

The International Dimension of the EU Agencies: Framing a Growing Legal-Institutional Phenomenon[★]

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International cooperation has become a salient feature of EU agencies triggering important legal questions regarding the scope and limits of the agencies' international dimension, the nature and effects of their international cooperation instruments, and their legal status within the EU and on the global level. This article examines the international dimension of EU agencies by advancing a legal-analytical blueprint linking EU law to international public law. The principle of institutional balance and the Meroni doctrine are used as EU law parameters for assessing the agencies' international cooperation mandate, powers and actions, whilst the concepts of 'international agreement' and 'international legal personality' serve as standards for clarifying the legal nature of EU agencies' international cooperation instruments and their legal status as global actors. Case studies on the European Aviation Safety Agency, Frontex and Europol 'test on the ground' the legal-analytical framework advanced and offer fresh insights into the EU agencies' international cooperation practice.

Whilst the institutional balance in EU external relations does not prohibit entrusting certain international cooperation tasks to EU agencies, the application of the Meroni requirements suggests a limited role for these EU bodies as global actors. Next, the international cooperation instruments concluded by EU agencies can be legally binding agreements which, as a specific category of technical-administrative agreements, could still be accommodated within the EU legal framework. Albeit EU agencies could acquire in theory a derived and functionally limited international legal personality, none of the three agencies examined has such a legal status entailing that their international cooperation actions are in principle attributable to the Union.

1 INTRODUCTION

International cooperation has become a salient feature of the EU agencies, being reflected accordingly in their legal framework and current practice. This article investigates the international dimension of EU agencies with a view to map an area characterized by legal ambiguity and disdain.¹ Our analysis focuses on what were

* The author would like to thank the anonymous reviewers for their comments. All websites accessed 29 November 2017.

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¹ This article is based on the author's PhD dissertation, F. Coman-Kund, *European Union Agencies as Global Actors. A Legal Study of the European Aviation Safety Agency, Frontex and Europol* (DPhil thesis, Universitaire Pers Maastricht 2015).

considered the most relevant formal aspects of EU agencies' international dimension (i.e. the design of their international cooperation mandate, the legal requirements under which EU agencies may pursue international cooperation, the legal nature and implications of their formal international cooperation instruments, their legal status as global actors). These issues have not been sufficiently examined while at the same time raising pressing legal concerns regarding EU agencies' international cooperation.

For this purpose, a comprehensive legal-analytical blueprint linking EU law to international public law with a view to assessing EU agencies as actors on the global arena is proposed. The principle of institutional balance and the so-called *Meroni* doctrine bear particular importance as EU law parameters for assessing the agencies' international cooperation mandate, powers and actions. Furthermore, the concepts of 'international agreement' and 'international legal personality' serve as international law standards for examining the legal status of the EU agencies as global actors, and the legal nature of their international cooperation instruments.

Case studies on the European Aviation Safety Agency (EASA), Frontex and Europol serve to 'test on the ground' our legal-analytical framework and to illustrate how international cooperation by EU agencies really works. These agencies have in common a rich potential for international cooperation reflected in their relevant legal framework and documented by their practice. Additional factors for choosing these agencies rather than others are: the well-developed external dimension of the EU policy areas within which these agencies are active; the features of agencies' (international cooperation) mandate according to their founding acts; the characteristics of their international cooperation instruments;² the peculiarities of an agency allowing it to serve as a case in point as regards the outer limits and salient legal problems of EU agencies' international dimension.³

2 BRIEF TOUR D'HORIZON OF EU AGENCIES' INTERNATIONAL DIMENSION

EU agencies are increasingly interacting in various ways with actors outside the EU and they are becoming arguably visible actors on the international arena.⁴

² The selection sought to cover variations in EU agencies' international cooperation instruments *qua* terminology (agreements and arrangements) and *qua* legal nature (apparently binding [Europol]; apparently non-binding [Frontex]; not clear [EASA]).

³ I.e. Europol, whose intergovernmental 'pedigree' and international cooperation instruments distinguish it from other EU agencies.

⁴ On the international dimension of EU agencies, see A. Ott, *EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law*, 13(4) *Eur. For. Affairs Rev.* 515 (2008); A. Ott, E. Vos & F. Coman-Kund, *EU Agencies on the Global Scene: EU and International Law Perspectives*, in *European Agencies In-Between Institutions and Member States* 87–122 (M. Everson, C. Monda & E. Vos eds, Kluwer Law International 2014); M. Groenleer & S. Gabbi,

Interactions take place routinely between the EU agencies and various international organizations and third countries or competent authorities from third countries. Such cooperation ranges from light and informal forms of collaboration (e.g. common events, exchanges of best practices) to more structured and substantial cooperation formalized through international agreements or treaty-like instruments.⁵

One may discern several closely inter-linked ways in which the international dimension of the EU agencies materializes in practice.⁶ First, EU agencies become involved in the management of the external dimension of their respective policy area by assisting the EU institutions and the Member States in their relations with third countries and international organizations. Second, third countries and international organizations participate in the internal structures of some EU agencies. Third, EU agencies establish direct cooperation with third countries or third country authorities and international organizations materialized most importantly through the conclusion of arrangements and agreements.

In what follows a selective overview of the international cooperation practice of some agencies is provided. The focus is placed on the formal cooperation instruments between the EU agencies and their partners, as these are the easiest to examine from a legal point of view, and they arguably trigger significant legal consequences. Most EU agencies conclude in practice cooperation instruments labelled 'working arrangement' 'administrative arrangement' or 'arrangement' with the competent authorities of third countries and with relevant international organizations (e.g. Frontex, EASA, EMA). Other EU agencies formalized their relationships with external partners through instruments called 'memorandum of understanding' or 'memorandum of cooperation' (e.g. Eurojust, EMCDDA). Several agencies concluded international cooperation instruments entitled 'agreements', thereby suggesting heavier forms of cooperation from a legal point of view (e.g. Europol, Eurojust).

