Regional aviation safety organisations: enhancing air transport safety through regional cooperation

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Chapter 4

The European Aviation Safety Agency: Case Study of a Supranational Aviation Safety Organisation

'This Europe must be born. And she will, when Spaniards say ´our Chartres´, Englishmen say ´our Cracow´, Italians ´our Copenhagen´ and Germans ´our Bruges´. Then will Europe live.'

Salvador de Madariaga (1886-1978)[1]

4.1 INTRODUCTION

This chapter presents a case study of the European Union's Aviation Safety Agency, which is considered as a supranational aviation safety agency (RASO Type II) from the perspective of the RASO typology proposed in Chapter 3. This means that EASA is part of and relies for its functioning on a REIO – the EU.

Although EASA is not a single aviation authority for EU Member States, similar to the ECCAA described in the preceding chapter, the volume of aviation activity for which it is responsible together with the EU national aviation authorities (NAAs),[2] the legal powers it enjoys as part of the supranational EU system, and the resources it has at its disposal[3] definitely makes it the most relevant RASO functioning today.

The EU aviation safety system, including EASA, has over the last twelve years undergone a dynamic evolution, including two extensions of its scope.[4] This evolution is expected to continue in the years to come and thus provides a lot of interesting material for analysis.[5]

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[1] Salvador de Madariaga y Rojo was a Spanish diplomat, writer, historian and pacifist. He was also a co-founder of the College of Europe and a promoter of the vision of a united Europe.

[2] EASA, 'Annual Safety Review', (2013), <http://easa.europa.eu/system/files/dfu/199751_EASA_ASR_2013_ok.pdf> [accessed 6 August 2014], at Chapter 3.

[3] EASA, 'Annual General Report', (2013), <http://easa.europa.eu/system/files/dfu/TOAC14001ENN.pdf> [accessed 6 August 2014], at Annexes 6 and 8.

[4] EASA, '10th Anniversary Chronicle', (2013), p. 36.

[5] EC, 'Roadmap for a policy initiative on aviation safety and a possible revision of Regulation (EC) No 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency', (2014), <http://ec.europa.eu/smart-

Europe has also been, for many years, an arena for a number of regional aviation organisations, which in addition to the EU included or still includes ECAC, JAA and EUROCONTROL. As a result of the interactions between these organisations some of them ceased to exist (JAA) or had to reform (ECAC, EUROCONTROL), while others benefitted and increased their influence on the European aviation scene (EASA). From this perspective, Europe as a whole is an interesting *laboratory* for studying regional cooperation in civil aviation matters and its impact on aviation safety.

The purpose of this chapter is to demonstrate to what extent and how exactly EASA contributes to the improvement of global aviation safety and to the objective of uniformity in civil aviation, as set out by the Chicago Convention (Section 4.4). Particular emphasis will be placed on the on fact that EASA functions within the legal and institutional framework of the EU as a supranational REIO (Section 4.2). The role of EASA in international relations and its status under the Chicago Convention will be also addressed (Section 4.3). Finally the question of whether EASA could one day become a single aviation authority for Europe and the impact this could have on aviation safety will be addressed (Section 4.6).

For the purpose of this chapter, when referring to Europe this means - unless otherwise indicated - the geographical boundaries of Member States of ECAC.[6] In 2014 ECAC consisted of 44 Member States, which is much broader than the membership of the EU.[7] This ECAC area is an arena for a number of aviation organisations, which in addition to ECAC, EU and EASA include also EUROCONTROL,[8] as shown on Figure XIII. Up to June 2009, there was also the JAA, which was a predecessor of EASA and which will be briefly addressed in the following section.

While non-EU States also participate in the work of EASA on the basis of international agreements or working arrangements, this chapter will refer primarily to the EU Member States. The question of associating non-EU States with the work of EASA will be dealt with specifically in Section 4.5 of this chapter.

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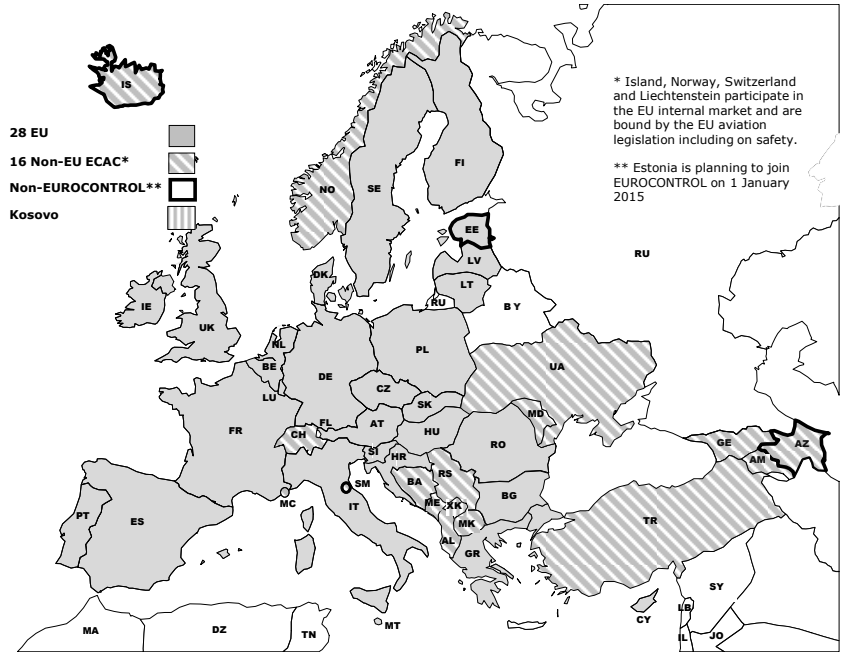
regulation/impact/planned_ia/docs/2015_move_001_revision_easa_regulation_en.pdf> [accessed 19 April 2014].

[6] ECAC was established in 1955 following a recommendation of the Council of Europe. See: ECAC, 'About ECAC' <https://www.ecac-ceac.org//about_ecac> [accessed 3 January 2014].

[7] In addition to the 28 Member States of the EU, ECAC membership consists also of: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Republic of Moldova, Monaco, Montenegro, Norway, San Marino, Serbia, Switzerland, former Yugoslav Republic of Macedonia (fYROM), Turkey and Ukraine.

[8] EUROCONTROL, 'About EUROCONTROL' <http://www.eurocontrol.int/about-eurocontrol> [accessed 3 January 2014].

Figure XIII: The European Aviation Safety Landscape (2014)



4.2 EASA AS PART OF THE EU CIVIL AVIATION SAFETY SYSTEM

4.2.1 INTRODUCTION

It is not possible to understand the functioning of EASA and the benefits that it brings for aviation safety without apprehending the fact that it is an integral part of the EU legal and institutional framework and could not exist without the EU. In this respect it is appropriate to refer to this system as the 'EU civil aviation safety system' rather than the 'EASA system'.

The EU civil aviation safety system encompasses not only EASA and EU institutions,[9] but also EU Member States which have the primary responsibility for the implementation of the EU aviation safety legislation.[10] In this respect it is a multi-layered and multifaceted system, with the tasks and responsibilities shared between all its actors.

The establishment of the EU civil aviation safety system should also not be seen in isolation from other EU policies, but as a logical consequence of the development of the single EU aviation market which started in the 1990s, and which in itself constituted an element of a greater effort to create a single internal market for the EU.[11]

[9] Primarily the European Commission, which has the monopoly of the legislative initiative, the European Parliament and the Council which act as co-legislators, and the European Court of Justice, which exercises the judiciary control.
[10] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, at Preamble clause 3.
[11] Isabella H. Ph. Diederiks-Verschoor, An Introduction to Air Law, (2006), pp. 72-77.

The necessity of a linkage between the EU civil aviation safety system and other EU policies was essential for the establishment of EASA. EASA's predecessor, the JAA, lacked this linkage whilst it was regulating issues at the crossroads of aviation safety and socio-economic matters, such as aircrew flight and duty time limitations, certification of cabin crew or leasing of aircraft.[12] Whilst clearly having a safety dimension such issues were also linked to the single aviation market and thus required greater involvement of the EU institutions.[13] The existence of this disharmony was used by the EU as one of the arguments against the JAA and in favour of EASA which ultimately replaced the former.[14]

4.2.2 THE INITIAL ATTEMPTS TO ESTABLISH EASA IN THE FORM OF AN INTERNATIONAL ORGANISATION

Initially there were attempts to establish EASA as an international organisation by means of a treaty.[15] However these attempts failed, largely as a result of the inability of EU Member States to find a politically acceptable and legally sound solution which would allow EASA to adopt binding and directly applicable decisions and regulations.[16]

Finding such a solution was necessary to address the shortcomings of the previous system, where the JAA - because of its legally non-binding status - could only recommend the adoption of harmonised regulations and was not able to deliver certificates on behalf of its member authorities. This was not considered as sufficient by the industry,[17] and was criticised by the European Commission which believed that the JAA 'has not produced the single system sought by the industry.'[18]

At that time, some EU Member States argued that direct applicability of rules adopted outside the EU framework would require a change to their constitutions and possibly also a referendum.[19] From the EU law point of view, and based on the principles established by the Court of Justice of the European Union

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[12] Sulocki and Cartier, 'Continuing Airworthiness in the framework of the transition from JAA to EASA', *supra* note 53 in Ch.1, at p. 313; Jon Pierre and Guy B. Peters, 'From a club to a bureaucracy: JAA, EASA, and European aviation regulation', JEPP, 16 (2009), p. 350.
[13] Pierre and Peters, 'From a club to a bureaucracy: JAA, EASA, and European aviation regulation', *supra* note 12, at p. 350.
[14] Ibid.
[15] EU, 'Recommandation de décision du Conseil autorisant la Commission à engage des négociations en vue de la création d'une organisation européenne pour la sécurité de l'aviation civile', SEC(96) 2152 final, (EU Council archives, Brussels, 1996).
[16] EASA 10th Anniversary Chronicle, *supra* note 4, at p. 9.
[17] In December 1992, the JAA Board held a meeting with the European aviation associations to discuss the concept of a single European airworthiness organisation, which the industry saw as urgently needed; see: ECAC, 'Report on 'JAA activities'', DGCA/86, (ECAC archives, Paris, 1992). See also: Pierre and Peters, 'From a club to a bureaucracy: JAA, EASA, and European aviation regulation', *supra* note 12, at p. 351.
[18] Neil Kinnock, Member of the European Commission responsible for Transport, 'Meeting the global challenge: the outlook for civil aviation in the EU', SPEECH/98/1, (Forum Europe, Brussels, 1998).
[19] See: Interventions of the Irish and Italian delegations during the 2108th Council (Transport) meeting, 17-18 June 1998, (EU Council archives, Brussels, 1998).

(CJEU), it was also questionable if it is possible to delegate such broad regulatory competences to an external organisation,[20] as this could amount to:

> [A] surrender of the independence of action of the Community in its external relations and a change in the internal constitution of the Community by the alteration of essential elements of the Community structure as regards both the prerogatives of the institutions and the position of the Member States *vis-à-vis* one another.[21]

The EU could agree to such delegation only if the provisions of a future EASA treaty defined and limited the powers in question so clearly that they would be exclusively executive powers.[22] In the context of the EASA treaty, this meant that the EU could probably only agree to the transfer of competences to take individually binding decisions, but not to adopt directly applicable regulations of a general nature. This in practice meant that the main legal *flaw* of the JAA, namely its inability to 'produce the single system sought by the industry' would persist.

As a result, alternative proposals started to emerge, with some EU Member States arguing that an EU-type organisation 'would solve the legal and political problems arising from the setting up of an international organisation ...'.[23] All in all, the idea of establishing EASA by means of a treaty was finally abandoned and it became clear that an alternative solution had to be found within the institutional framework of the EU. To this end the European Commission presented an outline for the setting up of EASA as an EU agency.[24] This was soon after followed by a proposal for the 'Regulation of the European Parliament and of the Council setting up the European Aviation Safety Agency'.[25]

4.2.3 THE BENEFITS OF ESTABLISHING EASA IN THE FORM OF AN EU AGENCY

EASA is one of the EU's regulatory agencies and, like most of the other such agencies, was created by an act of EU secondary legislation - regulation of the European Parliament and the Council (hereinafter the 'EASA Basic Regula-

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[20] EU, 'European Organisation Responsible for Civil Aviation Safety: Report on the Work of the Expert Group on Legal Issues', Working Party on Aviation of 19 February 1998, Working Document AER/98/17, (EU Council archives, Brussels, 1998).

[21] 'Opinion 1/76 concerning the draft agreement establishing a European laying-up fund for inland waterway vessels', in: [1977] ECR I-741, (CJEU,1977), (p. 758).

[22] Ibid. at p. 759. See also: EC, 'Proposal for a Regulation of the European Parliament and of the Council on establishing common rules in the field of civil aviation and creating a European Aviation Safety Agency', (COM(2000) 595 final), p. 4.

[23] See: Intervention of the German delegation during the 2074th Council (Transport) meeting of 17 March 1998, (EU Council archives, Brussels, 1998). On the other hand the UK, fearing further transfers of power from London to Brussels, continued to back the original concept of an international organisation, see: Airline Business, 'EASA delayed by debate over powers' <www.flightglobal.com/news/articles/easa-delayed-by-debate-over-powers-63801/> [accessed 7 August 2014].

[24] EC, 'Commission Working Document: In view of the discussions within the Council on the creation of the European Aviation Safety Authority in the Community framework', COM (2000) 144 final, (Brussels, 2000).

[25] EC proposal for the 'EASA Basic Regulation' (COM(2000) 595 final), *supra* note 22.

tion'),[26] which is of general applicability and binding in its entirety and directly applicable in all EU Member States by virtue of Article 288 of the Treaty on the Functioning of the European Union (TFEU).[27]

Under its Basic Regulation, EASA was given the status of an 'EU body' with legal personality.[28] This means that it has independent legal standing under public EU law, can conclude contracts with EU institutions,[29] and can be a party to the proceedings in the CJEU.[30] Its legal personality extends to domestic legal orders of all EU Member States, where EASA enjoys 'the most extensive legal capacity accorded to legal persons under their laws.'[31]

Thus two main benefits stem from EASA's legal basis:

- The legally binding and directly applicable nature of the regulatory framework on the basis of which EASA was established and in which it operates together with the EU Member States, and
- The possession of a legal personality which is valid in the domestic legal orders of all EU Member States.

These two benefits address the shortcomings of the previous JAA system which was based on a non-binding arrangement between national aviation authorities of the ECAC Member States and where the JAA executed legal personality through a foundation which was established under the Dutch law.[32] However, as Section 4.2.4 below demonstrates, the fact that EASA is based on a legally binding and directly applicable legal framework does not mean that it can itself adopt rules with similar status. This is not unusual for RASOs. In fact this study did not identify a single RASO with competence to adopt legally binding and directly applicable measures of general applicability which would be of legislative nature (see Chapter 5 for further details).

