggests that the working arrangements are 'soft law instruments with a structure flexible enough to adapt to the interests of the signatories', which suggests that signatories on both sides can have significant impact on actual cooperation. As previously mentioned, third countries have input into Frontex's work through their participation in information-sharing networks, and one could surmise that participating countries have joint ownership of these networks. However, the extent to which this means that third countries also have joint ownership over activities that the agency decides to undertake on the basis of the information given is not entirely clear. After all, the core task of the agency is to assist EU Member States with their border management, and cooperation with third countries is maintained to fulfil this task. This is also reflected in the administrative assistance programmes implemented by Frontex in third countries.

While the focus of the technical assistance programmes is not very reflexive, there is an element of inclusiveness. What capacity building activities will be undertaken as part of the EaP is determined by needs identified by the third country authorities, which suggests an element of joint ownership of the project. The 'Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey' programme aims to 'complement national efforts in the area of migration management'.[74]

4.2.3 Universal norms

The current regulation guiding Frontex's work is the prime source on the norms which inform cooperation with third countries. Recital 46 of the Frontex Regulation states that in its cooperation with third countries, the agency 'should comply with Union law at all times, including fundamental rights and the principle of non-refoulement' (see also Article 34 and Article 54). Recital 47 covers the legal texts from which fundamental rights are derived; here it becomes very clear that the norms the agency needs to adhere to are very much regarded as universal. The legal texts informing Frontex's concept of fundamental rights are the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the United Nations Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Relating to the Status of Refugees, the United Nations Convention on the Law of the Sea, the International Convention

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[73] Raoül Hernández i Sagrera, 'Exporting EU integrated border management beyond EU borders: modernization and institutional transformation in exchange for more mobility?', [2014] *Cambridge Review of International Affairs* 1 167, 173.

[74] Frontex, supra note 16.

for the Safety of Life at Sea and the International Convention on Maritime Search and Rescue. The principle of non-refoulement, more specifically, has a firm grounding in international law and is undoubtedly acknowledged in the UN system. It has its origin in the 1951 Convention Relating to the Status of Refugees and is also enshrined in the International Covenant on Civil and Political Rights, as well as in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[75] None of the working arrangements concluded with third countries makes specific references to these legal texts, although the working arrangements with Kosovo and Azerbaijan have generic references to international law and principles.

5. CONCLUDING REMARKS

The conceptualization of Frontex's activities as expressions of EU normative power entails an understanding that the agency can and should apply the universally accepted normative principle of respect for fundamental rights in its external relations. This chapter set out to assess Frontex's cooperation with third countries with a focus on normative intent and normative process.

A close reading of the 2016 Frontex Regulation shows that fundamental rights norms occupy a central role. References to such norms are positioned prominently throughout the Regulation and in the provisions on third country cooperation. However, cooperation is also governed by working arrangements signed by the agency and competent third country authorities, and all existing working arrangements were concluded prior to the entry into force of the current Frontex Regulation. With the exception of the few arrangements concluded from 2012 onwards, these working arrangements do not mention fundamental or human rights. No official information is provided as to whether they will be revised to reflect the increased attention to fundamental rights given in the agency's mandate. Academic literature on organizational legitimacy holds that organizations seek to act in a socially desirable way. Against the background that Frontex's legitimacy has been questioned with reference to activities that impact negatively on fundamental rights, it is in Frontex's interests, and in the interests of the EU at large, that the agency seeks to apply fundamental rights more consistently than previously. However, a conflict of objectives within the agency can be discerned, in that some Member States − which are represented on the agency board and within the EU institutions deciding on the resources

[75] European Union Agency for Fundamental Rights, *Scope of the Principle of Non-refoulement in Contemporary Border Management: Evolving Areas of Law* (Luxembourg: Publications Office of the European Union, 2016), 13.

given to the agency − may prioritize strict border control, including operations leading to early detection, interception and pushback of migrants.

Since the entry into force of the 2016 Regulation, there has been a high level of norm consistency with regard to fundamental rights norms. All actors, whether internal to Frontex or third country officials taking part in joint operations, are expected to live up to the same standards. The principles applied are part of a bigger picture − that is, they can be deemed universal in that they are derived from established sources of international law, which suggests that the agency is coherent in the norms it applies. However, even if the agency consistently expects the same standards of its officers and third country officers during the course of joint operations, the agency's actions can call coherence into question. If the agency is contributing to returning people to third countries where their fundamental rights will not be respected once Frontex's responsibility for the returnees comes to an end, this action is not consistent with the commitment to fundamental rights that is supposed to permeate every aspect of the agency's work.

Most working arrangements follow the same template, but they all emphasize aspects such as building trust and reciprocity, which indicates a degree of reflexivity. The results of Frontex's cooperation with third countries on risk analysis and information exchange feed into activities and practices at both European and third country level. Similarly, information exchange and adaption of training show a willingness to engage in reflexive practice. With regard to the deployment of liaison officers to third countries, this can be done on a reciprocal basis, but it is very obvious that the EU's concerns of securing its borders and reducing irregular migration are prioritized over any other concern that third country authorities may have. Finally, the purpose of technical assistance programmes is clearly pronounced to be the promotion of European standards.

As mutual agreement is a requirement for the conclusion of working arrangements, an element of inclusiveness is inherent to their conclusion. Moreover, the working arrangements are flexible and can be adapted in accordance with the wishes of third country authorities and Frontex. As the agency cannot force any third country authorities to take part in information networks, inclusiveness is a prerequisite and we can assume a degree of joint ownership of these networks. However, the degree of influence of third countries over what action is taken as a result of the information they provide is not clear. The technical assistance programmes have a high degree of inclusivity and joint ownership, as the assistance provided is guided by needs identified with the participating third countries.

In conclusion, this analysis suggests that the agency is moving towards a more genuine commitment to implement and apply fundamental rights, and that there is a fair degree of inclusivity and reflexivity to third country coop-

eration. These are promising signs for individuals affected by Frontex's work, and for the perception of the agency − and by extension also of the EU − as a normative power. What nonetheless remains problematic is the possibility of Frontex being confronted with conflicting expectations, confusing its mandate. As this is a nascent research agenda, the focus of the current chapter has been to offer preliminary findings primarily based on documentary sources. These preliminary findings need to be tested by further research on how the agency implements its mandate 'on the ground' by interviewing people involved and engaging in participant observation. A first step could be to investigate empirically what norms are prioritized by Frontex in situations where conflicting expectations of the agency are apparent. Another research strand could follow up on the nature of cooperation within information sharing networks and technical assistance programmes. This would move beyond questions of normative intent and normative process to address the crucial question of what real impact the agency can have on third countries.

6. EU agencies – agents of policy diffusion beyond the EU

Sevasti Chatzopoulou

1. INTRODUCTION

'Agencification' refers to the proliferation of EU agencies, which exist at arm's length from the EU institutions and, more specifically, the Commission.[1] During often intense inter-institutional negotiations, the Commission and the European Parliament (EP) supported the establishment of the decentralized agencies,[2] which number 40 today. Their founding regulations define their tasks as contributing to the harmonization and expansion of regulatory standards within the EU multilevel governance in order to respond to evolving needs in the internal market.

The literature on EU agencies is extensive.[3] However, this mostly focuses on the agencies' role in policy coordination among Member States and examines their establishment, organization and governance, accountability and legiti-

[1] Magdalena Busuioc and Martijn Groenleer, 'Wielders of Supranational Power? The Administrative Behaviour of the Heads of European Union Agencies' in Magdalena Busuioc, Martijn Groenleer and Jarle Trondal (eds), *The Agency Phenomenon in the European Union* (Manchester, Manchester University Press, 2012).

[2] Daniel R Kelemen, 'The Politics of 'Eurocratic' Structure and the New European Agencies', [2002] *WEP* 4 93.

[3] Fabrizio Gilardi, 'The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe', [2005] *Annals of the American Academy of Political and Social Sciences* 1 84, 84−101; Susana Borrás, Charalambos Koutalakis and Frank Wendler, 'European Agencies and Input Legitimacy: EFSA, EMEA and EPO in the Post-Delegation Phase', [2007] *JEI* 5 583, 583−600; Martijn Groenleer, *The Autonomy of European Union Agencies A Comparative Study of Institutional Development* (Delft, Eburon, 2009); Jarle Trondal and Lene Jeppesen, 'Images of Agency Governance in the European Union', [2008] *WEP* 3 417, 417−444; Morten Egeberg and Jarle Trondal, 'Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?', [2017] *JCMS* 4 675, 675−690.

macy; there is no common understanding of their governance and functioning.[4] Moreover, existing academic contributions do not pay adequate attention to the agencies' actorness, activities and behaviour beyond the EU. This chapter adds a new dimension to the agencification literature, investigating the EU agencies' behaviour and activities beyond the EU. It argues that since their establishment, the agencies have developed their own capacity, interests and strategies, practices and normative weaves beyond the tasks initially assigned to them. They act as pools of scientific knowledge, initiate new areas of action (self-tasks), and organize and coordinate transnational regulatory networks that enhance their behaviour as policy actors and entrepreneurs, both within the EU and beyond. This chapter also contributes to the literature on the EU as a global actor.[5] However, instead of concentrating on the macro level and the role of the Commission, like most studies of the EU as a global actor, this chapter focuses on the meso level of analysis and examines the agencies' actorness, day-to-day practices and activities which strengthen their role in policy diffusion beyond the EU.

As 'transnational administrative apparatuses', the EU agencies respond to emerging opportunities for policy action and create new opportunities for international collaboration. In this way, they justify their existence and consolidate their role as actors in EU policy making in the international arena. The EU agencies differ in size, structure, organization and policy objectives. In order to understand their role and behaviour, drawing on organization theory,[6] this chapter investigates four of their organizational structural characteristics: (1) the governance provisions of their founding regulations; (2) capacity; (3) specialized expertise; and (4) autonomy. These characteristics enable the EU agencies to develop collaborations, arrangements and activities through which participants − through processes of socialization, persuasion and learning − engage in the exchange of ideas, reconsider and promote behavioural change, and adopt new practices. Through their activities and tasks, the agencies aim to enhance their actorness and promote the diffusion of EU standards, instruments, models and principles. Policy diffusion can be applied to a broad range

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[4] Sevasti Chatzopoulou, 'Unpacking the throughput of the agencies', [2015] *EPS* 2 159, 159−177.

[5] Ian Manners, 'Normative power Europe: A contradiction in terms?', [2002] *JCMS* 2 235, 235–258; Chan Damro, 'Market power Europe', [2012] *JEPP* 5 682, 682–699; Sophie Meunier and Kalypso Nicolaıdis, 'The European Union as a conflicted trade power', [2006] *JEPP* 6 906, 906–925; Alasdair R Young, 'The European Union as a global regulator? Context and comparison', [2015] *JEPP* 9 1233, 1233−1252.

[6] Morten Egeberg, Åse Gornitzka and Jarle Trondal, 'Organisation Theory' in Christopher Ansell and Jacob Torfing (eds), *Handbook on Theories of Governance* (Cheltenham, Edward Elgar 2016).

of social and political phenomena, such as concrete policies (eg, regulatory instruments) and more general policy frameworks (eg, policy principles and processes).[7] However, policy diffusion is not easily measurable or generalizable. In the same vein, as the EU agencies cannot impose policy on other institutions beyond the EU, this chapter does not measure or evaluate their effectiveness in policy diffusion beyond the EU; 'actorness is separated from EU effectiveness, since these two are not automatically two sides of the same coin as is often implied'.[8] Nevertheless, the agencies can facilitate deliberation, engage in negotiations and dialogue, and provide expert knowledge to policy makers, international organizations and regulators which are interested in non-formal learning, in order to reduce uncertainty and clarify their own policy preferences within an interdependent world. While it is acknowledged that other international actors may affect the EU agencies, this does not constitute part of this study.

In order to operationalize the chapter's main argument − namely, that the EU agencies develop their behaviour with the aim of diffusing policy and standards beyond EU borders − this chapter investigates and compares the organizational structural characteristics of three regulatory agencies: the European Environmental Agency (EEA), the European Medicines Agency (EMA) and the European Food Safety Authority (EFSA). These agencies share a common interest in environmental and health quality within their risk assessment mandate. They support the Commission in its international commitments; participate in transnational networks, where they promote collaboration with their international counterparts and other organizations; organize and coordinate training activities and conferences; sign agreements and memoranda of understanding; and exchange information and knowledge on scientific methods, benchmarking instruments and administrative practices. Generally, actors engage in such processes because of strategic interests (eg, access to a specific market), to consolidate their role and for normative reasons (eg, societal benefits and higher quality of life standards − for example, relating to health, food or the environment).

This chapter is organized as follows. The next section explains the case and data selection. The EU agencies' organizational structural characteristics and their link to the agencies' behaviour beyond EU borders are then theorized. A presentation and comparison of the three agencies' organizational structural characteristics follows. The chapter demonstrates that the agencies' actor-

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[7] Fabrizio Gilardi, 'Who Learns from What in Policy Diffusion Processes?', [2010] *AJPS* 3 650, 650–666.

[8] Louise van Schaik, 'The EU's growing pains in negotiating international food standards', [2013] *IR* 3 292, 293.

ness and behaviour beyond EU borders are contingent on their own internal organizational characteristics. Differences in these characteristics explain the variations in the agencies' arrangements and strategies, and are reflected in their behaviour.

2. CASE SELECTION AND DATA

The EU agencies were established by secondary EU law − usually a regulation − which prescribes their competences, object and scope of activity, financing and governance. Their establishment was an institutional innovation aimed at depoliticizing decision making and increasing legitimacy by separating administration from politics; it also strengthened the Commission's Secretariat as a political actor in initiating policies in accordance with New Public Management[9] trends and ideas.[10] The EU agencies are assigned specific tasks, prepare reports, consult the EU institutions and Member States, support the Commission's commitments and develop scientific and technical know-how in specific areas.[11] They also seek to ensure the proper implementation of EU policies, reduce transaction costs in the internal market, and increase accountability and credibility in EU policy making.[12]

This chapter examines three decentralized agencies − the EEA, EMA and EFSA − which, along with the European Centre for Disease Prevention and Control (ECDC) and the European Chemicals Agency (ECHA) (which are not studied in this chapter), are part of the 'health and environment' agency cluster. These agencies share a common interest in environmental and health quality within their risk assessment mandate. They are expected to provide specialist scientific and technical knowledge without relying on partisan

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[9] Whether EU agencification, like national agencification, is informed by New Public Management is disputed, *inter alia*, by Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford, OUP, 2016), 3–4.

[10] Giandomenico Majone, *Regulating Europe* (London, Routledge, 1996), 336; Renaud Dehousse, 'Regulation by networks in the European Community: the role of European agencies', [1997] *JEPP* 2 246, 246–261.

[11] European Commission, 'The operating framework for the European Regulatory Agencies', COM (2002) 718 final, 4; Helena M Ekelund, *The Agencification of Europe: Explaining the Establishment of European Community Agencies* (University of Nottingham, 2010, unpublished PhD thesis), 51; Mark Thatcher, 'Delegation to independent regulatory agencies: pressures, functions and contextual mediation', [2002] *WEP* 1 125, 125–147; Egeberg and Trondal, supra note 3.

[12] Majone, supra note 10; Groenleer, supra note 3; Trondal and Jeppesen, supra note 3; Bertold Rittberger, and Arndt Wonka, *Agency governance in the European Union and its consequences* (London, Routledge 2012); Egeberg and Trondal, supra note 3.

relations and ideology. However, the three agencies present distinctive differences − concerning the provisions of their establishment, the scope of their specialized expertise, decision-making competences and autonomy – which are useful from a comparative perspective. The EEA is responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information and networking services to other agencies and institutions on environmental issues.[13] EMA and EFSA have acquired de facto[14] regulatory competence in two policy areas that are especially regulated at EU level: pharmaceuticals and food, respectively. They provide technical and scientific advice to the Commission and Member States. Furthermore, the scope of their activities is significant both within the EU and globally, as they are involved in international agreements and negotiations (eg, relating to climate, food, environment and health).

The agencies prepare Multiannual Work Programmes (MAWPs) and Scientific Cooperation Roadmaps which outline their initiatives and the key strategic dimensions of their international engagements. The present analysis is based on these documents, complemented by publications on the agencies' international strategies, multi-annual plans, collaboration arrangements, training and conference activities. In addition, several interviews were conducted in 2017 with high-level officials in the international departments of the three EU agencies and the Commission. The interviews are not quoted in the analysis, but are used to provide information on formal and informal international interactions and forms of contact, and the processes and purpose of these interactions (eg, exchange of information and knowledge transfer on risk methods), as well as for data triangulation.

3. ORGANIZATIONAL CHARACTERISTICS OF THE EU AGENCIES

The EU agencies sit between pure administration and politics.[15] They are essentially 'transnational administrative apparatuses, embodying contradictions and dilemmas that are difficult to resolve and that affect how decisions

[13] Maria Martens, 'Voice or Loyalty: The Evolution of the European Environment Agency (EEA)', [2010] *JCMS* 4 881, 881−901.

[14] *De jure*, the Commission has the right to make decisions that are binding. *De facto*, however, it is less powerful, since it nearly always follows the opinions or recommendations of the agencies when making decisions.

[15] Ellen Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?', [2000] *CMLR* 5 1113, 1113–1134.

are made'.[16] They are transnational because they extend their activities and operate across national boundaries; they also recruit civil servants from all Member States. Transnationality creates certain expectations among EU civil servants in general regarding the future direction of organizations, enhances integration and favours supranationalism.[17] Like the Commission 'Eurocrats', the agencies' transnational civil servants expand their tasks through a dynamic bureaucratization process within the 'European executive order'.[18]

The agencies undertake 'regulatory functions [such] as adopting individual decisions, issuing guidelines on the application of EU law at the national level, engaging in national agencies' handling of single cases, and developing new EU legislation'.[19] They also develop 'entrepreneurial methods' and take the initiative to disseminate policy ideas, scientific knowledge and new practices to ensure and externalize high standards worldwide through their international networks.[20] Through their activities, the agencies justify their existence and consolidate their role as actors in the EU policy field, while enhancing the role of the EU as a global actor. These activities are especially apparent in collaborations with jurisdictions that have similar economic and social standards or trade agreements with the EU (eg, the US, Japan and Canada). By concentrating on the agencies' day-to-day tasks with their international counterparts, this chapter differs from the existing studies on the EU as a global actor, which focus on EU macro-level regulatory capacity, crisis management responses and norm diffusion (eg, democracy).[21]

According to the agencies' founding regulations, which prescribe their competences, objectives, limitations and opportunities, the EU agencies have no formal policy decision-making competences, cannot induce 'direct coercive policy transfer' and have no authority to impose any conditionality on other agencies or organizations beyond the EU. However, being part of the EU administrative space and supported by their organizational structural characteristics, the agencies seek innovative methods to achieve 'voluntary policy diffusion' both within and beyond the EU. For this purpose, the agencies mainly concentrate on 'voluntary forms of practice'; they help to disseminate intellectual

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[16] Jarle Trondal, *An Emergent European Executive Order* (Oxford, OUP, 2010), 216.

[17] Antonis Ellinas and Ezra Suleiman, 'Supranationalism in a Transnational Bureaucracy: The Case of the European Commission', [2010] *JCMS* 5 923, 923–947.

[18] Trondal, supra note 16.

[19] Egeberg and Trondal, supra note 3, 4.

[20] Matthew Wood, 'Mapping EU agencies as political entrepreneurs', [2017] *EJPR* 2 404.

[21] Manners, supra note 5; Damro, supra note 5; Meunier and Nicolaïdis, supra note 5; Young, supra note 5.

and scientific knowledge that underpins policies (eg, on environmental safety, health and food standards), and develop practices (eg, risk assessment methods and standards evaluation) and administrative models. Moreover, they organize training activities, awareness conferences and networking arrangements. In these fora, agency experts aim to interact and socialize with their counterparts, policy makers and representatives from international organizations and other regulators who are interested in reducing uncertainty and clarifying their own policy preferences. This occurs through socialization, deliberation, dialogue and learning, and can lead to adaptation through internalization. Through these processes, the agencies act as transnational 'expertise tanks', which aim to change the ideas and beliefs of participants who can become persuaded and adapt and justify their policy choices accordingly. Such processes are referred to as 'power through ideas'.[22] Learning processes incorporate normative and appropriateness dimensions, and are more proactive than mere 'emulation', as they are 'reflected in both the behavioural and cognitive worlds of the policy actors'. The agencies thus develop these technocratic expertise roles that shape their actorness and behaviour over time. These roles also legitimize their decisions and activities, referred as 'technocratic legitimacy'.[23] Such characteristics define certain expected roles of the actors within a specific organizational setting.[24]

Drawing on organization theory, this chapter identifies four characteristics that are not interconnected and allow for a better understanding of the agencies' behaviour and activities concerning policy diffusion. These characteristics are not mutually exclusive, but rather complementary. First, the timing of and rationale for the agencies' establishment are significant, because these determine their scope of activities, objectives, competences, responsibilities and resources. Indicatively, if an agency is established in response to a mismanagement crisis or increased politicization of an issue due to increased salience (eg, the bovine spongiform encephalopathy (BSE) crisis), its founding regulation will impose stricter control mechanisms in relation to its activities and competences. This is the first characteristic: the agencies' governance provisions.

Second, when an agency is founded, it is equipped with resources such as human capital, personnel (departments/units), experts and working groups and advisory boards, to support its functioning. This is the second characteristic:

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[22] Martin Carstensen and Vivien Schmidt, 'Power through, over and in ideas: conceptualizing ideational power in discursive institutionalism', [2016] *JEPP* 3 318, 318–337.

[23] Martin Shapiro, 'Deliberative' 'Independent' Technocracy v. Democratic Politics: Will the Globe Echo the EU?', [2005] *LCP* 3/4 341, 341–356.

[24] Egeberg and Trondal, supra note 3.

the (administrative) capacity that enables the agencies to define, pursue, coordinate and implement their goals. The recruitment of highly qualified personnel, who can respond to the agency's evolving functional needs and participate in transnational administrative networks, enriches this administrative capacity, which becomes institutionalized over time. The expansion of agencies' administrative capacity occasionally raises concerns about bureaucratic drift,[25] which can lead to the imposition of various control mechanisms and constraints.

Third, the agencies recruit professionals with specialized expertise in their individual policy areas (eg, biologists, veterinarians, health specialists and doctors, and environmental scientists). These specialist experts contribute to the agencies' science-based assessments. Specialized expertise distinguishes the agencies from political actors and reduces uncertainty in policy making, but also helps to clarify policy preferences. In addition, it facilitates the creation of new scientific ideas, innovative assessment methods and policy standards. Consequently, this specialized expertise makes the agencies significant actors in the standard-setting process and brings them closer to the relevant industry (eg, pharmaceuticals, chemicals or food). The form and boundaries of this relationship are important, as it can create barriers to entry and access to markets.

The fourth characteristic is the agencies' autonomy, which refers to their ability to decide on the scope of their activities and the use of resources in performing their assigned tasks.[26] The level of autonomy depends on the financial resources available: financial independence affords greater room for manoeuvre and for the expansion of initiatives, and can also create links to specific interests (eg, interest groups, industry). The greater the agencies' capacity, expertise and autonomy, the more they can delve into new policy areas and services, develop their own strategies, explore new ideas and opportunities, innovate and expand their tasks and activities beyond their initial mandate, albeit without violating any provisions of their establishment.

4. ORGANIZATIONAL STRUCTURAL CHARACTERISTICS

The three agencies studied in this chapter were established at different times, in response to different exogenous events, needs and rationales. The provisions in their founding regulations reflect these differences. Table 6.1 presents the four organizational structural characteristics for the examined agencies.

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[25] 'Bureaucratic drift occurs if a bureaucratic agent develops and pursues a policy agenda differing from that of its political principals', Kelemen, supra note 2, 96.

[26] Groenleer, supra note 3.

Table 6.1 EU agencies' organizational structural characteristics

Organisation structure characteristics	EEA	EMA	EFSA
Governance provisions	7 May 1990, Council Regulation (EEC) 1210/90. Response to broader environmental concerns.	22 July 1993, Council Regulation (EEC) 2309/93. Human health concerns (thalidomide tragedy 1960s). Market liberalization and efficacy.	28 January 2002, European Parliament and Council Regulation (EC) No 178/2002 (Arts 22 and 23). Response to food crises (especially BSE); mismanagement of the existing system.
Capacity	280 employees; Management Board (33 members), supported by the Bureau (five members); International Unit Scientific Committees; Experts and forums	860 employees; Management Board (33 members); International Unit Scientific Committees and working groups; Exchange of human resources (liaison in FDA)	520 employees; Management Board (14 Members); International Unit Scientific Committees and working groups; Exchange of human resources (with counterparts in non EU countries).
Specialised expertise	Consultative; Data gathering Information exchange; Networking and coordination; Indicator development and analysis of data	Regulatory; Science-based product evaluation; Dissemination/exchange of information; Data gathering; Scientific advice and Technical assistance (MS and others); Networking and coordination; Collaborations and agreements on product development; Market efficacy support.	Regulatory; Science-based risk assessment; Dissemination/exchange of information; Data gathering Scientific advice and Technical assistance (MS and others); Networking and coordination; Expertise knowledge and training development.
Autonomy	Financially supported by the EU Budget; No formal decisions on policy or standards.	80% financed/20% EU budget; Human resources; Risk evaluation and risk management competences.	Financially dependent on the EU budget; Independent scientific experts' committee; No formal competences on risk management.

The EEA was established in 1990, in order to coordinate EU environmental legislation, facilitate networking among Member States and provide objective, reliable and comparable, sound, independent information on environmental issues to EU policy makers, Member States and the public. While there was no legal basis for environmental policy in the Treaties until the Single European Act, the EU has produced a considerable amount of environmental legislation since the 1960s.[27] The EEA prepares policy reports, and gathers and analyses data for those involved in developing, adopting, implementing and evaluating environmental policy.

EMA was initially founded in 1993 by bringing together the pre-existing Committee for Human Medicinal Products (formerly the Committee for Proprietary Medicinal Products) and the Committee for Veterinary Medicinal Products. However, the EU pharmaceutical legislation was introduced back in 1965, in response to the thalidomide scandal (malformation effects on babies caused by a medicine for pregnant women). EMA's mission was to promote the efficient and flexible implementation of EU legislation on pharmaceuticals, and facilitate rapid access of new products to the Community market.[28]

EFSA − the most recently founded of the three agencies − was established in response to criticisms of the mismanagement of the BSE crisis by the EU scientific committees under the Commission.[29] Although the EU had experienced a number of food crises before this (eg, E-coli in Belgium), it was not until the BSE crisis that intense media coverage increased politicization and emphasized the need for EU food safety policy. EFSA was therefore established to provide independent scientific advice and clear communication on existing and emerging risks in the area of food and feed safety, animal health and welfare, as well as plant health.[30] Before this, and despite the economic

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[27] Groenleer, supra note 3, 215.

[28] Fernand Sauer, 'European Medicines Evaluation Agency: Status Report', in Alexander Kreher (ed), *The New European Agencies* (Florence, EUI, 1996), 23, as cited in Groenleer, supra note 3, 145.

[29] Alberto Alemanno, 'Food Safety and the Single Market' in Christopher Ansell and David Vogel (eds), *What's the Beef? The Contested Governance of European Food Safety* (Cambridge, MIT Press, 2006), 237–258.

[30] EFSA, 'Multi-annual programme on International Scientific Cooperation 2014–2016', (2014) mb 26 06 14 item 9 doc 7, www.efsa.europa.eu/sites/default/files/corporate_publications/files/iscmap1416.pdf, last accessed 20 October 2018.

significance of the food sector,[31] food safety[32] issues were not salient and fell under national competence.

Each of the agencies is governed by a Management Board that ensures its efficient functioning, approves the budget, appoints and dismisses the executive director (and members of the scientific committee and panels in EFSA), and often takes executive decisions (EEA and EMA). The EEA's Management Board consists of 33 members (representatives from all Member States, two from the Commission and two appointed by the European Parliament). EMA's Management Board has 36 members (representatives from all Member States, two from the Commission and two from the European Parliament, two from patient organizations, one from doctors' organizations and one from veterinary organizations). The EFSA Management Board consists of only 14 members (13 experts from Member States and one from the Commission).

The three agencies differ in size, organizational organograms, and number and type of units and committees, reflecting differences in their capacity (the EEA is the smallest, while EMA is the largest). The agencies' highly qualified transnational civil servants include national seconded administrators and specialized scientists (eg, biologists, doctors and chemists). They are recruited on permanent or temporary contracts and ensure the day-to-day functioning of the agencies (200 staff in the EEA, 850 in EMA and 512 in EFSA). They usually speak more than one EU language and are extensively trained over time. As they respond to emerging circumstances, the agencies acquire new tasks and competences that enhance their capacity. Their coordination tasks aim to utilize expertise efficiently and avoid duplication of work among the 28 national authorities. In addition, the agencies' International Units − in consultation with the other units, the Commission and the Management Board − develop and implement the international strategy of each agency. These activities can be undertaken on demand by the Commission (eg, in relation to specific issues), but are mostly an initiative of the agencies themselves, as they have both the expertise and the organizational impetus to expand their scope of activities. The three EU agencies have developed tremendous administrative

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[31] The EU is the world's largest producer of food and drink products. Food and drink companies constitute the EU's biggest manufacturing industry, create value-added activities, provide employment for 4.2 million people and contribute to exports (€102 billion in 2017) and growth in the EU economy; www.fooddrinkeurope.eu/uploads/publications_documents/DataandTrends_Report_2017.pdf, last accessed 29 October 2018.

[32] 'Food safety' refers to 'whether the consumption of a foodstuff by a human may cause a risk to his/her health'. Morten Broberg, *Transforming the European Community's Regulation of Food Safety* (Stockholm, Swedish Institute for European Policy Studies, 2008).

capacity and know-how in the initiation and coordination of collaboration among relevant actors from different governance levels, bridging cultural and organizational differences and establishing working processes within diverse professional environments and with international counterparts beyond the EU (Table 6.1).

Specialized expertise among the three agencies differs, as reflected in their activities. A number of committees prepare scientific opinions to support the agencies' work. The agencies then provide these opinions to the Commission and Member States. The EEA's scientific committee consists of 20 members from Member States designated by the European Parliament.[33] EMA has seven scientific committees and various working groups comprised of experts appointed by the 28 Member States (all Member States are represented) from the national authorization bodies. EFSA has one scientific committee and ten scientific panels (one for each scientific area). These consist of independent scientists, appointed by an open call for a specified period, based on relevance of scientific discipline rather than country of origin. Thus, national representation differs between EFSA and EMA.

The EEA's specialized expertise is focused on gathering and analysing data for the production of assessments on a wide range of environmental topics, disseminating information to institutions and the public, networking and coordinating the implementation of environmental policy. The EEA establishedthe European Environmental Information and Observation Network (Eionet) in close collaboration with its 33 member countries in order to monitor and coordinate among EU Member States and non-EU members on relevant areas. In 2008 it established the Shared Environmental Information System (SEIS) in order to improve the collection, exchange and use of environmental data and information across Europe. SEIS aims to create an integrated, web-enabled, EU-wide environmental information system by simplifying and modernizing existing information systems and processes. The EEA is not involved in any form of regulatory policy making and thus differs from EMA and EFSA.

EMA coordinates and supports regulatory cooperation between Member States and operates as the linchpin of the pharmaceuticals regulation network. EMA has developed independent expertise in the management of health crises − and more specifically, influenza pandemics[34] − and the surveillance of the pharmaceutical market, in collaboration with other agencies (eg, the ECDC). EMA validates applications for marketing authorizations for pharmaceutical

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[33] EEA, 'Governance', (2018), www.eea.europa.eu/about-us/governance, last accessed 20 October 2018.