If one takes a closer look at the legal framework of the EU agencies, in most cases their founding acts include general or more detailed provisions regarding international cooperation. In some cases, the (task) duty or possibility to establish relations with non-EU actors is mentioned in broad terms.⁷ In other instances, the founding acts contain more detailed provisions regarding the agency's international cooperation mandate, the instruments used and relevant procedural aspects.⁸

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, 4 Eur. J. Risk Reg. 482 (2013).

⁵ F. Coman-Kund, *Assessing the Role of EU Agencies in the Enlargement Process: The Case of the European Aviation Safety Agency*, 8 Croatian Y. Eur. L. Pol'y 338–340 (2012).

⁶ *Ibid.*

⁷ E.g. Cedefop, EMSA, Eurofund.

⁸ E.g. EASA, EASO, EBA, Europol, FRA, Frontex.

The overview of the EU agencies' international dimension from both a practical and a legal-formal perspective reveals a complex picture with common features, but also idiosyncrasies peculiar to individual agencies or groups of agencies.

3 A LEGAL-ANALYTICAL FRAMEWORK FOR ASSESSING EU AGENCIES' INTERNATIONAL DIMENSION

3.1 THE PRINCIPLE OF INSTITUTIONAL BALANCE AND THE DOCTRINE OF DELEGATION OF POWERS

Developed gradually in CJEU's case law⁹ and enshrined in Article 13(2) TEU, the principle of institutional balance has been portrayed by scholars as a tool performing a similar function at EU level to the principle of separation of powers in state constitutional systems.¹⁰ According to Majone, institutional balance requires 'that each institution: 1. has the necessary independence in exercising its powers; 2. must respect the powers of the other institutions; and 3. may not unconditionally assign its powers to other institutions and bodies'.¹¹ With respect to EU agencies, institutional balance requires that they do not encroach upon the powers conferred by the Treaties on the EU institutions.¹²

The main tool ensuring that EU agencies do not affect the institutional balance is the delegation of powers doctrine or the so-called *Meroni* doctrine.¹³ The delegation of powers doctrine determines the kind of powers which may be entrusted to EU agencies, as well as the requirements attached to such powers. In the *Meroni* cases, the Court established that EU institutions may delegate to external bodies executive powers that they themselves possess only if such powers are 'clearly defined' and subject to their supervision.¹⁴ In the *ESMA* judgment, the Court confirmed the application of the *Meroni* doctrine to EU agencies,¹⁵ but, at

⁹ Some of the landmark cases affirming the principle of institutional balance are Case 9/56 *Meroni & Co, Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*, EU:C:1958:7 and Case 10/56 *Meroni & Co., Industrie Metallurgiche, società in accomandita semplice v. High Authority of the European Coal and Steel Community*, EU:C:1958:8 (the *Meroni* cases); Case C-70/88 *Parliament v. Council. Radioactive contamination of foodstuffs (Chemobyl)*, EU:C:1991:373.

¹⁰ S. Prechal, *Institutional Balance: A Fragile Principle with Uncertain Contents*, in *The European Union After Amsterdam. A Legal Analysis* 280 (T. Heukel, N. Blokker & M. Brus eds, Kluwer Law International 1998); J. P. Jacqué, *The Principle of Institutional Balance*, 41 *Com. Mkt. L. Rev.* 384 (2004).

¹¹ See G. Majone, *Delegation of Regulatory Powers in a Mixed Polity*, 8 *Eur. L. J.* 327 (2002).

¹² See S. Griller & A. Orator, *Everything Under Control? The 'Way Forward' for European Agencies in the Footsteps of the Meroni Doctrine*, 35 *Eur. L. Rev.* 31 (2010).

¹³ K. Lenaerts, *Regulating the Regulatory Process: 'Delegation of Powers' in the European Community*, 18 *Eur. L. Rev.* 40–49 (1993).

¹⁴ Case 9/56, *Meroni*, 152 and Case 10/56, *Meroni*, 173.

¹⁵ Case C-270/2012 *United Kingdom v. Parliament and Council (ESMA)*, EU:C:2014:1, para. 41.

the same time, it opened the path for quite wide-ranging powers being entrusted to these bodies.¹⁶ According to the *Meroni* logic as reinterpreted by the CJEU in *ESMA*,¹⁷ and in light of the principle of institutional balance,¹⁸ EU agencies' powers seem to be acceptable as long as these:

- (1) are of executive nature;
- (2) are clearly defined, meaning, however, that they stay within the boundaries of the agency's broad regulatory framework;
- (3) there are criteria and conditions limiting the discretion of the agency, which entails mechanisms ensuring sufficient oversight by the main EU institutions;
- (4) do not encroach upon the powers conferred by the Treaties on the EU institutions.¹⁹

What seems to matter in terms of institutional balance and in light of the revived *Meroni* doctrine is the system of controlling mechanisms on EU agencies' powers in order to preserve the system of checks and balances.

The principle of institutional balance and the *Meroni* requirements are relevant standards for assessing the overall design and powers of EU agencies. As such they are also applicable to the agencies' international cooperation tasks and activities.

3.1[a] *Institutional Balance and Delegation of Powers in the EU External Action Area*

Whereas various actors are involved in different ways in the Union's external action, from Articles 16(6), 17(1) and 21(3) TEU, as well as Article 220 TFEU it can be inferred that the Council and the Commission are mainly in charge of the management of Union's external relations.²⁰ Recently in Case C-660/13,²¹ the Court confirmed that the EU external action is based on an institutional system whereby the Commission exercises executive and management functions and

¹⁶ *Ibid.*, para. 44–45. See for a detailed analysis, M. 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*, 39 *Eur. L. Rev.* 381–403 (2014).

¹⁷ There is no general consensus on the detailed list of requirements which make up the *Meroni* doctrine; for an overview of the various *Meroni* conditions devised in literature, see M. Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* 187–192 (Oxford University Press 2016).

¹⁸ Whereas, conceptually, the principle of institutional balance, being concerned with preserving the prerogatives of the EU institutions, is different from the *Meroni* doctrine, in our view, in practice, these two parameters are tightly connected.