4.2.4 THE LIMITS OF EASA POWERS AS AN EU AGENCY

The main consequence of EASA being an EU agency is that its competences have to fit 'within the EU's existing institutional structure and balance of powers.'[33] This means that EASA itself cannot adopt legally binding acts of general applicability other than of executive nature, as the competence to adopt legislative

[26] EU, 'Regulation (EC) No 1592/2002 of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency', (OJ L 240, 7.9.2002).
[27] EU, 'Treaty on the Functioning of the European Union (TFEU)', in: Consolidated Treaties and Charter of Fundamental Rights, (2010).
[28] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 28.
[29] For example EASA concludes agreements with the European Commission under which it provides technical assistance to third countries in the area of aviation safety. See: EASA, 'Management Board Decision 02-2014 adopting the first 2014 amending budget (Annex)' 2014) <http://easa.europa.eu/the-agency/governance/management-board/decisions/easa-mb-decision-05-2014-adopting-2014-first> [accessed 7 August 2014].
[30] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 50.
[31] Ibid. Article 28(2).
[32] Roadmap for JAA (2005), *supra* note 57 in Ch.3.
[33] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Preamble clause 12.

measures is, under Article 288 of the TFEU, reserved exclusively for the EU institutions.[34]

The question of whether EU institutions can delegate to agencies the powers to adopt legally binding acts of general applicability is subject to jurisprudence of the CJEU. Of key importance to this debate is the *Meroni* doctrine, which stems from the 1956 case law.[35] It is to date consistently applied by EU institutions,[36] and re-confirmed in subsequent rulings of the CJEU.[37]

The *Meroni* doctrine is based on the concept of *institutional balance*, which requires that 'the powers of any rule-making body ultimately should be traced back to the authority of a democratically elected parliament.'[38] On this basis, the CJEU developed a number of principles which the EU institutions must respect when delegating powers to bodies not established by the Treaties:

- The delegating institution cannot delegate broader powers than it itself possesses or allow their exercise under the conditions other than it would have to observe itself;
- Only clearly defined, executive powers can be delegated, the exercise of which can be subject to strict review in the light of objective criteria determined by the delegating authority;
- Delegation of discretionary powers implying a wide margin of discretion is not allowed, since by replacing the choices of the delegator by the choices of the delegate it would bring about an actual transfer of responsibility;[39]

The *Meroni* doctrine does not in itself prohibit EU agencies from adopting acts of general application, as this possibility is explicitly envisaged by the TFEU.[40] What it does however prohibit is adoption by an EU agency of an act of general application which would be of *legislative nature*, as this would amount to

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[34] TFEU, Article 288: 'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.'

[35] 'Case C-9/56 Meroni and Co., Industrie Metallurgiche S.p.A. v. Highly Authority', in: [1957-1958] ECR I-133, (CJEU,1958).

[36] EC, 'European Governance: A White Paper', (COM (2001) 428 final), p. 35; EC, 'Communication from the Commission to the European Parliament and the Council: European Agencies: The Way Forward', COM (2008) 135 final, pp. 9-10; EC, 'Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies', COM (2005) 59 final, p. 5.

[37] 'Joined Cases C-154/04 and C-155/04, The Queen v. Secretary of State for Health and National Assembly for Wales', in: [2005] ECR I-06451, (CJEU,2005), (p. 6514). See also: 'Case C-270/12, United Kingdom v. Parliament and Council ', in: not yet published (available on-line), (CJEU,2014), (Paragraphs 41-53).

[38] Koen Lenaerts and Amaryllis Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance', in: Good Governance in Europe's Integrated Market, ed. by Christian Joerges and Renaud Dehousse (2002), p. 37; Ellen I. L. Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?', CMLR, 37 (2000), p. 1123.

[39] 'Case C-9/56, Meroni', *supra* note 35, (pp.150-152).

[40] See in particular Article 277 of the TFEU. The CJEU has also recalled in its rulings that 'institutional framework established by the TFEU, in particular the first paragraph of Article 263 TFEU and Article 277 TFEU, expressly permits Union bodies, offices and agencies to adopt acts of general application' (See: 'Case C-270/12, United Kingdom v. Parliament and Council ', *supra* note 37, (Paragraph 65)).

the transfer of responsibility, which is prohibited by *Meroni*.[41] It is therefore perfectly consistent with the EU institutional framework to delegate to an EU agency such as EASA the powers to adopt legally binding measures of general applicability which would be of *executive nature*.

Although the *Meroni* doctrine excludes giving EASA powers to adopt legislative acts, the practical necessities of regulating aviation safety challenged this principle. This is because the EASA Basic Regulation is built on a hierarchy of norms, which distinguishes between, the binding measures of general applicability which are contained in EU regulations, and more detailed texts: certification specifications (CS), acceptable means of compliance (AMC) and guidance material (GM).

While the measures of the first type are adopted through the EU legislative machinery,[42] the other type can be adopted directly by EASA.[43] This distinction was necessary to enable technical standards to be adapted quickly in view of operational experience and rapid scientific progress which characterises the aviation sector.

Although formally non-binding, it can be asserted that some of the measures adopted by EASA, and especially CS, have in practice, a value of law. This reasoning is based on the following:

- In some jurisdictions, the CSs used to approve aircraft design are legally binding requirements. For example, in the US they are contained in Federal Aviation Regulations.[44] This was also the case in Europe before the establishment of EASA, when the JARs had to be transposed into the national legal orders of JAA member authorities;[45]
- In addition, although general in nature, the CS are *tailor-made* by EASA for each individual product and notified to the applicant as a final *certification basis*, which makes the CS binding in individual cases.[46] The objective of this notification is to create certainty for the applicant, and a clear reference against which demonstration of compliance can take place;

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[41] See also the 'Romano Case' where the CJEU Stated that an EU body such as an administrative commission may not be empowered by the Council to adopt acts having the force of law ('Case C-98/80, Giuseppe Romano v. Institut national d'assurance maladie-invalidité', in: [1981] ECR I-1241, (CJEU,1981), (p. 1256)).

[42] EASA prepares proposals for binding measures of general applicability. These proposals, which are formally referred to as 'opinions', are submitted to the European Commission, who on this basis formulates proposals to the European Parliament and Council, or, in case of implementing measures, directly to the Member States. See: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 19(1).

[43] Ibid. Article 19(2).

[44] See for example 14 CFR, Part 25 in the US, which establishes airworthiness standards for transport category airplanes.

[45] For example in Poland the JARs were transposed into the national legal system by means of implementing regulations issued by the minister of infrastructure. See: Regulation of the Minister of Infrastructure of 5 October 2004 concerning the introduction of European requirements of aviation safety 'JAR' and European requirements concerning facilitation of civil aviation (Official Journal Nr 2004.224.2282 of 15 October 2004).

[46] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 20. See also: EASA, 'General Principles Related to the Certification procedures to be applied by the Agency for the issuing of certificates for products, parts, and appliances (Product Certification Procedures) ', (Decision of the EASA Management Board No 07-2004, and amended by Decision No 12-2007).

- Similarly, the AMCs although not legally binding, create a presumption of compliance with essential requirements of the EASA Basic Regulation, implementing rules and CS.[47] By following them, the applicant's task of demonstrating compliance is thus greatly facilitated.

The CS and AMC issued by EASA can be considered as measures, which in legal studies are sometimes referred to as *quasi-law*[48] or *soft law*[49]. This somewhat controversial concept is based on the premise that certain normative material such as codes of practice, guidelines or resolutions can produce legal effects,[50] or in practice 'influences State and corporate behaviour but lacks judicial enforceability'.[51]

In addition there are *sui generis* measures that EASA can adopt, such as the Airworthiness Directives (ADs), which EASA issues on behalf of EU Member States,[52] as part of its responsibility for continuing airworthiness of aircraft design.[53] ADs apply to all aircraft of a given type or model, and therefore have a status which puts them between an individual decision and a regulation of general applicability. An EASA AD is a powerful tool and can even be used to ground all aircraft of a given type on the registries of the States on behalf of which it was issued.[54]

It could be argued that the competence of EASA to issue ADs, which have a general scope of application, is not compatible with *Meroni*. In the case of EASA however, this competence stems from the relationship of *international agency* which exists between EASA and EU Member States, as will be demonstrated in the following section. Under this relationship, it is the EU Member States not the EU institutions which delegate to EASA the exercise of certain competences.

EASA competence to issue ADs is therefore a *Europeanization* of certain domains of national competence, rather than a delegation from an EU institution to an EU body, which would be governed by the *Meroni* doctrine. In addition, as was pointed out in preceding paragraphs, the EU institutional framework explicitly permits EU agencies to adopt legally binding acts of general applicability if they are of executive nature only and do not replace the choices which have been made by the EU legislator.[55]

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[47] See for example: Commission Regulation (EU) No 748/2012, *supra* note 86 in Ch.2, Article 10.
[48] Huang, *supra* note 29 in Ch.1, at p. 187.
[49] Gregory Shaffer and Mark A. Pollack, 'Hard and Soft Law', in: Interdisciplinary Perspectives on International Law and International Relations: The State of the Art, ed. by Jeffrey L. Dunoff and Mark A. Pollack (2013), pp. 197-218.
[50] Ingo Venzke, How Interpretation Makes International Law: On Semantic Change and Normative Twists, (2012), p. 228.
[51] Laurence Boulle, The Law of Globalization: An Introduction, (2009), p. 363.
[52] For examples of EASA Airworthiness Directives see: EASA, 'Airworthiness Directives Publishing Tool' <http://ad.easa.europa.eu/> [accessed 02 March 2014].
[53] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 20(1); Commission Regulation (EU) No 748/2012, *supra* note 86 in Ch.2, at Annex I (Part 21), Paragraph 21A.3B.
[54] See for example: Aviation Safety Network, 'EASA grounds all Dassault Falcon 7X aircraft pending incident investigation' <http://news.aviation-safety.net/2011/05/26/easa-grounds-all-dassault-falcon-7x-aircraft-pending-incident-investigation/> [accessed 14 June 2014].
[55] Supra note 40

4.3 THE ROLE OF EASA IN INTERNATIONAL RELATIONS AND ITS STATUS UNDER THE CHICAGO CONVENTION

4.3.1 THE QUESTION OF INTERNATIONAL LEGAL PERSONALITY OF EASA

As was described under Section 4.2.2, initially there was an attempt to establish EASA by means of an international treaty and in the form of an international organisation, which was however ultimately abandoned.[56]

The fact that EASA was established in the form of an EU agency did not diminish the importance of international cooperation for the functioning of this agency. Indeed one of the main objectives set by the EASA Basic Regulation, is to 'promote [EU] views regarding civil aviation safety standards and rules throughout the world by establishing appropriate cooperation with third countries and international organisations'.[57] In this respect the primary role of EASA is to:

> [A]ssist the [EU] and its Member States in the field of international relations, including the harmonisation of rules, recognition of approvals and technical cooperation, and be entitled to establish the appropriate relations with the aeronautical authorities of third countries and international organisations … .[58]

The use of the word *assist* above is symptomatic of the fact that EU institutions and Member States do not consider EU agencies, including EASA, as being entitled to represent the EU position to an outside audience or commit the EU to international obligations.[59] This is yet another consequence of EASA being part of the EU legal system. In practice however the situation is more complex, especially if one tries to analyse the question of EU agencies' legal status not from the perspective of EU law, but from the perspective of public international law.

While EASA's legal personality in the territories of EU Member States is explicitly envisaged under its Basic Regulation,[60] the question of EASA's international legal personality is not so clear. This is not a surprise as the question of international legal personality of EU agencies in general is subject to divergent views in academic writings.[61] The controversies around legal status of EU agen-

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[56] The EU institutional practice also provides examples of bodies which were established in a form of an international organisation but functioning under close control of EU institutions. This was the case with Europol, which was originally created by an international convention concluded by EU Member States and subsequently transformed into an EU agency. For further discussion see: Andrea Ott, Ellen I. L. Vos, and Florin Coman-Kund, 'European Agencies on the Global Scene: EU and International Law Perspectives', in: European Agencies in between Institutions and Member States, ed. by Michelle Everson, Cosimo Monda, and Ellen I. L. Vos (2014).

[57] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 2(d).

[58] Ibid. Preamble clause 23.

[59] EU, 'Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies', (2012), <http://europa.eu/agencies/documents/joint_Statement_and_common_approach_2012_en.pdf> [accessed 9 January 2014].

[60] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 28.

[61] See in particular: Gregor Schusterschitz, 'European Agencies as Subjects of International Law', IOLR, 1 (2004), pp. 163-188; Andrea Ott, 'EU regulatory agencies in EU external relations: Trapped in a legal minefield between European and International Law', European Foreign Affairs Review, 13 (2008), pp. 515-540; Fink Melanie, 'Frontex Working Arrangements: Legitimacy and

cies as international actors[62] can be viewed as an emanation of a more general discussion on the relationship between international law and the EU law, which 'to some extent still remains quite an esoteric issue'.[63]

The question of international legal personality of EU agencies is primarily approached in the academic writings from the perspective of potential treaty making powers of these bodies. While there are differences of opinion concerning the international status of some working arrangements concluded by EU agencies, including EASA[64] (this issue will be further addressed under Section 4.3.4), it has been demonstrated in the literature that a limited international legal personality of EU agencies can be established in case they conclude headquarters agreements with their host States.[65]

Indeed, by the end of 2013 over eighteen EU agencies had concluded headquarters agreements,[66] and from the analysis of their provisions and State practice it is clear that they are governed by international law, which was demonstrated by Schusterschitz.[67] However, so far EASA has not been granted the capacity to conclude a headquarters agreement, although in 2013 a proposal to this end was made by the European Commission.[68]

In any case, headquarters agreements are one of the very few exceptions to the general principle under the EU Treaties according to which only the 'Union may conclude an agreement with one or more third countries or international organisations'.[69] It could be argued that it is not legally possible to delegate to EASA, or any other EU Agency, broader treaty making powers, as it would be inconsistent with the *Meroni* doctrine presented in the previous section.

EASA also does not have its own privileges and immunities on the international field, but relies on the privileges and immunities of the EU, which have been granted to the EU on the basis of its founding Treaties.[70]

Human Rights Concerns Regarding 'Technical Relationships", Utrecht Journal of International and European Law, 28 (2012), pp. 25-26.

[62] The question of international activities of EU agencies has so far been studied only scarcely. At the time of writing this study a research project was being finalised on this topic at the Maastricht University, and the author has consulted one of the researchers involved in that project when preparing this section of Chapter 4.

[63] Enzo Cannizzaro, Peolo Palchetti, and A. Ramses Wessel, 'International law as law of the European Union', (2012).

[64] See in particular: Melanie, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'', *supra* note 61, at pp.25-26; Ott, Vos, and Coman-Kund, *supra* note 56, at pp.104-105.