[34] Arjen Boin, Magdalina Busuioc and Martijn Groenleer, 'Building Joint Capacity: The Role of European Union Agencies in the Management of Transbountary Crises'**,** [2011] *Jerusalem Papers in Regulation & Governance*, Working Paper 36 1.

products, coordinates the assessment of new medicines by national authorities and delivers opinions to the Commission on which to base authorization decisions.[35] The assessment process is supported by 4500 experts across the EU and relies on the resources of the national medicines authorities of Member States. EMA's scientific evaluations constitute the basis for the EU regulations on pharmaceuticals. In authorizing medicinal products, the Commission is seen as mainly 'rubber-stamping' the draft opinions submitted to it by EMA.[36]

Over time, EMA has been confronted with conflicting expectations and demands, originating from contradictory regulatory objectives and conflicting interests.[37] The scope and type of its tasks have expanded in line with new EU legislation. In addition to 'the evaluation of human and veterinary medicines, EMA is also responsible for products developed in the specialised areas of medicines for rare diseases (since 2000), herbal medicines (since 2004), medicines for children (since 2006) and advanced-therapy medicines (since 2007)'.[38] These activities have contributed to EMA's specialized technical expertise with the support of the expanded scientific committees. One of EMA's objectives is to remove barriers in the pharmaceuticals market. This coincides with industry interests and facilitates the efficient circulation of drugs within the EU, while ensuring high health standards for the public. However, EMA's focus has shifted over time from industry interests to those of European patients. This 'increased focus on patients is linked to the expansion of legislation on and subsequent creation of committees for orphan drugs, herbal medicines and medicines for children'.[39] EMA also provides advice to healthcare professionals and patient groups, and involves them in the provision of information and in the opinion-making process through full membership in the Committee for Orphan Medical Products and the Paediatric Committee.[40] In the early 2000s EMA became proactive in post-marketing surveillance and broadened its scope, as reflected in its change of name from the European Medicines Evaluation Agency to EMA.[41]

EFSA is the EU's risk assessor on food and feed. EFSA gathers and analyses scientific and technical data relating to food safety and advises on plant health, animal welfare and health, human nutrition and crisis management

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35 Groenleer, supra note 3, 150.
36 Egeberg and Trondal, supra note 3, 8.
37 Borrás, Koutalakis and Wendler, supra note 3.
38 European Medicines Agency, 'History of EMA'; www.ema.europa.eu/ema/index.jsp?curl=pages/about_us/general/general_content_000628.jsp&mid=WC0b01ac058087addd, last accessed 20 October 2018.
39 Groenleer, supra note 3, 151.
40 Ibid.
41 Ibid.

procedures.[42] EFSA also develops 'harmonised risk assessment methodologies on scientific matters of a horizontal nature in the fields within its remit where EU-wide approaches are not already defined'.[43] Like the other agencies, EFSA provides administrative, scientific and technical advice to Member States, the Commission and candidate countries, and conducts scientific work on its own initiative (self-tasks). The founding regulation of EFSA separated the responsibility for risk assessment (science) from risk management (policy) of food and feed[44] (European Commission, 2000a). 'Risk assessment' refers to the provision of scientific advice, which requires extensive information gathering and analysis. The Commission is responsible for 'risk management', which refers to legislation and risk control.[45] Both institutions share risk communication responsibilities (EFSA on scientific matters and the Commission on management), in order to inform consumers about food-related health issues and nutrition. This division of responsibilities aims to eliminate bureaucratic and political[46] drift, prevent politicization and ensure the independence, objectivity, equivalence and effectiveness of the control and food inspection systems, and a safe and wholesome supply. Although the Commission mostly follows EFSA's scientific opinions, it is free to depart from them. Decisions are determined by voting in the Standing Committee on the Food Chain and Animal Health under the Commission, based on a qualified majority. In sum, EMA and EFSA have developed deep technical scientific specialized expertise which is significant in ensuring human and animal health, guiding EU standards and providing the basis for regulation of the pharmaceutical and food industries.

Finally, the agencies' level of autonomy affects the type, scope and expansion of their activities and their international arrangements. The governance provisions and structures determine the control mechanisms used by the agencies' principals. For example, the separation of the risk assessment and risk management competences for feed and food reflects the rationale behind the founding of EFSA and the 'police patrol' type of control by both the Commission and Member States. This was a response to the mis-

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[42] See Articles 22 and 23 of Regulation (EC) 178/2002 of the European Parliament and the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, [2002] OJ L 31/1 (hereinafter Regulation 178/2002).

[43] EFSA, 'Scientific committee'; www.efsa.europa.eu/en/panels/scientific-committee, last accessed 20 October 2018.

[44] European Commission, 'Communication from the commission on the precautionary principle', COM (2000) 1 final.

[45] Alemanno, supra note 29.

[46] Political drift occurs where future holders of public authority direct a bureaucratic agency to pursue objectives which differ from those of the political coalition that originally delegated authority to the agency.

management of the BSE crisis and the high degree of politicization on food policy. However, actual politicization has not decreased under this new food governance process, where two different levels − one scientific (EFSA) and one political (Commission) − are involved and share competences. Thus, a long-term, credible commitment to common regulation based on scientific evidence has not been achieved; instead, Member States' short-term interests and politics are the ultimate determinants of the food regulatory framework. Moreover, 'the regulation of foodstuff mainly has to rely on post marketing control' because the foodstuffs market is much more fragmented − with the exception of food additives, as well as novel foods and food ingredients, especially genetically modified organisms, which must be authorized before they can access the Single Market.[47] In practice, when different views and interests among Member States emerge, these are expressed in the voting in the Standing Committee on the Food Chain and Animal Health under the Commission. As a result, national politics, rather than the scientific opinions provided by EFSA, often determine the Commission's authorization decisions on food (eg, GMOs). In contrast, the specific rules for the relatively homogeneous pharmaceuticals products that are produced by large companies allow for pre-market[48] evaluation and regulation.[49] Since all Member States are involved in the risk evaluation − in contrast to the risk assessment at EFSA, which is conducted by individual scientists, without all Member States being represented − differences in national opinions can be resolved before EMA provides its scientific opinions to the Commission, which then mostly rubber-stamps EMA's opinions. These procedural and organizational differences thus shape the Commission's final authorization decisions. This is also relevant for the agencies' initiatives and collaborations with other regulatory authorities and with industry: the greater autonomy the agency enjoys and the less influence that politics exerts on its processes, the more attractive it becomes as a potential collaborator.

Financial independence complements and strengthens the agencies' autonomy, as it determines the availability of resources and facilitates the expansion of their international activities. The EEA has traditionally had limited formal autonomy from the Commission and Member States, although this is changing over time. The EU budget fully finances both the EEA and EFSA, which are thus financially dependent on the EU institutions. Restricted regulatory com-

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[47] Sebastian Krapohl, 'Credible Commitment in Non-Independent Regulatory Agencies: A Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs', [2004] *ELJ* 5 518*,* 519.

[48] Post-market control also applies for pharmaceuticals (pharmacovigiliance), but this works as a subsequent 'fire-alarm' control.

[49] Krapohl, supra note 47, 519.

petences and a lack of extra financial resources checks the expansion of their activities and new initiatives. Nevertheless, EFSA's highly scientific and technical tasks in risk assessment have counterbalanced some of these restrictions and facilitated new endeavours and areas of action.

EMA is one of the few agencies that is partially self-financed: it charges pharmaceutical companies fees for its services − accounting for around 90 per cent of its budget[50] − which increases its autonomy vis-à-vis the EU institutions. However, given the public character of its services, EMA is not entirely financed by fees;[51] the EU budget contributes a subsidy, for which the agency is accountable to the Parliament and the Council.[52] This system of financing enhances EMA's financial independence, while also providing incentives for the strategic expansion of activities. While EMA is highly independent financially from the EU budget, its close financial relations with pharmaceutical companies also strengthen its connection to the industry. The extent to which this connection influences its core risk evaluation tasks occasionally raises concerns over potential conflicts of interest and doubts as to its independence from the industry. The interviewees for this chapter rejected the suggestion that the industry has any influence over EMA, and indicated that there are clear institutionalized mechanisms of control in place and a high level of transparency in its processes (interview with EMA, 2017).

5. INTERNATIONAL ARRANGEMENTS OF EU AGENCIES

The organizational structural characteristics of the agencies are directly linked to what the agencies can and cannot do. Differences in these characteristics lead to differences in their activities, international collaborations and behaviour with respect to policy diffusion. During the EU enlargement process − initially on the request of the Commission − the agencies developed external activities and collaborations focused on the integration of candidate countries, providing support, capacity building and training with respect to environ-

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[50] EMA, 'Funding', www.ema.europa.eu/ema/index.jsp?curl=pages/about_us/general/general_content_000130.jsp&mid=WC0b01ac0580029336, last accessed 20 October 2018.

[51] The legal provisions concerning the level of the fees are Council Regulation (EC) No 297/95 on fees payable to the European Agency for the Evaluation of Medicinal Products [1995], OJ L 35/1 and Regulation (EU) No 658/2014 of the European Parliament and of the Council on fees payable to the European Medicines Agency for the conduct of pharmacovigilance activities in respect of medicinal products for human use, [2014] OJ L 189.

[52] Groenleer, supra note 3, 149.

mental and pharmaceutical standards and food safety assessment methods. In fulfilling these tasks, the agencies required extra resources and human capital, which expanded and strengthened their international units. The agencies developed significant expertise and know-how in the process. They also seized this opportunity and defined new targets and strategies in new territories, as presented in their MAWPs.

As the EEA has no competence or capacity to evaluate and regulate standards, as defined by its establishing regulation, it developed expertise on the coordination of networking, analysis of data and indicators and preparation of policy reports. Consequently, the EEA's[53] international tasks − both during the enlargement process with candidate countries and with other international partners − are focused on coordinating networking and capacity building (Table 6.2). The EEA exchanges experiences and views on environmental issues and shares information on practices and policies with its international partners: international organizations and regulators in European Neighbourhood Policy countries and beyond. In its MAWP 2014−20, the EEA identified three regional priorities: the Arctic region, the Mediterranean and the Black Sea.[54] Its activities aim to ensure 'EU contributions to regional and global processes of a crosscutting nature'.[55] They do not involve coercion, but rather socialization and interaction within various networks, such as SEIS and Eionet. Through these activities, the EEA aims to disseminate information and promote learning and awareness of EU environmental policies, policy principles and standards. More importantly, it aims to influence its partners' beliefs and views, and transfer policy knowledge and practices. In addition, the EEA supports the Commission's international commitments on the environment and climate change by providing reports, expert knowledge and data, based on professionally gathered information, during negotiations and in conferences. This is all done in a bid to persuade others to adopt the EU views on the protection of the environment, climate change and human and animal health (eg, regarding the effects of chemicals and pollution).

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[53] EEA, 'International cooperation', www.eea.europa.eu/about-us/international-cooperation, last accessed 20 October 2010.

[54] EEA, 'EEA framework for international engagement', www.eea.europa.eu/publications/eea-framework-for-international-engagement, last accessed 25 October 2018.

[55] Ibid, 5.

Table 6.2 International arrangements organized by agencies

EEA	EMA	EFSA
- European environment information and observation network Assessment of the state of the environment in Europe - Regional relationships in the EU neighbourhood Eastern countries: Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova, Ukraine (ENI SEIS II East project) Southern Mediterranean countries: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Tunisia (SEIS Support Mechanism) - International organization connections: United Nations, Global Earth Observation System of Systems Non-European country connections: USA Environmental Protection Agency, Australia, Canada, China, India, South Korea; regional-level bodies in Africa, Asia and South America	- International agreements: WHO, Australia, Canada, Japan, Switzerland, USA - Support the EC's work on pharmaceuticals: China, India, Russia - International workshops on the EU regulatory system on pharmaceuticals - Bilateral engagements: USA, Japan, Switzerland, New Zealand Israel, Australia - Bilateral activities (convergence of global standards on pharmaceuticals) Codex Alimentarius, EDQM, ICH, ICMRA, IGDRP, IPRF, OIE, PIC/S, VICH,WHO **- Cluster activities:** United States Food and Drug Administration, Health Canada, Japanese Pharmaceuticals & Medical Devices Agency, Australian Therapeutic Goods Administration Regional relationships/ EU neighbourhood	- Joint work programmes with international partners - Preparation of supporting documents for EC - Support the EC on EU international commitments Codex Alimentarius, WHO, FAO, IPPC/EPPO, OECD, OIE - Multilateral liaison groups - Bilateral engagements: USA, Japan, New Zealand, Australia, Canada, - International workshops and seminars: Brazil, Chile, China, Hong Kong, Korea, Malaysia, Singapore, Thailand and Taiwan - Communication on risk assessment - Regional relationships − European Neighbourhood Policy Instrument: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Tunisia and Ukraine

EMA[56] and EFSA[57] are de facto regulators, responsible for the evaluation of pharmaceutical standards and the risk assessment of foodstuffs respectively. EMA focuses on the efficiency, safety and quality of pharmaceuticals (Table 6.2), which is also of great interest to the industry; these standards can determine whether entry to specific markets is granted or denied and allow for product differentiation. Initially, EMA focused on tasks and activities within the EU; but as a member of the EU regulatory network, it developed capacity and collaborations with international organizations and expanded its international activities beyond the EU over time. Like the EEA, EMA provided capacity-building support to the candidate countries during the EU enlargement process, to help them adapt to EU standards. Due to its specialized expertise in pharmaceutical regulation, EMA frequently represents the EU in international expert meetings (eg, the International Conference on Harmonization).[58] In these fora, EMA acts as a policy entrepreneur and eventually becomes the point of reference with respect to risk evaluation methods and product development, administrative patterns and practices worldwide. Although the Commission formally represents the EU on pharmaceuticals at the international level, EMA is often perceived as a leading global regulator. The EMA sometimes appoints a liaison (eg, to the United States Food and Drug Administration) to strengthen these collaborations, and hosts visitors from various countries in an effort to promote awareness and externalize its assessment methods and standards, on its own initiative. EMA can pursue such initiatives through the support of its human and resource capacity (second organizational characteristic). Its international civil servants facilitate such collaborations, while its scientific and technical specialization (third characteristic) further allow for expanded coordination and knowledge sharing, and even common product development. EMA's international arrangements aim to move further 'from harmonisation of technical requirements towards a more convergence-based approach, emphasising information and work-sharing through multilateral cooperation and coalitions'.[59] On EMA's initiative, public authorities and agencies from different countries and industry representatives participate and

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[56] EMA, 'partners and network', www.ema.europa.eu/ema/index.jsp?curl=pages/partners_and_networks/general/general_content_001848.jsp&mid=WC0b01ac0580c4d3fe, last accessed 20 October 2018.

[57] EFSA, 'International', www.efsa.europa.eu/en/partnersnetworks/international, last accessed 20 October 2010.

[58] Wirtz Sabrina, *The Interplay of Global Standards and EU Pharmaceutical Regulation* (Maastricht University, 2017, unpublished PhD thesis).

[59] EMA, 'International Agreements', www.ema.europa.eu/ema/index.jsp?curl=pages/partners_and_networks/general/general_content_001842.jsp&mid=WC0b01ac0580c4d3ff, last accessed 20 October 2018.

coordinate activities and strategies, and develop memoranda of understanding and agreements on pharmaceutical product development and innovation. Recognizing the high degree of interdependence in the international market and the benefits enjoyed through coordination among the EU Member States, EMA argues that such coordination beyond the EU can result in efficient use of expertise and avoid duplication of work among partners (interview at EMA, 2017). Characteristically:

> [The EMA], the Japanese Pharmaceuticals and Medical Devices Agency (PMDA) and the United States' Food and Drug Administration (FDA) agreed to align their data requirements for certain aspects of the clinical development of new antibiotics in order to stimulate the development of new treatments to fight antimicrobial resistance and protect global public health.[60]

EMA supports the Commission's collaboration on pharmaceuticals with China, India and Russia; and has concluded confidentiality arrangements that go beyond public information and 'provide a framework for regulatory cooperation' with regulators in the United States, Canada, Japan, Switzerland, Australia, New Zealand and Israel (EMA; see footnote 14). EMA also organizes expert meetings by phone or videoconference with the world's largest regulatory bodies outside the EU on issues such as inspections, safety of medicines and exchange of information on matters of mutual concern (cluster activities) (Table 6.2). EMA's international behaviour and arrangements thus go beyond dissemination of information and networking; they aim to externalize not only pharmaceutical risk evaluation processes, but also standards, policy practices and principles, in a bid to enhance market efficacy, create agreements and safeguard public health. It strives to achieve these aims through socialization and learning at networking events. EMA is usually supported in these tasks by its international, highly trained human capital; it has the necessary scientific technical specialization, linguistic and transnational governance skills, and resource capacity to operate, network and act as a policy entrepreneur in these fora.

In comparison to the other two agencies, EMA has a comparative advantage in its level of financial and regulatory autonomy. This derives from its organizational structure, as defined by its founding regulation. EMA also operates EudraVigilance, an EU web-based information system which collects, manages, monitors and analyses information on suspected side effects of

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[60] EMA, 'Regulators in EU, Japan and US take steps to facilitate development of new antibiotics', (2017), www.ema.europa.eu/ema/index.jsp?curl=pages/news_and_events/news/2017/06/news_detail_002763.jsp&mid=WC0b01ac058004d5c1, last accessed 20 October 2018.

medicines provided by patients and healthcare professionals.[61] EMA's scientific committee consists of scientists from all Member States − a composition which facilitates regular processes and consensus-driven decisions on the regulatory framework for pharmaceuticals, and resolves national differences before they reach the Commission.[62] This gives EMA greater regulatory capacity than, for example, EFSA, as well as an interest in innovating on product development. It further strengthens EMA's contacts with industry and its collaborations with international partners to promote common interests. Thus, EMA has a strong incentive and ability to promote policy at the international level, which it does through both bilateral agreements and collaboration with international organizations (Table 6.2).

Lastly, as food safety increasingly becomes a global matter, EFSA has shown an interest in assuming a strategic international role in food safety and risk assessment. EFSA must respond to emerging new challenges in the global world, such as tracking food-borne outbreaks, which cannot be dealt at state level. Regional and national economies, societies and cultures are becoming ever more closely integrated, in a context where countries frequently sign free trade agreements that affect food and feed products and increase the complexity of the food supply chain.[63] EFSA's activities concentrate on the preparation of scientific opinions for the Commission concerning risk assessments for food and feed, plant and animal health and welfare. EFSA's international tasks prioritize the development of relevant instruments for the promotion of EU risk assessment and communication methods for food safety.[64] Like EMA, EFSA supports the Commission in its international commitments and assists candidate countries during the pre-accession process, as well as neighbouring countries (eg, via the programme funded by the European Neighbourhood Policy Instrument, 2014).

EFSA develops international agreements[65] − both formal and informal (eg, through food safety risk assessment mandates, cooperation, exchanges of experience and administrative practices, and work programmes) − and creates bilateral and multilateral liaison groups with international organizations (eg, the United Nations, the World Health Organization (WHO), the World Trade Organization (WTO), the Food and Agriculture Organization and the Codex

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[61] EMA, 'The European regulatory system for medicines', (2015), www.ema.europa.eu/docs/en_GB/document_library/Leaflet/2014/08/WC500171674.pdf.

[62] Krapohl, supra note 47.

[63] EFSA, 'International Scientific Cooperation 4 Work Plan 2017–2020', (2017) Advisory Forum and Scientific Cooperation Unit.

[64] EFSA, supra note 30.

[65] EFSA, 'International', www.efsa.europa.eu/en/partnersnetworks/international, last accessed 20 October 2018.

Alimentarius) (Table 6.2). EFSA also hosts experts from various risk assessment bodies for short or longer periods, to better understand risk assessment practices in specific domains in other countries (eg, Japan, India, China),[66] and collaborates with risk assessment bodies in third countries (eg, China and Southeast Asian, African,[67] South American and Arab countries) (Table 6.2). These countries have a similar remit at the global level and have often concluded agreements with the EU or face common challenges (eg, limited risk assessment capacity, budget constraints, scientific competence and independence issues).[68] EFSA collaborates with the authorities in these countries in order to create risk assessment bodies and engage in capacity building and the exchange of scientific data and knowledge. With EFSA's support, the authorities identify, analyse and propose solutions for emerging risks in areas of mutual interest (eg, climate change, emergency prevention systems, animal health and welfare, microbiological risk assessments, antimicrobial resistance, nanotechnology, biotechnology, risk communication guidance and the development of an EFSA thesaurus).[69] This also includes training on risk assessment practices and the exchange of staff and information. Through these activities, EFSA has become a driving force at the international level in the harmonization and innovation of methodologies for risk assessment, risk communication and knowledge transfer.[70] Once again, socialization and learning are crucial in achieving these goals, promoting awareness and visibility of EFSA's risk assessment methods and coherence in risk communication at international level. EFSA has thereby become a key point of reference on risk assessment methods in the international scientific community, thus leading to policy diffusion.[71] This would not be possible without the administrative capacity and specialized expertise of EFSA.

Recently, EFSA has stepped up its international activities. For example, it initiated the establishment of International Risk Communication Liaison Group I for the development and implementation of harmonized risk communication practices, and an International Food Safety Risk Assessment Liaison

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66 EFSA, supra note 30.

67 EFSA, supra note 30, 12.

68 European Food Safety Authority, 'Scientific Cooperation Roadmap 2014–2016', (2014); www.efsa.europa.eu/sites/default/files/corporate_publications/files/scientificcooperationroadmap1416.pdf, last accessed 20 October 2018.

69 EFSA, 'Definition and description of Emerging Risks within the EFSA's Mandate', (2007),
www.efsa.europa.eu/cs/BlobServer/Scientific_Document/sc_definition_emerging%20risks, last accessed 20 October 2018; EFSA, supra note 30,11.

70 EFSA, supra note 30, 5.

71 Ibid.

Group for the harmonization of chemical risk assessment methodologies[72] (EFSA,[73] 2017:9). EFSA is also participating in the International Health Claims Liaison Group together with Food Standards Australia New Zealand, Health Canada and New Zealand Medical Professionals Insurance to exchange experience in the scientific evaluation of health claims. In cooperation with EU risk assessment agencies such as EMA, ECHA and the Joint Research Centre, EFSA contributes to shaping the agenda of annual global summits of the Global Coalition for Regulatory Science Research.

6. CONCLUSION

This chapter has investigated the behaviour of the EU agencies, their international tasks and their initiatives beyond the EU to promote and externalize EU policy standards and practices and act as policy entrepreneurs. The main finding is that the EU agencies exhibit certain organizational structural characteristics that enable them to develop their own interests and tasks, such as organizing conferences and training events, and establishing collaborations. These activities strengthen the agencies' actorness beyond the EU and − through socialization, persuasion and learning − externalize EU standards, administrative practices and policy models to non-EU actors.

Based on organization theory, the chapter has identified four key organizational structural characteristics of the agencies: the governance provisions of their founding regulations; capacity; specialized expertise; and level of autonomy. These characteristics are not mutually exclusive, but rather complementary. In order to operationalize the main argument, the chapter investigated three EU agencies which share a mandate on risk assessment relating to health and the environment: the EEA, EMA and EFSA. Specifically, these agencies concentrate on the general need for care for the environment (EEA), concerns about health standards and efficiency in the pharmaceutical markets (EMA) and concerns about food safety and human health (EFSA). Their organizational structural characteristics were compared and linked to their activities and collaborations beyond the EU. The analysis showed that differences in the organizational structural characteristics among the three agencies result in variations in their international priorities and strategies, tasks and arrangements. For example, an agency with a consultative role (eg, the EEA) develops strategies and international contacts that concentrate on the dissemination of information. By contrast, agencies with regulatory competence (EFSA, EMA)

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[72] EFSA, 'International Scientific Cooperation 4 Work Plan 2017–2020', (2017) Advisory Forum and Scientific Cooperation Unit.

[73] Ibid.

focus on the externalization and harmonization of standards with international counterparts. Consequently, the EEA's international collaborations primarily involve networking; while the activities of EMA and EFSA aim to promote and externalize pharmaceutical and food and feed safety standards, evaluation and risk assessment methods, and common communication on risk assessment.

The chapter has further shown that both administrative capacity and technical and scientific specialization enhance the agencies' international role and activities. Transnational human capital, scientific and administrative expertise, connections with industry and other resources enable them to initiate, develop and implement activities with their counterparts and other international actors, such as the exchange of information and data, the promotion of evaluation and risk assessment methods, and capacity building. These activities differ according to administrative capacity − the greater the capacity, the more such activities; content − depending on the available expertise and scientific specialization, data analysis or regulatory standards and product development; and autonomy − the greater the financial dependence and the lower the decision-making competence, the lower the ability to initiate and implement such activities. The EEA and EFSA have limited regulatory competence and are fully financially dependent on the EU budget. While the interconnection of industry interests with EFSA's specialized expertise enhances its role in policy diffusion (EFSA's 2020 strategy), EFSA does not always succeed in exporting its standards or assessment methods to international organizations (eg, the WHO and WTO or Codex Alimentarius).[74] In addition, EU Member States often want to safeguard their competence in relation to health policy and do not always defer to international organizations in this regard. Neither the salience of food issues nor their direct link to everyday life as compared to, for example, pharmaceuticals has resulted in a stronger international role for EFSA than for EMA. This may be attributed to their different organizational characteristics. Lastly, EMA has a different mandate from the WHO, for example, in health policy development. Nevertheless, the Commission recently intensified its efforts towards harmonization of the diverse views in this area. In these fora, non-EU actors are often reluctant to support the adoption of the EU standards, either due to high costs or lack of resources, or because they view the standards as barriers to free trade. In such cases, the EU seeks support from certain countries and tries to form alliances in order to export its standards at the international level. In addition, the EU has greater bargaining power in these fora:

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[74] Louise van Schaik, 'The EU's Performance in the World Health Organization: Internal Cramps after the "Lisbon Cure"', [2011] *JEI* 6 699, 699−713; Schaik, supra note 8; Alasdair R Young, 'Europe as a global regulator? The limits of EU influence in international food safety standards', [2014] *JEPP* 6 904, 904−922.

it has more votes compared to other actors in the international arena, since it is also represented by the individual Member States.

As this chapter does not assess or measure the impact of the characteristics of such activities, the hope is to trigger debate and inspire further research on the agencies' behaviour and actorness beyond the EU.

PART III

EU agencies' external action: legitimacy and accountability

7. Reinforcing EU financial bodies' participation in global networks: addressing legitimacy gaps?

Maurizia De Bellis

1. INTRODUCTION

In the domain of financial regulation, the scope of EU regulatory autonomy is circumscribed by the impact of standards and rules established by transnational networks and bodies. For example, the standards with which EU banking legislation complies are originally set by the transnational regulatory network (TRN) for banking, the Basel Committee on Banking Supervision (BCBS). EU regulations for credit rating agencies (CRAs) in turn comply with the code of conduct drafted by the TRN for securities, the International Organization of Securities Commissioners (IOSCO); while EU regulations for derivatives implement recommendations of the Financial Stability Board (FSB), a body put in place by the G20 after the global financial crisis of 2008.[1] Even if these standards are drafted as soft law, they are perceived as binding because of a number of institutional and market incentives.

EU bodies' participation in the decision-making processes of global standard-setting bodies – how far they can make their voice heard during the drafting of global standards – affects the legitimacy of the reception of these global standards in EU law. The EU Parliament, in a resolution of 2016, considered the EU's contribution to shaping global financial governance as

[1] For the first seminal study on TRNs, see Anne-Marie Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004); see also David Zaring, 'International Institutional Performance in Time of Crisis', [2010] *Chi J Int'l L* 2 475, 475–504; and Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits', [2009] *Yale J Int'l L* 1 113, 113–172 (for a more critical assessment). On the FSB, see Douglas W Arner and Michael W Taylor, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation', [2009] *UNSWLJ* 2 488, 488.

essential for democracy.[2] Although it has not received that much scholarly attention,[3] the interaction between global and EU regulators is crucial.

Articulating the most appropriate channels of EU representation in global financial governance, however, is far from straightforward. The EU financial regulatory architecture is the result of two major structural reforms, approved by the EU in the aftermath of the financial crisis. In 2010, the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) – collectively known as the European Supervisory Authorities (ESAs) – were set up. Together with the competent national authorities, they form the European System of Financial Supervision (ESFS).[4] The setting up of the ESFS was subsequently followed by a second reform, the European Banking Union (EBU). The EBU comprises the Single Supervisory Mechanism (SSM)[5] and the Single Resolution Mechanism (SRM).[6] Within the SRM, the Single Resolution Board (SRB), another new agency, was also established. The construction of the third pillar of the EBU – the European Deposit Insurance Scheme – is still debated and falls beyond the scope of this chapter.[7]

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[2] European Parliament, 'Resolution on the EU role in the framework of international financial, monetary and regulatory institutions and bodies', OJ [2018] C58/76.

[3] See Luisa Quaglia, *The European Union and Global Financial Regulation* (OUP, 2014), and Daniel Mugge (ed), *Europe and the Governance of Global Finance* (OUP, 2014). See also the papers commissioned by the EU Parliament in order to fully understand the EU role in international economic fora; www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)542193, last accessed 24 October 2018. I started exploring this interaction in Maurizia De Bellis, 'Relative Authority in Global and EU Financial Regulation', in Joana Mendes and Ingo Venzke (eds), *Allocating Authority: Who Should do What in European and International Law* (Oxford, Hart, 2018).

[4] The regulations setting up the ESAs are Regulation 1093/2010 of the European Parliament and of the Council establishing the European Banking Authority, [2010] OJ L331/12; Regulation 1094/2010 of the European Parliament and of the Council establishing the European Insurance and Occupational Pensions Authority, [2010] OJ L331/48; and Regulation 1095/2010 of the European Parliament and of the Council establishing the European Securities and Markets Authority, [2010] OJ L331/84.

[5] See Council Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013] OJ L287/63.

[6] Regulation (EU) 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms within the framework of a Single Resolution Mechanism and a Single Resolution Fund, [2014] OJ L225/1.

[7] Directive (EU) 2014/49 of the European Parliament and of the Council on deposit guarantee schemes, [2014] OJ L173/14, does not build a European deposit insurance scheme, but merely aims to harmonize national deposit guarantee schemes.

In order to enhance the effectiveness of financial regulation, the new financial agencies are entrusted with a number of unprecedented rule-making and supervisory powers.[8]

According to Niamh Moloney, ESAs have the 'potential to become significant actors in international financial governance' and to strengthen the 'EU's ability to impose its preference'.[9] The ESAs could be the obvious candidate to represent the EU in global standard-setting bodies, for two reasons. The first is their composition: global bodies entrusted with standard-setting functions are usually TRNs – that is, networks of national regulatory agencies. European agencies and TRNs are hence both made up of experts originating from national regulators and participate in the same international epistemic communities. Second, EU financial agencies are well equipped to participate in global standard setting because of the functions they are entrusted with. ESAs play

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Proposals to complete the EBU, through the building of an actual common deposit system, have been suggested (see European Commission, 'Communication On Steps Towards Completing Economic And Monetary Union', COM (2015) 600 final, 13, and 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme', COM (2015) 0586 final), but are still under discussion. For comment, see Maurizia De Bellis, '*Unione bancaria europea e assicurazione dei depositi*', in Angela Del Vecchio and Paola Severino (eds), *Tutela degli investimenti tra integrazione dei mercati e concorrenza di ordinamenti* (Bari, Cacucci, 2017), 259.

[8] For a general overview of the features and evolution of EU agencies, see Edoardo Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', [2009] *CMLRev* 5 1395; Michelle Everson, Cosimo Monda and Ellen Vos, *EU Agencies In Between Institutions And Member States* (Wolters Kluwer, 2014); Morten Egeberg and Jarle Trondal, 'EU-level agencies: new executive centre formation or vehicles for national control?', [2011] *JEPP* 6 868; Miroslava Scholten, *The Political Accountability of EU Agencies: Learning from the US Experience* (Leiden, Brill Nijhoff, 2014). On the ESAs, see Eilis Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision', in Guido Ferrarini, Klaus J Hopt, and Eddy Wymeersch (eds), *Rethinking Financial Regulation and Supervision in Times of Crisis* (OUP, 2012), 111–58; Eddy Wymeersch, 'The European Financial Supervisory Authorities Or Esas', in Guido Ferrarini, Klaus J Hopt, and Eddy Wymeersch (eds), *Rethinking Financial Regulation and Supervision in Times of Crisis* (Oxford, OUP, 2012), 232–317; Michelle Everson, 'A Technology of Expertise: EU Financial Services Agencies', [2012] *LEQS Paper No. 49* 1, www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper49.pdf, last accessed 26 October 2018; Annetje Ottow, 'The New European Supervisor Architecture of the Financial Markets', in Michelle Everson, Cosimo Monda and Ellen Vos (eds), *EU Agencies In Between Institutions And Member States* (Alphen aan den Rijn, Wolters Kluwer, 2014), 123–143.

[9] Niamh Moloney, 'International Financial Governance, the EU, and Brexit: the "Agencification" of EU Financial Governance and the Implications', [2016] *EBOR* 4 451.

a key role in rule making and have only limited supervisory powers, while the ECB in the context of the SSM and the SRB are competent for supervision and resolution, respectively. TRNs, in turn, undertake standard-setting activities which circumscribe the rule-making powers of the ESAs and do not exercise any type of direct supervisory functions.

However, entrusting the ESAs with a stronger external role within global networks raises several problems. The first problem stems from the current very unclear division of competences among agencies and institutions within the EU financial architecture. The blurred division of regulatory and supervisory competences between the EBA and the ECB is a case in point. Even though the EBA plays the key role in rule making, the ECB – entrusted with banking supervision – is the institution that currently represents the EU in a greater number of standard-setting networks. A second problem is how powers should be divided between the agencies and the Commission. Before 2010, when the EU financial agencies were established, the Commission was the institution representing the EU in financial fora. In recent years, the EU financial agencies have been admitted to global networks without the Commission losing its seat. However, strengthening the agencies' external activity in global networks to the point of a substitution of the Commission's role would also affect the institutional balance of powers within the EU: hence, it is therefore relevant for the debate on the legitimacy of the agencies themselves. From this point of view, identifying the proper body to represent the EU in global networks and shaping the most appropriate instruments for such representation are delicate tasks, also in light of the need to ensure that proper accountability instruments are in place.

This chapter will first clarify the global financial standards which form the basis for EU regulation (section 2), in order to show their regulatory impact and significance (section 3). The chapter will then explore current mechanisms of EU bodies' participation in global financial networks and institutions (section 4), in order to suggest possible adjustments. These are aimed not only at enhancing the efficacy of EU participation (section 5), but also at ensuring that the increase in EU agencies' external activity does not come at the expense of the agencies' legitimacy (section 6).