¹⁹ *ESMA*, *supra* n. 15, paras 44–54, 67 and 84–86.

²⁰ See Ott, *supra* n. 4, at 521, and European Commission, *Vademecum on the External Action of the European Union*, SEC(2011)881/3, 16–19 (2011).

²¹ Case C-660/13 *Council v. Commission*, EU:C:2016:616, paras 33–34.

ensures Union's external representation, whilst the Council is in charge of policy making.

Regarding the Union's binding international agreements, Article 218 TFEU features a procedure according to which the Council formally decides on the opening of negotiations, the signing and conclusion of the international agreements, while the Commission, in principle, can only propose and negotiate such agreements. On this division of tasks, the Court took a rather strict stance relying on the principle of institutional balance. The issue arose most famously in Case C-327/91 *France v. Commission*²² where the Commission invoked a general autonomous power to conclude international agreements as a projection of its internal powers.²³ The Court disagreed, arguing that the institutional balance regarding the Union's international agreements requires the conclusion of such agreements by the Council, not the Commission.²⁴ The strict stance taken by the Court seems to be backed up by Article 218(1) TFEU, suggesting a single procedure for the negotiation and conclusion of the Union's international agreements.²⁵

However, the delegation of specific treaty-making powers to the Commission or other actors should not be ruled out, provided that the prerogatives of the institutions involved in 'Article 218 TFEU' procedure are not affected.²⁶ Thus, a more flexible view of the institutional balance in external relations has been embraced by the EU legislator, entrusting limited external relations tasks to the Commission and to other actors, in particular EU agencies. The most obvious examples are the financing agreements concluded by the Commission with third countries and international organizations on the basis of the EU Financial Regulation.²⁷ A common thread in these cases is that the enabled international cooperation is ancillary and instrumental to the implementation of the relevant secondary legislative instruments. One may wonder whether interpreting such secondary law provisions as allowing legally binding agreements being concluded by the Commission and the EU agencies entails that the EU legislator distorted the institutional balance under Article 218 TFEU.

A more pragmatic option could be to consider them as a form of external administrative action outside the 'monopoly' instituted by Article 218 TFEU.

²² Case C-327/91 *France v. Commission*, EU:C:1994:305.

²³ J. Kingston, *External Relations of the European Community: External Capacity Versus Internal Competence*, 44 *Intl. Comparative L. Q.* 659–670 (1995).

²⁴ Case C-327/91 *France v. Commission*, para. 36.

²⁵ J. C. Piris, *The Lisbon Treaty. A Legal and Political Analysis* 87 (Cambridge University Press 2010).

²⁶ See R. Schütze, *Foreign Affairs and the EU Constitution. Selected Essays* 392–399 (Cambridge University Press 2014).

²⁷ Arts 58 and 184–189 of Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 Oct. 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) 1605/2002, [2012] OJ L 298/1.

Whereas such administrative agreements should certainly be in line with Article 218 TFEU, the principle of institutional balance would not require maintaining the prerogatives of the Council and the European Parliament (EP) in ‘Article 218 TFEU’ procedure.

Accordingly, a delineation²⁸ could be made between agreements concluded according to the ordinary procedure laid down in Article 218 TFEU and international agreements concluded by the Commission and EU agencies. The first category embodies the most important legal-political commitments taken by the Union on the international plane corresponding to a sort of ‘external legislation-making’, and requiring the participation of the EU institutions which are also involved in the legislative process.²⁹ The second category features agreements of 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.³⁰ In addition to explicit delegation by the legislator, the competence of the Commission to enact agreements could be based on its role in ensuring the Union’s external representation under Articles 17 TEU and 220 TFEU, in combination with its role as the main EU implementing body.³¹

3.1[b] *EU Agencies and Institutional Balance in External Relations*

The Treaties are silent as regards the role of agencies in the EU external action area, but the possibility for EU agencies to pursue international cooperation has been acknowledged in the Common Approach on EU agencies.³² Unlike the Commission, EU agencies may get involved in international cooperation as sectoral actors, as far as necessary to fulfil their core mandate entrusted by the legislator in a certain policy area. Accordingly, entrusting certain international cooperation tasks to EU agencies is acceptable, but the *Meroni* requirements listed previously and the institutional balance in the EU external action area must be observed.

It is also maintained that EU agencies can be delegated by an act of secondary legislation limited powers to conclude binding international agreements inherent

²⁸ For a similar view, see Schütze, *supra* n. 26, at 392–396.

²⁹ For a parallel between the Union’s international law-making and the making of its ‘internal’ legislation, see P. Eeckhout, *EU External Relations Law* 193–194 (Oxford University Press 2011).

³⁰ See for an analysis of the concept of ‘international administrative agreement’, Coman-Kund, *supra* n. 1, at 155–165.

³¹ Arts 290–291 and 317 TFEU.

³² *Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies of 19 July 2012 (Common Approach on EU Agencies)*, pt. 25, (19 July 2012), https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf.

to the fulfilment of their mandate.³³ Similarly to the Commission's administrative agreements, such agreements concluded by the EU agencies are *a special form of EU external administrative action* which does not automatically disturb the institutional balance laid down in Article 218 TFEU.³⁴ 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 in the EU external action area (the Commission and the Council) are not affected.

3.2 THE INTERNATIONAL LAW DIMENSION

3.2[a] *The Concept of 'International Agreement'*

Article 2(1)(a) of each of the two Vienna Conventions on the Law of Treaties³⁵ defines a treaty as 'an international agreement' concluded in a written form and governed by international law, regardless of whether it is embodied in one, two or more instruments and whatever its particular designation. This definition is widely accepted by the international law scholarship³⁶ and it is also supported by the International Court of Justice (ICJ)³⁷ as reflecting customary international law.

It follows that under international law 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 the form of the instrument.³⁸ Accordingly, one may identify two essential requirements for an agreement to become binding under international law:

- (1) there must be an intention to create legally binding effects;
- (2) such effects must be governed by international law.³⁹

However, it is more difficult to assess whether particular agreements fulfil these requirements.⁴⁰ The factors most commonly used include the wording and

³³ See Schütze, *supra* n. 26, at 397–399.