[65] Schusterschitz, 'European Agencies as Subjects of International Law', *supra* note 61, at p. 188.

[66] EC, 'Decentralised agencies: 2012 Overhaul (analitical fiches)' <http://europa.eu/agencies/documents/fiche_3_sent_to_ep_cons_2010-12-15_en.pdf> [accessed 9 January 2014].

[67] Schusterschitz, 'European Agencies as Subjects of International Law', *supra* note 61, at pp. 176-177.

[68] EC, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 216/2008 in the field of aerodromes, air traffic management and air navigation services', (COM(2013) 409 final).

[69] TFEU, Article 216.

[70] The application of the 'Protocol on the Privileges and Immunities of the EU' to EASA is confirmed by Article 30 of Regulation (EU) No 216/2008. This means, in particular, that the premises, buildings and archives of EASA are inviolable and exempt from search, requisition, confiscation or expropriation. Also the property and assets of EASA cannot be the subject of administrative or legal measures without the authorisation of the CJEU.

In view of the above it could be concluded that EASA, at this stage, does not have any features indicating possession of international legal personality. This study argues however that this is not the case, and that a limited legal personality can be attributed to EASA. This is justified by the safety functions which were given to EASA by EU Member States as is demonstrated below.

4.3.2 THE RELATIONSHIP OF 'INTERNATIONAL AGENCY' BETWEEN EASA AND EU MEMBER STATES

The fact that EASA has been established in the form of an EU agency and not international organisation is not necessarily, on its own, a showstopper to this body having competences, the execution of which would pre-suppose a certain, even very limited, degree of international legal personality.

As explained by Brownlie in his principles of public international law, 'entities acting with delegated powers from States, may appear to enjoy a separate personality and viability on the international plane',[71] and that 'joint agencies of States ... may have restricted capacities and limited independence but be regarded as a separate legal person'.[72]

The question of international legal personality is today primarily approached from a functional perspective, meaning that it is important to look at the totality of the factors, including the powers and competences that were given to a given organisation, as well as its relevant practice, and on this basis to assess whether these powers, competences and practice pre-suppose that the organisation is a separate legal person under international law.[73] This approach is in-line with the famous *Reparation for Injuries* ruling of the International Court of Justice (ICJ).[74]

When looking at EASA from the functional perspective, of primary importance are Articles 17(e) and 20(1) of the EASA 'Basic Regulation', which provide that the Agency shall:

> [I]n its fields of competence, carry out, on behalf of Member States, functions and tasks ascribed to them by applicable international conventions, in particular the Chicago Convention.[75]

And:

> With regard to the products, parts and appliances …, the Agency shall, where applicable and as specified in the Chicago Convention or its Annexes, carry out on behalf of Mem-

[71] James Crawford, Brownlie's principles of public international law, (2012), p. 120.
[72] Ibid. at p. 169-170.
[73] See: Henry G. Schermers and Niels M. Blokker, International Institutional Law, (2011), pp. 989-990; Crawford, *supra* note 71, at p. 170; Jan Klabbers, An Introduction to International Institutional Law, (2009), pp. 49-50.
[74] In this case the ICJ concluded that UN is an international legal person because its member States 'by entrusting certain functions to it, with the attendant duties and responsibilities have clothed it with the competence required to enable those functions to be effectively discharged' ('Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion', in: [1949] ICJ Reports 174, (ICJ,1949), (p. 179).
[75] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 17(e).

> ber States the functions and tasks of the State of design, manufacture or registry when related to design approval.[76]

The legal and practical consequence of the above provisions is that, whenever the EASA Basic Regulation grants to the Agency competences which are also covered by international conventions and in particular the Chicago Convention, then EASA in this respect will be acting as an authorised representative of all EU Member States.

Following the establishment of EASA, each EU Member State has notified ICAO, through diplomatic channels, that EASA is 'now its authorised representative for the fulfilment of its obligations, as State of design or manufacture, as specified in Part II of Annex 8 to the Chicago Convention'.[77] Subsequently EASA has been implementing and enforcing the relevant provisions of the Annexes to the Chicago Convention on behalf of EU member States, including through the issuance of Type Certificates to aircraft, and following the continuing airworthiness of the aircraft which it has certified.

Following on from the above, it is clear that a relationship of agency has been established between EASA and EU Member States.

The concept of direct delegation of the exercise of competences from EU Member States to an EU agency has so far been addressed in the literature only scarcely and primarily from the perspective of EU law. Hofman and Moroni in their analysis of 'pluralisation of EU executive' observe that the model of direct delegation:

> [M]ight seem at first sight attractive in that it could be capable of explaining the most far-reaching delegations of powers to EU agencies such as the power to take externally binding implementing acts and engage in international relations in absence of any clear Treaty authorisation to do so.[78]

They conclude however that the consequence of direct delegation from EU Member States to EU agencies:

> [W]ould result in EU agencies, which are established under EU law, and apply EU procedural law, exercising Member State competences. This concept and mix of approaches would lead, in effect, to nothing less than the creation of agencies as bodies, legally speaking, occupying a place in between EU and Member States law. Conceptualising delegation to agencies in the European Union as direct or horizontal delegation – although it might be an apt description of delegation of powers from a political scientist's point of view – *is thus difficult to establish in terms of EU law* (emphasis added).[79]

The question of direct delegation from EU member States to EU agencies, in the specific context of EASA, has also been looked at by Vos, Ott and Koman-Kund, who came to a conclusion that this construction '… is quite peculiar, as we see that Member States "borrow" EASA for tasks relating to powers for which

[76] Ibid. Article 20(1).
[77] EC, 'Template for EU Member States démarche to ICAO on the transfer of regulatory tasks to EASA', (EU Council archives, Brussels, 14 November 2003).
[78] Herwig C.H. Hofmann and Alessandro Morini, 'The Pluralisation of EU Executive - Constitutional Aspects of "Agencification"', ELR, 37 (2012), p. 431.
[79] Ibid. p. 432.

they are responsible. Consequently *this necessitates more empirical research on this matter* (emphasis added)'.[80]

The difficulty that researchers experience in fully explaining the legal basis and consequences of the direct delegation of implementing powers from EU member States to an EU agency, or more specifically to EASA, suggests that a different approach may be necessary. In particular, given the fact that in the case of EASA the delegation concerns powers to implement international law, namely the Chicago Convention, the public international law perspective has to be employed, in addition to the EU law perspective.

This study argues that Articles 17(e) and 20(1) and subsequent practice related to the implementation of these provisions establish a relationship of agency between EASA and EU Member States not only from the perspective of public EU law, but also from the perspective of public international law.[81]

This is because EASA has been authorised to implement and enforce, on behalf of EU Member States, international law, and in particular the Chicago Convention. This includes EASA having the powers to make decisions that are binding for EU Member States under the Chicago Convention.[82] An example of such a decision would be the issuance by EASA of a Type Certificate confirming that an aircraft design complies with an appropriate certification basis.[83] Such a decision creates effects under Annex 8 to the Chicago Convention, including the triggering of obligations which this Annex attributes to the 'State of Design'.[84]

The concept of international agency is recognised in the rulings of international courts, by practitioners as well as in academic writings, as was demonstrated by Sarooshi.[85] Sereni describes this relationship as follows:

> In the field of international law every subject generally acts in person, through its own organs, without resorting to cooperation with other subjects. However, international practice shows that members of the community of nations sometimes act on behalf of other members, with the legal effect that the transactions performed by the acting subject in the name and for the account of the other person have for the latter the same legal consequences as if it had acted in person. … This legal phenomenon implies a split between the

[80] Ott, Vos, and Coman-Kund, *supra* note 56, at p. 105

[81] For an overview of the concept of agency in international law see in particular: Sarooshi, *supra* note 19 in Ch.2, at pp. 33-51; Angelo P. Sereni, 'Agency in International Law', American Journal of International Law, 34 (1940), pp. 638-660; Curtis A. Bradley and Judith G. Kelley, 'The concept of international delegation', Law and Contemporary Problems, 71 (2008), pp. 1-36.

[82] The relationship of an international agency between a State and organisation, as described in this section, has to be distinguished from the notion of a 'joint organ', which is a different category of State cooperation under international law. A 'joint organ' is a body *composed* of the States, and does not have a separate legal personality. Two most prominent examples of such joint organs, often referred to in the literature, are the Nauru Administering Authority established under the 'Trusteeship Agreement for the Territory of Nauru', New York, 1 November 1947, UN General Assembly Resolution 140(II); and the Intergovernmental Commission under the 'Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link', Canterbury, 12 February 1986, UKTS No. 15 (1992).

[83] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 20.

[84] See for example: Annex 8 to the Chicago Convention, at Paragraph 4.2.1.1.

[85] Sarooshi, *supra* note 19 in Ch.2, at p. 33.

> immediately acting international person and the person to whom the legal effects of these acts are imputed.[86]

Given the fact that the international agency concerns the performance of international activities, it is governed by international law, and can therefore exist 'only between parties recognised as subjects of international law'.[87]

Similar view is expressed by Sarooshi:

> [A]n important precondition for the existence of an agency relationship in both international and domestic law is that the principal and agent are separate legal entities. This flows from the principle of representation inherent in an agency relationship: that an agent acts on behalf of its principal to change certain of its rights and obligations.[88]

It has also to be underlined that in this case we are dealing with a constitutional agency, and not a factual agency which 'does not hinge specifically on the nature of personality of the organisation nor does it flow from the constitutional relationship between the organization and its members'.[89]

The requirement that the principal and agent are separate international legal persons when it comes to the implementation of the Chicago Convention and its Annexes may also be derived from the practice of ICAO, which in its Resolution on nationality and registration of aircraft operated by international operating agencies, had defined international aircraft registration as:

> The cases where the aircraft to be operated by an international operating agency would be registered not on a national basis but with an international organization having legal personality, whether or not such international organization is composed of the same States as have constituted the international operating agency.

As EASA acts today on behalf of EU member States as a 'State of Registry' for all issues related to aircraft design, and this has been found acceptable by ICAO as the subsequent section demonstrates, it should not be excluded that it could similarly act on behalf of EU Member States for the purpose of international aircraft registration.

To conclude, while EASA has legal personality under public EU law, which is separate from EU Member States and the EU itself, this personality resonates also at the international plane through the relationship of international agency on the basis of which EASA was authorised to act on behalf of EU Member States, including by taking binding decisions, under the Chicago Convention. This international legal personality is however limited by scope of Articles 17(e) and 20(1) of the EASA 'Basic Regulation'.

The existence of EASA's limited legal personality does not mean however, as will be demonstrated in Chapter 6, that EU Member States ceased to be responsible for compliance with their obligations as contracting parties to the Chicago

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[86] Sereni, 'Agency in International Law', *supra* note 81, at p.638.
[87] Ibid. p. 639.
[88] Sarooshi, *supra* note 19 in Ch.2, at p. 34.
[89] Chittharanjan F. Amerasinghe in: Institute of International Law (IIL), 'Yearbook', Volume 66, Part I, Session of Lisbon, (1995), p.353.

Convention. Neither does this legal personality negate the general principle that agencies do not represent the EU position to an outside audience or commit the EU to international obligations.[90]

4.3.3 PRACTICAL CONSEQUENCES OF THE RELATIONSHIP OF 'INTERNATIONAL AGENCY' BETWEEN EASA AND EU MEMBER STATES

The relationship of international agency between EASA and EU Member States is in the first place a consequence of a decision which was driven by arguments of safety and efficiency - namely to perform certain certification tasks centrally, on behalf of all EU Member States, and with binding legal effects. Given that these tasks are also governed by the Chicago Convention, meant that the creation of EASA necessarily had to have effects under international law.

From the Chicago Convention point of view there are a number of practical consequences of the establishment of the international agency relationship between EASA and EU Member States.

First of all, under Article 83 of the Chicago Convention ICAO Member States:

> [M]ay make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible.[91]

Because the relationship of international agency between EASA and EU Member States alters the way in which the latter discharge their responsibilities under the Chicago Convention, such relationship falls within the scope of Article 83. The analysis of State practice indicates that this is also the understanding of the EU Member States which have notified ICAO about the fact that EASA exercises on their behalf the 'functions and tasks of the State of design, manufacture or registry when related to design approval.'[92] This is in line with the theory of international agency:

> Since international agency is intended to function with relation to third parties, it is necessary that they be informed of the extent of the authority conferred upon the agent. … Every international transaction is so closely connected with the special characteristics and qualities of each subject involved that each of them must necessarily know the other parties to whom rights and duties are to be assumed. There is no place in international law for the doctrine of the undisclosed principal.[93]

The second consequence of EASA acting on behalf of EU Member States is the fact that this reflects on the scope of the ICAO USOAP activities. As a re-

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[90] EU Joint Statement on decentralised agencies (2012), *supra* note 59.
[91] 'Chicago Convention', Article 83.
[92] ICAO, 'Final Report on the safety oversight audit of the civil aviation system of the European Aviation Safety Agency', (2008), <http://cfapp.icao.int/fsix/AuditReps/CSAfinal/EASA_USOAP_Final%20Report_en.pdf> [accessed 9 August 2014], at Paragraph 1.1.10.
[93] Sereni, 'Agency in International Law', *supra* note 81, at p.649.

sult, ICAO had to conduct audits of EASA to verify the compliance of EU Member States with the relevant ICAO SARPs, in particular Annex 8 to the Chicago Convention.[94] This was a major benefit for ICAO and EU Member States, as instead of conducting an audit of each individual State, ICAO could conduct just one audit of EASA and subsequently link its results with the USAOP reports of each EU Member State.[95]

The Chicago Convention is not the only international legal instrument which is impacted by the agency relationship existing between EASA and EU Member States. The other two instruments are BASAs concluded by the EU, and working arrangements concluded by EASA. The following section will look at the benefits of these two instruments and associated legal problems.