2. GLOBAL FINANCIAL STANDARDS: SOFT LAW WITH A HARD IMPACT

In order to fully understand the impact of global financial standards on EU regulatory autonomy, it is necessary to clarify the features of global financial standards.

Standard setting in the area of financial regulation started in the 1970s and increased over time. The BCBS, a network of the G10 central bankers, was

established in 1974 and started drafting the first standards on banking at the end of the decade.[10] The BCBS counterpart for securities, IOSCO, was established in 1983; while the International Association of Insurance Supervisors (IAIS) was established in 1994. All three bodies lack a founding treaty and are not intergovernmental organizations. They are rather TRNs, because they 'involve specialized domestic officials directly interacting with each other, often with minimal supervision by foreign ministries'. [11] While the BCBS has limited membership (initially comprising the central banks of the G10 and enlarged after the crisis to the G20 central bankers), IOSCO and the IAIS are universal networks, their membership being open to any securities or insurance regulator.

TRNs are not the only global bodies setting financial standards. In the aftermath of the global financial crisis, the FSB[12] was set up, bringing together not only national authorities from G20 countries,[13] but also international financial institutions such as the World Bank and the International Monetary Fund (IMF), and the transnational networks mentioned above. Rather than being a transnational *regulatory* network, it is a *hybrid* network, where both political representatives (from treasury departments) and technical representatives (central banks and supervisory representatives) come together. Moreover, the FSB is different from the TRNs not only because of its composition, but also because of its functions: its mandate is not focused on standard setting, but rather mainly on coordination and standard implementation.

In addition to (regulatory or hybrid) networks, a private organization, the International Accounting Standards Board (IASB), establishes standards – the so-called International Financial Reporting Standards (IFRS)[14] – concerning only the accounting sector.

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[10] On the BCBS's history, structure and activity, see Duncan R Wood, *Governing Global Banking: The Basel Committee and the Politics of Financial Globalisation* (Aldershot, Ashgate Publishing, 2005).

[11] See Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', [2002] *Va J Int'l L* 1 1, 4–5.

[12] See FSB, 'Press Release, Financial Stability Forum re-established as the Financial Stability Board', (2009), www.financialstabilityboard.org/press/pr_090402b.pdf, last accessed 26 October 2018.

[13] See FSF, 'Press Release, The Financial Stability Forum decides to broaden its membership', (2009), http://www.financialstabilityboard.org/press/pr_090312b.pdf, last accessed 26 October 2018.

[14] For a general overview of the IASB, see Walter Mattli and Tim Buthe, 'Global Private Governance: Lessons from a National Model of Setting Standards in Accounting', [2005] *Law & Contemp Probs* 3/4 225, 225–262.

Global financial standards are not formally binding: they are drafted as voluntary, purely soft law. Nevertheless, compliance with global financial standards can be very high, as the BCBS's most famous global standard – for capital requirements of banking institutions, in its various revisions – shows.[15]

Factors explaining compliance with this soft law are typically identified in the standard-setting bodies' expertise and capacity.[16] However, several institutional instruments are in place which are intended to improve the implementation of global financial standards. A first instrument is conditionality: the IMF has often included compliance with standards among the conditions imposed on a State that wishes to borrow from its resources. According to Delonis, the extensive use of conditionality makes the adoption of the standards 'essentially mandatory'. [17] A second, 'softer' institutional instrument aimed at improving implementation is that of peer review, through which global bodies such as the FSB measure countries' degree of compliance with certain global financial standards.[18]

Because of these different factors and institutional instruments, global financial standards, although formally soft law, have a 'hard impact',[19] resulting in strong pressure to comply. As a result of such pressure, standards are implemented in national jurisdictions, through a number of different means, which can lead to their incorporation in formally binding acts. As the next section shows, this is often the case in the EU.

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[15] More than 100 states complied with the 1988 Capital Accord: see Patricia Jackson, 'Capital Requirements and Bank Behaviour: the Impact of the Basel Accord', [1999] *Basel Committee on Banking Supervision Working Papers* 1, 1 www.bis.org/publ/bcbs_wp01.pdf, last accessed 26 October 2018; the first revision of the Basel Capital Accord – so-called Basel II, published in 2004 – was implemented in more than 80 jurisdictions: see Bank for International Settlements (BIS), 'Implementation of the new capital adequacy framework in non-Basel Committee member countries: Summary of responses to the 2006 follow-up Questionnaire on Basel II implementation', www.bis.org/fsi/fsipapers06.htm, last accessed 26 October 2018. The most recent revision of the accord – Basel III – is being implemented in 98 non-BCBS countries: FSI, 'Survey. Basel II, 2.5 and III Implementation', (2015), www.bis.org/fsi/fsiop2015.pdf, last accessed 26 October 2018.

[16] Slaughter, supra note 1, 213.

[17] Rober P Delonis, 'International Financial Standards and Codes: Mandatory Regulation Without Representation', [2004] *Intl Law & Pol* 2 563, 563–634.

[18] See FSB, 'Framework for Strengthening Adherence to International Standards', (2010), www.fsb.org/wp-content/uploads/r_100109a.pdf, last accessed 26 October 2018.

[19] Slaughter, supra note 1, 224. See also Chris Brummer, 'How International Financial Law Works (and How It Doesn't)', [2011] *Geo LJ* 2 257, 268–270.

3. THE IMPACT OF GLOBAL STANDARDS ON EU FINANCIAL REGULATION

Studies on soft law and international governance draw a distinction between compliance and implementation. 'Compliance' refers to the conformity of national legislation with the content of norms drafted by global bodies. 'Implementation' refers to the legal process through which such conformity is produced – for example, through 'the passage of domestic legislation' or the 'promulgation of regulations'.[20] This means that:

> as both a deductive and an empirical matter, it is the case that while implementation is typically a critical step toward compliance, compliance can occur without implementation. That is, compliance with a legal rule can occur without any effort or action by a government or regulated entity. If an international commitment matches current practice in a given state, for instance, implementation is unnecessary and compliance is automatic.[21]

For the purposes of this chapter, 'implementation' will be used to refer to the different legal processes through which conformity with global standards is pursued. A full examination of those legal techniques through which global standards are implemented in the EU legal system would fall beyond the scope of this chapter.[22] However, some clarifications are needed.

It must be borne in mind that the idea underpinning TRNs – as briefly shown above (section 2), TRNs are still the main global financial standard-setting bodies (the FSB having a coordination role and the IASB concentrating its activities in the accounting sector) – is that when a TRN publishes a standard, national regulatory agencies that form the network and have agreed upon the given standard are expected to implement it within their own jurisdictions.

In the US, until the global financial crisis, global standards were implemented directly through an act of rule making of the national financial regu-

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[20] Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', [2000] *Case W Res J Int'l L* 2 387, 391–393; For this distinction, see also Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"', in Dinah Shelton (ed), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (Oxford, OUP, 1999), 13.

[21] Ibid.

[22] I suggested a taxonomy in Maurizia De Bellis, *La regolazione dei mercati finanziari* (Milan, Giuffrè, 2012), 301–398.

latory agencies,[23] on the basis of the International Lending Supervision Act.[24] However, this was abandoned following the crisis.[25]

In the EU, there is no one specific model for the implementation of global financial standards, except for the case of accounting. In this latter case, Regulation 1606/2002 (the so-called 'IAS Regulation') requires all publicly traded EU companies to prepare their consolidated accounts using the IASB's standards – the IFRS – as 'endorsed' by the EU. This means that after each standard is approved by the IASB, the Commission must check whether it meets certain criteria set forth in the IAS Regulation. Only after the 'endorsement' procedure (or 'adoption' procedure – the IAS Regulation uses both terms), which also involves a technical committee and a comitology committee, is the standard formally incorporated in an EU regulation (ie, copied and pasted word by word).[26]

No specific procedure, comparable to that specified in the IAS Regulation for accounting, exists for the implementation of other global financial standards in the EU. The first BCBS standard for capital requirements of banks, approved in the 1980s, was implemented through Directive 93/6/EEC,[27] while its first revision in 2004 (so-called 'Basel II') was transposed in the

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[23] Daniel Tarullo, *Banking on Basel: The Future of International Financial Regulation* (Peterson Institute for International Economics, 2008), 127; and Pierre-Hugues Verdier, 'U.S. Implementation of Basel II: Lessons for Informal International Law-Making', in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford, OUP, 2012) 437–467.

[24] See Sec 902(b): 'The Federal banking agencies shall consult with the banking supervisory authorities of other countries to reach understandings aimed at achieving the adoption of effective and consistent supervisory policies and practices with respect to international lending'; Sec 910(a): 'The appropriate Federal banking agencies are authorized to interpret and define the terms used in this title, and each appropriate Federal banking agency shall prescribe rules or regulations or issue orders as necessary to effectuate the purposes of this title and to prevent evasions thereof.'

[25] The Dodd-Frank Act, approved in 2010, set forth several guiding principles deemed essential by the FSB and the G20; in this way, global financial standards have been implemented by Congress, which in turn delegates the power to adopt to rule-making acts to the agencies. See FSB, 'Peer Review of the United States Review Report. Review Report', (2013), www.fsb.org/2013/08/r_130827/, last accessed 26 October 2018.

[26] On the endorsement procedure, see Maurizia De Bellis, 'EU and Global Private Regulatory Regimes: The Accounting and Auditing Sectors', in Edoardo Chiti and Bernardo G Mattarella (eds), *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison* (Berlin, Springer, 2011), 269.

[27] Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions, [1993] OJ L141/1.

Capital Requirement Directive (CRD).[28] All major reforms of EU financial regulation adopted after the crisis have been consistent with reforms agreed upon within the G20 and specified in global standards of the TRNs or the FSB. The CRD has been amended to take into account the revisions to the Basel Capital Accord decided in 2011 (Basel III), and further adjustments are currently under scrutiny in order to adjust to the most recent agreements (Basel IV).[29] The Banking Recovery and Resolution Directive (BRRD) implements the FSB Key Attributes of Effective Resolution Regimes for Financial Institutions.[30] The European Markets Infrastructure Regulation (EMIR) implements the FSB recommendations for OTC Derivatives Market Reforms,[31] and the CRA Regulation complies with the IOSCO Code of Conduct for Credit Rating Agencies.[32] In all these cases, there is no formal incorporation (ie, word-for-word transcription of the global standard within a EU regulation), such as that which takes place in the area of accounting as a result of the endorsement procedure. EU directives and regulations comply with principles, criteria and in some cases also specific rules set at the global level, but they are significantly more detailed.

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[28] Enrico Camilli, 'Basel-Brussels One Way? The EU in the Legalization Process of Basel Soft Law', in Edoardo Chiti and Bernardo G Mattarella (eds), *Global Administrative Law and EU Administrative Law: Relationships. Legal Issues and Comparison* (Berlin, Springer, 2011) 323, 324.

[29] European Commission, 'Banking regulation: Commission welcomes Basel Committee's agreement on post-crisis reforms', (2017), http://europa.eu/rapid/press-release_IP-17-5171_en.htm, last accessed 26 October 2018.

[30] Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms, [2014] OJ L173/190; On the BRRD as the legislative act implementing FSB key attributes on resolution regimes, see Lorenzo Stanghellini, '*La disciplina delle crisi bancarie: la prospettiva europea*', in Bank of Italy, *Quaderni della ricerca giuridica*, *Dal Testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri. Atti del convegno tenutosi a Roma il 16 settembre 2013* (Rome: Banca d'Italia, 2014), 147–177, at 157, www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2014-0075/Quaderno_n-75.pdf, (last accessed 26 October 2018.

[31] Regulation (EU) 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, [2012] OJ L201/1; see FSB, 'OTC Derivatives Market Reforms Seventh Progress Report on Implementation', (2014), for an analysis of the correspondence between EMIR provisions and FSB standards.

[32] Regulation 1060/2009 of the European Parliament and of the Council on credit rating agencies, [2009] OJ L302/1; FSB, 'IMN Survey of National Progress in the Implementation of G20/FSB Recommendations, Jurisdiction: EU Commission', (2014), www.fsb.org/wp-content/uploads/European-Commission_2014.pdf, at 53−4, indicating the regulation as the act of primary legislation implementing the IOSCO Code, last accessed 26 October 2018.

The analysis shows that global standards have a hard impact on EU regulatory autonomy, resulting in the implementation of the standards in EU binding legal acts, even though there is no one specific model through which this occurs (incorporation of the standards or specification of the more general global principles in detailed EU rules). This raises concerns about the legitimacy of their reception,[33] as pointed out by the EU Parliament in a resolution of 2003, which criticized the fact that 'international agreements laying down a framework for legislation at EU level came into existence without any form of democratic mandate or control by the European Parliament'.[34] In order to ensure that 'national parliaments and the European Parliament [are not] reduced to a role of mere rubberstamping', [35] in a Resolution of 2016 the European Parliament suggested that the EU should become a 'more proactive global actor' in financial networks.[36] While the goal of fostering EU participation in global fora is laudable, how to shape the most appropriate institutional representation model is far from straightforward.

This chapter will now examine how EU bodies and institutions currently participate in global financial standard-setting bodies and the problems connected with the existing mechanisms, in order to suggest possible adjustments.

4. EU'S PARTICIPATION IN GLOBAL FINANCIAL STANDARD-SETTING BODIES: THE CURRENT LANDSCAPE

In order to properly understand the EU's participation in global financial standard-setting bodies, it is necessary to recall that, as explained above (section 2), most of these are TRNs – that is, networks made up of representatives of national regulatory authorities for banking, securities and insurance that started operating in the 1970s–80s. Only the FSB has a less homogenous composition, since it allows international organizations to join together with national authorities, and since the admitted national authorities are not only regulators, but also financial ministries. Because of this composition, the regulatory authorities of EU Member States have been part of financial standard-setting bodies since their inception (all of them, in the case of the universal networks IOSCO and IAIS; and some them, in the case of the

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[33] Even though specific modifications to global rules are occasionally introduced in EU directives, to meet Member States' demands: for example, the definition of Core Tier 1 capital has been softened; see Luisa Quaglia, supra note 3, 49.

[34] European Parliament resolution on the adequacy of banks' own funds (Basel II), OJ [2004] C76E/103, para 4.

[35] European Parliament, supra note 2.

[36] European Parliament, supra note 2, para. 7.

BCBS and FSB, whose membership is limited). Since TRNs are networks of regulators, the lack of this type of agency in the financial domain in the EU before the financial crisis made the EU's representation problematic. The Commission has long been accepted as the EU body that represents the EU's views in these global networks; however, as it is not a regulatory agency, it was not recognized as a full member, but rather as an observer. After the reforms to the EU financial regulatory architecture, the newly established financial agencies and the ECB were gradually admitted to global networks. However, such admission had to be coordinated with the existing representation both of the Commission and of national competent authorities.

In the BCBS, the Commission still enjoys observer status. The EBA also has the same type of limited status,[37] while the ECB has been given full membership, with two seats.[38] This type of representation does not reflect the current division of competences in the EU. It is worth recalling that the BCBS is competent for standard setting, and not for supervision. The agency competent for banking regulation – the EBA – has been granted observer status only; while the ECB, which has been given direct banking supervisory competence over significant credit institutions, enjoys full member status. This mismatch can be explained by the blurring of competences between the EBA and the ECB, and the stronger independence of the ECB, recognized in the Treaty on the Functioning of the European Union (TFEU) (this will be developed in section 5).

Within IOSCO, both the Commission and ESMA are associate (non-voting) members of the Presidents' Committee, but ESMA also enjoys observer status on the Board[39] and participates in many internal committees and working groups of IOSCO. ESMA's request for representation on the IOSCO Board was discussed within the ESMA Board of Supervisors, made up of the national competent authorities (NCAs) of EU Member States. The NCAs agreed that ESMA would be entitled to represent the EU position on the IOSCO Board in the areas where it has direct supervisory competence (ie, CRAs and TRNs).[40] In 2014, one year after ESMA, the Commission also applied for admission to the

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[37] BIS, 'Basel Committee membership', (2016), www.bis.org/bcbs/membership.htm, last accessed 25 October 2018.

[38] In its capacity as both a monetary authority and a supervisory authority, within the SSM of the EBU.

[39] IOSCO, 'Associate members of IOSCO', www.iosco.org/about/?subsection=membership&memid=2 and 'IOSCO Board', www.iosco.org/about/?subsection=display_committee&cmtid=11, last accessed 25 October 2018.

[40] See Pierre-Henri Conac, 'The European Union's Role in International Economic Fora - Paper 6: The IOSCO', (2015), 26–27, www.europarl.europa.eu/RegData/etudes/STUD/2015/542195/IPOL_STU(2015)542195_EN.pdf, last accessed 26 October 2018.

IOSCO Board. However, its request was rejected by IOSCO for two reasons: first, unlike all other members of IOSCO, it is not a regulatory authority (its admission as an associate member of the general assembly already being an exception); and second, there were concerns about overrepresentation of EU members among non-EU members of IOSCO.[41] Moreover, thanks to its seat on the IOSCO Board, ESMA is also informed in due time of the setting up of new internal committees and is hence in a better position than the Commission to apply for admission to such committees.[42] On the contrary, the Commission's requests to participate in working groups have been refused several times.[43] In contrast to the EBA, then, ESMA is gaining increasing prominence in trans-national fora. This is due to the different allocation of competences within the EU legal order itself. While the functions of the EBA are limited, in light of the prominent supervisory role of the ECB within the EBU, ESMA's mandate has been expanded, due to the significant direct supervisory competences it has been given through sector regulations in the areas of CRAs and derivatives; it can now be considered as the most powerful of the supervisory agencies.[44]

Within the TRN for insurance, the IAIS, both the Commission and the European agency, EIOPA, are members of the general meeting.[45] EIOPA is also represented in the executive committee. Both are represented in internal committees, but EIOPA enjoys broader representation.[46] As in the securities area, the Commission has not given up its seat in the trans-governmental network, but the competent ESA is establishing itself as the key representative of EU views in the internal committees, where the standard-setting works take place (while the general assembly has an approval role).

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41 Ibid, 27.

42 Ibid, 30.

43 Ibid.

44 On the growing role of ESMA, see Niamh Moloney, 'The European Securities and Markets Authority and institutional design for the EU financial market – a tale of two competences: Part 1 rule making', [2011] *EBOR* 1 41; and Niamh Moloney, 'The European Securities and Markets Authority and institutional design for the EU financial market – a tale of two competences: Part 2 rules in action', [2011] *EBOR* 2 177.

45 See Lieve Lowet, 'The European Union's Role in International Economic Fora Paper 8: The IAIS', (2015), www.europarl.europa.eu/RegData/etudes/STUD/2015/542197/IPOL_STU%282015%29542197_EN.pdf, 26, last accessed 26 October 2018.

46 Both sit in three internal committees (the Capital, Solvency and Field Testing Working Group, the Financial Stability and Technical Committee and Systemic Risk Assessment), but EIOPA also sits in the resolution working group, Insurance Capital Standard Task Force, and the Signatories Working Group; see IAIS Committee and Subcommittee Membership List, 'Organisational Structure', (2017), www.iaisweb.org/page/about-the-iais/organisational-structure//file/66824/iais-committees-and-members-public, last accessed 25 October 2018.

Within the FSB, the Commission and the ECB are members of both the Plenary and the Steering Committee, as well as the two standing committees;[47] none of the ESAs is represented in any FSB body. As noted above (section 2), both the composition (which brings together not only national financial regulators, but also national political representatives and international organizations) and the functions (its mandate including setting the priorities of reforms and checking the implementation of standards) of the FSB are different from those of the three TRNs. These differences can explain the prominent role of the Commission in this global hybrid network, but do not provide a satisfactory explanation of the key role granted to the ECB (while the ESAs are absent). Both in the FSB and in the BCBS, the recognition of the ECB as the key actor in representing the EU is due more to its longstanding position among EU institutions than to the correspondence of this role to the current division of competences within the EU financial regulatory architecture.

5. ASSESSING EU PARTICIPATION IN GLOBAL NETWORKS: ALLOCATING COMPETENCES

Several points of friction can arise from EU participation in global financial networks. On the one hand, recognition of the new role of EU agencies in representing the EU position in global networks can meet with opposition from the national regulatory authorities of Member States, keen to preserve their own competences in the global networks (as illustrated by the discussion among national authorities within the ESMA Board about the limits of the role that ESMA should play within IOSCO, examined in section 4). On the other hand, there are limits on the number of seats available to EU bodies, due to the concerns of non-EU members about over-representation of the EU. This can

[47] See FSB, 'Members of FSB', www.fsb.org/about/organisation-and-governance/members-of-the-financial-stability-board, last accessed 15 May 2019; FSB, 'Members of the Steering Committee', www.fsb.org/about/organisation-and-governance/members-of-the-steering-committee, last accessed 15 May 2019; FSB, 'Members of Standing Committee on Supervisory and Regulatory Cooperation', www.fsb.org/about/organisation-and-governance/members-of-standing-committee-on-supervisory-and-regulatory-cooperation, last accessed 15 May 2019; FSB, 'Members of Standing Committee on Standards Implementation', www.fsb.org/about/organisation-and-governance/members-of-standing-committee-on-standards-implementation, last accessed 15 May 2019. The ECB is represented in the Plenary with two seats: one for its vice president (representing the monetary authority) and one for the Supervisory Board of the SSM (as banking supervisory authority). In the Steering Committee, only the vice president is represented; as for the standing committees, the vice president sits in the committee competent for supervisory cooperation, while the Supervisory Board takes part in the committee for standards implementation.

result in competition among EU bodies (ESAs, the ECB, the Commission). For example, as mentioned above, ESMA has been admitted to a greater number of internal bodies of IOSCO than the Commission, whose applications were rejected.

Which EU body is best equipped to participate in global networks? According to Moloney, it is the EU agencies that should represent the EU: because of their expertise, they are considered to be better placed to effectively influence global financial governance.[48] Moreover, given the composition of global standard-setting bodies, EU agencies appear to fit well within these types of epistemic communities (although the FSB raises different problems, due to its hybrid composition).

In suggesting in its 2016 Resolution that the EU should strengthen its activity in financial networks,[49] the European Parliament did not go into detail as to what the respective roles of the agencies and the Commission should be. On the one hand, the European Parliament considers the Commission to be the actor representing the interests of the EU as a whole;[50] on the other hand, however, it also stresses that 'membership of these organizations and bodies should be allocated in accordance with the respective competences of the EU institutions and the European Supervisory Authorities (ESAs)'.[51]

The prevailing criterion of allocating representation in global financial governance based on competence appears reasonable. However, its practical implementation is not straightforward, because of the very unclear current division of competences across different bodies in the EU financial architecture. A full examination of this division falls beyond the scope of this chapter. However, a brief summary is useful to illustrate this point.[52]

The establishing regulations of 2010 entrust the three ESAs with broad regulatory powers, through the adoption of technical regulations. However, in order to have binding effect, technical standards must be endorsed by the Commission, which can reject or amend the drafts.[53] Hence, the rule-making activity of the ESAs is not completely autonomous.[54] As far as supervisory

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48 Moloney, supra note 9, 453−455.

49 European Parliament, supra note 2, para 7.

50 Ibid, para 11.

51 Ibid, para 19.

52 For an in-depth analysis, see Maurizia De Bellis, 'European Financial Supervision after the Crisis: Multi-Speed Models within a Two-Track Framework', in Edoardo Chiti and Giulio Vesperini (eds), *The Administrative Architecture of Financial Integration. Institutional Design, Legal Issues, Perspectives* (Percorsi, Il Mulino, 2015), 61−92.

53 ESA Regulations, Article 10(1) and Article 15(1).

54 Conflicts between the Commission and the ESAs are rare, yet significant examples can be identified in both the banking and securities sectors: see Maurizia De Bellis, 'Procedural Rule-Making of European Supervisory Agencies (ESAs): An Effective

competences are concerned, according to the establishing regulations of 2010, financial supervision, as a general rule, is in the domain of national authorities, except for three cases.[55] However, subsequent sectoral regulations gave ESMA direct supervisory powers in relation to CRAs, short selling of credit default swaps and trade repositories.[56]

Since the core activity of transnational networks is standard setting, the agencies competent for rule making appear to be the better-equipped actors to participate in the TRNs. Given the limits to the ESAs' powers, however, it seems appropriate that the Commission retains its seats as observer within the TRNs. From this point of view, the solution currently being applied at IOSCO and the IAIS is reasonable: the Commission has a seat in the general assembly, with approval powers, and the agency has a role in the internal committees, which have competence for standard setting. A simplification of this representation would be desirable only if the powers of these agencies were increased.[57]

In the banking sector, however, there are specific difficulties. Through the establishment of the EBU, the ECB has been given supervisory powers over 'significant' banking institutions across the euro area. As a result, the EBA fulfils a regulatory role, while the ECB (more specifically, its Supervisory Board) is entrusted with direct banking supervisory functions.[58] However, there are considerable overlaps and potential conflicts between the EBA and the ECB, given that some specific regulatory powers have also been entrusted to the ECB.[59] Moreover, the recognition of the ECB in the Treaties as an EU

Tool for Legitimacy?', [2017] *TARN Working Paper Series* 12 1, https://ssrn.com/abstract=3030064, last accessed 25 October 2018.

[55] In order to ensure consistent application of EU law by NCAs, in emergency situations and in case of disagreement between competent authorities in cross-border situations, see ESA Regulations, Articles 17−19.

[56] Regulation (EU) 513/2011 of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies, [2011] OJ L145/30, Article 30; and Regulation (EU) 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, [2012] OJ L201/1.

[57] The current proposal does not seem to address this issue; see Andrea Magliari, '*La proposta di riforma delle Autorità europee di vigilanza finanziaria. Verso un ulteriore accentramento delle funzioni di vigilanza a livello sovranazionale: prospettive e problemi*', [2018] *Ridpc* 2 391, 391−443.

[58] National authorities being competent for supervision of non-significant banking institutions.

[59] Regulation 1024/2013, supra note 5, Article 4(3). On the rule-making powers of the ECB, see Enrico L Camilli, 'The Governance of EU Regulatory Powers in the Banking Sector', in Edoardo Chiti and Giulio Vesperini (eds), *The Administrative Architecture of Financial Integration*, supra note 52, 23, 52.

institution provides it with a much stronger legal basis than the EBA. These reasons all help to explain the pivotal role which the ECB (both as a monetary and as a supervisory authority) plays within the BCBS and the FSB (in contrast to the EBA). A simplification of external representation appears more necessary in the banking sector than in the other sectors; but this could not occur without more general reform of the allocation of competences between the EBA and ECB, the features of which fall beyond the scope of this chapter.

6. THE LEGITIMACY OF EU AGENCIES' PARTICIPATION IN GLOBAL NETWORKS

The ESAs' participation in global networks should be assessed not only from the point of view of their potential efficacy in ensuring that EU interests are taken into account in global fora, but also from the point of view of legitimacy. What is the legal basis for such participation? Is it sufficient? If not, which adjustments might be required?

According to the establishing regulations of 2010, each ESA has the power to 'develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries', on condition that these arrangements 'shall not create legal obligations in respect of the Union and its Member States'.[60] The ESAs' founding regulations formalized what is common practice at many agencies: a general mandate for external relations, insofar as their acts do not create legally binding obligations.[61]

This is in line with the orientation of the Court of Justice regarding the Commission's external relations. In its first ruling in *France v Commission*, the Court considered that the Commission's activity, aimed at concluding binding administrative agreements on the application of competition rules with the US, violated the distribution of powers in external relations.[62] In its second ruling in *France v Commission*, however, the Court concluded that the Commission could adopt non-binding guidelines.[63] However, in a more recent case, the Court of Justice seemed to depart from this criterion of the binding or

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[60] See Articles 33 of the three ESA Regulations.

[61] See Andrea Ott, Ellen Vos and Florin Coman-Kund, 'European Agencies on the Global Scene: EU and International Law Perspectives', in Michelle Everson, Cosimo Monda and Ellen Vos (eds), *EU Agencies In Between Institutions And Member States*, supra note 8, 87, 112.

[62] Judgment of 9 August 1994, *France v Commission*, Case C-327/91, ECLI:EU:C:1994:305.

[63] Judgment of 23 March 2004, *France v Commission*, Case C-233/02, ECLI:EU:C:2004:173.

non-binding nature of the agreements as a guiding principle to assess the legitimacy of the Commission's external activities and its impact on institutional balance.[64]

Insofar as agencies are concerned, however, other limitations also apply. According to the principles established by the Court in *Meroni*, only executive powers, and not discretionary powers, can be delegated to agencies.[65] Criticisms about the suitability of the *Meroni* doctrine within the context of the evolution of the EU institutional framework have long been widespread. In particular, it has been argued that the very concept of institutional balance evolved over time; hence, delegation of discretionary powers to EU agencies should be formally admitted.[66] In the *ESMA Short Selling* judgment of 2014, the Court – albeit formally upholding the *Meroni* doctrine – departed from this longstanding paradigm.[67] Under the new paradigm, powers granted to EU agencies are considered non-discretionary when they are narrowly circumscribed by conditions whose satisfaction can be the object of judicial review. The Court thereby put in place a procedural paradigm for the delegation of powers to EU agencies to be legitimate.[68]

Given the ambiguous legal nature of the standards, the question of which requirements should apply to EU agencies when they participate in global networks becomes even more pressing. As noted in Chapter 2, one specific question is whether the *Meroni* doctrine should apply to EU agencies when they co-adopt soft law in global networks. Similarly, Chamon and Demedts noted that the framework should not be too restrictive so as to hamper the agencies in their external relations.

As a minimum, therefore, it would seem essential to prescribe clear reporting obligations of the EU agency with regard to the Commission and the European Parliament. However, it is the scope of such reporting that is problematic; a balance must be struck between the need to establish instruments through which the external activities of the ESAs can be controlled and the

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[64] Judgment of 28 July 2016, *Council of the European Union v European Commission*, Case C-660/13, ECLI:EU:C:2016:616; For a first assessment, see Valerie Demedts and Merijn Chamon, 'The Commission back on the leash: No autonomy to sign non-binding agreements on behalf of the EU: Council v. Commission', [2017] *CMLR* 1 245; on the implications of this case for the external activities of EU agencies, see also Chapter 2.

[65] Judgment of 13 June 1958, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, Case 9-56, ECLI:EU:C:1958:7.

[66] Chiti, supra note 8,1422−1424.

[67] Judgment of 22 January 2014, *United Kingdom of Great Britain and Northern Ireland* ('*ESMA Short Selling*'), Case C-270/12, ECLI:EU:C:2014:18.

[68] Ellen Vos and Michelle Everson, 'European Agencies: What About the Institutional Balance?', [2014] *Maastricht Faculty of Law Working Paper* 4 1.

need to leave them room for manoeuvre when cooperating with their foreign counterparts. The easier instrument in this regard would be the addition of a specific requirement for the ESAs to report *ex post* to the Commission and the Parliament about their external activities (the ESA Regulations already set out reporting obligations, but there is no specific obligation to report on their external activities).

A more controversial issue concerns the opportunity to define *ex ante* the position that the ESAs should support within the global networks. In *Germany v Council*,[69] the Court of Justice considered Article 218, paragraph 9 of the Treaty on the Functioning of the European Union (TFEU) to be an appropriate legal basis for the adoption of a decision of the Council establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, including in the context of international agreements to which the EU is not a party. Moreover, the Court of Justice, departing from the position taken by the advocate general, did not exclude the applicability of Article 218 TFEU on the basis of the soft law nature of the standards established by the organization concerned in the case, the International Organisation of Vine and Wine (OIV). This interpretation suggests that Article 218 TFEU could also be used as a legal basis to define a position *ex ante* in global financial networks (even though there are still considerable differences between these networks − which are not established on the basis of an international Treaty − and the OIV, an intergovernmental organization).

However, it is doubtful whether it is desirable to clearly define *ex ante* the position that agencies should stick to, because this would not leave them enough room to reach compromises with their counterparts. In the US, a proposal to introduce *ex ante* Congressional approval of the position that financial agencies should adopt within global networks was discussed and abandoned due to these concerns.[70] In a less formal way, however, the Commission could give the agencies some broad indications of the position to support, and regular follow-up reports on the development of the negotiations should be previewed. Moreover, the transparency of negotiations within global networks should be ensured (eg, through publication of the minutes on the agencies' websites), so that the position argued by the ESAs is clear to the EU institutions and to the citizens.

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[69] Judgment of 7 October 2014, *Federal Republic of Germany v Council of the European Union*, Case C-399/12, ECLI:EU:C:2014:2258, para 54.

[70] I analysed these attempts elsewhere; see De Bellis, supra note 22, 122−123 and 134−135.

7. CONCLUDING REMARKS

Given the impact of global financial standards on EU regulatory autonomy, ensuring proper EU participation in networks where standards are drafted is of paramount importance. In this regard, the ESAs can play an effective role in light of their expertise and composition (similar to that of transnational networks, which are generally comprised of national regulatory authorities). However, identifying the most appropriate instruments for EU representation in global fora is a challenging task, for a number of reasons.

The current unclear division of competences across different agencies and bodies within the EU financial architecture must be taken into account. The limitations to the powers of the ESAs could risk impairing their activities in transnational networks. This suggests that the Commission should maintain its seat as observer, retaining control through information; while the agencies should be given seats in the internal bodies of the networks, where the actual standard-setting work takes place (as is happening in the securities area).