³⁴ Ott, Vos & Coman-Kund, *supra* n. 4, at 91–93 and 115–116.

³⁵ *Vienna Convention on the Law of Treaties Between States* (the 1969 Vienna Convention) and *Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations* (the 1986 Vienna Convention).

³⁶ D. B. Hollis, *Defining Treaties*, in *The Oxford Guide to Treaties* 12 (D. B. Hollis ed., Oxford University Press 2012).

³⁷ Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria: Equatorial Guinea Intervening*), Judgment, 2002 I. C. J. 303, 263.

³⁸ O. Schachter, *The Twilight Existence of Non-binding International Agreements*, 71 Am. J. Intl. L. 296 (1977).

³⁹ For more elaborated discussions, see H. G. Schermers & N. M. Blokker, *International Institutional Law. Unity Within Diversity* 1121–1123 (5th ed., Martinus Nijhoff Publishers 2011).

⁴⁰ Hollis, *supra* n. 36, at 26–28.

substance, as well as the particular circumstances (context) surrounding the negotiation and conclusion of the instrument.⁴¹ Determining the legal nature of international cooperation instruments requires a careful analysis which entails looking not only at what the parties state explicitly in the instrument, but also considering more objective manifestations of intent.⁴²

Things are not different within the European Union. The CJEU stated that the binding character of an agreement should be established, based on the intention of the parties as results from the wording of the instrument and the history of negotiations.⁴³ Moreover, in its *Vademecum* on the External Action, the Commission stresses the decisive character of the content of an instrument for the purpose of determining its legal nature, and warns about a careful drafting in order to avoid an instrument being considered as legally binding.⁴⁴

Determining the legal nature of EU agencies' international cooperation instruments entails an assessment of their legal framework pertaining to international cooperation, including procedural aspects, and an analysis of the content of their international agreements.

3.2[b] *International Legal Personality*

International legal personality indicates that an organization can act as a distinct subject at the international level and is capable of having rights and duties.⁴⁵ According to the seemingly prevailing view⁴⁶ international personality is derived from the creators of the organization, but it may also be implied from the competence or powers of the relevant entity as laid down in its founding act.⁴⁷ Accordingly, the following standard requirements should be fulfilled by an organization with international legal personality:⁴⁸

- (1) it must be 'a permanent association of states' (organization);
- (2) it must be possible to make 'a distinction in terms of legal powers and purposes, between the organization and its members states' (creators);
- (3) the entity must be equipped with 'legal powers exercisable on the international plane'.

⁴¹ See K. Schmalenbach, *Article 2. Use of Terms*, in *Vienna Convention on the Law of Treaties. A Commentary* 40–41 (O. Dörr & K. Schmalenbach ed., Springer 2012).

⁴² Hollis, *supra* n. 36, at 27–28.

⁴³ Case C-327/1991 *France v. Commission*, para. 15.

⁴⁴ European Commission, *supra* n. 20, at 52.

⁴⁵ Schermers & Blokker, *supra* n. 39, at 993.

⁴⁶ *Ibid.*, at 989.

⁴⁷ *Ibid.*

⁴⁸ I. Brownlie, *Principles of Public International Law* 677 (7th ed., Oxford University Press 2008).

Regarding the question whether agencies and semi-autonomous organs set up by states and international organizations may acquire their own international legal personality, no definite answer is provided in the international law literature, while practice provides different solutions.⁴⁹ With regard to the organs or agencies of international organizations specifically, this issue has been called the '(in)divisibility of international legal personality'.⁵⁰ Two elements appear to be important for such an entity to claim its own international status: (1) it must have powers which it can exercise on the international plane;⁵¹ and (2) it must have sufficient organizational and decision-making autonomy so that it can be perceived as an entity detached from its creators.⁵² According to Brownlie, the higher the degree of autonomy and legal powers of an agency increase, the more can it be approximated to an international organization.⁵³

Assuming that post-Lisbon the EU maintains a degree of 'divisibility' of its international legal personality, the EU agencies might qualify for the status of 'subject of international law with a limited functional capacity'. EU agencies are explicitly provided with legal personality by their founding regulations, but such provisions have generally been interpreted as conferring only domestic legal personality.⁵⁴ Accordingly, the EU agencies' international personality and capacity depend essentially on the degree of autonomy and on the powers exercisable on the international plane they possess, assessed on a case-by-case basis.

4 THREE CASE STUDIES: EASA, FRONTEX AND EUROPOL

4.1 THE LEGAL FRAMEWORK FOR INTERNATIONAL COOPERATION

4.1[a] *Mandate, Tasks and Instruments*

4.1[a][i] EASA

The international dimension of EASA's mandate is primarily defined in Article 27 of Regulation 216/2008 (EASA Regulation).⁵⁵ Article 27(1) covers aspects related to the assistance which EASA should lend to the Union and the Member States in their relations with third countries. Article 27(2) pertains to the possibility of

⁴⁹ *Ibid.*, at 61 and 66–67.

⁵⁰ Schermers & Blokker, *supra* n. 39, at 994.

⁵¹ N. D. White, *The Law of International Organisations* 30–32 (Manchester University Press 2005).

⁵² Brownlie, *supra* n. 48, at 66–67.

⁵³ *Ibid.*, at 61.

⁵⁴ See G. Schusterschitz, *European Agencies as Subjects of International Law*, 1 Int'l Org. L. Rev. 163 (2004).

⁵⁵ Regulation (EC) 216/2008 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, OJ L 79/1 (2008).

establishing direct cooperation with third countries and relevant international organizations. First, the subject-matter of such direct international cooperation must remain within the scope of EASA Regulation. Second, EASA's direct international cooperation is in principle based on working arrangements which are subject to a double requirement: (1) they must be in accordance with the relevant provisions of the Treaty, and (2) they must obtain *prior* approval from the Commission. According to Article 27(3), EASA is to assist the Member States with regard to their compliance with international obligations, in particular those under the Convention on International Civil Aviation.