4.3.4 LEGAL STATUS OF EASA UNDER BASAs AND WORKING ARRANGEMENTS

When it comes to the conclusion of BASAs, which were addressed in Chapter 2, the role of EASA is only to assist the European Commission in their negotiations - this is clear from the provisions of EU Treaties,[96] EASA Basic Regulation,[97] and practice.[98]

Compared with the situation under the JAA, EU BASAs offer considerable benefits from a safety and efficiency perspective. Whilst in the past not all EU Member States had such agreements, today when the EU concludes a BASA, it applies, in principle, to all EU Member States.[99] This is because EU BASAs, although being *bilateral in form* – that is they are concluded between the EU and the third country only – have a *multilateral effect.*

The EU BASAs also create a level playing field by replacing the national BASAs, which EU Member States were allowed to continue using even after the adoption of the EASA Basic Regulation.[100] In addition, because they are above secondary legislation in the hierarchy of EU laws, EU BASAs allow derogating from the provisions of EASA Basic Regulation and its implementing rules.[101] This brings benefits such as automatic acceptance of foreign approvals,[102] or the possibility to issue certificates in a simplified manner, that is by checking only the differences between the EU and foreign requirements.[103] Not all countries have this

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[94] ICAO USOAP report on EASA (2008), *supra* note 92.
[95] Ibid. at Paragraph 1.1.9.
[96] TFEU, Article 218.
[97] In accordance with Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 27: 'the Agency shall assist the Community and the Member States in their relations with third countries in accordance with the relevant Community law.' The Agency shall, in particular, '[A]ssist in the harmonising of rules and mutual recognition regarding approvals attesting the satisfactory application of rules.'
[98] EASA Information Note on the EU-US BASA, *supra* note 118 in Ch.2.
[99] For examples of BASA concluded by the EU with third countries see: List of EU Bilateral Aviation Safety Agreements, *supra* note 108 in Ch.2.
[100] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 12(2).
[101] Ibid. Article 12(1).
[102] This is the case for example under the EU-US BASA with approvals of production and design organisations, and certain minor repair and design change approvals. See: Annex I to 'EU-US BASA', *supra* note 97 in Ch.2.
[103] This is the case for example in respect of the approval of repair stations under the EU-US BASA. See Annex 2, Paragraph 4.4 of the EU-US BASA, *supra* note 97 in Ch.2.

possibility. For example in the US, BASAs are treated as executive agreements only which means that they cannot derogate from the national requirements.[104]

In addition to assisting in BASA negotiations, EASA also plays an important role in their implementation. Each of the agreements concluded so far by the EU designates EASA as a technical agent of the EU and its Member States for matters falling within the scope of EASA's competence.[105] This role of EASA as a technical agent implies that it may act in the international arena as a body designated by the EU under a BASA.

The legal situation is different in the case of working arrangements (WA), which EASA can conclude with third country aviation authorities or international organisations under Article 27(2) of its Basic Regulation. Such WAs require however prior approval of the European Commission, to ensure their consistency with EASA's mandate and EU's international aviation policy.

The legal status of EASA WAs creates some difficulties for academic writers. For example Ott observes that certain formulations they use, such as the *entry into force* clauses, suggest that EASA WAs could be considered as internationally legally binding and that this results:

> [I]n a grey area which is legally not acceptable and creates problems of legal uncertainty with regard to their implications and consequences for the internal and external division of [EU] competences in external relations.[106]

Also other sources suggest that, looking from the international law perspective, some of the EASA WAs could be considered as having the status of an international agreement.[107]

The above uncertainties regarding the legal status of EASA WAs can be explained by referring to the relationship of international agency which exists between EASA and EU Member States. The fact that a WA stipulates that EASA acts on behalf, or represents EU Member States, is a recognition of the delegation provisions already contained in the EASA Basic Regulation, and should not be understood as implying that a WA in any way binds the EU institutions or EU Member States under international law. In this situation the WA is a tool used by EASA to exercise the implementing powers which have been given to it as a technical agent.

It is however true that EASA is not always consistent in clarifying the legal status of its WAs, and some of them do not explicitly State that they are without prejudice to international agreements.[108] Divergences of interpretations also do happen, as was the case in 2013 when the Turkish aviation authority argued in a case involving aircraft certification that it delegated to EASA the exercise of its

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[104] Jennison, 'The Future of Aviation Safety Regulation: New US-EU Agreement Harmonizes and Consolidates the Transatlantic Regime, but What is the Potential for Genuine Regulatory Reform', *supra* note 117 in Ch.2, at p. 344.

[105] See for example Article 1F of the EU-US BASA, *supra* note 97 in Ch.2.

[106] Ott, 'EU regulatory agencies in EU external relations: Trapped in a legal minefield between European and International Law', *supra* note 61, at p. 539.

[107] Ott, Vos, and Coman-Kund, *supra* note 56, at p. 103-104

[108] The list of EASA working arrangements can be found at: EASA, 'Working Arrangements' <http://easa.europa.eu/document-library/working-arrangements> [accessed 6 August 2014].

'State of Design' responsibilities on the basis of a WA, and where EASA had to clarify that this is possible only on the basis of an international agreement.[109]

Finally, because WAs do not have a binding status under international law, they cannot derogate from EU law, which is in fact their main limitation. As a consequence, when implementing a WA, EASA must follow the provisions of EU law. This also means that any provision in a WA suggesting obligations for third parties, such as aircraft manufacturers or designers would have to be considered as *ultra vires*, and therefore void.[110]

4.4 CONTRIBUTION OF EASA TO THE IMPROVEMENT OF GLOBAL AVIATION SAFETY AND OBJECTIVES OF THE CHICAGO CONVENTION

This section will provide an analysis of the safety functions of EASA and demonstrate how and to what extent these functions contribute to global aviation safety and the Chicago Convention objectives of ensuring 'the highest practicable degree of uniformity in regulations, standards, and procedures.'[111]

In this context it has to be recalled that EASA is not a single EU authority for aviation safety, and has to work in partnership and share tasks with the NAAs of EU Member States. In addition, similarly to EASA's legal status, the performance of its safety functions is also impacted by the fact that it is part of the EU institutional system.

The scope of EASA's Basic Regulation and EASA's mandate has gradually evolved, starting with airworthiness matters in 2002,[112] and then extended to flight operations and aircrew in 2008,[113] and in 2009 further extended to safety aspects of ATM/ANS and aerodromes.[114]

The following sub-section will address three aspects of EASA's functioning as a RASO: rulemaking, certification and finally oversight and enforcement. This should not be understood as an exhaustive study of EASA's safety functions but rather as a critical analysis of those of their aspects which are most relevant from the perspective of this study.

4.4.1 THE EU AVIATION SAFETY REGULATORY PROCESS

The primary objective of the EASA Basic Regulation is to ensure 'a high and uniform level of protection of the European citizen'.[115] One of the means to ensure

[109] Author was involved personally in the clarification of this case.
[110] This does not mean however that the working arrangements do not affect third parties from a practical point of view. For example if EASA concludes an arrangement on participation of a foreign authority in the EU SAFA programme, this means that this authority may have access to information on ramp inspections performed by EU Member States.
[111] 'Chicago Convention', Article 37.
[112] Regulation (EC) No 1592/2002, *supra* note 26.
[113] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2.
[114] EU, 'Regulation (EC) No 1108/2009 of the European Parliament and of the Council of 21 October 2009 amending Regulation (EC) No 216/2008 in the field of aerodromes, air traffic management and air navigation services and repealing Directive 2006/23/EC', (OJ L 309, 24.11.2009).
[115] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, at Preamble clause 1.

this objective is 'the preparation, adoption and uniform application of all necessary acts.'[116]

A single regulatory framework is also essential for a level playing field for the industry, facilitating free movement of goods, persons and services, and promoting cost-efficiency in the regulatory and certification processes. This harmonisation is also in line with the Chicago Convention objective of ensuring 'the highest practicable degree of uniformity in regulations, standards, and procedures.'[117]

It is important to recall that aviation safety rulemaking in the EU is based on the division of work between EASA, and the European Commission, European Parliament, Council and specialised regulatory committees.[118] As demonstrated under Section 4.2.4, EASA can only adopt non-legally binding documents, but when it comes to adoption of legally binding EU regulations, its role is limited to assisting the European Commission.[119]

The EU aviation safety regulations, unlike ICAO SARPs are not minimum requirements. They are directly binding in their entirety,[120] and with the exception of conditions envisaged under Article 14 of the EASA Basic Regulation (see Section 4.4.1.1 below) EU Member States are not allowed to derogate from them or to impose additional requirements. This principle of EU law, which is reflected in the founding treaties,[121] and confirmed by rulings of the CJEU,[122] is essential for the functioning of the single aviation market which requires uniform conditions of operation for undertakings.

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[116] Ibid. Article 2.3(a).

[117] 'Chicago Convention', Article 37.

[118] Paul Craig and Gráinne de Búrca, EU Law: Text, Cases, and Materials, (2011), pp. 121-141.

[119] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 19, which states that: 'In order to assist the Commission in the preparation of proposals for basic principles, applicability and essential requirements to be presented to the European Parliament and to the Council and the adoption of the implementing rules, the Agency shall prepare drafts thereof. These drafts shall be submitted by the Agency as opinions to the Commission.'

[120] TFEU, Article 288.

[121] Ibid.

[122] 'Case C-6/64, Flaminio Costa v. ENEL', in: [1964] ECR I-585, (CJEU,1964), (p. 594), where the CJEU stated that: '[T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.' See also: 'Case C-26/62, Van Gend en Loos v. Administratie der Belastingen', in: [1963] ECR I-1, (CJEU,1963), (p. 12), where the CJEY stated that: '[T]he Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.'

4.4.1.1 BENEFITS AND SHORTCOMINGS OF THE EU AVIATION SAFETY REGULATORY PROCESS

The benefits brought about by the establishment of the EU aviation safety regulatory process are so far mixed. On the one hand the EU regulations are directly applicable and legally binding for all EU Member States, as was demonstrated in the preceding section. There is thus no need to transpose them into the national legal systems to make them binding for individuals.[123] This is the most significant benefit, as compared with the previous JAA system, which could only recommend adoption of harmonised requirements to its member authorities.[124]

On the other hand the establishment of this process did not seem to result in substantial efficiencies in terms of resource savings for the EU national authorities. A study conducted in 2010 for the European Parliament concluded that:

> More than half of the European national agencies stated that their costs had increased since the establishment of the EU rulemaking procedure. Only very few countries had a reduced workload following the change to the rulemaking process compared with the JAA process. Their workload is still heavy in general, as it encompasses the wider number of consultations. The largest NAAs who were particularly active in the JAA negotiations (e.g. Germany) are the ones who experienced a reduction in their workload.[125]

The above can be attributed to two facts. Firstly, following its establishment and subsequent two extensions of its mandate, EASA had to undertake a large number of rulemaking tasks in order to help build the system. The review of rulemaking deliverables of EASA for the years 2004-2013 shows that on average EASA published nineteen 'Notices of Proposed Amendment' (NPA) a year, with an upwards trend towards the end of the analysed period.[126] Secondly the EASA rulemaking process was already preceded by a regional system set up under the JAA, and - as far as ATM/ANS is concerned - by EUROCONTROL.[127] It is likely that if the EASA rulemaking system had not built upon the largely harmonised JAA/EUROCONTROL system, but on the twenty eight different national frameworks of EU Member States the cost savings would be more visible.

The fact that the EU system is based on directly applicable and binding regulations does not mean that all regulatory differences have been eliminated.

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[123] This is also because a general trend can be observed in the air transport sector towards replacing EU Directives, which need transposition, with EU regulations, which do not need transposition.

[124] As it the case with the 'differences' to ICAO SARPs, the JAA authorities committed only to 'declare all their national regulatory differences to existing JARs … and to work towards the deletion of these national regulatory differences or their embodiment in the appropriate JAR.' See Cyprus Arrangements, *supra* note 52 in Ch.3, at Paragraph 3.

[125] Pricewaterhouse Coopers on behalf of the European Parliament's Committee on Budgets, 'The impact on the EU and national budgets of EU agencies: case studies, PricewaterhouseCoopers study prepared for the European Parliament's Committee on Budgets', (2012), <http://www.europarl.europa.eu/studies> [accessed 2 March 2014], p. 82.

[126] EASA, 'Notices of Proposed Amendment (NPAs)' <http://easa.europa.eu/document-library/notices-of-proposed-amendment> [accessed 3 June 2014].

[127] For an overview of the EUROCONTROL safety related rulemaking activities before the extension of the EASA competence to ATM/ANS safety see: Van Antwerpen, *supra* note 52 in Ch.1, at p. 54.

The possibility of such differences, although considered as exceptional, is envisaged under Article 14 of the EASA Basic Regulation, which gives to EU Member States the possibility to: (1) adopt additional safety measures in case they need to immediately react to a safety problem; (2) grant exemptions in the event of unforeseen urgent operational circumstances or operational needs of a limited duration, provided the level of safety is not adversely affected; and (3) issue individual approvals derogating from the common requirements where an equivalent level of protection can be achieved by other means.

The application of Article 14 is subject to the control of the European Commission and EASA.[128] An evaluation of the application of this Article 14 conducted by the European Commission in 2013 shows that an increasing number of EU Member States are submitting a growing number of notifications under this article, and especially under its provisions referred to in points 2 and 3 above.[129]

Another observation is that the EU civil aviation safety system does not encompass all aviation activities. Two examples can be given in this respect. Firstly, so called Annex II aircraft[130] are excluded, unless they are used in commercial air transport.[131] The second exclusion concerns aerodrome safety, as the EASA Basic Regulation applies only to:

> Aerodromes, including equipment, located in the territory subject to the provisions of the Treaty, open to public use and which serve commercial air transport and where operations using instrument approach or departure procedures are provided, and:
>
> (a) have a paved runway of 800 meters or above; or
> (b) exclusively serve helicopters.[132]

Such exclusions principally stem from the subsidiarity principle enshrined in Article 5 of the Treaty on the European Union (TEU), which limits EU regulations to only those issues which by reason of the scale or effects of the proposed action, can be better achieved at Union level than at the national level.[133] In practice they mean however that Member States still need to maintain and correctly implement national rules to the extent necessary to regulate activities falling outside the EU competence.[134]

The other feature of the EU regulatory framework is that not all aviation safety regulations fall within the scope of the EASA Basic Regulation. This is the case *inter alia* for regulations on accident investigation,[135] occurrence report-

[128] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 14.
[129] EC, 'Information Note: Handling of notifications in the context of the flexibility provisions under Articles 14(1), 14(4) and 14(6) of EU Regulation No 216/2008', (meeting of the EASA committee No 3/2013).
[130] 'Annex II aircraft' include a wide category ranging from amateur built or historic aircraft, to modern ultralight aircraft built in serial production. See: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Annex II.
[131] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 4(4) and (5).
[132] Ibid. Article 4(3a).
[133] EU, 'Treaty on the European Union (TEU)', in Consolidated Treaties and Charter of Fundamental Rights, (2010).
[134] EASA, 'The EASA system as an integral part of the EU (Aviation) legal system', in EASA International Cooperation Forum Legal Workshop, (Brussels, 12-14 October 2009).
[135] Regulation (EU) No 996/2010, *supra* note 180 in Ch.3.

ing,[136] or SES.[137] The practical consequence of that is that they are adopted in a separate rulemaking process not involving EASA and their implementation is not necessarily monitored through the EASA standardization inspections. At the same time the Agency can be given certain tasks and responsibilities under such legislation.[138]

While in certain cases such separation can be justified – for example accident investigation which has to be independent from EASA as a certifying authority - this dichotomy is proving to be an increasing source of problems. This is most visible in ATM/ANS where, following the extension of EASA competences to this domain, safety is regulated in parallel under the SES and the EASA Basic Regulation. As pointed out by the European Commission, this creates duplication and is not efficient because it necessitates involvement of two specialised bodies, meaning EUROCONTROL and EASA to deal with technical aspects of civil aviation regulation.[139] Although the European Commission believes that it is possible to 'eradicate the overlap between SES and EASA regulations' through better coordination between EASA and EUROCONTROL,[140] this study advocates a partial or even complete merger of these two organisations for reasons explained under Section 4.6.