In the banking sector, a further layer of complexity arises: the relevant competences in this field are shared not only between the EBA and the Commission, but also with the ECB. Since global networks are mainly standard-setting bodies that do not exercise direct supervisory functions, the agency that plays a key role in rule making should be the obvious candidate to represent the EU. The ECB's stronger legal basis and independence, as well as the prominence it has gained over the years, explain its leading role in the most powerful standard-setting networks (ie, the traditional BCBS and the hybrid FSB).

Uncertainties and overlaps in the EU financial architecture can also affect the EU's external activities. Because of this complexity, simplification of the arrangements for representation in global networks is neither feasible nor desirable until such complexity has been reformed.

The legitimacy of the external activities of EU financial agencies is also a delicate issue. From a formal point of view, since global standards are not binding, the agencies' external activities in global networks find a clear legal basis in the ESA Regulations. However, the ambiguous legal status of the standards challenges this traditional perspective. Given the significance of the activities taking place in global networks, the EU bodies representing EU views in these fora – whether they be agencies or other EU institutions – should at least be subjected to reporting obligations and transparency requirements. On the other hand, a binding *ex ante* definition of the position to be taken in such networks could risk impairing flexibility in negotiations.

8. Accountability challenges for EU agencies in the context of third country equivalence assessments

Pieter Van Cleynenbreugel

1. INTRODUCTION

In addition to their roles supporting EU institutions and policies, EU agencies have gradually come to play a role − albeit to varying degrees − in preparing, guiding and supervising procedures assessing the equivalence of third country legal rules or regimes with EU regulatory standards. Seeking to map the powers of EU agencies in this regard and the limits associated with their third country equivalence procedures, this chapter will offer an overview of the equivalence procedures in place and the accountability challenges they pose. To that extent, section 2 of this chapter will identify and classify the different third country equivalence procedures in place. Analysing the legal basis for agency intervention and the specific powers granted to the respective agencies in this respect, this section will develop a topology of four different equivalence roles conferred on EU agencies.

The choice to involve agencies in the assessment of the quality of third country legal regimes is not entirely unproblematic. In particular, the absence of direct democratic oversight or alternative accountability standards accompanying third country quality assessments may put the legitimacy of this procedural framework at risk and thus threaten the overall legitimacy of external action powers entrusted to EU agencies. Building on the descriptive analysis in section 2, section 3 will establish that, given the nature of third country equivalence assessments, more tailored accountability measures in relation to third country equivalence assessments may be desirable to complement the general accountability framework supporting EU agencies, which is largely focused on their internal functioning. In making that proposition, the section will offer a concrete way forward in reflecting on the need for and design of such measures.

2. ASSESSING THE EQUIVALENCE OF THIRD COUNTRY LEGAL REGIMES: THE ROLES OF EU AGENCIES

Third country equivalence procedures pervade the EU legal order. Businesses established in a third country that wish to gain access to the EU internal market must generally abide by the rules in place within the internal market when doing business there. However, EU law provides for instances where those businesses can operate in accordance with their own third country jurisdiction's rules. In those instances, third country rules will be deemed equivalent to the EU rules in place. As a result of this equivalence, third country legal rules are presumed, as a matter of EU law and subject to rebuttal in specific situations, to offer an equivalent amount of legal protection to either businesses or consumers, and therefore to be compatible with EU law requirements on the matter.[1] From that point of view, an equivalence stamp offers third country businesses an opportunity to gain access to the EU market without necessarily having to adapt their functioning to an entirely new legal framework. They are considered as if they are directly compliant with EU law by the mere fact that their rules are deemed equivalent to those in place at the EU level. Being established in an 'equivalent' third country thus offers direct access to the EU market.

Within those third country equivalence assessment frameworks, however, the role of agencies is essentially confined to a supplementary and supporting one. As the European Commission is primarily responsible for proposing and adopting third country equivalence decisions (section 2.1), agencies rather offer technical advice or practical support to the Commission in this task (section 2.2). To the extent that the Commission has developed a more generally applicable equivalence framework, agencies are sometimes nevertheless called upon to verify compliance by individual businesses with that framework. In doing so, agencies may adopt individual binding decisions which do not require the exercise of discretionary powers (section 2.3). Above and beyond those roles, different EU agencies also play a more indirect soft coordination role on the international level, which could in that regard contribute to the preparation of future third country equivalence decisions (section 2.4).

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[1] For a similar working definition, see Norton Rose Fulbright LLP, 'Examining regulatory equivalence, study prepared for the Financial Services Negotiation Forum', (2017), 9, www.nortonrosefulbright.com/files/regulatory-equivalence-paper-145872.pdf, last accessed 22 March 2018.

2.1 The European Commission as Primary Equivalence Decision-making Body

Given the political sensitivities and obvious risks surrounding decisions as to whether third country rules are equivalent to those at EU level, decisions on equivalence are generally taken by the Commission by means of an implementing decision according to Article 291 of the Treaty on the Functioning of the European Union (TFEU). The Commission will then be accountable to the European Parliament and the Court of Justice of the European Union for having adopted such decisions.[2] Determinations of equivalence of third country legal rules presuppose an in-depth assessment of the law in the books and the law in action in specific third country jurisdictions. This in itself requires an in-depth factual analysis as to how legal rules are applied and enforced there.

On the basis of that technical analysis, a subsequent comparison with the EU legal framework in place must be made.[3] That comparison enables the Commission to assess whether third country legal regimes operate in compliance with international legal standards that also bind the EU or its Member States, to what extent law enforcement is taken seriously in that third country and other more specific criteria. That assessment could result in a Commission implementing (or delegated) decision establishing the equivalence of a third country. As legal acts emanating from one of the EU institutions, Commission evaluation decisions can be subject to judicial review by the EU Courts.

2.2 EU Agencies' *Meroni*-compatible Supporting Roles in Equivalence Decisions

In general, and in conformity with the *Meroni* doctrine limiting agencies' discretionary decision-making powers,[4] EU agencies only provide advice or assist in the monitoring of third country equivalence decisions. Agencies in that regard only verify, *ex ante* or *ex post*, whether the equivalence criteria have

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[2] On implementing acts, see among others Jürgen Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law', [2012] *Common Market Law Review* 3 885, 885−928, arguing that implementing acts constitute 'acts that do not find their legal basis directly in the Treaties but rather in an act of the institutions that has delegated the power to adopt implementing measures'.

[3] See Norton Rose Fulbright LLP, supra note 1, 8.

[4] Judgment of 13 June 1958, *Meroni v High Authority*, Case 9/56, ECLI:EU:C:1958:7, p133, para 152; see also Judgment of 14 May 1981, *Giuseppe Romano v Rijksinstituut voor Ziekte- en Invaliditeitsverzekering,* Case 98/80, ECLI:EU:C:1981:104, para 20; and Merijn Chamon, 'EU agencies between Meroni and Romano or the Devil and the Deep Blue Sea', [2011] *Common Market Law Review* 4 1055, 1055−1075.

been respected, without being able formally to adopt a decision on that matter. In those situations, the European Commission or a national authority will be responsible for the adoption, revocation or suspension of an equivalence decision, leaving the agencies with only a subordinate role to play. Within the realm of EU substantive law, both the European Supervisory Authorities (ESAs) in the realm of financial services regulation and the European Medicines Agency (EMA) in the context of EU medicinal products regulation contribute to third country equivalence decisions in such an indirect way.

In the context of financial services regulation, EU agencies have played a supporting preparatory and monitoring role in third country equivalence procedures. The provisions of EU financial services regulation were traditionally implemented and enforced by national supervisory authorities, informally coordinating their activities.[5] In the wake of the financial crisis of 2008, the European Union took action on this front by establishing three new agencies in the realm of financial services: the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (ESMA).[6] All three authorities have been granted coordination and individual decision-making powers in the implementation and application of EU financial services regulation.[7] Subsequent EU legislation even conferred (subsidiary) sanctioning powers on ESMA, an approach deemed to fall within the scope of EU competitions according to the Court in its *Short Selling* judgment.[8] Decisions adopted by one of the ESAs can be con-

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[5] See Beatrice Vaccari, '*Le processus Lamfalussy : enjeux, leçons et perspectives'*, [2007] *Revue du droit de l'Union Européenne* 1 41, 41−72.

[6] On those authorities, see Eillis Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision' in Eddy Wymeersch, Klaus Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision. A Post-Crisis Analysis* (Oxford, OUP 2012), 111−158.

[7] See Articles 17 and 18 of Regulation 1093/2010 of the European Parliament and of the Council establishing a the European Banking Authority, [2010] OJ L331/12; of Regulation 1094/2010 of the European Parliament and of the Council establishing the European Insurance and Occupational Pensions Authority, [2010] OJ L331/48; and of Regulation 1095/2010 of the European Parliament and of the Council establishing the European Securities and Markets Authority, [2010] OJ L331/84, collectively referred to as 'ESA Regulations'.

[8] Judgment of 22 January 2014, *United Kingdom v Council and European Parliament,* Case C-270/12, EU:C:2014:18; For an analysis, see Pieter Van Cleynenbreugel, 'Meroni circumvented? Article 114 TFEU and EU regulatory agencies', [2014] *Maastricht Journal of European and Comparative Law* 1 64, 64−88; and Merijn Chamon, 'The empowerment of agencies under the Meroni doctrine and article 114 TFEU: comment on United Kingdom v Parliament and council (short-selling) and the proposed single resolution mechanism', [2014] *European Law Review* 3 380, 380−403.

tested, first before the Board of Appeal and, after exhaustion of this remedy, before the EU Courts.[9] The founding Regulations have also acknowledged the roles the three ESAs can play in international relations. To that extent, EU law now proclaims that the ESAs may conclude agreements with third country supervisors, without those agreements imposing legally binding consequences on the EU institutions and Member States.[10] That provision above all permits the ESAs to agree on exchange of information practices with counterparts in third states.[11]

On a more general level, EU financial services regulation is predicated upon guaranteeing EU-established financial services providers with 'passport' rights, using their authorization in one Member State to engage in activities in other Member States.[12] In an attempt to enhance the benefits attached to the EU passport, EU legislation allowed the European Commission to recognize third country legal regimes as equivalent, thus permitting financial services providers established there to operate within the EU internal market on the same or similar conditions as those established in the EU territory.[13] Adopting a piecemeal approach, different EU regulatory instruments allowed for the recognition of third countries' equivalence.[14] To that extent, the European Commission has prepared and adopted decisions recognizing the equivalence of third country regulatory regimes, most notably in relation to Japan, the United States, Canada and Australia.[15]

When assessing the equivalence of a third country's regulatory regime, the Commission takes the existence of similar provisions, enforcement and supervision structures and the existence of cooperation agreements into account.[16] Additional attention is paid to the respect for international standards and the guarantees against money laundering being present in that third country.[17]

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[9] Article 60 of the ESA Regulations.

[10] Article 33 of the ESA Regulations.

[11] See, for example, the Memorandum of Understanding concluded between ESMA and the US Commodity Futures Trading Commission (CFTC), www.esma.europa.eu/sites/default/files/library/mou_for_usa.pdf, last accessed 22 March 2018.

[12] See, in detail, Niamh Moloney, *EU Securities and Financial Markets Regulation* (Oxford, OUP, 2014), 396.

[13] European Parliament Briefing, 'Third country equivalence in EU banking legislation', 1 www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI(2016)587369_EN.pdf, last accessed 22 March 2018.

[14] See, for a schematic overview, ibid, 6−12.

[15] European Commission, 'Commission Staff Working Document, EU equivalence decisions in financial services policy: an assessment', SWD (2017) 102 final, 11.

[16] Ibid, 10.

[17] Ibid, 10.

Specific legal instruments contain more specific equivalence criteria in that respect.

Within that particular context, the three ESAs play a supporting preparatory role, on two fronts. First, and in general, Article 33(2) of the same Regulations entrusts the ESAs with the power to assist in preparing equivalence decisions in third countries. Upon request by the European Commission, the ESAs concerned may be asked to verify whether the criteria outlined in the relevant legislation are complied with. Advice given by the ESAs is non-binding and constitutes a preliminary assessment only. The Commission, through its implementing acts procedure, adopts a final decision on the matter.[18] ESMA's advice is published on its website and can be accessed by all interested parties.[19] In those reports, it is outlined how the third country legal rules fit criteria posed by the Commission and applied by ESMA.[20] That said, it nevertheless remains somewhat unclear how much impact the ESAs' advice has on final equivalence decisions adopted by the Commission. Second, and more particularly, the EU legislature entrusted ESMA with an advisory role in the assessment of an authorization of a third country alternative investment fund manager applying for an authorization to one of the EU Member States. In that context, ESMA is tasked with giving advice on a preliminary equivalence assessment made by that Member State's authority.[21] Again, the advice given by ESMA is not binding. To the extent that ESMA gives negative advice, but the Member State concerned would still like to proceed, ESMA need only publish the fact that its advice has not been followed.[22] On a case-by-case basis, it may also decide to publish the reasons for not following that advice.[23] Overall, however, ESMA does not retain any final decision-making powers in this respect.

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[18] As confirmed in Article 13(2) of Regulation 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, [2012] OJ L201/1 (hereafter 'EMIR Regulation'); see in that respect, for example, Commission Implementing Decision (EU) 2016/2271 on the equivalence of financial instrument exchanges and commodity exchanges in Japan in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council, [2016] OJ L342/45.

[19] ESMA, 'International Cooperation', www.esma.europa.eu/convergence/international-cooperation, last accessed 22 March 2018.

[20] See, for example, ESMA, 'Final report Technical advice on third country regulatory equivalence under EMIR – United States', (2013), www.esma.europa.eu/sites/default/files/library/2015/11/2013-1157_technical_advice_on_third_country_regulatory_equivalence_under_emir_us.pdf, last accessed 22 March 2018.

[21] Article 37(5) of Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers, [2011] OJ L174/1 (hereafter 'AIFM Directive').

[22] Article 37(5) of the AIFM Directive.

[23] Article 37(5) of the AIFM Directive.

In addition to providing non-binding technical advice on equivalence decisions, the ESAs are also involved in the continuous monitoring of equivalence conditions. Although the scope of such obligations differs in relation to the different equivalence regimes in place, the Commission has recently called for a more streamlined and coherent role for the ESAs in the monitoring of equivalence decisions.[24] The Markets in Financial Instruments Regulation additionally states that the Commission shall, in cooperation with ESMA, monitor the effective implementation by third countries for which an implementing act on equivalence has been adopted of the requirements equivalent to those contained in that Regulation.[25] This obligation to monitor is limited in both scope and scale. On the one hand, the ESAs only assist in assembling data and drafting reports on compliance. They do not as such investigate specific infringements or address advices directly to the third country authorities or financial market operators. The Commission retains its discretion to adopt third country equivalence decisions, and will be accountable for the way in which it exercises this discretion in the adoption of equivalence decisions. Agencies' preparatory involvement and the potential exercise of discretion at that stage are not amenable to any type of specific oversight, as the Commission adopts the final decision on the matter. On the other hand, the ESAs themselves do not take action against infringing authorities. The decision to revoke or suspend equivalence decisions remains with the European Commission, which must adopt an implementing decision revoking its previous authorization decision.[26] As such, the Commission is also solely accountable to the European Parliament when confronted with a defaulting third country supervisory regime. To the extent that this regime would be implemented across all instances of third country equivalence in EU financial services regulation, the role of the ESAs would remain supplementary at best.[27]

In the context of medicinal products, EU law provides for an authorization system for human or veterinary products. The authorization decision taken in that procedure entitles a medicine's producer to market and commercialize the medicinal products derived from it throughout the European Union.[28]

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[24] European Commission, supra note 15, 12.

[25] Article 33(4), first paragraph of Regulation 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012, [2014] OJ L173/84 (hereafter 'MIFIR').

[26] Article 33(4), second paragraph of the MIFIR.

[27] According to Madalina Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope', [2013] *European Law Journal* 1 111, 114.

[28] See, for background, the leaflet by the European Medicines Agency, 'The European regulatory system for medicines', www.ema.europa.eu/docs, last accessed 22 March 2018.

Centralized medicinal authorization decisions are adopted by the Commission, but only after having received a scientific assessment from the Committee for Medicinal Products for Human Use, the Committee for Orphan Medicinal Products or the Committee for Medicinal Products for Veterinary Use.[29] Those committees are attached to and function under the banner of EMA.[30] EMA receives the case file and ensures that non-binding advice is offered. The Commission takes a decision based on that advice.[31]

In order to avoid the unnecessary duplication of authorization, inspection and control procedures, however, the European Commission has sought to recognize good manufacturing practices in third countries.[32] Such recognition implies that products manufactured in third countries which engage in, control and enforce the same good manufacturing practices as those followed in the European Union do not require authorization and additional inspections by EU Member States' authorities upon import in the EU territory. Articles 18(2) and 43(2) of Regulation 726/2004 envisage that appropriate agreements can be made between the EU and the third country to ensure that those controls are carried out in the exporting country and that the manufacturer applies standards of good manufacturing practice at least equivalent to those laid down by the EU. According to the same provisions, EMA can assist the Member States and the Commission in preparing such agreements. In practice, EMA's role is to offer technical advice to the European Commission, seeking to determine the equivalence of good manufacturing processes applicable in third countries. Its role does not, however, seem to go beyond a mere advisory role in this respect. Mutual recognition agreements are negotiated and concluded between the Council, following negotiations coordinated by the Commission, and the third country concerned.[33]

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[29] Articles 6 and 30 of Regulation 726/2004 of the European Parliament and of the Council laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, [2004] OJ L136/1 (hereafter Regulation 726/2004).

[30] Article 4 of Regulation 726/2004; see also Article 5 of Regulation 141/2000 of the European Parliament and of the Council on orphan medicinal products, [2000] OJ L 18/1.

[31] Articles 9−10 of Regulation 726/2004. The EMA committees do inform the applicants of negative advice given at that stage of the proceedings.

[32] See, to that extent, Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use, [2001] OJ L311/67; supplemented by Commission Delegated Regulation 1252/2014 supplementing Directive 2001/83/EC of the European Parliament and of the Council with regard to principles and guidelines of good manufacturing practice for active substances for medicinal products for human use, [2014] OJ L337/1.

[33] See, for example, Council Decision 2013/1/EU on the conclusion of a Protocol to the Euro-Mediterranean Agreement establishing an association between the European

In addition to its advisory role, EMA is responsible for the coordination of preparatory works for revised or new good manufacturing practices. Such coordination work necessarily also implies keeping up to date on the kinds of EU good manufacturing practices that are formulated and the good manufacturing practices that have been put in place in third countries, and comparing both sets of practices. In making such comparisons and in giving advice, when requested, on the scope of good manufacturing practices, EMA contributes indirectly to the analysis and oversight of the equivalence of third country manufacturing practices, and to the updating of their compatibility with EU good manufacturing practices. EMA's website serves as a useful starting point for manufacturers or interested parties seeking to obtain more information as to whether an equivalence regime is in place. Aside from those complementary and supporting competences, however, EMA does not hold specific hard monitoring or enforcement powers.

2.3 EU Agencies' Binding Individual and Supplementary Decision-making Powers

Agencies have sometimes been granted more direct decision-making powers in third country equivalence assessments. However, such powers are limited to the adoption of individual decisions that do not require a large amount of agency discretion. Those procedures appear prominently in the context of aviation safety and financial instrument trading venues − so-called central counterparties.

In the realm of aviation safety, any aircraft registered in a third country and used by a third-country operator into, within or out of the EU must comply with applicable International Civil Aviation Organization (ICAO) Standards, or, in the absence of the latter, with minimal safety requirements imposed by EU law comparable to such Standards.[34] Third country commercial[35] operators of aircraft must demonstrate their capability and means of complying

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Communities and their Member States, of the one part, and the State of Israel, of the other part, on Conformity Assessment and Acceptance of Industrial Products (CAA), [2013] O.J. L1/1. In practice, agreements have thus been concluded with Australia, Israel, Canada, New Zealand, Japan, Switzerland and the United States. For an overview, see EMA, the mutual recognition tabs in the human and veterinary regulatory sections, www.ema.europa.eu, last accessed 22 March 2018.

[34] Article 9(1) jo 4(1)(d) of Regulation 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, [2008] OJ L79/1 (hereafter Regulation 216/2008).

[35] Article 3(i) of Regulation 216/2008.

with those standards, following which their operations into, within or from the EU can be authorized.[36] The Regulation entrusts the European Aviation Safety Agency (EASA) with the issuance of such authorizations[37] and with the renewal, suspension or revocation of authorization if the conditions leading to its issuance are no longer fulfilled.[38] In doing so, it may conduct itself, or through national aviation authorities or other qualified entities, investigations and audits.[39] Two annexes to Commission Regulation 452/2014 outline in more detail the procedures to be followed in this respect.[40]

In assessing whether a third country operator fulfils all ICAO safety requirements, EASA considers, on a case-by-case, operator-by-operator basis, whether third country standards comply effectively with relevant ICAO Standards that have also been implemented in EU law. EASA effectively authorizes a third country operator to have access to the EU territory in cases where the latter is subjected to third country rules. The assessment of the operator's access to the territory amounts, in practice, to an assessment of the third country rules in place. Given that those third-country rules amount to implemented or transposed international safety standards, it could be argued that EASA verifies whether third countries have implemented those standards to a sufficient extent in order to allow their operations within the European Union, where the same standards have also been implemented in a certain fashion.

The powers entrusted to EASA are nevertheless restricted to the particular assessment of whether a third country operator sufficiently respects the ICAO Standards as implemented in the EU. EASA does not, as such, evaluate whether a third country in general respects those standards, guaranteeing along the way that its operators effectively comply with those standards. That kind of macro-evaluation of the safety levels applied in one country is left to the European Commission to make. Regulation 2111/2005 conferred on the Commission the power to establish an air safety list, which indicates which air carriers are banned from EU activities for failing to comply with the relevant safety standards in place.[41] A decision banning an air carrier from EU activities

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36 Article 9(2) of Regulation 216/2008.

37 Article 23(1)(b) of Regulation 216/2008.

38 Article 23(1)(c) of Regulation 216/2008.

39 Article 23(1)(a) of Regulation 216/2008.

40 See in particular Annex II to Commission Regulation 452/2014 laying down technical requirements and administrative procedures related to air operations of third country operators pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, [2014] OJ L133/12.

41 Article 3 of Regulation 2111/2005 of the European Parliament and of the Council on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of

can be inferred from a lack of cooperation from that air carrier or proof that the authorities of a third country cannot effectively guarantee the safe operations of the air carrier concerned.[42] As a result, the Commission is called upon to verify to what extent third country authorities can guarantee the safety of passengers and/or crew of air operators. Decisions relating to an operating ban are adopted by the Commission following advice from the EU Air Safety Committee.[43] When adopting a decision, the operator concerned may be heard and have the right to defend itself before the Commission.[44] Following the adoption of an updated list by means of a Commission implementing Regulation, airlines concerned may lodge appeals before the EU Courts against this Regulation. EASA is not as such involved in this process. It only maintains and exchanges information with the relevant Commission services in order to ensure that its third country authorization decisions are compatible with banning decisions taken by the Commission.[45]

In the context of the recognition of central counterparties − trading venues where transactions in financial instruments can be cleared in a centralized way[46] − under the European Market Infrastructure Regulation (EMIR), the Commission may recognize third countries' legal systems as equivalent to their EU counterpart.[47] Once an equivalence decision has been adopted on the matter, ESMA is tasked with engaging in recognizing, in light of that decision, specific third country trading venues to engage in EU law compatible transactions.[48] The investigation against the trading venue concerned takes place independently from the assessment of the rules in place in a third country.[49] ESMA may grant or refuse such recognition, which is a binding individual act against which administrative and judicial review avenues are open.[50] ESMA does not, however, have supervisory powers over third country established trading venues.[51] It rather monitors those trading venues by concluding

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the operating air carrier, and repealing Article 9 of Directive 2004/36/EC, [2005] OJ L344/15, (hereafter Regulation 2111/2005).

42 Annex to Regulation 2111/2005.

43 Article 15 of Regulation 2111/2005.

44 Article 7 of Regulation 2111/2005.

45 Article 4 of Regulation 2111/2005.

46 An example of such a venue, established in the EU is LCH Clearnet, www.lchclearnet.com, last accessed 22 March 2018.

47 Article 2a jo 13(2) of the EMIR Regulation.

48 Article 25(1) of the EMIR Regulation.

49 See, for that clarification, explicitly, ESMA, 'Central Counterparties and Trade Repositories' www.esma.europa.eu/regulation/post-trading/central-counterparties-ccps, last accessed 25 October 2018.

50 Article 25(4) of the EMIR Regulation.

51 Implicitly, Article 25(7) of the EMIR Regulation.

non-binding memoranda of understanding with third country supervisors. Those memoranda allow for exchanges of information and supervisory coordination actions to be put in place.[52] Comparable to EASA, ESMA adopts individual recognition decisions that enable a third country operator to have access to the EU territory.

2.4 EU Agencies' Non-binding Supporting Powers in Equivalence Decision Making

While other founding regulations do not explicitly grant a role to EU agencies in equivalence procedures, many of those instruments state that agencies may assist or support the EU institutions in establishing relationships with third countries or in assisting in the development of comparative studies requiring an analysis of third country legal regimes. That is the case for the European Border and Coast Guard Agency,[53] the European Food Safety Authority,[54] the European Agency for Network and Information Security,[55] the European Fisheries Control Agency[56] and the European Railway Agency.[57]

Although those examples demonstrate that EU agencies are increasingly entrusted with an international relations mandate, the scope of that mandate is always confined narrowly. Indeed, the development of cooperation links or non-binding agreements with third country authorities or the setting up of technical assistance means do not in themselves implicate that agencies adopt equivalence decisions. At the very least, however, the study and assessment of

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[52] Article 25(7) of the EMIR Regulation

[53] Articles 8(f) and 14(2)(e) of Regulation 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, [2016] OJ L251/1.

[54] Article 23(i) of Regulation 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, [2010] OJ L31/1.

[55] Article 3(1)(f) of Regulation 526/2013 of the European Parliament and of the Council of 21 May 2013 concerning the European Union Agency for Network and Information Security (ENISA) and repealing Regulation (EC) No 460/2004, [2013] OJ L165/41.

[56] Article 4(1) of Council Regulation 768/2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy, [2005] OJ L128/1, only permitting such assistance at the explicit request of the European Commission.

[57] Article 44(1) of Regulation (EU) 2016/796 of the European Parliament and of the Council on the European Union Agency for Railways, [2016] OJ L138/1.

third country legal rules increasingly become elements that fuel the day-to-day work of EU agencies. From that perspective, it is not entirely unlikely that the mandate of some agencies mentioned here may be extended towards a more explicit role in assessing the equivalence of third country legal standards in the near future.

3. ACCOUNTABILITY CHALLENGES FOR EU AGENCIES IN ASSESSING THIRD COUNTRY LEGAL REGIMES: THIRD COUNTRIES AND THEIR NATIONALS IN THE CONTEXT OF ADVISORY PROCEDURES

It follows from the foregoing analysis that although agencies have a role to play in the adoption of equivalence decisions, that role is limited and supplementary to the Commission's tasks in this respect. As a result, agencies support and structure the Commission's decision-making procedures in this regard, without having the final authority to adopt decisions. Binding individual decision-making powers, when they exist, are confined to verifying whether EU standards are indeed complied with by third-country businesses. As such, agency powers in relation to third country equivalence procedures seem to match the powers they enjoy when performing tasks internal to the EU legal order. From that point of view, the accountability mechanisms in place to oversee agencies in their internal tasks could also function well when performing supporting equivalence tasks (section 3.1). At the same time, however, the advisory or preparatory role of agencies in equivalence procedures seems to escape, in one important way, certain accountability features (section 3.2). Recognizing this gap, this section proposes a way forward to address it (section 3.3).

3.1 Accountability Features in EU Agencies

In terms of accountability of agencies for third country equivalence assessments, no specific controversies appear evident at first sight.[58] Accountability

[58] On accountability in general, see, among others, Carol Harlow, *Accountability in the European Union* (Oxford, OUP, 2002), 6; public bodies are forced to seek to promote the public interest and are compelled to justify their actions in those terms. See also Deirdre Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability', in Damien Geradin and Nicolas Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Cheltenham, EE, 2005), 88−119; Yoannis Pappadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance', [2007] *European*

demands in essence that one institution or person is called upon to assess the operations (the 'bookkeeping') of another person or institution.[59] As such, the notion of accountability expresses a:

> dual relationship (operationalized through norms and procedures) between the public and a body, through which the latter 'takes account' of the interests, opinions and preferences of the former prior to making a decision (responsiveness), and through which it 'renders account' *a posteriori* of its activities and decisions, with the possibility of facing sanctions (control).[60]

By means of that process, the assessing institution aims to determine whether the accountable institution acted in accordance with 'good accounting' standards. Accountability, in one way or another, could therefore imply a subordination to higher regulatory standards.[61] In the context of agencies, general and specific reporting obligations have been put in place to ensure that their activities are subject to control. Agencies receive specific mandates from the Commission, whose activities are controlled in light of EU primary law and secondary legislation. As such, EU agencies must also report on their third country equivalence assessment preparatory activities in their yearly reports submitted to the controlling institutions.

In addition to general accountability obligations *vis-à-vis* controlling institutions, the accountability of bodies is also ensured *vis-à-vis* individuals and entities that are directly or indirectly affected by any decisions or activities undertaken by those bodies. In general, the existence of administrative or judicial review procedures against individual decisions has been considered essential in a Union founded on the rule of law.[62] As such, review opportunities

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Law Journal 4 469, 469−486; Deirdre Curtin, 'Holding (Quasi) Autonomous EU Administrative Actors to Public Account', [2007] *European Law Journal* 4 523, 523−541; Mark Bovens, 'Analysing and Assessing Accountability. A Conceptual Framework', [2007] *European Law Journal* 4 447, 447−448; Deirdre Curtin and André Nollkaemper, 'Conceptualizing Accountability in International and European Law', [2005] *Netherlands Yearbook of International Law* 1 3, 3−20.

[59] See also Walter Van Gerven and Steven Lierman, *Algemeen Deel – 40 jaar later. Privaat- en publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing* (Mechelen, Kluwer, 2010), 64.

[60] See, for that definition, Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'The Exercise of Public Authority through Informal International Lawmaking: an Accountability Issue?', [2011] *Jean Monnet Working Paper* 6 1, 28.

[61] For that perspective, see Mark Bovens, Deirdre Curtin and Paul 't Hart, 'The EU's Accountability Deficit: Reality or Myth?' in Mark Bovens, Deirdre Curtin and Paul 't Hart (eds.), *The Real World of EU Accountability. What Deficit?* (Oxford, OUP, 2010), 1.

[62] See, very generally, Article 1 of the Treaty on European Union.

against EU agency decisions have also been introduced. This is clearly the case in the context of third country equivalence procedures. EASA and ESMA decisions authorizing or recognizing third country operators can be reviewed by Boards of Appeal and the EU Courts respectively. From that point of view, existing oversight mechanisms tailored to agencies' internal decision-making powers may also be relevant for the assessment of specific decisions relating to or having an impact on third country equivalence assessments.

In the realm of preparatory third country equivalence assessments, the Commission still generally abides by the principle that agencies' involvement should be of an advisory nature. Agencies do not in themselves adopt decisions involving policymakers' discretion, but merely advise the European Commission on the equivalence of third country legal regimes. In doing so, equivalence decisions involving discretionary policy choices are left to the Commission to take. The Commission will, as a result, be accountable for any decisions recognizing or refusing to recognize the equivalence of third country legal regimes, supported yet not bound by the expert opinions provided by the relevant agencies. Agencies' opinions are presumed to have a non-binding influence on the Commission and therefore do not constitute legal acts under EU law.[63] On the basis of that observation, however, agencies' supporting activities in the realm of third country equivalence assessments still largely escape from more direct oversight from other EU institutions and the individuals or businesses affected by that advice.

3.2 A Gap in Third Country Equivalence Accountability?

The absence of direct discretionary decision-making powers of EU agencies has justified more limited oversight of any advice they offer the Commission in third country equivalence procedures. Although the EU Courts have acknowledged that seeking the advice of EU agencies, if required by EU secondary legislation, constitutes an essential procedural requirement, breach of which may result in annulment of the relevant decision,[64] the advice as such does not constitute EU acts amenable to judicial review. As a result, agencies are supposed to be accountable only *vis-à-vis* the Commission, and to a lesser extent the European Parliament, when engaging in their policy-supporting activities. It could be argued that this limitation on policy-supporting activities is justified by the very nature of those activities: as they do not comprise the exercise of binding decision-making powers, no direct judicial control over

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[63] See, most notably, Order of 2 June 2004, *Pfizer v Commission*, Case T-123/03, ECLI:EU:T:2004:167, para 22.

[64] In accordance with Article 263 TFEU.

the agencies' preparatory decisions is considered necessary. As far as third country equivalence procedures are concerned, this reasoning seems to remain applicable to its fullest extent.

EU law's focus on general reporting obligations as accountability features seems to be grounded in an understanding of agencies engaging only in general expertise-focused and policy-supporting tasks. As it is believed that agencies do not play an important role in the preparation of third country equivalence assessments, no tools have been put in place to make them more accountable for the supporting roles they perform *vis-à-vis* the third countries concerned or the individual operators established in those countries. That belief in itself has removed any incentive to reflect on the development of accountability tools in relation to this type of decision making. As a result, the introduction of accountability-enhancing tools in relation to the assessment of third country legal regimes does not seem to rank high on the Commission's agency institutional design agenda.