The international cooperation tasks and activities performed by the Agency appear to be inherent to its core mandate, which determines both the scope and the limits *ratione materiae* of such cooperation. Article 27 in combination with other relevant provisions in the EASA Regulation indicate quite clearly that EASA does not pursue international cooperation completely independently, but within the framework of the EU external aviation policy and in cooperation with the Member States.⁵⁶

4.1[a][ii] Frontex

Articles 13–14 of Regulation 2007/2004 (the former Frontex Regulation)⁵⁷ provided the general legal framework for Frontex's international cooperation activities, and indicated the 'working arrangement' as the preferred instrument to formalize direct operational cooperation with partners. All working arrangements: (1) could only cover issues within the Agency's mandate, and (2) had to be concluded 'in accordance with the relevant provisions of the TFEU'. Moreover, there was a duty on behalf of the Agency to inform the EP of the working arrangements entered into.⁵⁸ Regarding specifically the conclusion of working arrangements with third countries, the prior opinion of the Commission was required.⁵⁹ Other important aspects pertaining to the Agency's international dimension were the possibility to deploy liaison officers in third countries, and the possibility to launch and finance technical assistance projects in third countries.⁶⁰

Frontex has been recently consolidated and rebranded as the European Border and Coast Guard Agency.⁶¹ Regarding Agency's international dimension,

⁵⁶ Recital 23 of the Preamble of the EASA Regulation.

⁵⁷ 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, OJ L349/1 (2004).

⁵⁸ *Ibid.*, Arts 13(1) and 14(8).

⁵⁹ *Ibid.*, Art. 14(8).

⁶⁰ *Ibid.*, Arts 14 (3)–(5).

⁶¹ 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

Article 54(2) of Regulation 2016/1624 (the New Frontex Regulation) features a novelty by subjecting working arrangements with international organizations and competent authorities from third countries to the Commission's *prior approval*. Regarding the relationship between the Agency and third countries, a change potentially increasing democratic accountability for the Agency's international cooperation actions consists of the duty to inform the EP *before* concluding a working arrangement. Furthermore, the new legal framework seeks to enhance consistency of Agency's international actions with the EU external action, by inserting a duty of coordination with EU delegations.

4.1[a][iii] Europol

The legal framework for Europol's international cooperation activities was provided primarily by Article 23 of the Europol Council Decision (ECD)⁶² complemented by Council Decision 2009/934/JHA.⁶³ Article 23(1) ECD stipulated clearly that Europol's international cooperation activities were instrumental to the core mandate and tasks of the Agency. The only way for the Agency to formalize its relationship with partners outside the EU was by concluding cooperation agreements. Exchange of information related to the areas of crime within Europol's mandate was the main concern of such instruments.⁶⁴ Depending on the information which could be exchanged under each type of instrument, a distinction between Europol's operational and strategic agreements was introduced.⁶⁵ The ECD provided two important limitations on Europol's international cooperation: (1) agreements could be concluded only with third countries and international organizations put on a 'list' drawn up by the Council;⁶⁶ (2) each Europol's agreement was subject to prior approval by the Council.

The New Europol Regulation⁶⁷ substantively redesigns Europol's international dimension. First, there will no longer be Europol cooperation agreements.

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, OJ L251/1 (2016).

⁶² *Council Decision 2009/371/JHA of 6 April 2009 Establishing the European Police Office (Europol)*, OJ L131/37 (2009).

⁶³ *Council Decision 2009/934/JHA of 30 November 2009 Adopting the Implementing Rules Governing Europol's Relations with Partners, Including the Exchange of Personal Data and Classified Information*, OJ L325/6 (2009).

⁶⁴ Arts 23(3)–(9) ECD.

⁶⁵ Council Decision 2009/ 934/JHA, *supra* n. 63, Arts 1(g) and (h).

⁶⁶ The 'list' took the form of *Council Decision 2009/935/JHA of 30 November 2009 Determining the List of Third States and Organisations with Which Europol Shall Conclude Agreements*, OJ L325/12 (2009).

⁶⁷ *Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA*, OJ L135/53 (2016).

Although Europol's agreements concluded until 1 May 2017 are preserved, future international agreements relevant for the Agency will be concluded according to Article 218 TFEU.⁶⁸ Second, Europol is still allowed to conclude working arrangements and administrative arrangements. The working arrangements are designed to cover cooperative relations, except for exchanges of personal data, and are explicitly characterized as not being binding for the EU and the Member States.⁶⁹ Europol's administrative arrangements are intended to implement 'Article 218 TFEU' agreements or the Commission's 'adequacy decisions' regarding the transfer of personal data, but unlike the working arrangements, nothing is mentioned about their legal nature.⁷⁰ Third, scrutiny on Europol's international cooperation is enhanced. A Joint Parliamentary Scrutiny Group (JPSG) bringing together members of the EP and of national parliaments is established to monitor Europol's activities.⁷¹ Moreover, an obligation is placed on Europol to transmit to JPSG various documents, including the administrative arrangements implementing the Union's international agreements or the Commission's 'adequacy decisions'.⁷²

4.1[b] *The Procedure for the Agencies' International Formal Cooperation Instruments*

4.1[b][i] EASA

EASA has put in place an internal procedure regarding the negotiation and conclusion of its working arrangements.⁷³ It provides for the Commission's involvement from the initiation phase, throughout the drafting and negotiation phase, up to the stage the working arrangement is concluded. This reveals a much more intensive level of involvement by the Commission than the formal *prior* approval referred to in Article 27(2) of EASA Regulation.

4.1[b][ii] Frontex

The procedure under the former Frontex Regulation⁷⁴ included a preparatory phase in which the Executive Director produced a draft mandate for negotiation

⁶⁸ *Ibid.*, Art. 25.

⁶⁹ *Ibid.*, Art. 23(4).

⁷⁰ *Ibid.*, Art. 25(1).

⁷¹ *Ibid.*, Art. 51(1).

⁷² *Ibid.*, Art. 51(3).