4.4.1.2 COMPLIANCE OF EU AVIATION SAFETY REQUIREMENTS WITH ANNEXES TO THE CHICAGO CONVENTION

Under the EASA Basic Regulation one of the obligations of the Agency is to:

> [A]ssist Member States in fulfilling their obligations under the Chicago Convention, by providing a basis for a common interpretation and uniform implementation of its provisions, and by ensuring that its provisions are duly taken into account in this Regulation and in the rules drawn up for its implementation.[141]

Under the above provision EASA should be assisting EU Member States in identifying differences between ICAO SARPs and EU regulations. So far however the practical implementation of this function is not ideal, as EASA does not seem to systematically identify the differences between the rules that it proposes and the ICAO SARPs.

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[136] EU, 'Regulation No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation (EU) No 996/2010 of the European Parliament and of the Council and repealing Directive 2003/42/EC of the European Parliament and of the Council and Commission Regulations (EC) No 1321/2007 and (EC) No 1330/2007', (OJ L 122, 24.4.2014).

[137] EC, 'Framework for creation of the Single European Sky (SES)' <http://europa.eu/legislation_summaries/transport/air_transport/l24020_en.htm> [accessed 29 March 2014].

[138] See for example: Regulation (EU) No 996/2010, *supra* note 180 in Ch.3, Article 8, which sets outs the rights and responsibilities of EASA in the course of an air accident investigation.

[139] EC, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Accelerating the implementation of the Single European Sky', (COM(2013) 408 final, 2013), p.9.

[140] Ibid.

[141] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 2(d).

A review of thirty opinions published by EASA between 2010 and 2013, shows that although EASA compares the proposed rules with ICAO SARPs, there is no uniform process followed by EASA in this respect, and the comparisons are either very general,[142] or not documented in a way which would allow EU Member States to correctly discharge their obligations under Article 38 of the Chicago Convention.[143] In addition none of the opinions analysed presented the identified differences using the ICAO recommended classification methodology.[144]

The closest to ideal in identifying differences with SARPs is the EU regulation 'laying down the common rules of the air and operational provisions regarding services and procedures in air navigation'[145] which contains a list of 'commonly agreed differences' to ICAO Annexes 2 and 11. This regulation also obliges the EU Member States to notify to ICAO the 'commonly agreed differences' and mandates the European Commission to update them if justified by subsequent amendments to ICAO SARPs.[146] The fact that the differences are commonly agreed is important for maintaining uniformity. As experience shows – knowing that a difference exists is not sufficient for the proper assessment and classification of such a difference.[147] This method of keeping track of the differences could be usefully extended to other ICAO Annexes, for example by mandating EASA under its Basic Regulation to develop and make available to EU Member States an inventory of differences.

By the end of 2013 EASA had also identified differences between EU regulations and SARPs contained in ICAO Annex 8 and, partially, in Annexes 1 and 6, which had been undertaken for the purpose of ICAO USOAP audits of EASA conducted in 2005 and 2009.[148] Comparison had also been done between EU regulations and the latest ICAO Annex 19 on safety management.[149]

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[142] Many of the EASA Opinions simply state that: 'with the proposed changes ICAO compliance is ensured' (Opinion 5/2013), that the proposed rule 'has taken into account the development of international law (ICAO)' (Opinion 2/2013) or 'the proposed rules are compliant with ICAO Standards and Recommended Practices' (Opinion 4/2012). Some Opinions do not provide a correlation table indicating differences with SARPs, although the Opinion itself admits that some of the provisions it proposes are below ICAO requirements (Opinion 07/2010, Opinion 03/2013).

[143] See for example EASA Opinion 11/2013 on 'Licensing and medical certification of air traffic controllers' at: EASA, 'Agency Opinions' <http://easa.europa.eu/document-library/opinions> [accessed 28 July 2014]. Although Opinion 11/2013 is a rare example of an EASA proposal containing a single consolidated correlation table between the ICAO SARPs and the proposed EU requirements, it does not identify in which ICAO category each of the differences falls.

[144] ICAO classifies the differences into three categories, that is: (1) more exacting or exceeds the ICAO Standard or Recommended Practice (Category A); (2) different in character or other means of compliance (Category B); (3) less protective or partially implemented/not implemented (Category C). See: C-WP/12412, *supra* note 42 in Ch.2, at Appendix A (as approved by ICAO Council by C-DEC 177/14)

[145] EU, 'Commission Implementing Regulation (EU) No 923/2012 of 26 September 2012 laying down the common rules of the air and operational provisions regarding services and procedures in air navigation and amending Implementing Regulation (EU) No 1035/2011 and Regulations (EC) No 1265/2007, (EC) No 1794/2006, (EC) No 730/2006, (EC) No 1033/2006 and (EU) No 255/2010', (OJ L 281, 13.10.2012). The proposal for this regulation was prepared jointly by EASA and EUROCONTROL.

[146] Ibid. Article 5.

[147] 'Interview No 1', (2013), *supra* note 37 in Ch.2.

[148] ICAO USOAP report on EASA (2008), *supra* note 92.

[149] 'Interview No 4', (2014), *supra* note 41 in Ch.2.

The shortcomings concerning the identification of differences with ICAO SARPs need to be addressed as a matter of priority. From a legal point of view, it is not easy for EU Member States today to discharge their obligations under Article 38 of the Chicago Convention without full knowledge of the differences. Secondly this hampers the ability of ICAO to rely on the EU system for the purpose of monitoring EU Member States under the USOAP, as envisaged under the recently signed EU–ICAO Memorandum of Cooperation[150]. This last point will be further addressed under Section 4.4.3.3.

At the same time, the fact that in addition to 28 EU Member States there is also a number of non-EU European States associated with the work of EASA (see Section 4.5) offers an opportunity for helping ICAO to standardise the application of Article 38 of the Chicago Convention and make it more focused, as was advocated in Chapter 2. If over 30 European States came to a common interpretation of what constitutes a difference under Article 38 of the Chicago Convention and filed with ICAO such differences in a uniform and consistent manner, this would not only be a resource efficiency and safety benefit for ICAO and Europe but could also pave the way for an internationally agreed manner of interpreting Article 38 of the Chicago Convention.

4.4.2 THE ROLE OF THE EU SYSTEM IN CERTIFICATION OF CIVIL AVIATION ACTIVITIES

The main benefit of the EU system from the perspective of certification[151] of civil aviation activities is the principle of *automatic recognition* of certificates which is enshrined under Article 11 of the EASA Basic Regulation. This provision requires EU Member States to:

> [R]ecognise, without further technical requirements or evaluation, certificates issued in accordance with that regulation and related implementing rules.[152]

` The precondition for automatic recognition of certificates is the existence of the common regulatory framework presented under Section 4.4.1 above. In the case of the EU, it is not appropriate to speak about *reciprocal recognition* of certificates, as the defining criteria triggering EU-wide acceptance of a certificate is its issuance in compliance with the applicable regulations. Making recognition conditional on reciprocal benefits offered by other EU Member States would not be allowed under the EASA Basic Regulation.

Automatic recognition is an advantage when compared with the previous system of mutual recognition 'recommendations' under the JAA, which referred

[150] 'Memorandum of Cooperation between the European Union and the International Civil Aviation Organization providing a framework for enhanced cooperation', 4 May 2011, (OJ L 232, 9 September 2011).
[151] In the EU civil aviation safety system certification is understood as: 'any form of recognition that a product, part or appliance, organisation or person complies with the applicable requirements …, as well as the issuance of the relevant certificate attesting such compliance.' See: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 3(e).
[152] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 11(1).

to different levels of JAR amendments, and in practice lead, as the example of aircrew licensing shows, to a patchwork of recognition arrangements.[153]

The second feature of the EU system is that certain certification tasks are performed centrally by EASA on behalf of EU Member States. This is however an exception, as under the '[EU] institutional system, implementation of … law is primarily the responsibility of the Member States', in line with the subsidiarity principle.[154] Conceptually, this principle of implementation of EU law at the national level can be summarised as *locally approved, globally accepted*.

Therefore, certification tasks were given to EASA only when this was deemed to be more cost efficient and practical, or if justified by need for uniformity of action *vis-a-vis* third countries. In 2014 EASA was competent to issue certificates in the areas of: approval of design of aeronautical products, parts and appliances,[155] third country organisations and operators,[156] and organisations providing pan-European air navigation services.[157] EU Member States may also delegate to EASA certain certification tasks on a voluntary basis – this is for example the case for production, and where France, United Kingdom, Spain and Germany delegated to EASA certification and oversight of the Airbus consortium.[158]

The EASA certification process represents a *one-stop-shop* for the aeronautical industry. From a technical point of view, similar to the previous JAA process, EASA conducts one technical investigation on behalf of all the EU Member States. However, and this is an important difference with the previous system, the EASA certificate is valid in all EU Member States.[159] There is no need for issuance of the certificate in each of the States as was the case under the JAA regime.[160] In addition EU Member States cannot modify the certificate or add additional conditions – something which had been possible under the JAA.[161]

Review of the available reports assessing the functioning of EASA does not offer a clear picture as to the cost efficiency impacts that the transfer of certification tasks had on national authorities. The initial evaluation of the functioning of EASA conducted in 2007 was inconclusive on this point and stated that:

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[153] See for example the last version of JAA mutual recognition recommendations for aircrew licensing at: *supra* note 54 in Ch.3.
[154] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Preamble clause 13.
[155] Ibid. Article 20.
[156] Ibid. Articles 20.2(b)(iii), 21.1(b), 21.2(iii), 22a(b), 22b(b) and 23.
[157] Ibid. Article 22(a).
[158] The legal basis for such approval is: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 20.2(b)(ii). See also: EASA, 'Agency issues first European Single Production Organisation Approval to Airbus', Press release of 21.07.2008,
[159] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 11.
[160] Sulocki and Cartier, 'Continuing Airworthiness in the framework of the transition from JAA to EASA', *supra* note 53 in Ch.1, at p. 321. See also: Günter Verhaugen, Vice-President of the European Commission responsible for Enterprise and Industry, 'The role of the Aviation Safety Agency from an industry point of view', SPEECH/04/536, (Speech at the occasion of the inauguration of EASA in Cologne, 2004).
[161]Ramboll-Euréval-Matrix on behalf of the European Commission, 'Evaluation of the EU decentralised agencies: Final Report - Volume III, Agency level findings', (2009), p. 56.

> With detailed information on cost structures under the former system being unavailable, no significant cost reductions in certification procedures compared to the former system could be identified. [162]

On the other hand the evaluation performed in 2010 for the European Parliament, somewhat surprisingly came to a conclusion that:

> The expected effect of shifting both the responsibility and the execution of some tasks is usually a budget reduction. However, the perception-based results of our survey show that, all in all, the impact of the task transfer at national level has been toward an increase in budget pressure with very few exceptions. [163]

The available reports are more consistent about the impact of centralisation on the industry. The EU-wide legal value of a single EASA certificate is identified as a major benefit.[164] There seems to also be a consensus that the EASA certification processes are better suited for the larger industries,[165] and that the smaller industry faced challenges stemming from the complexity of the regulations and operational distance of the Agency,[166] which outsources around 20% of the technical work to local NAAs when it comes to approval of aircraft design.[167]

4.4.2.1 IMPLICATIONS FROM THE PERSPECTIVE OF THE CHICAGO CONVENTION

The principle of automatic recognition and centralisation of certain tasks at EASA level has a number of implications from the perspective of the Chicago Convention. The first one is the establishment of the international agency relationship between EASA and EU Member States along with the associated consequences under the USOAP, as was presented in Section 4.3.3.

The second consequence is the separation of the functions and tasks of the 'State of Design' which are related to aircraft airworthiness and investigation of aviation accidents, which will be presented in more detail in Chapter 5 as an example of unintended consequences that establishment of a RASO may have on the responsibilities of States under the Chicago Convention.

In addition, the following consequences were identified with respect to Article 32 of the Chicago Convention which deals with recognition of certificates for the purpose of international air navigation:

(1) With regard to Article 32(a) of the Chicago Convention, which states that:

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[162] Horváth & Partners Management Consultants on behalf of the EASA management board, 'Evaluation on the Implementation of EU Regulation 1592/2002: Final Report ', EASA evaluation prepared on the basis of Article 51 of Regulation (EC) 1592/2002, (2007), p. 12.
[163] The impact on the EU and national budgets of EU agencies, *supra* note 125, at p. 75.
[164] Evaluation of the EU decentralised agencies (2009), *supra* note 161, at p. 56; EASA evaluation (2007), *supra* note 162, at p. 100.
[165] Ibid.
[166] EASA evaluation (2007), *supra* note 162, at p.100.
[167] Certification tasks internalisation rate on the basis of: EASA, 'Business Plan 2014-2018', EASA Management Board Decision Nr 12-2013, (2013).

> The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered.

- The EASA Basic Regulation should be considered as a mechanism for automatic validation or 'rendering valid' of aircrew licences between EU Member States. This is because under Article 11 of the EASA Basic Regulation, an EU 'State of Registry' must automatically accept an aircrew licence which was issued by any other EU Member State 'in accordance with that regulation and related implementing rules'. Given that it is not possible to file differences with the provisions of the Chicago Convention, this is the only possible explanation of consistency between Article 11 of EASA Basic Regulation and Article 32 (a) of the Chicago Convention.

(2) With regard to Article 32 (2) of the Chicago Convention, which provides that:

> Each contracting State reserves the right to refuse to recognize, for the purpose of flight above its own territory, certificates of competency and licenses granted to any of its nationals by another contracting State.

- The EU Member States have waived the possibility of such refusal of recognition. Exercise of the right provided in Article 32 (b) by one EU Member State in respect of another EU Member State would not only be in contradiction of Article 11 of the EASA Basic Regulation but also of the principle of non-discrimination established by EU Treaties.[168]

Finally, the EASA Basic Regulation also has consequences from the perspective of Article 83bis of the Chicago Convention, which provides for the possibility of a transfer of certain 'State of Registry' responsibilities to the 'State of the Operator'.[169] For such transfer to take place an agreement is needed between the States concerned and to make the transfer binding for third countries, they have to be notified about the existence of such agreement either directly or through ICAO.[170]

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[168] TFEU, Article 18.

[169] 'Chicago Convention', Article 83 bis (a), which states that: 'Notwithstanding the provisions of Articles 12, 30, 31 and 32(a), when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft under Articles 12, 30, 31, and 32(a). The State of registry shall be relieved of responsibility in respect of the functions and duties transferred.'