It is submitted that this limited accountability perspective reflects a failure more fully to acknowledge the potential policy-steering role that EU agencies can play in third country equivalence decision making. That is all the more so in light of the finding that third country equivalence assessments are generally not accompanied by a public consultation.[65] Equivalence decisions must necessarily be based on a wide range of empirical data, assembled in order to verify the relevant equivalence criteria. To the extent that agencies assemble those data, and that only those data are used as a basis for Commission decision making in equivalence procedures, agencies have more soft power over whether a third country or an operator will be acknowledged as subject to equivalent legal standards.[66] Given that, in addition, the decisions adopted based on those data are of direct and individual concern to third countries and their nationals wishing to rely on that third country's rules to gain access to the EU market, any preparatory advice adopted by the agency has the potential to affect, indirectly, the legal positions of those countries and nationals. From that point of view, individuals and third countries potentially face the adoption of a decision based on findings they cannot contest by means of an administrative or judicial review procedure. It would thus appear that, in terms of accountability *vis-à-vis* third countries and those individuals, the technical advisory and

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[65] For an explanation why, see, among others, point 6 of ESMA's technical advice on third country regulatory equivalence under EMIR – Japan, www.esma.europa.eu, last accessed 22 March 2018.

[66] On soft power in this regard, David Kennedy, *A World of Struggle. How Power, Law and Expertise Shape Global Political Economy* (Princeton, Princeton University Press, 2016), 109.

preparatory roles of EU agencies seemingly fall short of offering sufficient guarantees for contesting expertise-based findings.

3.3 Addressing the Gap: A Proposed Research Agenda

While the lack of individualized accountability measures is not necessarily problematic in and of itself, it is to the extent that third countries or individuals are deprived of any possibility to contest the findings of the agency in the preparation of an equivalence decision. Being deprived of that possibility would trigger the risk of abuse of power and limited accountability over the activities of expert agencies. In an attempt to address this situation in the specific context of preparatory third country equivalence assessments, a way forward for future research may be proposed. In that way forward, three questions should be developed further, seeking to question the need for and the enhancement of individual accountability features in relation to preparatory third country equivalence procedures.

First, it is necessary to establish clarity on the scope of fact finding and preliminary drafting powers. That in itself requires an empirical and qualitative assessment of how agencies actually work in third country equivalence assessment procedures.[67] On the basis of a mere reading of the Regulations outlining their powers in this respect, the scope of their soft powers is not clear at all. It is thus necessary to establish the actual extent of those powers and see whether they indeed require an extension of similar procedural and accountability and monitoring mechanisms in place in relation to some internal policies. In fields such as financial services regulation, where technical advice is rendered public, such assessments can be facilitated to a significant extent.

Second, to the extent that those soft powers indeed have a significant impact on the Commission's final decision-making process, it must be asked to what extent the Commission exercises its discretion when confronted with detailed advice by an agency pointing clearly in one direction. The Commission could then choose not to exercise any discretion whatsoever and to follow the advice given. If that is the case, specific accountability and review mechanisms may have to be put in place, ensuring that the agency has reached its conclusions in an appropriate way without manifest error in this respect. To the extent that the Commission clearly makes an independent discretionary decision, not necessarily accepting the contents of the advice, it should be assessed whether

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[67] For an example in the United States, see Daniel Carpenter, *Reputation and Power. Organizational image and pharmaceutical regulation at the FDA* (Princeton, Princeton University Press, 2010).

and how it can be ensured that advice is drafted in a sufficiently informed and correct way.

Third, based on the answers provided to the previous two questions, questions may arise regarding the extent to which existing review and oversight procedures could or should be extended to advisory third country equivalence assessment procedures. If one accepts the starting point that in cases where agencies take preparatory decisions, their fact finding, report drafting and preliminary assessment powers should be held to account more explicitly, reflections should be initiated on the design and functionality of such mechanisms. Given that, especially in equivalence-based individual recognition or authorization decisions in the realm of financial services regulation and commercial aviation, similar mechanisms have been set up in the realm of equivalence monitoring activities, nothing would seem to similar guarantees from being put in place in the external realm at the preparatory technical advice delivering stage. Questions that are relevant in that respect amount to asking to what extent third countries or third country operators should be consulted by the agency concerned in preparation for advice and have access to certain procedural features to make their voices heard in that procedure; to what extent agency preparatory decisions – which seemingly have a direct influence on the Commission's final decision making – should be subject to judicial or administrative review; and how the discretion of agency experts should be accounted for in the Commission decision-making stages. It can also be asked, at this stage, to what extent the mere publication of technical advice is sufficient in itself to counter accountability challenges levelled against the agencies concerned. One could argue in those contexts that the set-up of additional procedures in which third country representatives and agency experts engage in a policy discussion in the presence of Commission officials tasked with guiding the third country equivalence decision could already offer a partial solution in that regard. It must thus be determined in which contexts and under what circumstances such complementary steps would indeed serve to enhance the accountability of third country equivalence assessment procedures.

A research agenda structured around these three questions should not be read as the only way forward in seeking to enhance agencies' third country equivalence assessment powers. It should be understood rather as a means to reflect on ways in which the sometimes hidden interventions of EU agencies can be made more explicit and structured from the point of view of those directly or indirectly affected by those findings − that is, the third countries and operators established in those countries. From that point of view, the agenda proposed seeks to further map EU agencies' real interventions in third country assessment procedures prior to looking for workable ways forward that might

enhance their accountability in doing so.[68] A more developed accountability framework may, in turn, result in a more comfortable conferral of less piecemeal, more explicit equivalence assessment powers to agencies with the necessary expertise to make such assessments. However, this should not necessarily flow from the outcomes produced by this agenda.

4. CONCLUSION

EU law increasingly sets up mechanisms aimed at establishing the equivalence of third country legal regimes. Operators active in one of those regimes would also be granted the right to conduct their activities on the territory of EU Member States. EU agencies play a variety of supporting roles in the assessment of the equivalence of those legal regimes. This chapter has identified the various powers conferred on different EU agencies in that respect. An overview of agencies' third country equivalence rules leads to the conclusion that only limited and often preparatory or supporting powers have been allocated to EU agencies. Even when those agencies are called upon to make authorization decisions, as is the case in aviation, they can do so only in individual cases, based upon a verification of international standards implemented by the third country. The limited powers conferred on agencies in this respect reflect a traditional understanding of EU agencies as expert-oriented bodies that play a subordinate role in EU policy making. That understanding, although not without merit, has the somewhat perverse consequence that the powers and influence of EU agencies in taking those decisions remain somewhat unaccounted for. The lack of accountability at the preparatory/advisory stage level being justified by this lack of powers, a vicious accountability circle emerges, the contours of which remain most explicit in the operation of third country equivalence procedures. Seeking to prevent this accountability vicious circle from continuing, the chapter has offered three suggestions, all in light of recent institutional developments that have challenged the *modus operandi* of agencies' powers within the European Union. In light of those developments, this chapter has sketched the contours of a research agenda focused particularly on detecting, in more detail, the actual extent of the soft and supporting powers exercised by EU agencies in this domain. Doing so would allow for more in-depth reflection on whether and how existing accountability features in the realm of internal monitoring powers can be extended to agencies' third country equivalence assessment involvements.

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[68] For a similarly tailored perspective, see Madalina Busuioc, *European Agencies. Law and Practices of Accountability* (Oxford, OUP 2013), 56.

9. EU agencies' external activities and the European Ombudsman

Marco Inglese[1]

1. INTRODUCTION

The agencification of the European Union (EU) is a lengthy and multi-layered process that has preoccupied EU institutions, Member States and scholars since its inception.[2] Above and beyond the issues relating to, for instance, the legal basis for establishing an agency, its composition, mission and powers, and more recently, the (re)location thereof – a particularly sensitive matter in light of the Brexit negotiations[3] – perhaps one of the most interesting aspects in this regard is the external relations of agencies. While in principle it may be true that some agencies have a more international stance than others, given their statutory missions and objectives,[4] it is undoubtable that the actions of all may have international repercussions.

The European Ombudsman (EO) was established by the Treaty of Maastricht to address concerns about an EU democratic deficit and provide a friendly, easily accessible forum for both natural and legal persons to resolve alleged

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[1] I am grateful to the editors of this book for their suggestions. All errors remain mine. marco.inglese@hotmail.it.

[2] See, among others, Edoardo Chiti, 'The Emergence of a Community Administration: The Case of European Agencies', [2000] *CML Rev* 2 309, 309−343; Paul Craig, *EU Administrative Law* (Oxford, OUP, 2012), 140−181; Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk, *Administrative Law and Policy of the European Union* (Oxford, OUP, 2011), 281−306; Merijn Chamon, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford, OUP, 2016), 3−51; Martin Shapiro, 'Independent agencies' in Paul Craig and Grainne De Burca (eds), *The Evolution of EU Law* (Oxford, OUP, 2011), 111, 111−120; Carlo Tovo, *Le agenzie decentrate dell'Unione europea* (Napoli, Editoriale Scientifica, 2016), 3−30.

[3] See Council of the European Union, 3579th Council Meeting, 'General Affairs, Article 50', 14559/17, (2017).

[4] For a discussion on some selected agencies' external relations, see the chapters by Chatzopoulou and Rimkute and Shyrokykh in this book.

cases of maladministration; in other words, to ensure their right to good administration.[5] For these purposes, it is interesting to note that while Article 24 of the Treaty on the Functioning of the European Union (TFEU) refers to 'every citizen of the Union', Article 228 TFEU broadens the scope of application of the EO's review to encompass any 'natural or legal person residing or having its registered office in a Member State'. Article 43 of the Charter of Fundamental Rights of the European Union (the Charter) also reflects this expanded scope.

According to Article 228 TFEU, the EO is competent to hear cases of maladministration committed by EU institutions, bodies, offices or agencies in order to reach an amicable and non-binding solution. Notably, the Court of Justice of the European Union, when acting in its judicial capacity, does not fall within the remit of the EO. To achieve its goals, the EO is vested with investigative powers which may be exercised *ex officio* through strategic inquiries or *ex parte* through individual complaints.[6] Although EO decisions are not binding in themselves, recent data show that the compliance rate exceeds 80 per cent.[7] While initially, the vast majority of complainants were EU citizens targeting institutions – most often, the Commission – today the EO is increasingly seized by legal persons complaining about maladministration

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[5] Ian Harden, 'Article 43 – European Ombudsman' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The European Charter of Fundamental Rights. A Commentary* (Oxford: Hart Publishing, 2014), 1164, 1164−1193; Katja Heede, *European Ombudsman: Redress and Control at Union level* (The Hague: Kluwer Law International, 2000), 7−24; Herwig CH Hoffman, 'The Developing Role of the European Ombudsman' in Herwig CH Hoffmann and Jacques Ziller (eds), *Accountability in the EU. The Role of the European Ombudsman* (Cheltenham, UK: Edward Elgar, 2017), 1, 1−27; Petia Kostadinova, 'Improving the Transparency and Accountability of EU Institutions: The Impact of the Office of the European Ombudsman', [2012] *JCMS* 5 1077, 1077−1093; Anne Peters, 'The European Ombudsman and the European Constitution', [2005] *CML Rev* 3 697, 697−743; Nikos Vogiatzis, *The European Ombudsman and Good Administration in the European Union* (London, Palgrave MacMillan, 2018), 13−55.

[6] Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, [1994] OJ L113/15; amended by Decision of the European Parliament amending Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties [2002] OJ L 92/13 and Decision of the European Parliament amending Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties, [2008] OJ L189/25. See also Decision of the European Ombudsman adopting Implementing Provisions, www.ombudsman.europa.eu/en/resources/provisions.faces, last accessed 19 May 2018.

[7] European Ombudsman, 'Putting it Right? How the EU institutions responded to the Ombudsman in 2015', 16 December 2016, www.ombudsman.europa.eu/en/cases/followup.faces/en/74247/html.bookmark, last accessed 19 May 2018.

by EU agencies.[8] The extensive regulatory powers that certain agencies enjoy make it highly likely that their decisions can affect people and undertakings beyond the EU territory. Indeed, the EO has recently been investigating the external activities of agencies through strategic inquiries.

This chapter analyses the increased importance of the EO's decisions – the so-called 'ombudsprudence' – regarding the external relations, actions and policies of EU agencies. While the EO's intra-EU role as a guardian of the right to good administration and promoter of institutional accountability[9] has been acknowledged, its impact on the external activities of EU agencies is still largely unexplored. This chapter hence endeavours to verify whether and to what extent the EO has influenced agencies' external relations, policies and activities.

In order to delimit the scope of the analysis, this chapter does not aim to provide a full account of the current development of EU agencies or to review existing case law and literature on this topic. Moreover, it will not offer a detailed assessment of recent ombudsprudence, but limits itself to highlighting cases that are relevant to its objective. In doing so, particular attention will be devoted to the right to good administration as enshrined in Article 41 of the Charter and to the Code of Good Administrative Behaviour (the Code). Moreover, decisions stemming from *ex parte* complaints, essentially dealing with access to documents, will be cited solely where strictly relevant to corroborate the findings.

This chapter is structured as follows. Without engaging in a discussion on the atypical position held by the EO within the EU institutional framework – from which it is excluded, according to Article 13 of the Treaty on European Union[10] – this chapter will first provide an overview of the concept of maladministration and the right to good administration. It will then provide a detailed assessment of the strategic inquiries into the management of irregularities by Frontex[11] and the European External Action Service (EEAS) involving the EU

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[8] See European Ombudsman Annual Report 2016, 36.

[9] Madalina Busuioc and Martijn Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives' in Michelle Everson, Cosimo Monda and Ellen Vos (eds), *European Agencies in Between Institutions and Member States* (The Hague, Kluwer Law International, 2014) 175, 175−200; Madalina Busuioc, 'Accountability, Control and Independence: the Case of European Agencies', [2009] *ELJ* 5 599, 599−615.

[10] Yves Petit, '*Les relations entre le médiateur européen et les institutions et organes de l'Union européenne*' in Symeon Karagiannis and Yves Petit (eds), *Le Médiateur européen : bilan et perspectives* (Bruxelles, Bruylant, 2007), 3, 3−34.

[11] Implementation by Frontex of its fundamental rights obligations, Case OI/5/2012/BEH-MHZ, opened on 6 March 2012, recommendation on 9 April 2013, special report on 7 November 2013, decision on 12 November 2013.

Rule of Law Mission in Kosovo (EULEX),[12] which illustrate the deep relationship that the EO has established with agencies that have a high international standing. Building on this analysis, it will then explore the role that the EO has played in influencing the external relations of agencies. In conclusion, this chapter will argue that the EO has made a decisive contribution to shaping the external relations of EU agencies.

2. AN OVERVIEW OF THE CONCEPT OF MALADMISTRATION AND THE RIGHT TO GOOD ADMINISTRATION

Since the Treaty of Maastricht was signed, the EO has investigated and resolved cases of maladministration brought by EU citizens and legal persons.[13] The *locus standi* to bring a case before the EO is particularly generous and, according to Article 228 TFEU, complaints can also target EU agencies. Complainants have a period of two years in which to submit a complaint; they must have already contacted the relevant body about the complaint and, more importantly, the subject matter of the complaint must not be under judicial review or have been settled in a jurisdiction.[14] The EO also enjoys wide discretionary powers to conduct strategic inquiries *ex officio* targeting institutions, bodies and agencies in order to verify whether they are respecting the right to good administration.

In terms of its investigative powers, the EO can access all documents that are relevant to the case at hand and can interview the civil servants involved.[15] If maladministration is found, the EO will seek to correct it between the two

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[12] Decision of the European Ombudsman closing own-initiative inquiry OI/15/2014/PMC into the way in which the EEAS handles allegations of serious irregularities involving EULEX in Kosovo.

[13] Ian Harden, 'When Europeans Complain: The Work of the European Ombudsman', [2000] *CYELS* 3 199, 199–237.

[14] M Remàć, *Coordinating Ombudsmen and the Judiciary: A Comparative View on the Relations Between Ombudsmen and the Judiciary in the Netherlands, England and the European Union* (Cambridge: Intersentia, 2014), 231–324; Alexandros Tsadiras, 'Navigating Through the Clashing Rocks: the Admissibility Conditions and the Ground for Inquiry Into Complaints by the European Ombudsman', [2007] *YEL 1* 157, 157–192; Alexandros Tsadiras, 'The Position of the European Ombudsman in the Community System of Judicial Remedies', [2007] *EL Rev* 5 607, 607–626.

[15] A Tsadiras, 'Unravelling Ariadne's thread: the European Ombudsman's Investigative Powers', [2008] *CML Rev* 3 757, 757–770.

parties by adopting a non-binding decision. Where the EO acts *ex officio*, it is likewise empowered to issue a non-binding recommendation.[16]

The EO's 2017 Annual Report[17] shows that agencies are the second most targeted bodies, after the Commission, and that two of the relevant fields of intervention relate to the protection of fundamental rights and to issues of transparency and accountability. The compliance rate is generally high; however, should the defendant body, agency or institution reject the solution offered by the EO, the European Parliament may be informed accordingly.[18]

According to the EO, the notion of maladministration refers, but is not limited, to:

> poor or failed administration. This occurs if an institution fails to act in accordance with the law, fails to respect the principles of good administration, or violates human rights. Some examples are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay.[19]

On the one hand, therefore it seems that the concept of maladministration encompasses some core general principles of EU law. On the other hand, however, it is narrowed down to encapsulate the principle of good administration, which in turn – since the entry into force of Treaty of Lisbon and given the binding force of the Charter – is now considered a fully fledged fundamental right.[20] Be that as it may, it is clear that the above-mentioned list is open ended.

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[16] Tom Binder, Marco Inglese and Frans van Waarden, 'The European Ombudsman: Democratic Empowerment or Democratic Deficit?', [2017] *BEUI Citizen Report*, http://beucitizen.eu/publications/the-european-ombudsman-democratic-empowerment-or-democratic-deficit-deliverable-8-9/, last accessed 19 May 2018; Martin Martinez Navarro, '*Le Mediateur européen et le juge de l'UE*', [2014] *CDE* 2 389, 389−426; Alexandros Tsadiras, 'The European Ombudsman's Remedial Powers: An Empirical Analysis in Context', [2013] *EL Rev* 1 52, 52−64.

[17] See European Ombudsman Annual Report 2017, 44.

[18] Alexandros Tsadiras, 'Of Celestial Motions and Gravitational Attractions: The Institutional Symbiosis Between the European Ombudsman and the European Parliament', [2009] *YEL* 1 435, 435−457.

[19] See European Ombudsman, www.ombudsman.europa.eu/it/atyourservice/couldhehelpyou.faces/en/26/html.bookmark, last accessed 19 May 2018. In addition, see European Ombudsman Annual Report 1995, 8−9, which interestingly includes 'the rules and principles of law established by the Court of Justice and Court of First Instance'. See also Jacob Söderman, 'A Thousand and One Complaints: the European Ombudsman en Route', [1997] *EPL* 3 351, 351−361; Alexandros Tsadiras, 'Maladministration and Life Beyond Legality: the European Ombudsman's Paradigm', [2015] *Intl Rev L* 3 1, 1−17.

[20] Paul Craig, 'Article 41. Right to Good Administration' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The European Charter of Fundamental Rights. A Commentary* (Oxford: Hart Publishing, 2014), 1112, 1112−1141; Theodore

The EO has thus contributed to creating and elaborating norms of good administration[21] which are valid for every institution, body and agency. These norms, adopted through non-binding codes, apply irrespective of the area in which the institution, body or agency exercises its statutory powers. In addition, more than the norms themselves, the fact that these codes have been voluntarily adopted by institutions reflects a renewed sensibility towards the right to good administration.[22] This in turn is shaping the international behaviour of agencies, given that − as has been anticipated − they may touch upon individuals and legal persons not based in the EU and unfamiliar with its legal system.

The Code confirms this approach and highlights some of the elements of the right to good administration.[23] It acknowledges that good administrative practices especially benefit those who have direct dealings with EU institutions, bodies and agencies. According to Article 1, agencies are included within the broader concept of EU institutions. Article 4 enshrines the principle of the rule of law, according to which civil servants and officials must respect the rules and procedures laid down in EU legislation. Article 6 codifies the principle of proportionality, requiring a balance between the interests of individuals and the general public interest. Article 10 sets out the principles of legitimate expectations and consistency. Regarding the latter, civil servants must be 'consistent' in their decisions, thus enabling a higher degree of predictability of the outcome of decision-making processes. Article 16 provides that where the interests of a person are at stake, he or she has the right to be heard and to submit written and oral observations. Article 17 is a time limit provision, which stipulates that decisions must be taken within a reasonable time − a particularly pressing need when it comes to complex scientific assessments. Article 18 imposes the duty to state reasons, with a reinforced obligation to

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Fortsakis, 'Principles Governing Good Administration', [2007] *EPL* 2 207, 215−216; Herwig CH Hofmann and Bucura C Mihaescu, 'The Relation Between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case', [2013] *EuConst 1* 73, 86−96; Paivi Leino, 'Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU', [2014] *EPL* 4 681, 708−710; *contra*, Rita Bhousta, 'Who Said There Is a 'Right to Good Administration'? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union', [2013] *EPL 3* 481, 487−488.

[21] Magdalena E De Leeuw, 'The European Ombudsman's role as a developer of norms of good administration', [2011] *EPL* 2 349, 349−368.

[22] See European Commission, the Code of Good Administrative Behaviour, [2000] OJ L 267/63.

[23] European Ombudsman, 'The European code of good administrative behaviour', www.ombudsman.europa.eu/en/resources/code.faces#/page/1, last accessed 19 May 2018. See Joan Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behaviour', [2009*] EUI Working Papers* 9 1, 1−13, http://hdl.handle.net/1814/12101, last accessed 19 May 2018.

explain individually each ground on which the decision is based. Finally, Article 26 establishes the right to complain to the EO.

Following this overview of the EO's powers and the concept of maladministration, it is now possible to scrutinize cases dealing with the external relations of EU agencies.

3. THE FRONTEX AND EEAS EULEX KOSOVO INVESTIGATIONS

EO investigations involving the external relations of agencies are essentially strategic inquiries launched *ex officio*. The vast majority of cases dealt with by the EO still concern access to documents[24] and employment relations, and are thus essentially launched following an *ex parte* complaint. On the other hand, as will be shown, strategic inquiries carried out by the EO aim to verify whether agency practice is compliant with the right to good administration, rather than to make good a specific issue of maladministration. This distinction is of crucial importance when it comes to assessing how agencies comply with EO decisions.

The EO has conducted numerous inquiries into whether Frontex[25] respects fundamental rights and, to a certain extent, how to increase the level of protection it affords to individuals in the accomplishment of its tasks.[26] From the

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[24] Dacian Dragos and Bogdana Neamtu, 'Freedom of Information in the EU in the Midst of Legal Rules, Jurisprudence and Ombudsprudence: The European Ombudsman as Developer of Norms of Good Administration', [2017] *EuConst 4* 641, 652−662; Vogiatzis, supra note 5, 145−184.

25 The European Border and Coast Guard Agency (Frontex) was established by Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, [2016] OJ L251/1, 1; While the "European Border and Coast Guard Agency" replaces the "European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", it has the same legal personality and the same short name: Frontex.

Frontex, 'Legal basis', http://frontex.europa.eu/about-frontex/legal-basis/, last accessed 19 May 2018. For a detailed account of Frontex's external actions, see Coman-Kund, Ekelund and Meissner in this book.

[26] Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex); Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex.

exchange of opinions between the EO and the agency, it was immediately apparent that the issue at stake was not a specific act of maladministration. Among the criticisms highlighted by the EO, the following deserve specific attention, since they were addressed in the new Frontex Regulation, as will be further discussed below.

First of all, the EO found that Frontex's action plan and strategy were not sufficiently detailed, insofar as they did not establish the agency's responsibility for issues relating to a potential breach of fundamental rights in joint return operations. A generic, non-specific respect for international, European and national law was not considered sufficient to ensure the protection of fundamental rights. In addition, no sanctions were specified for civil servants found responsible for violations. Furthermore, the professional figure of the Fundamental Rights Officer − a civil servant especially tasked with fundamental rights issues − was not considered to offer enough guarantees in this regard, as the role was purely administrative and came with no concrete investigative or remedial powers in respect of potential violations. Frontex responded to these observations by claiming that it could not ensure fundamental rights protection because some of the staff it employs in joint return operations are seconded to it by Member States; hence, it cannot control them and cannot be held responsible for their misconduct. Frontex thus did not accept the recommendation of the EO, which duly informed the European Parliament through a special report.

In particular, the EO stressed that the alleged artificial dichotomy between the responsibilities of Frontex civil servants and those of civil servants from Member States could jeopardize the respect of fundamental rights of individuals under joint return operations. In doing so, the EO emphasized the importance of the Frontex Fundamental Rights Officer, suggesting that this person should effectively manage all complaints relating to the respect of fundamental rights.

Following from this rich dialogue between the EO, Frontex and the European Parliament, the new Frontex Regulation fully implemented the observations made by the EO. This is also noteworthy since it highlights the symbiotic relationship between the EO and the Parliament, which in turn is linked to the latter's role as a co-legislator, standing on an equal footing with the Council. It further shows how the EO's non-binding recommendations and special reports can be transformed into powerful instruments that shape new legislative measures. Thus, Article 71 of the new Frontex Regulation stipulates that the Fundamental Rights Officer contributes to the agency's strategy for respecting and guaranteeing fundamental rights; while Article 72 establishes a complaints mechanism and Article 73 affirms that in managing complaints, the right to good administration must be respected. These elements are also

duly taken into account in the Frontex code of conduct,[27] which is supplemented by a specific code of conduct for joint return operations.[28]

Despite initial criticisms put forward by some scholars, especially in the early years of the EO's mandate,[29] the EO has been able to exert a positive influence in relation to the protection of fundamental rights, especially in the aforementioned sensitive area. This seems even more far reaching when one acknowledges that the process of agencification has led to the creation of an agency specifically tasked with monitoring them.[30]

The EO's *ex officio* investigation of Frontex signals its willingness to improve the external relations and accountability of agencies. Given that individuals need not be EU citizens to make a complaint, and that Frontex's activities often − even typically − target third country nationals, the external activities of that agency have clearly benefited from the EO's review. An individual who is adversely affected by Frontex's behaviour can now lodge a complaint before the Fundamental Rights Officer and ultimately, in case of maladministration, can also address the EO. These flexible non-judicial remedies may be extremely important for individuals who are unfamiliar with EU technicalities or unable to lodge a complaint before a court of law.

Another good illustration of the EO's impact on the external actions of EU agencies is the EEAS-EULEX Kosovo investigation. The EO was informed by a prosecutor working for EULEX that some of its staff were taking bribes and that the EEAS was not properly investigating the matter. In opening its inquiry, the EO made it clear from the outset that it was not investigating whether specific irregularities had taken place, but rather whether the EEAS had dealt with them in compliance with the right to good administration. The EO focused on the scope and process of the EEAS's investigation, as well as whether it had been carried out independently and impartially. It concluded that these three elements had not been dealt with according to the standard procedure as set out in the EULEX Code of Conduct and Discipline, but welcomed the fact that the

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[27] See Frontex, 'Code of Conduct Applicable to All Persons Participating in Frontex Operational Activities'.

[28] See Frontex, 'Code of Conduct for Joint Return Operations Coordinated by Frontex'.

[29] Symeon Karagiannis, '*L'apport du Médiateur à la protection des droits fondamentaux*' in Symeon Karagiannis and Yves Petit (eds), *Le Médiateur européen : bilan et perspectives* (Bruxelles, Bruylant, 2007), 89, 92−100; Konstantinos D Magliveras, 'Best Intentions but Empty Words: The European Ombudsman', [1995] *EL Rev* 401, 404−405.

[30] Armin Von Bogdandy and Jochen Von Bernstorff, 'The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law', [2009] *CML Rev* 4 1035, 1051−1056.

EEAS had appointed an external expert. Nevertheless, the EO stressed that the selection of this external expert may have raised a potential conflict of interest, since the members of the panel charged with this task had also been involved in conducting the previous internal investigation. Despite this, the EO held that maladministration was not proven, adding that it had 'contributed both towards assisting in the efforts to examine the relevant allegations and to informing the public of the background of this matter'.[31]

In the follow-up stage of the EEAS-EULEX investigation,[32] the EO took stock of the external expert's assessment − namely, that serious misconduct must be investigated in accordance with the standard procedure and by an independent external body − and acknowledged that these suggestions, 'if implemented, [would] constitute a significant improvement'.[33] In particular, the fact that an external body would be tasked with investigating serious misconduct was welcomed as a systemic solution to possible recurring problems. Moreover, in the letter that the EO addressed to the Office of the High Representative,[34] it recognized the efforts made to comply with the external expert's assessment, thereby avoiding any potential issues of maladministration.

Another interesting investigation concerned accountability for maladministration in missions carried out within the framework of the Common Security and Defence Policy (CSDP).[35] According to the EO, where daily operations taking place in third countries cause maladministration, it is not clear who should deal with the issue. The EO noted that in practice, such issues have been tentatively addressed to the Council, the Commission and/or the Office of the High Representative/EEAS. For their part, however, the Council has argued that it cannot deal with issues of maladministration, the Commission that it is responsible only for the financial management of such missions, and the Office of the High Representative that it cannot review maladministration committed by personnel involved in those missions, since they are not under its control. Dissatisfied by this piecemeal framework, the EO insisted that 'the proposition that no EU institution should be held accountable for instances of maladministration. . . cannot be accepted'.[36] In response, the Office of the

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[31] Ibid, para 36.

[32] Follow-up to own-initiative inquiry OI/15/2014/PMC concerning alleged irregularities affecting EULEX Kosovo.

[33] Ibid, para. i.

[34] Ibid.

[35] Decision of the European Ombudsman closing own-initiative inquiry OI/12/2010/(BEH)MMN concerning the Council of the European Union, the European Commission and the High Representative/European External Action Service.

[36] Ibid, para 66.

High Representative assured the EO that it would take cognizance of individual complaints addressed to the EO − a development which was warmly welcomed as a possible means of improving the accountability of CSDP missions. However, as the EO has itself asserted, this is not sufficient in itself to ensure full accountability; hence, the EO has reserved the right to make further inquiries in the future. To date, no follow-up measures have been adopted and the EO's current agenda makes no further mention of the matter.

The ombudsprudence analysed so far illustrates the typical working methods of the EO *vis-à-vis* the external actions of agencies, to the extent that the latter must demonstrate that their internal decision-making processes are as transparent, open, reasonable, accountable and compliant with fundamental rights as possible.

These various examples lead to the interim finding that the EO's close scrutiny and control of the external actions of agencies have positively influenced their conduct, resulting in new internal remedies for potential issues of maladministration in the EEAS-EULEX investigation and the assumption of clearer responsibility by the Office of the High Representative in the CSDP investigation, which appears to have been considered sufficient. That said, the Frontex case remains the most relevant precedent, since the EO's recommendations were subsequently transposed into legislation, thus decisively contributing not only to the general improvement of fundamental rights, but also to making the agency more accountable to EU citizens as well as third country nationals.

4. THE EUROPEAN NETWORK OF OMBUDSMEN AND BREXIT

The European Network of Ombudsmen (ENO)[37] is a flexible, non-hierarchical mechanism of cooperation, which aims to foster the right to good administration in parallel with the mandate of the EO. The ENO has 95 offices in 36 European countries − Member States, candidate countries and third countries − including national, regional and even *ad hoc* ombudsmen. The ENO has proved to be useful in dealing with cases of potential maladministration committed by national administrations in applying EU law, which fall outside the mandate of the EO and must be resolved at the national level. The ENO operates through a cooperative and horizontal framework aimed at boosting not only the visibility of its members and their missions, but also the development and dissemination of best administrative practices. The ENO is currently

[37] See Binder, Inglese and van Waarden, supra note 16, 14−16; Alexandros Tsadiras, 'Rules of Institutional "Flat-Sharing": the European Ombudsman and His National Peers', [2008] *EL Rev* 1 101, 101−115.

undergoing a review under the direction of the current EO, Emily O'Reilly. In particular, she aims to enhance the impact, the goals and the visibility of the ENO.

Two aspects of the ENO's operations are particularly relevant to the external actions of EU agencies: parallel investigations and queries about EU law. As an example of the parallel inquiries conducted through the ENO, national ombudsmen were involved in verifying respect of the human rights of asylum seekers and resettled persons in the context of the Asylum, Migration and Integration Fund.[38] In essence, the EO asked national peers to assess whether EU funds were being efficiently spent in compliance with fundamental rights. This data is extremely recent and will need further elaboration, as only some EU national ombudsmen participated.[39] It would also have been interesting to examine the approaches taken by candidate countries, given that they have been particularly affected by migratory pressures from the Balkan route.