⁷³ EASA internal procedure for working arrangements, EASA PR.WARG, 00001-001, 'Working arrangements', approved 19 Aug. 2012.

⁷⁴ Art. 2 of Decision of the Management Board of Frontex 11/2006 of 1 Sept. 2006 laying down the procedures for negotiating and concluding working arrangements with third countries and international organizations.

with the international partner concerned, after consultations with the Commission and the Member States (in case of third countries). Then, the Management Board approved the draft mandate, including the guidelines that had to be observed during the negotiation process. When a draft working arrangement had been agreed upon by the parties, the Executive Director had to ask for the Commission's opinion. Next, the draft working arrangement was submitted to the Management Board for adoption, and signed by the Executive Director.

Frontex's Management Board adopted new Rules of Procedure adjusting the procedure for the negotiation and conclusion of working arrangements in light of the New Frontex Regulation. The New Rules of Procedure⁷⁵ lay down a more simplified formal procedure, which comprises the following steps: (1) the Executive Director must inform the Management Board of its intention to negotiate a working arrangement; (2) after negotiations and before submitting the working arrangement to the Management Board, the Executive Director must seek Commission's approval and inform the EP; (3) approval of the working arrangement by the Management Board; (4) signing of the working arrangement by the Executive Director.

4.1[b][iii] Europol

Essential procedural aspects regarding Europol's international agreements were mentioned in Article 23 ECD, but details of the full cycle were listed in Articles 5–6 of Council Decision 2009/934/JHA. The procedure included the following milestones with regard to all Europol's agreements:

- the negotiations with a third country or international organization included on the Council's 'list' were carried out by the Executive Director;⁷⁶
- the Executive Director had to submit the draft agreement to the Management Board for endorsement;⁷⁷
- the draft agreement endorsed by the Management Board was submitted to the Council for approval;⁷⁸
- the agreement was signed by the Executive Director after Council's approval.⁷⁹

⁷⁵ Art. 19 of Management Board Decision 11/2017 of 30 Mar. 2017 adopting the Rules of Procedures of the Management Board. The New Rules of Procedure repealed Management Board Decision 11/2006 laying down the procedures for negotiating and concluding working arrangements with third countries and international organizations.

⁷⁶ Council Decision 2009/934/JHA, *supra* n. 63, Arts 6(1) and (2).

⁷⁷ *Ibid.*, Art. 6(3).

⁷⁸ *Ibid.*, Art. 6(4).

⁷⁹ *Ibid.* Currently, the approval takes the shape of a Council implementing decision.

Regarding specifically the operational agreements, before initiating negotiations, Europol had to carry out ‘an assessment of the existence of an adequate level of data protection ensured by the third party’.⁸⁰ The Joint Supervisory Body (JSB)⁸¹ was called to issue an opinion on this assessment before the Management Board authorized the Executive Director to start negotiations.⁸² After negotiations, the Management Board asked again for the opinion of the JSB on the draft agreement.⁸³

Unlike the ECD, the New Regulation does not provide details regarding the procedure for the negotiation and conclusion of Europol’s working and administrative arrangements, except that the Management Board decides on the conclusion of such instruments, and that the Executive Director must inform the Management Board on the intention to initial such arrangements.⁸⁴

4.2 THE INTERNATIONAL DIMENSION IN PRACTICE

4.2[a] *Setting the International Cooperation Priorities and Actions*

4.2[a][i] EASA

EASA documents, such as the five-year business plans and the annual work programmes, touch upon the Agency’s international cooperation. Additionally, EASA internal documents set more detailed priorities and roadmaps with regard to third countries and international organizations.⁸⁵ These documents are sent to the Commission (DG MOVE), which provides its view especially from the wider perspective of the Union’s aviation and external relation policies. The general line is that EASA’s international cooperation strategy needs to fit with the political lines adopted by the Commission.⁸⁶ Hence, EASA does not enjoy full independence in setting and pursuing its international cooperation strategy, but it is dependent in particular on the Commission.

4.2[a][ii] Frontex

The strategic planning of Frontex’s international cooperation can be described as a mix of operational needs and wider policy-political considerations. From the technical-

⁸⁰ *Ibid.*, Art. 5(4).

⁸¹ Europol’s former data protection control authority.

⁸² Council Decision 2009/934/JHA, *supra* n. 63, Art. 6(1).

⁸³ *Ibid.*, Art. 6(3).

⁸⁴ Arts 11(1)(r) and 23(3) of Regulation 2016/794, *supra* n. 67.

⁸⁵ Interview with EASA officials on 13 May 2013 (Brussels).

⁸⁶ Interview with EASA officials on 7 Nov. 2012 (Cologne).

operational perspective, the priorities for international cooperation are said to be mainly risk-analysis driven. From the policy-political side, the main priorities regarding international cooperation are set based on a wider scale, in the Area of Freedom, Security and Justice (AFSJ) or in the EU external relations area and involves different actors, such as the Member States, the Council, and the Commission (interview by phone with a Frontex official on 27 November 2012). Thus, the degree of independence enjoyed by the Agency looks rather limited, and it seems heavily dependent on other EU actors, in particular the Commission and the Member States.

4.2[a][iii] Europol

According to an Europol official, the overall planning of Europol's international cooperation priorities can be depicted as mainly being operationally-driven, but also subject to policy-political influences (interview on 29 January 2013, The Hague). Though driven mostly by operational needs, setting the Agency's priorities was tightly restricted and controlled by the Council and the Member States via the Management Board. Furthermore, Europol's priorities regarding international cooperation need to be consistent with the Union's operational and political needs and priorities.⁸⁷ Under the New Europol Regulation, it is mainly the Commission which seeks to secure that Europol takes into account the Union's position and priorities, and it may also review Agency's cooperation agreements with a view to replace them with 'Article 218 TFEU' agreements.