[170] Chicago Convention, Article 83bis (b), which states that: 'The transfer shall not have effect in respect of other contracting States before either the agreement between States in which it is embodied has been registered with the Council and made public pursuant to Article 83 or the existence and scope of the agreement have been directly communicated to the authorities of the other contracting State or States concerned by a State party to the agreement.'

As observed by Manuhutu, in the EU 'any aircraft – regardless in which EU Member State that aircraft is registered – must comply with the same aviation safety rules and standards if that aircraft is operated within the territory of an EU Member State.'[171] This study agrees that 'as between EU Member States there is no need for EU Member States to conclude among them arrangements as envisaged under Article 83bis.'[172] Such a position is supported by the arguments of efficiency and uniformity of safety levels which are the objectives of the EU system. For legal certainty purposes such interpretation could be enshrined in the EASA Basic Regulation, and subsequently notified by EU Member States to ICAO to ensure the international recognition of such a multilateral Article 83bis agreement.[173]

4.4.3 THE BENEFITS OF THE EU SYSTEM FOR OVERSIGHT AND ENFORCEMENT

The EU aviation safety system has its own oversight and enforcement mechanisms which complement those available in EU Member States.[174] As with rulemaking and certification, these mechanisms must be seen in the context of the EU as a whole, and involve multiple actors, which in addition to EASA include the NAAs and EU institutions, notably the European Commission – each with its own role, competences and responsibilities.

The multifaceted nature of the EU system requires close cooperation between all the actors involved. This cooperation is a necessity due to legal considerations, which are analysed in subsequent paragraphs, but primarily from a safety point of view, as none of the actors has a complete picture, or can address problems on its own. For example, while a safety issue can be identified at a national level, it may require resolution through EU legislation. Similarly a problem identified by EASA may have to be addressed by an NAA.

4.4.3.1 EASA STANDARDISATION AND MONITORING ACTIVITIES

Key features of the EU system are the EASA standardisation inspections and other monitoring activities, which constitute a regional mechanism mandated by EU law to control the application by EU Member States of the EASA Basic Regulation and its implementing rules, as well as to verify the uniform implementation of these rules across the EU.[175]

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[171] Frank Manuhutu, 'Article 83bis (Revisited): Transfer of Safety Oversight Responsibilities Seen from a European's Regulator Perspective', in: From Lowlands to High Skies: A multilevel Jurisdictional Approach towards Air Law, ed. by Pablo Mendes de Leon (2013), pp. 89-95.
[172] Ibid.
[173] Ibid.
[174] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 68, which mandates the EU Member States to lay down penalties for infringement of this regulation and its implementing rules.
[175] EU, 'Regulation (EU) No 628/2013 of 28 June 2013 on working methods of the European Aviation Safety Agency for conducting standardisation inspections and for monitoring the application of the rules of Regulation (EC) No 216/2008 of the European Parliament and of the Council and repealing Commission Regulation (EC) No 736/2006', (OJ L 179, 29.06.2013), Articles 1.1(a) and 3.1.

In a regional system, an additional level of monitoring independent from national continuing oversight functions is useful to ensure the consistent implementation of the common regulatory framework. This is especially important if a regional system is based on the principle of recognition of certificates which requires trust between the Member States. A reliable, independent verification mechanism is a guarantor of this confidence.

EASA standardisation inspections and monitoring activities are mandatory.[176] This is an advantage over the previous JAA system of standardisation visits which a national authority could reject.[177] The mandatory nature of the EASA activities is justified because, while JAA was issuing only mutual recognition 'recommendations', in the EU the recognition is automatically granted by law as Section 4.4.2 demonstrated.

In addition, while the JAA standardisation visits were organised by the aviation authorities themselves and could thus be considered more as 'peer reviews', the EASA process is independent from the NAAs.[178]

4.4.3.2 ENFORCEMENT COMPETENCES OF THE EUROPEAN COMMISSION

The EASA standardisation inspections and other monitoring activities are ancillary to the enforcement competences of the European Commission. Their purpose is to assist the Commission, as the *Guardian of the Treaties* in monitoring the application of the EASA Basic Regulation and its implementing rules.[179] They are also 'without prejudice to the enforcement powers conferred by the Treaty on the Commission.'[180]

Therefore when EASA identifies a serious non-compliance, it must report back to the European Commission, possibly with a recommendation to suspend recognition of certificates under Article 11 of EASA Basic Regulation.[181] In this respect the position of EASA is similar to the previous JAA which could only withdraw the mutual recognition recommendations, as was explained in Section 3.4.2 of Chapter 3.

The European Commission is not obliged to act upon a recommendation of EASA.[182] The Commission may also initiate an infringement action directly against a Member State without a prior EASA recommendation using its enforcement competences under the EU Treaty.[183] This discretion of the European Com-

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[176] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Articles 24 and 54.

[177] Francesco Banal, former EASA Quality and Standardisation Director, 'EASA Standardisation', in Aircraft Engineers International Conference, (Belgrade 2006).

[178] Ibid.

[179] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 54(1).

[180] Ibid. The enforcement powers are vested into the European Commission through Article 258 of the TFEU.

[181] In case of non-compliance or ineffective compliance, the European Commission shall require the issuer of a certificate to take appropriate corrective action and safeguard measures, such as limitation or suspension of the certificate. Moreover, the EU-wide recognition of the certificate ceases to apply from the date of the notification of the Commission's decision to the Member States. See: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 11(2).

[182] See: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 11, which States that the Commission *may* initiate such procedure.

[183] Infringement procedures are actions taken by the European Commission under Article 258 of the TFEU against a Member State which is in breach of EU law, and involve judicial control by

mission stems from Article 11 of the EASA Basic Regulation, standardisation regulation,[184] and is confirmed by the jurisprudence of the CJEU.[185]

The fact that enforcement is dependent on the discretion of the European Commission could be subject to criticism. The very purpose of establishing an independent safety agency was to insulate technical decisions from political considerations and associated discretion. This is however an inevitable consequence of the initial decision to establish EASA as an EU agency, as launching infringement actions is a discretionary competence the delegation of which to EASA would be incompatible with the *Meroni* doctrine presented in Section 4.2.4.[186]

By mid-2014, with the exception of safeguard measures adopted by the European Commission at the time of Bulgaria's accession to the EU in 2007,[187] there had been no cases of non-compliance with the EU safety requirements which necessitated an enforcement action by the European Commission under Article 11 of the EASA Basic Regulation.[188] Whether this is an indication of a system which functions well, or rather a symptom of the system's genuine inability to deal decisively with serious deficiencies could of course be a point for discussion.

On the one hand, the review of EASA annual reports indicates that between 20% - 34 % of the overall number of standardisation findings can be classified as 'significant deficiencies that may raise safety concerns if not duly corrected.'[189] It also seems that the main cause of such findings is 'insufficient availability of adequate inspecting staff, in terms of qualification and/or number',[190] which is an important observation given that one of the main advantages of regional systems is supposed to be enhancement of safety oversight capabilities of States.

On the other hand, looking at the actual safety record, it is clear that the EU system delivers a consistently low accident rate, although now stabilised following the significant reductions achieved in the first half of the previous decade.[191] Between 2003 and 2013 the average rate of scheduled passenger and cargo fatal accidents per 10 million flights, oscillated around two for the aircraft opera-

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the CJEU. Originally, they were intended to be the primary mechanism for enforcement of EU law. However since the development by the CJEU of the doctrines of direct effect and State liability which allow for enforcement of EU law by national courts, infringement procedures are only one element of the EU enforcement system. See in particular: 'Joint Cases C-6 and C-9/90, Francovich and Bonifaci v. Republic of Italy', in: [1991] ECR I-05375, (CJEU,1991).

[184] Regulation (EU) No 628/2013, *supra* note 175.

[185] This discretion of the Commission has been confirmed in the CJEU ruling: 'Case C-247/87, Star Fruit Company v. Commission', in: [1989] ECR I-291, (CJEU,1989), (p. 301). See also: 'Case T-571/93, Lefebvre and Others v. Commission ', in: [1995] ECR II-02379, (CJEU,1995), (p. 2403).

[186] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Preamble clause 18 and Article 25.

[187] EU, 'Commission Regulation (EC) No 1962/2006 of 21 December 2006 in application of Article 37 of the Act of Accession of Bulgaria to the European Union', (OJ L 408, 30.12.2006).

[188] Official of the European Commission, 'Interview No 9', (2014).

[189] EASA, 'Annual General Reports for the years 2010-2013' <http://easa.europa.eu/newsroom-and-events/general-publications> [accessed 28 July 2014].

[190] EASA, 'Annual General Report', (2012), <http://easa.europa.eu/system/files/dfu/EASA-Annual_General_Report_2012.pdf> [accessed 20 December 2013], at p.31.

[191] EASA Annual Safety Review (2013), *supra* note 2, at p. 27.

tors under responsibility of the States participating in the work of EASA.[192] This is one of the best safety records in the world.[193]

4.4.3.3 INTERACTION BETWEEN EASA STANDARDISATION AND MONITORING ACTIVITIES AND ICAO USOAP-CMA

While EASA monitoring activities are justified by the regional nature of the EU system, they are also an additional layer of oversight which requires resources. In 2012 the EASA standardisation department had in total 48 members of personnel,[194] and a budget of 635.000 EURO.[195] EASA also involves inspectors from EU Member States. In 2012, EU Member States provided 134 inspectors which constituted 50% of all EASA standardisation inspection team members.[196] The inspections also require preparation on the part of EU Member States and continuous monitoring and follow up of results by EASA and the European Commission.

In addition EASA conducts inspections in non-EU European States on the basis of international agreements or working arrangements concluded by EU or EASA respectively. In 2012 EASA was involved in standardisation activities in 46 countries.[197]

Such an effort to a certain extent duplicates the ICAO USOAP-CMA monitoring activities, which apply equally to States which are subject to EASA standardisation activities. The EU could eliminate this overlap and realise efficiencies for ICAO and EU Member States by relying on the 2011 EU-ICAO Memorandum of Cooperation (hereinafter the 'EU-ICAO MoC') which provides for the possibility of coordinating the EASA standardisation inspections and the ICAO USOAP-CMA.[198] Paragraph 7 of the safety Annex to the EU-ICAO MoC States that:

> In order to verify compliance by EU Member States with ICAO safety-related Standards and adherence to ICAO Recommended Practices …, the Parties shall establish a framework for conducting, as appropriate …: ICAO oversight of the EU Standardisation Inspections conducted by EASA of the national competent authorities of EU Member States regarding safety-related SARPs that are addressed by EU legislation.[199]

Establishing such a link would allow ICAO to recognise the results produced by the EU system, at least in those areas where the EASA standardisation inspections and monitoring activities and those of USOAP-CMA are deemed to be equivalent. This could ultimately reduce the duplication of inspection and moni-

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[192] Ibid. at p.15.
[193] Ibid.
[194] EASA, 'Staff Policy Plan for the years 2014-2016: Annex I', EASA Management Board Decision 2/2013, (2013).
[195] EASA, 'Amended Budget', EASA Management Board Decision 02/2012, (2012).
[196] EASA Annual General Report (2012), *supra* note 190, at p.31.
[197] Ibid. at p.30
[198] 'EU-ICAO MoC (2011)', *supra* note 150.
[199] 'Decision of the EU-ICAO Joint Committee of 21 September 2011 on the adoption of an Annex on aviation safety to the Memorandum of Cooperation between the European Union and the International Civil Aviation Organization providing a framework for enhanced cooperation', (OJ L 172, 25.6.2013).

toring activities of EU Member States by ICAO, as is already the case in the area of aviation security.[200]

In 2014 ICAO and EASA signed a 'Working Arrangement on Continuous Monitoring Activities', to implement the provisions of the EU-ICAO MoC and its safety annex related to the coordination of the ICAO USOAP and EU standardisation inspections. It is expected that such coordination will be put into effective operation in the near future.[201]

One of the primary obstacles to realising efficiencies between ICAO USOAP and EASA standardisation remains the inadequate knowledge by EASA of the differences between EU regulations and ICAO Annexes as was demonstrated in Section 4.4.1.2. In addition, due to the split of responsibilities between EASA and the European Commission, ICAO would also probably need to monitor the latter, notably in view of the European Commission's legislative and enforcement competences which are related to CEs seven and eight under the ICAO safety oversight model which was presented in Chapter 2.

4.4.3.4 INDEPENDENT EASA ENFORCEMENT ACTIONS

The only independent enforcement actions that EASA can take, *de lege lata*, is the possibility to suspend, revoke or amend a certificate that EASA granted to an organisation, operator or aeronautical product.[202] Such decisions can be subject to an appeal process, and include a judicial control by the CJEU.[203] Revoking or suspending a certificate is however an ultimate measure. Therefore if a more 'nuanced, flexible and graduated response to a breach of the rules, is warranted',[204] the EU legislation provides the possibility of imposing financial penalties or periodic penalty payments on holders of certificates issued by EASA which have intentionally or negligently breached the provisions of EU law.[205]

Such penalties or payments are imposed not by EASA but by the European Commission upon the Agency's recommendation.[206] This is another consequence of EASA being an EU agency, because launching infringement actions is a discretionary competence, the delegation of which to EASA would contradict the *Meroni* doctrine. The fact that EASA cannot impose financial penalties is a key difference with a traditional set-up, where national authorities may have competences to fine operators or individuals for breaches of aviation legislation.[207]

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[200] 'Memorandum of Cooperation between the International Civil Aviation Organisation and the European Community regarding security audits/inspections and related matters', 17 September 2008, (OJ L 36, 5.2.2009).
[201] 'Interview No 4', (2014), *supra* note 41 in Ch.2.
[202] See for example: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 20.1(i).
[203] Ibid. Articles 40-51.
[204] Ibid. Preamble clause 18.
[205] EU, 'Commission Regulation (EU) No 646/2012 of 16 July 2012 laying down detailed rules on fines and periodic penalty payments pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council', (OJ L 187, 17.7.2012).
[206] Ibid. Article 10.
[207] For example in the US, the FAA has a competence to impose civil penalty payments for violations of aviation regulations under: Title 14 CFR, Part 13 'Investigative and Enforcement Procedures' ('Code of Federal Regulations', <http://www.gpo.gov/fdsys/pkg/CFR-2014-title14-vol1/pdf/CFR-2014-title14-vol1.pdf> [accessed 29 March 2014].

By mid-2014, the European Commission had not used its competences to impose financial penalties or periodic penalty payments on EASA certificate holders.[208] It was therefore not possible to assess the effectiveness of this instrument.