Each national, regional or *ad hoc* ombudsman can also submit questions on the application and implementation of EU law to the EO. This mechanism is voluntary and the EO's response is not binding, although it is highly influential. At a quantitative and qualitative level, the EO does not publish information on the number and content of queries from non-EU ombudsmen. However, this does not affect the validity of the mechanism in itself, especially considering the increasing number and complexity of EU external actions. The ENO may become even more important after Brexit, given that the fates of many EU citizens and former EU citizens will be unknown, and that the UK administration will be still required to apply EU law stemming from the withdrawal agreement, to a certain extent.

Indeed, the EO has been particularly active in relation to Brexit. First, it raised issues regarding transparency and access to documents. Foreseeing its involvement in potential cases of maladministration, the EO invited the Commission to specify the types of information and documents that it intends to publish, as well as when and how it will publish them. Second, the EO urged the Commission to take care of EU citizens' rights. In doing so, the EO highlighted the importance of the ENO, stressing that national ombudsmen are best placed to address Brexit-related issues raised by EU citizens living in the United Kingdom or by UK nationals living in other Member States. In addi-

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[38] See European Ombudsman, 'Parallel Inquiries and Initiatives', www.ombudsman.europa.eu/cases/parallel-inquiries-and-initiatives.faces, last accessed 19 May 2018.

[39] The national ombudsmen that have replied to the EO's letter to date are those from the Czech Republic, Poland, Austria, Ireland, Spain, Malta, Denmark, the United Kingdom and Croatia. See European Ombudsman, 'Parallel Inquiries and Initiatives', www.ombudsman.europa.eu/cases/parallel-inquiries-and-initiatives.faces, last accessed 19 May 2018.

tion, the EO invited the UK members of the ENO to use the query procedure more often.[40]

The EO has already decided two cases dealing with Brexit, both regarding access to documents stemming from *ex parte* complaints. In one case, a UK citizen living in Belgium asked the Commission about retaining his EU citizenship despite the UK's withdrawal.[41] The Commission replied that EU citizenship solely concerns citizens of EU Member States; dissatisfied, the complainant submitted a complaint to the EO. The EO had to back the Commission's position, but interestingly added that:

> the concerns of citizens affected by Brexit, among them the complainant, are understandable. . . EU citizens rightly expect the Commission to continue to pursue its efforts to reach an agreement with the UK which will protect, to the greatest extent possible, their interests.[42]

In another case,[43] the EO had to decide on an issue regarding access to minutes of meetings relating to Brexit negotiations. On this occasion, the EO noted that the Commission had granted partial access to the complainant, but since extensively published relevant documentation regarding the Brexit process and negotiations. Therefore, no maladministration was found.

The EO has thus played an active and important role in guaranteeing the transparency and fairness, to the maximum extent possible, of the Brexit negotiations, thereby increasing its impact over the external relations of EU institutions, bodies and agencies.

5. EU AGENCIES' EXTERNAL ACTIVITIES AND THE EUROPEAN OMBUDSMAN: AN OVERALL ASSESSMENT

In light of the above-discussed ombudsprudence, it is possible to verify the extent to which the EO has influenced the external activities of EU agencies. To date, the impact of EU agencies in the global sphere has been surprisingly

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[40] See 'Ombudsman urges appropriate Brexit transparency', Case SI/1/2017/KR, opened on 28 February 2017.

[41] Decision in Case 59/2018/TN on the European Commission's reply to correspondence concerning EU citizenship for UK nationals post-Brexit.

[42] Ibid, para 6.

[43] Decision in Case 2130/2017/KM on the European Commission's failure to reply to the complainant's request to review its refusal of access to documents relating to the Brexit negotiations.

neglected in the legal literature, despite some noteworthy exceptions.[44] In turn, the role of the EO in this area is a complete blind spot.

Given that the EO investigates cases of maladministration, at this stage it is important to stress again that according to Article 228 TFEU, anybody can potentially bring a case before the EO. Focusing on the regulatory powers of EU agencies, the EO has been involved in verifying, *a contrario*, whether EU agencies and their decision-making processes respect the principle of good administration. This intervention essentially fosters internal accountability, giving individuals and legal persons that are exposed to agencies' powers privileged access to a non-judicial remedy. The next logical step is to transplant this reasoning into the external sphere.

At the theoretical level, one may draw parallels between internal accountability and its external projection. Insofar as a body exists which is entrusted with ensuring checks and balances − albeit in a non-judicial way[45] − between individuals and governmental bodies, agencies will be perceived as reliable actors in the international arena. The development of non-judicial checks and balances through the case law of the EO, as well as the voluntary adoption[46] of a code of good administrative practices under the model developed by the EO itself, thus ensures increased accountability. Furthermore, the development of a body of norms of good administration[47] benefits the external accountability of EU agencies at the operative level − as discussed, for instance, in the EEAS-EULEX investigation.

This aspect must now be linked to the conditions for lodging a complaint before the EO. As explained, individuals must be resident in a Member State, while legal persons must have a registered office in a Member State. The fact that the Code is gradually being adopted by institutions and agencies makes it easier to substantiate a complaint and in turn facilitates the EO's assessment of potential maladministration. All of these elements, as well as the valorization of the Code and the consistent body of EO decisions, have expanded the accountability of EU agencies from a purely internal perspective to an

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[44] Andrea Ott, Ellen Vos and Florin Coman-Kund, 'European Agencies on the Global Scene: EU and International Law Perspectives' in Michelle Everson, Cosimo Monda and Ellen Vos (eds), *European Agencies in Between Institutions and Member States* (The Hague, Kluwer Law International, 2014), 87, 87−122; Florin Coman-Kund, 'The International Dimension of the EU Agencies: Framing a Growing Legal-Institutional Phenomenon', [2018] *EFA Rev* 1 97, 97−118.

[45] Paul Magnette, *Controler l'Europe. Pouvoirs et responsabilité dans l'Union européenne* (Bruxelles, Editions de l'Université de Bruxelles, 2003), 134.

[46] See the European Medicines Agency Code of Conduct, EMA/385894/2012 rev1, (2016); and the European Asylum Support Office Code of Conduct.

[47] Paul Bonnor, 'The European Ombudsman: A Novel Source of Soft Law in the European Union', [2000] *EL Rev* 1 39, 39−56.

unexplored external dimension. It seems safe to argue that the EO has made a decisive contribution to increasing agencies' accountability in their external relations – for example, by influencing the recast of the Frontex Regulation, which has strengthened the position of the Fundamental Rights Officer.

The EO's control of agency accountability in the external sphere can also be assessed from an internal EU standpoint. Assuming that an agency's international mandate must respect the *Meroni* doctrine, Coman-Kund points out that 'it is essential that. . . the agency is subject to sufficient supervision and control, ensuring that the powers of the main actors in the EU external action area (the Commission and the Council) are not affected'.[48] He adds that 'within the Union, the ultimate political responsibility of the agencies' technical external action seems to lie mainly with the Commission'.[49] In other words, the EO effectively controls the internal and external actions of agencies, making them accountable for potential issues of maladministration and thereby contributing to their legitimacy.

The EO is developing a consistent and uniform body of decisions regarding horizontal aspects of EU agencies, – that is, aspects which are relevant to both their internal and external actions. While this body of decisions is important to the extent that it informs individuals of their administrative rights, it is also true that these rights have been given greater visibility through the Code. This gives rise to a different form of accountability: neither judicial accountability nor political accountability, but rather a form of administrative accountability, whose positive effects expand from the internal control of agencies' activities to the external sphere.

Increasing awareness of the right to good administration, as one of the EO's most important goals, is also connected to two other essential features of the EO: its unconventional position within the EU institutional framework and its impact on the development of EU citizenship.

First, as has already been observed, the EO is clearly positioned outside the EU institutional framework. However, it enjoys special ties with the Parliament, since it is appointed by the latter, is accountable to the latter and addresses its annual report to the latter.[50] This organic, almost symbiotic relationship stems from the fact that the drafters of the Treaty of Maastricht sought to link a body tasked with controlling institutions with the only democratically elected EU institution. Certainly, some EU developments were unforeseea-

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48 Coman-Kund, supra note 44, 104.

49 Ibid, 117.

50 Christine Neuhold, '"Monitoring the Law and Independent From Politics?" The Relationship Between the European Ombudsman and the European Parliament' in Herwig CH Hoffmann and Jacques Ziller (eds), *Accountability in the EU. The Role of the European Ombudsman* (Cheltenham, Edward Elgar, 2017), 53, 56−59.

ble at that time and it was hard to imagine an expansion of the EO's role.[51] However, the Treaty of Lisbon decisively, though indirectly, contributed to this by making the European Council an EU institution, thereby broadening the EO's mandate.[52] Furthermore, the de-pillarization introduced by the Treaty of Lisbon gave new impetus to the Common Foreign Security Policy and the CSDP. The latter has been already the subject of an EO investigation and there may well be similar issues regarding the former. In other words, a three-tier parallel may be drawn between the external reach of EU actions and the increased level of control of the EO thereover.

Second, it has been shown that the EO has increased awareness of the right to good administration among EU citizens.[53] However, as EU citizenship is not a criterion for lodging a complaint before the EO, it could be argued that the EO has promoted awareness of *some* rights for people *lato sensu* affected by the external activities of EU agencies. Certainly, the criteria for lodging a complaint require that the complainant be based in the territory of the EU; but it is also true that the complainant need not demonstrate an interest to act. Therefore, it is theoretically possible that an individual who is affected by the actions of an agency but is not based in the EU, instead of commencing transnational litigation, might entrust somebody else based in the EU territory to act on his or her behalf. In other words, the scope of the right to good administration − or rather, the possibility to make good an alleged act of maladministration − extends well beyond the concept of EU citizenship and the EU territory, thereby making the EU itself more accountable in the eyes of those in third countries. The EO thus allows EU agencies to be held accountable by non-EU citizens, thereby providing for an accountability that is broader than the political accountability devised through the institutional framework.

As a final point, the EO's strategic inquiries may play a decisive role in bolstering the external accountability of EU agencies. As the EO is a personalized body, the meaningful use of *ex officio* investigations essentially rests upon the office holder. While a general and continual increase in complaints has been recorded over the years, strategic inquiries have always been used rather prudently. However, Ms O'Reilly has made decisive strides in this

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[51] Nikiforos Diamandouros, 'The European Ombudsman and Good Administration Post-Lisbon' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union After the Treaty of Lisbon* (Cambridge, Cambridge University Press, 2012), 210, 211−212.

[52] Nikos Vogiatzis, 'Exploring the European Council's Legal Accountability: Court of Justice and European Ombudsman', [2013] *GLJ* 9 1661, 1681−1685.

[53] Claude Blumann, '*La contribution du médiateur européen à la citoyenneté européenne*' in Symeon Karagiannis and Yves Petit (eds), *Le médiateur européen : bilan et perspectives* (Bruxelles, Bruylant, 2007), 59, 63−69.

regard, launching the investigations into the EEAS and EULEX, Frontex and maladministration in CSDP missions.

In conclusion, the relationship between the EO and EU agencies may be construed according to a single pattern. Irrespective of the field of action – external or internal – and irrespective of the type of control performed by the EO – *ex officio* or *ex parte* – what really matters is respect of the fundamental right to good administration. This is why Article 41 of the Charter is complemented by Article 43, offering an exhaustive set of rights and remedies – both judicial and non-judicial – regarding the multi-faceted relationship between individuals and EU administrations.

Mastroianni has convincingly argued that 'as a consequence of the increased responsibilities entrusted to the EO by the Treaties, it seems that (almost) no aspect of EU institutional life can escape some sort of accountability'.[54] He also points out that the quality and number of strategic inquiries are increasing, reflecting the positive contribution of the EO not only in rendering the right to good administration more visible and somewhat enforceable, but also in proactively protecting it. This approach confirms that the EO is 'more focused on preventing cases of maladministration rather than sanctioning them',[55] thus contributing to the creation of a 'new concept of good administration'.[56] Harden in turn stresses that the EO is successfully promoting 'good governance' in the EU through its increased legitimacy − a legitimacy that, far from deriving solely from its atypical institutional position, essentially stems from a consistent and predictable flow of decisions.[57] And for our purposes, it is important to emphasize that this consistent and predictable flow of decisions essentially affects the external relations of EU agencies.

6. CONCLUDING REMARKS

This chapter has sought to demonstrate that, through a consistent body of decisions primarily adopted in strategic inquiries, the EO is positively influencing the behaviour of European agencies in their external relations, increasing their accountability and respect of the right to good administration.

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[54] Roberto Mastroianni, 'New Perspectives for the European Ombudsman Opened by the Lisbon Treaty', in in Herwig CH Hoffmann and Jacques Ziller (eds), *Accountability in the EU. The Role of the European Ombudsman* (Cheltenham, Edward Elgar, 2017), 178, 183.

[55] Ibid, 197.

[56] Ibid.

[57] Ian Harden, 'The European Ombudsman's Role in Promoting Good Governance' in Herwig CH Hoffmann and Jacques Ziller (eds), *Accountability in the EU. The Role of the European Ombudsman* (Cheltenham, Edward Elgar, 2017), 198, 201−216.

The relationship between the EO and the EU agencies has given rise to a win-win situation: on the one hand, the EO has increased its standing as a non-judicial settler of disputes, a creator of norms of good administration and a promoter of accountability even in external relations. On the other, in turn, the agencies have acquired a higher degree of accountability while benefiting from greater visibility − aspects which have gone beyond EU borders and expanded into their external sphere of intervention.

Considering the current state of research in the field of EU agencies, coupled with the more positive narrative of the EO, it seems safe to conclude that the latter is making a decisive contribution to increasing the accountability of the former. However, this finding will need to be further corroborated by EO practice in assessing agencies' external activities. The EO's Strategy Towards 2019[58] stresses the need to deepen cooperation with the ENO in order to enhance the protection of fundamental rights, and with international networks and organizations in order to disseminate best practice. However, it seems probable that, given the steady increase in EU agencies' external actions, the number of issues of maladministration will also increase accordingly. It remains to be seen how the EO will respond and how the agencies will implement its decisions, or whether the intervention of the Parliament will be required on a case-by-case basis, as happened with Frontex.

[58] See European Ombudsman, 'Strategy of the European Ombudsman 'Towards 2019', www.ombudsman.europa.eu/en/resources/strategy/strategy.faces, last accessed 25 October 2018.

PART IV

EU agencies' external action: impact on third countries

10. Transferring the *acquis* through EU agencies: the case of the European Neighbourhood Policy countries

Dovilė Rimkutė and Karina Shyrokykh

1. INTRODUCTION

One of the key features of the evolution of the 'European regulatory state' has been 'agencification'.[1] To date, more than 40 decentralized EU agencies and bodies support EU institutions and Member States in making and implementing European regulations. Such institutional processes have significantly affected the nature of the EU regulatory state, as well as the means of setting standards within the internal market.

EU agencies are actively involved not only in shaping the regulatory landscape of the EU, but also in building the EU regulatory state beyond its borders through a dense net of transgovernmental ties that extend to third-country regulators.[2] In particular, EU agencies focus on institution building and advancing the state capacity of third countries to bring their regulatory standards closer to the EU norms.[3] A recent contribution by Lavenex provides one of the first assessments of the EU's regulatory governance in third countries. She demonstrates that non-Member States have an opportunity to align themselves with the standards of the EU and benefit from the 'access to a plethora of committees and regulatory agencies that contribute to the development and

[1] See Madalina Busuioc, Martijn Groenleer and Jarle Trondal, *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making* (Manchester, MUP 2012); see also Arndt Wonka and Berthold Rittberger, 'Credibility, Complexity and Uncertainty: Explaining the Institutional Independence of 29 EU Agencies', [2010] *WEP* 4 730, 730–752.

[2] See Sandra Lavenex, 'The External Face of Differentiated Integration: Third Country Participation in EU Sectoral Bodies', [2015] *JEPP* 6 836, 836–853.

[3] See Rimkutė and Shyrokykh, 'The Role of EU Agencies in the Acquis Transfer: The Case of the European Neighbourhood Policy Countries', [2017] *TARN Working Paper Series* 14 1, 1−19.

implementation of EU policies'.[4] She also illustrates that such integration has a differentiated character in contributing to the spread of the *acquis* (ie, EU legislation and regulation) in third countries. More precisely, various EU agencies are open to the participation of third countries, both at different points in time and to a different extent.

Building upon existing scholarly work, this chapter aims to systematically map and explain the variance across agencies' openness to participation of the European Neighbourhood Policy (ENP) countries. We aim to examine whether the external dimension of EU agencies' inclusion reflects the pursuit of the overarching EU foreign policy objectives as stated in Article 21 of the Treaty on European Union and/or echoes the objectives dictated by the need to find common solutions in the policy domains marked by high interdependencies. Empirically, the chapter concentrates on all EU agencies involved in all ENP states. The period of investigation covers ten years (2007−17). The analysis builds upon primary sources and information provided by the European Commission and EU agencies. Empirical analysis reveals that sector-specific interdependencies explain EU agencies' engagement patterns with the ENP countries.

The chapter contributes to the scholarship of the external dimension of EU agencies in two ways. The EU agency phenomenon has received much scholarly attention:[5] the role that EU agencies play internally in the multi-level arrangements[6] and how they impact on the functioning of the internal market have been explored.[7] However, our understanding of the regulatory outreach of EU agencies beyond the EU's borders is rather limited and only recently started to receive scholarly attention.[8] We know very little of the extent to which EU agencies are involved in the EU's external governance and the ways in which they contribute to this domain. This chapter, therefore, first undertakes a systematic explanation of EU agencies' external outreach.

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[4] Lavenex, supra note 2, 850.

[5] For an overview, see Morten Egeberg and Jarle Trondal, 'Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?', [2017] *JCMS* 4 675, 675−690.

[6] See Eva Heims, 'Regulatory Co-ordination in the EU: A Cross-Sector Comparison', [2017] *JEPP* 8 1116, 1116–1134; see also Emmanuelle Mathieu, *Regulatory Delegation in the EU: Networks, Committees and Agencies* (London, Palgrave Macmillan, 2016); *see also* Jarle Trondal and Lene Jeppesen, 'Images of Agency Governance in the European Union', [2008] *WEP* 3 417, 417−441.

[7] See Herwig Hofmann, 'European Regulatory Union? The Role of Agencies and Standards', in Panos Koutrakos and Jukka Snell (eds), *Research Handbook in Internal Market Law* (Cheltenham, Edward Elgar, 2017), 460.

[8] See also the chapters by Helena Ekelund and Merijn Chamon and Valerie Demedts in this book.

Additionally, existing literature on the external dimension of EU agencies is predominantly based on single case studies or small-*n* comparisons.[9] Thus, this chapter's second contribution is a comparative assessment of all of the EU agencies that cooperate with the ENP countries. By providing a systematic and holistic perspective on supranational agencies' involvement in the EU's neighbourhood, this study describes the variance in the agencies' outreach across policies and states.

The remainder of this chapter is organized as follows. First, we briefly introduce the empirical phenomenon of interest − namely, the external dimension of the EU agencies. Second, we review relevant literature and introduce two explanations that we expect to account for the variance in the agencies' involvement in the ENP region. The third section discusses the core findings on the involvement of EU agencies in the transfer of the EU *acquis* to the ENP region. Lastly, in the concluding section, we summarize the contribution of this chapter and indicate avenues for future research.

2. EU AGENCIES IN THE ENP COUNTRIES

In 2004, the European Commission stated that ENP states are eligible to participate in EU programmes that are 'in the interest of the enlarged EU and neighbouring countries'.[10] The EU declared its commitment to develop a close relationship with 16 neighbouring countries: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Syria, Palestine, Tunisia and Ukraine. The ENP envisioned 'the gradual opening of certain Community programmes, based on mutual interests and available resources'.[11] Participation in specific programmes aims to contribute towards the development of administrative and state capacity needed for effective cooperation and reaching common goals. Through the ENP, the EU seeks to ensure stability, security, prosperity and good governance in its neighbour-

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[9] See Florin Coman-Kund, 'The International Dimension of the EU Agencies Charting a Legal-Institutional 'Twilight Zone'', [2017] *TARN Working Paper Series* 5 1, 1–22; see also Martijn Groenleer and Simone Gabbi, 'Regulatory Agencies of the European Union as International Actors: Legal Framework, Development over Time and Strategic Motives in the Case of the European Food Safety Authority', [2013] *EJRR* 4 479, 479−492.

[10] European Commission, 'European neighbourhood policy: strategy paper', COM (2004) 373 final, Brussels, 4.

[11] European Commission, 'General approach to enable ENP partner countries to participate in Community agencies and Community programmes', COM (2006) 724 final, Brussels, 3.

ing countries and thus subsequently ensure its own prosperity and security.[12] The organizational opening of EU agencies to the ENP countries evidently contributes to this goal.

In 2007 the Council of the European Union approved the participation of the ENP countries in the activities of some EU agencies. The participation of the ENP partner countries in the work of the EU decentralized agencies is regarded as a key element of the ENP instrument. Such a partnership is based on the agreement between a specific EU agency and an interested ENP partner country. The core precondition for the participation of the ENP country in EU agencies' activities is based on the merits of the progress of the third countries − that is, the implementation of sector-specific reforms and compliance with EU technical standards (European Commission 2011). As a result, involvement in the activities of EU agencies infers integration in the regulatory framework of the EU and is an instrument for approximation to EU norms and standards.

More than 20 EU agencies are open for participation by ENP partner countries. Collaboration between EU agencies and the ENP partner countries can manifest in two forms: (1) *ad hoc* arrangements (temporary project-based technical or scientific cooperation) and/or (2) special bilateral arrangements signed between two parties and henceforth establishing a sustained institutionalized link between an EU agency and an ENP country. According to the first format, the ENP states can gain access to the activities of EU agencies on an *ad hoc* basis − for example, various short-term arrangements aimed at institution and technical capacity building. They are organized via the Technical Assistance and Information Exchange (TAIEX) tool or via other programmes managed by the Directorate-General for Neighbourhood and Enlargement Negotiations of the European Commission (DG NEAR). EU agencies thus have an opportunity to support the approximation, application and implementation of EU legislation in the ENP region. For instance, participation in TAIEX activities is aimed at facilitating the delivery of tailor-made expertise to address issues that are relevant to individual ENP countries.[13] Within this setting, the primary beneficiary group is civil servants from ENP countries operating at national, subnational or local levels. TAIEX provides a platform for EU agencies to share their technical and scientific expertise in all fields of the EU *acquis*, such

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[12] European Commission, 'Wider Europe–Neighbourhood: A New Framework for Relations with Our Eastern and Southern Neighbours', COM (2003) 104 final, Brussels.

[13] Karina Shyrokykh, 'Policy-Specific Effects of Transgovernmental Cooperation: A Statistical Assessment across the EU's post-Soviet Neighbours', [2019] *JEPP* 1 149, 149−168.

as justice and home affairs, internal market, environment, agriculture, food safety and transport (including the aviation, maritime and railway sectors).

The second format of cooperation stipulates that EU agencies can propose bilateral cooperation to third countries and establish institutionalized ties by signing formal working/strategic/technical/operational arrangements with an individual ENP country. These formal working arrangements are often restricted to technical collaboration underlining the capacity-building function, as seen in the example of EU enlargement.

Within the existing legal framework, EU agencies can employ various forms of cooperation, be they *ad hoc* arrangements, bilateral working agreements or a combination of both. Studies focusing on a small sample of EU agencies (ie, the European Chemicals Agency, the European Food Safety Authority, the European Environmental Agency, Frontex and Europol) suggest that EU agencies are open to participation of third countries at different points in time, to a different extent, and that they propose various forms and combinations of cooperation to the different groups of the ENP states.[14] Building on this observation, this study aims to explain the patchy patterns of cooperation between EU agencies and the ENP countries across policy sectors, agencies and countries.

3. THEORETICAL FRAMEWORK: FOREIGN POLICY OBJECTIVES *VERSUS* SECTOR-SPECIFIC INTERDEPENDENCIES

In studies investigating external governance of the EU towards third countries, major attention is usually paid to the material leverage of the EU to impact third states' behaviour.[15] For instance, studies highlight the role played by conditionality attached to reforms in various sectors. The economic leverage is, in fact, significant, since the EU is a prominent economic actor. More recent literature, however, has started to pay attention to the fact that the EU may wield influence not just by leverage, but also by disseminating practices, norms and ideas.[16] Existing scholarly work demonstrates that the EU's techni-

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[14] Lavenex, supra note 2.

[15] See Frank Schimmelfennig, 'Strategic Calculation and International Socialization: Membership Incentives, Party Constellations, And Sustained Compliance in Central and Eastern Europe', [2005] *IO* 4 827, 827–860; see also Antoaneta Dimitrova and Rilka Dragneva, 'Shaping Convergence with the EU in Foreign Policy and State Aid in post-Orange Ukraine: Weak External Incentives, Powerful Veto Players', [2013] *Europe-Asia Studies* 4 658, 658–681.

[16] See Julia Langbein and Kataryna Wolczuk, 'Convergence without Membership? The Impact of the European Union in the Neighbourhood: Evidence from Ukraine',

cal assistance via various capacity-building instruments is an effective tool to promote legislative convergence and diffuse best practices. In addition to this, it can also impact on the democratic attitudes of public servants and in turn foster democratic change.[17] This scholarship focuses on transgovernmental networks and the role they play. Networks established between public servants in Member States and the ENP countries focus on problem and sector-specific cooperation and are limited to a participation of professionals with recognized knowledge, expertise and competence in a specific policy domain or issue area. They stimulate the transfer of knowledge, which in turn may induce a change in third countries.[18]

Instead of focusing on the effects of such cooperation, this study addresses the variance existing in the degree of cooperation between EU agencies and the ENP states, which the literature relating to the external dimension of EU governance has so far not sufficiently explained. A recent contribution of Lavenex (2015) proposes a very first appraisal of the EU agencies' involvement in third countries, describing the variance in cooperation across seven EU agencies. We build on this contribution, but extend our focus to all EU agencies that are involved in the EU's external governance activities in the ENP region.

Existing scholarly work suggests that the core drivers of the external differentiation of EU governance in the neighbouring regions are either foreign policy objectives in the region and/or functional interdependencies that require effective cooperation for successful problem-solving.[19] We tailor these explanations to examine the role of EU agencies in the context of the ENP states.

The foreign policy objectives are predominantly political and are aimed at serving the general interests of the EU. In this logic, the inclusion of the ENP countries in EU agency activities is not an objective *per se,* but rather serves as a foreign policy tool that is aimed at advancing the *acquis* of the EU.[20] Thus, the core aims of the inclusion of the ENP countries in EU agency activities is

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[2012] *JEPP* 6 863, 863–681; see also Sandra Lavenex, 'A governance Perspective on the European Neighbourhood Policy: Integration beyond Conditionality?', [2008] *JEPP* 6 938, 938–955; see also Tina Freyburg, 'Transgovernmental Networks as Catalysts for Democratic Change? EU Functional Cooperation with Arab Authoritarian Regimes and Socialization of Involved State Officials into Democratic Governance', [2011] *Democratization* 4 1001, 1001–1025.

[17] See Shyrokykh, supra note 13; see also Tina Freyburg, 'Transgovernmental Networks as an Apprenticeship in Democracy? Socialization into Democratic Governance through Cross-National Activities', [2013] *ISQ* 1 59, 59–72.

[18] Shyrokykh, supra note 13.

[19] Lavenex, supra note 2; see also Frank Schimmelfennig, Dirk Leuffen and Berthold Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation', [2015] *JEPP* 6 764, 764–782.

[20] Lavenex, supra note 2.

to prepare third countries for further integration with the EU, acquaint them with the *acquis* or signal a symbolic recognition by and acceptance into the European community.

The foreign policy perspective views cooperation between the ENP countries and EU agencies as one of the avenues to further extend the regulatory and territorial boundaries of the EU.[21] To that end, EU agencies support the European Commission in promoting its core foreign policy agenda to enhance regional stability, strengthen liberal democratic values and foster regional economic wellbeing through third countries' approximation to the EU *acquis*.[22]

EU agencies are a part of a broader hierarchical chain supporting EU institutions in achieving their wider objectives. In line with this reasoning, the expectation is that the decision to grant the access to EU agencies' activities for the ENP country is based on the integration status of the country. That is, from the foreign policy perspective, one would expect the deepening cooperation between an EU agency and an ENP country to be a result of the country's integration attempts and status (rather than a result of sector-specific functional interdependencies). In this way, patterns of cooperation should mimic the level of integration. Hence, in accordance with this logic, we expect EU agencies to engage in various forms of cooperation with the ENP countries following these countries' association stage with the EU. The organizational inclusion of the ENP countries in EU agencies' undertakings should echo formal pledges to the EU *acquis*. The domestic pre-existing differences of the ENP countries – in terms of their regulations or administrative capacities – should be less important for granting access to the participation in EU agencies' activities because the core goal of such inclusion is to foster approximation to the EU *acquis*. Hence, we expect that:

Foreign Policy Hypothesis (H1): Cooperation between EU agencies and the ENP partner countries follows the patterns of the ENP countries' integration status with the EU.

If this 'foreign policy' hypothesis holds, we should empirically observe the variance in agencies' involvement across different groups of countries rather than across policy domains. The integration status of an ENP country should be a core factor defining the extent to which EU agencies are open to the ENP states. By 'integration status', we mean the depth of the relations between the EU and an ENP state – exemplified, for instance, by the conclusion of an Association Agreement, such as those with Ukraine (2017), Georgia (2016),

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[21] Lavenex, supra note 2.
[22] European Commission, supra note 11.

Moldova (2016), Israel (2000), Tunisia (1998), Algeria (2005), Egypt (2004), Jordan (2002), Lebanon (2006) and Morocco (2000). Negotiations for such Association Agreements have also been conducted with Armenia (suspended since 2013), Azerbaijan, Libya (suspended since 2011) and Syria (suspended since 2011). There have been no negotiations with Belarus, due to its domestic practices that pose threats to the EU's core democratic values. If this hypothesis holds, we expect to observe that countries in more advanced stages of integration (ie, Association Agreements have been signed) are given greater access to EU agency activities. On the contrary, in countries that are in the less advanced phase of Association Agreements, we expect to observe only limited access to EU agencies' activities. In other words, we expect this variation to be present across states, rather than policy fields.

A functionalist perspective proposes a different explanation. From the functional interdependencies perspective, EU agencies provide expertise in key areas of mutual interest. Such transgovernmental networks between the EU and neighbouring states facilitate *acquis* transfer and regulatory convergence.[23] They have been featured as functional bodies shaping the Europeanization of neighbouring states,[24] often operating as hubs or scientific communities bringing together supranational and national experts.[25]

From the functional interdependencies perspective, openness of EU agencies to participation of ENP states does not follow the 'top-down' patterns of the EU foreign policy objectives. Instead, it follows 'bottom-up' dynamics and originates from functional interdependence in a specific sector.[26] The functional interdependencies logic suggests that cooperation between EU agencies and the ENP partner countries reflects policy-specific patterns of interdependence rather than broad foreign policy objectives. In other words, it is not an ENP country's position *vis-à-vis* the EU that induces access to EU agencies, but rather policy-specific functional needs to jointly address common problems.

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[23] Shyrokykh, supra note 13.

[24] Lavenex, supra note 2; Shyrokykh, supra note 13.

[25] See Burkard Eberlein and Abraham L Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union', [2008] *Governance* 1 25, 29; see also Martino Maggetti and Fabrizio Gilardi, 'Network Governance and the Domestic Adoption of Soft Rules', [2014] *JEPP* 9 1293, 1293–1310; see also Emmanuelle Mathieu, 'When Europeanization Feeds Back into EU Governance: EU Legislation, National Regulatory Agencies, and EU Regulatory Networks', [2016] *PA* 1 25, 25–39; see also Kutsal Yesilkagit, 'Institutional Compliance, European Networks of Regulation and the Bureaucratic Autonomy of National Regulatory Authorities', [2011] *JEPP* 7 962, 962–979.

[26] Lavenex, supra note 2.

To define the level of interdependence between the EU and ENP states, we rely on the international cooperation model introduced by Botcheva and Martin,[27] who argue that two parties considering cooperation aim to tackle collective action problems. Botcheva and Martin further argue that the level of international cooperation depends on the certain issues being addressed, as different policy sectors are marked by different level of externalities.[28] As a result, the first step in identifying the level of independence is to look at the level of externalities of the specific policy area that two parties aim to address. In the case of high externalities of non-cooperation, two parties will aim to establish strong ties because in this way states can address common action problems better. In this case, states benefit from cooperating, as it increases the pay-offs for both. This in turn leads to higher interdependencies in policy areas that are marked by higher externalities of non-cooperation. In contrast, in the case of low externalities of non-cooperation, the outcome of one party is not affected by the choices of the other. Policy failures in a neighbouring country are unlikely to affect a situation in an EU Member State. Consequently, in policy sectors marked by such lower externalities, we expect lower interdependencies and thus less intense cooperation.

In accordance with this logic, the expectation would be that cooperation between EU agencies and the ENP countries follows the pattern of sector-specific dynamics (ie, sectoral interdependence). We expect to observe the EU granting access to the ENP countries in policy areas where there is greater sectoral interdependence. We expect that the increase of interdependencies in specific policy domains creates a necessity for cross-national cooperation to resolve common issues by utilizing formal and informal means.[29] Thus, the functional interdependence hypothesis reads as follows:

Functional Interdependence Hypothesis (H2): Cooperation between EU agencies and the ENP partner countries follows the patterns of sector-specific interdependencies.