4.2[b] *International Cooperation Instruments*

4.2[b][i] EASA

In practice, almost all working arrangements concluded by EASA are with competent third country authorities.⁸⁸ The numerous working arrangements entered into by EASA are characterized by a certain degree of heterogeneity determined by the Agency's tasks, the international cooperation needs and priorities of EASA, and the wider EU international cooperation framework with certain countries. One may however roughly distinguish between working arrangements concluded (1) with relevant aviation authorities from non-EU European countries, and (2) with third countries worldwide. EASA has sought to conclude two types of working arrangements with non-EU European countries:⁸⁹ (1) on the collection and

⁸⁷ *Europol External Strategy 2010–2014*, EDOC # 434663, 3 (2010).

⁸⁸ *EASA/Working Arrangements*, <http://easa.europa.eu/rulemaking/international-cooperation-working-arrangements.php>.

⁸⁹ Also referred to as PANEP or Pan-European partner countries.

exchange of information on aircraft safety, for implementing the Safety Assessment of Foreign Aircraft (SAFA) Programme managed by EASA, and (2) on regulatory cooperation and standardization. Worldwide, EASA has concluded working arrangements with Canada, United States, Australia, New Zealand, Asian countries (China, Hong Kong, Japan, Vietnam, Singapore, Taipei), Morocco, Israel, Saudi Arabia and United Arab Emirates, covering issues such as exchange of safety information and validation of type certificates and design approvals.

A common feature of EASA's working arrangements is the widespread use of the words 'Party' or 'Contracting Party' and of 'will/shall' clauses.

The working arrangements include as a rule detailed procedures, the activities performed and the responsibilities undertaken by the parties. Within these general lines, there is some differentiation among the working arrangements, depending on the particular scope and objectives of the cooperation. The working arrangements pertaining to certification issues routinely include detailed provisions regarding the procedure under which one competent authority validates or accepts the type certificates issued by the other competent authority on aircraft, parts and appliances. These certification procedures often include specific rights and duties for third parties, labelled as 'the applicant', 'the type certificate holder', 'the manufacturer'. The working arrangements regarding the 'standardization' of the PANEP countries are mainly concerned with the adoption and implementation of EU safety standards by these countries. The SAFA working arrangements address issues related to the nature and form of the exchange of information within the SAFA programme, as well as confidentiality duties in handling information.

The final provisions of EASA's working arrangements cover the entry into force, amendment procedure and termination of the cooperation instrument, the interpretation of its provisions, and the procedure for solving disagreements and conflicts.

4.2[b][iii] Frontex

Frontex concluded more than twenty working arrangements with third countries (Type 1)⁹⁰ and with international organizations (Type 2).⁹¹ Frontex's working arrangements are rather brief documents. The preamble of some working arrangements includes a formulation according to which Frontex and the partner

⁹⁰ E.g. Ukraine, Moldova, Georgia, Albania, USA, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey, Azerbaijan, Kosovo, Frontex/Partners/Third countries, <http://frontex.europa.eu/partners/third-countries/>. The distinction between Type 1 and Type 2 working arrangements is based on information regarding the use of two different templates in practice by the Agency (Interview by phone with a Frontex official on 27 Nov.. 2012).

⁹¹ E.g. UNHCR, Interpol, UNODC.

organization or third country authority ‘agree’ to establish operational cooperation.⁹² Type 1 working arrangements feature provisions characterized by the use of ‘may’ in combination with ‘will’ clauses, whilst Type 2 working arrangements are characterized by a more extensive use of ‘will/shall/must’ clauses.

Type 1 working arrangements normally list the following core areas of cooperation: risk analysis, training, research and development, joint operations, and operational interoperability. The practical modalities for implementing the cooperation between the parties cover exchanges of information, exchange of analytical products and training tools, exchanges of best practices, the participation of observers from one competent authority in various activities of the other authority, participation in various projects launched by Frontex. Some working arrangements⁹³ include provisions regarding the financial aspects of the cooperation between the Agency and its counterpart. Type 2 working arrangements allow for information exchanges, including confidential data, but personal data is excluded from the scope of cooperation.

The final provisions of all Frontex working arrangements cover the entry into force, amendment procedure and the termination of the cooperation instrument, the interpretation of the instrument, and the procedure for solving disagreements. Importantly, Type 1 working arrangements include a standard provision that they are not to be considered an international treaty and that their implementation shall not be regarded as the fulfilment of international obligations by the EU, its institutions and its Member States.

4.2[b][iii] Europol

Europol has currently eighteen operational agreements (seventeen with third countries⁹⁴ and one with Interpol) and eight strategic agreements (six with third countries⁹⁵ and the remaining two with UNODC and WCO). The scope of Europol’s strategic agreements is more limited in that they allow for the exchange of information, except for personal data, while operational agreements also cover personal data.

Both strategic and operational agreements feature prescriptive ‘shall/will’ clauses. The core part of the agreements deals mostly with the exchange of information including confidentiality duties. Importantly, the agreements

⁹² E.g. Nigeria, Cape Verde, Interpol.

⁹³ E.g. Turkey, Nigeria, Cape Verde, Armenia, Belarus, Georgia, USA.

⁹⁴ Albania, Australia, Bosnia and Herzegovina, Canada, Colombia, Georgia, Former Yugoslav Republic of Macedonia (FYROM), Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Serbia, Switzerland, Ukraine, USA (2002).

⁹⁵ Brazil, China, Russian Federation, Turkey, United Arab Emirates, USA (2001).

provide for the possibility to assign liaison officers. The final provisions of the strategic agreements usually cover dispute settlement, amendment procedures, entry into force, termination of the agreement, and the relationship with other international instruments. The operational agreements include detailed provisions concerning the exchange, processing and handling of *personal data*, and lay down a right for individuals to have access to personal data concerning them. Additionally, these agreements comprise provisions on liability for damages caused to individuals resulting from errors in the exchange and processing of personal data.

5 CROSS-CASE STUDY FINDINGS

The international dimension of the agencies examined seems instrumental to their core mandate and at the same time embedded in the external dimension of the relevant EU policies. Whilst all three agencies appear to have a certain degree of autonomy in setting priorities and planning actions in the area of international cooperation, in doing so they may not ignore the wider EU policy directions in the external action area. Although there are some differences between the agencies examined, it appears that in all cases the controls and monitoring mechanisms put in place are capable of ensuring overall that the agency's international cooperation is consistent with the Union's external relations policy.