4.5 ASSOCIATION OF NON-EU EUROPEAN COUNTRIES WITH EASA

In addition to EU Member States, non-EU European countries can also participate in the work of EASA and be associated with the EU aviation safety system. The legal basis for this association is Article 66 of the EASA Basic Regulation, which provides that:

> The Agency shall be open to the participation of European third countries which are contracting parties to the Chicago Convention and which have entered into agreements with the European Community whereby they adopted and apply Community law in the field covered by this Regulation and its implementing rules.[209]

This Pan-European dimension of the EU aviation safety system is driven by two developments. The first one was the closure of the JAA in 2009, which necessitated offering ex-JAA non-EU countries 'an alternative forum to express interests regarding aviation safety matters.'[210] The second one is the European Neighbourhood Policy (ENP)[211] and its aviation component - the Common Aviation Area - which is based on uniform conditions of doing business, including as regards aviation safety.[212]

The main precondition for associating a non-EU European country with the EU aviation safety system and EASA is the conclusion of an international agreement meeting conditions of Article 66 of EASA Basic Regulation. By mid-2014 the EU had signed five such agreements,[213] although none of them is limited solely to aviation safety: [214]

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[208] 'Interview No 9', (2014), *supra* note 188.

[209] Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 66.

[210] At the time of the dissolution of the JAA, there were fifteen non-EU European States whose aviation authorities were members or candidate members of the JAA. For more information about the transition from the JAA to EASA, see: JAA, 'FUJA II Working Group: Final Report (2008)' <www.jaa.nl/fuja/fuja_report.html> [accessed 28 March 2014].

[211] The ENP was established in 2004 and is the EU's policy for promoting political association and economic integration with the sixteen neighbouring countries of the EU. For more information on the ENP see: EC, 'A new response to a changing Neighbourhood: Joint Communication by the High Representative of The Union For Foreign Affairs And Security Policy and the European Commission', COM (2011) 303, (Brussels, 2011).

[212] Common Aviation Area aims at establishing a single aviation market comprising, in addition to the EU Member States, also the ENP countries. It is based on aviation agreements encompassing gradual market opening and regulatory convergence towards EU aviation legislation and regulations. For more information about the Common Aviation Area see: EC, 'The EU's External Aviation Policy: Addressing Future Challenges, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', COM(2012) 556, (Brussels, 2012).

[213] In addition to 'Article 66' agreements the EU has signed, in the framework of the ENP, agreements with non-European countries which also extend, to various degrees, the EU aviation safety

- Agreement on the European Economic Area;[215]
- Agreement between the European Community and the Swiss Confederation on Air Transport;[216]
- Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the Establishment of a European Common Aviation Area (ECAA);[217]
- Common Aviation Area Agreement between the European Union and its Member States and Georgia;[218]
- Common Aviation Area Agreement between the European Union and its Member States and the Republic of Moldova.[219]

Under the above agreements the partner countries commit to implement the EU aviation safety legislation, and in exchange have the possibility of acquiring status equivalent to an EU Member State, including as regards recognition of certificates, participation in EASA rulemaking process and other technical initiatives, as well as delegation of safety functions to EASA. The main limitation of

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legislation but which do not create regulatory consequences under the EASA 'Basic Regulation' such as recognition of certificates or delegation of State safety functions to EASA. These are for example the agreements signed with Morocco, Jordan and Israel.

[214] 'Article 66' agreements can be: (i) aviation specific agreements, (ii) more general and free-standing association agreements providing for the adoption and implementation by third countries of EU legislation, including in the area of aviation safety, or (iii) agreements specifically aimed at adopting and implementing existing EU legislation on aviation safety, concluded specifically to enable third countries to participate in the work of EASA. See: EC, 'Participation of European third countries in the work of the European Aviation Safety Agency, Commission Staff Working Paper', SEC(2002) 1090, (Brussels, 2002).

[215] 'Agreement on the European Economic Area', 2 May 1992 (OJ L 1, 3.1.1994). Provides for integration of the EEA countries (Norway, Iceland and Liechtenstein), into the EU internal market, including the air transport market.

[216] 'Agreement between the European Community and the Swiss Confederation on Air Transport', 21 June 1999, (OJ L 114, 30.4.2002). It is an aviation specific agreement providing for integration of the Swiss Confederation into the EU internal air transport market.

[217] 'Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area', 9 June 2006, (OJ L 285, 16.10.2006). Signed with States candidates for EU membership and providing for their gradual integration into the single EU aviation market. The agreement also covers Norway and Iceland. Since the signature of the agreement a number of its contracting parties (Bulgaria, Romania, and Croatia) have become EU Member States.

[218] 'EU-Georgia Common Aviation Area Agreement', *supra* note 123 in Ch.3. This agreement provides for implementation by Georgia of EU aviation legislation and exchange of traffic rights between EU Member States and Georgia. The agreement does not provide for full integration of Georgia into the EU's common aviation market.

[219] 'EU-Moldova Common Aviation Area Agreement', *supra* note 124 in Ch.3. This agreement provides for implementation by the Republic of Moldova of EU aviation legislation and exchange of traffic rights between EU Member States and the Republic of Moldova. The agreement does not provide for full integration of the Republic of Moldova into the EU's common aviation market.

'Article 66 agreements' is lack of the possibility of granting to non-EU countries voting rights in the EASA management board and regulatory committees taking legally binding decisions.[220]

4.5.1 IMPLEMENTATION AND SAFETY BENEFITS OF 'ARTICLE 66 AGREEMENTS'

The evaluation of the implementation of the five 'Article 66 agreements' signed until mid-2014 reveals mixed results. The main problem is that most of these agreements take a long time to actually enter into force. Here a clear distinction must be made between 'Article 66 agreements' negotiated as *mixed*, which necessitate ratification by both the EU and its Members States, and *EU only* meaning that EU Member States are not parties to the agreement and do not need to ratify it[221]

Only two out of five 'Article 66 agreements' actually entered into force by mid-2014, and both of them were negotiated as 'EU only' agreements: the Agreement on the European Economic Area[222] which is not aviation specific, and the EU–Switzerland Air Transport Agreement.[223] It took on average two and a half years for these agreements to enter into force.[224]

The other agreements - with the Western Balkan States (ECAA), Republic of Georgia and Republic of Moldova - were signed as *mixed*, and in mid-2014 none of them was in force, or provisionally applied, due to either lack of sufficient number of ratifications by EU Member States, or lack of completion by the EU and its Member States of procedures necessary for enabling provisional application.[225] In mid-2014, the ECAA agreement was closest to entering into force, but only after over seven years following signature.[226]

The fact that an 'Article 66 agreement' is not in force, has a number of consequences. Firstly, it prevents a Joint Committee established under such agreement to update the list of EU legislation which the EU's partner country must apply.[227] A review of the five 'Article 66 agreements', including relevant Joint Committee decisions, shows that in the case of agreements which are not in

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[220] Any participation by a third party's representative in the decision-making process of an EU body must always respect the principle of EU decision-making autonomy. See: 'Opinion 1/76', *supra* note 21. Similarly: Participation of European third countries in the work of EASA (SEC(2002) 1090), *supra* note 214, at p. 4.

[221] The legal justification for 'an EU only' agreement is that EU's competences cover the entire agreement. See: Piet Eeckhout, External Relations of the European Union: Legal and Constitutional Foundations, (2004), p. 191.

[222] In force since 1 January 1994.

[223] In force since 1 June 2002.

[224] Based on the analysis of information available in: Council of the EU, 'International Agreements Database' <http://www.consilium.europa.eu/policies/agreements?lang=en> [accessed 28 March 2014].

[225] Ibid.

[226] Ibid.

[227] In the case of the five 'Article 66' agreements such decisions were taken on regular basis only by the Joint Committees established under the EEA Agreement and the EU-Switzerland Air Transport Agreement. The Joint Committee established under the ECAA Agreement took only one such decision since the signature of the agreement. This analysis was conducted on the basis of information from: European External Action Service, 'Treaty Office Database' <http://ec.europa.eu/world/agreements/default.home.do> [accessed 30 March 2014].

force, the lists of EU aviation safety legislation are largely outdated.[228] Although this does not prevent the partner countries from implementing the latest EU aviation legislation on a voluntary basis, the present situation creates a lack of legal certainty and contributes to a patchwork of regulatory requirements.

The second consequence of an 'Article 66 agreement' not being in force or provisionally applied is that even if a partner country implements EU aviation safety legislation, its certificates continue to be treated as coming from a third country. This is because activation of the recognition of certificates requires a formal decision by the Joint Committee to be taken under the agreement. In 2014 only Norway, Switzerland, Iceland and Liechtenstein had a status equivalent to an EU Member State, and benefited from recognition of certificates.[229]

It is also legally not possible to establish a relationship of international agency between the EASA and the partner countries on the basis of an 'Article 66 agreement' which is not in force or at least provisionally applied. As was demonstrated in Section 4.3.4, a country cannot delegate to EASA the exercise of its safety functions on the basis of a working arrangement which is not binding under international law. In 2014 only the countries party to the EEA agreement and EU-Switzerland Air Transport agreement have effectively delegated to EASA the exercise of safety tasks as envisaged under the EASA Basic Regulation.[230]

Last but not least, not all States parties to 'Article 66 agreements' are able to apply directly EU aviation safety legislation in their internal legal orders. In 2014 this has been the case only for Liechtenstein and Switzerland, which do not need implementing regulations to apply the EU aviation safety standards.[231] All other States which are parties to 'Article 66 agreements' do not consider such agreements as self-executing and need to enact national legislation to give effect to EU aviation safety regulations.[232]

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[228] International Agreements Database, *supra* note 224. In addition the author reviewed a registry of decisions of joint committees set up pursuant to an international agreement and comprising representatives of the signatories for the purpose of administering the agreement, at: EU, 'EUR-Lex, International Agreements' <http://eur-lex.europa.eu/collection/eu-law/inter-agree.html> [accessed 30 March 2014].

[229] 'Decision No 1/2013 of the Joint European Union/Switzerland Air Transport Committee set up under the Agreement between the European Community and the Swiss Confederation on Air Transport of 2 December 2013 replacing the Annex to the Agreement between the European Community and the Swiss Confederation on Air Transport', 2 December 2013, (OJ L 12, 17.1.2014); 'Decision of the EEA Joint Committee No 179/2004 of 9 December 2004 amending Annex XIII (Transport) to the EEA Agreement', 9 December 2004, (OJ L 133, 26.5.2005).

[230] Ibid. Such delegation is possible when a partner country completes transitional periods under the relevant agreement. Successful transition is confirmed by a decision of the Joint Committee established under the agreement, and which also establishes the precise conditions for participation of the country in question in the work of EASA.

[231] Official of the Swiss Civil Aviation Authority (FOCA), 'Interview No 3', (2014). For information about the transposition of EU law by the EEA States see: EFTA Surveillance Authority, 'Internal Market Scoreboard No 33', (2014), <http://www.eftasurv.int/media/scoreboard/Scoreboard_No_33_pdf.PDF> [accessed 30 March 2014], p. 22.

[232] In the case of the former Yugoslav Republic of Macedonia (fYROM) and Kosovo such transposition can also take place by reference to a specific piece of EU law.

4.6 EASA AS A SINGLE AVIATION AUTHORITY FOR EUROPE: POLITICAL FICTION OR LONG TERM VISION?

Although sometimes compared with the FAA, EASA is today still far from becoming a similar authority. Of course, the main difference between the US and EU is that while the former is a federal State, the latter is comprised of 28 independent countries, each with its own airspace, interests, language and culture. EASA, which recently celebrated its tenth anniversary,[233] is also a young organisation if compared with the FAA, which in 2014 had its 56th birthday.[234]

Although some discussions have taken place in 2014 about the possibility of establishing a single European aviation (safety) agency, it does not seem that such a scenario would materialise soon.[235] A further discussion on this subject is however worthwhile especially in view of the mounting pressure on national and EU budgets, coupled with continuing demand for aviation transportation from the public, and increasing market competition from other regions of the world that Europe has to face.[236]

In this respect a comparison with the US is not entirely inappropriate. While in the US all aspects of aviation safety, interoperability, deployment of large infrastructure programmes like NextGen,[237] and even provision of ANS are under the responsibility of one body, the FAA, on the European side these issues are dealt with by multiple organisations which include the European Commission, EASA, NAAs, EUROCONTROL, ECAC, and various joint technology initiatives such as SESAR[238] or Clean Sky.[239]

A good illustration of the inefficiencies which this fragmentation creates is ATM, where the US system is capable of handling 70% more aircraft movements than in Europe at a total cost that is 23% lower.[240] Similarly, any significant aviation initiative in Europe requires elaborate coordination to ensure that the different organisations contribute to it in a coherent way, and have a common understanding of the objectives. This can be illustrated with the example of SESAR deployment, which requires involvement of multiple authorities and bodies at both the

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[233] EASA 10th Anniversary Chronicle, *supra* note 4.

[234] Theresa L. Kraus, The Federal Aviation Administration: A historical perspective, 1903-2008, (2008), p. 9.

[235] This discussion has been undertaken in the framework of the EASA Management Board based on the report presented by the Finish Director General of Civil Aviation, Mr Pekka Hentu.

[236] EASA 2013 Article 62 evaluation, *supra* note 29 in Ch.3, at pp. 10-12.

[237] NextGen is a US project for the deployment of a Next Generation Air Transportation System in the national airspace. See: SESAR, 'Discover SESAR' <http://www.sesarju.eu/discover-sesar> [accessed 30 March 2014].

[238] SESAR or Single European Sky ATM Research is the EU's equivalent of the US NextGen project. See: FAA, 'NextGen' <http://www.faa.gov/nextgen/> [accessed 30 March 2014].

[239] Clean Sky is an EU aeronautical research programme which mission is to significantly increase the environmental performances of airplanes and air transport. See: Clean Sky, 'About Us' <http://www.cleansky.eu/content/homepage/about-us> [accessed 30 March 2014].

[240] EC, 'Single European Sky 2+, Cost and Flight efficiency' <http://ec.europa.eu/transport/modes/air/single_european_sky/doc/ses2plus/cost-flight-efficiency.pdf> [accessed 30 March 2014].

EU and national levels,[241] while in the US the responsibility for NextGen development and deployment rests largely with the FAA.[242]

This structural problem is well defined and recognised in Europe. The 2007 High Level Group for the Future European Aviation Regulatory Framework has already underlined that the current 'patchwork of responsibilities and regulatory structures' is a 'major bottleneck in improving the performance of the European aviation system.'[243]

Focusing on aviation safety, a recent evaluation of the EASA system concluded that 'there are too many actors in the System with different or overlapping responsibilities and roles', which makes it 'unsustainable in the medium to long term' and that therefore:

> [T]he required processes to create a genuine European Aviation Safety System through the convergence of the various existing actors in the System towards a single entity responsible for all aviation safety regulation and oversight should be embarked upon.[244]

The following paragraphs will try to identify the legal and institutional enablers of such a change, and obstacles to implementation.