In line with this reasoning, one would expect to observe that EU agencies working in fields marked by higher interdependencies (high externalities of non-cooperation) are more involved in the external dimension of EU governance. That is, EU agencies in the interconnected issue areas (eg, border control,

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[27] Liliana Botcheva and Lisa Martin, 'Institutional Effects on State Behavior: Convergence and Divergence', [2001] *ISQ* 1 1, 1–26.

[28] *Ibid.*

[29] See Henry Farrell and Abraham L Newman, 'Domestic Institutions beyond the Nation-State: Charting the New Interdependence Approach', [2014] *World Politics* 2 331, 331–363.

migration, transportation, and drug and human trafficking) will be more open to cooperation than EU agencies working in policy areas marked by lower interdependencies (lower externalities of non-cooperation) (eg, social regulation issues such as food safety, chemicals and pharmaceuticals).

To test these hypotheses, the study draws on the analysis of primary documents of the European Commission and EU agencies (eg, internal policy documents, register of events, cooperation agreement/arrangements, Association Agreements). First, relying on systematic desk research, we map the cooperation practices between EU agencies and the ENP countries. Second, to obtain this data, we contacted all EU agencies requesting them to confirm the status and forms of their cooperation with each of the ENP countries. All of the agencies responded to our request either by confirming the findings of our desk research or by providing additional information and clarifications regarding their external activities.

4. MAPPING THE ROLE OF EU AGENCIES IN THE EUROPEAN NEIGHBOURHOOD POLICY

In this section, we describe and explain the extent to which individual EU agencies are involved in EU external governance. Furthermore, we explore whether the variance in EU agency openness to the ENP countries follows the broad foreign policy objectives (*H1*) or is rather rooted in the (sector-specific) functional interdependence considerations (*H2*).

The EU agencies' involvement in the ENP region varies considerably across agencies (see Figure 10.1). Some EU agencies have both *ad hoc* and institutionalized cooperation arrangements with the ENP states, while others only recently started to engage in sporadic *ad hoc* arrangements. Furthermore, different agencies became involved in the external dimension of EU governance at different points in time. The entire population of agencies can be assigned to three different groups regarding their role and engagement with the ENP partner states: (1) a group representing a higher degree of cooperation of agencies, which combines both of the means of interaction with the neighbouring states (ie, *ad hoc* and institutionalized arrangements); (2) a group representing moderate cooperation of agencies, which predominantly focuses on the *ad hoc* arrangements; and (3) a group representing a lower extent of cooperation with agencies, which is not involved with the ENP states even though the Council of the European Union has given approval for such cooperation. The following section systematically describes each of these three groups.

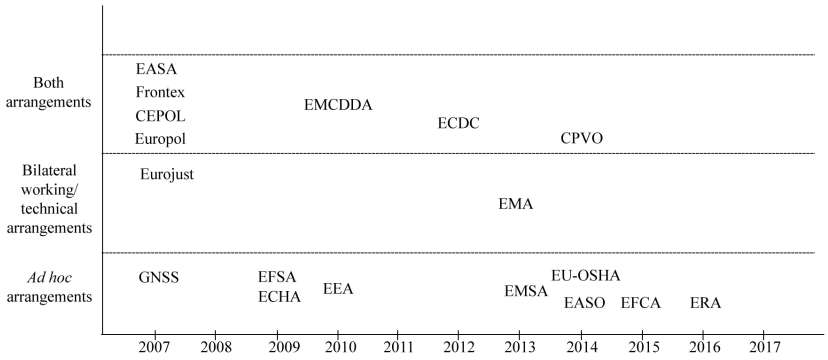

Figure 10.1 The external dimension of EU agencies: types of cooperation

4.1 Highest Level of Cooperation

The analysis reveals that the most engaged EU agencies are the European Union Aviation Safety Agency (EASA), Frontex, Europol, the European Union Agency for Law Enforcement Training (CEPOL) and the European Monitoring Centre on Drugs and Drug Addiction (EMCDDA) (see Figure 10.1). The five agencies propose both forms of cooperation to the ENP countries: *ad hoc* cooperation activities and bilateral working arrangements. Furthermore, in terms of timing, the five agencies can be regarded as 'early birds', as they were the first to open for cooperation with the ENP states. This empirical observation gives strong support to the functional interdependence hypothesis, as all five agencies work in the policy areas that are marked by high interdependencies between the EU and the ENP partner countries. Four out of these five EU agencies work closely with the ENP partner countries (ie, Frontex, Europol, CEPOL and the EMCDDA) and contribute to the policies of Justice and Home Affairs. In the Justice and Home Affairs configuration, interdependencies are highest, as this includes issues such as border control, immigration flows and drug trafficking, which require joint problem solving. All five EU agencies are focused on capacity building and on establishing strong institutional ties with the ENP countries, as demonstrated in the discussion that follows.

EASA cooperates widely with authorities in the ENP partner countries in order to raise their regulatory standards in the aviation safety domain. EASA aims to support the implementation of comprehensive Aviation Agreements, and seeks to develop common safety standards and procedures, as well as to further foster cooperation between EASA and the ENP countries themselves. Working agreements signed between EASA and the authority of an ENP

country exclusively cover issues of a technical nature.[30] EASA has already signed arrangements with Armenia, Azerbaijan, Georgia, Israel, Moldova, Morocco and Ukraine. Besides its more institutionalized ties with the ENP countries, EASA continuously arranges *ad hoc* technical cooperation projects (eg, Transport Corridor Europe-Caucasus-Asia (TRACECA) and the Euro-Mediterranean Partnership). The projects are carried out in close cooperation with local ENP authorities and stakeholders, and are aimed at advancing regulatory and oversight competences of national aviation authorities.

In a similar vein, Frontex, CEPOL and Europol offer many opportunities for cooperation (both *ad hoc* and bilateral arrangements). For instance, cooperation with third countries is a fundamental part of the formal mandate of Frontex. The agency claims that 'building external relations is a valuable tool for effectively handling irregular migration and cross-border crime in accordance with EU's Integrated Border Management (IBM) strategy'.[31] Moreover, Frontex continuously works on developing and maintaining close cooperation with the authorities of third states. The partnerships are usually established with the law enforcement authorities responsible for border control to work towards effective border management capacities. Frontex emphasizes that its highest priority is to create firm technical cooperation with immediate neighbours, as well as with those third countries bordering the southern neighbourhood countries. Frontex has signed working arrangements with the authorities of five ENP countries: Ukraine, Moldova, Georgia, Belarus, Armenia and Azerbaijan. The agency is in various negotiation stages of discussions with the authorities of Libya, Morocco, Egypt and Tunisia.

Furthermore, Frontex oversees several technical assistance projects in non-EU countries via the TAIEX tool managed by the European Commission. Frontex liaises with the ENP partner countries in the areas of information exchange, research and development, risk analysis, training, pilot projects and joint operations. Examples include initiatives such as the Migration and Mobility Partnerships, the Eastern Partnership (EaP) Initiative and the Building Migration Partnerships.[32] The latter projects, for instance, support the realization of IBM across borders of the EaP countries – Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. The project aims to provide training individually tailored to the specific needs of beneficiaries to 'facilitate smooth

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[30] See Florin Coman-Kund, *European Union Agencies as global actors – a legal study of the European Aviation Safety Agency, Frontex, and Europol* (Maastricht, Universitaire Pers Maastricht, 2015).

[31] See Frontex, 'Third Countries', (2017), http://frontex.europa.eu/partners/third-countries/, last accessed 25 October 2018.

[32] Ibid, 31.

border crossing for legitimate travel and trade and at the same time to prevent cross-border crime'.[33]

In addition, Frontex works together with the European Asylum Support Office (EASO) to support the external dimension of the Common European Asylum System, engage with third countries to reach common solutions and provide third countries with capacity-building and regional protection programme. For instance, EASO has implemented an ENPI project (2014−16) with Jordan, Tunisia and Morocco. The core objective of the project was to familiarize officials from Tunisia, Morocco and Jordan with the mandate of EASO and Frontex, and to introduce the tools and instruments that the two EU agencies use. EASO aimed to assess the technical needs of the three countries in order to provide them with suitable tools to support capacity building to respond to these needs.

CEPOL and Europol cooperate with the relevant bodies of the ENP countries in the field of law enforcement. Corresponding capacity building targeting police authorities in third countries is a priority of CEPOL. To that end, CEPOL is regularly involved in regional training activities. In these activities, CEPOL works together with Europol; however, Europol focuses mostly on the ENP countries that have signed cooperation agreements (Moldova, Ukraine and Georgia), while CEPOL engages in various *ad hoc* arrangements with all ENP partner countries. CEPOL is an active contributor to TAIEX activities, where it oversees the regional MEDA/MEDA JAI programmes and the European Police Exchange programmes. It regularly provides workshops targeting the national law enforcement agencies from the ENP countries on issues such as police conduct and use of powers, police activity in a democracy, cross-border police cooperation, management and police ethics, police activity in a democracy, police conduct and use of powers, as well as combating cyber-terrorism.

In its training activities, CEPOL cooperates with Eurojust. Eurojust representatives provide training at CEPOL courses, seminars and conferences on a regular basis. Besides these *ad hoc* demand-driven arrangements, CEPOL has concluded a cooperation agreement with Georgia and has signed working arrangements with Armenia and Moldova. Meanwhile, Eurojust has signed cooperation agreements with Moldova and Ukraine.

Among the most engaged EU agencies is the EMCDDA. The EMCDDA's cooperation with the ENP countries ranges from coordination of technical *ad hoc* assistance projects to consultative support and training. The core objective of such cooperation is to share the EMCDDA's monitoring practices, data collection tools and guidelines, as well as to assist the ENP countries in creating

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[33] Ibid, 31.

their own national drug information systems. The EMCDDA cooperates with the ENP countries to exchange data and methodologies for monitoring the drug situation and organizing joint training activities. Almost all ENP countries are participants in the EMCDDA's *ad hoc* activities which are implemented through the TAIEX tool. The core objective of the EMCDDA's *ad hoc* arrangements is to strengthen the capacity of ENP partner states to respond to emerging challenges and the most recent developments of the drugs situation. Four ENP countries have already signed a memorandum of understanding with the EMCDDA: Ukraine, Moldova, Israel and Georgia.

The European Centre for Disease Prevention and Control (ECDC) aims to establish technical cooperation on the prevention and control of communicable diseases.[34] Its long-term objective is to create a set of procedures and tools for technical cooperation with the ENP countries and establish well-functioning contacts for cooperation. The ECDC, however, has signed a Memorandum of Understanding and an Administrative Agreement solely with Israel.

The aforementioned patterns of cooperation between EU agencies and the ENP partner countries support the functional interdependence hypothesis suggesting that agencies fulfil roles dictated by higher externalities. That is, EU agencies related to the fields marked by higher sector-specific mutual dependencies are considerably more active in the ENP region, in comparison to other agencies.

When we further analyse the patterns of cooperation by looking at the ENP countries that receive most attention from EU agencies, two core patterns emerge (see Figure 10.2). First, a group of countries that has an advanced integration status is, on average, more integrated into EU agencies' activities. Hence, Georgia, Moldova, Ukraine and Israel are among the ENP countries that have obtained the most access to EU agencies. However, countries that signed their Association Agreement with the EU earlier (Tunisia in 1998, Algeria in 2005, Egypt in 2004, Jordan in 2002, Lebanon in 2006 and Morocco in 2000) than Ukraine (2017), Georgia (2016), Moldova (2016) and Israel (2000) follow the uneven patterns of integration into EU agency activities. Furthermore, empirical evidence does not provide a systematic explanation of the variance in the extent of cooperation. For instance, although Belarus is among the least integrated ENP states, having no formal association status, it has had a working agreement with Frontex since 2009. Security and border protection cooperation between the EU and Belarus is rather developed,

[34] See ECDC, 'Partnerships', (2018), https://tickmaps.ecdc.europa.eu/en/about-us/partnerships-and-networks/partnerships, last accessed 25 October 2018.

despite low democratic standards.[35] Hence, the results suggest that the foreign policy hypothesis does not provide a full and systematic explanation of the detected patterns, although it cannot be completely rejected either.

The second pattern reveals that EU agencies working in fields marked by higher levels of interdependence are more open to institutionalized cooperation with the ENP countries (see Figure 10.2). That is, EASA, Frontex, CEPOL and the EMCDDA are most engaged with a group of ENP countries (Moldova, Georgia, Ukraine, Israel, Azerbaijan and Armenia). Such findings in turn provide additional empirical support that these patterns reflecting foreign policy objectives are less pronounced compared to the empirical evidence pointing to the (sector-specific) functional interdependence patterns. This empirical evidence strengthens the functional interdependence hypothesis, as we find that EU agencies working in certain policy fields – that is, security and safety-related areas – are more open to cooperation with the ENP states.

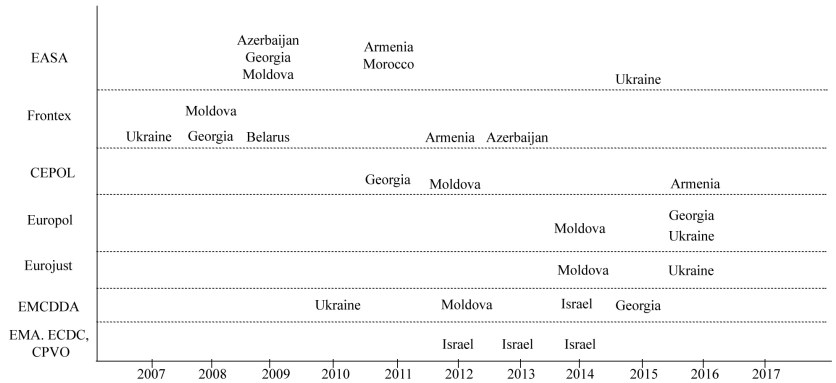

Figure 10.2 The external dimension of EU agencies: cooperation between EU agencies and the ENP partner countries

4.2 Moderate Cooperation

The second group of agencies – the European Global Navigation Satellite Systems Agency (GNSS), the European Food Safety Authority (EFSA), the European Chemicals Agency (ECHA), the European Environment Agency (EEA), the European Maritime Safety Agency (EMSA), the European Agency

[35] For more on functional cooperation, see Giselle Bosse, 'A Partnership with Dictatorship: Explaining the Paradigm Shift in European Union Policy towards Belarus', [2012] *JCMS* 3 367, 367–384.

for Safety and Health at Work (EU-OSHA), the European Fisheries Control Agency (EFCA) and the European Union Agency for Railways (ERA) – are engaged in cooperation with the ENP countries via *ad hoc* arrangements. However, none of these agencies has established institutionalized ties with neighbouring countries (eg, as opposed to EASA, Frontex, Europol, CEPOL and the EMCDDA). The empirical evidence reveals that the EU regulatory agencies working in the food safety, chemicals, health, environmental protection and railways policy domains form informal transgovernmental networks (as opposed to strong institutionalized ties by, for instance, signing working arrangements with the ENP countries). In the informal transgovernmental networks, EU agencies provide the ENP countries' regulators with individually tailored technical or scientific expertise. In doing so, they contribute to the extension of the EU regulatory state beyond its borders; however, the interaction is organized via *ad hoc* arrangements in which agencies often contribute to the ENP framework through the TAIEX instrument or are involved in various cooperation activities arranged by DG NEAR.

This finding lends further support to the functional interdependence hypothesis − that is, agencies operating in the policy fields marked by lower interdependencies are expected to be engaged with the ENP countries to a lesser degree than agencies working in the domains of high interdependencies (eg, border control, migration, drug and human trafficking). Provided that the EU and the ENP countries do not manage to establish strong ties in the food safety, chemicals, health, environmental protection and railways domains, the externalities of non-cooperation to the EU are moderate (ie, the EU can still maintain high food, chemical and medicine safety standards within the common market regardless of the level of the safety standards in the ENP countries). In what follows, the section further specifies how EU agencies working in the aforementioned policy fields cooperate with the ENP regulatory authorities.

GNSS has a long and continuous track record of overseeing multiple infrastructural projects in the Eastern and Southern Neighbourhood. It closely works with its local partners to promote the use of the European Geostationary Navigation Overlay Service (EGNOS) and Galileo within the region. Activities are aimed at helping regional countries to embrace and adopt European GNSS technology, with a focus on civil aviation and other transport domains. GNSS is active in providing training sessions and technical assistance to the ENP countries to prepare them for the EGNOS standards.

EFSA is becoming increasingly involved in cooperation with the ENP states. Although EFSA's involvement with the ENP started in 2009, a more sustained cooperation with the EU neighbouring countries via the programme funded

from the ENP instrument began in 2014.[36] Through the existing cooperation programme, EFSA aims to improve the ENP states' integration into its core work and responsibilities. In particular, developing and maintaining working relations and scientific cooperation with the EU's neighbourhood is a priority to EFSA for the coming years (EFSA 2014). Through this programme, EFSA is aiming for greater integration of the ENP region. EFSA works with the EU neighbours to transfer EU food safety regulations and consumer safety standards. EFSA's focus is on scientific cooperation with partner countries. To this end, EFSA focuses on exchanging information regarding risk assessment and risk communication practices, and on sharing expertise on handling food crises.

In a similar vein, ECHA has been involved in the EU technical assistance programmes since 2009. Since 2011, ECHA has provided training events for the authorities from the ENP countries upon their *ad hoc* requests.[37] Examples include presentations on the EU classification labelling and packaging legislation, the Registration, Evaluation, Authorisation and Restriction of Chemicals legislation and the safety management of chemicals.

EMSA manages training and capacity-building activities and technical assistance projects in the beneficiaries of the ENP states.[38] Common concerns of the EU Member States and the ENP partner countries bordering the Mediterranean Sea and the Black Sea are maritime safety, maritime security and protection of the marine environment. EMSA is implementing two separate projects for technical assistance (SAFEMED IV and Black and Caspian Seas Region) in the Southern and Eastern Neighbourhood. The core objective is to unify national, European and international stakeholders with the purpose of enhancing the security and safety of marine environment standards. To achieve this goal, EMSA assists the ENP countries in the implementation of the international maritime conventions and helps them to build the necessary administrative capacity to prepare and implement these conventions. The approximation of the ENP countries' national legislation to the relevant EU standards is also an objective of projects implemented by EMSA. EMSA pursues these objectives by providing the ENP countries with training, technical support, tools and services. The specific needs of project beneficiaries are addressed through targeted bilateral technical assistance. Pilot projects in the area of pollution detection and sharing of maritime traffic information

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[36] See EFSA, 'International', (2018), www.efsa.europa.eu/en/partnersnetworks/international, last accessed 25 October 2018.

[37] See ECHA, 'International Cooperation', (2018), https://echa.europa.eu/about-us/partners-and-networks/international-cooperation, last accessed 25 October 2018.

[38] See EMSA, 'Partnerships', (2018), www.emsa.europa.eu/about/cooperation.html, last accessed 25 October 2018.

are implemented to incentivize cooperation between beneficiaries and the EU Member States.

EEA has *ad hoc* cooperation with the ENP partner countries. In the period from 2010−15, it supported the implementation of the Shared Environmental Information System (SEIS) principles and good practices in the countries of the European Neighbourhood, covering EaP countries and Southern Mediterranean partner countries.[39] The SEIS programme aims to strengthen the steady creation of environmental indicators and assessments, with the ultimate objective of creating knowledge-based policy making and good governance in the ENP partner countries. EEA's support and technical assistance are tailored to the identified national priority areas and therefore target country-specific needs.

EU-OSHA became involved in *ad hoc* technical cooperation later (in 2014) than other regulatory agencies (eg, EFSA, ECHA and EEA). Furthermore, it pursues different goals from other EU agencies. The core aim of the *ad hoc* arrangements of EU-OSHA is to establish a single contact point in each country and involve the ENP partner countries in the work of the agency. In so doing, EU-OSHA aims to create a platform for sharing information and best practices with the local safety and health networks. Such links have been established with Algeria, Israel, Morocco, Palestine, Tunisia, Armenia, Azerbaijan, Georgia, Moldova and Ukraine.

EFCA oversees the international dimension of the Common Fisheries Policy (CFP), as well as combating illegal, unreported and unregulated (IUU) activities.[40] EFCA is obliged to assist the Commission in strengthening operational coordination and regulatory compliance in third countries. To achieve this objective, EFCA participates in *ad hoc* capacity-building training missions in the ENP countries with which the EU has a sustainable fisheries partnership agreement. The core goal of such missions is to assist countries in the development of inspection of training programmes. Furthermore, EFCA supports the Commission in the framework of the IUU Fishing Regulation. It also assists states in fulfilling their responsibilities by organizing workshops and seminars for national administrations on the application of the Regulation.

ERA only became involved with the ENP partner countries more recently.[41] ERA oversees the EUMedRail Project (2017−20), which aims to improve the operations and efficiency of the Mediterranean transport system. ERA works

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[39] See EEA, 'International Cooperation', (2018), www.eea.europa.eu/about-us/who/international-cooperation, last accessed 25 October 2018.

[40] See EFCA, 'International Operations', (2018), https://efca.europa.eu/en/content/international-operations, last accessed 25 October 2018.

[41] See ERA, 'Cooperation', (2018), www.era.europa.eu/The-Agency/Cooperation/Pages/home.aspx?UniqueID=FAQ&filterValue1=-1, last accessed 25 October 2018.

closely with the southern region countries of the ENP (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine and Tunisia) to foster regulatory reforms.

The European Medicines Agency (EMA) constitutes an exception, as it does not cooperate with the ENP partner countries. Health is not an eligible domain of the ENP programme.[42] Furthermore, EMA cannot invite third country participants as observers to attend Committee and product-related meetings, for confidentiality reasons. EMA has signed a working agreement with regard to pharmaceuticals with Israel only (2013).

4.3 Limited Cooperation

The third group of agencies has very limited engagement with the ENP partner countries. For instance, the Foundation for Improvement of Living and Working Conditions and the European Institute for Gender Equality (EIGE) report no activities with the ENP partner countries. EIGE, for example, participates in informal meetings with EU agencies working with the ENP countries to share experiences and good practices. However, EIGE has reported no concrete activities aimed at addressing gender equality standards in the neighbouring regions − for example, *ad hoc* training or other capacity-building arrangements. This empirical observation provides additional support for the functional interdependencies hypothesis, as the agencies that are least involved (or not at all involved) work in the policy fields that are marked by relatively low interdependencies, such as the European Centre for the Development of Vocational Training and the EU Agency for Fundamental Right. This finding in turn suggests that the promotion of human rights and democratic values (by including EU agencies that oversee these issues) does not play a core role in defining the extent and focus of cooperation with (these) EU agencies.

5. CONCLUSIONS

EU agencies introduce a new format of EU external governance that operates beneath the surface of EU centralized decision making. Supranational agencies boost technocratic transgovernmental cooperation by providing access to scientific expertise and know-how experience, as well as by proposing a range of formal and informal cooperation arrangements.

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[42] See EMA, 'International Activities', (2018), www.ema.europa.eu/ema/index.jsp?curl=pages/partners_and_networks/general/general_content_001848.jsp&mid=WC0b01ac0580c4d3fe, last accessed 25 October 2018.

Agencies' contribution to the expansion of the EU regulatory state beyond its borders can follow two different organizational dynamics: cooperation driven by the foreign policy objectives of the EU or sector-specific functional interdependencies. The empirical findings of the study confirm that the external dimension of EU agencies has a differentiated character − that is, different agencies are involved in various regulatory sectors to different degrees. Additionally, the extent to which EU agencies engage in the *acquis* transfer varies from time to time and from country to country.

The evidence presented in the chapter suggests that this variance predominantly follows the sector-specific interdependence dynamics rather than the overall foreign policy goals of the EU. The strongest, most sustainable cooperation has been established in those policy fields that are by nature transboundary, as predicted by the functional interdependence hypothesis. In line with this hypothesis, issues relating to security, border control and migration take a very prominent role when it comes to the external dimension of EU agencies. The EU agencies working in these policy fields marked by higher functional interdependencies (eg, border control, migration and international crime) establish cooperation with the ENP states earlier than their counterparts working in other policy areas (eg, food safety, chemicals, health, environmental protection and pharmaceuticals). Furthermore, agencies in the field of Justice and Home Affairs (as well as EASA) are open to stronger and more intense cooperation with the ENP states compared to EU agencies overseeing other policy domains.

In contrast, there is little empirical evidence to suggest that cooperation between EU agencies and the ENP partner countries follows the patterns of the ENP countries' integration status with the EU, as the foreign policy hypothesis would predict. We do find that the ENP countries with a more advanced integration status (ie, Moldova, Georgia, Ukraine and Israel) cooperate with EU agencies more than other ENP states. However, we detect little empirical support that this cooperation extends to policy areas beyond security-related issues.

This chapter has provided a systematic overview of the transgovernmental outreach of EU agencies to the ENP countries across different policy domains. It has illustrated that the EU agencies take an active role in the extension of the EU regulatory state beyond its borders. However, multiple research gaps remain to be filled by future scholarship. For instance, we do not know whether the involvement of EU agencies in transgovernmental outreach enables third countries to actually align with EU standards and regulations.[43] Furthermore,

[43] See Karina Shyrokykh and Dovilė Rimkutė, 'EU Rules Beyond its Borders: The Policy-Specific Effects of Transgovernmental Networks and EU Agencies in the European Neighbourhood', [2019] *JCMS, online first.*

we know little of what the most favourable conditions for a positive effect of such regulatory involvement in the neighbourhood are. Therefore, future research should assess the effects of EU regulatory transfer by examining whether the involvement of EU agencies in regulatory outreach in third countries can bring the standards of ENP countries closer to the EU's norms.

11. Third countries in EU agencies: participation and influence

Marja-Liisa Öberg

1. INTRODUCTION

The European Union (EU) engages in the widespread practice of integrating third countries from its closer or more distant neighbourhood into the internal market by exporting (parts of) its *acquis*. This process of norms export largely takes place through the accession process, but also through the conclusion of international agreements between the EU and third countries, regardless of whether the latter qualify or aim for future membership of the EU. Such agreements notably include Stabilization and Association Agreements (SAAs) concluded between the EU and Southern and Eastern European countries that are set to accede to the EU in the future; Partnership and Cooperation Agreements (PCAs) with Eastern European countries that are not likely to join the EU; deep normative integration agreements such as that establishing the European Economic Area (EEA)[1] and the bilateral agreements concluded between the EU and Switzerland;[2] and multilateral sectoral agreements such as the Energy Community Treaty,[3] the European Common Aviation Area (ECAA) Agreement[4] and the Transport Community Treaty.[5]

The EU's norms export is usually perceived as a one-way street leading from the EU to the third countries. The formal legislative procedure in the EU is strictly reserved for Member States. However, even in the absence of official EU membership, third countries that engage in importing the *acquis* have

[1] Agreement on the European Economic Area, [1994] OJ L1/3.

[2] An updated overview of the bilateral agreements is provided by the Swiss Federal Department of Foreign Affairs, www.eda.admin.ch/dea/en/home/bilaterale-abkommen/ueberblick.html, last accessed 11 July 2018.

[3] Treaty establishing the Energy Community, [2006] OJ L 198/18.

[4] Agreement on the Establishment of a Common Aviation Area, [2006] OJ L 285/3.

[5] Treaty establishing the Transport Community, [2017] OJ L 278/3.

a limited stake in EU policy and law making. One of the most prominent examples is the EEA European Free Trade Association (EFTA) States' involvement in 'decision shaping' in areas relevant to the EAA Agreement. This includes 'continuous information and consultation'[6] and participation in various programmes and committees, as well as comitology committees.[7] Another example is the EFTA countries'[8] enhanced possibility to contribute to the making of Dublin and Schengen *acquis* in the respective Mixed Committees.[9] In neither case, however, are the third countries given a formal right to vote that would place them on the same footing as EU Member States.[10]

Another important forum for non-EU Member State involvement in the EU's regulatory processes − and one on which this chapter focuses − is the EU agencies. The founding acts of a number of agencies foresee the possibility for non-EU Member States to participate in their activities. In most cases these third countries have adopted EU law through bilateral or multilateral agreements concluded with the EU or during the accession process.

Similar to the adoption of the EU *acquis*, the integration of third countries in the work of the EU agencies varies in both form and intensity. The EEA EFTA countries and Switzerland adopt large portions of the EU *acquis* without wishing to join the EU. Candidate countries, on the other hand, adopt the bulk of the *acquis* in preparation for their imminent or more distant membership in the EU; whereas European Neighbourhood Policy (ENP) countries have

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6 Article 99 EEA Agreement, in particular Article 99(3).

7 Article 100 EEA Agreement; see John Forman, 'The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and its Implementation by the Two EEA Courts', [1999] *Common Market Law Review* 4 751, 757.

8 Norway, Iceland, Liechtenstein and Switzerland.

9 Nicole Wichmann, '"More In Than Out": Switzerland's Association With Schengen/Dublin Cooperation', [2009] *Swiss Political Science Review* 4 653, 670−671; Micheal Emerson, Marius Vahl and Stephen Woolcock, '*Navigating by the Stars: Norway, the European Economic Area and the European Union* (CEPS Working Document, 2002), 76−77. See, for example, the Agreement concluded between the EU and Iceland and Norway concerning the latter's association with the Schengen *acquis*, [1999] OJ L176/36; the Arrangement between the EU and Iceland, Liechtenstein, Norway and Switzerland on the participation by those States in the work of the committees which assist the European Commission in the exercise of its executive powers as regards the implementation, application and development of the Schengen *acquis*, [2012] OJ L103/4; and the Agreement between the EC and Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, [2006] OJ L93/40.

10 Emerson, Vahl and Woolcock, supra note 9, 50; see also Halvard Haukeland Fredriksen and Christian Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On', [2015] 52 *Common Market Law Review* 3 629, 680.

mainly made political commitments to align with the EU *acquis*.[11] The reasons for including different third countries in the work of agencies vary, as they serve to accommodate both the interests and needs of the EU and those of the non-Member States in question. The official status of third countries in EU agencies ranges, in turn, from '(EEA) EFTA Members' to mere observers.

The current study seeks to assess the possibilities for non-EU Member States − in particular, those that adopt and implement the EU *acquis* in their national legal orders − to influence the content of the EU *acquis* via their involvement in the EU agencies. It presents, first, the range of third countries participating in the agencies and their objectives for doing so; second, the modes of influence available to them; and, third, the potential impact of third countries' participation in agencies on the EU *acquis*. The chapter will therefore distinguish three categories of third countries according to their rationales in engaging in norms import from the EU and the participatory methods available in EU agencies to highlight the relationship between the rationales for non-Member States of adopting the EU *acquis* and the extent of their subsequent capacity to influence EU norms.

The chapter draws on the agencies' establishing acts, the rules of procedure of their Management Boards and information reporting on third countries' actual participation in board meetings.[12] The analysis is limited to the legal framework and does not consider in detail third countries' *de facto*, including informal, influence. The focus of the study is on countries in the EU neighbourhood and thus omits cooperation with other global players, since such cooperation is generally based not on the EU *acquis*, but rather on a mutual recognition of standards.

2. THIRD COUNTRIES AND COUNTRY GROUPS PARTICIPATING IN EU AGENCIES

The founding regulations of EU agencies often allow for the participation of third countries in the work of the Management Boards, the bodies in which EU Member States are typically represented.[13] However, when such an enabling

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[11] Sandra Lavenex, Dirk Lehmkuhl and Nicole Wichmann, 'Modes of external governance: a cross-national and cross-sectoral comparison', [2009] *Journal of European Public Policy* 6 813, 820.

[12] This miscellaneous information ranges from lists of participants provided on the agencies' own websites to minutes of meetings of the respective boards.

[13] On this, see Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford, OUP, 2016), 87−89; European Commission, 'Preparing for the participation of the Western Balkan countries in Community programmes and agencies', COM (2003) 748. The boards in question may

clause is included in the founding act, a separate agreement must still always be concluded between the EU and the third country in question, elaborating the modalities of participation, including its nature, scope and procedural aspects, as well as financial contributions and staffing matters.[14]

Three broad groups of third countries that may participate in EU agencies can be identified: (1) the EEA EFTA States and Switzerland − that is, countries that could join the EU, but do not wish to do so;[15] (2) countries in the various stages of the accession process; and (3) other third countries, especially those that implement the EU *acquis* by virtue of agreements concluded with the EU − that is, countries that might or might not want to join the EU, but that in any case do not participate in the agency by virtue of being an EFTA State or a prospective EU Member State. In addition to this formal participation, it should be noted that the Management Boards can generally invite third countries to their meetings on an *ad hoc* basis should the needs of the agency so require.[16]

The frameworks for the participation of the first group of countries are not always consistent. In some instances, the EFTA States' participation is explicitly provided for either individually or as a group.[17] In other cases, the EFTA countries are subsumed under the third category of countries that adopt the EU

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be called, for example, Management Boards, Supervisory Boards or Administrative Boards. For the sake of simplicity, they are referred to as 'Management Boards' hereinafter.

[14] See, for example, Article 31(2) Regulation (EC) 713/2009 of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, [2009] OJ L 211/1.

[15] The EEA EFTA States are often represented as a group, which justifies considering them separately from Switzerland, the fourth EFTA State.

[16] See, for example, Article 4(1) of the EU Intellectual Property Office (EUIPO) founding regulation.