The working arrangements and agreements concluded by EASA, Frontex and Europol are regarded by the EU agencies as forms of international cooperation, although of a practical and technical nature and sometimes not at the same level as a 'treaty'. However, the analysis of the content, wording and structure of the international cooperation instruments concluded by EASA, Frontex and Europol reveals that they can be qualified as binding agreements or, at least, as including limited substantive and procedural obligations.

In the case of Europol's cooperation agreements, there are no difficulties in general in considering these instruments as binding international agreements. This will change, however, under the New Europol Regulation replacing Europol's cooperation agreements with working and administrative arrangements. EASA's working arrangements pertaining to cooperation with regard to certification and design approvals are the most obvious examples of the Agency's binding agreements, whereas other working arrangements seem to include at least limited procedural and substantive obligations. Frontex's working arrangements suggest quite a low-level cooperation. In particular, the working arrangements with the competent authorities of third countries bespeak the concern to avoid taking these instruments as binding international

agreements. Yet the overall analysis of the wording and content of Frontex's working arrangements suggests that they are still capable of giving rise to limited legal rights and obligations, though most of these rights and duties would become active upon the conclusion of subsequent agreements.

The procedure for the negotiation and conclusion of EU agencies' international cooperation instruments lends further support to the view that these are considered as more than mere non-binding instruments. EASA, Frontex and Europol have quite complex and formalized procedures, and in practice, the initiation, negotiations and conclusion of these instruments take a significant period of time. One may assume that these agencies do not enter into long negotiations and complex procedures solely to attain something which does not involve any commitment on behalf of the parties.⁹⁶

The overall analysis of the working arrangements concluded by EASA and Frontex, as well as of Europol's agreements, allows concluding that these instruments provide a very specific framework for technical and operational cooperation, and are intended to enable the respective agency to implement its regulatory framework. In line with the distinction made in section 2 between the so-called 'legislative' external action and administrative external action, these international cooperation instruments are included in the category of international agreements of a 'technical-administrative' nature. Such agreements do not necessarily affect the institutional balance in external relations, as long as they stay outside the scope of Article 218 TFEU, comply with 'Article 218' agreements and with the EU legislation, do not entrench on the Commission's powers under Articles 17 TEU and 220 TFEU, and there are sufficient controls and supervision according to *Meroni*.

Our analysis suggests that the formal international cooperation instruments concluded by EASA, Frontex and Europol comply overall with the above-mentioned parameters. The initiation, negotiation and conclusion of EASA's working arrangements appear to be steered closely by the Commission. Regarding Frontex's working arrangements, the Commission was involved throughout the procedure for the negotiation and conclusion, and had a much more authoritative position than the consultative role formally provided for in the former Frontex Regulation. Regulation 2016/1624 aligns formally Frontex with EASA by imposing Commission's approval for all Frontex's working arrangements. Europol's agreements have been subjected to strict formal controls by the Council. Furthermore, the involvement of the Commission in Europol's international cooperation has increased over time, and has been further upgraded by the New Europol Regulation. Strikingly, the

⁹⁶ See J. Klabbers, *The Concept of Treaty in International Law* 256 (Kluwer 1996).

New Regulation is elliptical as regards the involvement of the Council, the Commission and the EP in the procedure for the negotiation and conclusion of Europol's international cooperation instruments which raises questions about the sufficiency of controlling mechanisms by the main EU institutions in light of *Meroni*. Conversely, the New Europol Regulation and the New Frontex Regulation mark a tendency towards increased parliamentary oversight over EU agencies' international activities.

None of the three agencies examined displayed sufficient autonomy in pursuing its international cooperation so as to acquire its own international legal personality. In spite of some variations, all three agencies are subject to a plethora of formal and informal conditions and controls which significantly limit their discretion in pursuing international cooperation. As an immediate consequence, the actions of EASA, Frontex and Europol on the international plane are performed ultimately on behalf of the EU. In this regard, paragraph 25 of the 'Common Approach' stating that EU agencies cannot commit the Union to binding obligations is not accurate, as it ignores the international law perspective which may lead to a different outcome.

6 CONCLUSION

The institutional balance in EU external relations does not prohibit entrusting certain international cooperation tasks to EU agencies, though the application of the *Meroni* requirements suggests a limited role for the EU agencies as global actors. Nonetheless, it is maintained that the international cooperation instruments concluded by EU agencies can qualify as legally binding agreements from an international law perspective. In this respect, delineating between 'technical-administrative' agreements as forms of EU external administrative action and the Union's 'politically significant' agreements based on Article 218 TFEU could render EU agencies' legally binding agreements compatible with the Union's constitutional framework. Consequently, EU agencies' binding international cooperation instruments as a specific category of technical-administrative agreements can be accommodated within the EU legal framework and are valid if they meet certain conditions. Finally, while the possibility for EU agencies to acquire a derived and functionally limited international legal personality should not be excluded *per se*, none of the three agencies examined through the case studies has such a legal status. As a result, more often than not, EU agencies are acting as technical bodies of the EU on the international plane, entailing that their international cooperation actions are in principle attributable to the Union. Yet within the Union, the ultimate political responsibility of agencies' technical external actions seems to lie mainly with the Commission,

considering the role of agencies as tools contributing to the implementation of EU policies, the role of the Commission as a manager of Union's external administrative action, as well as the relationship between the Commission and the EU 'decentralized agencies' enshrined in the 'Common Approach' and further carved in the legal design of these bodies and through institutional practice. Things are perhaps less obvious in the case of Europol, where the Council still exercises important powers such as appointing the Executive Director,⁹⁷ and requesting the Commission, where necessary for the performance of Agency's tasks, to adopt an 'adequacy decision' or to initiate 'Article 218 TFEU' agreements.⁹⁸

⁹⁷ Regulation 2016/794, *supra* n. 67, Art. 11(1)(j).

⁹⁸ *Ibid.*, Art. 11(2).