4.6.1 MILESTONES TOWARDS A EUROPEAN AVIATION (SAFETY) AUTHORITY

Although slow, the process of establishing a single aviation safety entity for Europe has already started. The major milestone in this respect was the transition from the JAA to EASA, and the closure of the former in 2009. EASA also effectively took over from EUROCONTROL the development of ATM safety standards[245] and inspects national authorities' ATM oversight capabilities, as part of its standardisation programme.[246] In 2013 the European Commission proposed renaming EASA as the 'European Aviation Agency', which is a symbolic reflection of these changes.[247]

The next milestones that would need to be accomplished to realise the vision of 'a single entity responsible for all aviation safety regulation and oversight', would be a merger of EASA and EUROCONTROL, and a much closer

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[241] EC, 'Communication from the Commission: Governance and incentive mechanisms for the deployment of SESAR, the Single European Sky's technological pillar', COM(2011) 923 final, (Brussels, 2011).

[242] United States Government Accountability Office, 'Report to Congressional Requesters on NextGen Air Transportation System', GAO-13-264, (2013).

[243] 'Report of the High Level Group for the Future European Aviation Regulatory Framework: A framework for driving performance improvement', (2007), <http://ec.europa.eu/transport/modes/air/doc/hlg_2007_07_03_report.pdf> [accessed 2 February 2014], p.7.

[244] EASA 2013 Article 62 evaluation, *supra* note 29 in Ch.3, at p. 29.

[245] EASA, 'Revised 4-year Rulemaking Programme 2014-2017', Annex I to EASA Executive Director's Decision No 2013/029/R, (2013), <http://easa.europa.eu/document-library/rulemaking-programmes/revised-2014-2017-rulemaking-programme> [accessed 6 August 2014], p. 5.

[246] By mid-2014, all EUROCONTROL Member States with the exception of Ukraine and Turkey have accepted this competence of EASA, based on working arrangements signed with the Agency. See: EASA, 'Working Arrangements' <http://easa.europa.eu/document-library/working-arrangements> [accessed 6 August 2014].

[247] COM(2013) 409 final, *supra* note 68.

integration between such a future European Aviation Authority (EAA) and the NAAs.

The main challenge for a potential EASA-EUROCONTROL merger is that these two organisations belong to different political and legal worlds. While EASA is a body governed by EU public law, EUROCONTROL is an intergovernmental organisation governed by public international law.[248] The membership of EUROCONTROL is also broader than EU,[249] and while 'Article 66 agreements' enable participation of non-EU States in the work of EASA, they cannot grant voting rights, which the partner countries enjoy in EUROCONTROL.[250] This absence of voting rights is difficult to accept for important aviation countries such as Turkey,[251] and underlines even more the need for efficient and prompt implementation of 'Article 66' agreements by the EU.

Concerning the relationship between EASA and the NAAs, the fact that EASA operates in an environment comprising multiple national States is not in itself an obstacle to transforming it into a single EU aviation safety authority. As the example of the ECCAA (see Chapter 3) showed, it is legally possible to create a single aviation authority spanning across multiple States, although of course the EU is not a small community of Caribbean islands sharing common language and legal heritage - issues which from a practical point of view cannot be ignored.

The setting up of such a single authority would probably require transformation of the EASA Basic Regulation into a much more elaborate European Aviation (Safety) Act, which would need to go into much more detail concerning the relationship between the EAA and EU Member States and possibly also harmonising the national administrative procedures.[252] Under such a scheme the NAAs would become local offices, or outstations of EAA.

The main rationale for establishing EAA would be the pooling of the technical resources available at the EU and national levels, and deploying them in a way which would best correspond to the actual needs of the system. This would necessitate giving to the EAA the authority to close and open local offices-NAAs and to redistribute the workforce among them as necessary. The geographical scope of responsibility of such local offices-NAAs could span across multiple EU Member States, if justified by the volume of aviation activity. This structure

[248] For an overview of EUROCONTROL's legal status see: Pablo Mendes de Leon, 'The Relationship between Eurocontrol and the EC: Living Apart Together', IOLR, 4 (2008), pp. 305–320.

[249] EUROCONTROL's membership consists of 40 States. Except for Estonia, which is planning to join EUROCONTROL in January 2015, all EU Member States are also EUROCONTROL's Member States. See: EUROCONTROL, 'Member States' <http://www.eurocontrol.int/articles/member-States> [accessed 3 March 2014].

[250] Non-EU States can at best enjoy observer status in EU committees and bodies such as the Single Sky Committee or the EASA Management Board. For details of the status given to non-EU States please consult the international agreements signed between the EU and such countries, as presented in Section 4.5.

[251] Aytaç Aras, 'European aviation safety regulatory framework and Turkey: A critical analysis', University of Turkish Aeronautical Association, Faculty of Business Working Papers (2011), pp. 13, 17.

[252] In the past the JAA has been harmonising also the procedures of member authorities through the issuance of the Joint Implementation Procedures (JIPs).

would be similar to the FAA, which has a highly decentralised structure and operates with a nation-wide network of specialised local offices.[253]

Irrespective of the political will to actually put such a structure in place, and practical difficulties, such as language differences, transformation of EASA and EUROCONTROL into an EAA would also pose legal challenges. It is not clear whether the legal form of an EU agency and the limitations that it brings could actually hinder the effectiveness of the EAA. For example, given that EU agencies cannot impose penalties on individuals (see Section 4.4.3.4), the enforcement function in such a system could become difficult to manage.

From the perspective of the Chicago Convention, the setting up of such a system would require delegation by EU Member States of all safety functions and tasks to EAA. This could have consequences such as, for example, the setting up of a multinational aircraft registry managed by EAA on behalf of EU Member States. As Chapter 6 will demonstrate, there are limitations in respect of such far reaching delegations stemming from the provisions of the Chicago Convention.

While the above scenario is an ambitious, long term vision, there are intermediate steps which could make the current EU aviation safety system more resource-efficient in the short to mid-term. These include for example the extension of the possibility for EU Member States to delegate to EASA, on a voluntary basis, certification and oversight tasks, or to link, by means of the EASA Basic Regulation, the NAAs and EASA into a single EU aviation safety oversight network within which all the authorities could pool their resources and share the oversight work more flexibly.

4.7 GENERAL CONCLUSIONS

In 2014 EASA was still the only example of a RASO which fully relies for its functioning on a supranational REIO. In this respect, the purpose of this chapter was to demonstrate how EASA contributes to the improvement of global aviation safety and to the objective of uniformity in civil aviation regulation and oversight, as set out by the Chicago Convention. In addition this chapter verified what the limitations of EASA are in respect to the achievement of the above mentioned objectives.

While initially there has been an attempt to establish EASA in the form of an international organisation, EASA has been ultimately set up in the form of an EU agency, which means a body governed by EU public law.

The main benefit of EASA being an EU agency is the fact that it can take advantage of the EU's legally binding and directly applicable legal framework. This is an advantage compared with the previous legally non-binding JAA framework, which could not mandate any legislation and relied on voluntary compliance of participating authorities. The second benefit is that the EU law grants to EASA legal personality which is valid in domestic legal orders of all EU Member States - this is also an advantage over the previous JAA, which exercised a legal personality only as a foundation under the Dutch law.

[253] This includes: nineteen Manufacturing Inspection District Offices (MIDOs), over eighty Flight Standards District Offices (FSDOs), ten aircraft certification offices (ACOs), twenty-two Certificate Management Offices (CMOs), five Aircraft Evaluation Groups (AEGs), and one aeronautical center and one technical center. See: FAA, 'Offices' <http://www.faa.gov/about/office_org/> [accessed 12 March 2014].

Being an EU agency also brings certain limitations for EASA, the main one being that it cannot adopt acts of general application which would be of legislative nature. This in practice does not constitute a problem for the EU aviation safety system as a whole, because the EU Treaties allow delegation of more detailed, implementing rulemakings to the European Commission, which in turn relies on the technical advice of EASA. On the other hand EASA can adopt certain executive measures such as Airworthiness Directives, which are legally binding and of general applicability. In addition, although formally non-binding, certain other measures adopted by EASA such as CS or AMC, produce legal effects because they determine how people will act in practice.

Contrary to the current view expressed in most academic studies which limit the international legal personality of EU agencies to the possibility of concluding headquarters agreements, EASA also has a limited international legal personality. This chapter found that this international legal personality stems from the fact that EASA acts as an authorised representative of all EU Member States under the Chicago Convention, notably as far as the 'functions and tasks of the State of design, manufacture or registry when related to design approval' are concerned. The practical benefit of this international agency relationship is that EASA has the powers to make decisions that are binding for EU Member States under international law.

The relationship of international agency which exists between EASA and EU Member States has been recognised by ICAO under the USOAP, as well as by a number of non-EU States which have concluded international aviation safety agreements with the EU or working arrangements with EASA.

From the point of view of the Chicago Convention, the establishment of the relationship of an international agency has brought benefits for EU Member States, which now do not need to be audited under the USOAP in those areas where EASA acts on their behalf. Instead ICAO is now able to conduct just one audit of EASA and to subsequently link its results with the USAOP reports of each EU Member State. This provides an example of an interaction between a RASO and ICAO which constitutes an important building block of the GASON concept which was proposed in Chapter 2.

As far as rulemaking is concerned, the main benefit of the EU system is the fact that EU regulations are directly applicable and legally binding for all EU Member States. On the other hand the fact that the EU system is based on directly applicable and binding regulations does not mean that all regulatory differences have been completely eliminated, as there are still some possibilities of exemptions.

In addition, the EU civil aviation safety system does not encompass all aviation activities, which means that EU Member States still need to maintain national rules – and the resources to maintain them - to the extent necessary to regulate activities falling outside the EU competence.

Finally a review of the EASA rulemaking proposals from the period 2010-2013 demonstrates that EASA does not systematically identify the differences between the rules that it proposes and the ICAO SARPs. This is potentially an obstacle to ICAO relying more closely on the EU oversight system for the purpose of monitoring EU Member State compliance with their obligations under the Chicago Convention. This discrepancy should be fully eliminated, as it is not in line with the GASON concept.

From the certification point of view, the EU created a multilateral regime for automatic recognition of certificates amongst all the EU Member States – which is a big benefit the EU system has to offer to the aviation industry. In addition, certain certification tasks are exercised centrally and in a legally binding manner by EASA where this has been found to be more efficient, or where the requirements of unity vis-à-vis third countries so justify. This is an advantage compared to the previous system of mutual recognition recommendations under the JAA.

Although this study was not able to identify clear evidence of cost efficiencies that the transfer of certification tasks had on authorities of EU Member States, the current system, and especially the single EASA certificate which is valid across the EU, is an obvious benefit for the industry, especially large aircraft manufacturers. This large scale, automatic recognition of certificates, the issuance of which is based on a uniform and legally binding legal framework is in line with the GASON concept.

When it comes to oversight, the key feature of the EU system are the EASA standardisation inspections and other monitoring activities, which are of mandatory nature and are used to control, in an independent manner, the application by EU Member States of the EASA Basic Regulation and its implementing rules, as well as to verify the uniform implementation of these rules across the EU. This verification mechanism is important in view of the fact that the EU system is based on the principle of wide scale recognition of certificates which requires trust between all the EU Member States.

From the point of view of ICAO, but also the GASON concept proposed in Chapter 2, the EASA system of standardisation inspections and monitoring activities offers an opportunity to optimise the monitoring of EU Member States' obligations under the USOAP and the Chicago Convention. This could ultimately reduce the duplication of inspection and monitoring activities of EU Member States by ICAO, as is already the case in the EU in the area of aviation security.

As far as enforcement is concerned, EASA, with the exception of withdrawing, suspending or limiting a certificate that it has issued, has so far not been granted by the EU legislator own enforcement competences, and can only recommend to the European Commission suspension of recognition of certificates in a given EU Member State, or recommend imposition of a fine or periodic penalty payment on a certificate holder. The fact that enforcement is dependent on the discretion of the European Commission could be subject to criticism, but the fact that the EU system consistently produces a good safety record, is an indication that overall the system works effectively.

The EU civil aviation safety system is Pan-European in scope. Up to mid-2014 the EU had signed five international agreements with non-EU European countries on the basis of which such countries can participate in the work of EASA and be part of the EU aviation safety system as per Article 66 of the EASA Basic Regulation. The analysis of these agreements shows that, as far as legal aspects are concerned, the safety benefits which they offer are the greatest when they are negotiated as *EU only*, which significantly speeds up their entry into force.

Although the EU partner countries can implement the EU legislation on a voluntary basis, the main benefits offered by the EU aviation safety system, such as uniform regulatory framework, automatic acceptance of certificates, and centralisation of certification tasks at the level of EASA, are possible only on the ba-

sis of an 'Article 66 agreement' which is in force or at least provisionally applied. The 'Article 66 agreements' are generally not able to provide for direct applicability of the EU aviation safety legislation, and the majority of the EU partner countries require implementing legislation to make the EU requirements part of their internal legal orders.

The EU should therefore consider making more use of 'Article 66 agreements' negotiated as *EU only*, similar to the one concluded with Switzerland or the EEA countries. In order to overcome the political reluctance of EU Member States towards *EU only* agreements, their scope could be limited to aviation safety matters, leaving commercial aspects and exchange of traffic rights to more comprehensive Common Aviation Area type agreements to be negotiated in parallel.[254]

Finally this chapter considered the feasibility of merging EASA and EUROCONTROL into a single European Aviation Authority, or EAA. The main reason for establishing such an entity is the fact that the current architecture of the EU aviation safety system is not efficient enough and maybe even not sustainable in the long term perspective, as some reports on the functioning of EASA argue. This is due to the fact that the system is institutionally fragmented and that there are too many actors involved. The inefficiencies in this respect have been well documented in the ATM sector but also affect other domains.

Whilst establishing a single entity in Europe responsible for aviation safety, or even all technical aspects of aviation regulation and oversight, would be a very challenging undertaking, this possibility should not be excluded in the long term perspective. The main rationale for establishing such an authority would be the pooling of EU technical resources, and deploying them in a way which would best correspond to the actual needs of the system.

The major steps that would need to be considered in this respect are the merger of EASA and EUROCONTROL and transformation of EU NAAs into local offices of the new EAA. In addition, while legally feasible, the setting up of the new EAA would need to consider the impacts from the perspective of the Chicago Convention, and practical difficulties such as related to language differences. The legal form of an EU agency could also bring limitations for such a single authority, in particular as far as enforcement of aviation safety regulations is concerned.

Irrespective of the above challenges, intermediate steps could be taken to make the EU system more resource-efficient. This could be achieved for example by extending the possibility for EU Member States to delegate to EASA, on a voluntary basis, certification and oversight tasks, or to link the NAAs and EASA into a single EU aviation safety oversight network within which the authorities could pool their resources and share the oversight work more flexibly.

[254] For an overview of the reasons why EU Member States prefer 'mixed' agreements see: Eeckhout, *supra* note 221, at p. 198.