[17] See, for example, Article 49(1) of Regulation (EU) 439/2010 of the European Parliament and of the Council establishing a European Asylum Support Office (EASO), [2010] OJ L132/11. Similar provisions are provided in the documents of the Body of European Regulators for Electronic Communications (BEREC) Office (Article 1(4) of the Rules of Procedure of the of the Board of Regulators and Article 1(4) of the Rules of Procedure of the Management Committee); Frontex (Recitals 32−34, Preamble to the founding regulation); the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) (Recitals 35−37, Preamble and Article 13(5) of the founding regulation); the European Food Safety Authority (EFSA) (Articles 1(1) and 3 of the Management Board Decision Concerning the Operation of the Advisory Forum); the European Chemicals Agency (ECHA) (Article 1(2) of the Rules of Procedure of the Management Board); the European Insurance and Occupational Pensions Authority (EIOPA) (Article 1(b) of the Rules of Procedure of the Board of Supervisors); the European Medicines Agency (EMA) (Article 1(3) of the Rules of Procedure of the Management Board); the European Union Agency for Railways (ERA) (Article 75 of the founding regulation);

acquis with no mention of their particular status. The EEA EFTA States participate in the work of 17 EU agencies.[18] This participation is made possible by a decision of the EEA Joint Committee[19] laying down the modalities for participation, on which the parties concerned will typically first have negotiated.[20]

As concerns the countries belonging to the second group – the acceding states – the standard formulation allows for the participation of states which have applied for membership of the EU, on condition that the accession negotiations have been successfully completed.[21] There are currently no countries that enjoy the status of acceding states and hence no third countries participating in the work of agencies based on these provisions. In practice however 'mere' candidate status also enables neighbourhood countries to participate in the activities of agencies, albeit to a very limited extent. Relevant

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and the European Securities and Markets Authority (ESMA) (Article 1(1)(b)(ii) of the Rules of Procedure of the Board of Supervisors).

[18] The Agency for the Cooperation of Energy Regulators (ACER), the European Agency for Health and Safety at Work, the European Aviation Safety Agency (EASA), the European Banking Authority (EBA), the European Centre for the Development of Vocational Training, the European Centre for Disease Protection and Control (ECDC), ECHA, the European Environment Agency, EFSA, the European Foundation for the Improvement of Living and Working Conditions, EIOPA, the European Global Navigation Satellite Systems Agency, the European Maritime Safety Agency (EMSA), EMA, the European Agency for Network and Information Security (ENISA), ERA and ESMA.

[19] For example, Decision of the EEA Joint Committee 160/2009 amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms, [2009] OJ L62/67, which extended the cooperation between the parties to the EEA Agreement to Council Regulation (EC) 2062/94 establishing a European Agency for Safety and Health at Work, [1994] OJ L 216/1.

[20] Jacqueline Breidlid and Marius Vahl, '20 years on: Current and future challenges for the EEA', [2015] *EFTA Bulletin* 32, 38.

[21] See, for example, Article 4(3) of the Rules of Procedure of the Administrative Council of the Community Plant Variety Office (CPVO). Similar wording has been used in the documents of the BEREC Office (Article 1(4) of the Rules of Procedure of the of the Board of Regulators and Article 1(4) of the Rules of Procedure of the Management Committee, omitting reference to the completion of accession negotiations); EASA (Article 5(2) of the Rules of Procedure of the Management Board); ECDC (Article 4(3) of the Rules of Procedure of the Management Board); EFSA (Article 3 of the Management Board Decision Concerning the Operation of the Advisory Forum, reference to candidate countries); ECHA (Article 1(2) Rules of Procedure of the Management Board); ERA (Article 4(2) of the Rules of Procedure of the Administrative Board); EIOPA (Article 1(5) of the Rules of Procedure of the Board of Supervisors); EMSA (Article 4(3) of the Rules of Procedure of the Administrative Board); ESMA (Article 1(5) Rules of Procedure of the Board of Supervisors); the FRA (Articles 28(1) and (3) of the founding regulation, reference to candidate and SAP countries); and EUIPO (Article 4(4) of the founding regulation).

examples include Albania, North Macedonia, Montenegro, Serbia and Turkey, which are candidate but not yet acceding countries, and act as observers in the BEREC Office and in the EFSA Advisory Forum; and North Macedonia in the European Union Agency for Fundamental Rights (FRA) Management Board.[22] Actual participation in Management Boards is, as usual, subject to the mandate of the agency, the agency's possibilities of accommodating third countries and the commonality of objectives with the countries in question.[23] In addition to participating in EU agencies as acceding or candidate countries, these non-member states have the possibility to participate as ordinary third countries on an *ad hoc* basis or as countries falling within the third category.

The standard provisions allowing the third group of countries to participate in the work of agencies enable the latter to invite as observers representatives of either (1) third countries that share the interests of the EU and the Member States in the agency's field,[24] or (2) third countries that have entered into agreements with the EU whereby they adopt and apply EU law in the field covered by the agency.[25] The countries adopting such EU *acquis* notably include the EFTA States and countries that are engaged in deep sectoral cooperation with the EU on a bilateral or multilateral basis.[26] For example, Albania, Bosnia and Herzegovina, North Macedonia, Georgia, Moldova, Montenegro and Serbia adopt and apply the EU *acquis* in the field of aviation safety, and are thereby included in the activities of EASA as observers. Furthermore, Turkey participates as a member of the Management Board without voting rights in both the European Environment Agency and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), since it is a third country that shares the interests of the EU and its Member States in these agencies' fields. Closer regulatory cooperation with the EU in individual policy sectors therefore enables candidate countries to participate in the work of agencies even before

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[22] The EFSA Advisory Board also features the participation of Bosnia and Herzegovina as observer.

[23] European Commission, supra note 13, 9.

[24] See, for example, Recital 17, Preamble to Council Regulation 2062/94, supra note 19. Similar formulations are used in the founding regulations of the European Environment Agency (Recital 12, Preamble); the EMCDDA (Article 21) and the European Training Foundation (ETF) (Article 23(1)).

[25] See, for example, Article 66 of Regulation (EC) 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA), [2008] OJ L79/1; similar formulations can be found in the founding Regulations of ACER (Article 31(1)); EASO (Recital 24, Preamble); the EBA (Article 75(1)); the ECDC (Article 30(1)); EFSA (Article 49); EMSA (Article 17(1)); and ENISA (Article 30(1)).

[26] These include, for example, the countries of the Western Balkans, Ukraine, Moldova, Georgia, Morocco, Jordan and Israel.

achieving acceding state status. This in turn exemplifies the combination of different – foreign policy and functional – rationales for engaging non-member states in the work of agencies, as discussed in the following section.

3. OBJECTIVES OF THIRD COUNTRY PARTICIPATION IN EU AGENCIES

As further discussed in the chapter by Rimkute and Shyrokykh, both foreign policy and functionalist rationales can be discerned in the process of including third countries in the work of the EU agencies.[27] The former considers third country participation in agencies as a necessary corollary to the crucial role played by the EU *acquis* in the EU's relations with neighbourhood countries. From this foreign policy perspective, the main objective of opening up agencies to external participation is to prepare third countries for the adoption of the *acquis* either through the accession process or as parties to an *acquis*-exporting agreement.[28] While the EU's law-making institutions and legislative procedures are reserved for Member States only, providing third countries with insight into the workings of the EU agencies familiarizes them with EU norms and best practices.[29] This in turn increases the effectiveness of the transfer of norms from the EU.[30] The functionalist rationale, on the other hand, follows from the EU's internal need to provide an external dimension to its domestic policies. As Rimkute and Shyrokykh suggest, in practice, the functionalist rationale is predominant[31] and most international cooperation takes place between the EU agencies and third countries with an administrative capacity comparable to that of the EU Member States, allowing for effective participation.[32]

The increasing relevance of agencies in the EU's regulatory practices has brought about a corresponding need to involve the EEA EFTA States in their activities.[33] The objective of EEA EFTA States' participation in the various stages of EU decision-shaping procedures, including those of the agencies, is twofold. The first is to enhance democratic legitimacy and preserve the

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[27] Sandra Lavenex, 'The external face of differentiated integration: third country participation in EU sectoral bodies', [2015] *JEPP* 6 836, 836−853.

[28] Ibid, 837.

[29] European Commission, 'Communication on European agencies – the way forward', COM (2008) 135 final, 5; Recital 28 Preamble, Council Regulation (EC) 168/2007 establishing a European Union Agency for Fundamental Rights, [2007] OJ L 53/1.

[30] European Commission, supra note 13, 1.

[31] They thereby confirm the original claim of Lavenex, supra note 27, 830.

[32] Lavenex, ibid, 850.

[33] EFTA Bulletin, 'Decision shaping in the European Economic Area', (2009), 34. See further section 5 below.

decision-making autonomy of all parties involved.[34] To achieve the aim of creating a homogeneous legal space with the EU,[35] a quasi-automatic system was established to bring the annexes to the EEA Agreement containing EEA relevant *acquis* up to date with legislative and judicial developments in the EU.[36] Notwithstanding the theoretical possibility for the EEA EFTA States to refuse to incorporate a new or amended EU legal act into the EEA Agreement[37] and the purely international law character of the arrangement,[38] the ability to influence the content of the legislation means that EU legislation is not completely 'foreign' to the EEA EFTA States.[39] In the meantime, both the EEA EFTA States and the EU are expected to maintain their autonomy of decision making in their separate pillars of the EEA,[40] and thus the overall balance of benefits and obligations in the Agreement.[41]

The second, more pragmatic reason is to ensure that through continuous information sharing and consultation throughout the legislative procedure, with the exception of the moment of adopting the legal act, a consensus will be reached in the EEA Joint Committee.[42] The Joint Committee approves the addition of new *acquis* to the EEA Agreement, in terms of both classifying a new piece of *acquis* as EEA relevant and actually amending the Agreement.[43] Access to decision shaping therefore seeks to reinforce both the substantive and temporal dimensions of homogeneity of the EU *acquis* in the EEA, and in turn the achievement of the objectives of the EEA Agreement. By and

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[34] European Commission, 'Press Release − Future Relations between the Community and EFTA', 22 November 1989, P/89/72.

[35] Article 1(1) of the EEA Agreement.

[36] Lavenex, Lehmkuhl and Wichmann, supra note 11, 818.

[37] Emerson, Vahl and Woolcock, supra note 9, 30; on delay incorporation, see Haukeland Fredriksen and Franklin, supra note 10, 658.

[38] See Hans Peter Graver, 'Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement', [2002] *European Foreign Affairs Review* 1 73, 73−90.

[39] EFTA, 'EEA Decision-Shaping and Comitology', Fact Sheet, (2007), 1 www.efta.int/media/publications/fact-sheets/EEA-factsheets/FS_DecShaping.pdf, last accessed 11 July 2018.

[40] Sven Norberg, 'The Agreement on a European Economic Area', [1992] *Common Market Law Review* 6 1171, 1172. For the two-pillar structure, see European Economic Area, 'The two-pillar structure of the EEA Agreement – Incorporation of new EU acts', www.efta.int/media/documents/eea/16-532-the-two-pillar-structure-incorporation-of-new-eu-acts.pdf, last accessed 11 July 2018, 1.

[41] Recital 4, Preamble to the EEA Agreement. See Forman, supra note 7, 756; Christophe Reymond, 'Institutions, Decision-Making Procedure and Settlement of Disputes in the European Economic Area', [1993] *Common Market Law Review* 449, 478−480.

[42] Ibid, 464.

[43] Article 99(4) EEA Agreement.

large, the grounds for the EEA EFTA States' inclusion also apply to countries belonging to the third category that adopt the EU *acquis* – both share the ultimate aim of securing the effectiveness of norms export from the EU.

The objective of involving acceding states and candidate countries in the work of EU agencies also follows this broad rationale, albeit in a comprehensive, all-encompassing form. It is complemented by a desire to support capacity building in the candidate countries and by a wish to draw upon the symbolic value of participation.[44] Familiarization with the EU *acquis* and best practices[45] and the EU's institutions and procedures, in addition to establishing contacts with national authorities and conducting monitoring and inspection tasks,[46] is a key element for candidate countries' inclusion in agencies.[47] A good example can be found in the FRA Regulation, which provides that the participation of candidate countries and those with which SAAs have been concluded:

> will enable the Union to support their efforts towards European integration by facilitating a gradual alignment of their legislation with Community law as well as the transfer of know-how and good practice, particularly in those areas of the *acquis* that will serve as a central reference point for the reform process in the Western Balkans.[48]

Looking beyond the countries involved in deep regulatory cooperation with the EU via bilateral or multilateral agreements and the agencies that support this cooperation, the involvement of third countries in the work of agencies is motivated by more humble aims than supporting the EU's *acquis* export. For example, EU agencies and programmes are increasingly opened up for external participation by ENP countries,[49] account being taken of the corresponding interests between the EU, the ENP partners and the respective agencies.[50] Both foreign policy and functionalist rationales are evident here. It is in the

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[44] European Commission, supra note 13, 2.

[45] European Commission, supra note 29, 5.

[46] Florin Comin-Kund, 'Assessing the Role of EU Agencies in the Enlargement Process: The Case of the European Aviation Safety Agency', [2012] *CYELP* 1 335, 343.

[47] Communication from the Commission to the Council, 'Participation of candidate countries in Community programmes, agencies and committees', COM (1999) 710, 8. A certain level of administrative capacity is already demanded from third countries prior to joining in the work of an agency: European Commission, supra note 13, 10.

[48] Recital 28 of the Preamble to the Council Regulation 168/2007, supra note 29.

[49] European Commission 'Communication from the Commission to the Council and to the European Parliament on the general approach to enable ENP partner countries to participate in Community agencies and Community programmes', COM (2006)724 final.

[50] Ibid, 3.

EU's interest to support reforms and institution building in the ENP countries, sometimes encouraging them to adopt EU *acquis* in relevant sectors to participate in the agencies, with the greater aim of promoting 'prosperity, stability and security' beyond its immediate borders; whereas agencies themselves can likewise benefit from the expertise provided by neighbourhood countries. [51]

The FRA and ETF are examples of agencies that, in addition to having EU-internal aims, are geared towards bringing about positive changes in the EU's neighbourhood. They engage North Macedonia, and Azerbaijan, Tunisia and Serbia, respectively, as observers in their Management Boards.[52] The ETF Regulation provides that its activities contribute to the economic development and social cohesion of third countries;[53] its preamble repeatedly refers to the importance of the agency's activities in the context of the EU's external relations. The agency's objective is 'to contribute, in the context of EU external relations policies, to improving human capital development' in the EU neighbourhood,[54] including countries in the Western Balkans, the Southern Mediterranean, Eastern Europe, the Middle East and the former Soviet Union. In the meantime, the activities of these agencies − especially when involving third countries − are strongly directed towards capacity building in the neighbourhood countries concerned and not specifically regulatory cooperation.[55]

In sum, the range of reasons for inviting external actors to contribute to and gain from the work of the agencies is not one-dimensional and is expected to bring mutual benefits for both the EU and the countries in its neighbourhood. A strong foreign policy rationale − in particular, one based on extensive norms export from the EU to third countries, such as in the case of the EEA EFTA States and acceding countries − grants extensive participation possibilities in agencies. The practical use of them in the form of actual third country participation, however, is very much dependent on the functional rationales that reflect the external dimension of EU policies. Overall, it is apparent that the deeper the *acquis*-based cooperation between the EU and an individual third country or group of third countries, the greater the incentives on both sides to participate in the activities of the relevant agency. Similarly, the stronger the

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[51] Ibid, 3−4.

[52] The ETF observers participate as 'partner countries': Article 1(1) of the Rules of Procedure of the Governing Board. Partner countries are the recipients of the agency's assistance.

[53] Recital 9 of the Preamble to Regulation (EC) 1339/2008 of the European Parliament and of the Council establishing a European Training Foundation, [2008] OJ L 354/82.

[54] Article 1 of the ETF Regulation.

[55] Lavenex, supra note 27, 850.

third country's administrative capacity, the more likely that it will be involved in the agency's work.

4. MODES OF INFLUENCE AVAILABLE TO THIRD COUNTRIES

The three categories of countries involved in the work of agencies enjoy different rights of participation, ranging from 'everything but a vote' to the limited status of an observer. The rights granted to third countries also vary from one agency to another, reflecting the variety in the many dimensions of third country participation in EU agencies.

The EEA EFTA States and Switzerland play different roles in the Management Boards: observers, members without voting rights, members with voting rights or 'EEA EFTA Members' (excluding Switzerland). As a significant exception among all agencies, the EEA EFTA States are members of the EFSA Advisory Forum alongside the EU Member States and enjoy the same voting rights as the latter.[56] Generally, the most advanced status that the EEA EFTA States can gain is that of EEA EFTA Members, which grants them 'but for the right to vote, . . . the same rights and obligations as the Voting Members in [the agency's] working structures'.[57]

Frontex and eu-LISA are special cases in point. The Frontex Regulation,[58] for example, makes a particular reference to the Regulation constituting 'a development of the provisions of the Schengen *acquis* within the meaning of the [Agreements concluded between the EU and the EFTA States] concerning the latter's association with [the Schengen system]', subsequently demanding the participation of the EFTA States 'as members of the Management Board, albeit with limited voting rights'.[59] A similar arrangement is in place in eu-LISA;[60] but in the absence of a separate agreement concluded by those countries and the EU, they currently enjoy observer status in the Management

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[56] See Articles 1(1) and 8(1) of the EFSA Management Board Decision Concerning the Operation of the Advisory Forum. Currently Iceland and Norway participate in the Advisory Forum.

[57] For example, Article 6a of the EIOPA Board of Supervisors Rules of Procedure; Article 7(1) of the ESMA Board of Supervisors Rules of Procedure.

[58] See Recital 61 of the Preamble to Regulation 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard, [2016] OJ L251/1.

[59] See Article 67(4) of the Frontex Regulation.

[60] Recitals 35−37 of the Preamble to Regulation 1077/2011 of the European Parliament and of the Council establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, [2011] OJ L286/1.

Board. By virtue of their participation in the Dublin Regulation, the four EFTA States may also become observers in EASO,[61] although the founding regulation makes no mention of granting them (limited) voting rights. As observers in other agencies, the rights of the EFTA States do not differ from those of other third countries with the same status.

As concerns the accession countries in the second group, their involvement in the EU agencies is generally more limited than that of the EFTA States and does not usually extend beyond observer status. As an exception, Turkey is a third country member of the Management Boards of the EMCDDA and the European Environment Agency, without a right to vote. In the meantime, candidate countries can be granted more informal 'formative and informative' forms of participation through seminars, special meetings, joint working parties, secondment of national experts and so on.[62] Acceding countries play a special role in the EU's decision-making structures, including agencies. They can comment on draft EU proposals, communications, recommendations and initiatives, and in agencies have 'active observer status', with a corresponding right to speak, but not to vote.[63] Formally, they are involved as observers on the Management Boards. The possibility for acceding states to influence decisions taken by agencies as third countries is rather limited, due to the short timespan between finalizing accession negotiations and formally becoming an EU Member State. However, once they achieve the enhanced status of 'Member State' in the agencies, they enjoy full voting rights.

The involvement of the third category of countries in the EU agencies is generally limited to observer status, which entails a right to attend meetings, but no formal right to speak and no voting rights. Observers may participate in debates at the invitation of the chairperson,[64] but cannot participate in confidential deliberations.[65]

The participation rights of third countries in agencies again demonstrate a clear correlation between the depth of normative cooperation and the ensuing possibilities to participate in the agencies. The EEA EFTA States and acceding countries are the most apparent cases in point, as the only groups of countries with a status beyond that of ordinary observers. However, this holds true only for countries engaged in deep normative cooperation, such as the groups of

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61 See Article 49 of Regulation 439/2010, supra note 17.

62 European Commission, supra note 13, 9.

63 European Commission, 'Understanding Enlargement', (2011), 13, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/publication/20110725_understanding_enlargement_en.pdf, last accessed 11 July 2018.

64 See, for example, Article 4(7) of the EUIPO Regulation.

65 See Article 4(4) of the CPVO Administrative Council Rules of Procedure and Article 4(5) of the EUIPO Regulation.

countries previously mentioned. The link is not so evident for third countries that have adopted the EU *acquis* in specific sectors only, such as the ECAA countries and their participation in EASA. A similar correlation is apparent between the administrative capacities of third countries and the extent of their possibilities to participate. However, a well-functioning but small national administration does not in itself guarantee highly effective participation in agencies, as not all policy concerns can be given equal attention in these circumstances.[66]

Finally, a fundamental question pertaining to the actual influence of third countries − albeit one which falls outside the scope of this study − concerns the importance of voting in agencies. In cases where there is no formal voting and third countries have the opportunity to participate in discussions together with other voting members, their influence on the decisions taken is not necessarily more limited than that of EU Member States.[67] Where voting takes place, third countries that lack a vote but still enjoy speaking rights − even if granted on an *ad hoc* basis − can share their expertise and help to shape discussions prior to the vote. The potential impact of third countries in agencies is thus not necessarily dependent on whether they have the right to vote.

5. THE POTENTIAL INFLUENCE OF AGENCIES ON EU *ACQUIS*

As third countries have a range of possibilities − albeit limited in scope − to participate in the work of the EU agencies, the question of the degree of influence which they can exert on the making or shaping of the EU *acquis* is not straightforward to answer. First, there is significant diversity among the agencies in terms of their powers and influence on EU rule making. Second, as noted above, the modalities of third country participation in the agencies vary considerably. The actual impact of third countries' participation depends on the openness of the *acquis* to adoption by non-Member States, as well as the agency's ability to influence its content.[68] In order to assess the possibility for third countries to help shape the *acquis* though their participation in agencies, it is necessary to establish both the scope of the relevant *acquis* and the influence of individual agencies on EU rule making.

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[66] Svanur Kristjánsson and Ragnar Kristjánsson, 'Delegation and Accountability in an Ambiguous System: Iceland and the European Economic Area (EEA)', [2000] *The Journal of Legislative Studies* 1 105, 118.

[67] On the relevance of voting rights in Schengen cooperation, for example, see Wichmann, supra note 9, 20; and Emerson, Vahl and Woolcock, supra note 9, 76−77.

[68] Lavenex, Lehmkuhl and Wichmann, supra note 11, 818.

The EU *acquis* relates to the rights and obligations that Member States and their citizens derive from EU law, whether legally binding or not.[69] It may have legislative, political or jurisprudential origin.[70] Of particular relevance for this chapter is the legislative *acquis*,[71] comprising the body of legally binding and non-binding acts adopted at all stages of the regulatory process, including implementation measures and soft law.[72]

When it comes to the agencies' formal competences, the original guiding principle laid down in the seminal *Meroni* judgment[73] ruled out the possibility for agencies to exercise law-making or discretionary powers. However, the evolution of the EU regulatory system has led both to an expansion of administration and an increase in the delegation of powers to the agencies.[74] This trend was sanctioned by the Court in *Short Selling*.[75] As a result, the agencies now also enjoy some rule-making powers. Originally, the agencies were established in order to support the establishment and operation of the internal market, with administrative rules on the implementation of the *acquis*.[76] Today, although policy implementation is still a primary focus of the agencies, they are also

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[69] For a comprehensive overview of the origins of the term, see Knud Erik Jørgensen, 'The Social Construction of the Acquis Communautaire: A Cornerstone of the European Edifice', [1999] *European Integration online Papers* 5 1, 8-10, http://eiop.or.at/eiop/texte/1999-005a.htm, last accessed 11 July 2018.

[70] Pierre Pescatore, '*Aspects judiciaires de l'«acquis communautaire»*', [1981] *Revue trimestrielle de droit européen* 4 617, 619.

[71] Also referred to as normative *acquis*: Carlo Curti Gialdino, 'Some Reflections on the *Acquis Communautaire*' [1995] *Common Market Law Review* 5 1089, 1092.

[72] Soft law constitutes quasi-normative instruments, especially in the realm of new governance methods: Joanne Scott and David Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', [2002] *European Law Journal* 1 1, 8.

[73] Judgment of 13 June 1958, *Meroni & Co., Industrie Metallurgiche S.p.A. v High Authority*, Case 9/56, ECLI:EU:C:1958:7.

[74] Ellen Vos, 'Reforming the European Commission: What role to play for EU agencies?', [2000] *Common Market Law Review* 5 1113, 1123.

[75] See Judgment of 22 January 2012, *UK v Council and Parliament (Short Selling)*, Case C-270/12, ECLI:EU:C:2014:18. For a list of other relevant case law, see Herwig CH Hofmann, 'European regulatory union? The role of agencies and standards' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Cheltenham, Edward Elgar, 2017) 460, 469 at footnote 51.

[76] Vos, *supra* note 74, 1113; Martijn Groenleer, Michael Kaeding and Esther Versluis, 'Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation', [2010] *Journal of European Public Policy* 8 1212, 1215. See also the introduction to this book.

increasingly involved in policy formulation.[77] Some agencies engage in actual regulatory practices that lead to the adoption of binding implementing rules; others coordinate administrative networks that provide advisory or technical assistance to the EU and national administrations; and others primarily produce and disseminate high-quality information in the relevant policy field.[78] With the exception of the FRA, these latter information agencies are not formally involved in rule making; they do not participate in the adoption of binding implementing rules or regulation by soft law.[79] In contrast, the agencies that enjoy decision-making powers[80] and those that offer support to the EU and national institutions[81] are more directly involved in shaping the *acquis*.[82]

Certain agencies may adopt binding decisions which are directed towards individuals and are non-legislative in character.[83] Agencies may also act as technical actors in the initial stages of adopting binding implementing rules − for example, through providing assistance to the Commission or directly adopting technical regulations − or issue guidance, application guides, communications and other soft law instruments.[84] Although these instruments cannot be compared to binding law, they nonetheless fall within the broad concept of the EU *acquis*.

The agencies' research tasks are also relevant in shaping the EU *acquis*.[85] In light of the increase in 'indirect information-based modes of regulation', it has become difficult to distinguish between the administrative and regulatory tasks that specific agencies fulfil.[86] The collection and analysis of data to assist the Commission in updating and developing the EU *acquis* contribute directly

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[77] On the different stages in the EU's policy process, see Jeremy Richardson, 'The EU as a policy-making state: A policy system like any other?' in Jeremy Richardson and Sonia Mazey (eds), *European Union: Power and Policy-making* (Abingdon, Routledge, 2015), 4, 12.

[78] Edoardo Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment', [2013] *European Law Journal* 1 93, 95.

[79] Ibid, 98−99.

[80] For example, EUIPO, CPVO, ECHA, EBA, EIOPA, ESMA.

[81] For example, ENISA, EMSA, ACER, ERA, EASA, EMA.

[82] Chiti, supra note 78, 99−100.

[83] European Commission, 'The operating framework for the European Regulatory Agencies', COM (2002) 718 final, 11.

[84] Chiti, supra note 78, 99.

[85] Agencies with a 'semi-regulatory function' generally exercise four types of tasks: decision making, inspection, training and research; Groenleer, Kaeding and Versluis, supra note 76, 1216.

[86] Vos, supra note 74, 1130.

to law making,[87] especially in risk-regulating areas.[88] Overall, the crucial importance of information to public policy means that influence exerted in the decision-making process is also relevant both in shaping the *acquis* and in assessing the possibilities of third countries to influence it. This applies to decisions and to the various instruments of soft law adopted by agencies,[89] as well as to the information that they gather and process, which contributes − directly or indirectly − to the EU's legislative output.

One topical example of the potential for EU agencies to shape the EU *acquis*, and the interest that third countries may thus have in participating in agencies, is Brexit and the United Kingdom's recently expressed wish to continue structured cooperation with a handful of EU agencies after leaving the EU as part of the future economic and security partnership. Planning to (partly) remain within the EU's regulatory sphere, the United Kingdom envisages 'active participation, albeit without voting rights' in ECHA, EASA, EMA, Europol and Eurojust, in order to continue to influence the *acquis* by providing 'expertise and capability'. This can be regarded as another example of the perceived relevance of agencies in the making of EU *acquis* and the ability of non-member states to influence this process.[90]

In conclusion, the extent to which third countries can affect the development of the EU *acquis* through agencies is determined by both the agency's capacity to influence the *acquis* and the third country's possibility to contribute to its work. Formally, the impact of third countries is limited at best. This may be linked to the view of the EEA as a 'semi-colonial' construct.[91] However, given the proliferation of new governance modes in the EU, participation in norm shaping without voting rights may sometimes have an effect that is comparable to participation in formal decision-making procedures.[92] This has been noted

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[87] Berthold Rittberger and Arndt Wonka, 'EU Agencies' in Jeremy Richardson and Sonia Mazey (eds), *European Union: Power and Policy-making* (Abingdon, Routledge, 2015), 234.

[88] Giandomenico Majone, 'The new European agencies: regulation by information', [1997] *Journal of European Public Policy* 2 262, 264.

[89] Sometimes 'quasi-binding'; see Chiti, supra note 78, 98.

[90] United Kingdom Government White Paper, 'The future relationship between the United Kingdom and the European Union', CM 9593 (2018), 20 and 22.

[91] Alfred Tovias, 'Exploring the "Pros" and "Cons" of Swiss and Norwegian Models of Relations with the European Union – What Can Israel Learn from the Experiences of These Two Countries?', [2006] *Cooperation and Conflict* 2 203, 219.

[92] Sandra Lavenex, 'Concentric circles of flexible "European" integration: a typology of EU external governance relations', [2011] *Comparative European Politics* 4 372, 377.

in relation to comitology committees [93] and may apply by analogy to agencies. A future research agenda would see this assumption tested in relation to specific agencies and specific areas of the EU *acquis*.

6. CONCLUSION

The growing agencification in the EU and the partial opening of agencies to third countries raise questions about the possibilities for non-EU Member States to shape the *acquis* which they adopt in the transfer of norms from the EU. The present study suggests that although third countries' participation in agencies is limited and their influence is conditional upon a number of factors, including the practical working structures of the agencies, they enjoy a theoretical possibility to leave a mark on the *acquis* that they have committed to adopt.

Third countries' formal participation possibilities in agencies' Management Boards, and thus their potential impact on the making and implementation of the EU *acquis*, largely correlate to the rationales for their involvement. The main contributing factor is the intensity of norms export between the EU and the countries in question. In general, the bigger the stake of third countries in the internal market and other EU policies and the more extensive their commitment to the EU *acquis*, the greater their potential impact in agencies and on the shaping of the *acquis* that they are bound to adopt and implement. The most extensive participation opportunities are provided to those countries that engage in substantial norms import from the EU and that also possess an administrative capacity which is comparable to that of the EU Member States.

Just as agencies were created for the primary purpose of improving the implementation of EU law in Member States, so too is third country participation geared towards the aim of increasing the effectiveness of norms transfer through information, training and the sharing of best practices. The deep integration envisaged in the EEA Agreement and the EU-Swiss bilateral agreements justify granting these countries participation rights in a large number of agencies that in many cases fall just short of official voting rights in the Management Boards. The large number of agencies that involve the EEA EFTA States in their activities reflects the breadth of the EEA Agreement, and the EEA EFTA States' extensive participation rights the profundity of this cooperation. Many agencies are also open to participation for acceding states that have adopted the bulk of the EU *acquis*, which comes with a correspond-

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[93] Günter Schaefer and Alexander Türk, 'The role of implementing committees' in Thomas Christiansen and Torbjörn Larsson (ed), *The Role of Committees in the Policy-Process of the European Union* (Cheltenham, Edward Elgar, 2007) 182, 184.

ing enhanced observer status for those third countries. However, their involvement in EU agencies is more limited in terms of both the number of agencies open for participation and the observer status granted to third countries, to candidate countries in the earlier stages of the accession process and to the ENP countries. Those agencies that engage third countries mainly based on the needs of the agency itself, such as EASA, involve a number of non-member states without necessarily granting them more comprehensive participation rights than those of an observer.

The agencies' role is most significant at the stage of implementing EU law and ensuring its uniform application by individual Member States, as well as by third countries that adopt EU law. However, it is apparent that the activities of agencies can affect the making of the EU *acquis*. Agencies help to provide expert information that may influence, and sometimes even constitute, EU policy in the given field. Where third country representatives are given the possibility to participate in the work of such agencies, their expertise may thus contribute to the shaping of the *acquis* in these very specific instances.

Looking at the bigger picture of EU law making, however, the influence that third countries can exert on the EU *acquis* via participation in agencies is a mere drop in the ocean. Not only is rule making by agencies a small part of all legislative and regulatory activity taking place in the EU, but third countries are further restricted from making a mark by the fact that many agencies' establishing acts do not allow for third country participation at all, or that in practice the necessary agreements providing for third country participation have not always been concluded.

Furthermore, the typical observer status enjoyed by third countries is no guarantee of actual influence. However, third country participation in agencies is a significant departure from the strict view on the EU's decision-making autonomy, which restricts the making of the *acquis* to Member States, irrespective of the actual range of recipients of those norms. The findings of this study reveal that agencies are indeed an avenue that includes third countries as stakeholders in the European project – an endeavour in which they have long been involved as the target of EU norms. Overall, this is an adjustment to the prevailing view on the balance of benefits and obligations between the EU and the neighbourhood countries that adopt the EU *acquis*, going beyond the traditional dichotomy between the supranationality of the EU's legal order and the traditional international law character of the agreements by which its *acquis* is exported.